

NO. 45949-3-II

COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION II

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CHRISTOPHER DAVIS,

Appellant,

v.

THURSTON COUNTY, ET AL.,

Respondents.

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On Appeal from Thurston County Superior Court  
Cause No. 12-2-01707-4

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DIVISION II  
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RESPONDENTS' BRIEF

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**I. IDENTITY OF RESPONDENTS**

Thurston County and Sally Harrison are the Respondents herein.

**II. COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

- A. Does a criminal defendant have an attorney client relationship with the director of a County's public defender's office by virtue of being briefly represented by an attorney in that office?
- B. Can a claim for criminal malpractice proceed without proof of innocence or a successful post-conviction challenge?
- C. Does a breach of fiduciary duty claim require that an attorney client relationship exist at the time of the alleged breach?
- D. Can a criminal defendant assert a consumer protection act claim against a public agency administering public funding for non-attorney indigent defense services?
- E. Can a negligence claim survive if none of the elements are established?
- F. Is the director of a public agency and the director's employer, entitled to quasi-judicial immunity for administering funds for non-attorney indigent defense services when that function is delegated to the director by the Court via Local Court Rule?

### III. COUNTER-STATEMENT OF THE CASE

#### A. Factual History.

Christopher Davis, the appellant herein, was charged with Rape in the 2<sup>nd</sup> Degree for reportedly raping a female as she lay unconscious in her friend's bedroom. CP 45. This was not his first brush with violent crime. Mr. Davis had two prior felony convictions, including an Assault 2, domestic violence charge. CP 68.

On the night of the alleged rape, the victim was described by Mr. Davis as “highly intoxicated” and “about to fall over” and “puking” in the bathroom at an apartment where Mr. Davis was visiting. CP 69. Mr. Davis later witnessed the victim's friends taking her into a bedroom and laying her down to sleep because “she was passing out.” CP 70. The victim indicated that she awoke to find Mr. Davis “was on top of her . . . having sex with her.” CP 8. His verified complaint acknowledges that the victim alleged she awoke with him “penetrating her vaginally” and when she asked what was going on, he “replied that she wanted him to do it.” CP 8. His complaint then claims that he “stopped as she requested and left the room.”<sup>1</sup> *Id.*

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1. Mr. Davis admits being alone with the victim, while she was extremely intoxicated with her pants down. CP 71-74.

The law enforcement investigation into the rape allegations revealed another witness who saw Mr. Davis leaving the bedroom where the victim was located. CP 8. Investigators further determined that the victim was too intoxicated to consent to sexual intercourse with Mr. Davis. CP 9. Mr. Davis was therefore charged with Rape 2<sup>nd</sup> Degree, which occurs when a “person engages in sexual intercourse with another person . . . . [and] the victim is incapable of consent by reason of being physically helpless or mentally incapacitated.” RCW 9A.44.050(1)(b). *See*, CP 45.

The Court initially appointed James Shackleton to represent Mr. Davis. CP 10. Mr. Shackleton is an attorney employed as a public defender with the Thurston County Office of Assigned Counsel (OAC). *Id.* OAC’s attorneys represent indigent criminal defendants and the OAC Director administers funding for non-attorney services to indigent criminal defendants in Thurston County. CP 41-42. Pursuant to Thurston County Local Criminal Court Rule (LCrR) 3.1, OAC’s Director is responsible for authorizing funds for non-lawyer services “upon a showing that the services are necessary and that the defendant is financially unable to obtain these services.” LCrR 3.1(f)(2). CP 39-40. Authorization for non-

attorney services funding must be obtained “prior to the procurement of the necessary services.” *Id.*

Mr. Davis’s family promptly retained a private attorney, James Gazori, to defend him on the rape charges. CP 78. Mr. Davis never spoke with Sally Harrison, the former director of OAC, regarding his case or any other topic. CP 75-76. According to Mr. Gazori, from the moment he began representing Mr. Davis, he was the only attorney representing him in the case. CP 91-92.

Ms. Harrison was never personally assigned or appointed to represent Mr. Davis in his criminal case and never appeared in Court or any other proceeding on his behalf. CP 44. She has never communicated with Mr. Davis for any reason and never provided him with any advice regarding his charge. *Id.* Mr. Davis has conceded that he never spoke with Ms. Harrison. CP 75-76.

Once Mr. Gazori substituted in as Mr. Davis’s attorney, he retained an “expert” named Dr. Robert Julien. CP 85-86. According to Mr. Gazori, Dr. Julien planned to testify that an extremely intoxicated female (even passed out apparently) can consent to sexual intercourse. CP 86.

The Superior Court signed the order authorizing an expenditure of

public funds for Dr. Julien “in a sum *not exceeding* \$3,000,” subject to further court order, but notified Mr. Gazori of the local rule referenced above, that required the OAC Director to authorize expert funds.<sup>2</sup> CP 85. (emphasis added). Ms. Harrison learned of the Court’s order and gave Mr. Gazori a copy of OAC’s “Expert Services Policies and Procedures.” CP 42; 46-49. OAC received the first official request for Dr. Julien’s services on June 2, 2009 and Ms. Harrison approved an initial \$900 on June 3, 2009. CP 42; 50-52. Mr. Gazori was never told that *additional* funds for Dr. Julien would not be approved. CP 42; 92-93.

On June 18, 2009 OAC received a request from Mr. Gazori for \$1,000 for the investigator and Ms. Harrison approved an initial \$480 on June 24, 2009. CP 42.

OAC next received a new request for an additional \$1,150 for a psychosexual evaluation by Ms. Sue Batson. CP 43. Ms. Batson charged \$800 for the evaluation and \$350 for a polygraph. OAC regularly asks if a defendant or his/her family can help pay for the polygraph, although if

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2. “The Sixth Amendment right to effective assistance of counsel includes expert assistance necessary to an adequate defense.” *State v. Punsalan*, 156 Wn.2d 875, 878, 133 P.3d 934 (2006).

they are not able to, OAC will provide the funding.<sup>3</sup> *Id.* Mr. Gazori said that Mr. Davis' family could contribute \$250 toward the polygraph. *Id.* Ms. Harrison authorized \$800 for Sue Batson for a psychosexual evaluation and \$100 toward the polygraph. CP 43; 53-55.

In sum, OAC Director Harrison approved a total of \$2,055, for four separate non-attorney experts or professionals: Dr. Julien, Frank Wilson, Sue Batson, and polygrapher Ron Younck. CP 42-43. Of that amount, Mr. Gazori spent only \$675 before recommending Mr. Davis accept a plea agreement. CP 59.

Without actually requesting additional funding from OAC, Mr. Gazori filed a motion in the criminal case to *compel* additional funding for Dr. Julien. CP 44. The Court denied the motion. *Id.* Mr. Gazori did not appeal the Court's ruling. *Id.*

Mr. Gazori negotiated a plea agreement for Mr. Davis to assault 3 without a requirement to register as a sex offender. CP 88. Mr. Gazori explained that the plea was an excellent outcome for the case as Mr. Davis was "looking at some substantial time. He had prior offenses." CP 89.

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3. *See, e.g., Punsalan, supra*, 156 Wn.2d at 879 ("Unsurprisingly, the State encourages criminal defendants to contribute to the cost of their defense

This was the best plea offer he was going to get and the only other alternative was taking the case to trial, and risk a conviction that could have carried a 10 year sentence and a sex offender registration requirement. CP 89-90. Mr. Gazori felt that the victim was “very credible” and thus Mr. Davis’ denial of any sexual contact whatsoever would have been hard to defend. CP 94.

Mr. Gazori admits that he was never told that funding for Dr. Julien would not have been provided by OAC if Mr. Davis had chosen to go to trial. CP 93-94. He also admits that he had the ability to go to trial and call Dr. Julien at the time he was negotiating the plea agreement. CP 93. Mr. Gazori was never told that OAC would not compensate Dr. Julien if Mr. Davis decided to go to trial. CP 77.

Ultimately, Mr. Davis voluntarily accepted the offer and pled guilty to Assault 3 after agreeing that “there [was] a likelihood that a jury (trier of fact) would convict me [of rape 2] if it believed the State’s evidence.” CP 79; 81. Based on his plea, Mr. Davis was convicted of Assault 3 and sentenced to 16 months incarceration. CP 80; 56-65. He never appealed or otherwise challenged his conviction or sentence. CP 80. He lost no wages or property as a result of his sentence and he had no

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whenever possible.”)

business interests affected. CP 82.

Mr. Davis's complaint alleged the following causes of action against the moving defendants:

1. professional malpractice against Defendant Harrison;
2. breach of fiduciary duties against Defendant Harrison;
3. violation of consumer protection act against Defendant

Harrison;

4. negligence against Thurston County only.

CP 13-17.

**B. Procedural History.**

Thurston County and Ms. Harrison moved for summary judgment on all claims against them. CP 26-38. The trial court granted the motion in all respects. CP 210-211. This appeal followed.

**IV. LAW AND ARGUMENT**

**A. Standard of Review.**

In reviewing the grant of summary judgment “the appellate court engages in the same inquiry as the trial court.” *Maynard v. Sisters of Providence*, 72 Wn. App. 878, 866 P.2d 1272 (1994).

The purpose of summary judgment is to avoid a useless trial.

*Hudesman v. Foley*, 73 Wn.2d 880, 886, 441 P.2d 532 (1968). Summary judgment should be granted if it appears from the record that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends. *Hudesman*, 73 Wn.2d at 886.

The party moving for summary judgment has the burden of establishing the absence of any issue of material fact. *Wojcik v. Chrysler Corp.*, 50 Wn. App. 849, 854, 751 P.2d 854 (1988). However, once the moving party has presented competent summary judgment proof, the non-moving party may not rest on mere allegations in its pleadings, but must respond by affidavit or other proper method setting forth specific facts showing there is a genuine issue for trial. *McGough v. Edmonds*, 1 Wn. App. 164, 168, 460 P.2d 302 (1969). Broad generalizations and vague conclusions set forth in an affidavit in opposition to a motion for summary judgment are insufficient to successfully resist the motion. *Island Air, Inc. v. LaBar*, 18 Wn. App. 129, 136, 566 P.2d 972 (1977).

Summary judgment does not alter the applicable burden of proof; a moving party need not disprove an essential element of the nonmoving party's case, and may merely point out for the court the absence of any

essential element. *Young v. Key Pharmaceuticals*, 112 Wn. 2d 216, 225-27, 770 P.2d 182 (1989).

Finally, “an appellate court may affirm a grant of summary judgment on an issue not decided by the trial court provided that it is supported by the record and is within the pleadings and proof.” *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061, 1064 (2003), *citing*, *Int'l Bhd. of Elec. Workers v. Trig Elec. Constr. Co.*, 142 Wn.2d 431, 435, 13 P.3d 622 (2000); and *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984).

**B. Summary judgment should be affirmed on Mr. Davis’s legal malpractice claim.**

To establish legal malpractice, Mr. Davis had to establish “(1) the existence of an attorney-client relationship giving rise to a duty of care to the client, (2) act or omission in breach of the duty, (3) damages to the client, and (4) proximate causation between the breach and damages.” *Smith v. Preston Gates Ellis, L.L.P.*, 135 Wash.App. 859, 863–64, 147 P.3d 600 (2006), *review denied*, 161 Wn.2d 1011, 166 P.3d 1217 (2007) (emphasis added). Because this is a criminal malpractice claim, Mr. Davis was required to establish “both a successful postconviction challenge and proof of innocence.” *Falkner v. Foshaug*, 108 Wash. App. 113, 118, 29

P.3d 771 (2001). Thus, summary judgment was appropriate on this claim because Mr. Davis did not establish an attorney client relationship between himself and Sally Harrison, a successful post-conviction challenge, or damages.

**1. No Attorney Client Relationship Existed.**

“The essence of the attorney/client relationship is whether the attorney's advice or assistance is sought and received on legal matters.” *In the Matter of the Disciplinary Proceeding against James Byron Holcomb*, 162 Wn.2d 563, 578, 173 P.3d 898 (2007). In this case, Sally Harrison was never appointed to represent Mr. Davis, never spoke with him, never met him and never advised him on his criminal charges. Mr. Davis acknowledges that he has never spoken or corresponded with Ms. Harrison and that she never indicated to him that she was his attorney. The belief of the client that a relationship exists will control only if it “is reasonably formed based on the attending circumstances, including the attorney's words or actions.” *State v. Hansen*, 122 Wn.2d 712, 720, 862 P.2d 117 (1993).

Mr. Davis does not point to any evidence suggesting that he sought or received legal advice from Ms. Harrison. He points to a notice of

appearance signed by Ms. Harrison, but neglects to point out that the notice states “James Shackleton, #18174 is appointed as counsel for the defendant.” CP 134. It does not say that OAC or Ms. Harrison were appointed counsel for the defendant. Next he argues that he was initially represented by an OAC attorney and Ms. Harrison was the OAC director, so “by default” she was his attorney. No authority is cited for this proposition. Obviously, being the OAC Director does not place Ms. Harrison in an attorney client relationship with every individual represented by an OAC attorney. *See, e.g., State v. Stenger*, 111 Wn.2d 516, 522-23, 760 P.2d 357 (1988) (Even if a deputy prosecuting attorney would be disqualified from a case because they previously represented a criminal defendant, that does not mean the entire prosecuting attorney’s office is disqualified.)

In *Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355 (1995), the Court rejected a claim that multiple assistant attorneys general (AAG) could not represent different persons that had adverse interests. The Court held that as long as separate files were maintained and the attorneys did not confer about the matter with each other, that no conflict was created. The Court cited an earlier case, *Amoss v. University of Washington*, 40

Wn. App. 666, 700 P.2d 350 (1985) in which the Court held that a supervising AAG could represent a different party in the same matter in which a subordinate AAG also represented a party as long as the files were screened. Obviously, if being a supervising attorney made one the attorney for all of the clients of the subordinate attorneys, such an arrangement could not work.

In this case, Ms. Harrison did not consult with Mr. Shackleton about the defense of Mr. Davis and did not review his files. CP 202-03. Her role was limited to carrying out the Local CrR 3.1(f)(2). CP 203. She did not act as Mr. Davis's attorney at any time. A claim that Ms. Harrison was "discussing the case" with Mr. Davis's attorneys is a mischaracterization. There is no evidence in the record that Ms. Harrison ever spoke with Mr. Shackleton about plaintiff's case. Moreover, the only discussions she had with Mr. Gazori had to do with his requests for expert witnesses. An "attorney client relationship is not created . . . merely because an attorney discusses the subject matter with a nonclient." *Bohn v. Cody*, 119 Wn.2d 357, 364, 832 P.2d 71 (1992). *See, also, Sherman, supra*, 128 Wn.2d at 189 (Despite fact that AAG sent a memo to a university doctor asking for him to write a statement regarding the case,

the AAG did not form an attorney client relationship with the doctor.)

Further, it is undisputed that the alleged acts of Ms. Harrison occurred after Mr. Shackleton withdrew and Mr. Gazori became his only attorney of record. CP 41; 78. Mr. Davis argues that despite this undisputed fact, Ms. Harrison was his attorney for “administrative purposes.” There is no authority for the proposition that an attorney can represent someone for “administrative purposes.” His citation to *Miranda v. Clark County*, 319 F.3d 465 (9<sup>th</sup> Cir. 2003) actually refutes his argument. In that case, the Court explained that “[i]n allocating the county's funds, [the elected Public Defender] was performing essentially an administrative role on behalf of Clark County. It was a function similar to that performed by the head of every government administrative office. It therefore *materially differs from the relationship inherent in a public defender's representation of an individual client.* *Id.* at 469 (emphasis added). *Miranda* supports the defendants position here. Ms. Harrison’s role in Mr. Davis’s case was administering funds for non-attorney services as required by the Court rule. That did not transform her into Mr. Davis’s “administrative attorney”. Mr. Davis’s citation to *Polk County v. Dodson*, 454 U.S. 312, 321, 102 S.Ct. 445 (1981) is also curious in that it points out

that a public defense attorney acts independently on behalf of their client, and is not “the servant of an administrative superior.” Again, the fact that Ms. Harrison was the OAC’s director, does not mean “by default” she is the attorney for all of her subordinate’s clients.

In sum, there is no objective evidence that an attorney client relationship ever existed between Mr. Davis and Ms. Harrison. Mr. Davis does not point to anything that would lead a reasonable person to believe that Ms. Harrison was his attorney. She never advised him and he never sought her advice. Because there is no evidence that an attorney client relationship ever existed between Mr. Davis and Ms. Harrison and it is undisputed that he was represented by private counsel at the time of the alleged misconduct, summary judgment was appropriate.

**2. Plaintiff cannot establish a duty owed by an attorney to a non-client.**

The plaintiff suggests that even if no attorney client relationship existed with Ms. Harrison at the time she was allocating County funding at OAC, he can still establish a malpractice claim. He cites *Bohn, supra*, 119 Wn.2d at 364-65 in support. While it is true that *Bohn* holds that in some cases a non-client can assert a malpractice claim against an attorney, the facts in this case do not fit within that limited exception.

First, the test described in *Bohn* has been subsequently modified and explained further by *Trask v. Butler*, 123 Wn.2d 835, 842-43, 872 P.2d 1080 (1994). As *Trask* explained: “To establish a claim for legal malpractice a nonclient plaintiff must prove the following elements: (1) the existence of an attorney-client relationship which gives rise to a duty of care to the plaintiff, (2) an act or omission by the attorney in breach of the duty of care, (3) damage to the plaintiff, and (4) proximate causation between the attorney's breach of duty and the damage incurred.” *Id.* at 839-840. Thus, there must still be an attorney client relationship that can then create a duty owed to a non-client if the multi-factor test justifies the duty. In this case, Ms. Harrison did not have an attorney client relationship with Mr. Davis or any other individual. She acted solely as the OAC director.

Mr. Davis assumes that because Ms. Harrison is an attorney that she can be sued for legal malpractice by any indigent defendant who received services in some fashion by OAC. That is not what *Bohn* or *Trask* stand for. In *Bohn*, an attorney was in an existing attorney client relationship and allegedly provided advice *to a non-client* involved in the same matter that a non-client later argued was intended to benefit them

(the non-client) and caused them damages. The Court held the attorney's statements to the non-client in connection with the attorneys representation of another client in the same matter created a duty of care owed to the non-client. *Bohn v. Cody*, 119 Wn.2d at 365-66.

In *Trask*, an attorney was retained by the personal representative of the estate. The beneficiaries of the estate attempted to sue the attorney for malpractice arguing that he owed them a duty of care as beneficiaries of the estate. The Court held that an attorney hired by the personal representative of an estate does not owe a duty of care to the estate or the estate beneficiaries. *Trask v. Butler*, 123 Wn.2d at 845. The Court explained that:

The multi-factor balancing test does not impose legal malpractice liability upon Butler to Russell under these facts for three reasons: (1) the estate and its beneficiaries are incidental, not intended, beneficiaries of the attorney-personal representative relationship; (2) the estate heirs may bring a direct cause of action against the personal representative for breach of fiduciary duty; and (3) the unresolvable conflict of interest an estate attorney encounters in deciding whether to represent the personal representative, the estate, or the estate heirs unduly burdens the legal profession.

*Id.*

Thus, under *Bohn* and *Trask*, the exception wherein an attorney

owes a duty of care to a non-client only applies, if at all, where there is an attorney-client relationship with someone in the first place. Ms. Harrison was not acting as anyone's attorney and did not advise any clients. She acted to administer funding under Local CrR 3.1(f)(2). Thus, neither *Bohn* nor *Trask* apply.

### **3. No Successful Post-Conviction Challenge.**

It is undisputed that Mr. Davis did not challenge his conviction in the criminal case. Thus, under *Falkner, supra*, Mr. Davis failed to establish legal malpractice despite the absence of an attorney client relationship with Ms. Harrison.

Mr. Davis states that because the acts complained of did not occur in Ms. Harrison's "capacity as a criminal defense attorney" he is not required to establish a successful post-conviction challenge. *Response*, pg. 14. No authority is cited for this statement. In *Ang v. Martin*, 118 Wn. App. 553, 558, 76 P.3d 787 (2003), the Court explained:

To succeed on a claim of legal malpractice allegedly occurring in a criminal trial, a plaintiff must prove "at a civil trial that he or she is innocent of the charged crime" and must do so by a preponderance of the evidence. *Falkner v. Foshaug*, 108 Wash.App. 113, 119, 29 P.3d 771 (2001) (emphasis added). We hold that this requires the plaintiff to prove innocence in fact and not merely to present evidence of the government's inability to prove guilt.

There are sound policy reasons for the proof of innocence requirement, namely prohibit[ing] criminals from benefitting from their own bad acts, maintain [ing] respect for our criminal justice system's procedural protections, remov [ing] the “harmful chilling effect” on the defense bar, prevent[ing] suits from criminals who “may be guilty, [but] ... could have gotten a better deal,” and prevent[ing] a flood of nuisance litigation.

*Citing, Falkner, supra*, 108 Wn. App. at 123-24. Proof of innocence in fact more appropriately furthers these policies.

Mr. Davis is making a claim for legal malpractice that occurred during his criminal proceedings. He must establish innocence in fact, which he did not do - he pled guilty to a lesser charge and has not had his conviction vacated.

Mr. Davis claims that an exception recognized in *Powell v. Associated Counsel for the Accused*, 125 Wn. App. 773, 106 P.3d 271 (2005) applies. In that case, the Court excused the “proof of actual innocence” requirement because the alleged malpractice had to do with the sentencing portion of his case, not the guilt phase.

In this case, Mr. Davis alleges that he was deprived of an expert during the guilt phase of his case. He was not. Further, unlike *Powell*, Mr. Davis claims that he was innocent and had to plead guilty. Again,

there is no evidence he had to plead guilty and no evidence conclusively establishing his innocence. In fact, there was substantial evidence of Mr. Davis's guilt to the crime of rape, not the least of which was the victim's testimony and that of witnesses who saw Mr. Davis leave the room the victim was in and entered it to find the victim hysterical and with her pants down. CP 8. Mr. Davis's attorney, Mr. Gazori, felt that a jury could have convicted Mr. Davis had they believed the victim, which he found made a credible witness. CP 94. Thus, this is not a case where an actually innocent person was wrongfully convicted.

In *Falkner*, the Court explained the policy behind its holding:

Requiring a defendant to prove by a preponderance of the evidence that he is innocent of the charges against him will prohibit criminals from benefitting from their own bad acts, maintain respect for our criminal justice system's procedural protections, remove the "harmful chilling effect" on the defense bar, prevent suits from criminals who "may be guilty, [but] ... could have gotten a better deal," and prevent a flood of nuisance litigation. These considerations all support our conclusion that post-conviction relief is a prerequisite to maintaining the suit and proof of innocence is an additional element a criminal defendant/malpractice plaintiff must prove to prevail at trial in his legal malpractice action.

*Falkner v. Foshaug*, 108 Wn. App. at 123-24.

The same policy considerations apply here. Mr. Davis failed to

prove he was actually innocent and prove a successful post-conviction challenge to his conviction. He has not cited any authority excusing him from making that showing in a case alleging malpractice allegedly occurring during the guilt phase of a case. Summary judgment should be affirmed.

#### **4. No damages.**

Mr. Davis had two choices in his criminal case. He could accept a plea which his criminal defense attorney stated was the best offer he was going to get from the prosecution, or go to trial. Trial risked a possible 10 year sentence and sex offender registration requirement. He cannot establish beyond speculation what the outcome of a trial would have been and thus there is no way to claim that he could have achieved a better outcome than what Mr. Gazori achieved in the plea agreement.

Evidence establishing proximate cause must rise above guess, speculation, or conjecture. *Gardner v. Seymour*, 27 Wn.2d 802, 808, 180 P.2d 564 (1947). A jury is not permitted to speculate on how an accident or injury occurred when causation is based solely on circumstantial evidence and there is nothing more substantial to proceed on than competing theories with the defendant liable under one but not the other.

*Sanchez v. Haddix*, 95 Wn.2d 593, 599, 627 P.2d 1312 (1981). Thus, Mr. Davis cannot establish any damages proximately caused by the alleged malpractice.

Mr. Davis's only argument to this element of his case is to claim, incorrectly, that he would not have had funding for his desired expert if he had opted to go to trial. First, this argument does not establish damages because he cannot establish beyond speculation to claim that had plaintiff proceeded to trial, with or without the expert in question, that a jury would have acquitted him of the charges. Second, Ms. Harrison testified that he could have had the necessary funding for Dr. Julien if he had opted to go to trial. CP 43. His attorney did not even spend a third of the approved funding and concedes that he was never told by Ms. Harrison that he would not receive funding for Dr. Julien if the case proceeded to trial. CP 94. Mr. Davis's claim that his option to go to trial was taken away is contrary to all the evidence, and is a self-serving conclusion and is therefore insufficient to withstand summary judgment. *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 133 P.3d 944 (2006) ("The nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain.")

**C. Mr. Davis's Breach of Fiduciary Duty Claim Fails Because Sally Harrison Did Not Have an Attorney Client Relationship with him and Proximate Cause is Lacking.**

This claim is subsumed within the malpractice claim and like that claim, an attorney's fiduciary duty to a client is dependent upon the existence of an attorney-client relationship at the time of the alleged breach. *See, e.g., Nichols v. Keller*, 15 Cal.App.4th 1672, 19 Cal.Rptr.2d 601, 608 (Ct.App.1993); *Ronald E. Mallen & Jeffrey M. Smith*, 2 Legal Malpractice sec. 14.2, at 232 (4th ed.1996). There is no evidence that an attorney client relationship ever existed between Ms. Harrison and Mr. Davis. It is likewise undisputed that the OAC attorney assigned to Mr. Davis had withdrawn and a private defense counsel substituted in *before* any alleged fiduciary violations allegedly occurred. *See, Ronald E. Mallen & Jeffrey M. Smith*, 2 Legal Malpractice sec. 14.2, at 232 (4th ed.1996) (Generally, to find a breach of fiduciary duty, the attorney-client relationship must exist at the time of the alleged transaction or wrong.) Thus, Mr. Davis failed to establish a duty on behalf of Ms. Harrison.

He does cite to a number of Rules of Professional Conduct ("RPC") that he claims were violated by Ms. Harrison, assuming an attorney client relationship existed. First, *Hizey v. Carpenter*, 119 Wn.2d

251, 266, 830 P.2d 646 (1992) held that RPC's *cannot be used to* establish a standard of care in legal malpractice claims. Even if the RPC's were admissible in a breach of fiduciary duty case, they relate, if at all, to the standard of care, not the issue of whether a duty was owed in the first place. *Eriks v. Denver*, 118 Wn.2d. 451, 824 P.2d 1207 (1992) does not alter this point. In that case, there was no dispute about the existence of an attorney client relationship. The issue was whether there was an actual conflict of interest created by representing two separate clients in the same matter. *Id.* 454-55. The issue presented here is whether Ms. Harrison had an attorney client relationship with plaintiff at any time, in particular the time of the alleged breach.

A breach of fiduciary duty claim also has "proximate cause" and proof of damages requirements. *Senn v. Northwest Underwriters, Inc.*, 74 Wn. App. 408, 875 P.2d 637 (1994). As with the malpractice claim, Mr. Davis has not established beyond speculation that any damages were proximately caused by the alleged breach. Specifically, Ms. Harrison never told Mr. Gazori that he could not have funding for Dr. Julien if the case proceeded to trial. And, even if he had gone to trial, there is no basis beyond speculation to say the outcome would have been acquittal.

Finally, as already noted, it is also undisputed that Mr. Davis spent only a third of the funds Ms. Harrison authorized.

**D. Mr. Davis’s CPA Claim Fails Because He Cannot Establish the Elements as a Matter of Law.**

To state a prima facie claim under the Consumer Protection Act, Mr. Davis must “establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to Mr. Davis in his or her business or property; (5) causation.” *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

**1. No Unfair or Deceptive Act.**

Mr. Davis was represented by counsel, who sought, and received, funding for an expert that may have been called as a witness if the case had proceeded to trial. Ms. Harrison authorized an initial amount of funding for that expert and never indicated that additional funding could not be provided if the case proceeded to trial.

An act or practice is unfair or deceptive if it has the capacity to deceive a substantial portion of the public. *State v. Pacific Health Center, Inc.*, 135 Wn.App. 149, 170, 143 P.3d 618, 628 (2006). “Implicit in the definition of ‘deceptive’ under the CPA is the understanding that the

practice misleads or misrepresents something of material importance.”  
*Holiday Resort Comm. Ass'n v. Echo Lake Assoc., LLC*, 134 Wn.App. 210, 226, 135 P.3d 499 (2006). Mr. Davis has cited no authority for the proposition that Ms. Harrison’s administration of Local CrR 3.1(f) constitutes an unfair or deceptive act.

## **2. Trade or Commerce.**

The provision of legal services does not generally fall within the definition of “trade or commerce”, except as those services relate to the “entrepreneurial aspects” of the practice of law. *Short v. Demopolis*, 103 Wn.2d 52, 60-61, 691 P.2d 163 (1984); “Claims for malpractice and negligence are not subject to the CPA, since those claims go to the competence and strategy of lawyers, and not to the entrepreneurial aspects of practice.” *Eriks v. Denver*, 118 Wn. 2d. 451, 464, 824 P.2d 1207 (1992).

Indigent defense services are provided free of charge and cannot be considered trade or commerce. *See, e.g. Keenan v. Allan*, 889 F.Supp. 1320 (E.D. Wash.,1995) (“While the district court provides services to people in Washington, it does not sell these services.”) Mr. Davis argues that he was ordered to repay OAC funds expended on his behalf but he

fails to cite any record that he did repay these funds or that the debt was turned over to collections. *Cowiche Canyon Conservancy v. Bruce Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (appellate court will not consider arguments not supported by authority or citations to the record). Even if he did repay the funds, however, he fails to explain how that transforms a taxpayer funded service into trade or commerce.

### **3. No Public Interest Impact.**

The purpose of the CPA is to “protect the public.” RCW 19.86.920. “[I]t is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest.” *Hangman Ridge Training Stables v. Safeco Title Insurance Co*, 105 Wn.2d 778, 790, 719 P.2d 531 (1986). “[T]here must be shown a real and substantial potential for repetition, as opposed to a hypothetical possibility of an isolated unfair or deceptive act's being repeated.” *Eastlake Constr. Co. v. Hess*, 102 Wn.2d 30, 52, 686 P.2d 465 (1984).

Mr. Davis has not demonstrated a public interest impact. His dispute with Ms. Harrison is nothing more than a private dispute stemming from his apparent unhappiness with his guilty plea.

#### 4. No injury to business or property.

Mr. Davis did not establish the damage element. In *Ambach v. French*, 167 Wn.2d 167, 171-173, 216 P.3d 405 (2009) the court explained:

“Business or property” is not defined in chapter 19.86 RCW. Black's Law Dictionary defines “business” as “[a] commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain.” BLACK'S LAW DICTIONARY 226 (9th ed.2009). “[P]roperty” is defined as “[t]he right to possess, use, and enjoy a determinate thing ...; the right of ownership.” *Id.* at 1335. The legal definition of “property” appears to have narrowed over time and does not include rights to one's person or body. (Internal citations omitted).

The Court went on to note that the “legislature's use of the phrase ‘business or property’ in the CPA is restrictive of other categories of injury and is “used in the ordinary sense [to] denote a commercial venture or enterprise.’ ” *Ambach*, 167 Wn.2d at 172. *Ambach* noted that “Washington courts have found injury to ‘business or property’ where the defendant's act in violation of the CPA caused Mr. Davis to suffer loss of professional or business reputation, loss of goodwill, or inability to tend to a business establishment.” *citing, Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 739-41, 733 P.2d 208 (1987) (damage to business reputation caused by trade name infringement “easily met” injury to business or

property requirement); *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wash. App. 553, 563-64, 825 P.2d 714 (1992) (time spent away from business to address a deceptively formed contract made with sign company was injury to business).

However, “[p]ersonal injury damages, . . . ‘are not compensable [damages] under the CPA’ and do not constitute injury to business or property.” *Ambach, citing Hiner v. Bridgestone/Firestone, Inc.*, 91 Wash. App. 722, 730, 959 P.2d 1158 (1998); *rev'd on other grounds*, 138 Wn.2d 248, 263-64, 978 P.2d 505 (1999) (damages “including reimbursement for lost wages and earning capacity, medical expenses and damages to [a vehicle] arise from personal injuries [are] commonly awarded in personal injury actions” and are “not recoverable under the CPA”).

Mr. Davis presented no evidence of damage to his business or property. Nor did he present evidence that any act occurred in trade commerce. He alleges, without citation to evidence in the record, that his personal reputation and ability to find work were damaged. First, he was not working at the time he was arrested. CP 82. Second, he had a significant criminal background prior to this incident. CP 57. Third, conclusory allegations alone are insufficient to withstand summary

judgment. *Baldwin v. Silver*, 165 Wn. App. 463, 471, 269 P.3d 284 (2011) (“A nonmoving party cannot defeat a motion for summary judgment with conclusory statements of fact.”) Finally, even if supported by the record, these types of personal injury damages are not compensable under the CPA. *Ambach, supra*, 167 Wn.2d at 174.

#### **5. No Causation.**

Ms. Harrison approved more funding than Mr. Davis’s private attorney used for non-attorney services. Mr. Davis could have gone to trial and called Dr. Julien as an expert. Mr. Davis took the best plea deal he was going to get in order to avoid a trial that could have resulted in a 10 year sentence and a sex offender registration. He has not demonstrated any damages caused by any act of Ms. Harrison.

#### **E. Mr. Davis’s Negligence Claim Fails Because He Cannot Establish any of the Elements.**

##### **1. Duty**

A claim for negligence requires, first and foremost, that Mr. Davis establish that he was owed a duty of care enforceable in tort. *Honcoop v. State*, 111 Wn.2d 182, 188, 759 P.2d 1188 (1988). Whether Thurston County owes a duty to Mr. Davis in this case is a legal question. *Keller v. City of Spokane*, 146 Wn.2d 237, 243, 44 P.3d 845 (2002). The existence

of a duty “depends on mixed considerations of logic, common sense, justice, policy, and precedent.” *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 389, 241 P.3d 1256 (2010). None of these considerations support a duty in this case.

Mr. Davis’s complaint asserts that Thurston County was negligent in selecting Sally Harrison as the OAC Director because the County knew or should have known that she had a conflict of interest. First, this claim is baseless because she did not represent Mr. Davis at any time and had no current or former attorney client relationship with him. Thus, she had no conflict of interest in reviewing and authorizing funding for experts and investigator services in his case. In addition, it is a local court rule, not Thurston County, which established the OAC Director as the person responsible for administering non-attorney indigent services funding. Mr. Davis offers no other allegations supporting this claim.

Second, if Mr. Davis believed he was receiving ineffective assistance of counsel for any reason, he had a number of remedies. He could have retained a new attorney or asked the court to appoint new counsel. He could have moved to dismiss the charges on grounds that he

was being denied effective assistance of counsel.<sup>4</sup> He could have challenged his conviction on direct appeal based on ineffective assistance of counsel. What he cannot do, however, is cite authority that Thurston County had a duty *enforceable in tort* to provide some specific level of funding for experts and investigative services for his criminal defense without regard to an actual request and demonstrated need. *See Foster v. County of San Luis Obispo*, 14 Cal.App.4th 668, 17 Cal.Rptr.2d 730, 733 (Ct.App.1993) (“[T]he duty of [the county] to provide appellant with competent legal assistance extended only to the appointment of counsel, and not to counsels subsequent legal performance.”)

## **2. Breach.**

Mr. Davis has not established that Thurston County breached any duty he claims was owed to him. He cannot establish that he was ever denied funding for experts or prohibited from choosing to go to trial rather than accept a plea offer. If there is no evidence of a breach of an alleged duty, then a negligence claim fails. *See, Kempter v. City of Soap Lake*, 132 Wn. App. 155, 130 P.3d 420 (2006).

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4. “Whether expert services are necessary for an indigent defendant's adequate defense is within the discretion of the trial court and its decision will not be overturned absent an abuse of discretion.” *State v. French*, 157 Wn.2d 593, 607, 141 P.3d 54 (2006).

### **3. Proximate Cause.**

A claim for negligence requires that the breach of a duty be a proximate cause of the claimed injury or damages. *Hartley v. State*, 103 Wn.2d 768, 777 (1985). The issue of proximate cause can be decided on summary judgment, “where reasonable minds could not differ.” *Bowers v. Marzano*, 170 Wash. App. 498, 506 290 P.3d 134 (2012). There are two elements of proximate cause: cause in fact and legal causation. *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 474-75, 656 P.2d 483 (1983).

#### **a. Cause in fact.**

Cause in fact is lacking if Mr. Davis’s injury would have occurred without defendant’s breach of duty. *Walker v. Transamerica Title Insurance*, 65 Wash. App. 399, 828 P.2d 621 (1992). There is “cause-in-fact if a plaintiff’s injury would not have occurred ‘but for’ the defendant’s negligence.” *Estate of Bordon v. Dep’t of Corr.*, 122 Wn. App. 227, 240, 95 P.3d 764 (2004). When the connection between a defendant’s conduct and Mr. Davis’s injury is too speculative and indirect, the cause in fact requirement is not met. *Taggart v. State*, 117 Wn.2d 195, 227 (1992). “[P]roximate cause may be a question of law for the court if the facts are undisputed, the inferences are plain and inescapable, and reasonable minds

could not differ.” *Estate of Bordon*, 122 Wn. App., 227, 239, 95 P.3d 764 (2004).

In *Walters v. Hampton*, 14 Wash. App. 548, 556, 543 P.2d 648 (1975), the Court explained that factual causation “requires a sufficiently close, actual connection between the complained of conduct and the resulting injuries. Where inferences from the facts are remote or unreasonable, as here, factual causation is not established as a matter of law.”

In this case, Mr. Davis’s claim is based on a series of speculative assumptions: If he had rejected what was undisputedly the “best” plea agreement he was going to get and proceeded to trial he would have been found not guilty. Further speculation is required to gauge the affect of Dr. Julien’s expected testimony, whether the trial court would have permitted it, whether the prosecution would have rebutted it and whether the jury would have given it any credit. Mr. Davis’s proximate cause in fact argument is just a series of “what ifs” lacking any evidence in support.

Perhaps most glaringly, his attorney spent only a third of the funds that were authorized for non-attorney services and admitted he could have taken the case to trial and called Dr. Julien as an expert.

Cause in fact was not established.

**b. Legal Causation.**

Determining whether the alleged breach of a duty of care was the legal cause of damages involves “mixed considerations of logic, common sense, justice, policy and precedent.” *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985). One such policy consideration is how far should the consequences of a defendant’s acts extend. *Id.* Thurston County’s OAC never denied Mr. Davis’s request for expert funding. Mr. Davis chose to accept a plea agreement that avoided the risk of a 10 year prison sentence and sex offender registration. It defies logic and common sense to hold the County liable for Mr. Davis’s decision to take an extremely favorable plea rather than risk a 10 year jail sentence at trial, particularly when there is no evidence that OAC denied him the ability to go to trial and call the expert of his choosing. Legal causation is lacking.

**F. Quasi-Judicial Immunity.**

The summary judgment granted on behalf of Sally Harrison and Thurston County should also be affirmed on the basis of quasi-judicial immunity. CrR 3.1(f) provides:

Services Other Than a Lawyer.

(1) A lawyer for a defendant who is financially unable to

obtain investigative, expert or other services necessary to an adequate defense in the case may request them by a motion to the court.

(2) Upon finding the services are necessary and that the defendant is financially unable to obtain them, the court, **or a person or agency to which the administration of the program may have been delegated by local court rule** shall authorize the services. The motion may be made ex parte and, upon a showing of good cause, the moving papers may be ordered sealed by the court and shall remain sealed until further order of the court. The court, in the interest of justice and on a finding that timely procurement of necessary services could not await prior authorization, shall ratify such services after they have been obtained.

(3) Reasonable compensation for the services shall be determined and payment directed to the organization or person who rendered them upon the filing of a claim for compensation supported by affidavit specifying the time expended and the services and expenses incurred on behalf of the defendant, and the compensation received in the same case or for the same services from any other source.

(emphasis added).

By Local Rule, the Superior Court in Thurston County delegated the “administration of the program” to the OAC Director. CP 39-40.

Quasi-judicial immunity “attaches to persons or entities who perform functions that are so comparable to those performed by judges that it is felt they should share the judge's absolute immunity while carrying out those functions.” *Lutheran Day Care v. Snohomish Cy.*, 119

Wn.2d 91, 99, 829 P.2d 746 (1992). *See, Taggart v. State*, 118 Wn.2d 195, 203, 822 P.2d 243 (1992) (the purpose of judicial immunity is not to protect judges as individuals but to safeguard the independence of the judiciary).

In *Taggart*, the court held that parole officers are entitled to quasi-judicial immunity “for those functions they perform that are an integral part of a judicial or quasi-judicial proceeding.” *Taggart*, 118 Wn.2d at 213. The court explained that quasi-judicial immunity was appropriate “when a parole officer performs functions such as ... providing the [Parole] Board with a report to assist the Board in determining whether to grant parole [.]” *Id.* Likewise, in *Barr v. Day*, 124 Wash.2d 318, 331-32, 879 P.2d 912 (1994), the court held that guardians ad litem in guardianship proceedings involving court approval of settlements of civil claims of incompetents act as an arm of the court, and are, therefore, entitled to quasi-judicial immunity from civil liability. *Id.*

In this case, Sally Harrison was performing a function that is normally a court function, but which was delegated to her by the Court via Local Rule. In reviewing and approving requests for non-attorney indigent services acts as an arm of the court and she should therefore be

entitled to quasi-judicial immunity. Thurston County enjoys the quasi-judicial immunity afforded to Sally Harrison. *See Lutheran Day Care, supra*, 119 Wn.2d at 101. This is because

[t]he public policy which requires immunity for the [individual officer] also requires immunity for both the state and the county for acts of judicial and quasi-judicial officers in the performance of the duties which rest upon them; otherwise, the objectives sought by immunity to the individual officers would be seriously impaired or destroyed. If the [officer] must weigh the possibility of precipitating tort litigation involving the county and the state against his action in any ... case, his freedom and independence in proceeding ... will be at an end.

*Creelman v. Svenning*, 67 Wn.2d 882, 885, 410 P.2d 606 (1966).

Generally, an appellate court may affirm a grant of summary judgment on an issue not decided by the trial court provided that it is supported by the record and is within the pleadings and proof. *Int'l Bhd. of Elec. Workers v. Trig Elec. Constr. Co.*, 142 Wn.2d 431, 435, 13 P.3d 622 (2000); *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984). *See also, Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998) (“[a] party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.” RAP 2.5(a).)

The record demonstrates that Ms. Harrison and Thurston County

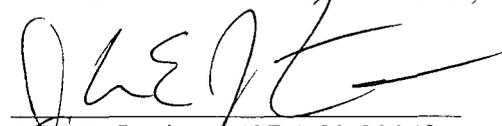
are entitled to quasi-judicial immunity as an independent basis to affirm summary judgment.

## V. CONCLUSION

For the foregoing reasons, the summary judgment should be affirmed on all claims for the Respondents.

DATED this 26<sup>th</sup> day of August, 2014.

LAW, LYMAN, DANIEL,  
KAMERRER & BOGDANOVICH, P.S.



John E. Justice, WSBA No 23042  
Attorneys for Respondents

CERTIFICATE OF SERVICE

I certify that I caused to be delivered via UPS overnight and via e-mail a copy of **RESPONDENT'S BRIEF**, on this 26<sup>th</sup> day of August, 2014, to the following counsel of record:

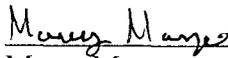
Attorneys for Appellants:

Harold Karlsvik  
1929 Raymond-South Bend Road  
Raymond, WA 98577

Original plus one copy UPS overnight for filing to:

Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402

DATED this 26<sup>th</sup> day of August, 2014 at Tumwater, Washington.

  
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Marry Marze

FILED  
COURT OF APPEALS  
DIVISION II  
2014 AUG 27 AM 9:54  
STATE OF WASHINGTON  
BY ~~DEPUTY~~