Court of Appeals No. 46105-6-II

BEFORE THE WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

RONALD AUER and JOHN TRASTER
Appellants/Cross-Respondents

vs.

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; ANDERSON HUNTER LAW FIRM, P.S., INC., and SAFECO INSURANCE,
Respondents/Cross-Appellants

On Appeal from the Snohomish County Superior Court
SCSC Case No. 11-2-03105-3

APPELLANTS' OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

Plaintiffs Ronald Auer and John Traster (hereinafter collectively "plaintiffs") appeal from an order granting summary judgment in favor of defendants, and against plaintiffs, for the following reasons:

First – the lower court erred in ruling that, as a matter of law, no triable issues of fact existed as to whether plaintiffs would have achieved a different or better result in the underlying action entitled *Auer, et al. v. Westland*, SCSC Case No. 06-2-05602-5, and therefore dismissing plaintiff's legal malpractice claims. Specifically:

- The lower court erroneously applied the legal standards set forth in *Young v. Key Pharmaceuticals, Inc.*, 112 Wash.2d 216, 225 n. 1, 770 P.2d 182 (1989); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); and, *White v. Kent Medical Center, Inc.*, 61 Wash.App. 163, 170, 810 P.2d 4, 9 (1991) in finding that defendants had met their burden of proof, and shifted the burden to plaintiffs to affirmatively prove in opposition to a motion for summary judgment that they could prevail in the underlying action.
- Although the lower court found that triable issues of fact existed as to duty and breach of the standard of care, the trial court erroneously found that no triable issues of material fact existed as to the issues of causation in the underlying action, ignoring the

clear evidence and facts establishing that plaintiffs' had established a causal link between the breach of duty of the defendants (which the trial court acknowledged), and the damages suffered;

- The lower court erroneously found that plaintiffs required expert witness testimony to establish a causal link between the breach of duty of the defendants (which the trial court acknowledged was met by the evidence), and the damages suffered, and then abused its discretion by failing to consider the expert's opinion on plaintiffs' motion for reconsideration;
- The lower court further erred, as a matter of law, by disregarding plaintiff's right to have the trier of fact decide the issues of proximate cause and damages in a legal malpractice action as required by Washington law, disregarding *Brust v. Newton,* 70 Wash.App. 286, 293, 852 P.2d 1092 (1993) and other case authority;
- The lower court erred by dismissing out individual defendants J. Robert Leach, Christopher Knapp and Geoffrey Gibbs;
- The lower court erred by dismissing plaintiffs' Consumer Protection Act violation claim.

Finally – the lower court abused its discretion by refusing to consider the supplemental declaration of Paul Brain, additional evidence,

and then denying plaintiffs' motion for reconsideration.

II. STATEMENT OF THE CASE

1. INTRODUCTION AND PROCEDURAL BACKGROUND

This appeal originates from an order by King County Superior Court Judge Beth Andrus, who was assigned as a special judge hearing this matter venued in the Snohomish County Superior Court.[1] Plaintiffs filed a lawsuit against their former attorneys J. Robert Leach ("Leach")[2], Christopher Knapp, Geoffrey Gibbs, and Anderson Hunter Law Firm, P.S., Inc. (collectively "defendants").

On December 6, 2013, defendants filed and served a fourteen (14)-page motion for summary judgment as to all causes of actions. Defendants' motion was primarily directed at plaintiffs' alleged failure to have a standard of care expert, as well as plaintiffs' inability to meet the elements of a Consumer Protection Act violation. Defendants spent approximately 1-½ pages in total addressing causation.[3] Defendants submitted no evidence or other documents in support of its motion, other than the Declaration of Philip Meade, and attachments consisting of pleadings and discovery responses filed in this case. Defendant's primary

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1 Because all but one judge of the Snohomish County Superior Court recused themselves (the remaining judge was disqualified by plaintiffs), the Snohomish County Superior Court assigned the matter to Judge Andrus.

2 Defendant J. Robert Leach was appointed to Division 1 of the Court of Appeals at the end of the defendants' representation of plaintiffs. Defendant Safeco Insurance company was never served.

3 CP (II) 701-714 (see Defendants' motion pages 7 and 8)

argument regarding causation focused on one issue at page 8, lines 1 through 20: That plaintiffs could not prove that but-for the negligence of defendants "Safeco…would have offered any more money to the plaintiffs or that the case would have concluded sooner had the Plaintiffs' attorneys…taken a different course." Defendants ***did not*** submit any substantive evidence from the underlying case in support of its motion, and in fact, submitted no evidence in its motion that related to the claims of the underlying case. In short, Defendants' motion as to the legal malpractice claim was premised upon plaintiff's lack of an expert, upon plaintiffs' "alleged" inability to prove its case and argued virtually no substantive evidence or facts other than that.

In response to this motion, plaintiffs submitted the declaration of Ronald Auer, the Declaration of Paul Brain (plaintiffs' expert witness), multiple evidentiary documents from the underlying case, including emails between the parties, a demand letter from subsequent counsel Ben Wells, and other evidentiary proof establishing the elements of legal malpractice and violation of the Consumer Protection Act.[4]

In response to plaintiffs' opposition, defendants filed a ***twenty-six*** page "reply brief" and submitted new evidence. This "reply" was more of a second motion, expounding upon, and raising, new arguments and new

4 CP (I) 433-500; CP (II) 599-604; 745-769

theories never presented in the moving papers.[5] Included in this were arguments related to the alleged "impossibility" of building the road (an "argument" made by the underlying defendants' attorney in his mediation brief, never raised in the moving papers, and which was attached for the first time in defendants' reply brief) and that plaintiffs could not have obtained equitable or injunctive relief because of this alleged "impossibility".

On January 3, 2014, the court denied defendants' motion for summary judgment regarding legal malpractice as to the elements of duty and breach of the standard of care, but granted the motion as to the issue of proximate cause. The court found that there was "no causal link" between Mr. Brain's opinions of a breach of the standard of care, including the delay of the defendants and the failure of defendants to obtain alternative remedies including an injunction or specific performance. The Court further found that plaintiffs could not establish that had the defendants sought injunctive relief or equitable relief sooner, a "better result" would have occurred; in addition the court found that plaintiffs could not prove that had the case been tried in 2005, they would have achieved a better result—despite the fact that plaintiffs had presented

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5 The "Reply Brief" also included a subsumed "motion" to exclude plaintiffs' expert opinion, which was inappropriately filed without notice to plaintiffs or opportunity to reply. CP (I) 363-405, 406-432. Despite repeatedly referring to plaintiffs' expert as "untimely", the trial court correctly rejected defendants' efforts to exclude, and found no basis to disregard plaintiffs' expert's opinion

clear evidence (see *infra*) that had the defendants not been dilatory their ultimate damages would have actually been mitigated.[6] The court also granted the Motion for Summary Judgment as to the Consumer Protection Act finding no public interest impact and causal link.[7]

Plaintiffs timely moved for reconsideration pursuant to CR 59, and argued that the court erred in its ruling on the issue of proximate cause.[8] Plaintiffs' expert Paul Brain submitted a supplemental declaration wherein he opined that he always believed there was a causal link between defendants' breaches of the standard of care and the damages sustained by the plaintiffs. More significantly, Mr. Brain opined that he believed that, based upon the evidence below, it is very likely some form of equitable relief would have been obtained which would have allowed the plaintiffs to obtain a building permit to proceed with their planned development. Mr. Brain further opined that he had always believed that the dilatory actions of the defendants caused the plaintiffs ***additional*** damages that they should not have been exposed to had the defendants proceeded within

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6 In her written order denying plaintiffs' motion for reconsideration, Judge Andrus stated that she believed the facts were "too complex" for a a reasonable juror to figure out cause in fact without an opinion from an expert as to causation. See CP 34.

This observation, however, ignores the fact that an attorney standard of care expert will not opine as to the technical complications of "building a road." Such evidence was presented by plaintiffs in opposition to the Motion for Summary Judgment (and as part of the motion for reconsideration) in the form of declarations from plaintiffs as well as declarations from Messrs. Seal and Murray. The court simply refused to consider that evidence.

7 The court also indicated it would have also dismissed defendants Knapp and Gibbs from the lawsuit as not having any culpability, had it not dismissed the entire case

8 CP (I) 344-359

the standard of care, including seeking equitable remedies and being prepared to proceed to trial in a first lawsuit that was dropped by defendant Leach.[9]

Finally, plaintiffs submitted declarations from the original engineers involved in the permitting and grading of the road: John Seal and Alan Murray. Mr. Murray is now employed by Snohomish County, and the Westland defendants in the underlying matter hired Mr. Murray as their engineer. Mr. Seal was a former Snohomish County engineer. Both testified that the road ***could have*** been permitted without the need for additional easements and requirements, and ***had*** those permits been obtained, the plaintiffs could have received building permits to proceed with their on-site projects (as early as 2003, and certainly before 2005), thereby avoiding further damages that they did in fact sustain.[10]

Upon requesting briefing from defendants, Judge Andrus refused to consider any of the additional evidence submitted by plaintiffs (erroneously finding that they should have been presented sooner), and denied the motion for reconsideration.[11]

2. BACKGROUND FACTS

Plaintiff Ron Auer ("Ron") was an inventor and product developer, with a broad background in engineering and product incubation. Ron

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9 CP (I) 321-325
10 CP (I) 182-193
11 CP (I) 31-39

became strongly motivated during his career to explore the development of products in environmentally sound food production technologies, and began looking to develop products in a closed environment (hydroponic) system. Ron began a startup business called North American Hydroponics, working out of his garage. Using his personal savings, Ron was granted U.S. Patent 6247268 for the products he was developing.[12]

In 2002, John Traster ("John") and Ron were looking for real property to build homes on, which also included commercial quality buildings on acreage so that Ron could begin work on his hydroponics business. In early 2003, Ron located the property in the Granite Falls area that he believed would work for both John's and his residences and home based business. Stephen Westland handled the sale of the property for the estate of Margaret Westland, and the real estate broker was Tom Rhinevault. Mr. Rhinevault began acting as a "dual agent" for Westland, and John and Ron. Ron had never purchased property, and relied exclusively on Mr. Rhinevault's expertise as a real estate broker.[13]

In the course of negotiations, Mr. Rhinevault drafted an addendum to the Purchase and Sale Agreement ("PSA") that indicated Westland would build a road to the property within 60 days of the close of escrow. Mr. Rhinevault presented Ron with the PSA and the Addendum. After closing, Westland constructed a rough road that was not in compliance

12 CP (I) 439-444 (Declaration of Ronald Auer, ¶¶3-5)
13 *Id.* (Declaration of Ronald Auer, ¶¶6-7)

with the contract, or local Snohomish County Code requirements, and was constructed in an inferior, unsafe and illegal manner. Eventually the County placed a "Stop Work Order " on the project. The "Stop Work Order" and lack of an approved access road to service the two, five acre lots resulted in both properties being ineligible for issuance of building permits. This caused delay in the development of the property, which caused delay in the development of Ron's business, both residences and auxiliary buildings, which continued through 2009. Both Ron, Patricia, his wife, and John had to have alternative living arrangements which created strain in their personal lives, health, marriage, earning abilities, as well as continuing money damages.[14]

In 2003, Ron and John retained J. Robert Leach and the Anderson Hunter law firm to represent them in pursuing legal claims against both Westland and Rhinevault. Ron and John impressed upon defendant Leach that they wanted to move the case along quickly because the development of the property was instrumental in the development of Ron's hydroponics business, and to both John's and his homes. In October of 2003, suit was filed against Westland to obtain compliance with the terms of the contract.[15]

Defendant Leach and Anderson Hunter dragged out and delayed the matter for 5 years—doing virtually nothing. In 2004, Ron and John

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14 *Id.* (Declaration of Ronald Auer, ¶¶8-9)
15 *Id.* (Declaration of Ronald Auer, ¶10)

were assured by defendants that there would be no more problems, and that the case would proceed efficiently. However, defendant Leach continued to do little to move the case forward. The trial date was continued at least four times, and canceled twice. By the end of 2005, and with the trial date approaching, little had been done by Leach to prepare the case, despite repeated requests no review of the damages was conducted, and plaintiffs were facing a motion for summary judgment. At this point, Leach recommended that plaintiffs drop the lawsuit to avoid summary judgment and re-file a separate lawsuit. Once again, John and Ron raised the issue of Leach's lack of performance to Anderson Hunter management, which resulted in a meeting between defendant Leach and defendant Knapp, the managing partner. At this meeting, plaintiffs were once again assured that Leach intended to communicate better and to attend to the case.[16]

In January of 2006, Leach filed a new lawsuit on the plaintiffs' behalf. Ron and John were assured by Leach that he would stay on the case and be more proactive. Despite his promises, very little was done on the case over the next 2 years to move it to a conclusion. In fact, over a 5-year period, defendants only billed plaintiffs 72 hours in time. In 2003 defendants billed a total of 10.7 hours to proceed with the litigation; in 2004 defendants billed only 6.1 hours; in 2004, 37 hours; in 2005, 12.8

16 *Id.* (Declaration of Ronald Auer, ¶11)

hours; in 2007, *only* 2 hours; in 2008, 7. 5 hours.[17]

Despite the fact that Defendant Leach had been the only attorney principally in charge of handling the matter, in early 2008 plaintiffs were suddenly advised that Leach had been named to the appellate court effective March 1, 2008, and that they could either seek new counsel, or that they could "interview" Mr. Gibbs of the firm to see if he would handle the matter. At this point in time, the trial date was scheduled for June 2008 (less than 2 1/2 months a way), yet the defendant law firm had taken virtually no action to secure depositions or discovery from an extensive list of candidates previously discussed with both Mr. Leach and Mr. Gibbs. A meeting was scheduled with defendants Leach and Gibbs at the Anderson Hunter firm on February 20, 2008, wherein Mr. Gibbs (1) acknowledged that the case had significant merit, (2) was "all about the damages" because of the strong basis in evidence, and (3) agreed to take over the handling of representation from Leach. Mr. Gibbs assured plaintiffs that he had adequate time to prepare the case for trial, which was coming up in June of 2008. This was the first, and only, time plaintiffs met with Mr. Gibbs.[18]

Within 30 days of this meeting, however, defendant Gibbs advised plaintiffs that he felt there was a "conflict of interest" between John and Ron due to the difference in magnitude between their claims, and he

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17 CP (I) 433-500 (Declaration of Ronald Auer, ¶¶12-15; Exhibit 8)
18 CP (I) 439-444 (Declaration of Ronald Auer, ¶¶12-15)

further questioned the success of their claims, and particularly the amount of damages they could recover.[19] Ron and John immediately responded in detail, and specifically addressed all the concerns raised by defendant Gibbs, including pointing out that the Anderson Hunter firm and defendant Leach had recommended and retained an expert, Robert Bauer of Bauer Evans, that opined the potential income of North American Hydroponics would have been approximately $8,151,757 had the underlying defendants complied with their contractual obligations and material representations.[20]

After representing plaintiffs for nearly five (5) years, filing two lawsuits, dropping one, and accomplishing virtually nothing, on April 7, 2008, Gibbs joined with the Anderson Hunter law firm in withdrawing as attorneys of record for the plaintiffs. Since taking over the case from defendant Leach, Mr. Gibbs had only worked eight hours on the case, never met with the plaintiffs after the hand-off meeting, did not conduct any pre-trial depositions, and pursued no discovery. Plaintiffs objected to the withdrawal, and requested that Gibbs and Anderson Hunter not be permitted to withdraw. After a hearing on the motion to withdraw, during which Mr. Gibbs made several knowingly inaccurate statements regarding the reasons for withdrawal (including that plaintiffs had not paid their bills

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19 CP (I) 433-500 (Exhibits 4 and 5). Defendant Leach testified he never identified, nor believed there to be, any "non-waivable" conflict between Ron and John. *Id.* (Exhibit 14 thereto)

20 CP (I) 433-500 (Declaration of Ronald Auer, ¶16-18; See Exhibit 10)

and that there were conflicts of interest)[21], defendant's motion to withdraw was granted on April 16, 2008.[22]

After the Anderson Hunter firm was permitted to withdraw by the court, the trial was continued until June of 2009. At that point plaintiffs were forced to hire new counsel, Ben W. Wells. Mr. Wells submitted information to the opposing defendants indicating plaintiffs' provable damages as of September 2005 (at the time Leach dismissed the first lawsuit) were approximately $2,733.360.21.[23] By this time, plaintiffs had been in litigation for over 6 years, and it had taken its toll on their health, marriage, business and income. On March 30, 2009, plaintiffs participated in a settlement conference with the underlying defendants. Although they had been counseled that their damages were well in excess of $8 million as of March 2009, they had now spent almost $200,000 in attorney's fees related to the Anderson firm's withdrawal, as well as for Mr. Wells to come "up to speed." Plaintiffs were no longer in a financial position to continue. As such, despite their reluctance, plaintiffs agreed to accept the defendant's offer of settlement of $500,000.[24]

Although plaintiffs "netted" $448,000 from settlement, plaintiff's damages at the end of the ***first year alone*** equaled nearly $490,000.[25]

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21 CP (I) 439-444; 194-297
22 CP (I) 439-444 (Declaration of Ronald Auer, ¶¶18-22)
23 CP (I) 433-500 (Declaration of Brian H. Krikorian, ¶16; Exhibit 10 thereto)
24 CP (I) 439-444 (Declaration of Ronald Auer, ¶23)
25 CP (I) 194-297 (Declaration of Ron Auer, ¶16)

Plaintiffs are now responsible for the additional cost of engineering, permitting, and constructing the access road, estimated at $48,000. Plaintiffs were forced to spend $15,000 for a utility easement because of Defendants' failure to gain control of the road allowing utility installation. Defendant's inattention to the case necessitated at least $232,750 in additional legal fees, approximately $34,100 in expert fees, and the continuing damages for the subsequent nine years, all directly attributable to Defendant's inattention to the case. By May of 2009, the $448,000 net settlement actually netted plaintiffs only approximately $170,000, which went to satisfy debt obligations and cost they had incurred outside of the legal case. Plaintiffs' damages for expenses alone exceeded $800,000 (not including economic damages which conservatively increased plaintiffs' damages by 1.5 to 8 million dollars).[26]

III. ARGUMENT

1. STANDARD OF REVIEW

A. Defendants did not Meet The Requisite Legal Burden On Summary Judgment

The standard of review on appeal of a summary judgment order is de novo, with the reviewing court performing the same inquiry as the trial court. *Castro v. Stanwood School Dist. No. 401*, 151 Wash.2d 221, 224, 86 P.3d 1166 (2004); *Herron v. Tribune Pub'g Co.*, 108 Wash.2d 162, 169,

26 *Id.* CP (I) 329-344

736 P.2d 249 (1987). See also *Ski Acres, Inc. v. Kittitas County*, 118 Wash.2d 852, 854, 827 P.2d 1000, 1002 (Wash.,1992), A summary judgment motion can only be sustained if there is no genuine issue of material fact, looking at all evidence and inferences in the light most favorable to the nonmoving party. *Pelton v. Tri-State Mem'l Hosp., Inc.*, 66 Wash.App. 350, 354, 831 P.2d 1147 (1992).

CR 56(c) provides in part that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The burden of showing that there is no genuine issue of material fact falls upon the party moving for summary judgment. *Hash by Hash v. Children's Orthopedic Hosp. and Medical Center*, 110 Wn.2d 912, 757 P.2d 507 (1988). ***If the moving party does not sustain its burden, summary judgment should not be granted, regardless of whether the non-moving party has submitted affidavits or other evidence in opposition to the motion.*** *Id.*

In their motion, defendants only pointed to the lack of evidence of the plaintiff to shift the burden. *Young v. Key Pharmaceuticals, Inc.*, 112 Wash.2d 216, 225 n. 1, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986)). In this situation, the moving party is not required to support its summary

judgment motion with affidavits. *Young*, 112 Wash.2d at 226, 770 P.2d 182. ***However, the moving party must identify those portions of the record, together with the affidavits, if any, which he or she believes demonstrate the absence of a genuine issue of material fact.*** *White v. Kent Medical Center, Inc.*, 61 Wash.App. 163, 170, 810 P.2d 4, 9 (1991) (citing Celotex, 477 U.S. at 323, 106 S.Ct. at 2553; *Baldwin v. Sisters of Providence in Washington, Inc.*, 112 Wash.2d 127, 132, 769 P.2d 298 (1989)). ***If the moving party does not meet this initial burden, summary judgment may not be entered, regardless of whether the opposing party submitted responding materials***. *White*, supra; *Jacobsen v. State*, 89 Wash.2d 104, 108, 569 P.2d 1152 (1977); see also *Baldwin*, 112 Wash.2d at 132, 769 P.2d 298. The Court in *White*, supra, noted:

> **Defendants only marginally complied with this requirement. Their claim that White had no competent expert testimony regarding the applicable standard of care was not substantiated by reference to any pleadings, documents, or deposition testimony. Not until they submitted their "rebuttal documents" did Defendants point out those parts of the depositions upon which they relied to support their lack of evidence claim. . . . We emphasize, however, that only rarely will a moving party comply with the strict requirements of Celotex, Young, and Baldwin *without having made specific citations to the record in its opening materials*. (Emphasis added).**

A review of the moving papers shows that there is simply no effort on the part of the defendants to meet their burden under *Young* and *White*. In the moving papers, the defendants offered no evidence or made no

evidentiary citation to support the notion that plaintiffs' claims completely lacked evidentiary support. Nonetheless, plaintiffs submit that they met their legal burden, in that the evidence submitted in opposition to the Motion for Summary Judgment, as well as the supplemental evidence submitted with the Motion for Reconsideration establishes triable issues of fact on all of the elements of legal malpractice (including causation and damages), and the Consumer Protection Act, and the trial court erred by granting summary judgment.

B. Motion for Reconsideration

An appeal of a trial court's denial of a motion for reconsideration and its decision whether to consider new or additional evidence presented with the motion, is reviewed on the basis of whether the trial court's decision is manifestly unreasonable, or based on untenable grounds. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wash.2d 654, 683, 15 P.3d 115 (2000); *Chen v. State*, 86 Wash.App. 183, 192, 937 P.2d 612 (1997). *Martini v. Post*, 178 Wash.App. 153, 161, 313 P.3d 473, 478 (Wash.App. Div. 2, 2013). Plaintiffs submit that the trial court abused its discretion in refusing to consider supplemental timely submitted evidence pursuant to CR 59 and Washington case authority, and further refused to reconsider its ruling, applying an erroneous interpretation of the law.

2. THE COURT ERRED BY FINDING NO GENUINE ISSUES OF MATERIAL FACT EXISTED AS TO PLAINTIFFS' CLAIM FOR LEGAL MALPRACTICE BASED UPON THE ELEMENT OF CAUSATION

A. The Trial Court correctly Denied Defendants' Motion on Duty and Breach, As Plaintiffs' Expert Paul Brain Opined As To Defendants' Breaches of the Standard of Care

In their motion, defendants argued that plaintiffs could not establish, through expert testimony, *a breach of the standard of care*. Despite the fact that plaintiffs' expert, Paul Brain, was timely designated in plaintiffs Primary Witness Disclosure in January 2013 (11 months earlier), or that defendants themselves refused to identify their expert opinions, defendants repeatedly asserted that plaintiff's expert opinion was "untimely."[27] Mr. Brain provided a declaration in support of plaintiffs' opposition to the motion for summary judgment. In his declaration, Mr. Brain opined, among other things, that:

> "In my opinion, the standard of care here was breached at multiple levels. First, given the express objectives of the clients (i.e. the Plaintiffs here) – to promptly obtain a road complying with the purchase and sale agreement ("PSA") – a lawyer exercising that decree (sic) 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 would not have

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27 At defendants' request in late November 2013, plaintiffs amended their discovery response and provided a basis for Mr. Brain's opinion on November 27, 2013, and produced additional documents responsive to the expert discovery at the same time. Plaintiffs also agreed, at defendants' counsel's request, to continue the trial 45 days to permit him additional time to take depositions. Despite taking only <u>one</u> deposition throughout the case, at the time of the Motion for Summary Judgment hearing, defendants had almost 30 days to complete their discovery.

In the hearing on the defendants' Motion for Summary Judgment, Judge Andrus rejected defendants' effort to "strike" Mr. Brain's declaration, and noted that although plaintiffs should have supplemented discovery earlier, defendants made no effort to request supplementation or file a motion to compel sooner (a fact defense counsel acknowledged in open court), and that ***both sides*** made "strategic decisions to hold off on making or requesting complete expert disclosures"). See CP 34, ¶1

brought an action for damages. Rather, an action for specific performance of the PSA would have been the appropriate course of action followed immediately by a request for injunctive relief. The failure of the attorneys here (i.e. Defendants) to advise their clients as to an equitable remedy is a clear breach of the duty of care."[28]

"There is no evidence I have seen that the seller would have cooperated, and these facts do not change my basic conclusion. If litigation was necessary, a damage action was the wrong remedy to pursue. A lawyer exercising 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 would have brought an action for specific performance followed promptly by a Motion for Injunctive Relief."[29]

"With respect to Safeco, this is another aspect of the failure to do due diligence. As I understand it, Safeco was the E & O insurer for the broker who was a name defendant in the actions against the seller. One of the first things any competent attorney should have done was propound an insurance interrogatory to the agent. The failure to do so is another breach of the standard of care in my opinion."[30]

"The lack of diligence in Defendants' conduct in the subject litigations is so obvious as to almost not require comment. The lack of attention to Plaintiffs' interests is simply shocking. The original Complaint was filed in October 2003 and Leach did virtually nothing to work the case up for over a year-and-a-half. Time only works to the benefit of defendants. A lawyer exercising that decree (sic) 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 would have immediately commenced and actively pursued discovery."[31]

"Moreover, if faced with a Summary Judgment Motion requiring discovery to defend, the appropriate response would have been a CR 56(f) Motion for Continuance – not a voluntary dismissal. I can find no evidence that this alternative was discussed with Plaintiffs. Leach's failure to inform Plaintiffs of this alternative would be a

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28 CP (II) 599-604 (Declaration of Paul Brain ¶5)
29 *Id.* at ¶6
30 *Id.* at ¶17
31 *Id.* at ¶18

> separate breach of the duty of care. The voluntary dismissal was not for the benefit of Plaintiffs – it was clearly prompted by Leach's self interest in avoiding summary judgment caused by Leach's own lack of diligence in obtaining discovery on a timely and appropriately diligent basis."[32]
>
> "In my opinion, [the conflict of interest identified by Geoffrey Gibbs] goes to an issue of collectability post-judgment. Nevertheless, the record is clear that the conflict – if it was a conflict – was known from the outset. Various documents indicate that this issue was raised at the outset of the representation with Defendant Robert Leach ("Leach"). In my opinion, the standard of care would have required a determination as to whether the conflict could be waived at the outset of the engagement, not some seven years later. The failure to properly address this issue at the outset of the engagement was unquestionably a breach of the standard of care and the withdrawal certainly appears pretextual."[33]

Based upon Mr. Brain's opinions, plaintiffs clearly met their burden of establishing facts that demonstrate defendants, as lawyers, owed plaintiffs a duty of care, and breached the standard of care when it came to representing plaintiffs. The trial court correctly found that triable issues of fact existed, and denied defendants' motion on these grounds.[34]

B. The Trial Court Erred by Finding that No Genuine Material Issues of Fact Existed as To Causation

(1) Plaintiffs Established Sufficient Facts To Raise Triable Issues, And There Is No Requirement That Plaintiff Submit An "Expert Opinion As To Causation.

In granting defendants' motion on the element of causation, the trial court erred by both refusing to take all reasonable inferences in favor

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32 *Id.* at ¶19; In fact, defendant Leach raised a continuance as a viable option to defendants, as well as "changing counsel" to obtain a last-minute continuance. CP (I) 433-500, Exhibit 3, page 5

33 CP (II) 599-604 (Declaration of Paul Brain ¶__)

34 See CP (I) 34 (Order Denying Motion for Reconsideration)

of plaintiffs on the issue of causation, and further by erroneously finding that, absent a "causal link" created by an expert, plaintiffs could not establish causation.[35]

Cause in fact is usually a question for the trier of fact and is generally not susceptible to summary judgment. *Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wash.2d 780, 788, 108 P.3d 1220 (2005) (quoting *Ruff v. King County*, 125 Wash.2d 697, 703, 887 P.2d 886 (1995)); *Martini v. Post*, 178 Wash.App. 153, 164, 313 P.3d 473, 479 (Wash.App. Div. 2,2013); See also *Nielson v. Eisenhower & Carlson*, 100 Wash.App. 584, 999 P.2d 42 (2000); *Daugert v. Pappas*, 104 Wash.2d 254, 704 P.2d 600 (1985). However, it is the general rule in Washington that in a legal malpractice action, whether a plaintiff would have prevailed in an underlying matter, is a question of fact for the jury. See *Brust v. Newton,* 70 Wash.App. 286, 293, 852 P.2d 1092 (1993):

> **The Washington Supreme Court has held that in most instances the question of cause in fact is for the jury: The principles of proof and causation in a legal malpractice action usually do not differ from an ordinary negligence case.... 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. *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 that in most legal***

35 *Id.* page 35: "The summary judgment ***was based*** on Plaintiffs' failure to submit expert evidence *to establish causation in the first instance.*" (Emphasis added).

> ***malpractice actions the jury should decide the issue of cause in fact.*** **(Citations omitted.)** ***Daugert*****, 104 Wash.2d at 257-58, 704 P.2d 600. (Emphasis added).** *Id*
> . . .
> **[I]t follows that if it is for the trier of fact to decide "whether the client would have fared better but for [the attorney's] mishandling" of his case, *Daugert*, 104 Wash.2d at 257, 704 P.2d 600, it is also for the trier of fact to decide the extent to which that is true.** *Id.* at 294

(Emphasis added)

In *VersusLaw v. Stoel Rives,* 127 Wash. App. 309, 111 P.3d 866 (2005), the trial court granted the law firm's Motion for Summary Judgment. The trial court found that, "as a matter of law, there is 'no cause in fact' and no 'legal causation'" between the acts of Stoel Rives and the alleged damages sustained by VersusLaw. *Id.* at 328. On appeal, the Court of Appeals reversed. The Court of Appeals observed that "[p]roximate cause may be determined as a matter of law ***only when reasonable minds could reach but one conclusion.***" (Emphasis added). *Id.* The Court went on to find that the record before it demonstrated that there were material issues of fact about whether Stoel Rives' alleged negligence caused VersusLaw damages. The Court found that this was a question for a jury to find, in that reasonable minds could reach different conclusions. *Id.* at 329.

In granting defendants' motion as to the element of causation, the Court stated it relied upon, among others, *Griswold v. Kilpatrick* 107 Wash.App. 757, 760, 27 P.3d 246 (2001), *Smith v. Preston Gates Ellis,*

L.L.P., 135 Wash.App. 859, 863–64, 147 P.3d 600 (2006), review denied, 161 Wash.2d 1011, 166 P.3d 1217 (2007) and *Estep v. Hamilton*, 148 Wn. App. 246, 256, 201 P.3d 331, 336 (2008). The court's reliance upon these decisions, however, for the notion that an expert is required to establish causation was misplaced, in that they are not analogous to this matter. First—the *Griswold* case is not applicable here, since plaintiffs are not arguing they "could have settled" for a greater amount. Rather, plaintiffs are arguing that their damages were in excess of 8 million dollars as of the time of settlement, and that after six (6) years of dilatory actions by defendants, and being terminated by the defendants on the eve of trial, they were left with no choice but to make a business judgment, mitigate their continued losses, and settle for what they could get from the defendants. Plaintiffs would have rather proceeded to trial, or a reduction of their ongoing damages. See also *City of Seattle v. Blume*, 134 Wash.2d 243, 947 P.2d 223 (1997).

Likewise the court's citation to *Geer v. Tonnon*, 137 Wn. App. 838, 851-52, 155 P.3d 163, 170 (2007) for the proposition that expert testimony is "required" to prove causation is in error.[36] In *Geer*, the court stated that "Geer failed to provide expert testimony ***or*** other evidence to demonstrate that such a breach of Tonnon's duty of care was the cause in fact of Geer's claimed damages." (Emphasis added). Here plaintiffs'

36 In their opposition to plaintiffs' motion for reconsideration, defendants conceded that *Geer* does not stand for this proposition. CP (I) 157.

expert *can* opine as to causation, ***and*** plaintiffs *did* produce clear evidence ("in the first instance") that supported a causal link between the clear breaches of duty and their damages.[37]

In *Estep*, the court reiterated, "the plaintiff must demonstrate that he or she would have prevailed or at least would have achieved a better result had the attorney not been negligent." (Citing to *Halvorsen v. Ferguson*, 46 Wash.App. at 719, 735 P.2d 675). *Estep v. Hamilton*, 148 Wn. App. 246, 256, 201 P.3d 331, 336 (2008). In *Estep*, the plaintiff's expert reached no opinion as to whether she would have prevailed or achieved a "better result," **and** the defendant attorney presented contrary expert testimony opining that it was likely a better result ***would not*** have been achieved. In the instant case, Mr. Brain opined that he believed "given the express objectives of the clients (i.e. the Plaintiffs here) – to promptly obtain a road complying with the purchase and sale agreement ("PSA") – a lawyer exercising that decree (sic) 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 would not have brought an action for damages. Rather, an action for specific performance of the PSA would have been the appropriate course of action

37 It should also be observed, that in the State of Washington, there is no "requirement" that an expert witness be used *even* as to the standard of care in some instances. See *Walker v. Bangs*, 92 Wn.2d 854, 858, 601 P.2d 1279, 1282 (1979) holding that in Washington, "expert testimony is not necessary when the negligence charged is within the common knowledge of lay persons" and only required where the conduct "involves matters calling for special skill or knowledge."

followed immediately by a request for injunctive relief. The failure of the attorneys here (i.e. Defendants) to advise their clients as to an equitable remedy is a clear breach of the duty of care."[38] Mr. Brain further opined if litigation was necessary, a damage action was the wrong remedy to pursue. "A lawyer exercising that decree (sic) 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 would have brought an action for specific performance followed promptly by a Motion for Injunctive Relief."[39]

In response to the trial court's comment that Mr. Brain did not opine to a "causal link" between the failure of pursuing equitable remedies and the likelihood that plaintiffs would have achieved a better result, Mr. Brain provided a supplemental declaration indicating he had reached such an opinion, and that his omission to include the same in his prior declaration was because he was asked to opine for the purposes of the opposition as to the standard of care only. Mr. Brain concluded that he "would draw a direct and proximate causal link between the failure" of defendants "to exercise due diligence and any damage after the voluntary dismissal [of the first action in 2005]."[40] Mr. Brain further opined that a properly framed motion for injunctive relief would have had a very high

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38 CP (II) 599-604 Declaration of Paul Brain ¶5
39 *Id.* at ¶6
40 CP (I) 321-325 (Supplemental Declaration of Paul Brain ¶2)

chance of success because "interests in property under Washington law are putatively unique as a practitioner involved in a property rights case should be aware. The fact that there may be an accessory damages remedy does not preclude injunctive relief because the interest being protected is unique, in this case the use and enjoyment of the property."[41] Finally, Mr. Brain opined that based upon his experience as a practitioner in the same area, as well as his review of the material in this case, his opinion is the defendants would have been successful in obtaining some form of equitable remedy in the first instance, and this would have substantially mitigated the damages suffered by the plaintiffs, as well as eliminate further damages resulting from the dismissal of the 2003 lawsuit.[42] This is supported by the evidence, and the declarations of Mr. Seal and Murray (both engineers, and current and/or former employees of Snohomish County), which were also submitted as part of the motion for reconsideration. Both men testified that a road could have been built, and the road *permitted* without the need for easements or other concessions.[43]

Although plaintiffs believe they can prove they would have prevailed at an ultimate trial, the case law does not require plaintiffs to prove, with certitude, they would have prevailed, or access a "crystal ball" to predict what result would have occurred for purposes of defeating a

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41 *Id.* at ¶3
42 *Id. at* ¶¶4-5
43 CP (I) 194-297; 392-344 (Declarations of Ron Auer and John Traster)

Motion for Summary Judgment – rather plaintiffs must only establish that evidence *supports* the inference they would have achieved a better result but-for the negligence, and that reasonable minds could conclude that harm occurred:

> ***The plaintiff, however, need not prove cause in fact to an absolute certainty***. *Gardner v. Seymour*, 27 Wash.2d 802, 808, 180 P.2d 564 (1947). It is sufficient if the plaintiff presents evidence that "allow[s] a reasonable person to conclude that the harm more probably than not happened in such a way that the moving party should be held liable." *Little*, 132 Wash.App. at 781, 133 P.3d 944 (citing Gardner, 27 Wash.2d at 808–09, 180 P.2d 564). The evidence presented may be circumstantial as long as it affords room for "reasonable minds to conclude that there is a greater probability that the conduct relied upon was the [cause in fact] of the injury than there is that it was not." *Hernandez v. W. Farmers Ass'n,* 76 Wash.2d 422, 426, 456 P.2d 1020 (1969).

Martini v. Post, 178 Wash.App. 153, 165, 313 P.3d 473, 479 (Wash.App. Div. 2, 2013)

As the case law above establishes, and taking all inferences favorably to plaintiffs, reasonable minds could not "reach but one conclusion." The facts show that the defendants did virtually ***nothing*** for a period of five to six years to bring the underlying matter to closure, and achieve "a result" for the plaintiffs (let alone, "a better result"). First—as Mr. Brain notes, the major issue faced by the plaintiffs at the very outset in 2003 was the failure of the underlying defendants (the Westlands) to carry out their contractual promise to permit and thereafter build an access road. Instead of pursuing immediate equitable and injunctive remedies that

would have ensure that either the road was permitted, and then later built—or secure that right for plaintiffs so they could permit the road, and build it, and later sue for damages—defendant Leach instead initiated an action for damages, although he was dilatory in that pursuit. In the course of that first action filed in 2004, Mr. Leach did very little discovery and pursued theories that would not focus on seeking an immediate resolution.[44] It is plaintiffs' position that had the road been ***permitted*** at the outset, that act alone would have mitigated most of their damages and would have allowed them to proceed with building their homes and businesses.[45]

Second, defendants were dilatory to the point of gross negligence in doing any discovery on the defendants' insurance coverage. In fact, the record is clear that Mr. Leach did not even send a discovery request for insurance information until ***December of 2006***, and then sat back and allowed the defendants to provide absolutely no responses for 15 months—despite the repeated demands of the plaintiffs for action.[46] It was not until Mr. Leach was appointed to the appellate bench, and the matter was transferred over to new attorneys at the Anderson Hunter firm in March of 2008, that defendants ***finally*** obtained discovery responses, including the insurance policy in issue. That policy showed that there was

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44 CP (I) 433-500 (emails attached as Exhibits 2 and 3 to the Krikorian declaration)
45 *Id.* Exhibit 3, pages 1 to 4
46 *Id.* Exhibit 13

a total of $1,000,000 in coverage. At that point plaintiffs' damages were in excess of 8 million dollars, due largely to defendants' delay in moving the case to trial.[47] Clearly the inferences here establish that had defendants pursued the insurance coverage earlier, plaintiffs would have been in a much better position to evaluate settlement and risk, and not had to incur another $100,000 plus in fees to hire new counsel once the Anderson Hunter firm had terminated their representation in June of 2008.

There are numerous examples of emails and evidence where plaintiffs pleaded for some action on behalf of Mr. Leach, and he did not follow through. In 2007 alone, when plaintiffs complaints were the most vocal, it is telling to note that Mr. Leach billed only a ***total*** of ***1.8 hours*** on plaintiffs' case. Of course, in the latter part of the year, Mr. Leach was seeking a judicial appointment (this time successfully) and in effect totally abandoned plaintiffs' case.[48]

When Mr. Gibbs took over the case in the spring of 2009, he advised plaintiffs he would require an additional $25,000 to $35,000 in fees to prepare for trial, along with $15,000 for trial.[49] In the same letter he provided this estimate of fees, he also raised a conflict of interest for the first time—noting that the defendants "will consider and likely prepare a written 'waiver of conflicts' for your review and signature in the near

47 *Id.* Exhibits 10 and 12
48 *Id.* Exhibits 2 and 3
49 *Id.* Exhibit 4

future."[50] As Mr. Brain opined, the defendants used this alleged "conflict" as a pretext for the final act of abandonment of the plaintiffs, leaving them lawyer-less after almost 5 years of delays and inaction, and only 2 months before trial. As a result of this *coup de gras* plaintiffs were forced to hire new counsel to both deal with the abandonment by the Anderson Hunter firm as well as to take over handling the underlying lawsuit. All tolled, plaintiffs incurred over $152,000 in additional fees just to get the case settled (and ***not*** to go to trial), whereas Mr. Gibbs projected only $40,000 to $50,000 additional fees ***through trial***.[51] This fact—alone—establishes a clear inference that plaintiffs were damaged by at least an additional $100,000 in fees they should not have incurred had the Anderson Hunter firm completed their 5 year representation of plaintiffs as they represented they would.

Faced with 6 years of losses, millions of dollars in damages, close to $200,000 in attorney's fees, financially destitute with no end in sight, and nothing short of a complete loss, plaintiffs elected to settle the case for what they could and "stop the bleeding" of costs and damages. Because they were forced to make a reasonable business judgment does not change the fact they walked away from an $8 million claim. Washington Courts have long rejected the notion that a party's business decision acts as an automatic legal bar to its claims, and thus takes this question away from

50 *Id.*
51 *Id.* Exhibit 9

the jury. See *City of Seattle v. Blume*, 134 Wash.2d 243, 947 P.2d 223 (1997)—holding that "independent business judgment rule can no longer serve as bar to proximate cause element of legal claim".

Viewing all evidentiary inferences in favor of plaintiffs, it should be left to the second trier of fact to ultimately decide if plaintiffs would have prevailed at the original trial. *Brust v. Newton,* 70 Wash.App. 286, 293, 852 P.2d 1092 (1993) "*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.*" (Emphasis added). Since the trial court acknowledged it was taking the evidentiary inferences in the light most favorable to plaintiffs, plaintiffs respectfully submit the trial court erred in not allowing a second trier of fact to reach the ultimate issue of causation and damages, as there is ample evidence (not speculation) that but for the breaches of defendant, plaintiffs would likely have had a better result than netting $170,000 on an $8 million claim.

There are also clear inferences that the termination by the Anderson Hunter firm was pretextual, and that the delay in finding attorneys caused plaintiffs additional loss.[52] The two (2) declarations of Paul Brain, as well as the declarations of Ron Auer and John Traster, John Seal, Alan Murray, and the other evidenced in the record, show that the

52 CP (I) 298-320; CP (II) 599-604 (Declarations of Samuel Elder and Paul Brain)

defendants' *below-standard* practices directly *caused* plaintiffs damage. Considering that there was evidence before the court that plaintiffs suffered in excess of $2 million in hard dollar damages as of September 2005 alone (and excluding the 4 years of additional damage due the defendants' dilatory practices and inaction), certainly, reasonable minds ***could*** differ that had defendants not breached their duty of care (which the trial court conceded was established for purposes of denying defendants' motion for summary judgment), plaintiff "would have had a better result" than settling after 6 years of litigation and netting only a fraction of the amount of money they were seeking.[53]

Plaintiffs respectfully submit that sufficient evidence in the record existed to reasonably infer that (i) had defendants proceeded with equitable relief at the outset, a court would have very likely granted plaintiffs injunctive relief, either the right to proceed with the road themselves, or have assigned the right to obtain the permit subject to a later damage suit against the underlying defendants;[54] (ii) had plaintiffs obtained the permit for the road alone, that would have allowed them to

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53 The amount of damages plaintiffs suffered was fixed and determined both in 2005 and 2009. There is no speculation, and there is ample evidence that had defendants not breached the standard of care, plaintiffs' damages would have been substantially less had they followed a more expeditious course, prepared the case, and tried it in the first instance. These damages are supportable by the record, and were spelled out by Mr. Wells in his demand to the underlying defendants for purposes of settlement discussions. Mr. Wells fixed these damages as of September 2005 for that discussion. The trial Court overruled defendants' objections to Mr. Wells letter except for a hearsay statement from a county official contained therein, and considered Mr. Well's letter as evidence when it granted defendants' Motion for Summary Judgment.

54 CP (II) 599-604 (Declarations of Paul Brian)

obtain permits for the building of their homes and buildings;[55] (iii) had plaintiffs been permitted to build their homes and buildings in a timely fashion, they would have had the financial ability to do so, and their damages would have been reduced;[56] and (iv) had defendants prepared the case sufficiently and not voluntarily dismissed the first action, then plaintiffs damages would have likely been limited and they would have recovered sufficiently to avoid further damage.[57]

The ample evidence in the records establishes that defendants pursued none of these remedies—instead, the favorable inferences show that they did very little for 5 years; dropped the first case due to inaction and not being prepared; re-filed the case, and then did very little, again, for 2 more years; and then finally abandoned plaintiffs under a pretext—causing plaintiffs, at a minimum, to incur further costs and damages, and ultimately having to accept substantially less in settlement to cut their losses. Certainly a reasonable mind could reach more than just "one" conclusion in this case, and could find that the dilatory, substandard conduct of the defendants caused the plaintiffs damaged. As such, the trial court erred by finding that, as a matter of law, there was no cause-in-fact.

3. TRIABLE ISSUES OF FACT EXIST AS TO PLAINTIFF'S CONSUMER PROTECTION ACT CLAIMS

The entrepreneurial aspect of legal practice – how the price of

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55 CP (I) 182-186; CP (I) 187-193; CP (I) 329-344; CP (I) 194-297
56 *Id.*
57 *Id.* CP (II) 599-604 (Declarations of Paul Brian)

legal services is determined, billed, and collected and the way a law firm obtains, retains, and dismisses clients—are legitimate concerns of the public which are properly subject to the Consumer Protection Act ("CPA"). S*hort, Cressman & Burgess v. Demopolis,* (1984) 103 Wn.2d 52, 61, 65. The purpose of the CPA is to protect the public and to foster fair and honest competition. RCW 19.86.020; *Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co.*, 105 Wn.2d 778, 783-84 (1986). The CPA is to be liberally construed in order to achieve this objective. RCW 19.86.020; *Short v. Demopolis*, 103 Wn.2d 52, 61, 56 (1984). In order to establish a cause of action based upon a violation of the CPA, a plaintiff must show: 1) an unfair or deceptive act or practice; 2) occurring in trade or commerce; 3) a public interest impact; 4) injury to the plaintiff's business or property; and 5) causation. *Hangman Ridge*, 105 Wn.2d at 780. Whether or not acts give rise to a violation of the CPA are normally questions of fact. See *Cotton v. Kronenberg*, 111 Wash.App. 258, 264, 44 P.3d 878 (2002)

Further, RCW 19.86.030 provides:

> In a private action in which an unfair or deceptive act or practice is alleged under RCW 19.86.020, a claimant may establish that the act or practice is injurious to the public interest because it: (1) Violates a statute that incorporates this chapter; (2) Violates a statute that contains a specific legislative declaration of public interest impact; or *(3)(a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons.* (Emphasis added)

In their motion, defendants argued that the facts did not support a Consumer Protection Act violation case because the alleged complaints have nothing to do with the entrepreneurial aspects of the practice of law, and that defendants acts were not deceptive. Moreover, defendants argued that their conduct was not deceptive.

In *Short*, supra, the Washington Supreme Court specifically observed that the way a law firm obtains, retains, and ***dismisses*** clients—are legitimate concerns of the public which are properly subject to the Consumer Protection Act. In this case, after nearly 5 years of doing virtually nothing on the case, defendant Leach ultimately obtained a judicial appointment—something he had been campaigning for since 2005. Despite repeated requests that defendant Leach, and the Anderson Hunter firm, provide adequate legal services, defendants had done virtually nothing to prepare the case for trial. Remarkably, rather than "own up" to their own failures and abide by their ethical responsibilities, defendants have resorted to blaming the plaintiffs for defendants' own abdication of responsibility: Calling them "rude" and claiming that plaintiffs themselves were responsible for conducting discovery and dealing with expert witnesses.[58]

In 2008, when Mr. Leach was appointed to the appellate bench, defendants agreed to proceed further with the case, and prepare it for trial

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58 CP (I) 433-500 (See for example Exhibit 2, page 22)

in June of 2008. However, within weeks of agreeing to bring this matter to closure, defendant Gibbs first "identified" an alleged "conflict of interest" that he believed to be waivable, and then used that alleged "conflict" as a pretext to withdraw and abandon plaintiffs' interests. It is important to observe Mr. Gibbs never met with the plaintiffs to have any substantive discussion regarding the case, or prepare the matter for trial in the coming two (2) months.

As noted in Mr. Brain's opinion, this conflict clearly was not grounds for withdrawal and was obviously used as a pretext to avoid Anderson Hunter facing the fact that one of their members was woefully unprepared for trial. It is understandable that Mr. Gibbs wanted to abandon the case, because of the clear failures of Mr. Leach in preparing the case. In order to find an "escape mechanism", Mr. Gibbs sought to find the one thing he could use as a pretext to get the Anderson Hunter firm out of representing the plaintiffs: an unwaivable conflict.

The facts are clear that the disparity in damages between Mr. Auer and Mr. Traster existed from day one. In fact, in his deposition, Mr. Leach testified that he did not believe this to be a conflict at all.[59] Initially, Mr. Gibbs raised this as a "waivable" conflict, only to conclude days later that it was now a fatal conflict to permit the abandonment of

59 *Id.* Deposition Transcript of J. Leach, page 67:9 to 69:17 (Exhibit 14)

plaintiffs.[60] When plaintiffs specifically addressed this conflict in emails, advised Gibbs they would reach an agreement to avoid any conflict, and in view of Gibbs' assessment of the conflict as "unwaivable" offered to obtain independent counsel to draft a waiver, Gibbs simply ignored this and proceeded to withdraw.[61] When plaintiffs retained new counsel, Ben Wells, he dispensed with this issue and obtained a written conflict waiver without difficulty.[62] As Mr. Brain opines at ¶16 of his declaration, "it is obvious that Defendants did an unjustified cut-and-run using the supposed conflict as a pretext for avoiding the consequences of Defendants' own failure to adequately pursue Plaintiffs' interests."

Taking the reasonable inferences from this evidence, it is clear that a triable issue of fact exists as to whether the "pretext" used by defendants to "dismiss" their client was deceptive. As noted in Mr. Brain's declaration, as well as under Washington law, attorneys are bound to follow the Rules of Professional conduct, and have an ethical duty not to harm their clients, as well as communicate clearly, fairly and honestly with their clients. A trier of fact could draw the reasonable inference that defendants were using a deceptive reason to avoid facing the consequences of Mr. Leach's failure to adequately prepare and pursue the case, and therefore used the alleged "conflict" as a pretext to proceed.

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60 *Id.* See Exhibits 4 and 5
61 *Id.* See Exhibit 6
62 *Id.* See Exhibit 11

Moreover, such conduct ***did*** cause plaintiffs damages. For example, in addition to other consequential damages, they went from a possible projected cost of trying the case made by Mr. Gibbs of $40,000 to $50,000, to incurring over $152,000 in fees just to get the case into a settlement posture, as a result of the abandonment by the Anderson Hunter firm.

Finally, as subsection (3) of RCW 19.86.030 states, private conduct is actionable if it injured other persons; had the capacity to injure other persons; *or* has the capacity to injure other persons. Here there are clear issues of fact as to whether defendants' conduct had, or has, the capacity to injure clients if they are permitted to use a pretext to abandon a client after having damaged them with inaction over the past 6 years.

For the reasons stated above, plaintiffs respectfully submit that triable issues of fact existed as to their claims of violation of the Consumer Protection Act, and that the trial court erred in dismissing those claims.

4. THE COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

As argued above, on appeal, the court determines if the trial court's refusal to consider additional evidence, and to grant or deny a motion for reconsideration, was manifestly unreasonable or based on untenable grounds. Here plaintiffs respectfully submit that the trial court abused its discretion in both refusing to consider additional evidence in plaintiff's

motion for reconsideration, and thereafter denying the motion.

A. There is No Prohibition in CR 59 for the Trial Court To Consider Additional Evidence

Nothing in CR 59 prohibits the submission of new or additional materials on reconsideration, nor does CR 59 prohibit this court from considering such information. See *Sellsted v. Washington Mut. Sav. Bank*, 69 Wn. App. 852, 865, fn. 19, 851 P.2d 716, 724 (1993)—noting that both the trial court and the appellate court could consider evidence submitted after summary judgment motion was granted to find issues of fact; see also *Chen v. State*, 86 Wn. App. 183, 192, 937 P.2d 612, 617 (1997). Motions for reconsideration and the taking of additional evidence, therefore, are within the discretion of the trial court. See *Chen*, supra, *Trohimovich v. Department of Labor & Indus.*, 73 Wash.App. 314, 318, 869 P.2d 95 (1994); see *Ghaffari v. Department of Licensing*, 62 Wash.App. 870, 816 P.2d 66 (1991) (consideration of additional evidence at motion for reconsideration of bench trial within discretion of trial court).[63]

In the context of summary judgment, unlike in a trial, there is no prejudice if the court considers additional facts on reconsideration. *August v. U.S. Bancorp*, 146 Wash.App. 328, 347, 190 P.3d 86 (2008) (quoting *Chen*, 86 Wash.App. at 192, 937 P.2d 612)—holding that trial should have

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63 See also CR 59(g) Reopening Judgment. On a motion for a new trial in an action tried without a jury, the court ***may open the judgment if one has been entered, take additional testimony***, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

considered a new theory of fraudulent concealment presented on a motion for reconsideration, and reversed a summary judgment order). See *Martini v. Post*, 313 P.3d 473, 478 (November, 2013)—holding that trial court properly exercised its discretion when reviewing new evidence presented on reconsideration, and abused its discretion, since that new evidence warranted reversal of summary judgment on appeal.

Despite the foregoing authority, defendants repeatedly argued to the trial court that that "no Division One authority" permitted the "newly submitted 'evidence'." [See Opposition page 2, lines 10-11; page 3, lines 1-2; page 9-14].[64] While it was notable that that defendants limited their analysis only to "Division One" cases, the "Division One" authority relied upon by defendants either pertained only to a motion under CR 59(a)(4)[65], or had nothing to do with a Motion for Reconsideration. Moreover, the trial court apparently adopted this view, which was an abuse of discretion.

First—plaintiffs did not bring their motion under CR 59(a)(4), nor did they argue that the trial court should have reconsidered the motion based upon "surprise " or "discovery of new evidence" after the hearing. As such, the trial court's reliance upon the standards of CR 59(a)(4) and on *Go2Net, Inc. v. C.I. Host, Inc.,* 115 Wn. App. 73, 88, 60 P.3d 1245,

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64 Both *Sellsted* and *Ghaffari*, supra, are Division One decisions.

65 "....Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:... (4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

1252-53 (2003) and *Brown v. Peoples Mortgage Co.*, 48 Wn. App. 554, 739 P.2d 1188 (1987) were misplaced.[66]

The *Martini v. Post* decision, supra, is directly on point with this case. In *Martini*, the plaintiff sued his landlord for negligence causing his wife's (Judith Abson) death after a fire in their rented house. Before the fire, Martini had repeatedly asked Post to repair windows that were inoperable because they were painted shut. Martini's wife died of smoke inhalation after the inoperable windows prevented her from escaping the fire. The trial court granted summary judgment on the ground that Martini failed to prove the cause in fact element of proximate cause and stated Martini failed to present sufficient evidence to show that "'but for' the negligence of the defendants, [Martini's wife] would not have died." Martini moved for reconsideration under CR 59(a)(7)-(9), arguing that his wife would have survived the fire but for Post's failure to repair the inoperable windows, and Post's failure was the legal cause of Abson's death. In his motion for reconsideration, Martini also introduced new evidence of handprints around the window in the northeast bedroom and a

66 The *Go2Net* case dealt primarily with a 59(a)(4) argument of "newly discovered" evidence. However, *Brown* is not even a case dealing with a motion for reconsideration. In *Brown*, the plaintiff filed a supplemental affidavit with more facts the following day after the Court took the matter under submission. The Court struck that declaration as untimely, which was upheld on appeal since the declaration was not submitted in compliance with CR 56 or the local rules. Here, plaintiffs did not claim that the trial court view late submitted evidence in a vacuum, and in fact submitted it (properly) as part of their motion for reconsideration and pursuant to CR 59 (something the plaintiff in *Brown* did not do).

declaration from Dr. Kiesel, who performed Abson's autopsy, testifying that Abson would have survived if she had been able to open a window and breathe fresh air. The trial court considered both the declaration and the fingerprints, but denied the motion for reconsideration.

On Martini's appeal, the Court of Appeals re-affirmed the well settled law, above, that in the context of summary judgment, unlike in a trial, there is no prejudice if the court considers additional facts on reconsideration. *Id.* at 478. There the court found that the consideration of the declaration and fingerprints by the court was not improper, and in fact, supported a reversal of both the summary judgment order as well as the court's denial of the motion for reconsideration. *Id. at* 479-480

In *Sellsted*, supra, the trial court granted the defendant's motion for summary judgment. In support of his motion for reconsideration, Sellsted submitted an additional excerpt from his deposition testimony and additional documents to substantiate his earlier affidavit, some of which defendant Washington Mutual moved to strike on the ground that they did not constitute "newly discovered evidence." The trial court granted the motion to strike most of the documents and denied Sellsted's motion for reconsideration. *Id.* at 857. The Court of Appeals (a *Division One* case) reversed, holding that the totality of information presented to the court, including the evidence submitted as part of the motion for reconsideration, established inferences supporting denial of summary judgment. In a

footnote, the court noted "nothing in CR 59 prohibits submission of new or additional material on reconsideration, and KCLR 7(b)(2)(H)(i) and (ii) appear to contemplate such submissions. Thus, both we and the trial court could consider Sellsted's performance evaluations." *Id. at* 865, fn. 19.

Based upon the above authority, the trial court's refusal to consider the additional evidence submitted in support of the Motion for Reconsideration was a manifest abuse of its discretion..

B. There Was No Prejudice to Defendants As They Did Not Even Raise Specific Factual Theories Related to Causation Until Their Reply Brief

In the context of summary judgment, unlike in a trial, there is no prejudice if the court considers additional facts on reconsideration. *Chen* at 192; *August* at 347.

In this case, defendants filed a motion for summary judgment as to plaintiffs' claims of legal malpractice and violation of the Consumer Protection Act. Defendants argued they did exactly what was required of them: Point to the "lack" of an expert witness declaration and evidence in support of malpractice. However, the first, and only, articulation of defendants' challenge to "causation" (or damages for that matter) occurs at page 8, lines 6-9 of the Motion for Summary Judgment, where defendants state:

> ...the Plaintiffs have not presented any proof that the defendants in the underlying case or their insurer, Safeco, would have offered any more money to the plaintiffs or that the case would have

> concluded sooner had the Plaintiffs' attorneys, the Lawyer Defendants herein, taken a different course of action....[¶] Plaintiffs have not offered any evidence that the value of their claim was reduced by anything the Lawyers Defendants did or did not do."

In other words, defendants' "framed" their argument about causation as follows: But-for the defendants' negligence plaintiffs had to prove that: (i) Safeco would have paid, or offered, more money to plaintiffs; (ii) the case would have "concluded sooner" had the defendant attorneys taken a different action; or (iii) the value of plaintiffs claims was "reduced" by actions of the defendants. Defendants cited to no evidence, nor did they make any other factual or legal arguments related to the above (including collectability or the lack of damages), and plaintiffs submit they adequately addressed the three issues framed above and met their burden in their original opposition by showing that a causal link existed based upon those issues.[67]

The additional evidence that was submitted by plaintiffs in their motion for reconsideration went directly to arguments raised in the reply by the defendants (and in oral argument with this Court) that were directed to the impossibility of building the road and the obtaining of permits, and

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67 As previously argued, defendants and the trial court's reliance upon *Griswold v. Kilpatrick* is misplaced, since plaintiffs are not asserting that Safeco was willing to, or would have, paid more money "but for" the negligence of the defendants. Nor do plaintiffs assert that Safeco would have paid "more money" if the parties settled sooner. Plaintiffs argue that the failure of defendants to meet the standard of care in how the prosecuted plaintiffs' case resulted in their damages.

whether there would have been a "better result" had the equitable remedied been sought, and the case had been tried in 2005, rather than settled in 2009. Neither of these arguments was raised at all in the moving papers. See *White* at 168—"Nothing in CR 56(c), which governs proceedings on a motion for summary judgment, permits the party seeking summary judgment to raise issues at any time other than in its motion and opening memorandum." (Emphasis added).

In their response to plaintiffs' motion for reconsideration, defendants argued that White is not applicable, because unlike the defendant in White, who only raised the breach of the standard of care in its Motion for Summary Judgment, and then later raised causation in reply, the defendants raised both issues in their motion. The trial court agreed. However, in accepting this argument, the trial court elevated form over substance. Simply saying in their motion that plaintiffs cannot prove "proximate cause", without at least pointing to where in the record that issue is deficient, does not frame the issue for plaintiff to make a meaningful response. In this case, defendants framed the issue in their motion one way, and then have changed the substance of that issue repeatedly in their reply and even in its response to the motion for reconsideration—adding more "areas" of deficiency that were never raised before in their original motion. The intent of the reasoning in White is to allow the non-moving party the opportunity to directly address the issues

and prove it can meet its burden—not be left to "guess" which theory of "deficiency" the defendants are pursuing. In this case, plaintiffs did address the only issues defendants' framed in their motion and the trial court abused its discretion by permitting defendants to raise additional issues on reply, and then refusing to consider plaintiff's additional evidence.

Plaintiffs respectfully submit that both the evidence submitted in opposition to the Motion for Summary Judgment, as well as the evidence submitted with the Motion for Reconsideration establish triable issues of fact on the issues of proximate cause and damages, and the court should exercise its discretion in considering all the evidence which supports denial of defendants' Motion for Summary Judgment.

In their reply brief, during oral argument, and again in their response to this motion, defendants continue to argue that plaintiffs could not have "built a road" or had one permitted due to the fact that they would have required an easement from a third party and it was "impossible" to do so without such an easement or as contemplated by the parties.[68] Mr. Murray makes clear in his declaration that "***a design could***

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68 CP (I) 173 (page 34 of defendants' response). Defendants ***conceded*** that the first time they raised the issue of "impossibility" of building the road, or presented in any "evidence" in support, was in their reply and submitted that evidence in reply. [See page 34, footnotes 20 and 21]. There is no mention at all of "impossibility" or issues with permitting the road in their moving papers. As such, it was not unreasonable for plaintiffs to provide additional evidence to refute this defense as part of its motion for reconsideration.

be prepared that would not impact the land outside the 30' wide easement. The construction would be limited by a minimum setback of at least 2 feet from each side of the easement, depending on the height of cuts and fills needing support as required by the appropriate grading codes and standards." (Emphasis added).[69]

Whether or not plaintiffs *actually* built a road is not the relevant point for the court to focus on. As Mr. Brain points out, that was not the issue. The issue was that had defendant Leach proactively sought equitable relief, and had he acted to represent plaintiffs in a zealous manner that met the standard of care, there would have been an ***immediate*** resolution of the non-existent impossibility issue defendants continue to cite, and it no longer would be a matter of debate. Had the plaintiffs been in a position before 2005 to obtain the permits, build their homes and auxiliary buildings, conduct their business operations, they would not have suffered further and more extensive damages. Moreover, as Mr. Brain opines, this act alone likely would have accelerated a resolution and would not have required Mr. Leach to dismiss the case in the end of 2005, and would have cut-off any additional damages flowing to the plaintiffs.

With regard to John Seal's declaration, again defendants spend much time arguing the weight and credibility of his testimony under the guise of "evidentiary objections." However, Mr. Seal testifies that he was

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69 CP (I) 187-193 (Murray Declaration ¶6 and Exhibit 1 thereto).

aware of alternative designs that would have allowed for a permitted road that would have been contemplated by, and would have likely complied with the letter and spirit of, the Purchase and Sale Agreement ("PSA").[70]

Plaintiffs again submit that the evidence before the trial court, both in opposition to the Motion for Summary Judgment and as part of the Motion for Reconsideration, was sufficient to infer that (i) had defendants proceeded with equitable relief at the outset, a court would have very likely granted plaintiffs relief, either the right to proceed with the road themselves, or have assigned the right to obtain the permit subject to a later damage suit against the underlying defendants which would have allowed them to obtain permits for the building of their homes and auxiliary buildings. Moreover, taking all evidentiary inferences in the light most favorable to plaintiffs, had defendants prepared the case sufficiently and not voluntarily dismissed the first action, then plaintiffs' monetary damages would have likely been substantially limited and they would have recovered sufficiently in 2005 to avoid further damage.

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70 CP (I) 182-186. As they did with Mr. Brain's opinions, defendants also sought to strike the declarations of Mr. Murray and Seal, claiming they were not "identified" in plaintiffs' Primary Witness List and defendants some how were "prejudiced" by that. This argument is disingenuous as both Mr. Murray and Mr. Seal were both listed on the Defendants' own witness list at Page 6. At page 4 of Plaintiff's Witness List, Plaintiffs "adopt and incorporate those individuals and witnesses disclosed by the defendants in their witness lists as potential witnesses with knowledge of this matter." It is therefore difficult to understand how defendants were "prejudiced " by plaintiffs' use of witnesses identified ***by defendants as having knowledge of the facts of this case***, nor its clear how plaintiff is precluded from using those witnesses' declarations in opposition to a Motion for Summary Judgment, especially when the period for completing discovery had not ended and plaintiff adopted and incorporate defendants' witnesses in their list.

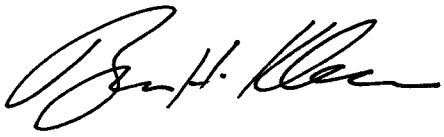
Again, plaintiffs submit a reasonable mind could reach more than just "one" conclusion in this case, and could conclude that plaintiffs would have "at least" achieved a "better result" than netting out $170,000 on a $8 million dollar (plus) claim.

IV. CONCLUSION

For all of the foregoing reasons, plaintiffs and appellants respectfully submits that the trial court erred in granting summary judgment, and further, by denying plaintiffs' motion for reconsideration. Accordingly, the orders below should be reversed and this matter remanded for trial.

Dated: June 30, 2014

LAW OFFICES OF BRIAN H. KRIKORIAN



By_____
Brian H. Krikorian, WSBA # 27861

On June 30, 2014, I caused to be served a copy of the document described as **Appellant's Opening Brief** on the interested parties in this action, by United States, First Class Mail and email, addressed as follows:

Philip Meade
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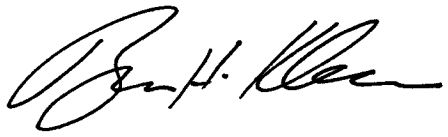
Seattle, WA 98121

Attorney for Defendants

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

Executed this 30th day of June, 2014.



Brian H. Krikorian

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