NO. 42864-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CLARK COUNTY FIRE DISTRICT NO. 5, and AMERICAN ALTERNATIVE INSURANCE CORPORATION,

Appellants,

v.

BULLIVANT HOUSER BAILEY, P.C., and RICHARD G. MATSON,

Respondents.

ADDITIONAL BRIEFING OF APPELLANTS

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I. INTRODUCTION

The issue of proximate cause was not specifically raised by the parties and was not specifically addressed by the trial court below.[1] CP at 313-43, 346-96, 653-65, 695-99, 718-52, 1209-25; 1234-36; RP (October 14, 2011) 1-22; RP (August 17, 2012) 1-75. But based on the pleadings, depositions, and declarations in this case, there nevertheless is a genuine issue of material fact whether Clark County Fire District No. 5 ("the Fire District") and American Alternative Insurance Corporation ("AAIC") would have "fared better"[2] but for the professional negligence of Bullivant Houser Bailey, P.C. ("BHB"), and its attorney Richard G. Matson ("Matson") in defending the underlying case. Therefore, a trial is "absolutely necessary." *See Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977).

II. SUMMARY JUDGMENT

"Under CR 56(c), summary judgment is appropriate if the record presents no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Biggs v. Nova Servs.*, 166 Wn.2d 794, 801, 213 P.3d 910 (2009). A material fact is one on which

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[1] Absent a sufficiently developed record, it is improper for this Court to consider alternative grounds for affirming a trial court's decision. *See* RAP 2.5(a); *Blueberry Place v. Northward Homes*, 126 Wn. App. 352, 362-63, 110 P.3d 1145 (2005); *see also Bernal v. Am. Honda Motor Co.*, 87 Wn.2d 406, 553 P.2d 107 (1976); *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 609, 94 P.3d 961 (2004).

[2] *Daugert v. Pappas*, 104 Wn.254, 257, 704 P.2d 600 (1985).

the outcome of the litigation depends. *Morris v. McNichol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). A genuine issue of material fact exists when there is "sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).[3]

When reviewing a summary judgment order, this Court performs the same inquiry as the trial court. *Ames v. City of Fircrest*, 71 Wn. App. 284, 289, 857 P.2d 1083 (1993). Neither the trial court nor this Court may replace the jury by weighing facts or deciding factual issues. *Babcock v. State*, 116 Wn.2d 596, 598-99, 8009 P.2d 143 (1991); *Ames*, 71 Wn. App. at 289.[4] Instead, "the evidence *and all reasonable inferences therefrom* is considered in the light most favorable to the plaintiff, the nonmoving party." *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 227, 770 P.2d 182 (1989) (emphasis added).

"When material issues of fact exist, *they may not be resolved by the trial court* and summary judgment is inappropriate." *Halvorsen v. Ferguson*, 46 Wn. App. 708, 712, 735 P.2d 675 (1986) (emphasis added), *review denied*, 108 Wn.2d 1008 (1987). "If reasonable persons

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[3] "Washington courts treat as persuasive authority federal decisions interpreting the federal counterparts of our own court rules." *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

[4] This Court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue of material fact for trial. *See Anderson*, 477 U.S. at 249.

might reach a different conclusion, the motion should be denied." *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 932, 653 P.2d 280 (1982). "Where different, competing inferences may be drawn from the evidence, the issue must be resolved by the trier of fact." *VersusLaw, Inc. v. Stoel Rives, L.L.P.*, 127 Wn. App. 309, 320, 111 P.3d 866 (2005).

III. PROXIMATE CAUSE

Our Supreme Court has recognized that "[t]he principles of proof and causation in a legal malpractice action usually do not differ from an ordinary case." *Daugert v. Pappas*, 104 Wn.2d 254, 257, 704 P.2d 600 (1985). "Proximate cause consists of two elements: cause in fact and legal causation." *Nielson v. Eisenhower & Carlson*, 100 Wn. App. 584, 591, 999 P.2d 42, *review denied*, 141 Wn.2d 1016 (2000). "Cause in fact refers to the 'but for' consequences of an act – the physical connection between an act and an injury." *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985); *see also Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 753-55, 818 P.2d 1337 (1991). While a plaintiff's case must be based on more than just speculation, the "but for" test simply requires a plaintiff to establish that the act complained of "probably caused" the alleged injury. *Daugert*, 104 Wn.2d at 260.[5]

[5] Legal causation involves the question of whether liability should attach as a matter of law, even if the evidence establishes cause in fact. *Hartley*, 103 Wn.2d at 779. Given the parties' already extensive briefing on the elements of the modified multi-factor balancing test, as announced by our Supreme Court in *Trask v. Butler*, 123 Wn.2d 835, 842-43, 872 P.2d 1080 (1994), the Fire District and AAIC have limited their additional briefing solely to the issue of cause in fact.

Furthermore, our Supreme Court has consistently held that the question of cause in fact is a question for the jury. *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 935, 653 P.2d 280 (1982); *see also Daugert*, 104 Wn.2d 257; *Hartley*, 103 Wn.2d at 778; *Petersen v. State*, 100 Wn.2d 421, 436, 671 P.2d 230 (1983). Thus, unless the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion, it is inappropriate for either the trial court or this Court to determine the question of cause in fact on summary judgment. *Hartley*, 103 Wn.2d at 778; *see Daugert*, 104 Wn.2d at 257; *Petersen*, 100 Wn.2d at 436.

In a legal malpractice action, the question of cause in fact boils down to whether the former client would have (on a more probable than not basis) "fared better" but for the attorney's negligence. *Daugert*, 104 Wn.2d at 257; *Nielson*, 100 Wn. App. at 594; *Halvorsen*, 46 Wn. App. at 719; *see also Brust v. Newton*, 70 Wn. App. 286, 293-94, 852 P.2d 1092 (1993), *review denied*, 123 Wn.2d 1010 (1994).[6] Typically, such proof

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[6] In analyzing a failure-to-appeal legal malpractice action, our Supreme Court considered alternative tests for determining questions of cause, such as the loss of chance test and the substantial factor test. *Daugert*, 104 Wn.2d at 261-62. Ultimately, our Supreme Court concluded that these other tests were inappropriate. *Daugert*, 104 Wn.2d at 261-63. This Court since has stated that our Supreme Court's reasoning in *Daugert* is "equally applicable to other attorney actions or omissions." *Nielson*, 100 Wn. App. at 592.

But it is important to note that "[t]he holding of *Daugert* rests largely on the court's acceptance that failure-to-appeal cases are different in nature from most legal malpractice actions. *Causation is a question of law in failure-to-appeal cases*, an anomaly largely due to practical

requires a "trial within a trial." *Brust*, 70 Wn. App. at 293; *Kommavongsa v. Haskell*, 149 Wn.2d 28, 300, 67 P.3d 1068 (2003).

"[T]he purpose of the 'trial within a trial' that occurs in a legal malpractice action is not to recreate what a particular judge or factfinder would have done." *Brust*, 70 Wn. App. at 293. Rather, the impact of the attorney's negligence in the underlying case is judged against an objective standard. *Phillips v. Clancy*, 152 Ariz. 415, 733 P.2d 300, 303 (Ariz. Ct. App. 1986). "[T]he jury's task is to determine what a reasonable judge or factfinder would have done, i.e., what the result should have been." *Brust*, 70 Wn. App. at 293. In discussing an attorney's error made during a trial, our Supreme Court stated:

> [T]he causation issue in the subsequent malpractice action is relatively straightforward. The trial court hearing the malpractice claim merely retries, or tries for the first time, the client's cause of action which the client asserts was lost or compromised by the attorney's negligence, and the trier of fact decides whether the client would have fared better but for such mishandling... In such a case it is appropriate to allow the trier of fact to decide proximate cause. *In effect the second trier of fact will be asked to decide what a reasonable jury or fact finder would have done but for the attorney's negligence.* Thus, it is obvious that in most legal malpractice actions the jury should decide the issue of cause in fact.

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considerations of judicial efficiency." Polly A. Lord, Comment, *Loss of Chance in Legal Malpractice*, 61 WASH. L. REV. 1479, 1489-90 (1986) (emphasis added).

And even though Washington courts generally have declined to extend the loss of chance test, our Supreme Court nevertheless acknowledged, "A reduction in one's opportunity to recover (loss of chance) *is a very real injury which requires compensation.*" *Daugert*, 104 Wn.2d at 261 (emphasis added).

Daugert, 104 Wn.2d at 257-58 (citation omitted) (emphasis added).[7]

IV. PROXIMATE CAUSE IS A QUESTION FOR THE JURY IN THIS CASE

Here, considering the evidence and all reasonable inferences therefrom in the light most favorable to the Fire District and AAIC, *Young*, 112 Wn.2d at 227, there is sufficient evidence for a jury to decide, on a more probable than not basis, that the Fire District and AAIC would have "fared better," *Daugert*, 104 Wn.2d at 257, but for the negligence of BHB and Matson.

BHB and Matson held themselves out as competent to defend and try sexual harassment cases. CP at 952, 956-59, 986-87. Yet, in his career, Matson had never tried a sexual harassment case and had never defended a sexual harassment case with multiple plaintiffs. CP at 918-9. And, despite his lack of experience in handling cases of this nature, Matson did not consult with others at BHB who were more experienced than him in handling cases of this nature. CP at 976.

It is not surprising that BHB and Matson proceeded on a defense strategy premised upon a fundamentally erroneous understanding of the law. CP at 799-801, 816-23, 1060-61. Despite being on notice that the

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[7] "[I]f it is for the trier of fact to decide whether the client would have fared better but for [the attorney's] mishandling of his case, it is also for the trier of fact to decide the extent to which that is true." *Brust*, 70 Wn. App. at 293-94 (quotations and citations omitted). And absolute certainty of damages is not required. *Alpine Indus., Inc. v. Gohl*, 30 Wn. App. 750, 755, 637 P.2d 998 (1981), *review denied*, 97 Wn.2d 1013 (1982); *Wilson v. Brand S Corp.*, 27 Wn. App. 743, 745 (1980).

plaintiffs' allegations in the underlying case were serious, and that there was the potential for a multi-million dollar verdict, CP at 941-42, Matson simply assumed that a jury would find the conduct of the Fire District's administrator, Marty James, to be "lighthearted and banter." CP at 937. But as Claire Cordon opined, "A lawyer experienced in this area would recognize most jurors, especially female jurors, would not consider comments [such as "bitch," "bitchy," "on the rag," and "barefoot and pregnant" to be] either "lighthearted" or harmless "banter." CP at 821.

Based on this assumption, Matson placed heavy emphasis on blaming plaintiff Sue Collins for the hostile work environment. CP at 500, 936-37, 948-49. But as Anne Bremner opined, Matson failed to understand that "[t]he emphasis on plaintiff Collins's behavior clearly bolstered plaintiffs' case against defendants." CP at 801. She continued:

> Mr. Matson appears to have placed plaintiff Collins's behavior into a vacuum, failing to recognize that her behavior directly reflected the hostile work environment the plaintiffs were attempting to prove. *Mr. Matson essentially helped prove a significant element of plaintiffs' case and, to date, still does not appear to understand this failed reasoning.*

CP at 801 (emphasis added). Bob Gould succinctly explained why this strategy was negligent: "The more you go after Ms. Collins, the more is the duty of Mr. James, her supervisor, to bring it to a halt." CP at 1061.

Still, Matson admitted that he was in the best position to advise AAIC as to liability and damage exposure in the underlying case. CP at 952. Brian McCormick, a claims specialist for AAIC, testified that AAIC relies on local counsel "a lot" in evaluating sexual harassment

cases. CP at 531. And even Matson testified that "[i]t's true" that the Fire District and AAIC could reasonably rely upon him. CP at 986-87.

But Matson's negligence foreclosed any opportunity to settle. As Bremner opined, "It does not appear that Mr. Matson was familiar with or fully understood the legal theories asserted by plaintiffs and the available defenses. This led to his unreasonable failure to properly assess damages and likely outcomes." CP at 799. Matson's evaluation and settlement recommendations were an insult to the plaintiffs, providing them with a paltry recovery. CP at 504-10, 805-07, 838-39. Yet Matson stubbornly and foolishly stood by his evaluation, leaving no option but to try the underlying case. CP at 898, 894-96, 899, 908-11.

Unfortunately, at trial, BHB and Matson continued with their negligent defense strategy of "point[ing] the finger at plaintiff Collins for the hostile work environment." CP at 450-52, 799, 800-801, 816-23, 1060-61. As Bremner opined, "[H]ighlighting plaintiff Collins's behavior only shined a brighter light on Mr. James' failure to act." CP at 800. As Cordon explained, "Matson knew or should have known this was not a typical 'he said/she said' sexual harassment case," CP at 821, especially with four women providing corroborating testimony. CP at 822. "With more experience in these types of cases, in particular with more expertise with how juries assess cases of this nature, Matson would have known most jurors have little tolerance for the kinds of comments James admitted making, particularly when they are made by someone in a position of authority, such as James, who should know better." CP at

821. In fact, even the trial court *sua sponte* recognized that the defense strategy asserted by BHB and Matson at trial was flawed, noting:

> It is clear that [Sue Collins's] behavior at the employment site was totally inappropriate and should have been corrected by her supervisor Marty James. James had a clear duty and responsibility as director of the Training Center to prevent any such actions from taking place. It was clear from the jury's finding that not only did he permit it to occur, but he helped promote some of the specific activities in question.

CP at 763.[8]

Thus, taking the evidence and all reasonable inferences therefrom in the light most favorable to the Fire District and AAIC, *Young*, 112 Wn.2d at 227, the causation issue in this case becomes relatively straightforward. *See Daugert*, 104 W.2d at 257-58. But for the negligent defense strategy of assuming James's conduct to be "lighthearted" and "banter," CP at 937, what would a reasonable finder of fact have done? But for the negligent defense strategy of blaming Collins for the hostile work environment, what would a reasonable finder of fact have done? But for the negligent failure to object to improper comments made by the plaintiffs' attorney as he ended his

[8] At trial, Matson also failed to preserve any objection to opposing counsel's improper comments made during closing argument. *See Collins v. Clark County Fire District No. 5*, 155 Wn. App. 48, 72-73, 95, 231 P.3d 1211 (2010). Bremner and Gould both expressed the opinion that this failure breached the applicable standard of care. CP at 807-08, 849, 1063-64. Even this Court expressed its opinion that a timely objection and curative instruction could have cured any prejudicial effect. *Collins*, 155 Wn. App. at 95.

closing argument, what would a reasonable finder of fact have done? In other words, the trial court in this case merely retries the underlying case that was compromised by the negligence of BHB and Matson, and the jury decides whether the Fire District and AAIC would have fared better but for such mishandling. *See Daugert*, 104 Wn.2d at 257-58.[9]

Therefore, because the Fire District and AAIC have presented sufficient evidence to allow submission of the question of proximate cause to the jury, it would be inappropriate for either the trial court or this Court to determine the question of cause in fact on summary judgment. *See Hartley*, 103 Wn.2d at 778; *see also Daugert*, 104 Wn.2d at 257; *Petersen*, 100 Wn.2d at 436. And a trial is "absolutely necessary." *See Jacobsen*, 89 Wn.2d at 108.

RESPECTFULLY SUBMITTED this 3rd day of February, 2014.

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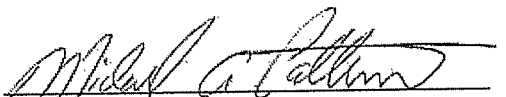
By: 
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[9] "This trial within a trial avoids the specter that the damages claimed by a plaintiff are a matter of pure speculation and conjecture." *Cal. State Auto. Ass'n Inter-Ins. Bureau v. Parichan*, 84 Cal. App. 4th 702, 101 Cal. Rptr. 2d 72, 78 (Cal. Ct. App. 2000).

CERTIFICATE OF SERVICE

I, Rachel A. West, hereby certify that on this 3rd day of February, 2014, I served the foregoing with the Court of Appeals **VIA E-MAIL** to coa2filings@courts.wa.gov and caused the same to be served upon each and every attorney of record as noted below:

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I certify under penalty of perjury under the laws of the State of Washington that the above is correct and true.

Executed in Seattle, Washington, on February 03, 2014.

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