

CASE # 50685-8

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BRADFORD BALINT et; ux, Respondent,

V.

MICHAEL J. WYNNE, et; ux, Appellants.

APPELLANTS' BRIEF

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I.

ASSIGNMENTS OF ERROR

1. The Trial Court erred by finding Appellant's evidence was insufficient concerning the breach of duty by a lawyer, Respondent Michael J. Wynne.
2. The Trial Court erred by requiring an expert witness to present testimony by Appellants on the duty of care by Respondent Wynne.
3. The Trial Court erred by failing to accept the Declaration of James Senecu as the expert witness under Motion for Admission of Additional Evidence.
4. Trial Court erred by denying Appellant's Motion for Reconsideration.

II.

STATEMENT OF THE CASE

Respondent Michael J. Wynne was involved in the Balint family for a good deal of time (CP 123). It is known that in 2004 he prepared various estate planning documents for the grandmother, Charlotte Balint and a deed from Charlotte to her sole offspring, son David Balint. In

addition, he prepared estate planning documents for Bradford and Danice Balint. These were accomplished in September of 2004 (CP 124).

Respondent Wynne knew that David had been sick the previous year or so. He had met with the entire family at one point in time, including both Bradford and Jason, his sons. He knew that David had more than one child (CP 124). While he was preparing the documentation of the transfer by Charlotte to David, he was told that David had esophageal cancer and there was a prognosis that he would survive only another 18 months (CP 123).

There were several conversations in 2004 and early 2005 between Mr. Wynne and David Balint and Appellants Bradford and Danice Balint (CP 124). These primarily concerned the desire of David to transfer the 9 acres he'd received from Charlotte to Bradford and his wife Danice. The reason for this was that Bradford and Danice had moved onto David's 9 acre property in Ridgefield, Washington area to take care of him as he lived out his life. In September of 2004 he executed a Power of Attorney placing Bradford and Danice in charge of his personal and financial affairs (CP 124). Mr. Wynne drafted that document.

In September of 2005, it was determined by the Balint family that the deed needed to be accomplished because David Balint's condition was

worsening. Mr. Wynne was called on more than one occasion by either Bradford or Danice Balint to make arrangements to prepare this deed (CP 124). It is known that on September 27, 2005 there was an appointment made for David to be taken to Mr. Wynne's office, however, he fell and Danice Balint called to ask if Mr. Wynne could come to the home (CP 124-125).

Mr. Wynne did come to the property and was surprised to see David in a hospital bed. There were other items within the room that David Balint was living in, including a table full of medications (CP 125). Mr. Wynne went to the house with the deed and excise tax affidavit and spent about a half an hour with David but did not ask any questions about any illness, medication, status of David's health (CP 125). At the same time, Bradford and Danice did not volunteer any information about David's condition.

Mr. Wynne knew that Bradford and Danice had moved onto the property in late 2004 to care of David. He had no conversation with them concerning David's condition as he left the premises but told them not to worry (CP 125). David signed the quit claim deed and excise tax affidavit gifting the Ridgefield property to Bradford and Danice (CP 125).

On October 2, 2005, David died.

David's other son, Jason Balint, was appointed personal representative of his estate. On June 1, 2006, Jason commenced a quiet title action against Bradford and Danice after questions surfaced surrounding their deceased father's competency during the week leading up to his death (CP 41-48). On March 5, 2010, after a 3-day bench trial, Jason prevailed in a nearly four year-long quiet title proceeding against Bradford and Danice (CP 16-31) The trial court found that Bradford and Danice occupied a fiduciary relationship with David and that they breached that duty when they secured the quit claim deed and excise tax affidavit. The court further determined that David lacked capacity to execute the legal documents with the inference of Bradford and Danice exerted undue influence. The trial court ruled that Bradford and Danice should restore the property to the Estate and should pay attorney's fees and other damages to the Estate (CP 16-31).

On July 22, 2011, Bradford and Danice filed suit against Respondent Michael J. Wynne.

At his deposition, Appellant Bradford Balint rejected the earlier trial court's conclusion that David Balint lacked capacity. He indicated that he believed his father had the mental capacity to convey the property and that he was of sound mind (CP 33-39). What Bradford Balint didn't

realize was that taking care of his parent and living on the property for nearly a year, put them in the awkward position of raising a presumption of “undue influence” when the father transferred, by gift, 9 acres to Bradford and Danice. This 9 acres was a substantial part of the total Estate held by David Balint. Bradford and Danice did not have an attorney at their 3-day trial against the David Balint Estate (CP 125).

Particularly, the matter before the court has found its way through discovery and was culminated by a Motion for Summary Judgment brought by Respondent Wynne asserting that Appellants could not prove any breach of standard of care without expert testimony and that they lacked causation testimony. Appellants responded that Mr. Wynne had a fiduciary duty to them as prior clients to make sure that the action of Mr. Wynne and David Balint did not conflict with the prior contact and further, that as beneficiaries of the David Balint Estate, Mr. Wynne had a duty to advise them of the concept of “undue influence” and take steps to refute that presumption.

The trial court, the Honorable Robert Lewis, entered a Memorandum of Opinion on May 3rd, 2017 ruling that Appellants presentation of evidence of the relationship between themselves and Michael Wynne is insufficient to create a duty (CP 147-152). He further

ruled that Michael Wynne was required to use “the degree of care, skill, diligent and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in his jurisdiction” Citing *Walker v. Bangs* 92, Wn.2d 854, 859 601 P.2 1279 (1979). However, he went on to indicate that Appellants Balint failed to produce competent evidence that established Wynne’s breach of duty of care owed to them onto David Balint. He ruled that in this case, expert testimony is required to establish the specifics of the standard of care and how the attorney breached that standard (CP 151-152). The trial court concluded that Balints have not produced evidence on the issues of the duty owed to them or on the breach of that duty and determined that expert testimony was required and the Motion for Summary Judgment was granted. Judge Lewis did deny Defendant’s Motion to Dismiss on the issue of causation (CP 152).

Following entry of trial court’s Order, Appellants Balint brought a Motion for Reconsideration together a Motion for Admission of Additional Evidence which was a Declaration from Attorney James Senescu. He testified by Declaration that Mr. Wynne had violated the duty of an attorney working in the State of Washington for estate planning purposes (CP 153-157).

III.

STANDARD OF REVIEW

A. Motion for Summary Judgment. The Standard of Review for an Appellate Court reviewing Motions for Summary Judgment is stated in the case of *Roger Crane & Associates v. Felice*, 74 Wn.App. 769, 875 P2d 705 (1994). Therein the Court of Appeals stated:

“[1] Standard of Review. The Standard of Review of a Summary Judgment is well settled. We engage in the same inquiry as the Trial Court and review the evidence in the light most favorable to the non-moving party.” [citation omitted] *Roger Crane & Associates & Felice*, supra page 773.

A Motion for Summary Judgment is to allow the Trial Court to determine whether or not there is any genuine issue of material fact pursuant to Civil Rule 56. There are many cases outlining criteria for granting or denying such a motion. The case of *Balise v. Underwood*, 62 Wn. 2d 195, 381 P2d 966 (1963) outlines it succinctly.

“(1) the object and function of the summary judgment procedure is to avoid a useless trial; however, a trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact. [citation omitted]

...

(3) A material fact is one upon which the outcome of the litigation depends. [citations omitted]

(4) In ruling on a motion for summary judgment, the court’s function is to determine whether a genuine issue of material fact exists, not to resolve any existing factual issue. [citation omitted]

...

...

(7) In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences therefrom most favorable to the nonmoving party and, when so considered, if reasonable men might reach different conclusions the motion should be denied.” *Balise v. Underwood*, supra page 199.

In *Wood v. Seattle*, 57 Wn.2d 469, 358 P.2d 141 (1960), the Court ruled as follows:

“In ruling on a Motion for summary judgment, the Court must consider the material evidence and all reasonable inferences therefrom most favorably to the non-movant party and, when so considered, if reasonable men might reach different conclusions, the motion should be denied because a genuine issue as to a material fact is presented. *Brannon v. Harmon*, 56 Wn. 2d 826, 355 P.2d 792 (1960). Considering Appellants evidence most favorably to him (for the purposes of this motion), we find that it presented a genuine issue of fact relative to his contributory negligence, and that the court erred in granting the motion for summary judgment.” *Wood v. Seattle*, supra page 473.

Likewise, is *Saluteen-Maschersky v. Countrywide Funding Corporation*, 105 Wn. App. 486, 22 P.3d 804 (2001):

“... A Trial Court’s Order granting Summary Judgment is reviewed de novo on the record before the Trial Court at the

time of the Order [citation omitted] Summary Judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. [Citation omitted] All facts and reasonable inferences from them are to be considered in the light most favorable to the nonmoving party. [Citation omitted] The Motion should be granted if, from all the evidence, reasonable persons could reach but one conclusion. [Citation omitted] *Saluteen-Maschersky v. Countrywide Funding Corporation*, supra page 850 and 851.

Stated another way in *Ward v. Coldwell Banker* 74 Wn.App. 157, 872 P.2d 69 (1994), the Court held:

“ . . . if reasonable minds could draw different conclusions from undisputed facts, or if all the facts necessary to determine the issues are not present, summary judgment is improper.”

B. Standard for Motion for Reconsideration. The Standard of Review for Motions for Reconsideration is that the Court of Appeals will review a Trial Court’s denial of a Motion for Reconsideration and its decision to consider new or additional evidence presented with the Motion to determine if the Trial Court’s decision is manifestly unreasonable or based on untenable grounds. *Martini v. Post* 178 Wn.App. 153 313 P.3d, 473 (2013) citing *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d, 654, 683,15 P.3d 115 (2000) and *Chen v. State* 86 Wn. App. 183, 192, 937 P.2d 612 (1997).

IV.

ARGUMENT

A. Trial Court Erred by Finding Appellant's Evidence was Insufficient Concerning the Breach of Duty by a Lawyer.

In his Memorandum of Opinion Trial Judge Robert Lewis dismissed Appellant's case on the procedural fact that Appellant did not have an expert witness to provide testimony as to the duty of degree, case, skill and diligence and knowledge required in this case. The Court cited *Walker v. Bangs*.

In his Motion for Summary Judgment, Respondent's Counsel cites *Geer v. Tonnon* 137 Wn. App. 838, 155 P.3d, 163 (2007), *Lynch v. Republic Pub. Co.* 40 Wn 2d, 379, 243 P.2d, 636 (1952), *Tegman v. Accident and Medical Investigations Inc.*, 107 Wn.App. 868, 30 P.3d, 497 (2003) and *Hansen v. Wightman* 14 Wn.App. 78 588 P.2d, 1238 (1975).

Each of these cases provide that law is a highly technical field beyond the knowledge of the ordinary person and expert testimony is generally required to establish the recognized standard of care of the legal profession.

However, on the other side of that legal spectrum are other cases. Particularly *Slack v. Luke* 192 Wn.App, 909, 370. P.3d, 49 (2016) indicates that the law in the State of Washington is as follows:

“As noted previously, expert testimony is permitted in Washington, but typically it is **not required** if the attorney’s negligence is within the “common knowledge of the lay persons”.”

With these two divergent principals of law Appellant was faced with whether or not he believed that the negligence of attorney Wynne was within “common knowledge of lay person”. An analysis of respective cases is in order.

Walker v. Bangs, supra, is a case in which there was a personal injury action by a longshoreman involving federal law. The expert brought in by Plaintiff was not licensed in Washington. The *Walker* court indicates by its very nature an action for professional negligence in the preparation and conduct of specific litigation involves special skill or knowledge. They also go on to say that the general rule is to permit but not require expert testimony. In the specifics of the *Walker* case, the allegations pertain to trial tactics and procedures in federal court and the court concluded that those elements are not within the common knowledge of lay persons. So rule of law was specific to that type of case.

In *Geer v. Tonnon*, supra, the result was the same. Plaintiff failed to provide expert testimony, demonstrating a breach of Tonnon's care. In this case, there was a requirement to file a lawsuit challenging applicability of the retroactive endorsement of insurance within one year. The truth of the case is that the Plaintiff never provided his attorney with notice of the retroactive endorsement. The attorney was left to find that one year notice independently. Since his client did not provide the notice. That court ruled:

“As a result, expert testimony was necessary to establish that Tonnon breached the duty of care owed to Geer by failing to independently discover existence of the endorsement, a fact that his client failed to disclose to him, in order to commence suit to enforce the endorsement against Lloyd's within the one-year limitation period. However, Geer failed to proffer any such expert testimony. Thus, there was no evidence that attorney Tonnon breached any applicable duty to Geer.” *Geer v. Tonnon*, supra, page 851.

In *Hansen v. Wightman*, supra, the case had gone so far as to be presented to the jury. The question was over instructions. The trial court did instruct the jury that the standard of practice of the legal profession must be proved by testimony by a member of that profession but went on to say that the establishment of the standard of care by expert testimony is

unnecessary, however, where the area of claim of malpractice was in the common knowledge of laymen.

The case relied upon by Appellant, on the other hand, *Slack v. Luke*, supra, involved a case in which Plaintiff believed that she had been wronged by the Department of Commerce and allegedly hired Luke to represent her and file suit against that agency. The case discusses a WLAD lawsuit. The Defendant lawyer contended that the merits of the case presented a legal rather than factual question that needed expert analysis and the trial judge agreed to the contention but the Court of Appeals concluded that was error. It stated:

“As noted previously, expert testimony is permitted in Washington, but typically is not required if the attorney’s negligence is within the “common knowledge of lay person”, *Slack v. Luke*, supra, pg. 918.

The Court had earlier stated that some states require expert testimony to establish the standard of care in a legal malpractice action, but concluded: “However, the general rule is to permit but not require expert testimony. Washington does not require expert testimony when the negligence charged is within the common knowledge of lay person.” Accordingly, that Court of Appeals concluded that both parties were partially correct. It decided that the trial court had erred to the extent it

required expert testimony from Plaintiff concerning the merits of her case, however the Defendant's argument did present a legal question for the judge rather than a factual question for the jury when the Plaintiff presents insufficient evidence to present her claim for the jury the trial court will dismiss the action instead of presenting it to the jury. They concluded that the Plaintiff, Slack, would not have been able to pursue her WLAD case over some technicality so the trial court would have been required to dismiss a legally insufficient case. So that even though Ms. Slack failed to produce expert testimony and was not required to do so, it held that the trial court was correct in dismissing the case because the WLAD accommodation case was meritless.

Appellants Balint found themselves on the horns of a dilemma: is the malpractice of Respondent Wynne within the knowledge of general laymen or is it a highly technical aspect of the law which requires expert testimony. Unfortunately, a party to a lawsuit would not know which horn was the appropriate one until the trial court dismisses Plaintiff's case. Appellant contends that that is a highly inappropriate use of the rule of Summary Judgment. It results in a roll of the dice to know which way to go.

Please note that the cases relied upon by Respondent, *Tonnon*, supra, and *Walker v. Bangs*, supra, both note in their discussion that an expert is not required in a case of malpractice. It is tempered by the realization that laypeople need to understand and know about the within the common knowledge of layperson.

From that dilemma, the court must analyze Mr. Wynne's relationship with the Balints. He had done estate planning for three generations of the Balint family and there was no question that he was the attorney for Appellants Balint as well as the parent David Balint. Is there a conflict of interest? Laymen can understand that concept. An expert testimony should not be necessary. Respondent Wynne had a duty to Balints not only as a client but also as a beneficiary of David Balint's estate. That concept can be easily instructed and does not take an expert to show that duty. More appropriately, that duty itself becomes a factual issue and factual issues should be decided by the jury not by a trial judge on Motion for Summary Judgment.

Appellant further contends that the concept of undue influence and whether or not that concept should have been relayed to Plaintiff's Balint by their attorney is something that is within the common knowledge of laypersons. With instructions, laymen can figure out that when there is this

concept or any legal concept that needs to be discussed with the client, that the failure to discuss that information is malpractice. Failure to take steps to make sure that that concept did not adversely affect the client is well within the laymen's understanding. Those are factual issues that should be allowed to be determined by a jury. It is not a highly specialized area of law like trial tactics in the *Walker* case or failure to independently find a notice of one-year limitation in the *Tonnon* case nor a determination whether the judgment letter properly included the parents as well as the child in the *Hansen* case.

From the cases cited above, the Court of Appeals can conclude that a determination of whether or not an expert witness is necessary should be done on a case-by-case basis. The determination needs to be made as to whether or not a layperson can understand the concepts and finding a duty with the erring attorney. Unfortunately, legal minds can differ whether or not the issue confronting the parties was something a layperson might be aware of. The trial lawyer that makes the wrong decision will be faced with an order of dismissal without really having had an opportunity to deal with the expert question. This is a failure on the part of the trial judge in ruling on the Motion for Summary Judgment. In fact, additional evidence

was brought before the trial judge which should have created a material issue of fact in the form of the Declaration of James Senescu.

B. Trial Court Erred by Failing to Accept the Declaration of James Senescu as an Expert Witness under Plaintiff's Motion for Admission of Additional Evidence.

The segway from the Motion for Summary Judgment to Plaintiff's Motion for Admission of Additional Evidence is that the missing link is an expert witness according to the trial judge's Memorandum. Following the issuance of the court's Memorandum of Opinion, Plaintiff made two Motions: one, a Motion for Reconsideration and secondly, a Motion to Admit the Declaration of Mr. Senescu.

It is important to note that the Memorandum of Opinion by Judge Lewis specifically indicated that there would be a presentation of a "Judgment of Dismissal" based on this Order. It could be concluded that that is a recognition that the Memorandum of Opinion itself is not a "final order" or an "appealable order". There needs to be finality in the form of a Judgment of Dismissal.

1. Court Erred by Failing to Use the Declaration of James Senescu.

Appellant submitted the Declaration of James Senescu to provide the expert testimony that trial court indicated in its Memorandum of Opinion that was needed by Appellant. This was a Motion that was coupled with the Motion for Reconsideration by Appellant. However, it could stand as an independent Motion, although it is unclear in the court rules how that request for admitting of additional evidence would get before the court.

The leading case in this regard is *Martini v. Post*, 178 Wn.App 153, 313, P.3d 473 (2013). This Court of Appeals decision came down well after the new rule found in CR 59 was adopted in 2005. Unfortunately, the recitation of the case does not indicate the timing of the Motion for Reconsideration versus the entry of an order granting summary judgment. Trial court did grant summary judgment but the plaintiff in that case made a motion for reconsideration and introduced new evidence concerning handprints around the window in a room which the deceased person occupied. That court held:

“... we construe all facts and the reasonable inferences from those facts in the light most favorable to the nonmoving party. *Jones v. Allstate Ins. Co.*, Wn.2d 291, 45 P.3d 1068 (2002). We review a trial court’s denial of a motion for reconsideration and its decision to consider new or additional evidence presented with the motion to determine if the trial court’s decision to consider new or

additional evidence presented with the motion to determine if the trial court's decision is manifestly unreasonable or based on untenable grounds. [citation omitted]

...

The decision to consider new or additional evidence presented with a motion for reconsideration is squarely within the trial court's discretion. *Chen*, 86 Wn.App, at 192. "In the context of summary judgment, unlike a trial, there is no prejudice if the court considers additional facts under reconsideration." *August v. U.S. Bancorp*, 146 Wn.App. 328, 347, 190 P.3d 86 (2008)(quoting *Chen*, 86 Wn.App. at 192). Generally, nothing in CR 59 prohibits the submission of new or additional materials on reconsideration. *Chen*, 86 Wn.App. at 192." *Martini v. Post*, supra, pg. 161-162.

It is the Declaration that completes the issue. It responds to the trial judge's own concern about the lack of an expert witness. Yet he apparently concluded that he could not use that Declaration and denied Appellant's Motion for Reconsideration. Appellant submits that the refusal to take into consideration Mr. Senescu's Declaration is "manifestly unreasonable". It is exactly what the trial court asked for and received. To deny the Motion to Admit New Evidence and therefore lead to the granting of Respondent's Motion for Summary Judgment is untenable.

It is appropriate to review the case of *Chen v. State of Washington* 86 Wn.App 183, 937 P.2d 612 (1997) relied upon by the *Martini* court. Dr. Chen also submitted an Affidavit and Declaration in Support of his Motion for Reconsideration. The court ultimately determined that the

Affidavit contained no new information about Chen only a repetition of already presented information. But in getting to that conclusion, Court of Appeals held:

“... In the context of summary judgment, unlike in a trial, there is no prejudice if the court considers additional facts on reconsideration. *Applied Indus. Materials Corp. v. Melton*, 74 Wn.App. 73, 872 P.2d 87 (1994). Furthermore, nothing in CR 59

prohibits the submission of new or additional materials on reconsideration. *Sellsted*, 69 Wn. App. at 865 n. 19, 851 P.2d 716. Motions for reconsideration and the taking of additional evidence, therefore, are within the discretion of the trial court.” *Chen v. State of Washington*, supra, pg. 192.

It is the very essence of the Senescu Declaration that the court should have taken into account, when rendering its decision on the Motion for Summary Judgment. CR 56 provides that the judgment sought shall be rendered forthwith with the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, to show that there is any genuine issues as to material fact, or in this case, that Appellants had sufficient evidence to go forward. The cases cited above in the section on Standard of Review, clearly state that the trial court must consider the material evidence and all reasonable inferences therefore most favorable to the non-moving party. The essence of the trial court’s Memorandum of Opinion was that the Appellants Balint needed an

expert. Mr. Senescu provides that expertise, yet the court failed to take his declaration and opinion into consideration when finalizing its ruling. Judge Lewis should have taken that Declaration into consideration and a failure to do so is error.

2. Timeliness of Appellants' Motion for Reconsideration is Immaterial.

Appellants filed its first Motion for Reconsideration together with its Motion for Admission for the Declaration of James Senescu 14 days after the court's Memorandum of Opinion. Respondent Wynne asserted that this violates the Rule 59 requirement that the Motion be filed not later than 10 days after the entry of the "judgment, order, or other decision." Respondent points out that the order adopting that amendment was found in 2005. Respondent did not cite any precedential court action that has defined what orders or decisions are really implicated in those very words. Respondent refers to an non-binding authority that was not published.

Appellants argue that the case required a "final" or an "appealable" judgment or order to come within the 10 day rule. Respondents cite *Metz v. Sarandos* 91 Wn.App 357, 967 P.2d 795 (1998) as an indication that trial court has no authority to extend the time for filing a Motion for Reconsideration. In that case the judgment had been entered. That trial

judge had indicated that the 10-day period which starts from the date counsel received the order, not when it was filed in the court. The Court of Appeals ruled that CR 58(b) indicated that judgment should be deemed filed when they are delivered to the clerk for filing. That case cited *Schaefer Inc. v. Columbia River Gorge Commission* 121 Wn.2d 366 849 P.2d 1225 (1993) and *Moore v. Wentz* 11 Wn.App. 796, 525 P.2d 290 (1974) as supporting cases. In *Schaefer* the Motion for Reconsideration was filed in time but not served on the attorneys for the defendants for another 6 days or more. That clearly was in violation of the Civil Rules. In *Moore v. Wentz*, supra, the Motion for Reconsideration was put in the mail and therefore not served in a timely manner.

In the case at bar, Judge Lewis asked for Supplemental Memorandums from each counsel relative to the timing of Appellant's Motion for Reconsideration. He concluded, during the oral argument that the issue of timeliness was satisfied by Respondents argument that the revision of CR 59 now included more than just final judgments entered but applied to any other order or decisions made by a trial judge.

At the same time, when he issued his Memorandum of Opinion, he recognized that there needed to be a "final judgment" or judgment of dismissal. Are those two different orders or rulings by the court

inconsistent? If the Motion for Reconsideration must be brought within 10 days of the rendering of an opinion, then what is the purpose of having a fall back to a judgment of dismissal? Appellants submit that CR 59, even in its modified version, does not apply to the Memorandum of Opinion rendered by Judge Lewis, therefore, the 10 day rule would not apply.

In any event, the 10 day rule does not apply in any rule concerning the Appellant's Motion for the Admission of the James Senescu Declaration. That could have been done independently from the Motion for Reconsideration. Accordingly, to not take into the Declaration and to render the denial of Appellant's Motion for Reconsideration is error and must be reversed.

Trial court himself was a bit flummoxed about whether or not the 10 day rule applied. He acknowledged in his discussion on May 19, 2017, that he wasn't going to make a specific ruling but wanted the Supplemental Memorandums. He recognized that his memorandum could have been an oral pronouncement and then the 10 rule wouldn't apply. Now he felt that he needed to figure out whether or not the Declaration of Mr. Senescu created material issue of fact.

At the end, the trial judge ended up not wanting to make the decision on procedural ground and thus avoided the question of timeliness.

Instead, he indicated that there wasn't anything indicating that Mr. Senescu's information could not have been produced before his ruling. That is what he based his Order on. Unfortunately, we are back to the beginning question of Mr. Senescu's Declaration and need for it. Back to the horns of the dilemma and whether you need an expert witness or whether you can go with the general rule of State of Washington that an expert witness is not needed so long as it is within the purview of the layman understanding. Appellants Balint didn't know they needed the expert until the judge's Memorandum of Opinion. So they didn't know to bring that evidence to court.

3. Court Erred by Failing to Admit the Senescu Declaration Based on the Fact that it Could Have Been Discovered Before the Hearing.

As just indicated, Judge Lewis ended up not wanting to make procedural decisions but instead ruled that the Senescu Declaration could have, with due diligence, been secured before the hearing on the Motion for Summary Judgment. What is missing is that there are two theories of law, one of which does not require expert testimony.

Whether or not the grant of the new trial or grant of reconsideration based on "newly discovered evidence" is best recited in

the case of *State of Washington v. Swan* 114 Wn.2d 613 790 P.2d 610 (1990). While the case was discussing a new trial, it discussed that new trial on the base of newly discovered evidence. Judge Lewis asserted that the Senescu Declaration was “newly discovered evidence” and should not be allowed. The *Swan* case states:

“A new trial will not be granted on the basis of newly discovered evidence unless the moving party demonstrates that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. The absence of any one of these five factors justifies denial of a new trial. Furthermore, the granting of a new trial for newly discovered evidence rests within the sound discretion of the trial court, and a denial will not be reversed except for an abuse of that discretion.”
Washington v. Swan, supra, pg. 642.

Appellant asserts that Judge Lewis did abuse his discretion. While Mr. Senescu’s Declaration could have been obtained prior to the hearing on the Motion for Summary Judgment, it was not known that such expert testimony was necessary until the court made its ruling. As explained above, there are two theories of law regarding the necessity of expert witnesses in a legal malpractice case. The general rule is that an expert is not needed in the State of Washington, and may be permitted but is not mandatory.

The Senescu Declaration would change the result and was obtained after the Order on Motion for Summary Judgment. It is material and it is not merely cumulative or impeaching but rather states the fact of the breach of the duty of Mr. Wynne which the court seemed to be looking for.

So while having extensive argument over the timeliness of the Motion for Reconsideration and its corollary Motion to Admit Additional Evidence, the court ruled that that additional evidence could have been found before the hearing on Motion for Reconsideration. Similarly, in *Martini v. Post*, supra, the bloody handprint next to the window could have been made available prior to the Motion in that case. It was not. It was admitted and accepted. Judge Lewis abused his discretion by not allowing the Senescu Declaration to be used.

As pointed out in *Martini v. Post*, supra, in the context of Summary Judgment there is no prejudice if the court considers additional facts. Generally nothing in CR 59 prohibits the submission of new or additional materials on reconsideration. To fail to bring in the Senescu Declaration is manifestly and reasonable. That Declaration was exactly what the court said was needed. There would be no prejudice to the

Respondents by considering that additional evidence. The trial judge should have considered it and denied Respondent's Motion for Summary Judgment.

V.

CONCLUSION

Respondents brought their Motion for Summary Judgment in an effort to challenge the sufficiency of the evidence held by Appellants Balint. The essence of it, if there was a duty of Respondent Wynne to do certain legal things, that he breached, then Appellants needed an expert witness to describe that duty and the breach thereof. As the matter progressed, Appellants Balint held the belief that an expert was not necessary. The trial judge, in a Memorandum of Opinion determined that an expert was necessary. Appellants Balint then went out and found an expert, filed a Motion to Admit that expert's Declaration together with a Motion for Reconsideration of the Judge's Memorandum of Opinion. It is now before the Court of Appeals to determine whether or not CR 59, and its 10-day rule, applies to that Memorandum of Opinion. Appellants state that it does not apply. The Memorandum of Opinion would be the same as an oral opinion before the entry of a final judgment.

But the judge's final pronouncement was that Mr. Senescu's Declaration could have been produced prior to the Motion and therefore should be disallowed now. But as stated, several times in this brief, it was not clear to Appellants Balint that that expert testimony was necessary until the court agreed with Respondent.

Like in *Martini v. Post*, supra, the Declaration of Mr. Senescu was produced before the final judgment was entered. This satisfied the issue of whether or not an expert was needed to prove the sufficiency of Appellant's case concerning the breach of duty by Respondent attorney Michael J. Wynne. That Declaration should have been admitted, should have been used by the trial judge and the Order of Dismissal based on the Summary Judgment should have been changed. The trial court's ruling should now be reversed and the matter sent back for trial.

Respectfully submitted this 25th day of October, 2017.

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