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Court of Appeals  
Division III  
State of Washington

No. 32921-6

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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TAMMY WOLF SLACK,

Appellant,

v.

LUCINDA LUKE, Attorney at Law, and COWAN MOORE STAM  
LUKE & PETERSON, Law Firm,

Respondents.

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APPEAL FROM THE SUPERIOR COURT  
FOR BENTON COUNTY  
THE HONORABLE STEVEN DIXON

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REPLY BRIEF OF APPELLANT

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SMITH GOODFRIEND, P.S.

By: Howard M. Goodfriend  
WSBA No. 14355  
Ian C. Cairns  
WSBA No. 43210

1619 8<sup>th</sup> Avenue North  
Seattle, WA 98109  
(206) 624-0974

Attorneys for Appellant

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## I. INTRODUCTION

A legal malpractice plaintiff is not required to submit “expert” testimony stating she would have prevailed on the claim forfeited because of her attorney’s negligence. A jury resolves that issue in the “trial within a trial” held in a legal malpractice action. This Court should reject Ms. Luke’s argument – erroneously accepted by the trial court – that an attorney can usurp the constitutional role of a jury to resolve disputed issues of fact by offering “expert” testimony on the merits of a legal claim. This Court should also reject Ms. Luke’s alternative arguments for affirming, all of which require this Court to adopt a standard of review that improperly views the facts in the light most favorable to Ms. Luke, the moving party on summary judgment.

## II. REPLY ARGUMENT

### A. **Ms. Luke’s Restatement of the Facts impermissibly recounts the facts in the light most favorable to her.**

Because the trial court dismissed her claim on summary judgment, the facts must be viewed in the light most favorable to Ms. Slack. There is nothing “unfair” about this established standard of review. (Resp. Br. 3 n.2) Below are just the most egregious examples of the disputed facts Ms. Luke disregards:

- Whether Ms. Slack told Ms. Luke that the attorney she previously consulted had declined to represent her. (*Compare* Resp. Br. 5 & n.6 *with* CP 176 (October 13, 2009, email from Ms. Slack to Ms. Luke stating “[t]he other attorney . . . decided he would not take the case”), 376 (“I informed Ms. Luke that I had consulted another attorney . . . but that he would not represent me”))
- Whether Ms. Slack provided Ms. Luke with documentation supporting her mold related disability. (*Compare* Resp. Br. 30 *with* CP 1250 (July 2006 letter from Ms. Slack’s physician stating she “continues to suffer with the effects of the exposure to molds and their airborne toxins in the building that she works or worked in.”), 1652 (“I provided Ms. Luke . . . this critical information”))
- Whether the DOC ordered Ms. Slack a new workstation to accommodate her sciatica, carpal tunnel, and shoulder impingement. (*Compare* Resp. Br. 36 *with* CP 62 (showing order was “estimate” and not finalized), 64 (stating workstation will not be shipped “until order is complete” and instructing DOC to submit additional paperwork to finalize order))
- Whether Ms. Slack consulted Ms. Luke only for a “second opinion” and to review documents. (*Compare* Resp. Br. 5 *with* CP 375-76 (“Ms. Luke . . . told me that she would follow up with” the state investigator), 1814 (Ms. Luke called the Office of Financial Management on Ms. Slack’s behalf only to learn that the limitations period had already expired))
- Whether Ms. Slack believed she had hired Ms. Luke to file a tort claim. (*Compare* Resp. Br. 11 *with* CP 176 (October 13, 2009, email from Ms. Slack to Ms. Luke asking whether she should “write back to the Risk Management person to let him know I have hired you to represent me?”) (emphasis added))

These (and more) disputed issues of material fact should have prevented summary judgment.

**B. “Expert” testimony is not required to raise a genuine issue of material fact regarding causation in a legal malpractice action, particularly where the malpractice involves a missed statute of limitations.**

Ms. Luke confuses the need for expert testimony on the standard of care and causation. Expert testimony is not required to establish causation because it is a question of fact within the understanding of a layperson. This Court should reject Ms. Luke’s argument that causation is a question of law for “experts.”

To establish causation in a legal malpractice action the plaintiff must show that she would have achieved a better result in the underlying suit but for the defendant’s negligence. *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 328, ¶ 42, 111 P.3d 866 (2005), *rev. denied*, 156 Wn.2d 1008 (2006). That question is answered by holding a “trial within a trial” in the legal malpractice action in which the jury is “asked to decide what a reasonable jury ... [in the underlying action] would have done but for the attorney’s negligence.” *Daugert v. Pappas*, 104 Wn.2d 254, 258, 704 P.2d 600 (1985).

Thus, “in most legal malpractice actions the jury should decide the issue of cause in fact.” *Daugert*, 104 Wn.2d at 258; *see also Versuslaw*, 127 Wn. App. at 329, ¶ 43 (“Whether Stoel Rives’ alleged negligence caused VersusLaw’s damages is a question of fact

for a jury”). The only exception is where causation “depends on an analysis of the law,” such as in *Daugert* where it turned on whether a petition for review would have been granted. 104 Wn.2d at 258; *Brust v. Newton*, 70 Wn. App. 286, 291, 852 P.2d 1092 (1993) (“*Daugert* is an exception to the rule that issues of fact be determined by a jury.”), *rev. denied*, 123 Wn.2d 1010 (1994).<sup>1</sup>

Here, determining whether Ms. Slack would have prevailed on her failure to accommodate claim against the DOC (had Ms. Luke filed it) did not require analysis of the law. Resolution of her underlying claim required the jury to do only what it would do in any case – decide whether a plaintiff established the elements of her claim. That is the quintessential and constitutional jury task. Ronald Mallen, 4 Legal Malpractice § 37:126 at 1768 (2015 ed.) (“resolving the underlying case ordinarily is within the expertise of the jury.”); *Brust*, 70 Wn. App. at 289 (“Article 1, section 21 of our constitution provides that the right to a jury trial shall remain inviolate.”).

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<sup>1</sup> *Nielson v. Eisenhower & Carlson*, 100 Wn. App. 584, 999 P.2d 42, *rev. denied*, 141 Wn.2d 1016 (2000) nowhere states that the “failure to file a claim within the statute of limitations is treated under the same analysis as a failure to timely file a notice of appeal.” (Resp. Br. 16) *Nielson* applied the *Daugert* exception because the case turned on how the Court of Appeals would have resolved a timely appeal. 100 Wn. App. at 594-95.

Ms. Luke's argument confuses the requirement of expert testimony on the standard of care, which may be a "highly technical" issue if the error is not obvious (unlike a missed statute of limitations). *Geer v. Tonnon*, 137 Wn. App. 838, 851, ¶ 22, 155 P.3d 163 (2007), *rev. denied*, 162 Wn.2d 1018 (2008). Ms. Luke's argument that causation is a question of law requiring expert testimony in a legal malpractice action relies almost exclusively on a misreading of *Geer*. In *Geer*, the mortgagee of a house required the mortgagors to insure the property on his behalf. The mortgagors obtained insurance, but did not list the mortgagee as a named insured. After the house burned down, the mortgagee's attorney did not file suit to collect the insurance proceeds within a year of the fire, as required by the policy. The mortgagee sued his attorney for malpractice and the trial court dismissed on summary judgment.

Division One affirmed, rejecting the mortgagee's argument that he would have prevailed in a suit against the insurer because Washington law does not provide "a person who is not a named insured with a cause of action to sue an insurer directly to enforce an equitable lien on insurance policy proceeds." 137 Wn. App. at 845, ¶ 12. Thus, as in *Daugert*, causation required an analysis of

the law because the court had to assess whether any legal authority authorized the allegedly forfeited cause of action. 137 Wn. App. at 850, ¶ 20 (malpractice claim failed “[b]ecause no statute, reported decision, or ‘bedrock principle of equity’ provided Geer with a cause of action to enforce an equitable lien directly against Lloyd’s”). In contrast, a failure to accommodate claim is well-established, as both parties recognize. (App. Br. 32-37; Resp. Br. 23-30)

*Geer* also rejected the plaintiff’s secondary argument that he could have recovered the insurance proceeds based on a retroactive endorsement because he failed to provide “expert testimony . . . to establish that [the attorney] *breached the duty of care* . . . by failing to independently discover the existence of the endorsement.” 137 Wn. App. at 851, ¶ 23 (emphasis added). The Court then opined that the plaintiff also failed to establish causation because he “failed to provide expert testimony *or other evidence* . . . to show that had [the attorney] discovered the retroactive endorsement and filed suit . . . [he] would have obtained a favorable judgment.” 137 Wn. App. at 851, ¶ 24 (emphasis added). *Geer*’s passing reference to “expert testimony” when holding the claim failed because of a total lack of causation evidence did not establish the rule of law Ms. Luke advances here – a legal malpractice plaintiff’s claim fails as a matter

of law without expert testimony stating she would have prevailed in the underlying action. *See In re Stockwell*, 179 Wn.2d 588, 600, ¶ 22, 316 P.3d 1007 (2014) (“Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis”) (quotation omitted).<sup>2</sup>

The only legal issue relevant to causation is whether Ms. Slack presented sufficient evidence supporting her underlying claim to avoid summary judgment. However, this question of law is for the trial court not “experts” to address, just as it would in the underlying case. *Mallen*, 4 Legal Malpractice § 37:101 (“if the evidence is undisputed or so conclusive that reasonable persons would not disagree, the resolution presents a question of law for the court”). A court could not dismiss Ms. Slack’s underlying claim or her malpractice claim based on “expert” testimony that it lacked

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<sup>2</sup> The other case Ms. Luke primarily relies on confirms expert testimony is required to establish the standard of care, not causation. (*See Resp. Br. 21-22*, citing *Boyle v. Welsh*, 256 Neb. 118, 589 N.W.2d 118 (1999)) *Boyle* involved an attorney who sued a client’s physician, but not the physician’s partner or partnership. *Boyle* held expert testimony was necessary to establish it was a breach of the standard of care to sue only the primary physician, noting “[w]hether a suit should be instituted against a particular defendant is an issue that is within the province of an attorney’s professional skill and judgment, and is not within the ordinary knowledge and experience of laypersons.” 589 N.W.2d at 127.

merit or violated CR 11, RCW 4.84.185, or RPC 3.1. (Resp. Br. 19, 41) *See Washington State Physicians Ins. Exch. & Assn v. Fisons Corp.*, 122 Wn.2d 299, 344, 858 P.2d 1054 (1993) (trial court erroneously “considered the opinions of attorneys and others as to whether” counsel’s actions violated court rules); *Stenger v. State*, 104 Wn. App. 393, 407, 16 P.3d 655 (“Experts may not offer opinions of law in the guise of expert testimony.”), *rev. denied* 144 Wn.2d 1006 (2001).<sup>3</sup>

“Testimony” that a claim is meritorious is little more than vouching for one’s own legal arguments. It is not evidence whether presented by a party’s counsel or its “expert.” 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 1.02 (6th ed.) (“arguments are not evidence”). Indeed, here the “expert testimony” added nothing – it was a nearly word for word repetition of argument in Ms. Luke’s summary judgment motion. (*Compare* CP 153 (cited at Resp. Br. 40) *with* CP 811) Ms. Luke is free to argue (and has) that she did not cause Ms. Slack any harm because her lost cause of action would have failed – but that is a question first for the trial court on

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<sup>3</sup> Ms. Luke contradicts herself by asserting that Ms. Slack’s claim fails as a matter of law because she did not have experts opine about compliance with RPC 3.1, and then later asserting that “[c]ompliance with [RPC 1.2] is a matter for the courts.” (*Compare* Resp. Br. 19 *with* Resp. Br. 53)

summary judgment and then for a jury in the “trial within a trial,” not for “experts” presenting the rehashed arguments of the parties as “testimony.”

Even if viewed as an issue of standard of care, no expert testimony is needed where, as here, the causal link between the attorney’s negligence and the client’s harm is obvious, as when an attorney misses the statute of limitations. “The most frequent situation, not requiring expert testimony, is a statute of limitations . . . missed.” Mallen, *supra*, § 37:128 at 1776-77; *see also* § 37:137 at 1809 (“Causation may be obvious, if the lawyer’s error was an affirmative act or for some omissions, such as the failure to file a lawsuit.”). Even though none was required, Ms. Slack nevertheless provided expert testimony that Ms. Luke’s conduct fell below the standard of care. (CP 204-13)<sup>4</sup>

Ms. Luke provides no reason for disregarding the well-established “trial within a trial” procedure for resolving causation in

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<sup>4</sup> Ms. Slack’s experts did not impermissibly render opinions about whether Ms. Luke satisfied RPC 1.2, but instead pointed out only that it is the rule governing limiting the scope of representation. (Resp. Br. 53; CP 207, 212) Indeed, Ms. Luke cites it herself in arguing she did not commit malpractice. (Resp. Br. 49) Likewise, Ms. Slack’s experts properly relied on facts supplied by Ms. Slack, just as Ms. Luke’s experts relied on facts provided by her. (*Compare* Resp. Br. 53 *with* CP 151 (“It is my understanding, based [on] Luke’s testimony . . .”), ER 703 (experts need not have personal knowledge of facts on which they base their opinions))

legal malpractice cases. This Court should reverse and remand for a jury to weigh the merits of Ms. Slack's malpractice claim.

**C. No alternative grounds support summary judgment.**

- 1. Ms. Luke's self-serving testimony cannot negate the existence of an attorney-client relationship as a matter of law, particularly in light of the unrestricted fee agreement.**

Ms. Luke cannot justify summary judgment by pointing to only the evidence favorable to her and ignoring the evidence that Ms. Slack hired her to file an action against the DOC. *See Taylor v. Bell*, 185 Wn. App. 270, 289-95, ¶¶ 45-60, 340 P.3d 951 (2014), *rev. denied*, 352 P.3d 188 (2015) (conflicting testimony of client and attorney created issue of fact on scope of representation) (Resp. Br. 49). Yet, that is precisely what Ms. Luke does, repeatedly citing her own statements as "fact," while ignoring Ms. Slack's. This Court should reject Ms. Luke's one-sided account and reverse because it is an issue of fact whether filing a tort action was within the scope of Ms. Luke's representation of Ms. Slack.

The objective facts, at a minimum, create an issue of fact whether Ms. Slack retained Ms. Luke to file suit. On December 21, 2009 – two months after she purportedly told Ms. Slack she would not pursue a claim on her behalf – Ms. Luke called the state investigator to ascertain the status of Ms. Slack's claim. (CP 41,

1814, 2056; *see also* CP 643 (Ms. Luke requested documents from Ms. Slack from September through December 2009))<sup>5</sup> Ms. Luke nowhere explains why she undertook the steps necessary to file a suit if, as she now asserts, she had told Ms. Slack that she would not do so. *See Taylor*, 185 Wn. App. at 289-90, ¶¶ 45-47 (whether scope of representation was limited was “at best . . . a disputed question of fact” because firm “work[ed] on an issue that it now claims was exempted from the scope of representation”). That Ms. Luke failed to perform other “usual tasks that a litigator would,” *e.g.*, actually filing an action, establishes her malpractice, not limited representation. (Resp. Br. 51)

The “Fee Agreement” signed by Ms. Slack in no way limited Ms. Luke’s representation, as she asserts. (CP 45; Resp. Br. 50-51) It stated that Ms. Luke would use her “best efforts to accomplish [Ms. Slack’s] objectives,” which Ms. Luke concedes included filing a lawsuit against the DOC. (CP 45) The Fee Agreement nowhere mentions a “second opinion” or any other language limiting the scope of representation. If Ms. Luke intended to limit her representation it was incumbent on her – the drafter of the Fee

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<sup>5</sup> Ms. Luke has contradicted herself on when she contacted the state investigator, sometimes insisting she called him on October 20, 2009, other times stating she contacted him on December 21, 2009, but she does not deny calling him. (CP 41, 473, 754-58; Resp. Br. 9-10 n.14)

Agreement – to include appropriate language. *Disciplinary Proceeding Against Van Camp*, 171 Wn.2d 781, 810, ¶ 47, 257 P.3d 599 (2011) (“The client must know and understand the agreement. Any ambiguities will most often be construed against the lawyer as the drafter.”). Nor did the separate “Client Intake Sheet” containing the notation “4-5 hours for initial review” (which was never seen by Ms. Slack) limit Ms. Luke’s representation. (CP 44) Without further explanation from Ms. Luke, “initial review” means only that – Ms. Luke would perform 4-5 hours of *initial* review, with additional work to follow, including the filing of a lawsuit.

Ms. Luke concedes “the client’s subjective belief is key” in determining the scope of an attorney-client relationship. (Resp. Br. 48) *See also Teja v. Saran*, 68 Wn. App. 793, 795, 846 P.2d 1375, *rev. denied*, 122 Wn.2d 1008 (1993). But Ms. Luke ignores that rule by focusing on *her* “belie[f] that she only was providing an ‘initial review’ of [Ms.] Slack’s documents and a second opinion.” (Resp. Br. 6) Ms. Luke cites no contemporaneous records in which she expressed that belief to Ms. Slack, instead relying exclusively on her declaration filed in this action. (*See, e.g.*, Resp. Br. 49 (“Luke testified . . . .”)) Indeed, it was only *after* Ms. Luke learned the limitations period had expired that she put in writing her “belief”

that she was not retained to file a tort action and that Ms. Slack's claim lacked merit. (CP 181 (December 22, 2009, letter discussing merits of claim), 185 (January 6, 2010, letter apologizing "for our miscommunication about the scope of my representation")) Had Ms. Luke ever told Ms. Slack that her claim lacked merit and she would not file it, Ms. Slack would have immediately moved on, rather than waste time and money on an attorney that did not believe in her case. (CP 647, 1659-60, 2064)

Ms. Slack believed she retained Ms. Luke to pursue a lawsuit against the DOC, noting that Ms. Luke told her the case had merit and that she would pursue the necessary next steps, including contacting the state investigator to follow up on the tort claim Ms. Slack had filed. (CP 375-76) Ms. Slack provided Ms. Luke with the correspondence from the state investigator so that she could follow up with him (which she eventually did). (CP 642) Ms. Slack confirmed *her belief* that Ms. Luke would file a tort action in an October 13, 2009 email to Ms. Luke, stating that the other attorney she consulted had declined to represent her, and expressing concern that Ms. Luke had not yet responded to the state investigator and that the time for bringing suit was expiring:

I am sorry to bother you before our next scheduled meeting but I have some concerns. The other attorney who decided he would not take the case due to my location did not contact the Risk management person regarding his letter last month. I filed the tort, per the other attorney, early August. I am afraid time may be running out on this case.

(CP 162, 176, 644)

Ms. Slack stressed her belief that she had hired Ms. Luke to file an action, asking “should I write back to the Risk management person to let him know *I have hired you to represent me?* What should I do?” (CP 176 (emphasis added)) Rather than clarify the purportedly limited scope of representation before the limitations period expired, Ms. Luke did nothing.

Ms. Luke and Ms. Slack did not have a “mutual understanding” that Ms. Slack had hired a separate attorney to file her failure to accommodate claim. (Resp. Br. 51) Ms. Slack told Ms. Luke at their initial meeting that the other attorney had declined to represent her, and confirmed that in her October 13, 2009, email to Ms. Luke. (CP 176, 376) Ms. Luke confuses the sequence of events by asserting Mr. Rhodes declined to represent Ms. Slack on September 19, 2009, ignoring his testimony that after his first meeting with Ms. Slack on August 28, 2009, “Ms. Slack understood . . . my office was not undertaking responsibility for

filing a tort claim.” (*Compare* Resp. Br. 52 with CP 341) And if Ms. Slack had already hired Mr. Rhodes to file a claim, she would have had no need to consult with Ms. Luke. Whether filing a tort action was within the scope of Ms. Luke’s representation of Ms. Slack should be resolved by a jury.

**2. Genuine issues of fact exist regarding Ms. Slack’s underlying failure to accommodate claim.**

Ms. Luke (again) ignores the evidence refuting her contentions that Ms. Slack did not have a disability and that the DOC accommodated Ms. Slack’s purportedly non-existent disabilities. Because a reasonable fact finder could have found in Slack’s favor on her underlying failure to accommodate claim, a jury should have resolved the “case within the case.”

**a. Ms. Slack had multiple disabilities, as confirmed by the documents she provided Ms. Luke.**

Ms. Luke does not dispute that Ms. Slack had a disability arising from her sciatica, carpal tunnel, and shoulder impingement (Resp. Br. 34 (“Slack was diagnosed in June 2005 with joint pain and sciatica”)), but wrongly asserts that Ms. Slack “failed to provide [her] any documentation in 2009 that she actually had a mold-related WLAD disability.” (Resp. Br. 30) In addition to her own accounts of disability, included in the documents Ms. Slack gave

Ms. Luke was a January 26, 2006, diagnosis from Ms. Slack's physician noting her "possible reaction to mold in office." (CP 2044; CP 1658 ("I provided Ms. Luke some of my medical receipts," including mold diagnosis))<sup>6</sup> Ms. Slack also gave Ms. Luke a July 2006 letter from her physician stating she "suffer[s] with the effects of the exposure to molds and their airborne toxins in the building that she works or worked in." (CP 1250, 1652 ("I provided Ms. Luke . . . this critical information"); see also CP 1444, 1446)

That Ms. Luke points to doctors who disagreed with Ms. Slack's physician only underscores that the existence of a disability was an issue of fact for the jury. (Resp. Br. 30-31) *Intalco Aluminum v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 662, 833 P.2d 390 (1992) (conflicting physicians set up "a classic battle of the experts, a battle in which the jury must decide the victor"), *rev.*

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<sup>6</sup> Ms. Luke does not deny that Ms. Slack provided her with a "large binder" of documents, yet she only provided the trial court and her expert with roughly 30 pages from that "large binder." (CP 35) An index of the binder shows that Ms. Slack provided Ms. Luke with "Communications with . . . former manager," refuting Ms. Luke's contention that Ms. Slack failed to provide her evidence that she notified the DOC of her disabilities. (Compare CP 676 with Resp. Br. 33 n.37; see also CP 1640, 1650-51 ("There are many numerous emails between my former manager and myself discussing my health issues in the white binder that I gave Ms. Luke but she did not review them."), 1915) Moreover, Ms. Slack informed the DOC of her mold-related health issues in January 2006, not May 2006, as Ms. Luke alleges. (Compare Resp. Br. 30 with CP 1915)

*denied*, 120 Wn.2d 1031 (1993).<sup>7</sup> Indeed, Ms. Slack’s evidence is the same as in *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 771, ¶ 2, 249 P.3d 1044, *rev. denied*, 172 Wn.2d 1013 (2011), where the court relied on the plaintiff’s primary care physician’s diagnosis of a “respiratory sensitivity to molds, chemicals, and other environmental toxins” to reverse summary judgment in favor of the employer. Ms. Luke’s one-sided account of the evidence on Ms. Slack’s disabilities cannot support the trial court’s summary judgment.

**b. The DOC did not reasonably accommodate Ms. Slack.**

Ms. Luke likewise overlooks the evidence Ms. Slack gave her establishing that the DOC failed to reasonably accommodate her disabilities. The DOC did not accommodate Ms. Slack’s sciatica, carpal tunnel, and impingement, by ordering her a new workstation, as Ms. Luke asserts. (Resp. Br. 36) After Ms. Slack

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<sup>7</sup> The conclusions of the physicians relied on by Ms. Luke are suspect for a number of reasons. (Resp. Br. 30-31) For example, those physicians focused on whether Ms. Slack was allergic to various molds – not including the ones actually found in the Kennewick office – largely ignoring mold’s impact on Ms. Slack’s *non-allergic* rhinitis, although they did concede that regardless of whether Ms. Slack was allergic “a moldy or musty smell” could “have caused the symptoms [she] experienced.” (CP 851; *see also* CP 66 (“the presence of ‘musty’ smell could trigger headaches in someone with a migraine history such as you”)) Moreover, the Proposed Decision and Order cited by Ms. Luke remains on appeal. (CP 823; Benton County Superior Court Case No. 08-2-02716-1)

complained of pain caused by her workstation in April 2004, the DOC did not evaluate her workstation for eight months and then because the DOC's ergonomic consultant "dropped the ball" nothing happened for another six months at which point Ms. Slack went on leave. (CP 1893, 1898-99) When Ms. Slack returned in October 2005, the DOC took another three months to obtain a quote for a new workstation, *but the DOC did not actually order it*, as Ms. Luke asserts. (*Compare* CP 62 (showing order was "estimate") CP 64 (stating workstation will not be shipped "until order is complete" and instructing DOC to submit additional paperwork to finalize order), 1652 *with* Resp. Br. 36) In short, despite having more than two years to do so, the DOC never obtained a new workstation for Ms. Slack.

Likewise, the purported accommodations of Ms. Slack's mold disability fall short of being the reasonable accommodations required by Washington law. Far from undertaking a "comprehensive response" (Resp. Br. 37) to the mold issues at the Kennewick office, the DOC did not perform *any* remediation, ignoring its own report's remediation recommendations and flatly insisting "[t]here isn't anything that has to be done" because "the air quality is typical of what we would find in any office." (CP 1010-

12, 1918) *Frisino* rejected Ms. Luke’s argument that an employer *reasonably* accommodates a mold-sensitivity by performing an air quality survey and nothing more (Resp. Br. 37), instead holding that an employer must engage in an “interactive process” to determine whether the disabled employee can return to work “free from substantially limiting symptoms.” 160 Wn. App. at 782, ¶ 23.<sup>8</sup>

“Allowing” Ms. Slack to work from home was not an accommodation. (Resp. Br. 36) Ms. Slack’s job, Community Victim Liaison, cannot be taken home. It requires absorbing the details of horrific crimes (including rape, murder, and even infanticide) and listening to pleas for protection from crime victims as their abusers near release. (CP 48-49, 1895) Because the DOC “allowed” Ms. Slack to work from home she did “not feel the same way about my home as I did before” and no longer felt “what used to be the relative safety and security of my own living room.” (CP 49) Ms. Slack was still required to visit the office at least twice a week, becoming sick on each visit. (CP 1037, 1927, 1952, 2049) As Ms. Slack told the DOC, “I do not want to move out of the office, I want the mold moved out of the office.” (CP 1973)

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<sup>8</sup> Ms. Luke’s assertion that Ms. Slack did not timely disclose her mold expert, Greg Baker, ignores her counsel’s concession that “I overlooked that disclosure.” (*Compare* RP 12 *with* Resp. Br. 32 n.36)

The broken promises of Ms. Slack's supervisor to find her a new office are likewise not an accommodation. (Resp. Br. 37) On two occasions Ms. Slack's supervisor promised to "follow up" on alternative office spaces for Ms. Slack, but never did. (CP 1656, 1977, 1980) Ms. Slack's supervisor then told her he would not find an office for her, and instead required her to "pick her poison" – aggravate her sciatica by working without a formal office and commuting as much as four hours to other DOC offices, or return to the mold-infested Kennewick office. (CP 640-41) Only after being presented with that dilemma did Ms. Slack resign, stating "I do not feel I have any options left but to resign my CVL position with DOC." (CP 1792; *compare* CP 48, 71 ("Ongoing health issues I incurred as a direct result of working for DOC have dictated my need to resign from this position. This has been a very difficult decision for me."), 641, 1656 *with* Resp. Br. 37) The Washington Law Against Discrimination (WLAD) rightly recognizes that the DOC's actions are not an accommodation and that under such circumstances an employee may resign without forfeiting a failure to accommodate claim. (*Compare* Resp. Br. 26, 42 *with* *Frisino*, 160 Wn. App. at 785, ¶ 33 ("an employee who is forced to

permanently leave work for medical reasons may have been constructively discharged”))

**3. The Industrial Insurance Act does not bar Ms. Slack’s failure to accommodate claim.**

Ms. Luke’s argument that the Industrial Insurance Act (IIA) barred a failure to accommodate claim as a matter of law is meritless. Washington courts have repeatedly recognized that the IIA and WLAD provide recovery for distinct wrongs and thus “there are no double recovery problems with simultaneous IIA and [W]LAD actions.” *Hinman v. Yakima Sch. Dist. No. 7*, 69 Wn. App. 445, 451, 850 P.2d 536 (1993), *rev. denied*, 125 Wn.2d 1010 (1994); *Reese v. Sears, Roebuck & Co.*, 107 Wn.2d 563, 571–74, 731 P.2d 497 (1987).<sup>9</sup> Indeed, Ms. Luke concedes that “a failure to accommodate claim, a dignitary tort, [can] be presented, notwithstanding the IIA’s exclusive remedy.” (Resp. Br. 43) The failure to accommodate is a distinct wrong, compensable under the WLAD even if the underlying disability stems from workplace injury.

Had Ms. Luke filed Ms. Slack’s claim it would have sought recovery not for her underlying disabilities, but for the separate

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<sup>9</sup> *Overruled in part on other grounds by Phillips v. City of Seattle*, 111 Wn.2d 903, 766 P.2d 1099 (1989).

damages arising from the DOC's failure to accommodate them. "[T]he IIA does not bar a civil action for a *separate* physical injury flowing from a discriminatory response to an IIA-compensable injury." *Birkliid v. Boeing Co.*, 127 Wn.2d 853, 870, 904 P.2d 278 (1995) (emphasis in original). As Ms. Slack's counsel explained below, the failure to accommodate her disabilities had caused her further injury, *e.g.*, asthma. (RT 33 ("this has metamorphosed into all kinds of sickness and injury resulting from lack of accommodation"); CP 1662) Ms. Slack may recover for these distinct injuries caused by the DOC's failure to accommodate. At the very least, whether the injuries Ms. Slack sought recovery for are distinct from any industrial injury is an issue of fact for the jury. *Hinman*, 69 Wn. App. at 452 (issue of fact whether injuries suffered by plaintiff were distinct from industrial injury).

Ms. Slack also sought recovery for the "mental health issues . . . and extreme stress" caused by "research[ing] files and talk[ing] with victims while sitting at home absorbing all the details of rape, attempted murder, murder and current threats towards victims." (CP 49-50; *see also* CP 49 ("I heard, while sitting on my living room couch where I watched TV with my children, stories of a mother whose boyfriend beat her 6 month old baby to death")) Ms. Slack

explained, “I do not feel the same way about my home as I did before I had to bring [into it] the details of the outrageous evil that exists in some offenders.” (CP 49)<sup>10</sup> In addition to these emotional damages, Ms. Slack sought to recover her past and future wages, for which no workers’ compensation claim has paid, a fact Ms. Luke ignores. To the extent she ever is paid these wages, that would only require a deduction from her damages after trial, not dismissal of her entire claim on summary judgment. *Reese*, 107 Wn.2d at 574.

The cases relied on by Ms. Luke do not involve failure to accommodate claims. (Resp. Br. 44, citing *Wolf v. Scott Wetzel Servs., Inc.*, 113 Wn.2d 665, 782 P.2d 203 (1989); *Goad v. Hambridge*, 85 Wn. App. 98, 931 P.2d 200, *rev. denied*, 132 Wn.2d 1010 (1997); *Birklid*, 127 Wn.2d 853) *Wolf* held that an employee could not bring a civil action for wrongful delay or termination of benefits against a company hired by a self-insured employer to administer workers’ compensation claims. 113 Wn.2d at 668. *Goad* held that the employee’s claim did not fall within the intentional

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<sup>10</sup> Ms. Slack did not withdraw her claim to recover these damages. (Resp. Br. 12 n.17) Ms. Slack stated she did not intend to assert emotional distress damages based on Ms. Luke’s malpractice, but never said that she would not assert emotional distress damages caused by the DOC’s failure to accommodate. (CP 1658) Ms. Slack’s statements (made in 2013) were consistent with current Washington law, which did not allow recovery of emotional distress damages in legal malpractice actions. Because those damages are now allowed, Ms. Slack reserves the right to assert them at trial. *Schmidt v. Coogan*, 181 Wn.2d 661, 335 P.3d 424 (2014).

injury exception to the IIA, making clear that the “sole basis for the [plaintiff’s] claims is [defendant’s] alleged failure to provide a safe workplace and [his] resulting injury.” 85 Wn. App. at 104. *Birklid* held that the intentional injury and outrageous conduct exceptions to the IIA applied, and recognized that “employment discrimination actions do not come within this immunized area of tort law.” 127 Wn.2d at 869 (quotation omitted).<sup>11</sup> This Court should reject Ms. Luke’s argument that the IIA bars Ms. Slack’s underlying failure to accommodate claim as a matter of law.

### III. CONCLUSION

This Court should reverse and remand for a trial of Ms. Slack’s legal malpractice claim.

Dated this 10th day of August, 2015.

SMITH GOODFRIEND, P.S.

By:   
Howard M. Goodfriend, WSBA No. 14355  
Ian C. Cairns, WSBA No. 43210

Attorneys for Appellant

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<sup>11</sup> Ms. Luke’s statement that the IIA barred Ms. Slack’s claim is not only incorrect, but is an impermissible legal conclusion masquerading as “testimony.” (Resp. Br. 46; *Stenger v. State*, 104 Wn. App. 393, 407, 16 P.3d 655 (2001) (witnesses “may not offer opinions of law”))

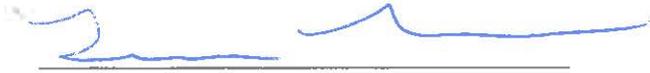
**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 10, 2015, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 10<sup>th</sup> day of August,  
2015.

  
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Tara D. Friesen