

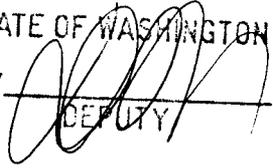
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COURT OF APPEALS  
DIVISION II

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Division Two No. 41279-9-II

Supreme Court No. 88460-9

STATE OF WASHINGTON

BY   
DEPUTY

SUPREME COURT  
OF THE STATE OF WASHINGTON

**FILED**  
FEB 21 2013

CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

*DF*

TERESA SCHMIDT,

Respondent/Cross-Appellant,

vs.

TIMOTHY P. and JANE DOE COOGAN and the martial community  
comprised thereof, and THE LAW OFFICES OF TIMOTHY PATRICK  
COOGAN and all partners thereof,

Appellant/Cross-Respondent.

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RESPONDENT'S PETITION FOR DISCRETIONARY REVIEW

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**A. Identity of Petitioner**

Teresa Schmidt is the petitioner and was the plaintiff in Superior Court.

**B. Court of Appeals Decision**

Ms. Schmidt seeks review of Division Two's most recent published opinion in her case. See Appendix at page SC 1-11.

**C. Overview Of Issues On Review**

This matter has been tried to a jury twice and has a long appellate history with now three Division Two opinions and one by this Court.

Division Two's most recent opinion is in direct, black-and-white conflict with Division One (and the national rule) on the same issue. It also applied the wrong standard of review and dismissed the case on an issue that was not preserved in the Trial Court nor error assigned; but even if it was and had merit, should only result in a new trial – not an outright dismissal.

The case arises out of respondent Timothy Coogan's failure to perfect Ms. Schmidt's slip-and-fall claim within the statute of limitations. At the most recent second trial, the Trial Court denied Mr. Coogan's motions for a directed verdict and a new trial and entered judgment.

The sole issue remanded for that second trial was the value of Ms. Schmidt's personal injury. No other element was at issue.

Consistent with that, in motions in limine at the second trial Mr. Coogan told the court collectability was not at issue by moving to exclude evidence of the underlying tortfeasor's liability insurance arguing it was "not relevant." Based on that, the Trial Court granted Mr. Coogan's motion in limine and excluded evidence of the store's insurance.

However, in the middle of trial Mr. Coogan flip-flopped, saying he wanted to argue collectability on – in his words – "proximate cause" and argue a judgment against the original tortfeasor would not have been collectable.

The Trial Court denied that request, ruling both that the only issue remanded for trial was damage and that even without that limitation Mr. Coogan was raising the issue for the first time too late in the life of the case, not having raised it at the first trial nor any time since.

Thus, not only did the Trial Court deny Mr. Coogan's request to argue collectability (on proximate cause, which is what he argued), it prevented Ms. Schmidt from presenting it as well.

That ruling was consistent with Division One's opinion in Tilly v. Doe, 49 Wn.App. 727 (1987) (review denied, 110 Wn.2d 1022 (1988)) and the national rule both of which hold "collectability" is an element of proximate cause. It is clear Mr. Coogan understood that as well because he argued he wanted to raise the issue on proximate cause, not damage.

Additionally, not allowing that new argument, over 10 years after the initiation of the case, was also within the Trial Court's discretion in determining the appropriateness of the scope of new issues to be raised on retrial that had not been raised before.

Contradicting his argument to the trial Court, on appeal Mr. Coogan argued collectability was an element of damage. Despite not raising that timely in the Trial Court, Division Two agreed and reversed.

Division Two erred. This Court should accept review for a variety of compelling reasons.

First, Division Two's opinion directly conflicts with Division One in Tilly's that collectability is an element of "proximate cause in a legal malpractice action." Tilly, 49 Wn.App. at 732. Here, Division Two held "collectability is a component of damages in a legal malpractice action." Schmidt, 171 Wn.App. at 685. This Court should resolve the conflict between Divisions One and Two.

Second, Division Two's holding conflicts all case law by applying the wrong standard of review. Through deft drafting, Division Two reviewed the Trial Court's rulings on the appropriate scope of issues for retrial de novo by focusing only on the record at half time while ignoring the discretionary rulings that created the record in the first place.

Third, the opinion deviates from a variety of accepted appellate

procedures: (a) it considered and reversed on an issue that was not raised in the Trial Court nor even assigned as error; (b) it made decisions on the sufficiency of Mr. Coogan's attempt to preserve the record that are at odds with this Court's holdings on what is required; (c) it reversed on an issue that at best should have generated a remand for a new trial.

**D. Issues Presented For Review**

1. Whether Division Two's opinion is in conflict with Division One's decision in Tilly by its conclusion "collectability" in legal malpractice cases is an issue of damage as opposed to proximate cause;
2. Whether Division Two applied the correct standard of review by reviewing de novo the Trial Court's ruling on the permissible scope of issues on remand;
3. Whether Division Two erred by the several holdings it made regarding preservation of the record;
4. Assuming "collectability" was properly put at issue by respondent and assuming the issue was even assigned as error, whether Division Two erred by reversing based on the quantum of circumstantial evidence present;
5. Whether Division Two erred by denying appellant's motion for reconsideration;
6. Whether this Court should accept review of the balance of the issues raised, but not decided by Ms. Schmidt's appeal to Division Two on legal malpractice as they logically flow from the issues presented above.

**E. Facts**

This matter was originally tried to a jury in 2003. (CP 23-28) Mr.

Coogan moved for (and obtained) a new trial, arguing the quantum of damage awarded for Ms. Schmidt's personal injury was not supported by the evidence. Id. He did not argue Ms. Schmidt failed to present evidence of "collectability." Both parties appealed.

Mr. Coogan did not raise collectability while on appeal. But, Division Two reversed and dismissed the case outright finding Ms. Schmidt did not prove the "case within the case" against the original tortfeasor. 135 Wn.App. 605 (2006). This Court, en banc, reversed and remanded for resolution of the remaining issues. 162 Wn.2d 488 (2007).

Again, Mr. Coogan did not raise collectability while on that second appeal to Division Two or this Court as an alternate means to affirm the original reversal. Division Two remanded the matter for trial on the sole issue of damage. 145 Wn.App. 1030 (2008).

Thus, Mr. Coogan had up to the point of retrial five opportunities to raise "collectability;" at the: (1) first trial, (2) his first post trial motions where he obtained a new trial; (3) first Division Two appeal, (4) Supreme Court as an alternate basis to sustain the dismissal, and (5) the second Division Two appeal on remand from this Court. He did not do so.

Consistent with never raising the issue and no intention of ever doing so, during motions in limine on retrial Mr. Coogan moved to exclude evidence of collectability as being irrelevant; specifically, the

grocery store's liability insurance:

Exhibit 1. Cover of Coogan's file regarding Ms. Schmidt; this exhibit is objected to on the grounds that it clearly depicts the words (sic) "Safeco" on its cover thus inappropriately references insurance which as discussed above is inadmissible.

(App. 22). Based on Mr. Coogan never raising collectability and representing to the Court evidence collectability from the underlying tortfeasor was irrelevant, Ms. Schmidt demurred and the Trial Court granted the motion and excluded the evidence. (RP 53).

Despite that, during the middle of the second trial, Mr. Coogan for the first time argued he wanted to raise the issue of "collectability."

May I go into my next issue? It's very short and **I did not brief this**. And a lot of times these motions are not briefed. But there is an issue here that I raised in summary judgment **with respect to proximate cause** and I remember briefing this issue and bringing this to the attention of everybody.

RP 507, lines 16-22.

Contrary to his self-serving assertion, Mr. Coogan did not "raise" (collectability) on "summary judgment." What he did was in a motion in limine make an extended, block cite from AmJur on the issue of excluding evidence of general damages for malpractice. (CP 735, page 4 of defendant's motions in limine). Contained in that block quote, and entirely in passing, was one limited mention of the word "collectability."

Mr. Coogan did not “brief” collectability in his pre trial motions much less did he properly bring it to the attention of the Trial Court.

In any event, during trial (after his preamble above and reply by Ms. Schmidt) the Trial Court specifically asked Mr. Coogan what element he wanted to raise collectability on; he was clear:

Element two, **proximate cause is what I’m talking about** here. They’re still going to have to prove proximate cause of damages. And in this context, she has to prove that but for his negligence, she would have fared better. An element of that concept and that goes to the value of the underlying claim. An element of that concept is the plaintiff’s burden of proof collectability.

Id. at 507, lines 16-22. (emphasis added).

The Trial Court properly recognized the case was not remanded on proximate cause. The Trial Court also exercised its discretion by finding that even if properly raised, it was being raised too late in the proceedings:

...this case is not about any element of malpractice other than damages and proximate cause as it relates to damages (e.g., what injury was caused when Ms. Schmidt fell).

If there was a question as to collectability, that should have been addressed at the first trial. This trial is about damages only.

RP 508.

It was only later, after it was too late, that Mr. Coogan asserted collectability was an issue of damage Further, on appeal he did not assign as error the Trial Court’s exercise of its discretion to determine and limit

the scope of factual matters to be retried.

**F. Authority And Argument**

**1. THE CRITERIA TO ACCEPT REVIEW**

Division Two's opinion implicates the following provisions of RAP 13.4(b); the decision:

- (1) ...is in conflict with a decision of the Supreme Court;
- (2) ...is in conflict with another decision of the Court of Appeals; and
- (4) ...involves an issue of substantial public interest that should be determined by the Supreme Court.

**2. FINDING COLLECTABILITY IS AN ISSUE OF PROXIMATE CAUSE CONFLICTS WITH DIVISION ONE AND IS THE INCORRECT RULE**

The conflict between Division One in Tilly and Division Two here is manifest and requires no extended discussion. Tilly explicitly held collectability is an issue of proximate cause, Tilly, 49 Wn.App. at 732, whereas Division Two here found it was an issue of damage. Schmidt, 287 P.3d at 685.

What is particularly perplexing is Division Two in this case cited its own opinion of Matson v. Weidenkopf, 101 Wn.App. 972 (2000) as support. However, Matson indicated it was following the rule of Tilly.

Matson, 101 Wn.App. at 484.<sup>1</sup> Thus, not only does the opinion conflict with Division One in Tilly, it appears to conflict with Division Two's own opinion in Matson with no attempt to reconcile the conflicts.

Additionally, Division Two's opinion considering collectability an element of proximate cause is inconsistent with how negligence is viewed in general.

In this case, it is not subject to dispute Mr. Coogan breached his duty of care when he failed to timely file Ms. Schmidt's claim. His argument that, 'I may have been negligent, but the judgment was not collectability anyway,' is plainly one of proximate cause: 'I breached my duty but that breach was not the cause in fact of injury because there was nothing to collect.'

That is the very definition of proximate cause: "but for" the conduct of the defendant, the plaintiff was injured. Anderson v. Weslo, Inc., 79 Wn.App. 829, 838 (1995). See also Moyer v. Clark, 75 Wn.2d 800, 804 (1969) ("Negligence standing alone is not sufficient to impose liability on a wrongdoer. The wrongful conduct attributed to him must also constitute some substantial factor in producing the result complained of, e.g., there must have been causation in fact.")

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<sup>1</sup> Division Two in Matson also cited Schirmer v. Nethercutt, 157 Wash 172 (1930) and Martin v. Legal Servs., 43 Wn.App. 405 (1986) however while both discuss the broader concept of collectability of the underlying claim neither squarely addresses which element collectability is properly characterized as.

Other states that have considered this issue agree collectability is better understood as an element of proximate cause. Several have determined that represents the “majority rule”:

A majority of courts that have considered this issue view collectability as being closely related to proximate cause... Consequently, these courts have concluded that the plaintiff must demonstrate that if the defendant had performed adequately, the plaintiff would have succeeded on the merits in the underlying case and would have succeeded in collecting on the resultant judgment, because only then would the plaintiff have proven that the lawyer’s malfeasance was the proximate cause of the plaintiff’s loss.

Carbone v. Tierney, 151 NH 521, 532, 864 A.2d 308, 318 (2004)

(underline in original, citations omitted).<sup>2</sup>

That collectability is better understood as an element of proximate cause (the attorney may have been negligent, but that negligence was of no import because the judgment was not collectable anyway) has already

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<sup>2</sup> See also Kituskie v. Cobrman, 552 Pa. 275, 714 A.2d 1027 (1998); Tidwell v. Hinton & Powell, 315 Ga.App. 152, 153, 726 SE.2d 652, 654 (2012); Levin v. Lacher & Lovell-Taylor, 256 AD.2d 147, 149, 681 NYS.2d 504, 505 (1998) (“In order to show proximate cause, the plaintiff-client must establish that “but for” the attorney’s negligence the plaintiff would have prevailed in the matter at issue or would not have sustained any damage... In the present case, plaintiff’s have failed to show that “but for” the defendants’ alleged negligence they would have been **able to collect** on their judgment...”); Burke v. Roberson, 417 NW.2d 209, 211 (1987) (“A showing of proximate cause requires proof that the client would not only have prevailed in the underlying claim but that a judgment in the client’s favor **would have been collectible.**”); Haberer v. Rice, 511 NW.2d 279, 286 (1994) (“A showing of proximate cause requires proof that the client would not only have prevailed in the underlying claim but that a judgment in the client’s favor **would have been collectible.**”); Szurovy v. Olderman, 243 Ga.App. 449, 452, 530 SE.2d 783, 786 (2000) (“We note also Ms. Szurovy has not shown that any agreement would have been collectible.”);

been conceded by Mr. Coogan as that is precisely how he argued the issue to the Trial Court. Supra. It was only after realizing much later the case was not remanded on proximate cause that he flip-flopped and argued it should be considered an element of damage. His later attempt to fit a round peg into a square hole, however, does not change his original representations (his only preservation of the record) to the Trial Court that he wanted to reopen an element not remanded for consideration.

This Court should accept review on this issue. As the case law existed, particularly Tilly, Ms. Schmidt, the Trial Court and even Mr. Coogan, understood collectability to be an issue of proximate cause and proceeded accordingly. Attorney malpractice is a not uncommon tort. A conflict between the divisions on something as fundamental as to what the element of proximate cause and damage even are on such a basic claim cannot be allowed to stand and is an issue only this Court may resolve.

### **3. DIVISION TWO DEPARTED FROM THE APPROPRIATE STANDARD OF REVIEW**

#### **a. Overview**

Division Two indicated as a denial of Mr. Coogan's motion for directed verdict it considered the Trial Court's rulings on collectability and proximate cause de novo. Schmidt, 287 P.3d. at 684. That stands the standard of review on its head and eviscerates the abuse of discretion

standard that applies to the Trial Court's rulings that determined the record Division Two applied de novo review to in the first place.

The record that is reviewed de novo consists of issues and evidence admitted by the Trial Court; but, those are discretionary rulings reviewed for an abuse of discretion standard. Havens v. C&D Plastics, 124 Wn.2d 158, 168 (1994). Only after determining the appropriate scope of that discretionary record may a de novo review of that record occur.

By skipping ahead to the CR 50 motion and ignoring the discretionary rulings that determined the record the Court's CR 50 order was based on, Division Two negated the abuse of discretion standard for the Trial Court's rulings that determined the scope of the record in the first place; the effect of that was to review those discretionary rulings under a de novo standard as well.

This is particularly significant as Mr. Coogan failed to assign error to the Trial Court's discretionary rulings that themselves determined the scope of the record Division Two applied a de novo review to.

**b. Authority And Argument**

On remand and a second trial, a Trial Court may but is not required to revisit in the new trial, issues that were not previously (but could have) been raised at the first trial. See RAP 2.5(c)(1). As explained by State v. Barberio, 121 Wn.2d 48 (1993), RAP 2.5

...does not revive automatically every issue or decision which was not raised in an earlier appeal. Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question.

Id. At 50 (underline added).

And as well established, indeed, as even Division Two conceded in its opinion, Mr. Coogan never raised the issue of collectability until the middle of the second trial despite having no less than five opportunities (obligations) to do so. See Schmidt, 287 P.3d at 685.

Thus, in State v. Kilgore, 167 Wn.2d 29 (2009) this Court held that following remand even if a Trial Court “could” consider new issues on remand, its decision not to do so is within its discretion and if the Trial Court exercises its discretion not to do so, the appellate Court may not review on the merits decisions the Trial Court did not make because the Trial Court exercised its discretion not to allow them to be raised on retrial in the first place. Id. at 42.

In this case, not only did the Trial Court appropriately rely on the statement by Mr. Coogan that he wanted to argue collectability on an issue that was not remanded (proximate cause), even if not foreclosed by the limited remand the Trial Court determined it was not going to allow it because in her discretion she determined it “should have been addressed at the first trial.” RP 508. That may hardly be said to be an abuse of

discretion, particularly in light of Tilly.

Thus, ignoring the fact (which cannot be ignored) Mr. Coogan did not assign as error those discretionary rulings, if it could do anything, what Division Two was required to do was to first review the Trial Court's exercise of discretion to not allow Mr. Coogan's request to reopen proximate cause to put collectability at issue as he asked to do and whether, even if he could, whether it was unfair and too late to do it.

If and only if Division Two found the Trial Court abused its discretion in making those decisions, could it have conducted a de novo review of the record in light of what it would have been if collectability was allowed to have been put at issue. See Goodman v. Goodman, 128 Wn.2d 366, 371 (1995) (The appellate court must consider the record as considered by the Trial court). Here, Division Two conducted a de novo review of a record that did not exist. That was error.

However, it is suggested that for this Court the issue is actually more significant.

The import of Division Two's opinion is to make any discretionary decision subject to de novo review, provided the subject of the discretionary decision is later the basis of a CR 50 motion for directed verdict. Division Two provides no explanation why it failed to first review for an abuse of discretion the Trial Court's discretionary rulings

that created the record that was the basis of the denial of Mr. Coogan's CR 50 motion in the first place.

Division Two's opinion inexplicably omits the facts (cited above) of what took place in regard to Mr. Coogan expressly telling the Trial Court he wanted to raise the issue (collectability) on proximate cause as well as his moving in limine to exclude evidence of collectability (the store's insurance policy) by representing it was irrelevant. Those statements during trial were binding and the Trial Court was entitled to rely. See Kahn v. Salerno, 50 Wn.App. 110, 124 (1998); State ex rel. Turner v. Briggs, 94 Wn.App. 299, 303 (1999); Plankel v. Plankel, 68 Wn.App. 89, 95 (1992). Or in the alternative, his statement must be viewed as having "withdrawn" the issue for consideration on damage by telling the Trial Court he wanted to pursue it via proximate cause and not damage. See In re Marriage of Wherley, 43 Wn.app. 344 (1983).

And because Division Two does not acknowledge the Trial Court's discretionary rulings that created the record itself, it errs by not acknowledging the import of Mr. Coogan's failure to assign error to them.

If Division Two had properly started with the Trial Court's discretionary decisions that determined the scope of the record it reviewed de novo, that Mr. Coogan failed to assign as error that exercise of discretion should have stopped the analysis right there. This is no

different than if the Court of Appeals reversed a criminal jury verdict because exculpatory evidence should have resulted in an acquittal, while giving no weight to the Trial Court's proper exercise of its discretion in excluding that evidence in the first place. Here, the Trial Court exercised its discretion to exclude that issue for the reasons stated above. Mr. Coogan cannot even reach the penultimate issue he wanted to raise on appeal regarding the so-called lack of evidence of collectability (ignoring he had successfully moved to exclude it in limine) without first assigning error to the discretionary ruling that excluded the issue in the first place.

This Court should accept review to correct this issue. Division Two conflicted Barbaerio and Kilgore by holding a Trial Court has no authority on remand to determine the scope of facts and issues that may be put at issue nor may it rely on an offer of proof by a party. Mr. Coogan will argue "a new trial is exactly that, a new trial so he should be able to argue whatever he wants." As a general statement, that is agreed. However, that does not obviate the issues identified above.

**4. DIVISION TWO CREATED SEVERAL NEW RULES OF REVIEW THAT CONFLICT WITH LONG HELD STANDARDS**

**a. Division Two Reversed And Dismissed On An Issue That At Best Should Have Generated A New Trial**

It is axiomatic to say Ms. Schmidt was no less bound by the Trial

Court's rulings as Mr. Coogan. The Trial Court denied Mr. Coogan's request to raise collectability. As such, Ms. Schmidt could no more present evidence of collectability than Mr. Coogan could.

Ms. Schmidt did not invite error. If any party did, it was Mr. Coogan by telling the Court that he wanted to argue collectability on proximate cause.

However, regardless of how it came about, the Trial Court ruled collectability was not at issue. If that decision was in error, then Ms. Schmidt has (had) every bit as much of a right to prepare for and present evidence on the issue as Mr. Coogan did to raise it. The Trial Court had already excluded the most important piece of evidence of collectability at Mr. Coogan's motion: the grocery store's liability insurance. At that point, what more could she have done.

If the Trial Court's decision to not allow collectability to be at issue was error, (and ignoring that it was: (1) was not preserved, (2) not assigned as error, and (3) ultimately reviewed under the wrong standard of review), then the only appropriate result would be a reversal of that decision and a remand – as unpalatable as even that may have been. To dismiss Ms. Schmidt's case for not producing evidence she was told not to offer undermines every concept of appellate procedure and fairness.

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b. **Division Two Has Eroded The Standard For Preserving Error In The Trial Court**

In order to reach the conclusion Mr. Coogan preserved the issue it actually decided, Division Two made several conclusions that if allowed to stand undermine what it means to actually preserve the record.

At 287 P.3d at 683<sup>3</sup> Division Two stated:

...[B]oth parties filed motions in limine... Coogan sought to prevent Schmidt from obtaining general damages and to confine her damages to the amount originally collectible from the grocery store. In support of his motions in limine, Coogan filed an article that detailed a plaintiff's need to prove collectability in a legal malpractice action.

That statement is problematic for a number of reasons worthy of review.

First, merely attaching an article is not sufficient to preserve the record. For Division Two to even imply that may preserve an issue will encourage parties to pack briefs with all manner of attachments, hiding "Easter Eggs" on issues never properly put at issue. It is contrary to the longstanding rule appellate courts "...can consider only evidence and issues called to the attention of the trial court." McClarty v. Totem Elec., 119 Wn.App. 453, 460 (2003)(reversed on other grounds, 157 Wn.2d 214).

[P]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration on appeal.

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<sup>3</sup> For reasons that are unclear, the undersigned's Westlaw opinion is not populating Washington Appellate reporter page numbers. Therefore, Pacific Reporter numbers are provided.

Kaplan v. Northwestern Mut. Life Ins. Co., 115 Wn.App. 791, 801 (2003)

Citing Holland v. City of Tacoma, 90 Wn.App. 533, 538 (1998).

Here, what Mr. Coogan actually did in his motions in limine was to argue general damages are not compensable and then attach the entire 85 page chapter from the COA Digest, two sentences of which mentioned collectability only in passing.<sup>4</sup> That was his sole raising of the issue to the Trial Court. His actual motion the chapter was attached in support of was that “a plaintiff cannot recover damages for emotional distress,” and that “comparative fault” should be at issue. His motion did not argue collectability. (CP 737 – 738). And to make matters worse for the Trial Court and Ms. Schmidt, even that (the chapter) was contained in a document dump by Mr. Coogan, dumping the full digest chapter among 811 pages of motions in limine and documents most of which were never referenced or argued by him. (CP 734-844, 194-205, 206-232, 303-401, 402-403, 404-514 and appendix<sup>5</sup>). Ostensibly, Division Two would have had the Trial Court parse through over 800 pages of material and read the

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<sup>4</sup> And even then, they were two squib citations (one a trial court level Pennsylvania decision from 1978 and the other a case from New Jersey also from 1978) that if actually read do not even support the proposition either Mr. Coogan or the Court of Appeals would contend they stood for.

<sup>5</sup> Mr. Coogan did not make the bulk of his motions in limine Clerk’s Papers and as it was not anticipated a page count of motions in limine would be relevant, neither did plaintiff. However, if the issue of two sentences contained in one of Mr. Coogan’s attachments to his motions in limine is Mr. Coogan’s preservation, it is suggested to be important to consider the context.

entire COA Digest to find two sentences on an issue that was not even argued by Mr. Coogan. That is not the proper preservation of the record.

On a more basic level, Division Two's statement Mr. Coogan submitted a "lengthy article detailing the need for a plaintiff to prove collectability" as an element of damage is utterly without basis in the record. It would be accurate to say: Mr. Coogan among 811 pages of motion in limine filings attached the entire 85 page COA chapter, two sentences of which mentioned collectability in passing but not for the proposition he now argues. That would be accurate. But, it would also be more difficult to point to as having preserved the record.

**c. Division Two Has Wrongly Considered Alleged Error Not Assigned**

As referenced above, Mr. Coogan simply did not in any way identify as error the Trial Court's decision to not allow him to put collectability at issue on the element of proximate cause nor to raise it (even if properly raised) so late in the life of the case. It has always been the rule that a party must assign as error, the decisions it wants reviewed.

We may not review the unpreserved assignment of error unless we determine the (error) constitutes manifest constitutional error.

State v. Powell, 166 Wn.2d 73, 84 (2009). Division Two's opinion conflicts with the Supreme Court's; the decision at issue does not raise an

issue of “manifest constitutional error” for Division Two to have considered without Mr. Coogan assigning error.

**d. Sufficient Evidence Was Presented**

Notwithstanding the foregoing, Ms. Schmidt presented evidence of collectability by circumstantial evidence admitted on other issues by way of photographs of shelves full of stock. (RP 321, Exhibit #23) There was also evidence of the store’s liability policy she was prepared to offer the Court excluded in reliance of Mr. Coogan’s pre-trial representation it was not relevant. That is another causality of Division Two’s disregarding Mr. Coogan’s prior statements; it ignores other evidence of collectability.

**5. REVIEW SHOULD BE ACCEPTED**

That Division Two’s opinion on its face is a square contradiction of Division One’s opinion in Tilly is reason enough to accept review. It is suggested to be an untenable situation for the Divisions to have conflicting rules on what the basic elements of a standard tort are. That well satisfies RAP 13.4(b)(2). The other procedural and review errors described above that conflict with decisions of this Court satisfy RAP 13.4(b)(1).

However, beyond that, it is respectfully suggested Division Two’s opinion in this case presents a manifest injustice by the procedure used to reach its result, implicating RAP 13.4(b)(4). It is an issue of “substantial public interest” when the Court of Appeals issues an opinion that so

materially fails to account for the record as outlined above. If, having identified the above issues, Division Two could still reconcile its conclusion then so be it. Ms. Schmidt does not contend any result other than the one she wants is “unfair” or in error. However, it is suggested to be difficult to reconcile making a de novo review of a motion for directed verdict while paying no heed to the discretionary rulings that determined the scope of the record in the first place – which themselves were based on the actions and representations of Mr. Coogan himself.

The opinion deftly omits Mr. Coogan’s offer of proof that he wanted to raise this issue on proximate cause (an issue Division Two previously ordered , and the Trial Court relied, was not to be relitigated) as well as the Trial Court’s exercise of discretion in determining the proper scope of issues on retrial and while criticizing Ms. Schmidt for not offering collectability evidence ignores Mr. Coogan had already represented it was irrelevant and not an issue by moving to exclude evidence of the store’s insurance. Division Two instead focused solely on the penultimate motion for a directed verdict as though Mr. Coogan’s earlier binding representations never happened and ostensibly conducts a de novo review of the record while giving no weight to the discretionary decisions that lead to the state of the record in the first place.

And even to do that, Division Two must give (and gave) no weight to the fact Mr. Coogan did not assign those discretionary Trial Court rulings as error (something Ms. Schmidt briefed extensively) and expands what the record actually was in order to justify concluding he did preserve the record and assign error on the issue it ultimately wrote its opinion on (again, something Ms. Schmidt briefed extensively).

It is suggested the opinion cannot be reconciled with the record.

And ultimately, the opinion is logically inconsistent. While affirming the Trial Court's decision to not allow Ms. Schmidt to amend her complaint to add a cause of action that added no new facts and sought no new relief over what was fully litigated and tried at the first trial (general damages) because the amendment was ostensibly too late and thus unfair to Mr. Coogan, Division Two held it was fair for the defendant attorney Mr. Coogan to ambush his former client after 10 years of litigation to raise "collectability" for the first time (1) after not raising at the first trial, (2) after not raising it in his original motions for a directed verdict and later a new trial following the first trial, (3) after not raising it at three different levels of appeal (as an alternate ground for affirming the original Division Two opinion this Court reversed as he should/could have done), (4) after not raising it pretrial leading up to the second trial, (5) after in limine making motions that could be made only if collectability

was not put at issue, (6) after raising it for the first time in the middle of an element the mandate indicated was not to be relitigated, (7) and with Division One in Tilly clearly saying it was on the element of proximate cause anyway, Division Two in Matson indicating it was following Tilly, and thus was an issue Ms. Schmidt, the Trial Court, and even Mr. Coogan at the time all believed was on the element of proximate cause and not damage. That was fair. But Division two affirmed Ms. Schmidt raising an amendment months before trial that put neither new evidence or relief at issue was not.

And what was worse, Division Two did not simply reverse but dismissed Ms. Schmidt's case for, apparently, not acting in contempt of court and offering evidence of collectability in defiance of the Trial Court's order that it would not be admissible.

**6. REVIEW SHOULD BE ACCEPTED OF THE BALANCE OF THE APPELLATE ISSUES**

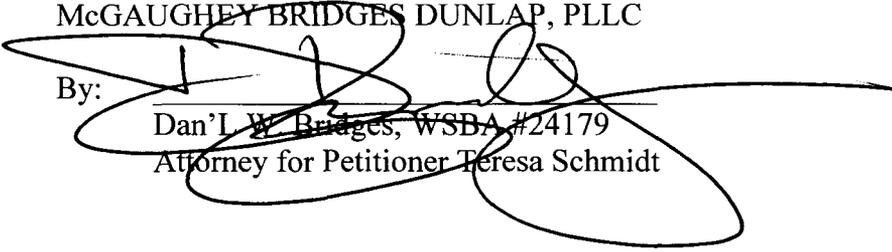
If this Court accepts review, this Court should accept review of all of the matters put at issue by the appeal and certainly no less than the related malpractice issues including the availability of general damages (an issue never decided by a Washington opinion – reported or unreported), which party should bear the burden of proof on collectability, and Ms. Schmidt's motion to amend her complaint on that issue. Those

matters were extensively briefed to Division Two and raise matters of substantial public interest. RAP 13.4(b)(4).

No Washington case has addressed the issue of general damages for malpractice. For reasons Ms. Schmidt submits are unequal and inconsistent with all tort law, and with no law actually holding this, in practice attorneys are given a free pass for the upset their negligence and breach of special relationship causes while insurance agents, bankers, etc., are accountable; Mr. Coogan was here. That aspect of the case is fully developed and presents an ample record to resolve that unjust result given the egregious conduct of Mr. Coogan from swearing at Ms. Schmidt when she asked questions over when the case would be filed, concealing from her he agreed to dismiss her case because of his error, trying to cover up his negligence by telling her the case was not worth anything, to blaming her for his own negligence. If this Court addresses the issue of collectability, it will already have a basis to decide the balance of the issues. It would be a better use of judicial resources, having come that far, for this Court to do so.

DATED this 19th day of February, 2013.

McGAUGHEY BRIDGES DUNLAP, PLLC

By: 

Dan L. W. Bridges, WSBA #24179  
Attorney for Petitioner Teresa Schmidt

# Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TERESA SCHMIDT,  
Respondent,  
v.  
TIMOTHY P. COOGAN, ET AL,  
Appellants.

No. 41279-9-II

ORDER DENYING MOTION FOR RECONSIDERATION

FILED APPEALS  
COURT OF APPEALS  
DIVISION II  
2013 JAN 18 AM 10:19  
STATE OF WASHINGTON  
BY *[Signature]*

**Respondent/Cross Appellant** moves for reconsideration of the Court's **November 16, 2012** opinion. Upon consideration, the Court denies the motion. Accordingly, it is

**SO ORDERED.**

PANEL: Jj. Johanson, Quinn Brintnall, Penoyar

DATED this 18<sup>th</sup> day of January, 2013.

FOR THE COURT:

*[Signature: Johanson, A.C.J.]*  
ACTING CHIEF JUDGE

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DIVISION II

2012 OCT 30 AM 8:37

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

TERESA SCHMIDT,

No. 41279-9-II

Respondent/  
Cross-Appellant,

v.

TIMOTHY P. COOGAN and DEBORAH  
COOGAN, and the marital community  
comprised thereof; and THE LAW OFFICES  
OF TIMOTHY PATRICK COOGAN and all  
partners thereof,

PUBLISHED OPINION

Appellants/  
Cross-Respondents.

JOHANSON, A.C.J. — In 1995, Teresa Schmidt was injured when she slipped and fell at a Tacoma grocery store. She retained attorney Timothy P. Coogan to handle her personal injury suit against the grocery store, but Coogan failed to file Schmidt's suit before its statute of limitations expired. Schmidt sued Coogan, and a jury found Coogan liable for malpractice. On appeal, we affirmed the trial court's order granting a new trial to determine damages only. At the damages-only trial, a jury awarded Schmidt damages, and Coogan now appeals various trial court rulings, including its denial of his CR 50 motion for judgment as a matter of law, because Schmidt failed to prove collectibility at trial. Schmidt never proved collectibility, an essential component of damages in a legal malpractice claim, so we reverse the trial court's denial of Coogan's CR 50 motion as a matter of law because there was insufficient evidence to support the jury's verdict. We remand for dismissal of Schmidt's action and need not address Coogan's other claims on appeal.

No. 41279-9-II

Schmidt cross-appeals (1) the trial court's denial of her motion to amend her complaint and (2) its denial of her motion to seek general damages. First, we do not address availability of general damages because, absent proof of collectibility, Schmidt cannot collect any damages. Second, the trial court did not abuse its discretion in denying Schmidt's motion to amend her complaint because she only sought amendment after an undue delay, and an amended complaint would have worked an undue hardship on Coogan's defense. Accordingly, we affirm the trial court actions that Schmidt challenges on cross-appeal.

#### FACTS

On December 23, 1995, Schmidt slipped and fell at a Tacoma grocery store. On January 8, 1996, Coogan agreed to represent Schmidt in her slip-and-fall tort case. Coogan failed to properly perfect Schmidt's tort claim within the statute of limitations, and Schmidt sued Coogan and his associates, alleging legal malpractice. Schmidt filed her suit on November 3, 2000, claiming negligence and breach of contract. The case finally went to trial in November 2003, and a jury entered a verdict against Coogan for \$32,000 in past economic damages and \$180,500 for non-economic damages. Coogan filed a series of post-trial motions, and the trial court granted his motion "for a new trial on the issues of Damages Only." Clerk's Papers (CP) at 27. Schmidt appealed and we issued an unpublished opinion affirming the trial court's "grant of a new trial on damages." *See Schmidt v. Coogan*, noted at 145 Wn. App. 1030 (2008). Schmidt's trial against Coogan to determine damages was set for August 2010.

In March 2010 Schmidt sought to amend, under CR 15, her complaint against Coogan. She sought to add a cause of action for outrage/reckless infliction of emotional distress against Coogan. The trial court denied this motion because it deemed the motion untimely. Then in

May 2010, Schmidt filed motion for summary judgment, asking the trial court to determine whether she could pursue general damages. The trial court denied this motion as well. Before the damages-only trial, both parties filed motions in limine. Schmidt pursued general damages, and Coogan sought to prevent Schmidt from obtaining general damages and to confine her damages award to the amount originally collectible from the grocery store. In support of his motions in limine, Coogan filed an article that detailed a plaintiff's need to prove collectibility in a legal malpractice action. And while arguing this motion, Coogan alluded to collectibility, "The only issues remaining in this case under case-within-a-case theories is simply what—if Mr. Coogan had done his job successfully, what would [Schmidt] have gotten in her claim against the [the grocery store]." Verbatim Report of Proceedings (VRP) (Aug. 20, 2010) at 21.

After Schmidt rested her case in the damages trial, Coogan filed a CR 50 motion for a judgment as a matter of law asserting, among other things, that Schmidt failed to present any evidence that, had Coogan originally filed this case within the statute of limitations and won a jury verdict, the verdict would have been collectible.<sup>1</sup> Coogan stated:

There has been no evidence presented in this case, none whatsoever, as to whether or not even if Mr. Coogan had handled this case right, even if Mr. Coogan had taken it to a jury trial and got a verdict for Ms. Schmidt that that verdict would have been collectible. That is an essential element of their case, they put on no proof; therefore, dismissal is warranted.

3 VRP at 504. Schmidt responded to Coogan's motion:

I think what the argument of defendant ignores is that the issue of malpractice or negligence has already been tried, and that if this issue was to have any merit, or to be argued, or when it should have been argued was at the first trial. If Ms. Schmidt could not have demonstrated that any judgment would have been

<sup>1</sup> In this context, collectibility refers to Schmidt proving that the owners of the grocery store had assets from which Schmidt could have collected her jury verdict award.

collectible, that would have been a liability defense. It's not an issue of quantum of damages and people often ignore this. You can have liability and be liable but there'd be no damages. That's a fine result. Or you could have damage, but no proximate cause and, therefore, no liability.

The first trial established and I think, I hope, and I've heard defendant argue this many times already, this is a damages only trial. Division II has already indicated duty, breach, proximate cause. That's what the first trial established. Now we are only here to talk about the damages Ms. Schmidt sustained.

To inject a new element at this time, which frankly has already been tried and resolved, would itself be an ambush even if it were a proper argument to make, and it's simply not a proper argument to make in the first place.

3 VRP at 505-06. The trial court denied this motion, finding that Coogan should have raised questions of collectibility at the first trial, not at this damages-only trial:

The motion is denied. The element of proximate cause with regard to damages will be an instruction given to this jury. . . . I believe it is a fine line, however, this case is not about any element of malpractice other than damages and proximate cause as it relates to damages.

If there was a question as to collectibility, that should have been addressed at the first trial. This trial is about damages only.

3 VRP at 508.

On August 27, 2010, the jury ultimately awarded Schmidt \$3,733.16 in past economic damages and \$80,000 in non-economic damages. Coogan filed a motion under CR 50 and/or CR 59 for judgment as a matter of law and/or a new trial, and he again claimed that Schmidt failed to establish collectibility.<sup>2</sup> The trial court ultimately denied Coogan's motion without issuing findings of fact or conclusions of law.

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<sup>2</sup> Specifically, Coogan argued,

There was no evidence submitted regarding the financial wherewithal of the owner of the [grocery store] at the time of Ms. Schmidt's slip and fall. There was no evidence regarding what insurances were in place at the time in question, and it simply would be rankly speculative just to assume that the [grocery store], a

Coogan now appeals, on various grounds, the trial court's denial of his CR 50 motion for judgment as a matter of law and his CR 50 and/or CR 59 motion for a new trial. Schmidt cross-appeals the trial court's denial of her motion to amend her complaint and its denial of her motion to include a jury instruction on general damages arising from legal malpractice.

### ANALYSIS

#### I. DENIAL OF MOTION FOR JUDGMENT AS A MATTER OF LAW

Coogan first argues that the trial court improperly denied his CR 50 motion for a judgment as a matter of law because Schmidt failed to establish collectibility, a necessary element of damages in a legal malpractice claim. We agree.

Judgment as a matter of law is appropriate where a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on a specific issue. *See* CR 50(a). We review de novo a

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discount store, which apparently had changed hands a number of times between the years 1995 and 1998, necessarily had all available insurance coverages in place.

CP at 1334-35 (emphasis omitted). Schmidt responded, asserting that Coogan's arguments failed as a matter of law because the first trial determined all the elements of liability, including proximate cause:

Division Two was clear that the retrial was limited to determining Ms. Schmidt's damage—not to allow defendant to reopen a basic liability element by contesting the basic prong of proximate cause. If Division Two intended defendant to be able to argue an element of liability itself, that would have required the court to specifically say that only "duty and breach" had been determined, with a remand to determine both proximate cause and damage. Division Two clearly did not do that, saying only that it was ordering a "new trial on damages."

CP at 1716-17.

trial court's ruling on a CR 50 motion for judgment as a matter of law, applying the same standard as the trial court. *Goodman v. Goodman*, 128 Wn.2d 366, 371, 907 P.2d 290 (1995).

## II. COLLECTIBILITY

Coogan argues that Schmidt failed to establish the essential element of collectibility that he contends is necessary for Schmidt's damages claim. Because collectibility is a component in determining legal malpractice damages, and Schmidt failed to prove collectibility at trial, the trial court improperly denied his CR 50 motion for judgment as a matter of law.

As an initial matter, we must decide whether Coogan preserved this issue for appeal. Coogan did not challenge Schmidt's failure to prove collectibility at the first trial. Instead he raised this issue during the damages-only trial.<sup>3</sup> But because this second trial involved damages only, and collectibility is a "component of damages in a legal malpractice action," Coogan validly pursued his collectibility challenge during the second trial. *See Matson v. Weidenkopf*, 101 Wn. App. 472, 484, 3 P.3d 805 (2000). Accordingly, Coogan validly raises this issue on appeal, and we will consider the merits of his claim.

The measure of damages for legal malpractice is the amount of loss actually sustained as a proximate result of the attorney's conduct. *Matson*, 101 Wn. App. at 484. And collectibility of the underlying judgment is a "component of damages in a legal malpractice action." *Matson*,

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<sup>3</sup> At oral argument, the parties agreed that Coogan raised the collectibility issue before the damages-only trial. In his pretrial motions in limine at the damages-only trial, Coogan argued that Schmidt could only pursue the damages that she would have collected against the grocery store had Coogan successfully prosecuted her original claim. Coogan also attached to his reply to Schmidt's response to Coogan's motions in limine a lengthy article detailing the need for a plaintiff to prove collectibility in legal malpractice actions. Then, in his CR 50 motion, Coogan asserted that collectibility, "is an issue here that I raised [pretrial]." 3 VRP at 503. Thus, Coogan did not "ambush" Schmidt by waiting to raise this issue until it was too late for Schmidt to present evidence of collectibility. 3 VRP at 506.

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101 Wn. App. at 484. Courts consider collectibility of the underlying judgment to prevent the plaintiff from receiving a windfall because it would be inequitable for the plaintiff to be able to obtain a greater judgment against the attorney than the judgment that the plaintiff could have collected from the third party. *Matson*, 101 Wn. App. at 484.

Here, Schmidt did not prove collectibility at the first trial. Then, the trial court granted Coogan's motion for a new trial "on the issues of Damages Only." CP at 27. Schmidt did not prove collectibility at the damages-only trial, and Coogan challenged Schmidt's failure to prove collectibility in a CR 50 motion for judgment as a matter of law. The trial court denied Coogan's motion, determining that collectibility was not at issue in the damages-only trial. But collectibility *was* at issue because collectibility is a "component of damages in a legal malpractice action." *Matson*, 101 Wn. App. at 484. Accordingly, Schmidt needed to prove collectibility at trial and failed to do so.

Schmidt argues that two pieces of evidence established collectibility. First, she states that she "testified the grocery store was a large, busy going concern." Br. of Resp't at 9. Second, she asserts that five photographs, apparently showing the shampoo aisle inside the grocery store, demonstrate the grocery store's solvency and the collectibility of a judgment. Schmidt's evidence, however, does not prove collectibility.

*Matson* demonstrates the required showing of judgment collectibility in legal malpractice claims. The Matsons retained attorney Jerry Weidenkopf to assist them in collecting on three promissory notes executed by the Shafers. *Matson*, 101 Wn. App. at 474. But Weidenkopf took no action to recover on the notes, and the statute of limitations ran. *Matson*, 101 Wn. App. at 474. The Matsons sued Weidenkopf for legal malpractice and were awarded the full amount on

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the notes, plus interest accrued through the expiration of the statute of limitations. *Matson*, 101 Wn. App. at 474. Weidenkopf appealed, challenging the award of damages and arguing that the collectible damages included the amount the Matsons could have collected before the statute of limitations ran. *Matson*, 101 Wn. App. at 484. We held that collectibility of an underlying judgment is a component of damages in a legal malpractice action and that the Matsons presented sufficient evidence to support a finding that they could have collected on a judgment against the Shafers. *Matson*, 101 Wn. App. at 484.

Evidence in *Matson* related to collectibility included the testimony of Julie Schafer, who stated that she worked continuously during the relevant time period, earning between \$35,000 and \$55,000 over that time. *Matson*, 101 Wn. App. at 485. She also possessed between \$10,000 and \$12,000 in savings. *Matson*, 101 Wn. App. at 485. Finally, she testified that she would have tried to pay a legal obligation to the Matsons. *Matson*, 101 Wn. App. at 485.

Unlike *Matson*, where the record contained sufficient evidence showing that the Matsons could have collected the judgment, Schmidt submitted just five photos of the grocery store's shampoo aisle and offered a blanket statement that her observation was that the grocery store's business was bustling. Given the dearth of evidence proving collectibility of a judgment against the grocery store—an essential component in determining damages in Schmidt's legal malpractice action against Coogan—the trial court erred in denying Coogan's motion for judgment as a matter of law because Schmidt presented insufficient evidence establishing grocery store's collectibility. *See Matson*, 101 Wn. App. at 484.

Accordingly, we reverse the trial court's denial of Coogan's CR 50 motion for judgment as a matter of law, remand for dismissal of Schmidt's claim, and decline to consider the other issues Coogan raised on appeal.

### III. SCHMIDT'S CROSS APPEAL

Schmidt cross-appeals the trial court's denial of her motion to amend her complaint and its denial of her motion to seek general damages arising out of legal malpractice. We need not address the general damages issue because, absent proof of collectibility, Schmidt cannot collect any damages, including general damages. Also, the trial court did not abuse its discretion in denying Schmidt's motion to amend her complaint because she sought to amend the complaint only after an undue delay, and an amended complaint would have worked an undue hardship on Coogan's defense.

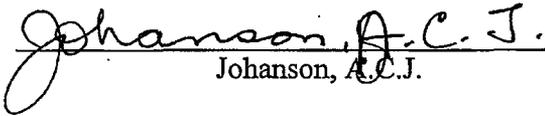
We review a denial of a plaintiff's motion for leave to amend a complaint for a manifest abuse of discretion. *McDonald v. State Farm Fire & Cas. Ins. Co.*, 119 Wn.2d 724, 737, 837 P.2d 1000 (1992). Undue delay, which works a hardship or prejudice on an opposing party, constitutes sufficient reason for denial of leave to amend. *Appliance Buyers Credit Corp. v. Upton*, 65 Wn.2d 793, 800, 399 P.2d 587 (1965). And hardship sufficient to deny a motion to amend includes the need to find and disclose new witnesses and experts, reformulate defense strategies and the disruptions of an already set case schedule. *See Donald B. Murphy Contractors, Inc. v. King County*, 112 Wn. App. 192, 199-200, 49 P.3d 912 (2002).

In March 2010, Schmidt sought to amend her complaint to include a cause of action against Coogan for outrage/reckless infliction of emotional distress. The trial court, however, denied this motion. Schmidt proposed her amendment well over a decade after the alleged

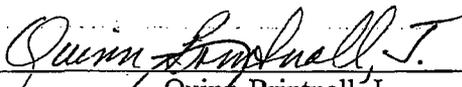
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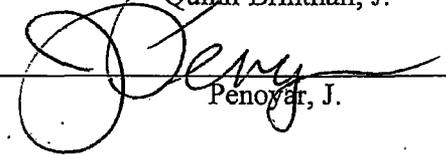
infliction of emotional distress occurred, and well after the first trial established Coogan's liability for negligence in failing to comply with the statute of limitations relating to Schmidt's slip and fall. Accordingly, raising a new claim against Coogan in March 2010 constituted an undue delay and would have broadened the trial's scope and forced Coogan to reformulate his defense strategies. Therefore, the trial court did not abuse its discretion in denying Schmidt's motion to amend her complaint. *See Appliance Builders*, 65 Wn.2d at 800; *Murphy Contractors*, 112 Wn. App. at 199-200.

We affirm the trial court actions Schmidt challenges on cross-appeal and deny her request to sanction Coogan under CR 11. We also deny Schmidt's request for attorney fees because she is not a substantially prevailing party.

  
Johanson, A.C.J.

We concur:

  
Quinn-Brintnall, J.

  
Penoyar, J.

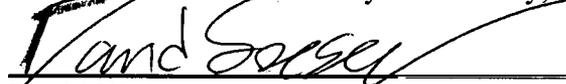
**CERTIFICATE OF SERVICE**

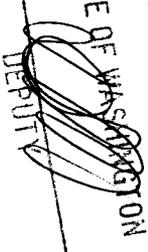
I certify that on February 19, 2013, I caused the foregoing TERESA SCHMIDT'S MOTION FOR RECONSIDERATION to be served on the following by the methods indicated:

Paul A. Lindenmuth	<input checked="" type="checkbox"/>	Via Hand Delivery by Legal Messenger
Law Offices of Ben F. Barcus & Assoc.	<input type="checkbox"/>	Via U.S. Mail, 1st Class, Postage Prepaid
4303 Ruston Way	<input type="checkbox"/>	Via FedEx 3-day
Tacoma, WA 98402	<input type="checkbox"/>	Via Facsimile
	<input type="checkbox"/>	Via Email
	<input type="checkbox"/>	Other: <u>Electronic Pacer</u>

I certify under penalty of perjury that the foregoing is true and correct.

DATED this 19<sup>th</sup> day of February, 2013.

  
\_\_\_\_\_  
David W. Loeser

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