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NO. 93214-0

SUPREME COURT
OF THE STATE OF WASHINGTON

JAMES SCHIBEL, and individual; and PATTI SCHIBEL, an individual;
and the marital community thereof,
Respondents.

v.

RICHARD EYMANN, an individual; EYMANN ALLISON HUNTER
JONES, P.S., a Washington professional services corporation; MICHAEL
WITHEY, an individual; LAW OFFICES OF MICHAEL WITHEY,
PLLC, a Washington professional limited liability company,
Petitioners,

PETITIONERS' SUPPLEMENTAL BRIEF

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A. INTRODUCTION

This case presents a significant issue of first impression that impacts Washington attorneys, clients, and trial courts. The Attorneys request that the Court reverse the Court of Appeals' decision and, in doing so, provide clarity regarding the collateral estoppel effect of a trial court's order authorizing an attorney to withdraw and provide guidance to the lower courts regarding the proper application of CR 71 and RPC 1.16.

B. COLLATERAL ESTOPPEL BARS THE SCHIBELS' CLAIMS

The trial court in the Underlying Lawsuit determined that the Attorneys had an ethical obligation to withdraw. During oral argument, the court stated, "So at this point, I am going to allow [the Attorneys] to withdraw. They've given the proper notice, and at this point, the Court can't, on a civil case, order them to stay on board and work the case, **especially with their ethical obligations.**" CP 140 (emphasis added). The trial court's written order stated, "[T]he court finds that . . . the attorney-client relationship in its current status requires said withdrawal due to the ethical obligations of plaintiff's counsel." CP 73. The Court of Appeals "agreed with the trial judge's findings that counsel's ethical obligations required the withdrawal." Petition for Review, Appendix, A-4. It is thus a settled question that the ethical obligations of the Attorneys required that the withdrawal motion be granted.

The trial and appellate courts sanctioned and approved the Attorneys' actions in obtaining permission to withdraw. *See Bright v. Zega*, 16 S.W.3d 201, 205 (Ark. 2004) (“[T]he federal district court permitted [the attorney’s] withdrawal, thereby sanctioning his actions in doing so”).

The Schibels' arguments that the Attorneys were not ethically obligated or permitted to withdraw were rejected by the trial and appellate courts. Nevertheless, the Court of Appeals' decision in this case improperly allows the Schibels to repackage the identical, failed arguments as a legal malpractice claim. This not only undermines the purposes of collateral estoppel, which are to encourage respect for judicial determinations by ensuring finality, and to conserve judicial resources by discouraging the same parties from re-litigating the same issues again and again. *State Farm v. Avery*, 114 Wn. App. 299, 57 P.3d 300 (2000). It also undermines the process of attorney withdrawal that RPC 1.16 and CR 71 contemplates. As the Michigan Court of Appeals aptly put it:

[I]f collateral estoppel did not apply in this situation, withdrawing under court order would expose an attorney or law firm to exactly the same consequences as abandoning a client. This exposure, in turn, would discourage law firms and attorneys from taking the time and incurring the expense of obtaining permission from the court to withdraw, which is what MRPC 1.16, operating in conjunction with MC 2.117(c) contemplates. Alternatively, failing to apply collateral estoppel in this case may force

some attorneys and law firms to remain counsel in cases in which the attorney-client relationship has degraded to the point where it is no longer beneficial to the client.

Keywell & Rosenfeld v. Bithell, 254 Mich. App. 300, 355-356, 657 N.W.2d 759 (2002).

Here, the Attorneys complied with all applicable rules regarding the withdrawal. The Schibels had notice of the Attorneys' intent to withdraw. The Schibels were motivated to oppose the withdrawal. The Schibels filed a written objection to the withdrawal with the assistance of another attorney. The Schibels argued against the withdrawal at a hearing. The Schibels made every argument they make in support of their malpractice and fiduciary breach claims in opposing the withdrawal. The trial and appellate courts approved the withdrawal after determining that the Attorneys were ethically obligated to withdraw.

The Court should rule that the Schibels' claims are barred by collateral estoppel for two equally important reasons. First, as argued in the Attorneys' Petition for Review, all of the elements of collateral estoppel are satisfied. Second, such a determination will serve two important goals: to encourage Washington attorneys to utilize and comply with the process contemplated by CR 71 and RPC 1.16 when circumstances warrant and to discourage attorneys from remaining counsel in cases where the attorney-client relationship has degraded to the point

where it is no longer beneficial to the client. Simply put, the prospects of having to defend a potential legal malpractice lawsuit later should not be an inducement for counsel to avoid using CR 71 and to continue to represent a client when her or his ethical obligations require withdrawal.

To further the proper application of both CR 71 and RPC 1.16, the Court should also clarify that when an attorney seeks to withdraw from representation pursuant to CR 71 because the attorney's continued representation is inconsistent with the attorney's ethical and professional obligations to the client, the Court, and/or the administration of justice, the client who objects to the withdrawal must present to the court all of the reasons they oppose the withdrawal. Such a rule would allow the trial court to make a factual determination whether any reasons exist that would justify denying the motion for withdrawal (including alleged legal malpractice or breach of fiduciary duty in the context of seeking permission to withdraw).

Such a rule is in the public interest because it:

- (1) affirms and upholds the important doctrine of collateral estoppel so trial court orders allowing withdrawal are final and not subject to later collateral attack;
- (2) insures that attorneys utilize and comply strictly with CR 71 and RPC 1.16;

(3) encourages clients to advise the trial court of all relevant facts and arguments at the withdrawal stage, thus empowering the trial court to make the right decision on the motion; and

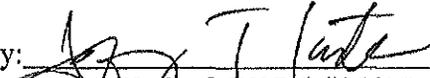
(4) avoids presenting the attorney with the unfair choice of either (a) continuing to represent a client in conflict with the attorney's ethical obligations, or (b) risking the onerous professional and financial burdens of defending a legal malpractice suit based on the withdrawal itself. The former (continued representation) would encourage ethical breaches while the latter would punish an attorney who does the right thing and whose withdrawal is authorized by the trial court. Requiring such a Hobson's choice is manifestly "perverse". *Bright v. Zega*, 16 S.W.3d, at 205.

C. CONCLUSION

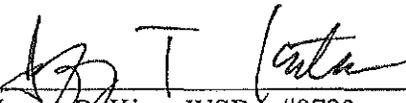
This Court should reverse the Court of Appeals and remand the case to the trial court with directions to enter summary judgment dismissal on behalf of the Attorneys. By so holding, this Court can clarify the law in this state and provide useful guidance to the trial courts, counsel, and party litigants in bringing and adjudicating motions to withdraw under CR 71.

RESPECTFULLY SUBMITTED this 28th day of October, 2016.

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DECLARATION OF SERVICE

I, Lynda T. Ha, declare under penalty of perjury that I am over the age of 18 and competent to testify as to service in this matter.

On the date given below, by 4:30 p.m., I caused to be served the foregoing **PETITIONERS' SUPPLEMENTAL BRIEF** on the following individuals in the manner indicated:

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I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 28th day of October, 2016 at Seattle, Washington.



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Rec'd 10/28/16

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Re: James and Patti Schibel v. Michael Withey, et al.
Court of Appeals No.: 32937-2-III
Supreme Court No.: 93214-0

Good afternoon:

Attached for filing with the Supreme Court is Petitioners' Supplemental Brief in the above-referenced matter. Please confirm that you have received. Thank you and please let me know if you have any questions.

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