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Supreme Court Holds Order Allowing Withdrawal Precludes Subsequent Malpractice Claim Over the Withdrawal

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The Washington Supreme Court held recently in *Schibel v. Eymann*, ___ Wn.2d ___, ___ P.3d ___, 2017 WL 3382278 (Aug. 3, 2017), that a court order permitting withdrawal under CR 71 precludes a subsequent malpractice claim over the withdrawal.

Schibel grew out of a commercial lease and related mold exposure litigation. Disagreements over strategy in the underlying case led the lawyers to seek leave to withdraw. Because the trial was approaching rapidly, the lawyers also filed a motion to continue. The trial court allowed the withdrawal but denied the continuance. When the clients—who were then *pro se*—did not appear for trial, the trial court dismissed their claims with prejudice and the Court of Appeals affirmed in *Schibel v. Johnson*, 2012 WL 2326992 (Wn. App. June 19, 2012) (unpublished). The clients later sued the lawyers for legal malpractice, alleging that the lawyers' withdrawal was improper that close to trial. In the legal malpractice case, the lawyers moved for summary judgment—arguing that the clients were precluded from challenging their withdrawal because it had been allowed by the trial court and affirmed on appeal. The trial court in the legal malpractice case denied the motion, concluding that the subsequent action was not barred by collateral estoppel. On discretionary review, Division III agreed.

On a 6-3 vote, the Supreme Court reversed—holding that the portions of the subsequent legal malpractice claim focused on withdrawal were precluded as a matter of law.

In doing so, the Supreme Court noted that for collateral estoppel to apply, four elements must be met:

> "(1) the issue in the earlier proceeding is identical to the issue in the later proceeding, (2) the earlier proceeding ended with a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party, or in privity with a party, to the earlier proceeding, and (4) applying collateral estoppel would not be an injustice." 2017 WL 3382278 at *3.

The parties agreed that the second and third elements were satisfied, leaving the first and fourth in dispute. The Supreme Court concluded that—at least on the portions of the malpractice case that were based on withdrawal—the issues were identical. The Supreme Court also found that no injustice resulted because the former clients had an opportunity to litigate the withdrawal issue earlier in the underlying case.

The Supreme Court summarized its view:

> "Through CR 71(c)(4) [*i.e.*, when a client objects], we have established a system by which individual attorneys cannot make the ultimate decision to withdraw. The trial court must intervene and order the withdrawal. Once the trial court approved the Attorneys' withdrawal, it sanctioned the Attorneys' actions in doing so and the withdrawal became a decision of the court, which could then be appealed. The issue of withdrawal was actually litigated in the prior case because whether the withdrawal was

> proper necessarily turns on whether the trial court abused its discretion in approving the withdrawal. The Court of Appeals found it had not. Thus, withdrawal was proper." *Id*. at *4.

Schibel does not address the comparatively more common scenario under CR 71(c)(3) when withdrawal becomes effective following notice without a court order if the client does not object. *Schibel*, however, provides important protection to lawyers in situations when the client objected and the trial court permitted withdrawal nonetheless.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB Ethical Oregon Lawyer, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.