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**May 20, 2015**

Court of Appeals

Division III

State of Washington

No. 32921-6-III

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COURT OF APPEALS, DIVISION III  
FOR 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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BRIEF OF RESPONDENTS

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A. INTRODUCTION

Tammy Wolf Slack, a former Department of Corrections (“DOC”) employee, was told by two capable attorneys that she did not have a claim against DOC under Washington’s Law Against Discrimination, RCW 49.60 (“WLAD”) for DOC’s alleged failure to accommodate her claimed disability. She decided to sue Lucinda Luke, then of the Richland law firm of Cowan Moore Stam Luke & Peterson (“Cowan Moore”),<sup>1</sup> for malpractice because Luke declined to file an action on her behalf against DOC, despite Luke’s belief, confirmed by expert testimony, that Slack’s claim was baseless.

The trial court here correctly granted summary judgment to Luke. While there was no attorney-client relationship between Slack and Luke to undertake the filing of an action against DOC, even if there were, Slack cannot prove causation here, the so-called “case within a case,” because Luke was under no legal obligation to file a meritless claim based on the materials Slack provided her in 2009, as unrebutted expert testimony stated. Moreover, Slack’s claim against DOC was meritless.

In seeking to reverse the trial court’s well-reasoned decision, Slack conflates the information regarding her claim against DOC that she

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<sup>1</sup> Cowan Moore Stam Luke & Peterson, P.S. is now Cowan Moore, PLLC.

provided to Luke in 2009 with information, and expert testimony, she generated *nearly five years later* to support her putative claim. Failing to obtain expert testimony on causation, both as to whether she had a legitimate reasonable accommodation claim against DOC based on the materials that she possessed in late 2009 *and* after she filed the present action, Slack asserts that such expert testimony was unnecessary. She is wrong.

This Court should affirm the trial court's summary judgment decision.

B. ASSIGNMENTS OF ERROR

Luke acknowledges Slack's assignments of error, br. of appellant at 2, but believes the issues pertaining to those assignments of error are more appropriately formulated as follows:

1. Was the trial court correct in concluding that a legal malpractice claimant failed to state a *prima facie* case against an attorney where the claimant failed to offer expert testimony that when the claimant consulted the attorney she had a sufficient basis for filing a reasonable accommodation claim in court?

2. Was the trial court correct in concluding that such a legal malpractice claimant also failed to state a *prima facie* claim against the attorney by failing to establish that she would have prevailed on a reasonable accommodation claim?

3. Under the facts in this case, was the legal malpractice claimant's assertion that she had an attorney-client relationship with the attorney to file an action in court unreasonable as a matter of law?

C. STATEMENT OF THE CASE<sup>2</sup>

Slack's statement of the case is troubling because she deliberately, or carelessly, conflates the information she provided to Luke in the fall of 2009, evidence that demonstrated she had no WLAD reasonable accommodation claim against DOC, with evidence and events occurring *years afterwards*, including expert testimony she generated in support of her putative claims, to resist a summary judgment motion *in 2014*. This Court should appropriately distinguish the information Slack gave to Luke in 2009, or was available then, from Slack's subsequently-developed facts.

The record here documents that Slack was employed by DOC as a Community Victim Liaison, primarily in its Kennewick office, from 2002 to 2006. CP 159. During her time at that office, Slack presented a number of industrial insurance claims arising out of that employment, including an occupational disease claim for her alleged exposure to mold on the job. CP 39.

As the record amply discloses, Slack complained of *numerous* physical and emotional problems. She asserted musculoskeletal disabilities in her right wrist and shoulder that led to mental health issues

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<sup>2</sup> Slack's statement of the case is far from a fair recitation of the facts and procedure below without argument. RAP 10.3(a)(5). This Court should disregard her argumentative, only partially accurate, rendition of the facts here.

and stress. CP 48-50. She also contended that she had an unspecified “disability” pertaining to mold or musty smells at the DOC Kennewick office that was not being accommodated by DOC. *Id.* Slack even repeats her claim that she experienced symptoms similar to multiple sclerosis in her brief at 6, a diagnosis that has *never* been sustained in this case.<sup>3</sup>

Slack first consulted attorney Greg Rhodes of the law firm of Younglove & Coker PLLC<sup>4</sup> in Olympia on August 28, 2009 regarding such a mold claim. CP 326-27. Rhodes agreed to consult with her for a flat fee of \$100. CP 341. He reviewed certain documents she provided and she signed a fee agreement to that effect. CP 341, 346. Upon his review of Slack’s putative case, he declined to pursue a case against DOC on her behalf. CP 341-42.<sup>5</sup> Rhodes let Slack down easy in an October 6, 2009 letter in which he stated: “This decision is based on a number of

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<sup>3</sup> Ironically, Slack omits any reference to how DOC bent over backwards to accommodate her belief she might have MS, providing her extensive FMLA leave upon extensive correspondence with her “friendly personnel guy” at DOC. CP 1829-34, 1837-49, 1900.

<sup>4</sup> That firm often represents the Washington Federation of State Employees (“WFSE”). *E.g.*, *Univ. of Washington v. WFSE*, 175 Wn. App. 251, 303 P.3d 1101 (2013); *WFSE v. State, Dep’t of Gen. Admin.*, 152 Wn. App. 368, 216 P.3d 1061 (2009); *WFSE v. State*, 127 Wn.2d 544, 901 P.2d 1028 (1995).

<sup>5</sup> While Slack has implied that Rhodes thought her claims against DOC had merit, CP 375, or that Rhodes declined her representation due to “distance,” br. of appellant at 13, those assertions are belied by Rhodes’ more candid statement to Luke’s counsel that his “initial impression was that Ms. Slack’s potential claim presented significant hurdles,” CP 326, and he communicated to her “the challenges of proof created by the specific facts in her situation.” CP 341.

factors, including the risk associated with a case such as yours, and our commitments to other clients. This decision to decline representing you should not be considered evaluation or rejection of the merits of your potential claims.” CP 348.<sup>6</sup> *See also*, CP 326-27. At that point, she looked elsewhere for an evaluation of her putative claims.

On September 15, 2009, Slack met with Luke at the Cowan Moore offices for what was described as a meeting to obtain a “second opinion” on a claim she purportedly had against DOC. CP 33-34. Slack had made a “new client” appointment through Cowan Moore’s front desk. CP 34.

At the meeting, Slack described her dispute with DOC to Luke. *Id.* She claimed she had a disability that had not been accommodated by DOC with regard to her workspace. *Id.* Slack told Luke at the meeting that she already had an unnamed lawyer in Western Washington with whom she had consulted and who was retained to take action against DOC, including a claim or lawsuit. *Id.* Luke determined during the interview that Slack did not have a viable case, and Luke had no interest in presenting Slack’s case to a court. *Id.* She told Slack at that meeting that her case lacked merit, and explained the litigation process, as she did with all prospective

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<sup>6</sup> Slack did not disclose Rhodes by name to Luke. It was only in discovery that Rhodes’ identity was revealed. CP 156-57. Rhodes’ decision not to represent Slack occurred well *after* Slack’s initial meeting with Luke, and Slack never communicated Rhodes’ declination to Luke.

clients. *Id.* Slack did not bring her files or other documents to the appointment, but she prevailed upon Luke to review those materials. *Id.* Luke agreed to do so, but only on an hourly basis. *Id.* Luke told Slack she would charge her for four to five hours of work as an initial consultation and provide her an analysis of her situation. *Id.*

Luke prepared and carefully went over a fee agreement with Slack, explaining the agreement paragraph by paragraph, and Slack signed it. CP 34, 44-45. The agreement says nothing about the filing of a lawsuit and, instead, memorializes the parties' agreement that Luke's services would consist of "4-5 hrs for initial review." CP 44. While it was Cowan Moore's policy to require a retainer for matters involving a potential lawsuit, due to the limited nature of the services requested by Slack, no retainer was required of Slack. CP 34, 45.<sup>7</sup>

At the end of that first meeting, based upon the agreement and discussion with Slack, Luke believed that she only was providing an "initial review" of Slack's documents and a second opinion regarding the viability of any claim Slack believed she had against DOC, particularly where she never discussed with Slack the filing of a claim or a lawsuit.

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<sup>7</sup> The fact that the services were limited to 4-5 hours of time and were billed hourly without a substantial deposit for litigation expenses only confirms the limited nature of the representation and the fact that Luke was not undertaking to represent Slack in filing a complaint.

CP 35. Slack informed Luke at the meeting that she had filed a standard tort claim with the State, received by the Office of Financial Management Risk Management Division (“OFM”) on August 7, 2009, on the advice of her unnamed Western Washington attorney. CP 35, 47-50. Slack and Luke briefly discussed the advice from that attorney about filing the tort claim, but Luke did not know what that attorney told Slack. CP 35. Luke’s understanding that Slack was represented by counsel was confirmed by letters included in those documents from Slack to OFM following OFM’s receipt of the tort claim, in which Slack wrote, “I have consulted an attorney in the Seattle area and will ask that he review your request and provide appropriate answers.” CP 35-77. OFM’s tort claims investigator, Michael Hopkins, wrote back to Slack, requesting that she share this letter with her attorney so that the investigator could contact the attorney; the letter also expressly requested Slack to advise if she was unrepresented so he could explain the process to her. CP 78. Slack never responded, further reinforcing the notion that Slack had counsel for her claim.

Several days after the September 15, 2009 meeting between Slack and Luke, Slack delivered documents to Luke consisting of a large binder of paper and several loose sheets. *Id.*<sup>8</sup>

Luke undertook the limited review of Slack's documents she promised,<sup>9</sup> and determined that Slack lacked evidence of disability discrimination that could be blamed on DOC. Luke found no evidence that DOC discriminated against, or failed to accommodate, Slack. CP 35-36. Slack's evidence that she actually had a disability at all was contradictory. CP 37-38.

At a subsequent meeting with Slack at Luke's office on October 20, 2009, Luke explained in detail the significant weaknesses in Slack's purported claim reiterating her opinion that Slack's claim lacked merit and was not worth pursuing. CP 40. Luke stated she would not represent Slack in filing such a claim. *Id.* Because Slack indicated emotional distress damages were a major component of her claim, Luke also explained to Slack that she would be litigating the case in Benton County, a county with a very conservative jury pool, and because of such

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<sup>8</sup> Slack referred to this as a white binder of materials she had also provided to Rhodes. CP 408. From the voluminous attachments to her various declarations, it is unclear which precise documents she believed Luke had in 2009.

<sup>9</sup> Luke's time records are consistent with a limited review; Luke performed 3.6 hours of work. CP 36, 143.

conservative juries, Luke generally did not calculate emotional distress damages as a major component of a potential jury award. *Id.*<sup>10</sup> Luke also discussed with Slack that the fees and costs of litigation would be prohibitive unless a case has a better than equal chance of success and a case value is greater than the fees and costs that could be awarded. *Id.* Luke told Slack that her case did not meet either of these criteria. *Id.*<sup>11</sup>

In late December 2009,<sup>12</sup> Luke had a phone conversation with Slack<sup>13</sup> during which Luke explained to Slack that it had come to Luke's attention that Slack's tort claim was barred by the applicable statute of limitations. CP 41.<sup>14</sup> Luke explained to Slack that her claim was time-

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<sup>10</sup> If emotional distress damages were the only component of damages that was being pursued in a case against DOC, Luke would not have recommended pursuing a claim even if it was meritorious. CP 40.

<sup>11</sup> Despite Luke's opinion that her DOC claim was meritless or would not be successful, Slack offered to provide Luke with her pay stubs on a future date. CP 40. Luke later received those pay stubs from Slack, and although she did not request them, Luke also received other documents from Slack, including Slack's December 21, 2009 letter of resignation from DOC. CP 40, 71-72, 79-142.

<sup>12</sup> Luke's receptionist, who was responsible for maintaining Luke's schedule and calendar, rescheduled meetings on November 17, 2009, and December 10, 2009, due to conflicts in Luke's schedule that Slack had requested to further discuss Luke's opinion of her case. CP 40-41.

<sup>13</sup> The meeting with Slack was conducted by phone due to Slack's illness at the time. CP 41.

<sup>14</sup> Slack resigned from her DOC job on August 7, 2006, and her last day of work was August 23, 2006. CP 71-72, 144. Under RCW 4.92.100, the statute of limitations for filing a lawsuit was tolled by the filing of the tort claim. The tolling was effective for 60 days plus five court days, and therefore, her claim was tolled until October 29, 2009, when the statutory limitation period expired. CP 144. Luke had

barred, Luke further explained that application of the discovery rule would not further toll the statute of limitations because Slack was aware of the harm prior to the date she submitted her letter of resignation. *Id.*

Luke also re-explained that even if the statute of limitations had not run, Slack would not have had a viable case. *Id.* Luke reviewed in detail all of the weaknesses in Slack's case that she had previously explained during the October 20, 2009 meeting, concluding again that Slack's case was not viable and that it was not a case that Luke would advise Slack to pursue. *Id.* Luke also specifically explained to Slack that cases like Slack's can exceed \$50,000 in attorney fees and costs and that such fees and costs would be prohibitive given the slim likelihood of success of Slack's case and absence of evidence of any damages. *Id.*<sup>15</sup> Luke offered to meet face-to-face with Slack to answer any further questions and return the documents Slack had provided. *Id.* Luke sent Slack a detailed December 22, 2009 letter that memorialized their conversations. CP 41, 144-46.

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learned that the statute may have expired through a phone call to OFM's Michael Hopkins, the same day. CP 41.

<sup>15</sup> Slack *concedes* that Luke told her she would need to retain a CPA on damages and that \$50,000 in litigation costs were likely. CP 163, 165. Incredibly, Slack claims that Luke told her such necessary costs could be paid later, CP 552-53, despite the Cowan Moore policy on the need for a cost retainer referenced *supra*.

On January 5, 2010, Luke had a final meeting with Slack at Luke's office. CP 41. During that meeting, Slack explained to Luke for the first time her contention that she had retained Luke to represent her in a tort claim against DOC. CP 42. Luke told Slack that this was a misunderstanding, and that Luke had merely agreed to provide a "second opinion" of the viability of Slack's case consistent with Slack's representations at the initial meeting of September 15, 2009, and the signed agreement. *Id.* Luke reminded Slack that they had discussed Slack's representation at the initial meeting and that she had already retained a Western Washington attorney to represent her in the tort claim and the limited scope of the agreement. *Id.*

Luke told Slack that at no time did she understand that she was to represent Slack in her tort claim. *Id.* Luke explained that during the initial consultation and later, Luke and Slack did not discuss statute of limitation issues in depth, which Luke would have done in the event she thought there was any likelihood that she would handle the litigation. *Id.*<sup>16</sup> Luke memorialized their conversation in a January 6 letter to Slack. CP 41, 147-48.

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<sup>16</sup> Realizing the existence of this misunderstanding, unreasonable as it may have been on Slack's part, Luke refunded the fees that Slack paid for her consultation as an accommodation. CP 42, 149.

Slack filed a complaint against Luke and Cowan Moore on December 19, 2012 in the Benton County Superior Court, alleging counts of negligence, “Due Dilligence [sic],” “Breech [sic] of Contract,” and malpractice. CP 1-19.<sup>17</sup> Simultaneously, Slack filed a grievance against Luke with the Washington State Bar Association. CP 381-82, 713-14. The trial court granted Luke’s motion to strike any reference to the bar grievance. RP (8/28/14):8. Slack has not appealed that decision. Br. of Appellant at 2.

Further evidencing the fanatical nature of her antagonism toward Luke, Slack had huge signs complaining about Luke and Cowan Moore affixed to her truck which she parked outside the Benton County courthouse. CP 1302-03.

Luke/Cowan Moore answered, denying Slack’s claims. CP 21-32. They pleaded affirmative defenses that third parties were responsible for any harm to Slack. CP 30-31.<sup>18</sup>

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<sup>17</sup> In essence, Slack’s claims related to her failed attempts to retain an attorney to represent her in a possible tort claim against DOC based on the DOC’s alleged failure to accommodate her disability. CP 17-19. Slack asserted that Luke was liable for all damages she would have sought in that claim including lost wages, medical costs, damages for emotional distress and pain and suffering, reimbursement of life insurance premiums, payment of life insurance benefits, punitive damages, and attorney fees and costs. *Id.* Slack later apparently withdrew emotional distress damages as an item of her professional negligence claim against Luke. CP 571.

<sup>18</sup> Slack initially moved to strike Luke’s defenses under CR 12, but the trial court denied the motion in an April 8, 2014 order because it was, in effect, a summary

Both parties then filed motions for summary judgment. CP 708-77, 796-98. Ultimately, the trial court, the Honorable James Dixon, a visiting judge from Adams County, granted Luke's motion and denied Slack's in an order entered on September 29, 2014. CP 1571-73. Slack moved for reconsideration, CP 1574-1600, which the trial court denied. CP 1601-02. Slack appealed to this Court. CP 1603-15.

D. SUMMARY OF ARGUMENT

Slack failed to establish the necessary elements of a legal malpractice claim against Luke/Cowan Moore as a matter of law.

Slack also failed to establish the "but for" causation element of a legal malpractice claim. Luke appropriately determined that there was no basis in fact or law to file a reasonable accommodation claim on Slack's behalf against DOC. Slack presented no expert testimony to contradict Luke's testimony and that of her expert, a seasoned Tri-Cities litigator, based on the evidence provided by Slack to Luke in 2009, that Slack's WLAD claim was meritless and should not have been filed. Moreover, Slack failed to demonstrate as a matter of law that she would have prevailed on her claim against DOC.

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judgment that was untimely and was not filed in compliance with CR 56. CP 442, 492-93, 586. Slack refiled the motion verbatim as a summary judgment motion. CP 394-69, 437, 581. The trial court denied it in a July 11, 2014 order. CP 705-07, 1606-08.

Slack also did not establish that she had an attorney-client relationship with Luke/Cowan Moore to file a complaint against DOC.

The trial court properly dismissed Slack's legal malpractice claim against Luke/Cowan Moore as a matter of law.

#### E. ARGUMENT

The issue of Slack's burden to come forward with evidence on summary judgment is an important one in this case. Here, Slack had a duty to come forward with expert testimony to establish the causation element of her professional negligence claim and failed to do so.<sup>19</sup> Moreover, as will be documented *infra*, Slack did not demonstrate as a matter of law that she had a meritorious claim against DOC.

##### (1) Overview of Washington Malpractice Law

To establish a professional negligence claim in Washington, a plaintiff must first establish the existence of an attorney-client relationship giving rise to a duty to the client. The test for the existence of an attorney-

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<sup>19</sup> Summary judgment is proper if the non-moving party, after the motion is filed, fails to establish any facts that would support an essential element of its claim. CR 56(c); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). If the moving party shows that there is an absence of evidence to support the non-moving party's case, the burden is on the non-moving party to make out a prima facie case concerning an essential element of the claim. *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988). This burden cannot be met "by relying on conclusory allegations, speculative statements, or argumentative assertions." *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992). Rather, a plaintiff must set forth specific facts regarding each element of his/her claim. *Id.* This Court reviews summary judgment de

client relationship, a central issue in this case, is a mixed one with both subjective and objective elements. The client must subjectively believe the relationship exists, but the belief must also be reasonable. *Dietz v. Doe*, 131 Wn.2d 835, 843-44, 935 P.2d 611 (1977).

Then, a plaintiff must prove also breach of that duty, harm, and proximate causation between the breach and the harm. *Schmidt v. Coogan*, 181 Wn.2d 661, 665, 335 P.3d 424 (2014); *Ang v. Martin*, 154 Wn.2d 477, 481-82, 114 P.3d 637 (2005); *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992). With regard to causation,<sup>20</sup> the burden on the plaintiff is a heavy one – the so-called “case within a case.” The plaintiff must show that the client would have prevailed or improved upon his/her position but for the attorney’s negligence. *Daugert v. Pappas*, 104 Wn.2d 254, 257-58, 704 P.2d 600 (1985).

The trial court was correct in concluding that Slack failed to establish a professional negligence claim<sup>21</sup> against Luke as a matter of law.

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novo. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

<sup>20</sup> Causation in the professional negligence setting retains both elements of legal causation and “but for” causation. *Ang*, 154 Wn.2d at 482. Historically, the former is a question of law. *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985). Expert testimony is necessary when legal causation must be addressed.

<sup>21</sup> Slack’s inarticulate complaint presented only a claim of professional negligence against Luke; she has not asserted a claim for breach of fiduciary duty. While

(2) Slack Failed to Establish Causation, the Case-Within-a-Case, as a Matter of Law

Luke will address the other elements of a legal malpractice claim that Slack failed to establish as a matter of law *infra*, but the most glaring failure in Slack's contention below is her failure to prove causation, the *Pappas* "case within a case." To establish causation, Slack had an affirmative burden to demonstrate that but for any alleged negligence on Luke's part, she "would have prevailed or achieved a better result." *Halvorsen v. Ferguson*, 46 Wn. App. 708, 719, 735 P.2d 675 (1986), *review denied*, 108 Wn.2d 1008 (1987).

A case involving a 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. *Nielson v. Eisenhower & Carlson*, 100 Wn. App. 584, 999 P.2d 42, *review denied*, 141 Wn.2d 1016 (2000).<sup>22</sup>

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Slack alleged four "Counts" in her complaint – negligence, "Due Diligence [sic]," "Breach [sic] of Contract," and malpractice, CP 13-17, the facts alleged by Slack in connection with those counts essentially state only a claim for legal malpractice, a claim that Luke failed to meet the applicable standard of care. *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d (1992). "Due Diligence [sic]" is simply not a valid cause of action; rather it is simply another formulation of Slack's legal malpractice claim against Luke/Cowan Moore. Finally, while Washington courts have allowed "an action for legal malpractice [to] be framed conceptually either as a tort or a breach of contract," Slack's claim here clearly sounds in tort. *Peters v. Simmons*, 87 Wn.2d 400, 404, 552 P.2d 1053 (1976).

<sup>22</sup> There, Division II, in a case not cited by Slack, held that although an attorney gave the clients erroneous advice about the statute of limitations for a federal tort claim and, based on that advice, they settled their case rather than risk a Ninth Circuit appeal, the plaintiffs failed to establish that but for the attorney's negligence they would have obtained a more favorable result. The court determined the causation issue was a

In addressing the causation element of her claim, Slack erroneously treats the need for expert testimony. Br. of Appellant at 20-27. Slack also fails to differentiate between Luke's two bases for asserting that Slack failed to meet her obligation to prove the causation element of her professional negligence claim. First, Luke and her expert John Schultz properly concluded that Luke had no basis in law or fact in the fall of 2009 from the facts then in existence to sue DOC on Slack's behalf. *Slack failed to offer any expert testimony to rebut that evidence.* Second, Slack could not establish a reasonable accommodation claim against DOC as a matter of law.

Instead, Slack contends that in professional negligence cases, there will *always* be a "trial-within-a-trial" on the claimant's underlying claim. Br. of Appellant at 21-22.<sup>23</sup> That argument is belied by Washington law.<sup>24</sup>

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*question of law. Id.* at 594-95. The court further concluded that the clients would not have obtained a more favorable result on appeal. *Id.* at 598-99.

<sup>23</sup> Slack cites to the Third Edition of *Washington Practice* for her conclusion. Br. of Appellant at 22. The proper citation is to David DeWolf/Keller Allen: 16 *Wash. Prac.* § 16.33 (4th ed. 2013).

<sup>24</sup> Washington courts have routinely rejected professional negligence cases on summary judgment for failure to prove the causation element as a matter of law. In *Sherry v. Diercks*, 29 Wn. App. 433, 628 P.2d 1336, *review denied*, 96 Wn.2d 1003 (1981), for example, a client sued his attorney when the attorney told the client prior to trial that he had no defense to a claim brought against him by his commodities futures broker. The attorney allowed a default and default judgment to be taken against the client. Ultimately, the trial court dismissed the legal malpractice claim at the close of the client's case. Division I affirmed because the client had no legitimate defense to the broker's claim for moneys owing as a matter of law. *See also, Halvorsen v. Ferguson*, 46 Wn. App. 708, 735 P.2d 675, *review denied*, 108 Wn.2d 1008 (1987) (no relitigation of

For example, in *Daugert*, our Supreme Court distinguished between a situation where the lawyer made an error during trial and where the lawyer failed to file a timely appeal. In the former situation, the “trial court hearing the malpractice claim merely retries, or tries for the first time, the client’s cause of action which the client asserts was lost or compromised by the attorney’s negligence, and the trier of fact decides whether the client would have fared better but for such mishandling.” *Daugert*, 104 Wn.2d at 257. When the malpractice is the failure to timely file a notice of appeal, the “cause in fact inquiry becomes whether the frustrated client would have been successful if the attorney had timely filed the appeal.” *Id.* at 258. This is a *question of law* for the court as the

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factual basis for client’s malpractice theory that attorney failed to present theory for property split in divorce action; summary judgment for attorney upheld); *Leipham v. Adams*, 77 Wn. App. 827, 894 P.2d 576, *review denied*, 127 Wn.2d 1022 (1995) (summary judgment for attorney affirmed where estate beneficiary did not prove that attorney should have disclaimed decedent’s joint tenant interest in cash management account in a bank); *Griswold v. Kilpatrick*, 107 Wn. App. 757, 27 P.3d 246 (2004) (summary judgment for attorney affirmed where causation element was not established; client claimed earlier initiation of settlement discussions would have improved settlement of case); *Soratsavong v. Haskell*, 133 Wn. App. 77, 134 P.3d 1172 (2006), *review denied*, 159 Wn.2d 1007 (2007) (summary judgment for attorney affirmed where client failed to prove causation element; attorney allegedly failed to timely file motion to vacate default order but court concluded as a matter of law that client had no legitimate defense to liability and stipulated to amount of damages); *Smith v. Preston Gates Ellis, LLP*, 135 Wn. App. 859, 147 P.3d 600 (2006), *review denied*, 161 Wn.2d 1011 (2007) (Court indicated it could decide causation element where reasonable minds could not differ, and, where an attorney poorly drafted a construction contract, its deficiencies had no impact on later suit by client against building contractor); *Estep v. Hamilton*, 148 Wn. App. 246, 201 P.3d 331, *review denied*, 166 Wn.2d 1027 (2009) (this Court affirmed summary judgment where client failed to prove causation element; client failed to demonstrate that she would have done better had the beneficiary designation on her ex-husband’s life insurance policy been re-designated post-dissolution).

client must prove that the appellate court would have granted review and rendered a judgment in the client's favor, as Slack ultimately acknowledges, albeit in a footnote. Br. of Appellant at 22 n.2. Division I refined this analysis in *Brust v. Newton*, 70 Wn. App. 286, 292, 852 P.2d 1092 (1993), *review denied*, 123 Wn.2d 1010 (1994). There, the court indicated that expert testimony is critical on *questions involving issues of law*. The present case is precisely the type of case where the trier of fact must "engage in an analysis of the law."

First, Luke's determination that Slack did not have a sufficient basis in law and fact to file an action in court in 2009 against DOC is decidedly a question of law requiring legal analysis of CR 11.

Second, even as to whether there is a basis for a WLAD reasonable accommodation case, legal issues are present as to whether Slack had a basis for such a claim.

(a) Attorney's Decision Whether to File An Action Is a Question of Law Requiring Expert Testimony

An attorney's decision whether to file an action implicates that attorney's duties under CR 11/RCW 4.84.185 and RPC 3.1.<sup>25</sup> Such a

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<sup>25</sup> In pertinent part, RPC 3.1 states: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

decision involves the attorney's professional expertise, requiring expert testimony.<sup>26</sup>

Slack cites *Geer v. Tonnon*, 137 Wn. App. 838, 155 P.3d 163 (2007), *review denied*, 162 Wn.2d 1018 (2008), br. of appellant at 24, but misstates its actual holding. Far from being limited to a case in which no facts were adduced on whether the client would have obtained a more favorable result if the lawyer had filed suit against homeowner's insurer within one year, the court held that causation was a *question of law* and court concluded that the clients failed to establish that they would have obtained a favorable judgment but for the attorney's negligence. More particularly, the court discussed the necessity of expert testimony on whether an attorney's decision not to file a case constituted a breach of the standard of care or that the breach was the cause in fact of the client's alleged damages. The court noted that the plaintiff failed to provide any expert support for the proposition that the attorney's failure to file suit on a chancy legal theory breached the standard of care. *Id.* at 850-51.

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In *Watson v. Maier*, 64 Wn. App. 889, 891 827 P.2d 311, *review denied*, 120 Wn.2d 1015 (1992), a CR 11 case, then – Judge Gerry Alexander observed: “A famous lawyer once said: ‘About half the practice of a decent lawyer is telling would be clients that they are damned fools and should stop.’”

<sup>26</sup> As our Supreme Court noted in *In re Disciplinary Proceedings Against Jones*, 182 Wn.2d 17, 338 P.3d 842 (2014), frivolousness turns on whether a lawyer of ordinary competence would recognize the issue's lack of merit. *Id.* at 41. Clearly, what an ordinarily competent lawyer would know is a question for expert testimony.

Similarly, on causation, the court observed that the law is a highly technical field beyond the knowledge of the ordinary person, *id.* at 851, and affirmed dismissal of the case because “...Geer failed to provide expert testimony or evidence to demonstrate that such a breach of Tonnon’s duty of care was the cause in fact of Geer’s claimed damages.” *Id.* at 852.

The law from other jurisdictions supports the need for expert testimony on such a legal issue. “Obviously, an attorney commits no negligence concerning the statute of limitations by failing to file a *frivolous* lawsuit or one which otherwise would not produce a satisfactory result.” *Boyle v. Welsh*, 589 N.W.2d 118, 127 (Neb. 1999).<sup>27</sup>

Ultimately, the decision about whether to file an action is entrusted to the professional judgment of the attorney and is subject to the attorney’s ethical obligation under the RPCs, court rules like CR 11, and statutes like RCW 4.84.185. As the *Boyle* court noted: “Whether a suit should be

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<sup>27</sup> See also, *Koeller v. Reynolds*, 344 N.W.2d 556, 561 (Iowa App. 1983) (plaintiff argued that it was malpractice not to file case within statute of limitations, but court responded that the “argument begs the question of negligence by assuming she had a good case.”) “Thus, determining whether there was a suit that should be filed is a predicate to determining whether the failure to file such a suit within the period provided for in the statute of limitations constituted a violation of an attorney’s standard of conduct.” *Boyle*, 589 N.W.2d at 127. See also, *Procanik v. Cillo*, 543 A.2d 985 (N.J. Super. 1988), *cert. denied*, 113 N.J. 357 (1988) (attorney not culpable for malpractice in declining representation in a wrongful birth action where, in exercising his professional judgment, the attorney concluded that the law at the time disfavored such claims; court also concluded no attorney-client relationship was created).

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. This is fully consistent with *Geer*, 137 Wn. App. at 851 (the law is a highly technical field beyond the knowledge of the ordinary person). Moreover, because this decision about whether a case has sufficient merit is so plainly one that involves professional judgment, expert testimony is essential to establish the standard of care and its breach. *Boyle*, 589 N.W.2d at 127.

Accordingly, where an attorney in a malpractice action presents expert testimony on summary judgment that an underlying case should not have been filed, the non-moving party *must* submit expert testimony to the contrary to defeat summary judgment. *Boyle*, 589 N.W.2d at 128. This is entirely consistent with Washington's standard for summary judgment referenced *supra*.

- (b) Evidence in Luke's Possession in 2009 Indicated Slack Did Not Have an Actionable Reasonable Accommodation Claim

The records provided by Slack to Luke in 2009, CP 157, were limited in scope, and are found in the Clerk's Papers annexed to Luke's declaration. CP 33-149.<sup>28</sup>

As part of her obligation on summary judgment, Slack had to present evidence that she would have prevailed on her WLAD reasonable accommodation claim against DOC, but for Luke's negligence. Specifically, she had to demonstrate that Luke and Schultz were wrong in concluding that she did not have a legitimate reasonable accommodation claim against DOC based on the evidence she gave to Luke in 2009.

To properly understand this issue, it is important to understand a WLAD reasonable accommodation claim because many of the issues associated with such a claim involve questions of law for the trial court, requiring expert testimony to establish them as part of the causation element of Slack's prima facie professional negligence case. *Brust, supra*.

(i) WLAD Reasonable Accommodation Claim

WLAD protects employees from discrimination based on disability. RCW 49.60.030(1).<sup>29</sup> Under WLAD, employers must

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<sup>28</sup> The records Slack provided to Luke are distinct from subsequent evidence developed by Slack and her attorneys in the present action in 2014 to attempt to support a professional negligence cause of action against Luke.

<sup>29</sup> A disability is defined in RCW 49.60.040(7):

reasonably accommodate a disabled employee who is able to perform the essential functions of the job, unless to do so would impose undue hardship on the employer's business. WAC 162-22-080(1). *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 145, 94 P.3d 930 (2004) (citing *Pulcino*, 141 Wn.2d at 639).

To establish a prima facie case of failure to accommodate a disability, an aggrieved employee must show that he or she (1) had a sensory, mental, or physical abnormality that substantially limited his/her ability to perform the job; (2) was qualified to perform the essential functions of the job with or without reasonable accommodation, or was

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(d) Only for the purposes of qualifying for accommodation in the employment, an impairment must be known or shown through an interactive process to exist in fact and:

(i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment; or

(ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.

(e) For purposes of (d) of this subsection, a limitation is not substantial if it has only a trivial effect.

Even with a physical disability, a qualifying disability for purposes of a WLAD reasonable accommodation claim is not established unless the disability had a substantially limiting impact on job performance, as this Court has held. *Townsend v. Walla Walla School Dist.*, 147 Wn. App. 620, 627, 196 P.3d 748 (2008) (hearing loss corrected by hearing aids). See also, *Wade v. Premera Blue Cross*, 2012 WL 12790 (E.D. Wash. 2012) (no reasonable accommodation claim where plaintiff failed to present

qualified to fill vacant position; (3) gave the employer notice of the disability and its accompanying substantial limitations; and (4) upon notice, the employer failed to reasonably accommodate the employee. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 532, 70 P.3d 126 (2003); *Roeber v. Dowty Aerospace Yakima*, 116 Wn. App. 127, 138-39, 64 P.3d 691 (2003).

A “disability” means that the employee has a sensory, mental or physical impairment that either must be the source of a substantial limitation or there must be medical documentation indicating a reasonable likelihood that engaging in the job’s duties would aggravate the impairment to the extent that it would create “a substantially limiting effect.” RCW 49.60.040(7). *See Crume v. Bi-Mart Corp.*, 2013 WL 1328427 (E.D. Wash. 2013) (court dismissed reasonable accommodation claim where plaintiff’s migraines did not substantially limit her ability to do her job). Ordinarily, to prove such a WLAD disability, medical evidence is necessary. *Simmerman v. U-Haul Co. of Inland Northwest*, 57 Wn. App. 682, 687, 789 P.2d 763 (1990) (this Court dismissed wrongful discharge based on disability claim for lack of medical evidence of disability).

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medical documentation that work assignment would worsen her musculoskeletal disability so that it would substantially limit her ability to work).

Reasonable accommodation should be an “interactive process” that involves “an exchange between employer and employee where each seeks and shares information to achieve the best match between the employee’s capabilities and available positions.” *Davis*, 149 Wn.2d at 536 (quoting *Goodman v. Boeing Co.*, 127 Wn.2d 401, 408-09, 899 P.2d 1256 (1995)). That interactive process requires a sharing of information in good faith where the employee has a duty to cooperate with the employer’s accommodation efforts by explaining her/his disability and qualifications. *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 780-81, 249 P.3d 1044, *review denied*, 172 Wn.2d 1013 (2011). Moreover, the employee has a specific duty to communicate with the employer on the effectiveness of any accommodation. *Id.* at 783. The communication must occur while the employee is employed so that the employer can act; communications after the employee has left the employment do not satisfy this duty. *Id.*

It is precisely because the reasonable accommodation process is interactive that if an employee resigns voluntarily from the employment during that interactive process that any claim for failure to reasonably accommodate fails. In *Loulseged v. Azko Nobel, Inc.*, 178 F.3d 731 (5th Cir. 1999), an employee claimed disability discrimination by her employer in violation of the Americans with Disabilities Act. At the close of the presentation of the employee’s case at trial, the court granted judgment as

a matter of law on her reasonable accommodation claim because she had voluntarily resigned. The Fifth Circuit affirmed. Given the shared obligation of employers and employees to engage in the interactive process of reasonable accommodation, an employee's voluntary resignation short-circuits that process and forecloses a reasonable accommodation claim. "To hold otherwise would reward [the employee's] unilateral withdrawal from a process designed for her own benefit." *Id.* at 740.<sup>30</sup>

The employee has the burden to show that a specific reasonable accommodation was available to the employer when it learned of the disability and that accommodation was medically necessary. *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 643, 9 P.3d 787 (2000) (citing *MacSuga v. County of Spokane*, 97 Wn. App. 435, 442, 983 P.2d 1167 (1999)). If the employee meets this initial burden, the burden then shifts to the employer to show that the proposed accommodation is not feasible. *Pulcino*, 141 Wn.2d at 643 (citing *MacSuga*, 97 Wn. App. at 442). An employer need not necessarily grant an employee's specific request for accommodation. *Pulcino*, 141 Wn.2d at 643. For example, the employer

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<sup>30</sup> See also, *Malloy v. City of Bellevue*, 71 Wn. App. 382, 859 P.2d 613 (1993), review denied, 123 Wn.2d 1024 (1994) (employee's reasonable accommodation claim dismissed where employee declined job offer, indicating he planned to move to California).

need not create a new position, transfer an employee to a position already occupied, or eliminate or reassign essential job functions. *Id.* at 644. Rather, an employer must “reasonably” accommodate the disability. *Id.* at 643 (quoting *Snyder v. Med. Servs. Corp. of E. Wash.*, 98 Wn. App. 315, 326, 988 P.2d 1023 (1999)).

The “scope of an employer’s duty to reasonably accommodate an employee’s abnormal condition is limited to those steps necessary to enable the employee to perform his or her job.” *Jane Doe v. Boeing Co.*, 121 Wn.2d 8, 14, 846 P.2d 531 (1993). “The term ‘reasonable’ is linked to necessity and limits the duty to ‘removing sensory, mental or physical impediments to the employee’s ability to perform his or her job.’” *Riehl*, 152 Wn.2d at 146 (quoting *Jane Doe*, 121 Wn.2d at 21).

Where multiple methods of accommodation exist,<sup>31</sup> the employer is entitled to select the method; the employee is not. *Frisino*, 160 Wn.

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<sup>31</sup> Reasonable accommodations may include:

- (a) Adjustments in job duties, work schedules, or scope of work;
- (b) Changes in the job setting or conditions of work;
- (c) Informing the employee of vacant positions and considering the employee for those positions for which the employee is qualified.

WAC 162-22-065(2).

App. at 779; *Wilson v. Wenatchee Sch. Dist.*, 110 Wn. App. 265, 270, 40 P.3d 686 (2002).<sup>32</sup>

An employer may comply with its accommodation duty by providing unpaid leave, since “[g]enerally speaking, ‘[t]he direct effect of [unpaid leave] is merely a loss of income for the period the employee is not at work; such an exclusion has no direct effect upon either employment opportunities or job status.’” *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70-71, 107 S. Ct. 367, 93 L.Ed.2d 305 (1986) (most alterations in original) (quoting *Nashville Gas Co. v. Satty*, 434 U.S. 136, 145, 98 S. Ct. 347, 54 L.Ed.2d 356 (1977)); *Tepper v. Potter*, 505 F.3d 508, 514 (6th Cir. 2007) (employer’s requirement that employee take Saturdays off from work without pay “reduc[ing] his annual pay and eventual pension,” did not establish discriminatory discipline or discharge even where it reflected a change from employer’s prior policy of scheduling him with Saturdays off).<sup>33</sup>

Turning to the facts in this case, it is clear that Slack failed to prove necessary elements of any WLAD reasonable accommodation claim

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<sup>32</sup> See *Harrell v. Wash. State Dep’t of Soc. & Health Servs.*, 170 Wn. App. 386, 285 P.2d 159 (2012) (court upholds jury verdict that DSHS reasonably accommodated employee with night blindness by giving him day shifts where available and exempting him from night shifts); *Garcia v. Cintas Corp. No. 3*, 2013 WL 1561116 (E.D. Wash. 2013) (court dismisses failure to accommodate claim where employee rejected proffered accommodations).

against DOC as a matter of law. The contemporaneous evidence provided by Slack to Luke did not support the existence of a meritorious prima facie reasonable accommodation claim, as Luke testified. CP 36-39, 152.

(ii) Slack Failed to Prove a Disability

Slack failed to provide Luke any documentation in 2009 that she actually had a mold-related WLAD disability. The documents she provided actually *contradicted* the existence of a mold-related disability, the focus of her reasonable accommodation claim against DOC when she consulted Luke in the fall of 2009. CP 37-38. Slack's initial complaints appeared to be musculoskeletal, involving her back, wrist, or shoulder. CP 36-37. Her *first* allegation of any alleged work environment mold or must smell was in May 2006. CP 37.

A June 1, 2006 medical opinion letter by Dr. Dennis Schusterman of Harborview Medical Center provided by Slack to Luke stated: "In terms of the symptoms you report that you associate with your building, I have not seen evidence of your having an allergy to mold spores, and believe that there is no compelling scientific evidence linking 'mold toxins' in moist buildings to symptoms such as yours." CP 37-38, 66,

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<sup>33</sup> The rationale of these religious accommodation cases is "equally applicable" to a claim for reasonable accommodation of a disability under the WLAD. *Barron v. Safeway Stores, Inc.*, 704 F.Supp. 1555, 1567 (E.D. Wash. 1988).

2058.<sup>34</sup> The opinion further states that while a “musty” smell could “potentially” trigger headaches or exacerbate Slack’s “nonallergic rhinitis,” its ultimate conclusion was that “we cannot currently ascribe your symptoms and health complaints to your workplace with ‘reasonable medical probability’ (i.e., a greater than 50% certainty).” CP 66. Moreover, a contemporaneous opinion given by Dr. Patricia Sparks, a board-certified physician with a master’s in public health, CP 846, was that: Ms. Slack does not have any evidence of an occupational disease due to alleged mold exposure in her workplace more probably than not.” CP 1266.<sup>35</sup> Even the expert to whom Dr. Krause sent Slack testified on a more probable than not basis, that he did not “believe mold was causing her symptoms, nor did he believe that mold caused an aggravation in Ms. Slack’s pre-existing condition.” CP 851. In short, according to the materials Slack provided to Luke, Slack did not have sufficient evidence

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<sup>34</sup> Slack solicited this opinion from Dr. Schusterman. CP 2049-50.

<sup>35</sup> It is noteworthy that the expert upon whom Slack has relied, Dr. Charles E. Krause, is a family doctor. CP 843. The Board of Industrial Insurance Appeals found this to be significant:

... Dr. Krause candidly indicated that he did not have a great deal of information related to the effects of mold in the environment. He is a family practice specialist; and made no claims to special expertise in occupational exposures or diseases. As pointed out by Dr. Sparks, he may not have had a clear understanding of mycotoxins and their significance in evaluating air quality.

CP 878 (citations omitted).

that she suffered from a WLAD disability with respect to her mold-related claim.

This lack of a diagnosable disability during her DOC employment was further confirmed by the denial of Slack's mold-related occupational disease claim. Slack presented an industrial insurance claim to the Department of Labor and Industries ("DOLI") for alleged mold-related disability. The Department *denied* that claim, CP 832, the Board of Industrial Insurance Appeals *upheld* that denial in a July 29, 2008 decision. CP 832-82. The Board's Proposed Decision and Order ruled: "Setting aside for a moment the question of the extent of the mold present in the building, the medical evidence of record in this case establishes that [Slack's] allergy testing...showed that *Slack was not allergic to mold.*" CP 876 (emphasis added). Moreover, that opinion recounted Slack's extensive pre-existing conditions and concluded that she failed to prove that they were aggravated by her work at DOC. CP 880.<sup>36</sup>

In sum, Slack did not provide evidence to Luke to suggest that she had a WLAD disability with regard to a major component of her claim.

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<sup>36</sup> To attempt to overcome the BIIA decision, Slack filed belated declarations from an undisclosed industrial hygienist, Greg Baker, that Slack's office building had a mold problem, and that the Slack's symptoms were worsened by that problem. CP 788-91, 1342-83. In addition to the fact that Baker was not disclosed as an expert in this action, his conclusions are baseless and go well beyond the purview of his knowledge and expertise. His testimony was contradicted by the expert testimony of Coreen Robbins. CP 922-64.

(iii) DOC Reasonably Accommodated Slack<sup>37</sup>

The evidence Slack provided to Luke in 2009 indicated that DOC, in fact, accommodated her alleged disability. In general terms, over a two-year period, in response to Slack's complaints about mold and a "musty smell" at her Kennewick office or musculoskeletal problems, Slack's manager at DOC, Steve Eckstrom, an occupational nurse consultant, Glenn Johnson, and others worked on assessing and accommodating her alleged disabilities by approving her for FMLA leave, allowing her a reduced work schedule, allowing her to work from home, attempting to arrange an alternative office, and ordering her a new, customized workstation. DOC ordered an independent air quality evaluation to determine whether its Kennewick building, in fact, had a mold problem. CP 886-900. While the test in the spring of 2006 found "traces" of mold spores in the various parts of the building that were tested, the indoor mold levels were significantly lower than those found in outdoor samples. CP 888.

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<sup>37</sup> Slack not only had to demonstrate that she *had* a disability, but that she "gave the employer notice of abnormality." *Roeber*, 116 Wn. App. at 138-39. More importantly, Slack had to demonstrate that "the employer failed to affirmatively adopt available measures to accommodate the abnormality." *Id.* Slack did not provide evidence to Luke that supported these elements of a WLAD reasonable accommodation claim.

As Luke recounted from her review of Slack's materials, Slack was hired by DOC in August 2002. CP 51. Slack first notified Eckstrom that she was experiencing pain in her wrist and back via an email dated April 8, 2004. CP 36, 52. Slack did not identify the pain as related to any disability or medical diagnosis but requested that Eckstrom refer her to "ergonomic folks" who could assist her with altering her workstation to relieve her pain. CP 52. Eckstrom immediately responded via email dated April 9, 2004, referring Slack to Johnson, the DOC occupational nurse consultant assigned to her work region. *Id.* No further communication from Slack regarding this issue occurred in 2004, but a July 5, 2005 email from Johnson to Eckstrom shows that Johnson performed an evaluation of Slack's workstation in "[l]ate 2004." CP 36, 58. Johnson recommended in the email that Slack's desk and chair be replaced and recommended a staff person who helps employees fit and choose chairs. *Id.*

Slack was diagnosed in June 2005 with joint pain and sciatica, CP 37, 53, and before any workstation alterations could occur, Slack was placed on FMLA leave effective July 6, 2005. CP 36-37, 54. An October 17, 2005 DOC letter to Slack stated that DOC received a doctor's note allowing Slack to return to work on a part-time schedule of 20 hours per

week. CP 37, 55. The letter welcomed Slack back to work on that reduced schedule. CP 55.<sup>38</sup>

In late 2005, Slack's additional records document email communications from Slack to Eckstrom regarding Slack's reduced 20-hour schedule. CP 1910-11. While Slack expressed difficulties in keeping within her reduced schedule, Eckstrom responded that "it is important to stay within the 20 hours per week authorized your health care provider" and offered several suggestions for strategies to do so, including that he could reassign some of Slack's work. CP 1910-11. Ultimately, Eckstrom offered to meet with Slack in early January to discuss the issue, as Slack had reported that she would be on vacation in December. CP 1911. Following some rescheduling, this meeting took place shortly after the planned date. CP 1913.

On December 17, 2005, Slack contacted Johnson and requested that he provide her with the workstation recommendations completed prior to her FMLA leave; Johnson complied. CP 37, 56. On January 6, 2006, Eckstrom also forwarded those recommendations to Slack, stating that he had contacted the staff person who arranges chair replacements to set up an appointment for Slack. CP 37, 57. Before this appointment could take

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<sup>38</sup> By email during Slack's FMLA leave, Slack thanked Eckstrom "for all you...have done to assist on my behalf." CP 1901.

place, Slack responded to that email on January 12, 2006, with additional complaints about back, shoulder, and wrist pain and her workstation setup. *Id.* In response, a new, \$1,677.40 workstation was ordered for Slack on January 27, 2006. CP 37, 59-65, 1954.

Slack argued below that her DOC workstation was not, in fact, ordered or put in place at that time, CP 565,<sup>39</sup> but the workstation was ordered for her by DOC. CP 59, 1954.

Slack was allowed to work at home. A January 20, 2006 email demonstrates that Slack reported to Eckstrom for the first time that she was “planning on conducting most of my work from home until someone tells me my office is clean of toxic molds or other hazards.” CP 1915. She further reported: “I did not speak to anyone about my issues before I left last year because I was tired all the time and did not feel like running on about how bad I felt.” *Id.*<sup>40</sup> In response to her request, Slack was allowed to work from home from “the end of January 2006 until August 2006,” as Slack confirmed in her OFM tort claim form. CP 37, 49.

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<sup>39</sup> Contrary to Slack’s assertion that the workstation was never *received*, a June 21, 2006 email reported that Slack herself stated” “I received a new laptop and desk set up.” CP 1978.

<sup>40</sup> This January 20, 2006 email was the *first notice* Slack gave management that her symptoms may be related to mold in DOC’s Kennewick building. The first communication from Slack to Eckstrom regarding her various symptoms occurred via email dated July 6, 2005, but that email did not contain any assertion that the symptoms were related to any specific condition of Slack’s employment; but Slack simply requested “three weeks off” to “get healthy.” CP 1897.

DOC responded seriously to mold concerns. As explained in the DOLI proposed decision and order cited above, DOC ordered an air quality test in March 2006 to investigate the mold issue. CP 823, 886-900. A DOC May 25, 2006 memorandum documents DOC's comprehensive response to Slack's mold complaint, including an air quality survey. CP 823, 901-09.<sup>41</sup>

DOC allowed Slack extensive leave days. Slack's documents contained a voluminous packet of leave requests, with no assertion or evidence that any were ever denied. CP 1837-1953.

During 2006, a number of emails between Slack and Eckstrom show that Eckstrom attempted to find Slack an alternative office, although one was not readily available. CP 1977-78, 1980. Several different options were being pursued, during which time Slack was still allowed to work from home. *Id.* Slack and Eckstrom were attempting to figure out an alternative office for Slack on August 4, 2006, when Slack and Eckstrom "discussed by telephone a plan under which [Eckstrom] would attempt to arrange an alternative office location for [Slack]." CP 38, 74. Despite this effort, Slack gave notice of her resignation in an August 6, 2006 letter to Eckstrom. CP 71-72. This letter stated nothing about

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<sup>41</sup> Slack was aware of the report, offering a detailed response to it. CP 1029-72. DOC responded to employee concerns about the building and the report, including Slack's. CP 1025-28, 1076-78.

Slack's workstation complaints but, instead, gave as the reason for her resignation her "homeless status." CP 71.

Eckstrom responded in an August 8, 2006 letter expressing regret that Slack would not allow him to pursue finding her an alternative office location, as the two had agreed on August 4, 2006. CP 74-75. Eckstrom's letter also stated: "Please let me know, too, if you would like me to refer you to any vacant positions within the Department, within reasonable commuting distance, for which you may be qualified." CP 74. There is no evidence that Slack attempted to take Eckstrom up on this offer. CP 38.<sup>42</sup>

DOC reasonably accommodated Slack. It ordered an independent air quality survey (which showed no mold problem), it allowed Slack to continue working from home, it gave her generous leave, it provided a new work station, and it attempted to arrange an alternative office for Slack prior to her registration.<sup>43</sup> Ultimately, Slack's only complaint was with the *type* of accommodation she was provided, which was not actionable. *Frisino*, 160 Wn. App. at 779; *Wilson*, 110 Wn. App. at 270

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<sup>42</sup> Slack made separate applications for employment with the State in 2005, but the record shows no communications with anyone at DOC regarding those applications. CP 1964-68.

<sup>43</sup> Slack's claim in her brief at 35-36 that DOC made "no effort" to engage in an interactive accommodation process is patently false based on the materials Slack gave Luke in 2009, and that process was terminated by Slack herself when she quit DOC's employ.

(where multiple methods of accommodation exist, the employer, and not the employee, is entitled to select the method).

Moreover, Slack's voluntary quitting of her DOC employment foreclosed a reasonable accommodation claim as a matter of law.

In sum, Slack's accommodation claim was baseless based on evidence provided to Luke in 2009.

(c) Luke Presented Unrebutted Expert Testimony that Slack Had No Reasonable Accommodation Claim in 2009

Luke presented appropriate expert testimony, based on the information in her possession in 2009 from Slack, that Slack's claim against DOC was baseless in law and fact. Luke was meticulous in recounting that she initially believed Slack's WLAD claim against DOC was baseless, CP 34, and her subsequent review of Slack's materials only confirmed that "there was no evidence that the State discriminated against or failed to accommodate Slack." CP 36. Moreover, any damage claim was largely unsupported except as to lost wages. CP 38-39. But even the lost wage claim was unconnected to any WLAD violation. CP 39-40.

Luke's position was fully supported by John Schultz, a Tri-Cities litigator with 49 years of experience. CP 150. Schultz specifically testified that the materials Slack provided to Luke did not support a meritorious reasonable accommodation claim. CP 152-53. He noted: "It

goes without saying that an attorney does not have a duty to file a case that should not be filed.” CP 152. He further stated:

...even if Slack could demonstrate that her alleged ailments qualified as a disability and that she communicated that disability to her superiors – the evidence of which is thin – her case utterly fails on the fourth element. In short, there is no evidence that the DOC failed to adopt measures to accommodate Slack’s needs. Of course, this assumes that Slack – with or without an accommodation – was qualified to do the job, and it is unclear from the record whether that was the case.

CP 153. Schultz also opined that Slack’s extensive damages claims were unsupported by necessary evidence. CP 153-54. He concluded: “...it is my opinion that Slack’s case completely lacked merit, and Luke accordingly never had a duty to file it within the SOL.” CP 154.

In sum, as of the fall of 2009, it was Luke’s opinion, confirmed by Schultz, that Slack had no claim against DOC, and filing an action would have been improper. The record supports the legal conclusion offered by Luke and Schultz where the evidence Slack provided to Luke for her alleged mold-related disability, particularly after the Board had denied her occupational disease claim, was questionable, and the evidence indicated DOC accommodated her alleged disabilities in a *variety* of ways.

Slack presented *no expert testimony* to contradict Luke’s conclusion, CP 34-40, or Schultz’s confirming opinion that Slack did not have a legitimate claim against DOC, CP 152-54, and filing Slack’s case

against DOC in the fall of 2009 would have violated CR 11/RCW 4.84.185. RP (8/28/14):34-35. *Neither* of Slack's experts addressed this issue. CP 207, 212-13.<sup>44</sup> Because this was a *legal issue* for expert testimony, Slack's failure to rebut that testimony with expert testimony of her own means that her professional negligence claim must fail for failing to prove its causation element. Her present claim fails on this fact alone. *Geer*, 137 Wn. App. at 851 (where expert testimony is necessary to establish standard of care and its breach, failure to proffer expert testimony makes summary judgment appropriate); *Sullivan v. City of Marysville*, 2014 WL 2896003 (W.D. Wash. 2014); *Ertur v. Edwards*, 297 Fed. Appx. 674 (9th Cir. 2008).

(d) Slack Failed to Establish that She Would Have Prevailed on Her Reasonable Accommodation Claim Where It Was Barred As a Matter of Law

Causation is an element of a professional negligence claim and that includes both facets of proximate cause -- "but for" causation addressed

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<sup>44</sup> Attorneys Joe Ganz and Michael David Meyers offered only *very limited* expert testimony. Ganz did not address the substance of the documents Slack provided Luke regarding her alleged reasonable accommodation claim or the causation element of Slack's claim except a conclusory assertion that harm to Slack resulted from Luke's failure to file a claim within the limitation period. CP 207. Ganz appeared to endorse the proposition that Luke had to file a frivolous claim even if she was not going to represent Slack. *Id.* Meyer testified similarly. CP 213. Neither expert addressed the CR 11/RCW 4.84.185 and RPC 3.1 implications of that position. Neither addressed *Geer*. Moreover, both based their opinions on factual assumptions that were inaccurate. CP 206, 211-12.

*supra*, as well as legal causation. *Ang*, 154 Wn.2d at 482. That issue is a question of law. *Id.*<sup>45</sup>

Here, Slack's claim against Luke was foreclosed under legal causation principles because Slack could not establish a reasonable accommodation claim against DOC where she quit its employment before it could accommodate her and because her recovery on any claim against DOC was precluded by the employer immunity of the Washington Industrial Insurance Act ("IIA"). RCW 51.04.010.<sup>46</sup>

First, Slack resigned her employment notwithstanding DOC's ongoing efforts to provide the very accommodation she ultimately demanded – a new office. CP 38, 74. That resignation eliminated Slack's involvement in the interactive process necessary to reasonably accommodate her alleged disability. Her claim failed as a matter of law. *Loulseged, supra*.

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<sup>45</sup> It is for this reason, for example, that the court concluded in *Ang* that a criminal defendant could not establish a prima facie malpractice claim in the absence of proof his/her actual innocence. *Id.* at 854-55. *Accord, Piris v. Kitching*, \_\_\_ Wn. App. \_\_\_, 345 P.3d 13 (2015). *See also, Schmidt v. Coogan*, 181 Wn.2d 661, 335 P.3d 424 (2014) (court treats question of collectability of a judgment in underlying case, an issue related to both proximate cause and damages as an affirmative defense in a professional negligence case).

<sup>46</sup> Slack made the bizarre argument in her motion for reconsideration below that the IIA was inapplicable to state employees. CP 1586, 1593-94. She is wrong. RCW 51.08.185 (definition of worker under IIA covers "all officers of the state, state agencies, counties, municipal corporations, or other public corporations, or political subdivisions.").

Second, Slack's WLAD claim was barred by the IIA's employer immunity. The IIA "provides the exclusive remedy for workers injured during the course of their employment." *Wash. Ins. Guar. Ass'n v. Dep't of Labor & Indus.*, 122 Wn.2d 527, 530, 859, P.2d (1993); RCW 51.04.010; *Goyne v. Quincy-Columbia Basin*, 80 Wn. App. 676, 681-82, 910 P.2d 1321 (1996). As this Court explained in *Goyne*, the exclusive remedy provisions of the IIA bar civil actions for injuries or occupational diseases that are "within the basic coverage of the IIA" even where they are not ultimately compensable under the facts of the particular case. *Id.* at 683.<sup>47</sup>

In *Reese v. Sears, Roebuck & Co.*, 107 Wn.2d 563, 731 P.2d 497 (1989), our Supreme Court concluded that a failure to accommodate claim, a dignitary tort, could be presented, notwithstanding the IIA's exclusive remedy, so long as the employee suffered truly separate injuries of a different nature, arising at different times in the employee's work history, and involve differing casual factors. *Id.* at 573-74. *See also, Goodman*, 127 Wn.2d 401 (employee could recover for physical and emotional damages apart from injuries covered under IIA pursuant to WLAD).

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<sup>47</sup> RCW 51.24.010 allows an employee to sue an employer only in a narrow set of circumstances where the employer has deliberately injured the employee, notwithstanding the exclusive remedy of RCW 51.04.010.

But merely claiming that separate dignitary damages have been sustained is not enough for an employee to escape the exclusivity of the IIA. *See Wolf v. Scott Wetzel Services, Inc.*, 113 Wn.2d 665, 782 P.2d 203 (1989) (IIA precluded claim against worker compensation claims management firm by employee asserting wrongful delay and termination of IIA benefits); *Goad v. Hambridge*, 85 Wn. App. 98, 931 P.2d 200 (1997) (this Court concluded plaintiffs' claims of negligent infliction of emotional distress barred by IIA because they essentially constituted a claim that the defendant failed to provide a safe workplace and the plaintiff was injured, matters that clearly fall within the IIA).

In order to avoid the preclusive effect of the IIA and recover damages for a workplace injury in a failure to accommodate action, a plaintiff must show that the injury claimed was truly a "separate injury" that "stemmed from the employer's discrimination and not from her work in the workplace." *Birklid v. The Boeing Co.*, 127 Wn.2d 853, 870, 904 P.2d 278 (1995). In *Birklid*, a key case not addressed in Slack's brief, as in *Wolf* and *Goad*, our Supreme Court noted the plaintiffs' allegations that Boeing engaged in various acts of negligent or intentional infliction of emotional distress, and that it allegedly failed to accommodate workers who were sensitive to toxic chemical exposure, *id.* at 870-71, but the

Court nevertheless held that the employees' claims were barred by IIA exclusivity:

These allegations of harm do not meet the separate-injury test. Far from being "too tenuous in its relationship to the underlying workplace injury," *Wolf*, 113 Wn.2d at 677, 782 P.2d 203, the conduct complained of is integral to the plaintiffs' claims of workplace injuries. The injuries the plaintiffs attribute to intentional infliction of emotional distress are not of a different nature, did not arise at different times, and do not have different casual factors from the injuries that resulted from the plaintiffs' exposure to the toxic substances. Although the allegations set forth some elements of a dignitary injury, the gravamen of the conduct complained of goes directly to what caused the physical and psychological harm to the plaintiffs: exposure in the workplace to toxic substances. Merely characterizing the acts that caused the harm as outrageous does not elude the exclusivity provision. These claims do not, therefore, have a separate existence, given the exclusive remedy provision of the IIA.

*Id.* at 871-72.<sup>48</sup>

Here, Slack's claims were also barred by the IIA as they did not involve truly distinct claims. They were merely a follow-on to the allegations she made to sustain her industrial insurance musculo-skeletal and mold claims. Slack's musculo-skeletal IIA claims were accepted by DOLI;<sup>49</sup> Slack's IIA claim for carpal tunnel and right shoulder injury were

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<sup>48</sup> The Court also foreclosed claims of outrage based on reckless infliction of emotional distress as they were barred by the IIA. *Id.* at 872.

<sup>49</sup> Slack repeatedly asserted below that her IIA claims for workers' compensation were disallowed, CP 337, 557, 570, 1390; RP (8/28/14):28, but that assertion is simply *false*. In fact, Slack's claims for carpal tunnel problems and sciatica

allowed with benefits paid and her IIA claim for sciatica was allowed and reopened for determination of benefits. CP 823, 826-31. Slack presented a specific IIA claim relating to mold exposure to DOLI; that claim was rejected by DOLI and the Board of Industrial Insurance Appeals. CP 823, 832-82. In fact, as the Board's IAJ concluded: "The claimant has not established, based on the preponderance of the evidence, that the aggravation of her pre-existing rhinitis, sinusitis, migraine headaches, or any other condition was proximately caused by the distinctive conditions of her employment with the Department of Corrections." CP 880. The damages sought by Slack in her industrial insurance claim replicate the damages she seeks in this WLAD action.

Luke testified that any damages Slack might choose to assert in a reasonable accommodation claim against DOC were essentially the same wage loss damages she was asserting in her IIA compensation claims. CP 39, 182. This was confirmed by Slack's tort claim in which she indicated she was seeking "lost wages, medical bills, plus amounts to be specified by an attorney and attorney fees." CP 47, 182. When pressed by the trial court in argument, Slack's counsel could not identify a single item of

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were accepted by DOLI, and her medical expenses were paid. CP 823, 826-27. However, she did not receive time loss for those conditions-temporary total disability-CP 1594, further reinforcing the belief that she did not have a disability.

damages that could be recovered in a WLAD claim different from those that could be recovered in her IIA claims. RP (8/28/14):32-34.

Slack's alleged industrial injuries, which are the entire basis for Slack's claim for damages in her WLAD claim, are plainly "within the basic coverage of the IIA." *Goyne*, 80 Wn. App. at 681-82. Slack's claims are barred by the IIA's exclusive remedy provisions because her injuries, if any, were not "separate injur[ies]" that "stemmed from the employer's discrimination," but rather injuries that generally arose from "her work in the workplace." *Birklid*, 127 Wn.2d at 870.

Slack failed to present any argument or evidence separating her injuries arising from her workplace from those arising from DOC's alleged discrimination. Indeed, Slack repeatedly argued below that her injuries arose from the conditions of her employment at DOC from 2002 to 2006.

Slack's WLAD claim was *barred* by the IIA and, accordingly, Slack's malpractice claim against Luke was foreclosed as a matter of law.

(3) No Attorney-Client Relationship Existed Between Slack and Luke as to Her WLAD Claim as a Matter of Law

As noted *supra*, a gateway element to the existence of a malpractice claim is the existence of an attorney-client relationship. *Schmidt*, 181 Wn.2d at 665.

To establish an attorney-client relationship the client's subjective belief is key. The existence of the attorney-client relationship "turns largely on the client's subjective belief that it exists." *In re Disciplinary Proceedings Against McGlothlen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983). The belief of the client will control when it "is reasonably formed based on the attending circumstances, including the attorney's words or actions." *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). The relationship need not be formalized; it may be implied from the parties' conduct. *Id.* (citing *McGlothlen*, 99 Wn.2d at 522).

As noted *supra*, the test for the existence of an attorney-client relationship contains both subjective and objective elements. *Dietz*, 131 Wn.2d at 843-44. But the burden of establishing its existence rested with Slack. *Id.*

In certain circumstances, a court can determine the relationship does or does not exist as a matter of law, evaluating the reasonableness of the client's subjective belief, where reasonable minds could reach but one conclusion on the facts presented. *Bohn*, 119 Wn.2d at 363 (attorney told mother of client he was not acting as her attorney, but was representing daughter; mother's assertion that attorney was representing her was unreasonable as a matter of law).

Courts also recognize that an attorney may undertake initial investigation of a person's potential claim without undertaking the full representation of that person, and this is particularly true when an attorney expressly limits the scope of her engagement to an initial investigation by written agreement. *See Setzer v. Robinson*, 57 Cal.2d 213, 217, 368 P.2d 124 (1962); *McGlynn v. Gurda*, 585 N.Y.S.2d 608 (App. Div. 1992), *motion for leave to appeal denied*, 80 N.Y.2d 988 (1992); *Farmer v. Mt. Vernon Realty, Inc.*, 720 F. Supp. 223 (D.D.C. 1989). An attorney may limit the scope of her/his representation. RPC 1.2(c). *See generally, Taylor v. Bell*, 185 Wn. App. 270, 340 P.3d 951 (2014). In *Taylor*, Division I concluded from the evidence surrounding the legal representation of a corporate officer involved in a stock redemption agreement that the firm's representation was not limited and it could be culpable for its misreading of Idaho law on the corporation's authority. The Seattle firm not only did not limit its representation in any fashion, internal memos indicated it was working on the Idaho law question at issue in the case. *Id.* at 289-90. The evidence in this case indicates Luke's representation of Slack was limited, contrary to Slack's assertions in her brief at 27-31.

Luke testified that Slack sought, and she agreed to provide, only a "second opinion" on Slack's WLAD claim against DOC. CP 33-35. Luke

communicated as much to Slack at the parties' initial meeting on September 15, 2009, and Slack signed a fee agreement memorializing the parties' agreement that Luke would provide "4-5 hours for initial review." CP 44-45.<sup>50</sup> At no time did Luke promise that she would "represent" Slack in the WLAD claim and, in fact, Slack specifically told Luke at the initial meeting that she had already retained a Western Washington attorney to pursue the claim on her behalf. CP 34-35. Luke fully discharged her obligation to Slack by reviewing Slack's provided materials and, at the parties' second meeting on October 20, 2009, explaining in detail her opinion that Slack's claim was meritless and had no chance of success. CP 35-36, 40, 152. Any further communication with Slack or document review following that meeting was at Slack's insistence and performed only as a courtesy to Slack to help Slack better understand Luke's legal opinion. CP 40.

Notwithstanding Slack's alleged subjective belief of an attorney-client relationship, the parties' agreement speaks for itself and contains no language obligating Luke to file a claim, contact OFM, or otherwise

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<sup>50</sup> Slack's effort to explain away the reference to 4 to 5 hours of analysis as merely an "initial step" in Luke's representation and that "more was to follow" is utterly unsupported by the fee agreement itself. Br. of Appellant at 31. Rather, it is entirely in keeping with Luke's assertion that her representation was limited to a second opinion. Moreover, that initial assessment revealed to Luke that Slack's claims were baseless and a lawsuit should not be filed.

engage in any “representation” beyond the “initial review” of Slack’s documents. CP 34, 44-45, 151-52. Moreover, Slack’s subjective belief is rendered objectively unreasonable by the fact that Luke did not undertake to perform the usual tasks that a litigator would undertake in connection with a case to be filed in court against a state agency. Luke did not prepare a claim with the State; Slack herself did so before she ever met with Luke on September 15, 2009. CP 46-50.<sup>51</sup> Similarly, the fact that Luke did not require Slack to address the financial reality of litigation is telling. Slack did not pay a substantial deposit for the costs obviously associated with the presentation of a complicated and expensive case against DOC. CP 34, 45.<sup>52</sup>

Indeed, additional documentary evidence shows that the parties mutually understood Slack’s “Western Washington attorney,” Greg Rhodes, had accepted the responsibilities Slack now seeks to retrospectively impose on Luke. At the time of the parties’ initial meeting on September 15, 2009, Slack *understood and communicated to Luke* that she was otherwise represented, thereby putting Luke on notice that another

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<sup>51</sup> Slack’s tort claim was received by OFM on August 10, 2009. CP 76.

<sup>52</sup> That Slack is a novice litigant unsophisticated in the ways and means of personal injuries litigation is belied by numerous records. Slack filed her tort claim with OFM. CP 35, 47-50. She made three Public Records Act requests to OFM. CP 1825-26. Moreover, Slack worked for two years for the Benton County Prosecutor’s Office before working at DOC. CP 381. She worked for a law firm after her time at DOC, CP 1802,

attorney was retained to file and pursue the WLAD claim undermining Slack's contention that she was hiring Luke to pursue that claim. CP 34-35, 77, 156-57, 326-27. In addition to the undisputed fact that Slack filed a tort claim form per Rhodes' direction, this understanding is further supported by letters Luke reviewed along with Slack's tort claim documents, in which Slack wrote to OFM, "I have consulted an attorney in the Seattle area will ask that he review your request and provide appropriate answers." CP 35, 77. In fact, the materials provided to Luke's counsel by Rhodes demonstrate that he did not decline to represent Slack until September 19, 2009, well after Slack's September 15, 2009 meeting with Luke. CP 326.

John Schultz opined that Slack's subjective belief regarding the scope of Luke's "representation" was unreasonable because Luke effectively limited the scope of her services to "initial review" of Slack's files stating:

Executing an hourly fee agreement limiting the scope of an attorney's services to initial investigation of a potential client's files is consistent with common practice among lawyers in the Tri-Cities area and across the State, and would not result in obligation on the part of Luke to file any claim on Slack's behalf. Further, it appears that Luke's conduct and representations at the initial meeting were consistent with that limited scope and would have not have

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2052, later retaining that firm to represent her in one of her many IIA claims. CP 1393. Slack even contemplated entering the "law field." CP 317, 559.

given Slack any reasonable basis to believe that Luke had agreed to represent her in her Underlying Claim.

CP 151-52.

Schultz further testified that Luke discharged her duty by providing her opinion to Slack, and that opinion met the expected standard of care. CP 152.

The declarations of Slack's legal experts were both based on facts supplied to them by Slack's counsel, CP 206 ("I have been asked to assume the following to be true."); CP 211 ("I have made the following assumptions:"). Those assumptions were erroneous in many respects. But, more to the point, both experts rendered opinions about whether RPC 1.2(a) was satisfied. CP 207, 212.<sup>53</sup> Compliance with the rule is a matter for the courts. Based on the undisputed evidence here, the trial court and this Court could conclude that Slack's belief that Luke was to file a lawsuit on her behalf, regardless of the merits, was objectively unreasonable.

The trial court was correct in granting summary judgment because Luke had no obligation to file Slack's spurious WLAD claim against DOC where she did not undertake to represent Slack for that purpose.

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<sup>53</sup> Both experts opined identically that Luke had a duty to file a complaint on Slack's behalf, apparently even if the claim was entirely frivolous, to "toll the statute of limitations even if she was not going to represent Ms. Slack." CP 207, 213. Neither expert even mentioned CR 11, RCW 4.84.185, or RPC 3.1.

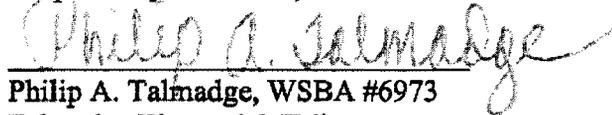
F. CONCLUSION

The trial court here correctly discerned that Slack failed to establish the necessary elements of a professional negligence claim against Luke/Cowan Moore. Slack failed to present necessary expert testimony on “but for” causation, the “case-within-a-case,” and to counter testimony that Luke had no obligation to file a baseless reasonable accommodation claim under the WLAD against DOC. Slack’s reasonable accommodation claim failed in any event as a matter of law.

This Court should affirm the trial court’s summary judgment decisions. Costs on appeal should be awarded to respondents Luke and Cowan Moore.

DATED this 20~~th~~ day of May, 2015.

Respectfully submitted,



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# APPENDIX

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THE HONORABLE STEVEN DIXON

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR BENTON COUNTY

TAMMY WOLF SLACK,

Plaintiff,

vs.

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

Defendants.

Case No. 12-2-03089-5

[REDACTED] ORDER ON CROSS-  
MOTIONS FOR SUMMARY JUDGMENT

The matter before the Court is Defendants' Amended Motion for Summary Judgment ("Defendants' Motion") and Plaintiff's Amended Motion for Summary Judgment ("Plaintiff's Motion"). A hearing on the cross-motions was held on August 28, 2014, at which argument was heard from both parties.

The Court has reviewed the cross-motions, including the following argument and evidence: Memorandum in Support of Defendants' Amended Motion for Summary Judgment; Declaration of Lucinda Luke; Declaration of Stephen C. Smith; Declaration of John Schultz;

[PROPOSED] ORDER ON CROSS-MOTIONS FOR SUMMARY  
JUDGMENT - 1  
Case No.: 12-2-03089-5

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877 Main Street, Suite 1000 - P.O. 0-000001571  
Boise, Idaho 83701-1617  
208.344.6000

1 Supplemental Declaration of Stephen C. Smith in Support of Defendants' Amended Motion for  
2 Summary Judgment; Response to Plaintiff's Amended Motion for Summary Judgment;  
3 Declaration of Daniel E. Mooney in Support of Response to Plaintiff's Amended Motion for  
4 Summary Judgment; Declaration of Coreen A. Robbins, MHS, PHD, CIH; Response to  
5 Plaintiff's Motion to Strike Declaration of Coreen A. Robbins from Court Records and Reply in  
6 Support of Defendants' Amended Motion for Summary Judgment; Defendants' Motion to Strike,  
7 Motion in Limine, and Motion to Redact Records; Memorandum in Support of Defendants'  
8 Motion to Strike, Motion in Limine, and Motion to Redact Records; Declaration of Stephen C.  
9 Smith in Support of Motion to Strike, Motion in Limine, and Motion to Redact Records; Reply  
10 in Support of Motion to Strike, Motion in Limine, and Motion to Redact Records; Plaintiff's  
11 Amended Motion for Summary Judgment; Declaration of Tammy Slack; Declaration of Bret A.  
12 Espey; Declaration of Greg Baker; Declaration of Paul Torelli; Declaration of Joseph J. Ganz;  
13 Declaration of Michael David Myers; Declaration of Gregory Rhodes; Supplemental Declaration  
14 of Tammy Slack in Support of Plaintiff's Response to Defendants' Summary Judgment Motion;  
15 Plaintiff's Motion to Strike Declaration of Coreen A. Robbins from Court Records; Declaration  
16 of Raphael Nwokike; Plaintiff's Reply to Defendants' Response to Plaintiff's Amended  
17 Summary Judgment and to Strike the Declaration of Coreen Robbins as a Witness; Declaration  
18 of Raphael Nwokike; Second Supplemental Declaration of Tammy Slack in Support of Reply to  
19 Defendants' Response to Plaintiff's Amended Summary Judgment; Supplemental Declaration of  
20 Greg Baker.  
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28 [PROPOSED] ORDER ON CROSS-MOTIONS FOR SUMMARY  
JUDGMENT - 2  
Case No.: 12-2-03089-5

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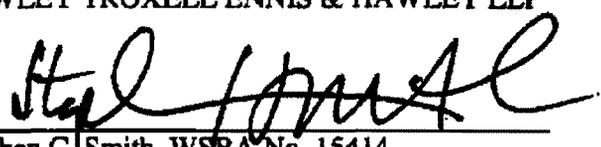
1 For the reasons stated in the Court's oral ruling, IT IS HEREBY ORDERED that  
2 Plaintiff's Motion is DENIED, Defendants' Motion is GRANTED, and this case is DISMISSED  
3 with prejudice.  
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6 DATED this 29 day of September, 2014.  
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12 Hon. Steven Dixon

13 Presented by:

14 HAWLEY TROXELL ENNIS & HAWLEY LLP

15   
16 \_\_\_\_\_  
17 Stephen C. Smith, WSBA No. 15414  
18 877 Main Street, Suite 1000  
19 P.O. Box 1617  
20 Boise, ID 83701-1617  
21 Telephone: 208.388.4990  
22 Facsimile: 208.954.5268  
23 E mail: scsmith@hawleytroxell.com  
24 Attorneys for Defendants  
25  
26  
27

28 [PROPOSED] ORDER ON CROSS-MOTIONS FOR SUMMARY  
JUDGMENT - 3  
Case No.: 12-2-03089-5

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Boise, Idaho 83701-1617  
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SUPERIOR COURT OF WASHINGTON  
IN AND FOR BENTON COUNTY

TAMMY WOLF SLACK

Plaintiff,

No. 12-2-03089-5

v.

LUCINDA LUKE, ATTORNEY AT  
LAW AND COWAN MOORE STAM  
LUKE & PETERSON, LAW FIRM

Defendants.

ORDER DENYING PLAINTIFF'S  
MOTION FOR A NEW TRIAL AND  
RECONSIDERATION

THIS MATTER having come on upon Plaintiff's Motion for a New Trial and Reconsideration Pursuant to CR 59 based on the Order of the Court on September 29, 2014, that granted Defendants Amended Summary Judgment but denied Plaintiff's Amended Summary Judgment Motion, and the Court having considered the said Motion, and the records and files herein, and the Court having reviewed the following:

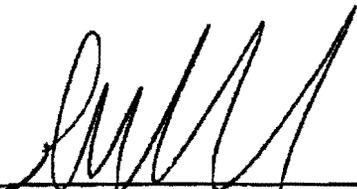
Plaintiff's Motion For a New Trial/ Reconsideration of Judgment

NOW, THEREFORE, IT IS HEREBY; ORDERED, DECREED

That Plaintiff's Motion For a New Trial, Reconsideration of Judgment is DENIED.

DATED THIS 13<sup>TH</sup> day of October 2014.

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HONORABLE STEVE DIXON  
ADAMS COUNTY SUPERIOR COURT

DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Brief of Respondents in Court of Appeals Cause No. 32921-6-III to the following parties:

Stephen C. Smith  
Hawley Troxell Ennis & Hawley LLP  
877 Main St. Ste 1000  
P.O. Box 1617  
Boise, ID 83702-5884

Raphael I Nwokike  
Law Offices of Raphael Nwokike PS  
30640 Pacific Hwy S Ste E3  
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Howard M. Goodfriend  
Ian C. Cairns  
Smith Goodfriend PS  
1619 8<sup>th</sup> Ave N  
Seattle, WA 98109-3007

Original efiled with:  
Court of Appeals, Division III  
Clerk's Office  
500 N. Cedar Street  
Spokane, WA 99201

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: May 20<sup>th</sup>, 2015, at Seattle, Washington.

  
\_\_\_\_\_  
Matt J. Albers, Legal Assistant  
Talmadge/Fitzpatrick/Tribe