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.

REPLY BRIEF OF APPELLANTS

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A. AN ATTORNEY'S ERROR OF JUDGMENT MUST FALL SHORT OF NEGLIGENCE TO BE PROTECTED FROM LIABILITY

Other than a single reference to *Cook, Flanagan & Berst v. Clausing*, 73 Wn.2d 393, 394, 438 P.2d 865 (1968), in a block quotation on page two of their 47-page brief, BHB and Matson conspicuously fail to recognize (or even address anywhere in their argument) that more than 40 years ago our Supreme Court unequivocally rejected the very position currently being advanced by them. *Cook*, 73 Wn.2d at 394.

As with many other jurisdictions, *see, e.g., Woodruff v. Tomlin*, 161 F.2d 924, 930 (6th Cir. 1980) ("[An attorney] is still bound to exercise a reasonable degree of skill and care in all his professional undertakings."); *Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 133 Idaho 1, 981 P.2d 236, 240 (Idaho 1999); *Kling v. Landry*, 686 Ill. App. 3d 329, 686 N.E.2d 33, 37 (Ill. App. Ct. 1997) ("the law distinguishes between negligence and mere errors of judgment"); *Baker v. Beal*, 225 N.W.2d 106, 112 (Iowa 1975) ("It is the generally accepted rule that mere errors in judgment by a lawyer are not grounds for negligence, at least where the lawyer acts in good faith and exercises a reasonable degree of care, skill, and diligence."); *Simko v. Blake*, 448 Mich. 648, 532

N.W.2d 842, 847 (Mich. 1995) ("mere errors in judgment by a lawyer are generally not grounds for a malpractice action where the attorney acts in good faith and exercises reasonable care, skill, and diligence"), Washington law is clear that an attorney's error of judgment – even when made in good faith and in an honest belief that his acts and advice are well founded and in the best interest of his client – "*must itself fall short of negligence if the lawyer is to be protected from liability.*" *Cook*, 73 Wn.2d at 394 (emphasis added); *see also Halvorsen v. Ferguson*, 46 Wn. App. 708, 717, 735 P.2d 675 (1986), *review denied*, 108 Wn.2d 1008 (1987). Any instruction to the contrary, under the weight of Washington authority, "*is patently misleading and standing alone is an incorrect statement of the law.*" *Cook*, 73 Wn.2d at 394 (emphasis added).

B. Whether an Attorney's Error of Judgment Falls Short of Negligence is a Question of Fact

For all the rhetoric of BHB and Matson, (Br. of Resp't at 20-25), "the elements for legal malpractice are the same as for negligence." *Bowman v. John Doe*, 104 Wn.2d 181, 185, 704 P.2d 140 (1985). In particular, what constitutes reasonable care and whether a defendant has breached his duty are generally questions of fact reserved for the trier of fact. *Travis v. Bohannon*, 128 Wn. App. 231, 240, 115 P.3d 342 (2005); *see also Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400

(1999); *Bodin v. City of Stanwood*, 130 Wn.2d 726, 735-36, 927 P.2d 240 (1996). Thus, on a motion for summary judgment, it is error for the trial court to assume the function of the jury by weighing the facts as presented in documents before trial. *Babcock v. State*, 116 Wn.2d 596, 598, 809 P.2d 143 (1991).[1]

Blatantly ignoring our Supreme Court's announcement that an attorney's error of judgment "*must itself fall short of negligence if the lawyer is to be protected from liability*," *Cook*, 73 Wn.2d at 394 (emphasis added), BHB and Matson rely exclusively on cases from jurisdictions other than Washington, (Br. of Resp't at 20-26), to conclude summarily that "judgmental immunity is a question of law which should be determined by the court." Br. of Resp't at 25. BHB and Matson even go so far as to claim, without any citation to authority,[2] that "judgmental immunity *negates* the breach element." Br. of Resp't at 21 (emphasis added). But again, our Supreme Court already has rejected this very position being advanced by BHB and Matson, concluding that it "*is*

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[1] *Accord Hatfield v. Hertz*, 109 F. Supp. 2d 174, 179 (S.D.N.Y. 2000) ("The Court's function in adjudicating a summary judgment motion is not to try issues of fact, but instead to determine whether there is such an issue.").

[2] This court does not need to consider arguments for which a party has not cited authority. RAP 10.3(a)(6); *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.3d 232 (2004), *review denied*, 155 Wn.2d 1015 (2005).

patently misleading and standing alone is an incorrect statement of the law." *Cook*, 73 Wn.2d at 394 (emphasis added).

C. THE QUESTION OF FACT AS TO WHETHER AN ATTORNEY'S ERROR OF JUDGMENT FALLS SHORT OF NEGLIGENCE IS GENERALLY FOR THE JURY

Thus, good faith, standing alone, is no defense to an objective-based legal malpractice standard. *Cook*, 73 Wn.2d at 394; *see also Ardis v. Sessions*, 383 S.C. 528, 682 S.E.2d 249, 250 (S.C. 2009). "It is not sufficient that the attorney exercise his or her best judgment; rather, that judgment must be consistent with the standard of practice." *Blanks v. Seyfarth Shaw LLP*, 89 Cal. Rptr. 3d 710, 744 (2009); *see also Baker*, 225 N.W.2d at 112; *Simko*, 532 N.W.2d at 847. Moreover, merely characterizing an act or omission as a matter of judgment, as BHB and Matson have done in this case, does not end the factual inquiry. *See Cook*, 73 Wn.2d at 394; *Gelsomino v. Gorov*, 149 Ill. App. 3d 809, 502 N.E.2d 264, 267 (Ill. 1986); *see also State v. Grier*, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011); *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842, *review denied*, 172 Wn.2d 1015 (2011).[3]

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[3] Thus, even though BHB and Matson gratuitously characterize Matson's failure to object to opposing counsel's improper comments made during closing argument as a "trial tactic," (Br. of Resp't at 28-33), this characterization does not end the factual inquiry. Despite the bitter criticism of the Fire District and AAIC, (Br. of Resp't at 28-37), BHB and Matson fail to recognize (or even address anywhere in their argument) that

Rather, "[t]he issue remains as to whether the attorney has exercised a reasonable degree of care or skill in representing his client." *Gelsomino*, 502 N.E.2d at 267; *see also Cook*, 73 Wn.2d at 394. "The question of whether an attorney has exercised a reasonable degree of care and skill is one of fact." *Spivack Shulman & Goldman v. Foremost Liquor Store*, 124 Ill. App. 3d 676, 465 N.E.2d 500, 505 (Ill. App. Ct. 1984). And it generally is the function of the jury, not the trial court, to resolve these factual issues. *See Fleming v. Smith*, 64 Wn.2d 181, 185, 390 P.2d 181 (1964); *see also Babcock v. State*, 116 Wn.2d 596, 598, 809 P.2d 143 (1991).

Of course, as with any negligence case, a question of fact (such as whether a defendant has breached his duty) may be determined as a matter of law when reasonable minds could reach but one conclusion. *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985); *Baxter v. Greyhound Corp.*, 65 Wn.2d 421, 426, 397 P.2d 857 (1964); *see also Martin v. Burns*, 102 Ariz. 341, 429 P.2d 660 (Ariz. 1967); *Sun Valley Potatoes, Inc.*, 981

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our Supreme Court has stated, "The fact that counsel's decision is tactical in nature does not insulate it from a claim that the decision is unreasonable." *Michael*, 160 Wn. App. at 526; *Grier*, 171 Wn.2d at 33-34 ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.") (quotations and citation omitted). And as Bob Gould opined, "[S]itting there like a potted plant and doing nothing ... does not meet the standard of care." CP at 1064.

P.2d at 240; *Davis v. Damrell*, 119 Cal. App. 3d 883, 174 Cal. Rptr. 257 (Cal Ct. App. 1981); *Bergstrom v. Noah*, 266 Kan. 847, 947 P.2d 531, 554 (Kan. 1999); *Hatfield v. Hertz*, 109 F. Supp. 2d 174, 180 (S.D.N.Y. 2000); *Medrano v. Miller*, 608 S.W.2d 781, 784 (Tex. App. 1980).

But it is error for the trial court to resolve factual issues. *See Fleming v. Smith*, 64 Wn.2d 181, 185, 390 P.2d 181 (1964); *Bates v. Bowles White & Co.*, 56 Wn.2d 374, 353 P.2d 663 (1960). "When material issues of fact exist, *they may not be resolved by the trial court and summary judgment is inappropriate*." *Halvorsen*, 46 Wn. App. at 712 (emphasis added). "Even where the evidentiary facts are undisputed, if reasonable minds could draw different conclusions from those facts, then summary judgment is not proper." *Chelan County Deputy Sheriffs' Ass'n v. County of Chelan*, 109 Wn.2d 282, 295, 745 P.2d 1 (1987). "This rule prevents courts from assuming the function of a jury by weighing the facts as presented in documents prior to trial." *Babcock*, 116 Wn.2d at 598. And "[i]f different results might be honestly reached by different minds then negligence is not a question of law, but one of fact for the jury." *Baxter*, 65 Wn.2d at 426 (quotations and citations omitted); *see also Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 257, 616 P2d 644 (1980) (citations omitted).

II. THE TRIAL COURT ERRED IN IMMUNIZING BHB AND MATSON UNDER THE GUISE OF "JUDGMENTAL IMMUNITY"

Under the foregoing rules, there should be no question that it was error for the trial court to inject its opinions as to whether the acts or omissions of BHB and Matson were negligent. RP (August 17, 2012) at 66-73.[4] There should be no question that it was error for the trial court to rule, "You know, everything Mr. Matson did in this case, he acted in good faith toward his client. He did in fact make reasonable decisions. And I don't believe it's appropriate for me to second-guess that decision." RP (August 17, 2012) at 70. And there should be no question that it was error for the trial court to grant summary judgment for BHB and Matson under the guise of judgmental immunity. CP at 1234-36.[5]

Contrary to the puffery of BHB and Matson, (Br. of Resp't at 5-6), the Fire District and AAIC presented pleadings, depositions, and declarations pointing out numerous deficiencies in the legal services provided by BHB and Matson in the underlying case. CP at 718-1208.

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[4] *See Hunt v. Dresie*, 241 Kan. 647, 740 P.2d 1046, 1054 (Kan. 1987); *see also* Code of Judicial Conduct (CJC) 2.4 and comment 1 thereto ("Judges shall decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family.").

[5] After all, it is axiomatic that summary judgment does not exist as an unfair substitute for a trial. *Babcock*, 116 Wn.2d at 598.

On the state of the record as it existed before the trial court, the facts showed Matson's lack of subject matter expertise and his unsuitability to serve as lead counsel in the underlying case. CP at 799-809, 814-41. And considering the facts and all reasonable inferences therefrom in the light most favorable to the Fire District and AAIC, *see Hertog*, 138 Wn.2d at 275, a jury could find that BHB and Matson failed to act as reasonable, careful, and prudent legal practitioners in Washington state.

A. Based on the Facts of the Case, There is a Genuine Issue of Material Fact Regarding Whether BHB and Matson Were Negligent in Handling the Underlying Case

The facts are undisputed that Matson was not experienced in defending sexual harassment cases. CP at 918-19, 956-57, 971. Matson could not recall ever handling a case with an exposure over $500,000.00. CP at 971. He had never defended a sexual harassment case with multiple plaintiffs. CP at 919. And before the underlying case, he had never tried a sexual harassment case in his career. CP at 918.

The facts are undisputed that BHB had no policy or practice to determine whether an attorney had the requisite experience to handle a case. CP at 1017. BHB had no policy or practice regarding the assigning or reassigning of cases, especially where an attorney was unable to provide competent representation. CP at 1015-17, 1020. BHB abdicated to each attorney the decision whether he or she was competent to take on a

case. CP at 1022-23. And BHB's "practice" was that its attorneys would self-report when they could not provide competent and/or diligent representation to a client. CP at 1020-21.

While experience need not be the handmaiden of competence, the facts are undisputed that Matson did not self-report or consult with others at BHB who were more experienced. CP at 976. The chairman of BHB's employment law practice group did not recall Matson ever discussing the underlying case during their practice group meetings. CP at 1148.[6] And the associate initially assigned to the underlying case, by Matson no less, had no experience in handling sexual harassment claims. CP at 1032-34. He was a bankruptcy attorney. CP at 1030-31.

Utterly ignoring these short-comings, BHB and Matson rely in part on Bruce Rubin's declaration, and the exhibits thereto, to argue that Matson met the standard of care and properly evaluated the underlying case. Br. of Resp't at 7. But contrary to what Rubin claims, (CP at 414), there are no admissible facts showing that Matson properly "evaluated and/or interviewed" each material witness. CP at 424-42. Exhibit A to Rubin's declaration is simply a summary of the witnesses identified by

[6] It is telling that BHB used its employment law practice group meetings not for discussing clients' cases or keeping current with the law, but for marketing purposes. CP at 1149-50.

each party in the underlying case. CP at 424. And it was prepared, not by Matson, but by Carrie Vandervort. CP at 424.

Neither Rubin nor the attorneys for BHB and Matson have authenticated this exhibit. *See* CR 56(e); ER 901; *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 745-56, 87 P.2d 774, *review denied*, 153 Wn.2d 1016 (2004). Moreover, Rubin even admitted in his deposition that he just "assumed that the information in that 19-page list and the 155-page list was true, so I know that someone talked to those people, at least that was my assumption." CP at 1111-12.

Still, BHB and Matson rely on Rubin's declaration to tout the quantity of their work over the quality of their work. Br. of Resp't at 7. Incredibly, BHB and Matson even argue that any opposition to the timing of their actions in the underlying case is "irrelevant," "without any meaning," and "without merit." Br. of Resp't at 5-6. Apparently, for BHB and Matson, diligence and promptness in representing a client is "irrelevant," "without any meaning," and "without merit." But such an argument clearly flies in the face of Rules of Professional Conduct (RPC) 1.3, which states, "A lawyer shall act with reasonable diligence and promptness in representing a client."[7]

[7] While the RPCs were never intended as a basis for civil liability, a violation of the RPCs nevertheless may constitute a deviation from the

As a result of the consolidated list of plaintiffs' allegations/responses, (CP at 445-46), BHB and Matson knew that the Fire District's administrator, Marty James, had admitted to several of the underlying plaintiffs' allegations, including the patently sexist and racist comments that formed the basis of the their hostile work environment claims. CP at 936-37, 992-93. BHB and Matson knew that James had not attended any sexual harassment training before 2003. CP at 925-26. And BHB and Matson knew that the Fire District did not have a written sexual harassment policy at the time the underlying plaintiffs filed their complaints. CP at 924.

From the very beginning of the case, Matson believed that the overall liability was unfavorable. CP at 953. In his deposition, Matson admitted that "the big issue" in the underlying case was damages, not liability. CP at 985. Even Rubin testified that "common sense tells you that if liability is likely, *the next thing to focus on is what's the damage exposure*." CP at 1117 (emphasis added). So what did Matson do next?

He did not consult with others at BHB who were more experienced than him in handling cases of this nature. CP at 976. He did not have any focus groups evaluate the underlying plaintiffs' claims. CP at 939. He did

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standard of care. *Hizey v. Carpenter*, 119 Wn.2d 251, 261-65, 830 P.2d 646 (1992).

not have any mock juries evaluate the plaintiffs' claims. CP at 939. And he did not review any jury verdicts from sexual harassment cases, summarily dismissing their usefulness. CP at 945-46, 989-90.

He did not listen to the pleas, from the insurance adjustor for Glatfelter Claims Management (GCM),[8] to move the case into mediation. CP at 1044. He did not engage in any substantive efforts to settle the case until mediation – almost *two years* after being retained in the case and just less than *two months* before the initial trial date. CP at 890, 908-09. And he did not provide an evaluation regarding the damage exposure until just weeks before the mediation. CP at 890, 897.[9]

While BHB and Matson self-servingly describe these omissions as strategic choices, (Br. of Resp't at 37, 39-41, 45), it is difficult to conceive of any strategic or tactical advantage that could have been served by neglecting to focus on the issue of damages especially where, as Matson believed, the overall liability was unfavorable. "There is nothing strategic

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[8] GCM is a third-party administrator for Munich Reinsurance America, which wholly owns AAIC, an insurance provider. CP at 1094-97.

[9] There should be no basis for concluding that an attorney is insulated from liability for failing to exercise ordinary skill and care in resolving settlement issues. *See Sauer v. Flanagan & Maniotis, P.A.*, 748 So. 2d 1079, 1082 (Fla. Dist. Ct. App. 2000); *Ziegelheim v. Apollo*, 128 N.J. 250, 607 A.2d 1298, 1304 (1992) ("we insist that the lawyers of our state advise clients with respect to settlements with the same skill, knowledge, and diligence with which they pursue all other legal tasks.").

or tactical about ignorance ...." *Pineda v. Craven*, 424 F.2d 368, 372 (9th Cir. 1970). Similarly, there is nothing strategic or tactical about a failure to prepare. *Cf. Hodge v. Haeberlin*, 579 F.3d 627, 655 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 2107 (2010).

B. BHB AND MATSON CANNOT AVOID RESPONSIBILITY FOR THE VERY DUTIES THEY UNDERTOOK TO PERFORM

Incredibly, BHB and Matson seek to excuse their failures – to perform the very acts for which they were hired – by blaming anyone, but themselves. Br. of Resp't at 6, 8-10, 38, 44-45. They blame the Fire District and AAIC for their conduct before the representation. Br. of Resp't at 8-9, 38. They blame the Fire District and AAIC for their conduct during the representation. Br. of Resp't at 9-10, 38, 44-45. And they blame Katherine Hart Smith for her representation. Br. of Resp't at 9-10, 38. But instead of absolving BHB and Matson from any (or all) liability, this argument further underscores why summary judgment for them in this case was inappropriate.

First, courts have soundly rejected contributory negligence defenses based on a client's conduct before obtaining a professional's services.[10] *McLister v. Epstein & Lawrence*, 934 P.2d 844, 846-47 (Colo.

[10] To date, it does not appear that any Washington court has ruled on this particular issue.

Ct. App. 1996); *Steiner Corp. v. Johnson & Higgins*, 996 P.2d 531, 533 (Utah 2000). As the Utah Supreme Court succinctly noted:

> [A] preexisting condition that a professional is called upon to resolve cannot be the cause, either proximate or direct, of the professional's failure to exercise an appropriate standard of care in fulfilling his duties. To decide otherwise would allow professionals to avoid responsibility for the very duties they undertake to perform. A doctor, for example, might be able to avoid liability for negligently treating an injured person because the patient negligently had run a traffic light and was injured. Such a result would be clearly unsound.

Steiner Corp., 996 P.2d at 533 (citation omitted). And as the South Dakota Supreme Court astutely noted, "Thus, if a professional accepts a duty to serve a client, *the professional is generally liable for negligence in the performance of that duty regardless of how or why the client became involved in the matter for which the professional was retained.*" *Behrens v. Wedmore*, 698 N.W.2d 555, 571 (S.D. 2005) (emphasis added); *see also* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIABILITY, § 7, cmt. m (2000) (noting that a plaintiff is not contributorily negligent for causing the problem he takes to the professional).

Of course, a client's conduct before obtaining a professional's services may be relevant; but it would be relevant only to the issue of causation, not contributory negligence. *McLister*, 934 p.2d at 846-47; *Conklin v. Hannoch Weisman*, 145 N.J. 395, 678 A.2d. 1060, 1069 (N.J.

1996) ("In any event, the analysis is that of causation, not contributory negligence."). And where, as in this case, there is a genuine issue as to causation (in fact), summary judgment is inappropriate. *Halvorsen*, 46 Wn. App. at 712; s*ee Daugert v. Pappas*, 104 Wn.2d 254, 257, 704 P.2d 600 (1985) (the issue of causation (in fact) is one for the jury).

Second, while courts have recognized that contributory negligence may serve as an affirmative defense to legal malpractice claims, this affirmative defense is limited to only a handful of circumstances, e.g., where a client's conduct impedes an attorney's ability to perform the services for which he was retained. *See Hansen v. Wightman*, 14 Wn. App. 78, 86-88, 538 P.2d 1238 (1975) (discussing that the burden is on the attorney to prove that the client was contributorily negligent in failing to act or in failing to disclose information to the attorney); *see also* RONALD E. MALLEN & JEFFREY M. SMITH, 3 LEGAL MALPRACTICE, § 22.2 (2009).

Significantly, several courts have expressly held that a client may not be found contributorily negligent for failing to guard against the attorney's own negligence or for failing to perform itself those services within the purview of the attorney's representation. *Theobald v. Byers*, 193 Cal. App. 2d 147, 151, 13 Cal. Rptr. 864 (Cal. Dist. Ct. App. 1961); *Gorski v. Smith*, 812 A.2d 683, 700-01 (Pa. Super. Ct. 2003); *Behrens*, 698 N.W.2d at 571.

Other than the implication by BHB and Matson that the Fire District and AAIC failed to perform the very services for which BHB and Matson were hired, (Br. of Resp't at 6, 8-9, 38, 44-45), there is no evidence in the record that either the Fire District or AAIC: (1) did anything to withhold information from BHB and Matson; (2) failed to follow the advice of BHB and Matson; or (3) acted in any manner that hindered the ability of BHB and Matson to perform the very services for which they were retained.

Simply put, therefore, BHB and Matson cannot premise their affirmative defense of contributory negligence on the alleged failure of the Fire District and AAIC to perform the very acts for which BHB and Matson were employed. *See Theobald*, 193 Cal. App. 2d at 151; *Gorski*, 812 A.2d at 700-01; *Behrens*, 698 N.W.2d at 571; *see also* Susan L. Thomas, Annotation, *Legal Malpractice: negligence or fault of client as a defense*, 10 A.L.R. 5th 828 (1993) (jury instructions should "prevent defendant attorneys from using a client's failure to perform the attorneys' function as a defense against a legal malpractice claim.").[11]

[11] Even assuming *arguendo* that there was evidence of contributory negligence, the question of contributory negligence still would be for the jury, not the trial court. *Baxter*, 65 Wn.2d at 426.

Third, with regard to Katherine Hart Smith, BHB and Matson fail to divulge that she provided AAIC her opinion of the underlying case in October 2006, (CP at 532-33), only because GCM's insurance adjustor was "concerned [that] Mr. Matson didn't seem to be aggressively defending the case or moving the case." CP at 236.[12] And there is no evidence, *contra* RAP 10.3(a)(6), that Hart Smith was a member of GCM's "defense counsel 'panel.'" Br. of Resp't at 9.

After a cursory review of documents, and a telephone conversation with Matson, Hart Smith opined, "We both agree that it will be an all or nothing verdict. If the jury believes the plaintiffs, then I expect that it will be a multi-million dollar award." CP at 532-33. Yet just four months later – and after almost two years of representation – BHB and Matson opined the value of the underlying case to be: (1) $370,000.00 for purposes of settlement and (2) $741,000 for purposes of trial. CP at 504-10.

Justifiably (and to their detriment, unfortunately), the Fire District and AAIC relied on the evaluation prepared by BHB and Matson in defending the underlying case. After all, as GCM's adjustor testified, she

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[12] It is disappointing that AAIC had to consult with Katherine Hart Smith, as "[c]lients should not be forced to act as hawk like inquisitors of their own counsel, suspicious of every step and quick to switch lawyers." *Daley v. Butte County*, 227 Cal. App. 2d 380, 392, 38 Cal. Rptr. 693 (Cal. Dist. Ct. App. 1964).

relied on Matson because "[h]e is the person who practices in Washington. He knows the values of this case. I pay him to tell me what is this case worth." CP at 908. Brian McCormick, a claims specialist for AAIC, testified that AAIC relies on local counsel, such as BHB and Matson, because they are "boots on the ground, *they know what's going on in that jurisdiction.*" CP at 265-72, 531 (emphasis added).[13]

Significantly, Matson admitted that the Fire District and AAIC were entitled to reasonably rely upon him in making informed decisions about settlement. CP at 986-87. And Matson even admitted that, between himself and the insurer, he was in the best position to determine the value of these types of cases and to determine liability and damages exposure in these types of cases in the Vancouver, Washington market. CP at 952. So, it is ridiculous for BHB and Matson to claim that their improvident evaluation – made after almost two years of representation – was somehow "harmless error" because of Hart Smith's cursory review.

In addition, contrary to what BHB and Matson imply, (Br. of Resp't at 9), Hart Smith was not counsel of record in the underlying case

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[13] Without any citation to facts, *contra* RAP 10.3(a)(6), BHB and Matson erroneously claim that AAIC undertook an independent evaluation of liability and/or damages in the underlying case. (Br. of Resp't at 6). BHB and Matson ignore the facts that AAIC specifically relied on Matson's evaluation. CP at 531, 889, 907-08.

until just shortly before trial in May 2007. CP at 240.[14] Importantly, she was admitted *pro hac vice* in association with Matson. CP at 235. Accordingly, under APR 8(b), Matson maintained responsibility for the proceedings, was the "lawyer of record therein," and assumed responsibility for Hart Smith's actions. *See Dorsey v. King County*, 51 Wn. App. 664, 670-71, 754 P.2d 1255 (1988). And contrary to what BHB and Matson assert, (CP at 17), there is "no authority recognizing a cause of action in favor of a co-counsel for negligence arising from representation of a mutual client." *Evans v. Steinberg*, 40 Wn. App. 585, 588, 699 P.2d 797, *review denied*, 104 Wn.2d 1025 (1985).

C. Based on the Experts' Opinions, There is a Genuine Issue of Material Fact Regarding Whether BHB and Matson Were Negligent in Handling the Underlying Case

In an argument that strains credulity, BHB and Matson argue that the declarations of Anne Bremner, Claire Cordon, and Bob Gould[15] are insufficient to create a genuine issue of fact regarding whether BHB and Matson were negligent. Br. of Resp't at 26-27. For the first time on

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[14] During this time, Hart Smith freely offered to assist BHB and Matson in any way that she could help. CP at 248-52. But BHB and Matson put Hart Smith in an office with a computer that had no internet access, excluded her from trial preparation meetings, and essentially ignored her and her advice. CP at 238-39, 251-52.

[15] The Fire District and AAIC also supported their response with Gould's deposition testimony and an exhibit therefrom. CP at 1037-83

appeal, and without any citation to law or facts, *contra* RAP 10.3(a)(6), BHB and Matson claim that the opinions of these experts are insufficient because the underlying case allegedly involved "an uncertain and unsettled legal area." Br. of Resp't at 27. But absent this single, bare assertion, there is no evidence in the record that, at the time Matson rendered his professional advice, the underlying case involved an uncertain, unsettled, or debatable proposition of law. *Contra Halvorsen*, 46 Wn. App. at 717-18. As such, "[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998); *see also* RAP 10.3(a)(6).[16]

Here, the experts' opinions are sufficient to create a genuine issue of fact regarding whether BHB and Matson were negligent.[17] Among the experts' opinions, Cordon opined, "Matson knew or should have known this was not a typical 'he said/she said' sexual harassment case where the

[16] Expert testimony is often permitted, but not required, to establish a prima facie case of legal malpractice, in part because law is a highly technical field beyond the knowledge of the ordinary person. *Walker v. Bangs*, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979); *Lynch v. Republic Publ'g Co.*, 40 Wn.2d 379, 389, 243 P.2d 636 (1952); *see also Rorrer v. Cooke*, 313 N.C. 338, 329 S.E.2d 355, 356 (1985).

[17] Bremner, Cordon, and Gould are not merely expressing a difference in opinion consistent with the exercise of care. *Contra Rorrer*, 313 N.C. at 357. Rather, they are expressing their opinions that BHB and Matson breached the duty of care.

facts were largely contested." CP at 821. A reasonable, careful, and prudent attorney would have known, based on "the totality of circumstances,"[18] that the evidence was sufficient for a jury to find that James created an unlawfully hostile work environment at the Fire District. CP at 818, 833-34. "Only a lawyer with limited trial experience in handling sex harassment cases would assume the Defendants could prevail before a jury given the damaging admissions made by Defendant James, coupled with the testimony from the four Plaintiffs." CP at 821.

Yet that is exactly what BHB and Matson assumed. Despite having "the resources of the entire firm, which would include senior lawyers, colleagues, written resources, [and] anything that would be of assistance to the lawyer," (CP at 1013), Matson simply assumed that a jury would find James's conduct to be "lighthearted and banter." CP at 937. Despite knowing that James admitted to many of the allegations raised by the underlying plaintiffs, including using the words and phrases "bitch," "bitchy," "on the rag," and "barefoot and pregnant" when referring to women at the Fire District, (CP at 871-75), Matson still maintained – even after the trial – that he "was not sure that [James] ever did engage in sexual harassment." CP at 926. Clearly, Matson did not have the ordinary

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[18] *See Harris v. Forklift Sys*, 510 U.S. 17, 23, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993).

knowledge and skill to practice in this particular field, as a reasonable, careful, and prudent attorney would know that "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." CP at 821-22.

Moreover, a reasonable, careful, and prudent attorney would not have proceeded on a defense strategy of blaming Sue Collins for the hostile work environment. CP at 799-801, 821-22, 1060-61. As the underlying trial court *sua sponte* recognized in 2007 – well before the parties retained any experts in this case – the defense strategy of BHB and Matson was flawed: "It is clear that [Sue Collins's] outrageous behavior at the employment site was totally inappropriate *and should have been corrected by her supervisor Marty James*." CP at 763 (emphasis added). Gould succinctly explained why such a defense 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. It's as simple as that." CP at 1061. As Bremner opined, such a defense strategy actually served to bolster the other three plaintiffs' hostile work environment claims. CP at 801.[19]

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[19] Thus, it is entirely appropriate for a second trier of fact to decide what a reasonable jury would have done but for the negligent defense that BHB and Matson provided. *See, e.g., Daugert*, 104 Wn.2d at 258, 704 P.2d 600 (1985); *Nielson v. Eisenhower & Carlson*, 100 Wn. App. 584, 591-92, 999 P.2d 42, *review denied*, 141 Wn.2d 1016 (2000).

Inexplicably, Matson shunned a number of "discovery tools," including motions to bifurcate and offers of judgment, which a reasonable, careful, and prudent attorney would use to limit liability and damages. CP at 801-05, 825-29, 919-20, 929-31, 951. In fact, Matson admitted that he never even recommended to his clients that they consider filing either a motion to bifurcate or an offer of judgment. CP at 919-20, 929-31.[20] Incredibly, Matson testified to the following about the usefulness of an offer of judgment: "It's not effective unless it's accepted." CP at 930. And as Bremner questioned, "[I]t is unclear whether he fully understands the purpose and use of an offer of judgment." CP at 804.

In short, "[i]t does not appear that Mr. Matson was familiar with or fully understood the legal theories asserted by plaintiffs and the available defenses." CP at 799. "Given his lack of experience in this area, Matson was negligent in not taking advantage of the resources readily available to him." CP at 830.[21] And as Bremner opined, "This led to his unreasonable failures to properly assess damages and likely outcomes." CP at 799.

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[20] Bremner, Cordon, and Gould also opined that BHB and Matson were neither prompt nor diligent in their communications regarding the evaluation of the underlying plaintiffs' claims. CP at 805-06, 835-36, 1055-56.

[21] Such resources could include jury verdicts, other attorneys who had experience litigating similar cases, potential experts, and jury consultants. CP at 830-31.

CONCLUSION

The law does not immunize BHB and Matson from tort liability for their professional negligence. *Cook*, 73 Wn.2d at 394. More than 40 years ago our Supreme Court unequivocally rejected the very position currently being advanced by BHB and Matson. *Cook*, 73 Wn.2d at 394. Washington law is, and has been, clear that an attorney's error of judgment – even when made in good faith and in an honest belief that his acts and advice are well founded and in the best interest of his client – "*must itself fall short of negligence if the lawyer is to be protected from liability.*" *Cook*, 73 Wn.2d at 394 (emphasis added).

Merely characterizing an act or omission as a "trial tactic," "tactical choice," "trial strategy," or "strategy decision," (Br. of Resp't at 2, 29, 32, 37-38, 39), does not end the factual inquiry. *See Cook*, 73 Wn.2d at 394; *Grier*, 171 Wn.2d at 33-34; *Michael*, 160 Wn. App. at 526. "The issue remains as to whether the attorney has exercised a reasonable degree of care or skill in representing his client." *Gelsomino*, 502 N.E.2d at 267; *see also Cook*, 73 Wn.2d at 394. And unless reasonable minds could reach but one conclusion, *see Hartley*, 103 Wn.2d at 768, it is error for the trial court to resolve factual issues. *Fleming*, 64 Wn.2d at 185.

Based on the law and the record before the trial court, it erred in ruling, "You know, everything Mr. Matson did in this case, he acted in

good faith toward his client. He did in fact make reasonable decision. And I don't believe it's appropriate for me to second-guess that decision." RP (August 17, 2012) at 70. The trial court erred in sanctioning conduct – which a jury otherwise could find to be negligent – under the guise of "good faith" and "judgmental immunity." RP (August 17, 2012) at 70; CP at 1234-36. Thus, granting summary judgment based on judgmental immunity was improper; and the trial court erred.

For the foregoing reasons, this court should: (1) reverse the trial court's order dismissing the claims of the Fire District and AAIC; and (2) remand for trial on the remaining elements of negligence.

RESPECTFULLY SUBMITTED this 20th day of March, 2013.

PATTERSON BUCHANAN
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CERTIFICATE OF SERVICE

I, Jennifer N. Culbertson, hereby certify that on the date below I caused the foregoing to be served upon the Court of Appeals ***via ABC Legal Messenger*** and 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 March 20th, 2013.

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