

No. 43674-4-II

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

**ALAN J. VEYS; LONE EAGLE RESORTS, INC.; and  
ALAN J. VEYS PROPERTIES, LLC, Appellants,**

v.

**MICHAEL LONG, an attorney at law, and ANN LONG,  
his wife, and the marital community property comprised  
thereof; OFFICE OF P. MICHAEL LONG; and P.  
MICHAEL LONG, P.S., INC., a professional services  
corporation, Respondents.**

**BRIEF OF RESPONDENTS MICHAEL  
LONG, OFFICE OF P. MICHAEL  
LONG, AND P. MICHAEL LONG, P.S.  
INC.**

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COURT OF APPEALS  
DIVISION II

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## I. INTRODUCTION.

Long wins and Veys loses this legal malpractice case on summary judgment because Veys has not shown, and cannot show, that any negligent performance by his lawyer, Long, in the course of a failed commercial property transaction, in fact caused Veys the particular damages he claims.<sup>1</sup>

Under established Washington law and in the trial court, Veys lost because he could not overcome evidence that his decision to breach his contract to sell, in a fit of “seller’s remorse,” prompted the aggrieved purchasers to sue him and obtain a \$3 million judgment against him.

On appeal, Veys bypasses the trial court’s rationale for granting Long summary judgment. He presses another theory, *i.e.*, that Long’s conduct regarding the transaction caused Veys damages due to his loss of the prerogative to walk away unscathed from a deal that he knew he had made but which he voluntarily chose to breach. Veys would hold his commercial transaction attorney to a “satisfaction guaranteed” obligation to hold him harmless for exercising seller’s remorse and unilaterally repudiating his contract. The law recognizes no such guarantee, and the

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<sup>1</sup> Defendants Michael Long, Office of P. Michael Long and P. Michael Long, P.S., Inc, are collectively referred to as “Long”.

trial court's granting of Long's motion for summary judgment should be affirmed.

## **II. RESPONSES TO ASSIGNMENTS OF ERROR.**

### **A. Response to Assignment of Error No. 1.**

The trial court correctly granted summary judgment to Long because Veys failed to show that Long's negligence, if any, in fact caused Veys to incur a \$3 million judgment for damages for breach of contract.

**PERTINENT ISSUE:** Whether a lawyer who represented seller in a commercial property transaction is entitled to summary judgment in a legal malpractice action brought by the seller, when the seller admits that he knew he had a valid contract to sell but refused to perform it and thus prompted the aggrieved purchasers to sue him.

### **B. Response to Assignment of Error No. 2.**

The trial court correctly granted Long's alternate motion for summary judgment limiting Veys' damages, if any, to \$300,000.

**PERTINENT ISSUE:** Whether a lawyer who represented seller in a commercial real estate transaction is entitled to summary judgment limiting his former client's damages in a malpractice action due to another lawyer's negligent failure to convey settlement offers in subsequent litigation between the parties to the transaction.

### **C. Response to Assignment of Error No. 3.**

The trial court correctly granted Long's motion for partial summary judgment on Veys' claims that were unrelated to Long's services regarding the failed commercial property transaction.

**PERTINENT ISSUE:** Whether specifications of unrelated acts of legal malpractice under a single claim for relief are insulated from challenge by motions for summary judgment because they previously have withstood challenge by motions to dismiss and to make more definite and certain.

## **III. STATEMENT OF THE CASE.**

### **A. Procedural History.**

Long accepts Veys' short, literal account of the procedural history of the case but tenders some supplementary details below.

Veys' complaint is primarily a claim for legal malpractice against Long, his lawyer in a failed commercial real estate sale. CP0003-CP0004. Veys principal allegations of negligence are that Long: (a) failed to protect Veys' interests in the negotiation of a Purchase and Sale Agreement ("PSA"); and (b) failed to prevent Veys from executing the PSA. CP0021-CP0024.

Veys' complaint, however, presents 105 paragraphs of factual allegations that trace the relationship between the lawyer, Long, and the client, Veys, from its inception in 2002 (CP0006) and an initial series of alleged legal ethics violations, *id.*; to a purported joint purchase of the so-called "Accretion Land" property on the Cowlitz River in Washington on February 23, 1994 (CP0007); through the protracted negotiations of the failed sale of Veys' Alaska Lodge property (CP0007-CP0016); culminating in an account of the "Applequist Litigation" in the Wyoming courts between the putative purchasers of the Alaska Lodge property and Veys, including a \$3 million damages award against Veys and his unsuccessful appeal of the judgment. CP0017-CP0019. At that point, Veys' complaint shifts to allegations of Long's contemporaneous involvement with an alleged tax scheme referred to as "The Method" (CP0018-CP0020), which the complaint ties to conduct by Long and Veys before, during, and after the failed Alaska Lodge sale. CP0020-CP0021.

In his complaint, under his First Claim for Relief, Veys recapitulates Long's alleged professional failings over the course of their attorney-client relationship (CP0021-CP0024) and alleges, "As a result of [Long's] breach of duty, Plaintiffs' have been damaged." CP0024. The complaint also alleges a Second Claim for Relief (Attorney Malpractice-Breach of Contract), *id.*; however, in his Opening Brief in this court Veys

announces that he “. . . has abandoned the contract-based malpractice claim.” Appellants Brief, 4, n. 9.

It is also noteworthy that in his complaint, Veys seeks only damages related to the judgment, attorney fees, lost profits and expenses associated with the “Applequist Litigation”. CP0024-CP0025.

In Long’s motion for summary judgment, his points were: (a) Veys’ decision to breach the PSA, not any actions of Long, was the “but for” cause of the judgment entered against Veys in the Applequist Litigation; and in the alternative, (b) Veys’ damages must be capped as a matter of law at \$300,000, as anything more than that amount was caused by the unforeseeable superseding negligence of Veys’ lawyer in the Applequist Litigation who, according to Veys, never communicated three settlement offers to Veys. CP0138-CP0139.

In addition, Long moved for summary judgment against all of Veys’ claims for relief that did not pertain to the failed commercial property transaction, as these claims were not the subject of a tolling agreement and were thus filed beyond the period of the applicable statute of limitations. Among these claims was the so-called Accretion Land claim, which is based upon a transaction that took place in 1994.

In Veys’ Memorandum in Opposition to Defendants’ Motion for Summary Judgment, Veys’ primary arguments were: (a) Veys would have

been able to walk away from the failed sale transaction had Long insisted that the purchasers agree to the terms Veys wanted in the PSA and thereby obtained the “better result” for Veys, which was “no deal”; and (b) the failure of Veys’ trial lawyer in the subsequent Applequist Litigation to convey the written settlement offers to Veys was neither “highly extraordinary” nor “exceptional” enough to constitute a superseding cause as a matter of law.

Regarding Long’s summary judgment motions against Veys’ claims as barred by the statute of limitations, Veys argued only that the trial court’s previous rulings on the issues in the context of Long’s motions to dismiss the complaint and to make it more definite and certain were “law of the case” and final. CP0520-CP0529.

As to Long’s motion for summary judgment on the Accretion Land claim, Veys attempted only to re-cast his complaint. Veys argued that the Accretion Land claim was no longer a claim for attorney malpractice, but a claim for a “deprivation” or continuing tort that continues to this day and thus is not barred by the statute of limitations. CP0529-CP0530.

Superior Court Judge Woolard granted Long’s motions for summary judgment. CP0793. In her letter ruling, the trial judge said:

“It is apparent to me that the plaintiff knew of the PSA and for whatever reason decided not to perform under the contract. This was of his own volition which

was thoroughly vetted in the Wyoming [Applequist] lawsuit brought by the buyer that resulted in a verdict against Veys.”

*Id.*

In the trial court’s formal order, she granted Long’s summary judgment motion “as to all claims” and dismissed plaintiff’s claims “. . . in their entirety, with prejudice.” *Id.* The order also said:

“The court considered the theory of ‘legal impossibility’ and relied on that theory as an additional basis for the relief granted.”

*Id.*

Thus, the court apparently concluded that it would be impossible for reasonable jurors to find that any negligence by Long caused Veys the damages he claimed regarding the failed sale of the Alaska Lodge property (*cf.* App Br, 41, arguing to the contrary). The trial court also said in its final order that it was granting Long’s motions for summary judgment “with regard to plaintiff’s claims not related to the PSA which were filed outside the statute of limitations . . . without finding it necessary to review individually each of the allegedly defective paragraphs as articulated in defendants’ motions.” CP0881.

#### **B. Substantive Facts.**

Long does not accept Veys’ statement of the facts because it is incomplete and unbalanced. Recognizing that on summary judgment this court will view the facts and draw inferences therefrom in the light

favorable to Veys, Long submits the following supplemental statement of material facts.

Plaintiff Alan J. Veys, through two wholly owned companies, owned and operated a fishing lodge that was commonly known as Pybus Point Lodge (the "Lodge"). CP0003-CP0004. The Lodge is located on Admiralty Island, a remote part of Alaska that is approximately 80 miles southwest of Juneau, Alaska. *Id.* Veys sued Defendant P. Michael Long and several law firms with which he previously had been associated for malpractice in providing legal advice to, and legal representation of, Veys regarding an attempted sale of the Lodge in 2004. *Id.*

In the spring of 2004, before consulting with Long, Veys conducted discussions with a group of prospective purchasers to sell the Lodge. CP0007. The potential purchasers were three men from Wyoming: Marvin Applequist, Val Jones, and Bruce Reed (collectively "purchasers"). CP0005. Purchasers were assisted in negotiations by their attorney, Darin Scheer, Mr. Applequist's son-in-law. CP0005. After discussing initial contract terms with the purchasers, Veys was aided in negotiations by Long and Veys' longtime accountant, Jerome "Tonk" Fischer. *Id.* Veys had also been in concurrent negotiations with another potential buyer, Art Thompson. CP0267-CP0268.

Although the negotiations with the purchasers were progressing, the purchasers were hesitant to commit to a price because they had not been able to look at any recent statements of the Lodge's financial performance. CP0177-CP0181. Purchasers put together a proposal based on representations by Veys as to the recent and projected profits of the Lodge and the amount purchasers would need to pay to service the debt on a ten-year mortgage. *Id.* Several drafts of a proposed PSA passed back and forth between the parties during April and May of 2004. CP0007.

The negotiations grew serious enough for the purchasers and their lawyer Scheer to fly to Washington over the weekend of May 29-30, 2004, to negotiate in person with Veys and Long. CP0007-CP0008. The parties accelerated the negotiations because one of the purchasers, Applequist, had a deadline looming on June 3, 2004. CP0183-CP0185. On that date, Applequist was scheduled to meet with his employer's Board of Directors to notify the Board whether or not he would be resigning his \$72,000 a year position and moving to Alaska. *Id.*

Purchasers' plan for acquisition was that Applequist and Jones would work at the Lodge during the summer of 2004, learn the business of running the Lodge from Veys, and obtain more concrete data regarding the Lodge's finances. CP0015. For that plan to work, Applequist had to quit his job and Jones had to forego several construction projects he had lined

up for the summer. CP0187-0189. Purchasers were only willing to move forward with the purchase of the Lodge if they could secure a *binding* agreement that would give Applequist the peace of mind to quit his job and move to Alaska. CP0191-CP0195.

After a full day of face-to-face negotiations between the parties on May 30, 2004, purchasers felt the parties had reached agreement on the substantive terms of a deal. CP0194-CP0195. Lawyer Scheer was tasked with memorializing what the sides had agreed to in an updated version of the initial PSA. *Id.* Scheer stayed up all night that night drafting the revisions to the PSA. CP0291. Purchasers reviewed Scheer's draft and emailed it to Veys and Long during their layover at the Denver Airport on May 31, 2004. CP0196. The purchase price agreed upon at that time was \$2.8 million with Veys financing \$800,000 through a second note encumbering the Lodge. Purchasers would receive the profits from the Summer 2004 season, and Veys would get back half of those profits or \$200,000, whichever was greater. CP0198-CP0200.

Some of the details of the PSA remained unresolved at that time. However, because of the need for a binding agreement to meet Applequist's deadline, the parties agreed to memorialize the details to be resolved later in a series of exhibits (the "initial exhibits") that were added to the PSA. CP0291. The parties agreed to this solution in order to allow

the unresolved details to be negotiated in good faith during the weeks following June 3, 2004, while having a binding agreement in place to move forward with the sale of the Lodge. CP0292.

The parties agreed to work toward finalizing the initial exhibits. Each individual exhibit, once agreed to by *both* sets of parties, would become final and replace its corresponding initial exhibit. CP0191-CP0194; CP0292. However, if the parties could not agree to terms regarding one or more of the final exhibits by June 18, 2004 (the “cram down date”), then any exhibit that had not been finalized would revert to the initial exhibit and would be binding on both parties. CP0191-CP0194.

The clause describing this concept (the “cram down clause”) allowed Applequist and Jones to quit their jobs knowing that a binding agreement was in place on which they could rely should negotiations over the initial exhibits break down. CP0191-CP0195. The cram down clause was negotiated during the face-to-face negotiations in Washington on May 30, 2004. *Id.* Purchasers later testified at a subsequent trial (the “Applequist Litigation”, discussed below) how crucial the cram down clause was to their agreeing to sign the PSA. CP0193.

On June 3, 2004, Applequist went into his meeting with his employer’s Board of Directors not knowing if Veys had signed the PSA. CP0202. Because of Veys’ hesitance at financing \$800,000 of the

purchase price, purchasers agreed to the addition of a second price option for Veys whereby the Lodge could be sold for \$2.65 million in cash (without Veys financing any of the purchase price), but with 100% of the Summer 2004 proceeds going to purchasers. CP0203. Veys had the choice between the original \$2.8 million seller-financed option and the \$2.65 million all cash option.

Scheer pressed Veys and Long for a decision. CP0203. Scheer sent several emails explicitly explaining to Veys and Long that if Veys elected to agree to the PSA it would then be binding and Applequist would be quitting his job in reliance on Veys' promise to sell the Lodge to purchasers. CP0205.

Veys decided he wanted to sell the Lodge and instructed Long to release his signature page (which he had previously faxed to Long) to the purchasers. CP0207-CP0208. Scheer received Veys' signature and contacted Applequist. Applequist told Scheer he would rely upon Veys' commitment to selling the Lodge and quit his job. CP0209. The purchasers signed the PSA and all parties agreed they would work to resolve the unresolved issues before the cram down date.

Almost immediately after signing the PSA, Veys admitted he was suffering from "seller's remorse". CP0213; CP0215. Veys told Scheer he felt like he had "lost his very best friend" (meaning the Lodge) in an email

sent only a few hours after he authorized release of his signature to the agreement to the PSA. CP0216. At approximately one o'clock in the morning on June 4, 2004, he sent another email, this one to Applequist, saying he felt he had made a mistake and couldn't sleep because he was so upset. CP0218.

Though Veys signed the PSA and was bound as of June 3, 2004, the purchasers gave him until June 5, 2004, to elect which purchase price option he preferred. CP0219. After conferring with his accountant, Fischer, Veys chose the \$2.65 million all cash option. CP0213. He was required to notify Scheer which purchase price option he had chosen. In the email to Scheer electing the purchase price Veys admitted to "seller's remorse" and said that if the purchasers wanted to "start over" he would be okay with that. *Id.*

On June 6, 2004, just three days after signing the PSA, Veys made it known to Long that he was no longer happy with the PSA and he now wanted the option to back out if his terms were not met. CP0220. Veys did not like the fact purchasers had the option to terminate the sale if certain conditions were not met but he could not do the same. *Id.*

After Veys changed his mind about selling the Lodge under the terms of the PSA, to which he had agreed, he devised a strategy he felt might help him get out of the contract. His strategy was to try to anger or

frustrate the purchasers by not cooperating to finalize the initial exhibits so he could claim that it was the purchasers, not he, who breached the PSA. CP0164.

On June 24, 2004, in an effort to execute this strategy, Long wrote Scheer a letter saying he did not believe the agreement was binding because the exhibits were so extensive that the lack of completion meant there never was a meeting of the minds. CP0221. This argument was outwardly promoted as Veys' position from this point forward in an effort to avoid having to give up the Lodge on the terms Veys agreed to in the PSA. CP0165. Scheer vigorously objected to this position and provided several concrete examples why the PSA was binding as of June 3, 2004. CP0223. At this same time, on June 24, 2004, Applequist and Jones arrived at the Lodge to begin learning the day-to-day operations of the Lodge and to perform due diligence on the Lodge's finances. CP0228.

Jones and Applequist worked at the Lodge throughout July 2004, but were continuously blocked when they attempted to inspect the operational and financial records of the Lodge pursuant to the terms of the PSA. CP0230-CP0233. The relationship between Veys and the purchasers deteriorated significantly during this period. CP0235-CP0240. Purchasers were extremely frustrated with Veys' behavior and unwillingness to adhere to the PSA. *Id.*

Negotiations continued through the end of August between the parties, but Veys persisted in attempting to change the terms of the PSA to provisions to which he believed he was entitled, while simultaneously denying the purchasers access to the financial and operational information under the terms of the PSA. CP0242-CP0245. Veys continued to assert the position that no binding agreement existed between the parties and purchasers, and Scheer continued to maintain that the parties had a binding agreement. CP0016.

On August 27, 2004, Veys sent an email to Long saying he wanted out of the PSA unless purchasers agreed to his demands. CP0246. On the same date, Scheer sent a letter to Long formally notifying Veys of his non-compliance with the PSA. CP0247. Scheer and purchasers extended a good faith period to cure the non-compliance to September 7, 2004. *Id.* On September 1, 2004, Long sent Scheer a letter asking Applequist and Jones to leave the Lodge immediately. CP0253.

The purchasers left the Lodge on approximately September 6, 2004. CP0244. On September 9, 2004, Long sent a "final offer" from Veys to the purchasers expressing the terms under which Veys would agree to sell the Lodge at that time. CP0257. Purchasers rejected this offer and filed a lawsuit in Wyoming on October 7, 2004, to enforce the PSA. CP0259.

Veys hired Don Riske of Cheyenne to defend him in the Applequist Litigation. CP0167. During the course of the litigation each of the purchasers was deposed, as was Veys. CP0167. Early in the litigation, sometime in February 2005, purchasers offered to settle their lawsuit if Veys would agree to one of the following two options: (1) Veys would sell the Lodge and his Pybus Point residence to purchasers for \$2 million; or (2) purchasers would dismiss their lawsuit and release Veys of all liability for \$300,000. CP0167; CP0260.

According to Riske, after consulting with Veys and after receiving Veys' specific authorization and direction to reject this offer, Riske notified purchasers' counsel via letter on March 1, 2005, that Veys rejected the offer. CP0168; CP0260.

The case proceeded to trial, during which Veys admitted, under oath on the witness stand, that he knew he had a binding contract with purchasers when he signed the PSA. CP0263-CP0268.

After Veys testified, but before the jury returned a verdict, purchasers offered to settle the lawsuit for \$1 million. CP0168; CP0292. According to Riske, after consultation with Veys and after receiving Veys' specific authorization and direction to reject such offer, Riske notified purchasers' counsel that the offer was rejected by Veys. CP0168.

On December 20, 2005, the jury found that Veys had entered into a binding contract on June 3, 2004, when he authorized his signature page be released by Long. CP0017. The jury returned a verdict for damages of \$3 million. *Veys v. Applequist*, 2007 WY 60, 155 P.3d 1044, 1046 (2007).

After the verdict was entered against Veys, the parties attended mediation where the purchasers made a final settlement offer to release Veys of all claims if he would pay purchasers \$850,000 cash. CP0168. According to Riske, after consulting with Veys and after receiving Veys' specific authorization and direction to reject such offer, Riske notified purchasers that Veys had rejected the offer. *Id.*

Veys denied that he was ever notified of any of the settlement offers. CP0290.

Veys appealed the trial court judgment on the verdict, but the Wyoming Supreme Court upheld the judgment in its entirety. *Veys*, 155 P.3d at 1053.

Veys now has sued Long arguing that as a result of Long's actions, Veys has suffered more than \$3 million in economic damages.

#### **IV. SUMMARY OF ARGUMENT.**

Veys' \$3 million in damages, awarded by the jury in the Applequist Litigation over the failed sale of the Alaska Lodge, all flow

directly from Veys' decision to breach the Purchase and Sale Agreement that Veys knew bound him to sell the property. After he signed the PSA, Veys admitted that he had "seller's remorse," and he attempted to renegotiate the deal he had made in an effort to obtain a substantially better deal or, in the alternative, scuttle the transaction entirely.

Veys created the risk of a lawsuit and its consequences when he chose not to honor the PSA and sell the Lodge as he had agreed. After purchasers filed suit against Veys in Wyoming, Veys admitted on the witness stand that he knew he had a contract with the purchasers.

Veys now argues that nevertheless it was Long's work on the PSA and his advice regarding the agreement that was the cause of the \$3 million verdict entered against Veys in the Applequist Litigation.

Veys ignores the most important event in the causal chain. If he had not decided to *breach the PSA*, Veys would have suffered none of the alleged damages. If, instead, Veys had fulfilled his obligations under the PSA, he would have sold the Lodge and received \$2.65 million from purchasers. If at that point, Veys was unhappy with the details of the transaction, he would have been in position to theoretically hold his transaction attorney accountable for specific financial losses attributable to his lawyer's performance of his role in the sale. Instead Veys chose to breach the PSA which he knew was binding and decided to take his

chances with a lawsuit. It was Veys' decision to breach that had an immediate causal connection to his eventual damages in the Applequist Litigation. It is that decision to breach the PSA that is the "but for" cause of his damages, not any actions of Long.

Alternatively, any damages caused by Long's alleged negligence legally must be capped at \$300,000. Any damages above \$300,000 were caused by the superseding negligence of Veys' trial lawyer in the Applequist Litigation and his failure, according to Veys himself, to communicate a \$300,000 settlement offer to Veys. The trial lawyer's failure to convey a written settlement offer of the Applequist Litigation to Veys caused Veys harm that was so different and independent from any alleged harm caused by Long, the transaction attorney, as to be so unforeseeable that it requires capping Veys' damages caused by Long, if any, at \$300,000 as a matter of law.

Regarding Veys' claims in his complaint for Long's negligence that were not associated with the PSA for the Lodge, summary judgment should be granted for two reasons. First, Veys has produced no evidence contesting Long's assertion that Veys' filing of the claims is barred by the applicable statute of limitations. Second, Veys' contention that his claims should be sustained based on the doctrine of "law of the case" actually has no basis in law.

Veys' failure to tender any substantive legal proof or arguments why his claims for negligence regarding legal matters arising after the verdict in the Applequist Litigation or matters related to a tax scheme called "The Method" were not barred by the statute of limitations is fatal. Similarly, Veys' failure to meet Long's motion with proof of the viability of his "Accretion Land" claim rather than semantics and speculation is fatal to that claim, if it is actionable at all.

Finally, Veys' attempt to re-cast his Accretion Land claim as a deprivation is inappropriate on appeal and should be disregarded.

The trial court's order granting Long summary judgment on all of Veys' claims should be affirmed.

## **V. ARGUMENT.**

### **A. Standards of Review.**

#### **1. The standard of review on summary judgment.**

The standard for this appellate court's review of the trial court's summary judgment order is the same test the lower court used in granting Long's summary judgment motion: Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). *Smith v. Preston Gates Ellis, LLP*, 135 Wash.App. 859, 863, 147 P.3d 600 (2006). A "material fact" is outcome determinative. *Id.* Although all facts and the inferences

to be drawn therefrom are viewed in the light most favorable to the non-moving party, to defeat summary judgment, that party — in this case, Veys — must raise specific facts and may not rely on speculation. *Id.*

**2. Summary judgment standards in a legal malpractice action for negligence.**

To survive a motion for summary judgment in a legal malpractice negligence action stemming from a failed business transaction, a former client must show that deficiencies in the contract attributable to the lawyer caused the harm about which the client now complains; specifically, the client “. . . needs to demonstrate that a better contract or full disclosure would have prevented the injury or improved his recovery.” *Id.* at 864, 147 P.3d 600. In a failed business transaction case, the aggrieved client must show “. . . that ‘but for’ these deficiencies in the contract he would have had a better result.” *Id.* at 865, 147 P.3d 600. “Without such evidence, there is no prima facie case for causation[.]” *Id.* at 870, 147 P.3d 600. Speculation is not enough to survive a summary judgment motion in a legal malpractice action. *Id.*

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**B. Argument Refuting Veys' Assignment of Error 1: On Summary Judgment Veys' Cannot Show that Anything But His Decision to Breach the PSA was the "But For" Cause of the Particular Damages He Seeks in This Legal Malpractice Action.**

In his Appellant's Brief, Veys completely ignores Long's primary argument in his motion for summary judgment and the trial court's reason for granting the motion: Veys' decision to breach the PSA, not any contractual deficiency attributable to his lawyer, Long, was the "immediate connection" to the particular damages that Veys claims in his legal malpractice action, *i.e.*, the economic damages awarded against Veys in the Applequist Litigation. Veys chooses to focus on Long's second "but for" causation argument, *i.e.*, Veys failed to satisfy the "better result" test of Washington's transactional legal malpractice jurisprudence. Veys' claim fails both tests for the causation-in-fact required to establish liability.

Long certainly does *not* concede proximate cause as Veys suggests. App. Br, 41. In this legal malpractice action, the burden is on Veys to show that Long's negligence, if any, was the proximate cause of Veys' claimed injury. *See 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, 134 Wash.2d at 251-52 (emphasis added). Legal causation is based on policy considerations determining how far the consequences of an act should extend. Id. at 252.*

In a transactional legal malpractice case as we have here, a second test must be satisfied by plaintiffs. The transactional legal malpractice plaintiff needs to demonstrate that “but for” the attorney’s negligence he would have obtained a better result, in order to defeat summary judgment. *See Sherry v. Diercks*, 29 Wash.App. 433, 438, 628 P.2d 1336 (1981). Although proximate cause is usually the province of the jury, *Brust v. Newton*, 70 Wash.App. 286, 291-93, 852 P.2d 1092 (1993), 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).

Here it is impossible for reasonable minds to conclude that anything but Veys’ refusal to perform the deal he knew he had made with the prospective purchasers was the proximate cause of the damages he sustained in the purchasers’ subsequent, successful lawsuit against him.

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**1. Veys' decision to breach the PSA, not Long's allegedly negligent conduct, was the "immediate connection" that led to Veys' damages.**

Veys cannot make a prima facie claim for legal malpractice because he cannot allege facts that show Long's allegedly negligent conduct had an "immediate connection" to the eventual judgment entered against Veys in the Applequist Litigation. Veys admitted at trial in that case that he knew he had an agreement with purchasers when he authorized Long to release his signature on the PSA to the purchasers' transaction attorney. Purchasers' trial attorney in the Applequist Litigation, Mr. Gifford, questioned Veys regarding his email correspondence during the course of the prior contract negotiations as follows:

**Gifford:** You say, "Darin [Scheer, purchasers' transaction attorney], I talked to Mike [Long, defendant, Veys' transaction attorney] and we will go for one of the two [sale contracts]. We will be contacting you. My phone up here is not working now, so I am on the email with you. I have told Mike to go for one of the two. I just need to talk with Tonk (Fischer, Veys' accountant) and I'm still open for both. I'm going to one or the other." Is that what you said?

**Veys:** Yes.

**Gifford:** You were going to accept either the 2.8 (million) with the carry or you were going to accept the 2.65 (million), but one or the other was a go?

**Veys:** Yes.

**Gifford:** Now at this point did you think you had an agreement?

**Veys:** Yes.

CP0263-CP0264.

Veys later reaffirmed that he believed there was a contract when he authorized Long to release his signature.

**Gifford:** And the reason you were sending this note to Van Carpenter to deliver to Art (Thompson) was that Exhibit 2, the PSA specifically required that you notify any other interested parties that you had made a deal with my clients, correct?

**Veys:** Yes.

**Gifford:** And at that point – as I understand your testimony now – you thought you had an agreement?

**Veys:** Yes.

CP0268.

It is uncontroverted that Veys knew he had a binding contract when he authorized Long to release his signature. Veys gave into his “seller’s remorse,” refused to perform the contract, and accepted the risk of a lawsuit by purchasers in order to renegotiate terms of sale more to his liking. Veys did not sue his lawyer, Long, for financial damages of the type commonly caused by contractual deficiencies, he sued for the amount of the damages he sustained in subsequent litigation he brought upon himself.

Veys tenders no plausible argument that Long's allegedly deficient drafting or advice regarding the PSA had an immediate connection to the judgment damages he sustained in the Applequist Litigation because, had Veys satisfied the terms of the PSA, the purchasers would not have had the basis for their eventual lawsuit against him. The act with the *immediate connection* to the injury in the form of the eventual adverse jury verdict was Veys knowing and voluntary breach of the PSA, which led directly to the lawsuit by purchasers. Veys cannot make a prima facie claim that Long's allegedly negligent conduct was the but for cause of his injuries. Summary judgment for Long is appropriate.

**2. Veys fails to demonstrate with anything but conjecture that any contractual deficiencies attributable to Long prevented Veys from obtaining a better result in the commercial property transaction.**

In his opening brief, Veys chides Long a bit for relying on *Smith v. Preston Gates Ellis, LLP, supra*, in support of Long's motion for summary judgment. App. Br, 34-35. *Smith*, however, provides the second causation test Veys must satisfy in this transactional malpractice claim, that he would have obtained a better result in the contract negotiations, but for Long's negligence. *Smith*, 135 Wash.App. at 864, 147 P3d 600.

In *Smith*, a former client sued the lawyer who reviewed a construction contract for work, the eventual cost of which put the client in

a bad financial situation and over which the client became involved in litigation with the construction contractor. Smith, as the plaintiff Veys here, argued the lawyer's failure to recognize a number of deficiencies in the contract caused Smith the loss of a better result. The court, however, found that where Smith had knowledge of the contract's deficiencies when he signed it, had other reasons for proceeding as he did, and could only claim after the fact that he would have walked away from the contract if the lawyer had done more to help him, Smith failed to establish a prima facie case for causation. *Id.* at 869, 147 P3d 600.

The main thrust of Veys' argument regarding the "better result" test is that had Long pressed for the terms Veys claims were so important to him *before* he signed the PSA, purchasers would have said no and Veys' "better result" would have been no deal being reached. App. Br, 36. The problem with this argument is that Veys has produced no evidence other than speculation that he insisted on these terms before he signed the PSA.

The evidence to which Veys points in his brief regarding his insistence on the particular terms is emails he sent to Long on June 14, 15, 16 and 18, 2004. *Id.* Veys, however, had already signed the binding PSA on June 3, 2004, so these emails asking for these terms had no bearing on whether or not Veys simply would have walked away. He could not have walked away at that point because he already had agreed to the contract.

The only timely evidence supplied by Veys in support of his argument that he would have walked away before signing the PSA unless all his terms were met is an email to the purchasers' attorney, Scheer, dated May 19, 2004. CP0607. It is unclear how the substance of this email supports Veys' position. Veys states he is "excited to see [the Lodge] go to you" and that he does not want to have "ANY PROBLEMS down the road". *Id.*

The last piece of evidence Veys offers to support his position is his self-serving affidavit filed in response to Long's motion for summary judgment. CP0772-CP0781. This, of course, is purely speculative evidence and was provided years after the fact in an attempt to create a question of fact. Such an affidavit does not create a genuine issue of material fact. Speculation is not sufficient to withstand summary judgment. *Smith*, 135 Wash. App. at 869, 147 P3d 600.

In support of his legal argument that the "better result" prong of "but for" causation can be satisfied by the "no deal" or "walk away" principle, Veys offers *Ludlow v. Gibbons*, Case No. 10CA1719 (Colorado Court of Appeals, Nov. 10, 2011) (unpublished Opinion). App. Br, 37.

Although the *Ludlow* decision does not bind this court, and its discussion of the "no deal" or "walk away" aspects of a "better result test" is *dicta*, its holding reinforces our principal point: Because Veys did not

complete the transaction, his decision to breach the contract is the immediate cause of his damages, not any act or omission by Long.

In *Ludlow*, the plaintiff in a professional malpractice action actually went through with the allegedly mishandled transaction to which plaintiffs had agreed. There, the plaintiff was advised by a real estate professional and a lawyer regarding a real estate transaction. Although the plaintiffs/sellers learned at closing that the broker (and the lawyer) had failed to discover that the buyers had inserted a \$1.6 million infrastructure credit into the \$6.67 million contract, they went through with the business transaction and demonstrated that the \$1.6 million loss was caused by the negligence of their professional advisors.

Veys' situation is not akin to *Ludlow*. Had Veys performed his obligations under the PSA (that he admitted, under oath, he knew was binding), he would have sold the Lodge to the purchasers for \$2.65 million. Veys then perhaps would have been in position to demonstrate what economic losses, if any, were caused in fact by deficiencies in Long's legal services, instead of claiming damages stemming from a lawsuit caused by his own conduct. Because Veys did not complete the transaction, neither *Ludlow* nor the "no deal" standard may be applied, even if that were the standard in Washington (which it is not).

In summary, *Ludlow* is not the applicable legal standard for “better result” causation in Washington, *Smith v. Preston Gates* is. Even if *Ludlow's* “walk away” standard was the law in Washington, Veys still could not satisfy it as he has provided no non-speculative evidence that these terms were important enough to him before signing the PSA to walk away. Finally, *Ludlow's* standard can only be applied when the client/plaintiff actually goes through with the transaction, and the actual result can be compared to what would have happened had the plaintiff walked away.

Long’s motion for summary judgment was granted correctly.

**C. Argument Refuting Assignment of Error 2: In Any event, Veys’ Trial Lawyer’s Failure to Communicate a Settlement offer to Veys in the Subsequent Wyoming Litigation Was a Superseding Cause Capping the Amount of Damages, if any, Caused by Long.**

As a matter of law, the amount of Veys’ damages, allegedly caused by Long, must be limited to a maximum of \$300,000. That is the amount of the offer to settle the Applequist Litigation, the verdict of which forms the basis of Veys’ damages claim. That is the amount of the settlement offer which, Veys asserts, his trial lawyer Riske never communicated to Veys.

Taking Veys at his word, any damages suffered by Veys in an amount greater than \$300,000 were thus caused by the conduct of Riske

which, as described by Veys, would be negligent to such a degree as to constitute a superseding cause of the harm which Veys sustained in the Applequist Litigation.

Whether or not “an act may be considered a superseding cause sufficient to relieve a defendant of liability depends on whether the intervening act can reasonably be foreseen by the defendants; only intervening acts which are not reasonably foreseeable are deemed superseding causes.” *Anderson v. Dreis & Krump Mfg. Corp.*, 48 Wash.App. 432, 442, 739 P.2d 1177 (1987). Long agrees that normally whether or not intervening acts are 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 v. Dept. of Highways*, 73 Wash.App. 516, 521, 870 P.2d 999 (1994). However, an “intervening act may be so highly extraordinary or unexpected as to fall outside the realm of reasonable foreseeability as a matter of law.” *Smith v. Acme Paving Co.*, 16 Wash.App. 389, 396, 558 P.2d 811 (1976). This case presents the extraordinary.

Long accepts Veys’ recitation of the superseding cause standard in Washington: The intervening negligence must (1) create a *different type of harm* than otherwise would have resulted from the defendant's conduct, and (2) *operate independently* of the situation created by the defendant's

conduct. *Anderson*, 48 Wash.App. at 444, 739 P.2d 1177. The negligence of Veys' trial lawyer meets these standards.

**1. Different type of harm.**

The type of harm purportedly caused by Veys' trial attorney in failing to communicate a \$300,000 settlement offer in litigation is a different type of harm from the harm which is reasonably foreseeable when an attorney is working, as did Long, on a transaction. The type of harm with which transactional attorneys typically deal are bad business outcomes for their clients.

Any damages incurred by Veys above \$300,000 and caused by his trial lawyer's failure to relay a written settlement offer to his client are neither transactional in nature nor related to the nature of the particular transaction that was the subject of litigation. Those type of damages are not within the reasonable contemplation of transaction attorneys.

**2. Operate independently.**

The negligent conduct which Veys attributes to his trial lawyer, Riske, — the same lawyer Veys accuses of having failed to timely file a crucial bond pending appeal in the Applequist Litigation (CP0018) — necessarily was distinct from the transactional situation in which the business lawyer, Long, was involved. Riske did not participate in the

failed property sale in Washington. Long is not admitted in Wyoming, and he did not participate in the trial.

Riske's purported actions in not relaying a written settlement offer of \$300,000 to Veys were several steps removed from the negotiations of a business deal, itself, and even the litigation over the terms of the deal. The harm caused by an attorney's failure to communicate a settlement offer for one-tenth of the amount of the eventual verdict is so unexpected and unpredictable as to be wholly outside the scope of any situation created by any conduct of Long.

The trial court correctly ruled that the damages, if any, attributable to Long are limited to \$300,000 as a matter of law.

**D. Argument Refuting Assignment of Error 3: Veys Filed His Claims Which Did Not Pertain to the Failed Commercial Real Estate Transaction Beyond the Period of the Applicable Statutes of Limitations.**

**1. Failure of proof.**

Veys has provided no argument other than asserting "law of the case" as to why summary judgment was improperly granted against the non-Lodge and non-Accretion Property claims (the "additional claims"). Once Long moved for summary judgment against the additional claims as being filed outside the statute of limitations because they were not tolled by the tolling agreement (CP0159-CP0160), the burden shifted to Veys to establish the existence of each essential element of his case and to offer

admissible evidence to establish each element of his causes of action. *See Shows v. Pemberton*, 73 Wash.App. 107, 110, 868 P.2d 164 (1994).

Veys has the burden of showing why there is a question of fact about whether each of the additional claims actually was filed within the applicable statute of limitations. He has failed that burden. Summary judgment was properly entered against the additional claims and should be affirmed on this basis.

## **2. Law of the case.**

Veys' only legal argument why summary judgment should be reversed against the additional claims is that Judge Woolard's rulings on Long's motion to dismiss are the "law of the case" and thus Long cannot also move against the same causes of action at the summary judgment stage. App. Br, 49-50. Veys offers no authority that the "law of the case" doctrine supports his position.

In fact, Washington law is clear that the "law of the case" doctrine does not apply in the situation at bar. The Washington Court of Appeals held in *MGIC Fin. Corp. v. H. A. Briggs Co.*, 24 Wash.App. 1, 8, 600 P.2d 573 (1979), that the "law of the case" doctrine was not violated when a trial court granted a motion for summary judgment several days after another trial judge had denied a similar motion. The court clarified that the "law of the case" doctrine "generally applies only to parties who raise

identical issues on successive appeals of the same case.” *Id.* See also *Greene v. Rothschild*, 68 Wash.2d 1, 414 P.2d 1013 (1966); *Pierce County v. Desart*, 9 Wash.App. 760, 761, n. 1, 515 P.2d 550 (1973).

The court went on to hold in *MGIC* that the movant presented “no relevant authority for extending the doctrine to apply to motions raised several times at the trial court level. We see no reason to extend the doctrine here.” *MGIC*, 24 Wash.App. at 8, 600 P.2d 573. Oregon courts have held similarly that “law of the case does not prevent a trial judge from reconsidering his or her own rulings or the rulings of another trial judge in the same litigation.” *State v. Demings*, 116 Or.App. 394, 396, 841 P.2d 660 (1993).

Thus, the “law of the case” doctrine does not bar a trial judge from reconsidering even the same motion several times at the trial court level. There is no Washington authority for Veys’ position that a trial judge’s rulings in a motion to dismiss somehow foreclose a motion for summary judgment against causes of actions also moved against in the motion to dismiss.

This argument should be disregarded and Long’s summary judgment motions should be evaluated as the different motions they are and summary judgment affirmed.

**3. The Additional Claims were not tolled and are thus barred by the statute of limitations.**

This lawsuit was filed on June 15, 2009. CP0003-CP0025. In Washington, the statute of limitations for attorney malpractice claims is three years. *Huff v. Roach*, 125 Wash.App. 724, 729, 106 P.3d 268 (2005) (citing RCW 4.16.080(3)). Therefore, unless tolled, any tort claims against Long must involve actions that occurred on June 15, 2006, or later. Veys alleges multiple claims for relief in his complaint based on events that occurred prior to June 15, 2006, that were not tolled by the tolling agreement<sup>2</sup>. CP0023-CP0024

On September 18, 2006, Veys and Long signed an agreement that tolled the running of statutes of limitation only against claims that pertained to the failed Lodge transaction. CP0286-CP0288.

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<sup>2</sup> Notwithstanding the Accretion Land claim which is covered in the next section, the specific claims for relief not tolled by the tolling agreement are as follows: 1) Veys' claim for negligence regarding Long's alleged actions or inaction after the Applequist Litigation verdict; 2) Veys' claim for negligence regarding Long's alleged advice regarding the Method; 3) Veys' claim for negligence regarding Long's alleged failure to bill Veys in accord with the legal work actually performed; 4) Veys' claim for negligence regarding Long's allegedly causing Veys to violate legal tax reporting practices. CP0022-CP0023.

The pertinent sections of the Tolling Agreement follow:

1.2 Veys contends that Long represented Veys with respects to aspects of a transaction involving Veys, as the seller, and Bruce F. Reed, Marvin N. Applequist and Val B. Jones as purchaser.

1.3 On or about December 20, 2005, a judgment was entered in the approximate sum of \$3,000,000 in the case of Marvin N. Applequist, et al. v. Alan J. Veys, et al., in the State of Wyoming, County of Converse, Eighth Judicial District Case No. 14186. Veys has appealed the judgment.

1.4 Veys believes he may have claims against Long arising out of *services rendered to Veys from Long pertaining to the Asset Sale Agreement (the "Possible Claim")*.

2.1 Long and Veys agree that any statute of limitations or other time limitation *with respect to the Possible Claim* that has not expired shall be and hereby is suspended and tolled beginning on the effective date hereof, September 18, 2006. The time period extending from and including September 18, 2006 until the date this Agreement terminates in accordance with its terms shall not be counted in determining the time in which Veys is required by the applicable statute of limitations to file an action against Long *with respect to the Possible Claim described above*.

CP0286-CP0287 (emphasis added).

The tolling agreement terminated effective May 2, 2009, after a period of approximately 31.5 months.

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As shown in the excerpts above, the tolling agreement did not suspend the running of the legal deadlines regarding all claims Veys may have had against Long; only the deadline for the “Possible Claim” was tolled. The Possible Claim is defined as “claims against Long arising out of services rendered to Veys from Long pertaining to the ‘Asset Sale Agreement.’” The term “Asset Sale Agreement” is not defined but Paragraphs 1.2 and 1.3 make clear that the Asset Sale Agreement is another term for the PSA at issue in this case and the Applequist Litigation.

The tolling agreement granted Veys an extra 31.5 months to file the Possible Claim or the claims pertaining to the failed Lodge transaction. The tolling agreement did not bar *any and all claims* Veys may have had against Long, it tolled only the narrowly defined Possible Claim. Thus, all claims other than the Possible Claim must have been filed within the statute of limitations period applicable to each respective claim.

The trial court appropriately granted Long’s summary judgment motion against all claims other than the Possible Claim as they were filed outside the applicable statutes of limitations.

#### **4. Accretion land claim.**

Veys maintained the Accretion Land claim as a professional negligence claim from the outset of this case. CP0023. The Accretion

Land transaction took place in 1994. CP0007. Because the Accretion Land claim does not pertain to the 2004 Alaska Lodge transaction, the actions allegedly giving rise to the claim must have occurred after June 15, 2006, to be viable. The claim is no longer viable, if it ever was. There is no question of fact regarding the timing of the filing of the claim that it is barred by the statute of limitations. As a matter of law, summary judgment should be entered for Long on Veys' negligence claim regarding the Accretion Land claim. On appeal, Veys attempts to re-cast this claim as a continuing "deprivation" against which the statute of limitations has yet to run. App. Br, 48.

Even if it was proper to re-plead the cause of action at this point, a "deprivation" is not a continuing tort under Washington law. A tort is only continuing if the intrusive condition is reasonably abatable and not permanent. *Pac. Sound Res. v. Burlington N. Santa Fe Ry. Corp.*, 130 Wash.App. 926, 941, 125 P.3d 981 (2005). Here, Long has allegedly converted Veys' property, thereby causing Veys damage. Therefore, neither condition is met. Under these circumstances, the statute of limitations for the Accretion Land claims expired sometime in 1997. The Accretion Land claim was filed outside the statute of limitations.

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Additionally, Veys should not be allowed to re-plead his complaint at the summary judgment or appellate stage. The proper avenue for Veys to amend his cause of action regarding the Accretion Land from negligence to a “deprivation” is via a motion seeking an order allowing the desired amendment. CR 15(a). A copy of the proposed amended pleading, denominated “proposed” and unsigned, must be attached to the motion. *Id.* The motion is served, filed, and decided like any other nondispositive motion. *Id.*

Summary judgment was properly entered against the Accretion Land claim as it was filed outside the statute of limitations and attempting to re-cast the claim at the summary judgment stage is improper.

## **VI. CONCLUSION.**

Veys would have this court hold, in effect, that business transaction lawyers such as Long are the guarantors of their business client’s satisfaction and success in every transaction because any contractual deficiency must be the proximate cause of any unfortunate result. That is not the law. The trial court’s orders and judgment granting Long summary judgment should be affirmed. After conducting its own

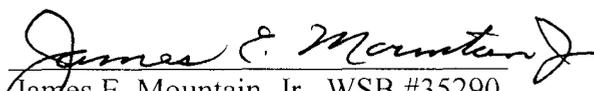
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review of the records, this court should grant Long summary judgment and dismiss Veys' complaint, or in the alternative, limit any damage award that Veys might recover to \$300,000.

Respectfully submitted this 13th day of March, 2013.

**HARRANG LONG GARY RUDNICK P.C.**

By:   
James E. Mountain, Jr., WSB #35290  
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Of Attorneys for Respondents Michael  
Long, Office of P. Michael Long, and  
P. Michael Long, P.S., Inc.

**CERTIFICATE OF FILING AND SERVICE**

I, James E. Mountain, Jr., declare under penalty of perjury of the state of Washington that the following is true and correct:

I am a citizen of the United States, over the age of 18 years, and otherwise competent to testify. I am an attorney with Harrang Long Gary Rudnick P.C. and my business address is 1001 SW Fifth Avenue, 16th Floor, Portland, OR 97204.

On March 13, 2013, I caused to be filed the original and one copy of the foregoing **BRIEF OF RESPONDENTS MICHAEL LONG, OFFICE OF P. MICHAEL LONG, AND P. MICHAEL LONG, P.S. INC.** with the Clerk of the Court, Washington State Court of Appeals, Division Two, by mailing, via first class mail, postage prepaid, to the following address:

Washington State Court of Appeals - Division Two  
950 Broadway, Suite 300  
Tacoma, WA 98402

I further certify that on said date I served one true and correct copy of said document on the party or parties listed below, via email transmission and first class mail, postage prepaid, and addressed as follows:

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By: *James E. Mountain, Jr.*  
James E. Mountain, Jr., WSB #35290

Of Attorneys for Respondents Michael Long, Office of P. Michael Long, and P. Michael Long, P.S., Inc.

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