No. 1012501

SUPREME COURT OF THE STATE OF WASHINGTON

TED SPICE, a Single Person, and PLEXUS INVESTMENTS, LLC, a Washington LLC,

Petitioners,

vs.

CAROLYN A. LAKE, Individually, and on Behalf of Her Marital Community; and GOODSTEIN LAW GROUP, PLLC, a Washington Professional Limited Liability Company,

Respondents.

ANSWER TO PETITION FOR REVIEW

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Respondents are Carolyn Lake and Goodstein Law Group, PLLC ("Lake").

II. INTRODUCTION AND RESTATEMENT OF ISSUES

This case arises out of Lake's representation of Spice and Plexus ("Spice") in seeking water rights from the City of Puyallup to develop a property located just outside of its city limits (the "Property"). Spice blames Lake that he lost the Property and profits from its development because Lake was ultimately unsuccessful.

But a poor outcome, alone, is not proof of wrongdoing by an attorney. *See Clark Cnty. Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, 180 Wn. App. 689, 701, 324 P.3d 743 (2014). Spice's claims were dismissed on summary judgment because, among other reasons, he proffered no evidence linking what he claimed Lake did wrong to the damages he sought to recover.

Spice's request that this Court review Division 1's unpublished opinion (the "Opinion") should be denied. None of the requirements of RAP 13.4(b) are met. The opinion involves no constitutional questions of law or issues of substantial public interest. Nor does it conflict with any decision of this Court or published Court of Appeals opinion.

Spice's primary contention is that the Opinion conflicts with precedent that causation in legal malpractice cases – the outcome of the "case-within-a-case" – is a question of fact for a jury. But the same precedent holds where key facts are undisputed and inferences therefrom are incapable of reasonable doubt or difference of opinion, causation may be adjudicated as a matter of law by a court. *See Daugert v. Pappas*, 104 Wn.2d 254, 257, 704 P.2d 600 (1985). So the issue Spice poses is not a matter of a conflict with precedent, but rather Division 1's application of the summary judgment

standards. That issue does *not* meet RAP 13.4's criteria.

This is such a case. The fallout from Doris Mathew's death in December 2009 is undisputed: a bitter legal fight with her daughter and personal representative of her estate, Donna Dubois, that continues to this day. That fight – including a dispute over title to the Property – stopped development in its tracks. The lawsuit against Puyallup was dismissed because DuBois, who was determined to own a 75% interest in the Property, was a necessary party and refused to join the lawsuit. And the Property itself, including Spice's 25% interest, was sold by the DuBois bankruptcy trustee.

No admissible evidence suggests that, had Lake done everything Spice's expert claims she should have, she would have been able to secure water rights for Property, much less that it would have been permitted for development, before Mathews died. All evidence is to the contrary. Indeed, Spice's expert represented the

neighboring property owner, Stanzel, in parallel litigation with Puyallup. He was unable to secure water rights for that property *until 2011*, well after Spice and DuBois were fighting over the Property and other matters. Spice's petition ignores these and other key undisputed facts as to why the lawsuit against Puyallup, and the Property, were lost. Spice has no answer for them.

Spice also contends that Division 1 *required* Spice, as a threshold to meeting his burden of proof, to offer expert testimony on causation, in conflict with precedent that such evidence is *never* admissible. This is also wrong. First, expert testimony on causation *is* admissible in appropriate circumstances, including in legal malpractice cases. So a conflict with precedent is, again, lacking. Second, Division 1 did not require expert testimony on causation, rather it simply observed (in regard only to the loss of the Property through the DuBois bankruptcy) that it, or any other evidence suggesting that this was caused

by Lake's alleged negligence, was lacking.

Spice's petition should be denied.

III. RESTATEMENT OF THE CASE

The relevant underlying proceedings now span 18 years. Several appellate opinions summarize critical events and issues. *See Spice v. DuBois*, No. 44101-2-II (Wash. Ct. App. Mar. 1, 2016); *Spice v. Estate of Mathews*, No. 48458-7-II (Wash. Ct. App. Dec. 12, 2017); *Spice v. Pierce Cnty.*, No. 45476-9-II (Wash. Ct. App. Nov. 28, 2018); *Spice v. Estate of Mathews*, No. 50915-6-II (Wash. Ct. App. Oct. 15, 2019); and most recently, *Spice v. Estate of Mathews*, No. 55314-7-II (Wash. Ct. App. Aug. 2, 2022).

A. Relevant Events Prior to Mathews' Death.

1. Spice Takes Control of Mathews' Assets, Including the Property.

Spice met Mathews in 2003 when he became her Section 8 tenant in a duplex that she owned, along with a number of other properties. Within weeks, Spice had

ingratiated himself with Mathews (then 74, with no high school diploma) such that in October, 2003 she signed a letter Spice drafted granting him the authority to act as her agent "regarding any property, Legal, business, assets, County, City, State or Federal Department(s), Construction and Financial matters." CP 837-38 at 97:19-98:16; CP 1246-47. A few months later, Spice convinced Mathews to sign a promissory note (Spice drafted) purporting to give him half of all proceeds from property sales, investments, developments, or refinancing from her properties, up to $8 million. CP 837 at 95:3-96:19; CP 1243-45. A month later she signed a Durable Power of Attorney (Spice drafted) authorizing him to "exercise or perform any act, power, duty, right or obligation," including to "sue for . . . tangible property and property rights." CP 838 at 98:24-99:24; CP 1248-54.

A few weeks later Mathews quitclaimed the Property to Plexus, an LLC formed by Spice.[1] CP 1256-58. Title to the Property changed hands several times in the following years. Plexus quitclaimed the Property to Mathews in January 2007. She conveyed a one-third interest to Spice in December 2007, and ostensibly conveyed her "remaining three quarters interest" in the Property to Spice in June 2009. CP 1259-64. But Spice did not contemporaneously record either of the last two deeds, and the latter not until *after* Mathews died in December 2009, to hide the conveyances from DuBois. CP 839-40 at 108:9-111:6.

2. Spice Hires Lake to Pursue Water Service for the Property.

As title to the Property pinballed between Mathews, Plexus and Spice, in June 2004 Spice sought a "water availability letter" from Puyallup confirming that water

[1] Spice owned 51% of Plexus and Mathews' owned 49%.

was available for the Property, as a predicate to its development. CP 841-42 at 125:11-126:15; CP 697-98 ¶ 3. Puyallup refused to provide the letter until the Property was being annexed, as then required by the Puyallup Municipal Code. CP 853-54. So in October 2004 Spice and Plexus (title was then in Plexus' name) hired Lake to help compel Puyallup to provide the letter. CP 697-98 ¶¶ 2-3; CP 843-44 at 137:18-139:20; CP 854; CP 1266-67.

In January 2006 a Hearing Examiner held that if Spice could not find an alternative water source, he could ask the Examiner to order Puyallup to provide water. CP 1269-82. To up the ante and incent settlement, Lake filed a petition under the Land Use Petition Act – *LUPA I* – to appeal aspects of those orders. Lake focused on trying to settle the dispute, while Spice sought other sources of water. When settlement proved improbable and with no other water source available, Lake suggested that Spice nonsuit *LUPA I* and seek further relief from the Hearing

Examiner as contemplated in his prior orders. This would allow the matter to proceed on the basis that no other source of water was available, and avoid an argument that Spice had not exhausted his administrative remedies. CP 698 ¶¶ 4-5.

Spice agreed; Lake nonsuited *LUPA I* in November 2006. Puyallup then moved that it be dismissed with prejudice. Lake argued that the nonsuiting of *LUPA I* ended that court's jurisdiction – a position ultimately vindicated on appeal. CP 1284-88; CP 698-99 ¶ 6. In December 2007 the court dismissed *LUPA I* with prejudice.

In August 2007, even though no other water source was available, the Hearing Examiner held that he had no authority to compel Puyallup to provide expanded water service. CP 1290-94. Lake filed a second LUPA petition – *LUPA II*, naming Mathews as a party because at that point Plexus had re-conveyed the Property to her (LUPA

requires that all persons listed in the tax rolls as owners be named as a parties). RCW 36.70C.040(2)(c). She did so in the reasonable—but ultimately mistaken—belief that Spice could sue in Mathews' name as her attorney-in-fact.[2] CP 699-700 ¶ 7. The petition also included tort and damages claims seeking damages for Puyallup's failure to approve expanded water service in 2004.

At one point Puyallup raised the dismissal of *LUPA I* with prejudice as a defense in *LUPA II*, prompting Lake to move to have the dismissal order set aside. The matter eventually landed in Division 2, which agreed that Spice's withdrawal of the *LUPA I* petition ended the trial court's jurisdiction; thus all subsequent rulings (including the dismissal with prejudice) were moot. *Spice v. Pierce Cnty.*, 149 Wn. App. 461, 468, 204 P.3d 254 (2009).

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[2] Unbeknownst to Lake, on February 6, 2007, Mathews rescinded all prior powers of attorney, and signed a new Durable Power of Attorney naming DuBois as her exclusive attorney-in-fact. CP 862-82.

Inexplicably, for the same reason, Division 2 held that *Spice's* appeal of the dismissal with prejudice was frivolous, and awarded fees and costs *to Puyallup*. After this Court granted Spice's request for review of that internally inconsistent decision, Puyallup agreed to forego the fee award. CP 856-60; *see generally* CP 698-99 ¶ 6.

Thus, the order dismissing *LUPA I* with prejudice had no adverse impact on Spice's claims in *LUPA II*. In September 2008, the *LUPA II* court entered an order memorializing a January 2008 oral ruling on the merits that (1) the Hearing Examiner could not order Puyallup to provide water service, but (2) *could* determine what "reasonable pre-conditions" Puyallup could impose, including whether annexation was a reasonable precondition. It remanded the LUPA claims to the Hearing Examiner, and bifurcated Spice's tort and damages claims for trial. CP 700 ¶ 8; CP 1296-99.

3. Spice Puts Puyallup Case on Hold to Ride Stanzel's Coattails.

Significantly, in April 2008, another Pierce County judge reached a different conclusion in a case involving a neighboring property owner, Stanzel. The *Stanzel* Hearing Examiner also held he was not authorized to force Puyallup to provide expanded water service, which Stanzel challenged in a LUPA petition ("*Stanzel I*"). But unlike the *LUPA II* court, the *Stanzel I* court held that the Hearing Examiner *could* order Puyallup to issue a water availability letter. CP 700 ¶ 9; CP 1301-04.

With the *LUPA II* and *Stanzel I* rulings at odds, and Stanzel better positioned legally and financially to defend his ruling on appeal, in February 2009 Spice told Lake to put his case on hold while the *Stanzel* case played out:

> The outcome of the Stanzel is paramount. . . . [W]e need to stall the petition until the outcome of the [S]tanzel appeal and not jump through expensive hoops. . . . **I WOULD LIKE TO HOLD OFF ON EVERYTHING UNTIL THE OUTCOME OF THE STANZEL APPEAL.**

CP 1306-10 (emphasis added); CP 897-904. Lake paused active work. CP 700-01 ¶¶ 10-11.

While Spice makes much of the April 2008 trial court ruling in *Stanzel I*, he ignores that Stanzel could not proceed with development at that point or for years after. Puyallup appealed, and while that appeal was pending, filed its own LUPA petition ("Stanzel II") when the Hearing Examiner ordered it to issue a water availability letter as directed in *Stanzel I*. It appealed the dismissal of *Stanzel II*, which was reversed in July 2010. CP 884-95. On remand, the *Stanzel* trial court again ordered Puyallup to provide water service, and Puyallup appealed again. The *Stanzel* dispute continued until settled in 2011.

B. Mathews' Death and Its Aftermath.

1. Spice and DuBois' Fight Ends Development and Forces a Sale of the Property.

By the time Stanzel settled, Spice had other, much bigger impediments to development. On December 8,

2009, Mathews died. Spice and DuBois (named as the Personal Representative of Mathews' estate), soon became involved in bitter litigation that continues to this day. CP 701 ¶ 12.

Within days of Mathews' death, Spice recorded the final deed conveying her remaining interest in the Property. DuBois was upset by that, and other transfers and massive debt she learned encumbered properties she expected to inherit. Spice urged her to support various Plexus lawsuits to recover large sums of money that could pay the debt (e.g., *LUPA II*), to no avail. CP 909. DuBois' husband summarized DuBois' view of Spice:

> You seem to be the one at the center of it all. From outside looking in it would appear that you have more balls in the air than you can juggle and the whole thing is upside down (real estate speaking). **I honestly don't see how you will pull it off. You have a mortal enemy in Donna and she is the partner in Plexus.**

CP 1314 (emphasis added).

Spice filed a creditor's claim in the Mathews' probate to recover $8 million he claimed was owed under the promissory note. CP 1317-18. DuBois rejected this claim, and in May 2010 gave notice that the Estate asserted ownership of the Property and others conveyed to Spice. CP 911-13; CP 1324-26. In August 2010, Spice sued the Estate for breach of the promissory note and to quiet title. CP 1320-22. DuBois counterclaimed for fraud, undue influence, and breach of fiduciary duties, among other claims. CP 915-60. She blamed Spice for Mathews' death, and for misappropriating $400,000 withdrawn from Plexus accounts at casinos. *Id.;* CP 725.

Based on inflammatory attacks against each other, the trial court issued restraining orders against both Spice and DuBois, including precluding Spice from conveying any interest in the Property. CP 967-72. DuBois refused to support Spice's attempts to borrow more money. Her assertion of title impeded Spice's ability to proceed with

development. CP 846-48 at 205:13-206:8, 207:2-210:17; CP 1328-50; CP 977 ¶ 7.

In September 2012, a jury ruled that Spice owned only 25% of the Property, and the Estate the rest. CP 980-981. Spice then launched a litigation offensive against DuBois that encompassed multiple proceedings in Pierce County, the United States Bankruptcy Court, and the United States District Court.[3] His strategy: obtain a judgment against DuBois on some basis, which he would execute against DuBois' 75% interest in the Property. CP 847-48 at 206:9-207:1, 212:18-213:3.

The strategy backfired. The lawsuits and defaults on mortgages forced DuBois into bankruptcy in September

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[3] *See Spice v. Doris E. Matthews*, Pierce Cnty. Super. Ct. No. 13-2-09887-9; *Spice v. Doris E. Mathews*, Pierce Cnty. Super. Ct. No. 14-2-08948-7; *Spice v. Doris Mathews*, Pierce Cnty. Super. Ct. No. 14-2-08947-9; *Spice v. Doris Mathews*, Pierce Cnty. Super. Ct. No. 17-2-06511-6; *Spice v. DuBois*, Bankr. W.D. Wash. No. 16-04069; *Spice v. Internal Revenue Serv.*, W.D. Wash. No. 3:20-cv-05005-RJB.

2013.[4] CP 984. Once the Estate's interest in the Property was transferred to DuBois in 2017, (CP 1001-07), it became an asset of her bankruptcy estate. The bankruptcy trustee brought an adversary proceeding against Spice to authorize the Property's sale without partitioning his interest, so that it would not be lost in foreclosure. The court approved its sale without partition and refused to stay the sale pending appeal. Spice's appeal of the order authorizing the sale was dismissed as moot after the sale closed in July 2019.[5] CP 992-99, 1009-10, 1053-55.

Spice's lawsuits against DuBois continued. In May and June 2020, the U.S. District Court dismissed a lawsuit against DuBois, the Estate, the DuBois bankruptcy estate, the Trustee, and Puyallup. CP 1057-83. To the

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[4] *In re DuBois*, Bankr. W.D. Wash. No. 13-46104-BDL.
[5] Spice then became involved in litigation with the buyer when he refused to remove several mobile homes from the Property; the court granted summary judgment ordering their removal. *See Milwaukee Ave. LLC v. Spice*, Pierce Cnty. Super. Ct. No. 19-2-10972-1; CP 1012-51.

extent Spice's waste claims survived several appeals, they were adjudicated at a bench trial, where the judge rejected them, and awarded DuBois fees. CP 1331-50.[6] Division 2 recently rejected Spice's appeals of those rulings, save only the court's Rule 11 sanctions against Spice. *Spice v. Estate of Mathews*, No. 55314-7-II (Wash. Ct. App. Aug. 2, 2022).

2. Spice's Claims Against Puyallup Are Dismissed Because DuBois Refused to Join *LUPA II*.

When Mathews died in 2009, Spice informed Lake that the Property was in his name only and that he did *not* want DuBois involved in *LUPA II*:

> My business partner Doris Mathews died last week. The Subject property that is part of this lawsuit is in my name only and has been since June of 09. Her Daughter Donna DuBois is being appointed as Estate Personal Representative. Me and her do not get along at all. It's really ugly dealing with. Don't think we need to deal with her or add her name to

[6] The Court is commended to review Judge Chuschcoff's findings of fact and conclusion of law in full.

> the lawsuit because the property is in my name not Plexus Investment or Doris'.
>
> Advise me if I'm wrong. . . .

CP 1089-90. Lake responded: "Yes, if the property is in your name only we need not do anything." *Id.*; CP 701 ¶ 12. [7] Lake was correct. What was wrong was Spice's claim that he owned the Property. That flawed assertion proved to be the death knell of *LUPA II*.

Based on Spice's claim to ownership and direction not to involve DuBois, Lake said nothing to Puyallup about Mathews' death. *LUPA II* remained dormant for several years, while *Stanzel* wended its way through multiple appeals. By the time Stanzel and Puyallup settled in 2011, title to the Property was in dispute in the DuBois litigation. Preoccupied with that fight, Spice did not want to invest more into the Property until his ownership was confirmed. CP 701-02 ¶ 13.

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[7] Spice reiterated his direction to keep DuBois out of the case in other emails. *See, e.g.*, CP 1092-93; CP 701 ¶ 12.

In October 2012, the Spice/DuBois jury found that Spice owned only a 25% interest in the Property. The bifurcated damages claims against Puyallup resumed in February 2013,[8] and in June were dismissed for failure to exhaust administrative remedies. CP 1115-19. Lake appealed that ruling in October, including a footnote in the notice of appeal that Mathews had died. CP 1121-33; CP 702 ¶ 15.

Upon learning of Mathews' death, Puyallup asked Division 2 to dismiss the appeal because the Estate was a necessary party, and all orders entered after Mathews' death were void. Instead, Division 2 remanded the issue to the trial court. CP 1138-39. On remand, in support of

[8] By then the LUPA issues the *LUPA II* court had remanded to the Hearing Examiner were moot. Pierce County had eliminated the Hearing Examiner's authority to hear water service challenges, and Puyallup had eliminated the annexation requirement for extending water service to properties outside its borders. CP 1098-1107, 1109-13.

Puyallup, DuBois testified that the Estate would not, and would never have, joined *LUPA II* with Spice:

> [N]either Mr. Spice, Attorney Lake nor Attorney Hansen have ever approached or contacted me . . . about substituting the Estate of Doris Mathews for the individual Doris Mathews in this case. **If they had asked about substituting the estate for my mother the individual, I would have adamantly declined to allow the substitution** . . . .
>
> **. . . The Estate of Doris Mathews wants no part of this lawsuit, does not want to intervene in the case and will not allow the estate to be substituted for Ms. Matthews** [sic].

CP 1144-45 ¶¶ 12, 14 (emphasis added).

Lake argued (among other things), on Spice's behalf that the Estate was not a necessary party to Spice's claims for damages as a 25% owner. CP 1148-72; CP 702-03 ¶ 16. The trial court rejected these arguments,[9] held that the

[9] In the months between when the motion was briefed and argued, Spice rejected the notion of settling on a walkaway basis, by which he would have avoided his ultimate liability for Puyallup's fees. CP 906-07.

Estate was a necessary party, voided its prior rulings, and dismissed the case with prejudice because DuBois refused to join it. *See* CP 1182-84 (FOF 25, 28-29, 31).

Puyallup requested $300,000+ in Rule 11 sanctions against Lake and Spice for failure to disclose Mathews' death sooner. The trial court granted that motion only as to Lake, and only awarded $45,000. CP 1211-30. Division 2 affirmed the trial court in all respects. CP 759-89.

C. Spice Sues Lake for Losing the Property and Development Profits.

Spice sued Lake in 2019, seeking as damages (among other items) $20-25 million for 100% (i.e., not 25%) of the value of the Property and revenue stream, had it been developed, and legal fees and expenses incurred in his litigation with Puyallup and with DuBois. *See* CP 1233-34; CP 1238-40; CP 1352-57; CP 849-850 at 289:4-293:21. Lake moved for summary judgment and, although not her burden, supported her motion with undisputed evidence of the legal proceedings in the Puyallup and

DuBois litigations. She argued, among other things, that this undisputed evidence proved the lack of causal relation as a matter of law between anything Lake did in the Puyallup cases and Spice's alleged damages.

Spice's expert opined that Lake "breached the standard of care" in three respects:

- withdrawing *LUPA I* rather than moving to stay it while Spice sought alternative water sources;
- putting *LUPA II* on hold in September 2008, to ride the *Stanzel* coattails; and
- failing to promptly advise the *LUPA II* court when Mathews died.

But among other legal deficiencies, Spice offered no evidence—expert testimony or otherwise—establishing a question of fact (given the undisputed evidence of the proceedings in the Puyallup and DuBois lawsuits) that these breaches could be linked to his loss of the Property, the profits he hoped to realize from its development, or

any damages he sought. The trial court granted Lake's motion on multiple grounds. CP 1734-37; VRP 39:10-42:5. Division 1 affirmed.

IV. ARGUMENT

A. The Standard for Granting Review.

Spice offers no argument that the Opinion raises "a significant question of law under the Constitution of the State of Washington or of the United States" or involves "an issue of substantial public interest." RAP 13.4(b)(3)-(4). He relies on RAP 13.4(b)(1) and (2), which allow review by this court:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision . . . is in conflict with a published decision of the Court of Appeals[.]

B. There Is No Conflict With Supreme Court or Court of Appeals Precedent.

1. The Opinion Does Not Conflict With Precedent Regarding Summary Adjudication of Legal Malpractice Causation Issues.

Central to Spice's petition is the notion that legal malpractice causation cannot be adjudicated as a matter of law on summary judgment. Rather, he contends causation must be tried to a fact finder, to determine the case-within-a-case: what would have been the result in the underlying matter absent the alleged negligence. To this end, Spice prominently cites a passage from *Daugert v. Pappas*, 104 Wn.2d 254, 704 P.2d 600 (1985), describing how but-for causation is determined in this fashion. He further cites various other cases in which courts found, under the facts of *those* cases, that causation was a question of fact.

Spice is wrong. Washington law is clear that in legal malpractice cases, causation can sometimes be

adjudicated on summary judgment. Conspicuously absent from Spice's petition is the passage in *Daugert* immediately preceding that which he quoted:

> In *most* instances the question of cause in fact is for the jury. It is only when the facts are undisputed and inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that this court has held it becomes a question of law for the court. *Petersen v. State*, 100 Wn.2d 421, 436, 671 P.2d 230(1983) (quoting *Mathers v. Stephens*, 22 Wn.2d 364, 156 P.2d 227 (1945)). The principles of proof and causation in a legal malpractice action usually do not differ from an ordinary negligence case.

Id. (emphasis added). Like any other tort claim, if undisputed facts prove that causation is lacking, the case may be dismissed on summary judgment. Numerous cases so hold. *See, e.g., Smith v. Preston Gates Ellis, LLP*, 135 Wn. App. 859, 864-65, 147 P.3d 600 (2006).

Daugert's statement as to the standard for adjudicating causation as a matter of law is precisely that which Division 1 applied in evaluating whether any evidence linked Lake's alleged negligence to the damages

Spice sought to recover. "Proximate cause may be determined as a matter of law when reasonable minds could reach but one conclusion." Opinion at 16. The Opinion is not in conflict with *Daugert*, or any other precedent. Having applied the correct standard, the requirements of RAP 13.4(b)(1) and (2) are not met.

Even if the Opinion was reviewable, Division 1 carefully applied this standard. It painstakingly looked at the undisputed evidence, and *admissible* evidence proffered by Spice,[10] and analyzed causation separately as to each category of damages: loss of the Property, loss of development profits, and legal fees incurred in regard to the Dubois litigation, etc. Undisputed evidence showed that:

[10] Division 1 properly ignored hearsay and speculation proffered by Spice in certain respects.

- Spice lost 75% of what at one point appeared to be 100% ownership of the Property through his first lawsuit with DuBois;
- He was unable to develop the Property once DuBois asserted an interest in it, undermined his financing efforts, and otherwise refused to support its development.
- He lost *LUPA II* because DuBois refused to join as a co-plaintiff.
- He lost his 25% interest when the DuBois Trustee was allowed to sell the Property without partitioning Spice's interest.

Given the undisputed evidence of what transpired once Mathews died, no admissible evidence created a question of fact linking Lake's alleged negligence – nonsuiting *LUPA I*, putting *LUPA II* on hold to await the outcome of *Stanzel*, and not immediately notifying Puyallup of Mathews' death – to these losses or any other alleged

losses. All flowed from his scorched earth dispute with DuBois.

2. The Opinion Does Not Conflict With Precedent Regarding the Admissibility of Expert Testimony on Legal Malpractice Causation Issues.

Spice also argues that Division 1 erred by requiring him to "introduce expert opinion 'to link the loss of property to anything Lake did or failed to do'" even though "a legal malpractice plaintiff may *not* introduce expert testimony to establish proximate cause ." Petition at 2. His framing of this issue misstates the law and the Opinion.

First, Spice cites no case, much less published precedent, that Washington forbids any expert testimony on causation in legal malpractice cases. While testimony on how a court would or should rule may be ignored,[11]

[11] Spice's characterization of the holding in *Butler v. Thomsen*, No. 76536-1-I, 2018 WL 6918832, at *9 (Wash. Ct. App. Dec. 31, 2018) is wrong. On the particular and unique facts in that case, the *Butler* Court held only that

cases uniformly hold that expert testimony *is* admissible on other causation issues, is necessary where a jury could otherwise only find an element of negligence claim by pure speculation, and that these principles apply in legal malpractice cases. *See Auer v. Leach,* No. 46105-6-II, 2015 WL 6506549, at *11 (Wash. Ct. App. Oct. 27, 2015) (citing *Estate of Bordon ex rel. Anderson v. Dep't of Corr.,* 122 Wn. App. 227, 243-44, 95 P.3d 764 (2004); *Geer v. Tonnon,* 137 Wn. App. 838, 851, 155 P.3d 163 (2007); 4 R. Mallen & J. Smith*, Legal Malpractice* § 34:20, at 1172 (2008 ed.)). The *Auer* Court rejected the same argument advanced here – that the trial court had held the plaintiff to an improper burden on summary judgment by requiring expert testimony to survive

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expert opinion as to what would have been the outcome had an attorney selected a different forum – arbitration rather than court – or offered different evidence in response to a motion, was inadmissible. *Butler* did not hold broadly that expert testimony is never admissible on causation.

summary judgment. *Id. See also Cox v. Lasher Holzapfel Sperry & Eberson, PLLC,* No. 83360-0-I, 2022 WL 2662032, at *3-4 (Wash. Ct. App. July 11, 2022) (affirming summary judgment dismissing legal malpractice claims absent evidence, including expert opinions, as to what additional evidence would have been developed absent the attorney's alleged failure to develop and introduce evidence at trial).

Second, Division 1 did *not* hold that expert testimony on causation is *required* in all legal malpractice cases, as a threshold matter, to meet a plaintiff's burden of proof. In analyzing causation as to each category of damages, Division 1 referenced a lack of expert testimony in regard to only one: the loss of the value of the property.[12] Its observation as to the lack of expert testimony in that context was within a discussion of the

[12] There was no reference to a lack of expert testimony in analyzing causation as related to, e.g., lost development profits, or any other category of damages.

broader record: that Spice "lost his interest in the Property because a bankruptcy court ordered it to be sold," and that Spice received his 25% share of the sales proceeds. Opinion at 18. The Court then noted the lack of expert testimony on the subject ("Aramburu provides no expert opinions to link the loss of this Property to anything Lake did or failed to do.") – i.e., that such evidence was absent, not that it was required. Thus, on the record before it, "any causal link between the sale of the Property and the delay in obtaining a water availability letter for the Property is entirely speculative." *Id.* at 18-19.

Spice cites no case, much less published precedent, that conflicts with Division 1's discussion of the evidence in *this* case. RAP 13.4(b)(1) and (2) are not met.

DATED this 6th day of October, 2022.

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CERTIFICATE OF COMPLIANCE This brief complies with the type-volume limitation of RAP 18.17 because this brief contains 4,985 words, which is less than the 12,000-word limitation.

CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 6th day of October, 2022, 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 6th day of October, 2022.

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