72533-5

72533-5

No. 72533-5-I

COURT OF APPEALS

DIVISION I

STATE OF WASHINGTON

HAITHAM JOUDEH,

Appellant,

vs.

PFAU COCHRAN VERTETIS AMALA, PLLC, a Washington Professional Limited Liability Company d/b/a PFAU COCHRAN VERTETIS KOSNOFF, PLLC; DARRELL L. COCHRAN, Individually and on behalf of the Marital Community comprised of DARRELL L. COCHRAN and JANE DOE COCHRAN,

Respondents.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Respondent Cochran's[1] Brief misstates Washington law[2] and significant facts,[3] and ignores Appellant Joudeh's careful analysis of critical issues and case law applicable to this appeal,[4] thus leaving Mr. Joudeh's analysis of those issues unchallenged.

II. GENUINE ISSUES OF MATERIAL FACT REMAIN RELATIVE TO MR. JOUDEH'S LEGAL MALPRACTICE CAUSE OF ACTION.

A. Cochran's Passing Reference to Damages, in One Sentence of Their Summary Judgment Motion Related to Mr. Joudeh's CPA Claim, Does Not Constitute a Sufficient "Showing" Under *White* and *Admasu*.

Cochran's initial summary judgment "showing," relative to Mr. Joudeh's legal malpractice cause of action, consists solely of their assertion that Haitham cannot prove proximate cause because he "failed to challenge or appeal the adverse ruling in the underlying personal injury action." CP 82-83, 92-95. Mr. Joudeh thus objected in the trial court (as he does here) that Cochran made no "showing" relative to whether the underlying trial court was in error when it dismissed Mr. Joudeh's claims against the remaining defendants in the underlying matter. See, App. Br.,

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[1] As he did in his Opening Brief, Appellant refers to Respondents (Mr. Cochran and his law firm) collectively as "Cochran." Mr. Joudeh intends *no* disrespect to Mr. Cochran.
[2] See *infra,* p. 5 n. 10, and p. 11.
[3] See *infra,* pp. 3-4, 5-6, 6-7, 12, 13-14.
[4] See *infra*, pp. 7-8, 9-10, 13, 14, 15-16.

pp. 17, 19.

In that context, *Admasu v. Port of Seattle,* 185 Wn. App. 23 ¶28, 340 P.3d 873 (Div. I, 2014) held that:

> "[I]t is incumbent upon the moving party to determine what issues are susceptible to resolution by summary judgment, **and to clearly state in its opening papers those issues upon which summary judgment is sought**." If the moving party fails to do so...[it] cannot prevail on the original motion based on issues not raised therein. *Quoting, White, supra,* 61 Wn. App. at 169 (Emphasis added).[5]

Here, the "Statement of Issues"[6] section of Cochran's opening summary judgment motion listed five (5) issues "upon which the Court is requested to rule," of which only one mentions proximate cause [CP 89]:

> 3. Plaintiff's failure to challenger [sic] or appeal the adverse ruling in the underlying personal injury action defeats his proof of proximate cause as a matter of law.

Cochran's statement of "Relief Requested,[7] similarly asked that the trial court dismiss Mr. Joudeh's Complaint because his failure to "challenge or

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[5] Cochran represented the plaintiffs/appellants in *Admasu*, in which their Briefs complained that "[p]assing references to 'vibrations' or dismissal of 'all claims" cannot change the fact that the only argument and authority the Port's opening summary judgment brief presented in the trial court pertained to dismissal of noise claims. Such **passing treatment was insufficient to inform either the trial court or Appellants as to *how* or *why* Appellants' non-noise claims were "susceptible to summary judgment, . . ."** *Admasu* Reply Br., pp. 9-10 (Emphasis added); see, *Admasu* App. Br., pp. 36-38. This Court adopted Cochran's arguments in *Admasu* and should reach the same conclusion here.

[6] King County Superior Court Local Rule 7(b)(5)(B)(iii).

[7] King County Superior Court Local Rule 7(b)(5)(B)(i).

appeal the adverse ruling in the underlying personal-injury action ...defeats plaintiff's proof of proximate cause here." CP 82-83.

Nevertheless, quoting their trial court argument related to Mr. Joudeh's Consumer Protection Act cause of action [CP 104] but referencing CP 82-83, 92-95, 98-99, 100, and 103-104,[8] Cochran asserts that they actually based their initial "showing" as to "all claims" [Resp. Br., p. 21] on the assertion that Mr. Joudeh "cannot show that he would have obtained more." Resp. Br., p. 14, *quoting* CP 104.

Beyond the fact that Cochran's "Relief Requested" and "Statement of Issues" make no such claim, closer examination confirms that their Brief also misstates the facts. Thus, at CP 82-83, Cochran argued that Mr. Joudeh could not prove his legal malpractice cause of action because he "failed to challenge or appeal the adverse ruling in the underlying personal-injury action ...[and] that failure defeats plaintiff's proof of proximate cause here." No mention of damages or recovering "more" appears. Similarly, at CP 92-95, Cochran argued that Mr. Joudeh "cannot

[8] Resp. Br., p. 14 also cites CP 927 (Cochran's summary judgment Reply brief) and CP 965-966 (transcript of the summary judgment oral argument) to support their contention. The Reply Brief and oral argument do *not* constitute part of the "initial showing" and are therefore irrelevant. *White v. Kent Medical Center, Inc.,* 61 Wn. App. 163, 168, 810 P.2d 4 (1991)(party may not correct deficient initial "showing" for the first time in reply).

make the requisite [proximate cause] showing because, as a matter of law, the loss of his claims. . .was not caused by Mr. Cochran's conduct but, rather, by plaintiff's own failure to oppose those defendants' summary judgment motions." No mention of recovering damages or "more" appears. Likewise, at CP 98-99 and 100, Cochran asserted that Mr. Joudeh could *not* prove his breach of contract cause of action "because plaintiff wholly failed to oppose the summary judgment motions...". No mention of recovering damages or "more" appears.

Finally, as to Mr. Joudeh's CPA cause of action, at CP 103-104, Cochran asserted that "...plaintiff does *not* identify what damages were caused by this alleged violation of the CPA. Plaintiff asserts that he was coerced into accepting a settlement recommendation,...[but] **he cannot show that he would have obtained more**." (Emphasis added). Thus, Cochran's entire proximate cause argument stands or falls on one single sentence tucked into the final page of their argument about the CPA claim, without mention in their Relief Requested or Statement of Issues.

Under *Admasu* and *White,* Washington's burden-shifting scheme related to summary judgment requires more. The Court should therefore hold, as a matter of law, that summary judgment was improper because Cochran did *not* clearly state in its opening papers that it sought summary

judgment based on its later assertion that no genuine issue of material fact remained relative to whether Mr. Joudeh may have been able to recover more but for Cochran's breaches of duty.

B. Nevertheless, Mr. Joudeh Also Introduced Evidence from which the Factfinder Can Infer that Mr. Joudeh Would Have Recovered More but for Mr. Cochran's Negligence.

Nevertheless, Mr. Joudeh also introduced sufficient evidence in the trial court record to establish a genuine issue of material fact about whether he could have recovered "more" but for Cochran's breaches of duty. Indeed, Cochran themselves acknowledge that even "[a]fter the initial settlements, Auto Trackers and SFCU both continued to make large settlement offers." Resp. Br., p. 6, citing CP 254, 257. Mr. Joudeh also introduced extensive evidence concerning the nature of his injuries, the amount of his medical bills (as calculated by Cochran), and the damages he claims in this lawsuit. App. Br., pp. 9-10, citing CP 628-629, 630-631, 656-659, and; CP 618-619 (Ans. to 'Rog. no. 9 re: damages). Mr. Joudeh thus offered ample evidence from which the factfinder could indeed infer[9] that Mr. Joudeh would have recovered "more" but for Mr. Cochran's negligence. Cochran's assertion to the contrary [Resp. Br., pp. 29-30] is

[9] See, App. Br., pp. 15, 20-25 (all reasonable inferences drawn in favor of Mr. Joudeh; legal malpractice plaintiff proves proximate cause through inferences).

therefore mistaken.[10]

C. Cochran Made No Initial "Showing" that Joudeh Would Have Defeated the Remaining Defendants' Summary Judgment Motion in the Underlying Matter.

Mr. Joudeh's Opening Brief explained that Cochran had "made no showing, in either his original Motion, or in Reply, to prove that Joudeh would have won if he had defended the remaining defendants' summary judgment motion or appealed the underlying matter." App. Br., p. 32. And, in fact, no such assertion appears in the "Relief Requested" or "Statement of Issues" sections of Cochran's Motion. CP 82-83, 88-89. Cochran's initial summary judgment "showing" thus failed to meet the standards required by *Admasu* and *White* relative to their contention that Mr. Joudeh would have won those issues if he had defended and/or appealed the remaining defendants' motions.

Cochran nevertheless asserts (referencing CP 381, 340, and 932) that they "did show that Mr. Joudeh could have successfully opposed those motions...". Resp. Br., p. 26. However, CP 381 is merely a copy of

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[10] Cochran's assertion [Resp. Br., pp. 23-24, 31] that Mr. Joudeh was required to submit expert testimony that he would have defeated the remaining defendants' summary judgment motions conflicts with the fundamental principle that "expert testimony as to what a judge, jury or tribunal would have decided in the underlying matter is *not* admissible." App. Br., p. 22.

an opposition to a *prior* motion in the underlying matter, unsupported by any evidence. CP 340 is merely a court docket. And CP 932 is the trial court's superfluous "Findings of Fact and Conclusions of Law" in this case, entered at the conclusion of the summary judgment hearing in this case. See, App. Br., pp. 15-16.

Cochran thus failed to make the requisite "showing" that comports with *White* and *Admasu* on this issue as well. See discussion *supra,* pp. 1-4. It follows then that, if the burden of proving that Mr. Joudeh would have defeated the summary judgment motions by the remaining defendants in the underlying matter fell to Cochran, then Cochran did *not* carry that burden. Moreover, Cochran did indeed have the burden of proving that Joudeh would have prevailed if he had opposed or appealed the remaining defendants' summary judgment motions, because, as Mr. Joudeh's Opening Brief explained "*it is Cochran who claims that the underlying trial court rulings were in error,*" rather than Joudeh. App. Br., pp. 32. See further, App. Br., pp. 28-31.

D. Mr. Joudeh's Alleged Negligence Does *Not* Cut Off Proximate Cause On His Claims Against Cochran.

Cochran denigrates[11] Washington's jurisprudential concern [App.

[11] Resp. Br., p. 23 ("platitudes").

Br.,pp. 20-25] for protecting the province of the jury relative to proximate cause. See, App. Br., pp. 20-25. However, Cochran omits any discussion of the critical concepts of mitigation, superseding cause, and comparative fault, fundamental to determining whether post-withdrawal negligence by the victim of legal malpractice (whether *pro se* or through replacement counsel) cuts off proximate cause as to the attorney who withdrew. See, App. Br., pp. 26-30. Cochran thus leaves Mr. Joudeh's analysis of those issues unchallenged, and fails to discuss or even cite (much less distinguish) *Flint v. Hart* or *City of Seattle v. Blume*.

Cochran instead asserts that a tort victim's mitigation efforts can *only* qualify as reasonable if they "oppose the motions and appeal any adverse ruling." Resp. Br., p. 29. If that were the law in Washington, then no victim of legal malpractice could *ever* settle the underlying matter, or dismiss an appeal, or otherwise conclude the underlying matter other than in the Washington Supreme Court. Thus, Cochran's insistence, that mitigation *requires*, as a matter of law, that every legal malpractice victim must litigate every underlying matter to final judgment *and* appeal every adverse decision, is utterly preposterous, bad policy, and contrary to settled Washington case law. See, App. Br., pp. 26-27.

E. Rather Than "Speculative," Mr. Joudeh's Testimony About

What He Would Have Done Comports with Traditional Principles of Causation in Transactional Legal Malpractice.

Cochran also asserts that Mr. Joudeh's testimony as to what he would have done but for Mr. Cochran's breaches "is mere speculation, rather than any actual evidence to meet his burden of proof." Resp. Br., p. 29. If Cochran were right, then *no* plaintiff could *ever* establish proximate cause when the issue is "what the plaintiff would have done" but for the defendant's negligence. See, App. Br., pp. 22-25.

Although Cochran cites *Griswold v. Kilpatrick* [Resp. Br., p. 29, 31], as well as *Nielsen v. Eisenhower & Carlson* [*id.,* p. 30] and *Paradise Orchards Gen'l Partnership v. Fearing* [*id.,* pp. 27-28], Cochran's superficial reference to those cases fails to dispute, respond to, or even acknowledge Mr. Joudeh's analysis of those same cases in his Opening Brief. See, App. Br., pp. 25 (*Griswold* and *Nielsen*), and 27 n. 11 (*Paradise Orchards*). Furthermore, rather than merely "speculative," Mr. Joudeh's testimony comports with well-established principles of causation in transactional legal malpractice settings—which Cochran ignores. 5 Mallen & Smith, *Legal Malpractice* §§37.91-37.93, pp. 1681-1693 (2015 ed.); see, *e.g., Jerry's Enterprises, Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.,* 711 N.W.2d 711 (Minn. 2006).

Cochran also cites *Smith v. Preston Gates & Ellis, LLP,* 135 Wn. App. 859, 147 P.3d 600 (2006), without discussing it. Resp. Br., p. 31. However, the plaintiff/client in that case, Terry Smith, testified that "he could *not* say "'what [he] would have done'" and failed to "identify an alternative that would have led to a better outcome." *Id.,* 135 Wn. App. at 865. See, 5 Mallen & Smith, *supra,* §37.92, p. 1687. Mr. Joudeh, in contrast, not only identified what he would have done (*i.e., not* accept the settlements), but also explained that he would have gone to trial *and* he submitted evidence from which the finder of fact could have awarded him a better outcome. See discussion *supra,* p. 5.[12]

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[12] Cochran also relies on *Estep v. Hamilton,* 148 Wn. App. 246, 201 P.3d 331 (2009), which in turn relies on *Smith*. Resp. Br., pp. 30-31. In *Estep*, a dissolution of marriage case, Ms. Estep's husband refused to maintain Ms. Estep as his life insurance beneficiary (*i.e.,* "the final papers conclusively establish this fact"). *Id.,* 148 Wn. App. at 252-254. Ms. Estep then signed the "final papers" anyway, knowing they expressly awarded the policy to her husband, *and* then declined to pursue relief to try to force him to add her as beneficiary even after her attorney offered her that alternative. *Id.,* 148 Wn. App. at 252-253. The defense also introduced uncontroverted expert testimony that Ms. Estep would most probably have lost if she had chosen litigation to maintain the beneficiary status. *Id.* at 257. (Mr. Joudeh questions whether the courts properly considered that testimony. See, App. Br., p. 22). On these facts, and without disclosing the nature of the initially summary judgment showing, *Estep* held that Ms. Estep provided "no evidence she would have prevailed" if she had litigated the life insurance issue. Here, in contrast, Cochran maintains that Mr. Joudeh would have *won* the underlying matter if he had defended or appealed the remaining defendants' summary judgment motions. However, Cochran made no such showing in his initial motion. See discussion, *supra,* pp. 6-7.

Mr. Joudeh thus established genuine issues of material fact relative to the issue of proximate cause on his legal malpractice cause of action.

III. Cochran Misstates Washington Law and the Facts Related to Mr. Joudeh's Breach of Fiduciary Duty Cause of Action.

Mr. Joudeh established that the lower court erred when it held that he must prove proximate cause and damages as essential elements of a claim for fee disgorgement or fee forfeiture. App. Br., pp. 33-34.

Incredibly, Cochran actually asserts that "settled Washington law" requires that "Mr. Joudeh must prove proximate cause as an element of his breach-of-fiduciary-duty claim" for fee disgorgement or forfeiture. Resp. Br., pp. 33, 34. *Eriks v. Denver,* 118 Wn.2d 451, 462, 824 P.2d 1207 (1992) explicitly rejected any requirement that the client prove "damage and causation" prior to imposing fee disgorgement as a remedy for a breach of fiduciary duty. See, App. Br., p. 34. Cochran should be embarrassed to have asserted the contrary.

Cochran's related assertion, that Joudeh "wholly failed to submit any evidence in the record that he paid fees to Mr. Cochran," is similarly mistaken. Resp. Br. 34, 10. Beyond the fact that Mr. Joudeh had no burden to introduce such evidence because Cochran's summary judgment motion made no showing whatsoever relative to the breach of fiduciary

duty cause of action (See, App. Br. pp. 16-18), the record also supports the inference that Cochran had, in fact, charged a sizable fee. See, App. Br., p. 15. For example, Cochran's fee agreement provides for a 33 1/3rd % contingent fee on "the gross amount recovered by Client." CP 374-379. And Cochran themselves rely heavily on the fact that they recovered settlements totaling $350,000 for Mr. Joudeh. *E.g.,* Resp. Br., pp. 5, 7, 41. One-third of $350,000 equals $116,655. Cochran is, therefore, mistaken when they assert a lack of evidence that Mr. Joudeh paid fees to Cochran.

Mr. Cochran committed multiple, indisputable and serious breaches of fiduciary duty. His own testimony confirmed those breaches. This Court should not condone that conduct. The trial court erred and should be reversed.

IV. Cochran Misstates the Facts and Ignores Compelling Authority that Contradicts Their Summary Judgment Defense of Mr. Joudeh's Consumer Protection Act Cause of Action.

Mr. Joudeh's Opening Brief established that genuine issues of material fact remain relative to each essential element of his Consumer Protection Act cause of action. App. Br., pp. 34-39. For example, Mr. Cochran's "own testimony admits that he used the terms of his firm's form fee agreement for the improper purpose of coercing 'unreasonable' clients into accepting his settlement recommendations." *Id.,* p. 36. Thus,

"Cochran's problem is *not* that they had reserved the right to require Mr. Joudeh to pay costs, but that they exercised that right for the improper purpose of coercing Mr. Joudeh (and other clients) into accepting Mr. Cochran's settlement recommendations." *Id.* Mr. Joudeh cited compelling authority supporting the conclusion that an attorney acts unfairly and deceptively if, as occurred here, the attorney uses the fee agreement to "coerce" the client or "ratchet up the cost of representation." *Id.,* p. 36, n. 12. Unsurprisingly, Cochran [Resp. Br., pp. 37-38] offers no response to that fundamental concept *or* the authority Mr. Joudeh cites, presumably due to an inability to dispute that conclusion and authority.

Cochran nevertheless asserts, as fact, that "Mr. Joudeh can only speculate that a substantial portion of the public would be deceived by the practice at issue." *Id.,* p. 38. Cochran similarly asserts, as fact, that "Mr. Joudeh did not allege, much less prove, that additional plaintiffs have been or will be injured in precisely the same manner as he was allegedly injured." Resp. Br., p. 39. Both of Cochran's assertions are, of course, brazenly untrue. Mr. Cochran himself testified that he used the terms of his firm's **form fee agreement** for the improper purpose of coercing other "unreasonable" clients into accepting his settlement recommendations. See, *e.g.,* App. Br., p. 36, referencing CP 409 (25:3-13), CP 412 (94:4-9).

Mr. Joudeh's Opening Brief also cited the 2009 amendment that added RCW 19.86.093(3). App. Br., p. 37. That statute, as amended, provides (in pertinent part): "...a claimant may establish that the act or practice is injurious to the public interest because it:...(3)(a) injured other persons; (b) had the **capacity to injure other persons, or** (c) has the **capacity to injure other persons**." (Emphasis added). Cochran offers no response to RCW 19.86.093(3), presumably because they have no response. Resp. Br., pp. 39-40.

Moreover, whether a CPA plaintiff has satisfied the public interest element presents an issue of fact for the jury. *E.g.,* WPI 310.04.[13] Here, ample evidence exists from which the factfinder can infer that Cochran's conduct had the capacity to injure other clients. See, App. Br., p. 15. Genuine issues of material fact thus remain.

As to damages, Mr. Joudeh's Opening Brief, p. 38, explained:

> The "injury" element of a CPA claim is minimal. *Frias v. Asset Foreclosure Services, Inc.,* 181 Wn.2d 412 ¶¶38-43, 334 P.3d 529 (2014)("quantifiable loss is not required"); *Mason v. Mtg. Am., Inc.,* 114 Wn.2d 842, 854, 792 P.2d 142 (1990). Moreover, whether a defendants' conduct proximately caused damage to the victim presents an issue for the jury. WPI 310.07.

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[13] WPI 310.05 has been withdrawn because the 2009 amendment of RCW 19.86.093 "effectively removed the distinction between private and consumer disputes... Accordingly, the new statutory test has been incorporated into WPI 310.04." WPI 310.05.

As with other issues addressed in Mr. Joudeh's Opening Brief, Cochran does *not* discuss, but instead evades, the controlling authority related to the issue of CPA injury. Resp. Br., pp. 40-42. The coercive effects of Cochran's conduct are indisputable and Mr. Joudeh did, in fact, submit evidence from which the factfinder could conclude that he would have recovered more. See discussion, *supra,* pp. 5-6. Thus, genuine issues of material fact also remain in dispute relative to Mr. Joudeh's CPA cause of action.

V. GENUINE ISSUES OF MATERIAL FACT REMAIN RELATIVE TO MR. JOUDEH'S BREACH OF CONTRACT CAUSE OF ACTION.

Mr. Joudeh's Opening Brief explained that "ample and uncontroverted evidence establishes that Cochran disregarded Joudeh's express instructions relative to settlement on numerous occasions. See, pp. 10-14, *supra*. Those acts constitute both breaches of contract *and* of fiduciary duty. CP 566-568 ¶¶25-27." App. Br., p. 39.

Cochran did *not* dispute or even respond to those assertions. They instead assert that the trial court correctly dismissed Mr. Joudeh's breach of contract cause of action "because he wholly failed to oppose the summary judgment motions by Auto Trackers and SFCU." Resp. Br., p. 35. In contrast, Cochran's initial summary judgment "showing" relative

to Mr. Joudeh's breach of contract cause of action was limited to his assertion that "undisputed...facts show that Mr. Cochran in fact obtained plaintiff's informed consent and therefore refute that claim" and "undisputed communications refute that claim." CP 83, 89.

Cochran did *not* make the requisite initial "showing" relative to proximate cause or damages arising out of Mr. Joudeh's breach of contract cause of action. See discussion *supra,* pp. 1-4. Furthermore, as to those issues that Cochran did raise, genuine issues of material fact remain in dispute. The trial court thus erred when it dismissed Mr. Joudeh's breach of contract cause of action.

VI. CONCLUSION

The trial court erred on every issue, as a matter of law. Haitham Joudeh thus asks the Court to reverse the judgment in favor of Cochran in all respects, remand his case for trial on the merits, and award him all taxable costs of this appeal.

DATED: April 24, 2015.

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I hereby certify that on this 24th day of April, 2015, I caused a copy of the foregoing Appellant's Reply Brief to be delivered to Respondents, through their attorneys on the following in the manner indicated below:

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