100085-5

No. 81406-1-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

3320 MLK, LLC, a Washington Limited Liability Company; CARL RAYMOND HAGLUND, a single person, COLUMBIA CITY CONDOS #1, LLC, a Washington Limited Liability Company,·4532 S. HENDERSON, LLC, a Washington Limited Liability Company; 2023 24th AVE, LLC, Limited Liability Company; CLAREMONT PROPERTIES, LLC, a Washington Limited Liability Company; COLOMBIA CITY CONDOS-OW AHE, LLC, a Washington Limited Liability Company; COLUMBIA CITY CONDOS-KENNY, LLC, a Washington Limited Liability Company; COLUMBIA CITY CONDOS-CORAL REEF # 1, LLC; a Washington Limited Liability Company; CONDOS-CORAL REEF #2, LLC; a Washington Limited Liability Company; MY BIG CHINESE ROOSTER INVESTMENT, COMPANY, LLC, a Washington Limited Liability Company; BIG ROOSTER INVES1MENTS, LLC, a Washington Limited Liability Company; COLUMBIA MODERN LIVING, LLC, a Washington Limited Liability Company; I STREET, LLC, a Washington Limited Liability Company; SEW ARD PARK, LLC, a Washington Limited Liability Company; 910 S. BYRON, LLC; a Washington Limited Liability Company; 3320 MICRO, LLC, a Washington Limited Liability Company; 3948 FARRAR, LLC, a Washington Limited Liability Company; 5949 36, LLC, a Washington Limited Liability Company, and; 5002 ROSE, LLC, a Washington Limited Liability Company,

Petitioners,

v.

HELSELL FETTERMAN, LLP a Washington Limited Liability Partnership, and BRANDON S. GRIBBEN, Individual and on Behalf of the Marital Community Comprised of BRADON GRIBBEN and JANE DOE GRIBBEN,

Respondents.

PETITION FOR REVIEW

Brian J. Waid, WSBA #26038
Waid Law Office, PLLC
5400 California Ave SW, Suite D
Seattle, WA 98136
(206) 388-1926

Philip A. Talmadge, WSBA #6973
Aaron P. Orheim, WSBA #47670
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Petitioners

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A. IDENTITY OF PETTITIONERS

3320 MLK, LLC, Carl Raymond Haglund, 2023 24th Ave, LLC, Claremont Properties, LLC, Columbia City Condos-Owaha, LLC, Columbia City Condos-Kenny, LLC; Columbia City Condos-Coral Reef #1, LLC, Columbia City Condos-Coral Reef #2, LLC, My Big Chinese Rooster Investment Company, LLC, Big Rooster Investments, LLC, Columbia Modern Living, LLC, I Street, LLC, Seward Park, LLC, 2910 S. Byron, LLC, 3320 Micro, LLC, 398 Farrar, LLC, 5949 36, LLC, and 5002 Rose, LLC (hereafter "Haglund") are the petitioners seeking review of the Court of Appeals decision terminating review identified in Part B.

B. COURT OF APPEALS DECISION

Division I of the Court of Appeals filed its decision affirming a trial court order on summary judgment on July 19, 2021. A copy of that decision is in the Appendix at pages A-1 through A-20.

C. ISSUE PRESENTED FOR REVIEW

Where a client's attorney failed to timely file a supersedeas bond, permitting a judgment creditor to establish RCW 25.15.256 charging order liens against all of the LLC properties owned by the client to the client's detriment, did the trial court err in concluding that the client failed to establish the harm element of his professional negligence claim or fiduciary duty claim?

D. STATEMENT OF THE CASE

Division I's opinion sets out the facts and procedure in this case. Op. at 1-7. That recitation is largely correct, but several facts bear emphasis.

Attorney Brandon Gribben of the Helsell Fetterman law firm ("Helsell") failed to properly handle the trial of an action brought against Carl Haglund and 3320 MLK, LLC by Pacific 500, resulting in a more than $1.147 million judgment against them. Stephanie Bloomfield, Haglund's highly experienced expert, CP 591-97, testified that Gribben failed to timely submit his list of witnesses for trial, did not conduct necessary discovery, and failed to follow up on key witnesses, whose testimony would have been favorable to Haglund. CP 600-02. Those witnesses' testimony was excluded by the court as a result of their tardy disclosure by Gribben. CP 600-01. At trial, she opined that Gribben's cross-examination of witnesses at trial was also ineffective because he had not obtained their depositions. CP 602.[1]

That trial-related poor performance was exacerbated by Gribben's inexplicable failure to file a supersedeas bond to stay enforcement of the judgment that resulted in RCW 25.15.256 charging orders being established against other LLCs (the other petitioners here) owed by

[1] While Haglund believes that Division I's treatment of his legal malpractice/breach of fiduciary duty claims against Helsell for Gribben's inexplicably poor performance at trial was erroneous, its petition to this Court focuses on the supersedeas issue.

Haglund.

The trial court entered a judgment on June 29, 2017 against Haglund and 3320 MLK, LLC. CP 684-747. Under the timelines set forth in CR 62(a) and CR 6(a) for stays of enforcement of a judgment, Pacific 5000 could not have commenced execution proceedings in connection with the judgment until *after* Monday, July 10, 2017. CP 605. On Friday, July 7, 2017, Haglund obtained a $1.525 million supersedeas bond from Travelers Casualty and Surety Company to prevent Pacific 5000 from executing on its judgment. CP 759-60.

Overlooked by Division I in its opinion is the fact that between June 29 and July 7, Haglund *repeatedly* reminded Gribben of the importance of posting the supersedeas bond and of his worry that the bond must not be filed late. CP 662-63, 797-810. On July 7, Haglund hand delivered the supersedeas bond to Gribben for filing with the Pierce County Superior Court. CP 760. Still on that same day, July 7, Gribben sent an email to Haglund at 12:09 p.m. in which he acknowledged having received the bond, stating: "Bond looks good. I should be around after 2:30 p.m. to discuss." CP 664, 798. Inexplicably, Gribben, did not file the supersedeas bond *until five days later*, on Wednesday, July 12, 2017. CP 749-52, 760, 767-69. Gribben never told Haglund that he was not promptly filing the bond. CP 602. Helsell *conceded* in discovery

responses and deposition testimony that Gribben had no explanation for his delay in filing and serving the supersedeas bond. CP 662, 780, 787 ("Defendants do not recall why the supersedeas bond was not filed prior to July 12, 2017."). Gribben did not communicate the existence of the supersedeas bond to Pacific 5000's counsel until either July 12 or 13, 2017. CP 793. Helsell conceded that the bond was not timely filed. Resp'ts br. at 10.

On Tuesday, July 11, 2017, during the interim period between his receipt of the supersedeas bond on Friday, July 7, and Gribben's filing of the bond on July 12, Pacific 5000 obtained a charging order *ex parte* under RCW 25.15.256 against 18 of Haglund's LLCs. CP 760, 771-74. The charging order prevented the Haglund LLCs subject to it from closing any pending or proposed real estate transactions and interfered with Haglund's business interests, including but not limited to his interests in the LLCs; Fidelity National Title, Haglund's title insurer as to a transaction involving one of the affected LLCs, would not close the transaction because of the charging order. CP 603, 1019-29.

A point omitted from Division I's opinion was Gribben's decided and intentional lack of knowledge of charging orders. Gribben testified that prior to receiving the charging order on July 14, he had not seen a charging order and was not sure whether he understood the ramifications

of a charging order. CP 660. Notwithstanding his own lack of understanding about charging orders, he did not consult with attorneys in his own firm or others about them. *Id.* Gribben conceded that he was aware that real estate developers "certainly create LLCs" and had seen the use of single project limited liability companies "many times," *id.,* and acknowledged that Haglund had "mentioned other [real estate] projects" and recalled Haglund emailing him prior to expiration of the bonding period that Haglund had over $150,000,000 in real estate projects in place. CP 660-61, 809.

Gribben eventually filed the bond several days past the deadline, but the damage was done. The charging order remained in place, clouding title to Haglund's LLCs' properties and preventing Haglund from conducting important real estate transactions. CP 602-03, 1019-29. Despite Bloomfield's efforts as successor counsel to Helsell, CP 596, Haglund was unable to remove the charging order, and, therefore, he was forced to drop his appeal and satisfy the outstanding judgment, so that his business transactions could proceed. *Id.* The charging order was vacated only *after* the satisfaction of the judgment. CP 325-27.

Bloomfield documented the harm caused by Gribben's inexcusable failure to timely file the bond and prevent the charging order from issuing:

> In late 2017, Haglund had real estate transactions involving these separate LLC's that he wished to close. However, due to the plaintiff's charging order Fidelity National Title would not allow the deals to close. Haglund attempted to obtain court relief to vacate the charging order without success. Plaintiff in the underlying matter was unwilling to enter a stipulation that would allow the transactions to close. Thus, Haglund had no reasonable choice but to forego his appeal and pay the judgment so as not to lose the sales he had negotiated. There was no reasonable alternative that would allow his real estate transactions to close.

CP 603. This harm to Haglund was occasioned by Gribben's breach of the standard of care and his fiduciary duty to Haglund. CP 605 ("Gribben's failure to file the supersedeas bond within the 10 day window allowed the Plaintiff to obtain a charging order that prevented Haglund from closing real estate transactions involving property owned by the LLCs subject to the charging order.").

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED[2]

[2] Division I correctly articulates the standard of review on summary judgment, op. at 8, but overlooks an important factor applicable here. When expert opinions come to differing conclusions on a key issue, that creates a plain issue of fact for the jury. *E.g.*, *Intalco Aluminum v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 662, 833 P.2d 390 (1992), *review denied*, 120 Wn.2d 1031 (1993) (holding that such cases present "a classic battle of the experts, a battle in which the jury must decide the victor.") (quoting *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1535, *cert. denied*, 469 U.S. 1062 (D.C. Cir. 1984)). *See also*, *Chen v. City of Seattle*, 153 Wn. App. 890, 900, 223 P.3d 1230 (2009), *review denied*, 169 Wn.2d 1003 (2010); *Bowers v. Marzano*, 170 Wn. App 498, 290 P.3d 134 (2012) (experts in disagreement on cause of auto crash); *Advanced Health Care, Inc. v. Guscott*, 173 Wn. App. 857, 295 P.3d 816 (2013) (differing opinions in medical negligence action as to cause of patient's injury); *C.L. v. State Dep't of Soc. & Health Servs.*, 200 Wn. App. 189, 200, 402 P.3d 346 (2017), *review denied*, 192 Wn.2d 1023 (2019) ("In general, when experts offer competing, apparently competent evidence, summary judgment is inappropriate.").

At the core of this case is the question of attorneys' competent handling of supersedeas, Title 8 RAP. The Court has only rarely addressed supersedeas issues, and the effect of charging orders under RCW 25.15 is a question of first impression.[3] The practicing bar and the public would benefit from the Court addressing those issues. RAP 13.4(b)(4).

(1) Division I Erred in Deciding Malpractice as a Matter of Law

Initially, Division I repeated the trial court's error in concluding that Helsell owed no duty to the 18 Haglund LLCs affected by its negligence in connection with its failure to timely file the supersedeas bond here. Op. at 13 n.7. As will be noted *infra*, this is not a *duty* issue, but a *damages* issue. Compounding that misperception, the court upheld Helsell's blatant failure to post the bond by claiming that Helsell's *post-hoc* agreement with Pacific 500's counsel not to enforce the judgment and Haglund's inability to close real estate transactions relating to LLC property sustained a determination on summary judgment that Haglund

[3] Charging orders are not commonly understood. As the Kansas Supreme Court observed in *City of Arkansas City v. Anderson*, 752 P.2d 673, 682 (Kans. 1988) in connection with a charging order under the Uniform Partnership Act "there are few cases and very little authority on the actual procedure to be followed in enforcing a charging order."

was not harmed as a matter of law. Op. at 14.[4] Division I was wrong, particularly on summary judgment where all facts, and reasonable inferences from those facts, must be interpreted in a light most favorable *to Haglund*, not Helsell.

In a legal malpractice action, a plaintiff must prove the traditional elements of a negligence claim – duty, breach of that duty, harm, and proximate causation between the breach and the harm. *Schmidt v. Coogan*, 181 Wn.2d 661, 665, 335 P.3d 424 (2004); *Ang v. Martin*, 154 Wn.2d 477, 481-82, 114 P.3d 637 (2005); *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992). Regarding causation, a plaintiff must establish the so-called "case within a case," *i.e.* that the client would have prevailed or improved upon his/her position but for the attorney's negligence. *Daugert v. Pappas*, 104 Wn.2d 254, 257-58, 704 P.2d 600 (1985). In specific, the client must have "fared better" but for the attorney's professional negligence. *Id.* at 257; *Auer v. Leach*, 190 Wn. App. 1043, 2015 WL 6506549 at *10 (2015), *review denied*, 185 Wn.2d 1024 (2016).

First, Haglund had an attorney-client relationship with Helsell, given his reasonable subjective belief that it existed. *Dietz v. Doe*, 131

[4] And, moreover, Division I ignores the fees charged both by Helsell and Bloomfield Haglund needlessly incurred to undo Helsell's negligence.

Wn.2d 835, 843-44, 935 P.2d 611 (1977); *In re Disciplinary Proceedings Against McGlothlen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983); *Schmidt*, 181 Wn.2d at 665. As of mid-October 2016, and certainly no later than Helsell's appearance in the *Pacific 5000* litigation on October 31, 2016, *Helsell represented Haglund and 3320 MLK, LLC* and continued to do so through the time that Gribben missed the supersedeas deadline, thus causing the charging order to issue against Haglund's other LLCs.

Based on Helsell's argument, the trial court may have confused the duty Helsell owed to Haglund with a duty owed to the various Haglund LLCs against which charging orders were issued. CP 45-46, 51-52. Division I repeated this ostensible error failing to recognize that the argument is not so much a duty issue, as it was a damages issue.[5] The

[5] Even if this were a duty issue, Helsell owed a duty to those LLCs under *Bohn v. Cody*, 119 Wn.2d 357, 835 P.2d 71 (1992) and *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994) in any event. Under the *Trask* factors for a duty to third parties:

> (1) the extent to which the transaction was intended to benefit the plaintiff;
> (2) the foreseeability of harm to the plaintiff;
> (3) the degree of certainty that the plaintiff suffered injury;
> (4) the closeness of the connection between the defendant's conduct and the injury;
> (5) the policy of preventing future harm; and
> (6) the extent to which the profession would be unduly burdened by a finding of liability.

id. at 842, Helsell owed the LLCs a duty of care. Helsell knew that the supersedeas was important to protect Haglund's real estate transactions. It was a foreseeable and certain result of Helsell's negligence that Pacific 500 would seek to collect on the judgment, including causing charging orders to issue against his LLCs. That is precisely why Haglund repeatedly insisted that Gribben file the bond in a timely fashion. A lawyer

point is: Helsell owed Carl Haglund/3320 MLK LLC a duty and Haglund was harmed by the charging order's effect on the 18 LLCs he owned. Haglund was foreseeably harmed by Helsell's negligence in failing to prevent enforcement of the judgment, as Gribben himself admitted. CP 660-61, 809.

Helsell breached its duty to Haglund when Gribben failed to timely file the supersedeas bond.[6] The failure to file a supersedeas bond is like the failure to file a notice of appeal. That failure is plain malpractice. It did not even require an expert to establish breach;[7] rather, the trial court acts as the appellate court in determining the impact of the breach of duty upon the client. *Daugert*, 104 Wn.2d at 258-59.

The same analysis applicable to a failure to timely file a notice of

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must understand the clear procedural rules and deadlines of CR 62 and RAP 8.1, and should be versed in them to prevent future, foreseeable harm from occurring, as Bloomfield testified. CP 605 ("A Washington attorney would be expected to be familiar with the timeline for bonding a judgment.").

[6] Gribben's failure to timely file the bond not only implicates his ethical duty to be competent per RPC 1.1, it clearly implicates his duty under RPC 1.3 which provides: "A lawyer shall act with reasonable diligence and promptness in representing a client." Comment [3] to the rule is clear: "Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected, in substance, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness."

[7] Here, of course, Haglund had extensive expert testimony documenting that the standard of care required the filing of a bond, CP 605, and that Gribben breached the standard in failing to file it, *id*., and then misleading Haglund about it. CP 606.

appeal applies when the malpractice is the failure to file a claim within the statute of limitations or to timely file a supersedeas bond. *Nielson v. Eisenhower & Carlson*, 100 Wn. App. 584, 999 P.2d 42, *review denied*, 141 Wn.2d 1016 (2000) (statute of limitations). In such instances, the "cause in fact inquiry becomes whether the frustrated client would have been successful if the attorney had timely filed the appeal." *Id*. at 258. This is a *question of law* for the court. This present case is precisely one where the trier of fact must "engage in an analysis of the law." The trial court needed to analyze the precise effect of Gribben's failure to timely file the supersedeas bond on Haglund's interests, but it did not do so, particularly where it declined to reveal its analysis.

Finally, at a minimum, Haglund proved harm.[8] Under RAP 8.1(b), a timely filing of the bond stayed enforcement of the trial court's judgment.[9] Gribben was obligated to understand the supersedeas process as well as the law of charging orders, as Haglund's expert, Bloomfield,

[8] Division I seems to imply that Haglund bore the burden on summary judgment of proving the quantum of his damages rather than the existence of harm from Helsell's negligence. Op. at 15. That is not so. Haglund met his burden of proving the fact of harm from Helsell's negligence. The amount of damages is for the jury. *Abawi v. Qureshi*, 14 Wn. App. 2d 1012, 2020 WL 4596297 (2020), *review denied*, 196 Wn.2d 1038 (2021) at *8 ("… with regard to the damages element, to defeat summary judgment, [the plaintiff] was required to present evidence of the *fact* of damages caused by the defendant's conduct, not the amount of damages.") (court's emphasis).

[9] *E.g.*, *Ryan v. Plath*, 18 Wn.2d 839, 855, 140 P.2d 968 (1943) ("The purpose of a supersedeas bond is to stay further proceedings in the superior court…"); *Guest v. Lange*, 195 Wn. App. 330, 338, 381 P.3d 130 (2016), *review denied*, 187 Wn.2d 1011 (2017) ("…when a supersedeas bond is filed, the judgment cannot be enforced.").

opined. CP 605.

By failing to timely file the bond, Helsell allowed for the issuance of charging orders authorized under RCW 25.15.256 against *all* of Carl Haglund's LLCs. CP 605. *Haglund* was harmed by the charging orders directed to the other LLCs, as Bloomfield testified. CP 603. This harm to Haglund was occasioned by Gribben's breach. CP 605 ("Gribben's failure to file the supersedeas bond within the 10 day window allowed the Plaintiff to obtain a charging order that prevented Haglund from closing real estate transactions involving property owned by the LLCs subject to the charging order.").

Division I's belief that causation could not be established because Helsell negotiated a deal with opposing counsel in the *Pacific 5000* litigation that they would not enforce the judgment against Haglund and 3320 MLK LLC for the duration of the appeal, op. at 14, does not obviate the charging order's harm to Haglund.[10]

Division I misunderstood the legal impact of the RCW 25.15.256 charging order. A judgment clearly constitutes a lien against the real estate of the judgment debtor. RCW 4.56.190; *Hartley v. Liberty Park Associates*, 54 Wn. App. 434, 437, 774 P.2d 40, *review denied*, 113 Wn.2d

[10] And, in any event, Helsell's alleged mitigation of Haglund's harm does not vitiate the causation element.

1013 (1989). The entry of the judgment against Haglund and 3320 MLK, LLC constituted a lien against real property he or his LLC owned. *But the entry of judgment did not constitute a lien against any of the other Haglund LLCs*. RCW 25.15.126(1) (*see* Appendix) makes clear that any LLC debts are those of the LLC and *not* its members. RCW 25.15.256 creates a process by which the transferable interests of an LLC member may be subjected by court order to a charging order for payment of the *unsatisfied* amount of a judgment. RCW 25.15.256(2) makes that order a lien against the LLC member's transferable interest in the LLC.[11]

Moreover, the effect of the charging order was not barred by the Pacific 5000's alleged agreement with Haglund not to enforce the judgment or even the tardy filing of the supersedeas bond. In *Guest, supra*, for example, the filing of a supersedeas bond did not prevent the application of a collateral statutory scheme, there, the *lis pendens* statutes, designed to establish what amounted to a lien against a debtor's property interest. Thus, even if Pacific 5000 could not enforce the judgment as to Haglund himself or 3320 MLK, LLC as a result of the belated filing of the supersedeas bond or the agreement between Helsell and the Pacific 5000's

[11] This procedure has its direct analog in the Uniform Partnership Act. RCW 25.05.200 (partner is not co-owner of partnership property); RCW 25.05.215 (charging orders). *See generally*, J. Gordon Gose, *The Charging Order under the Uniform Partnership Act*, 28 Wash. L. Rev. 1 (1953); Alan Weinberger, *Making Partners Pay Child Support: The Charging Order at 100*, 27 Hous. L. Rev. 297 (1990).

counsel, the damage was already done – *the charging orders remained in place*, and constituted a lien against Haglund's interest in all of his other LLCs, of which Gribben was, or should have been, aware. CP 660-61, 809. And those liens prevented Haglund from transacting business in connection with them, CP 1019-29, a considerable harm.

And Haglund's testimony as to the response of lenders to that charging order and his consequent inability to close deals, is sufficient to document the "harm" element of Haglund's malpractice claim against Helsell. His direct testimony, particularly given his very significant real estate experience, CP 1019-29, creates a question of fact.

Simply put, there was a significant economic benefit to Haglund in avoiding any collection action against the various Haglund LLCs via charging orders for the eight to nine month duration of the *Pacific 5000* appeal, *regardless of whether he ultimately prevailed in that appeal.* He was harmed to the extent of the value of his ability to continue to transact business through those LLCs for those eight to nine months.

Additionally, Haglund was harmed by having to pay Helsell's fees for its incompetent representation and he was further damaged to the extent of Bloomfield's fees to remedy Helsell's error. This Court observed in *Maytown Sand & Gravel, LLC v. Thurston County*, 191 Wn.2d 392, 437-41, 423 P.3d 223 (2018), that attorney fees to remedy a

harm created by a defendant may be an item of damages. It is no different here where Haglund was compelled to hire Bloomfield to attempt to undo Helsell's harm so that he could proceed with transactions involving his properties with third parties.[12]

Division I erred in its analysis of the effect of the charging orders in granting summary judgment. Review is merited. RAP 13.4(b)(1), (2), (4).

(2) Division I Erred in Ruling on Haglund's Breach of Fiduciary Duty Claim as a Matter of Law

A distinct basis for an attorney's liability to a client arises out of any breach of the attorney's fiduciary duty to that client. The attorney-client relationship is a fiduciary one under which the attorney owes the highest duty to the client. *Perez v. Pappas*, 98 Wn.2d 835, 840-41, 659 P.2d 475 (1983).[13] A breach of fiduciary duty action is rooted in the

[12] In *LK Operating, LLC v. Collection Grp.*, LLC, 181 Wn.2d 117, 119-20, 330 P.3d 190 (2014), this Court held that where the only damages claimed by a legal malpractice plaintiff are fees incurred in a separate action and their basis was the so-called ABC rule, the defendant is entitled to summary judgment if the ABC rule is inapplicable. Here, Haglund's sole damages were not fees, and the ABC rule is inapplicable. His fees were incurred as an item of damages – to attempt to remove the harmful effect of Gribben's failure to timely file the supersedeas bond.

[13] *Accord*, *In re Estate of Carl Larson*, 103 Wn.2d 517, 520, 694 P.2d 1051 (1985); *In re Disciplinary Proceedings Against Sawyer*, 98 Wn.2d 584, 586, 656 P.2d 503 (1983) ("The relationship between attorney and client is 'one of the strongest fiduciary relationships known to the law.'") (quoting *In re Beakley*, 6 Wn.2d 410, 423, 107 P.2d 1097 (1940)); *Liebergesell v. Evans*, 93 Wn.2d 881, 889-90, 613 P.2d 1170 (1980). *See also*, *VersusLaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 333, 111 P.3d 866 (2005); *Kelly v. Foster*, 62 Wn. App. 150, 155, 813 P.2d 598, *review denied*, 118 Wn.2d 1001 (1991).

attorney's relationship to the client and the breach of the RPCs is relevant to such a cause of action. *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992).[14]

Moreover, one of the remedies available to a client for an attorney's breach of fiduciary is the disgorgement of fees the attorney charged to the client. Disgorgement is routinely a remedy for a breach of a fiduciary's duty. *Eriks*, 118 Wn.2d at 462 ("The general principle that a breach of ethical duties may result in denial or disgorgement of fees is well-recognized.").[15] Disgorgement and forfeiture of fees serve both to remedy specific breaches of professional responsibility and to deter future misconduct of a similar type. *Behnke*, 172 Wn. App. at 298. Thus, "a

[14] In Washington, the elements of a claim for breach of fiduciary duty are clear. "The plaintiff must prove (1) existence of a duty owed, (2) breach of that duty, (3) resulting injury, and (4) that the claimed breach proximately caused the injury." *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 433-34, 40 P.3d 1206 (2002). *See also*, WPI 107.10. The RPCs generally establish an attorney's fiduciary duty to a client, *Arden v. Forsberg & Umlauf, P.S.*, 189 Wn.2d 315, 326-29, 402 P.3d 245 (2017); they may constitute a basis for discerning a breach of such a fiduciary duty. *Eriks*, 118 Wn.2d at 457-58; *Cotton*, 111 Wn. App. at 266; *Behnke v. Ahrens*, 172 Wn. App. 281, 297-98, 294 P.3d 729 (2012), *review denied*, 177 Wn.2d 1003 (2013). Whether an attorney principally violated the RPCs is a question of law for the court. *Chism v. Tri-State Constr. Inc.*, 193 Wn. App. 818, 374 P.3d 193, *review denied*, 186 Wn.2d 1013 (2016).

[15] *See also*, *Cotton v. Kronenberg*, 111 Wn. App. 258, 44 P.3d 878 (2002), *review denied*, 148 Wn.2d 1011 (2003) (court upheld complete disgorgement of attorney's fees for breach of fiduciary duty); *Behnke v. Ahrens*, 172 Wn. App. 281, 294 P.3d 729 (2012), *review denied*, 177 Wn.2d 1003 (2013) (causation and damages not required for disgorgement); *Joudeh v. Pfau Cochran Vertetis Amala, PLLC*, 190 Wn. App. 1030, 2015 WL 5923961 (2015), *review denied*, 185 Wn.2d 1019 (2016). Reflecting that policy, a claimant need not prove causation or other damage to obtain disgorgement as relief. *Behnke*, 172 Wn. App. at 298.

finding of causation and damages is not required to support an order of disgorgement." *Id.*

The principal fiduciary duty that is relevant here is the duty of competence owed by an attorney to the client. RPC 1.1. At a very basic level, an attorney owes a duty of care to a client to provide competent representation in connection with the services provided by the attorney to the client. RPC 1.1. Bloomfield's testimony was sufficient to create a question of fact as to Gribben's breach of fiduciary duty where he had no competence as to supersedeas and charging orders and neglected to obtain such competence by his own research or consulting other attorneys.

In addition to questions of competence, Helsell breached other RPCs. Gribben breached his RPC 3.3(a) duty of candor to Haglund as to the bond. Bloomfield testified that Gribben breached his duty of candor to Haglund:

> 37. To the extent Gribben misled Haglund about his failure to file the bond, his conduct violated fiduciary duties of candor and loyalty owed to Mr. Haglund.
>
> 38. Washington RPC 3.3(a) prohibits a lawyer from making a materially false statement to a court in litigation. RPC 3.4(c) prohibits a lawyer from knowingly disobeying the rules of a tribunal. RPC 8.4(c) prohibits a lawyer from engaging in conduct involving dishonesty, deceit or misrepresentation. RPC 8.4(d) prohibits a lawyer from engaging in conduct that is detrimental to the administration of justice.

CP 606.

Division I chose to gloss over Helsell's breaches of fiduciary duty. Op. at 17-19. That court asserted in an abbreviated fashion, *id*. at 18-19, that Bloomfield did not testify on causation. That is wrong. Bloomfield connected Helsell's failure to timely file the supersedeas bond to the harm Haglund experienced. CP 603.

Division I's analysis of Helsell's breach of fiduciary duty to Haglund was flawed. Review is merited. RAP 13.4(b)(1), (2).

F. CONCLUSION

This Court's review is appropriate in this case because Division I misapplied Washington precedent on legal malpractice and breach of fiduciary duty in connection with Helsell's failure to post supersedeas bonds. This case presents an opportunity for this Court to consider supersedeas, an important topic in appellate practice, rarely addressed in Washington case law. RAP 13.4(b)(1), (2), (4).

This Court should reverse the trial court's February 24, 2020 order granting summary judgment in Helsell's favor. Costs on appeal should be awarded to Haglund.

DATED this 16th day of August, 2021.

Respectfully submitted,

Philip A. Talmadge

Philip A. Talmadge, WSBA #6973
Aaron P. Orheim, WSBA #47670
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Brian J. Waid, WSBA #26038
Waid Law Office, PLLC
5400 California Ave SW, Suite D
Seattle, WA 98136
(206) 388-1926

Attorneys for Petitioners

APPENDIX

FILED
7/19/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

3320 MLK, LLC, a Washington limited liability company; CARL RAYMOND HAGLUND, a single person; COLUMBIA CITY CONDOS #1, LLC, a Washington limited liability company; 4532 S. HENDERSON, LLC, a Washington limited liability company; 2023 24th AVE, LLC, a Washington limited liability company; CLAREMONT PROPERTIES, LLC, a Washington limited liability company; COLUMBIA CITY CONDOS-OWAHE, LLC, a Washington limited liability company; COLUMBIA CITY CONDOS-KENNY, LLC, a Washington limited liability company; COLUMBIA CITY CONDOS-CORAL REEF #1, LLC, a Washington limited liability company; COLUMBIA CITY CONDOS-CORAL REEF #2, LLC, a Washington limited liability company; MY BIG CHINESE ROOSTER INVESTMENT COMPANY, LLC, a Washington limited liability company; BIG ROOSTER INVESTMENTS, LLC, a Washington limited liability company; COLUMBIA MODERN LIVING, LLC, a Washington limited liability company; I STREET LLC, a Washington limited liability company; SEWARD PARK, LLC, a Washington limited liability company; 2910 S. BYRON, LLC, a Washington limited liability company; 3320 MICRO, LLC, a Washington limited liability company; 3948 FARRAR, LLC, a Washington limited liability company; 5949 36, LLC, a Washington limited liability company; and 5002 ROSE,	No. 81406-1-I DIVISION ONE UNPUBLISHED OPINION

LLC, a Washington limited liability company,

Appellants,

v.

HELSELL FETTERMAN, LLP, a Washington limited liability partnership; and BRANDON S. GRIBBEN, individually and on behalf of the marital community comprised of BRANDON GRIBBEN and JANE DOE GRIBBEN,

Respondents.

APPELWICK, J. — Haglund appeals the summary judgment dismissal of his claims for breach of fiduciary duty and legal malpractice against Gribben and Helsell Fetterman. Haglund argues Gribben breached the duty of care owed to Haglund as a client by providing inadequate counsel at trial and failing to timely file a supersedeas bond posttrial. We affirm.

FACTS

On April 11, 2016, in the underlying litigation to this matter,[1] Pacific 5000 LLC sued Carl Haglund and his company, 3320 MLK LLC.[2] Pacific 5000 was the debtor on a bank loan Haglund purchased. Pacific 5000 alleged that after it stopped making loan payments in furtherance of an agreement to sell the building to Haglund, he reneged and foreclosed on the loan. It further alleged that Haglund

[1] Pacific 5000, LLC v. 3320 MLK, LLC, No. 16-2-06880-0 (Pierce County Super. Ct., Wash.).

[2] The matter on appeal concerns a legal malpractice suit and the underlying Pacific 5000 litigation giving rise to that suit. When referring to the matter on appeal, appellants Haglund and his 19 LLCs are referred to collectively as "Haglund." When referring to the underlying Pacific 5000 litigation, the defendants in that case, Haglund and 3320 MLK, LLC, are also referred to collectively as "Haglund."

engaged in illegal acts to manipulate the bid price, including trespassing onto the property and committing intentional waste of the electrical system.

On October 14, 2016, Haglund's initial attorney withdrew from the case. On October 31, 2016, Brandon Gribben of Helsell Fetterman LLP, entered his formal appearance as counsel for Haglund. This was also the due date for Haglund's primary witness disclosures. That afternoon, Gribben sent an e-mail to opposing counsel stating,

> Attached is a courtesy copy of my notice of appearance, which will be filed with the court shortly. I noticed that the disclosure of primary witnesses is due today and I am requesting a one week extension while I get caught up to speed on the case. I hope to be in touch early next week once I have had a chance to review the documents.

On November 2, 2016, opposing counsel rejected the request. Gribben also moved twice to continue the trial date, but was unsuccessful in both efforts. On November 23, 2016, Gribben filed the now tardy primary witness disclosure. In January and February 2017, Haglund informed Gribben of several new witnesses.

On March 3, 2017, the trial court entered partial summary judgment in favor of Pacific 5000 on its claim of intentional trespass. The issue of the amount of damages proximately caused by the trespass remained for trial.

On March 30, 2017, Pacific 5000 filed a motion in limine addressing several issues, including the exclusion of 15 defense witnesses as not timely disclosed. The court excluded 10 of the 15 witnesses. The trial court's order on motions in limine also excluded many of the exhibits Haglund offered. It ruled the documents were irrelevant, misleading, and/or unfairly prejudicial.

On April 19, 2017, Pacific 5000 filed its final amended complaint that included claims of fraud, breach of contract, violation of the Consumer Protect Act, ch. 19.86 RCW, slander of title, declaratory judgment, restitution/unjust enrichment, interference with contractual relations, civil conspiracy, trespass, and waste. The case proceeded to trial.

On June 6, 2017, the trial court sent the parties an outline of the court's decision. On June 29, 2017, the trial court entered findings of fact and conclusions of law and a judgment in favor of Pacific 5000 and against Haglund in the amount of $1,148,034.43. It concluded that Pacific 5000 was damaged in a complete loss of its $313,447.21 equity in the property under multiple theories. The court awarded treble the damages for the trespass, under RCW 4.24.630, and for restraint of trade, under RCW 19.86.030, and awarded attorney fees. The court agreed with Pacific 5000's analysis concerning its other causes of action. However, the court did not allow double recovery under multiple legal theories and stated that its alternative damages for loss of equity measured from the foreclosure sale would be less than the trespass damages.

On Friday July 7, 2017, Haglund obtained a supersedeas bond in the amount of $1,525,000.00 to prevent execution on judgment.[3] Later that day, he delivered the supersedeas bond to Gribben to file with the Pierce County Superior Court. Gribben acknowledged receipt of the bond in an e-mail to Haglund and

[3] CR 62(a) provides an automatic stay on the execution or enforcement of a judgment until 10 days after its entry. The limited liability company statute authorizes judgment creditors to obtain a charging order constituting a lien against a judgment debtor's transferrable interests for the unsatisfied amount of the judgment with interest. RCW 25.15.256(1), (2).

informed him that he would file the bond "first thing Monday morning." Haglund believed the bond needed to be filed either July 7, 2017 or by Monday, July 10, 2017 to avoid execution of the judgment. Gribben admits that he understood that if a bond did not get filed, execution on the judgment could proceed. Gribben did not file the supersedeas bond on Monday, as promised.

On July 10, 2017 Gribben filed a motion for reconsideration. In this motion, Gribben argued that Haglund had not caused the vandalism to Pacific 5000's building. He argued there was newly discovered evidence demonstrating that Haglund did not damage the electrical wiring to the building or otherwise cause waste. Gribben presented the court with a declaration from Haglund and documentation to show that the vandalism predated Haglund's trespass onto the site.

The next day, on July 11, 2017, Pacific 5000 obtained a charging order against 17 of Haglund's limited liability companies (LLCs). In this order, the court found the judgment against Haglund was unpaid. It restricted the business activities of the LLCs owned by Haglund as follows:

> [U]ntil such judgment is satisfied in full, including interests [sic] and costs, that none of said limited liability companies, their members or their managers shall undertake, enter into, or consummate any sale, encumbrance, hypothecation or modification of any membership interest of the Judgment Debtors without court approval or approval of the Judgment Creditors herein.

And, it ordered,

> [E]ach of the companies affected by this order are directed to pay any and all distributions, credits, draws or payments owing by such companies to either of the Judgment Debtors into the registry of the court.

Gribben filed the supersedeas bond with the trial court on July 12, one day after the charging order went into effect. Gribben contacted opposing counsel to confirm that there was a stay on enforcement of the judgment. Gribben informed Haglund that opposing counsel agreed to stay the enforcement of the judgment.[4]

On August 2, 2017, Haglund called another attorney at Helsell Fetterman and left a voicemail message indicating he would be filing a malpractice claim against Gribben. The managing partner at Helsell Fetterman contacted Haglund on August 3, 2017, disclosing that Haglund's allegation of malpractice created a conflict of interest and letting him know, if he did not waive the conflict, the firm would have to withdraw as his attorneys in the lawsuit. On August 16, 2017, Stephanie Bloomfield and Robert Wilke, attorneys with Gordon Thomas Honeywell LLP, substituted into the case to replace Gribben as Haglund's counsel.

On August 17, 2017, Haglund, through Bloomfield, moved to set aside the judgment under CR 60. Haglund alleged that Gribben had been grossly negligent in failing to produce "key documents and witnesses." He argued that had these records been produced, they would have corroborated his assertion the premises were vandalized prior to his trespass. The motion was set to be heard along with the motion for reconsideration.

On August 25, 2017, the court denied Haglund's July 10 motion for reconsideration, finding that Haglund's declaration did not contain new evidence not in his possession before trial. It also concluded that "if the evidence in Mr.

[4] In a later deposition related to this matter, Haglund confirmed that he could not recall if Pacific 5000 took any other steps to collect the judgment.

Haglund's declaration were admitted, it would not alter the court's findings of fact and conclusions of law."

On September 14, 2017, Haglund appealed a number of orders and the final judgment in the matter.

In Haglund's motion to vacate the charging order, dated February 14, 2018, he alleged it was interfering with real estate transactions involving his other LLCs. Haglund also contended that the title insurer was unwilling to deposit funds from these transactions into the registry of the court, even though the charging order provided that it must do so.

On March 26, 2018, the parties stipulated to discharging the supersedeas bond contingent on Haglund's agreement to satisfy the judgment and to dismiss his appeal. On April 10, 2018, counsel for the parties stipulated that all the issues in this matter were fully settled and the appeal should be dismissed.

Haglund filed suit for legal malpractice and breach of fiduciary duty against Gribben and Helsell Fetterman LLP (collectively Gribben), on May 15, 2019. On January 10, 2020, Gribben moved for summary judgment, arguing "(1) Mr. Haglund cannot meet his burden of proving proximate cause under either legal theory, and (2) as a matter of law Mr. Haglund is not entitled to disgorgement of attorney fees." The same day, Haglund moved for partial summary judgment on liability. On February 24, 2020, the trial court granted Gribben's motion and denied Haglund's.

Haglund and his 19 LLCs appeal.

DISCUSSION

Haglund argues the trial court erred in dismissing both his professional negligence and his breach of fiduciary duty claims against Gribben. First, he argues Gribben committed malpractice during the trial by failing to disclose witnesses in a timely manner and by failing to investigate and produce evidence regarding the cause of the extensive damage inside Pacific 5000's building. He argues Gribben committed malpractice posttrial when he failed to timely file the supersedeas bond, causing Haglund to incur damages. Next, he argues that Gribben owed a fiduciary duty to Haglund, that breach of that duty was a question for the jury, and that he was entitled to seek disgorgement of attorney fees as a remedy for this breach. He asserts this court should reverse the order on summary judgment and remand the case to the trial court.

We review summary judgment orders de novo. Hayden v. Mut. of Enumclaw Ins. Co., 141 Wn.2d 55, 63-64, 1 P.3d 1167 (2000). We consider the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c); Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). A material fact is one on which the outcome of the litigation depends, either in whole or in part. VersusLaw, Inc. v. Stoel Rives, LLP, 127 Wn. App. 309, 319, 111 P.3d 866 (2005).

I. Legal Malpractice

To establish a claim of legal malpractice, a plaintiff must show (1) the existence of an attorney-client relationship giving rise to a duty of care to the client, (2) an act or omission in breach of the duty, (3) damages to the client, and (4) proximate causation between the breach and damages. Smith v. Preston Gates Ellis, LLP, 135 Wn. App. 859, 863-64, 147 P.3d 600 (2006).

Gribben moved for summary judgment based in part on a lack of evidence of proximate causation. General principles of causation are no different in a legal malpractice action than in an ordinary negligence case. Versuslaw, 127 Wn. App. at 328.

Proximate cause is composed of two distinct elements: (1) cause in fact and (2) legal causation. Fabrique v. Choice Hotels Int'l, Inc., 144 Wn. App. 675, 683, 183 P.3d 1118 (2008). Cause in fact refers to the "but for" consequences of an act, or the physical connection between an act and the resulting injury. Id. In a legal malpractice case, the first question is whether the client's case was lost or compromised by the attorney's alleged negligence. Spencer v. Badgley Mullins Turner, PLLC, 6 Wn. App. 2d 762, 777, 432 P.3d 821 (2018), review denied, 193 Wn.2d 1006, 438 P.3d 119 (2019). The second question is whether the client would have fared better but for the attorney's mishandling of the claim. Id. Legal causation rests on policy considerations as to how far the consequences of a defendant's acts should extend and involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. Fabrique, 144 Wn. App. at 683. Both elements must be satisfied. Id.

Proximate cause may be determined as a matter of law only when reasonable minds could reach but one conclusion. Tae Kim v. Budget Rent A Car Sys., Inc., 143 Wn.2d 190, 203, 15 P.3d 1283 (2001).

A. Defense at Trial

Haglund alleges that Gribben committed malpractice by failing to properly defend him in the Pacific 5000 litigation. He alleges Gribben failed to properly investigate and produce certain physical evidence, to make an offer of proof, and to produce and timely disclose certain witnesses relating to the cause of the physical damage to Pacific 5000's apartment building.

The trial court made these findings with regard to the statutory trespass claim:

> 44. . . . HAGLUND proceeded, on his own, to enter the property a second time. Therefore, during the week of May 25, 2015, HAGLUND went into the building alone, forced his way through the security fence, removed boards from one of the entry ways, and entered the building.
>
> 45. Once inside the building, HAGLUND intentionally sabotaged the electrical system of the building by going from room to room, and cutting holes in the ceiling of each room and severing electrical conduits supplying electricity to several separate apartment units. An interior hallway does not serve the apartment complex. Therefore, to accomplish this sabotage, HAGLUND cut holes in the drywall between apartment units so that he could gain access to further units, and commit widespread damage.
>
> 46. HAGLUND also severely damaged several electrical panels located in a utility room that served all the apartment units. At no point did HAGLUND ever receive permission from the owner of the property to enter it.

Haglund relied upon Bloomfield as his expert to establish his prima facie case. Bloomfield's declaration provided support for the contention that Gribben's malpractice led him to incur financial losses at trial that he would not have incurred

but for the claimed malpractice.[5] But, Bloomfield's opinions focused on the alleged breach of a duty of care, rather than cause in fact. She asserted,

> Gribben fell below the standard of care when he failed to properly investigate his clients' claims and defenses, develop those defenses and the evidence needed to support Haglund's positions in the litigation, and ensure that the evidence supporting the [sic] Mr. Haglund's defense (including identifying witnesses and documents) was properly disclosed in discovery and included in Haglund's trial exhibits and witness list. Gribben further fell below the standard of care when he failed to create an adequate record for review with offers of proof as to the specific content of any evidence that had been excluded in error.

Bloomfield also testified that other potential witnesses could have spoken to what she called a "critical evidentiary issue" in the case—that the building was already "derelict"—to rebut charges Haglund had committed waste or vandalized the building. She named "key witnesses" such as "Keith Williams and Richard Boyce." But, Bloomfield's declaration stopped short of providing an expert opinion on proximate causation in fact.

And, much of the evidence regarding preexisting building damage that Haglund accuses Gribben of not putting before the court was placed before the court in support of Haglund's motion for reconsideration (filed by Gribben) and his motion to set aside judgment (filed by Bloomfield). Haglund contends that the "key witnesses" could have testified that the extensive damage inside Pacific 5000's

[5] In 2018, Bloomfield succeeded Gribben in representing Haglund. In June 2019, Bloomfield was retained to provide expert testimony relating to Gribben's representation in the Pacific 5000 litigation. In her declaration, she discussed her opinions on that representation as well as her own understanding of the timeline from her time as Haglund's attorney.

building predated Haglund's trespass in late May 2015.[6] In his motion to set aside judgment, he also referred to a failure to produce witnesses and "key documents" primarily addressing vandalism. These documents included photographic evidence that Haglund alleged confirmed that the poor condition and vandalism predated his trespass.

In his motion for reconsideration, he asserted that the totality of new evidence and exhibits in the motion proved that Haglund did not damage the electrical wiring or otherwise cause waste. His evidence included photographs of the property taken by the bank and by Haglund, as well as the City of Tacoma's documents indicating the property had been vandalized. The motion for reconsideration also pointed to the exclusion of witnesses mentioned in the motion to set aside judgment, such as Scott Whaley.

The court rejected Haglund's assertions that these exhibits or the additional witnesses would have changed the outcome. It found that "if the evidence contained in Mr. Haglund's declaration were admitted, it would not alter the court's findings of fact and conclusions of law." The trier of fact made it clear that the outcome would have been the same on the trespass claim whether or not Gribben had acted negligently in the manner alleged.

For these reasons, Haglund failed to make a prima facie showing that any breach of the standard of care in the presentation of evidence at trial was a cause in fact for his alleged damages.

[6] In his August 17, 2017, motion to set aside judgment, Haglund acknowledged that his first counsel's withdrawal "was the sole cause of the delay in filing the disclosure of the witness list."

B. Posttrial Supersedeas Bond

Haglund argues Gribben committed malpractice when he failed to timely file a supersedeas bond, resulting in a charging order issued against 17 of his LLCs.[7]

A supersedeas bond is a means of staying enforcement of a trial court judgment while on appeal. RAP 8.1(a); Guest v. Lange, 195 Wn. App. 330, 338, 381 P.3d 130 (2016). When a supersedeas bond is filed, the judgment cannot be enforced. Lange, 195 Wn. App. at 338. "'The effect of a supersedeas is to preserve the status quo, stay proceedings; it does not reverse or undo what has already been done.'" Brown v. Gen. Motors Corp., 67 Wn.2d 278, 288, 407 P.2d 461 (1965) (emphasis omitted) (quoting Lowe v. N.B. Clark & Co., 150 Wash. 267, 273, 272 P. 955 (1928)). Under CR 62(a), a party may not seek to enforce a judgment until the expiration of 10 days after its entry. This 10 day automatic stay period allows the judgment debtor time to make arrangements to delay enforcement, such as the filing of a supersedeas bond. RAP 8.1; CR 62(a).

The charging order against a member of a limited liability company is statutorily authorized by RCW 25.15.256. On application of a judgment creditor of a member or transferee, a court may charge the transferable interest of the

[7] Haglund argues that, although Gribben did not represent 18 of the 19 LLCs listed in the complaint, a duty to them should be imposed. Whether a duty was owed to third parties in such cases is evaluated under the six-part balancing test announced in Trask v. Butler, 123 Wn.2d 835, 842-43, 872 P.2d 1080 (1994). The threshold question is the extent to which the transaction was intended to benefit the third-party plaintiff. Id. Haglund has not satisfied this threshold question. He has not provided sufficient evidence that Gribben was aware of his other LLCs or intended his counsel to benefit them as entities. But, there is a separate question as to whether Haglund incurred personal losses from the delay of the bond and alleged failure of LLC transactions, which we analyze.

judgment debtor to satisfy the judgment. RCW 25.15.256(1). The charging order constitutes a lien on the judgment debtor's transferable interest, which may be foreclosed. RCW 25.15.256(2). The transferable interest of a member of a limited liability company is also subject to a charging order, which gives a judgment creditor the rights of a transferee. RCW 25.15.256. A person is dissociated as a member of a limited liability company upon the transfer of all of the member's transferable interest in the LLC. RCW 25.15.131(1)(b).

Haglund gave Gribben the supersedeas bond within the 10 day window to stay execution of judgment. Gribben did not recall why the supersedeas bond was not filed prior to July 12, 2017. But, the day before it was filed, Pacific 5000 obtained a charging order against 17 of Haglund's LLCs.

Had Gribben filed the supersedeas bond July 10, he could have prevented the charging order from being effective when filed. The question is whether this inaction was the proximate cause of damages to Haglund. See Smith, 135 Wn. App. at 864. Gribben took steps to mitigate any potential harm from the delay in filing the supersedeas bond the following day by securing the agreement of opposing counsel to not execute on the judgment. Haglund confirmed that he could not recall any other steps being taken towards collection that would have violated that agreement.

But, Haglund asserts that the charging order prevented the LLCs subject to it from closing any pending or proposed real estate transactions and interfered with his business interests. To support this assertion, he cites to Bloomfield's declaration in support of partial summary judgment in this matter, his motion to

vacate the charging order in the underlying matter, and his own declaration in support of his motion to vacate the charging order.

Haglund's declaration stated that the title insurer involved in the alleged transactions, Fidelity National Title Group, would not allow the deals to close and would not disburse funds because of the charging order against the LLCs. He provided a copy of his January 15, 2018 personal financial statement representing his current net worth as an exhibit attached to the declaration. He claims that Fidelity was unwilling to deposit funds into the registry of the court or otherwise permit closing absent either the agreement of the plaintiff or an order vacating the charging order or expressly allowing the closing to go forward. Plaintiff's counsel did not agree to any of the proposals offered by Haglund's counsel. In February 2018, Haglund moved to vacate the charging order. The trial court ordered the bond discharged based on the stipulation of parties.

Bloomfield's declaration repeated the assertion that in late 2017, Haglund had real estate transactions involving his LLCs that he wished to close, but that he was unable to do so because of the charging order. She further opined that as a result, Haglund had no reasonable choice but to forego his appeal and pay the judgment so as not to lose the deals he had negotiated.

Haglund and his expert were clear that he settled the case and dismissed his appeal to avoid losing the sales he had negotiated. But, he has not offered evidence of any financial losses caused by the charging order applied to those sales or his other LLC interests. His remaining alleged harm relates to his loss of opportunity to do better on appeal.

C. Loss of Opportunity to Appeal

The trial court rested its award in the Pacific 5000 case on several alternative legal claims, not just the trespass claim. The court found Haglund liable for fraud, breach of contract, violations of the CPA, slander of title, tortious interference with business relationships, civil conspiracy, trespass, and waste under RCW 64.12.020. It valued Pacific 5000's damages as the loss of equity it had in the building as of May 2015, in the amount of $313,447.21. It trebled this award under RCW 4.24.630 based on Haglund's intentional trespass, but also trebled the award under RCW 19.86.090 based on Haglund's conspiracy in restraint of trade.

Haglund asserts that Gribben's malpractice caused the trial court to exclude evidence that would have changed the outcome. But, the evidence at issue related primarily to the trespass claim. The court found Haglund conspired in restraint of trade with Fife Commercial Bank, Pacific 5000's lender. It also found Haglund conspired in restraint of trade with his former attorney, Tom Linde, to artificially drive up Pacific 5000's debt, for sale purposes. These conspiracies each "proximately caused the Plaintiff's damages through a loss of equity" in the building. Even if the court had admitted the evidence of preexisting damage to Pacific 5000's building and had found Haglund did not intentionally sabotage the electrical system or cut holes in the drywall, this evidence would not have affected any of the court's factual findings on the restraint of trade claim. Even if judgment on the trespass claim was vacated, the court still would have found that Haglund caused Pacific 5000's loss of equity in the building and that the loss should be

trebled under RCW 19.86.090 based on Haglund's conspiracies in restraint of trade.

Haglund failed to demonstrate he would have materially bettered his position on appeal but for Gribben's alleged malpractice during or after trial. For this reason, he has not established that he was damaged by loss of opportunity on appeal.

We hold that the trial court did not err in dismissing Haglund's claim for legal malpractice on summary judgment.

II. Breach of Fiduciary Duty

Next, Haglund argues the court erred in dismissing his claim for breach of fiduciary duty as a matter of law. To prevail on a breach of fiduciary duty claim, a plaintiff must prove (1) the existence of a duty owed, (2) a breach of that duty, (3) resulting injury, and (4) that the claimed breach proximately caused the injury. Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 433-34, 40 P.3d 1206 (2002).

Pursuant to its power to regulate the practice of law within Washington, Washington courts adopted the Rules of Professional Conduct (RPCs). Hizey v. Carpenter, 119 Wn.2d 251, 261, 830 P.2d 646 (1992). Although the RPCs are not designed to be a basis for civil liability,[8] a trial court may properly consider them in an action by a client for the attorney's alleged breach of fiduciary duties. See Eriks v. Denver, 118 Wn.2d 451, 457, 824 P.2d 1207 (1992). Whether an attorney's conduct violates the RPCs is a question of law. Id. at 457-58. Whether an attorney

[8] RPC Scope cmt. 20.

has breached his fiduciary duty to a client is also a question of law. Id. at 457. So, we review the breach of fiduciary duty claim de novo. See Stone v. Sw. Suburban Sewer Dist., 116 Wn. App. 434, 438, 65 P.3d 1230 (2003) (questions of law are reviewed de novo).

Haglund argues Gribben breached two fiduciary duties owed to a client, (1) the duty related to conflicts of interest under RPC 1.7, and (2) the duty of competence under RPC 1.1.

RPC 1.7(a) provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." A concurrent conflict of interests exists if there is a significant risk that the representation of one or more clients will be materially limited by a personal interest of the attorney. RPC 1.7(a)(2). Haglund argues Gribben had a conflict of interest requiring disclosure on March 30, 2017, when Pacific 5000 served its motion in limine to exclude evidence and witnesses for untimely disclosure. Haglund has not made a prima facie showing that Gribben breached any duty related to the exclusion of evidence and witnesses. Thus, no conflict of interest arose from his conduct relative to the evidence and witnesses.

In support of his claim under RPC 1.1, Haglund argues that Bloomfield's testimony was sufficient to create a question of fact as to Gribben's breach of fiduciary duty. He points to her testimony on Gribben's trial conduct and the filing of the supersedeas bond. Haglund provided evidence that posttrial, Gribben failed to timely file the supersedeas bond. Bloomfield's testimony addressed his violation of the standard of care, but it did not address causation, it likewise does not create

a question of fact as to that issue. Just like his malpractice claim, his breach of fiduciary duty claim suffers from the absence of prima facie evidence of proximate causation of any damages.

We hold the trial court did not err in dismissing Haglund's claim for breach of fiduciary duty.

Fee disgorgement is an equitable remedy separate from the legal claim for breach of fiduciary duty. Bertelsen v. Harris, 537 F.3d 1047, 1057 (9th Cir. 2008) ("Under Washington law, disgorgement of fees is a remedy."); Eriks, 118 Wn.2d at 462-3 (affirming a trial court order to return all fees where it had not found the attorney committed malpractice). A breach of ethical duties may warrant a disgorgement of attorney fees independent of proof of damages. Eriks, 118 Wn.2d at 462-63. A finding of causation and damages is not required to support an order of disgorgement. Id. Disgorgement of fees is a reasonable way to "discipline specific breaches of professional responsibility, and to deter future misconduct of a similar type." In re E. Sugar Antitrust Litig. Pantry Pride, Inc., 697 F.2d 524, 533 (3d Cir. 1982). When an attorney is guilty of fraudulent acts or gross misconduct in violation of a statute or against public policy, the client may have a complete defense to the attorney's action for fees. Dailey v. Testone, 72 Wn.2d 662, 664, 435 P2d 24 (1967). While attorney misconduct can be so egregious as to constitute a complete defense to a claim for fees, not every act of misconduct will justify such a serious penalty. Kelly v. Foster, 62 Wn. App. 150, 156, 813 P.2d 598 (1991). The trial court has discretion in deciding what impact, if any, lawyer misconduct will have on a claim for attorney fees. Id. We review a trial court's

decision to deny disgorgement of fees for abuse of this discretion. Spencer, 6 Wn. App. 2d at 777.

The request for disgorgement of fees was necessarily dismissed as a result of the grant of summary judgment dismissing all claims. For purposes of evaluating the disgorgement request, we will accept as true Haglund's evidence that Gribben's representation fell below the standard of care and violated RPC 1.1's duty of competence. See Keck, 184 Wn.2d at 370. The nature of the professional errors alleged was failure to meet a filing deadline and failure to notify the client that this mistake created a potential conflict of interest. The facts do not allege or support a finding of fraudulent acts or gross misconduct in violation of a statute or against public policy. No record was made relative to the likelihood of repetition of the conduct and the need for deterrence to protect the public. The loss of the case is clearly attributed by the trial court to Haglund's conduct relative to the transaction at issue and to his lack of credibility in the proceedings. The record on appeal does not demonstrate any harm to Haglund flowing from Gribben's conduct. On this record, we cannot hold the trial court abused its discretion in dismissing the requested remedy of disgorgement of fees.

We affirm.

Appelwick, J.

WE CONCUR:

Smith, J.

Andrus, A.C.J.

RCW 4.56.190:

The real estate of any judgment debtor, and such as the judgment debtor may acquire, not exempt by law, shall be held and bound to satisfy any judgment of the district court of the United States rendered in this state and any judgment of the supreme court, court of appeals, superior court, or district court of this state, and every such judgment shall be a lien thereupon to commence as provided in RCW 4.56.200 and to run for a period of not to exceed ten years from the day on which such judgment was entered unless the ten-year period is extended in accordance with RCW 6.17.020(3), or unless the judgment results from a criminal sentence for a crime that was committed on or after July 1, 2000, in which case the lien will remain in effect until the judgment is fully satisfied. As used in this chapter, real estate shall not include the vendor's interest under a real estate contract for judgments rendered after August 23, 1983. If a judgment debtor owns real estate, subject to execution, jointly or in common with any other person, the judgment shall be a lien on the interest of the defendant only.

Personal property of the judgment debtor shall be held only from the time it is actually levied upon.

RCW 25.15.126(1):

(1) Except as otherwise provided by this chapter, the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort or otherwise, are solely the debts, obligations, and liabilities of the limited liability company; and no member or manager of a limited liability company is obligated personally for any such debt, obligation, or liability of the limited liability company solely by reason of being or acting as a member or manager respectively of the limited liability company.

RCW 25.15.256(1)-(2):

(1) On application to a court of competent jurisdiction by any judgment creditor of a member or transferee, the court may charge the transferable interest of the judgment debtor with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of a transferee. The court may appoint a receiver of the

share of the distributions due or to become due to the judgment creditor in respect of the limited liability company and make all other orders, directions, accounts, and inquiries the judgment debtor might have made or that the circumstances of the case may require to give effect to the charging order.

(2) A charging order constitutes a lien on the judgment debtor's transferable interest. The court may order a foreclosure upon the transferable interest subject to the charging order at any time. The purchaser at the foreclosure sale has the rights of a transferee.

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division I Cause No. 81406-1-I to the following:

Jeffrey P. Downer, WSBA #12626
Zabrina B. Delgado, WSBA #54507
Lee Smart P.S., Inc.
1800 Convention Place
Seattle, WA 98101

Brian Waid, WSBA #26038
Waid Law Office, PLLC
5400 California Ave SW Ste D
Seattle, WA 98136

Original E-filed with:
Court of Appeals, Division I
Clerk's Office

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

DATED: August 16, 2021, at Seattle, Washington.

/s/ Matt J. Albers
Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

August 16, 2021 - 1:47 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	81406-1
Appellate Court Case Title:	Helsell Fetterman, LLP, Respondents v. 3320 MLK, LLC, et al., Appellants

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