SUPREME COURT NO. 90351-4

COURT OF APPEALS NO. 42864-4-II

SUPREME COURT
OF THE STATE OF WASHINGTON

CLARK COUNTY FIRE DISTRICT NO. 5, and AMERICAN ALTERNATIVE INSURANCE CORPORATION,

Respondents,

v.

BULLIVANT HOUSER BAILEY, P.C., and RICHARD G. MATSON,

Petitioners.

ANSWER TO PETITION FOR REVIEW

Michael A. Patterson, WSBA No. 7976
Daniel P. Crowner, WSBA No. 37136
Of Attorneys for Respondents Clark County Fire District No. 5 & American Alternative Insurance Corporation

PATTERSON BUCHANAN
FOBES & LEITCH, INC., P.S.

2112 Third Avenue, Suite 500
Seattle, WA 98121
Tel. 206.462.6700

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Statutes

Rules

Other Authorities

I. STATEMENT OF THE CASE

In 2009, Clark County Fire District No. 5 ("the Fire District") and American Alternative Insurance Corporation ("AAIC") sued Bullivant Houser Bailey, P.C. ("BHB"), and its attorney Richard G. Matson ("Matson") for their negligence in defending the Fire District and its administrator against a lawsuit in which several women raised claims of: outrage; negligent supervision; negligent retention; negligent infliction of emotional distress; and violations of the Washington Law Against Discrimination (WLAD) under chapter 49.60 RCW. Clerk's Papers (CP) at 4, 24-27, 295-302; *see also Collins v. Clark County Fire Dist. No. 5*, 155 Wn. App. 48, 62-63, 231 P.3d 1211 (2010).

In response, BHB and Matson filed and served their answer. CP at 785-93. Among other things, they asserted that the "judgmental immunity" rule shielded them from claims arising from their negligent conduct. CP at 791.

The Fire District and AAIC filed a summary judgment motion, (CP at 313-43), arguing, among other things, that the defense of "judgmental immunity" should fail as a matter of law because "[n]o reasonable trier of fact could conclude that Matson acted reasonably under the circumstances of this case." CP at 314-15, 340-43. BHB and Matson filed a response, arguing for summary judgment in their favor. CP at 346-96.

After a hearing in November 2011, the trial court dismissed the claims of AAIC for lack of standing. CP at 695-99. Nevertheless, the parties and the trial court agreed to continue the Fire District's summary judgment motion to strike the affirmative defenses of contributory negligence and judgmental immunity. CP at 698.

After further discovery, BHB and Matson re-noted their summary judgment motion, arguing that Matson's conduct was reasonable, met the standard of care, and thus was shielded from any claims arising from their negligent conduct. CP at 346-96, 715-16. Consistent with its earlier position, the Fire District responded by arguing that Matson's conduct was unreasonable, did not meet the standard of care, and should not be immunized from liability. CP at 730-49.[1] Given the competing declarations and/or testimony from the parties' witnesses and expert witnesses, the Fire District maintained that the facts and all reasonable inferences therefrom presented genuine issues of material fact about the reasonableness exercised by BHB and Matson in defending the underlying case. CP at 718-1208.

After a hearing in August 2012, the trial court impermissibly assumed the function of a jury, stating, "You know, everything Mr. Matson did in this case, he acted in good faith toward his client. He did in fact make reasonable decisions. And I do not believe it's appropriate

[1] The Fire District did not re-note its summary judgment motion; instead, it simply opposed the summary judgment motion brought by BHB and Matson. CP at 718.

for me to second-guess that decision." RP (August 17, 2012) at 70. Thereafter, the trial court dismissed all claims in the case with prejudice. CP at 1236.

The Fire District and AAIC timely appealed. CP at 700-06, 1237-41. The Court of Appeals affirmed in part and reversed in part the trial court's grant of summary judgment on the Fire District's claims, declining to shield BHB and Matson from claims arising from their negligent conduct under the guise of the "judgmental immunity" rule. *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey*, No. 42864-4-II, at *10-23.

II. ARGUMENT WHY REVIEW SHOULD BE DENIED

In an attempt to make an end run around the Court of Appeals opinion, BHB and Matson argue, without any citation to authority,[2] that the Court of Appeals shifted the burden of proof at trial in legal malpractice cases when it adopted the "attorney judgment" rule. (Br. of Petitioners at 6-7). But the Court of Appeals did no such thing. *Clark County Fire Dist. No. 5*, at *9-13. While BHB and Matson conflate the burden of proof *at trial* with the burden of proof *at summary judgment*, (Br. of Petitioners at 7), the Court of Appeals correctly ruled that, in Washington, "non-liability" rules, e.g., the "judgmental immunity" rule,

[2] This Court does not need to consider arguments for which a party has not cited authority. Rules of Appellate Procedure (RAP) 10.3(a)(6); *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 808, 225 P.3d 213 (2009).

the "error of judgment" rule, or the "attorney judgment" rule, "appear[] to be nothing more than a recognition that if an attorney's actions could under no circumstances be held to be negligent, then a court may rule as a matter of law that there is no liability.'" *Clark County Fire Dist. No. 5*, at *10 (quoting *Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 133 Idaho 1, 981 P.2d 236, 240 (Idaho 1999)).

For all their rhetoric, BHB and Matson fail to acknowledge that this Court, more than 25 years ago, stated that "the elements for legal malpractice are the same as for negligence." *Bowman v. John Doe*, 104 Wn.2d 181, 185, 704 P.2d 140 (1985). In order to prevail on a legal malpractice claim, the Plaintiff must prove: (1) the existence of a duty owed to the Plaintiff; (2) a breach of that duty; (3) an injury; and (4) that the Defendant's breach was a proximate cause of the Plaintiff's injury. *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992). As with any other negligence case, the burden of proving that an attorney has been negligent is on the Plaintiff. *Bowman*, 104 Wn.2d at 185-86; *Sherry v. Diercks*, 29 Wn. App. 433, 437, 628 P.2d 1336, *review denied*, 96 Wn.2d 1003 (1981); *Hansen v. Wightman*, 14 Wn. App. 78, 88, 538 P.2d 1238 (1975); *see also* 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL (WPI) 21.01, at 221 (5th ed. 2005).

But the question on summary judgment – whether there is a genuine issue of material fact – is completely separate. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). Thus, the concern is not which party will bear the burden of proof at trial, but

whether the moving party has borne its burden of proving that there is no genuine issue of material fact. *See, e.g., Hudesman v. Foley*, 73 Wn.2d 880, 889, 441 P.2d 531 (1968). Here, as the moving parties on summary judgment, BHB and Matson bore the burden of proving that there was no genuine issue of material fact about the reasonableness and care, skill, diligence, and knowledge exercised by them in representing the Fire District. *See Balise*, 62 Wn.2d at 199 ("One who moves for summary judgment has the burden of proving that there is no issue of material fact, irrespective of whether he or his opponent, at the trial, would have the burden of proof on the issue concerned."); *see also Burton v. Twin Commander Aircraft, LLC*, 171 Wn.2d 204, 233-34, 254 P.3d 778 (2011) (Stephens, J., dissenting).

Shunning any Washington authority on summary judgment, and instead relying on an altered quote from *Bergstrom v. Noah*, 266 Kan. 847, 974 P.2d 531, 554 (Kan. 1999), BHB and Matson argue that summary judgment in this case was proper under some nebulous "totality of circumstances" standard of review. (Br. of Petitioners at 8). But even BHB and Matson cannot dispute that their argument is unsupported by *Bergstrom*, in which the Supreme Court of Kansas actually stated, "When, under the totality of circumstances *as demonstrated by the uncontroverted facts*, a conclusion may be reached as a matter of law that negligence has not been established, judgment may be entered as a matter of law." *Bergstrom*, 974 P.2d at 554 (emphasis added).

Of course, as with any other negligence case, a question of fact (such as whether an attorney has breached his duty) may be determined as a matter of law when reasonable minds could reach but one conclusion. *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985); *Morris v. McNicol*, 83 Wn.2d 491, 494-95, 519 P.2d 7 (1974); *Balise*, 62 Wn.2d at 199; *Halvorsen v. Ferguson*, 46 Wn. App. 708, 712, 735 P.2d 675 (1986), *review denied*, 108 Wn.2d 1008 (1987); *see also Sun Valley Potatoes, Inc.*, 981 P.2d at 240; *Davis v. Damrell*, 119 Cal. App. 3d 883, 174 Cal. Rptr. 257 (Cal. Ct. App. 1981); *Bergstrom*, 947 P.2d at 554. *Medrano v. Miller*, 608 S.W.2d 781, 784 (Tex. App. 1980).

Significantly, though, BHB and Matson fail to appreciate that the core of the "judgmental immunity" rule on which they rely is nothing more than a tautology of this summary judgment rule. *See Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 701 S.E.2d 742, 756 (S.C. 2010) (Hearn, J., concurring in part and dissenting in part). As the Court of Appeals astutely – and correctly – observed in this case:

> "Rather than being a rule which grants some type of 'immunity' to attorneys, it appears to be nothing more than a recognition that if an attorney's actions could under no circumstances be held to be negligent, then a court may rule as a matter of law that there is no liability."

Clark County Fire Dist. No. 5, at *10 (quoting *Sun Valley Potatoes, Inc.*, 981 P.2d at 240); *see also Blanks v. Seyfarth Shaw LLP*, 171 Cal. App. 4th 336, 89 Cal. Rptr. 3d 710, 743 (Cal. Ct. App. 2009) ("when courts discuss what has come to be called the "judgmental immunity doctrine,"

they are actually addressing the factual issue as to whether an attorney breached the standard of care").[3]

Adopting a rule that restates the cardinal principle of negligence jurisprudence and denominates it as an "immunity" certainly is *de trop*. *See Harris Teeter, Inc.*, 701 S.E.2d at 756 (Hearn, J., concurring in part and dissenting in part). Indeed, if the "judgmental immunity" rule is in fact different from the general rules regarding negligence, as BHB and Matson have claimed, (Br. of Petitioners at 6-8), then inherently it would sanction some conduct that otherwise would be negligent. *See Harris Teeter, Inc.*, 701 S.E.2d at 756 (Hearn, J., concurring in part and dissenting in part).[4] But such a result would impermissibly conflict with this Court's prior statements that "the elements for legal malpractice are the same as for negligence" and that an attorney's error of judgment "must itself fall short of negligence if the lawyer is to be protected from liability." *Bowman*, 104 Wn.2d at 185; *Cook, Flanagan & Berst v. Clausing*, 73 Wn.2d 393, 394, 438 P.2d 865 (1968).[5]

---

[3] The phrase "judgmental immunity" may be convenient shorthand, but it is something of a misnomer, as it is not an immunity in the true sense. *See Blanks*, 89 Cal. Rptr. 3d at 743.

[4] In Washington, however, judicial support for the general concept of immunity from tort liability has been waning for some time. *Zellmer v. Zellmer*, 164 Wn.2d 147, 170 n.7, 188 P.3d 497 (2008) (Alexander, C.J., concurring in part and dissenting in part).

[5] Conspicuously, BHB and Matson fail to cite to *Cook* or *Bowman* anywhere in their Petition for Review.

Here, by adopting the "attorney judgment" rule, the Court of Appeals simply – and correctly – affirmed that Washington courts will not sanction negligent conduct under the guise of "good faith," "an honest belief," and/or "an informed judgment." *Clark County Fire Dist. No. 5*, at *10-13; *see Cook*, 73 Wn.2d at 394; *Halvorsen*, 46 Wn. App. at 718.[6] It is not sufficient that the attorney exercise his or her best judgment; rather, that judgment must be consistent with the attorney's duty of care. *See Blanks*, 89 Cal. Rptr. at 744. "To comply with the duty of care, an attorney must exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in [Washington state]." *Hizey*, 119 Wn.2d at 261.

As the Court of Appeals explained, the "attorney judgment" rule simply addresses "whether an attorney's error in judgment has breached the duty of care to his or her client." *Clark County Fire Dist. No. 5*, at *13; *see also Watson v. Hockett*, 107 Wn.2d 158, 164-65, 727 P.2d 669 (1986); *Fergen v. Sestero*, 174 Wn. App. 393, 397, 298 P.3d 782, *review granted*, 178 Wn.2d 1001 (2013); *see also* 6 WPI 105.08, at 581-82. If reasonable minds could reach but one conclusion that, in exercising their

[6] BHB and Matson continue to rely on the faulty premise that their acts and omissions are somehow protected under the rubric of "litigation strategies and tactics." (Br. of Petitioners at 15-16). But merely characterizing an act or omission as a matter of judgment does not end the inquiry. *Gelsomino v. Gorov*, 149 Ill. App. 3d 809, 502 N.E.2d 264, 267 (Ill. 1986).

judgment, BHB and Matson nevertheless exercised the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in Washington state, then summary judgment may be appropriate. *Clark County Fire Dist. No. 5*, at *12-14; *see* CR 56(c); *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999); *see also Sun Valley Potatoes, Inc.*, 981 P.2d at 240.[7]

But, as with any other negligence case, if there is a genuine issue of material fact about the reasonableness and care exercised by BHB and Matson in exercising their judgment, then the jury, not the court, must decide the issue. *Clark County Fire Dist. No. 5*, at *14-15; *see Babock v. State*, 116 Wn.2d 596, 599, 809 P.2d 1083 (1993) ("This rule prevents courts from assuming the function of a jury by weighing the facts as presented in documents prior to trial."); *Halvorsen*, 46 Wn. App. at 712; *see also Sun Valley Potatoes, Inc.*, 981 P.2d at 240; *Spivack, Shulman & Goldman v. Foremost Liquor Store, Inc.*, 124 Ill. App. 3d 676, 465 N.E.2d 500 (Ill. App. Ct. 1984).

In determining whether a genuine issue of material fact exists about the reasonableness and care exercised by BHB and Matson in

---

[7] Of course, this scenario explains why adopting the "judgmental immunity" rule would be superfluous. If BHB and Matson did not breach the duty of care as a matter of law, then an additional rule insulating them from liability would be unnecessary. *See Harris Teeter, Inc.*, 701 S.E.2d at 756 (Hearn, J., concurring in part and dissenting in part).

exercising their judgment, "the evidence *and all reasonable inferences therefrom* is considered in the light most favorable to the [Fire District], the nonmoving party." *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 227, 770 P.2d 182 (1989) (emphasis added).[8] As even BHB and Matson admit, (Br. of Petitioners at 9-10), an inference is "a process of reasoning by which a fact or proposition sought to be established is deduced as a *logical consequence* from other facts, or a state of facts, already proved or admitted." *Fairbanks v. J.B. McLoughlin Co.*, 131 Wn.2d 96, 102, 929 P.2d 433 (1997) (quotations and citations omitted).

Nevertheless, BHB and Matson fault the Court of Appeals for adhering to this process of reasoning. (Br. of Petitioners at 9-19). Relying on dicta (in dissenting opinions, no less) from inapposite cases in which this Court considered whether there was sufficient evidence to support a murder conviction[9] and whether a Plaintiff in a defamation case had produced clear and convincing proof of actual malice to survive a Defendant's summary judgment motion,[10] BHB and Matson claim that the Court of Appeals impermissibly "discovered," "self-manufactured,"

---

[8] "Even where the evidentiary facts are undisputed, if reasonable minds could draw different conclusions from those facts, then summary judgment is not proper." *Chelan County Deputy Sheriffs' Ass'n v. County of Chelan*, 109 Wn.2d 282, 295, 745 P.2d 1 (1987).

[9] *State v. Jeffries*, 105 Wn.2d 398, 442, 717 P.2d 722 (Pearson, J., dissenting), *cert. denied*, 479 U.S. 922 (1986).

[10] *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 792, 776 P.2d 98 (1989) (Andersen, J., dissenting).

and "created" inferences to reverse the trial court's summary judgment order. (Br. of Petitioners at 9-10, 13). But even the inapposite case of *State v. Jeffries*, 105 Wn.2d 398, 717 P.2d 722, *cert. denied*, 479 U.S. 922 (1986), on which BHB and Matson rely, belies the efficacy of their argument. After stating that "the inferences drawn must be rationally related to the proven facts," this Court then explained that "[a]n inference may be rationally related to the proven facts if that inference *is more likely than not to flow from those facts*." *Jeffries*, 105 Wn.2d at 442-43 (Pearson, J., dissenting) (citations omitted) (emphasis added).

Contrary to the argument of BHB and Matson, (Br. of Petitioners at 9-18), the Fire District and AAIC have set forth specific facts in their pleadings, depositions, and declarations that show the numerous deficiencies in the legal services provided by BHB and Matson in the underlying case. CP at 718-1208. Accepting these facts as true, and then considering all reasonable inferences – which more than likely flow from these facts – in the light most favorable to the Fire District, *see Dickinson v. Edwards*, 105 Wn.2d 457, 461, 716 P.2d 814 (1986), a jury could find that BHB and Matson failed to act as reasonable, careful, and prudent legal practitioners in Washington state.

BHB and Matson held themselves out as being competent to defend and try sexual harassment cases. CP at 952, 956-59, 986-87. Yet, other than Matson, no other attorney at the Vancouver, Washington office of BHB specialized in employment practices liability. CP at 1010-12. In his career, Matson had never tried a sexual harassment case and

had never defended a sexual harassment case with multiple Plaintiffs. CP at 918-19. In fact, Matson had tried only one other employment case before *Collins*. CP at 956.[11]

While experience need not be the handmaiden of competence, Matson did not consult with others at BHB who were more experienced than him in handling cases of this nature. CP at 976.[12] Matson did no specific research to determine what effect multiple Plaintiffs claiming sexual harassment would have on the case. CP at 921. And the associate initially assigned to the underlying case by Matson and BHB had no experience in handling sexual harassment claims, either. CP at 1032-34. It is not surprising, then, that BHB and Matson proceeded on a defense strategy premised on a fundamentally erroneous understanding of the law. CP at 799-801, 816-23, 1060-61.[13]

---

[11]While an attorney is not required to be an oracle, "an attorney has no right to be a clam, and shut himself up in the seclusion of his own self-conceived knowledge of the law." *Woodruff v. Tomlin*, 616 F.2d 294, 932 (6th Cir. 1980) (quotations and citations omitted).

[12] The Fire District should have been able to rely on BHB's attorneys to look collectively after its interests. *See Stangland v. Brock*, 109 Wn.2d 675, 690, 747 P.2d 464 (1987) (Goodloe, J., dissenting); *see also* RPC 5.1 and comments 2 and 3 thereto.

[13] Relying on *Halvorsen*, 46 Wn. App. at 718, BHB and Matson suggest that the underlying case involved an uncertain and unsettled legal area. (Br. of Petitioners at 18). They fail to support their argument with any citation to the facts or authority, and this Court does not need to consider their argument. RAP 10.3(a)(6); *see In re Disciplinary Proceeding Against Behrman*, 165 Wn.2d 414, 422, 197 P.3d 1177 (2008).

Early in the underlying case, Matson knew that the Plaintiff's allegations in the underlying case were serious, and that there was the potential for a multi-million dollar verdict. CP at 941-42. Matson knew that the Fire District did not have a written sexual harassment policy at the time the Plaintiffs filed their complaints. CP at 924. Matson knew that the Fire District's administrator, Marty James, had not attended any sexual harassment training before 2003. CP at 925-26. Moreover, Matson knew that James had admitted to several of the Plaintiffs' allegations, including the patently sexist and racist comments and conduct that formed the basis of their hostile work environment claims. CP at 501, 871-75, 936-37.

Despite knowing all this information, and despite having "the resources of the entire firm, which would include senior lawyers, colleagues, written resources, [and] anything that would be of assistance to the lawyer," (CP at 1013), Matson simply assumed that a jury would find James's conduct to be "lighthearted and banter." CP at 937. Even now, Matson maintains that he "was not sure that [James] ever did engage in sexual harassment." CP at 926.

While BHB and Matson allege that the opinions of Cordon, Bremner, and Gould are nothing more than personal opinions of dissatisfaction with strategic choices, (Br. of Petitioners at 14-15), the inconvenient truth for BHB and Matson is that these experts expressed their professional opinions that BHB and Matson failed to act as reasonable, careful, and prudent legal practitioners in Washington state

when exercising their judgment in defending the underlying case. Contrary to what BHB and Matson imply, (Br. of Petitioners at 15), "expert testimony on the standard of care does not have to be in standard-of-care terminology." *Leaverton v. Cascade Surgical Partners, PLLC*, 160 Wn. App. 512, 520, 248 P.3d 136, *review denied*, 172 Wn.2d 1005 (2011).[14] In Washington, "[courts] look instead to the substance of the allegations and the substance of what the experts bring to the discussion." *Leaverton*, 160 Wn. App. at 520.

As Cordon opined, "Matson's statements demonstrate his lack of subject matter expertise and his unsuitability to serve as lead counsel." CP at 822. "Only a lawyer with limited trial experience handling sex harassment cases would assume the Defendants could prevail before a jury given the damaging admissions made by Defendant James, coupled with the testimony from the four Plaintiffs." CP at 821. Furthermore, as Cordon opined, "A lawyer experienced in this area would recognize that most jurors, especially female jurors, would not consider comments [such as "bitch," "bitchy," "on the rag," and "barefoot and pregnant" to be] either "lighthearted" or harmless "banter." CP at 821.

---

[14] "In order to be admissible, it is only necessary that the expert's standard of care testimony be more than a personal opinion. This requirement is met so long as it can be concluded from the testimony that the expert was discussing general, rather than personal, professional standards and expectations." *White v. Kent Med. Ctr.*, 61 Wn. App. 163, 172, 810 P.2d 4 (1991).

Based on his erroneous understanding of the law, Matson placed heavy emphasis on blaming Plaintiff Sue Collins for the hostile work environment. CP at 500, 936-37, 948-49. But as Bremner opined, this strategy was unreasonable, as Matson failed to understand that "[t]he emphasis on Plaintiff Collins's behavior clearly bolstered the Plaintiffs' case against Defendants." CP at 801. She continued:

> Mr. Matson appears to have placed Plaintiff Collins's behavior into a vacuum, failing to recognize that her behavior directly reflected the hostile work environment the Plaintiffs were attempting to prove. *Mr. Matson essentially helped prove a significant element of Plaintiffs' case and, to date, still does not appear to understand this failed reasoning.*

CP at 801 (emphasis added). Gould succinctly explained why this strategy was negligent, "The more you go after Ms. Collins, the more is the duty of Mr. James, her supervisor, to bring it to a halt." CP at 1061.

Bruce Rubin, an expert witness for BHB and Matson, testified that "common sense tells you that if liability is likely, *the next thing to focus on is what's the damage exposure*." CP at 1117 (emphasis added). The required attention and preparation to answer such a question is determined in part by what is at stake; major litigation ordinarily requires more extensive treatment than matters of lesser complexity and consequence. *See, e.g.,* Rules of Professional Conduct (RPC) 1.1 and comment 5 thereto. Moreover, competent handling of a particular matter also requires the use of methods and procedures meeting the

standards of competent practitioners. *See* RPC 1.1 and comment 5 thereto.[15]

Egregiously, Matson did not provide an evaluation regarding the Plaintiffs' claims until just weeks before the mediation – almost two years after being retained in the underlying case and less than two months before the initial trial date. CP at 890, 908. Matson's actions in this regard were neither prompt, nor diligent. CP at 805. Despite admitting in his deposition that "the big issue" in the underlying case was damages, (CP at 985), Matson ignored the methods and procedures used by competent practitioners to assess (and limit) damages.[16] He filed no motion to bifurcate the Plaintiffs' claims. CP at 919-20. He served no offer of judgment. CP at 929-30. He did not have any focus groups or mock juries evaluate the Plaintiffs' claims. CP at 939. And he did not review any jury verdicts from other Washington state sexual harassment cases or any jury verdicts from other jurisdictions. CP at 945-46, 989-90. In fact, Matson summarily dismissed the usefulness of such jury verdicts by claiming that they are "often not very helpful in trying to analyze what's going to happen in your case." CP at 946.[17]

---

[15] A violation of the RPCs may constitute a deviation from the standard of care. *Hizey*, 119 Wn.2d at 261-65.

[16] "There is nothing strategic or tactical about ignorance ...." *Pineda v. Craven*, 424 F.2d 368, 372 (9th Cir. 1970).

[17] As Cordon noted, "Matson's opinion is not well founded and is undermined by his own post trial actions – Matson said he conduct[ed]

Had Matson done any jury verdict research, though, he would have realized that his evaluation negligently underestimated the value of the case. CP at 805-07, 831-32, 836-40. As Cordon explained, "[H]e would have found many six and seven figure settlements and jury verdicts for Plaintiffs, including some involving only a single Plaintiff." CP at 831. Instead, Matson's opinion that $370,000.00 was a fair and reasonable sum for purposes of settling the Plaintiffs' multi-million dollar claims was not supported by any substantive research, analysis, or objective data. CP at 504-10, 806. For instance, Matson's evaluation was devoid of any analysis explaining how he arrived at his evaluation of the strengths, weaknesses, opportunities, and threats of the Plaintiffs' claims. CP at 504-10. And Matson's evaluation was devoid of any analysis explaining how he arrived at the estimated percentage of recovery for each Plaintiff. CP at 504-10. As Bremner concluded, "It does not appear that Mr. Matson was familiar with or fully understood the legal theories asserted by Plaintiffs and the available defenses. This led to his unreasonable failure to properly assess damages and likely outcomes." CP at 799, 806.

Even with minimal research, calculations, or communications with others at BHB who were more experienced than him in handling cases of this nature, Matson would have discovered that his evaluation

---

jury verdict research after he was sued for malpractice in this case." CP at 831, 994.

and settlement recommendations were an insult to the Plaintiffs, providing them with a paltry recovery. CP at 838-39. While Cordon did not explicitly state that Matson's evaluation was not within the range of reasonable alternatives, her simple calculations showed that the Plaintiffs might have received just $25,000.00 each (after almost two years of litigation) to settle their claims. CP at 838-40. As Cordon opined, "It was negligent for Matson to believe these individual cases could be settled for a figure in the range of $25,000 or even $50,000, given the egregious facts in this case – where you had a supervisor who admitted making repeated, inappropriate comments in the workplace for approximately two and a half years by James' own admission." CP at 839. Yet Matson stubbornly and foolishly stood by his evaluation. CP at 898, 894-96, 899, 908-11.

At trial, BHB and Matson continued with their negligent defense strategy of "point[ing] the finger at Plaintiff Collins for the hostile work environment." CP at 450-52, 799, 800-01, 816-23, 1060-61. As Bremner opined, "[H]ighlighting Plaintiff Collins's behavior only shined a brighter light on Mr. James' failure to act." CP at 800. As Cordon explained, "Matson knew or should have known this was not a typical 'he said/she said' sexual harassment case," (CP at 821), especially with four women providing corroborating testimony. CP at 822. "With more experience in these types of cases, in particular with more expertise with how juries assess cases of this nature, Matson would have known most jurors have little tolerance for the kinds of comments James admitted

making, particularly when they are made by someone in a position of authority, such as James, who should know better." CP at 821. Ultimately, even the trial court *sua sponte* recognized that the defense strategy asserted by BHB and Matson was flawed, noting:

> It is clear that [Sue Collins's] behavior at the employment site was totally inappropriate and should have been corrected by her supervisor Marty James. James had a clear duty and responsibility as director of the Training Center to prevent any such actions from taking place. It was clear from the jury's finding that not only did he permit it to occur, but he helped promote some of the specific activities in question.

CP at 763.[18]

III. CONCLUSION

Contrary to the argument of BHB and Matson, the Court of Appeals did not adopt any new burden-shifting scheme by declining to apply the "judgmental immunity" rule. By ruling that an attorney may not act with impunity and avoid malpractice liability simply because his professional judgment is at issue, the Court of Appeals correctly

---

[18] Without citation to any authority, BHB and Matson argue that the Court of Appeals erred by not addressing the issue of proximate cause in this case. (Br. of Petitioners at 18-19). But under RAP 2.5(a), the Court of Appeals has the discretion to refuse to address an argument raised for the first time on appeal. On remand, the causation issue in this case becomes relatively straightforward. *See Daugert v. Pappas*, 104 Wn.2d 254, 257-58, 704 P.2d 600 (1985). But for the negligent defense strategy of BHB and Matson, what would a reasonable finder of fact have done? *See Kommavongsa v. Haskell*, 149 Wn.2d 288, 300, 67 P.3d 1068 (2003); *Brust v. Newton*, 70 Wn. App. 286, 293-94, 852 P.2d 1092 (1993), *review denied*, 123 Wn.2d 1010 (1994). This proof typically requires a "trial within a trial." *Kommavongsa*, 149 Wn.2d at 300.

affirmed that the long-standing rules of summary judgment, which apply in any other negligence case, also apply in a legal malpractice case:

> "Rather than being a rule which grants some type of 'immunity' to attorneys, it appears to be nothing more than a recognition that if an attorney's actions could under no circumstances be held to be negligent, then a court may rule as a matter of law that there is no liability."

Clark County Fire Dist. No. 5, at *10 (quotations omitted).

Here, taking the evidence and all reasonable inferences therefrom in the light most favorable to the Fire District, the Court of Appeals was correct in ruling that there is a genuine issue of material fact about the reasonableness and care exercised by BHB and Matson. Therefore, it is for the jury – not the trial court, not the Court of Appeals, and not this Court – to decide the issue of their negligence on remand.

Thus, there is no reason for this Court to accept review of the Defendants'/Petitioners' Petition for Review under Rules of Appellate Procedure (RAP) 13.4(b)(1) or (b)(4).

RESPECTFULLY SUBMITTED this 27th day of June, 2014.

PATTERSON BUCHANAN
FOBES & LEITCH, INC., P.S.

By: _____
Michael A. Patterson, WSBA No. 7976
Daniel P. Crowner, WSBA No. 37136
Of Attorneys for Respondents Clark County Fire District No. 5 & American Alternative Insurance Corporation

CERTIFICATE OF SERVICE

I, Stacy Hughes, hereby certify that on this 23rd day of June, 2014, I served the foregoing Answer to Petition for Review on the Supreme Court of the State of Washington and caused the same to be served upon each and every attorney of record as noted below:

Via Email

Ray P. Cox
Terrence J. Cullen
Richard R. Roland
Forsberg & Umlauf, PS
901 – 5th Avenue, Suite 1400
Seattle, WA 98164-2047
E-mail: rcox@forsberg-umlauf.com
E-mail: tcullen@forsberg-umlauf.com
E-mail: rroland@forsberg-umlauf.com
Attorneys for Respondents

I certify under penalty of perjury under the laws of the State of Washington that the above is correct and true.

Executed in Seattle, Washington, on June 23, 2014.

Stacy Hughes
Legal Assistant