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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.

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

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I. INTRODUCTION

It is axiomatic in Washington that "whenever possible, the rules of civil procedure should be applied in such a way that substance will prevail over form." *First Federal Savings & Loan Ass'n of Walla Walla v. Ekanger*, 93 Wn.2d 777, 781, 613 P.2d 129 (1980). Civil Rule 1 codifies this principle because the civil rules "are intended to allow the court to reach the merits of the action." *Spokane County v. Specialty Auto and Truck Painting, Inc.*, 153 Wn.2d 238, 245, 103 P.3d 792 (2004). The trial court ignored these overarching principles and committed reversible error when it unfairly denied Appellant Yakima Air Terminal - McAllister Field ("YAT") the opportunity to have its day in court on the merits of its legal malpractice claim against Defendants Russell and Jane Doe Gilbert ("Gilbert") and the law firm of Lyon Weigand & Gustafson P.S. ("LWG").

The legal malpractice claim arose from Gilbert's and LWG's faulty handling of an unlawful detainer action that fell below the accepted standard of care. Gilbert's and LWG's negligence exposed YAT to liability for damages for wrongful eviction, attorneys' fees, and a separate lawsuit by its former tenant's mortgagee for damages ("Lockwood action").

The trial court erroneously and unfairly refused to allow YAT to take Gilbert's deposition, then granted Defendants' motion for summary judgment dismissing YAT's legal malpractice claim despite the fact the record confirmed the existence of genuine issues of material fact on all elements of the malpractice claim. The trial court's erroneous decision, along with other errors, should be reversed, and this case remanded for completion of discovery and trial on the merits.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting Defendants' motion for summary judgment by order entered on December 21, 2015. (CP 356-57)
2. The trial court erred in denying YAT's CR 56(f) motion for a continuance by order entered on December 21, 2015. (CP 356-57)
3. The trial court erred in denying YAT's motion for reconsideration by order entered on February 3, 2016. (CP 881)
4. The trial court erred in granting Defendants' Motion to Compel Discovery and for Protective Order Pending Supplemental Response by order dated September 25, 2015. (CP 179-81)
5. The order granting costs should be reversed. (CP 894-96)

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by granting Defendants' motion for summary judgment and dismissing YAT's legal malpractice claim when genuine issues of material fact existed as to all elements of the claim?

(Assignment of Error 1)

2. Did the trial court improperly weigh the evidence when ruling on the motion for summary judgment? (Assignment of Error 1)

3. Was the motion for summary judgment granted as an improper sanction for YAT's failure to answer interrogatories to the satisfaction of Defendants or the Court? (Assignment of Errors 1 and 4)

4. Did the trial court abuse its discretion by denying YAT's CR 56(f) motion to continue Defendants' motion for summary judgment until Gilbert's deposition could be taken? (Assignment of Error 2)

5. Did the trial court err by denying YAT's motion for reconsideration of the order granting Defendants' motion for summary judgment when additional evidence submitted clearly demonstrated there were genuine issues of material fact as to all elements of the legal malpractice claim? (Assignment of Error 3)

6. Did the trial court abuse its discretion in granting Defendants' Motion to Compel Discovery and for Protective Order

Pending Supplemental Response? (Assignment of Error 4)

7. Should the award of attorneys' fees be reversed when the judgment on which it is based is reversed? (Assignment of Error 5)

IV. STATEMENT OF THE CASE

There proceedings below and related lawsuits relevant to this appeal are summarized as follows:

1. The Unlawful Detainer Action

On March 30, 2010, Defendants Gilbert and LWG, on behalf of YAT, filed an Eviction Summons (CP 904-06) and a Complaint for Unlawful Detainer (CP 907-941) against MA West Rockies Corporation ("tenant") in the matter titled *Yakima Air Terminal - McAllister Field v. MA. West Rockies Corporation*, Yakima County Superior Court, Case No. 10-2-00989-1 ("unlawful detainer action"). (CP 4, 9)

A writ of restitution was issued and the tenant was evicted from the leasehold premises. (CP 904-1002) The eviction was appealed. Division III of the Washington Court of Appeals issued two unpublished decisions reversing the eviction and awarding attorneys' fees to the tenant. *Yakima Air Terminal-McAllister Field v. M.A. West Rockies Corp.*, 166 Wn. App. 1005 (2012) and 178 Wn. App. 1016 (2013). The superior court entered a partial judgment against YAT on March 21, 2014 in the amount of

\$22,060.46 for the tenant's attorneys' fees as directed by the court of appeals. (CP 445-47) The tenant¹ then amended its Answer (CP 951-59) in the unlawful detainer action to assert a counterclaim for wrongful eviction against YAT seeking restitution for the wrongful eviction, an award of damages, and attorneys' fees. (CP 957-59)

2. The Lockwood Claim

On March 14, 2014, the tenant's mortgagee ("Lockwood") initiated a lawsuit in Yakima County Superior Court against YAT alleging damages for the wrongful termination of the tenant's lease, and that case was later consolidated with the unlawful detainer action. *Byron and Alice Lockwood Foundation v. M.A. West Rockies Corporation; Yakima Air Terminal – McAllister Field, et al.* (CP 407-443; 735-73) Lockwood sought a monetary judgment against YAT for the value of the land and collateral wrongfully seized, and damages for the amount of lost rental income from the date of seizure until the rental income could be restored. (CP 438)

3. The Legal Malpractice Claim

On February 9, 2015 YAT filed this legal malpractice lawsuit against Gilbert and LWG arising from their work in the unlawful detainer

¹ On March 2, 2011, the tenant (M.A. West Rockies Corporation) assigned all of its rights and interest in the unlawful detainer lawsuit to the Langdon Family Revocable Trust. (CP 954) For clarity of reference, in this brief YAT continues to use the identifier "tenant."

action.² (CP 1-7) An Answer was filed February 20, 2015. (CP 8-11) YAT sought to have the matter preassigned to Judge Elofson because of his familiarity with the companion proceedings in the unlawful detainer action and the Lockwood suit against YAT for damages arising out of the wrongful eviction. (CP 13-17) This effort was unopposed. (CP 18-19) Judge Elofson granted the motion expressly because of his familiarity with the companion cases. (RP 11-12; CP 173-74)

(a) Motion to Compel and Protective Order

YAT made multiple efforts to schedule Gilbert's deposition in the legal malpractice action. (CP 239-269) However, Gilbert and LWG insisted that the parties in the related unlawful detainer and Lockwood cases should participate in Gilbert's deposition so that he would not be subject to multiple depositions in the separate lawsuits. (CP 239-269) In August, YAT noted Gilbert's deposition for October 2, 2015. (CP 1030) Gilbert and LWG then filed a motion to compel discovery from YAT and for a protective order preventing Gilbert's deposition. (CP 1036-45) Gilbert and LWG asserted that YAT did not provide enough detail in response to their Interrogatory No. 3, which requested YAT to identify each act or omission of Gilbert that YAT claims fell below the standard of

² YAT had earlier attempted to assert a third-party complaint for legal malpractice against Gilbert and LWG in the unlawful detainer action, but that effort was denied by Yakima County Superior Court Judge Elofson. (CP 968-78; 982-83)

care. (CP 1039-43) YAT had objected to the interrogatory on the grounds that it impermissibly sought expert testimony or a legal opinion from YAT. (CP 1024) Without waiving the objection, YAT answered by referring to the unpublished decision of the court of appeals in *Yakima Air Terminal - McAllister Field v. M.A. West Rockies Corp.*, 178 Wn. App. 1016 (2013), which identified several errors in the underlying unlawful detainer action, including problems with the notice of default and the application of the tenant's payments, which led the court to conclude that the tenant had cured its default and that the elements of unlawful detainer were not satisfied. (CP 1024) Gilbert and LWG claimed YAT's interrogatory answer was insufficient. (CP 1039-43)

On September 25, 2015 the trial court granted Defendants' Motion to Compel Discovery and for Protective Order Pending Supplemental Response. (CP 179-81) The Order precluded YAT from taking the deposition of Gilbert "unless and until" YAT responded further to Interrogatory No. 3, which requested YAT to "identify with specificity the acts or omissions giving rise to this action for legal malpractice that it claims fell below the standard of care." (CP 179)

(b) Motion for Summary Judgment

Having hindered YAT's efforts to take Gilbert's deposition, Gilbert

and LWG then filed a motion for summary judgment on November 13, 2015. (CP 182-187) In support of the motion, each relied on a previously filed declaration from their counsel attaching copies of the court of appeals' opinions and the trial court findings from the unlawful detainer action, a meet and confer letter regarding discovery, a Notice of Deposition, and YAT's discovery responses. (CP 184; 991-1035) Knowing Gilbert's deposition had been precluded by Judge Elofson, Gilbert and LWG then asserted there was "no evidence of acts or omission on Mr. Gilbert's part that fell below the standard of care that would have produced a different outcome in the Underlying Case." (CP 182) YAT submitted its response to Gilbert's motion (CP 188-194) supported by the Declaration of an attorney expert, Evan Loeffler. (CP 195-202) Gilbert and LWG filed a reply without submitting any additional evidence. (CP 203-211)

The motion was argued on December 11, 2015. (RP 16-43) At the hearing, counsel for YAT reminded the court that YAT had not been allowed to depose Gilbert. (RP 28) Counsel for YAT asked the court to take judicial notice of the unlawful detainer case and the Lockwood case as evidence of the damages incurred by YAT as a result of Gilbert's negligence. (RP 30-31) Notably, the court of appeals' opinions in the

unlawful detainer case were also attached to the declaration of Gilbert's and LWG's counsel. (CP 1004-1015)

After the oral argument, but prior to the court issuing its decision on the summary judgment motion, YAT formally filed a Motion for Continuance of Summary Judgment pursuant to CR 56(f) pending the taking of the deposition of Defendant Gilbert. (CP 222-229) The motion was supported by the Declaration of Robert Gould, which detailed YAT's multiple attempts over several months to schedule Gilbert's deposition that were repeatedly rejected by Defendants. (CP 230-73) Counsel for YAT pointed out that it was unfair to proceed with the summary judgment motion while at the same time precluding YAT from deposing Gilbert to obtain the information necessary to oppose the motion. (CP 225) YAT explained to the court that the deposition would focus on obtaining facts related to Gilbert's errors and negligence that failed to satisfy the requirements for unlawful detainer, as set forth in the court of appeals' decision. (CP 225)

The trial judge specifically acknowledged the absence of evidence that only Gilbert's deposition could have supplied (RP 52), but then granted the summary judgment motion anyway. (RP 52) In his oral decision, the trial judge acknowledged the difficulty for YAT in not

having the opportunity to take Gilbert's deposition before responding to the summary judgment motion. (RP 44-45) The court refused to treat the unpublished opinions of the court of appeals as fact assertions in the legal malpractice case even though the opinions were also submitted by Gilbert and LWG in support of their summary judgment motion. (RP 46) Yet, in contradiction to his stated refusal to take judicial notice, the trial judge repeatedly referred to the court of appeals' opinions in his oral ruling as a basis for granting the motion for summary judgment. (RP 47-49) On December 21, 2015, the trial court entered a written order denying YAT's 56(f) motion for a continuance and granting Defendants' motion for summary judgment. (CP 356-57)

(c) Motion for Reconsideration

YAT timely filed a motion for reconsideration of the order granting summary judgment. (CP 371-375) To support its motion, YAT submitted several declarations that specifically addressed questions raised by the trial judge in his oral ruling. The declaration of Robert B. Gould (CP 401-473) attached a copy of the Lockwood Complaint against YAT (CP 407-444) and the judgment against YAT for attorneys' fees in the unlawful detainer action. (CP 445-47) YAT's manager stated in his declaration that the unlawful detainer action was commenced pursuant to

Gilbert's instructions. (CP 397-98) YAT's finance administrator affirmed that YAT followed Gilbert's guidance and direction in applying payments made by the tenant. (CP 376-96) Based on that testimony, Gilbert should have had a thorough and complete understanding of how the payments were accounted for in relation to the notice of default.

YAT also submitted a second Declaration from Mr. Loeffler with exhibits. (CP 474-840) Mr. Loeffler again stated his expert opinion that no reasonably prudent lawyer in the State of Washington would have commenced the unlawful detainer proceedings on behalf of YAT given the errors identified. (CP 475) Even where the court issued the writ of restitution, a reasonably prudent lawyer should have known that it would be reversed on appeal. (CP 475, 479)

Mr. Loeffler opined that Gilbert negligently failed to adequately familiarize himself with the terms of the tenant's lease. (CP 476) Gilbert was aware of Lockwood's security interest but failed to give Lockwood notice of the defaults or the unlawful detainer proceedings. (CP 476-77; 397-98) This failure directly exposed YAT to a lawsuit filed by Lockwood seeking over three million dollars in damages. (CP 476-478)

Mr. Loeffler identified several other areas in which Gilbert's actions fell below the standard of care. He stated that no reasonably

prudent lawyer would have commenced a lawsuit on the basis of a notice of default lacking the mandatory statutory language. (CP 479-80) Gilbert failed to properly calculate the cure period and failed to properly account for the tenant's efforts to cure. (CP 481-84) These flaws were expressly brought to Gilbert's attention by the tenant's attorney. (CP 484) Gilbert negligently ignored the identified problems and continued with the unlawful detainer proceedings. (CP 484-85; 376-96) The evidence established that the tenant had made a timely cure and was not guilty of unlawful detainer and was unlawfully evicted. (CP 482-85) The result was a judgment against YAT in the amount of \$22,060.46. (CP 484-85)

To compound matters, Gilbert breached the minimum standard of care when he prepared inadequate findings of fact and conclusions of law because he did not address the key issue regarding when the tenant tendered payment to YAT and how YAT handled the tenant's accounts. (CP 485-86)

In addition to these declarations, YAT again called to the attention of the trial court the records and files from the underlying unlawful detainer action (Yakima County Superior Court Cause No. 10-2-00989-1), the two opinions of the court of appeals in the unlawful detainer action (COA No. 29306-8-III), and the Lockwood action pending in Yakima

County Superior Court. (CP 372-73; 407-43; 735-73)

The trial court's Order for Motion for Reconsideration expressly states that the supporting documents filed by YAT with the Motion for Reconsideration were reviewed. (CP 881) However, despite the evidence before the court in response to the motion for summary judgment and the supplementary evidence submitted with the motion for reconsideration, the trial court denied the motion for reconsideration without a hearing, and without any explanation of the reasons for its decision. (CP 881)

YAT filed a timely Notice of Appeal. (CP 885-890) Thereafter, the court entered final judgment (CP 897-900) and awarded costs to Defendants. (CP 843-45; 1079-92) An Amended Notice of Appeal was filed. (CP 1979-92)

V. SUMMARY OF ARGUMENT

This case implicates a basic tenet of Washington law set forth in CR 1 -- it is a court's overriding responsibility to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination on the merits in every action. The trial court's decision to dismiss YAT's legal malpractice claim on summary judgment disregarded the fact that as of the date of the summary judgment ruling, no

discovery cutoff deadline had passed, Gilbert had not been deposed, YAT was still in the process of gathering facts through discovery to support its claims, and no trial date had been set.

The record in this case reveals a series of errors by the trial court resulting in the unfair dismissal of YAT's claim when there was evidence upon which a jury could find all the elements to support the malpractice claim. The trial court abused its discretion when it limited YAT's ability to depose Gilbert, who was the key actor in this case. The trial judge's ruling that YAT had to fully answer an interrogatory identifying the specifics of what Gilbert had done without being able to take his deposition was a clear abuse of discretion. The result was that the trial judge forced YAT into the untenable position of having to put "the cart before the horse." This was highlighted by the trial judge's acknowledgement that YAT was hampered in defending the motion for summary judgment without Gilbert's deposition. But the trial judge then denied YAT's motion for continuance to allow Gilbert's deposition to be taken before ruling on the motion for summary judgment. And the Court did so even though YAT submitted an expert opinion that Gilbert had breached the standard of care.

The trial court also denied YAT's request that the court take

judicial notice of adjudicative facts that created a question of fact on the proximate cause and damages elements of its malpractice claim. The court failed to consider all inferences in favor of YAT as the non-moving party, and improperly weighed the evidence in granting the summary judgment motion. The court further abused its discretion by denying YAT's motion for reconsideration, which presented obvious questions of fact that should have precluded summary judgment.

VI. ARGUMENT

A. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' SUMMARY JUDGMENT MOTION

1. Summary Judgment Standard of Review

Under CR 56, a grant of summary judgment is proper only when there is no genuine issue as to any material fact. *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 271, 285 P.3d 854 (2012). "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). In reviewing a summary judgment order, the appellate court evaluates the matter *de novo* and considers the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

A trial is not useless, but instead is absolutely necessary, where there is a genuine issue as to any material fact. *Babcock v. State*, 116 Wn.2d 596, 599, 809 P.2d 143 (1991)(“Summary judgment exists to examine the sufficiency of legal claims and narrow issues, not as an unfair substitute for trial”). Even where evidentiary facts are not in dispute, when different inferences may be drawn therefrom as to ultimate facts, summary judgment is not warranted. *Preston v. Duncan*, 55 Wn.2d 678, 681-82, 349 P.2d 605 (1960).

2. The Elements of a Legal Malpractice Claim

To establish a *prima facie* case for legal malpractice, the plaintiff bears the burden of demonstrating: (1) The existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred. *Hizey v. Carpenter*, 119 Wn.2d 251, 260–61, 830 P.2d 646 (1992).

3. The Evidence Before the Trial Court

(a) YAT’s Expert Declaration was Admissible and Should Have Been Considered

To comply with the duty of care, an attorney must exercise the degree of care, skill, diligence, and knowledge commonly possessed and

exercised by a reasonable, careful, and prudent lawyer in the practice of law in the state of Washington. *Hizey*, 119 Wn.2d at 261, 830 P.2d 646; *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, 180 Wn. App. 689, 701, 324 P.3d 743 (2014).

YAT offered the expert opinion of attorney Evan Loeffler to prove Gilbert's failure to satisfy the standard of care. (CP 195-202) An expert's opinion is admissible if the witness is properly qualified, relies on generally accepted theories, and the expert's testimony is helpful to the trier of fact. *Martini v. Post*, 178 Wn. App. 153, 163, 313 P.3d 473 (2013); ER 702. Mr. Loeffler's qualifications as an expert were stated in his Declaration and were not challenged by Defendants. (CP 195-96; 200) He specifically identified relevant materials he reviewed in preparing his opinion. (CP 196) Based on his review of these materials, Mr. Loeffler stated his expert opinion that Gilbert did not exercise the minimum standard of care for a landlord-tenant attorney in handling and prosecuting the unlawful detainer action on behalf of YAT. (CP 196) Mr. Loeffler's opinion was based on the following specific facts:

1. The notice of default prepared by Gilbert was defective on its face because it did not contain the necessary alternative language to either pay rent "or vacate," as expressly required by statute. (CP 197)

2. The notice appeared to have been delivered only to YAT's tenant. The assignor on the lease, Noland Decoto Flying Services, Inc. ("Noland Decoto") was not provided notice even though, under the terms of the assignment, it was still liable in the event of a breach. (CP 197) Mr. Loeffler opined that Noland Decoto may have been able to cure the breach of lease if it had received notice of the default. (CP197)

3. The notice of default prepared by Gilbert required payment in ten days. (CP 197) However, the lease did not require YAT to give ten days notice in the event of a failure to pay rent. (CP 197) Under paragraph 24(A) in the lease, a three-day notice to pay or vacate was all that was necessary. (CP 197) This deviation from the provisions of the lease led to Mr. Loeffler's expert opinion that Gilbert had not reviewed the terms of the lease prior to delivering the notice. (CP 198)

4. The transcript of proceedings in the unlawful detainer action also led Mr. Loeffler to conclude that Gilbert was not familiar with the notice requirements of the landlord-tenant law. The trial transcript revealed that Gilbert repeatedly stated that rent was not received until the eleventh day after service of the notice to pay rent. (CP 198) Under the unlawful detainer statute, the 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. Mr. Loeffler noted that this would have made the compliance window from March 15 to March 26, 2010. (CP 198) Mr. Loeffler stated that the transcript was quite clear that the payment was tendered on March 26, 2010, which was a timely tender that should have prevented the unlawful detainer. (CP 198)

5. Paragraph 24(A) of the lease requires that additional time be provided to the tenant in the event a notice of lease default is mailed. This paragraph requires three days instead of the statutory one day. The fact that Gilbert was not aware of this contractual requirement caused Mr. Loeffler to conclude that Gilbert had never read the lease. (CP 198)

6. The lease required notice to the tenant's mortgagee before any unlawful detainer action. Based on paragraph 3 of the lease, if the tenant had a mortgage YAT was required to provide 30 days notice before commencing any unlawful detainer action. (CP 198) Gilbert's failure to notify the tenant's mortgagee would have been a defense to the unlawful detainer action. (CP 199)

7. Even though the tenant complied with the notice in a timely manner, Gilbert still proceeded with the unlawful detainer action. (CP 199)

An expert's declaration submitted in opposition to a motion for

summary judgment must be factually based and must affirmatively show competency to testify to the matters stated therein. *Pagnotta v. Beall Trailers of Oregon, Inc.*, 99 Wn. App. 28, 34, 991 P.2d 728 (2000). An expert's factual basis may consist of information in the record or information not in the record but reasonably relied on by others in the field. *Id.* Mr. Loeffler's expert opinion was based on his review of the relevant documents, information made known to him, the proceedings in the underlying unlawful detainer action, and his own expert knowledge. (CP 196) In the context of summary judgment, when an expert supports his opinion with specific facts, i.e., things that exist in reality, the evidence is admissible. *See Woodward v. Lopez*, 174 Wn. App. 460, 468, 300 P.3d 417 (2013); ER 703. The facts upon which Mr. Loeffler based his opinions were clearly identified. Gilbert's and LWG's disagreement with those facts alone establishes that summary judgment was not appropriate. When taken in the light most favorable to the nonmoving party, Mr. Loeffler's declaration established the applicable standard of care and offered opinions based on the evidence from which a jury could conclude that Gilbert and LWG breached that standard. *See Keck v. Collins*, 184 Wn.2d at 372-73 (where an expert connected his opinions about the standard of care and causation to a factual basis, his opinion was sufficient

to raise a question of fact).

(b) The Trial Court Should Have Taken Judicial Notice of the Related Cases

A trial court's ruling on a request for judicial notice is reviewed *de novo*. *Welch Foods, Inc. v. Benton County*, 136 Wn. App. 314, 324, 148 P.3d 1092 (2006). YAT twice requested the trial court to take judicial notice of the proceedings in the unlawful detainer action, the Lockwood action, and the opinions of the court of appeals in the unlawful detainer action. (RP 34-35, 46; CP 372) In its oral ruling, the Court declined to take judicial notice of the related actions. (RP 46)

Under ER 201, a court may take judicial notice of certain adjudicative facts. ER 201(b) states in pertinent part:

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

In this case, the court should have taken judicial notice of the following adjudicative facts:

1. The Partial Judgment Based upon the Directive in the Court of Appeals Opinion that was entered against YAT in the amount of \$22,060.46 in the unlawful detainer action (CP 401-402; 445-47);
2. The counterclaim for wrongful eviction 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 (*Yakima Air Terminal - McAllister Field v. M.A. West Rockies Corporation*, 166 Wn. App 1005 (2012) and 178 Wn. App. 1016 (2013)); and,

4. The fact that YAT was sued by Lockwood in Yakima County Superior Court because Lockwood did not get notice of the unlawful detainer proceedings. *Byron and Alice Lockwood Foundation v. M.A. West Rockies Corporation, Yakima Air Terminal – McAllister Field, et al.* (CP 407-436; 735-773)

Although these proceedings are independent and separate from the legal malpractice claim, under ER 201 the court is permitted to take judicial notice of the adjudicative facts from such cases. *Welch Foods, Inc.*, 136 Wn. App. at 324 (Courts may take judicial notice of records from a different proceeding to establish the truth of the matters contained therein). Gilbert and LWG did not contest the existence or accuracy of the adjudicative facts the trial judge refused to consider. In fact, Gilbert and LWG also 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) The trial

court should have taken judicial notice of the adjudicative facts established in those proceedings as requested by YAT for purposes of its opposition to the motion for summary judgment.

(c) **The Trial Court Abused its Discretion When it Precluded YAT from Taking Gilbert's Deposition**

The trial judge ruled that Gilbert's deposition could not proceed "unless and until" YAT supplemented its answer to Defendants' interrogatory requesting YAT to identify "with specificity the acts or omissions giving rise to this action for legal malpractice that it claims fell below the standard of care." (CP 179) This effectively amounted to an inappropriate sanction against YAT under CR 37.

YAT's timely notice of appeal from the summary judgment order brings up for review all prior orders and judgments that prejudicially affect the final judgment. *Franz v. Lance*, 119 Wn.2d 780, 781, 836 P.2d 832 (1992); RAP 2.4(b). The trial court's discovery rulings are reviewed under the abuse of discretion standard. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). A court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Id.* Judicial discretion means a sound judgment which is not exercised arbitrarily, but with regard to what is right and

equitable under the circumstances and the law, and which is directed by the reasoning conscience of the judge to a just result. *Diaz v. Washington State Migrant Council*, 165 Wn. App. 59, 73, 265 P.3d 956 (2011).

In their motion to compel and for a protective order, Gilbert and LWG criticized the lack of detail in YAT's Complaint. (CP 1036) But YAT's pleading satisfied the notice pleading requirement of CR 8(a), and neither Gilbert nor LWG filed a motion under CR 12(b)(6) for failure to state a claim or 12(b)(e) for a more definite statement. Gilbert and LWG then complained that YAT wanted to take Gilbert's deposition "hoping to uncover information that might conceivably support its malpractice action." (CP 1036) This was remarkable in view of the fact that is ***the very purpose of discovery!*** See *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 232, 654 P.2d 673 (1982)(The purpose of the discovery rules is to enable the parties to prepare their cases for trial).

"CR 26(b)(1) allows a broad scope of discovery, the only restrictions being that the matter must be relevant and not privileged." *Id.* In determining whether a protective order is needed, a court must decide whether a party has shown good cause to limit the scope of discovery. CR 26(c). To establish good cause, the party must show that specific prejudice or harm will result if a protective order is not issued. *Flower v.*

T.R.A. Industries, Inc., 127 Wn. App. 13, 38, 111 P.3d 1192 (2005)(Harm threatened by a duplication of a deposition is insufficient cause to preclude a party's deposition).

Gilbert and LWG made no showing of any unfair prejudice sufficient to support their request for a protective order under CR 26. It appears the court entered the discovery order merely for Gilbert's convenience, so that he could be fully briefed on YAT's claims before being questioned about the factual basis for that claim, and despite the fact he undeniably possessed facts relevant to YAT's malpractice claim. (CP 179-181) A deposition of the responsible defendant lawyer is an essential step in preparing a case to survive summary judgment and proceed to trial on a legal malpractice claim. Yet this was denied to YAT. *See Flower v. T.R.A. Industries, Inc.*, 127 Wn. App. at 38 (A plaintiff's right of access to the courts includes the right of discovery authorized by the civil rules).

The trial court's restriction on deposing Gilbert essentially amounted to a sanction against YAT for purportedly not providing enough information in its answers to discovery requests. In granting summary judgment, the court specifically noted that Gilbert's deposition was foreclosed because the interrogatory was not fully answered. (RP 45) The court's exercise of discretion regarding this discovery order should be

reviewed under the standards set forth in *Burnett*:

...When the trial court “chooses one of the harsher remedies allowable under CR 37(b), ... it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed,” and whether it found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial....We have also said that “ ‘it is an abuse of discretion to exclude testimony as a sanction [for noncompliance with a discovery order] absent any showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct.’ ” [Citations omitted]

Burnet v. Spokane Ambulance, 131 Wn.2d at 495-96.

YAT's legal malpractice claim was pending for less than a year at the time of the summary judgement hearing (including a delay of several months due a bankruptcy issue (CP 175; RP 12-13)) -- no discovery deadline had passed, and the case had not yet been scheduled for trial. The court made no finding that YAT willfully violated the discovery rules. On these facts, it was an abuse of discretion for the trial court to impose the severe sanction of denying YAT the ability to depose the central defendant in its malpractice claim without first having considered, on the record, a more reasonable alternative that could have advanced the purposes of discovery and still address Defendants' minor complaint about the effect (if any) of YAT's supposed inadequate interrogatory response.

Id. An easy and obvious alternative would simply have been to allow YAT to depose Gilbert and then supplement its interrogatory response, as occurs in thousands of lawsuits every day. Instead, the trial judge issued an arbitrary, harsh and unreasonable order. The court failed to consider what was right and equitable under the circumstances and, therefore, abused its discretion. *Diaz*, 165 Wn.App. at 73.

The trial court's preclusion of Gilbert's deposition unquestionably and unfairly prejudiced YAT's ability to defend against the motion for summary judgment. (RP 44-45) The court noted that the motion for summary judgment was driven by its order that Gilbert could not be deposed until YAT had identified all of the reasons Gilbert breached the standard of care, stating: "I put it under the category of you've pointed your finger at this particular lawyer and said, 'You've done me wrong,' and I think you have a duty to say how you done him wrong, or how he did you wrong, rather, before you take his deposition." (RP 44-45) Putting the cart before the horse, the court ruled that YAT was required to identify all of the ways that Gilbert breached the standard of care before YAT had an opportunity to depose Gilbert to discover what he did or didn't know, did or didn't do, and why he made the choices he made. This was a clear abuse of discretion. *See Doe v. Puget Sound Blood Center*,

117 Wn.2d 772, 780, 819 P.2d 370 (1991)(It is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense).

4. YAT Established a Genuine Issue of Material Fact as to all the Elements of its Malpractice Claim

(a) YAT Presented Evidence to Create a Question of Fact Regarding Breach of the Duty of Care

Whether a defendant has breached the duty of care generally is a question of fact. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999); *Bullivant*, 180 Wn. App.at 705.

Based on the facts laid out in his Declaration, Mr. Loeffler gave his expert opinion that a lawyer unfamiliar with the relevant terms of the lease and the fundamentals of landlord-tenant law has not demonstrated or complied with the minimum standard of care required of an attorney skilled in the area of landlord-tenant law in the State of Washington. (CP 199) The specific facts on which Mr. Loeffler relied to reach his opinion are set forth in detail above. *Supra* at pp. 17-19.

Mr. Loeffler also relied on the two opinions of the court of appeals in *Yakima Air Terminal - McAllister Field v. M.A. West Rockies Corporation*, 166 Wn. App 1005 (2012) and 178 Wn. App. 1016 (2013) to support his opinion that Gilbert did not satisfy the standard of care. (CP

196, 199) In those unpublished opinions, the court of appeals identified numerous errors in procedure which required reversal of the Writ of Restitution and Judgment issued in the unlawful detainer action. *Id.*, 178 Wn. App. 1016, *4. The court of appeals clearly stated: “it is evident that the airport commenced its unlawful detainer action at a time when West [the tenant] had cured the breach...” *Id.* at *1. The court of appeals also held that the airport’s finance administrator refused the tenant’s payment as untimely due to Gilbert’s advice, which was based on a misunderstanding of how previous payments had been applied. The court concluded there was no basis on which to refuse the tender. *Id.* at *2. The elements of unlawful detainer were not satisfied. *Id.* at *3.

While all the errors committed by Gilbert may not have been specifically addressed in the court of appeals’ review of the unlawful detainer action, the issues it did decide led Mr. Loeffler to conclude that Gilbert had breached the standard of care. (CP 196) On this evidence, a jury could find that Gilbert breached the standard of care of a reasonable attorney prosecuting an unlawful detainer claim.

The law is clear that the unlawful detainer statute is strictly construed in favor of the tenant. *Hous, Auth. v. Terry*, 114 Wn.2d 558, 563, 789 P.2d 745 (1990). A party who fails to comply with the unlawful

detainer statute may not maintain the action or avail itself of the superior court's jurisdiction. *Tacoma Rescue Mission v. Stewart*, 155 Wn. App. 250, 254 n. 9, 228 P.3d 1289 (2010). When a tenant contracts with his landlord for a specific period or manner of notice, compliance with such a condition is a jurisdictional prerequisite to relief in an unlawful detainer proceeding. *Cnty. Invs., Ltd. v. Safeway Stores, Inc.*, 36 Wn. App. 34, 37–38, 671 P.2d 289 (1983)(where lease provided 20–day notice to cure default, unlawful detainer action could not be based on less notice). A “termination notice that fails to follow the lease's terms is ineffective to maintain an unlawful detainer action.” *Tacoma Rescue Mission*, 155 Wn. App. 250, 255, 228 P.3d 1289 (2010). Based on the facts and law discussed above, YAT offered sufficient evidence from which a jury could conclude that Gilbert breached the standard of care for an attorney in Washington handling an unlawful detainer action.

Even though the trial court stated it would not take judicial notice of the court of appeals’ decisions in the unlawful detainer action (RP 46), the trial court heavily relied on those opinions in granting Defendants’ motion for summary judgment. The court’s ruling reflects an inconsistent and unfair double standard. (RP 47-51)

Mr. Loeffler’s Declaration made clear that the notice of default

was defective, but the trial court rejected this evidence because the court of appeals did not base its decision on that fact. (RP 47) However, the defective notice was a fact Mr. Loeffler relied upon in reaching his expert opinion that Gilbert breached the standard of care. (CP 196-97) It is evidence from which the jury could infer a breach of the standard of care.

Mr. Loeffler's Declaration also noted that the tenants' assignor, Noland Decoto, may have been able to cure if it had been given notice of the default, as required under the lease. (CP 197) The trial court rejected that evidence because Mr. Loeffler did not state with a certainty that Noland Decoto would have cured. (RP 48) This is an impossible evidentiary standard to meet, and one not properly resolved on summary judgment. Instead, it presents a question of fact for the jury to decide. *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).

Mr. Loeffler stated his opinion that it was clear from the transcript of the unlawful detainer action proceedings that the tenant's payment was tendered on March 26. (CP 198) The trial court disagreed. (RP 48-50) The court expressly observed that there was a significant factual dispute as

to when the payment was made. (RP 48-49) The trial court specifically stated: “The issue is whether or not Mr. Gilbert as the attorney had a viable and arguable position on a payment received on the 29th. And I can't answer that. I don't know whether he did not.”³ (RP 50) This is a clear question of fact that should have prevented summary judgment.

In its oral ruling, the trial judge stated: “It's clear from the decision that there were failures of communication between the lawyer and the client. Again, I don't know what that means, and I don't know whose fault it is. Is it the failure of the client to provide information to the lawyer? Was it the lawyer not providing information to the client? I don't know.” (RP 50) Again, this frames precisely why YAT should have been allowed to depose Gilbert, and reveals clear questions of fact which should have precluded summary judgment on the malpractice claim.

The failure to give notice to the mortgagee as required by the lease was a crucial and negligent failure by Gilbert. (CP 198-99) The court rejected Mr. Loeffler's opinion on this issue because there was no independent evidence that there was a mortgagee.⁴ (RP 51) Gilbert and LWG argued to the trial court that there was no evidence that Gilbert

³ Neither Gilbert nor LWG submitted any evidence to the trial court that the payment was received on the 29th.

⁴ There was evidence that there was a mortgagee if the trial court had taken judicial notice of the Lockwood case as requested by YAT. (CP 407-49; 735-73)

knew there was a mortgagee. (CP 208) However, neither Gilbert nor LWG submitted any evidence that Gilbert was unaware of the mortgagee. Whether Gilbert did know or should have known of the mortgagee is a question of fact for the jury in light the clear requirement in the lease that such a mortgagee must be given notice. (CP 198-99)

In its oral ruling, the trial judge also stated: "I can't find that there's been any identifiable breach. There are suggestions of breach, but no identifiable breach." (RP 51-52) It is apparent from this statement that the court was weighing the evidence, which it is not permitted to do in assessing a motion for summary judgment. *Renz v. Spokane Eye Clinic*, P.S., 114 Wn. App. 611, 623, 60 P.3d 106, 112 (2002)(On summary judgment the courts do not weigh or balance competing evidence).

On summary judgment, the trial court must be particularly careful to give deference to the position of the nonmoving party to avoid usurping the role of the fact finder. *Id.* The trial court must view the evidence and the inferences that can be drawn therefrom in the light most favorable to YAT. *Id.* When taken in the light most favorable to YAT as the nonmoving party, Mr. Loeffler's Declaration would allow a jury to conclude that a reasonable attorney would have made himself familiar with the specific terms of the lease so as to comply with all notice

requirements and would not have filed the unlawful detainer action after a timely tender of payment by the tenant. *See Keck v. Collins*, 184 Wn.2d at 372-73 (where the expert stated the standard of care and how it was breached, summary judgment should not have been granted). Mr. Loeffler provided the necessary testimony to establish that Gilbert negligently failed in many aspects to meet the applicable standard of care. *Id.* Because the facts viewed most favorable to YAT could sustain a verdict for YAT, denial of the summary judgment motion was required.

(b) **The Attorney Judgment Rule Does Not Shield Gilbert's Actions from Review**

In the trial court, Gilbert and LWG argued that Gilbert could not be liable for malpractice because he made a “judgment call” in pursuing the unlawful detainer claim. (RP 23-25) Under the attorney judgment rule, an attorney is not liable for making an allegedly erroneous decision involving honest, good faith judgment if (1) that decision was within the range of reasonable alternatives from the perspective of a reasonable, careful and prudent attorney in Washington; and (2) in making that judgment decision the attorney exercised reasonable care. *Bullivant*, 180 Wn.App. at 704. But no Washington case supports the proposition that an attorney cannot be liable for an error of judgment as a matter of law when the plaintiff comes forward with evidence sufficient to create factual

issues on breach of duty. *Id.* at 705.

Bullivant establishes that under the attorney judgment rule a plaintiff can avoid summary judgment on breach of duty for an error in judgment in one of two ways. First, the plaintiff can show that the attorney's exercise of judgment was not within the range of reasonable choices from the perspective of a reasonable, careful and prudent attorney in Washington. *Bullivant*, 180 Wn. App. at 706. Second, the plaintiff can show that the attorney breached the standard of care in making the judgment decision. *Id.* Even if the decision itself was within the reasonable range of choices, an attorney can be liable if he was negligent based on how that decision was made. *Id.*

Gilbert and LWG argued to the court that an expert declaration must use “magic language” by specifically stating that “no reasonable Washington attorney would have made the same decision.” (RP 25) That argument should have been rejected by the trial court. In *Bullivant*, the Fire District submitted opinions from three experts that the attorney’s settlement evaluation was erroneous and underestimated the value of the plaintiffs' claims. All three expressly stated that the attorney’s settlement evaluation breached an attorney's standard of care. Even though none of the experts specifically used the “magic language”, the appeals court

inferred that the experts believed that no reasonably prudent attorney would have agreed with the attorney's evaluation based on their opinions that he breached the standard of care. *Id.*, at 709.

Mr. Loeffler's Declaration opined that the notice on which the unlawful detainer action was based was defective on its face; 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 be familiar with the terms of the lease or the requirements of Chapter 59.12 RCW prior to commencing this action; and the action was improperly brought after the tenant had timely cured the default. (CP 196-199) Based on these facts, Mr. Loeffler stated his opinion that Gilbert did not comply with the minimum standard of care required of an attorney skilled in the area of landlord-tenant law. (CP 199) As in *Bullivant*, it is a reasonable inference that Mr. Loeffler believed no reasonably prudent attorney would have pursued the unlawful detainer action in the same manner as Gilbert when the tenant had made a timely tender of payment (or there was doubt if the payment was timely made). It is for a jury to decide whether a reasonably prudent attorney would have pursued the eviction knowing that strict compliance with the unlawful detainer statute was necessary to avoid exposing YAT to significant damages. Gilbert's clear lack of familiarity

with the terms of the lease resulted in the lease assignor and the tenant's mortgagee not receiving notice of the default as required by the lease, and Gilbert's errors exposed YAT to liability and damages. (CP 197-99) Jury questions abound.

(c) **YAT Presented Evidence to Create a Question of Fact Regarding Proximate Cause**

Proximate cause has two elements: cause in fact and legal causation. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). Cause in fact, or "but for" causation, refers to the "physical connection between an act and an injury." *Hartley*, 103 Wn.2d at 778. A plaintiff "must establish that the harm suffered would not have occurred but for an act or omission of the defendant." *Joyce v. Dept. of Corr.*, 155 Wn.2d 306, 322, 119 P.3d 825 (2005). Cause in fact is usually a question for the trier of fact and is generally not susceptible to summary judgment. *Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005); *Bullivant*, 180 Wn. App. at 707.

The plaintiff need not prove cause in fact to an absolute certainty. It is sufficient if the plaintiff presents evidence that "allow[s] a reasonable person to conclude that the harm more probably than not happened in such a way that the moving party should be held liable." *Martini v. Post*, 178 Wn. App. at 165, (citing *Little v. Countrywood Homes, Inc.*, 132 Wn. App.

777, 781 (2006)). The evidence presented may be circumstantial as long as it affords room for “reasonable minds to conclude that there is a greater probability that the conduct relied upon was the [cause in fact] of the injury than there is that it was not.” *Id.*, (citing *Hernandez v. W. Farmers Ass’n*, 76 Wn.2d 422, 426, 456 P.2d 1020 (1969)).

Mr. Loeffler’s Declaration provided several factual bases for a jury to conclude that but for Gilbert’s decision to pursue the unlawful detainer action when there were issues regarding the timing of the tenant’s cure and the flawed notice of default, YAT’s tenant would not have been wrongfully evicted and/or the other parties requiring notice would have had an opportunity to participate in the proceedings. Gilbert’s continued negligent pursuit of the eviction directly exposed YAT to damages for restitution and for attorneys’ fees and costs. *Yakima Air Terminal - McAllister Field v. M.A. West Rockies Corp.*, 178 Wn. App. 1016, *4 (2013). (CP 445-47) In addition, Gilbert’s failure to give notice to the mortgagee (Lockwood) exposed YAT to further litigation and the risk of a substantial judgment against it. (CP 407-36; 735-73)

In its oral ruling, the court stated: “I can’t find that anything that Mr. Gilbert did was actually the cause of the damage.” (RP 52) This comment confirms that the trial court was making conclusions as to what

disputed facts showed rather than deciding whether there was evidence that the jury could consider. (RP 52) This was reversible error. A trial court cannot weigh the evidence when deciding a motion for summary judgment. *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. at 623. There was sufficient evidence before the trial court to support a jury verdict on causation, and summary judgment should have been denied.

(d) **YAT Presented Evidence that it Incurred Damages Due to Gilbert's Negligence**

The damages to which YAT was exposed by Gilbert's and LWG's negligent actions are clearly identified in the court of appeals' opinion that directed the trial court to award the tenant its reasonable attorney fees and costs in the unlawful detainer action and appeal. 178 Wn. App. 1016 *4. The court of appeals also directed the trial court to enter orders and authorize the issuance of process appropriate to restore the tenant to the leased premises; the value of the leased premises; or, if appropriate to provide restitution. *Id.* The trial court in the unlawful detainer action entered a Partial Judgment Based upon the Directive in the Court of Appeals Opinion against YAT on March 21, 2014 in the amount of \$22,060.46. (RP 31; CP 401-402; 445-47) YAT requested the trial court take judicial notice of this adjudicative fact. (RP 30-31) That judgment alone creates a question of fact as to YAT's damages.

In addition, in the unlawful detainer action the tenant has asserted a counterclaim against YAT for wrongful eviction. (CP 954-59) YAT has also been sued for damages by the tenant's mortgagee due to the wrongful termination of the lease. *Byron and Alice Lockwood Foundation v. M.A. West Rockies Corporation; Yakima Air Terminal – McAllister Field, et al.* (CP 407-36; 735-73) The filing of these claims against YAT is an adjudicative fact of which the court should have taken judicial notice pursuant to ER 201(b). These adjudicative facts were ample to create a question of fact regarding YAT's damages so as to preclude summary judgment on this element.

(e) **The Evidence was Sufficient to Defeat Summary Judgment**

The trial court's oral ruling demonstrates that it did not view all reasonable inferences from the evidence in YAT's favor. Instead, the court weighed the evidence. This is not proper under CR 56. *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. at 623.

"The court's 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." *Keck v. Collins*, 184 Wn.2d at 369, (citing *Burnet*, 131 Wn.2d at 498). In this case, the evidence, if believed, could sustain a verdict for YAT, and summary judgment should have been

denied. *Keck v. Collins*, 184 Wn.2d at 372-73.

B. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED YAT'S MOTION FOR CONTINUANCE

The trial court ruled that YAT's motion for 56(f) relief was untimely, failed to identify the facts it sought through Mr. Gilbert's deposition, why such facts would raise a genuine issue of fact on all of the elements challenged, and why YAT could not prove the same facts through other evidence available to it. (CP 356-57) The court also criticized YAT's supposed delay in deposing Mr. Gilbert or in developing other helpful evidence. (CP 357)

The trial court was well aware that the delay in scheduling the deposition was due to Defendants' unwillingness to make Gilbert available for a deposition (CP 239-273; 1030-35) and that YAT was barred from taking Gilbert's deposition due to the court's own discovery order. (CP 179-81) A continuance on the summary judgment motion should have been granted because Gilbert's testimony would have gone directly to the primary fact issues in the lawsuit, and may alone have required denial of the summary judgment motion.

The trial court was surely aware of the facts YAT sought through Gilbert's deposition in light of the fact that the judge expressly acknowledged that YAT was without key evidence in the matter because

of the court's order preventing YAT from deposing Gilbert. (RP 44-45)
The trial judge specifically observed that he did not know what Gilbert's relationship was with YAT, and what information he did or didn't have. (RP 50) Clearly, this was a recognition that key evidence was missing, and it was an abuse of discretion for the court to deny YAT's motion for continuance:

... [W]hen a trial court has been shown a good reason why an affidavit of a material witness cannot be obtained in time for a summary judgment proceeding the court has a duty to accord the parties a reasonable opportunity to make their record complete before ruling on a motion for a summary judgment, especially where the continuance of the motion would not result in a further delay of the trial.

Cofer v. Pierce County, 8 Wn. App. 258, 262-63, 505 P.2d 476 (1973).

The trial court must make justice its primary consideration in ruling on a motion for continuance, even an informal one. CR 1; *Coggle v. Snow*, 56 Wn. App. 499, 507-08, 784 P.2d 554 (1990)(the trend of modern law is to interpret court rules and statutes to allow decision on the merits of the case); *Butler v. Joy*, 116 Wn. App. 291, 299, 65 P.3d 671 (2003)(the primary consideration in the trial court's decision on the motion for a continuance should have been justice).

The court also suggested in its oral ruling that more detail as to the basis of Mr. Loeffler's opinion was desirable. (CP 48-50) The court

should have allowed YAT the opportunity to provide that foundation through a deposition of Gilbert. But even without that deposition, as long as Mr. Loeffler's affidavit testimony if believed by a jury could sustain a verdict, the trial court should give a plaintiff an opportunity to supply more detail. *Keck v. Collins*, 184 Wn.2d at 372-73, n. 10 (citing *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1317 (1985))(As a proper accommodation between Rule 56(e) and Fed.R.Evid. 705, an expert opinion is admissible if the factual basis for the opinion is stated in the affidavit, even though the underlying factual details and reasoning upon which the opinion is based are not. If further facts are desired, the movant may request and the court may require their disclosure).

C. THE COURT ABUSED ITS DISCRETION WHEN IT SUMMARILY DENIED YAT'S MOTION FOR RECONSIDERATION

The denial of a motion for reconsideration is reviewed for an abuse of discretion. *Chen v. State*, 86 Wn. App. 183, 192, 937 P.2d 612 (1997); *Perry v. Hamilton*, 51 Wn. App. 936, 938, 756 P.12d 150, *review denied*, 111 Wn.2d 1017 (1988). The Order For Motion For Reconsideration (CP 881) fails to identify any reasons for the trial court's decision, and it does not reflect that the court addressed the legitimate basis for YAT's reconsideration motion. The record is devoid of any reasoning that would

allow the court of appeals to review the trial court's reasoning in denying the motion for reconsideration.

1. **Grounds for Granting a Motion for Reconsideration Were Present**

A court may reconsider a summary judgment decision if the non-prevailing party provides it with additional facts or theories showing that an issue of material fact exists. *See August v. U.S. Bancorp*, 146 Wn. App 328, 347, 190 P.3d 86 (2008); *Martini v. Post*, 178 Wn. App. at 161-62; *Snoqualmie Police Ass 'n v. City of Snoqualmie*, 165 Wn. App. 895, 906, 273 P.3d 983 (2012); *Chen v. State*, 86 Wn. App. at 192.

CR 59 sets forth the grounds for a trial court to reconsider an order granting summary judgment. YAT requested reconsideration based on CR 59(a)(7); namely, that there is no evidence or reasonable inference from the evidence to justify the decision, or that it is contrary to law; and (9) that substantial justice has not been done.

In addition to the evidence submitted in opposition to the motion for summary judgment, which should have been sufficient to defeat the summary judgment motion, YAT submitted additional evidence strengthening its position that summary judgment should have been denied because there were questions of material fact as to all elements of the malpractice claim. The trial court's summary judgment ruling was

contrary to the law and evidence, and substantial justice was not done.

2. **YAT's New Evidence Should Have Been Considered**

Nothing in CR 59 prohibits the submission of new or additional materials on reconsideration. *Chen*, 86 Wn. App. at 192. "In the context of summary judgment, unlike in a trial, there is no prejudice if the court considers additional facts on reconsideration." *August v. U.S. Bancorp*, 146 Wn. App. at 347 (citing *Chen v. State*, 86 Wn. App. at 192). Motions for reconsideration and the taking of additional evidence are within the discretion of the trial court. *Martini*, 178 Wn. App. at 162 (The decision to consider new or additional evidence presented with a motion for reconsideration is squarely within the trial court's discretion).

The order denying YAT's motion for reconsideration specifically noted that the court had considered YAT's Motion for Reconsideration **and supporting documents**.⁵ (CP 881) Accordingly, that additional evidence is part of the record upon which the court of appeals should base its review. *See Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 284 n. 9, 943 P.2d 1378 (1997); *Tanner Elec. Coop. v. Puget Sound Power &*

⁵ In *Keck v. Collins*, 184 Wn.2d at 362, the Washington Supreme Court held that a trial court must apply the *Burnet* factors when deciding whether to exclude untimely evidence submitted in response to a summary judgment motion. Based on *Keck*, if the trial court excluded the new evidence because it was untimely, the court should have considered the *Burnet* factors on the record or in its order denying reconsideration. It would have been error for the trial court to exclude the additional declarations without analyzing the *Burnet* factors. *Keck*, 184 Wn.2d at 369.

Light, 128 Wn.2d 656, 675 n. 6, 911 P.2d 1301 (1996). Because there was ample evidence of a breach of the standard of care that directly exposed YAT to significant liability and damages related to the wrongfully issued unlawful detainer, there was no good or fair reason for denying YAT's motion for reconsideration.

3. **The Evidence Before the Court Established Questions of Fact as to All Elements of YAT's Malpractice Claim**

Mr. Loeffler's second Declaration reiterated his expert opinion that no reasonably prudent lawyer in the State of Washington would have commenced the unlawful detainer proceedings on behalf of YAT when the notice of default was not compliant with statutory requirements, the attorney was not familiar with the requirements of the lease and the tenant had made a timely tender to cure the default. (CP 475-486) Even where the court issued the writ of restitution, a reasonably prudent lawyer should have known that it would be reversed on appeal. (CP 475)

YAT relied upon Gilbert's and LWG's advice in proceeding with the unlawful detainer action. (CP 397-98) Gilbert negligently failed to ensure that the elements of unlawful detainer were satisfied before he proceeded with the unlawful detainer action. (CP 481) Gilbert's glaring errors and omissions were almost immediately identified by the tenant as fundamental flaws in the eviction case, and were delineated item-by-item

by the tenant's counsel in a letter to Gilbert dated August 13, 2010. (CP 481; 791-795) These were the very same issues that the court of appeals ultimately determined to constitute wrongful eviction. *See Yakima Air Terminal McAllister Field v. M.A. West Rockies Corporation*, 178 Wn. App. 1016 (2013). The court of appeals observed:

In conclusion, the March 26 payment by West [the tenant] more than covered its defaults in payment of monthly rent. Its only other breach under the lease at the time the unlawful detainer action was commenced was its failure to pay attorney fees and costs but it had not received a notice of default identifying those breaches or providing it with what would have been a 30-day period to cure. The elements of unlawful detainer were not satisfied.

Id., 178 Wn. App. 1016, *3.

Gilbert then prepared inadequate findings of fact and conclusions of law because he did not address the key issue regarding when the tenant tendered payment to YAT and how YAT handled the tenant's accounts. (CP 485) The evidence is sufficient for a jury to conclude that Gilbert and LGW's actions in pursuing the unlawful detainer action fell below the standard of care of a reasonably prudent lawyer in the State of Washington. *Bullivant*, 180 Wn. App. at 704-09.

Mr. Loeffler's Declaration also provided evidence of proximate cause. He stated that the ultimate reversal of the eviction and the writ of restitution "was entirely foreseeable," and "there is a direct causal

connection between Mr. Gilbert's failure to meet the standard of care and the damages sustained" by YAT's tenant due to the wrongfully issued writ of restitution. (CP 475-76) Mr. Loeffler further declared that there is "a direct unbroken causal connection between Mr. Gilbert's negligence and the damages inflicted upon YAT." (CP 475) Had Gilbert met the standard of care, the Lockwood lawsuit could not have been prosecuted. (CP 475-76) The evidence is sufficient for a jury to find that but for Gilbert's faulty actions, YAT would not have been exposed to a lawsuit and judgment for wrongful eviction and attorneys' fees (CP 445-47, 951-959) and would not have been sued by the tenant's mortgagee.⁶ (CP 735-73) Mr. Loeffler stated:

Any reasonably prudent lawyer practicing in this field should have recognized that such a result from the trial court would be vulnerable on appeal and that any reliance on such a result would expose the tenant to being evicted improperly. Consequently, the landlord would similarly be exposed to the threat of damages for wrongful eviction and other causes of action. Failure to perceive these risks and avert them constitutes a failure to fulfill the minimum standard of care associated with appropriate representation of a landlord's interest in commencing and prosecuting an unlawful detainer action. (CP 479)

Mr. Loeffler then opined:

Because the unlawful detainer notice was statutorily

⁶ The Court can take judicial notice of the fact that claims have been asserted in other court actions and are a matter of public record. ER 201(b). (CP 951-59; 407-43; 445-47; 735-73)

defective, the trial court lacked jurisdiction, and the unlawful detainer proceeded on a fundamentally flawed basis. As a result, the tenant's eviction was not proper under the law. Consequently, YAT, as the landlord, was and is exposed to claims of wrongful eviction. (CP 480)

There was also ample evidence that YAT suffered damages as a direct result of the wrongful eviction caused by Gilbert's negligence. (CP 475-76) YAT's damages included a judgment against it (CP 401-402, 445-47) attorneys' fees in defending against the lawsuits filed by Lockwood and Langdon [the tenant], and exposure to the damages alleged in both actions. (CP 477-79; 486)

The supplemental declarations offered by YAT directly addressed questions raised by the trial judge during its oral decision. (CP 376-840; RP 44-52) The trial court's denial of the motion for reconsideration was manifestly unreasonable because the evidence, when viewed in the light most favorable to the nonmoving party, creates a genuine issue of material fact as to YAT's malpractice claim. *Martini*, 178 Wn. App. at 164.

D. THE ORDER GRANTING ATTORNEYS' FEES AND COSTS SHOULD BE REVERSED

Because the summary judgment motion should have been denied, the court's order granting Defendants' statutory attorneys' fees and costs should also be reversed. (CP 894-899)

VII. CONCLUSION

The court abused its discretion in limiting YAT's ability to depose Gilbert and in denying YAT's motion for continuance. The trial court also erred in declining to take judicial notice of adjudicative facts. These errors unfairly prevented YAT from offering relevant evidence in opposition to the motion for summary judgment. Even so, the declaration of YAT's expert was sufficient to raise questions of fact on all the elements of the legal malpractice claim. Because there were questions of material fact, the trial court erred in granting Defendants' motion for summary judgment. The court also abused its discretion in denying YAT's motion for reconsideration because the additional evidence created a genuine issue of material fact. The summary judgment order should be reversed, and the case should be remanded to the superior court for trial on the merits.

Respectfully submitted this 1st day of August, 2016.



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YAKIMA AIR TERMINAL - McALLISTER FIELD

CERTIFICATE OF SERVICE

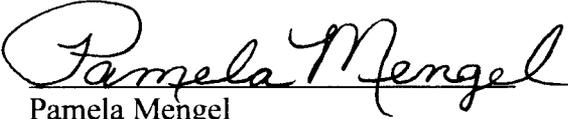
I HEREBY CERTIFY that on the 1st day of August, 2016, I caused to be served a true and correct copy of the foregoing on the following in the manner indicated:

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