

NO. 72655-2-I

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

TAMMY BECK, as personal representative of the Estate of My father,

Appellant.

v.

DARREN G. GRAFE and JANE DOE GRAFE, and the marital
community composed thereof,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This is a legal malpractice action arising out of the law offices of David H. Middleton and Associates P.S.'s representation of Appellant's father, Claud Goll, while Respondent Darren Grafe was employed as an associate with the firm.

In 2001, Mr. Goll retained the firm and Mr. Grafe to defend him in a claim arising from a failed real estate transaction. Mr. Goll desired to bring a third-party claim against his real estate broker, Prudential, because he believed Prudential was responsible for the claims asserted against him. However, Mr. Grafe pursued a different strategy based on substantial compliance with former RCW 64.04.005, which would limit claimant's damages to forfeiture of Mr. Goll's earnest money.

In May 2003, Mr. Grafe left his employment with Middleton & Associates and formally withdrew as counsel of record. Mr. Goll chose to stay with the Middleton firm. The firm's principal, David Middleton, substituted as counsel of record and took over the case. Mr. Middleton pursued the substantial compliance defense and did not sue Prudential, despite Appellant's claim that Mr. Goll specifically asked him to do so.

As of 2003, Mr. Goll was aware that neither Mr. Grafe nor Mr. Middleton brought a claim against Prudential as Mr. Goll instructed. Mr. Goll claims this omission caused him injury, because he believed

Prudential would have indemnified and held him harmless and he had to pay his defense costs, instead of Prudential.

In August 2003, Mr. Middleton represented Mr. Goll through trial. At trial, the court held that Mr. Goll substantially complied with the statutory requirements for electing forfeiture of his earnest money. The plaintiff appealed. In 2005, this court reversed and remanded the lawsuit, holding the trial court erred by finding substantial compliance. In 2008, Mr. Middleton passed away, and his firm withdrew.

Following Mr. Middleton's death in 2008, Mr. Goll sought subsequent counsel, Jean Jorgenson, who now represents his estate after Mr. Goll passed away in 2009. The underlying real estate dispute settled.

In the present lawsuit, filed in August of 2010, plaintiff Tammy Beck, as personal representative of the Estate of Claud Goll, claims Mr. Grafe committed malpractice by not bringing a claim against Prudential. Although Ms. Beck concedes Mr. Middleton may also be negligent, she did not sue Mr. Middleton or his firm. Rather, she contends she could sue either Mr. Middleton, Mr. Grafe, or both under a concurrent tortfeasor theory of liability. However, the time for suing Mr. Middleton's estate had likely expired by the time she brought suit, *see* RCW 11.40.051; the time for bringing a malpractice claim against Mr. Grafe ran in 2006.

This is the second appeal of this case. The first appeal followed

summary judgment dismissal of plaintiff's claims on the ground that Mr. Grafe was not a proximate cause of the alleged damages. Mr. Grafe argued successfully to the trial court that he could not be liable to Mr. Goll because the case was taken over by Mr. Middleton long before the time to bring a third-party claim against Prudential expired. In an unpublished opinion, this court reversed, holding that genuine issues of material fact existed as to whether Mr. Middleton was a superseding cause.

After the case was remanded, Mr. Grafe filed a second motion for summary judgment dismissal on two grounds: 1) plaintiff's claim is barred by the three-year statute of limitations governing legal malpractice, as plaintiff filed suit over **seven** years after the claim accrued; and 2) the dead man's statute precludes plaintiff from offering evidence from Mr. Goll on liability and damages necessary to establish malpractice.

On September 19, 2014, the trial court held that the three-year statute of limitations barred Ms. Beck's claim against Mr. Grafe. The trial court correctly concluded that Mr. Goll had requisite notice of the facts to support a claim for malpractice more than three years before he filed the lawsuit. It is undisputed Mr. Goll was aware that Prudential had not been sued by the time Mr. Grafe withdrew in 2003, despite his requests, and Mr. Goll was claiming damages as a result. The court also rejected plaintiff's argument that the continuous representation should apply to toll

the statute of limitations as to Mr. Grafe because he did not continuously represent Mr. Goll. The court did not reach Mr. Grafe's argument on the dead man's statute.

Ms. Beck moved for reconsideration, asserting essentially the same arguments. The trial court properly denied her motion.

This court should affirm the trial court's dismissal of Ms. Beck's claim against Mr. Grafe as the claim is barred by the three-year statute of limitations. Additionally, this court may affirm dismissal on the ground that the dead man's statute prohibits plaintiff from presenting evidence necessary to establish a legal-malpractice claim.

II. ISSUES PRESENTED FOR REVIEW

Mr. Grafe disagrees with the statement of issues as framed by Appellant, and believes the issues are more properly stated as follows:

Whether this court should affirm summary judgment dismissal of plaintiff's claims against Mr. Grafe where:

1. The trial court properly held the three-year statute of limitations barred plaintiff's claim where i) the lawsuit was filed seven years after Mr. Grafe withdrew in 2003, ii) plaintiff had knowledge of the essential facts to support the alleged malpractice claim more than three years before he filed suit; and iii) the continuous representation rule did not apply to Mr. Grafe to toll the statute of limitations?

2. This court may alternatively find that dismissal is appropriate because the dead man's statute precludes plaintiff from offering necessary evidence to establish Appellant's malpractice claim?

III. STATEMENT OF THE CASE

A. The underlying real estate dispute: *Chrisp v. Goll*.

In July 2001, Claud Goll and Nancy Chrisp executed a Real Estate Purchase and Sale Agreement ("REPSA") in which Mr. Goll agreed to purchase Ms. Chrisp's home in King County. CP 57-68. Prudential acted as Mr. Goll's real estate broker in the transaction. CP 68. Shortly before the transaction was to close, Mr. Goll withdrew his offer. CP 191.

On October 29, 2001, Ms. Chrisp filed suit against Mr. Goll, seeking specific performance of the real estate contract, or, in the alternative, for damages associated with Mr. Goll's breach. CP 50-53. Ms. Chrisp sued both Mr. Goll and his lender Veterans Mortgage. *Id.* Prudential was never named as a defendant. *Id.*

1. Mr. Goll retains Middleton and Associates to defend him against the claims by Ms. Chrisp.

After the transaction fell through, in August 2001, Mr. Goll retained the law offices of David H. Middleton & Associates, P.S. and Mr. Darren Grafe, an associate at the firm. CP 30.

Mr. Grafe pursued the defense that Mr. Goll had substantially complied with the earnest-money-forfeiture statute, RCW 64.50.005. CP 5740457.doc

408-09. At that time, no Washington appellate court had analyzed whether the substantial-compliance doctrine applied to RCW 64.50.005. The crux of the defense was that, although Mr. Goll failed to initial the safe-harbor clause, he substantially complied with the statute, which limited Ms. Chrisp's recoverable damages to the \$2,000.00 in escrow and precluded common law remedies. *Id.* In the present lawsuit, Appellant argues that Mr. Goll repeatedly told Mr. Grafe that he wanted to bring a third-party claim against his broker Prudential because its agents failed to ensure he initialed the safe-harbor clause. CP 2. Mr. Grafe did not file a third-party complaint against Prudential. CP 3.

2. Mr. Goll's subsequent counsel was successful at trial, but this court reversed and remanded to the trial court.

On May 27, 2003, Mr. Grafe sent a letter of withdrawal to Mr. Goll stating that he was leaving Middleton & Associates and would no longer be representing Mr. Goll. CP 369, 372. On June 5, 2003, a notice of withdrawal and substitution of counsel was filed. CP 374-75.

The principal of the firm, David Middleton, assumed the defense and took Mr. Goll's case to trial in August 2003. *Id.* Mr. Middleton did not move to amend Mr. Goll's answer to add a third-party claim against Prudential, despite Appellant's allegation that Mr. Goll specifically asked him to do so. CP 85. At trial, the superior court agreed that the

substantial compliance doctrine limited Ms. Chrisp to the \$2,000 earnest money held in escrow. CP 156-58.¹

Ms. Chrisp appealed the decision. CP 185-89. On January 3, 2005, this court reversed, holding that the substantial-compliance doctrine did not apply to RCW 64.50.005 and that Ms. Chrisp was not limited in her common law remedies. *Id.*; *Chrisp v. Goll*, 126 Wn. App. 18, 104 P.3d 25 (2005), *rev. denied*, 156 Wn.2d 1004, 128 P.2d 1239 (2006). Following remand to the superior court, Mr. Middleton continued to represent Mr. Goll until Mr. Middleton died on May 8, 2008. CP 70. The parties later settled out of court. CP 3.

B. Ms. Beck claims that Mr. Grafe's failure to bring an action against Prudential constituted legal malpractice.

Mr. Goll passed away in 2009. On August 6, 2010, more than **seven years** after Mr. Grafe left the firm, Ms. Beck filed this action against Mr. Grafe on behalf of her father's estate. CP 1-5. She claims that he settled with Ms. Chrisp only because he could no longer sue Prudential or its agents because the statute of limitations had expired. *Id.*² Ms. Beck did not sue Mr. Middleton or his estate. *Id.* The time for filing suit

¹ Mr. Goll then stipulated to forfeiture of the earnest money, and the court dismissed the jury and awarded attorney's fees to Goll. CP 409.

² According to plaintiff's expert's calculations, the statute of limitations for claims against Prudential expired in October 2004, over seventeen months after Mr. Grafe withdrew and Mr. Middleton took over the case. *See* CP 238.

against the estate likely expired in May of 2010 pursuant to RCW 11.40.051, which prescribes a 24-month suit limitation after death.

Ms. Beck admitted she was never a client of Mr. Grafe or Middleton & Associates. CP 347. She claims nonetheless she was present at every meeting between her father and Mr. Grafe. CP 348.

Ms. Beck asserts that her father “spoke with Mr. Grafe ... about bringing the two real estate brokerage firms in the lawsuit because of their own acts and omissions.” CP 192. In addition to the alleged negligence of Prudential, Ms. Beck claims to have told Mr. Grafe that her father should sue Windermere for misrepresentation in the listing. CP 192. Ms. Beck claims that her father wanted Prudential and Windermere in the lawsuit to reduce his attorney’s fees and because one of the brokerage firms might accept the defense. CP 192-93. The only alleged witness to such a statement, Mr. Goll, is deceased.

Ms. Beck claims that Mr. Grafe told her father that the statute of limitations would not begin to run until Mr. Goll had been damaged. CP 193. Specifically, Ms. Beck alleges that Mr. Grafe advised Mr. Goll that he could not pursue claims against Prudential until he had incurred damages. *Id.* The only participant in this alleged conversation outside of the parties to this case is Mr. Goll, deceased.

Ms. Beck asserts that her father “pointed out the amount of

attorneys' fees expended to date as evidence of how [he] had been harmed." CP 194. Ms. Beck stated "each month my father had to pay attorneys' fees and each time we interacted with Mr. Grafe (and then later with Mr. Middleton) we raised the issue that the real estate brokerage firms got my father into the middle of this mess and they should be the ones to foot the bill." CP 193. In her deposition, Ms. Beck stated:

Q. What's your basis for claiming that your father would have had to pay less in attorney's fees if Prudential had been named as a party in the action?

A. Because they misrepresented my dad and I believe that their attorneys would have taken over to represent him and themselves.

CP 351. Again, the only supporting "evidence" of these alleged statements and opinions of Mr. Goll would come from Mr. Goll, deceased.

Through her deposition, Ms. Beck admits that she neither possesses nor knows of any documentation or writing anywhere to verify that Mr. Grafe told her father that the statute of limitations would not begin until after an adverse verdict. Ms. Beck stated:

Q. Have you – was there any legal memoranda prepared by Mr. Grafe as to the statute of limitations? Let me say that more plainly. In writing anywhere, is there any verification as to what you allege Mr. Grafe told you regarding the statute of limitations?

...

A. As far as him telling me we couldn't sue Prudential, Windermere and Veteran's Mortgage until after?

Q. Correct.

A. I don't know.

CP 350. Similarly, Ms. Beck admitted that she was speculating as to the outcome of the case and the amount of attorney's fees saved, if any:

Q. You don't think they would have resisted the fact that they were wrong using the same defenses that your father used at trial?

A. I think they would have found the most economical way to get out of it as fast as they could.

Q. They wouldn't have used the substantial completion argument that your father used and ultimately prevailed on at trial?

Ms. Jorgenson: Objection to the form of the question, it's ambiguous and it's calling for speculation.

Q. I guess that's my point. You would have to speculate, wouldn't you?

A. I think every case you have to speculate the outcome until it happens.

CP 352.

Ms. Beck went on to testify:

Q. Could you have added Prudential to the action and still incurred the same amount of legal fees?

...

A. I don't – I don't know. All – what I know is that Prudential ... we wanted listed as a third party. I do not know what the fees would have been or what the outcome would have been, but I do know that we would have had the opportunity now especially to sue [Prudential] or have this done.

CP 354.

Ms. Beck further disclosed in discovery that she had many conversations with Mr. Middleton about suing Prudential after Mr. Grafe

left the firm and before the statute of limitations for suing Prudential expired. CP 85. According to Ms. Beck's expert, the statute of limitations for suing Prudential would have expired in October 2004. CP 238.

C. Summary of Dates:

- **August 2001:** After Ms. Chrisp notified Mr. Goll that she would file suit, he sought legal counsel from David Middleton & Associates and Mr. Grafe. CP 33.
- **October 29, 2001:** Ms. Chrisp filed the underlying complaint for specific performance of the REPSA or alternatively for damages against Mr. Goll. CP 50-53.
- **May 27, 2003:** Mr. Grafe notified Mr. Goll that he was leaving the office of David Middleton & Associates. CP 37.
- **June 5, 2003:** The withdrawal of Mr. Grafe and substitution of Mr. Middleton was filed. CP 39-40.
- **August 2003:** Ms. Chrisp's case against Mr. Goll went to trial, where the judge ruled in a motion in limine that the substantial compliance doctrine applied and Ms. Chrisp was limited to the \$2,000 earnest money. CP 156-158.
- **October 28, 2004:** According to Appellant's expert, the statute of limitations for bringing a claim against Prudential expired. CP 238.
- **January 2005:** This court reverses the trial court's decision. CP

407-23; *Chrisp v. Goll*, 126 Wn. App. 18, 104 P.3d 25 (2005).

- **January 10, 2005:** The Washington Supreme Court denies Mr. Goll's petition for review in *Chrisp v. Goll*, 156 Wn.2d 1004, 128 P3d 1239 (2006).
- **June 13, 2008:** Middleton & Associates notifies Mr. Goll of Mr. Middleton's death on May 8, 2008, and withdraws. CP 70.
- **May 8, 2010:** The 24-month suit limitation period for bringing a claim against Middleton's estate ran under RCW 11.40.051.
- **August 5, 2010:** Mr. Goll's estate filed this lawsuit for legal malpractice against Mr. Grafe for his alleged failure to sue or preserve a claim against Prudential in the underlying suit. CP 1-5.

D. The superior court dismisses Ms. Beck's legal-malpractice suit for failure to prove proximate cause.

On February 11, 2011, Mr. Grafe filed a motion for summary judgment seeking dismissal of all claims against him. CP 13-29. He argued that Ms. Beck was unable to prove proximate cause as a matter of law because (1) he no longer represented Mr. Goll when the statute of limitations expired against Prudential; (2) Mr. Grafe did not breach any legal duty owed to Mr. Goll; and (3) Mr. Middleton was responsible for the legal file after Mr. Grafe withdrew as counsel and was an independent, intervening cause cutting off any liability as to prior counsel. CP 20. The

trial court agreed and dismissed plaintiff's case. CP 410. Ms. Beck filed her first appeal. *Id.*

E. Court of Appeals reverse, finding genuine issues of material fact preclude holding that the successor attorney Mr. Middleton was a superseding cause.

On April 8, 2013, this court filed its unpublished opinion on Ms. Beck's first appeal, number. 67641-5-1 (hereinafter "first appeal"). CP 407-423. The opinion addressed the following elements of a claim for attorney malpractice: (1) the existence of an attorney-client relationship which gives rise to a duty, (2) an act or omission by Mr. Grafe that breaches his duty of care, and (3) proximate causation between Mr. Grafe's alleged breach of duty and the damages incurred. CP 410.

With regard to the attorney-client relationship, this court held the element was met because "[i]t is undisputed that Goll and Grafe had an attorney-client relationship from 2001 until June 2003, when Grafe filed a notice of withdrawal and attorney Middleton took over Goll's case." CP 410. With regard to duty, the court held that a jury could find, based on Appellant's expert's testimony, that Mr. Grafe breached the standard of care of a reasonable attorney by failing to pursue a claim against Prudential as a back-up plan to the substantial compliance defense. CP 419. However, this court noted the primary issue on appeal was whether Mr. Goll's successor attorney was an intervening, or superseding cause

that absolved Mr. Grafe of liability. CP 407.

With regard to proximate cause, this court held that “[a] jury could find that by the time Middleton took over, it was already too late to bring Prudential in by amendment.” CP 419. It explained that a jury could find that “Grafe and Middleton committed malpractice as a single continuous course of inaction, making Middleton’s negligence a concurrent cause of the damage rather than an independent intervening cause.” CP 422.

The issue of whether Ms. Beck timely brought the claim against Mr. Grafe was not before this court, nor was the application of any basis for tolling of the statute of limitations. CP 407-423.

F. The superior court dismisses Ms. Beck’s lawsuit against Mr. Grafe, holding it was not timely filed within the three-year statute of limitations.

After the case was remanded to the trial court, Ms. Grafe filed a second motion for summary judgment seeking dismissal on two grounds: First, the dead man’s statute, RCW 4.60.030, precluded the admission of evidence as to liability and damages from Mr. Goll necessary to support the legal malpractice claim. CP 235-26. Second, plaintiff did not file the legal malpractice claim within three-years as required by RCW 4.16.080(3) and the claim was time barred. *Id.*

In response to the statute of limitations argument, plaintiff argued that the continuous representation rule should apply to toll the three-year

statute of limitations. CP 389-91. Alternatively, plaintiff argued that the discovery rule should apply to toll the statute of limitations until Mr. Goll retained new counsel after Middleton's death in 2008. CP 391-94.

In response to the dead man's statute argument, plaintiff argued it did not bar Ms. Beck from testifying as to what occurred during the legal representation of her father because she was present for every meeting, could testify about what Mr. Grafe told her father, could testify what her father told Mr. Grafe, and could testify what Mr. Grafe told her about the representation. CP 395-96.

On September 19, 2014, the Honorable Mary Roberts heard argument on Mr. Grafe's second motion for summary judgment. RP 1. The court did not reach the issue of the dead man's statute, and instead focused on the statute of limitations argument. RP 9. The trial court held that the statute of limitations barred Ms. Beck's malpractice claim against Mr. Grafe and granted summary judgment. RP 22. It correctly rejected plaintiff's argument that the statute of limitations was previously addressed, which plaintiff's counsel conceded at oral argument. RP 21-22. It also correctly held that the continuous representation rule did not apply to toll the statute of limitations against Mr. Grafe because he did not continuously represent Mr. Goll. *Id.* at 21-22. Finally, the trial court agreed that Mr. Goll had requisite notice of the facts underlying his claim

against Mr. Grafe, more than three years before he filed suit. *Id.* at 22.

G. The trial court denies plaintiff's motion for reconsideration.

On September 22, 2014, plaintiff filed a motion for reconsideration of the trial court's September 19, 2014 order granting Grafe's second motion for summary judgment. CP 435. In her motion, the plaintiff argued that it did not matter that Ms. Beck did not sue the successor attorney Mr. Middleton for malpractice, because under a concurrent tortfeasor theory, the plaintiff need only sue one of the two alleged tortfeasors. CP 437-38. She further argued that the court had erred in holding the continuous representation rule did not toll the action against Mr. Grafe. CP 439-40. She also asserted that the discovery rule operated to toll the malpractice claim against Mr. Grafe. CP 441. Alternatively, she argued that Mr. Grafe should be equitably estopped from relying on the statute of limitations because Mr. Goll allegedly relied on Mr. Grafe's legal opinion concerning the claim against Prudential. *Id.*

On October 10, 2014, the trial court properly denied plaintiff's motion for reconsideration. CP 450.

IV. ARGUMENT

A. The standard of review is de novo, but this court may affirm on any ground the record supports.

This court engages in the same inquiry as the trial court when

reviewing a summary judgment order. *See Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. *See* CR 56(c). However, “[a] trial court’s decision will be affirmed on appeal if it is sustainable on any theory within the pleadings and the proof.” Tegland, 2A Wash. Prac., Rules Practice RAP 2.5 (6th ed. 2010); *see also Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 493, 933 P.2d 1036 (2007).

B. This court did not previously consider Mr. Grafe’s statute of limitations defense.

The statute of limitations in the context of Ms. Beck’s malpractice claim was not argued, briefed, or decided in the first appeal, nor did this court address the continuous representation rule or the discovery rule as potential bases for tolling the limitations period. The only reference to the statute of limitations in the first appeal related to the claim against Prudential in the underlying case. Appellant conceded this point at oral argument:

The Court: But they’re not talking about the Statute of Limitations as to malpractice.

Ms. Jorgensen: Correct.

The Court: They’re talking about the Statute of Limitations in the underlying case.

Ms. Jorgensen: Absolutely.

RP at 12.

Rather, Ms. Beck argues that because this court reversed summary judgment on the first appeal, Ms. Grafe is not entitled to bring a motion for summary judgment dismissal on any other basis. *See* Appellant's Brief at 19. Appellant's argument is flawed.

This Court's decision on the first appeal considered whether there was sufficient evidence under the summary judgment standard to support the **merits** of plaintiff's malpractice claim, specifically the elements of breach and proximate cause, not whether Mr. Grafe could be absolved on another ground, such as a procedural defense like the statute of limitations. Whether or not Mr. Grafe's representation fell below the standard of care or could be considered a proximate cause is not relevant to the application of the statute of limitations, which involves whether the Appellant timely filed this lawsuit within three years after Mr. Goll had notice of the facts supporting his claim. CP 334-338; *Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 659, 37 P.3d 309 (2001).

Consistent with this Court's opinion, Mr. Grafe's second motion for summary judgment conceded he owed a duty of care to Mr. Goll during his representation through withdrawal on June 5, 2003. CP 336.

Mr. Grafe also conceded, for the purpose of the motion only, that he could be a proximate cause of any alleged damages. CP 338. As such, Mr. Grafe's motion expressly followed the decision in the first appeal. Similarly, the trial court, which was fully aware of the first appeal, correctly determined that the motion for summary judgment did not depend on the alleged breach or proximate cause analysis. Therefore, it properly rejected Appellant's argument that this Court had already ruled on the matter. This Court should affirm that decision.

C. The trial court properly held the three-year statute of limitations barred plaintiff's claims.

The statute of limitations for legal malpractice is three years. RCW 4.16.080(3); *Janicki*, 109 Wn. App. at 659.

A statute of limitations effectuates two policies. *Kittinger v. Boeing Co.*, 21 Wn. App. 484, 486, 585 P.2d 812, 814 (1978) (citing *Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969)). The first policy is repose: the statute of limitations "is intended to instill a measure of certainty and finality into one's affairs by eliminating the fears and burdens of threatened litigation." *Id.* at 486-87. Second, it protects against stale claims because they are more likely to be spurious and consist of untrustworthy evidence than fresh claims. *Id.* at 487. One is also less likely to have witnesses and relevant evidence available to defend against

stale claims. *Id.*; see also, *Dowell Co. v. Gagnon*, 36 Wn. App. 775, 776, 677 P.2d 783, 784 (1984)(“The purpose ... is to force cases to trial while witnesses are still available and memories are still clear.”).

This lawsuit was filed over seven years after Mr. Grafe withdrew in 2003, after the death of two crucial witnesses, and without any credible or verifiable evidence. This is precisely the type of claim that the policies underlying the statute of limitations are designed to prevent.

The statute of limitations on an action begins to run when the cause of action accrues – “that is, when the plaintiff has a right to seek relief in the courts.” *Janicki*, 109 Wn. App. at 659. The discovery rule applies to legal malpractice actions. *Janicki*, 109 Wn. App. at 655. The rule provides that the cause of action accrues when the client discovers or, in the exercise of reasonable diligence should have discovered the facts which give rise to the cause of action. *Id.*; *Peters v. Simmons*, 87 Wn.2d 400, 406, 552 P.2d 1053 (1976); see also *Davis*, 103 Wn. App. at 648, 655. The rule does not require knowledge of the existence of a legal cause of action. *Matson v. Weidenkopf*, 101 Wn. App. 472, 482, 3 P.3d 805 (2000) (quoting *Peters* 87 Wn.2d at 406). Instead, the statute of limitations begins to run when “the plaintiff knew or should have known all of the essential elements of the cause of action.” *Id.* (quoting *Gevaart v. Metco Constr. Inc.*, 111 Wn.2d 499, 501-02, 760 P.2d 348 (1988))

(internal quotations omitted). In other words, the discovery rule does not require “smoking gun” proof of the essential facts, *Beard v. King County*, 76 Wn. App. 863, 868, 889 P.2d 501 (1995), but instead begins to run when “[a]n injured claimant who reasonably suspects that a specific wrongful act has occurred is on notice that legal action must be taken.” *Id.* at 868; *see also Richardson v. Denend*, 59 Wn. App. 92, 97 n. 6, 795 P.2d 1192 (1990) (“knowledge of the ‘facts’ comprising a cause of action for attorney malpractice is to be distinguished from knowledge that such conduct constitutes malpractice. ... The discovery rule does not require that the plaintiff know of the negligent character of the conduct alleged as the cause of his ... injury.”).

The plaintiff bears a heavy burden with regard to the discovery rule. *See, Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 772, 733 P.2d 530 (1987) (“[a] party must exercise reasonable diligence in pursuing a legal claim.”). Courts charge the plaintiff with constructive knowledge of the essential facts if, under an objective standard, reasonable inquiry would disclose those facts. *Winbun v. Moore*, 143 Wn.2d 206, 228, 18 P.3d 576 (2001); *Green v. A.P.C.*, 136 Wn.2d 87, 96, 960 P.2d 912 (1998) (citation omitted) (“[O]ne who has notice of facts sufficient to put him on inquiry is deemed to have notice of all acts which reasonable inquiry would disclose.”). Due diligence and constructive knowledge can be

determined by a matter of law when reasonable minds can reach but one conclusion. *Cawdrey v. Hanson Baker Ludrow Drumheller, P.S.*, 129 Wn. App. 810, 818, 120 P.3d 605 (2005).

Here, Mr. Goll was aware of the “essential elements” of a legal malpractice action against Mr. Grafe by at least June of 2003, when Mr. Grafe withdrew as counsel of record. The elements of a legal malpractice claim are: (1) the existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of such duty of care; (3) injury to the client; and (4) proximate causation between the attorney’s breach of the duty and the injury. *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992) *Keller v. City of Spokane*, 146 Wn.2d 237, 242, 44 P.3d 845 (2002) (emphasis added). In professional malpractice cases, the pivotal factor which tolls the running the statute of limitations is the absence of injury. *Richardson*, 59 Wn. App. at 96.

1. The attorney-client relationship giving rise to Mr. Grafe’s duty of care.

Here, Mr. Goll had an attorney client relationship with Mr. Grafe from April 11, 2002 through June 5, 2003. CP 410. No attorney client relationship existed beyond that date. For purposes of this motion, Mr. Grafe does not contest that he owed a duty of care to Mr. Goll from

April 11, 2002 through June 5, 2003. CP 336. The duty of care to Mr. Goll ended after June 5, 2003. At that point, Mr. Grafe was not permitted to work on Mr. Goll's case; Mr. Middleton took over as attorney of record.

2. Mr. Goll was aware of the alleged breach.

At the time Mr. Grafe withdrew as counsel for Mr. Goll, Mr. Goll knew that Mr. Grafe had not filed a third-party complaint against Prudential. On August 6, 2002, Mr. Goll was informed that Mr. Grafe considered issues related to the third-party complaint and parties to list. *See*, CP 287-88. Mr. Goll knew or should have known through review of billings that a third-party complaint was never drafted. *Id.* Similarly, through review of his bill he knew or should have known that Mr. Grafe never finalized a motion to amend, or participated in any hearing related to amendment of the answer to include third-party defendants. Furthermore, Mr. Goll knew or should have known that the complaint was not amended when he first met with Mr. Middleton, and when he prepared for trial. CP 85. Certainly he knew that Mr. Grafe had not filed a third-party complaint against Prudential when he attended trial in August 2003. Thus, he knew in 2003 that Mr. Grafe had not filed a third-party complaint as he requested prior to leaving Middleton & Associates. According to plaintiff's expert, and in the opinion of this court, the failure to name

Prudential as a third party despite Mr. Goll's requests – at least as a back-up defense – constituted sufficient evidence of breach to preclude summary judgment. CP 230; 415.³

3. Injury to the client.

“In the legal malpractice context, injury is the invasion of another's legal interest, while damages are the monetary value of those injuries.” *Huff v. Roach*, 125 Wn. App. 724, 729-30, 106 P.3d 268 (2005). A plaintiff suffers “injury” or “damage” when its legal interests are invaded by negligence, even if the amount of damages has not been conclusively ascertained because of a contingency such as a pending appeal. *Id.*

In the case at bar, Appellant alleges Mr. Goll was injured because Mr. Grafe failed to sue or preserve a claim against Prudential, despite Mr. Goll's requests, which resulted in Mr. Goll having to pay his own defense costs. According to plaintiff's expert, as recognized by this court in the first appeal, Mr. Grafe allegedly breached his duty of care by failing to sue Prudential, which would be based on an ABC theory of indemnity as exemplified in *Manning v. Loidhamer*, 13 Wn. App. 766, 538 P.2d 136, *rev. denied*, 86 Wn.2d 1001 (1975). CP 226-27.

³ Mr. Grafe does not concede this conclusion, but does not dispute it for the purposes of this motion.

According to *Manning*, a claim for litigation expenses occurs when: “(1) a wrongful act or omission by A toward B; (2) such act or omission exposes or involves B in litigation with C; and (3) C was not connected with the initial transaction or event, viz., the wrongful act or omission of A toward B.” *Id.*, 13 Wn. App. at 769. Here, Appellant alleges that Prudential and Windermere (A) performed a wrongful act or omission that exposed Mr. Goll (B) in litigation with Ms. Chrisp (C). In a letter, which is undated, but which was drafted prior to the March 2003 trial, Mr. Goll states “Besides the fact that I want to be completely out of this mess, I want to recover all of the money that I’ve lost. I’m 72 years old and my time is extremely valuable to me. I feel that this lawsuit, which was filed on 10/29/01, and will go to trial on 3/24/03, is a gross waste of time and money.” Mr. Goll went on to state, “I’ve already paid \$3,000.00 to Mr. Grafe in attorney fees.” CP 365-67.

Mr. Goll knew prior to March 2003 that he was incurring attorney fees, which he did not believe he was responsible for paying. At the time of trial, Mr. Goll knew there was no suit filed against Prudential. This constituted an invasion of Mr. Goll’s legal interests sufficient to establish the element of injury. *See Janicki*, 109 Wn. App. at 660. Accordingly, at termination of the attorney-client relationship on June 5, 2003, injury was known and a claim should have been brought within 3 years of that date.

Appellant's own expert testified: **"The fact defendant conferred with the client and committed in writing to a course of action – billed client several hundred dollars to give effect to this plan of action - is itself sufficient to give rise to a cause of action against defendant Grafe when he did not perform the services for which charges were made."** CP 230 (emphasis added).⁴ Appellant cannot argue he was unaware of harm in light of this evidence. Because plaintiff did not file this lawsuit against Mr. Grafe for seven years after he was aware of the alleged harm, this claim is time-barred.

4. Even if Mr. Goll claims ignorance of harm when Mr. Grafe withdrew, he was put on notice when the Court of Appeals reversed in 2005.

Even if Appellant argues Mr. Goll was ignorant of an injury when Mr. Grafe withdrew, despite admissions to the contrary, the discovery rule prohibits Mr. Goll from sitting on his rights indefinitely. As such, in 2005 when this court reversed the defense theory Mr. Goll relied on at trial, he was deemed to be put on notice as a matter of law. *See, Richardson v. Denand*, 59 Wn. App. 92, 98, 795 P.2d 1192 (1990). Our courts have explicitly rejected Appellant's argument that "the statute is tolled until such time as a dissatisfied client obtains other legal counsel or engages in

⁴ Alternatively, Mr. Goll knew or should have known that Prudential was not a named defendant when he attended trial in August of 2003.

independent legal research to determine the propriety of the actions of his or her former counsel.” *Id.* (citing *Gevaart v. Metco Const., Inc.* 111 Wn.2d 499, 502, 760 P.2d 348 (1988)). This is not the law in Washington. *Id.* The discovery rule merely tolls the running of the statute of limitations until the plaintiff has knowledge of the “facts” which give rise to the cause of action. *Id.* at 95.⁵

In *Richardson*, the court held that, as a matter of law, “upon entry of an adverse judgment at trial a client is charged with knowledge, or at least put on notice, that his or her attorney may have committed malpractice in connection with the representation.” *Id.* at 98.

Unlike the situation with the provision of other professional services, however, the damages, if any, resulting from the errors or omissions of an attorney allegedly occurring during the course of litigation are embodied in the judgment of a court. The parties to such an action, in turn, are formally advised of the judgment of the court and, hence, receive notification of any damage which results from their attorney's representation. We conclude, therefore, that upon entry of the judgment, a client, as a matter of law, possesses knowledge of all the facts which may give rise to his or her cause of action for negligent representation.

Id. at 96-97; *see also Janicki* 109 Wn. App. at 660 (holding plaintiff knew or should have known of injury at the time of dismissal and could not

⁵ *Huff v. Roach*, which Appellant contends supports her claim, actually reaffirms the well-settled rule that accrual “does not specifically require knowledge of the existence of a legal cause of action.” 125 Wn. App. 724.

wait until all appeals were exhausted to bring a claim); *Quinn v. Connelly*, 63 Wn. App. 733, 741, 821 P.2d 1256 (1992)) (holding that statute of limitations began to run on the date of the conviction, despite the attorney's alleged assurances that the case could be overturned on appeal).

Richardson and its progeny make clear that a client is deemed to be put on notice of a potential malpractice claim, as a matter of law, when a court enters an adverse judgment against the client. In this way, assuming *arguendo* that Mr. Goll had no knowledge of his injury when Mr. Grafe withdrew, he was on actual or constructive notice of potential malpractice when the Court of Appeals reversed the dismissal of his case on January 3, 2005, holding the substantial compliance doctrine did not apply. *Chrisp v. Goll*, 126 Wn. App. 18, 25, 104 P.3d 25 (2005). In accordance with well-settled law, this adverse ruling establishes Mr. Goll was deemed to be put on notice of injury by 2005. This action was not commenced within three years of 2005 and is time-barred.

Appellant cannot hide behind the failure of Mr. Middleton to act following the Court of Appeals adverse decision. In Washington, [k]nowledge by the attorney is imputed to the client.” *Hill v. Dep't of Labor & Indus.*, 90 Wn. 2d 276, 279, 580 P.2d 636, 638 (1978); *Yakima Fin. Corp. v. Thompson*, 171 Wn. 309, 318, 17 P.2d 908, 911 (1933) (citing *Deering v. Holcomb*, 26 Wn. 558, 67 P. 240 (1901)) (holding

knowledge by counsel of facts sufficient to put an interested party on notice of claim constituted notice both to client and attorney sufficient to start running the statute of limitations)).

Thus, even if Mr. Goll maintains ignorance, Mr. Middleton knew or should have known the implications of the appellate court's reversal – namely, that the defense plan pursued at trial was overturned, and, at least according to plaintiff's expert, Prudential should have been sued for its role in preparing the REPSA paperwork. Notably, Appellant alleges in discovery her belief that Mr. Middletown **knew** that Mr. Grafe had missed the statute of limitations, “and David [Middleton] continued to cover it up for fear of being sued for Malpractice.” CP 85. Under Washington law, Mr. Middleton's knowledge of the potential malpractice by Mr. Grafe is imputed to Mr. Goll. *Hill*, 90 Wn. 2d at 279. If this meant bringing a claim for malpractice against his former associate, Mr. Middleton was obligated to advise his client. Mr. Middleton owed an “undeviating fidelity” to Mr. Goll, and “policy prohibits an attorney from owing a duty to anyone other than the client.” *Mazon v. Krafchick*, 158 Wn. 2d 440, 448, 144 P.3d 1168, 1172 (2006). If Mr. Middleton was concealing this knowledge from his client, then that is a breach of Mr. Middleton's independent duty to Mr. Goll for which Mr. Grafe cannot be held responsible.

D. The trial court correctly held that the continuous representation rule does not apply to Mr. Grafe.

The continuous representation rule “tolls ‘the statute of limitations until the end of an attorney’s representation of a client in the same matter in which the alleged malpractice occurred.’” *Cawdrey*, 129 Wn. App. at 819 (quoting *Janicki*, 109 Wn. App. at 661)). The continuous representation rule does not apply to Mr. Grafe, because he did not continuously represent Mr. Goll in the same or any matter.

Our courts first applied the rule in the attorney-client context in *Janicki*, where a law firm represented Janicki in a breach of contract claim against the United States Forest Service. *Id.*, 109 Wn.2d at 658. After Janicki received an unfavorable administrative decision, Janicki sought to file a civil lawsuit. However, the law firm missed the one-year filing deadline, resulting in dismissal of Janicki’s claim. *Id.* at 658. The firm then continued to represent Janicki for the next seven years through a series of unsuccessful appeals. *Id.* at 658-59. Janicki proceeded to file a legal malpractice lawsuit against the firm. The firm moved to dismiss on statute of limitations grounds. *Id.* at 659. Reversing the trial court, this court adopted the continuous representation rule, reasoning:

The continuous representation rule avoids disruption of the attorney-client relationship and gives attorneys the chance to remedy mistakes before being sued. The rule also prevents an attorney from defeating a malpractice claim by

continuing representation until the statute of limitations has expired. Courts adopting the rule have found it to be “consistent with the purpose of the statute of limitations, which is to prevent stale claims and enable the defendant to preserve evidence.... The attorney-client relationship is maintained and speculative malpractice litigation is avoided.

Janicki, 109 Wn. App. at 662 (internal and external citations omitted).

The *Janicki* Court emphasized that the rule is limited. “It does not apply to a client who retains new counsel on appeal. In addition, the rule does not toll the statute of limitations until the end of the attorney-client *relationship*, but only during the lawyer’s representation of the client in the same *matter* from which the malpractice claim arose.” *Id.* at 663-64 (emphasis in original).

The limited application of the rule was litigated in *Cawdrey v. Hanson Baker*. In *Cawdrey*, the attorney-defendant had represented the claimant on several matters continuously through 2000. *Id.* 129 Wn. App at 819. However, the attorney’s representation of the claimant in the transaction at issue ended in 1999. Accordingly, the trial court held the complaint filed in 2003 was untimely. In affirming dismissal, this court declined to expand the rule, holding that the limitations period begins to accrue when the attorney stops representing the client on a particular matter in which the alleged malpractice occurred. *Id.*

Here, the trial court correctly held the continuous representation

ceased to apply to Mr. Grafe once he withdrew from representing Mr. Goll. Quite simply, the continuous representation rule does not apply because Mr. Grafe did not continuously represent Mr. Goll in the same or any matter after he withdrew.

1. The policy considerations support the trial court's decision.

The policy considerations support affirming the trial court's decision. First, the potential disruption to the attorney-client relationship is a non-factor because it is undisputed Mr. Grafe's relationship with Mr. Goll (and his relationship to Middleton & Associates) ended in 2003. Second, Mr. Grafe had no ability to remedy the alleged mistakes after he withdrew. In fact, Mr. Grafe had an ethical duty not to get involved. *See*, RPC 4.2, cmt 2. Similarly, as Mr. Grafe was no longer representing Mr. Goll, there was no risk or ability to defeat a malpractice claim by representing him until the limitations period expired.

Importantly, the application of the rule must also consider the purpose of the statute of limitations, which is to prevent stale claims and enable the defendant to preserve evidence. *Kittinger*, 21 Wn. App. at 486. The import of these policies is all too evident in the present case, which was filed seven years after Mr. Grafe withdrew. By 2010, not only had Mr. Grafe's memory faded, but both Mr. Goll and Mr. Middleton had

passed away.

Additionally, the expansion of the rule urged by Appellant would have far-reaching negative implications on the practice of law and malpractice insurance. Attorneys frequently move firms throughout their careers. Indeed, the Washington Supreme Court has specifically developed rules of professional conduct recognizing this fact. *See*, RPC 1.9, cmt. 4. It is also known that clients, like Mr. Goll, often do not follow an attorney when he or she leaves a law firm. The rule the Appellant would have this court adopt would expose those departing attorneys to a potential malpractice claim on any case they ever worked long after he or she withdraws and moves firms. As this case illustrates, lawsuits may not resolve for many years or even decades, and the unwitting former associate could do nothing about it. This is not and should not be the law in Washington.

It bears emphasizing that Mr. Goll would not be without recourse had Middleton's firm been sued. The continuous representation rule would toll the malpractice claim against Mr. Middleton's firm because the firm continuously represented Mr. Goll from 2001 until 2008, when Mr. Middleton passed away. Unfortunately for Appellant, her attorney did not sue Mr. Middleton's estate. The Appellant suggests it is ironic that Mr. Grafe did not bring a third party claim against Mr. Middleton's estate,

but Mr. Grafe had no need nor obligation to sue an empty chair under Washington's comparative fault statute. *See*, RCW 4.22.070. On the other hand, the Appellant's claims against Middleton's estate were likely "forever barred" on June 13, 2010, twenty-four months after Mr. Middleton's death. RCW 11.40.051.⁶ The true irony is Ms. Beck likely has a malpractice claim against her current attorney for missing the statute of limitations against Mr. Middleton's estate.⁷

The Appellant misconstrues the holding in *Hipple v. McFadden*, 161 Wn. App. 550, 255 P.3d 730 (Div. 2, 2011). *Hipple* does not stand for the proposition that the continuous representation rule should be applied whenever doing so would benefit the aggrieved client. *See* Appellant's Brief at 25-36. *Hipple* held the test for determining whether an attorney-client relationship ends for the purposes of the statute of limitations is when the client actually or reasonably should have no expectation that the attorney will provide further legal services. *Id.*, 161 Wn. App. at 559. In *Hipple*, there were conflicting accounts about whether the attorney-

⁶ RCW 11.40.051(1)(c) provides in relevant part that " Whether or not notice is provided under RCW 11.40.020, a person having a claim against the decedent is forever barred from making a claim or commencing an action against the decedent, unless the creditor presents the claim in the manner provided in RCW 11.40.070 within ... (c) ... twenty-four months after the decedent's date of death.

⁷ Appellant may argue that at the time of filing she could have still sued to recover under any available malpractice insurance pursuant to RCW 11.40.060, which provides an exception to the time limits set out in RCW 11.40.051. While potentially true, such argument is meaningless as Ms. Beck never sued Mr. Middleton's estate, and any claim to recover against any potential insurance policies is certainly time-barred today.

defendants were representing Hipple in connection to a contempt proceeding, thus precluding dismissal. *Id.* at 555, 560. Here, there is no dispute Mr. Grafe notified Mr. Goll in writing he was leaving Middleton & Associates and would no longer represent him. There is no dispute Mr. Grafe formally withdrew, and that Mr. Middleton took over the case through trial and the subsequent appeals. Thus, *Hipple* undermines rather than supports Appellant's claim as it confirms the statute of limitations began to run when Mr. Goll knew Mr. Grafe no longer represented him in 2003.

Appellant's reliance on *Wagner v. Sellinger*, 847 A.2d 115, 1156 (D.C. App. 2004) is also misplaced. Our courts have expressly declined to adopt the tolling mechanism applied in that case, noting the proposed exception would conflict with Washington's policy favoring the statute of limitations shielding defendants from stale claims. *See, Huff*, 125 Wn. App. at 731-32.

In fact, other jurisdictions to address a nearly identical fact pattern support the trial court's decision. *See, e.g., Beal Bank, SSB v. Arter & Hadden, LLP*, 42 Cal. 4th 503, 513-14, 167 P.3d 666, 672-73 (2007). In *Beal Bank*, a former client sued an attorney and his prior law firm for malpractice arising out of a debt collection matter. *Id.*, 42 Cal. 4th at 505-506. The trial court dismissed the lawsuit against the prior law firm on

statute of limitation grounds. *Id.* at 506. The California Court of Appeal reversed, and the California Supreme Court granted review. *Id.* It held that under the continuous representation rule, codified by statute, “an action against an individual attorney is tolled so long as *that attorney* continues representation; conversely, an attorney’s continued representation tolls an action only against that attorney.” *Id.* at 508. Thus, it reversed the Court of Appeals, and affirmed dismissal of the lawsuit against the former law firm. *Id.* at 515. In reaching this result, the California Supreme Court carefully addressed the various policy implications:

[The] potential disruption from third party indemnity suits is surely less of a concern than that which triggered enactment of the continuous representation tolling provision—i.e., forcing the client to prematurely sue the attorney. Moreover, any disruption may be reduced through voluntary tolling agreements, as have been entered into in this case and in numerous others, or through stays of litigation. As we have previously emphasized, trial courts have inherent authority to stay malpractice suits, holding them in abeyance pending resolution of underlying litigation. The liberal use of tolling agreements and stays in malpractice cases may reduce the impact on the underlying litigation, ensure that plaintiffs do not have their claims prematurely barred, protect defendants' and defendants' insurers' interests in receiving timely notice and avoiding stale claims, and allow current counsel, to the extent practicable, to continue to work to ameliorate the consequences of any past mistakes. Current counsel will have considerable incentive to do so, as any mitigation will reduce their own potential future liability. As for the further risk Beane noted, that current counsel will continue

to lull unwary clients and prevent them from suing, attorneys have a fiduciary obligation to disclose material facts to their clients, an obligation that includes disclosure of acts of malpractice. Former counsel are powerless to control whether current counsel breach that obligation. To the extent current counsel do breach that obligation, it will do nothing to reduce their own liability, as their own ongoing representation will continue to toll the limitations period on claims against them; it will instead simply increase the risk that when the client does sue, current counsel and current counsel alone will be forced to bear responsibility for any errors.

Beal Bank, 42 Cal. 4th at 513-14. The California Supreme Court's decision in *Beal Bank* is well-reasoned, factually analogous to the case at bar, and consistent with the continuous representation rule in Washington.

2. Appellant confuses concurrent tortfeasor liability and the continuous representation rule.

Appellant argues the trial court erred by focusing on the fact that she never sued Mr. Middleton. She posits that under a concurrent tortfeasor theory of liability, she only needed to sue one or the other. *See*, Appellant's Brief at 21. However, the trial court did not discount plaintiff's concurrent tortfeasor theory in dismissing the action. Rather, the trial court correctly recognized that for the concurrent representation rule to apply there must be **continuous** representation. This was lacking because she did not sue Mr. Middleton and Mr. Grafe had withdrawn from representation of Mr. Goll in 2003.

To overcome this problem, Appellant attempts to conflate concurrent or successive negligence with the continuous representation rule. However, these are two distinct and unrelated rules. As set forth at length above, the continuous representation rule is a provision for tolling the statute of limitations and is driven by policy considerations. The theory of concurrent tortfeasor liability, by contrast, relates to proximate cause, and more specifically, whether the contributing concurrent or successive negligence of a third person is a superseding cause that breaks the causal chain between the original negligence and the injury. *State v. Jacobsen*, 74 Wn.2d 36, 37, 442 P.2d 629 (1968); *See, Estate of Keck By & Through Cabe v. Blair*, 71 Wn. App. 105, 112-13, 856 P.2d 740, 744 (1993); *Seibly v. City of Sunnyside*, 178 Wn. 632, 33, 35 P.2d 56 (1934). While Mr. Grafe maintains he was not a proximate cause, Appellant is correct that this court held that the jury could find that either Mr. Middleton or Mr. Grafe, or both were a proximate cause of Mr. Goll's alleged injury. CP 422-23. But the fact that Mr. Goll had the theoretical capacity to sue either attorney does not equate to an affirmation of the claim's validity or its timeliness. To maintain a claim for malpractice against either attorney, Appellant must still timely bring the claim. RCW 4.16.080; *Janicki*, 109 Wn. App. at 661. Whether or not Mr. Grafe could be deemed a proximate cause, the claim against him was untimely and she

never sued Mr. Middleton.

The continuous representation rule only applies when the same attorney represents the same client in the same matter. It does not apply to Mr. Grafe, who did not continuously represent Mr. Goll.

E. Equitable estoppel does not toll the statute of limitations.

Appellant's final argument regarding the statute of limitations, which she raised for the first time on reconsideration, is similarly unpersuasive and the trial court properly disregarded it. First, the plaintiff offered no authority to support its position, and the court need not consider it. *Johnson Forestry Contracting, Inc. v. Washington State Dep't of Natural Res.*, 131 Wn. App. 13, 27, 126 P.3d 45, 52 (2005), *as amended* (Jan. 4, 2006). Second, the record falls significantly short of the evidence necessary to support the claim. Washington courts do not favor equitable estoppel, and a party asserting it must prove each of its elements by clear, cogent, and convincing evidence. *Teller v. APM Terminals Pac., Ltd.*, 134 Wn. App. 696, 712, 142 P.3d 179, 187 (2006).

The elements are: (1) an admission, statement, or act inconsistent with a claim afterward asserted; (2) an action by another in reasonable reliance on that act, statement, or admission; and (3) injury to the party who relied if the court allows the first party to contradict or repudiate the prior act, statement, or admission. *Id.*

Id. Estoppel may be appropriate to prohibit a defendant from raising a statute of limitations defense, but only when the defendant “fraudulently or inequitably” invited plaintiff to delay commencing the lawsuit. *Id.* at 713. There is no evidence of fraud by Mr. Grafe here, and Appellant does not even allege it. Rather, Appellant alleges Mr. Grafe negligently failed to bring a claim against Prudential. Nor has Appellant presented clear, cogent, and convincing evidence of reasonable reliance. This element is not satisfied for the same reasons Appellant cannot show the claim should be tolled by the discovery rule – namely, Mr. Goll had actual or at least constructive notice of the essential elements of his alleged malpractice against Mr. Grafe long before he filed this suit. Such notice required him to diligently pursue a legal claim. *Reichelt*, 107 Wn.2d at 772. Mr. Goll failed to exercise diligence under the facts, and his claim is barred. *Id.*

F. This court may alternatively affirm dismissal on the ground the dead man statute bars evidence necessary to support plaintiff’s malpractice claim.

This court may alternatively affirm dismissal as the dead man’s statute precludes evidence from Mr. Goll necessary to support a claim for malpractice. As noted above, “[a] trial court’s decision will be affirmed on appeal if it is sustainable on any theory within the pleadings and the proof.” Tegland, 2A Wash. Prac., Rules Practice RAP 2.5 (6th ed. 2010); *see also Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 493, 933 P.2d

1036 (2007).

The dead man's statute, RCW 5.60.030, reads as follows:

No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility: **PROVIDED, HOWEVER, That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person ... then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased ... person[.]**

The dead man's statute precludes evidence as to liability and damages from Mr. Goll, the deceased, by his daughter Ms. Beck, his personal representative. The statute defines an "adverse party" as an "executor, administrator or legal representative of any deceased person." RCW 5.60.030. "In practice, the vast majority of cases involving the dead man statute are lawsuits either by or against a decedent's estate, brought or defended by the personal representative of the estate." 5A Wash. Prac., Evidence Law & Practice § 601.18 (5th ed.) Interested parties are those that stand to gain or lose by the operation and effect of the action or judgment in question. *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 150 P.3d 1163 (2007); *State v. Robbins*, 35 Wn.2d 389, 213 P.2d 310 (1950). The test for excluded "transactions" is whether the

deceased, if still alive, could contradict the offered testimony **from his own personal knowledge**. *Dennis v. Metzenbaum*. 124 Wn. 86, 213 P. 453 (1923).

The statute does not disqualify a person from being a witness; it prohibits him or her from telling of any transactions had by him with, or any statements made to him by the decedent. *Kauffman v. Baillie*, 46 Wn. 248, 252, 89 P. 548 (1907). “[I]t would be palpably unjust to permit the representative of a deceased person to examine the opposing party on matters as to which the party would otherwise be incompetent to testify, and accept his testimony in so far as it aids him and reject it in so far as it is adverse to him.” *Floe v. Anderson*, 124 Wn. 438, 440, 214 P. 827 (1923). Where testimony proffered is a narrative of transaction with decedent, it is not error to exclude such testimony. *Ulbright v. Hageman*, 181 Wn. 706, 44 P.2d 196 (1935).

Here, Appellant cannot testify as her father’s personal representative regarding what he allegedly knew or what damages he allegedly incurred. In her deposition, relating to the statute of limitations, Ms. Beck stated:

Q. And I am speaking more of what was said during the meetings. You said you, your father and Mr. Middleton were the only people present in the meetings?

A. Yes.

Q. So is there anyone who can refute or support your position as to the fact that Mr. Middleton never mentioned the statute of limitations?

A. Unless we have a phone to heaven, no.

CP 355-56.

The same is true as to Ms. Beck's meetings with Mr. Grafe where she allegedly was a witness to the conversations between her father and Mr. Grafe. CP 348-49.

Ms. Beck cannot testify as to what was said during the meetings with Mr. Grafe or Mr. Middleton, because she is an interested party and neither Mr. Goll nor Mr. Middleton can be cross-examined or subject to examination by a fact-finder. Among other arguments, Appellant relies on this inadmissible testimony to support her claim that the discovery rule should apply. Even though the discovery rule does not apply for the reasons set forth above, she can offer no admissible evidence of what Mr. Goll knew or what Mr. Grafe told him. The dead man's statute operates to exclude this type of information.

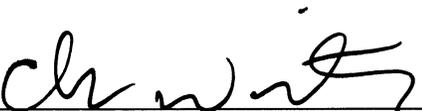
V. CONCLUSION

This Court should affirm summary judgment dismissal as the trial court correctly held that Appellant failed to timely bring this lawsuit against Mr. Grafe more than three years after the claim accrued. Alternatively, this court may affirm dismissal based on the record as the

dead man's statute precludes evidence from Mr. Goll necessary to pursue his claim against Mr. Grafe.

Respectfully submitted this 27th day of April, 2015.

LEE SMART, P.S., INC.

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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on April 27, 2015, I caused service of the foregoing pleading on each and every attorney of record herein:

VIA LEGAL MESSENGER

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DATED this 27th day of April, 2015 at Seattle, Washington.



Susan Munn, Legal Assistant

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