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SUPREME COURT
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HAITHAM JOUDEH, Petitioner, v. PFAU COCHRAN VERTETIS AMALA, PLLC, a Washington Professional Limited Liability Company d/b/a PFAU COCHRAN VERTETIS KOSNOFF, PLLC; DARREL L. COCHRAN, Individually and on behalf of the Marital Community comprised of DARREL L. COCHRAN and JANE DOE COCHRAN, Respondents.	No. 92537-2 OPPOSITION OF RESPONDENTS IN AUER v. LEACH et al TO MOTION (RAP 3.3) TO CONSOLIDATE THIS CASE FOR PURPOSES OF REVIEW WITH AUER v. LEACH (SUPREME COURT CASE NO. 92778-2)

I. IDENTITY OF RESPONDING PARTIES AND SUMMARY OF ARGUMENT

Responding parties J. Robert Leach and Jane Doe Leach, his wife; Christopher Knapp and Jane Doe Knapp, his wife; Geoffrey Gibbs and Jane Doe Gibbs, his wife; and Anderson Hunter Law Firm, P.S., Inc., are Respondents in a case for which a Petition for Review was filed

MERRICK, HOFSTEDT & LINDSEY, P.S.
ATTORNEYS AT LAW
3101 WESTERN AVENUE, SUITE 200
SEATTLE, WASHINGTON 98121
(206) 682-0610

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February 10, 2016, Supreme Court No. 92778-2 (*Auer v. Leach et al*).[1] Their Answer to the Petition in that case will be timely filed later this week.

Respondents will argue the Petition seeking review in *Auer v. Leach* should be denied. But even if review is granted in that case as well as the instant case, the cases should not be consolidated on appeal. The cases do not share parties or factual backgrounds, and each case involves issues on appeal distinct from the other. The single common issue Joudeh identifies is that in both cases Plaintiffs challenge the trial court's pre-trial scrutiny of the cause-in-fact prong of proximate causation for a claim of legal malpractice – an argument that a claim of legal malpractice should be treated differently than every other case involving a claim of negligence, shielding the "cause in fact" prong of proximate causation from any pre-trial challenge and mandating a full trial to determine causation.

As discussed below, these arguments misapprehend the trial courts' rulings and the respective Court of Appeals decisions, and ignore well-established Washington authority that approves the pre-trial determination of claim viability in legal malpractice cases as in other cases involving negligence claims. If review of both cases were granted, this Court might link the cases administratively for scheduling, but consolidating the cases would not "save time and expense and provide for a fair review of the cases" as contemplated by RAP 3.3(b).

II. ARGUMENT WHY PETITIONER'S MOTION SHOULD BE DENIED

Petitioner Joudeh's motion to consolidate the instant case with Supreme Court Case No. 92778-2 (*Auer v. Leach, et al*) should be denied. RAP 3.3, states:

> RULE 3.3 CONSOLIDATION OF CASES
>
> (a) Cases Tried Together. If two or more cases have been tried together or consolidated for trial, the cases are consolidated for the purpose of review unless the appellate court otherwise directs.

[1] The underlying case also lists SAFECO Insurance as a respondent. The reference in the caption is vestigial. SAFECO Insurance Company was named a defendant in the Complaint, but SAFECO Insurance was never joined in the action by process service or otherwise.

MERRICK, HOFSTEDT & LINDSEY, P.S.
ATTORNEYS AT LAW
3101 WESTERN AVENUE, SUITE 200
SEATTLE, WASHINGTON 98121
(206) 682-0610

> (b) Cases Consolidated in Appellate Court. The appellate court, on its own initiative or on motion of a party, may order the consolidation of cases or the separation of cases for the purpose of review. A party should move to consolidate two or more cases **if consolidation would save time and expense and provide for a fair review of the cases.** If two or more cases have been consolidated for review in the Court of Appeals, the cases remain consolidated for review in the Supreme Court unless the Supreme Court otherwise directs.

(Emphasis added). While the rule gives this Court discretion to consolidate cases "for the purpose of review" where "consolidation would save time and expense and provide for a fair review of cases," RAP 3.3(b) provides little else to guide the decision. But RAP 3.3(a) lists "cases tried together" as an instance where consolidation of cases on appeal is appropriate, suggesting that the considerations for consolidation in the trial court, set out in CR 42(a), may inform the consolidation decision to some extent.

CR 42(a) provides:

> (a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Consolidation of separate actions under CR 42(a) results in a single new action in the trial court, *Jeffery v. Weintraub*, 32 Wn. App. 536, 547, 648 P.2d 914 (1982), but consolidation in the trial court may also add complexity and uncertainty. See generally *Rash v. Providence Health & Servs.*, 183 Wn. App. 612, 626, 334 P.3d 1154 (2014), *rev. den.*, 182 Wn. 2d 1028 (2015). Consolidating unrelated parties and cases in the appellate court similarly adds complexity for the parties by expanding the relevant record on appeal and injecting issues into the appeal that might affect determination of the party's case without having any real relationship to the facts in that case.

Consolidation limits a party's autonomy in advocacy because consolidation envisions collaboration. RAP 10.1(g) states, "In cases consolidated for the purposes of review ... a party

MERRICK, HOFSTEDT & LINDSEY, P.S.
ATTORNEYS AT LAW
3101 WESTERN AVENUE, SUITE 200
SEATTLE, WASHINGTON 98121
(206) 682-0610

may (1) join with one or more other parties in a single brief, or (2) file a separate brief and adopt by reference any part of the brief of another." RAP 11.4(a) provides:

> (a) Time Allowed to a Party. The Supreme Court and each division of the Court of Appeals will define by general order the amount of time each side is allowed for oral argument. If there is more than one party to a side in a single review or in a consolidated review, the parties on that side will share the allotted time equally, unless the parties on that side agree to some other allocation. The appellate court may grant additional time for oral argument upon motion of a party.[2]

Consolidation thus diminishes a party's opportunity to have oral argument presented on its behalf by counsel of its choosing. Although this Court sometimes expands the time for oral argument when cases are consolidated, the total time allowed each side usually means that the time allowed for each party is diminished. While Respondents believe review in their case is not appropriate and should not be granted, if review is granted, the interest of Petitioner Joudeh can be addressed by having the cases "linked" to allow any similar issues to be addressed consistently, without burdening the parties and limiting their presentations through formal consolidation.[3]

Petitioner has identified one issue he believes his appeal shares with the Petition for Review filed in *Auer v. Leach*: "[H]ow a legal malpractice plaintiff proves proximate cause, and more particularly whether the legal malpractice plaintiff must offer expert testimony to prove proximate cause." Petitioner's RAP 3.3 Motion, at 2, 4. But the Court of Appeals decision in *Auer v. Leach* did not hold that a legal malpractice plaintiff must offer expert testimony to prove proximate cause. Moreover, the Petition for Review and the Court of Appeals decision in *Auer v.*

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[2] In contrast, time allowed to Amicus Curiae is determined under RAP 11.4(b):

(b) Time Allowed to Amicus Curiae.

Amicus curiae may present oral argument with the consent of a party and within a portion of the time for oral argument allocated to that party, or within the time allowed by the court.

[3] Petitioner Joudeh has also identified a pending case in the Court of Appeals where the parties have addressed directly the issue Joudeh mistakenly asserts is at issue in *Auer v. Leach*: "whether the legal malpractice plaintiff must offer expert testimony to prove proximate causation." *Slack v. Luke*, No. 32921-6 (Division III). If that case leads to another Petition for Review, the possibility of further consolidation only adds to the impact a consolidation order would have on the time and expense for the Respondents to handle the case during review and the fairness to each Respondent of defending the appeal while connected to unrelated Respondents through a Consolidation order.

MERRICK, HOFSTEDT & LINDSEY, P.S.
ATTORNEYS AT LAW
3101 WESTERN AVENUE, SUITE 200
SEATTLE, WASHINGTON 98121
(206) 682-0610

Leach show great differences between the underlying facts and procedural history in that case and what is presented in the Petition for Review in this case. Each case presents issues not germane to the other.[4] The mere fact that both cases involve legal malpractice claims and pre-trial determinations of whether the Plaintiffs had evidence sufficient to support their claims does not support consolidating these disparate cases for review.

In virtually every professional negligence case a Plaintiff must have proof sufficient to establish each element of his negligence case, including proximate cause.[5] How the plaintiff proves proximate cause sufficiently to establish a prima facie case will depend upon the facts in the case. Petitioner appears to contend that the issue of proximate cause in an attorney professional negligence case may not be decided except by trial. That has never been the law of Washington.[6] Moreover, his argument misapprehends the trial courts' rulings and the respective Court of Appeals decisions, and ignores well-established Washington authority that approves the pre-trial determination of claim viability in legal malpractice cases.

Those cases apply the principle that a plaintiff alleging malpractice must demonstrate the ability to introduce evidence of each element of his or her claim to avoid summary judgment. Otherwise, a jury or other trier of fact could only find the lawyers had proximately caused the damages alleged by pure speculation. The Court of Appeals decision in *Auer v. Leach* recognized that the trial court simply followed that well-established principle. *Auer v. Leach,* No. 46105-6-II, Unpublished Opinion at 20-21 (October 27, 2015, amended January 12, 2016, citing *Geer v. Tonnon,* 137 Wn. App. 838, 851, 155 P.3d (2007), as requiring evidence that would show, or

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[4] For example, in *Auer v. Leach*, No. 92778-2, a primary argument by Petitioner is that the trial court abused her discretion by not accepting new evidence submitted with their motion for reconsideration, and that the Court of Appeals erred in its review of that decision.

[5] *Daugert v. Pappas*, 104 Wn.2d 254, 257, 704 P.2d (1985).

[6] Petitioner cites *Daugert,* 104 Wn.2d at 257-258, for the proposition that "Proximate cause in a legal malpractice case requires a "trial within-a-trial" ...to determine whether the client would have fared better but for the lawyer's negligence." *Joudeh v. Pfau Cochran Vertetis Amala, PLLC,* No. 92537-2, Petition for Review, at 11. However, *Daugert* did not create a new rule for legal malpractice cases that relives the Plaintiff from a pre-trial challenge, as in other negligence cases, as to whether Plaintiffs can present evidence at trial that would not merely invite a jury or other trier of fact to speculate about the elements of a Plaintiff's negligence claim.

MERRICK, HOFSTEDT & LINDSEY, P.S.
ATTORNEYS AT LAW
3101 WESTERN AVENUE, SUITE 200
SEATTLE, WASHINGTON 98121
(206) 682-0610

allow the inference, that Plaintiffs would have obtained a better result in the underlying trial without the alleged malpractice.)

The Court of Appeals decision in the instant matter similarly held that Joudeh "provided no evidence that he could have recovered more..." and "fail[ed] to demonstrate a genuine issue of material fact that [the] alleged misconduct proximately caused Joudeh any damages...." *Joudeh v. Pfau Cochran Vertetis Amala, PLLC*, No. 72533-5-I, Unpublished Opinion at 10-11 (October 12, 2015), citing *Geer v. Tonnon,* 137 Wn. App. 838, 851, 155 P.3d (2007) ("requiring a plaintiff to produce 'expert testimony *or other evidence*' in order to demonstrate proximate cause (emphasis added).") The *Joudeh* court reiterated that "conclusory statements, mere allegations, or argumentative assertions" would not create a question of fact sufficient to require a trial to determine proximate cause. "Mere speculation and conjecture cannot raise a genuine issue of material fact" as to the "but for" test for the proximate cause element. *Joudeh,* Unpublished Opinion at 9-10. Neither the *Auer* decision nor the *Joudeh* decision held that expert testimony is always required to meet the burden of demonstrating a genuine issue of material fact that alleged misconduct proximately caused damages; both cases simply applied the rules set out in *Daugert, Geer,* and the many other Washington decisions cited by each court.[7]

In *Auer v. Leach,* the Court of Appeals addressed the proximate cause issue unremarkably, applying the same rules announced by Washington courts in published decisions that where a Plaintiffs have presented no admissible evidence that would directly show, or allow the inference, that they would have prevailed or obtained a better result in the underlying trial without the defendants' alleged malpractice, expert testimony was necessary to establish causation; otherwise the jury could only find the lawyers had proximately caused Auer's and Traster's losses by pure speculation. Opinion, at 20-21. Nothing in the court's decision states an

[7] To the extent Joudeh relies on a statement in the Motion to Publish, submitted in his Exhibit B, that states "that expert testimony is necessary to establish the causation element of a legal malpractice claim," that statement is not an accurate summary of the court's holding in *Auer v. Leach.*

MERRICK, HOFSTEDT & LINDSEY, P.S.
ATTORNEYS AT LAW
3101 WESTERN AVENUE, SUITE 200
SEATTLE, WASHINGTON 98121
(206) 682-0610

absolute rule that expert testimony is required in all cases to show a causal link between alleged legal malpractice and damages claimed and supported by evidence.

Auer and *Joudeh* share the unremarkable, well-established rule that in a legal negligence case the plaintiff must show four elements to succeed on a claim of legal malpractice: (1) the existence of an attorney-client relationship giving rise to a duty of care on the part of the lawyer; (2) an act or omission breaching that duty; (3) damage to the client; and (4) the breach of duty must have been a proximate cause of the damages to the client. Both cases followed the well-established rule that the Plaintiff must have sufficient evidence to prove each element without inviting the trier of fact to speculate in reaching a decision. Not only do the Petitions in each case not properly assert that the lower courts held expert testimony was necessary to establish the causation element of a legal malpractice claim, the two cases are not sufficiently similar to warrant consolidation under RAP 3.3(b).

III. CONCLUSION

This Court should deny the RAP 3.3 Motion to Consolidate This Case with *Auer v. Leach*, Supreme Court Case. No. 92778-2.

DATED this the 7th day of March, 2016.

MERRICK, HOFSTEDT & LINDSEY, P.S.

By _____
Philip R. Meade, WSBA #14671
Rossi F. Maddalena, WSBA # 39351
Of Attorneys for Respondents in *Auer v. Leach*, Supreme Court No. 92778-2

MERRICK, HOFSTEDT & LINDSEY, P.S.
ATTORNEYS AT LAW
3101 WESTERN AVENUE, SUITE 200
SEATTLE, WASHINGTON 98121
(206) 682-0610

DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I am now, and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date below stated I caused to be served in the manner indicated a copy of the

OPPOSITION OF RESPONDENTS IN AUER v. LEACH et al TO MOTION (RAP 3.3) TO CONSOLIDATE THIS CASE FOR PURPOSES OF REVIEW WITH AUER v. LEACH (SUPREME COURT CASE NO. 92778-2)

to the parties identified below:

Attorneys for Petitioner Joudeh Brian J. Waid Jessica M. Creager WAID LAW OFFICE 5400 California Ave., S.W., Ste D Seattle, WA 98136 bjwaid@waidlawoffice.com jcreager@waidlawoffice.com	☑ ☐	E-Mail U.S. Mail
Attorneys for Respondents Pfau Cochran Vertetis Amala, PLLC Jeffrey P. Downer Spencer N. Gheen LEE SMART, P.S., INC. 1800 One Convention Place 701 Pike Street Seattle, WA 98101 jpd@leesmart.com sng@leesmart.com	☑ ☐	E-Mail U.S. Mail
Attorney for Petitioners Auer & Traster (Supreme Court No. 92778-2) Brian H. Krikorian Law Offices of Brian Krikorian 4100 194th Street SW, Suite 215 Lynnwood, WA 98036 bhkrik@bhklaw.com	☑ ☐	E-Mail U.S. Mail
Attorney for ALPS Property & Casualty Insurance Company (prospective Amicus Curiae in Supreme Court No. 92778-2)	☑ ☐	E-Mail U.S. Mail

MERRICK, HOFSTEDT & LINDSEY, P.S.
ATTORNEYS AT LAW
3101 WESTERN AVENUE, SUITE 200
SEATTLE, WASHINGTON 98121
(206) 682-0610

Philip A. Talmadge TALMADGE/FITZPATRICK/TRIBE 2775 Harbor Avenue SW Third Floor, Suite C Seattle, WA 98126 phil@tal-fitzlaw.com		

Original E-filed with:
Washington Supreme Court
Clerk's Office
415 12th Street W
Olympia, WA 98504-0929

OFFICE RECEPTIONIST, CLERK: SUPREME@COURTS.WA.GOV

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

Executed this 7th day of March, 2016, at Seattle, Washington.

Philip R. Meade

MERRICK, HOFSTEDT & LINDSEY, P.S.
ATTORNEYS AT LAW
3101 WESTERN AVENUE, SUITE 200
SEATTLE, WASHINGTON 98121
(206) 682-0610

OFFICE RECEPTIONIST, CLERK

To: Philip R. Meade
Cc: Brian J. Waid; jcreager@waidlawoffice.com; Jeffrey Downer; sng@leesmart.com; Brian Krikorian; phil@tal-fitzlaw.com; shidalgo@waidlawoffice.com; matt@tal-fitzlaw.com; Rossi F. Maddalena; Jill C. Martin
Subject: RE: Filing in Case No. Supreme Court No. 92537-2

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To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Brian J. Waid <bjwaid@waidlawoffice.com>; jcreager@waidlawoffice.com; Jeffrey Downer <jpd@leesmart.com>; sng@leesmart.com; Brian Krikorian <bhkrik@me.com>; phil@tal-fitzlaw.com; shidalgo@waidlawoffice.com; matt@tal-fitzlaw.com; Rossi F. Maddalena <rmaddalena@mhlseattle.com>; Jill C. Martin <jmartin@mhlseattle.com>
Subject: Filing in Case No. Supreme Court No. 92537-2

Good Afternoon:

Attached please find the Opposition of Respondents in Auer v. Leach et al To Motion (RAP 3.3) To Consolidate This Case for Purposes of Review With AUER v. LEACH (Supreme Court Case No. 92778-2), for today's filing in Supreme Court Cause No. 92537-2.

I am filing this Memorandum on behalf of parties in No. 92778-2: J. Robert Leach and Jane Doe Leach, his wife; Christopher Knapp and Jane Doe Knapp, his wife; Geoffrey Gibbs and Jane Doe Gibbs, his wife; and Anderson Hunter Law Firm, P.S., Inc.

Thank you.

Sincerely,

MERRICK | HOFSTEDT | LINDSEY

Philip R. Meade
Merrick, Hofstedt & Lindsey, P.S.
3101 Western Avenue, Suite 200
Seattle, WA 98121

Telephone: (206) 682-0610
Email: pmeade@mhlseattle.com