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A. INTRODUCTION

This matter comes before the Court on appeal of an order of summary judgment dismissing Plaintiffs' complaint upon finding that Defendants' negligence was not the proximate cause of Plaintiffs' damages.

This lawsuit alleging legal malpractice was brought by Plaintiff Alan J. Veys and two (2) wholly owned companies¹ through which he owned and operated a fishing lodge that is commonly known as the Pybus Point Lodge (the "Lodge"). The Lodge is located on Admiralty Island, a remote part of Alaska approximately (80) miles southwest of Juneau, Alaska. Plaintiffs allege attorney malpractice by Attorney Long and the two law firms through which he acted as legal counsel to Mr. Veys and his companies for over 15 years.² Although divorced from Michael Long after the filing of the Complaint, Ann Long ("Ann Long") remains a defendant party because she continues to own former marital property that is at risk in the event of a judgment in Plaintiffs' favor.³

¹ The Plaintiffs are collectively and interchangeably referred to hereinafter as "Plaintiffs", "Mr. Veys" or "Veys."

² Mr. Long and his law firms are collectively and interchangeably referred to hereinafter as "Long" or Attorney Long.

³ Michael Long's Motion for Summary Judgment (hereinafter "Long SJ Motion"), CP 140 at footnote 1.

The Complaint, CP 3-25, asserts two claims for relief, a claim of legal malpractice sounding in tort (First Claim for Relief)⁴ and a second claim for legal malpractice sounding in breach of contract. (Second Claim for Relief).⁵ The attorney malpractice complained of occurred in relation to two transactions:

- the 1994 acquisition by Long and Alan Veys of a parcel of real estate located in Washington, bordering the Cowlitz River (the “Accretion Land”);⁶ and,
- Attorney Long’s representation of Mr. Veys in relation to the negotiation and sale of the Lodge in 2004 (the “Lodge Transaction”).

With regard to the Accretion Land, Veys asserts that although Long proposed that they purchase the Accretion Land on a 50/50 basis, and although Veys paid his share of the purchase price, Long acquired and recorded the property in the name of a company owned by Ann Long and himself. Attorney Long did not advise Veys of the actual conflict of interest, did not advise him to seek counsel in relation to the transaction and did not properly convey to Veys an interest in the land, a situation that continues to this day.

⁴ The First Claim for Relief is found at Complaint, CP 21, ¶¶ 124-131

⁵ The Second Claim for Relief is found at Complaint, CP 24, ¶¶ 132-136.

⁶ See Complaint, CP 6-7, ¶¶ 19 to 26 and CP 23, ¶¶ 130 j through l for allegations relevant to the Accretion Land.

With regard to the Lodge Transaction, Veys asserts that Long was negligent in that: Long failed to protect his clients' expressed interest while negotiating and participating in the drafting and review of the purchase and sale agreement (the "PSA"); failed to adequately consult with Veys with regard to the content of the PSA; failed to assure that Veys had received, reviewed and understood the PSA; failed to adequately consult with Veys prior to releasing a pre-signed signature page, thereby effecting execution of the PSA and binding his client to an unfavorable contract; and, ultimately, provided incorrect advice to Mr. Veys regarding the legal enforceability of the contract. Had Long properly done his job, Veys would not have entered into the PSA, would not have breached the PSA and would not have been sued by the buyers⁷, a lawsuit that resulted in a \$3,000,000 verdict and judgment against Mr. Veys, the subsequent bankruptcy filings of Alan J. Veys Properties, LLC and Lone Eagle Resorts, Inc. on May 1, 2006 and the personal bankruptcy filing of Alan Veys on July 19, 2006. Had attorney Long properly done his job, Veys would have achieved a "more favorable outcome" at the end of the negotiation... he would not have entered into the PSA.⁸

⁷ The Wyoming lawsuit by Buyers against Veys is referred to hereinafter as the 'Wyoming Trial.'

⁸ The allegations of negligence as to the Applequist Transaction are found at Complaint, CP 21-24, ¶ 130, subparagraphs a. to i. and o.

On or about October 31, 2011, Long filed the Long SJ Motion raising three issues relevant hereto:⁹

1. Should the court grant summary judgment against Plaintiffs' attorney malpractice claims because Plaintiffs cannot establish proof of proximate cause? (The "Proximate Cause Issue.")
2. Should the court limit the potential damages at trial to the amount that Plaintiffs can demonstrate are the result of Long's actions and not the actions of a superseding tortfeasor? (The "Superseding Tortfeasor Issue.")
3. Should the court grant summary judgment against Plaintiffs' claims that are unrelated to the PSA because they are barred by the statute of limitations? (The "Statute of Limitations Issue.")

By Order of June 14, 2012, CP 859, the trial court granted the motions for summary judgment on each of the three arguments above and dismissed the first cause of action that asserted legal malpractice sounding in tort. This appeal followed. CP 862.

B. ASSIGNMENTS OF ERROR

1. Long's conduct was the proximate cause of Veys' Damages.
2. The failure by trial counsel in the Wyoming Trial to convey a settlement offer to Veys is not a superseding tort that is "so highly

⁹ Long also asserted that Veys' contract-based malpractice claim should be dismissed as it is subsumed by the malpractice claim sounding in negligence. At the outset of oral argument, Plaintiffs conceded the that issue as the relevant, written contract for legal services had not been found. Veys has abandoned the contract-based malpractice claim.

extraordinary or unexpected as to fall outside the realm of reasonable foreseeability as a matter of law.”

3. The trial court erred in applying the statute of limitations to excise paragraphs of the complaint and dismiss the Accretion Land Claim “without finding it necessary to review individually each of the allegedly defective paragraphs, as articulated in defendants’ motions.” CP 859.

Issues Pertaining to Assignments of Error

1. Where Veys shows that “but for” Long’s negligence, he would not have entered into the PSA, would have avoided a \$4,000,000 loss and subsequently sold the Lodge for \$3,000,000, has he shown that Long’s conduct “probably caused” the alleged injury?

2. Is Riske’s failure to advise Veys of a settlement demand of \$300,000, a superseding tort that limits Veys’ recovery against Long to \$300,000?

3. Should summary judgment be utilized to excise individual factual allegations of the complaint that are relevant to the claim? As Long has yet to convey title in the Accretion Land to Veys, has the statute of limitations commenced running?

C. STATEMENT OF THE CASE

1. Procedural History

Veys' *Complaint*, CP 3, was filed in Cowlitz County Superior Court on June 19, 2009. On December 8, 2009, the case was assigned to Clark County Judge Diane M. Woolard for pretrial matters. CP 91-92. On October 15, 2009, Long filed a *Motion to Dismiss/Motion to Strike/Motion for More Definite Statement* (the "Motion to Dismiss"). CP 64. Said motion was denied by Order of March 19, 2010. CP 134. On November 1, 2011, Defendant Long filed *Defendant Michael Long's Motion for Summary Judgment and in the Alternative Partial Summary Judgment*, (hereinafter, the "Long SJ Motion"). CP 138. Ann Long joined in that motion on January 6, 2012. CP 294. Veys' *Memorandum in Opposition to Defendants' Motion for Summary Judgment* was filed on April 2, 2012. CP 466. The Defendants filed a *Joint Reply Brief in Support of Motion for Summary Judgment and in the Alternative Partial Summary Judgment* on April 6, 2012. CP 782. Following hearing and argument, the Court issued a preliminary letter ruling on April 26, 2012, CP 793, followed by an order of June 14, 2012 granting Defendants' motions and dismissing Veys' claims in their entirety, with prejudice. CP 843. Veys' *Notice of Appeal* to this Court was timely filed on July 9, 2012. CP 862.

2. Substantive Facts

In the spring of 2004, Messrs. Applequist, Jones and Reed (“Buyers”) and Alan Veys worked toward the sale of Pybus Point Lodge. Throughout May, drafts of a PSA were circulated among the parties, Buyers’ attorney Darin Scheer, attorney Long and “Tonk” Fischer, Mr. Veys’ accountant. Negotiations progressed very slowly. Long was Veys’ point man in the negotiations. CP 587; CP 7, ¶28. Veys has learning disabilities and difficulty reading; particularly complicated terms and concepts typically contained in contracts. CP 589. Given his shortcomings with evaluating financial and legal matters, Veys relied heavily on his professionals. CP 591; CP 773. Veys’ inability to comprehend the words or substance of the PSA was demonstrated at the Wyoming Trial.¹⁰ Veys has been examined and diagnosed with Pervasive Developmental Disorder characterized by impaired verbal and conceptual reasoning, impaired verbal memory and impaired verbal integration abilities rendering him unable to efficiently or effectively process written information. CP 773. Having worked with Veys for over a decade, Long was aware of his shortcomings. CP 773. Veys reminded Long, telling him in an e-mail of

¹⁰ CP 592: Wyoming Trial Transcript: pg. 976, ln. 13 – line 17, ([Mr. Veys]: “Again, I am -- I have to apologize. I’m not an accountant or a lawyer so I don’t understand a lot of this stuff, but to the best of my knowledge on -- this is what I will do on net profits. I don’t understand totally.”); and at pg. 935 line 16” ([Mr. Veys]: I have to apologize to the jury. I don’t understand a lot of this contract, and I’m sorry about that. I do not understand it.)

May 7, 2004, "I want you to write up another contract that is in your words and I can understand." CP 594.

As Veys was to retain ownership and use of his personal home that is adjacent to the Lodge, continuing access to Lodge resources and well-defined arrangements for shared use of the lodge facilities were critical to Veys and his willingness to enter into the transaction. By necessity, as the Lodge and home are on contiguous properties on isolated Admiralty Island, Veys would be dependent on the Lodge's resources and facilities to enjoy use of his home and, indeed, to survive on the Island. Among the issues critical to Veys were limitations on the use of his personal residence, his access to freezers, docks and moorings, storage for his airplane, and his ability to buy fuel and supplies from, or together with, the Lodge. CP 594; CP 773-774. From the outset, Veys was insistent on retaining access to Lodge resources on terms that would allow him and his guests to enjoy the use of the home. CP 773-774. On May 4, 2004, Veys faxed a handwritten note to Long listing items that he wanted included "in the contracts," including:

- A water Line Easement across the Lodge property to the house;
- Use of the Lodge's docks and the dock freezer at any time for himself and friends;
- The right to tie-up a floatplane to the existing docks and unlimited use of fresh water to wash the plane;
- The right to dock a boat at the docks;

- Use of existing fuel tanks and the right to purchase fuel;
- An easement right across the Lodge's front beach for access to docks and to transfer supplies;
- Use of the backhoe and six-wheeler without charge in order to do work at the house;
- Provision that Veys would work for the new owners for two to three years if they cover all of his expenses, food, travel and medical insurance;
- That the contracts include a "hold-harmless" agreement so that Veys could not be sued.

Veys closed the communication by saying, "Mike, you know what else we need to protect me. Thank you." CP 596

The items that Veys wanted included in the PSA, were conveyed by attorney Long to attorney Scheer, including in an e-mail of May 10, 2004, CP 599, where he listed the following items for inclusion in the PSA:

- Valerie Svendson (Mr. Veys' assistant) was to receive a \$10,000 bonus at closing if she is not retained by the new owners;
- Alan Veys and his house guests, are to have access, without charge, to the docks and freezers for twenty years, including access to fresh water and the right to dock Alan's float plane, irrespective of any subsequent sale or assignment [of the Lodge] to third parties;
- A water line easement to the home to perpetuity;
- Access to fuel docks and right to buy gas or diesel fuel;
- Health and medical insurance for Alan Veys;
- That a portion of the IFQ (fish quotas that limits the amount of fish that can be caught) be reserved for Alan Veys.
- That there be no encumbrances upon or subleases or sale of the Lodge until the purchase price was fully paid;
- That there be no indemnity agreement in favor of the Buyers;
- That Alan Veys have full access to the Cessna 206 airplane.

Veys also made direct written request of attorney Scheer for items that were important to him including, on May 22, 2004, when he emphasized that the PSA should have a “hold harmless agreement” in his favor and that he was concerned about the length of the agreement. CP 603. As excited as he was about the deal, Veys made it clear that he was relying on Long to assure that his interests were protected explaining, in an e-mail of May 14, 2004, ...”I think this is going to be a wonderful deal, and what I mean is Marvin, Val and Bruce are going to be great to purchase the lodge. In the future we will be able to work together. All that needs to happen is you put on your Att. hat and make this very secure for me.” CP 605.

Indeed, Veys’ priority was that the deal proceed smoothly and that nothing be left unattended or undecided that could later cause problems. CP 774. On May 19, 2004, Veys wrote to Darin Scheer:

... I just want you to know that this is more than just selling a piece of property, I have spent my life here and I am excited to see it go to you. How ever [sic] I just don’t want to have **ANY PROBLEMS** down the road. I have [sic] been ripped off by other people and I am so very careful now that, I would rather see this place sit empty or give it to the church, before I would ever go through that again. Both you and I know the real truth about our justice system it’s not who’s right.” (Emphasis in the original.)

CP 607; CP 364.

Veys was not in need of, or insistent upon, selling the Lodge and

was prepared to walk away from the deal in the face of any problem or disagreements on the terms of the sale. CP 774.

The progress of negotiations was slow. CP 358; CP 300, ln.11. By the end of May, many issues remained unresolved including the purchase price. CP 774. During the Wyoming Trial, Tonk Fischer explained that he thought that the draft contract for sale was “terrible”: “It's very hard to figure and will lead to disagreement in the end...” CP 609.

On Sunday, May 30, 2004, Veys, Long, attorney Scheer and Buyers met at Long's law office in Longview, Washington, in attempt to hammer out details of the sales transaction.

In addition to the inherent pressure of a negotiation, the principals faced an artificial deadline for coming to terms that was imposed by prospective buyer Marvin Applequist. CP 182-185. Mr. Applequist explained that his employment contract with the Farm Bureau Federation (the “Farm Board”) was to be renewed on Thursday, June 3, 2004; if the PSA were executed before then, Mr. Applequist would not renew his contract with the Farm Board. CP 617.

Thus, the parties had three days within which to revise, finalize and execute the draft PSA. By the end of the day on May 30, 2004, they had come to agreement on major terms such as the purchase price but most of Veys' concerns about his post-sale life on at his Admiralty Island home,

his unfettered right to use Lodge facilities, the personal property that he would retain and the terms of his consulting agreement with Buyers, remained unresolved. CP 195, ln. 7-22. It was agreed that attorney Scheer would prepare a draft PSA and circulate it for review by the parties and their attorneys. CP 195-195. Veys believed that unresolved issues that were of primary importance to him would be the subject of further amicable and successful discussion and negotiation after review of the revised PSA. CP 774-775.

Attorney Scheer spent much of the night following the May 30, 2004 meeting drafting the newly designed PSA. CP 194, ln. 10-21. At 12:46 P.M on May 31, 2004, Scheer attached the draft PSA to an e-mail and sent it to Applequist, Long and Veys. CP 196. At 7:37 P.M. Long e-mailed Veys and asked him to confirm receipt of the PSA, to review it and provide him with comments. CP 619. Veys could not confirm receipt of the draft PSA or the exhibits as he had not then received, and did not until June 16, 2004 receive, a copy of any version of the PSA that had been drafted or modified after the May 30, 2004 meeting. CP 775.

Neither Long nor Ann Long asserts that Veys received and was able to review a copy of either a draft or the final PSA prior to June 16, 2004. Veys has consistently explained that he did not receive the draft PSA's, as the computer at the Lodge could not open e-mail attachments.

CP 775.

Under pressure from Buyers to complete the deal by the date of Applequist's Farm Board meeting, on June 1, 2004, Long faxed a signature page from a draft PSA to Val Svendson in Juneau with request that Mr. Veys execute and return the page bearing his signature. CP 621. Veys flew his small plane from the Lodge to Juneau, signed the signature page and faxed it back to attorney Long. It was agreed between them that Long would not deliver the signature page to Buyers' attorney Scheer until so authorized by Veys. CP 775 ¶ 10.

Discussions continued over the next several days. Veys remained concerned with the post-sale, "lifestyle issues" raised by him at the May 30 meeting. Accountant Tonk Fischer, who had received a draft PSA, found many failings in the document and, including in a letter that that was admitted as Exhibit 65 at the Wyoming Trial, provided significant feedback to attorney Long. He testified about his concerns during that trial:

Q: [I show you] Exhibit 65 and ask if you have ever seen that document before?

A. [By Tonk Fischer] Yes, ...This is a letter I wrote to Mike [Long] with some of the concerns I had about the contract. ... I believe it was the last week of May, first day or two of June before the contracts were being signed....

Q. What I'm asking you to do is to tell me whether the comments that you made about the draft were incorporated into Plaintiff's Exhibit 2 [the Final PSA].

A. I believe, according to this, only number 6, number 8, and number 10 were. The other ones I looked up were not incorporated...I think a couple [that were not included] are probably the most important.... It's critical. I think in my eyes there was an understanding of how the contract was being drafted, but the way that it was written didn't clarify it.

CP 625.

Of the ten requested changes, only three were obtained by attorney Long and incorporated into the final PSA; the rest, including those most important to Veys' interest, were disregarded. CP 625. Among the items disregarded was accountant Fischer's concern about allocation of the purchase price and the adverse, tax consequences of the PSA on Veys. CP 625; CP 623.

By e-mail of 5:20 P.M. on June 2, 2004, attorney Scheer forwarded the proposed final PSA to Long and explained that the bulk of the changes requested by Veys were not included but would be considered in the future. CP 629. That e-mail reads, in part, as follows:

Mike. After getting your accountant's notes at 3:30 this afternoon. I've made all the changes I can without being able to get in touch with my clients. I think they're all on the road this afternoon to one place or another. Accordingly, attached is a final draft of the PSA – to the extent that my clients are agreeable to any additional request, we can modify those provisions in the form of amendments.

It is important to note, and critical to this case, that Veys' and Long's understanding as to how the remaining terms were to be resolved, was diametrically opposed to that of Buyers.

Buyers asserted that the PSA was to be a binding document and that any agreement as to the matters and issues delegated to the unfinished schedules, including those issues of paramount importance to Veys, might be agreed to later, if at all, but that the lack of agreement would not void the binding effect of the PSA. Applequist so testified during the Wyoming Trial, under questioning by his trial attorney:

Q: All right, and so to kind of finish your description of how this [Section] 2.1.1(a) [of the PSA] worked and what the deadline meant and what happened if you didn't meet that deadline.

A: Okay, [attorney Scheer] provided that if we couldn't reach agreement on what those additional things were, then we would go back to the contract [as executed], and that would be the binding thing that we would all stand by.

C 193, ln. 4-12.

Section 2.1.1(a) of the PSA to which Applequist referred in his Wyoming Trial testimony, has come to be known to the parties to this litigation as the "Cram Down Clause." It reads as follows:

(a) After execution and delivery of this Agreement, and upon the mutual agreement, execution and delivery by all Parties of all schedules and exhibits hereto ("Exhibits"), which Exhibits shall replace any corresponding initial exhibits attached hereto ("Initial Exhibits"), the Purchaser shall pay to the Seller the

amount of \$50,000 (the "Deposit") in immediately available funds by confirmed wire transfer to a bank account designated by the Seller. The Parties hereby agree to use diligent efforts and to work in good faith to negotiate and execute all Exhibits on or before June 18, 2004. The Parties will circulate and execute Exhibits as they become available without waiting for all Exhibits to be prepared and, as each Exhibit is **mutually agreed upon and executed by each party, said Exhibit shall immediately replace the corresponding Initial Exhibit hereto** even if other Exhibits remain to be finalized. Upon final mutual agreement by the Parties to all Exhibits hereto, which agreement shall be evidence by exchanging executed copies by facsimile or other means, Purchaser shall immediately remit the Deposit to Seller. **If the Parties have failed to agree on the Exhibits by June 18, 2004, Purchaser may, at any time thereafter, remit the Deposit to Seller and elect for both Parties to be bound by the Initial Exhibits hereto, which incorporate by reference the recital set forth above and the mutual intent and understanding of the parties that this Agreement be consummated in good faith under the terms set forth therein.**

CP 631-632. (Emphasis not in original.)

Long now adopts Buyers' position that the parties agreed to the substance of §2.1.1(a) during the May 30, 2004 negotiations. See CP 142, ln. 4-14. His current stance is belied by his June 24, 2004 letter to Scheer in which he asserted that the PSA was not final and binding "unless and until [the parties] can mutually agree on replacement exhibits." CP 634-635. Long rationalizes this inconsistency by asserting that what he told Scheer was untrue and that he was simply advocating a strategy position to help Veys. Today, Long asserts that Veys developed this strategy. CP 143, ln. 20 to CP 144, ln. 5. By contrast, during a July 14, 2010

deposition taken in this case, Long testified that he alone developed the strategy. CP 637-639. Veys maintained then, and does to this day, that: he did not see, read, have read to him, or discuss PSA Section 2.1.1(a), until well after Long's release of the signature page to Scheer; that the terms of the final PSA were not negotiated or agreed to during the May 30 meeting; that he was not aware of the full content of the final PSA until mid-June when it was explained to him by his friend, Washington Superior Court Judge Steve Warning; and, that **had he know what it was in the PSA, he would not have executed the agreement.** CP 775, ¶¶ 11, 12.

Ann Long seems to support Mr. Veys' assertion of fact. In that section of the Ann Long SJ Motion entitled "Statement of Undisputed Facts," defendant Ann Long references a June 5, 2004, e-mail from Veys to Darin Scheer, CP 381, in which Veys elects the \$2.65 million sale option and admits that "[a]t the point, Mr. Veys had agreed on a purchase price and agreed to sell the Lodge to the Applequist group, subject to agreeing on exhibits." CP 384, ln. 19-23. (Emphasis added.)

It is undisputed, however, that Veys did not see the May 31, 2004 draft PSA prepared by attorney Scheer, any subsequent draft or the final PSA, until June 16, 2004.

On June 3, 2004 at 12:04, attorney Scheer forwarded the proposed Final PSA to Long. CP 641. Although unable to transmit copy of the

proposed PSA to Veys, Long was able to telephone his client and discuss the purchase price options being presented by the Buyers. CP 776, ¶ 13. The isolation of the Lodge makes cellular telephone service sporadic; there are no “hard-lines” to the island. CP 776, ¶ 13. Shortly after Veys’ telephone discussion with Long, the cellular connection “died.” Thus, Veys, e-mailed attorney Scheer and advised, “... My phone up here is not working now so I am on the e-mail with you. I have told Mike [Long] to go for one of the two [purchase price options]. I just need to talk with Tonk and I am still open for both. I am going to one or the other...” CP 643. At 12:28 P.M., attorney Scheer wrote to Veys and explained, “Mike can’t get in touch with you, and we need to know [which option you are choosing]. Can Mike send your signature page for that agreement?” CP 645. In reply, at 12:29 P.M., Mr. Veys wrote back confirming that his telephone service was down and telling him that he would make his election and communicate it to attorney Scheer. Veys also asked attorney Scheer to pass that information on to Long as Veys was having difficulty communicating with him. CP 646. Continuing to pressure Veys, and aware that Veys was unable to contact Long, attorney Scheer wrote to Veys just eight minutes later asking him to commit to the deal saying “If you will do that, Mike [Long] can send me your signature. CP 649. At 12:45, Veys replies that he will commit “as soon as I talk to Tonk.” CP

651. Six minutes later, Scheer writes to Long, enclosing Veys immediately preceding e-mail and tells him: “Mike, Alan appears to have committed (see e-mail below). Can you send the signature pages?” CP 651. At 1:11 PM, Scheer again writes to Long and again encloses the final PSA, warning him, “Mike, THIS IS THE FINAL PSA. If and when you send Alan’s signature pages, this is what he’s signing.” CP 655.

At 1:24 PM, still without hearing from attorney Long, Veys writes to him:

My phone has gone down and I cannot call out. I just wanted to let you know to go for one of the deals with Darin. **Just so all the other conditions still apply to the deal, truck payment, starband, dock use, water line, one boat will be mine and 40 hp Yamaha. Alan** (Emphasis added.)

CP 657.

As he had not seen either a draft or the final PSA, Veys did not know that all of the “other conditions” that he had advised Long as early as May 4, 2004 were critical to him, were not included in the PSA. CP 776, ¶¶ 14-15; CP 596-597.

Disregarding Veys’ specific instructions to assure that his interests were safeguarded, and without assuring that his client wanted to be bound by the as yet unseen PSA, Long faxed the pre-signed, signature page to Scheer. CP 659-660. At 2:22 PM, Scheer wrote to Long, confirming that he had received the faxed signature page. CP 662.

On June 11, 2011, Long writes to Veys and to Tonk Fischer telling them that the exhibits to the PSA must be completed by the “cram down date”. He does not explain how Veys is to attend to exhibits that he has yet to see. Attorney Long writes:

Alan and Tonk, I have told each of you that there is an upcoming deadline on the exhibits to the PSA. If you miss the deadline, you will have a “cram down” and be stuck with what is there as of date. Alan, you have the opportunity to make changes now to the exhibits and the changes could potentially be a break point on the contract. But you cannot stick your head in the sand and ignore it. I cannot represent you in this matter. You need local counsel. Miller Nash may have an office in Juneau. I am not representing you in this. Not because of any ill will but you need someone there, someone who can meet with you and look at the documents. Do not delay. [Emphasis added.]

CP 666.

Veys did not understand why attorney Long suddenly felt it necessary that he engage Alaskan counsel to finish a sale that Long had negotiated. As of June 11, 2004, Veys had yet to receive a copy of the PSA and had no idea of the content or requirements of the exhibits. Long’s e-mail, however, was consistent with Veys’ understanding of the state of his agreement with Buyers, that is, that Veys would now have the opportunity to review the PSA and make changes that were important to him. As attorney Long had yet to forward copy of the PSA to him, Veys turned to opposing counsel Scheer for a copy. Veys was not yet aware

that he had no right and little leverage to include any remaining items of importance to him into the PSA. Neither in the June 11 e-mail, nor in any conversations between them, did attorney Long advise Veys of the “cram down provision” of Section 2.1.1(a) or that by application of that section, Veys had all bargaining right and leverage to add or modify any aspect of the PSA. CP 776, ¶¶14-15. Veys continued to communicate with Tonk Fischer about changes and accounting issues that would have to be added to the PSA, CP 668, unaware that the document did not provide him with the conditions and rights that he had consistently asserted to his attorney were of primary importance to him. CP 776, ¶¶14-15.

On Monday, June 14, 2004, Scheer e-mailed Long expressing concern that Veys had contacted his office late in the preceding week and advised that he had yet to receive a copy of the PSA that he was able to open and review. Attorney Scheer explained that he had assumed that Long had provided his client with a copy of the PSA. Scheer also advised Long that his secretary had sent a copy of the PSA to Veys by Express Mail, CP671; something that attorney Long had not bothered to do. CP 775, ¶12. Realizing that Veys had yet to see, much less evaluate, the PSA and exhibits, Scheer extended the “exhibit deadline” (the “Cram-Down Date”) for five weeks, until June 23, 2004. CP 672.

As of June 14, 2004, Veys had yet to receive attorney Scheer’s

express mail package that contained the PSA. CP 674. Now mindful of the June 23 deadline, Veys reiterated to Long those items and rights that had to be in the Final PSA; they were essentially the same items and rights that Veys had expressed to Long at the outset of the negotiations, in written communication as early as May 4 and again on May 10, 2004. CP 596, CP 599. On this occasion, for the first time, a full eleven days after Long released the signature page without authority, Long informed Veys that not all that he had asked for was contained in the PSA. Long continued to tell his client, however, that he could get out of the agreement, that it was not final until the parties were in agreement to the exhibits. CP 776, ¶15. Veys expressed his understandable concern in an e-mail to his attorney at 4:22 PM on June 14, 2004. CP 676. He wrote:

Mike, I hope this last e-mail makes sense. I did not do spell check and I hope by what you said to me earlier that I have the right and option to still say NO! if these issues are not met. I hope I have not been too much of a pain over this. This is more than a lodge to me this is my life. I have to make it very clear I won't be able to help them make it if they don't make issues right for me. Alan. (Emphasis added.)

In an e-mail on June 14, 2004 at 5:13 PM, CP 677, Veys asked,

“Mike if these items are not met [by inclusion in an exhibit] then can I get out of this deal as we mentioned earlier by not agreeing with the attachments that Marvin has not brought up as we agreed to earlier, Note I never did get a copy [of the PSA] prior to agreeing to sell this lodge and was under the understanding that items, attorney fees for Alan and use of house were to be in there...”

By e-mail of 5:01 PM on June 14, 2004, CP 680, Veys also expressed his concern directly to buyer Marvin Applequist, but confirmed his desire to go through with the sale:

As of right now I have still not received the final PSA. I HOPE for every one's sake that we do not have a problem. I want to state very clearly that I do want to work with you all on this. But since I did not receive a copy and do now know its contents I am not responsible for it. Just so you know and listen I do have some issues as I discussed with you briefly. I hope we can work through them. I hope we can. THESE ARE VERY IMPORTANT TO ME AND WE NEED TO MAKE THEM HAPPEN. I have sent a list to Mike he will go over them. As I said earlier I did not get a final PSA. I took your word on the final and if there is anything different we will have to make changes. I look forward to seeing you and hearing from you soon. I like to talk with you on the phone. Your friend, Alan. (Emphasis in the original.)

Marvin Applequist was not as understanding as Veys would have liked. He also, was the first one to explain the significance of Section 2.1.1(a) to him. Veys was shocked. CP 775, ¶11.

At 12:35 AM on June 15, 2004, he sought legal advice from Long:

Hi Mike. I am not getting results with Marvin over some of the issues I send you in the previous e-mail. In these papers that they are sending up with Marvin why to [sic] they get to change everything when they want and I don't have any options. I don't understand.

If I don't agree to thee papers and say No! what are the results or do I have any option. If I say the boats were not in this PSA is that possible. What about the fuel list I sent you. Mike I know that I am a big boy but I am worried about this PSA and how it is written. I don't have much choice or do I?

Please tell me if I am worrying over something small or what.
Thank you again. Alan.

CP 682.

As he learned more details about the PSA from Marvin Applequist, including the fact that he was now limited as to how many guests he could have at his own home, Veys became increasingly dismayed. CP 775, ¶11.

Again he looked to his attorney for explanation:

Mike, do I have any right to the lease on the plane that I had in the past with the lodge for the lodge to pay me for the use and standby time on the plane. I had that lease before we need to submit that to them. I talked to Marvin and in the PSA I can only have four guests here, he is worried that I will compete with them. There is no reason to keep the house. Mike you know me I am always a very happy person but this agreement psa dose [sic] not make me happy. I do not even want to be here.

CP 684.

On June 15, 2004, Washington Superior Court Judge Steven Warning arrived at Pybus Point Lodge. Judge Warning and Alan Veys are old friends and Veys sought explanation and advice from him. The judge called attorney Long for explanation of the situation as copy of the PSA had not yet been provided to Veys. Based on what Long told Judge Warning, Veys and the judge believed that Veys could still terminate the agreement if the parties did not come to terms on the remaining issues by the 18th, the original cram-down date. CP 775, ¶12. Long did not inform

his client that attorney Sheer had already extended the cram-down deadline five weeks until July 23, 2004. CP 678; CP 775, ¶12. Veys wrote:

Hi Mike; [Judge] Steven [Warning] made it here and thank you for talking with him. I like advice and help from both of you. We talked and he informed me what our options are. Tell me what we should do before the 18th. So we still have our options and still have some teeth! If they don't want to listen then we have no choice to STOP!! And then talk. Let me know what you think we should do. The issues are not big ones for what I am willing to do for them. Thank you Mike. Alan.

CP 686.

At 5:32 PM on June 15, 2004, the USPS delivered attorney Scheer's package to Valerie Svendsen in Juneau. CP 688. Veys was unable to have it flown to the Lodge until the next day. CP 776, ¶13. Throughout the evening of June 15 and through the day on June 16, Veys communicated with Tonk Fischer and Long regarding the PSA and his rights thereunder. He was led to believe that the PSA would not be binding on the parties if they could not reach agreement on the remaining issues. Veys wanted to consummate the sale, but not at the expense of losing the use and enjoyment of his house that he had always insisted in maintaining. CP 776-777, ¶¶ 15 & 17. Accordingly, at 7:01 AM on June 16, 2004 he wrote:

Mike, I hope you received my e-mails. I talked to Steve [Warning] and you and him have discussed the psa. I would like you to get this STOPPED now and you can send them the

paper work by the 18th that would make it so they would not sign. That would get us out of this with less cost and troubles. However if they will agree to my terms I am still interested in going though [sic] with the psa.

CP 670.

Veys continued to work with Long and Tonk Fischer in anticipation of receiving the PSA and with the hope of amending it as needed. In those discussions, Fischer advised Veys of problems with the PSA including Long's failure to include the purchase price allocation provisions earlier recommended by Tonk Fischer, and additional provisions that would allow Veys to later structure a 1031 property exchange. CP 777 ¶17. He shared ideas for necessary modifications with Long. At 10:45 AM on June 16, 2004, he wrote:

Hi Mike; Talked to Tonk and he had some recommendations on the psa additions.

1. Allocation for Alan's personal [residence] for purchase price?
2. Break down into 2 or 3 different sales of lodge for tax reasons.
3. Buyer to corporate with seller in doing a 1031.

Mike, Tonk said he will call you and make these understood with you. Thank you again. Alan.

CP 691.

He wrote again at 5:22 PM when he advised attorney Long that the PSA had finally arrived, two weeks after it was signed:

Hi Mike. I hope you know I am depending on you. I am sorry for being a bother, but I am not sure what is going on

and don't know where we are. Please let me know what you are going to do in this matter. As I said on the phone I have these issues over the sale and want them resolved. This is not a very good psa and I want some changes. I will be talking with [Judge] Steve [Warning] tonight when he gets back from fishing and we will go from there. I finally got a copy of the psa. Thank you again. Alan. (Emphasis added.)

CP 694.

That night, Mr. Veys reviewed the PSA for the first time and had it explained to him by Judge Warning. For the first time, he was able to see the unfinished exhibits to the PSA. For the first time, he began to comprehend that by operation of Section 2.1.1(a) he had no leverage and little hope of including into the PSA those critical conditions and matters of which he had advised his attorney for from the outset. CP 776, ¶13. In disbelief, the next morning, Veys wrote to his attorney:

Mike. What are all the attachments that we are talking about? Could you explain them to me and what the purpose they are for. Alan.

CP 696.

Accountant Tonk Fischer continued to write Long reminding him of important items that had been discussed before but had been left out of the PSA, including removing the limitation on visitors to Veys' home, purchase price allocation, and conditions that would enable Veys to minimize his taxes through a 1031 property exchange. CP 698.

By June 18, 2004, Veys knew but had difficulty dealing with the

fact that Section 2.2.1(a) that had been added to the PSA had bound him to restrictions, terms and conditions to which he had not intended to agree, and that his attorney had not prevented that. He was now aware that arms length negotiations that he anticipated would resolve the remaining terms of the PSA, would not happen. CP 777, ¶18. He wrote to attorney Long:

Hi Mike. I know you are very busy, I see by this psa that they changed things on there that I DID NOT AGREE TO. What is going on! What can we do to correct this and or get out of this. THIS IS NOT WHAT I AGREED TO OR WANTED. How much is this going to terminate and what is involved. How can they put things in there that I did not agree to and how can I be responsible for. I hope you get this e-mail!!!!!! I have send (sic) you many e-mails. (Emphasis in original.)

CP 701.

At 12:49 PM, that same day, Long sent a proposed, revised Schedule I (Post-Sale Consulting Agreement) that contained terms that Veys had wanted from the outset but were omitted from the PSA and to which it was thought there would be least resistance, including:

- Maintenance and repair of the home to be paid by the Lodge;
- Subsequent purchasers to have no restrictions on use of the home;
- Cooperation on structuring this sale so as to enable a 1031 exchange;
- Reimbursement to Alan for certain expenditures made by him prior to sale;
- Terms of the sale of the Cessna; and of greatest importance
- No limitations imposed on number of guests, use of home or guest activities.

CP 703.

Attorney Scheer replied by letter of June 22, 2004, making it extremely clear that the Buyers had no intention of accommodating Veys, and emphasizing that Section 2.2.1(a) gave the Buyers veto power regarding negotiation of the content of the schedules to the PSA.

Pursuant to Section 2.1.1(a), a new Exhibit will immediately replace the corresponding Initial Exhibit to the PSA only when the Exhibit is “mutually agreed upon and executed by each party...” Let me be very clear about this point. The proposed exhibits you e-mailed on June 17 and 18 contain completely new terms which bear little relation to, and in many cases directly contradict, the terms of the binding Final PSA executed on June 3. These documents are not binding upon the Purchaser in any way, nor do they serve to substitute for the Initial Exhibits to the Final PSA which are, and have been, fully binding upon all parties since the parties executed the Final PSA and Marv and Val quit their jobs solely in reliance on the Final PSA terms agreed upon by the parties. We have not agreed, and will not agree under any circumstances, to these propose exhibits as written. Accordingly, all parties remain bound by the mutually agree on replacement exhibits, which my clients intend to work with Alan to prepare. (Emphasis in original.)

CP 707-709.

On June 24, 2004, Long sent a letter to Scheer in which he disagrees with attorney Scheer’s conclusion that there was a meeting of the minds on the PSA and schedules. He also reminds Scheer that Veys had not received and had, thus, been unable to review the PSA before attorney Long sent off the signature page to Scheer. CP 634-635. On June 24, Long also wrote to his client.

Dear Alan: Enclosed please find a copy of the most recent letter that I received on June 22, 2004, from Darin Sheer. The upshot of the letter is that although they intend to be somewhat flexible on the exhibits, they are clearly stating their intention not to agree to the exhibits as I have rewritten them...

CP 711.

Veys replied on June 29, 2004, expressing his desire and intent to continue to resolve differences and see the sale through. He offered compromises that Long should propose to Buyers. He closes by saying, "Mike my intent is to go through with this deal, I will work with them and help but I want these items." CP 713.

On July 23, 2004, Long e-mailed Scheer asking why Scheer had not yet responded to Long's earlier suggestions for compromise and repeating the more critical terms that he and Veys wanted included: 1) exclusion of the Cessna Lease from the sale; 2) deleting limitations on the number of guests Veys could have at his house; 3) reservation of a number of IFQ's (Individual Fish Quotas); and, 4) postponing the cram-down date for one week until all parties and counsel could meet to resolve remaining differences. CP 715.

Ultimately, the parties never came to agreement; buyers exercised the cram-down provision and declared Veys in breach.

In the his affidavit submitted in support of his motion for summary

judgment, Long admits that Veys requested prior to June 3, 2004 that some if not all of his desired items be included in the PSA. CP 165, ¶4. CP 154, ln. 14. Long acknowledges that “[e]ach one of the rejected requests would have been deal breakers for the Buyers. CP 155, CP 292 ¶10. Long also acknowledges that the Buyers would have “walked away” from the deal as friends had Veys or Long insisted before execution that any of Veys’ critical issues be included in the June 3, 2004 PSA. CP 155, ln. 10; CP 293, ¶11. Thus, Defendants agree with Plaintiffs that had Long performed his fiduciary, professional duty, the parties would have walked away as friends and Mr. Veys would still have \$4,000,000 on his balance sheet.

Buyers filed a lawsuit in Wyoming on October 7, 2004 to enforce the PSA (the “Wyoming Trial”). CP 259. Veys hired Don Riske of Cheyenne to defend him in the Trial. CP 167, ¶2. The case proceeded to trial and, on December 20, 2005, the jury concluded that the PSA had been executed on June 3, 2004 when attorney Long released the signature page and subsequently breached by Veys. CP 17, ¶98. The jury awarded damages of \$3,000,000 to Buyers. CP 168, ¶8. Plaintiffs incurred additional costs in appealing the verdict and in related litigation. Total resultant loss approached \$4,000,000.00. In 2009, the Lodge sold to another purchaser for approximately \$3,000,000. CP 777, ¶20.

D. ARGUMENT

1. Standard of Appellate Review

This court reviews summary judgment grants de novo, engaging in the same inquiry and analysis as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wash.2d 291, 300, 45 P.3d 1068 (2002); *see also Margola Assocs. v. City of Seattle*, 121 Wash.2d 625, 634, 854 P.2d 23. Accordingly, the court examines the evidence—and only that evidence—in the record before the trial court when the summary judgment motion and any responsive memoranda were filed. *Hines v. Data Line Sys., Inc.*, 114 Wash.2d 127, 147, 787 P.2d 8 (1990).

2. Standard in Considering Summary Judgment

Summary judgment is appropriate "if the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Jones*, 146 Wash.2d at 300-01, 45 P.3d 1068. All facts, and inferences from the facts, are considered in the light most favorable to the non-moving party. *Id.* at 300, 45 P.3d 1068. "A material fact is one upon which the outcome of the litigation depends." *Barrie v. Hosts of Am., Inc.*, 94 Wash.2d 640, 642, 618 P.2d 96 (1980). Fact issues may be decided as a matter of law only if reasonable minds could reach but one conclusion. *Sherman v. State*, 128 Wash.2d 164, 184, 905 P.2d 355 (1995).

3. The “Proximate Cause Issue”

Defendants’ assert that summary judgment is appropriate because Veys cannot establish that Long’s negligence was the proximate cause of damages or that Veys would have obtained a **better result** than he did **but for** Long’s negligence. CP 152.

Legal malpractice requires a showing of (1) the existence of an attorney client privilege giving rise to a duty of care to the client, (2) an act or omission in breach of the duty, (3) damages to the client, and (4) proximate causation between the breach and damages. *Sherry v. Diercks*, 29 Wash.App. 433, 437, 628 P.2d 1336 (1981).

For purposes of their summary judgment motions, Defendants concede that an attorney-client privilege existed between attorney Long and the Plaintiffs giving rise to a duty of care; they also concede that Long’s conduct fell below the standard of care. They contest only whether Long’s negligence was the proximate cause of the injury. CP 149.

In a legal malpractice case the burden is on the plaintiff to show that the attorney's negligence was the proximate cause of the injury. *Hansen v. Wightman*, 14 Wash.App. 78, 88, 538 P.2d 1238 (1975). Proximate causation has two elements, cause in fact and legal causation. *City of Seattle v. Blume*, 134 Wash.2d 243, 251, 947 P.2d 223 (1997).

"Cause in fact refers to the 'but for' consequences of an act, that is, the immediate connection between an act and an injury." *Blume*, Wn.2d at 251-52. Legal causation is based on policy considerations determining how far the consequences of an act should extend. *Id.* Proximate cause is determined by the "but for" test. *Griswold v. Kilpatrick*, 107 Wash.App. 757, 760, 27 P.3d 246 (2001); *Sherry v. Diercks*, 29 Wash.App. 433, 628 P.2d 1336 (1981).

Proximate cause is usually the province of the jury. *Brust v. Newton*, 70 Wash.App. 286, 291-93, 852 P.2d 1092 (1993). However, the court can determine proximate cause as a matter of law if "reasonable minds could not differ." *Hertog v. City of Seattle*, 138 Wash.2d 265, 275, 979 P.2d 400 (1999).

To satisfy the "but for" test, plaintiffs need only show that the act complained of "probably caused" the alleged injury. *Daugert v. Pappas*, 104 Wn. 2d 254, 260, 704 P. 2d 600 91985). "The question is whether 'the performance of defendant's duties would have avoided loss, and what loss it would have avoided.'" *Senn v. Nw. Underwriters, Inc.*, 74 Wn. App. 408, 418, 875 P.2d 637 (1994) (quoting *Barnes v. Andrews*, 298 F. 614, 616 (S.D.N.Y. 1924)).

Relying on *Smith v Preston Gates Ellis, LLP, et al*, 135 Wn. App. 859, 947 P. 3d 600 (2006), defendants argue that in order to show

“proximate cause,” Mr. Veys has to show that he would have obtained a **“better result”** or **“more favorable outcome”** then he did but for Long’s alleged negligence. CP 152. In *Preston Gates*, plaintiff Smith brought a legal malpractice case for negligence relating to the drafting of a construction contract on his “dream home.” Smith alleged that had his attorney advised him of the numerous problems with the contract, he never would have signed it. The court considered Mr. Smith’s assertion but concluded that there was no proximate cause because plaintiff Smith offered only conjecture and speculation as to his alternative. *Smith v. Preston Gates*, 147 P. at 603. Smith did not specifically identify an alternative that would have led to a better outcome. He explained, “I can’t tell you what I would have done but I would not have entered into this contract.” He could only speculate that he might have looked for another builder but that he was committed to building his “dream home.” *Id.* The Court concluded that Smith could not rely on such speculation to defeat summary judgment.

By contrast, Veys has offered testimony and evidence of a non-speculative “better outcome.” Veys advised Buyers from the outset of their discussions that he was neither in need of nor insistent upon selling the Lodge and was prepared to walk away from the deal in the face of any problem or disagreements on the terms of the sale. CP 774, ¶5; CP 607.

Veys repeatedly informed Long that he would not sell the lodge unless the sale accommodated the terms and conditions critical to him, including when he so advised his attorney on June 14, 2004, CP 676, on June 15, 2004, CP 682, on June 16, 2004, CP 690, and again on June 18, 2004. CP 777, ¶18. Defendant Long has admitted in his summary judgment motion that if Veys had pushed for any of the conditions that he wanted in the PSA, the Buyers would have “walked away” from the deal as friends. Attorney Scheer concurs. CP 155, ln. 10; CP 292, ¶10. Veys has demonstrated that he would have been in a better situation had Long protected his interest or had Long not sent the signature page before confirming that his client was prepared to accept the PSA. Walking away from the deal and taking the Lodge off of the market would have realized a better outcome for Veys than a \$3,000,000 judgment against him. In any event, Veys sold the Lodge to another purchaser in 2009 for \$3,000,000, a price greater than the selling price to the Applequist Group. Unfortunately, having incurred approximately \$4,000,000 in judgments, fees and attendant costs resultant of the PSA, Veys has suffered a significant net loss. CP 777, ¶20.

In *Preston Gates*, this Court held that the plaintiff had “to demonstrate that a better contract or full disclosure would have prevented the injury or improved his recovery.” 135 Wn. App at 864. Veys submits

that he has offered sufficient, specific, non-speculative evidence to prove both. Sufficient evidence has been presented from which a jury could find that *but for* Long's violation of his fiduciary duty, Veys would have walked away from the deal, thereby preventing the injury and saving \$4,000,000. Veys has also submits that there is sufficient evidence in the record to allow a jury to conclude that he would not have entered into the PSA and would have opted not to sell the Lodge at all.... a better outcome, had Long fully disclosed the consequences to him of entering into the PSA as drafted. The jury may also conclude that had Veys, after competent advice from his attorney, decided to forego a sale to the Applequist Group, he ultimately would have sold the Lodge in 2009 for \$3,000,000 and have netted a positive \$3,000,000 profit rather than a \$1,000,000 net loss.

There is no post-*Preston Gates*, published, Washington decision in which a plaintiff presents, non-speculative evidence that he would have walked away from a contract but for the negligence complained of. Just last year, however, the Colorado Court of Appeals considered the “**more favorable outcome**” prong of the proximate cause analysis in a legal and real-estate broker malpractice case similar to this one. In *Ludlow v. Gibbons*, Case No. 10CA1719, (Colorado Court of Appeals, Nov. 10, 2011), (copy of which is found at CP 551-565), the court considered an

appeal of a trial court's order granting summary judgment in favor of defendant real estate agents. Plaintiff Ludlow, the seller of a parcel of land, brought a professional malpractice/breach of fiduciary duty lawsuit against his lawyer who handled the sale and the real estate agents who brokered the transaction. The principal claim was that the lawyers and brokers had failed to timely advise plaintiff of an infrastructure credit provision in the sale contract that caused them to have to sell their land for \$1.6 million less than what it was worth and what they had thought they would receive under the contract. *Ludlow*, p. 7. Both the lawyers and the brokers moved for summary judgment arguing, as here, that seller could not establish the causation element of the professional negligence claim. Lawyers and sellers reached a settlement agreement before the trial court could rule on the lawyers' motion but the trial court granted the brokers' motion for summary judgment ruling, as relevant hereto, that the sellers had failed to establish a genuine issue of material fact as to causation because they had not presented evidence that they "would have" sold the property to a specifically identifiable person or entity for the higher price but for the brokers' negligence. *Id*, p. 7-8.

Referencing *Smith v. Preston Gates*, the Colorado Court of Appeals included Washington courts among those, like Colorado courts, that in a case of alleged professional negligence in a transaction, require

that the plaintiff prove that “but for” the professional’s negligence plaintiff would have achieved a “better” or more favorable” result. *Ludlow*, at 12, citing *Smith v. Preston Gates*, at 602. The question remains, posited the court, “[h]ow may a plaintiff prove this requirement? *Id.*, at 13. It then answered the question.

Depending on the particular facts, in a case involving an allegedly unfavorable transaction, a plaintiff ordinarily may prove a more favorable result by proving that: either (1) he would have been able to obtain a better deal in the underlying transaction (commonly referred to as the “better deal” scenario); or (2) he would have been better off by walking away from the deal (commonly referred to as the “no deal” scenario).

Id., at 14 (internal citations omitted). The court went on to consider whether the sellers’ evidence was sufficient to establish a genuine issue of material fact as to proximate cause under the “no deal” scenario and concluded that it was, that the seller would have been better off by walking away. *Id.*, p. 22.

Here, Veys would have been better off had he been able to walk away; something that he could have done had Long done his job. Long did not press the issue or advocate for his client’s desired changes. He delivered the signature page, causing the PSA to go into effect, without assuring that his client had reviewed the PSA or knew its content. Long caused the PSA to go into effect without the addition of conditions and

provisions important to his client. He caused the PSA to go into effect without sufficient safeguards to assure that the sale could be consummated, or terminated without negative implications for Veys. That attorney Long bound his client to a contract that did not serve his client's interest, knowing that his client had not reviewed the contract, and that he had not explained its content to him, is difficult to comprehend. That Long would cause the contract to be executed with the unfounded hope that Buyers might make concessions after the fact, is incomprehensible.

Were the failings of the PSA substantive and important? Critical, as evidenced by Tonk Fischer's testimony at the Wyoming Trial regarding certain of the tax-related, failings of the PSA and how the documents' inadequacy hurt Veys' financial interests.¹¹ Asset allocation was a major but not the sole failing of the PSA. Veys expressed concern over the still unresolved "lifestyle issues" such as unrestricted use of his home, access to lodge facilities, docks and airplane moorings and Individual Fishing Quotas ("IFQ's").

As reasonable minds could differ on the issue of proximate cause, summary judgment should not issue. *See Hertog v. City of Seattle*, 138

¹¹ Accountant Fischer included among the failings: the inadequacy of the "net profits" definition that triggered an out provision for Buyers and the treatment of expenditures in a manner most favorable to Buyers, CP 717-727; unfavorable asset allocation yielding significant negative tax ramifications; preventing a § 1031 Exchange. CP 734-736. See also, *Plaintiffs Memorandum in Opposition to Defendants' Motions for Summary Judgment*, CP 503-506.

Wash.2d 265, 275, 979 P.2d 400 (1999); *see also Smith v. Preston Gates* at 602. Defendants cannot convince this court that it will be impossible for reasonable jurors to conclude that that Mr. Veys would have walked away rather than give up his unfettered right to use the home that he was to retain after the sale of the adjoining Lodge property; or, that Mr. Veys would have refused to sign the PSA if he had known that it transferred all of Mr. Veys' personal property to Buyers as part of the sale?

It is undisputed that Mr. Veys requested some, if not all, of his desired items from Buyers prior to June 3, 2004, CP 154, ln. 14; CP 165, ¶ 4, and that “[e]ach one of the rejected requests would have been deal breakers for the Buyers. CP 155, ln. 9; CP 292, ¶ 10. Attorney Long acknowledges that the Buyers would have “walked away” from the deal as friends had Veys or Long insisted that any of Mr. Veys critical issues be included in the June 3, 2004 PSA. CP 155, ln. 10; CP 293, ¶11. Defendants agree with Plaintiffs that had attorney Long performed his fiduciary, professional duty, the parties would have walked away as friends and Mr. Veys would still have \$4,000,000 on his balance sheet. Defendants, it seems, concede proximate cause.

Whether assessed by the “Better Deal” scenario or the “No Deal” scenario of proximate cause, Mr. Veys should prevail. Attorney Long failed to properly review the Final PSA. He made virtually no attempt to

deliver a copy to Alan Veys whether by courier, by overnight mail or by fax, enabling his client to review the critical changes. He failed to review the document with his client. He failed to summarize and highlight for his client, the impact of the addition of Section 2.1.1(a). He failed to object to Buyers or inform his client that the final PSA did not contain the items critical to Veys' continuing use of his home on Admiralty Island. Long failed to assure that the asset allocation and other tax related provisions, including regarding a possible 1031 exchange, were included in the document. He failed to tell Veys, his client and friend, that the effect of Section 2.1.1(a) and the failure to prepare Schedule 1.2.3 ("Excluded Assets") prior to the execution of the Final PSA, effectively conveyed all of Mr. Veys' personal property to Buyers.

Had Alan Veys known the terms to which he became bound upon "release" of his signature to Darin Scheer, he would have walked away from the deal and he would be \$4,000,000 richer today.

The purpose of tort damages is to place a plaintiff in the condition he would have been in had the wrong not occurred. *Kim v. Sullivan*, 133 Wn. App. 557, 564 (Div. 1, 2006). Whether Long was negligent, whether his conduct was a proximate cause of Plaintiffs' injury and the extent of that injury are traditionally issues for the jury and nothing about

this case removes those issues from the province of the jury that will sit on this case.

4. The “Superseding Tortfeasor Issue”

As an alternative to their proximate cause argument, Defendants argue that Plaintiffs’ damages must be limited as a matter of law to \$300,000.00, the amount for which Defendants allege Veys could have settled the Wyoming Trial. CP 155-158. The facts operative to this issue are disputed.

Defendants allege that during the course of the Wyoming Trial, Buyers offered to settle their lawsuit in exchange for a payment by Veys of \$300,000.00, CP 167, ¶4, and that Riske conveyed the offer to Veys who rejected it. CP 168, ¶5. Veys has consistently represented that he does not recall the offers of settlement but has never categorically asserted that the offers were not made or were not conveyed to him. CP 777, ¶22. However, for purposes of their motions for summary judgment, Defendants accept “Veys’s denial of knowledge of any settlement offers as true for purposes of their superseding negligence argument....”CP 156, ln. 7. Consequently, the undisputed facts are: that a settlement offer for \$300,000.00 was made to Riske; that Riske failed to convey it to Veys; and, that Riske took it upon himself to reject the offer.

The doctrine of superseding cause “applies where the act of a third party intervenes between the defendant’s original conduct and the plaintiff’s injury such that the defendant may no longer be deemed responsible for the injury.” *Anderson v. Dreis & Krump Mfg. Corp*, 48 Wash App 432, 442, 739 P.2d 1177 (1987). “Superseding cause thus prevents a determination of legal causation between a defendant’s actions and a plaintiff’s injuries where the intervening act breaks the otherwise natural and continuous causal connection between events.” *Anderson, Id.*, (internal citations omitted).

“An intervening act may be so highly extraordinary or unexpected as to fall outside the realm of reasonable foreseeability as a matter of law. But generally, the question whether an independent cause is reasonably foreseeable is a question for the jury. *McCoy v. Am. Suzuki Motor Corp.*, 136 Wash.2d 350, 358, 961 P.2d 952 (1998); *Cramer*, 73 Wash.App. at 521, 870 P.2d 999; see also RESTATEMENT (SECOND) OF TORTS § 453 cmt. b (1965) (when undisputed facts leave room for reasonable difference of opinion, question whether intervening act was foreseeable is for the jury).

Micro Enhancement International, Inc., V. Coopers & Lybrand, LLP, 40 P. 3d 1206, 1216, 110 Wash.App. 412 (2002) (emphasis added).

It is not the unusualness of the [intervening] act that resulted in the injury to plaintiff that is the test of foreseeability but whether the result of the act is within the ambit of hazards covered by the duty imposed upon defendant.... It is literally true that there is no liability for damage that falls entirely outside the general threat of harm which made the conduct of the actor negligent. ... The manner in which risk culminates in

harm may be unusual, improbable and highly unexpected, from the point of view of the actor at the time of his conduct. And yet, if the harm suffered falls within the general danger area, there may be liability...

In this context [the Washington Supreme Court] has held that generally an intervening act is not a superseding cause where the intervening act (1) does not bring about a **different type of harm** than otherwise would have resulted from the defendant's conduct; and (2) does not operate independently of the situation created by the defendant's conduct. *Campbell v. ITE Imperial Corp.*, 107 Wash.2d 807, 813-814, 733 P.2d 969 (1987). [Emphasis added.]

Anderson, 48 Wash.App, at 443. (Additional internal citations omitted.)

Contributory negligence or even the concurring negligence of a third party does not necessarily break the causal chain from original negligence to final injury. "Where a defendant's original negligence continues and contributes to the injury, the mere fact that another's intervening negligent act is a further cause of the accident does not prevent defendant's act from constituting a cause for which he is liable." *Smith v. Acme Paving Co.*, 16 Wash.App. 389, 396, 558 P.2d 811 (1976).

Applying Washington state law, the federal district court for the District of Washington more recently affirmed the utility of the "**different type of harm**" analysis when evaluating intervening cause defenses, holding that the an independent tortfeasor's intervening negligence does not constitute a superseding cause unless (1) the intervening negligence created a different type of harm; or (2) the intervening negligence operated

independently of the danger created by the manufacturer. *Headley, v. Ferro*, 630 F.Supp.2d 1261, 1273 (D. WA 2008).

Plaintiffs submit that the partial summary judgment sought by the defendants, limiting Plaintiffs' potential recovery to \$300,000.00, must be denied in that:

- a. the relevant facts regarding an offer of settlement are disputed;
- b. were they undisputed, the facts are not so highly extraordinary or unexpected as to fall outside the realm of reasonable foreseeability as a matter of law as to justify removing the issue from the purview of conclusions to be rendered by a jury;
- c. the harm suffered is not "a different type of harm" from that which would be expected by reason of the negligent acts of attorney Long, to wit, a lawsuit against his client and the possibility of an adverse judgment and award;
- d. the intervening act does not operate independently of the situation created by the defendant's conduct.

It is for a jury to assess whether Veys or Riske were contributory tortfeasors or whether Riske's acts were an intervening cause obviating Long's liability in total, or to any degree. Those matters, as is usually the case, should be resolved by the jury, not pursuant to a motion for summary judgment.

5. The “Statute of Limitations Issue”

a. *As to the Accretion Land*

In Section 3.D., beginning at page 22, of the Long SJ Motion, CP 159, Defendants assert that the statute of limitations for claims not “arising out of services rendered to Veys from Long pertaining to the [PSA]” were not tolled by the September 18, 2006 tolling agreement between Plaintiffs and Defendants.¹² The statute of limitations for attorney malpractice in Washington is three years. As the Complaint was filed on June 15, 2009 any claims therein not arising in relation to the Lodge Transaction must have occurred no earlier than June 15, 2006.

There is a distinct set of circumstances alleged in the complaint as a basis for a claim of malpractice that has nothing whatsoever to do with the PSA or the failed sale of the Lodge and, thus, is not subject to the tolling agreement. In 1994, Long structured a transaction by which he and Veys purportedly purchased a property bordering on the Cowlitz River (the “Accretion Land”), for \$5,000. The essential factual allegations regarding the purchase of the Accretion Land are found at Paragraphs 23 to 24 and 130 (j) through (l) of the Complaint. CP 7; CP 23. Veys made his payment to attorney Long for the property, CP 7, ¶23, which, at the

¹² The Tolling Agreement was signed on September 18, 2006 and terminated effective May 2, 2009. It tolled claims arising in relation to the Lodge Transaction only. The tolling agreement was submitted together with the Long SJ Motion as Ex. 34 to the Moscato Aff. CP 286-288.

time, was owned by Columbia Realty Services, Inc. (“Columbia”), a Washington company owned by Long and his wife. CP 759-78. Veys and Long agreed that they would own the property in equal share. CP 778. Veys has paid real estate taxes on the property. CP 760. Long drafted a deed that purported to transfer a one-half interest in the Accretion Land from Columbia to Veys. CP 764-765; CP 760, but which, according to Long, is not valid, under Washington law as it does not contain a legal description of the property or an acknowledgment (notarization) of such. CP 761. Long had not, until this litigation, told Veys that he had not transferred any interest in the Accretion Land to Veys or that Columbia had been dissolved and was no longer an active company. CP 760. Veys claims that Long has either negligently or intentionally deprived Veys of a one-half interest in the Accretion Land. Although the tolling agreement has no bearing on any allegation of malpractice relevant to the Accretion land, the claim was not filed outside the statute of limitations, as it is an ongoing deprivation and a continuing violation of attorney Long’s fiduciary duty; a tort that continues to this day.

2. As related to the failed sale of the Lodge

In addition to attacking the Accretion Land Claim, Defendants also argue that the Complaint alleges facts that occurred outside the statute of limitations and that should be excised from the Complaint. Forty-four such

paragraphs are challenged. CP 160. Defendants make these requests in complete disregard that in denying Defendants' 2009 Motion to Dismiss, the trial court found the paragraphs to be relevant to the causes of action raised. Defendants do not even attempt to revise their earlier attacks on the Complaint so that this aspect of their motions for summary judgment might credibly appear to be other than a reiterated motion to strike or to revise the Complaint. The rulings on the 2009 Motion to Dismiss, are "law of the case" and Defendants' raise no new argument and offer no additional undisputed facts to distinguish this challenge to the Complaint from that in the Motion to Dismiss as to warrant a revised ruling.

In its 2009 Ruling, the trial court denied the Defendants' challenges, securing from the parties agreement that each of the 136 paragraphs of the complaint was not intended to assert an independent cause of action but were offered as relevant background and context to the principal malpractice causes of action. That remains the case. Detailed response to the Motion to Dismiss was made in the form of the argument and chart presented Plaintiffs' reply to the Motion to Dismiss. CP 108-130 and in Plaintiffs' Memorandum in Opposition to the Defendants' Motion for Summary Judgment at pp. 53-65. CP 518-530. The chart within the opposition to summary judgment, CP 520-529, compares the challenges in the motions for summary judgment with those made in the earlier motion

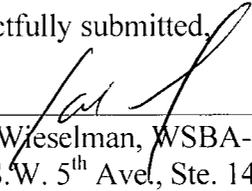
to dismiss and is particularly instructive. Review of the chart evidences that these challenges should be denied because of the law of this case established by the court's ruling from the bench on the Defendants' 2009 Motion to Dismiss and because, although presented in a motion for summary judgment, this portion of Defendants' motion is simply a motion to dismiss or strike factual allegations of the complaint.

F. CONCLUSION

For all such reasons and for reasons that may be presented at oral argument, Plaintiffs respectfully request that this Court conclude that Defendants' motions for summary judgment should have been denied, vacate the ruling dismissing Plaintiffs' claims with prejudice and remand this matter the trial court for further proceedings and trial.

DATED this 24th day of December 2012.

Respectfully submitted,

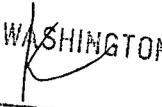


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CERTIFICATE OF SERVICE

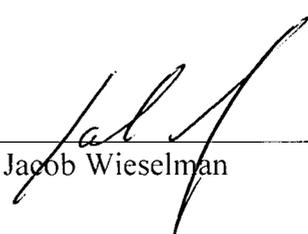
I certify that I caused to be served a true and correct copy of the foregoing *Brief of Appellant*, as follows:

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