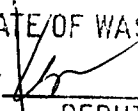


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STATE OF WASHINGTON
BY  _____
DEPUTY

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

Appellants,

v.

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

Respondents.

BRIEF OF APPELLANTS

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Daniel P. Crowner, WSBA No. 37136
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County Fire District No. 5 and
American Alternative Insurance
Corporation

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ASSIGNMENTS OF ERROR

ASSIGNMENTS OF ERROR

1. The trial court erred when it ordered that “Defendants’ Motion for Summary Judgment on Judgmental Immunity is hereby **GRANTED.**” Clerk’s Papers (CP) at 1234-36.

2. The trial court erred when it ordered that “[a]ll claims asserted in this matter are hereby dismissed with prejudice.” CP at 1234-36.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under CR 56(c) and applicable Washington law, did the trial court err as a matter of law when it ruled that Bullivant Houser Bailey, P.C., and Richard G. Matson were immune from tort liability for their professional negligence in the underlying case because of the doctrine of “judgmental immunity”? (Assignments of Error 1 and 2).

2. Under CR 56(c) and applicable Washington law, did the trial court err when it found that Bullivant Houser Bailey, P.C., and Richard G. Matson had exercised that 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, despite pleadings, depositions, and declarations showing that there was a genuine issue as to

their professional negligence in the underlying case? (Assignments of Error 1 and 2).

3. Under CR 56(c) and applicable Washington law, did the trial court err as a matter of law when, with respect to the claims of Clark County Fire District No. 5 and American Alternative Insurance Corporation, it entered judgment in favor of Bullivant Houser Bailey, P.C., and Richard G. Matson? (Assignments of Error 1 and 2).

STATEMENT OF THE CASE

I. FACTUAL HISTORY OF THE UNDERLYING CASE

In 2005, Sue Collins, Helen Hayden, Valerie Larwick, and Kristy Mason served and filed a lawsuit against the Fire District and its administrator, Marty James. CP at 858-63. These four female plaintiffs alleged that James, their supervisor, created a sexually hostile workplace by engaging in conduct that was demeaning and offensive.¹ CP at 860.

The allegations in this underlying case were serious. For example, in affirming in part and reversing in part the judgment from the underlying

¹ Each of these plaintiffs had been terminated from their positions with the Fire District, and three of them were away from work for asserted medical reasons secondary to stress at the time of their termination. CP at 858-59.

case, this court summarized just some of the testimony regarding the statements and conduct attributed to James as follows:

During their employment at the Training Center, Larwick, Collins, Mason, and Hayden experienced James's sexually inappropriate comments and purposeful discrimination of female employees. For example, James regularly commented in their presence about the anatomy of female passersby, saying, "[N]ice legs," and "[N]ice rack." Similarly, James commented on the anatomy of female employees, often discussing or comparing their breasts within the hearing range of other employees and visitors. James repeatedly remarked to Larwick and other female employees about "ladies' nipples getting hard," asking, "Is it cold in here, or are you happy to see me?" And when female employees would bend down to pick up an object in front of James, he often said such things as, "Looks good from here" or "That's how I like them, you know, down on their knees."

In addition, James subjected female employees to a "boy's club" atmosphere and a "very purposeful exclusion" from staff meetings and conversations. He frequently said, "We need more testosterone around here," while grabbing his crotch in front of Training Center personnel. In conversations with Training Center personnel, James frequently described Collins, Larwick, and other female employees as "stupid wom[e]n," "stupid bitch[es]," and "lying bitch[es]." And when James disagreed with a female employee, he often made comments such as, "She must be PMSing" or "Who's on the rag[?]"

....

Furthermore, Larwick and others noticed that James's sexist and demeaning conduct often targeted Larwick. He referred to Larwick as "a fucking cunt" and "a stupid bitch," and, on one occasion, he told Collins that Larwick "doesn't have any panties on" under her pants. James also told Larwick he could see her panties through

her slacks. On another occasion, James put a wind-up penis toy next to Larwick and laughed as it began hopping around her desk, even though he knew that Larwick had recently endured a family crisis involving her then-husband's sexual molestation of her daughter.

Collins v. Clark County Fire District No. 5, 155 Wn. App. 48, 56-57, 231 P.3d 1211 (2010) (citations omitted).

Even more telling, James had admitted to many of the allegations raised by the underlying plaintiffs. For instance, he had admitted to using the words and phrases “bitch” and “bitchy” when referring to women at the Fire District. CP at 871. He had admitted to calling people “douche bags.” CP at 873. He had admitted to referring to women at the Fire District as being “on the rag.” CP at 872. He had admitted to joking with a female employee at the Fire District about her being “barefoot and pregnant.” CP at 874-75. And he had admitted to using the expression that “nobody cuts my sack,” apparently in response to complaints made against him at the Fire District. CP at 869-70.²

Based on the above conduct, the plaintiffs raised many claims against the Fire District and James in the underlying case, including: outrage; negligent supervision; negligent retention; negligent infliction of

² When Larwick complained to one of the Fire District's commissioners, he replied, “Well, that's Marty. You know, Val, that's just Marty.” *Collins*, 155 Wn. App. at 58.

emotional distress; and violations of the Washington Law Against Discrimination (WLAD). CP at 858-63; *see Collins*, 155 Wn. App. 48.

**II. BULLIVANT HOUSER BAILEY, P.C.,
AND RICHARD G. MATSON COMMIT PROFESSIONAL NEGLIGENCE
IN DEFENDING THE UNDERLYING CASE**

In 2005, American Alternative Insurance Corporation (“AAIC”), through Glatfelter Claims Management (“GCM”),³ retained Bullivant Houser Bailey, P.C. (“BHB”), and its attorney Richard G. Matson (“Matson”) to defend the Fire District and James in the underlying case. Matson was purported to be experienced at trying sexual harassment cases in both state and federal courts. CP at 956-59.⁴

In reality, however, Matson had never tried a sexual harassment case in his career. CP at 918. He had never defended a sexual harassment case with multiple plaintiffs. CP at 919. In fact, Matson admitted at his deposition that he had tried only one other employment case before

³ GCM is a third-party administrator for Munich Reinsurance America, which wholly owns AAIC, an insurance provider. CP at 1094-97.

⁴ In particular, GCM’s representative testified, “[Matson] is the person who practices in Washington. He knows the values of this case. I’m paying him to tell me what is this case worth.” CP at 908. She continued, “I have to believe him because that’s his state, his territory, his expertise, not mine. I pay him to tell me this information.” CP at 911. By the end of the underlying case, BHB and Matson had billed AAIC approximately \$500,000.00 for their legal services. CP at 932.

Collins. CP at 956. And in that one other employment case, Matson was a plaintiff's attorney. CP at 956-57.⁵

During this time, BHB held itself out as being a team of experienced attorneys. Yet as a firm, only about 3% of BHB cases were made up of employment litigation. CP at 1006-07. And more importantly, the Vancouver, Washington office of BHB, of which Matson was the shareholder-in-charge, had been handling fewer and fewer cases of employment litigation. CP at 1001-09, 1085-89.

Unfortunately, in defending the underlying plaintiffs' claims, the conduct of BHB and Matson fell far below the standard of care to which attorneys must comply. Other than Matson, no other attorney – including associates, shareholders, and of counsel – at the Vancouver, Washington office of BHB specialized in employment practices liability. CP at 1010-12. All other attorneys who specialized in employment practices liability practiced out of other offices throughout the northwest. CP at 1010.

Nobody at BHB reviewed Matson's work. CP at 1013. As a matter of policy, the firm did not review reports, advice, or decisions of its shareholders for their accuracy, completeness, or sufficiency. CP at 1013-

⁵ In addition, Matson does not recall ever handling a case with an exposure over \$500,000.00. CP at 971.

14. Moreover, BHB abdicated to each individual attorney the decision whether he or she was competent to take on a case.⁶ CP at 1022-23.

Despite his lack of experience in handling cases of this nature, Matson did not consult with others at BHB who were more experienced than him in handling cases of this nature. CP at 976. 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 1032-34.⁷

Early in the underlying case, Matson was on notice that the plaintiffs' allegations were serious, and he should have known of the potential for a multi-million dollar verdict. Matson knew that the plaintiffs in the underlying case were seeking a multi-million dollar award. CP at 941-42. He knew that the Fire District did not have a written sexual

⁶ At the time the underlying case was assigned to Matson, BHB had no policy or practice regarding assigning or reassigning cases. CP at 1015-17. BHB's "practice" was that its attorneys would self-report when they could not provide competent and/or diligent representation to a client. CP at 1020-21. So, for instance, if an attorney received an assignment that was not within his expertise, he simply would "hand the case off to another lawyer in the firm." CP at 1016. BHB allowed its shareholders to reassign cases to other shareholders without notification to the respective practice areas within the firm. CP at 1019-20.

⁷ BHB's representative testified that BHB had no policy with regard to staffing a case with associates and paralegals. CP at 1016-18.

harassment policy at the time the plaintiffs filed their complaints. CP at 924. He knew that 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 936-37.

Despite 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. But as Robert Gould, Claire Cordon, and Anne Bremner, expert witnesses for AAIC and the Fire District, have concluded, Matson failed to recognize the magnitude of the underlying plaintiffs' case and, accordingly, failed to properly prepare the underlying case during all phases of discovery and pre-trial preparation. CP at 799-807, 814-41, 848-49, 1043, 1045.

For example, Matson did not take any of the plaintiffs' depositions until more than one year after being retained in the underling case. CP at 940. Matson knew that the plaintiffs' WLAD claims created attorney fee and cost exposure, but he served no offers of judgment. CP at 929-30. In

fact, Matson could not recall whether he even informed his clients about whether an offer of judgment should be served or considered. CP at 929.

Likewise, Matson filed no dispositive motions, despite the fact that the plaintiffs had raised a number of claims. CP at 927. Matson believed that trying a multi-plaintiff case with similar claims could be dangerous, and that trying them separately would be better. CP at 951. But he did not file a motion to bifurcate and, in fact, never even recommended a motion to bifurcate to his clients. CP at 919-20. At his deposition, Matson was unable to explain why these key motions were not filed.

Furthermore, Matson admitted that, from the beginning of the underlying case, “the big issue” was damages, not liability. CP at 985. But, despite his lack of experience in evaluating the measure of damages in cases of this nature, Matson was not diligent in determining a likely measure of damages for the four plaintiffs. He did not consult with others at BHB who were more experienced than him in handling cases of this nature. CP at 976. He did not have any focus groups evaluate the plaintiffs’ claims. CP at 939. He did not have any mock juries evaluate the plaintiffs’ claims. CP at 939. He even did not review jury verdicts from other Washington state sexual harassment cases or jury verdicts from other jurisdictions. CP at 945-46, 989-90. Instead, he 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.

Most egregiously, Matson did not engage in any substantive efforts to settle the case until mediation – almost *two years* after being retained in the underlying case and less than *two months* before the initial trial date. CP at 890, 908-09. Matson’s failure in this regard is particularly egregious in light of the earlier pleas from GCM’s insurance adjustor to move the case into mediation. CP at 1044.⁸

Matson never even provided an evaluation regarding the value of the plaintiffs’ claims to his clients until just weeks before the mediation. CP at 890, 897. When Matson finally did provide his evaluation, he underestimated the value of the case. Matson summarily assigned the case a settlement value of \$370,000.00. CP at 504-10. His 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 or analysis. CP at 504-10, 908, 945-47.

Of particular note, Matson knew that the claims in the underlying case exposed the Fire District and James to probable liability for

⁸ In late 2006 and early 2007, concerned with Matson’s handling of the case, GCM’s insurance adjustor sought the help of Ohio attorney Katherine Hart Smith to review several issues related to the underlying case. CP at 236-37, 241.

prevailing attorney fees and costs, but he nevertheless failed to make an informed judgment about the extent of such attorney fees and costs.⁹ CP at 928-29, 932-33, 935, 943-44. Matson admitted that he never made an effort to inquire with the underlying plaintiffs' attorney about the extent of attorney fees and costs he had incurred in the two years preceding mediation. CP at 928, 931-32.¹⁰ In trying to justify his valuation of such attorney fees and costs, Matson inexplicably declared, "[P]laintiffs' lawyers often compromise their fees ... in settling these types of cases." CP at 933.

Nevertheless, Matson testified at his deposition that, between him and the insurer, he was in the best position to determine the value of these types of cases and to determine liability and damages exposure in these types of cases in the Vancouver, Washington market. CP at 952. He also testified that AAIC, the Fire District, and James were entitled to

⁹ Likewise, Matson knew that the underlying case involved probable liability for other things, such as tax offsets, but he failed to factor these considerations into his monetary evaluation of the case as well. CP at 1052-54.

¹⁰ At his deposition, Matson tried to justify his actions by explaining, "I didn't inquire of him because I understood it to be part of his total demands and I had a sense that he was working at about the same rate we were on the case, I had a thought. I mean he was putting effort into it, we were putting effort into it." CP at 932.

reasonably rely upon him in making decisions about settlement. CP at 986-87.

Therefore, justifiably relying on Matson's evaluation and advice, AAIC and GCM brought \$400,000.00 in settlement authority for mediation in the underlying case. CP at 889. But by the time of the mediation, the plaintiffs in the underlying case increased their settlement demand to more than *eight million* dollars. CP at 891. GCM's insurance adjustor repeatedly asked Matson why the parties' evaluations of the underlying case were so different. CP at 892-93. "[W]hat is wrong? What are we missing? What are you not telling me? Why is this value so far off from their demand?" CP at 909. Matson could not provide any answer, except to say that his evaluation of the plaintiffs' claims was correct. CP at 894-96, 899, 909-11. When the mediation in the underlying case failed, AAIC, the Fire District, and James reluctantly headed to trial. CP at 898, 908.¹¹

¹¹ GCM's insurance adjustor recalled, "When I sat at mediation and my counsel tells me there's no way these numbers are wrong, they're barking up the wrong tree, they're totally unrealistic, I'm in a position where I have to go to trial and that's when I said we'd go to trial." CP at 898.

During the trial of the underlying case,¹² Matson proceeded on a defense strategy premised upon a fundamentally erroneous understanding of the law. Matson placed heavy emphasis on blaming Collins for the hostile work environment on the basis that she participated in inappropriate banter with James. CP at 936-37, 948-49. But Matson apparently failed to realize that his defense strategy actually served to bolster the other three plaintiffs' hostile work environment claims. CP at 799-801, 816-23, 1060-61.

After a lengthy trial, the plaintiffs' attorney in the underlying case ended his closing argument: (1) with a series of "improper" comments, to which Matson did not object; and (2) with a request for the jury to award one million dollars in non-economic damages to each plaintiff. *Collins*, 155 Wn. App. at 72, 95. The plaintiffs' attorney argued in closing:

The amount that's being sought will not in any way reduce fire services, hurt the department. It's not going to do anything that will hurt services in any way, or raise taxes, do any of the bogeys that might be mentioned. It will not happen. We know that.

What you need to do, please, is put a value on their suffering that other departments will look up and say, "We can't do that." Put a value on what they have experienced and compensate them to a level that says, "If you do this

¹² At the urging of GCM's insurance adjustor, Hart Smith agreed to assist Matson in trying the case. CP at 242-44. She was admitted *pro hac vice*. CP at 235.

serious consequences flow, and we compensate people as they are injured.” *And in so doing, help let the commissioners know the answer to the question they felt had to go to you all to be decided. And in so doing, also let HR departments know that there’s a better structure, there’s a better way to do this.*

HR departments don’t exist for the protection of the City. HR departments don’t exist for the protection of the company. *Let them know that they have to be up there with a viable means for somebody who’s experiencing harassment to step forward and bring it forth in a safe way. And an award of \$1 million [to each of the four women] ... is the best way you can do that.*

Collins, 155 Wn. App. at 72-73. Matson did not object to this, or any other, portion of the closing argument by the plaintiffs’ attorney. *Collins*, 155 Wn. App. at 73.

After its deliberations, the jury returned a verdict in favor of the underlying plaintiffs, awarding substantial judgments to each of them. *Collins*, 155 Wn. App. at 73-74. The jury’s award to the plaintiffs totaled more than \$3.5 million, or *almost 10 times more* than what Matson had evaluated the case for settlement purposes. *Collins*, 155 Wn. App. at 73-74. In addition, the trial court awarded the plaintiffs’ attorney more than \$750,000.00 in attorney fees and costs. CP at 765-68.

Following an appeal, in which this court reversed the trial court’s remittitur, *Collins*, 155 Wn. App. at 54, and then awarded the plaintiffs’ attorney \$116,650.69 in attorney fees and costs on appeal, (CP at 772), the

supplemental judgment, for which AAIC indemnified the Fire District and James, totaled more than \$4.8 million (not including interest of 7.007%). CP at 770-74.

III. PROCEDURAL FACTS OF THE CURRENT CASE

After two failed mediations, the Fire District and AAIC filed and served their complaint against BHB and Matson for professional negligence in August 2009. CP at 776-83 In their complaint, the Fire District and AAIC alleged that BHB and Matson breached their duty of care to act as reasonably and prudent legal practitioners in Washington state. CP at 781-82 The Fire District and AAIC further alleged that, as a direct and proximate result of BHB's and Matson's negligence, they suffered financial damages, including additional attorney fees and costs for post-trial motions, mediations, and appellate matters. CP at 782.

In response, BHB and Matson filed and served their answer. CP at 785-93. Among other things therein, BHB and Matson asserted several affirmative defenses. CP at 790-91. First, they asserted that AAIC lacks standing to bring the lawsuit. CP at 791. Second, they asserted an affirmative defense of "contributory negligence." CP at 791. Third, they asserted that BHB and Matson are shielded from claims arising from their negligent conduct based on "judgmental immunity." CP at 791.

The Fire District and AAIC filed a summary judgment motion, arguing that the trial court should summarily dismiss the above-referenced affirmative defenses. CP at 313-43. 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, agreeing with BHB and Matson that they owed no duty to AAIC. CP at 695-99.¹³ The trial court certified its order under CR 54(b) to facilitate an immediate appeal of the issues presented before it for summary judgment. CP at 695-99. And AAIC timely appealed. CP at 700-06.

Thereafter, 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 professional negligence claims based on "judgmental immunity." CP at 346-96, 715-16. Despite a response to the contrary, (CP at 718-1208), the trial court agreed with BHB and Matson. CP at 1234-36. After a hearing in August 2012, the trial court entered its order, simply stating, "All claims asserted in this

¹³ The parties and the trial court agreed to continue the summary judgment motion of AAIC and the Fire District to strike the affirmative defenses of contributory negligence and judgmental immunity. CP at 698.

matter are hereby dismissed with prejudice.” CP at 1236. AAIC and the Fire District timely appealed. CP at 1237-41.

Finally, in October 2012, this court consolidated both appeals under No. 42864-4-II.

ARGUMENT

I. THE TRIAL COURT ERRED IN SUMMARILY DISMISSING THE CLAIMS OF THE FIRE DISTRICT AND AAIC

Despite pleadings, depositions, and declarations showing that there is a genuine issue of material fact as to the professional negligence of BHB and Matson in the underlying case, (CP at 718-1208), the trial court improperly granted summary judgment. CP at 1234-36. In explaining its ruling, the trial court inexplicably and unabashedly stated, “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 for me to second-guess that decision.” RP (August 17, 2012) at 70. But it is error for the trial court to assume the function of a jury and weigh the facts as presented in documents before trial. *Babcock v. State*, 116 Wn.2d 596, 598, 809 P.2d 143 (1991).

Furthermore, contrary to the argument of BHB and Matson, (CP at 375-81, 386-88, 1209-32), the law does not immunize attorneys from tort liability for their professional negligence. *Halvorsen v. Ferguson*, 46 Wn. App. 708, 717, 735 P.2d 675 (1986), *review denied*, 108 Wn.2d 1008

(1987); accord *Cook, Flanagan & Berst v. Clausing*, 73 Wn.2d 393, 395-96, 438 P.2d 865 (1968). And contrary to the argument of BHB and Matson, (CP at 375-81, 386-88, 1209-32), the facts are not such that reasonable persons could reach but one conclusion. See generally *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 257, 616 P.2d 644 (1980) (citations omitted).

Therefore, for the reasons stated herein, this court should: (1) reverse the trial court's order dismissing the claims of the Fire District and AAIC; and (2) remand for trial on the remaining elements of negligence.

A. STANDARD OF REVIEW

When reviewing a summary judgment order, this court engages in the same inquiry as the trial court. See CR 56(c); *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 595, 70 P.3d 954 (2003). "Under CR 56(c), summary judgment is appropriate if the record presents no genuine issue as to any material fact *and* the moving party is entitled to a judgment as a matter of law." *Biggs v. Nova Servs.*, 166 Wn.2d 794, 801, 213 P.3d 910 (2009) (emphasis added).

With regard to questions of law, this court employs a *de novo* review. *M.W.*, 149 Wn.2d at 595. With regard to questions of fact, this court also employs a *de novo* review, considering the evidence and all

reasonable inferences therefrom in the light most favorable to the Fire District and AAIC. *Klinke*, 94 Wn.2d at 256; *Halvorsen*, 46 Wn. App. at 712. The burden is on BHB and Matson to prove that there is no genuine issue as to any material fact.¹⁴ *La Plante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975).

But “[w]hen material issues of fact exist, *they may not be resolved by the trial court and summary judgment is inappropriate.*” *Halvorsen*, 46 Wn. App. at 712 (emphasis added).¹⁵ And “a trial is absolutely necessary if there is a genuine issue as to *any* material fact.” *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977).

B. THE TRIAL COURT ERRED IN RULING THAT BHB AND MATSON ARE IMMUNE FROM TORT LIABILITY FOR THEIR PROFESSIONAL NEGLIGENCE UNDER “JUDGMENTAL IMMUNITY”

“In the realm of tort liability, immunities protect a class of defendants based upon public policy.” *Blanks v. Seyfarth Shaw LLP*, 89 Cal. Rptr. 3d 710, 743 (Cal. Ct. App. 2009). Immunity is conferred, not

¹⁴ A material fact is one on which the outcome of the litigation depends, in whole or in part. *Morris v. McNichol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

¹⁵ “The trial court must deny a motion for summary judgment if the record shows any reasonable hypothesis which entitles the nonmoving party to relief.” *Mostrom v. Pettibon*, 25 Wn. App. 158, 162, 607 P.2d 864 (1980); *see also Klinke*, 94 Wn.2d at 256-57) (“If reasonable persons might reach different conclusions, the motion should be denied.”).

because of the facts, but because of the status or position of the defendant. *Blanks*, 89 Cal. Rptr. 3d at 743. “When the law grants an immunity, it does not mean that the defendant’s conduct is not tortious, but rather that the defendant is absolved from liability.” *Blanks*, 89 Cal. Rptr. 3d at 743.

In Washington, 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). “The courts and Legislature in this state are very reluctant to grant immunity for tortious conduct, absent very compelling public interests.” *Burkhart v. Harrod*, 110 Wn.2d 381, 397, 755 P.2d 759 (1988) (Utter, J., concurring). In fact, our Supreme Court has abolished some traditional common law immunities, such as the inter-spousal immunity and the charitable immunity, in the interest of providing just remedies. *Burkhart*, 110 Wn.2d at 397 (Utter, J., concurring). And our Legislature has statutorily abolished sovereign immunity. RCW 4.96.010.¹⁶

In seeking to absolve themselves from liability, BHB and Matson argued that an attorney is immune from liability for making “informed,

¹⁶ “Where the Legislature has enacted statutory immunities, it is generally in response to a compelling social need.” *Burkhart*, 110 Wn.2d at 398 (Utter, J., concurring).

good-faith decisions” on behalf of his client. CP at 1212. In making this argument, they represented to the trial court that Division One of the Court of Appeals unconditionally stated that “mere errors in judgment or trial tactics do not subject an attorney to liability for legal malpractice.” CP at 376 (quoting *Halvorsen*, 46 Wn. App. at 717). BHB and Matson even asserted, “It is clear that an attorney who acts in an honest belief that his litigation conduct is well founded and in the best interests of his client should not be found liable for an error in judgment.” CP at 381.

But contrary to the inaccurate representations of law advanced by BHB and Matson, (CP at 376),¹⁷ and accepted by the trial court, (CP at 1234-36), Division One of the Court of Appeals actually stated, “*In general*, mere errors in judgment or in trial tactics do not subject an attorney to liability for legal malpractice.” *Halvorsen*, 46 Wn. App. at 717 (emphasis added).¹⁸ Importantly, Division One of the Court of Appeals

¹⁷ “[A]lthough a lawyer in an adversary proceeding is not required to present an impartial exposition of the law ... the lawyer must not allow the tribunal to be misled by false statements of law ... that the lawyer knows to be false.” See Rules of Professional Conduct (RPC) 3.3 and comment 2 thereto.

¹⁸ Relying in part on *Davis v. Damrell*, 119 Cal. App. 3d 883 (Cal. Ct. App. 1981), Division One of the Court of Appeals immediately clarified its statement by noting, “This rule has found virtually universal acceptance when the error involves an uncertain, unsettled, or debatable proposition of law.” *Halvorsen*, 46 Wn. App. at 717. Then, relying on *Smith v. Lewis*, 13 Cal. 3d 349, 530 P.2d 589, 595 (Cal. 1975), Division One of the Court

never stated that as a matter of law errors in judgment or in trial tactics are categorically or unconditionally immune from liability. *See Halvorsen*, 46 Wn. App. at 717. In fact, as authority for its statement, Division One of the Court of Appeals approvingly cited our Supreme Court’s decision in *Cook, Flanagan & Berst v. Clausing*, 73 Wn.2d 393, 394, 438 P.2d 865 (1968), which more than 40 years ago unequivocally rejected the very position being advanced by BHB and Matson.

In *Cook*, the plaintiffs sued the defendants for legal malpractice, and a jury returned a verdict in the plaintiffs’ favor. *Cook*, 73 Wn.2d at 393-94. The defendants appealed the verdict, primarily arguing that the trial court erred in giving the jury the following instruction:

An attorney is not liable for a mere error of judgment if he acts in good faith and in an honest belief that his acts and advice are well founded and in the best interest of his client. In the absence of an express agreement, an attorney is not an insurer or guarantor of the soundness of his opinion or of the successful outcome of litigation or of the validity of an instrument he is engaged to draft.

of Appeals stated, “An attorney’s immunity from judgmental liability is conditioned upon reasonable research undertaken to ascertain relevant legal principles and to make an informed judgment.” *Halvorsen*, 46 Wn. App. at 718. Interestingly, the controlling test for judgmental immunity in California is a two-pronged inquiry: (1) whether the state of the law was unsettled at the time the attorney rendered his professional advice and (2) whether that advice was based on the exercise of an informed judgment. *Village Nurseries v. Greenbaum*, 101 Cal. App. 4th 26, 36-37 (Cal. Ct. App. 2002).

Cook, 73 Wn.2d at 394. The defendants contended that the instruction was erroneous because it omitted the proviso that “*such an error in judgment must itself fall short of negligence if the lawyer is to be protected from liability.*” *Cook*, 73 Wn.2d at 394 (emphasis added). Our Supreme Court agreed with the defendants, ruling, “*The instruction is patently misleading and standing alone is an incorrect statement of the law.*” *Cook*, 73 Wn.2d at 394 (emphasis added).¹⁹

Thus, contrary to what BHB and Matson assert, (CP at 375-81, 386-88, 1209-24), merely characterizing an attorney’s act or omission as an error in judgment or in trial tactics does not end the inquiry. *See Gelsomino v. Gorov*, 149 Ill. App. 3d 809, 502 N.E.2d 264, 267 (Ill. 1986); *see also Woodruff v. Tomlin*, 616 F.2d 924, 930 (6th Cir. 1980) (“He is still bound to exercise a reasonable degree of skill and care in all his professional undertakings.”); *Biomet, Inc. v. Finnegan Henderson LLP*, 967 A.2d 662, 666 (D.C. 2009) (“Central to the doctrine is the understanding that an attorney’s judgmental immunity and an attorney’s obligation to exercise reasonable care coexist.”); *Kling v. Landry*, 686 Ill.

¹⁹ Our Supreme Court then went on to hold that “the correct standard to which [a lawyer] is held in the performance of his professional services is that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction.” *Cook*, 73 Wn.2d at 395.

App. 3d 329, 686 N.E.2d 33, 37 (Ill. App. Ct. 1997) (“the law distinguishes between negligence and mere errors of judgment”); *Baker v. Beal*, 225 N.W.2d 106, 112 (Iowa 1975) (“mere errors in judgment by a lawyer are not grounds for negligence, at least where the lawyer acts in good faith and exercises a reasonable degree of care, skill and diligence”); *Simko v. Blake*, 448 Mich. 648, 532 N.W.2d 842, 847 (Mich. 1995) (“mere errors in judgment by a lawyer are generally not grounds for a malpractice action where the attorney acts in good faith and exercises reasonable care, skill, and diligence”).

Instead, “[t]he issue remains as to whether the attorney has exercised a reasonable degree of care or skill in representing his client.” *Gelsomino*, 502 N.E.2d at 267. “The question of whether an attorney has exercised a reasonable degree of care and skill is one of fact.” *Spivack, Shulman & Goldman v. Foremost Liquor Store*, 124 Ill. App. 3d 676, 465 N.E.2d 500 (Ill. App. Ct. 1984). And “[a]s in any other negligence case ... if there is a genuine issue of material fact about the reasonableness and care exercised by the attorney, then the issue must be submitted to the jury for determination.” *Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 133 Idaho 1, 981 P.2d 236, 240 (Idaho 1999); *see also Grago v. Robertson*, 49 A.D.2d 645, 370 N.Y.S.2d 255 (N.Y. App. Div. 1975) (“It is, therefore, evident that the issue of whether specific conduct constitutes

malpractice normally requires a factual determination to be made by the jury.”); *Cook*, 73 Wn.2d at 394 (finding that material issues of fact relating to negligence were properly for the jury’s determination under appropriate instructions); *VersusLaw, Inc. v. Stoel Rives, L.L.P.*, 127 Wn. App. 309, 111 P.3d 866 (2005) (where material issues of fact existed about whether a law firm negligently represented a client and caused damages, the issues were questions of fact for the jury to decide).²⁰

C. THE TRIAL COURT ERRED IN RESOLVING THE PROFESSIONAL NEGLIGENCE OF BHB AND MATSON AS A MATTER OF LAW

Here, the Fire District and AAIC presented pleadings, depositions, and declarations showing that there is a genuine issue of material fact as to

²⁰ Summary judgment may be entered as a matter of law, but only in those instances where it is clear that an attorney reasonably exercised his judgment as how to proceed, such that a jury, under no circumstances, could find him to be negligent. *See Hatfield v. Hertz*, 109 F. Supp. 2d 174, 180 (S.D.N.Y. 2000); *Sun Valley Potatoes, Inc.*, 981 P.2d at 240; *Bergstrom v. Noah*, 266 Kan. 847, 875, 947 P.2d 531 (Kan. 1999). Importantly, the Supreme Court of Kansas has cautioned:

Because district judges and appellate court judges are, themselves, attorneys, they naturally have opinions as to whether or not certain conduct constitutes legal malpractice. It is easy to slip into the trap of deciding such questions “as a matter of law.” Not having a like expertise in other professions such as medicine or architecture, the issues of professional negligence there are routinely submitted to juries. Nevertheless, claims of legal malpractice, like other forms of malpractice, are normally to be determined by the trier of fact rather than by summary judgment.

Hunt v. Dresie, 241 Kan. 647, 656, 740 P.2d 1046 (Kan. 1987).

the reasonableness and care exercised by BHB and Matson. CP at 718-1208. On the state of the record as it existed before the trial court, a jury could find that BHB and Matson failed to act as reasonable, careful, and prudent legal practitioners in Washington State.²¹ CP at 346-652, 718-1232. Accordingly, it is the function of the jury, *not* the trial court, to resolve these factual issues. *See Fleming v. Smith*, 64 Wn.2d 181, 185, 390 P.2d 181 (1964) (“In ruling on a motion for summary judgment the court’s function is to determine whether such a genuine issue exists, *not to resolve any existing factual issues ...*” (Citation omitted)); *Bates v. Bowles White & Co.*, 56 Wn.2d 374, 353 P.2d 663 (1960). Thus, the trial court erred when it slipped into the trap of deciding this case under CR 56(c) as a matter of law.

1. BHB and Matson Were Professionally Negligent In Handling the Underlying Case

Among other things, BHB and Matson relied on the declaration (and the exhibits thereto) of their expert witness, Bruce Rubin, to establish that they met the standard of care and that they were entitled to judgment as a matter of law. CP at 409-523. But Rubin’s declaration, and the

²¹ “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 this jurisdiction.” *Hizey v. Carpenter*, 119 Wn.2d 251, 261, 830 P.2d 646 (1992); *Hansen v. Wightman*, 14 Wn. App. 78, 90, 538 P.2d 1238 (1975) (it is a statewide standard).

arguments of BHB and Matson, simply cannot eliminate the genuine issues of material fact that exist regarding the negligent nature of Matson's errors and omissions in handling the underlying case. Importantly, as the Ninth Circuit Court of Appeals has stated, "There is nothing strategic or tactical about ignorance" *Pineda v. Craven*, 424 F.2d 368, 372 (9th Cir. 1970).

While Rubin touted the quantity of work over the quality of work, he conveniently overlooked – just as BHB and Matson did – that James admitted to many of the plaintiffs' allegations, including the patently sexist and racist comments and conduct that formed the basis of the plaintiffs' hostile work environment claims. CP at 869-75. Furthermore, BHB and Matson knew that James had not attended any sexual harassment training before 2003. CP at 925-26.

BHB and Matson knew that the Fire District did not have a sexual harassment policy at the time the plaintiffs filed their complaint. CP at 924. BHB and Matson knew that, when one of the plaintiffs complained about James's conduct to a Fire District commissioner, he responded, "[T]hat's just Marty." *Collins*, 155 Wn. App. at 58. And even Matson admitted, in his pre-mediation statement to mediator Susan Hammer, that James "permitted an inappropriate tone of speech and behavior in the Training Center that he regrets." CP at 501.

As a consequence of this information, BHB and Matson knew or should have known that liability was very likely. CP at 814, 816-18. As Cordon opined, “Matson knew or should have known this was not a typical ‘he said/she said’ sexual harassment case where the facts were largely contested.” CP at 821. Even Gould testified:

I am astonished at how an allegedly experienced employment lawyer defending an employer on sexual harassment grounds, under anywhere near the facts recited by the Court of Appeals and found by the jury, could not and would not tell their client, Your chance of winning this on liability, Ms. Collins’ conduct to the contrary notwithstanding, are very, very slim.

And this is a case that calls out and cries out for trying to cut your losses and get the darned thing settled.

CP at 1055-56. There was no excuse for Matson to wait until after James’s deposition to conduct further research, to arrange for a mock trial, to arrange for a focus group, or to retain a jury consultant. CP at 833. There was no excuse for Matson failing to push for an early mediation. CP at 833. After all, from conversations with their clients, BHB and Matson knew or should have known that this evidence, standing alone, would be sufficient for a jury to find that James created an unlawfully hostile work environment at the Fire District. CP at 833-34.

In his declaration, Rubin unequivocally stated, “Fundamentally, juries in employment cases look to see if the employer acted fairly. That frequently drives the ultimate verdict. Matson was entitled to consider

that in developing a strategy.” CP at 419. Nevertheless, when asked whether he thought the Fire District acted fairly, Rubin testified, “I haven’t been asked to form an opinion on that.”²² CP at 1129-30. But given the undisputed facts above – admitted to by James – how could a jury have ever found that the Fire District “acted fairly?” In fact, given four women who were providing corroborating testimony,²³ Cordon opined that BHB and Matson should have been more concerned about the credibility of their own clients. CP at 822.

Despite knowing this information, Matson simply assumed that a jury would find James’s conduct to be “lighthearted and banter.” CP at 937. Perhaps based on this naïve assumption, Matson proceeded on a defense strategy premised upon a fundamentally erroneous understanding of the law. CP at 799-801, 816-23, 1060-61. Matson placed heavy emphasis on blaming Collins for the hostile work environment on the basis that she participated in inappropriate banter with James. CP at 936-37, 948-49. But Matson inexplicably failed to realize that James, as her supervisor, had the legal responsibility to intervene to protect his other

²² Nevertheless, Rubin noted, “I think I have seen some [articles] that suggest that jurors tend to start out more sympathetic to the employee.” CP at 1131.

²³ Matson even acknowledged that the plaintiffs had “a long opportunity to get their stories aligned, straight.” CP at 920.

staff members from such bad behavior. CP at 799-801. As Bremner opined, the defense strategy of BHB and Matson actually served to bolster the other three plaintiffs' hostile work environment claims. CP at 801. In fact, even the trial court *sua sponte* recognized this strategy asserted by BHB and Matson was flawed, noting:

It is clear that [Sue Collins's] outrageous 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 for the Training Center to prevent any such actions from taking place. It is clear from some of the jury's findings that not only did he permit it to occur, but he helped promote some of the specific activities in question.*

CP at 763 (emphasis added).

Interestingly, Rubin testified that Matson was “an experienced trial attorney,” who would be expected to use his “personal intuition based on a long history of successful and unsuccessful jury trials” as “the overriding factor” in evaluating the underlying case. CP at 1114. Yet, despite representing to the Fire District and AAIC that he was experienced in defending sexual harassment cases in both state and federal courts,²⁴ Matson could not recall ever handling a case with an exposure over

²⁴ Having held himself out as specializing and as possessing greater than ordinary knowledge and skill in this particular field, Matson should be held to the standard of performance of those who hold themselves out as specialists in that area. *See Walker v. Bangs*, 92 Wn.2d 854, 860, 601 P.2d 1279 (1979).

\$500,000.00. CP at 971. He had never defended a sexual harassment case with multiple plaintiffs. CP at 919. And before the underlying case, he had never tried a sexual harassment case in his career. CP at 918. As Cordon opined, “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.

The Fire District and AAIC should have been able to rely on BHB’s attorneys to look collectively after their interests. *See Stangland v. Brock*, 109 Wn.2d 675, 690, 747 P.2d 464 (1987) (Goodloe, J., dissenting); *see also* Rules of Professional Conduct (RPC) 5.1 and comments 2 and 3 thereto. “At the very least, the client would expect that the firm attorneys would communicate with one another so that reasonable service is provided.” *Stangland*, 109 Wn.2d at 690 (Goodloe, J., dissenting).

Yet, despite his lack of experience in handling cases of this nature, Matson did not consult with others at BHB who were more experienced. CP at 976. The chairman of BHB’s employment law practice group did not recall Matson ever discussing the underlying case during their practice

group meetings.²⁵ CP at 1148. Matson did no specific research to determine what effect multiple plaintiffs claiming sexual harassment could have on the underlying 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. He was a bankruptcy attorney. CP at 1030-31.²⁶ 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*, 616 F.2d at 932 (quotations and citations omitted); *see also Smith*, 530 P.2d at 595-96.

Matson filed no dispositive motions regarding the plaintiffs’ claims, despite believing that a jury would find James’s conduct to be “lighthearted and banter.” CP at 927, 937. Matson filed no motion to bifurcate and, in fact, never even recommended a motion to bifurcate to his clients. CP at 919-20. At his deposition, he was unable to explain why

²⁵ Rubin testified that the employment litigation group at his law firm, Miller Nash, LLP, has meetings that “have a lot of bouncing of ideas off each other” because “it’s a good use of time.” CP at 1127-28. In contrast, BHB used its employment law practice group meetings for marketing purposes. CP at 1149-50.

²⁶ Rubin tried to justify these staffing decisions by noting, “The Bullivant firm was in several different cities at the time that the *Collins* case was involved, and so it would be dangerous to assume that every member of management knew the full scope of every lawyer’s area of practice.” CP at 1115-16 (emphasis added).

these key motions were not filed. As Bremner noted, Matson had numerous opportunities to try to limit the exposure of an adverse judgment, yet he took none of the reasonable and customary procedures to do so. CP at 801-02. “It is because a lawyer cannot assuredly predict such rulings that an ordinarily careful, prudent, diligent, and skillful lawyer burdens the legal system with motions that, in retrospect, may have been unnecessary.” *Simko*, 532 N.W.2d at 851 (Levin, J., dissenting).

Furthermore, Matson admitted that “the big issue” in the underlying case was damages, not liability. CP at 985. In fact, from the very beginning of the case, Matson believed that the overall liability was unfavorable.²⁷ CP at 953. As Bremner opined, a reasonable attorney would have recognized that he needed to make individual settlement offers, followed by offers of judgment to protect against adverse attorney fees and costs exposure. CP at 803. Even Rubin 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).

Yet neither BHB nor Matson provided to AAIC, the Fire District, or James an evaluation regarding the value of the plaintiffs’ claims until

²⁷ Despite always believing that the underlying case was one of probable liability for three of the four plaintiffs, Matson proposed a settlement that represented a significant reduction from this opinion. CP at 838.

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. In his declaration, Rubin claimed that “Matson was informed of results of other sexual harassment case verdicts to determine how they should affect his recommendation.” CP at 420. But contradicting Rubin’s claims, Matson admitted that he did not “do a study” of jury verdicts relating to sexual harassment claims in Washington state or any other state, for that matter.²⁸ CP at 945-46, 977, 990.

Had Matson done any jury verdict research, he would have known that his evaluation was inadequate. CP at 831-32. As Cordon opined, such jury verdict research would have afforded Matson access to other valuable information, including: the names of other attorneys who had experience litigating similar cases; potential experts; and jury consultants.²⁹ CP at 831 Even Rubin testified that there are “so many other ways” for an attorney to train himself on evaluating damages in a

²⁸ Ironically, Matson only “[did] a study” of jury verdicts after being sued for legal malpractice. CP at 994.

²⁹ Even assuming *arguendo* that no reliable jury verdict research existed, Matson nevertheless could have – and should have – looked to other sources of information in making an informed judgment about the underlying case: local bar expertise; media reports about jury verdicts; specialized bar journals; and/or jury consultants.

case. CP at 110. “Judgment involves a reasoned process which presumes the accumulation of all available pertinent facts to arrive at the reasoned judgment.” *Glenna v. Sullivan*, 310 Minn. 162, 245 N.W.2d 869 (Minn. 1976). Instead, Matson’s judgment simply was uninformed.³⁰ CP at 799-807, 814-41, 848-49.

When Matson finally provided his evaluation, he underestimated the value of the case. CP at 805-07, 836-40. His 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. 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. Matson’s evaluation was devoid of any analysis regarding the medical expenses 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 504-10.³¹

³⁰ Matson did not use any focus groups or mock juries to evaluate the plaintiffs’ claims, either. CP at 939.

³¹ Likewise, Matson knew that the underlying case involved probable liability for prejudgment interest and tax offsets, but he failed to factor

Moreover, by the time of mediation, Matson knew that the underlying plaintiffs' attorney had incurred significant costs. CP at 834, 838, 954. Also, Matson knew that the underlying plaintiffs' attorney had a contingency rate of 45%. CP at 838. So how would \$370,000.00 ever compensate the plaintiffs and their attorney? Matson incredibly assumed that "[p]laintiffs¹¹ lawyers always – often substantially discount their fees in a case like this." CP at 933.³²

But with minimal research and calculations, Matson would have discovered that his evaluation and settlement recommendations were an insult to the plaintiffs, providing them with a paltry recovery. CP at 838-39. Even the simplest calculations performed by Cordon show 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 Bremner noted, "Multiple red flags were present that should have alerted Mr. Matson to

these issues into this monetary evaluation of the case as well. CP at 1052-53.

³² Of particular note, Matson knew that the claims in the underlying case exposed the Fire District to an adverse attorney fees and costs award, but he never asked the underlying plaintiffs' attorney about the extent of the attorney fees and costs he had incurred in the two years before mediation. CP at 931-32.

re-assess his settlement valuation.” CP at 806. Yet Matson stubbornly and foolishly stood by his evaluation. CP at 894-96, 899, 909-11.³³

In sum, the pleadings, depositions, and declarations point out numerous deficiencies in the legal services provided by BHB and Matson in handling the underlying case. The facts above show Matson’s lack of subject matter expertise and his unsuitability to serve as lead counsel in the underlying case. CP at 799-809, 814-41. Because Matson could not have appreciated the magnitude of the case, he failed in his “paramount duty” to apprise the Fire District and AAIC of the risk of carrying the case to trial. CP at 1048.³⁴ “Thus, reasonableness in the instant case is a material fact question which cannot be resolved by summary judgment proceeding.” *Morris v. McNichol*, 83 Wn.2d 491, 495, 519 P.2d 7 (1974).

2. BHB and Matson Were Professionally Negligent During and After Closing Argument

Among other things, BHB and Matson relied on the declaration of their expert witness, retired Judge James Ladley, to establish that they met the standard of care and that they were entitled to judgment as a matter of

³³ In his deposition, Matson was asked, “[I]s there anything you would have done differently knowing what you know now?” CP at 944. Matson responded, “I’m not sure there is.” CP at 944.

³⁴ After the negligence of BHB and Matson left no option but to try the underlying case, (CP at 898, 908), the jury returned a verdict of more than \$3.5 million in favor of the plaintiffs. *Collins*, 155 Wn. App. at 73-74.

law. CP at 398-408. But retired Judge Ladley's declaration, and the arguments of BHB and Matson, simply cannot eliminate the genuine issues of material fact that exist regarding the negligent nature of Matson's omissions in trying the underlying case. Thus, these issues must go to trial. *See Reed v. Streib*, 65 Wn.2d 700, 705, 399 P.2d 338 (1965).

Relying solely on criminal cases, in which Washington courts have analyzed claims of ineffective assistance of counsel, *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011); *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 16 P.3d 1 (2001); *State v. Piche*, 71 Wn.2d 583, 430 P.2d 522 (1967); *State v. Madison*, 53 Wn. App. 754, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989), BHB and Matson baldly declared that Matson's failure to object to opposing counsel's improper comments made during closing argument was entitled to "'trial tactic' immunity." CP at 376-77.

But this argument only highlights their misunderstanding of the doctrine of judgmental immunity. Among other things, *none* of the criminal cases relied on by BHB and Matson cites to, or applies, the doctrine of judgmental immunity as applied in Washington state. *See Grier*, 171 Wn.2d 17; *Stenson*, 142 Wn.2d 710; *Piche*, 71 Wn.2d 583; *Madison*, 53 Wn. App. 754. (In fact, in response to a question about whether he was aware of *any* Washington cases applying judgmental immunity to an attorney's decision whether to object to improper

comments during closing argument, retired Judge Ladley testified, “No, I don’t know of any that I could specifically say.”) CP at 1163-64. Moreover, even when analyzing an ineffective assistance of counsel claim, our Supreme Court has stated, “Not all strategies or tactics on the part of defense counsel are immune from attack.” *Grier*, 171 Wn.2d at 33-34. “*The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.*” *Grier*, 171 Wn.2d at 34 (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)) (emphasis added); *see also State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (“The fact that counsel’s decision is tactical in nature does not insulate it from a claim that the decision is unreasonable.”), *review denied*, 172 Wn.2d 1015 (2011).

Nevertheless, in seeking to absolve themselves of liability, BHB and Matson argued that Matson made “a specific tactical decision ... not to object to the vague statements of [opposing counsel], which might arguably have been interpreted as referring to improper subjects.” CP at 377.³⁵ Retired Judge Ladley tried to justify Matson’s conduct by explaining that he did not need to object to opposing counsel’s improper

³⁵ In his deposition, Matson testified that he did not object or ask for a curative instruction because he “didn’t want to spotlight the issue” and “didn’t want the judge to be inferring more importance to these comments.” CP at 963, 966.

comments because “the [opposing counsel] never uttered or stated the word ‘insurance’ at any time during his closing argument” and never requested the jury “to exercise their judgment separate from the instructions that they would receive from the Court.” CP at 403-04. In explaining his opinions, retired Judge Ladley testified:

I wasn’t present at the trial, so the only way I can give an opinion is based on hindsight. And so those things that took place, looking back, are the basis for the opinion that I rendered. So, sure, hindsight is important as far as an opinion is concerned, though. It’s got to be. It’s the only thing there is.

CP at 1158. Retired Judge Ladley then testified that his opinions were based on “a number of objective things,”³⁶ including: (1) Matson’s deposition transcript; (2) the pleadings of the Fire District and AAIC in this case; (3) the trial court’s memorandum of decision; and (4) this court’s opinion in *Collins*. CP at 20-21. Notably, retired Judge Ladley’s opinions were not based on any of the post-trial motions that BHB and Matson filed in the underlying case. CP at 399-400.

But if retired Judge Ladley had reviewed other “objective things,” (CP at 1160), such as the post-trial motions filed by BHB and Matson, he

³⁶ Retired Judge Ladley admitted that he has not spoken to Matson about his actions in the underlying case. CP at 1157. “I don’t think you can base the standard of care on the subjective thinking of counsel.” CP at 1159.

would have learned that Matson specifically argued and admitted before the trial court that opposing counsel's statements were "an irregularity in the proceedings" and "misconduct." CP at 1172. As Matson stated in the post-trial motions:

First, they were made in closing argument, just before the jury withdrew to deliberate. Their effect was therefore magnified, as opposed to comments made during the middle of the five-week trial. Second, they clearly violated ER 402, 403 and 411. Since long before the Rules of Evidence were propounded, Washington courts have recognized that evidence of liability insurance, whether direct or implied, is highly prejudicial to a defendant, and properly excluded.... Third, they were not based on any evidence presented at trial.

Finally, and most egregiously, [opposing counsel's] statements accomplished the mirror image of what his Motion in Limine No. 9 prevented the [underlying] Defendants from doing.... The language at the end of [underlying] Plaintiffs' motion is critical: "*nor should any direct or implied argument of any adverse financial effect of a judgment be mentioned.*" Opposing counsel's statements violated the court's ruling granting [underlying] Plaintiffs' own Motion in Limine No. 9.

It is no defense for the [underlying] Plaintiffs to contend that [opposing counsel] did not directly mention insurance, and that therefore his comments were not improper. The existence of insurance coverage was a reasonable inference; to require the utterance of "insurance" as some sort of "magic word" would conflict with a common-sense interpretation of [opposing counsel's] comments.

CP at 1172-73. Matson even stated, “[Opposing counsel’s] comments were clearly out of line at the time they were made, and no objection was necessary in order to preserve this error.” CP at 1174 (emphasis added).

This statement begs the question: if BHB and Matson knew that opposing counsel’s comments were “not based on any evidence presented at trial” and were “clearly out of line at the time they were made,” (CP at 1173-74), then why did Matson testify in his deposition that opposing counsel’s comments were just “arguably objectionable”? CP at 967. This statement also begs the question: if BHB and Matson knew that opposing counsel’s comments were “not based on any evidence presented at trial” and were “clearly out of line at the time they were made,” (CP at 1173-74), then why did BHB and Matson argue before the trial court in this case that opposing counsel’s comments were: “vague,” “not in fact even direct references to those issues;” “somewhat vague or oblique;” and “brief”? CP at 377-79. The conflicting statements raise a credibility problem that creates an issue of fact (regarding the reasonableness of Matson’s conduct during and after closing argument) for a jury to resolve. *See Powell v. Viking Ins. Co.*, 44 Wn. App. 495, 503, 722 P.2d 1343 (1986).

The above statement also begs the question: if Matson knew that opposing counsel’s comments were “not based on any evidence presented at trial” and were “clearly out of line at the time they were made,” (CP at

1173-74), then why did BHB and Matson make no effort whatsoever to preserve this error? After all, Thomas A. Mauet, on whose treatise BHB and Matson relied, (CP at 378-79), instructs attorneys to “[a]nticipate evidentiary problems. *Raise them before trial whenever possible. During the trial, try to make your objections out of the jury’s presence, during recesses, motions in limine, and side-bar conferences.* On the other hand, don’t be afraid to make objections.” THOMAS A. MAUET, TRIAL TECHNIQUES 449 (7th ed. 2007) (emphasis added). “You must make and protect your record.” MAUET, TRIAL TECHNIQUES at 450.³⁷

Yet BHB and Matson failed to do so. When asked whether he moved for a mistrial, Matson testified, “I didn’t.” CP at 966-67.³⁸ When asked whether he at least considered objecting outside the presence of the jury, Matson merely testified, “I did not.” CP at 963-64. Even after the trial court admonished opposing counsel outside the presence of the jury for his improper comments, Matson still did not object; instead, he sheepishly interjected, “I wanted to stand up, but for obvious reasons I

³⁷ Matson even testified, “I understood by not making an objection that [waiver] was possible, yes.” CP at 698.

³⁸ Even retired Judge Ladley opined that a reasonable attorney under the same or similar circumstances at least would have considered moving for a mistrial. CP at 1165.

didn't." CP at 1207.³⁹ Bremner opined that Matson never should have placed himself in this situation, concluding:

Mr. Matson violated the standard of care by failing to bring motions *in limine* (before the trial) for orders that would bar the plaintiffs' counsel from using the improper tactics that were eventually used by the plaintiffs in closing argument. Motions *in limine* serve to set the ground rules for a given trial and serve to remind the court and opposing counsel about potentially improper tactics before those tactics have the chance to taint the jury. Thus, defense counsel should routinely make motions *in limine* concerning the precise misconduct at issue in this case.

CP at 807.

Having failed to bring any motions *in limine* regarding "the ground rules" for closing argument, Bremner opined that Matson at least should have established with the trial court that improper comments, such as those by opposing counsel, would be grounds for a mistrial. CP at 808. "Doing so would have either dissuaded [opposing counsel] from using improper tactics or placed Mr. Matson's clients in a far better position in seeking posttrial relief, *and it would have in no way alienated the jury because it would have been done outside the presence of the jury.*" CP at 808 (emphasis added).

³⁹ Retired Judge Ladley explained that as a trial judge he sometimes made *sua sponte* comments to the parties as well: "Probably an alert to one [party] and a warning to the other [party], sure." CP at 1161. The "alert" would be to tell the party to protect its record. CP at 1161.

Finally, as Gould opined, the combined effect of opposing counsel's improper comments at the end of his closing argument should have prompted a reasonable, careful, and prudent attorney in Washington state to object and to request a curative instruction. CP at 849, 1063-64. If Matson truly was concerned about objecting in front of the jury, then he could have objected outside the presence of the jury. CP at 1063-64. "But doing nothing – doing nothing didn't preserve the issue for the Court of Appeals." CP at 1063. "[S]itting there like a potted plant and doing nothing ... does not meet the standard of care." CP at 1064.

In sum, the pleadings, depositions, and declarations point out the deficiencies in the legal services provided by BHB and Matson during and after closing argument in the underlying case. The facts above show that Matson failed to preserve an objection to opposing counsel's comments that were "not based on any evidence presented at trial" and were "clearly out of line at the time they were made." CP at 1173-74; *see Cook*, 73 Wn.2d at 394; *see also Grier*, 171 Wn.2d at 34. And again, "reasonableness in the instant case is a material fact question which cannot be resolved by summary judgment proceeding." *Morris*, 83 Wn.2d at 495.

3. JUDICIAL ESTOPPEL IS INAPPLICABLE

In a strained and convoluted argument, BHB and Matson argued that they were somehow entitled to summary judgment dismissal simply

because the Fire District took an inconsistent position on appeal in the underlying case. CP at 382-85, 1120-23.⁴⁰ Apparently, without any citation to legal authority, BHB and Matson sought to invoke the doctrine of judicial estoppel. But for the following reasons, the law does not support their argument.

“The circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle.” *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) (quotations and citations omitted). But this court has described judicial estoppel as a doctrine that is meant: (1) to prevent a party from gaining an advantage by taking a position inconsistent with a position the party previously took before a court; or (2) to maintain the integrity of judicial proceedings. *DeVeny v. Hadaller*, 139 Wn. App. 605, 620, 161 P.3d 1059 (2005) (citing *Garrett v. Morgan*, 127 Wn. App. 375, 379, 112 P.3d 531 (2005); see also *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 28 P.3d 832 (2001).

The United States Supreme Court has listed several factors that “typically inform the decision whether to apply the doctrine in a particular case,” including: (1) a clear inconsistency between the party’s earlier position and its later position; (2) the party’s success in

⁴⁰ It is ironic that BHB and Matson also took a position that is inconsistent with their earlier position in the underlying case. CP at 1168-1200. Yet BHB and Matson did not raise this fact before the trial court.

persuading a court to accept the party's earlier position; and (3) whether the party would derive an unfair advantage or impose an unfair detriment on the opposing party, if not estopped. *New Hampshire*, 532 U.S. at 750-51. And most importantly, Washington courts have concluded that "judicial estoppel applies *only if a litigant's prior inconsistent position benefited the litigant or was accepted by the court.*" *Johnson*, 107 Wn. App. at 909 (emphasis added).

Here, BHB and Matson derided the Fire District for arguing on appeal in the underlying case that no objection was necessary to opposing counsel's improper comments made during closing argument. CP at 382-85, 1120-23. (Conveniently, they ignored that the Fire District would not have been forced to take such an inconsistent position had Matson made and protected a record of these comments, which he described as being "clearly out of line at the time they were made," (CP at 1173-74), by: (1) objecting outside the presence of the jury; (2) requesting a curative instruction; and/or (3) moving for a mistrial.)

But the Fire District's position in the underlying case was not accepted by this court and, therefore, did not benefit the Fire District. *Collins*, 155 Wn. App. at 54, 93-97. BHB and Matson did not show how the Fire District would derive an unfair advantage in this case, if not estopped. *Contra New Hampshire*, 532 U.S. at 750-51. And BHB and Matson did not show how the Fire District would impose an unfair detriment on them, if not estopped. *Contra New Hampshire*, 532 U.S. at

750-51. In other words, judicial estoppel is inappropriate. *See, e.g., Johnson*, 107 Wn. App. at 912.

Interestingly, BHB and Matson seemed to argue that Matson's negligence during and after closing argument should be excused, (CP at 1220-23), simply because this court held that the trial court did not abuse its discretion in denying the Fire District's motion for a new trial under CR 59(a). *Collins*, 155 Wn. App. at 54, 93-97. To the contrary, this court still stated that opposing counsel's comments made during closing argument were "improper." *Collins*, 155 Wn. App. at 95. This court also expressed its opinion that a timely objection and curative instruction could have cured any prejudicial effect. *Collins*, 155 Wn. App. at 95. Therefore, it is entirely appropriate for a jury in this case to decide what a reasonable jury would have done but for Matson's negligence during and after closing argument in the underlying case. *Daugert v. Pappas*, 104 Wn.2d 254, 257, 704 P.2d 600 (1985).

Moreover, despite the protestations of BHB and Matson that a jury in this case would have to resort to speculation to decide whether the Fire District and AAIC would have fared better but for Matson's negligence, (CP at 384), our Supreme Court already has ruled otherwise. *Daugert*, 104 Wn.2d at 257. Our Supreme Court has stated:

For instance, when an attorney makes an error during a trial, the causation issue in the subsequent malpractice action is relatively straightforward. The trial court hearing the malpractice claim merely retries, or tries for the first time, the client's cause of action which the client asserts

was lost or compromised by the attorney's negligence, and the trier of fact decides whether the client would have fared better but for such mishandling. *See, e.g., Cline v. Watkins*, 66 Cal. App. 3d 174, 135 Cal. Rptr. 838 (1977). *In such a case it is appropriate to allow the trier of fact to decide proximate cause. In effect the second trier of fact will be asked to decide what a reasonable jury or fact finder would have done but for the attorney's negligence.* Thus, it is obvious in most legal malpractice actions the jury should decide the issue of cause in fact.

Daugert, 104 Wn.2d at 527 (emphasis added). This scenario is the oft-referred "trial within a trial." *See Kommavangsa v. Haskell*, 149 Wn.2d 288, 300, 67 P.3d 1068 (2003).

CONCLUSION

The law does not immunize BHB and Matson from tort liability for their professional negligence. *Cook*, 73 Wn.2d at 395-96; *Halvorsen*, 46 Wn. App. at 717. Contrary to what the trial court stated, (RP (August 17, 2012) at 70), good faith, standing alone, is no defense. *Cook*, 73 Wn.2d at 395-96; *see also Ardis v. Sessions*, 383 S.C. 528, 682 S.E.2d 249 (S.C. 2009) (finding a "good faith" jury instruction in a professional malpractice case was improper, due to the implication that an error in judgment was actionable only if made in bad faith). Moreover, it is not sufficient that BHB and Matson simply exercised their best judgment; rather, that judgment must be consistent with the standard of practice. *Cook*, 73 Wn.2d at 395-96; *Blanks*, 171 Cal. App. 4th at 379.

BHB and Matson astutely noted that “it presents a unique situation where courts are willing to take the question from the jury and hold, as a matter of law, that the attorney did not breach his or her duty to the client.” CP at 1217. Far from this case being such a “unique situation,” the Fire District and AAIC have demonstrated that there are material issues of fact – for a jury to resolve – whether BHB and Matson exercised that 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.

Therefore, summary judgment was improper. Cook, 73 Wn.2d at 394; Halvorsen, 46 Wn. App. at 712. The trial court erred. And for the foregoing reasons, this court should: (1) reverse the trial court’s order dismissing the claims of the Fire District and AAIC; and (2) remand for trial on the remaining elements of negligence.

RESPECTFULLY SUBMITTED this 17th day of January 2013.

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

By:



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CERTIFICATE OF SERVICE

I, Jennifer N. Culbertson, hereby certify that on the date below I caused the foregoing to be served upon the Court of Appeals *via ABC Legal Messenger* and each and every attorney of record as noted below:

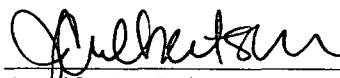
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I certify under penalty of perjury under the laws of the State of Washington that the above is correct and true.

Executed in Seattle, Washington, on January 10th, 2013.



Jennifer N. Culbertson
Legal Assistant to Daniel P. Crowner