Court of Appeals No. 46105-6-II

BEFORE THE WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

RONALD AUER and JOHN TRASTER
Appellants/Cross-Respondents

vs.

J. ROBERT LEACH and JANE DOE LEACH, his wife; CHRISTOPHER KNAPP and JANE DOE KNAPP, his wife; GEOFFREY GIBBS and JANE DOE GIBBS, his wife; ANDERSON HUNTER LAW FIRM, P.S., INC., and SAFECO INSURANCE,
Respondents/Cross-Appellants

On Appeal from the Snohomish County Superior Court
SCSC Case No. 11-2-03105-3

APPELLANTS' REPLY BRIEF AND RESPONSE TO CROSS-APPEAL

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I. INTRODUCTION

1. PLAINTIFFS' APPEAL

Respondents' Brief reads more like a case for why the parties *should have* been allowed to go to trial, rather than a compelling argument why the orders of Judge Beth Andrus should be affirmed. As they did in their reply brief below, defendants spend the bulk of their brief arguing the "merits" of plaintiffs' claims, the "believability" of plaintiff's evidence and witnesses, the credibility of its witnesses, damages and expert's opinion. All of this goes to the weight of the evidence, not whether reasonable minds can reach but one conclusion on plaintiffs' claims. Again the standard on summary judgment is not whether defendants adequately "scoff" at plaintiffs' evidence—the issue is whether the evidence presented by plaintiffs in their opposition *could* lead the trier of fact to find in plaintiffs' favor.

Defendants also make numerous arguments and assertions that are not supported by the record, or are simply false.[1] Again, defendants took these liberties in the trial court below—making assertions and arguments that were not part of the record or supported by the evidence before either Judge Andrus or this Court.[2] Here, they continue to raise arguments never

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1 For example, at page 4 of their brief, defendants falsely assert that: "It is uncontroverted that an access road meeting the specifications in the PSA could not be built without an easement from a non-party to the contracts." This is patently untrue, and not supported by the evidence (see pages ___ infra)

2 See for example, RP 20:8 to 21:20

briefed before, and not included in either the Notice of Appeal or in their Notice of Cross Appeal. This Court should reject these arguments.

The bottom line is that Judge Andrus based her ruling on one issue—and one issue only: That she "believed" that plaintiffs were required to submit an "expert opinion" as to causation. This was an error of law that plaintiffs could have not anticipated based upon the defendants' actual Motion for Summary Judgment or the existence of case authority to submit such an expert declaration. Judge Andrus then compounded this error by refusing to consider the supplemental declaration of plaintiffs' expert, and denying the motion for reconsideration. Accordingly, her orders should be reversed.

2. CROSS-APPEAL

In 2011, defendants filed a motion to dismiss plaintiffs' complaint based upon insufficiency of process pursuant to CR 12(b)(4) and CR 12(b)(5). After the judges in Snohomish County recused themselves from hearing this matter, this matter was assigned for all purposes to Judge Andrus in King County. Defendants then moved for summary judgment on the statute of limitations based upon failure to serve the complaint within 90 days.

Defendants focused on two technical, typographical errors in the form of the summons, to argue that the case should be dismissed:

- The complaint was filed in this case on February 14, 2011, well within (arguably) the earliest deadline for the tolling of the statute of limitations.[3] Pursuant to RCW 4.16.080, the statute of limitations was tolled until May 15, 2011.
- On April 25, 2011 the Anderson Hunter firm, and defendants Knapp and Gibbs were personally served with the complaint filed by plaintiffs on February 14, 2011 in compliance with CR 4 and RCW 4.16.170;
- The defendants were served within ninety (90) days of the complaint being filed in compliance with RCW 4.16.170;
- The defendants were served with a "summons" that provided the verbatim language required by CR 4(b)(2);
- Other than a typographical error as to the county of the court and omission of a date, the Summons fully complied with CR 4(b)(1);
- The defendants acknowledge receiving a print-out attached to the complaint showing that the action was, in fact, filed ***in Snohomish County***;
- The defendants received a complaint and summons that contained a ***Snohomish County*** case number;

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3 Plaintiffs contend the statute of limitations did not begin to run until March 30, 2009.

- On May 9, 2011, the defendants filed a Special Notice of Appearance ***in Snohomish County***;
- On April 29, 2011, counsel for plaintiffs served on the defendants, and filed with the court, a Notice of Unavailability captioned ***in Snohomish County***; and,
- On May 27, 2011, counsel for the defendants filed a Notice of Withdrawal and Substitution ***in Snohomish County***.

In their motion, the defendants asked the lower court to disregard a wealth of Washington and Federal legal authority going back over a century which consistently holds that the purpose of CR 4 is to provide adequate notice to the opposing party of their rights; that absent clear prejudice the courts will not elevate form over substance; and, the court will leniently overlook (and permit correction of) technical mistakes in captions and forms of the summons. Defendants could not, and cannot, cite to one case that supports their position, and there appears no clear Washington authority that has ***ever*** affirmed the dismissal of a lawsuit because of technical errors in the form of the summons. To the contrary, all recent authority supports the plaintiffs' position and Judge Andrus' order below.

II. REPLY ARGUMENT RE: APPEAL

1. JUDGE ANDRUS BASED HER DECISION TO GRANT SUMMARY JUDGMENT ON AN ERRONEOUS LEGAL BASIS

A. Judge Andrus Incorrectly Ruled That Plaintiffs Were Required To Submit Expert Witness Testimony As To The Cause-In-Fact Element Of Legal Malpractice

It is beyond dispute that the *only* basis for Judge Andrus granting summary judgment was her mistaken conclusion that plaintiffs were ***required*** to obtain an expert opinion to prove a "causal link".[4] A review of both the record, and the hearing establishes that. She *did not* find, however, that plaintiffs had not established evidentiary facts to meet their burden—rather her entire ruling is based upon her mistaken position that it was "necessary" for plaintiff to obtain such an expert opinion to avoid summary judgment.

For example, in the hearing, Judge Andrus stated:

> THE COURT: You got to tackle the proximate cause here....I hand (sic) you experts (sic) who says causation may not be a proper subject for my opinion and there is nothing in his testimony as to which of the alleged breaches that he identified was the proximate cause of any specific damage...So tell me...why he is wrong.
>
> MR. KRIKORIAN: Okay. Well, he is not wrong. I mean he is opining as *to the standard of care and the breach of the standard of care*. And so turning to proximate cause, you know, as we cited in our brief under the Brust case. The *Brust v. Newton* in general proximate cause is an issue for the jury to decide. And I would –
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> THE COURT: (Inaudible.)

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4 CP 34; 36-7; RP 66:13-21

> MR. KRIKORIAN: But -- and so let's address that. The issue here is two-fold. One is these attorneys were hired -- and Mr. Leach was hired in 2003 to basically accomplish something. And there is evidence clearly in both Mr. Auer's declaration and in the E-mails and in all those things we have provided the court, where they wanted a quick solution to this.
>
> THE COURT: Right. But I understand exactly what your clients wanted in the ongoing litigation. It's very clear from what you submitted.
>
> MR. KRIKORIAN: Okay.
>
> THE COURT: But what ***he*** [Paul Brain—*the Standard of Care Expert*] is missing is *anyone saying that that goal could have been achieved* ***but for*** *the dereliction of duty of the lawyers*. Because as I am reading these papers, Brain is saying Leach should have filed this as a specific performance action. And sought a permanent injunction or some sort of injunctive relief right off the bat, but he doesn't even say they wouldn't have prevailed on that. And you have submitted materials, *maybe it was in fact the defense has submitted materials outlining the defense. The position of impossibility that the contact group*. (sic) So … ***without an expert, how do I conclude that your clients could have in fact achieved the goal but for the malpractice of the lawyer***? (Emphasis added)[5]

Further into the argument, Judge Andrus *again* questioned how the jury would find proximate cause without an expert telling rendering an expert opinion on that element:

> THE COURT: How does a jury ***without an expert***, how is a jury going to *make an assessment of the strength of your client's underlying case had they pursued it in a different –*
>
> MR. KRIKORIAN: By putting on trying -- exactly what *Brust* saying, ***trying the underlying case to that jury***. I mean the court says in such a case is it appropriate to allow the trier of fact to decide proximate cause[.] In effect, *the second trier of fact will be*

5 RP 28:24 to 30:20

asked to decide what a reasonable juror or fact finder would have done but for the attorney's negligence. So our –

THE COURT: *How do you prove your underlying case*?

MR. KRIKORIAN: We prove that had the client -- that's exactly what we are arguing with the *Flynt* case and the business judgment. Had the clients been put in a position earlier because of Mr. Leach's failed to do them and Mr. Gibbs then set them off into the boat and pushed them off. If they had been allowed to try this case in '09 or '08, when it was set or even earlier, they could have proved all these damages. But basically they were set adrift. They had to hire a new attorney. Had to start over. Had to incur more fees. And it -- to me it's an argument of weight as to whether Mr. Gibbs' assessment of fees or not is accurate. What they then were faced --
…

THE COURT: And so you are saying that *you don't need an expert to make the link between the lawyers' breach and your client's damages*?

MR. KRIKORIAN: I don't believe an expert has to opine that, because he didn't try the case. Because they were woefully inadequate, in other words[.] Your Honor, the example of the statute of limitations as counsel brought up. You don't know what the lawyer would have done if he hadn't had brought the statute of limitations in time. It's done. He blew the statute of limitations. So the issue is, but for that negligence would you have had a better result? Our position is yes, but for his negligence. (Emphasis added)[6]

In reaching her decision to grant summary judgment, Judge Andrus stated:

I think that is the -- sort of what *Estep v. Hamilton* is saying. It's ***required*** there has to be something -- someone has to be saying, either one of the witnesses for the underlying litigation *the* ***expert*** *should --* ***has to say, Hey, but for this lawyer dilatory conduct we*** *-- the client would have not sustained these damages or would have received -- achieved more in litigation. And that is missing in this*

6 RP 33:2 to 35:14

case. (Emphasis added).[7]

Finally—in denying plaintiffs' motion for reconsideration, Judge Andrus made the following ruling:

> In a malpractice action, *the defendant can meet this burden by showing that plaintiff* ***lacks competent expert testimony to establish the elements of the claim.*** (Citation). Defendants met their burden by establishing that they had asked Plaintiffs to ***disclose expert opinions on standard of care and causation in discovery and Plaintiffs failed to disclose any expert opinions.***[8]
>
> …[T]he Court concluded that ***expert testimony was necessary to establish a causal link*** between the alleged breach by Defendant Leach and Plaintiffs' damages. Mr. Brain in his declaration, explicitly stated he was not sure that offering an opinion on causation was appropriate. (Emphasis added)[9]

The foregoing clearly establishes that Judge Andrus was erroneously holding plaintiffs and their counsel to a standard of proof on summary judgment for which there was no legal basis—that plaintiffs were "required" to provide expert witness testimony from a lawyer, prognosticating as to the causation element and what would have "been achieved." As argued in plaintiffs' Opening Brief, in the State of Washington, there is no "requirement" that an expert witness be used at all—*even* as to the standard of care in some instances. In *Walker v.*

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7 RP 66: 13-21

8 CP 33. Judge Andrus's finding that defendants "asked Plaintiffs to disclose expert opinions on standard of care and causation" is simply incorrect, and there was no basis for Judge Andrus to make such a statement. In fact, a review of the discovery served by defendants asked for no such thing. See CP 112 (Interrogatory No. 18). Moreover, Judge Andrus also found that Plaintiffs timely listed their expert witness as to the standard of care and, ultimately, amended their discovery. See CP 34; RP 58:2 to 62:24. Accordingly, Plaintiffs ***did not*** fail to disclose any expert opinions.

9 CP 34

Bangs, 92 Wn.2d 854, 858, 601 P.2d 1279, 1282 (1979) the Washington Supreme Court held that in Washington, "expert testimony is *not necessary* when the negligence charged is within the common knowledge of lay persons" and ***only required*** where the conduct "involves matters calling for special skill or knowledge."[10] Even then, the expert witness testimony is directed to the ***"standard of care"***—not causation. See *Brust v. Newton*, 70 Wash.App. 286, 293, 852 P.2d 1092 (1993); *VersusLaw v. Stoel Rives*, 127 Wash. App. 309, 111 P.3d 866 (2005).

Respondents argue, and Judge Andrus also noted, that the case of *Estep v. Hamilton*, 148 Wn. App. 246, 256, 201 P.3d 331, 336 (2008) supported her ruling. In *Estep*, the court reiterated, "the plaintiff must *demonstrate* that he or she would have prevailed or *at least would have achieved a better result* had the attorney not been negligent." (Citing to *Halvorsen v. Ferguson*, 46 Wash.App. at 719, 735 P.2d 675). Nowhere in *Estep*, is there any requirement that, in Judge Andrus' words, expert testimony is "necessary to establish a causal link." Even defendants do not advocate such a position in their brief. To the contrary, the *Estep* court only found that the plaintiff provided "*no evidence* she would have prevailed." *Estep* at 257, 201 P.3d 331, 337 (2008). (Emphasis added).

Moreover, in *Estep* the plaintiff's expert reached *no* opinion as to

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10 "The standard to which a lawyer is held in the performance of professional services is 'that decree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction.' *Walker v. Bangs*, 92 Wn.2d 854, 859, 601 P.2d 1279, 1282 (1979)

whether she would have prevailed or achieved a "better result," **and** the defendant attorney presented contrary expert testimony opining that it was likely a better result ***would not*** have been achieved. In the instant case, Mr. Brain opined, ***in his first*** declaration, that he believed "given the express objectives of the clients (i.e. the Plaintiffs here) – to promptly obtain a road complying with the purchase and sale agreement ("PSA") – a lawyer exercising that decree (sic) of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction would not have brought an action for damages. Rather, an action for specific performance of the PSA would have been the appropriate course of action followed immediately by a request for injunctive relief. The failure of the attorneys here (i.e. defendants) to advise their clients as to an equitable remedy is a clear breach of the duty of care."[11] Mr. Brain further opined if litigation was necessary, a damage action was the wrong remedy to pursue. "A lawyer exercising that decree (sic) of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction would have brought an action for specific performance followed promptly by a Motion for Injunctive Relief."[12]

Finally as argued more fully, *infra*, once Judge Andrus set up an

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11 CP (II) 599-604 Declaration of Paul Brain ¶5

12 *Id.* at ¶6

obstacle that did not exist prior to the motion (and which was ***never*** raised in the moving papers), to wit—an expert was "necessary" to establish a "causal link"—she erred further by not considering Mr. Brain's supplemental declaration opining to such "a causal link". Her refusal to do was clearly an abuse of discretion.

B. To Require Expert Testimony Opining As to the "Result" of a Trial, Which Never Occurred, Would Be Speculative and Is Not Permitted

Defendants continually repeat the rule of law that evidence submitted in opposition to the Motion for Summary Judgment cannot be based upon "conclusory, speculative, or factually unsupported testimony" [e.g. Respondents' Brief, p. 32 citing *Griswold v. Kilpatrick* 107 Wash.App. 757, 760, 27 P.3d 246 (2001)]. However, Judge Andrus ruled that—absent plaintiffs' production of *speculative* expert opinion or evidence—plaintiffs could not succeed.[13]

To be blunt, to ask an expert (or even plaintiffs' counsel) to opine, or predict, what "the result would have been" if the case had gone to trial sooner, or what would have "happened" if defendant Leach had actually tried the ***first*** case is 2005, ***is*** pure speculation. In fact, it would be impermissible for the expert to testify such a legal conclusion and the ultimate issue. In *Hiskey v. Seattle*, 44 Wash.App. 110, 113, 720 P.2d 867

13 See for example, RP 66:16-21: "the expert should -- has to say, Hey, but for this lawyer dilatory conduct we -- the client would have not sustained these damages or would have received -- achieved more in litigation. And that is missing in this case."

(1986), the court noted that "while expert testimony is admissible even if it embraces an ultimate issue to be decided by the trier of fact if it will assist the trier of fact to understand the evidence or determine a fact in issue, ER 702 and 704, experts ***are not to state opinions of law or mixed fact and law, such as whether X was negligent***; Comment ER 704; 5A K. Tegland, Wash.Prac., Evidence § 309, at 84 (2d ed. 1982). *Orion Corp. v. State*, 103 Wn.2d 441, 461, 693 P.2d 1369 (1985). An affidavit is to be disregarded to the extent that it contains legal conclusions. *Orion Corp.*, at 461-62 [693 P.2d 1369]; *American Linen Supply Co. v. Nursing Home Bldg. Corp.*, 15 Wn.App. 757, 763, 551 P.2d 1038 (1976); see CR 56(e)."

Ironically, in *Griswold,* which was relied upon by both Judge Andrus and defendants, the court specifically ***rejected*** the notion that an expert can testify as to the ultimate result, finding the same to be "speculative". In *Griswold,* the ***only*** evidence in support of plaintiff's claim was the testimony of her expert witness. The expert offered an opinion that the case was worth at least 1.5 million dollars before the plaintiff's husband's heart attack, but was unable to point to any other settlement or verdict as providing a foundation for his opinion. The only basis he identified for his opinion was his general experience in litigation of medical malpractice cases. *Griswold v. Kilpatrick,* 107 Wn. App. 757, 761, 27 P.3d 246, 248 (2001). The court found that the opinion was not

based upon facts or evidence, speculative and conclusory and for that reason—inadmissible to create an issue of material fact. *Id.* at 762.

As argued to Judge Andrus, neither Mr. Brain, nor plaintiffs' counsel, have a "crystal ball" or any other "magic" that lets them divine the future or travel back into time to change the result. Nor could Mr. Brain or plaintiffs' counsel "predict" what the result of a trial would be. The only way that can be proven, is *at trial*, when the case is "re-tried" as set forth in *Brust* and *VersusLaw*. See also *Martini v. Post*, 178 Wash.App. 153, 165, 313 P.3d 473, 479 (Wash.App. Div. 2, 2013), observing that "[t]he plaintiff...need not prove cause in fact to an absolute certainty."[14]

The *Griswold* case is not analogous to the facts here, since plaintiffs are not arguing they "could have settled" for a greater amount, sooner—as the plaintiff did in *Griswold*. This is a fiction that has repeatedly been proffered by the defendants. Rather, plaintiffs are arguing that their ***provable*** damages were in excess of 2.5 million dollars when defendant Leach dismissed the first lawsuit, and then over 8 million

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14 Perhaps because the *Martini* case supports plaintiffs' position, defendants claim in their brief that this case is distinguishable, since it was not a "legal malpractice case." See Respondents' Brief, page 27. However, in *Brust v. Newton,* supra, the court specifically noted that the Washington Supreme Court has held that "[t]he principles of proof and causation in a legal malpractice action *usually do not differ from an ordinary negligence case...*" and that "[i]n 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" citing *Daugert v. Pappas*, 104 Wash.2d 254, 257-8, 704 P.2d 600 (1985) (Emphasis added)

dollars as of the time of settlement, and that after six (6) years of dilatory actions by defendants, and being terminated by the defendants on the eve of trial, they were left with no choice but to make a business judgment, mitigate their continued losses, and settle for what they could get from the defendants. Plaintiffs would have rather proceeded to trial, or a reduction of their ongoing damages—not "settle the case sooner". See also *City of Seattle v. Blume*, 134 Wash.2d 243, 947 P.2d 223 (1997).

2. THERE IS AMPLE EVIDENCE IN THE RECORD, PRESENTED BY PLAINTIFFS, TO ESTABLISH TRIABLE ISSUES OF FACT AS TO THE CAUSATION ELEMENT, AND THE SUMMARY JUDGMENT ORDER MUST BE VACATED

Despite defendants' continued efforts to expand their grounds for summary judgment beyond that framed by their motion itself, even counsel for Respondents conceded at oral argument that the "only" issue in dispute was "proximate" cause.[15] And as argued in the Opening Brief, the only argument *framed* in the moving papers by defendants was that the plaintiffs "have not presented any proof that the defendants in the underlying case or their insurer, Safeco, would have offered any more money to the plaintiffs or that the case would have concluded sooner had the Plaintiffs' attorneys, the Lawyer Defendants herein, taken a different course of action....[¶] Plaintiffs have not offered any evidence that the

15 See RP 22:16-20: "MR. MEADE: Okay. And this legal malpractice, the court is familiar. And think Mr. Brain correctly summarized what the elements are. And really the elements that are dispositive in this case *are primarily the proximate cause.*" (Emphasis added)

value of their claim was reduced by anything the Lawyers Defendants did or did not do."[16] (Emphasis added).

To be clear—nowhere in the moving papers was there any mention of the road being impossible to build; that plaintiffs' needed an expert on cause-in-fact; that plaintiff's damages were speculative; that defendants were judgmentally immune, etc. This was how defendants' framed their motion.[17] Defendants cited to no evidence, nor did they make any other factual or legal arguments related to the above (including collectability or the lack of damages), and plaintiffs submit they adequately addressed the three issues framed above and met their burden in their original opposition by showing that a causal link existed based upon those issues with non-speculative, non-conclusory, and clear evidence.[18]

For example, in response to defendants' assertion that "Plaintiffs have not offered any evidence that *the value of their claim was reduced by anything the Lawyers Defendants did or did not do*" (Emphasis added),

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16 CP 708, ll. 6-19

17 As argued above, plaintiffs have *never claimed* that Safeco was willing to, or would have, paid more money "but for" the negligence of the defendants. Nor do plaintiffs assert that Safeco would have paid "more money" if the parties settled sooner. Plaintiffs argue that the failure of defendants to meet the standard of care in how the prosecuted plaintiffs' case resulted in their damages.

18 Defendants repeatedly, and disingenuously, argue that plaintiffs' are asserting that only "inferences" are required to meet their burden. That is neither what plaintiffs argue, nor is it a fair statement of the law. Defendants and their counsel must certainly be aware of the standard on summary judgment: A summary judgment motion can only be sustained if there is no genuine issue of material fact, looking at all **evidence** and **inferences** in the light most favorable to the nonmoving party. *Pelton v. Tri-State Mem'l Hosp.,* Inc., 66 Wash.App. 350, 354, 831 P.2d 1147 (1992). (Emphasis added) Plaintiff is entitled to all favorable inferences from the evidence and facts—a principle acknowledged by Judge Andrus.

plaintiffs provided clear evidence to the contrary. When Mr. Gibbs took over the case in the spring of 2009, he advised plaintiffs he would require an additional $25,000 to $35,000 in fees to prepare for trial, along with $15,000 for trial.[19] In the same letter he provided this estimate of fees, he also raised a conflict of interest for the first time—noting that the defendants "will consider and likely prepare a written 'waiver of conflicts' for your review and signature in the near future."[20] As Mr. Brain opined, the defendants used this alleged "conflict" as a pretext for the final act of abandonment of the plaintiffs, leaving them lawyer-less after almost 5 years of delays and inaction, and only 2 months before trial. As a result plaintiffs were forced to hire new counsel to both deal with the abandonment by the Anderson Hunter firm as well as to take over handling the underlying lawsuit. All tolled, plaintiffs incurred over $152,000 in additional fees just to get the case settled (and ***not*** to go to trial), whereas Mr. Gibbs projected only $40,000 to $50,000 additional fees ***through trial***.[21] This fact—alone—establishes a clear inference that plaintiffs were damaged by at least an additional $100,000 in fees they should not have incurred had the Anderson Hunter firm completed their 5 year representation of plaintiffs as they represented they would—and that

19 CP (I) 433-500 Exhibit 4
20 *Id.*
21 *Id.* Exhibit 9

this ***reduced the value*** of their recovery.[22]

The evidence presented by plaintiff to the three (3) issues *framed* by defendants in their motion, establish that not only did the defendants do virtually ***nothing*** for a period of five to six years to bring the underlying matter to closure, and achieve "a result" for the plaintiffs (let alone, "a better result"), but their dilatory conduct severely damaged plaintiffs and limited their options. First—as Mr. Brain notes, the major issue faced by the plaintiffs at the very outset in 2003 was the failure of the underlying defendants (the Westlands) to carry out their contractual promise to permit and thereafter build an access road. Instead of pursuing immediate equitable and injunctive remedies that would have ensure that either the road was permitted, and then later built—or secure that right for plaintiffs so they could permit the road, and build it, and later sue for damages—defendant Leach instead initiated an action for damages, although he was dilatory in that pursuit. In the course of that first action filed in 2004, Mr. Leach did very little discovery and pursued theories that would not focus on seeking an immediate resolution.[23] It is plaintiffs' position that had the road been ***permitted*** at the outset, that act alone would have mitigated most of their damages and would have allowed them to proceed with

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22 See CP (I) 433-500 Exhibit 1 (Declaration of Ron Auer, ¶22-23); Exhibit 4, page 2; Exhibit 9

23 CP (I) 433-500 (emails attached as Exhibits 2 and 3 to the Krikorian declaration)

building their homes and businesses.[24] Instead, defendants did nothing and instead dismissed the 2003 action on the eve of trial, to avoid opposing a Motion for Summary Judgment.

Second, defendants were dilatory to the point of gross negligence in doing any discovery on the defendants' insurance coverage. In fact, the record is clear that Mr. Leach did not even send a discovery request for insurance information until ***December of 2006***, and then sat back and allowed the defendants to provide absolutely no responses for fifteen months—despite the repeated demands of the plaintiffs for action.[25] It was not until Mr. Leach was appointed to the appellate bench, and the matter was transferred over to new attorneys at the Anderson Hunter firm in March of 2008, that defendants ***finally*** obtained discovery responses, including the insurance policy in issue. That policy showed that there was a total of $1,000,000 in coverage. At that point plaintiffs' damages were in excess of 8 million dollars, due largely to defendants' delay in moving the case to trial.[26] Clearly the favorable inferences gleaned from this evidence establish that had defendants pursued the insurance coverage earlier, plaintiffs would have been in a much better position to evaluate settlement and risk, and not had to incur another $100,000 plus in fees to hire new counsel once the Anderson Hunter firm had terminated their

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24 *Id.* Exhibit 3, pages 1 to 4
25 *Id.* Exhibit 13
26 *Id.* Exhibits 10 and 12

representation in June of 2008.

There are numerous examples of emails and evidence where plaintiffs pleaded for some action on behalf of Mr. Leach, and he did not follow through. In 2007 alone, when plaintiffs' complaints were the most vocal, it is telling to note that Mr. Leach billed only a ***total*** of ***1.8 hours*** on plaintiffs' case. Of course, in the latter part of the year, Mr. Leach was seeking a judicial appointment (this time successfully) and in effect totally abandoned plaintiffs' case.[27]

Finally, while not raised in their Motion for Summary Judgment, defendants continually argue that the "impossibility" of building the road in the underlying case prevented plaintiffs from obtaining equitable or final relief, and therefore cannot tie the defendants' malpractice in proceeding as Mr. Brain opined to their damages. Again, this is a classic "red herring" and, at best, goes to the weight of the defendants' defense, not whether there are no issues of fact to be resolved. First—defendants are simply false in portraying this was an "uncontroverted" fact acknowledged by "everyone".[28] For example, defendant's reliance upon CP 384-385 for such a proposition is in error. In fact, that evidence shows that plaintiffs' only requested an additional easement in mediation with the Westland defendants so that they could attempt to ***finish*** the insufficient road that Westland designed and then abandoned. The additional easement

27 *Id.* Exhibits 2 and 3
28 See RP 23:11-14

was requested (not required) in order to attempt to grade a road designed by Westland, which was predicated on the use of the additional easement, offered previously by Brian Westland, a party to the estate. This easement was available at no cost to the defendants for the completion of their road, but was withheld from Plaintiffs after defendants abandoned the construction effort. In his mediation letter—which defendants' cite to as support that "everyone knew" the road could not be built—does not say that—it merely asks for an *additional easement* to complete the grading to make the road safer.[29]

The evidence before Judge Andrus, and this Court, is clear and unwavering: the road is, and was, never impossible as specified in the PSA. No additional easement was ever required to meet the PSA and County requirements. The availability of the additional grading easement, available to defendants responsible for building the road , simply made the road less expensive to build…not impossible. Neither the underlying Westland defendants' obligation to build, nor the features of the road, changed as a result of their choice of construction methodology. The withholding of the permit simply resulted in a more expensive road, to be built without graded slopes on adjacent property, and constructed entirely within the confines of the existing easement. This was a decision made by the Westlands, at their expense. It did not make the road impossible. The

29 See CP 384-385

current Snohomish County Planning and Development Services engineering representative, Mr. Murray, agreed—and Judge Andrus refused to consider this evidence, even after these issues were only raised in defendants' reply brief. This evidence supports Mr. Brain's opinion set forth in his first declaration, that had defendants proceeded with equitable relief and, not acted dilatory, plaintiffs' damages would have been substantially less.[30]

It is significant to note that defendants' offered no independent evidence, or their own expert opinion whatsoever regarding impossibility. Instead, because defendant's position falls apart absent "impossibility", defendants sought to mislead the Court with an interpretation of the Seal and Murray statements based solely on a slanted mediation brief prepared by the Westland's attorney. Strikingly absent from defendants' moving papers, and defendants' reply was even a declaration from the supposed author of the "impossibility" opinion in the underlying case: Mr. Murray. It is significant that Mr. Murray, whose opinion was misused in the underlying case to justify the "impossibility" of the road, now subscribes to plaintiffs' view: i.e. that the road is not "impossible" to build.[31]

3. THE COURT SHOULD DISREGARD ANY ARGUMENTS NOT RAISED BELOW, OR NOT FRAMED AS PART OF THE NOTICE OF APPEAL AND NOTICE OF CROSS-APPEAL

30 It should also be pointed out that defense counsel never deposed or sought to depose Mr. Murray or Mr. Seal prior to bring his Motion for Summary Judgment.
31 See CP 187-193

A. Defendants Did Not Separately Appeal Any Evidentiary Rulings Made By Judge Andruss, And Therefore These Arguments Should Be Rejected

RAP 2.4(a) specifically limits the circumstances under which a respondent may seek affirmative relief:

> The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.

See also *State v. Sims*, 171 Wn.2d 436, 442, 256 P.3d 285, 289 (2011)

In *Sims*, the Washington Supreme Court stated:

> Affirmative relief "normally mean[s] a change in the final result at trial." 2A Karl B. Tegland, Washington Practice: Rules Practice RAP 2.4 author's cmt. 3, at 174 (6th ed. 2004). While RAP 2.4(a) does not limit the scope of argument a respondent may make, it qualifies any relief sought ***by the respondent beyond affirmation of the lower court.*** *See In re Arbitration of Doyle,* 93 Wash.App. 120, 127, 966 P.2d 1279 (1998) (holding that, when a respondent "requests a partial reversal of the trial court's decision, he seeks affirmative relief"); *cf. State v. McInally,* 125 Wash.App. 854, 863, 106 P.3d 794 (2005) ("The State is entitled to argue any grounds to affirm the court's decision that are supported by the record, and is not required to cross-appeal."). "[N]otice of cross-***review is essential if the respondent seeks affirmative relief as distinguished from the urging of additional grounds for affirmance.***' " *Robinson v. Khan,* 89 Wash.App. 418, 420, 948 P.2d 1347 (1998) (quoting *Phillips Bldg. Co. v. An,* 81 Wash.App. 696, 700 n. 3, 915 P.2d 1146 (1996)). Here, Sims sought reversal of part of the trial court's order. Rather than arguing to affirm the order below, the State conceded error and sought more extensive reversal than what Sims requested as relief. Because the State is seeking partial reversal of a trial court order, not just advancing an alternative argument for affirming the trial court, it is seeking affirmative relief.
>
> *Id.* at 442-43, 256 P.3d 285, 289 (2011)

In their brief, defendants ask this court to reverse Judge Andrus' rulings on the exclusion of evidence.[32] Defendants' reliance upon *Cameron v. Murray*, 151 Wn.App. 646, 214 P.3d 150, *rev. den.,* 168 Wn.2d 1081(2010) is misplaced. First—*Cameron* does not even address whether a respondent can separately appeal evidentiary rulings without ***separately appealing*** from the lower court's order. Second—in *Cameron*, the facts are squarely opposite—the respondent made the evidentiary challenge in the trial court, and the *appellant* appealed from the order and assigned as error the trial judge's exclusion of the evidence, i.e. the same order that the appellant appealed from. In this case, defendants ***did not*** appeal from Judge Andrus' order granting summary judgment.[33] In their cross-appeal, defendants only appealed form a separate order occurring years before.

Finally, while the rule permits this Court to grant the affirmative relief requested by the respondent if "demanded by the necessities of the case", that is not the situation here. In *Sims*, the Supreme Court noted that Washington courts generally apply the necessities provision of RAP 2.4(a) when "the petitioner's claim cannot be considered separately from issues a respondent raises in response." *Sims*, at 444. This is not the case here. The rulings by Judge Andrus on defendants' *separate* motion to strike

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32 See Respondents' Brief at page 1, "Assignment of Error Pertaining to Appeal"; page 2 "Statement of Issues" #2; page 16-17.

33 See CP 5-15

evidence (contained in its reply) and its objections to evidence are discretionary rulings, and only subject to consideration on appeal if defendants' themselves appealed from those orders. They did not. As such, this Court should not revisit Judge Andrus' evidentiary rulings as part of defendants' Respondent's Brief to the appeal.

B. Defendants Did Not Raise The Issue of "Speculative Damages" or the "Attorney-Judgment" Rule In their Motion for Summary Judgment, Nor Did Judge Andrus base Her Ruling on That Issue

For the first time on appeal, defendants now argue that plaintiffs' damages were speculative and unsupported by the evidence. This argument was specifically not raised below. As noted, *supra*, counsel for defendants specifically told the court in his oral argument that the "primary" dispositive element was proximate cause. While plaintiffs recognize that this Court can review the evidence *de novo* and affirm the trial court on any ground that is supported by the law and the evidence below, plaintiffs respectfully submit that defendants' arguments on appeal go beyond the record before this court, and delve into the weight and credibility of the plaintiff's damages, the witnesses believability, and other arguments that were not presented below. Again—a review of the motion itself shows no argument or any specific evidentiary citation, or even a mention, that plaintiffs' damages were speculative or not provable. Despite this, the record shows that plaintiffs sustained *provable* damages

well in excess of $2 million.[34]

In addition, apparently taking advantage of this Division's recent decision in *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, 324 P.3d 743, 752 (2014), defendants now raise—again for the *first* time—the argument that defendants' were somehow insulated from liability under the "attorney-judgment rule".[35] This issue was never raised, let alone addressed, in the lower court. As such, defendants' raising of this argument, for the first time on appeal, should not be permitted.

4. JUDGE ANDRUS ABUSED HER DISCRETION BY REFUSING TO CONSIDER ADDITIONAL EVIDENCE SUBMITTED ON PLAINTIFFS' MOTION FOR RECONSIDERATION

As argued above, during oral argument, Judge Andrus erroneously held plaintiff to a standard of proof that is non-existent: that the court "believed" that it was "necessary" for plaintiffs to provide an expert declaration from Mr. Brain as to the causation element, since the facts were "too complex" for a jury.[36] When plaintiffs provided this on a motion for reconsideration, Judge Andrus refused to consider it, and in fact found that Mr. Brain's declaration should be "excluded" and that it was "prejudicial" to defendants to allow plaintiff to supplement the record

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34 See CP (I) 439-444 (Declaration of Ronald Auer, ¶¶8-9); Exhibit 4, page 2; Exhibit 9; Exhibit 10, pages 7-10;

35 See Respondent's Brief, page 13, fn. 10; page 28-29, fn.19

36 See CP 34

"after losing on summary judgment and ***learning*** through the Court's ruling *what the Court* ***believed*** to be the crucial missing expert evidence".[37] This was an abuse of discretion.

In both her oral ruling, and in her written denial of plaintiff's motion for reconsideration, Judge Andrus took clearly inconsistent positions. First—during the summary judgment hearing, Judge Andrus rejected defendants' untimely motion to exclude Mr. Brain's declaration:

> I went through and looked at the entire chronology of this case. I'm pretty confident that based on what the two of you have indicated this morning, that there were things going on behind the scenes that I am not aware of, that may have led to there being delays. I do believe that Mr. Krikorian, that Rule 26(e) does require you to supplement the discovery responses, with the identification of an expert, the subject matter and substance of the testimony. So I think that as soon as you had gotten Paul listed, Paul Brain listed as an expert, you had a duty to supplement your discovery responses to give those opinions to opposing counsel. But under Jones v. City of Seattle, the fact that you didn't comply with CR 26(e) isn't enough to justify an exclusion of an expert's declaration. And so I am going to deny the motion to exclude Mr. Brain's declaration on summary judgment.[38]

In Judge Andrus's order denying the motion for reconsideration, she confirmed her oral ruling that "[t]he court ultimately decided not to exclude Mr. Brain's initial declaration *because Defendants did not move to compel answers to expert interrogatories and waited months before asking Plaintiffs to supplement the expert interrogatory.* The Court concluded ***that both parties*** had made strategic decisions to hold off on

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37 CP 36-38
38 RP 62:7-24

making or requesting complete expert disclosures." (Emphasis added).[39]

However, Judge Andrus went on to exclude the supplemental declaration of Mr. Brain, on the same grounds she ***rejected*** at the summary judgment hearing—that Mr. Brain's supplemental declaration was now "prejudicial" to defendants.[40] In other words, defendants ***were not*** prejudiced and it was acceptable to review Mr. Brain's *first* declaration. However, when the trial court raised an issue *during oral argument* that was never raised before, and unsupported by any case authority, it was no longer acceptable to consider supplemental testimony from plaintiff's expert as it ***prejudiced*** the defendants. This incongruous analysis is clearly an abuse of the trial court's discretion.

Even if Judge Andrus was correct to take inconsistent positions in her analysis, Judge Andrus's finding that there were no "lesser sanctions" available is an error. Certainly, there is no *greater* sanction than excluding evidence that addressed the court's concerns, and dismissing plaintiff's case. Plaintiffs could posit numerous "lesser sanctions", including monetary, discovery remedies and others, which would have ameliorated any alleged "prejudice" to the defendants.

As Judge Andrus noted, a trial judge has "broad discretion" as to how to respond to parties' non-compliance with discovery and case management orders. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494,

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39 See CP 34
40 CP 36-38

933 P.2d 1036 (1997). The court's "discretionary determination should not be disturbed on appeal except upon a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Burnet*, 131 Wn.2d at 494 (quoting *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wn.App. 223, 229, 548 P.2d 558 (1976)). When a trial court excludes testimony in response to a party's failure to obey a discovery order, the record must demonstrate that: (1) the trial court found the disobedient party's ***refusal to obey a discovery order was willful or deliberate*** and *substantially* prejudiced the opponent's ability to prepare for trial; and (2) the court *explicitly considered* whether a lesser sanction would probably have sufficed. *Burnet*, 131 Wn.2d at 494 (citing *Snedigar v. Hodderson*, 53 Wn.App. 476, 487, 768 P.2d 1 (1989)).

First—there was no "discovery order" that plaintiffs "willfully" or "deliberately" refused to obey. Second—plaintiffs ***did*** disclose their expert as required by the court's scheduling order, and further supplemented its discovery when finally requested to do so by the defendants. Finally—Judge Andrus specifically found that (i) both counsel for plaintiffs and defendants made "strategic" decisions to delay discovery disclosures; and (ii) that defendants' ***failure*** to move to compel and to seek supplementation for several months did not justify the exclusion of Mr. Brain's testimony. In other words, there was no *willful*

disobedience of a court order by plaintiffs. For Judge Andrus to take inconsistent positions on this is a clear, manifest abuse of discretion and certainly could have considered a "lesser sanction" rather than exclude Mr. Brain's supplemental testimony, as well as the other evidence which addressed issues raised solely in defendants' reply brief.

III. RESPONSE TO CROSS-APPEAL

1. DEFENDANTS' ASSIGNMENTS OF ERROR

Defendants contend the lower court erred by denying their 2011 Motion for Summary Judgment as to defective service, and therefore that the statute of limitations had run as to the defendants. Plaintiffs contend that Judge Andrus correctly rejected this argument, and correctly denied defendants' initial Motion for Summary Judgment.

2. STATEMENT OF FACTS

Plaintiffs filed the within action on February 14, 2011. At the time plaintiffs filed this action they were acting *pro se*. The plaintiffs did not serve the lawsuit immediately after it was filed. In late April 2011, the plaintiffs retained the Law Offices of Brian H. Krikorian to represent their interest in this case.[41] At the time he was retained, Mr. Krikorian was scheduled to be out of the country on vacation from May 12, 2011 through June 7, 2011. Because of his impending absence, Mr. Krikorian

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41 CP (III) 874-88 (Declaration of Brian H. Krikorian ("Krikorian Declaration") ¶2)

immediately set out to serve the summons and complaint on the defendants before he left.[42]

When the plaintiffs retained Mr. Krikorian, they provided the underlying files and an unsigned and un-conformed copy of the complaint. The plaintiffs could not locate a conformed copy of the complaint, or copies of the issued summonses. Mr. Krikorian confirmed, via the State of Washington Court website, that the complaint had, in fact, been filed on February 14, 2011 in the Snohomish County Superior Court.[43] Mr. Krikorian printed out the information at the website, filled in the Snohomish County case number on the copy of the complaint, wrote the date of February 14, 2011 on the top of the complaint, and attached the court web site printout to his copy of the unsigned complaint.[44]

Because he did not have a summons, Mr. Krikorian prepared and issued a new summons directed to all the defendants. The summons complied in almost all respects with CR 4(b)(1) and (b)(2). The summons contained the Snohomish County Superior Court case number, the correct parties, and the correct response dates. Due to a typographical error, however, the summons originally indicated that county was King, not Snohomish. The summons also omitted the date next to Mr. Krikorian's signature. Mr. Krikorian also prepared a Notice of Appearance on behalf

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42 *Id.* ¶2

43 *Id.* Krikorian Declaration ¶2

44 *Id.* Krikorian Declaration ¶3; CP (III) 1088-1099 (Exhibit 1 to the Declaration of Geoffrey Gibbs)

of the plaintiffs that also contained these two errors.[45]

Mr. Krikorian scanned in all of the documents (the summons, the complaint with attachment, and notice of appearance) and uploaded them all to ABC Legal Services on April 25, 2011. The defendants were served personally on April 26, 2011. None of the defendants alleged that there were any deficiencies in the manner in which they were served—only the caption of the Summons. Shortly after receiving confirmation of service, Mr. Krikorian discovered the error on the caption related to the King county designation. He corrected the county designation on the caption of both the Summons and Notice of Appearance, and sent the two documents (and a Notice of Unavailability (see below)) to be filed with the clerk. The court's docket reflects that the corrected Notice of Appearance and the Notice of Unavailability were both filed on May 4, 2011, but not the Summons.[46]

On April 29, 2011, Mr. Krikorian served a Notice of Unavailability on the defendants. The Notice of Unavailability listed ***Snohomish County*** in the caption and contained the same ***Snohomish County*** case number. This was filed with the Snohomish Superior court on May 4, 2011. Also on May 4, 2011, the defendants served a Special Notice of Appearance

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45 CP (III) 874-88 Krikorian Declaration ¶4; Exhibit 1 to the Declaration of Geoffrey Gibbs, above

46 Mr. Krikorian did not learn that the Summons was not filed until he returned from his vacation during the week of June 6, 2011, and was served with the Defendants' original motion on June 8, 2011. CP (III) 874-88, Krikorian Declaration ¶6 and Exhibit 4 thereto

pro se. The caption of the Special Notice of Appearance indicated ***Snohomish County*** (not King), and had the ***Snohomish County*** case number on it. This was filed on May 9, 2011 with the Snohomish County Court. [47] On May 26, 2011, counsel for the defendants, Merrick Hofstedt & Lindsey, served a Notice of Withdrawal and Substitution on Mr. Krikorian. That Notice contained the ***Snohomish County*** case number and listed ***Snohomish County*** as the location of the court. The Notice of Withdrawal was filed with the Snohomish County Superior Court on May 27, 2011.[48]

As the above demonstrates there was no "confusion" as to which County this matter was filed in. The defendants were served with a complaint with a ***Snohomish*** county case number, a printout that confirmed the action was filed in ***Snohomish*** county, and a subsequent pleading served by Mr. Krikorian indicating the court was ***Snohomish*** county. Neither the defendants *pro se*, nor their counsel, ever contacted Mr. Krikorian to express any "confusion" as to whether an action in King County was being initiated—because there obviously was not one. A simple phone call would have cleared up any alleged "confusion" regarding the county of venue. Instead defendants filed their motion to

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47 Krikorian Declaration ¶6, see Exhibits 4 and 5

48 CP (III) 874-88, Krikorian Declaration ¶6-7, Exhibit 6

dismiss.[49]

3. ARGUMENT

A. The Purpose Of CR 4 Is To Provide Adequate Notice To The Defendant

Both state and federal courts have consistently held that the underlying purpose of CR 4 is to provide adequate notice to a party to appear and defend. "We have held that 'the root purpose underlying service of process is to ensure that a defendant receives fair notice of the suit and adequate opportunity to protect her interests.'" *Libertad v. Welch,* 53 F.3d. 428, 440 (1st Cir., 1995), citing *Jardines Bacata, Ltd. v. Díaz-Márquez*, 878 F.2d 1555, 1559 (1st Cir.1989)). "Rule 4 is a flexible rule that should be liberally construed so long as a party receives sufficient notice of the complaint." *United Food & Commercial Workers Union, v. Alpha Beta Company*, 736 F.2d 1371, 1382 (9th Cir., 1984). See also *Sammamish Pointe Homeowners Ass'n v. Sammamish Pointe LLC, supra,* 116 Wash. App. 117, 64 P. 3d 656 – (Div. 1, 2003); *Quality Rock Products, Inc. v. Thurston County*, 126 Wash. App. 250, 108 P. 3d 805, 812 – (Div 2, 2005)—" CR 4(a)[13] and (b)[14] govern the form and content of a summons. 'The purpose of a summons is to give certain notice of the time prescribed by law to answer and to advise the defendant of the consequences of failing to do so'" citing *Sprincin King St. Partners v. Sound Conditioning Club, Inc.*, 84 Wash.App. 56, 60, 925 P.2d 217, 220

49 CP (III) 874-88 , Krikorian Declaration ¶9

(1996)—holding "Yet a summons confers jurisdiction upon the court when it gives notice according to the statutory requirements, with such particularity and certainty as not to deceive or mislead. Put another way, a summons is adequate ***when it substantially complies*** with the statutory requirements." (Emphasis added)

Here the defendants did not deny that they were personally served with a copy of the complaint that was filed on February 14, 2011 by the plaintiffs. The defendants also did not deny that they received a summons that contained the verbatim language of CR 4(b)(2), which contained the correct timing requirements and other procedures laid about by CR 4. The pleadings that were served on the defendants also contained a Snohomish County case number, as well a copy of the docket from the State of Washington Court web site. Finally, all subsequent pleadings filed and/or served by the parties were captioned in Snohomish County. As such, there can be no dispute that the spirit, and intent, of CR 4 was substantially complied with.

B. In Order To Justify A Dismissal Both Washington And Federal Authority Require A Showing Of Actual Prejudice By The Defendants

Going back over a century, the Washington courts have consistently held that they will not elevate form over substance, and will leniently excuse technical errors in captions and in the summons so long as the opposing side is not actually prejudiced by the error.

> **In matters of formal procedure, even though it be in proceedings so highly important as the process by which a party is brought into court, *this court has never exacted anything more than a substantial compliance with the statute.* Amendable defects, such as the one in question, have not been held fatal *unless injury directly caused thereby has been shown*, and it seems to us now that this is the just rule. Any other usually *leads to a sacrifice of substance to form*, and to decisions which shock the sense of justice and right, even in minds trained to the technicalities of the law. Clearly, such would be the effect of a decision sustaining the contention made here. *The defendant has had all the notice he would have received had the verification and filing been simultaneous, hence he has suffered no injury in that regard.* (Emphasis added)**

Whitney v. Knowlton, 33 Wash. 319, 74 P. 469 (1903)

More recent authority has also consistently held that the Court will overlook technical errors in the summons so long as the opposing party cannot show it was directly, and actually, prejudiced by the errors. For example, in *Sammamish Pointe, supra*, the plaintiff served a 20-day summons on the defendant, not realizing that the defendant was an out-of-state corporation. Although this issue was raised in letters after service, the plaintiff did not take a default of the defendant in issue. 90 days after service, the defendant filed a notice of appearance and answered. The defendant later moved to dismiss, arguing "the specification of 20 days instead of 60 rendered the service invalid because it did not strictly comply with the long-arm statute, and as a result the trial court did not have personal jurisdiction over the LSP defendants." *Id.* at 64 P.3d 656, 658. The lower court denied the plaintiffs' motion to amend the

summons, and granted the motion to dismiss. On appeal, the Court of Appeals reversed, relying upon both state and federal authority for the proposition that "[a] failure to accomplish personal service of process is not a defect that can be cured by amendment of paperwork. Errors in the *form* of original process are, however, generally viewed *as amendable defects*, so long as the defendant is not prejudiced." *Id.* at 660. (Emphasis added).

In *Quality Rock Products, Inc. v. Thurston County, supra*, the plaintiffs appealed the lower court's dismissal of a land use action. In that case, the defendant argued that both the manner of service and the form of the summons were improper. The County of Thurston argued that the summons was improper because even though the plaintiff mentioned the name of the Black Hills Audubon Society (a necessary party) in its land use petition and pleadings, the name of Black Hills Audubon Society was not mentioned anywhere in the caption. The plaintiff later personally served Black Hills, but the caption was never changed. On appeal, the Court of Appeals reversed, finding that the errors in the caption were not prejudicial:

> **Overemphasis on a summons' caption violates the civil rules' emphasis that substance trumps formality. See CR 8(f) ("All pleadings shall be so construed as to do substantial justice."); CR 4(h) (allowing "[a]t any time" an amendment of "any process or proof of service ... unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued."); see also 14 Karl B.**

> **Tegland, Washington Practice: Service of Process § 8.2 (Supp.2004) ("Although the courts have *rigorously enforced* the statutes governing the *manner of service*, the courts have been *relatively lenient* with respect to the *form and content of the summons*.") (Emphasis in original).**

Id. at 812-813

See also *Ryland v. Universal Oil Co.*, 504 P. 2d 1171 (2nd Div. 1972)—substantial compliance with service of process requirements under Washington's long-arm statute is sufficient. The court stated it would not elevate form over substance absent actual prejudice; *In re Marriage of Morrison*, 26 Wash.App. 571, 613 P. 2d 557 (3rd Div. 1980)—errors in the caption of the summons related to the capacity of the defendant are curable, and not fatal, if the plaintiff requests leave to amend process pursuant to CR 4(h). "The modern rule is that the proper remedy is not to dismiss the cause of action, but rather to give the parties the opportunity to amend to reflect the proper capacity of the defendant." *Id.* at 575.

In *United Food & Commercial Workers Union, v. Alpha Beta Company*, 736 F.2d 1371, 1382 (9th Cir., 1984), the plaintiff union served a summons with a 10-day requirement to answer, rather than the 20-day requirement under the Federal Rules of Civil Procedure. The 9th Circuit affirmed the district court's finding that this argument was "meritless", and rejected the notion that the service was insufficient due to the technical error:

> **Rule 4 is a <u>flexible</u> rule that should be liberally construed so**

> **long as a party receives sufficient notice of the complaint. (Citation). Even if the summons fails to name all of the defendants, (citation), or, as in the case before us, the summons specifies the incorrect time for filing of the answer, (citation) dismissal *is generally not justified absent a showing of prejudice*, see Fed.R.Civ.P. 61. (Emphasis added)**

The defendants can cite to no legal authority which supports the dismissal of this action based *solely* upon reliance upon the technical defects in the summons that was served upon them—and the cases they have relied upon are not helpful to them. For example, in *Lindgren v. Lindgren,* 58 Wn. App. 588, 794 P. 2d 526 (1st Div. 1990), the lower court did not dismiss a the case pursuant to CR 12(b)(4), but rather vacated a default because the service was faulty. The defendant had argued that she was never given notice of the lawsuit. On appeal, the Court held that the trial court was correct because the plaintiff had not filed the summons in issue. "The lack of summons in the file justifies an affirmance of the vacation of the default judgment. Without the benefit of the summons in the court file, we have no way to determine whether Kimzey was properly notified." *Id.* at 597. *Lindgren* is distinguishable on two points—first *Lindgren* was not dealing with a motion to dismiss; second—the court did not have the summons to review to determine if proper notice was given. Here, the defendants admit not only that they received the summons, but also they attach it to the declarations of both Mr. Knapp and Mr. Gibbs. As such, the court certainly can ascertain if

they were "properly notified" of the action.

The defendants also relied upon *Nearing v. Golden State Foods Corp.*, 114 Wn.2d 817, 792 P. 2d 500 (1990). *Nearing* actually supports plaintiffs' position. In *Nearing*, the plaintiff served only a summons ("Summons #1") on the defendant stating that he had a cause of action for breach of contract. Within 90 days of service of Summons #1, plaintiff changed counsel, who filed a second summons ("Summons #2") and a complaint with the court. Summons #2 and the complaint were served on the defendants two weeks later. The Supreme Court held that because the complaint was filed within 90 days of the service of the original summons, service was effectuated. *Id.* at 823.

The defendants also argued, that because the Summons served on them on April 26, 2011 was not "filed" it is therefore insufficient. However, the defendants' reading of the Civil Rules and the RCW sections is erroneous. First, RCW 4.16. 170 ***does not*** require that the ***summons*** be filed to commence an action:

> For the purpose of tolling any statute of limitations an action ***shall be deemed commenced when the complaint is filed*** **or** ***summons is served*** **whichever occurs first**. If service has not been had on the defendant prior to the filing of the complaint, ***the plaintiff shall cause one or more of the defendants to be served personally***, or commence service by publication within ninety days from the date of filing the complaint. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed

> to not have been commenced for purposes of tolling the statute of limitations. (Emphasis added).

According to RCW 4.16.170, the action is commenced either when the summons is first served, and the complaint is filed 90 days later, or if the complaint is filed, ***and served*** 90 days later. This section does not require that the summons be filed within the 90-day window. This is consistent with the holding of *Nearing*, which stated:

> Our conclusion that RCW 4.16.170 stands alone as the rule for tolling the statute of limitations is bolstered by the *Twenty-Sixth Annual Report* of the Judicial Council. The Council commented on amendments to CR 3 by stating "[b]oth the existing rule and the proposed amended rule defer to statutory law governing the tolling of the statute of limitations." Washington State Judicial Council, *Twenty-Sixth Annual Report* 28 (1977).
>
> Pursuant to CR 3(a), an action is commenced either by "service of a copy of a summons together with a copy of a complaint ... or by filing a complaint." Thus, compliance with the 90- day rule, contained in RCW 4.16.170, automatically results in the commencement of an action under CR 3(a). The statute is consistent with the court rule.

Nearing, at 822.[50]

Defendants also argued that plaintiffs were required to serve the ***same*** summons that was filed. In *Nearing*, Justice Worswick stated as follows:

> The summons filed *need not be the summons served.* Cf. Roznik v. Becker, 68 Wash. 63, 122 P. 593 (1912). The statute is complied

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50 It should also be noted that nothing in CR 4 mentions the filing of a Summons to effect its issuance. See CR 4(a)(1): "The summons must be signed and dated by the plaintiff or his attorney, and directed to the defendant requiring him to defend the action and to serve a copy of his appearance or defense on the person whose name is signed on the summons. "

> with if the summonses are substantially identical. Cf. Thayer v. Edmonds, 8 Wash.App. 36, 503 P.2d 1110 (1972). (Emphasis added)

In *Roznik v. Becker*, cited by Justice Worswick, the Supreme Court stated at page 68-69:

> It is next objected that there was no proper service of summons upon the defendant. This objection is divided into several distinct grounds, the first of which is that the summons served upon him *was not the original summons issued in the cause*, and that it is the rule that 'an amended or alias summons cannot issue until the necessity therefor is shown by the return of not found on the original summons.' But this argument overlooks the fact that in this *state a summons is in no sense a writ of court. It is not even issued by the court or the clerk thereof; but, on the contrary, is issued by the plaintiff in the action or by his attorney. The summons is in effect a mere notice, and hence there is no reason for holding that the issuance of one such notice in an action exhausts the power to issue another.* The essential requirement to obtain jurisdiction over the person of a defendant is that he be served with a summons in the form and in the manner prescribed by the statute, not that he be served with any particular summons. The fact that the appellant was served with a summons other than the one first issued does not therefore render the service void. (Emphasis added)

As the foregoing reflects there must be errors beyond the purely technical for the court to justify a dismissal. Moreover, where the errors raised by a moving defendant are directed at technical errors in the form of the summons or process, the defendants must present evidence that they have actually, and directly, been prejudiced by those errors. Here, the defendants **could not, and cannot** do so. They were personally served well within the 90-day period required by RCW 4.16.170; they were provided the verbatim notice required by CR 4(b)(2); and, the pleadings

that were served on the defendants contained the correct Snohomish County case number, together with a printout showing the matter was filed in Snohomish County. In addition, the defendants filed subsequent pleadings in Snohomish County, and received a subsequent pleading from plaintiffs' counsel, with a Snohomish County caption. Finally, the defendants had more than 20 days to respond to the complaint, and no defaults were sought against them. Certainly, the defendants cannot establish that the lack of a "date" on the Summons actually caused them actual, direct prejudice.

Other jurisdictions also support plaintiffs' position, and the decision of Judge Andrus on this issue. A case right on point is *James River Nat. Bank v. Haas, 73 N.D. 374, 15 N.W.2d 442* (1944) decision, where the court analyzed over 2 dozen different jurisdictional views on this issue and held that where the defendants were served with a copy of the *complaint* that provided the correct name of the county and court, concurrently with a summons containing a clerical error (in this case, that listed the wrong court), it was permissible for the court to amend the summons and not dismiss the action.[51] In that case, the plaintiff listed the court on the summons as the "county court", although the proper court

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51 It should be observed that some of the cases looked at by the *James River* court included instances where not only separate counties or county courts were listed, but actually separate ***state*** courts. See for example *Livingston v. Coe*, 4 Neb. 379 cited by the *James River* court at 388-389, where the petition stated it was premised in the State of New York, but the petition was actually filed in the ***State of Nebraska***. The court still found that amendment was the proper action—not dismissal.

was the "district court". The complaint served with the summons correctly listed the court as the "district court". The evidence before the court was that this was a clerical mistake of inadvertence by the plaintiff's attorney and his typist. The district court, nonetheless, dismissed the case claiming it did not have jurisdiction, even though to do so would bar the plaintiff's claim based upon the statute of limitations.

On appeal to the North Dakota Supreme Court, the Court reversed and held that there is "nothing sacrosanct about a summons." *Id.* at 381. The Court also noted that in listing the verbatim language required by statute to be on the summons, including the court and county where the case was initiated, "[i]n each of these requisites a mistake may occur. In the summons issued in this case, the defect relied upon by defendant is the error in specifying the court in which the action is brought." *Id.* at 382. The court stated that "[i]f the court may correct a mistake in one of the requisites, it may correct a mistake in the one which specifies the ***county*** in which the action is brought. One 'requisite' has no greater mandate behind it than another." (Emphasis added). *Id.* at 384-85. In reversing the dismissal, the Court held:

> The question of fact is clearly determined in this case ***that the plaintiff was invoking the jurisdiction of the district court, not the county court, even though there was this error in the summons***. The district court had jurisdiction of the subject matter and of the defendant because the defendant was served with this summons. ***The defendant could not help but know in what court the action was actually pending. He was not misled in any way and***

> ***furtherance of justice required the district court to permit the amendment, particularly when the question of the statute of limitations was in the offing***. (Emphasis added)

The *James River* court went on to state, in response to the defendants' argument that their statute of limitations defense was impacted by the amendment of a summons, that "no one has a vested right in the statute of limitations until it has run in its favor, and that the very purpose of permitting an amendment is to preserve the cause of action." *Id.* at 394. In other words, because plaintiff had timely served the complaint within the statute of limtiations period, the defendants could not argue they would "lose" a defense—since that defense was non-existent. That is the same case here.[52]

The case of *Kostrob et al. v. Riley* et al., 105 N.J.L. 37, 143 A. 863, 864 (1928), is directly on point as well. There the summons was properly served within the required time, *with the complaint attached*, so that the defendants had notice that an action at law had been commenced against them. Through a clerical mistake of counsel, the summons notified the defendants to appear in the Hudson county common pleas at Jersey City, and the complaint attached to the summons was entitled 'Supreme Court, Hudson County. The *Kostrob* court held:

> The court is also informed that the statute of limitations would operate against this plaintiff if the motion were granted. The issue of a new summons under this section of the act of 1903 is therefore in the nature of an amendment of the original summons. Gaskill v.

52 Cf. 124 A.L.R. 86: "The fact that an amendment of process or pleading to change or correct the name of a party will deprive the defendant of the defense of the statute of limitations is held, in the majority of the cases, to be no reason for refusing such amendment." 124 A.L.R. page 136.

Foulks, 83 N. J. Law, 375, 84 A. 1057.

> … **In the present instance quite manifestly the error which resulted was caused by the mistake or default of an attorney of this court, who also may be properly classed as an officer of the law, charged with the duty, not of serving the summons, but of drawing the same in proper and legal form, so that the rights of his client might be fully protected.**
>
> Under the circumstances, the motion to quash the writ will be denied, without costs, and a rule may be entered for the service of a new summons. (Emphasis added)[53]

All of these cases, including both the *James River* and *Kostrob* cases directly address defendants' argument that "a King County summons is not a Snohomish County summons." It should be noted again—defendants have not cited to any significant Washington or other case authority which has held that a mere typographical error stating the wrong county, when there was a plethora of other evidence given to the defendants which indicated the correct case number and correct county concurrently served with the defective summons, justifies dismissal of the case. There is simply no evidence these defendants were "misled" by the typographical error on the summons. Plaintiff respectfully submits that based upon the above authority, that defendants were not prejudiced or misled by the summons that contained a clerical mistake, that plaintiffs were not "required" to use the exact summons on file, and that the only just result was for the lower court to deny the Motion for Summary

53 Judge Andrus cited other out-of-state jurisdictions that supported her ruling, and plaintiffs' position. See CP (III) 816-817

Judgment, and permit plaintiffs to amended the summons requested in its opposition.

Plaintiffs substantially complied with CR 4 and RCW 4.16.170. The defendants had clear notice of the nature of the lawsuit and have been able to make a timely appearance and defend the same.

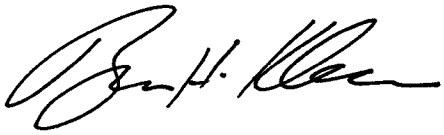
IV. CONCLUSION

For all of the foregoing reasons, plaintiffs and appellants respectfully submits that the trial court erred in granting summary judgment, and further, by denying plaintiffs' motion for reconsideration. Accordingly, the orders below should be reversed and this matter remanded for trial.

On defendants' cross-appeal, the lower court correctly denied their Motion for Summary Judgment as to improper service and the statute of limitations, and this order should be affirmed.

Dated: September 15, 2014

LAW OFFICES OF BRIAN H. KRIKORIAN



By_____
Brian H. Krikorian, WSBA # 27861
Attorney for Appellants and Cross-Respondents

On September 15, 2014, I caused to be served a copy of the document described as **Appellant's Opening Brief** on the interested parties in this action, by United States, First Class Mail and email, addressed as follows:

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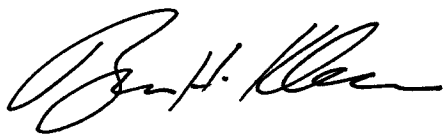
Seattle, WA 98121

Attorney for Defendants

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 15th day of September, 2014.



Brian H. Krikorian

BRIAN H KRIKORIAN LAW OFFICE

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