No. 97101-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

TERENCE BUTLER,

Petitioner,

v.

CALFO HARRIGAN LEYH & EAKES, LLP, a Washington Professional Limited Liability Partnership, f/k/a DANIELSON HARRIGAN LEYH & TOLLEFSON, LLP, et al.,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDING PARTIES

The responding parties are Calfo Harrigan Leyh & Eakes, LLP, and Randall Thomsen (collectively "Calfo"), defendants below.

II. INTRODUCTION

This legal malpractice case is the third in a trilogy of lawsuits involving Terence Butler ("Butler"). In the first ("*White*"), Calfo defended ImageSource and three shareholders, including Butler, against a fourth shareholder's claims. The *White* settlement included a release of claims.

After *White* (and Calfo's representation) ended, Butler's relationship with his former co-defendants deteriorated, and Butler sued. In the second case ("*Butler*"), the court made three rulings as a matter of law:

(i) the claims Butler asserted for company funds allegedly embezzled by other shareholders were ImageSource's claims that only the court-appointed receiver had standing to bring, and Butler lacked standing either individually or derivatively;

(ii) Butler's claim for a share of those funds were not "wages" under Washington's Wage Act; and

(iii) personal claims (if any) that Butler had that had accrued as of the *White* settlement were released.

In this third lawsuit ("*Calfo*"), Butler claims that Calfo negligently reviewed the *White* release, which the *Butler* court construed more broadly than intended. He now seeks to recover from Calfo – as wages – the same losses the *Butler* court held as a matter of law were not wages and that he had no standing to recover, regardless of the scope of the *White* release.

Calfo moved for summary judgment dismissing claims for most of Butler's alleged damages for lack of causation, because collateral estoppel precludes Butler from relitigating the standing and wage issues he litigated and lost in ***Butler*** that were dispositive independent of the ***White*** release. The *Calfo* court mistakenly held that issues of fact prevented it from deciding if collateral estoppel applied. The Court of Appeals reversed, because whether collateral estoppel applies is an issue of law, and it is undisputed that Butler vigorously litigated those issues in ***Butler*** and the ***Butler*** court addressed them on the merits adversely to him.

Butler moved for summary judgment that Calfo was negligent in its review of the ***White*** release. The parties submitted divergent expert opinions on whether Calfo breached the standard of care, and the *Calfo* court recognized that "if you look at the totality of everything, that perhaps a different Court would resolve this differently." Yet the *Calfo* court found Calfo negligent as a matter of law. The Court of Appeals reversed. It held that drafting a settlement agreement in the context of jointly representing multiple defendants in a complex business litigation is not within the common knowledge of laypersons. Thus, expert opinions were necessary, and conflicting opinions created a question of fact.

The rulings below apply long established precedent. As no grounds for review under RAP 13.4(b) exist, the petition should be denied.

III. RESTATEMENT OF ISSUES

1. Did the Court of Appeals properly apply collateral estoppel in holding that Butler is precluded from re-litigating issues that he lost in prior litigation, where the issues he lost were entirely unrelated to the attorneys' alleged negligence? Yes.

2. Did the Court of Appeals properly conclude that conflicting expert opinions regarding breach of the standard of care created issues of fact, where the alleged breach – reviewing a release in an agreement resolving claims against jointly represented defendants in a complex business litigation – is not within laypersons' common knowledge? Yes.

3. Did the Court of Appeals properly conclude that a disputed issue of fact regarding the meaning and scope of the release also precluded summary judgment of liability against Calfo? Yes.

IV. RESTATEMENT OF THE CASE

A. Calfo's Joint Representation of ImageSource and Three Shareholders in Litigation With a Fourth Shareholder, White.

ImageSource is a small company that had four equal shareholders: Butler, Terry Sutherland (CEO), Victor Zvirzdys (CFO), and Shad White. To enlist support for being named CEO, White told Butler that Sutherland had used company funds to pay extensive personal expenses. ImageSource's controller investigated, and initially ImageSource had paid approximately

$1.2 million of Sutherland's personal expenses over the years (most of which had been booked as loans to Sutherland). Butler had not received comparable loans or dividends. Sutherland, Zvirzdys and Butler agreed that ImageSource would "level up" Butler, but could defer full payment until financial conditions improved. CP 509:15-18, 510:10-13.

Anticipating litigation with White, Sutherland, Zvirzdys, and Butler jointly hired Randall Thomsen and the Calfo firm to advise them about the dispute with White. They told Thomsen that any issues between them about paying personal expenses had been resolved by the agreement to "level [Butler] out." CP 1251, 1268 at 16:10-17:4, 1270-71 at 24:25-26:13. Butler told Thomsen that his personal attorney had advised that the claims were not worth the time and expense of litigating, and having accepted the "level up" agreement, Butler viewed the matter as resolved. CP 1771-72 ¶ 20, 1271 at 28:7-15, 1279-80 at 144:21-146:8, 1529.

Based on these representations, Thomsen agreed to jointly represent Butler, Sutherland, Zvirzdys, and ImageSource. But he advised them to tell him if a dispute among them arose, and that if a dispute arose between them, he would not represent them in any such dispute. CP 1772 ¶¶ 21-24, 1835-37. After White sued, Thomsen believed that Butler continued to consult with his personal attorney throughout the case regarding any personal issues Butler had concerning ***White***. Thomsen never learned of any disputes between his

clients during the case. CP 1773-74 ¶¶ 26-27 & 30, 1839-42, 1844, 1846-47, 1781-82 ¶¶ 46-53, 1900-13.

The parties settled *White* in June 2012; ImageSource bought White's equity interest and the parties released claims, among other terms. App'x 60-63. White's counsel drafted an agreement that was intended to "more fully memorialize and finalize" the CR 2A Agreement the parties had signed. CP 1272 at 41:23-42:7; App'x 64. Calfo's representation of Butler ended in January 2013, shortly after the *White* agreement was signed. The "level up" agreement had not been breached at that point. CP 1273 at 80:4-17.

B. The *Butler* Litigation and Settlement.

After *White* settled, and after Calfo was no longer jointly representing the *White* defendants, the relationship among Butler, Sutherland, and Zvirzdys soured; Butler alleged that the others breached the "level up" agreement in mid-2013, months after the *White* settlement had been finalized and consummated. CP 511:11-12; *see also* CP 1264-65 at 236:22-239:5. ImageSource terminated Butler shortly after he demanded payment. Butler filed suit in December 2013 and obtained injunctive relief and appointment of a receiver for ImageSource. CP 1323-35, 478-99.

Butler then moved for summary judgment that Sutherland and Zvirzdys breached fiduciary duties and violated Washington's wage statute by using company funds to pay personal expenses and not paying Butler the

estimated $1.2 million that Sutherland had received or borrowed beyond his salary. CP 501-640. Sutherland and Zvirzdys, *and separately*, Butler's hand-picked receiver (all represented by other counsel) opposed Butler's motion. The ***Butler*** court denied the motion. It held as a matter of law that: (1) claims for misusing corporate funds belonged to ImageSource, which only the receiver had standing to pursue; (2) money Butler claimed he was owed to be "leveled up" with Sutherland were not "wages" under RCW 49.52, *et seq*.; and (3) Butler's personal claims (if any) that had accrued as of January 2, 2013, were released in the ***White*** settlement. App'x 53-56.

C. Butler's Lawsuit Against Calfo.

Before settling ***Butler***,[1] Butler sued Calfo for negligence in reviewing the ***White*** release. He seeks to recover from Calfo what he sought as wages in ***Butler***: $1.2 million in "level up" payments – the same damages the ***Butler*** court held were neither personal damages nor statutory wages. CP 1239-41; App'x 53-57. He also seeks (i) his share of company funds used to pay Sutherland's expenses beyond the $1.2 million estimate, other company losses caused by Sutherland and Zvirzdys wrongdoing, (ii) fees paid to Calfo in ***White***; and (iii) the attorneys' fees he incurred in ***Butler***.

[1] Butler later settled his claims in ***Butler*** for $2.6 million, structured as payment for his ImageSource stock, but which was an amount nearly five times what Butler had claimed his stock was worth in his divorce, and more than four times its appraised value. CP 1395-1485, 1489-92.

1. Calfo's Partial Summary Judgment Motion.

Calfo moved for partial summary judgment that the vast majority of damages Butler sought to recover were not caused by Calfo's alleged negligence. Calfo argued that Butler would have lost his claims in Butler regardless of the release, based on the standing and "wage" issues decided against him and which he was now collaterally estopped from re-litigating. CP 454-71, 2017-23.

2. Butler's Partial Summary Judgment Motion.

Butler moved for partial summary judgment on various issues, including that Calfo breached the standard of care in reviewing the *White* release. He supported his motion with expert testimony that Thomsen breached the standard of care by failing to ensure that the *White* release applied only to claims by and against White, and not to claims among the *White* co-defendants *inter se*. CP 451 ¶ 22. Calfo offered responding expert opinions from Robert Adolph, a Seattle litigator with decades of complex litigation experience. CP 1932-59. Adolph assumed the following facts – all supported by evidence in the record:

(1) Butler and the other *White* co-defendants resolved all disputes between them via the "level up" agreement before they hired Calfo;

(2) Calfo limited its engagement to claims by and against White, and excluded from the scope of its engagement any disputes between or among the *White* co-defendants;

(3) Butler had separate counsel who advised him on his personal interests throughout ***White***; and

(4) no disputes arose among the ***White*** co-defendants, nor was there a breach of the "level up" agreement, prior to the ***White*** agreement.

CP 1935-41. Based on these facts, Adolph opined that Calfo did not breach the standard of care because under those facts, a reasonably prudent lawyer would have no reason to review the release from the perspective of claims between his clients. Thus, the release competently memorialized the agreement to release claims by and against White. CP 1942-44.[2]

Adolph also opined – independently – that there was no breach because the release was not, in fact, as broad as the ***Butler*** court had construed it. He opined that the ***Butler*** court's mistaken ruling was due to a series of mistakes by Butler's lawyer, including: (1) failing to proffer a robust factual record in response to the release argument raised in opposition to his motion and (2) failing to make certain arguments. CP 1946-49 ¶¶ 21-26.[3] Adolph's declaration highlights evidence admissible under *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990) – much of which Butler's attorney did not offer or articulate – which showed that the ***White*** release did not encompass claims *inter se* between the ***White*** co-defendants, including that:

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[2] These opinions are independent of how a judge would have ruled on the scope of the release based on a full record and proper contract interpretation arguments.

[3] Adolph's opinions regarding the scope of the release were not offered to tell the court how it should rule on that issue. These opinions were offered regarding the negligence of Butler's attorney to oppose Butler's motion to dismiss Calfo's third party fault defense.

- No claims other than those by and against White were discussed during the June 2012 mediation (or thereafter), which produced a CR2A Agreement that specified a bilateral release between White, on the one hand, and the ***White*** defendants on the other.

- The preamble to the ***White*** Agreement states that it acts to resolve the claims alleged in the Thurston County Action.

- Recital B identifies the disputes as only White's employment and ownership claims.

- Recital D states that the ***White*** Agreement's purpose is to finalize the terms contained in the CR2A Agreement. No intention is stated to resolve other claims.

- No additional consideration was paid beyond that stated in the CR2A Agreement, which would have been necessary to support a broader release in the final ***White*** Agreement.

As these and other facts show, whether the ***White*** release encompassed claims *inter se* between the ***White*** co-defendants – the predicate to Butler's claims against Calfo – was an issue of fact, and the ***Butler*** court simply was wrong.[4]

3. The Trial Court's Summary Judgment Rulings.

The trial court held that Calfo breached the standard of care as a matter of law despite competing expert testimony. App'x 24-26. It denied Calfo's collateral estoppel motion, holding that whether the doctrine applied was a question of fact. App'x 27. Its oral ruling reflects its usurpation of the jury's role in determining breach and confusion regarding collateral estoppel:

[4] The ***Butler*** court's interpretation of the release leads to implausible results: wholesale releases of unidentified claims against shareholders, amongst shareholders and their lawyers, or amongst shareholders and company employees – all for no consideration beyond that in the CR2A Agreement that specified a release only of claims by and against White. These arguments were never pressed by Butler's attorney.

> THE COURT: …. So now I want to go to plaintiff's motion with regard to breach of the standard of care.…
>
> And I have reviewed everything. There are frankly very good arguments on both sides. *I do understand that if you look at the totality of everything, that perhaps a different Court would resolve this differently*. But I – I believe that the standard of care was breached.…
>
> … The harder question for this Court is what to do with the other portions of the motions, those brought by defendant.… You know, I do not find that the law on what his wage is sufficiently clear….
>
> [T]here are just too many questions of fact to the nature of those payments. And, frankly, they do look more to me like gratuitous gifts or payments.… So I think there are just simply too many questions of fact here despite the very excellent advocacy for this Court to grant the defendant's motion as to causation and as to collateral estoppel.…
>
> MR. PETRAK: And the question of fact as to collateral estoppel is on the wage issue?
>
> THE COURT: That's the one that comes to me mostly, but I don't want to limit myself. I'm not making any specific rulings about, you know, other issues of fact....
>
> MR. PETRAK: What I want to make sure I understand is, collateral estoppel as an issue is still in the case, but it just presents factual questions as opposed to no collateral estoppel.
>
> THE COURT: That's correct. That's absolutely correct. I'm not granting it on anyone's behalf. I'm just denying it, because I think that there are frankly too many questions of fact.

App'x 34-38 (emphasis added).

4. <u>The Court of Appeals Rulings</u>.

The Court of Appeals granted Calfo's motion for discretionary

review. After two attempts to have the grant of review reversed were denied (by the Court of Appeals, then by this Court (No. 94939-5)), the matter was heard by the Court of Appeals on the merits.

In an unpublished decision (that the Court of Appeals declined to publish despite Butler's request), the Court of Appeals reversed the trial court's rulings. *Butler v. Thomsen*, No. 76536-1-I, App'x 1-20. It held that the elements of collateral estoppel were met and that the trial court had erred in concluding issues of fact prevented its application. App'x 5-11. It also held that the trial court erred in finding liability as a matter of law when expert opinions differed on issues that are not within the common knowledge of laypersons. App'x 11-15.

V. ARGUMENT

Summary: Collateral Estoppel. The Court of Appeals properly applied collateral estoppel in holding that Butler is estopped from re-litigating two issues decided adversely to him in *Butler*. The Court of Appeal's decision is entirely in line with all Washington precedent. While Butler claims that the Court of Appeals' straight-forward application of governing collateral estoppel authority conflicts with unrelated legal malpractice jurisprudence, in substance he just disagrees with its conclusion. He argues that a "manifest injustice" would occur if collateral estoppel were to be applied "to prevent the client from re-litigating an issue

that had been decided 'based on attorney misfeasance or nonfeasance.'" Pet. at 12; *see also id.* at 3-4. But therein is the fallacy of his argument: the two issues to which collateral estoppel was applied (***Butler***'s standing and wages rulings) are unrelated to what Butler claims was Calfo's negligence (the review of the ***White*** agreement's release). There is no injustice in applying collateral estoppel, or any basis for review under RAP 13.4(b)(4).

Summary: Liability as a Matter of Law. Whether or not the standard of care has been breached in a legal malpractice case is generally a subject for expert testimony. *Walker v. Bangs*, 92 Wn.2d 854, 857-58, 601 P.2d 1279 (1979); *Slack v. Luke*, 192 Wn. App. 909, 916-17, 370 P.3d 49 (2016)). Thus, competing expert opinions create an issue of fact that precludes summary judgment. *Arden v. Forsburg & Umlauf, P.S.*, 189 Wn.2d 315, 328-29, 402 P.3d 245 (2017). Given conflicting opinions regarding whether Calfo breached the standard of care, the Court of Appeals properly concluded that it was error to grant summary judgment on liability.

Once again, Butler does not suggest that the Court of Appeals deviated from the general rules applicable to legal malpractice claims, but rather disputes its conclusion. He argues that this case is one of the rare ones where an attorney's alleged negligence is within the common knowledge of lay persons. He is wrong (and the Court of Appeals was

right) for two reasons. First, Butler defines the issue too narrowly. Whether an attorney met the standard of care depends on *all* relevant circumstances. The Court of Appeals properly concluded that "joint representation in a complex business litigation matter… can hardly be considered within the common knowledge of laypersons." App'x 15.[5] Thus, "[e]xpert opinion evidence on these complex legal circumstances is both appropriate and necessary." *Id*. Second, Butler's liability theory assumes that the ***Butler*** court correctly interpreted the ***White*** release. The Court of Appeals decided – rightly – that Calfo is not bound by that decision, and that the scope of the ***White*** release is a question of fact for the jury to decide in the "case-within-a-case."

Under RAP 13.4(b), review shall only be accepted if the appellate decision conflicts with governing authority, raises a significant constitutional issue, or invokes an issue of substantial public interest. The Court of Appeals' rulings do not qualify under any of these standards.

A. Applying Collateral Estoppel to the Standing and Wage Rulings Does Not Conflict With Washington Precedent.

In reversing the trial court, the unanimous Court of Appeals decision applied well-established precedent governing the application of collateral estoppel. *See* App'x 5-10. Collateral estoppel applies when four

[5] The issue becomes even more complicated given Calfo's belief that Butler was consulting with separate counsel on personal issues, who Butler could have but (unbeknownst to Calfo) elected not to have review the settlement agreement.

elements are met: (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) its application does not work an injustice on the party against whom the doctrine is to be applied. App'x 6 (citing *Malland v. Dep't of Ret. Sys.*, 103 Wn.2d 484, 489, 694 P.2d 16 (1985)). The Court of Appeals correctly concluded that the ***Butler*** summary judgment decisions regarding standing and the wage claims were sufficiently final to invoke the doctrine. Washington courts have repeatedly held that a party's subsequent decision to settle does not defeat the application of collateral estoppel to an earlier decisive judgment. *See* App'x 7 (citing *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 263-64, 956 P.2d 312 (1998) & *In re Dependency of H.S.*, 188 Wn. App. 654, 660-61, 356 P.3d 202 (2015)).

The lower court also concluded that applying collateral estoppel to ***Butler****'s* determination of the standing and wage issues would not cause an injustice to Butler. App'x 7-11. Butler does not argue that the Court of Appeals applied the wrong test, rather his petition merely disagrees with the outcome. None of Butler's arguments are persuasive.

First, Butler argues that a manifest injustice will result because legal malpractice plaintiffs must be permitted to make reasonable settlement decisions to resolve the risks of harm created by the alleged

malpractice. Pet. at 3-4, 12. Thus, he claims that the decision conflicts with *Barr v. Day*, 124 Wn.2d 318, 879 P.2d 912 (1994), which held that collateral estoppel does not prevent a client from re-litigating an issue that was decided "based on attorney misfeasance or nonfeasance." Pet. at 12. But the standing and wage issues that Calfo sought to bar Butler from re-litigating were separate and distinct from Calfo's alleged negligence regarding the ***White*** release. Put simply, nothing Calfo did reviewing the ***White*** release created a risk of judicial error by the ***Butler*** court regarding either the standing or the wage issue. The decision below highlighted this fundamental flaw in Butler's petition:

> If Butler had lost on his breach of fiduciary duty and statute wage claims because of the ***White*** Release, he could bring a claim against [Calfo] to recover what he would otherwise have recovered for such claims in the ***Butler*** Litigation. However, when as occurred here, Butler's breach of fiduciary duty and statutory wage claims failed for reasons other than the ***White*** Release, Butler cannot then seek to recover for those claims on the ground that [Calfo] committed malpractice when reviewing the language of the ***White*** Release.

App'x 8-9, n.3. When a party litigates and loses an issue unconnected to alleged attorney negligence, and then chooses to settle rather than appeal the adverse ruling, justice does not require a special exception to the collateral estoppel doctrine. Every litigant can – and should – weigh the import of substantive rulings made to date in a case in deciding whether to settle or to appeal. There is no injustice in this truth, and the Court of

Appeals' ruling does not inhibit a litigant's ability to engage in this analysis. Indeed, the "settlement" exception to the collateral estoppel doctrine that Butler is proposing not only conflicts with established law, but it would swallow the doctrine whole and virtually eliminate it.

Butler also argues that the trial court "implicitly" recognized that collateral estoppel is unjust because the law regarding the wage issue changed subsequent to the **Butler** decision, citing *LaCoursiere v. Camwest Development, Inc.*, 181 Wn.2d 734, 339 P.3d 963 (2014). *See* Pet. at 9.[6] But the trial court's oral ruling makes clear that this was *not* the basis for its ruling; it mistakenly held that whether collateral estoppel applied was a question of fact. In any event, *LaCoursiere* did not deviate from existing Wage Act jurisprudence. *LaCoursiere* recognized existing authority which held that unpaid discretionary bonuses, and bonuses paid but not for work performed, were *not* wages. It then held that "bonuses, *once paid for work performed*, are wages." 181 Wn.2d at 741-42 (emphasis added). Thus, it addressed only whether – and held – that employee bonuses are wages under the Act if "already paid for work performed." *Id.* at 743-44. What Butler sought was neither already paid or for work performed; he sued for unpaid "level up" payments to equalize him with what another shareholder

[6] Butler's petition does not cite or argue *LaCoursiere* in the argument section; rather only in the statement of the case explaining what was argued below. Out of an abundance of caution, Calfo treats it as an argument being made in favor of review.

received in payment of personal expenses.[7]

Moreover, perhaps more importantly and as the Court of Appeals noted, *LaCoursiere* was published only a few months after ***Butler***'s summary judgment ruling *and almost a year before Butler settled that case*. Butler "had sufficient opportunity to bring the *LaCoursiere* decision to the attention of the trial court." App'x 10-11.[8] And he knew, or should have known, about *LaCoursiere* when he chose to settle rather than appeal. So he had the opportunity to seek review of any ruling he believed to be erroneous. He cannot now use his decision to settle as a shield to block the application of collateral estoppel and obtain a second bite at the litigation apple on an issue unrelated to the alleged negligence in this case.

B. The Court of Appeals Properly Concluded That Issues of Fact Precluded Summary Judgment on Liability.

Divergent Expert Opinions Create A Question of Fact on Liability:

Butler does not argue that the Court of Appeals failed to apply governing case law regarding breach of the standard of care in legal malpractice actions. Instead he argues that the Court of Appeals erred because it did

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[7] *See, e.g., Arzola v. Name Intelligence, Inc.*, 172 Wn. App. 51, 288 P.3d 1154 (2012), *Amended on Denial of Reconsideration*, (April 8, 2013) (payments to employees under stock right cancellation agreement were not "wages" as payments were not for employees' services to company).

[8] Similarly, the *Donlin v. Murphy*, 174 Wn. App. 288, 300 P.3d 424 (2013) opinion about a shareholder's standing to pursue derivative claims after the company was dissolved was decided well before Butler brought his motion in ***Butler***; his attorney simply failed to cite it – likely because the case is inapplicable to the facts of ***Butler*** as argued below.

not conclude that the alleged breach was so blatantly obvious as to be within the common knowledge of laypersons. But he does not identify one Washington case that conflicts with the Court of Appeal's ruling reversing the trial court's liability summary judgment ruling. The most he can muster is that the decision below "is inconsistent" with *Walker v. Bangs*, 92 Wn.2d 854, 601 P.2d 1279 (1979). Pet. at. 5. Not only is the Court of Appeals' ruling consistent with *Walker*, it expressly relies on that case in framing the analysis. *See* App'x 12. What Butler disagrees with – once again – is not the law the court applied, but the result. That does not meet the standard for review under RAP 13.4(b).

Butler and the Court of Appeals agree on the standard of care for a Washington attorney. *Compare* Pet. at 17 (citing *Hizey v. Carpenter*, 119 Wn.2d 251, 261, 830 P.2d 646 (1992)) *with* App'x 11 (citing *Geer v. Tonnon*, 137 Wn. App. 838, 850-51, 155 P.3d 163 (2007) (*quoting Hizey*, 119 Wn.2d at 261)). They also agree that *Walker* holds that law is a "highly technical field beyond the knowledge of the ordinary person" and thus ordinarily requires expert testimony to determine whether a breach of the duty of care occurred, unless the breach is so obvious it is within the common knowledge of laypersons. *Compare* App'x 12 *with* Pet. at 18. It is Butler, not the Court of Appeals, who takes an overly simplistic and erroneous position in arguing that this is the rare case that presents such a

blatant breach of the standard of care that expert testimony is unwarranted.

To prove a breach as a matter of law, Butler needed to proffer undisputed expert testimony that no reasonable Washington attorney acting under similar circumstances would have acted as Calfo did. *Clarke Cnty. Fire Dist. No. 5. v. Bullivant Houser Bailey PC*, 180 Wn. App. 689, 701, 324 P.3d 743 (2014). What a reasonable attorney would do depends on the circumstances: the scope of the engagement, what the lawyer became (or should have become) aware of during the engagement, etc. In the eyes of the Court of Appeals, Butler's motion failed in part because his expert did not address the surrounding circumstances, while Calfo's exert did. Calfo proffered Thomsen's detailed testimony regarding the circumstances as he knew them and why he acted as he did – facts and inferences which must be accepted and drawn in Calfo's favor in this context. CP 1767-1931. Based on that testimony, Calfo's expert opined that given: (i) what Mr. Thomsen was told by Butler, Sutherland, and Zvirzdys, (ii) the limited scope of Calfo's engagement (excluding disputes amongst his clients), and (iii) that to Calfo's knowledge Butler was represented by personal counsel throughout, Calfo did not breach the standard of care in reviewing the release. CP 1942-44. The Court of Appeals correctly concluded that, "[t]he circumstances herein, a joint representation in a complex business litigation matter, can hardly be

considered within the common knowledge of laypersons. Expert opinion evidence on these complex legal circumstances is both appropriate and necessary." App'x 15 (citing *Geer*, 137 Wn. App. at 851-52). Disputes between experts must be resolved by a jury.

Issues About the Scope of the Release Create Issues on Liability. The foundational premise of Butler's liability theory is that the *White* release improperly encompassed claims between the *White* co-defendants. If the release was *not* so broad, then there was no breach of the standard of care. The Court of Appeals correctly concluded that because Calfo was not a party to *Butler*, it is not collaterally estopped from litigating the release's scope. App'x 14, n.11. It reviewed the evidence, and concluded that the scope of the *White* release was a disputed fact that the jury in the "case within the case" decides. As the scope of the *White* release is a disputed factual issue, granting summary judgment on liability was reversible error.

VI. CONCLUSION

The Court of Appeals' application of collateral estoppel is firmly grounded in Washington law and consistent with this Court's precedent. So are its rulings that competing expert opinions on the standard of care and conflicting evidence regarding the *White* release's scope create issues of fact on liability. Butler has failed to satisfy any grounds for review.

DATED this 31st day of May, 2019.

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 31st day of May, 2019, a true copy of the foregoing was served on each and every attorney of record herein via email:

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

DATED in Seattle, Washington, this 31st day of May, 2019.

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