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No. 66100-I

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

UWEM USORO and ETCETERA ENGINEERING
TRANSPORTATION & ALLIED SERVICES, INC., Individually and a
Washington Corporation,

PLAINTIFFS/APPELLANTS,

V.

CHARLES HELM AND JANE DOE HELM AND HELM & HELM,
INC, P.S., Husband and Wife and a Washington Corporation,

DEFENDANTS/RESPONDENTS.

AMENDED BRIEF OF APPELLANTS

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TABLE OF CONTENTS

INTRODUCTION.....	1
ASSIGNMENT OF ERROR	2
ISSUES PERTAINING TO ASSIGNMENT OF ERROR.....	3
STATEMENT OF THE CASE.....	4
A. Uwem Usoro formed Etcetera Engineering in 2001 as a Commercial Transportation Company with two vehicles, retired in 2003 and incorporated it (“Etcetera”) and became the major Shareholder and Manager	5
B. In 2004, Usoro had four vehicles registered to Etcetera, purchased Commercial Liability Insurance from Columbia Insurance for their 1996 Eldorado bus and issued with a Certificate of Liability Coverage from 12/28/2004 to 12/28/2005 on Policy #: 71 APN 325968	5
C. In February 2005, Usoro purchased their fifth vehicle, a 1998 Lincoln Town Car, purchased a commercial liability Insurance through Kathleen Rohner (now Allison) and Insuremax, the agents to Columbia based on Etcetera’s existing commercial auto coverage for their 1996 Eldorado bus with Columbia	5
D. After a valid certificate of commercial liability insurance, Rohner was issued to Usoro; Rohner was required to forward the papers to Columbia to cover the Town Car.....	6
E. In April 2005, Usoro hired The Law Office of Anders F. Olin, PS in Mukilteo to investigate the coverage with Insuremax, Columbia and on April 22, 2005, Olin submitted his report to Usoro.....	6

F.	Usoro hired their former Attorney; David Estudillo to represent him and Etcetera against Rohner, Insuremax and Columbia; Columbia agreed to defend the Third-party lawsuit, “With reservation of right” and hired Dunlap & Soderland, PS.....	7
G.	David Estudillo filed Motion for default judgment against Insuremax, Kathleen Rohner and Mybia Corporation on October 19, 2006, and for entry of default on July 11, 2007, pursuant to CR 55(b) (1), supported with Usoro’s affidavit detailing Etcetera’s damages and the Superior Court awarded judgment on July 25, 2007, for \$180,479.67 (\$14,141.67 in attorney fees and \$166,338 in damages)	8
H.	Helm wrote Usoro on April 10, 2009 to hire an expert to prove their damages, in May 2009, Usoro hired Kevin Grambush, CPA with Greggemann And Johnson, Yeanopolis, PC, CPA to review Etcetera’s financial statements to provide Helm with expert opinion and agreed to pay the initial retainer fee of \$1,500 in three installments in June, July and August 2009 to Grambush	8
I.	Helm did not follow the new Case Schedule, was served with Rohner’s disclosure of primary witnesses due on May 18, 2009, neglected to file Usoro’s Primary witnesses.....	9
J.	Helm withdrew from Usoro’s case on August 13, 2009, devoted no time to the case, alleged nonpayment of legal fees for July 2009, returned the Money Order of \$500 sent on June 17, 2009 for Usoro’s expert, failed to conduct discovery, neither filed motion to amend Usoro’s Complaint nor opposed Answer filed by Rockey in May 2009.....	10

PROCEDURAL HISTORY.....10

A. Usoro commenced this lawsuit on December 15, 2009, seeking damages for Legal Malpractice, breach of contract and emotional distress, against Charles Helm and company and later dropped emotional distress claim.....10

1. The Complaint alleged that Helm was hired to collect the Judgment of \$180,479.67 entered in favour of Usoro and Etcetera on July 25, 200710

2. The Complaint alleged that Helm did not disclose to Usoro he did not have litigation experience, did not provide reasons to Usoro for striking the supplemental proceeding, Usoro did not consent to Helm’s litigation inexperience, failed to withdraw from Usoro’s case on time and would have fired Helm if he knew he had limited litigation experience10

3. The Complaint alleged Helm received Rohner’s Motion to vacate judgment, filed a two page response and opposition, failed to address the legal issues raised in the Motion to vacate under CR 60, failed to support the response with Usoro’s affidavit or any witness, the Court vacated the judgment and entered a new Case Schedule on December 16, 2008.....12

4. The Complaint alleged Helm did not discharge the obligations owed Usoro, failed to file Motion to Amend Underlying complaint, negligently stayed on the case, messed it up by playing along with Rohner’s attorney, did not conduct discovery with brokers , failed to keep status update of the case with Usoro who was not told of the hearing on December16,2008, withdrew on August 13,2009 alleging non-payment of legal fees for July 2009 to insulate Helm’s misconduct, and failed to stay on until Usoro retained a new Counsel...12

5.	The Complaint alleged Helm misrepresented Usoro’s coverage on December 9, 2009 letter to his carrier on the witness provided by Usoro, Usoro hired Kevin Grambush who agreed to provide Etcetera’s damages, gave Helm his number to work with Grambush, received Grambush’s engagement letter on June 10, 2009 on agreed initial retainer of \$1,500 to be paid on three instalments , Helm received the initial \$500 and failed to forward the money to Grambush, provided witness list to Helm which was not filed in Court, failed to comply with activities on case schedule and abandoned Usoro’s case in the middle of litigation resulting in the underlying case being dismissed on September 18, 2009, Motion for reconsideration was also denied on October 9, 2009 and Usoro lost out	13
6.	The Complaint alleged Helm’s action helped Rohner’s attorney to have expeditious favorable resolution based on his letter on December 9, 2009, failed to protect Usoro’s interest, Helm directly or indirectly worked with Rockey until withdrawal, admitted he may have handled the matter poorly, stayed on until the case was dismissed because Helm mischaracterized the value of Usoro’s underlying case and breached his duty of care and failed to defend the underlying case	14
7.	The Complaint alleged Legal Malpractice, breach of Contract, and requested prayers for relief including reimbursement of the mishandled amount of \$180,479.67, attorney fees and costs incurred	15
B.	Usoro and Etcetera filed motion for summary judgment in March 2010 against Helm during discovery, Helm’s attorneys inundated Usoro with multiple Cross Motions to dismiss their lawsuit, strike Usoro’s declarations And Olin’s Exhibit 3 and remove Usoro as Plaintiff.....	15

C.	In May 2010, Usoro hired their experts, Tawni Berg, CPA to evaluate Etcetera’s financial statements and records, determine damages, and Joseph Ganz to review the underlying case and provide expert’s testimony regarding Helm’s representation during collection of judgment, and for Anders Olin to authenticate April 22, 2005 investigative report regarding Rohner’s cancellation of commercial coverage issued on February 10, 2005.....	16
D.	On June 18, 2010, the trial Court denied Helm’s Motion to dismiss Etcetera’s Lawsuit on June 21, 2010, gave Helm lee way to re-note their Motion within 60 days assuming Usoro was unable to prove causation and damages and Helm re-noted Motion to dismiss on July 9, 2010.....	17
E.	Usoro re-hired Joseph Ganz to review his earlier opinion and provide supplemental testimony, hired a financial expert, Bret Espey, CPAs to review Etcetera’s financial records and determine their damages, re-noted Etcetera’s Amended Motion for Summary Judgment on July 13, 2010 denied on April 30, 2010 and supported with Usoro’s experts’ testimony.....	17
F.	On August 20, 2010, Counsel presented oral argument. On August 26, 2010, the trial Court granted Helm’s Motion, dismissed Etcetera’s legal malpractice with prejudice and disregarded affidavit of Anders Olin and Uwem Usoro as inadmissible hearsay.....	18
G.	Usoro filed Motion for Reconsideration and New Trial on September 3 rd , 2010 and was denied on September 16, 2010	18
H.	Usoro and Etc Engineering filed their Notice of appeal on October 6, 2010. On October 6, 2010, Usoro filed their Notice of Appeal to Washington State Court of Appeals, Division 1.....	19

ARGUMENT	19
A. The trial Court erred by entering summary judgment in favour of Helm, denied Usoro and Etcetera’s motions for summary judgment for Legal Malpractice and breach of contract.....	19
1. The standard review from Summary Judgment is de novo.....	20
B. The trial Court erred removing Usoro as a Plaintiff in the Legal Malpractice and breach of contract on April 30, 2010	19
1. Usoro hired Helm to represent him and Etcetera for collection of judgment of \$180,479.67in 2008	20
C. The trial Court erred that Usoro’s legal malpractice is more of the legal question than it was a factual one	27
D. The trial Court erred by excluding Usoro’s experts testimony, dismissed Etcetera’s Legal Malpractice with prejudice with case law not on point.....	28
1. The trial Court erred by disregarding Usoro and Olin’s declarations as inadmissible hearsay or improper statements.....	28
E. The trial Court erred Usoro that provided the Court with no authority for the proposition of damages and causation in a legal malpractice showing it would have survived summary Judgment but faced with doubtful ultimate prospects on its merits	35
1. The trial Court erred in deciding Usoro’s legal Malpractice as a case within a case.....	35
F. The trial Court erred that the insurer in the Underlying case did provide all representation for the Plaintiff, paid all the costs of settling the claim against Usoro, that Usoro could not establish an entitlement to any further damages under	

the claim brought in the underlying lawsuit, and that this assertion was not directly refuted in the cursory opinion that summary judgment could have been defeated	38
G. The trial Court erred that Helm’s failure to respond to motion to vacate judgment in the underlying case was due to non-negligent of his	41
REQUEST FOR ATTORNEYS FEES.....	44
CONCLUSION.....	44

TABLE OF AUTHORITIES

CASES	Page(s)
Aubin v. Barton, 98 P.3d 126 Wash.App. Div.1 (2004).....	40
Anderson v. Weslo, Inc., 79 Wash. App, 829, 906 P.2d 336 (1996).....	38
Ang v. Martin, 114 P.3d 637, Wash. (2005).....	42
Ahmann-Yamane, 105 Wash.App. at 108, and 19 P.3d 436)	32
Barrie v. Host of Am., Ins., 94 Wash.2d 640, 642, 618 P.2d 96 (1980).....	19
Bohn v.Cody, 119 Wn. 2d 357. 365, 832 P.2d 71 (1992).....	21, 25, 27
Blume, 134 Wash.2d at 251-2, 947 P.2d 223	42
Bowman v. Two, 104 Wash.2d 181, 186, 704 P.2d 140 (1985).....	32
Bowman v. Doe, 104 Wn.2d 181, 187, 704 P.2d 140 (1985).....	20
Bruns v. PACCAR, Inc., 77Wash.App.201, 890 P.2d 469(1995).....	38
Brust, 70 Wn. App. at 293(quoted as BA 16).....	28
Bullard V. Bailey, 959 P. 2d 1122 Wash. App. Div. 1(1998).....	43

Bush v. O'Connor, 58 Wn. App. 138, 148 (1990).....	26
Cultum V Heritage House Realtors, 103 Wash. 2d 623, 633, 694, P. 2d 630 (1985).....	40
Daugert v. Pappas, 104 Wash. 2d 254, 257-59, 704 P.2d 600(1985)	36, 41
Dorf v. Relles, 355 F.2d 488 (7 th Cir. 1966)	32
Fishman v. Brooks, 487 N.E.2d 1377 (Mass. 1986).....	37
Geer v. Tonnon, 137 Wn. App. 838 155 P.3d 163 (2007).....	29, 30
Hzey V. Carpenter, 119 Wash. 2d 251, 260-61, 830 P.2d 646(1992)	20
In re Disciplinary Proceeding Against McGlothlen, 99 Wash.2d 515, 522, 663 P.2d 1330 (1983).....	21
In Re: Eggers, 152 Wn. 2d 393, 410, 98 P.3d 477 (2004).....	21
In Re Guardianship of Karan, 110 Wn.App 76, 84-87, 38 P.3d 396(2002).....	24
In re Pennington, 142 Wn. 2d 592, 602-03, 14 P.3d 764(2000).....	28
Jones V. Allstate Ins. Co 146 Wash.2d 291, 306, 45 P.3d 1068 (2002).....	21
Kelly v. Foster, 62 Wash. App, 150, 155, 813 P.2d 598 (1991).....	26
Kruse v Hemp, 121 Wash. 2d 715, 722, 853 P.2d 1373 (1993).....	19

Martin v. Northwest Washington Legal Services, 43 Wn. App. 405, 408 (1986)	27, 26
Matson v. Weidenkopf, 1010 Wash. App. 472, 3 P.3d 805 (2000).....	32, 40
Nielson v. Eisenhower & Carlson, 100 Wash. App, 584, 591, 999 P.2d 42(2000).....	42
Owens V Harrison, 120 Wn. App. 909 86 P.3d 1266 (2004)	23
Perez v. Pappas, 98 Wn. 2d 895, 840-41, 659 P.2d 475 (1983).....	26
Sherry v. Directs, 29 Wash. App. 443, 437, 628 P. 2d 133(1981).....	40
Stangland, 109 Wash.2d at 679, 747 P.2d 464	32
Tilly, 49 Wash. App at 732, 746 P.2d 323	40
Trask, 123 Wash.2d at 842, 872 P.2d 1080	24
VersusLaw, Inc. v. Stoel Rives, LLP, 127 Wash.App, 309, 111 P.3d 866 (2005).....	22, 26, 39, 41
Walker v. Bangs, 92 Wn.2d 854, 859 (1979)	24

STATUTES

Evidence Rule 701	32
Evidence Rule 602	33
Evidence Rule, ER 801 (a-c).....	33

Evidence Rule 901(b) (1)34

Evidence Rule 1001(a)34

OTHER AUTHORITIES

16 Wash. Practise. Tort Law and Practise
§ 15.41(3d ed.)23

INTRODUCTION

After a protracted legal battle in the underlying case regarding whether a Certificate of Commercial Liability Insurance Coverage was issued by their carriers on February 10, 2005 for the 1998 Lincoln Town Car involved in an auto accident in March 2005, Usoro and Etcetera Engineering Transportation and Allied Services, Inc (“Etcetera”) commenced a lawsuit against Columbia, Insuremax, Kathleen Rohner and Mybia Corporation for negligently canceling their Commercial Auto Insurance after the vehicle was involved in an accident with a Third party. CP 197-198. Following a Motion for default judgment in 2007, supported with Usoro’s declaration itemizing their damages, the King County Superior Court awarded a default judgment of **\$180,479.67** in favor of Usoro and Etcetera on July 25, 2007. CP 64- 70, 72-74.

Usoro hired Charles Helm to collect the judgment. Helm mishandled the underlying judgment and conceded to a Motion to vacate judgment 17 months thereafter and despite that the Court entered a new Case Schedule setting trial date to October 19, 2009, Helm was unable to comply with the schedule. Consequently, the underlying judgment was dismissed in September 2009. Usoro brought the Legal Malpractice against Helm on December 15, 2009 and filed Summary Judgment three months into discovery. Helm’s attorneys filed Cross Motions to remove

Usoro as a plaintiff and dismiss the legal malpractice. On April 30, 2010, the trial Court denied Usoro's motion and removed him as a plaintiff and subsequently dismissed their legal malpractice on August 26, 2010 with prejudice and disregarded Usoro and Olin's declarations as inadmissible hearsay. The trial court erred by failing to admit into evidence Usoro's experts testimony. The trial Court further erred by denying Usoro's Motion for Reconsideration on September 16, 2010.

Usoro asks for a new trial, or, in the alternative, a remand with directions that their experts' testimony be admitted into evidence, thus, for breach of standard of care, Attorney-Client relationship, and breach of contract, Causation and damages, the issues to be determined by the jury, not the trial Court.

ASSIGNMENTS OF ERROR

The trial court erred by:

1. Holding on Summary Judgment that Usoro's Legal Malpractice and breach of contract are dismissed with Prejudice, that Usoro could not prove causation and damages, disregarded Usoro and Olin's affidavit as inadmissible hearsay.
2. Denying Usoro's Summary Judgment and removed him as a Plaintiff in the legal malpractice and breach of contract against Helm.
3. Holding that the vacation of judgment in the Underlying was set aside through non- negligence on part of Helm.

4. Holding that Usoro's insurer in the underlying case provided all representation for Usoro and paid all the costs of settling the claim against Usoro, that Usoro could not establish an entitlement to any further damages under the claim.
5. Holding that Usoro did not directly refute in the cursory opinion that Summary judgment could have been defeated, that Usoro could not prove their damages and have not shown they should have had a different outcome during trial in the underlying case.
6. Holding that Usoro's legal Malpractice is more of a legal question than it was a factual one.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Usoro and Etcetera submit the following issues for review:

1. Whether the trial Court abused its discretion, set a higher standard in proving legal malpractice, refused to recognize Usoro's experts' testimony and other evidence showing Helm's breached the standard of care, failed to take reasonable steps to litigate the Underlying case, withdrew two months to trial without conducting a single discovery in the underlying case. (Related to Assignment 1)
2. Whether the trial Court erred denying Usoro's Motion for summary judgment, removed him as a plaintiff on April 30, 2010, disregarded that the contractual relationship with Helm was based upon 20% verbal contingency fee agreement during collection, neither told Usoro he was not his Client. (Related to Assignment 2)
3. Whether the trial Court committed reversible error by failing to apply the law by not looking at Helm's actions and in-actions following the vacation of the

default judgment and up to the time of his withdrawal in the underlying case. (Related to Assignment 3)

4. Whether the trial Court committed reversible error whereas Helm provided no evidence before the Court that Usoro purchased a private Insurance for their 1998 Town Car as opposed to Commercial liability coverage that they had, and that Usoro's Insurers provided representation, paid all the costs settling claim against Usoro as contained in the underlying Complaint. (Related to Assignment 4)
5. Whether the trial Court abused its discretion holding that Usoro did not directly refute in their cursory opinion that Summary judgment could have been defeated and could not prove their damages that a different outcome would be achieved at trial in the underlying case. (Related to Assignment 5)
6. Whether the trial Court committed reversible error holding that Usoro did not provide the Court with any authority for the proposition of damages and causation in the legal malpractice showing it would have survived Summary judgment but faced with doubtful ultimate prospects on its merits. (Related to Assignment 5)
7. Whether the trial Court abused its discretion by holding that Usoro's legal Malpractice was more of a legal question than a factual one. (Related to Assignment 6)

STATEMENT OF THE CASE

- A. **Uwem Usoro formed Etcetera in 2001 as a Commercial Transportation Company with two vehicles, retired in 2003 and incorporated it ("Etcetera") and became the major Shareholder and Manager.**

Usoro formed Etcetera in 2001 as a commercial transportation company providing services to their clients around King County, Washington. Usoro retired in 2003 and incorporated Etcetera and became the major shareholder in the company. CP10 ¶ 8-9, 792.

B. In 2004, Usoro had four vehicles registered to Etcetera, purchased Commercial Liability Insurance from Columbia Insurance for their 1996 Eldorado bus and was issued with a Certificate of Liability Coverage from 12/28/2004 to 12/28/2005 on Policy #: 71 APN 325968.

Usoro purchased a commercial liability insurance in 2004 with Columbia insurance for Etcetera's 1996 Eldorado bus and was issued a valid commercial liability coverage from 12/28/2004 to end on 12/28/2005 on Policy No: 71 APN 325968. CP 45-46, CP 254-255 ¶ 2.

C. In February 2005, Usoro purchased their fifth vehicle, a 1998 Lincoln Town Car, purchased a Commercial Liability Insurance through Kathleen Rohner (now Allison) and Insuremax, agents to Columbia based on their existing commercial auto coverage on the 1996 Eldorado bus with Columbia Insurance.

Usoro purchased Etcetera's fifth vehicle, a 1998 Lincoln Town Car, contacted Rohner to have it covered under their existing commercial auto insurance with Columbia Insurance based on the 1996 Eldorado bus. Rohner agreed, issued an Amended Certificate of Commercial Liability Insurance and Identity Card on February 10, 2005 starting from 12/28/2004 to 12/28/2005 based on Policy #: 71 APN 325968. CP47-49,

197-198. Usoro used the Certificate to register the vehicle with the Department of Licensing in Olympia, Washington. CP 254-257, CP 809.

D. After a valid Certificate of Commercial Liability Insurance was issued to Usoro, Rohner was required to forward the papers to Columbia to cover the Town car.

In March 2005, Etcetera's 1998 Town Car was involved in an auto accident with a Third party. Usoro contacted both Rohner and Columbia insurance to cover their liability. Columbia declined and alleged the vehicle was not a covered auto under their policy. Rohner alleged she cancelled the coverage shortly after issuance on 2/10/2005. Rohner did not send cancellation notice to Usoro within 30days as required under the policy and to other policy holders. CP 435-437, CP 659¶ 3, FORM E. The Third Party filed a Complaint for Personal injury against Etcetera and its driver at King County Superior Court on Cause #: 05-2-13588-3 SEA.

E. In April 2005, Usoro hired The Law Office of Anders F. Olin, PS in Mukilteo to investigate the disputed coverage with Insuremax, Columbia and on April 22, 2005, Olin submitted his report to Usoro.

Usoro hired Anders Olin to investigate their commercial auto coverage because Columbia and Rohner alleged the Town car was not covered under their policy. Olin received documents from Cochrane's Vice President, Lance Kilewer, agents to Columbia, Mybia Corporation and provided Usoro with a report on April 22, 2005 that Rohner

negligently canceled their coverage. CP 441¶3, 441¶2. The fax cover page provided to Olin showed Rohner's initial instructions to add the 1998 Town Car on February 10, 2005 based on Policy No. 71APN325968, and later used the same faxed paper to tell Mr. Kilewer to: "IGNORE MY ERROR WRONG ACCOUNT thx". CP 444.

F. Usoro hired their former Attorney, David Estudillo to represent him and Etcetera against Rohner, Insuremax and Columbia; Columbia agreed to defend the Third-Party Lawsuit, "With reservation of right" and hired a Law Firm, Dunlap & Soderland, PS.

Usoro hired David Estudillo to represent them on the disputed commercial Auto coverage. Columbia later agreed to represent Etcetera and its driver on a "reservation of right". CP 704 ¶ 2. It settled the Third-Party lawsuit with Ms. Duchemin's attorneys for \$95,000. CP 62. Columbia denied Usoro's damages submitted by Estudillo. Estudillo filed Complaint for damages on August 16, 2006 against named Defendants on Cause #: 06-2-26256- 5 SEA. CP 184-195. Columbia and Rohner were served with Complaint and Summons by ABC Legal Messengers on August 21, 2006, CP 320. Columbia filed an Answer, responded to Estudillo's Discovery requests, and no response was received from Rohner and Insuremax. CP 707-716. Columbia's investigations led to settling the personal injury lawsuit and entered into with Estudillo for an Agreed

Order of Stipulation for dismissal on May 11, 2005 and further agreed not to pursue their subrogation against Usoro and company. CP 732-733.

G. David Estudillo filed Motion for default judgment against Insuremax and Kathleen Rohner on October 19, 2006, and for entry of default on July 11, 2007 pursuant to CR 55(b) (1), supported Motion with Usoro's affidavit detailing Etcetera's damages and the Court awarded judgment on July 25, 2007 to Usoro and company for \$180,479.67 (\$14,141.67 in attorney fees and \$166,338 in damages).

David Estudillo's Motion for default was supported with Usoro's affidavit detailing Etcetera's damages on July 2, 2007. CP 64-70. Estudillo Motion for entry of Judgment on July 11, 2007, was served on Rohner who filed no response. The Court awarded Default Judgment in favor of Usoro and Etcetera against Rohner and Insuremax and others. CP 72-74. Mr. Estudillo withdrew from the case on September 20, 2007 because he had limited experience in collection procedures and recommended Helm. CP 76-77. Usoro hired Helm to collect judgment in April 2008 and entered into a verbal contingency fee of 20% of the judgment amount. CP 155 ¶ 5, 347 ¶ 8 RFA, CP 662 ¶ 9-10.

H. Helm wrote Usoro on April 10, 2009 to hire an expert to prove their damages and in May 2009, Usoro hired Kevin Grambush, CPA with Greggemann And Johnson, Yeanopolis, PC, CPA to review Etcetera's financial statements to provide Helm with expert opinion and agreed to pay initial retainer fee of \$1,500 in three installment payments in June, July and August 2009 to Grambush.

Usoro received Helm's letter to look for expert to prove their damages in April 2009. CP 110. In May 2009, Usoro hired Kevin Grambush and agreed to pay his retainer fee of \$1,500 in three installment payments of \$500 for June, July, and August 2009. Mr. Grambush sent engagement contract on June 10, 2009 to Helm to sign and return to him. CP 120-121. On June 17, 2009, Usoro sent the first installment payment of \$500 for June 2009. CP 125. Helm did not forward the money to Mr. Grambush and kept it for 60 days until August 13, 2009 withdrawal date.

I. Helm did not follow the new Case Schedule, was served with Rohner's disclosure of primary witnesses due on May 18, 2009, neglected to file Usoro's Primary witnesses on the same due date.

Helm neglected to follow the new case schedule entered by the Court on December 16, 2008. CP 105-106. Usoro submitted the names of witnesses to Helm as per the schedule. CP 16 ¶ 19. Helm alleged Usoro provided no witness. CP 666 ¶ 26. Helm's non-compliance with schedule includes not filing Usoro's; (a) Disclosure of Possible Primary witnesses due on 5/18/2009, (b) Disclosure of Possible Additional Witnesses due on 6/29/ 2009, (c) Jury Demand due on 7/13/2009, and (d) failure to conduct Discovery. CP 15-158 ¶ 4-5 RFD. On May 18, 2009, Helm was served with Rohner's disclosure of primary witness. CP 114-118. On June 4, 2009, Rohner's Attorney wrote Helm seeking to know whether Usoro was,

“disinterested in this case”, advising to file for a voluntary dismissal. CP

123 ¶ 1.

J. Helm withdrew from Usoro’s case on August 13, 2009, devoted no time to the case, alleged nonpayment of legal fees for July 2009, returned the Money Order of \$500 sent on June 17, 2009 for Usoro’s expert, failed to conduct discovery, neither filed motion to amend Usoro’s Complaint nor opposed Answer filed by Rockey in May 2009 and failed to file for Continuance of Rohner’s Summary Judgment to dismiss underlying case.

Helm withdrew from Usoro’s case on August 13, 2009, returned the money order for \$500 sent on June 17, 2009 by Usoro for their expert. Helm’s letter alleged he was not hired to pay Usoro’s costs. CP 130. Grambush’s engagement letter on June 10, 2009 allowed Usoro to make three payments starting in “June, July, and August” CP 207 ¶ 3. Helm received Rohner’s Summary Judgment Motion to dismiss underlying case on August 23, 2009, and did not file Motion for continuance because he alleged it was not his job to do so. CP 162-163 ¶2 RFD 15. Usoro’s underlying case was dismissed on September 2009 for lack of response on motion to dismiss.

PROCEDURAL HISTORY

- A. **Usoero commenced this lawsuit on December 15, 2009, seeking damages for Legal Malpractice, breach of contract and emotional distress against Charles Helm and company and later dropped emotional distress claim.**

Usoero retained their attorney to assert Legal Malpractice claims and breach of contract. CP 1-20. The Complaint was filed on December 15, 2009 against Charles Helm and Helm and Helm, Inc, for legal malpractice, breach of contract and negligent infliction of emotional distress. Usoero abandoned the infliction of emotional distress relief .CP 18-20.

1. **The Complaint alleged Helm was hired to collect the Judgment of \$180,479.67 entered in favour of Usoero and Etcetera on July 25, 2007.**

Usoero alleged Charles Helm was hired in April 2008 to collect the Judgment of \$180,479.67. Helm entered Appearance on August 11, 2008 and filed Supplemental proceeding and later had it Stricken on September 3, 2008. Complaint, ¶12-13 at CP 12.

2. **The Complaint alleged Helm did not disclose to Usoero he did not have litigation experience, did not provide reasons to Usoero for striking the supplemental proceeding, Usoero did not consent to Helm's litigation inexperience, failed to withdraw from Usoero's case on time and that Usoero would have fired Helm if he knew Helm had limited litigation experience.**

Complaint alleged Usoro was not provided with reasons for striking the supplemental proceeding on September 3, 2008, that Helm knew judgment was more than one year prior to motion to vacate and did not defend the CR60 motion well enough. Complaint alleged Helm did not have litigation experience, did not withdraw from case if Helm had difficulty prosecuting the underlying case, and Usoro did not consent to Helm's inexperience and would have fired Helm for lack of litigation experience and not paying attention to their case. Complaint, ¶ 13 at CP 12.

3. **The Complaint alleged Helm received Rohner's Motion to vacate judgment, filed a two page response and opposition, failed to address the legal issues raised in the Motion to vacate under CR 60, failed to support the response with Usoro's affidavit or any witness, the Court vacated the judgment and entered a new Case Schedule on December 16, 2008.**

The Complaint alleged that Rohner's Motion to vacate Usoro's judgment came too late, approximately 17months after entry of judgment, Helm's two page response failed to address the legal issues raised in the CR 60 motion , failed to support his response with Usoro's affidavit or any witness, the court vacated judgment and entered new case schedule. Complaint, ¶ 14-15 at CP 13-14.

4. **The Complaint alleged Helm did not discharge the obligations owed Usoro, failed to file Motion**

to Amend Underlying complaint, negligently stayed on the case, messed it up by playing along with Rohner's attorney, did not conduct discovery with brokers , failed to keep status update of the case with Usoro who was not told of the hearing on December 16,2008, withdrew on August 13,2009 alleged non-payment of legal fees for July to insulate Helm's misconduct, and failed to stay on until Usoro retained a new Counsel.

The Complaint alleged Helm breached the duty of care owed to Usoro by failing to file Motion to amend underlying complaint, engage in discovery to find brokers liability, negligently stayed on, messed their case up and played along with Rockey, failed to provide Usoro with case status update, withdrew on August 13, 2009 and alleged non-payment of July legal fee in attempt to insulate his misconduct and unable to stay until Usoro hired a substitute counsel. Complaint, ¶16-17 at CP14-15.

5. **The Complaint alleged Helm misrepresented Usoro's coverage on December 9, 2009 letter to his carrier on the witness list provided by Usoro, Usoro hired Kevin Grambush who agreed to provide Etcetera's damages, gave Helm his number to work with Grambush, received Grambush's engagement letter on June 10, 2009 on agreed initial retainer of \$1,500 to be paid on three instalments , Helm received the initial \$500 from Usoro and failed to forward the money to Grambush, provided witness list to Helm which was not filed in Court, failed to comply with activities on case schedule and abandoned Usoro's case in the middle of litigation resulting in the underlying case being dismissed on September 18, 2009, the Motion for**

reconsideration was also denied on October 9, 2009 and Usoro lost out.

The Complaint alleged Helm misrepresented facts on a letter of withdrawal on August 13, 2009 by alleging non-payment of legal fees to insulate his misconduct, that Helm received witness list and failed to file them in court, received engagement contract from Mr. Grambush on June 10, 2009 showing payment arrangement and did not sign or tell Usoro, received retainer fee of \$500 from Usoro which was not forwarded to their expert, the underlying case was dismissed in September 2009 and the Motion for reconsideration denied in October 2009. Complaint, ¶ 18-21 at CP15-17.

6. **The Complaint alleged Helm's action helped Rohner's attorney to have expeditious favorable resolution as stated in his letter on December 9, 2009, failed to protect Usoro's interest, directly or indirectly worked with Rockey until withdrawing from the case, admitted he may have handled the matter poorly, stayed on until the case was dismissed because Helm mischaracterized the value of Usoro's underlying case and breached his duty of care and failed to defend the underlying case**

The Complaint alleged Helm's action helped Rockey to have an expeditious favorable resolution, resulted in the dismissal of underlying case, failed to protect Usoro's interest, Helm admitted he handled the matter poorly and mischaracterized the value of Usoro's underlying case.

Complaint, ¶21 at CP 17-18. The Complaint alleged Helm and company are responsible for the wrongful conduct of Usoro's underlying case.

Complaint, ¶23 at CP 18.

7. The Complaint alleged Legal Malpractice, breach of Contract, and requested prayers for relief including reimbursement of the mishandled amount of \$180,479.67, attorney fees and costs incurred

The Complaint alleged legal malpractice, breach of contract and prayers for relief for reimbursement of Usoro's mishandled underlying case that had a value for \$180,479.67, plus interests, Attorney fees, et al. Complaint, ¶26-27 at CP18-20 .

B. Usoro and Etcetera filed motion for summary judgment in March 2010 against Helm during discovery, Helm's attorneys inundated Usoro with multiple Cross Motions to dismiss their lawsuit, strike Usoro's declarations And Olin's Exhibit 3 and remove Usoro as Plaintiff.

On March 23, 2010 Usoro and Etcetera filed Motion for Summary Judgment scheduled on April 30, 2010. The Motion was supported with other evidence and Helm's Supplemental Answers to Plaintiffs (Usoro) First Set of Interrogatories and Request for Production, et al. CP 22-228. On April 19, 2010, Helm's attorneys inundated Usoro with response and opposition to Usoro's Motion for Summary Judgment and sought to dismiss Underlying case, strike Usoro's declaration, and Olin's Exhibit 3, and remove Usoro as a Plaintiff, and supported their motion with

Declaration of Charles Helm and Stacia Hofmann. CP___ On April 26, 2010, Usoro filed a response and opposition to Helm's Cross Motion to remove Usoro as Plaintiff and Response to Motion to strike Olin's Exhibit 3. CP 229-235, 236-246. On April 29, 2010, Usoro filed response to Helm's supplemental Motion to Strike Usoro's declaration on April 25, 2010. CP 247-250. The Trial Court denied Usoro and Etcetera's Summary Judgment, granted Helm's Motion on April 30, 2010, removed Usoro as a Plaintiff, and continued Helm's Motion to dismiss Etcetera's lawsuit to June 18, 2010. CP 251-253.

C. In May 2010, Usoro hired their experts, Tawni Berg, CPA to evaluate Etcetera's financial statements and records to determine damages, and Joseph Ganz to review the underlying case and provide expert's testimony regarding Helm's representation during collection of judgment and for Anders Olin to authenticate April 22, 2005, investigative report regarding Rohner's cancellation of Usoro's commercial auto coverage issued on February 10, 2005.

Usoro hired Tawni Berg, CPA with Huddleston Tax CPAs to review Etcetera's financial statements, Tax returns, contracts, agreement, property schedules, prior valuation, reports and other records or documents to determine their damages. She submitted her report on June 8, 2010. CP 327-331. Usoro hired Joseph Ganz to review the underlying case and provided expert testimony on June 15, 2010. CP 333-342. Usoro hired Anders Olin who provided an affidavit on June 2, 2010

authenticating his report dated April 22, 2005. CP 309-318. On June 14, 2010, Usoro filed a response and opposition to Helm's Motion to Strike Exhibit 3(Anders Olin's affidavit), supported with Usoro's declaration and opposition to Helm's Motion to strike. CP254-264, 258-26. On June 15, 2010, Usoro filed Etcetera's response to Helm's Motion for Summary Judgment, supported with Usoro and Raphael Nwokike's declarations and attachments. CP 273-372.

D. On June 21, 2010, the trial Court denied Helm's Motion to dismiss Etcetera's Lawsuit, gave Helm leeway to re-note their Motion within 60 days assuming Usoro was unable to prove causation and damages and Helm re-noted the Motion on July 9, 2010.

On June 18, 2010, Counsel presented oral arguments. On June 21, 2010, the trial Court denied Helm's Motion. CP 417-420. The Court gave Helm 60 days to re-note motion assuming Etcetera was unable to prove causation and damages. Trial Court neither mentioned Tawni Berg's report on Usoro's damages, nor Anders Olin affidavit authenticating the report dated April 22, 2005. On July 9, 2010, Helm re-noted Motion to dismiss and scheduled it to August 20, 2010.

E. Usoro re-hired Joseph Ganz to review its opinion and provide supplemental testimony, hired a financial expert, Bret Espey, CPAs to review Etcetera's financial records and determine damages, re-noted Etcetera's Amended Motion for Summary Judgment on July 13, 2010 denied on April 30, 2010 and supported with Usoro's experts' testimony.

On July 13, 2010, Uoro re-noted Etcetera's Amended Motion for Summary Judgment denied on April 30, 2010. Uoro re-hired Mr. Ganz to provide Supplemental testimony. Bret Espey, CPA was hired to review Uoro's financial statements, do business valuation and determine Uoro's damages. On July 16, 2010, Etcetera filed an amended motion for Summary Judgment, supported with Ganz's supplemental opinion dated July 15, 2010. CP 519-520. On August 10, 2010, Etcetera filed Amended response to Helm's Motion to dismiss and supported it with Bret Espey's expert's testimony on Uoro's damages. CP 522-530.

F. On August 20, 2010, Counsel presented oral argument. On August 26, 2010, the trial Court granted Helm's Motion, dismissed Etcetera's legal malpractice with prejudice and disregarded affidavit of Anders Olin, Uwem Uoro as inadmissible hearsay.

On August 26, 2010 the trial Court dismissed Uoro's legal malpractice with prejudice and disregarded Uoro and Olin's declaration as inadmissible hearsay. CP 593-596.

G. Uoro filed Motion for Reconsideration and New Trial on September 3rd, 2010 which was denied on September 16, 2010.

On September 3, 2010, Uoro filed Motion for reconsideration and New Trial. CP 597-610. On September 16, 2010, the trial Court denied Uoro's Motion for reconsideration. CP 611.

H. Usoro and Etc Engineering filed their Notice of appeal on October 6, 2010 to Washington State Court of Appeals, Division 1.

On October 6, 2010, Usoro filed Notice of Appeal to Washington State's Court of Appeals, Div. 1.

ARGUMENT

A. The trial Court erred by entering summary judgment in favour of Helm, denied Usoro and Etcetera's motions for Summary judgment for Legal Malpractice and breach of Contract.

1. The standard review from Summary Judgment is de novo.

The Appellate Court reviews a Summary judgment order de novo. *Kruse v Hemp*, 121 Wash. 2d 715, 722, 853 P.2d 1373 (1993). Summary Judgment is appropriate only if the pleadings, affidavits, depositions and admissions on file demonstrate the absence of any genuine issues of material fact and the moving party is entitled to judgment as a matter of law CR 56(c). The moving party bears the burden of demonstrating there is no genuine dispute as to any material fact. A material fact is one upon which the outcome of the litigation depends, in whole or in part. *Barrie v. Host of Am., Ins.*, 94 Wash.2d 640, 642, 618 P.2d 96 (1980).

B. The trial Court erred and removed Usoro as a Plaintiff in the Legal Malpractice and breach of contract on April 30, 2010.

1. Usoro hired Helm to represent him and Etcetera for collection of judgment of \$180,479.67 in 2008

To establish a legal Malpractice claim, a party must prove the four elements; (i) the existence of an attorney-client privilege relationship, which gives rise to a duty of care on the part of the attorney to the client; (ii) act or omission by the attorney in breach of the duty of care, (iii) damage to the client, and (iv) proximate causation between the breach of duty and the damages. The trial Court erred by not applying the legal standard in proving legal malpractice in Usoro's case and refused to admit into evidence the testimony of their experts. This raised material issues of fact. *Hzey V. Carpenter, 119 Wash. 2d 251, 260-61, 830 P.2d 646(1992)*

Usoro hired Helm for the collection of judgment in 2008 and entered into a verbal contingency fee agreement of 20% on the judgment amount. CP 347 RFA¶7. The hiring of Helm is a question of fact that cannot be decided by summary judgment. Usoro subjectively believed Helm was his attorney as well as Etcetera, his company. Helm provided the Court with not single evidence regarding the scope of his representation and cannot claim Usoro was not a client. To settle this dispute, summary judgment is inappropriate because the contractual relationship between them sounds both in tort and breach of contract. *See Bowman v. Doe, 104 Wn.2d 181, 187, 704 P.2d 140 (1985)* (Washington

allows an action for legal malpractice to be framed either as a tort or a breach of contract); *Bohn v. Cody*, 119 Wn.2d 357, 367, 832 P.2d 71 (1992)("[b]ecause a duty could still exist between [the defendant attorney] and [plaintiffs], the [plaintiffs'] contract and negligence causes of action were improperly dismissed"). Therefore, the trial Court erred by removing Usoro as a Plaintiff in the legal malpractice.

In Re Eggers, 152 Wn. 2d 393, 98 P.3d 477(Wash. 2004), The Appeals Court held that the, "essence of the attorney-client relationship is whether the attorney's assistance or advice is sought and received on legal matters. *Jones v. Allstate Ins. Co.*, 146 Wash.2d 291, 306, 45 P.3d 1068 (2002); *Bohn*, 119 Wash.2d at 363, 832 P.2d 71. Usoro received legal advice and both assistance in their case with Helm as their attorney. An attorney-client relationship may be implied from the parties' conduct; it need not be memorialized in writing. *Bohn*, 119 Wash.2d at 363, 832 P.2d 71. Whether or not a fee is paid is not dispositive, for "[t]he existence of the [attorney-client] relationship 'turns largely on the client's subjective belief that it exists.' "Id. (quoting *In re Disciplinary Proceeding Against McGlothlen*, 99 Wash.2d 515, 522, 663 P.2d 1330 (1983). Usoro's subjective belief must be "reasonably formed based on the attending circumstances, including the attorney's words or actions." In this case, any doubt ought to be resolved in favor of Usoro, and not Helm. Regarding

whether Usoro was Helm's client, the trial Court seemed to base its opinion on inference upon inference that attorney-client relationship did not exist. The "essence of attorney-client relationship is whether the attorney's advice or assistance is sought and received on legal matters". *Id.* Similarly, Helm advised Usoro to seek for expert to prove their damages and as a result Usoro; (1) Paid Helm the sum of \$100 needed to start the supplemental proceedings for collection of judgment in July 2008, CP 79; (2) Usoro hired Kevin Grambush, CPA to review their financial statements, records and Tax Returns in May 2009, CP 112, (3) Provided Helm with the sum of \$500 initial retainer fee for their expert for June 2009 payment, CP 125, and (4) Submitted list of primary witnesses to Helm. CP 16. The trial Court erred by not recognizing that Usoro was an interested party in the Legal Malpractice and not an incidental beneficiary. It simply raises material issues to be decided by the jury whether the relationship between Helm and Usoro was incidental or intended. Although, Usoro did not file Motion for reconsideration, in *VersusLaw, Inc. v. Stoel Rives, LLP*, 127 Wash.App, 309, 111 P.3d 866 (2005), the Appeals Court opined that;" Client's appeal from order granting summary judgment to law firm in legal malpractice action was sufficient to encompass all three grounds relied on by trial court; client did not waive any ground by failing to specifically assign error to that portion

of summary judgment”. Usoro could not have waived his rights by not filing motion for reconsideration considering their expert; Joseph Ganz testified on June 15, 2010 that their relationship created an attorney-client. CP 336 ¶ 1

Realizing that Usoro shouldn't have been removed as a Plaintiff based on Ganz's opinion, the trial Court, instead, defended its misapplication of the law on June 21, 2010 Order, that Usoro did not file Motion for reconsideration. CP 419¶2. The trial Court's error cannot be allowed to stay as this should be reserved for the jury. It has been said that once the attorney-Client relationship is established, the remaining elements are the same as for other negligence actions. *16 Wash. Practise. Tort Law and Practise § 15.41(3d ed.)*. Legal Malpractice may be established based upon breach of contract which was asserted in Usoro's Complaint. CP 19 ¶ 27. To succeed, Usoro was only required to show the failure to fulfil specific terms of the contract for representation, rather than negligence performance of contractual duty. *Owens V Harrison, 120 Wn. App. 909 86 P.3d 1266 (2004)*. The loss of value of Usoro's underlying judgment showed that Helm was unable to collect because he lacked litigation experience. Helm's December 9, 2009 letter to his carrier was a case of res ipsa loquitor. CP 288 ¶ 3. The trial Court ignored this serious admission and evidence. The standard of care to which a Washington

lawyer is held is that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in the state of Washington. *Walker v. Bangs*, 92 Wn.2d 854, 859 (1979). Considering Helm's lack of litigation experience, the trial Court should have held him in breach of the standard of care. The defense of "lack of litigation experience" has never been a mitigating factor in legal malpractice. Helm needed to withdraw after vacation of judgment but stayed on.

In Re Guardianship of Karan, 110 Wn. App 76, 84-87, 38 P.3d 396(2002), the lawyer hired by the Mother of the minor to help her set up a guardianship for her child's estate, was held to owe the child a duty and established attorney-client relationship. Usually, Washington Court applies a six-element test to determine whether a person is an intended beneficiary. *Trask*, 123 Wash.2d at 842, 872 P.2d 1080. "In the absence of an express lawyer-client relationship, Washington courts use a *multi-factor balancing test* set forth in *Trask* to establish whether the lawyer owes the plaintiff a duty of care in a particular transaction, the court must determine: (1) The extent to which the transaction was intended to benefit the plaintiff, (2) The foreseeability of harm to the plaintiff, (3) The degree of certainty that the plaintiff suffered injury, (4) The closeness of the connection between the defendant's conduct and the injury, (5)The policy

of preventing future harm, and (6)The extent to which the profession would be unduly burdened by a finding of liability. This Court should adopt the same test in Usoro's case to remand it for a new trial. As an intended beneficiary on the judgment of \$180,479.67, it is difficult to fathom that an attorney hired to collect the value of an underlying judgment allowed it to dissipate due to his negligence. The Appeal Court, Div. 3 opined that; "The threshold question in determining if the lawyer owes a Plaintiff a duty of care in a particular transaction is whether the non-client Plaintiff is an intended beneficiary of the transaction; if not, there is no further inquiry" *Id.* In the instant case, Usoro is not a non-client because their expert said so and is willing to testify at trial.

The trial Court removed Usoro as Plaintiff because Helm argued there was no privity of contract, and yet, provided no evidence to support his theory. Contract law is concerned with society's interest in performance of promises, with the goal of placing the plaintiff where he should or would be, if the Defendant had performed as promised. It has been said that privity of contract ("written or oral") does not define the scope of those to whom you owe a duty of care. *Bohn v. Cody, 119 Wn. 2d 357, 365, 832 P.2d 71 (1992)*. Helm's denial that Usoro was not his Client and owed no duty falls apart on the Supplemental Response to Usoro's discovery request and opposition motions. CP161¶3, CP164¶1-4, CP 620.

In Bohn, the Supreme Court remanded the case to trial because it fathomed there existed genuine issues of material fact as to whether *Bohn* was within the class of non-clients to whom an attorney owes a duty of care. In other words, you may owe a duty of care, or, a fiduciary duty, to a person, even if you do not have a formal attorney-client relationship agreement with the party. In contrast, Helm owed a duty to Usoro when he agreed representation on a contingency fee of 20% of the judgment amount. This relationship created a contractual obligation.

The trial Court erred by failure to acknowledge that , when an attorney accepts representation for his client, he undertakes the duties of fiduciary to the client, bound to act with utmost fairness, and in good faith toward the Client in all matters. *Perez v. Pappas*, 98 Wn. 2d 895, 840-41, 659 P.2d 475 (1983) (“Attorney owes highest duty to the client”); *Versuslaw, supra*, (“[T]he attorney-client relationship is a fiduciary one as a matter of law and thus the attorney owes the highest duty to the Client”). *Kelly v. Foster*, 62 Wash. App. 150, 155, 813 P.2d 598 (1991). Helm’s failure to reduce his scope of representation in writing bars him from arguing that Usoro was not a Client. An attorney is expected to know the law or to research and determine the applicable law to avoid falling below the standard of care. *Bush v. O’Connor*, 58 Wn. App. 138, 148 (1990). Helm’s representation fell below standard. The standard of care that

should have been exercised and the scope of the attorney's duty to the client are determined as of the time the services are rendered. *Martin v. Northwest Washington Legal Services*, 43 Wn. App. 405, 408 (1986). The fiduciary relationship between attorney and client is neither new, nor unique in Washington. Washington's Court held that you may have a duty of care even if you have told the potential client, "no". *Bohn, supra*, 119 Wn. 2d at 359, 363, 365-67 (adopting a "multi-factor balancing test"). Both in the underlying case and the legal malpractice, Usoro and Etcetera were denied access to justice of having their case determined by the jury. The very purpose of trial is to allow each side to present evidence, not to pile inference upon inference from summary judgment pleadings as the trial Court did in this case. Usoro did not waive any ground by failing specifically to assign error to that portion of summary judgment order that removed him as a plaintiff by not filing Motion for reconsideration. Usoro seeks a remand so that the jury could decide whether he is Helm's client or not in the Legal Malpractice stemming from underlying case.

C. The trial Court erred that Usoro's legal malpractice is more of the legal question than it was a factual one.

Assuming the trial Court perceived Usoro's legal malpractice more of a legal question, the Court is still precluded from making an adverse ruling by deciding the case by summary judgment. Those questions are for

the jury to decide. The Appeal Court has previously held that certain material issues in dispute cannot be decided by the trial Court, even if it involves more of a legal question than factual one, “We view this determination as a mixed law and fact; as such, the trial court’s factual findings are entitled to deference, but the legal conclusion flowing from those finding are review de no”. *In re Pennington*, 142 Wn. 2d 592, 602-03, 14 P.3d 764(2000). “That is why this Court held in **Brust** that the jury’s task in a legal malpractice trial is to determine what a reasonable judge would have done”. *Brust*, 70 Wn. App. at 293(quoted as BA 16).

Usoro seeks a remand to correct this error by trial Court.

D. The trial Court erred by excluding Usoro’s experts testimony, dismissed Etcetera’s Legal Malpractice with prejudice with Case law not on point.

1. Trial Court erred by disregarding Usoro and Olin’s declarations as inadmissible hearsay or improper statements.

At the onset and opposition to Usoro’s Motion, Helm argued that Usoro failed to provide the Court with their experts’ testimony to prove damages. CP640-641. Whereas Usoro submitted their experts’ testimony the Court still excluded all of them. The trial Court erred by excluding Usoro’s experts’ testimony of Joseph Ganz’s on June 15, 2010 and July 15, 2010. CP 333-342, 474-475, Tawni Berg’s financial report showing Etcetera’s projected loss of revenue in 2009. CP 327-331, and Bret

Espey's update on Etcetera's damages through August 2010. CP 522-530. In excluding the proposed damages from Usoro's experts, neither did the Court show in its Order that Tawni Berg and Bret Espey's testimony were submitted before it, nor did it state that they were not "qualified" and could not be designated as Usoro's "experts" in the legal malpractice. The trial Court simply ignored the experts' testimony and their evidence. The same attitude was adopted by the trial Court regarding Anders Olin's affidavit authenticating the investigative report dated April 22, 2005. CP 309-318. The trial Court disregarded Olin's affidavit not minding he was both Usoro's witness and a licensed Attorney in Washington and went on to declare his testimony as inadmissible hearsay. Once again, the trial Court did not say whether Olin was not "qualified" or could not be referenced as an "expert". It has shown that Usoro could prove Attorney-Client relationship, breach of standard of Care, Causation and damages in the legal malpractice. The attitude of the trial Court raises material issues in dispute as to why Usoro's experts' opinions should be disregarded as if it did not exist and were not admitted into evidence.

Succinctly put, the trial court point blankly ignored each of Usoro's experts' testimony and brazenly dismissed the legal malpractice with prejudice adopting, *Geer v. Tonnon*, 137 Wn. App. 838 155 P.3d 163 (2007). At onset, Helm's opposition Motions cited the case of *Geer* as the

basis that Usoro could not prove damages. CP 641. When Usoro's experts provided proof of damages, Helm's attorneys continued to argue they could not still prove Causation and damages. Given Usoro's experts testimony on damages, Geer case has become irrelevant that Usoro could not prove damages given it was not on point with Usoro's legal malpractice. An opinion is on point, and may be considered as precedent, if there is sufficient similarity between the key facts and the rule of law/legal principles that governs both the trial Court's opinion. Applying a different rule should only occur when there is no case that interprets the rule or principle governing Usoro's case. The test of legal malpractice has stayed for ages and does not need the stringent tests that the Court subjected Usoro in proving their damages. The Trial Court's opinion is subject to an interpretation different from that relied upon in support of a legal position as in *Geer, supra*.

The Trial Court erred by a misplaced reliance on a case in which this Court justifiably affirmed a dismissal on summary judgment in a professional negligence claim for failure to prove damages and file an equitable lien claim because the claim was not a recognized cause of action under Washington law, *review denied, 162 Wn. 2d 1018 (2008)*. *Geer* alleged his attorney failed to file suit against an insurer within one year contractual limitation. *Geer* appealed the trial Court's dismissal of the

legal malpractice against Tonnon. On review, the Appeal Court affirmed and held that; (1) Geer's professional negligence claim based upon retroactive endorsement failed for lack of expert testimony, or, other evidence establishing either a breach of duty or attorney-client relationship with his attorney; (2) did not have insurance in his name, (3) did not have equitable lien on the policy proceeds with Lloyd and wouldn't have succeeded at trial. This Court held that Washington law does not provide a person who is not a named insured with a cause of action to enforce an equitable lien on insurance proceed directly against insurer, let alone suing his attorney.

Usoro's case sharply contrasts **Geer's** based on the following grounds; (1) Usoro hired an expert in May 2009, paid Helm \$500 for their expert to review financial statements/records, he kept the money for 60 days and failed to send it to Grambush; (2) Helm did not follow the new Case Schedule, consequently, Usoro's underlying case was dismissed on September 18, 2009, (3) Usoro hired four experts whose testimony were excluded by the trial Court except Ganz's testimony which was not fully adopted by the trial Court. Usoro's Motion for reconsideration pointed out the trial Court's errors and misapplication of the law on September 3, 2010, and yet, the Court denied the Motion. CP 597. Washington Court held that the expert testimony on standard of care is mandatory to establish

prima facie case of legal malpractice. *Dorf v. Relles*, 355 F.2d 488 (7th Cir. 1966). Even though Ganz opined on the standard of care, attorney-client relationship, Causation and other elements of the malpractice, the trial Court failed to acknowledge his opinion. Ganz did not opine on Usoro's damages because Usoro already retained a financial expert, Bret Espey to determine their damages. Because Ganz did not opine on damages does not, ipsa facto, imply that Usoro could not prove causation and damages, or, could not have prevailed at trial in the underlying case. Once a relationship giving rise to a duty is established, the elements of a malpractice claim are the same as for any other negligence action. *Stangland*, 109 Wash.2d at 679, 747 P.2d 464. Those elements are: breach, *Ahmann-Yamane*, 105 Wash.App. at 108, and 19 P.3d 436; proximate cause, *Bowman v. Two*, 104 Wash.2d 181, 186, 704 P.2d 140 (1985); and damages, *Matson v. Weidenkopf*, 101 Wash.App. 472, 484, 3 P.3d 805 (2000).

The trial Court's erred when it disregarded Usoro and Olin's declarations as inadmissible hearsay. **First**, Usoro's declaration presented a credible account and recollection of events that occurred between him and their attorney. Helm's Motion and opposition to strike Usoro's declaration was based on *ER 701* which injected nothing but confusion to the Court by misinterpreting *Evidence Rule 701*. The rule simply says, that

if a witness is not testifying as an expert, just like Usoro was not, his testimony in form of opinion or inference, may be limited to the opinions or inferences that are: (1) rationally based on the actual perception of the witness, and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. Undoubtedly, Usoro's declarations could not be considered as opinion of lay witness considering that he did not fabricate facts to support the legal malpractice theory. A person can actually testify on the basis of personal knowledge of the fact in issue. *ER 602*. The Rule provides that evidence of personal knowledge may consist of the witness own testimony. Here, equivocation goes to the weight, not admissibility of testimony. Credibility is for the jury to determine and not the trial Court. Further, Usoro's declarations are supported by Washington *Evidence Rule, ER 801 (a-c)* on the fact that these statements are the truth relied upon to determine whether Helm mishandled the underlying case or not. The litmus test for hearsay is reliability. Helm's admitted by his own words that; "I don't disagree that, after the judgment was vacated. Perhaps I handled the matter poorly", although he disagrees with the value of the award to Usoro in 2007. CP 289 ¶ 2. On equal relevance is the fact that the trial Court did not point out those portions of Usoro's declaration that should be admitted or considered as inadmissible hearsay. A blanket condemnation and exclusion of all of Usoro's statements on all

declarations supporting motion practise is not the law. These are material issues in dispute to be decided by the jury not the trial Court.

Secondly, the trial Court erred that Olin's declaration was inadmissible hearsay. Olin's declaration authenticated the investigative report submitted on April 22, 2005 to Usoro regarding the disputed commercial liability coverage for their 1998 Town Car with Rohner. CP 439-442. Olin's declaration on June 2, 2010 cannot be inadmissible hearsay since he was the maker of Exhibit 3 attached with Usoro's Summary Judgment motion in March 2010. CP 51-56. Olin's affidavit satisfied document authentication and identification under *ER 901(b) (1)*. Here, the best evidence rule required that Olin's 2005 report falls under *ER 1001(a)*, and cannot be disregarded as inadmissible hearsay. Olin is Usoro's expert, a licensed Washington attorney and qualified to authenticate his 2005 report. The reason for Helm's opposition to strike Olin's declaration and Exhibit 3 stemmed from the obvious fact, that if this piece of evidence is admitted by the trial Court, it beholds upon any reasonable mind to conclude that the Court should hold Helm in breach of standard of care for failure to conduct discovery with Rohner (underlying brokers) after the default judgment was vacated in December 2008. In this summary judgment appeal, the Court should accept Usoro's account and make any inferences favourable to Usoro and Etcetera, not to Helm.

E. The trial Court erred that Usoro provided the Court with no authority for the proposition of damages and causation in a Legal malpractice showing it would have survived summary Judgment but faced with doubtful ultimate prospects on its merits.

1. The Court erred in deciding Usoro's legal Malpractice as a Case within a Case.

To prevail on summary judgment, Helm was required to present evidence that Usoro could not prove damages in the underlying case. Helm failed to shoulder that burden but rather shifted it to Usoro who presented additional evidence through their experts. This is not how Summary Judgment works. Helm has the burden of showing absence of any issue of material issues in Usoro's case that they could not have prevailed in the underlying case. Helm utterly failed to carry that burden too. In the malpractice, Helm's opposition Motions alleged Usoro's Complaint did not include "First Party Loss" such as personal property loss of use and other economic damages, et al. CP630. Unable to look back on what he failed to do in Usoro's Underlying case, the question Helm did not answer was why he was hired as Usoro's attorney? Helm was expected to file Motion to Amend Underlying Complaint as soon as judgment was vacated in 2008 to include the theory not pleaded in their Complaint or withdraw from the case for lack of litigation experience. As records showed, Usoro had commercial coverage for their 1998 Town Car

as opposed to first party insurance and evidence was consistent with this fact. CP 305-306. Again, in this malpractice, to prove their damages, Usoro hired a financial expert, Bret Espey who provided the trial Court with an affidavit detailing Usoro's loss through August 2010 totalling \$512, 424. CP 522-530. The second expert, Tawni Berg initially provided a financial report on June 8, 2010 showing damages that Etcetera lost the projected net income (revenue-expenses) of \$195,677 in 2009. CP 535. The evidence of damages leaves no doubt Usoro could have proved their damages in the underlying case in October 2009 had the case gone to trial. Above all, Usoro's affidavit on July 2, 2007 had itemized their damages. CP 64. As a result of Helm's negligence, Usoro "lost" the golden opportunity to prove their damages in the underlying case which was dismissed prior to trial set October 19, 2009.

Helm succeeded in misdirecting the Court into believing that Usoro's case is "a case within a case" contrary to Usoro's opposition. CP 33. Traditionally, a malpractice action against a lawyer arising out of litigation was thought to require trial of both the underlying action and the malpractice case (the "case within the case"). *Daugert v. Pappas*, 104 Wn.2d 254, 257 (1985). The rule may be that proof of causation in a legal malpractice case arising out of litigation does not require a complete retrial of the underlying action. Since the vast majority of civil cases settle,

requiring a legal malpractice plaintiff to prove two cases is extremely harsh and not reflective of reality as seen in Usoro's case where he was pummeled by Helm's attorneys to prove their damages, and yet, the trial Court ignored evidence of those damages. Since causation requires that Usoro prove that he would have achieved a better result if the attorney had performed competently, expert opinion testimony on the reasonable settlement value and/or the probable chance of success of the underlying claim may be admissible. In the case of *Fishman v. Brooks*, 487 N.E.2d 1377 (Mass. 1986), the Massachusetts's Appellate Court permitted expert testimony from an experienced tort lawyer and claims adjuster as to the reasonable settlement value of an underlying claim. The same should have been adopted by the trial Court in Usoro's case with their experts' testimony. A more sensible and equitable rule would be to require that Usoro put on a prima facie underlying case and malpractice case, permit testimony by experienced experts, which he did, to show that they would have proved the underlying case had it gone to trial in 2009, and allow the jury to decide whether the case would have been settled (and for what amount), or, would have been tried to verdict. This error in Usoro's litigation cannot be allowed to stand because it is not a case within a case.

In the legal malpractice, Usoro proved legal causation through their experts but the trial Court disregarded the evidence. It has been said

that unlike factual causation, legal causation “hinges on principles of responsibility, not physics”.....Consequently, the existence of legal causation between two events is determined “on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent”. *Bruns v. PACCAR, Inc.*, 77Wash.App.201, 890 P.2d 469(1995). *Anderson v. Weslo, Inc.*, 79 Wash. App, 829, 906 P.2d 336 (1996) (legal causation “is driven by policy consideration and common sense). Usoro’s case should have been premised on a common sense and the trial Court failed to apply it. This Court is to determine how far an attorney’s conduct or negligence should prejudice his Clients before the trial Court says, enough is enough, and holds the attorney responsible for breaching the standard of care. Again, Shouldn’t the trial Court hold Helm in legal malpractice, to the extent he breached the standard of care given the existence of attorney-client relationship? Usoro requests a remand for the jury to decide these material issues relating to breach of contract, standard of care, causation and damages.

F. The trial Court erred that the insurer in the Underlying case did provide all representation for the Plaintiff, paid all the costs of settling the claim against Usoro, that Usoro could not establish an entitlement to any further damages under the claim brought in the underlying lawsuit, and that this assertion was not directly refuted in the cursory opinion that summary judgment could have been defeated.

Helm absolutely presented no evidence to support that Usoro and Etcetera damages were paid in full by insurers. The only evidence on the record was Columbia's settlement of Third Party lawsuit for personal injury for \$95,000 in 2005. CP 62. After settling the personal injury lawsuit, Columbia entered into a Stipulated Order for Dismissal on May 11, 2007 with Usoro's former attorney, Mr. Estudillo to excuse them from the underlying lawsuit. CP 732. Columbia further agreed they would not pursue subrogation rights against Etcetera and neither filed declaratory action against Usoro and company. The trial Court erred that Usoro's damages were fully paid by insurers in the absence of any evidence in the underlying case. The underlying Complaint was a request for damages, and not a Complaint for personal injury. Helm's opposition Motions were premised on the allegation that Usoro had "first party loss" and that the complaint did not mention property damage, loss of use or consequential damages. CP 643. There was no evidence to support this claim except three exhibits attached with Ms. Hofmann's declaration. CP 658-660. This evidence was in piece meal and told nothing about "first party loss" which made no sense at all. Contrary to the mischaracterization of underlying case, Usoro had commercial coverage for the 1998 Town Car that allowed him to seek damages as contained in the Complaint for breach of contract, negligent misrepresentation, negligent indemnity against Rohner and

Insuremax, Consumer protection Act and Insurance bad faith on August 2006. CP 191-195. Usoro could not prove them in the underlying case on October 19, 2010 after judgment was vacated due to Helm's negligence. The measure of damages in legal malpractice is the amount of loss actually sustained as a proximate result of the attorney's conduct. *Matson v. Weidenkopf*, 1010 Wash. App. 472, 3 P.3d 805 (2000). Here, the Appeals Court affirmed that, "...The measure of damages for legal malpractice is the amount of loss actually sustained as a proximate result of the attorney's conduct". *Tilly*, 49 Wash. App at 732, 746 P.2d 323. "This court must uphold an award of damages if it is within the range of relevant testimony". *Cultum V Heritage House Realtors*, 103 Wash. 2d 623, 633, 694, P. 2d 630 (1985). *Sherry v. Directs*, 29 Wash. App. 443, 437, 628 P. 2d 133(1981). To recover, a plaintiff must demonstrate that he or she would have achieved a better result had the attorney not been negligent. *Id. at 438*, 628 P.2d 1336. *VersusLaw, Inc. v. Stoel Rives, LLP*, 111 P.3d 866 Wash. App Div. 1(2005), *Aubin v. Barton*, 98 P.3d 126 Wash.App. Div.1 (2004) (Usually, the principles of proof and causation in legal malpractice action do not differ from an ordinary negligence). Usoro seeks the amount of loss in the underlying case plus the updated damages from their experts. The trial Court should have allowed Usoro to recover

the value of their underlying case at trial showing that Helm allowed the judgment to dissipate plus interest.

G. The trial Court erred that Helm's failure to respond to motion to vacate judgment in the underlying case was due to non-negligent of his.

The trial Court erred that Usoro's underlying case was vacated due to non-negligence of Helm. The trial Court previously opined that; "Etcetera's legal malpractice claim may now be considered limited to allegation about Mr. Helm's actions and in-action following the vacation of default and up to the time of withdrawal". CP 419. The Trial Court's change of opinion on August 26, 2010 was astonishing and not the principles in establishing legal malpractice. The action of the trial Court raises more questions and requires a remand because there are material issues in dispute. Washington Courts recognized that when determining questions of causation in a legal malpractice action, the concern is cause in fact, the "but for test" consequences of an attorney's negligent act. *Daugert v. Pappas*, 104 Wash. 2d 254, 257-59, 704 P.2d 600(1985). To recover, the Plaintiff must demonstrate that he or she would have achieved a better result had the attorney not been negligent. *Id. at 438, 628 P.2d 1336. VersusLaw, Inc. v. Stoel Rives, LLP*, 111 P.3d 866, Wash. App. Div 1 (2005.) Proximate cause consists of cause in fact which refers to the "but for test" consequences of an act, that is, the immediate connection

between the act and an injury. *Blume*, 134 Wash.2d at 251-2, 947 P.2d 223. The “but for test” requires a party to establish that the act or omission complained of probably caused the subsequent injury. *Nielson v. Eisenhower & Carlson*, 100 Wash. App, 584, 591, 999 P.2d 42(2000), *Ang.v. Martin*, 114 P.3d 637, Wash. (2005). Ganz’s supplemental testimony on July 15, 2010 stated that; “On a more probably than not basis but for attorney Helms violations of the standard of care, plaintiff’s case would not have been dismissed and would have gone to trial”. CP474 ¶ 3. To mention few, on issue of witness disclosure, Helm argued Usoro did not provide witness to disclose. CP 666¶ 26. Helm’s contradictions are littered in the Supplemental Answers to Plaintiffs Discovery Request when compared to his December 9, 2009 letter to his malpractice adjuster. CP 149-166, CP 288. The same contradictions trailed Helm’s response to Usoro’s Request for Admission. CP 349¶ RFA12. Helm later agreed that Usoro gave two witnesses after due date but disagreed that witnesses ought to be filed in Court. CP 666¶26. This showed material issues deference that should be determined by the jury. It seemed Helm did not know where to file witnesses in Court because he disagreed witnesses are filed at the Court. CP 157 ¶ 5. Helm had an opportunity to cure his negligence by filing Usoro’s disclosure of additional witness due on June 29, 2009, but failed to. CP 105¶ 1. Further, Helm argued he was guided

by his “professional judgment” during collection and could not; (a) “file jury demand because he did not think that Etcetera case warranted a jury as the trier of fact”. CP 666 ¶31, (b) did not conduct discovery “because anything he hoped to discover was provided in support of Ms. Rohner’s Motion to vacate”. CP157¶4, CP 666¶31, (c) did not respond appropriately to motion to vacate under CR 60 “because it would be futile because judgment awarded in the underlying case was beyond the relief in the complaint and that Etcetera did not follow proper procedure in entering default judgment for sum certain”. CP 664 ¶19. At no point did Helm’s attorneys point out the “improper procedure not followed” during entry of default judgment in 2007. Ganz’s expert testimony had dismantled these defenses in his expert opinion. CP 333. Should Helm have remained Usoro’s attorney with such poor judgment remained a material issues that cannot be decided by summary judgment?

Assuming Helm was right, which he wasn’t; “Independent business judgment rule does not apply to, and thus, does not negate proximate cause element of a client’s legal malpractice against attorney”. *Bullard V. Bailey, 959 P. 2d 1122 Wash. App. Div. 1(1998)*. Helm’s claims his decisions in the underlying case was based on “professional judgment” and given Usoro was not consulted at those times should be discarded. Usoro seeks a remand to address Helm’s negligence, breach of

contract and breach of standard of care that caused them the underlying judgment that disappeared.

REQUEST FOR ATTORNEY FEES

The Court should award Mr. Usoro his costs and attorneys' fees incurred in bringing this appeal. Although this appeal is brought by Usoro, it is clearly for the benefit of Etcetera and its shareholders. RAP 18.1(a) allows recovery of attorney fees and costs on appeal if applicable law grants the right. Mr. Usoro bore the entire costs of the litigation below in an attempt to recover the value of their underlying judgment mishandled by Helm during collection of judgment in 2008.

CONCLUSION

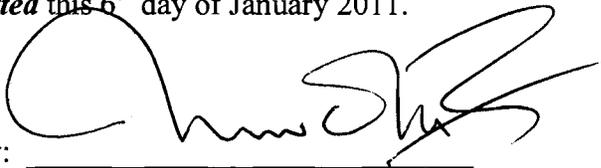
From April 2008 through August 2009, Helm acted like a robot, cared-less of the duty of care owed Usoro and Etcetera during collection of judgment, mindlessly defending the legal malpractice lawsuit. By his own admission, Helm stated; "I had no experience in this type of litigation...I don't disagree that, after judgment was vacated. Perhaps I handled the matter poorly". CP 288¶3, 289 ¶ 2. This is indicative that Helm realized that he messed up Usoro's underlying collection but wants to walk away free, while Usoro and company suffer. Helm rather hired his attorneys to defend the indefensible on the legal malpractice. As an attorney hired to collect a judgment of \$180,479.67, he stayed on for

16months, wasn't returning Usoro's phone calls, didn't follow the new case schedule, lacked experience to litigate the underlying case after judgment was vacated, couldn't request continuance of Rohner's motion to dismiss on behalf of Usoro until he found a new Counsel, and had the temerity to allege he did nothing wrong.

The trial Court exceeded its authority by dismissing Usoro's legal malpractice with prejudice and erroneously disregarded Usoro and Olin's declarations as inadmissible hearsay. This Court should reverse the August 26, 2010 Order, September 16, 2010 Order and the two orders on April 30, 2010 and June 21, 2010 regarding the removal of Usoro as a plaintiff and giving Helm leeway to re-note their motion to dismiss within 60days. The Court should remand this case with instructions that there are material issues in dispute, and to further instruct the trial Court to determine those material facts and re-consider Usoro's experts testimony.

Finally, this Court should grant Usoro the attorneys' fees and costs incurred in bringing this appeal

Respectfully submitted this 6th day of January 2011.

By: 

Raphael Nwokike, WSNB#:33148
Attorney for Appellants.

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

On January 6, 2011, I caused the following pleadings, a copy of the foregoing **AMENDED APPEAL BRIEF** served by Seattle Legal Messengers on the below Counsel for the Respondents at the following address:

Christopher Tompkins
Betts Patterson Mines, PS
701 Pike Street, Suite 1400
Seattle, WA 98101

Dated this 6th day of January 2011 at Federal Way, Washington



Raphael Nwokike, Esq.: WSBN: 33148
Attorney for the Appellants.