

FILED

OCT 05 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 341461

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

YAKIMA AIR TERMINAL - McALLISTER FIELD, an agency of the
City of Yakima and Yakima County, a municipal entity,

Plaintiff/Appellant,

vs.

RUSSELL HAROLD GILBERT and JANE DOE GILBERT, his wife,
and the marital community comprise thereof; and
LYON WEIGAND & GUSTAFSON P.S.,

Defendants/Respondents.

**REPLY BRIEF OF APPELLANT
YAKIMA AIR TERMINAL - McALLISTER FIELD**

Keller W. Allen, WSBA # 18794
Mary M. Palmer, WSBA # 13811
LAW FIRM OF KELLER W. ALLEN, P.C.
5915 S. Regal, Suite 211
Spokane, WA 99223
Telephone: (509) 777-2211

Attorneys for Appellant
YAKIMA AIR TERMINAL - McALLISTER FIELD

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. LAW AND ARGUMENT	3
A. Gilbert and LWG Were Adequately Informed by YAT's Complaint of the Claim Against Them	3
B. The Trial Court Abused Its Discretion When it Prevented YAT from Taking Gilbert's Deposition.....	5
1. A Discovery Deposition is not an "Ambush"	6
2. The Trial Court's Protective Order Had the Purpose and Effect of a Discovery Sanction	9
C. YAT's Expert Declaration Created Genuine Issues of Material Fact.....	10
D. If the Trial Court Had Properly Taken Judicial Notice of Adjudicative Facts from Other Proceedings There Was Ample Evidence to Support a Finding of Proximate Cause and Damages	16
E. Denial of YAT's CR 56(f) Motion and the Motion for Reconsideration Were Abuses of the Trial Court's Discretion	20
1. As a Matter of Fundamental Fairness the 56(f) Motion Should Have Been Granted.....	20
2. New Evidence Can Be Considered on Reconsideration	21

	<u>Page</u>
3. The Documents and Materials on Which an Expert Relies Need Not Be Admitted into Evidence	22
4. The Second Declaration of Evan Loeffler Established There Were Questions of Fact and it was an Abuse of Discretion for the Trial Court to Deny the Motion for Reconsideration	22
III. CONCLUSION.....	24

TABLE OF AUTHORITIES

	<u>Page</u>
CASES	
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 106 S.Ct. 2505 (1986).....	16
<i>August v. U.S. Bancorp</i> , 146 Wn.App. 328, 190 P.3d 86 (2008).....	21, 22
<i>Babcock v. State</i> , 116 Wn.2d 596, 809 P.2d 143 (1991).....	14
<i>Blankenship v. Hearst Corp.</i> , 519 F.2d 418 (9th Cir. 1975)	5
<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wn.2d 210, 829 P.2d 1099 (1992).....	4
<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484, 933 P.2d 1036 (1997).....	9, 10
<i>Cedell v. Farmers Ins. Co. of Washington</i> , 176 Wn.2d 686, 295 P.3d 239 (2013).....	5
<i>Chen v. State</i> , 86 Wn.App. 183, 937 P.2d 612 (1997).....	3, 21
<i>Dreiling v. Jain</i> , 151 Wn.2d 900, 93 P.3d 861 (2004).....	7
<i>Dysthe v. Basic Research, LLC</i> , 273 F.R.D. 625 (C.D. Cal. 2011).....	6
<i>Guile v. Ballard Community Hospital</i> , 70 Wn.App. 18, 851 P.2d 689, review denied, 122 Wn.2d 1010, 863 P.2d 72 (1993).....	22

	<u>Page</u>
<i>Joyce v. Dept. of Corr.</i> , 155 Wn.2d 306, 119 P.3d 825 (2005).....	19
<i>Keck v. Collins</i> , 184 Wn.2d 358, 357 P.3d 1080 (2015).....	9, 10, 11, 22
<i>Kim v. Budget Rent A Car Systems, Inc.</i> , 143 Wn.2d 190, 15 P.3d 1283 (2001).....	11
<i>Libertarian Party of Ohio v. Husted</i> , 302 F.R.D. 472 (S.D. Ohio, 2014).....	7
<i>Lightner v. Balow</i> , 59 Wn.2d 856, 370 P.2d 982 (1962).....	3
<i>McCallum v. Allstate Property and Cas. Ins. Co.</i> , 149 Wn.App. 412, 204 P.3d 944 (2009).....	7
<i>Peluso v. Barton Auto Dealerships, Inc.</i> , 138 Wn.App. 65, 155 P.3d 978 (2007).....	9
<i>Ranger Ins. Co. v. Pierce County</i> , 164 Wn.2d 545, 192 P.3d 886 (2008).....	14
<i>State v. LG Electronics, Inc.</i> , 185 Wn.App. 394, 341 P.3d 346 (2015).....	3
<i>VersusLaw, Inc. v. Stoel Rives, LLP</i> , 127 Wn.App. 309, 111 P.3d 866 (2005).....	11
<i>Waples v. Yi</i> , 169 Wn.2d 152, 234 P.3d 187 (2010).....	1
<i>Woodall v. Freeman School Dist.</i> , 136 Wn.App. 622, 146 P.3d 1242 (2006).....	23

Page

RELATED CASES

Byron and Alice Lockwood Foundation v. MA. West Rockies Corporation, Yakima Air Terminal- McAllister Field, et al. 18

Yakima Air Terminal - McAllister Field v. M.A. West Rockies Corp., 2013 WL 6532032 (2013) 13, 23

Yakima Air Terminal- McAllister Field v. MA. West Rockies Corporation, 166 Wn.App 1005 (2012) and 178 Wn.App. 1016 (2013))..... 18

STATUTES AND RULES

CR 8(a)..... 3, 4

CR 12(b)(6)..... 3

CR 12(e)..... 3

CR 26(b)(1)..... 8

CR 26(c)..... 7

CR 30(a)(1) 6

CR 30(b)(1) 7

CR 30(b)(6) 7

CR 56(f)..... 2, 20, 25

CR 59 21, 22

ER 201 18

Fed.R.Civ.P. 30(b)(1) 7

RAP 10.3..... 2

	<u>Page</u>
RCW 59.12	13, 15
WPI 107	11

I. INTRODUCTION

Respondents Gilbert and LWG appear to concede that a key material fact in this legal malpractice case is in dispute: should Gilbert have known that the tenant made a timely tender of rent? (Brief of Respondent, p. 46) This is a jury question. It was not a question for the trial court to resolve or gloss over on summary judgment. Equally important, this question of fact only scratches the surface of the many questions of material fact for a jury to resolve in this case.

The trial court's summary judgment ruling highlights a series of errors that denied YAT its day in court. The trial judge's rulings effectively cut off YAT's ability to develop the facts to support its claim in violation of one of the most basic tenets of Washington law:

Under notice pleading, plaintiffs use the discovery process to uncover the evidence necessary to pursue their claims...A requirement which requires plaintiffs to submit evidence supporting their claims **before** they even have an opportunity to conduct discovery and obtain such evidence fundamentally conflicts with the civil rules regarding notice pleading—one of the primary components of our justice system. [Emphasis added]

Waples v. Yi, 169 Wn.2d 152, 159–60, 234 P.3d 187 (2010).

Here, the trial judge required YAT to identify the facts supporting its claims without allowing YAT the fundamental right to depose Defendant Gilbert --- the central actor in this case. This unfairness was

further compounded when the trial court refused to take judicial notice of adjudicative facts that supported YAT's claim. The court refused to do so even though both parties relied on the trial court's familiarity with related proceedings in presenting their cases on summary judgment¹. The trial court denied YAT's CR 56(f) motion and dismissed YAT's legal malpractice claim on summary judgment, even though the trial court recognized there was a disputed question of fact as to what Gilbert knew or should have known regarding the timing of the tenant's tender of its rental payment to cure the default. The trial court then denied YAT's Motion for Reconsideration.

The trial court's rulings unfairly prejudiced YAT and prevented YAT from obtaining a decision on the merits of its legal malpractice claim. The trial court's orders should be reversed and the case remanded for a trial on the merits.

¹ In support of their Motion for Summary Judgment, Gilbert and LWG relied only upon a Declaration of Keith Petrak previously filed in support of their motion to compel discovery. (CP 184, ll. 6-7; 991-1035) That declaration attached copies of the Findings of Fact and Conclusions of Law, the two unpublished decisions of the Court of Appeals, and a subpoena *duces tecum*, all from the unlawful detainer action. (CP 995-1021) The declaration also included copies of the interrogatories, notice of deposition and correspondence related to the motion to compel. (CP 1022-1035) The facts set forth in the Brief of Respondent (pp. 4-7) are largely lacking in any citations to the record (in violation of RAP 10.3(a)(5)) because those facts are not part of the trial court record.

II. LAW AND ARGUMENT

A. Gilbert and LWG Were Adequately Informed by YAT's Complaint of the Claim Against Them

Gilbert and LWG's assertion that YAT's Complaint was somehow deficient is without merit. Washington is a notice pleading state. *Lightner v. Balow*, 59 Wn.2d 856, 370 P.2d 982 (1962). The purpose of our liberal notice pleading rules is to give fair notice to the court and the parties of the general nature of the claims asserted and to facilitate a proper decision on the merits. *State v. LG Electronics, Inc.*, 185 Wn.App. 394, 408, 341 P.3d 346 (2015); *Chen v. State*, 86 Wn.App. 183, 193, 937 P.2d 612 (1997). A pleading need only set forth "(1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment..." CR 8(a). Gilbert and LWG did not file a CR 12(b)(6) or 12(e) motion to challenge any alleged pleading deficiency in YAT's Complaint.

YAT's Complaint fully informed Gilbert and LWG that YAT was asserting a legal malpractice claim against them based on their handling of the unlawful detainer action on behalf of YAT. The Complaint is expressly titled a "Complaint for Legal Malpractice." (CP 3) It includes a plain statement of the claim against Gilbert and LWG: "[Gilbert and LWG] represented [YAT] in an unlawful detainer action that [Gilbert and

LWG] brought on behalf of [YAT].” (CP 4) The Complaint alleges that Gilbert and LWG failed to meet the minimum standard of care of reasonable real estate-eviction lawyers in the State of Washington in the same or similar circumstances. (CP 5) The Complaint states that the unlawful detainer action was remanded with direction to impose judgment against YAT for attorneys’ fees, and to restore the leased premises or the value of the leased premises to the tenant or provide restitution. (CP 5) The Complaint further alleges that as a direct and proximate result of Gilbert's and LWG's negligence, YAT has been subjected to significant claims for damages and actual damages, including a partial judgment against YAT, attorneys' fees and costs defending against claims made against YAT, and the risk of additional judgments against it. (CP 6) The Complaint sets forth a demand for judgment listing the relief to which YAT claims it is entitled to recover, as required by CR 8(a). (CP 6-7)

Despite Gilbert's and LWG's repeated assertions otherwise, YAT's Complaint is more than adequate to put the court, Gilbert and LWG on notice of the claims being raised. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 222, 829 P.2d 1099 (1992)(Washington's notice pleading rule does not require parties to state all of the facts supporting their claims in their initial complaint).

B. The Trial Court Abused Its Discretion When it Prevented YAT from Taking Gilbert's Deposition

In *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 695, 295 P.3d 239 (2013), our Supreme Court stated: “The scope of discovery is very broad...The right to discovery is an integral part of the right to access the courts embedded in our constitution.” A party objecting to a deposition carries a “heavy burden” to show why a properly noticed deposition should not go forward. *Id.* (citing *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975)).

The trial judge issued a protective order precluding YAT from taking Gilbert's deposition “unless and until” YAT supplemented its interrogatory answer detailing the acts or omissions it claims fell below the standard of care. (CP 179-80) Gilbert and LWG did not even remotely satisfy their heavy burden of showing that a protective order should have been issued. Discovery should not be one-sided. There was no tenable basis for the trial court's apparent conclusion that Gilbert and LWG's discovery was more important than YAT's discovery. The protective order unfairly prevented YAT from developing the evidence necessary to prove its claim.

1. A Discovery Deposition is not an "Ambush"

The evidence in the record establishes that YAT had noted Gilbert's deposition for October 2, 2015 *before* Gilbert and LWG raised any concern about the alleged inadequacy of YAT's answer to Interrogatory No. 3, which was served on Gilbert and LWG in May, 2015. (CP 1023-1028)²

After the deposition was noted, on September 3, 2015, counsel for Gilbert and LWG made a request for "a proper response to our interrogatory about what conduct you claim fell below the standard of care in advance of the deposition." (CP 1034) Conversations about scheduling and supplementation of discovery responses continued for nearly two months. (CP 239; 245-253) During that time, Gilbert and LWG filed a motion to compel discovery and for a protective order seeking to preclude YAT from taking Gilbert's deposition until YAT supplemented its Interrogatory response to specifically identify *all of the acts or omissions* that YAT claims fell below the standard of care. (CP 1036-44)

Under the civil rules, a plaintiff is entitled to take the deposition of a named defendant. CR 30(a)(1). *See also Dysthe v. Basic Research,*

² On August 12, 2015 YAT proposed several September dates for Gilbert's deposition. (CP 239) Two weeks later, on August 24, 2015, YAT served a Notice of Videotaped Deposition for Russell Harold Gilbert, setting the deposition for October 2, 2015. (CP 1030-32; 1034)

LLC, 273 F.R.D. 625, 629 (C.D. Cal. 2011)(“Defendants are certainly entitled to take the deposition of a party”). Generally, a party is under no obligation to describe, in advance, the subjects to be covered in a deposition. *See Libertarian Party of Ohio v. Husted*, 302 F.R.D. 472, 476 (S.D.Ohio, 2014)(the courts should be reluctant to permit a party who wishes not to be deposed to use a procedural device such as a motion for a protective order to force the requesting party to specify, in advance, the subject of the deposition as a precondition to proceeding). The only time the civil rules require that a party must specify the subjects about which it wishes to depose a witness is for a CR 30(b)(6) deposition of a designee to testify on behalf of a corporation. *Cf.* CR 30(b)(1); Fed.R.Civ.P. 30(b)(1).

To establish good cause to support a protective order limiting discovery, a party must show good cause to protect it from annoyance, embarrassment, oppression, or undue burden or expense. CR 26(c). The party should show that specific prejudice or harm will result if a protective order is not issued. *McCallum v. Allstate Property and Cas. Ins. Co.*, 149 Wn.App. 412, 423, 204 P.3d 944 (2009)(citing, *Dreiling v. Jain*, 151 Wn.2d 900, 916-17, 93 P.3d 861 (2004)).

Gilbert and LWG’s characterization of YAT’s intent to take a deposition of Gilbert as a “fishing expedition” or an “ambush” is ridiculous. Gilbert was YAT’s attorney in the unlawful detainer action.

Gilbert is the party who has information concerning what he knew, when he knew it and why he took the actions he took on behalf of YAT in that litigation. Deposing the key fact witness (Gilbert) about the facts is not an “ambush.” A discovery deposition of a party is not an ambush. The ambush here was blocking YAT from discovering key evidence and then filing a motion for summary judgment on the basis that YAT had no evidence to support its claims!

Gilbert and LWG did not establish that YAT’s deposition of Gilbert would expose anyone to annoyance, embarrassment, oppression, or undue burden or expense. They merely argued that they wanted to know how to prepare Gilbert for his deposition. (CP 1043) The scope of questioning at a deposition is broad – a party may ask any question relating to “any nonprivileged matter that is relevant to any party’s claim or defense.” CR 26(b)(1). Thus, even if YAT had outlined specific negligent conduct of Gilbert in its interrogatory answer, YAT would not have been limited to those specific issues when it deposed Gilbert. The trial court’s granting of the protective order was an abuse of discretion which unfairly prejudiced YAT in defending against a summary judgment motion, and in preparing and proving its case.

2. The Trial Court's Protective Order Had the Purpose and Effect of a Discovery Sanction

Gilbert and LWG assert that the trial court's protective order was not a sanction. But that is the only reasonable view of the protective order. It was designed to compel or punish YAT. The court made no findings as to willfulness, prejudice, or consideration of lesser sanctions before granting the order. There is no mention of good cause in the order to support its issuance. (CP 179-80)

Even if YAT's interrogatory answer, *arguendo*, was improper or insufficient, the court should not have precluded YAT from taking Gilbert's deposition. The decision to exclude evidence that would affect a party's ability to present its case amounts to a severe sanction. *Keck v. Collins*, 184 Wn.2d 358, 368-69, 357 P.3d 1080 (2015). It is an abuse of discretion for the trial court to impose the severe sanction of limiting discovery and excluding testimony without first having considered, on the record, whether a less severe action would likely suffice, and whether the disobedient party's refusal to obey the discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997); *Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn.App. 65, 69-70, 155 P.3d 978 (2007). The trial court made no findings on any of these

factors.

In *Keck*, 184 Wn.2d at 369, the Washington Supreme Court explained the purpose of this requirement:

... “our overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action.”... The “ ‘purpose [of summary judgment] is not to cut litigants off from their right of trial by jury *if they really have evidence which they will offer on a trial*, it is to carefully test this out, in advance of trial *by inquiring and determining whether such evidence exist.*’ ”... (citations omitted)

Under the important and guiding principles of *Burnet* and *Keck*, it was an abuse of discretion for the trial to have prevented YAT from deposing Gilbert without first considering, on the record, the *Burnet* factors.

C. YAT’s Expert Declaration Created Genuine Issues of Material Fact

The decision in *Keck* provides guidance for how an expert’s declaration should be reviewed to determine if it creates genuine issues of material fact for trial. Summary judgment was not proper if Mr. Loeffler’s declaration could sustain a verdict in YAT’s favor on its legal malpractice claim. *Keck*, 184 Wn.2d at 371.

Mr. Loeffler’s declaration adequately addresses the standard of care and Gilbert’s breach of that standard. To prove its claim for legal malpractice, YAT needs an expert to identify what a reasonable attorney

would or would not have done in the same or similar circumstances, how Gilbert and LWG failed to act in that manner, and that it caused YAT injuries.³ *Id.*; WPI 107.04.

Paragraph 6 of Mr. Loeffler's declaration plainly states that Gilbert breached the standard of care. (CP 196) The standard of care requires strict adherence to the terms of contract (i.e. the lease) and the requirements of the unlawful detainer statute. (CP 196-97, ¶ 7) The ensuing paragraphs from Mr. Loeffler's declaration identify the standard of care and how it was breached. (CP 196-99)

Viewed in the light most favorable to YAT, Mr. Loeffler states that a reasonable attorney would have been familiar with the terms of lease (the standard of care). (CP 196-97, ¶711) Mr. Loeffler then noted several facts that indicated Gilbert was not familiar with the terms of the lease (breach): The notice of default included reference to a rental agreement dated October 1, 1984, but the lease at issue here is from 1997 (CP 197, ¶9); the notice of default requires payment in ten days, but nowhere in the

³ Mr. Loeffler did not expressly address proximate cause and damages in his declaration, as YAT's position was that such elements were satisfied by the adjudicative facts for which YAT requested judicial notice. (RP 30-31) Proximate cause in a legal malpractice action is almost always a factual question for the trier of fact. "Proximate cause may be determined as a matter of law only when reasonable minds could reach but one conclusion." *VersusLaw, Inc. v. Stoel Rives, LLP*, 127 Wn.App. 309, at ¶41-42, 111 P.3d 866 (2005), *review denied*, 156 Wn.2d 1008, 132 P.3d 147 (2006)(citing *Kim v. Budget Rent A Car Systems, Inc.*, 143 Wn.2d 190, 203-04, 15 P.3d 1283 (2001).

lease is the landlord required to give ten days notice in the event of a failure to pay rent -- the lease specifically provides for a three-day notice to pay or vacate (CP 197-198, ¶11); Paragraph 24(A) of the lease requires that three additional days (rather than the statutory one day) be provided to the tenant in the event a notice of lease default is mailed. (CP 198, ¶ 13) *Viewed in the light most favorable to YAT*, a jury could conclude, based on this evidence, that Gilbert did not review and/or understand the terms of the lease prior to delivering the notice of default. (CP 197-98, ¶ ¶10, 11, 13)

The default notice was delivered to YAT's tenant only, and not to the assignor on the lease, Noland Decoto Flying Services, Inc. ("Noland Decoto"). Mr. Loeffler explained that under the terms of the assignment, Noland Decoto was still liable in the event of a breach⁴ and may have been able to cure the breach if it had received notice. *Viewed in the light most favorable to YAT*, a jury could find that a reasonable attorney would have given notice to Noland Decoto (the standard of care) and that Gilbert did

⁴ Gilbert and LWG argue at p. 25 of their Brief that Noland Decoto no longer has an interest in the lease. To support this argument, they cite to their Reply brief in support of the motion for summary judgment (CP 207, n.3) which relies entirely on Bankruptcy proceedings that were not before the trial court and are not part of the record on appeal. The trial court refused the request to take judicial notice of these proceedings. (RP 46) Gilbert and LWG did not appeal that ruling. It seems they want to have their cake (YAT is wrong in requesting judicial notice of the facts from related proceedings) and eat it too (the Court should take judicial notice of the facts from the bankruptcy proceedings).

not provide that notice (breach). (CP 197, ¶ 10)

Based on his review of the transcript of the unlawful detainer hearing, Mr. Loeffler concluded that Gilbert was not familiar with the notice requirements of landlord-tenant law. Gilbert should have understood that delivery of a pre-eviction notice by posting and mailing requires the landlord to wait one additional day before commencing an unlawful detainer action. RCW 59.12.040. This would have made the compliance window from March 15 to March 26, 2010. Based on the transcript, Mr. Loeffler concluded that the payment was tendered on March 26, 2010, which was a timely tender. (CP 198, ¶12) *Viewing this paragraph in the light most favorable to YAT*, a jury could find that the elements of unlawful detainer were not present, that Gilbert pursued the action anyway, and he did not strictly comply with the statute.

While YAT's expert concluded that the rent payment was received by March 26,⁵ (CP 198, ¶12) the trial court stated that the issue was whether Gilbert had a reasonable basis to argue that March 29th was the tender date. (RP 50) But Gilbert and LWG offered *no* evidence on that

⁵ On remand from the Court of Appeals, the trial court in the unlawful detainer action found that the rent payment was tendered on March 26th. *Yakima Air Terminal - McAllister Field v. M.A. West Rockies Corp.*, 2013 WL 6532032, at *2 (2013). That finding is either determinative in YAT's favor because Gilbert and LWG are collaterally estopped from arguing any different tender date, or at the very least, it is a question of fact to be decided by a jury.

issue. Mr. Loeffler's declaration presents a question of fact whether Gilbert and LWG were negligent in pursuing the unlawful detainer action at all. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008)("A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation."); *Babcock v. State*, 116 Wn.2d 596, 599, 809 P.2d 143 (1991)(A trial is absolutely necessary where there is a genuine issue as to any material fact.).

Mr. Loeffler was informed that there was a mortgage on the leasehold. Under the terms of the lease, the landlord was required to provide 30 days notice before commencing an unlawful detainer action if the tenant had a mortgage. *Viewed in the light most favorable to YAT*, a jury could conclude that Gilbert's failure to notify the tenant's mortgagee was not in strict compliance with the lease. (CP 198-99, ¶14)

Based on the materials he reviewed, Mr. Loeffler also concluded that although the tenant complied with the notice of default in a timely manner, Gilbert still proceeded with the unlawful detainer action. (CP 199, ¶ 15) *Viewed in the light most favorable to YAT*, this evidence could allow a jury to find that Gilbert failed to meet the standard of care.

In summary, Mr. Loeffler determined that the notice of default was defective; the notice did not provide the appropriate amount of time to

respond; the notice was not delivered to all interested parties; Gilbert did not appear to have familiarized himself with the terms of the lease or the requirements of Chapter 59.12 RCW prior to commencing the unlawful detainer action; and the unlawful detainer action was improperly brought after the tenant timely cured the default. (CP 199, ¶ 16) *Viewed in the light most favorable to YAT*, a jury could conclude that because of these errors and actions, Gilbert and LWG did not comply with the minimum standard of care required of a landlord-tenant attorney in the State of Washington acting in the same or similar circumstances. (CP 199, ¶ 17)

Gilbert and LWG dispute Mr. Loeffler's declaration by arguing fact issues to this court. (Brief of Respondents, pp. 28-30). This demonstrates quite clearly that summary judgment was not warranted by the record. Mr. Loeffler stated his opinion that the tender was timely made on March 26, 2010. (CP 198, ¶12) Gilbert and LWG now assert that "**when** M.A. West tendered payment was a **disputed issue of fact**"! (Brief of Respondents, p. 46) They maintain that it was not unreasonable for Gilbert to argue that the tender was not made until March 29, 2010.⁶ However, they submitted *no evidence* to support their claim that the tender was made on March 29 -- except for their reliance upon the facts from the

⁶ The trial court recognized this was a disputed fact question. (RP 49, l. 24 – p.50, 8)

Court of Appeals' opinions.⁷ It was error for the trial court to resolve this issue against YAT on summary judgment. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505 (1986)(at the summary judgment stage the judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial).

Based on Mr. Loeffler's declaration, a jury could conclude that a reasonable attorney would not have commenced the unlawful detainer action after the tenant had timely cured the default. A jury could also conclude that even if the cure was not timely, a reasonable attorney would have been more careful to provide notice to all interested parties and to conform that notice to the specific terms of the lease. *When viewed in the light most favorable to YAT*, Mr. Loeffler's declaration establishes the applicable standard of care and that Gilbert and LWG breached it.

D. If the Trial Court Had Properly Taken Judicial Notice of Adjudicative Facts from Other Proceedings, There Was Ample Evidence to Support a Finding of Proximate Cause and Damages

The trial court should have taken judicial notice of adjudicative facts from the unlawful detainer proceedings to recognize there was a

⁷ Here lies the conundrum: either the trial court should have taken judicial notice of the facts from the Court of Appeals' decisions as YAT requested, or there is no evidence in the record to support Gilbert and LWG's argument that Gilbert reasonably believed the tender was made on the 29th.

question of fact on proximate cause and damages that precluded summary judgment. These facts establish that the eviction was overturned because the elements of unlawful detainer were not present and (1) YAT became liable for a judgment entered against it (CP 401-402; 445-47), (2) YAT was subsequently subject to claims for restitution and damages (CP 407-36; 735-73), and (3) YAT was sued by the tenant's mortgagee because the mortgagee did not get proper notice of the eviction proceedings as required by the lease. (CP 407-36; 735-73) A jury could reasonably conclude that if Gilbert and LWG had not filed the unlawful detainer action, or if they had properly provided notice to all interested parties, YAT would not have been liable for wrongful eviction and/or would not have been sued by its tenant's mortgagee.

Gilbert and LWG now criticize YAT's assertion that the court should have taken judicial notice of the related proceedings. However, at the summary judgment hearing, both parties relied on the trial court's familiarity with the underlying facts. Gilbert and LWG submitted the Court of Appeals' opinions and the Findings of Fact and Conclusions of Law from the unlawful detainer action to support their motion for summary judgment (RP 17-18; CP 991-1015) and have relied upon them in the Brief of Respondents before this court. (Brief of Respondents, pp. 25, 28)

YAT has requested the court take judicial notice of specific adjudicative facts as permitted by ER 201:

1. A Partial Judgment Based upon the Directive in the Court of Appeals Opinion was entered against YAT in the amount of \$22,060.46 in the unlawful detainer action (CP 401-402; 445-47);
2. A counterclaim for wrongful eviction was asserted by YAT's tenant in the unlawful detainer action (CP 954-59);
3. The opinions of the Court of Appeals in the unlawful detainer action concluded that the elements of unlawful detainer were not satisfied (*Yakima Air Terminal-McAllister Field v. MA. West Rockies Corporation*, 166 Wn.App 1005 (2012) and 178 Wn.App. 1016 (2013)); and,
4. YAT was sued by Lockwood (the tenant's mortgagee) in Yakima County Superior Court because Lockwood did not get notice of the unlawful detainer proceedings as required by the lease. *Byron and Alice Lockwood Foundation v. MA. West Rockies Corporation, Yakima Air Terminal-McAllister Field, et al.* (CP 407-436; 735-773)

Gilbert and LWG did not contest the existence or accuracy of these adjudicative facts in the trial court or in this court. Instead, Gilbert and LWG concede that the trial court should have taken judicial notice of the judgment against YAT in the unlawful detainer action. (Brief of Respondents, p. 31 first full paragraph)

The trial court's error in refusing to take judicial notice of the adjudicative facts from the related proceedings was exacerbated by its

contradictory action in relying on certain facts from the Court of Appeals' opinions to discredit YAT's expert declaration and to support its decision to grant the motion for summary judgment.⁸ (RP 47-50)

These adjudicative facts support the opinions expressed by YAT's expert and, *when viewed in the light most favorable to YAT*, they raise questions of fact on the issues of proximate cause and damages. *Joyce v. Dept. of Corr.*, 155 Wn.2d 306, 322, 119 P.3d 825 (2005)(A plaintiff "must establish that the harm suffered would not have occurred but for an act or omission of the defendant."). It was error for the trial court to dismiss YAT's legal malpractice claim on summary judgment.

⁸ Similarly, while Gilbert and LWG argue that the court should not take judicial notice of the facts from the Court of Appeals decisions, they rely on facts from those decisions to argue their case. Gilbert and LWG rely on the same Court of Appeals decision to argue that the breaches of the lease asserted by Gilbert in the unlawful detainer action (on YAT's behalf) included a failure to timely replenish the deposit, and they speculate that this is why Gilbert may have included a notice period different from that specified in the lease. (Brief of Respondents, p. 28, citing to January, 2012 decision of the Court of Appeals, CP 697-723) In fact, the notice of default states that it is for "failure to pay rent." (CP 516) Gilbert and LWG also rely on facts from the Court of Appeals decision to assert that the notice of default was served by posting as well as by mail, and then argue that the posting rendered "the Lease provision regarding service by mail irrelevant." (Brief of Respondents, p. 28)

E. Denial of YAT's CR 56(f) Motion and the Motion for Reconsideration Were Abuses of the Trial Court's Discretion

1. As a Matter of Fundamental Fairness the 56(f) Motion Should Have Been Granted

The trial court was made aware of YAT's request to depose Gilbert at the beginning of the summary judgment hearing. (RP 28) The trial court was also well aware that both parties were relying on the court's familiarity with all the related proceedings during their arguments at the summary judgment hearing. YAT requested that the court take judicial notice of those proceedings at least three different times at the hearing. (RP 30-31, 35) The facts recited by Gilbert and LWG's counsel at the hearing had no support in the record outside of reliance on the facts from other proceedings. (RP 17-18, 14; 20-23, 25-26)

When the trial court denied the requests for judicial notice, the necessity for the CR 56(f) continuance became apparent as a matter of fairness to the parties. YAT was severely prejudiced when the court cherry picked some facts from the Court of Appeals decisions to rely upon, but rejected others.

Gilbert and LWG were not unfairly prejudiced by the request for CR 56(f) relief. The case had been pending for less than a year. No discovery cutoff was in place, and no trial date was on the court's calendar. Most importantly, the delay in obtaining Gilbert's deposition was entirely

due to Gilbert and LWG's own tactics to delay it.

2. New Evidence Can Be Considered on Reconsideration

The trial court's order summarily denying YAT's motion for reconsideration states that YAT's new evidence was considered. (RP 881) Gilbert and LWG assert that the new materials should not be considered in deciding the motion for reconsideration, but their reading of *Chen*, 86 Wn.App. 183, is faulty. The court's ruling in *Chen* was not based on a specific subsection of CR 59. The court did not even discuss the section of CR 59 it was considering. *Chen* states: "nothing in CR 59 prohibits the submission of new or additional materials on reconsideration." *Id.* at 192. In fact, the *Chen* court rejected the added affidavit on reconsideration because it did **not** contain new or different evidence that could change the result. *Id.*

Gilbert and LWG incorrectly argue that *August v. U.S. Bancorp*, 146 Wn.App. 328, 347, 190 P.3d 86 (2008) stands for the proposition that a new issue can be raised in a motion for reconsideration, only as long as new evidence is not required. (Brief of Respondents, p. 40, n. 3) *August* does not so hold. *August* specifically cites *Chen* with approval, "***In the context of summary judgment***, unlike in a trial, there is no prejudice if the court considers additional facts on reconsideration." *Id.* at 347 (*citing Chen*, 86 Wn.App. at 192 (emphasis added)). Like *Chen*, the court's

decision in *August* was not limited to any particular section of CR 59.

3. The Documents and Materials on Which an Expert Relies Need Not Be Admitted into Evidence

Gilbert and LWG argue that the materials submitted with Mr. Loeffler's second declaration in support of YAT's motion for reconsideration (CP 474-486) were inadmissible. (Brief of Respondents, p. 41-42) However, these materials were submitted to support his expert opinion and were not submitted for the truth of the matter asserted. In *Keck and Guile v. Ballard Community Hospital*, 70 Wn.App. 18, 851 P.2d 689, review denied, 122 Wn.2d 1010, 863 P.2d 72 (1993), the courts did not impose a requirement that an expert have personal knowledge of the underlying documents (medical records) or to separately authenticate the underlying documents for the purpose of admitting them into evidence. *Keck*, 184 Wn.2d at 371-73.

4. The Second Declaration of Evan Loeffler Established There Were Questions of Fact and it was an Abuse of Discretion for the Trial Court to Deny the Motion for Reconsideration

The second declaration of Evan Loeffler specifically addressed questions that troubled the trial court in its oral ruling. (CP 474-840) Based on this new evidence, it was an abuse of discretion to deny reconsideration when there were genuine questions of material fact that should be resolved by a jury.

Gilbert and LWG's argument that errors identified by Mr. Loeffler were not raised in the unlawful detainer action misses the point. Mr. Loeffler states that failure to give notice to Lockwood (the tenant's mortgagee) fell below the standard of care because such notice was required by the lease. Mr. Loeffler stated: "No reasonably prudent lawyer can commence an unlawful detainer appropriately without being fully aware of contractual lease obligations including those that impose duties as conditions precedent to commencement of eviction proceedings." (CP 476, ¶ 6) Gilbert's failure to give such notice exposed YAT to claims for substantial damages by Lockwood. (CP 477, ¶ 7) Gilbert's and LWG's factual dispute about whether Gilbert knew of the mortgage⁹ clearly demonstrates that summary judgment was contrary to law and that substantial justice has not been done. (Brief of Respondents, p. 44)

Gilbert and LWG now argue that "...**when** M.A. West tendered payment was a **disputed issue of fact**", but that issue has been established. *Yakima Air Terminal*, 2013 WL 6532032 at *2. In addition, YAT offered Mr. Loeffler's declaration to establish that the tender date was March 26th.

⁹ The Notice of Lien Upon Leasehold Interest was dated February 29, 2008 and was a matter of public record. (CP 731) Gilbert and LWG assert the Notice of Lien was first noted as being in YAT's files in January 2012. (Brief of Respondents, p. 44, n. 4) A reasonable inference from the document is that a copy was taken from YAT's file in January 2012, but it had been present in the file prior to that date. *All reasonable inferences from the evidence must be considered in the light most favorable to YAT.* *Woodall v. Freeman School Dist.*, 136 Wn.App. 622, 628, 146 P.3d 1242 (2006).

(CP 482-84, ¶¶ 21-25) YAT's finance administrator Rebecca Brown testified during the unlawful detainer hearing that the payment was tendered on March 26.¹⁰ (CP 483-84, ¶24) Her declaration also confirmed that YAT followed Gilbert's guidance and direction in applying payments made by the tenant. (CP 376-96) If the jury believes the payment was tendered on March 26 as reported by Ms. Brown, then Mr. Loeffler's declaration supports a finding that it was a breach of the standard of care to file the unlawful detainer action. (CP 475, 479, 483-84 ¶¶ 5, 12, 24, 25, 26) In light of the clear questions of disputed fact raised by the second declaration of Evan Loeffler,¹¹ the trial court's denial of the motion for reconsideration was untenable, and it was an abuse of discretion.

III. CONCLUSION

Gilbert and LWG complained that YAT did not detail each of the specific ways Gilbert breached the standard of care, but they prevented YAT from taking the deposition of Gilbert—the central actor in the

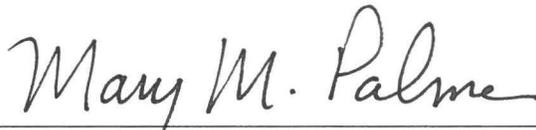
¹⁰ Gilbert presented Ms. Brown's testimony in the unlawful detainer action. (CP 555, ll. 13-19) Gilbert knew (or should have known) before that moment what Ms. Brown would say. Gilbert and LWG's argument that her testimony did not exist when the case was filed (Brief of Respondents, p. 46) is specious.

¹¹ Gilbert and LWG's argument concerning preparation of the findings of fact in the unlawful detainer action and their argument regarding the tenant's (M.A. West) failure to supersede the judgment (Brief of Respondents, p. 47, n. 6; p. 48) are not supported by any citations to the record.

malpractice claim, so that YAT was not able to conduct discovery into those details. Gilbert and LWG are insisting that YAT prove its case with its hands tied behind its back. That scenario does not comport with the purpose of the civil rules to encourage a decision on the merits of case. Even so, the evidence that was before the trial court was sufficient to avoid summary judgment, and the order granting summary judgment should be reversed. (CP 888-89) Similarly, under these facts the trial court's denial of the CR 56(f) motion and the motion for reconsideration were an abuse of discretion. (CP 888-89; 881)

The Court of Appeals should reverse the order granting summary judgment and the case should be remanded to the superior court for trial on the merits. In addition, the Court should reverse the order granting the protective order (CP 179-80) and the order granting Defendants' statutory attorneys' fees and costs. (CP 894-95)

Respectfully submitted this 5th day of October, 2016.



Keller W. Allen, WSBA NO. 18794

Mary M. Palmer, WSBA No. 13811

Attorneys for Appellant

YAKIMA AIR TERMINAL -McALLISTER FIELD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of October, 2016, I caused to be served a true and correct copy of the foregoing on the following in the manner indicated:

Keith D. Petrak	<u> X </u>	U.S. Mail
BYRNES KELLER CROMWELL, LLP	<u> X </u>	Email
1000 2 nd Avenue, Floor 38	_____	Hand Delivery
Seattle, WA 98104	_____	Facsimile
Email: kpetrak@byrneskeller.com	_____	Overnight Mail
<i>Attorney for Respondents</i>		

Robert B. Gould, WSBA # 4353	<u> X </u>	U.S. Mail
LAW OFFICES OF ROBERT B. GOULD	<u> X </u>	Email
51 West Dayton Street., Suite 208	_____	Hand Delivery
Edmonds, WA 98020	_____	Facsimile
Email: rbgould@nwlegalmal.com	_____	Overnight Mail
<i>Attorney for Appellant</i>		


Pamela Mengel