No. 92537-2

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

Court of Appeals Case no. 72533-5-I

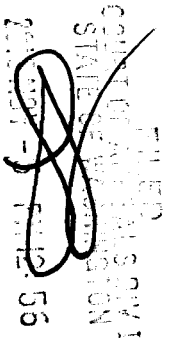
HAITHAM JOUDEH,

Petitioner/Appellant,

vs.

PFAU COCHRAN VERTETIS AMALA, PLLC, a Washington Professional Limited Liability Company d/b/a PFAU COCHRAN VERTETIS KOSNOFF, PLLC; DARRELL L. COCHRAN, Individually and on behalf of the Marital Community comprised of DARRELL L. COCHRAN and JANE DOE COCHRAN,

Respondents.



PETITION FOR REVIEW BY WASHINGTON SUPREME COURT

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I. Identity of Petitioner

This Petition asks the Court to address the tension between the fundamental concepts of mitigation and superseding (or intervening) cause. More particularly, after an attorney commits malpractice and withdraws, to what lengths must the client (and their replacement counsel) oppose and appeal adverse decisions in the underlying case?

Here, Petitioner Haitham Joudeh commenced a legal malpractice action in King County Superior Court. That Court dismissed all of his claims on summary judgment, holding in pertinent part (for purposes of this Petition) that his failure to "challenge or appeal the adverse ruling[s] in the underlying personal injury action...defeats the plaintiff's proof of proximate cause here, period....". App. Op., p. 5. Joudeh timely appealed. Division I affirmed that part of the trial court summary judgment. Opp., p. 11. Mr. Joudeh seeks review of the Court of Appeals ruling because the Court of Appeals holds, in effect, that the victim of legal malpractice must oppose and appeal *every* adverse ruling in the underlying matter; if the client fails to oppose and appeal every adverse ruling, regardless of the merits of those rulings, then the client's legal malpractice action is forever barred. The Court of Appeals thus abrogated well-established Washington jurisprudence related to the "reasonableness" of mitigation efforts and superseding cause.

II. Citation to Court of Appeals Decision

Joudeh v. Pfau Cochran Vertetis Amala, PLLC, Court of Appeals Case no. 72533-5-I, 2015 WL 5012612 (unpublished)[Appendix A], *withdrawn and superseded by* 2015 WL 5923961 [Appendix B].

III. Issues Presented for Review

1. Consistent with *Daugert v. Pappas,* how does a legal malpractice victim prove causation in a legal malpractice action?

2. Under what circumstances does a legal malpractice victim's (allegedly) negligent mitigation efforts constitute a superseding cause that cuts off the liability of a negligent attorney?

3. Must the client/victim of legal malpractice oppose every motion and appeal every adverse ruling after the attorney/tortfeasor withdraws, regardless of whether the client would have succeeded with those mitigation efforts?

IV. Statement of the Case

A. Background Facts

Haitham Joudeh entered into a consumer loan agreement with Spokane Firefighters Credit Union. CP 469 ¶3.0; CP 490 ¶1.7. The Credit Union subsequently pursued a non-judicial repossession of the truck. CP 470 ¶3.1; CP 491 ¶1.8. The Credit Union retained Auto Trackers and Recovery ("Auto Trackers") to repossess the truck. CP 469 ¶3.2; CP

491¶1.9. Auto Trackers, in turn, retained Joshua Strickland of Strickland Recovery, LLC to assist in the repossession. CP 469 ¶3.3; CP 490 ¶1.10. See further, CP 705-706 (pp. 45:14-46:16). Matthew Mayo and Trisha Matthews also participated. *Id.* [1]

On August 19, 2010, Haitham was traveling in the pickup truck in Pierce County, with his minor son, when he was accosted by Mayo and Matthews (in one vehicle) and Strickland in a large tow-truck, threatening to collide with it. CP 469 ¶3.4; CP 491 ¶1.11; see further, CP 868-882, 900-907. This led to a high speed chase over 30 city blocks, which ended when Mayo and Matthews blocked Plaintiff's truck, and Strickland rear-ended it, pushing it into the vehicle in which Mayo and Matthews were driving. *Id.* The police arrested Mayo and Strickland on charges of reckless driving. CP 470 ¶3.8; CP 492.

Haitham was seriously injured. *E.g.,* CP 628-629. His medical expenses totaled approximately $70,000. CP 630-631, 656-659.

The Strickland defendants had $1MM of liability insurance coverage for Mr. Joudeh's claims. CP 748, 803-804. Auto Trackers, Mayo and Matthews also had $1MM of liability insurance coverage, and

[1] A question arose in the Underlying tort case about whether Mayo and Matthews were "employees" of Auto Trackers. For purposes of this appeal, that distinction makes no difference because Auto Trackers had a $1MM liability policy that provided coverage regardless of whether they were "employees." CP 688, 695, 749, 814-816, 829-840.

Mayo and Matthews had an additional $100,000 of coverage through their individual policy. *Id.*; CP 688, 695, 749, 814-818, 829-839.[2] They were therefore "solvent." CP 563-564 ¶20-21.

Haitham first met with Mr. Cochran on August 26, 2010, and retained the Pfau Cochran law firm on October 25, 2010. CP 471 ¶3.9; CP 492 ¶1.14. Mr. Joudeh's fee agreement with Cochran provides, in part, that "[a]t their sole discretion, Attorneys will advance payment of Costs." CP 375. The fee agreement further provides that "Attorneys will obtain Client's informed consent prior to any settlement arising from this agreement." CP 376. Mr. Cochran assured Haitham that he and his law firm would advance the necessary litigation expenses. CP 408 (23:4-6), 530 ¶3. Cochran advanced Mr. Joudeh's litigation expenses until January 30, 2012 (when a disagreement arose over Mr. Cochran's unauthorized settlement offer). CP 471 ¶¶3.9-3.10; CP 492 ¶1.15.

From the outset of representation, Haitham had wanted to take his case to trial. *E.g.,* 531 ¶6, 613-617 (Ans. to 'Rog. no. 7), and 680 (113:12-14). Mediation of the underlying matter was scheduled on Monday, January 30, 2012. CP 473 ¶3.17; CP 494 ¶1.22. On January 24, 2012, Haitham wrote to Mr. Cochran, authorizing settlement within a range of $2,500,000 to $3,000,000. *Id.* Mr. Cochran nevertheless submitted a

[2] Mr. Cochran erroneously told Mr. Joudeh that Mayo and Matthews's policy limits were only $100,000. CP 215; CP 615 (Ans. to 'Rog. no. 7).

mediation brief on Friday, January 27, 2012, in which he communicated an opening settlement offer in the amount of $552,500. CP 473 ¶3.18; CP 494 ¶1.23; CP 655-659. Mr. Cochran had *not* allowed Haitham an opportunity to see the mediation brief prior to its submission, and Haitham had *not* authorized that settlement offer. CP 530-531 ¶¶4-5. Mr. Joudeh's expert, Philip Cutler, opined that Mr. Cochran breached the standard of care and his fiduciary duties, by making unauthorized settlement offers, including this one. CP564-568.

During and immediately after mediation of the Underlying Matter on January 30, 2012, Mr. Cochran changed his position about advancing costs because, in his words, Mr. Joudeh had "rejected my [settlement] advice;" he thereupon demanded that Mr. Joudeh deposit $10,000 and pay all future litigation expenses. CP 408-412 (pp. 21:17-25:13, 26:17-28:13, 29:1-21, 92:15-94:9), CP 414, 416-417, 419. See further, CP 473-476 ¶¶3.17-3.27; CP 494-495 ¶1.27. Mr. Cochran also decided that he must settle Mr. Joudeh's case and not take it to trial regardless of Mr. Joudeh's desire to do so. *E.g.,* CP 680 (113:4-114:4). Mr. Cochran demanded prepayment of costs, he said, because he was "no longer interested in carrying the loan for you on this case" and had "no interest in losing [his]

money."[3] CP 409 (27:16-28:12); CP 414, 416-417, 419. Mr. Cutler opines that Mr. Cochran's demand that Haitham deposit $10,000 and pay litigation expenses breached Mr. Cochran's fiduciary duties to Haitham. CP 568-569. Mr. Cochran himself confirmed that he has used this same form fee agreement and improper practice with other "unreasonable" clients. CP 409 (25:3-13), CP 412 (94:4-9).

On February 10, 2012, Mr. Cochran offered to "settle the claims against Jack [Strickland's attorney] for $300,000." CP 660-662. Haitham had not authorized that offer. CP 533 ¶9. On February 13, 2012, Mr. Cochran sent Haitham an email stating that the Strickland defendants had offered to settle for $100,000. CP 664-666. He wrote that this $100,000 offer was "a good offer" and "[i]f we can get them to $150,000, the offer should be accepted." *Id.* Mr. Joudeh rejected Mr. Cochran's advice to accept $150,000. CP 533 ¶8. Mr. Cochran assured Mr. Joudeh that he could settle with only the Strickland defendants without endangering his claims against the remaining defendants. CP 531-532 ¶6; CP 613-617

[3] On March 26, 2012, Mr. Cochran demanded that Mr. Joudeh authorize a $175,000 settlement offer to the Strickland defendants "or [send] a check for costs." CP 673-677.

(Ans. to 'Rog. no. 7).[4]

Mr. Cochran subsequently issued another unauthorized settlement offer to the Strickland defendants in the amount of $250,000 on March 13 and, when Strickland did not accept it, went further and offered that "we can come off $250,000" on March 14, 2012. CP 668. Mr. Joudeh had not authorized those offers. CP 633-634 ¶¶10-11. Mr. Cutler opines that Mr. Cochran's unauthorized settlement offers again breached the standard of care and his fiduciary duties to Haitham. CP 564-568. Based on Mr. Cochran's threats relative to litigation expenses, as well as his assurances that Haitham's claims against the remaining defendants would *not* be affected, Mr. Joudeh finally relented and agreed to a $250,000 settlement with the Strickland defendants. CP 86, 216.

Mr. Cochran next negotiated a $100,000 settlement with Mayo and Matthews. *Id.* As with the Strickland settlement, Mr. Cochran assured Haitham that this settlement would not endanger his claims against the Credit Union and Auto Trackers. CP 532-533 ¶7. Haitham would not have authorized settlement with Mayo and Matthews if Mr.

[4] *E.g.*, in a March 26, 2012 email, Mr. Cochran told Haitham "Let's get Strickland in now and that will enable us to keep pounding everyone else." CP 673, 534 ¶12.

Cochran had explained the risks posed by the partial settlement. *Id.*

Mr. Cochran next tried to negotiate with Auto Trackers and the Credit Union; however, Mr. Joudeh refused to consider the settlement amounts Mr. Cochran recommended. CP 616-617. Mr. Cochran and his law firm then withdrew from representation effective October 31, 2012 because Haitham would not accept their settlement recommendations. CP 259-262, 265-267; CP 682. Mr. Joudeh contacted an estimated 50 personal injury law firms in the area, 23 of which are identified by name in Mr. Joudeh's discovery responses. CP 534-535 ¶13; CP 620-624, 626-627 (Ans. to 'Rog. nos. 10, 13). At least two of those attorneys called Mr. Cochran for information. CP 680 (115:11-116:14). Haitham could not get any attorney to represent him as replacement counsel. CP 627 (Ans. to 'Rog. no. 13).

The remaining defendants (Auto Trackers and the Credit Union) thereafter moved for summary judgment, each successfully arguing that Haitham's releases of the Strickland defendants, and Mayo and Matthews,

effectively released them as well. CP 684-923.[5]

B. Proceedings in the Lower Courts

Haitham's Complaint alleged a cause of action for legal malpractice and other causes of action. CP 13-16.

Cochran moved for summary judgment. CP 82. Haitham opposed Cochran's motion. CP 504. Citing Cochran's opening motion [CP 82-83], Haitham pointed out that Cochran was limited to his four (4) initial summary judgment "showings" [CP 505] that:

> Defendants' motion for summary judgment purports to make four (4) summary judgment showings: (1) plaintiff cannot prove a breach of the standard of care because he "does not possess any expert testimony;" (2) plaintiff cannot prove proximate cause because he "failed to challenge or appeal the adverse ruling in the underlying personal-injury action;" (3) plaintiff cannot prove a breach of contract because "Mr. Cochran in fact obtained plaintiff's informed consent," and; (4) the court should "dismiss any such CPA claim as a matter of law."

In Reply, Cochran *conceded* that "Mr. Cutler's testimony creates an issue of fact whether Mr. Cochran violated the standard of care or fiduciary duties to plaintiff." CP 924.

The trial court granted summary judgment dismissing Haitham's Complaint in its entirety [CP 930], holding that Haitham's

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[5] Auto Trackers filed two separate motions, the first sought dismissal of vicarious liability claims and the second seeking dismissal of all remaining claims. CP 684-692, 742-744, 844-848. The Court in that case granted both motions. CP 921-923. The Court of Appeals thus mistakenly referenced counterclaims that were "dismissed for failure to prosecute" [Op., p. 1], considering that Haitham was the *plaintiff* in the underlying matter and his remaining claims in the Underlying Matter were dismissed on summary judgment and *not* due to failure to prosecute.

failure to "challenge or appeal the adverse ruling[s] in the underlying personal injury action...defeats the plaintiff's proof of proximate cause here, period....". App. Op., p. 5.

On August 24, 2015, the Court of Appeal affirmed the trial court's dismissal of Mr. Joudeh's legal malpractice, breach of contract, and Consumer Protection Act claims, but reversed and remanded his breach of fiduciary duty claims for trial. The Court held, *inter alia,* that "[h]ere, Joudeh's own conduct in failing to appear or oppose the motions for summary judgment caused any loss he sustained." Op., p. 11. Haitham timely filed motions for reconsideration and publication. On October 12, 2015, the Court of Appeals granted his motion for reconsideration in part by deleting its erroneous characterization of Haitham's position. Appendix B. The Court denied publication. Joudeh timely petitions this Court.

V. ARGUMENT

A. The Lower Court Decision Conflicts with *Daugert v. Pappas* Because Victims of Legal Malpractice Prove Causation Through Inferences Drawn from Evidence in the Trial-Within-The-Trial. RAP 13.4(b)(1), (2) and (4).

The Court of Appeals concluded that Haitham "provided no evidence that he could have recovered more for his vicarious liability claims through settlement or trial." Op., p. 10. However, victims of legal malpractice prove causation through inferences drawn by the finder of

fact, and Haitham introduced ample evidence from which a finder of fact could conclude that he would have recovered more.

Proximate cause in a legal malpractice case requires a "trial-within-a-trial" or "case-within-a-case" to determine whether the client would have fared better but for the lawyer's negligence. *Daugert v. Pappas*, 104 Wn.2d 254, 257-258, 704 P.2d 600 (1985) explains:

> [W]hen an attorney makes an error during a trial, the 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. [Citation omitted]. 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. (Emphasis added).

When the fact finder in a legal malpractice case must determine what would have occurred but for the defendants' negligence, **the plaintiff establishes proximate cause through *inferences drawn by the fact finder.*** *Daugert, supra*, 104 Wn.2d at 257-8; *Bishop v. Jefferson Title Co.,* 107 Wn. App. 833, 848-9, 28 P.3d 802 (2001)(reversing summary judgment in legal malpractice case); *Hetzel v. Parks,* 93 Wn. App. 929, 939-41, 971 P.2d 115 (1999) (reversing dismissal of legal malpractice

case); *Brust v. Newton,* 70 Wn. App. 286, 290-94, 852 P.2d 1092 (1993); *Clark Cnty. Fire Dist. No. 5 v. Bullivant Houser Bailey, P.C.,* 180 Wn. App. 689 ¶44, 324 P.3d 743, 754 (2014) (summary judgment reversed; Court "inferred that the [plaintiff's] experts believed that no reasonable prudent attorney would have agreed with [defendant's] evaluation based on their opinions that Matson breached the standard of care").

In contrast to medical malpractice cases in which expert testimony is critical to proving what would have occurred but for the malpractice, expert testimony as to what a judge, jury or tribunal would have decided in the underlying matter is *not* admissible.[6] *E.g.,* 4 Mallen & Smith, *Legal Malpractice* § 37:138, pp. 1812-1818 and §37:151, pp. 1849-1855 (2015 ed.); *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), *citing*, *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").

Here, Haitham introduced ample evidence from which the finder of fact could **infer** that he could have recovered "more" but for Cochran's

[6] The Court of Appeals appears to have approved expert testimony as to the result of the underlying matter. Op., pp. 10-11. This Court should reject that erroneous suggestion.

breaches. Indeed, Respondents themselves acknowledged that even "[a]fter the initial settlements, Auto Trackers and SFCU both continued to make large settlement offers." Resp. Br., p. 6, citing CP 254, 257. Mr. Joudeh also introduced extensive evidence concerning the nature of his injuries, the amount of his medical bills (as calculated by Cochran), and the damages he claims in this lawsuit. App. Br., pp. 9-10, citing CP 628-629, 630-631, 656-659, and; CP 618-619 (Ans. to 'Rog. no. 9 re: damages). The Court of Appeals opinion thus conflicts with *Daubert v. Pappas* and similar cases which establish the trial-within-the-trial as the means for determining whether the client would have recovered more.

B. The Lower Court Theory of Post-Malpractice Superseding Cause by Replacement Counsel (or the *Pro Se* Client) Conflicts with This Court's Decisions in *McCoy* and *Maltman*. RAP 13.4(b)(1) and (4).

Both the Court of Appeals [Op., p. 11] and the trial court [CP 933, 967] concluded, as a matter of law, that "it was Joudeh's failure to oppose the motions for summary judgment (or to appeal the adverse rulings) that broke any chain of causation based on Cochran's alleged misconduct." Significantly, *neither* lower court ever determined whether Haitham would have won those motions if he had opposed and/or appealed them. The lower court conclusions thus conflict with fundamental Washington concepts of superseding cause within our system of comparative fault.

Cochran's Answer alleged the affirmative defense of Haitham's negligence. CP 501 ¶2.2 ("caused in whole or in part"). The defendant, *not* plaintiff, carries the burden of proof on affirmative defenses involving allocation of fault. *E.g.,* 16 DeWolf and Allen, *Wash. Tort Law and Prac.* §13.7 (updated through 9/2014). See further, *Schmidt v. Coogan,* 181 Wn.2d 661 ¶¶9-10, 225 P.3d 424 (2014). Cochran thus had the burden of proving their affirmative defense of a superseding cause.

However, since the advent of comparative fault, the original negligent actor (*i.e.,* Cochran) remains liable even though a third person (*e.g.,* replacement counsel or the client acting *pro se*) negligently fails to take affirmative action which would have prevented the harm if the third person's conduct is reasonably foreseeable. *McCoy v. American Suzuki Motor Corp.,* 136 Wn.2d 350, 358, 961 P.2d 952 (1998); *Cline v. Watkins,* 66 Cal. App.3d 174, 178-180, 135 Cal. Rptr. 838 (1977)(legal malpractice case). Accord, *Maltman v. Sauer,* 84 Wn.2d 975, 982, 530 P.2d 254 (1975); 16 DeWolf & Allen, *Wash. Prac. Tort Law and Prac.* §5.15 and n. 9 (4th ed. 9/2014); 1 *Mallen & Smith, supra* §8.25, pp. 1039-1045 (2015 ed.). An independent intervening act constitutes a superseding cause that relieves the actor of liability for his negligence *only* if the intervening act is highly unusual or extraordinary and hence not reasonably foreseeable. 16 *Wash. Prac. supra* §5.15 and n. 14. Accord, *Cline, supra,* 66 Cal.

App.3d at 178.[7]

Here, regardless of what Mr. Joudeh could or should have done, Mr. Cochran should reasonably have foreseen that Mr. Joudeh would be unable to retain replacement counsel after Cochran had settled for the "easy money," and that Joudeh, acting *pro se*, would be unable to successfully defend the remaining defendants' summary judgment motions. The Court of Appeals thus imposed an erroneous standard relative to circumstances under which post-malpractice conduct completely bars a legal malpractice claim by the client. The Court of Appeals decision thus conflicts with *McCoy* and *Maltman,* and warrants review. RAP 13.4(b)(1) and (b)(4).

C. The Court of Appeals Imposed a New, Far-Reaching Duty of Mitigation that Conflicts with *City of Seattle v. Blume* and *Flint v. Hart.* RAP 13.4(b)(1), (2) and (4).

Until now, Washington has *never* required that victims of legal malpractice must oppose and appeal every adverse post-malpractice motion and decision—or have their legal malpractice claims forever

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[7] Whether a particular act is "foreseeable" and whether it constitutes a "superseding cause" or merely a "concurrent cause" constitutes an issue for the jury. *E.g., Travis v. Bohannon,* 128 Wn. App. 231, 242, 115 P.3d 342 (2005); *McCoy, supra,* 136 Wn.2d at 358; 16 *Wash. Prac., supra* §5.15 and n. 4.

barred. Instead, *City of Seattle v. Blume,* 134 Wn.2d 243, 259, 947 P.2d 223 (1997) recognized that "in many cases the tortious acts of another necessitate a person's decision to remove themselves from the legal process, to settle a claim, to dismiss an action, etc."[8] Accord, *Flint v. Hart,* 82 Wn. App. 209, 218-219, 917 P.2d 590 (1996). This Court thus rejected the independent business judgment rule "which rests on tenuous underpinnings, discourages settlement, favors those who can afford lengthy litigation, and serves as a potential shield from liability for those who would otherwise be found liable for a legal wrong." *Blume, supra,* 134 Wn.2d at 259-260. As a result, tort victims were still required to take "reasonable" steps to mitigate, but were *not* required to exhaust all conceivable mitigation possibilities.

Here, in contrast, the lower courts created a previously-unheard of, unlimited obligation that requires victims of legal malpractice to not just

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[8] *Paradise Orchards Gen'l Partnership v. Fearing,* 122 Wn. App. 507, 94 P.3d 372 (2004), cited in the Opinion (p. 11 n. 46) does *not* address mitigation and *City of Seattle v. Blume*, presumably due to the odd stipulation between the parties that "if the trial court revisited the [underlying] ruling...[and]...if the court determined that 'repossession was additive of other remedies ...then the Court will...enter judgment for the defendants...". *Id.* 122 Wn. App. at 512. Thus, when the Court in the legal malpractice action concluded that collateral estoppel did *not* bar re-determination of the legal issue *and* concluded that "repossession was additive of other remedies," the Court entered judgment pursuant to the stipulation dismissing the case, without considering the issue presented here.

oppose, but appeal, adverse decisions after their lawyers' malpractice.

Nielsen v. Eisenhower & Carlson, 100 Wn. App. 584, 999 P.2d 42 (2000), cited by the lower court [Op., p. 11 n. 45] further supports Haitham's position. The legal malpractice claims in *Nielson* arose out of an underlying personal injury trial, after which the defendant appealed on statute of limitations grounds and the plaintiffs cross-appealed seeking additional damages. The plaintiffs (who were also the legal malpractice plaintiffs) had *won* in the trial court. 100 Wn. App. at 587-588.

Fearing that they might lose their case entirely, the plaintiffs settled on appeal, without having obtained *any* determination by any court that they would have indeed lost the appeal; indeed, they had *won* on the statute of limitations in the trial court. The Plaintiffs then filed a legal malpractice action, in which they sought damages for (1) the difference between the original judgment and the amount for which they settled, and (2) additional damages not awarded by the trial court.

Under those circumstances, *Nielson* held that the plaintiffs had to prove that the Ninth Circuit Court of Appeals would have *affirmed* the district court's statute of limitations decision in their favor. *Id.* at 592, 595.

The Court thus placed the burden of proving that the district court was correct on the plaintiffs *because it was the plaintiffs who were claiming the risk of loss on appeal.*

Haitham faced exactly the opposite situation. He did *not* need to prove that the underlying trial court was correct; he had already lost.[9] Instead, Cochran needed to *prove the trial court wrong* and that Haitham would have won if only he had appealed.[10] Placing this burden on the malpractice plaintiff thus has far-reaching implications for the legal malpractice victim's mitigation choices because it will force victims of legal malpractice to appeal any adverse decision or automatically lose their legal malpractice claims.[11]

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[9] The Court of Appeals, on reconsideration [Appendix B], corrected its erroneous assertion on this issue; however, it refused to reconsider its related rationale.

[10] Haitham's summary judgment opposition nevertheless included the entire trial court record relative to the underlying summary judgment motions. CP 592-595 ¶¶22-32, 684-923. He thus proved that his claims had been rejected based on the piecemeal settlements. At the very least, his showing shifted the burden of proof to *Cochran, because it is Cochran who claims that the underlying trial court rulings were in error.*

[11] *Griswold v. Kilpatrick,* 107 Wn. App. 757, 27 P.3d 246 (2001), relied upon by the lower court [Op., pp. 10-11] is obviously inapposite. In *Griswold,* the witness tried to speculate about decisions (relative to settlement) under the control of *others.* Here, Haitham testified about what *he* would have done. Many cases rejected summary judgment on similar evidence when the issue was "what the plaintiff would have done" but for the defendant's negligence. *E.g., Physicians Ins. Exch. v. Fisons Corp.,* 122 Wn.2d 299, 314, 858 P.2d 1054 (1993); *Ayers v. Johnson & Johnson Baby Products Co.,* 117 Wn.2d 747, 754-755, 818 P.2d 1337 (1991), *Hartley v. State,* 103 Wn.2d 768, 775-

The Court of Appeals thus established a truly extraordinary standard for mitigation, inconsistent with well-established Washington case law, that warrants review. RAP 13.4(b)(1), (2) and (4).

VI. Conclusion

For these reasons, Petitioner requests that the Court grant review and thereafter reverse the dismissal of Haitham's legal malpractice cause of action, and remand that cause of action for trial.

DATED: November 5, 2015

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776, 698 P.2d 77 (1985).

APPENDIX A

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

HAITHAM JOUDEH, Appellant, v. PFAU COCHRAN VERTETIS AMALA, PLLC, a Washington professional limited liability company d/b/a PFAU COCHRAN VERTETIS KOSNOFF, PLLC; DARRELL L. COCHRAN, individually and on behalf of the marital community comprised of DARRELL L. COCHRAN and JANE DOE COCHRAN, Respondents.	)	No. 72533-5-I UNPUBLISHED OPINION FILED: October 12, 2015

VERELLEN, J. — Haitham Joudeh and his son were injured in a car accident resulting from a botched repossession. Joudeh hired attorney Darrell Cochran to pursue a personal injury action against multiple tortfeasors, alleging both direct and vicarious liability claims. With Cochran's urging, Joudeh settled for $350,000 with four of the six tortfeasors. Cochran then withdrew. Joudeh was unable to retain new counsel, and he did not appear or oppose the two remaining tortfeasors' motions for summary judgment. The court granted the remaining tortfeasors summary judgment and dismissed Joudeh's counterclaims for failure to prosecute. Joudeh did not appeal those adverse rulings.

Joudeh sued Cochran and his law firm, Pfau Cochran Vertetis Amala (Cochran), for legal malpractice and other claims. The trial court granted summary judgment dismissing all of Joudeh's claims.

Joudeh contends genuine issues of material fact remain for trial. But his failure to appear or oppose the motions for summary judgment in his underlying personal injury action cuts off any causal link between Cochran's alleged misconduct and the loss of his direct liability claims. And Joudeh fails to demonstrate that he would have recovered more than the $350,000 partial settlement for his vicarious liability claims. We conclude no genuine issues of material fact remain regarding proximate cause for any of his claims on appeal.

Joudeh also contends a trial court may order disgorgement of fees as a remedy for an attorney's breach of fiduciary duty, even absent proof of proximate cause. We agree.

We affirm in part, reverse in part, and remand to consider the potential equitable remedy of disgorgement of fees upon proof of a breach of fiduciary duty.

FACTS[1]

Joudeh entered into a loan agreement with Spokane Firefighters Credit Union (SFCU) to buy a truck. Joudeh defaulted on the loan. SFCU hired Auto Trackers to repossess the truck. Auto Trackers then hired Strickland Recovery LLC to assist in the repossession.

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[1] Cochran vigorously denies any malpractice, breach of fiduciary duty, breach of contract, or Consumer Protection Act violation. Because this is an appeal from summary judgment, we set forth the facts in a light most favorable to Joudeh.

Auto Trackers employees Matthew Mayo and Trisha Matthews and Strickland Recovery's owner Joshua Strickland found Joudeh driving the truck with his son. Strickland drove a tow truck. Mayo and Matthews followed in another vehicle. Joudeh and his son were injured when, following a high speed chase, Strickland's tow truck rear-ended Joudeh's truck, pushing it into Mayo's and Matthews's vehicle.

Joudeh hired Cochran and signed a contingent fee agreement. Regarding costs, the agreement states:

> Client agrees to reimburse Attorneys . . . for all Costs incurred by the same in pursuit of this matter. *At their sole discretion, Attorneys will advance payment of Costs . . . . Attorneys may require Client to pay for all such advanced Costs before additional Costs are incurred by Attorneys.*[2]

Joudeh sued SFCU, Auto Trackers, Mayo, Matthews, Strickland Recovery, and Strickland. The claims against SFCU and Auto Trackers included theories of vicarious liability for the acts of their purported agents and direct liability for negligent hiring, training, and supervision and breach of the peace.

Joudeh consistently told Cochran that he "very much wanted to take [his] case to trial."[3] During mediation, Joudeh said that "he didn't want to settle with anyone at various points or that he wanted a million dollars,"[4] and that he believed his "damages were between 2.5 to 3 million [dollars]."[5] Cochran advanced the litigation costs, but because he believed Joudeh was taking positions "against his best interest" and "his

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[2] Clerk's Papers (CP) at 375 (emphasis added).

[3] CP at 531.

[4] CP at 410.

[5] CP at 531.

child's best interests," Cochran requested that Joudeh deposit $10,000 for ongoing litigation expenses.[6]

Cochran urged Joudeh to accept a settlement for $350,000 to release Mayo, Matthews, Strickland, and Strickland Recovery from all liability. Strickland Recovery and Auto Trackers each had $1,000,000 of liability coverage. Mayo and Matthews each had $100,000 of liability coverage.

Joudeh authorized Cochran to settle with Strickland Recovery and Strickland for $250,000 and with Matthews and Mayo for $100,000. But he alleges Cochran coerced him into the partial settlement by invoking the cost provision of the fee agreement and requiring him to advance $10,000 if he did not agree to the $350,000 settlement offer. Joudeh also alleges Cochran assured him the partial settlement would not impact his vicarious liability claims.

Cochran obtained continuances for Joudeh's case against Auto Trackers and SFCU and then withdrew. Four months later, Auto Trackers and SFCU moved for summary judgment. Joudeh obtained an extension to respond. Later, attorney Steven Bobman made a limited appearance on behalf of Joudeh to seek additional time to oppose the summary judgment motions. The trial court denied the request. Neither Bobman nor Joudeh filed any materials in opposition to or appeared for argument of the summary judgment motions. The trial court granted SFCU and Auto Trackers summary judgment and dismissed Joudeh's counterclaims against SFCU for failure to prosecute. Joudeh did not appeal any of the adverse rulings.

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[6] CP at 234.

Joudeh sued Cochran for legal malpractice, breach of fiduciary duty, breach of contract, and violation of the Consumer Protection Act, chapter 19.86 RCW. Cochran moved for summary judgment, arguing that Joudeh could not establish proximate cause for any of his claims. The trial court granted Cochran summary judgment, concluding all of Joudeh's claims failed for lack of proximate cause. The trial court's oral ruling stated:

> [P]laintiff failed to challenge or appeal the adverse ruling[s] in the underlying personal injury action. As a matter of law[,] that failure defeats the plaintiff's proof of proximate cause here, period. . . .
>
> . . . [I]t applies equally across the board to each and every legal theory they now posit.[7]

Joudeh appeals.

ANALYSIS

Standard of Review

We review a summary judgment order de novo, performing the same inquiry as the trial court.[8] We view the facts and all reasonable inferences in the light most favorable to the nonmoving party.[9] Summary judgment is proper if there are no genuine issues of material fact.[10] "A material fact is one that affects the outcome of the litigation."[11]

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[7] CP at 972-73.

[8] McDevitt v. Harborview Med. Ctr., 179 Wn.2d 59, 64, 316 P.3d 469 (2013).

[9] Fulton v. State, Dep't of Soc. & Health Servs., 169 Wn. App. 137, 147, 279 P.3d 500 (2012).

[10] CR 56(c); Lowman v. Wilbur, 178 Wn.2d 165, 168-69, 309 P.3d 387 (2013) (quoting Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003)).

[11] Owen v. Burlington N. & Santa Fe R.R. Co., 153 Wn.2d 780, 789, 108 P.3d 1220 (2005).

The parties vigorously dispute the application of the burden-shifting scheme for summary judgment. The moving party initially bears the burden of showing the absence of any genuine issue as to any material fact.[12] A defendant moving for summary judgment "has the initial burden to show the absence of an issue of material fact, or that the plaintiff lacks competent evidence to support an essential element of [his] case."[13] If the defendant meets this initial showing, then the inquiry shifts to the plaintiff to set forth evidence to support his case.[14] The evidence set forth must be specific and detailed.[15] The responding plaintiff may not rely on conclusory statements, mere allegations, or argumentative assertions.[16] If the plaintiff fails to establish the existence of an essential element that he bears the burden of proving at trial, then summary judgment is warranted.[17]

Summary Judgment "Showing"

Joudeh first contends the trial court erred by permitting Cochran to raise proximate cause in his rebuttal materials and failing to limit Cochran to issues raised in his initial motion for summary judgment. We disagree.

The moving party in its motion for summary judgment must raise "all of the issues on which it believes it is entitled to summary judgment."[18] "Allowing the moving party to

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[12] Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 70, 170 P.3d 10 (2007).

[13] Seybold v. Neu, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001).

[14] Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989).

[15] Sanders v. Woods, 121 Wn. App. 593, 600, 89 P.3d 312 (2004).

[16] CR 56(e); Vacova Co. v. Farrell, 62 Wn. App. 386, 395, 814 P.2d 255 (1991).

[17] Young, 112 Wn.2d at 225.

[18] White v. Kent Med. Ctr., Inc., 61 Wn. App. 163, 168, 810 P.2d 4 (1991).

raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond."[19] The moving party must therefore determine what issues may be resolved by summary judgment and "clearly state in its opening papers those issues upon which summary judgment is sought."[20] The moving party cannot prevail on the original motion based on issues first raised in rebuttal materials.[21]

In White v. Kent Medical Center, Inc., for example, the defendant moved for summary judgment on the basis that White lacked expert testimony establishing the standard of care.[22] The defendant argued *for the first time* in its rebuttal materials that the plaintiff lacked evidence of causation. This court reversed the summary judgment order because it had been granted on proximate cause, an issue not raised until the defendant's rebuttal materials and to which the plaintiff had no opportunity to respond.[23]

Unlike White, Cochran's motion for summary judgment here clearly requested that the trial court dismiss all of Joudeh's claims for lack of proximate cause, claiming that

- Joudeh "failed to challenge or appeal the adverse ruling[s] in the underlying personal-injury action."[24]
- "Even assuming that plaintiff violated the standard of care, plaintiff cannot prove proximate cause."[25]

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[19] Id.

[20] Id. at 169.

[21] Id. at 168-69.

[22] 61 Wn. App. 163, 810 P.2d 4 (1991).

[23] Id. at 168-169.

[24] CP at 82-83.

[25] CP at 92.

- The "but for" test is used to determine proximate cause in a legal malpractice claim: "'but for' the attorney's negligence, the client would have obtained a better result."[26]

- Joudeh "must show that his underlying action was lost or compromised by Mr. Cochran's alleged breach of duty" and that "he would have fared better in the absence of Mr. Cochran's alleged breach—that is, that he would have prevailed and obtained a better recovery."[27]

- "[T]he loss of [Joudeh's] claims against SFCU and Auto Trackers was not caused by Mr. Cochran's conduct but, rather, by plaintiff's own failure to oppose those defendants' summary judgment motions."[28]

- For his CPA claim, Joudeh "cannot show that he would have obtained more [than the $350,000 settlement]" but for Cochran's misconduct in coercing Joudeh "into accepting a settlement recommendation."[29]

- "To the extent [Joudeh] alleges that these settlements compromised his other claims, such a claim would be defeated by lack of proximate cause."[30]

- Joudeh "must show that Mr. Cochran's breach [of contract] caused plaintiff to lose his claims."[31] "Had plaintiff opposed those summary judgment motions, the claims would not have been dismissed. Plaintiff cannot prove that, even if Mr. Cochran did breach the fee agreement, that breach proximately caused a dismissal of the remaining claims."[32]

Cochran here made more than a "passing mention" of proximate cause in its motion for summary judgment, and Joudeh responded to Cochran's proximate cause arguments. We conclude Cochran adequately raised proximate cause as a basis to dismiss all of Joudeh's claims.

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[26] CP at 92.

[27] CP at 93.

[28] CP at 93.

[29] CP at 104.

[30] CP at 104.

[31] CP at 99.

[32] CP at 98.

Proximate Cause

Generally, Joudeh contends there are genuine issues of material fact regarding proximate cause for all of his claims that warrant a trial. We disagree.

A. Legal Malpractice Claim

(1) Vicarious Liability Claims Against Auto Trackers and SFCU

Both parties agree that partial settlement with the purported agents of Auto Trackers and SFCU precluded any recovery from Auto Trackers and SFCU under a vicarious liability theory. Joudeh specifically contends that if Cochran had properly advised him about the risks of partial settlement, he would not have agreed to settle. The critical question here is what evidence Joudeh must put forth—beyond conclusory statements, mere allegations, or argumentative assertions—to create a question of material fact that he would have fared better than $350,000 on these claims had he not entered into the partial settlement.

"Liability for legal malpractice, as for other torts, requires proof of duty, breach of duty, causation, and damage."[33] The only issue here is causation. "General principles of causation are no different in a legal malpractice action than in an ordinary negligence case."[34] "[P]roximate cause is determined by the 'but for' test."[35] The plaintiff must show that the attorney's alleged breach proximately caused the injury,[36] such that his

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[33] Griswold v. Kilpatrick, 107 Wn. App. 757, 760, 27 P.3d 246 (2001).

[34] Versuslaw, Inc. v. Stoel Rives, LLP, 127 Wn. App. 309, 328, 111 P.3d 866 (2005).

[35] Griswold, 107 Wn. App. at 760.

[36] Smith v. Preston Gates Ellis, LLP, 135 Wn. App. 859, 864, 147 P.3d 600 (2006).

claims were lost or compromised by the attorney's misconduct and he would have fared better but for the attorney's misconduct.[37]

Joudeh argues proximate cause "is usually the province of the jury."[38] But in some circumstances, as here, proximate cause may be decided as a matter of law when "'reasonable minds could not differ.'"[39] Mere speculation and conjecture cannot raise a genuine issue of material fact.[40]

Griswold v. Kilpatrick is instructive.[41] Griswold settled a medical malpractice claim but then sued her attorney, asserting that "the settlement figure would have been higher but for the attorney's delay in initiating settlement negotiations."[42] Griswold's expert testified that the case would have settled for a greater amount absent the attorney's breach. This court affirmed summary judgment in favor of the attorney, holding that Griswold's evidence was "speculative and conclusory" and was "inadmissible to create an issue of material fact."[43]

Similar to Griswold, Joudeh provided no evidence that he could have recovered more for his vicarious liability claims either through settlement or trial. Expert testimony

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[37] Daugert v. Pappas, 104 Wn.2d 254, 258, 704 P.2d 600 (1985); Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson, 95 Wn. App. 231, 235-36, 974 P.2d 1275 (1999).

[38] Smith, 135 Wn. App. at 864.

[39] Moore v. Hagge, 158 Wn. App. 137, 148, 241 P.3d 787 (2010) (quoting Doherty v. Mun. of Metro. Seattle, 83 Wn. App. 464, 469, 921 P.2d 1098 (1996)).

[40] See Griswold, 107 Wn. App. at 761; Halvorsen v. Ferguson, 46 Wn. App. 708, 721, 735 P.2d 675 (1986).

[41] 107 Wn. App. 757, 27 P.3d 246 (2001).

[42] Id. at 758.

[43] Id. at 762.

is not always required to demonstrate proximate cause.[44] But Joudeh's belief that he could have done better absent Cochran's alleged negligence is insufficient to create an issue of material fact for proximate cause. Joudeh offered no expert testimony or any other evidence that, had he been advised of the risks of partial settlement, he would have fared better than the $350,000 partial settlement.

Joudeh fails to demonstrate a genuine issue of material fact that Cochran's alleged misconduct proximately caused Joudeh any damages for his vicarious liability claims.

(2) Direct Liability Claims against SFCU and Auto Trackers

For Joudeh's direct liability claims, either there was a question of material fact in the underlying personal injury action or there was not. If there was no question of material fact to be raised, then the trial court correctly granted SFCU and Auto Trackers summary judgment; nothing Cochran did or failed to do could have proximately caused Joudeh any damages. And if there was a question of material fact, then it was Joudeh's failure to oppose the motions for summary judgment (or to appeal the adverse rulings) that broke any chain of causation based upon Cochran's alleged misconduct. A defendant may break the chain of causation by showing that "a person's own conduct may be the sole cause of injuries."[45] Here, Joudeh's own conduct in failing to appear or oppose the motions for summary judgment caused any loss he sustained.[46]

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[44] E.g., Geer v. Tonnon, 137 Wn. App. 838, 851, 155 P.3d 163 (2007) (requiring a plaintiff to produce "expert testimony *or other evidence*" in order to demonstrate proximate cause (emphasis added)).

[45] Nielson v. Eisenhower & Carlson, 100 Wn. App. 584, 593, 999 P.2d 42 (2000).

[46] See generally Paradise Orchards Gen. P'ship v. Fearing, 122 Wn. App. 507, 94 P.3d 372 (2004) (an aggrieved party must first challenge an erroneous ruling before bringing a legal malpractice claim).

Joudeh relies on cases discussing the reasonableness of efforts to mitigate damages. But whether Joudeh had a duty to mitigate presupposes that Cochran was legally liable for Joudeh's damages.[47] No mitigation requirement arises before "a determination that a legal wrong ha[s] been committed."[48]

Because a "plaintiff's showing of proximate cause must be based on more than mere conjecture or speculation," we conclude Joudeh fails to show a genuine issue of material fact that Cochran proximately caused any loss.[49]

B. Breach of Fiduciary Duty Claim

The elements for a breach of fiduciary duty damage claim mirror those of a legal malpractice claim. The plaintiff must prove proximate cause. As discussed above, Joudeh fails to show a genuine issue of material fact that Cochran's alleged breach of his fiduciary duties proximately caused Joudeh's injury and damages.[50]

C. CPA Violation Claim

Joudeh contends genuine issues of material fact remain for his CPA claim. We disagree.

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[47] See Flint v. Hart, 82 Wn. App. 209, 215, 917 P.2d 590 (1996).

[48] City of Seattle v. Blume, 134 Wn.2d 243, 258, 947 P.2d 223 (1997); see generally Bullard v. Bailey, 91 Wn. App. 750, 759-60, 959 P.2d 1122 (1998) (analyzing the mitigation of damages doctrine only after determining that a client's former attorney caused him damages).

[49] Miller v. Likins, 109 Wn. App. 140, 145, 34 P.3d 835 (2001). This reasoning applies equally to Joudeh's intentional tort claims in the underlying personal injury action.

[50] To the extent Joudeh alleges Cochran made settlement offers that he did not authorize or that he was coerced into the partial settlement, Joudeh fails to raise a genuine issue of material fact that Cochran's alleged breach proximately caused Joudeh any harm.

"The Consumer Protection Act declares unlawful unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."[51] To establish a CPA claim, "the plaintiff must prove '(1) [an] unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.'"[52] All elements must be present.[53]

Proximate cause is critical here. A CPA claim requires proof that the claimant suffered a specific injury to his business or property and that the defendant's unfair or deceptive act proximately caused the plaintiff's injury.[54]

Joudeh contends that Cochran coerced him into accepting Cochran's settlement recommendations. But he does not allege how he was "injured" within the meaning of the CPA. Cochran never enforced his request that Joudeh pay $10,000 to cover litigation expenses. Joudeh admits in his declaration that he "would have rejected Mr. Cochran's settlement recommendations despite his demands that [he] pay future litigation expenses."[55] Joudeh offers no evidence that Cochran's request for costs caused him to accept Cochran's settlement recommendations. On this record, it is unclear how invoking the cost provision of the fee agreement caused or "coerced" Joudeh to accept Cochran's settlement recommendations. Moreover, as discussed

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[51] Behnke v. Ahrens, 172 Wn. App. 281, 290, 294 P.3d 729 (2012).

[52] Klem v. Wash. Mut. Bank, 176 Wn.2d 771, 782, 295 P.3d 1179 (2013) (alteration in original) (quoting Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986)).

[53] Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc., 86 Wn. App. 732, 743, 935 P.2d 628 (1997).

[54] Hangman Ridge, 105 Wn.2d at 792-93.

[55] CP at 533.

above, Joudeh does not establish how the partial settlement proximately caused him any injury. Therefore, we conclude Joudeh fails to demonstrate a genuine issue of material fact regarding proximate cause for his CPA claim.

D. Breach of Contract Claim

Joudeh contends genuine issues of material fact remain for his breach of contract claim. We disagree.

A breach of contract claim requires duty, breach, proximate cause, and damages.[56] Joudeh fails to cite any contractual provision in the fee agreement that Cochran allegedly breached. Instead, Joudeh claims Cochran disregarded Joudeh's express settlement instructions and did not explain the implications of partial settlement. But even if there is a genuine issue of material fact whether Cochran breached their agreement, there is no genuine issue of material fact for proximate cause warranting a trial. As discussed above, Joudeh fails to show how the partial settlement adversely affected his claims against Auto Trackers and SFCU. Therefore, we conclude Joudeh's breach of contract claim fails for lack of proximate cause.

Fee Disgorgement as Remedy for Breach of Fiduciary Duty

Joudeh contends a trial court may order fee disgorgement as an equitable remedy for a breach of fiduciary duty claim even absent proof of proximate cause. We agree.

"The general principle that a breach of ethical duties may result in denial or disgorgement of fees is well recognized."[57] It is within a trial court's "inherent power" to

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[56] Nw. Independent Forest Mfrs. v. Dep't of Labor and Indus., 78 Wn. App. 707, 712, 899 P.2d 6 (1995).

[57] Eriks v. Denver, 118 Wn.2d 451, 462, 824 P.2d 1207 (1992).

"'discipline specific breaches of professional responsibility, and to deter future misconduct of a similar type.'"[58] The remedy in such a case is fee disgorgement.[59] A trial court has the discretion to order a fee disgorgement as a remedy for an attorney's breach of fiduciary duty.[60] "A finding of causation and damages is not required to support an order of disgorgement."[61]

First, Cochran argues the record does not support that he ever received a fee. But the parties do not dispute that Joudeh recovered $350,000 in settlement and that the contingent-fee agreement applies to that settlement. Thus, there is a reasonable inference that Cochran received significant fees from the $350,000 recovery.

Second, Cochran relies upon Kelly v. Foster for the proposition that disgorgement of fees is available only for fraudulent acts or gross misconduct by an attorney.[62] Kelly holds only that a trial court is not compelled but has discretion to order disgorgement for attorney misconduct.[63] Recent case law recognizing that there is no requirement for proximate cause or damages is compelling.[64]

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[58] Id. at 463 (quoting In re Eastern Sugar Antitrust Litig., 697 F.2d 524, 533 (3d Cir. 1982)).

[59] Id. at 462.

[60] Cotton v. Kronenberg, 111 Wn. App. 258, 275, 44 P.3d 878 (2002).

[61] Behnke, 172 Wn. App. at 298.

[62] 62 Wn. App. 150, 813 P.2d 598 (1991).

[63] Id. at 157.

[64] Eriks, 118 Wn.2d at 462-63; Behnke, 172 Wn. App. at 298. Contrary to Cochran's suggestion at oral argument, Taylor v. Bell, 185 Wn. App. 270, 340 P.3d 951 (2014), does not hold that there is a causation requirement for a party seeking the equitable remedy of disgorgement of fees after a finding that an attorney breached his or her fiduciary duty.

Finally, it is clear that a question of material fact exists as to the alleged breach of fiduciary duty. Joudeh's expert opined that Cochran breached their fiduciary duty in several respects. If Cochran is found to have breached their fiduciary duty, then the trial court must exercise its discretion to determine whether the specific circumstances warrant disgorgement of fees as an equitable remedy.

Therefore, we reverse and remand only for consideration of disgorgement of fees as a remedy if Cochran breached their fiduciary duty to Joudeh. In all other respects, we affirm the trial court's summary judgment order.

WE CONCUR:

APPENDIX B

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

HAITHAM JOUDEH, Appellant, v. PFAU COCHRAN VERTETIS AMALA, PLLC, a Washington professional limited liability company d/b/a PFAU COCHRAN VERTETIS KOSNOFF, PLLC; DARRELL L. COCHRAN, individually and on behalf of the marital community comprised of DARRELL L. COCHRAN and JANE DOE COCHRAN, Respondents.	)	No. 72533-5-I ORDER DENYING MOTION FOR RECONSIDERATION, WITHDRAWING & REPLACING OPINION

Appellant filed a motion for reconsideration of the court's August 24, 2015 opinion. Respondent filed an answer, to which appellant replied. The court has considered the motion and determined that reconsideration should be denied, but that the opinion should be withdrawn and a replacement opinion filed.

The opinion has been changed by striking the language crossed out below in the second paragraph on page 12:

> ~~Joudeh contends Cochran failed to meet his initial burden of proving the trial court was right. But under the well-established standards for summary judgment, Cochran met his initial burden. Joudeh was then obliged to put forth evidence demonstrating a question of material fact that Cochran's alleged breach proximately caused the loss of his vicarious or direct liability claims~~. Because a "plaintiff's showing of proximate cause must be based on more than mere conjecture or speculation," we

conclude Joudeh fails to show a genuine issue of material fact that Cochran proximately caused any loss.

Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied. It is further

ORDERED that the opinion of this court filed August 24, 2015 is withdrawn and a replacement opinion filed.

Dated this 12th day of October, 2015.

Duffy, J.

Spearman, C.J.

Leach, J.