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STATE OF WASHINGTON
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Division I
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No.

101415-5

SUPREME COURT OF
THE STATE OF WASHINGTON

COURT OF APPEALS DIVISION I
STATE OF WASHINGTON No. 83360-0

KATHRYN M. COX,

Petitioner,

vs.

LASHER HOLZAPFEL SPERRY & EBBERSON, PLLC, a Washington Professional Limited Liability Company; and MAYA TRUJILLO RINGE and JOHN DOE RINGE, a marital community,

Respondents.

PETITION FOR REVIEW

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I. Identity of Petitioner

Petitioner Kathryn M. "Katy" Cox, plaintiff in the underlying legal malpractice lawsuit and Appellant in Division I, seeks review of the decision by Division I, as authorized by RAP 13.4(a).

II. Citation to Court of Appeals Decision

Petitioner Katy Cox seeks review of the Court of Appeals' decision affirming dismissal of her legal malpractice complaint. Appx. 20.[1] The Court denied Ms. Cox's Motion for Reconsideration on September 29, 2022. Appx. 29.

III. Issues Presented for Review

Petitioners seek review from the third in a series of four (4) legal malpractice appeals submitted for decision this year in which Division I has been called upon to decide whether a genuine issue of material fact remains in dispute relative to proximate cause.[2] In each of those cases, Division I has arrived

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1 2022 WL 2662032 (Div. I 07/11/2022).

2 In addition to this Petition: (1) *Spice v. Lake,* Supreme Court case no. 1012501 (Petition for Review pending); (2) *Dang v. Floyd Pflueger Ringer, P.S.,* __ Wn. App.2d __, __P.3d __, 2022 WL 9732289 (Div. I

at inconsistent and poorly articulated conclusions which fail to follow this Court's direction in *Daugert v. Pappas,* 104 Wn.2d 254, 704 P.2d 600 (1985) and thus impose unrealistic and insurmountable evidentiary requirements on legal malpractice plaintiffs. The unwillingness of Division I to abide by this Court's instructions in *Daugert* thus warrants review pursuant to RAP 13.4(b)(1).

As a result, the lower courts, like Division I in this case, routinely dismiss legal malpractice claims on summary judgment on the grounds of proximate cause by ignoring this Court's instruction that "in most legal malpractice actions the jury should decide the issue of cause in fact. *Daugert, supra* 104 Wn.2d at 258. The Petition of Katy Cox thus raises the following issues:

1. Considering that, unlike a medical malpractice

10/17/22), and; (3) *Angelo v. Kindinger,* case no. 82388-4, 2022 WL1008314. Petitioner maintains that Division I reached the correct result in *Angelo v. Kindinger.*

plaintiff, a legal malpractice plaintiff may *not* introduce expert testimony to establish the probable outcome of the underlying matter, did the Court of Appeals err when it held that, to establish a genuine issue of material fact relative to proximate cause, a legal malpractice plaintiff's standard of care expert must testify as to how defendant attorney's breaches of the standard of care would have "changed the outcome"?

2. Considering that a legal malpractice plaintiff may *not* introduce expert testimony to establish the probable outcome of the underlying matter and all reasonable inferences must be drawn in her favor, did Petitioner Cox establish that a genuine issue of material fact remains in dispute relative to proximate cause when all reasonable inferences are drawn in her favor?

3. Considering that the Division I opinion conflicts with this Court's decision in *Daugert v. Pappas* and reflects an inconsistency in the proximate cause standards imposed by Division I in multiple cases, should the Court grant review

pursuant to RAP 13.4(b)(1) and/or RAP 13(b)(2).

IV. STATEMENT OF THE CASE

A. Introduction

This legal malpractice case arises out of a post-nuptial agreement entered between Katy and John Cox in **2011**, after they had reconciled following a prior separation in 2007. Following years of physical and sexual abuse,[3] Katy filed a Petition for Separation from John in May **2016**. In response, John challenged the validity of the 2011 post-nuptial agreement. The trial court denied enforcement of the post-nuptial agreement and Division I affirmed. *In re Marriage of Cox,* 2019 WL 2423306 (Div. I 06/10/2019). Based on that decision, the courts thereafter granted John a writ of restitution forcibly removing Katy from the family home. *Cox v. Cox,* 20 Wn. App.2d 594, 501 P.3d 155 (2021) *review den'd,* 199 Wn.2d 1013, 508 P.3d 666 (2022).

Against this background, Katy seeks review of the lower

[3] *Cox v. Cox,* 2022 WL 2216038 (Div. I 06/21/2022).

court decisions which summarily dismissed her legal malpractice claims against the attorney who represented her in the trial relating to the validity of the post-nuptial agreement.

B. Proceedings in the Underlying Matter

Kathryn (Katy) Cox and John Cox were married on November 8, 1986 in Seattle. CP 0202. John and Katy had four children together, now adults. *Id.* After their marriage, Katy became a full-time, stay-at-home mom. CP 0258 ¶3. John, in contrast, became an immensely successful businessman and Senior Vice President at Alexandria Real Estate Equities where he (by his own firm's representations) negotiated and completed complex commercial real estate transactions with transaction values in excess of a *billion* dollars. CP 0259 ¶4.

On July 16, **2007,** John filed a Petition for Dissolution. CP 0199. However, Katy and John reconciled, and he dismissed the dissolution action in January 2008. CP 0201. Distressed by the financial and emotional ramifications of John's dissolution filing, and his threats to leave her penniless,

Katy began discussing a marital agreement with John as early as 2007. CP 0259-267 ¶6-24, 1336-1337 ¶4 and 1356-1434. After years of discussions, John and Katy entered into a "Property Settlement Agreement" on March 2, 2011, which John executed in the presence of a Notary Public, acknowledging his execution of the Property Settlement as his voluntary act. CP 0202-0216.

Five years later, on May 3, 2016, represented by Respondent Maya Trujillo Ringe, Katy filed a Petition for Legal Separation. CP 0217. The Petition requested recognition of the Property Settlement Agreement. CP 0219. John answered the Petition and asserted a counter-petition for dissolution of marriage. CP 0221.

The primary issue at trial involved the enforceability of the 2011 Property Settlement Agreement. Enforceability of postnuptial agreements depends on two key legal issues: substantive fairness and procedural fairness. From the outset of

her representation, Ms. Trujillo Ringe recognized that enforceability of the Property Settlement Agreement between Katy and John would depend on whether Ms. Cox could establish procedural fairness of the agreement. CP 0371 (97:1-23).[4] She thus testified that "his Achilles heel I thought was the procedural prong and her Achilles heel was the substantive fairness prong." *Id.*

In late December 2016, Trujillo Ringe filed a motion for summary judgment to enforce the Property Settlement Agreement in which she argued that the Property Settlement Agreement was both substantively fair (CP 0251) and procedurally fair (CP 0254). CP 0243-0257. Trujillo Ringe supported the motion with Katy's declaration. CP 0258.

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[4] Trujillo Ringe had very limited experience in litigating marital agreements, including only one prior trial relating to a marital agreement in which she appeared as lead counsel. CP 0359-0360 (16:20-21:3). See *Marriage of Berg,* 2013 WL 6153185 (Div. I)(in which Ms. Trujillo Ringe's client lost). Trujillo Ringe had appeared as second chair counsel in two other cases involving marital agreements that had settled in approximately 2008-2009. CP 0360 (20:6-21:3). She had not lectured on marital agreements at any CLE programs and had not published any legal articles on the subject. CP 0359 (14:2-15:4). She had also not drafted marital agreements "in quite some time." CP 0360 (19:18-23).

John's opposition included the Declaration of Gregory Porter [CP 1312], which established the substantive unfairness of the Property Settlement Agreement, and the Declaration of Diane Hutcheson, ARNP [CP 1311] who had most recently seen Mr. Cox on January 11, 2011 (nearly two months prior to his execution of the Property Settlement Agreement). Ms. Hutcheson opined that *if* Mr. Cox had stopped using his medications, "he would have been very vulnerable to demands from Katy."

During oral argument on summary judgment, the trial court (Hon. Jeffrey M. Ramsdell)[5] specifically asked Trujillo Ringe whether she knew of any similar case in which the trial court had granted summary judgment, to which she answered "no." CP 0306 (35:6-23). The trial court denied Ms. Cox's motion for summary judgment. CP 0307.

Knowing that procedural fairness represented the critical issue at trial, and aware of Diane Hutcheson's declaration in

[5] Judge Ramsdell subsequently retired.

connection with summary judgment, Trujillo Ringe decided not to depose Ms. Hutcheson prior to trial because the Judge who heard the summary judgment motion (*i.e.,* Judge Ramsdell) "didn't find her testimony particularly helpful and I didn't think it was particularly helpful because she admitted that she hadn't evaluated him at the time of the signing." CP 0371-372 (97:20-100:15). Unfortunately, following trial before a different Judge (Hon. John R. Ruhl), the Court adopted Ms. Hutcheson's testimony, finding that Mr. Cox had, in fact, ceased his medications and that he thus experienced side effects that prevented him from understanding the consequences of his actions. CP 0317-0318 (FOF 7-17).[6] The trial court made no findings related to the years-long discussions of the Property Settlement Agreement by John and Katy, that had begun in 2007 and continued up to execution of the property settlement agreement in 2011, apparently because Ms. Ringe introduced so

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[6] The FOF from the Underlying Matter do *not* collaterally estop Ms. Cox in this case. *Barr v. Day,* 124 Wn.2d 318, 325-326, 879 P.2d 912 (1994).

little evidence of those communications. CP 1356-1434. Nor did the trial court make any findings relative to the failure of Mr. Cox to take any action to renounce the post-nuptial agreement during the ensuing five years.

Ms. Ringe also decided not to call any of the children to testify at trial—a decision she blames on Ms. Cox. CP 0376 (116:7-25). Ms. Cox categorically denies that she refused to allow Ms. Ringe to call the children to testify; indeed, she had expressly asked Ms. Ringe to list them as witnesses. CP 1335-1336 ¶2, 1339-1340. Had the (adult) children been called, they would have testified that they were aware of their parents' disagreements and the idea that John did not understand the Property Settlement Agreement was "absurd." CP 1341-1355. Their daughter Jessica, now an attorney, confirms that she lived at home during the relevant time period and that she "watched them negotiate their post-nup for months. My dad was completely competent and understood the post-nup agreement—he made suggestions as to different clauses in the

agreement—I saw my parents discuss it." CP 1438-1439 ¶7. Jessica testified further that Judge Ruhl's finding that John was in a "'subservient bargaining position' because of his mental condition is somewhat laughable" because she heard her parents' discussions about the subject. *Id.*[7]

Following the trial court decision, Trujillo Ringe filed a CR 59 motion in which she, for the first time, argued that Katy had been the economically subservient spouse and that John had been the economically dominant spouse. CP 344-348, 374-375 (108:15-110:4). Trujillo Ringe had not raised that argument in Katy's Trial Brief. CP 374-375 (108:15-112:9). The Court denied the motion. CP 232 (Dkt. 86).

Ms. Cox appealed. CP 232 (Dkt. 98A). On appeal, Division I affirmed rejection of the Property Settlement

[7] This dispute between Trujillo Ringe and Katy relative to the decision to call the children to testify at trial, standing alone, establishes a genuine issue of material fact in dispute. The trial court nevertheless relied on Trujillo Ringe's version of these events, explaining that "[i]n response to Judge Ruhl's question. . . .Ms. Ringe stated 'she prefers I don't call her children to rebut things.'" CP 1586.

Agreement. CP 150; Appx. 20.

C. Proceedings in the Trial Court

Ms. Cox filed the Complaint in this case *pro se* on November 23, 2020. CP 0001. Respondents Trujillo Ringe and Lasher Holzapfel answered the Complaint, alleged a counterclaim for fees allegedly owed it, and asserted a claim for frivolous lawsuit damages. CP 0010-0012.[8]

The defendants/Respondents later filed a motion for summary judgment in which they argued, *generally*, that Katy had not established Trujillo Ringe's breach of the standard of care because she had not submitted expert testimony to establish a breach of the standard of care [CP 0024], and had not established that the alleged breaches of the standard of care had proximately caused her damage [CP 0025]. CP 0019-0026. The defendants' opening motion did *not* raise either the "attorney judgment rule" or collateral estoppel. *Id.*

[8] During the summary judgment proceedings, Respondents withdrew the motion related to their frivolous lawsuit counterclaim [CP 1584] and, after the court dismissed Ms. Cox's Complaint, dismissed their counterclaims without prejudice. CP 1597.

Ms. Cox opposed the motion for summary judgment [CP 1440], supported by the sworn testimony of standard of care expert Carolyn Martino [CP 1460-1474, 1575-1581],[9] Ms. Cox's own declaration [CP 1335-1436] and that of her daughter Jessica Cox. CP 1437-1439. Ms. Cox also submitted the dissolution trial court transcript,[10] together with pleadings and discovery from this case and the Underlying Matter. CP 0138-1334. Based on that documentation and information, Ms. Martino opined that Ms. Ringe's representation fell below the standard of care in "multiple ways."[11] CP 1469-1472. The defense offered no expert testimony on the standard of care; a genuine issue of material fact thus existed on the issue of whether Ms. Trujillo Ringe had breached the standard of care.

However, for the first time in their summary judgment

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[9] The trial court expressly denied Respondents' motion to strike and admitted Ms. Martino's expert testimony—a ruling which Respondents did not raise on appeal. RP (10/22/21) p. 36:3-14; CP 1585.

[10] See, *e.g.*, *Spencer v. Badgley Mullins Turner, PLLC,* 6 Wn. App. 2d 762, 784, 432 P.3d 821 (2018).

[11] CP 1472.

reply, Trujillo Ringe and Lasher Holzapfel raised the issues of the attorney judgment rule and collateral estoppel. CP 1475. Katy objected and moved to strike the defendants' attorney judgment rule and collateral estoppel arguments as improperly raised for the first time in reply. CP 1568-1574; RP 14:2-15:23, 21:13-22:19. The trial court, however, refused to strike the issues raised for the first time in reply, rationalizing [RP 29:19-25]:

> I am not going to grant Plaintiff's motion to strike the arguments raised in the reply by—by Defense. I think those arguments are raised in response to the sequence of disclosure of experts' opinion in this case, and I find that it's appropriate, so I'm not striking the arguments raised in Reply.

No serious dispute existed relative to the element of damage, *i.e.,* the difference between the result in *Marriage of Cox* and the result that would have occurred if the courts had upheld the Property Settlement Agreement. Both Mr. Cox's expert forensic accountant in the Underlying Matter (Greg Porter) and Ms. Cox herself quantified the difference. CP 0381 (Ans. to 'Rog. no. 5), 0433-0510, 1312-1334, 1435-1436.

Following oral argument, the trial court took the motion for summary judgment under submission. *Id.* (30:1-2). On October 22, 2021, the trial court granted the defendants' motion, explicitly based on the attorney judgment rule. Appx. 001; CP 1585-1586; RP (10/22/21)[5:15-10:10]. Ms. Cox timely appealed. CP 1588.

D. Proceedings in the Court of Appeals

Division I affirmed dismissal of Katy's Complaint based solely on proximate cause, concluding that Ms. Cox had "not sufficiently developed" the "impact" of Trujillo Ringe's specific breaches of the standard of care "to the ultimate failure of Katy's case." Appx. 26-27. **Division I further complained that Katy's standard of care expert** [App. 28]:

> ".....neglected to identify what evidence particular investigation would have produced, experts who would have provided the testimony she states was critical **and how that would have changed the outcome for Katy.**" [Emphasis added].

Petitioner Katy Cox thus seeks review of the Division I decision because standard of care experts in legal malpractice

cases are *not* allowed to opine as to the "outcome" of the underlying matter; instead, that role is reserved to the factfinder in the legal malpractice case.

V. ARGUMENT WHY THIS COURT SHOULD GRANT REVIEW

A. Petitioner Challenges Inconsistency in Lower Court Standards Governing Proximate Cause in Legal Malpractice Cases.

Summary judgment is a drastic remedy "appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Kittitas County v. Allphin*, 190 Wn.2d 691, 700, 416 P.3d 1232 (2018). A material fact is one controlling the litigation's outcome. *E.g., Mita v. Guardsmark, LLC*, 182 Wn. App. 76, 82, 328 P.3d 962, 965 (2014). Summary judgment is appropriate only where a trial would truly be "useless." *Wheeler v. Ronald Sewer Dist.*, 58 Wn.2d 444, 446, 364 P.2d 30 (1961).

When addressing whether a genuine issue of material fact is present, the Court must construe the facts, and all reasonable

inferences from the facts in a light most favorable to the non-moving party, *i.e.,* Petitioner. *E.g., Ranger Ins. Co. v. Pierce Cty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

Washington courts are to apply the same *general* principles of causation in legal malpractice actions as in ordinary negligence cases. *E.g., VersusLaw v. Stoel Rives, LLP,* 127 Wn. App. 309, 328-329, 111 P.3d 866 (2005). In that context, Washington jealously protects against infringement on the constitutional province of the jury to determine causation. *E.g., Sofie v. Fibreboard Corp.,* 112 Wn.2d 636, 771 P.2d 711 (1989).

However, unlike other professional negligence cases, the plaintiff in a legal malpractice case cannot introduce expert testimony to establish proximate cause, as 4 Mallen, *Legal Malpractice* §37:137, pp. 1921-1926 (2022 ed.) explains:

> Such use of expert testimony usurps the jury's prerogative to decide the ultimate facts. Under the objective standard for deciding what 'should have been,' the use of such testimony, even by the jurist who would have made that decision, is improper."

Accord, *Butler v. Thomsen,* 2018 WL 6918832 *9 (Div. I) ("testimony, even expert testimony, regarding what a decision-maker might or might not have decided, is speculative"); *Hickey v. Scott,* 796 F. Supp.2d 1, 5-6 (D.D.C. 2011)(excluding predictions of what some other fact finder would have concluded and evaluations of the legal merits' of the underlying claims, which would be impermissible legal opinion); *E-Pass Techs. v. Moses & Singer, LLP,* 2012 WL 2277937 *3 (N.D. Cal. June 18, 2012)(expert testimony not admissible "to tell the jury what a reasonable trier of fact would have done;" *Whitley v. Chamouris,* 265 Va. 9, 574 S.E. 2d 251 (Va. 2003)("No witness can predict the decision of a jury and, therefore, the former could not be the subject of expert testimony"); *Leibel v. Johnson,* 291 Ga. 180, 728 S.E.2d 554, 556 (2012)("second jury does this by independently evaluating the evidence in the underlying case as it should have been presented to determine whether it believes that the plaintiff has a winning case"").

Daugert Pappas, 104 Wn.2d 104 Wn.2d 254, 257-258,

704 P.2d 600(1985) explains the resulting trial-within-the-trial process as follows:

> The trial court hearing the malpractice claim merely retries, or tries for the first time, the client's cause of action which the client asserts was lost or compromised by the attorney's negligence, and the trier of fact decides whether the client would have fared better but for such mishandling. **In effect, the second trier of fact will be asked to decide what a reasonable jury or fact finder would have done but for the attorney's negligence. Thus, it is obvious that in most legal malpractice actions, the jury should decide the issue of cause in fact.** (Emphasis added).

Consistent with these principles, Washington requires that when the fact finder must determine what would have happened but for the defendants' negligence, the plaintiff establishes proximate cause through inferences drawn by the fact finder. *E.g., Physicians Ins. Exch. v. Fisons Corp.,* 122 Wn.2d 299, 314, 858 P.2d 1054 (1993).

Indeed, Washington case law provides many examples of inferences sufficient to establish a genuine issue of material fact that defeats summary judgment when the issue is what would have happened but for the defendant's negligence. For

example, in *Fisons, supra,* 122 Wn.2d. at 314, a failure to warn case, the defendant drug manufacturer "argue[d] that the trial court erred in failing to dismiss the physician's claims on the basis that there was insufficient evidence of proximate cause *because only the physician testified how he would have acted differently if he had been adequately warned.*" (Emphasis added). On that evidence, the Supreme Court held "there was sufficient evidence to justify the proximate cause issue being submitted to the jury." *Id.* [12]

Similarly, in *Ayers v. Johnson & Johnson Baby Products Co.,* 117 Wn.2d 747, 818 P.2d 1337 (1991), the Court

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[12] See further, *Hartley v. State,* 103 Wn.2d 768, 775-776, 698 P.2d 77 (1985)(whether driver "would not have driven if his license had been suspended...is a proper question for jury determination"); *Strother v. Capitol Bankers Life Ins. Co.,* 68 Wn. App. 224, 239, 842 P.2d 504 (1992), *reversed sub nom on other grounds, Ellis v. Wm. Penn Life Assur. Co. of Am.,* 124 Wn.2d 1, 873 P.2d 1185 (1994)("Although it is impossible to have direct evidence as to what Mark would have done [because he had died], we do not consider the question to be so **speculative** as to defeat liability…"); *Weatherbee v. Gustafson,* 64 Wn. App. 128, 133-134, 822 P.2d 1257 (1992)(reversing summary judgment based on "reasonable inferences" that smoke alarm would have gone off and victim would have reacted differently).

reinstated a jury verdict, explaining [117 Wn.2d at 755]:

> Johnson & Johnson asserts that under these circumstances it is "rank speculation" to suppose a warning would have prevented the injury.
>
> We reject this argument...**At most, Johnson & Johnson's argument suggests that reasonable persons might disagree as to whether a warning would have made any difference.** For this court to uphold the trial court's judgment notwithstanding the verdict, however, more is required. **This court must be prepared to conclude that no reasonable person could infer, as did the jury, that a warning would have altered the Ayerses' behavior. The evidence presented at trial was not so weak as to permit such a conclusion.** [Emphasis added].

In addition to this case, in which Division I held in pertinent part, that Katy's standard of care expert [App. 28]: neglected to identify what evidence particular investigation would have produced, experts who would have provided the testimony she states was critical **and how that would have changed the outcome for Katy.**" [Emphasis added].

Division I recently decided three other legal malpractice appeals from summary judgment, each of which depends upon correct application of *Daugert* and the drawing of

all reasonable inferences in favor of the legal malpractice plaintiff relative to proximate cause:

- ***Spice v. Lake,*** 2022 WL 1766359[13] in which Division I held that "Aramburu[14] provides no expert opinions to link the loss of this Property to anything Lake did or failed to do…".
- ***Angelo v. Kindinger,***[15] in which Division I held in pertinent part [*9]:

> [T]he **only question before us is whether** Angelo provided enough evidence to establish a genuine issue of material fact that **Kindinger's alleged breach of duty**—failing to disclose to the arbitrator—**probably caused Angelo's injury.** It is undisputed that the sanctions were, in part, based on the nondisclosure of the bid for WPC 2016 and that Kindinger did not disclose the information to the arbiter and also advised Angelo not to disclose the information to the arbiter. The fact that Angelo's conduct also caused sanctions does not insulate Kindinger from a claim of malpractice for his actions that led to the sanctions.

- ***Dang*** *v.* ***Floyd Pflueger & Ringer, P.S.***,[16] although

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[13] See n. 2, above.
[14] Spice Petitioners' standard of care expert.
[15] See n. 2, above. Petitioner *agrees* that *Angelo v. Kindinger* reached the correct result, despite its superficial analysis.
[16] See n. 2, above.

vaguely acknowledging that an adequate summary judgment showing "can be made without expert testimony" [*id.* at *9], nevertheless summarily concluded that no reasonable trier of fact could have decided that Dr. Dang would have obtained a more favorable result regardless of the evidence omitted from the MQAC administrative proceeding due to his attorney's breaches of the standard of care.

Thus, despite the inadmissibility of expert testimony to establish proximate cause in legal malpractice cases, Division I imposed precisely such a requirement in both this appeal and in *Spice*. Furthermore, even though *Dang* left the issue of the circumstances in which a legal malpractice plaintiff must introduce expert testimony uncertain, it nevertheless imposed its own summary conclusion relative to proximate cause without allowing the trial court factfinder to make that decision in the first instance. The Court should therefore grant review and explain the primacy of inferences in establishing proximate cause and the inadmissibility of expert testimony to establish

proximate cause in legal malpractice cases.

B. Applying the Correct Legal Standard, Ms. Cox Established a Genuine Issue of Material Fact Relative to Proximate Cause.

To defeat summary judgment on the issue of proximate cause, the plaintiff need only introduce evidence from which a reasonable juror could *infer* the fact of a better result. *Gaasland Co. v. Hyak Lumber & Millwork, Inc.,* 42 Wn.2d 705, 713-714, 257 P.2d 784 (1953)(reversing summary judgment).

Accordingly, to establish the existence of a genuine dispute relative to proximate cause, Katy need only have elicited evidence from which a reasonable juror could infer that she would have prevailed on enforcement of the post-nuptial agreement. To do that, as Division I explained in the underlying matter [2019 WL 2423306 at *2]:

> The court determines whether the agreement is procedurally fair by asking "(1) whether the spouses made a full disclosure of the amount, character, and value of the property involved and (2) whether the agreement was freely entered into on independent advice from counsel with full knowledge by both spouses of their rights." [Citation to quote authority omitted].

Inexplicably, Division I concluded that a reasonable juror could not have found the Property Agreement procedurally fair despite the omitted testimony of the couple's daughter and sons, coupled with the extensive email correspondence about the Property Agreement over the course of several years. Again, Washington courts must draw all reasonable inferences in favor of Katy, including when deciding the issue of proximate cause and, in this case, resolution of the procedural fairness determination.

By imposing its own judgment summarily, Division I usurped the province of the jury. Genuine issues of material fact remained in dispute relative to whether the trial court in *Marriage of Cox* would have found the Property Settlement Agreement procedurally fair in the Underlying Matter but for Ms. Trujillo Ringe's breaches of the standard of care. Summary judgment on the issue of proximate cause was therefore also improper.

VI. Conclusion

Petitioner therefore respectfully requests that the Court grant review and, following review, reverse the Court of Appeals and remand this matter for trial.

VII. RAP 18.17 Certificate of Compliance

This brief complies with the type-volume limitation of RAP 18.17 because this brief contains 4,894 words, which is less than the 5,000-word limitation.

DATED: October 31, 2022.

WAID LAW OFFICE, PLLC

BY: /s/ Brian J. Waid
BRIAN J. WAID
WSBA No. 26038
Attorney for Petitioner

CERTIFICATE OF SERVICE

This document was filed via CM/ECF and will be automatically served on all registered participants. Additional copies served by mail: None, unless requested.

DATED: October 31, 2022.

WAID LAW OFFICE, PLLC

BY: /s/ Brian J. Waid
Brian J. Waid
WSBA No. 26038
Attorney for Petitioner

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2

3 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

4 IN AND FOR THE COUNTY OF KING

5 KATHRYN M. COX, 6 Plaintiff, 7 vs. 8 LASHER HOLZAPFEL SPERRY & EBBERSON, PLLC, a Washington 9 Professional Limited Liability Company; and MAYA TRUJILLO 10 RINGE and JOHN DOE RINGE, a marital community, 11 Defendants.	)	No. 20-2-17075-5 SEA Appeal No. 83360-0-I

12

13 **Court's Oral Ruling - Motion for Summary Judgment**
Report of Proceedings from Audio Recording

14 **Appearances:**

15 Brian Waid, Attorney at Law, appeared via Zoom on behalf of the Plaintiff.

16

17 Roy Umlauf, Attorney at Law, appeared via Zoom on behalf of the Defendants.

18 BE IT REMEMBERED that on **October 22, 2021**, the

19 above-captioned cause came on for hearing before the

20 **Honorable Samuel Chung**, Judge of the Superior Court in and

21 for the County of King, State of Washington; the following

22 proceedings were had, to-wit:

23

24 Audio Recording Transcribed By:
Jan-Marie Glaze, CCR, RPR, CRR — Certified Court Reporter
25 janmarieglaze@gmail.com — License No. 2491

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2 Proceeding: Page

3 Motion for Summary Judgment:
Court's Oral Ruling 3

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1 October 22, 2021
2 Morning Session
3 * * *
4 THE COURT: ...everyone. This is Judge Chung
5 from King County Superior Court.
6 MR. WAID: Good morning, Your Honor.
7 THE COURT: Good morning. I want to thank
8 the parties and counsels for allowing me to reschedule
9 our -- my oral ruling till today. We had a month-long
10 trial that just wrapped up yesterday, and I just wasn't
11 able to get my arms around it. I appreciate your
12 patience. And what I've done is I've prepared written
13 remarks that I will read into the record, and I'm going
14 to ask the parties to prepare orders pursuant to my
15 oral ruling. I wish I had time to draft something of
16 my own, but I've just -- it is what it is. I
17 apologize.
18 I'll try to go slow so -- and you may have some
19 questions at the end which I'll take up.
20 All right. We are here on Plaintiff, Ms. Kathryn
21 Cox, and Defendants, Lasher Holzapfel Sperry and
22 Ebberson and Maya Ringe. The case number is
23 20-2-17075-5. This matter comes before this Court on
24 Respond -- Defendant's motion for summary judgment. I
25 heard oral argument last Friday, October 22, and I

1 reserved the ruling till today.
2 This is a legal malpractice action brought by
3 Plaintiff, Ms. Kathryn Cox, against her former
4 attorney, Maya Trujillo Ringe, and her law firm, Lasher
5 Holzapfel Sperry and Ebberson, PLLC who had represented
6 Ms. Cox in her divorce proceedings against her former
7 husband, John Cox. That case was tried before Judge
8 John Ruhl with the final orders entered on July 17,
9 2017. The cause number in that case was 16-3-02781-8.
10 One of the critical issues in that case was the
11 validity of the postnuptial agreement that Ms. Cox and
12 her former husband had entered into. Following a
13 five-day trial, Judge Ruhl found that the agreement was
14 both substantively and procedurally not fair and,
15 therefore, unenforceable. Ms. Cox then appealed that
16 decision, which was affirmed in an unpublished opinion
17 recorded on June 10, 2019.
18 In the opinion by Judge Leach, the decision of the
19 trial court was upheld finding that the postnuptial
20 agreement was invalid and not enforceable. This action
21 was filed on November 23, 2020.
22 Defendants' current motion first argues that
23 Plaintiff lacked a legal expert to opine on whether
24 Defendant's attorney was negligent. Since the filing
25 of the current motion, Plaintiff has obtained the

1 opinions of Ms. Carolyn H. Martino who is a licensed
2 attorney in California but not licensed in Washington.
3 Defendants argue that Ms. Martino is not qualified
4 since she's not licensed in Washington. Plaintiff has
5 responded that the laws regarding the validity of a
6 postnuptial agreement are similar, if not identical, in
7 California and Washington, and that in a legal
8 malpractice case, an out-of-state attorney can serve as
9 an expert citing a treatise -- a Washington practice
10 treatise by DeWolf and Allen. Defendants have not
11 provided any controlling legal authority to the
12 contrary; therefore, for the sake of this current
13 motion, the Court declines to strike Ms. Martino's
14 expert opinion.
15 Defendants have also asserted that Plaintiff's
16 current claims are barred by the so-called attorney
17 judgment rule which provides that, quote, in general,
18 mere errors in judgment or in-trial tactics do not
19 subject an attorney to liability for legal malpractice.
20 As held in *Clark County Fire District No. 5 vs.*
21 *Bullivant Houser Bailey, PC,* 180 Wn. App. 689, 2014
22 case, whether an attorney has breached a duty of care
23 is a question for the jury. However, under certain
24 circumstances, whether an error in judgment constitutes
25 a breach of duty can be decided as a matter of law.

1 This is no different than any other negligence
2 case where a defendant can obtain summary judgment on
3 the issue of breach of duty if reasonable minds could
4 reach only one conclusion. Under the attorney judgment
5 rule, a plaintiff can avoid summary judgment on breach
6 of duty for an error in judgment in one of two ways,
7 and I'm quoting from the *Clark County* case. First, the
8 plaintiff can show that the attorney's exercise of
9 judgment was not within the range of reasonable choices
10 from the perspectives of a reasonable, careful and
11 prudent attorney in Washington. However, merely
12 providing an expert opinion that the judgment decision
13 was erroneous or that the attorney should have made a
14 different decision is not enough. The expert must do
15 more than simply disagree with the attorney's decision.
16 And that's quoting from the *Halvorsen* case, 46 Wn. App.
17 at 715, which is cited by Defense.
18 Expert statements that they would have conducted
19 litigation differently cannot, as a matter of law,
20 support a legal negligence action. A plaintiff must
21 submit evidence that no reasonable Washington attorney
22 would have made the same decision as a defendant
23 attorney did. Citing the *Cook* case, 73 Wn.2d. at 396,
24 "Attorney not liable for judgment decision even though
25 he might not meet with unanimous approval."

1 Similarly, on the issue of proximate cause, this
2 can be decided as a matter of law if reasonable minds
3 could not differ. In order to avoid summary judgment,
4 Plaintiff must produce evidence that the error in
5 judgment did, in fact, affect the outcome.
6 Focusing on the alleged errors by Defendant,
7 Plaintiff's expert, Ms. Martino, states that Defendant
8 attorney, Ms. Ringe, committed legal malpractice by
9 failing to present evidence that would have upheld the
10 parties' postnuptial agreement. Specifically,
11 Ms. Martino and the plaintiff now argue that Ms. Ringe
12 failed to present evidence regarding the procedural
13 fairness such as how long the parties had negotiated
14 the postnuptial agreement, failing to call other
15 witnesses to illustrate how the former husband was
16 aware of the terms of the agreement, witnesses such as
17 the attorney who prepared the agreement and the
18 couple's children who have filed declarations in
19 support of Ms. Cox at the summary judgment stage.
20 As counsel for Plaintiff has argued, the trial
21 court hearing a malpractice claim merely retries, or
22 tries for the first time, the client's cause of action
23 which the client asserts was lost or compromised by the
24 attorney's negligence, and the trier of fact decides
25 whether or not the client would have fared better but

1 for such mishandling.
2 The prior case rulings do not have any collateral
3 effects on the current findings.
4 In reviewing the trial testimonies and the
5 findings entered by Judge Ruhl, the following evidence
6 was presented at the divorce trial: Ms. Cox testified
7 that the postnuptial agreement was a product of many
8 years of discussions between her and Mr. Cox following
9 their 2007 separation in which the parties had filed
10 for separation and counter filed for divorce. The
11 parties then reconciled or tried to reconcile. And to
12 serve as a shield against Mr. Cox, threatening to leave
13 her again, Ms. Cox understandably wanted the agreement
14 done.
15 Mr. Cox, on cross-examination, admitted that the
16 agreement took three years to negotiate. He also
17 testified that he was upset that the couple's children
18 had filed declarations in support of Ms. Cox and
19 actually had threatened the children with subpoenas in
20 the future if they had tried to testify.
21 Ms. Ringe impeached Ms. Cox -- I'm sorry.
22 Ms. Ringe impeached Mr. Cox with Jessica Cox's
23 declaration in which Ms. Cox stated that she had heard
24 the couple negotiating the terms of the agreement.
25 Mr. Cox also admitted that he reviews contracts as a

1 matter of course as part of his job as a real estate
2 executive and that he was capably doing his work about
3 the same time as he entered into the postnuptial
4 agreement.
5 Ms. Cox and her expert -- Ms. Cox's expert argues
6 that others, like the children, should have been
7 allowed to testify at trial as well as the attorney who
8 prepared the agreement. In support of her opposition
9 to the current motion for summary judgment, Ms. Cox
10 submitted a witness list from the divorce trial listing
11 the children. However, this list is contradicted by
12 Ms. Ringe's statement to the Court in response to Judge
13 Ruhl's question about what rebuttal evidence he was
14 going to put on, Ms. Ringe stated, quote, she prefers I
15 don't call her children to rebut things. That's on
16 Page 782 of the trial transcript.
17 Similarly, regarding the attorney who prepared the
18 agreement, Ms. Cox admitted during her testimony that
19 she had asked the attorney to prepare the agreement
20 pursuant to the terms she provided but did not provide
21 any of the underlying financial information to him.
22 Based on the above, this Court finds that the
23 expert's current argument that Ms. Ringe failed to
24 sufficiently emphasize -- basically constitutes
25 Ms. Ringe failed to sufficiently emphasize the argument

1 that there was procedural due -- fairness, I find that
2 this, in reality, involved the judgmental and tactical
3 decisions of an attorney in the conduct of litigation
4 and, therefore, is covered by the attorney judgment
5 rule.
6 I'm going to grant summary judgment because of
7 these findings. I find that the actions of Ms. Ringe
8 and the issues raised by the current expert is covered
9 by the attorney judgment rule, and I'm going to order
10 dismissal of the action accordingly.
11 All right. Any questions at this time?
12 MR. UMLAUF: No, Your Honor. Thank you.
13 SPEAKER: Thank you, Your Honor.
14 THE COURT: All right. I'm not hearing --
15 Mr. Waid, I think you're muted. Mr. Waid, you're
16 muted. Your microphone is muted.
17 MR. WAID: I unmuted and apparently muted
18 myself. No questions, Your Honor. I -- I think you
19 previously rejected our motion to strike their attorney
20 judgment rule argument raised for the first time in
21 reply, so I take it that your order today incorporates
22 that decision?
23 THE COURT: That is correct. And I ruled at
24 the last meeting that the expert was not disclosed
25 until the response and, therefore, Defense should be

1 allowed to submit that argument. And I also considered
2 the sur-rebuttal arguments raised by the plaintiff in
3 this case.
4 If you can work on the final order and findings,
5 and if you have differences, to go ahead and put them
6 in track changes, I will review them. I may have left
7 out a few things here as well, but I will look at them
8 next week, if you can get them to me the sooner the
9 better before I forget and move on to other things as
10 well.
11 MR. UMLAUF: Sure. Your Honor, I mean, I --
12 we have a proposed order. We can probably make it
13 simpler unless you want the specific findings. I mean,
14 I think the oral -- I think you made the oral findings;
15 that what we would propose is just a very simple
16 "motion for summary judgment is granted," if that's
17 okay with you.
18 THE COURT: I mean, it's -- I'm fine with
19 that, and -- I mean, for any future --
20 MR. UMLAUF: We have a record here, correct?
21 I mean, there's a tape recording of the oral ruling,
22 and it -- it then might just be easier to do a simple
23 motion rather than trying to incorporate all the oral
24 statements that you made, if that's okay with you and
25 with counsel.

1 THE COURT: Well, at this juncture, it's
2 purely up to your client and what you want to do. I
3 mean, I've made my ruling. I'm just thinking ahead.
4 You know, I don't know whether this will go up to
5 Division I or not, so I'll do whatever the prevailing
6 party feels comfortable doing. Okay?
7 MR. WAID: Your Honor, Roy and I will work it
8 out.
9 MR. UMLAUF: Great. Thank you, Your Honor.
10 SPEAKER: Thank you, Your Honor.
11 THE COURT: Great. Nice meeting you and take
12 care. Bye-bye.
13 MR. UMLAUF: Goodbye, thank you.
14 (End of recording.)
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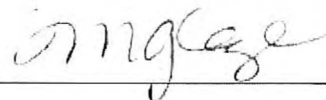
1 **CERTIFICATE**

2

3 I, JAN-MARIE GLAZE, Certified Court Reporter
4 in the state of Washington, do hereby certify:
5 That the foregoing proceedings were
6 transcribed from an audio recording received from Waid Law
7 Office, PLLC to the best of my ability, subject to the
8 quality of audio recording, or was transcribed under my
9 direction;
10 That I am not a relative, employee, attorney
11 or counsel of any party to this action or relative or
12 employee of such attorney or counsel, and I am not
13 financially interested in the said action or the outcome
14 thereof;
15 That this certification applies only to the
16 original and copies supplied under my direction and not to
17 any copies made by other parties;
18 IN WITNESS WHEREOF, I have hereunto set my
19 hand in Contoocook, New Hampshire, this 7th day of December
20 2021.

21

22

23 

24 Jan-Marie Glaze
Court Reporter
25

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4 Honorable Samuel Chung
Hearing Date: October 15, 2021
5 Hearing Time: 9:00 A.M.

6 IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR KING COUNTY
7

KATHRYN M. COX, Plaintiff, vs. LASHER HOLZAPFEL SPERRY & EBBERSON, PLLC, a Washington Professional Limited Liability Company; and MAYA TRUJILLO RINGE and JOHN DOE RINGE, a marital community, Defendants.	No. 20-2-17075-5 SEA ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT CLERK'S ACTION REQUIRED

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15 This matter came before the Court for hearing on October 15, 2021, on Defendants' Motion
16 for Summary Judgment. The Court heard argument from counsel for the parties on October 15,
17 2021. The Court reviewed the Court file, including the following documents:
18 1. Defendants' Motion for Summary Judgment.
19 2. Declaration of Roy A. Umlauf in Support of Defendants' Motion for Summary
20 Judgment and exhibits thereto.
21
22
23

FORSBERG & UMLAUF, P.S.
ATTORNEYS AT LAW
901 FIFTH AVENUE • SUITE 1400
SEATTLE, WASHINGTON 98164
(206) 689-8500 • (206) 689-8501 FAX

On behalf of Plaintiff:

3. Plaintiff's Opposition to Defendants' Motion for Summary Judgment;
4. Plaintiff's Complaint for Legal Malpractice;
5. Defendants' Answer to Plaintiff's Complaint for Legal Malpractice;
6. Plaintiff's Reply to Defendants' Counterclaim;
7. Declaration of Brian J. Waid dated October 4, 2021, with Exhibits 1 through 23 attached thereto;
8. Declaration of Carolyn Martino dated October 4, 2021;
9. Declaration of Kathryn M. Cox dated October 4, 2021;
10. Declaration of Jessica M. Cox dated October 4, 2021;
11. Complaint;
12. Defendants' Answer and Counterclaim;
13. Plaintiff's Reply to Counterclaim.

On behalf of Defendants in reply:

14. Reply Declaration of Roy Umlauf;
15. Defendants' Reply in support of Summary Judgment;

On behalf of Plaintiff in Opposition to Defendants' Motion to Strike:

16. Supplemental Declaration of Carolyn H. Martino;
17. Plaintiff's Opposition to Defendants' Motion to Strike and Sur-Reply re: Defendants' New Issues Raised for the First Time in Reply.

Based on the above, the Court gave an oral ruling on October 22, 2021. This oral ruling is incorporated by reference, and attached hereto (as corrected).

The court considered all of the above arguments and pleadings and did not strike the declaration of Ms. Martino or the arguments made in reply, as discussed in the oral ruling. The court hereby rules as follows:

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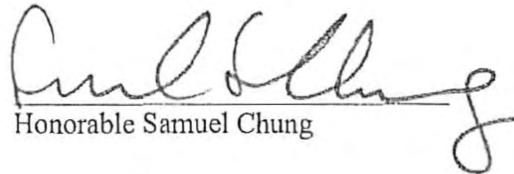
Defendants' Motion for Summary Judgment is GRANTED. Plaintiff's claims against Defendants are dismissed in their entirety, with prejudice. Defendants withdraw their motion for fees under the frivolous claims statute and therefore the court makes no ruling on this motion.

Defendants' counterclaim remains at issue.

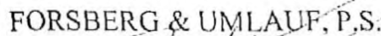
Dated this 26 day of October, 2021.



Honorable Samuel Chung

Presented by:

FORSBERG & UMLAUF, P.S.



Roy A. Umlauf, WSBA #15437
Jeffrey T. Kestle, WSBA #29648
Attorneys for Defendants

Approved for Entry:
Notice of Presentation Waived

WAID LAW OFFICE

Brian J. Waid, WSBA #26038
Attorney for Plaintiff
Per written authorization

FORSBERG & UMLAUF, P.S.
ATTORNEYS AT LAW
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This matter comes before this Court on Respondents' Motion for Summary Judgment. I heard oral arguments last Friday October 22, 2021, and I had reserved ruling to today.

This is a legal malpractice action brought by Plf Ms. Kathryn M Cox against her former attorney Maya Trujillo Ringe and her law firm, Lasher Holzapfel Sperry & Ebberson, PLLC, who had represented Ms. Cox in her divorce proceedings against her former husband John Cox. That case was tried before Judge John Ruhl with the final orders entered on July 17, 2017. The cause number was 16-3-02781-8. One of the critical issues in that case was the validity of the post nuptial agreement that Ms. Cox and her former husband had entered into. Following a 5-day trial, that court found the agreement both substantively and procedurally not to be fair and therefore unenforceable.

Ms. Cox then appealed that decision which was affirmed in an unpublished opinion on June 10, 2019. In an opinion by Judge Leach, the decision of the trial court was upheld, i.e. finding that the post nuptial agreement was invalid and not enforceable.

Ms. Cox then filed her current action against Defendant Ms. Ringe on November 23, 2020.

As counsel for Plf argued, the trial court hearing the malpractice claim merely retries, or tries for the first time, the client's cause of action which the client asserts was lost or compromised by the attorney's negligence, and the trier of fact decides whether the client would have fared better but for such mishandling. The prior case rulings do not have any collateral effects on the current findings.

Defendants' current motion first argues that Plaintiff lacked a legal expert to opine on whether Defendant attorney was negligent. Since the filing of the current Motion, Plaintiff has obtained the opinion of Ms. Carolyn H Martino, who is license attorney in California but not licensed in Washington. Defendants argued that Ms. Martino is not qualified since she is not licensed in Washington. Plaintiff has responded that the law regarding the validity of post nuptial agreements are similar if not identical in California and Washington, and that in a legal malpractice case, an out of state attorney can serve as an expert citing Washington Practice by DeWolf and Allen. Defendants have not provided any controlling legal authority to the contrary, therefore for the current motion, the Court declines to strike Ms. Martino's expert opinion.

Defendants have asserted that Plaintiffs' current claims are barred by the attorney judgment rule, which provides that "in general, mere errors in judgment or in trial tactics do not subject an attorney to liability for legal malpractice." Halvorsen v. Ferguson 46 Wn. App 708, 717 (1986).

As held in Clark County Fire Dist No 5 v Bullivant Houser Bailiy, PC, 180 Wn. App 689 (2014), whether an attorney has breached a duty of care is a question for the jury. However, under certain circumstances, whether an error in judgment constitutes a breach of duty can be decided as a matter of law. This is no different than in any other negligence case, where a defendant can obtain summary judgment on the issue of breach of duty if reasonable minds could reach only one conclusion.

> "Under the attorney judgment rule a plaintiff can avoid summary judgment on breach of duty for an error in judgment in one of two ways. First, the plaintiff can show that the attorney's exercise of judgment was not within the range of reasonable choices from the perspective of a reasonable, careful and prudent attorney in Washington. Merely

> providing an expert opinion that the judgment decision was erroneous or that the attorney should have made a different decision is not enough; the expert must do more than simply disagree with the attorney's decision. Halvorsen, 46 Wash. App. at 715–16 (expert statements that they would have conducted litigation differently cannot as a matter of law support a legal negligence action). The plaintiff must submit evidence that no reasonable Washington attorney would have made the same decision as the defendant attorney. *Cook,* 73 Wash.2d at 396, 438 P.2d 865 (attorney not liable for a judgment decision, even though it might not meet with unanimous approval)."
>
> Clark County Fire Dist. No. 5, at 706.

Similarly, on the issue of proximate cause, this can be decided as a matter of law if reasonable minds could not differ. An in order to avoid summary judgment, the plaintiff must produce evidence that the error in judgment did in fact affected the outcome. Id. at 707.

Focusing on the alleged errors by Defendant, Plf's expert, Ms. Martino states that Defendant attorney Ms. Ringe committee legal malpractice by failing to present evidence that would have upheld the parties' post nuptial agreement. Specifically, Ms. Martino and the Plaintiff argue that Ms. Ringe failed to present evidence regarding procedural fairness such as how long the parties had negotiated the post nuptial agreement, failing to call other witnesses to illustrate how the former husband was aware of the terms of the agreement. Witness such as the attorney who prepared the agreement, and the couple's children who had filed declarations in support of Ms. Cox at the summary judgment stage.

In reviewing the trial testimonies, and the findings entered by Judge Ruhl, the following evidence was presented at the divorce trial.

Ms. Cox testified that the post nuptial agreement was the product of many years of discussions between her and Mr. Cox following their 2007 separation in which the parties had filed for separation and counter filed for divorce. The parties then reconciled, and to serve as a shield against Mr. Cox threatening to leave her again, Ms. Cox wanted the agreement. Mr. Cox, on cross examination admitted that the agreement took 3 years of negotiating. He also testified that he was upset that the couple's children had filed declarations in support of Ms. Cox and had threatened the children with subpoenas in the future. Ms. Ringe impeached Ms. Cox with Jessica Cox's declaration in which stated that she had heard the couple negotiating the terms of the agreement. He also admitted that he reviews contracts as part of his job as a real estate executive, and was capably doing work about the same time as he entered into the post nuptial agreement.

Ms. Cox and her expert currently argues that others like the children should have been allowed to testify at trial and as well as the attorney who prepared the agreement. In support of her opposition to the current motion for summary judgment, Ms. Cox submitted a witness list from the divorce trial listing the children. However, this is contradicted by Ms. Ringe's statement to the court. In response to Judge Ruhl's question about what rebuttal evidence Petitioner (Ms. Cox) was going to put on, Ms. Ringe stated "she prefers I don't call her children to rebut things." P. 782 of the trial transcript. Similarly, regarding the attorney who prepared the agreement, Ms. Cox admitted during her testimony that she had asked

the attorney to prepare the agreement pursuant to the terms she provided without giving him any of the underlying financial information.

Based on the above, this Court finds that the expert's current arguments amount to allegations that Ms. Ringe failed to sufficiently emphasize an argument, which "in reality involves the judgmental and tactical decisions of an attorney in the conduct of litigation." Halverson v. Ferguson, 46 Wn. App at 716.

FILED
7/11/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KATHRYN M. COX, Appellant, v. LASHER HOLZAPFEL SPERRY & EBERSON, PLLC, a Washington Professional Limited Liability Company; and MAYA TRUJILLO RINGE and JOHN DOE RINGE, a marital community, Respondents.	)	No. 83360-0-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. — Kathryn "Katy"[1] Cox appeals from the summary judgment dismissal of her legal malpractice claim against her former attorney and law firm. She argues the trial court did not follow the proper procedural rules for summary judgment and that she raised genuine issues of material fact as to all four elements of her claim. Because Katy fails to meet her burden as to the element of proximate cause, we affirm the dismissal of her lawsuit.

FACTS

In May 2016, Katy Cox filed a petition for legal separation from her husband, John.[2] John had filed for dissolution nearly a decade earlier, but dismissed the

[1] We use Katy as that is the name the appellant uses for herself in briefing.

[2] Because the parties to the underlying dissolution and their children share a last name, we use their first names for clarity. No disrespect is intended.

Citations and pinpoint citations are based on the Westlaw online version of the cited material.

petition after the couple reconciled. Throughout their marriage, John had worked as a vice president of a real estate firm, while Katy stayed home to raise their children. In March 2011, the couple entered into a post-nuptial "Property Settlement Agreement," Katy's 2016 petition for separation requested recognition and enforcement of the agreement. In the proceeding, Katy was represented by attorney Maya Trujillo Ringe[3] of the firm Lasher, Holzapfel, Sperry & Ebberson (LHSE). Trujillo Ringe filed a motion for summary judgment in December 2016, requesting the court enforce the property settlement agreement as procedurally and substantively fair. The court denied the motion. The parties proceeded to trial and the trial court again declined to enforce the agreement after finding it was procedurally and substantively unfair. This court affirmed the ruling in an unpublished opinion.[4]

In November 2020, Katy brought a pro se complaint for legal malpractice against Trujillo Ringe and LHSE. LHSE filed a motion for summary judgment in September 2021, arguing Katy had not established a material issue of fact on the elements of breach, damage, or proximate cause. LHSE noted that Katy had not submitted any expert testimony on the element of breach. The same day LHSE filed its motion for summary judgment, Katy filed a "Supplemental Primary Witness Disclosure" identifying Carolyn Martino, a California family law attorney, as an expert on the legal standard of care. However, no expert opinions were submitted

[3] Katy's briefing refers to her former attorney as Ringe, whereas the respondent consistently uses her full last name, Trujillo Ringe. We will again use the name the party uses for herself.

[4] In re Marriage of Cox, No.77634-7-I (Wash. Ct. App. June 10, 2019) (unpublished), https://www.courts.wa.gov/opinions/pdf/776347.pdf.

as part of the pleading. Two weeks later on October 5, Katy presented a declaration from Martino containing her opinions about the case, along with a response opposing summary judgment. LHSE submitted a reply on October 11, 2021, objecting to Martino's declaration as unqualified and presenting authority on the attorney judgment rule in support of its request for summary judgment dismissal. Katy filed a written objection and provided a supplemental declaration from Martino, which the court allowed.

The trial court considered both expert declarations, the sur-reply from Katy, and LHSE's argument regarding the attorney judgment rule and granted LHSE's motion for summary judgment. The court found Katy failed to raise a material issue of fact because Trujillo Ringe's decisions were covered by the attorney judgment rule.[5] Katy timely appealed.

ANALYSIS

I. Introduction

Summary judgment proceedings are governed by CR 56. Dismissal on summary judgment "shall" be ordered if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."

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[5] Under this rule, an attorney cannot be liable for making an allegedly erroneous decision involving honest, good faith judgment if (1) that decision was within the range of reasonable alternatives from the perspective of a reasonable, careful and prudent attorney in Washington; and (2) in making that judgment decision the attorney exercised reasonable care.

Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C. (Clark County Fire), 180 Wn. App. 689, 704, 324 P.3d 743, (2014); see also Cook, Flanagan & Berst v. Clausing, 73 Wn.2d 393, 438 P.2d 865 (1968); Halvorsen v. Ferguson, 46 Wn. App. 708, 735 P.2d 675 (1986).

As a secondary matter, Katy assigns error to the court's consideration of the attorney judgment rule, characterizing it as both an unpleaded affirmative defense and new issue raised for the first time in reply. Because we may consider all relevant case law when conducting de novo review of summary judgment proceedings, we need not reach these assignments of error.

CR 56(c). This court reviews an order of dismissal on a motion for summary judgment de novo, conducting the same inquiry as the trial court. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998); Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 922, 296 P.3d 860 (2013). We take "'all facts and inferences in the light most favorable to the nonmoving party.'" Jackowski v. Borchelt, 174 Wn.2d 720, 729, 278 P.3d 1100 (2012) (quoting Biggers v. City of Bainbridge Island, 162 Wn.2d 683, 693, 169 P.3d 14 (2007)); see also Folsom, 135 Wn.2d at 663. "We may affirm on any basis supported by the record whether or not the argument was made below." Bavand v. OneWest Bank, 196 Wn. App. 813, 825, 385 P.3d 233 (2016), as modified Dec. 15, 2016. A defendant may prevail on summary judgment if they make an initial showing that there is an "absence of an issue of material fact," and the plaintiff in response fails to establish a genuine question of material fact. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

To survive summary judgment, a plaintiff seeking relief for negligence "must establish an issue of material fact as to each element of negligence"—duty, breach, causation and damage. Walter Family Grain Growers, Inc. v. Foremost Pump & Well Servs., LLC, __ Wn. App. 2d __, 506 P.3d 705, 710 (2022). However, the elements of legal negligence vary slightly from the elements of general negligence.[6] They are: (1) the existence of an attorney-client relationship creating

[6] Courts seem to use "legal negligence" and "legal malpractice" somewhat interchangeably. See Hizey v. Carpenter, 119 Wn.2d 251, 830 P.2d 646 (1992) ("legal malpractice"); Clark County Fire, 180 Wn. App. 689 ("legal negligence"); Arden v. Forsberg & Umlauf, P.S., 193 Wn. App. 731, 373 P.3d 320 (2016), aff'd but criticized, 189 Wn.2d 315, 402 P.3d 245 (2017) ("legal malpractice"); Spencer v. Badgley Mullins Turner, PLLC, 6 Wn. App. 2d 762, 432 P.3d 821 (2018) ("legal malpractice"). We use "legal malpractice" to mirror the language of the complaint.

a duty of care, (2) breach of that duty, (3) damage, and (4) proximate causation between the breach and the damage. Smith v. Preston Gates Ellis, LLP, 135 Wn. App. 859, 863–64, 147 P.3d 600 (2006). Both parties agree there was an attorney-client relationship between Katy and Trujillo Ringe giving rise to a duty of care; their dispute centers on the remaining elements.[7]

II. Proximate Cause

Proximate cause in a legal negligence claim is "no different . . . than in an ordinary negligence" claim where a plaintiff must demonstrate cause in fact and legal causation. Versuslaw, Inc. v. Stoel Rives, LLP, 127 Wn. App. 309, 328, 111 P.3d 866 (2005). In analyzing such a claim, "it is important to understand that an attorney is not a guarantor of success and is not responsible for a 'bad result' unless the result was proximately caused by a breach of the attorney's duty of care." Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C. (Clark County Fire), 180 Wn. App. 689, 701, 324 P.3d 743, (2014). Therefore, a "plaintiff must demonstrate that [they] would have achieved a better result had the attorney not been negligent." Versuslaw, Inc., 127 Wn. App. at 328.

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[7] LHSE has asked this court to examine the issue of whether the trial court erred by declining to strike the expert declaration. The issue is not properly before this court. Under RAP 10.3(b), "[i]f a respondent is also seeking review, the brief of respondent must state the assignments of error and the issues pertaining to those assignments of error presented for review by respondent and include argument of those issues." While argument is presented, LHSE did not cross-appeal the trial court's decision not to strike Martino's expert testimony.

Alternatively, under RAP 2.4(a), "[t]he appellate court will, at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent." Even if the trial court erred by failing to strike Martino's declaration and regardless of whether the declaration was deficient, the trial court ruled in favor of the respondent. Therefore the decision was not prejudicial against them.

While generally proximate cause is left for a jury, it can be determined on summary judgment "if 'reasonable minds could not differ.'" Smith, 135 Wn. App. at 864 (quoting Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999)). To survive summary judgment and reach the "trial within a trial" stage, "the plaintiff must produce evidence that the error in judgment did in fact affect the outcome." Clark County Fire, 180 Wn. App. at 707 (quoting Kommavongsa v. Haskell, 149 Wn.2d 288, 300, 67 P.3d 1068 (2003)). If the defendant demonstrates "'that there is an absence or insufficiency of evidence supporting an element that is essential to the plaintiff's claim,'" they are entitled to summary judgment dismissal. Slack v. Luke, 192 Wn. App. 909, 915, 370 P.3d 49 (2016) (quoting Tacoma Auto Mall, Inc. v. Nissan N. Am., Inc., 169 Wn. App. 111, 118, 279 P.3d 487 (2012)).

In her briefing, Katy focuses on the general rule that proximate cause is a question for a jury, ignoring the established exception that if reasonable minds could not differ, summary judgment on proximate cause is permitted. In her response opposing summary judgment presented to the trial court, Katy stated she provided "critical" evidence that was omitted in the underlying dissolution, namely testimonial and documentary evidence that "Mr. and Mrs. Cox had engaged in several years of discussions and negotiations that culminated in the Property Settlement Agreement." In her reply brief on appeal, Katy directs this court to a declaration from John Jake Cox, one of her adult sons, as an offer of his potential testimony. However, the declaration provides minimal information as to the "years of settlement discussions," stating only "[w]hile it's certainly hard to believe that

someone who deals with contracts intimately for work would neglect to seek legal eyes for something like this, his statement does, frankly, fit with his pattern of doing the bare minimum." John Jake does not otherwise discuss the timeline of the settlement discussions. Further, the declaration is unsigned. Katy next directs this court to a signed declaration by Andrew Cox, another adult son, but he likewise does not discuss the timeline of the settlement discussions between his parents. Third is a declaration by Jessica Cox, Katy's adult daughter, who does discuss seeing drafts of the agreement with "handwritten edits," and states she witnessed discussions of terms over the course of "months, maybe even years." Finally, Katy submitted emails between herself and John referencing the agreement.

However, Trujillo Ringe used the declaration by Jessica to impeach John at trial and John admitted on cross-examination that all four children[8] had filed "declarations about both the long-term negotiations that went into that contract, the postnup." Trujillo Ringe also elicited testimony from John that settlement discussions were taking place "from 2008 to 2011," and that there were "3 years of, quote, negotiating."

More critically, while Katy eventually presented expert declarations with her opposition to the motion for summary judgment, which included Martino's opinion that LHSE did not meet the appropriate standard of care due to failure to develop and introduce evidence,[9] the alleged impact of these errors on Katy's case is not

[8] While John and Trujillo Ringe refer to declarations by all four children, Katy only references three of the children's declarations in her briefing.

[9] Specific errors include failures to: "properly investigate and evaluate the competency of her own client [Katy]," "properly investigate the underlying facts and claims by not interviewing key witnesses," "properly prepare for trial or substitute a different attorney who was not distracted by personal issues," "provide information to her client about the possible outcomes of trial," "to secure

sufficiently developed to connect LHSE's specific conduct to the ultimate failure of Katy's case. Assuming, without deciding, that Martino was properly qualified to offer an expert opinion, her declaration does not establish a material question of fact as to proximate cause. Martino alleges Trujillo Ringe failed to secure experts or call certain witnesses, but does not identify who those experts should have been or what their testimony would have been to support her conclusory statement that "[t]he outcome was critically impacted by [Trujillo Ringe's] failure, and it is undeniable."

When a party brings a summary judgment challenge to a claim, the burden shifts to the non-moving party to demonstrate a genuine issue of material fact as to any disputed elements. "[A]n adverse party may not rest upon the mere allegations or denials of a pleading" but must "set forth specific facts showing that there is a genuine issue for trial." CR 56(e). If they fail to do so, "summary judgment, if appropriate, shall be entered against the adverse party." CR 56(e). See also First Class Cartage, Ltd. v. Fife Serv. & Towing, Inc., 121 Wn. App. 257, 262, 89 P.3d 226 (2004) ("If the moving party submits adequate affidavits, the burden shifts to the nonmoving party to set forth specific facts sufficiently rebutting the moving party's contentions and disclosing the existence of a material issue of fact."). Once LHSE put the element of proximate cause at issue, Katy bore the burden to prove the existence of a genuine issue of material fact in order to survive summary judgment. Setting aside the parties' dispute as to her qualification as an expert, Martino's declaration provided only conclusory statements without noting

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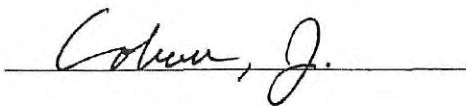
mental health experts," "secure a forensic accountant expert," "call witnesses . . . to directly address and refute facts being put forth by Mr. Cox."

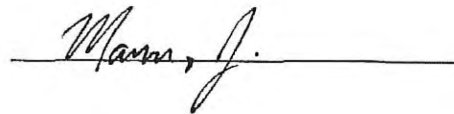
the basis of knowledge or foundation for those assertions. More critically, however, she neglected to identify what evidence particular investigation would have produced, experts who would have provided the testimony she states was critical and how that would have changed the outcome for Katy.

Accordingly, Katy fails to raise a material question of fact as to proximate cause. "[R]easonable minds could reach but one conclusion" as to this element, and summary judgment dismissal was proper. See Slack, 192 Wn. App. at 919. Because we may affirm on any basis in the record when conducting a de novo review of summary judgment proceedings, we need not reach the other assignments of error.

Affirmed.

WE CONCUR:





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Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

KATHRYN M. COX, Appellant, v. LASHER HOLZAPFEL SPERRY & EBERSON, PLLC, a Washington Professional Limíted Liability Company; and MAYA TRUJILLO RINGE and JOHN DOE RINGE, a marital community, Respondents.	No. 83360-0-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Kathryn Cox has moved for reconsideration of the opinion filed on July 11, 2022. Following consideration of the motion, answer of opposing party, and reply, the panel has determined the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

WAID LAW OFFICE

October 31, 2022 - 10:12 AM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	83360-0
Appellate Court Case Title:	Kathryn M. Cox, Appellant v. Lasher Holzapfel Sperry & Ebberson, PLLC, et ano., Respondents

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