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NO. 66100-I

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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UWEM USORO and ETCETERA ENGINEERING  
TRANSPORTATION & ALLIED SERVICES, INC., individually and a  
Washington Corporation,

Petitioners,

vs.

CHARLES HELM AND JANE DOE HELM and HELM & HELM, INC.,  
P.S., husband and wife and a Washington Corporation,

Respondents.

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**BRIEF OF RESPONDENTS HELM AND  
HELM & HELM INC., P.S.**

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ORIGINAL

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## I. INTRODUCTION

Charles Helm, Jane Doe Helm, and Helm & Helm, Inc., P.S. (collectively “Helm”), the respondents, respectfully request this Court to affirm the rulings of the trial court below. This lawsuit arises from claims by Uwem Usoro (hereinafter, “Usoro”) and Etcetera Engineering Transportation & Allied Services, Inc., (hereinafter, “Etcetera”) against Helm for legal malpractice and breach of contract. Helm was retained by Etcetera to collect a default judgment entered in its favor, which was obtained by another attorney. The default judgment was vacated because it awarded relief outside of that asked for in the complaint. Several months later, Helm withdrew as counsel, and the underlying defendants moved for, and were awarded, summary judgment in their favor. Usoro and Etcetera subsequently brought this action.

The essential elements of a legal malpractice claim are the same as an ordinary negligence claim: duty, breach, causation and damages. However, part of the duty element almost always requires the plaintiff to establish the existence of an attorney-client relationship. The causation element requires evaluation of the “case within a case;” the court considering a legal malpractice claim must evaluate the lawsuit in which it is alleged that the attorney was negligent, and determine whether the client would have prevailed but for the attorney’s malpractice. Accordingly, the facts in the underlying case brought by Etcetera are relevant to the consideration of the legal malpractice and breach of contract claims alleged here.

Summary judgment was properly granted because Etcetera and Usoro lack evidence necessary to support all essential elements of their claims. Accordingly, the trial court's rulings should be affirmed.

## **II. STATEMENT OF ISSUES**

The Honorable William Downing made four rulings that are the subject of Usoro and Etcetera's appeal, and which should be affirmed:

1. Order of April 30, 2010, granting Helm's motion for summary judgment dismissing Usoro's individual claims for legal malpractice, breach of contract and emotional distress, and denial of Usoro and Etcetera's motion for summary judgment. CP 251-253. The trial court correctly found that Helm owed no duty to Usoro individually and that issues of fact prevented entry of summary judgment for Etcetera. *Id.*

2. Order of June 21, 2010, granting, in part, Helm's motion to strike and denying, in part, without prejudice Helm's motion for summary judgment dismissing Etcetera's claims. CP 417-420. The trial court correctly struck certain testimony and evidence, which constitutes inadmissible hearsay, improper lay opinion testimony or legal conclusions in declarations submitted by Etcetera, and declined to consider testimony regarding previously dismissed claims. The trial court granted Helm's motion for summary judgment to the extent it held that vacation of the judgment previously entered was required because of errors in the judgment itself, and limited Etcetera's claims for legal malpractice to the time period after the vacation of the default judgment until Helm's withdrawal from the underlying case. *Id.* The trial court allowed

Etcetera additional time to obtain evidence relating to one issue: does Etcetera have legally sufficient evidence tending to establish that Helm proximately caused damage to it by causing it to lose a claim that had value that would have been realized had Helm performed non-negligently between the dates of December 16, 2008 and August 23, 2009. *Id.*

3. Order of August 26, 2010, granting Helm's motion to strike and motion for summary judgment dismissal of Etcetera's claims. CP 593-596. After granting Etcetera two months additional time to procure evidence necessary to establish the causation and damages elements of its claims, the trial court properly concluded that Etcetera had still failed to present evidence to satisfy the elements of its claims. *Id.* The trial court also properly struck additional testimony submitted by Etcetera that constituted inadmissible hearsay. *Id.*

4. Order of September 16, 2010, denying Etcetera's motion for reconsideration of the trial court's dismissal of Etcetera's claims on summary judgment. CP 611.

### **III. STATEMENT OF CASE**

#### **A. Facts Giving Rise to the Underlying Lawsuit**

Etcetera is a Washington corporation that offers transportation services in King County. CP 167. Usoro is a shareholder and officer of Etcetera. CP 167. Etcetera was incorporated in 2003. CP 167; CP 782-786. Etcetera leased vehicles to independent contract drivers. CP 670.

Etcetera claimed that it purchased a 1998 Lincoln Town Car for \$10,138 in February 2005. CP 671, ¶ 13. Etcetera was the only owner of

the 1998 Lincoln. CP 655-660. Usoro, acting in his capacity as shareholder and officer of Etcetera, contacted Etcetera's insurance agent, Kathleen Rohner (hereinafter, "Rohner"), who worked for Mybia Corporation ("Mybia")/Insuremax, Inc. ("Insuremax"), and requested that the 1998 Lincoln be added to Etcetera's existing commercial automobile policy with Columbia Insurance Company ("Columbia"). CP 671, ¶ 3. Etcetera was the only named insured on the Columbia policy. CP 655-660.

Rohner provided Usoro with a Certificate of Liability Insurance and liability insurance card for Etcetera's policy with Columbia after their February 10, 2005, conversation about insuring the 1998 Lincoln. CP 685-686, ¶ 2-4. Adding the 1998 Lincoln to the Columbia policy resulted in an increase in insurance premiums between \$5,000 and \$6,000 per year. CP 686-687, ¶ 5. Accordingly, Rohner suggested to Usoro on February 10, 2005, that Etcetera insure the vehicle with Cornhusker Insurance, a company that insured other vehicles owned by Etcetera. *Id.*

Usoro decided to insure the 1998 Lincoln with Cornhusker. CP 686-687, ¶ 5. Rohner specifically told Usoro that she would withdraw the request to Columbia and she did so. *Id.* Rohner also advised Usoro that he would be responsible for obtaining proof of insurance documents from the Oregon insurance agency that issued the Cornhusker insurance because it was the agent of record. *Id.*

On or about March 4, 2005, Usoro contacted Rohner and advised that he had not received any documents from Cornhusker showing that the

1998 Lincoln was added to the policy. CP 687, ¶ 6. Rohner called the Oregon insurance agency and learned that Etcetera's Cornhusker policy had been canceled for nonpayment, which was the reason no written confirmation that the 1998 Lincoln was added to the policy had been provided. CP 687-688, ¶ 6-7.

Rohner advised Usoro that Etcetera would need to apply to Cornhusker for the policy to be rewritten because the insurance could not be reinstated at that point. CP 688, ¶ 7. Usoro sent a fax to Rohner on March 8, 2005, identifying the three vehicles he wanted to list on the application for the rewrite. CP 688 ¶ 7; CP 695-696. The fax from Etcetera, dated March 8, 2005, reads:

Kathleen,

Please re-activate our Insurance for the following vehicles:

(I) 1998 Ford Club Wagon

*(II) 1998 Lincoln Town Car*

(III) 1992 Ford Club Wagon

Attached are copies of previous submittal to [illegible] in Oregon. Please discuss with the underwriters about the price and get me fleet price for 3 of the vehicles above...

[Illegible] Thanks Usoro

CP 695-696.

Rohner then resubmitted the application to Cornhusker on behalf of Etcetera. CP 688, ¶ 8. Rohner and Usoro specifically discussed that

there was no coverage at that point for the 1998 Lincoln or the other vehicles that Etcetera insured on the Cornhusker policy. *Id.*

On March 15, 2005, Usoro told Rohner by phone that he only wanted liability coverage with Cornhusker for the three cars, including the 1998 Lincoln. CP 688, ¶ 9. Rohner noted this request on a facsimile from Usoro. CP 688, ¶ 9; CP 698.

Cornhusker refused to rewrite Etcetera's policy. CP 688-689, ¶ 10. Rohner immediately advised Usoro that there was currently no coverage on the cars previously insured by Cornhusker or the 1998 Lincoln. CP 689, ¶ 10.

Five or six days after this conversation, on March 19, 2005, the 1998 Lincoln was involved in a motor vehicle accident. CP 689, ¶ 11. The driver of the other car was injured, and filed a lawsuit against the driver of the 1998 Lincoln and Etcetera. CP 689, ¶ 12.

Etcetera tendered the defense of the suit to Columbia, who agreed to defend under a reservation of rights. CP 689, ¶12; CP 700-705. Columbia paid \$95,000 to settle the personal injury lawsuit, and reserved its right to reimbursement by Etcetera. CP 672, ¶ 7; CP 716, ¶ 1.3.

### **1. The Underlying Lawsuit**

After the settlement of the personal injury suit, Etcetera, through its attorney David Estudillo ("Estudillo"), filed a lawsuit against Columbia, Rohner, Mybia, and Insuremax on August 16, 2006, in King County Superior Court. CP 719-730. Etcetera alleged breach of contract, bad faith and violations of the Consumer Protection Act against Columbia,

and negligence, negligent misrepresentation, and violations of the CPA against the insurance agents. *Id.* The complaint made no claim for any first party loss, such as personal property damage, loss of use, or other consequential economic losses. *Id.* The complaint also made no allegations that Rohner or any other defendant improperly failed to obtain first party property insurance on the 1998 Lincoln. The allegations in the complaint were solely concerned with liability insurance. *Id.*

Etcetera was the only plaintiff in the underlying action. CP 719. Usoro never made any individual claims in the underlying lawsuit. CP 719-730.

**a. Etcetera Settled with Columbia**

Columbia, which had defended and settled the third-party lawsuit, counterclaimed against Etcetera for reimbursement of the \$95,000 it paid to the third-party driver on Etcetera's behalf. CP 707-716. Columbia also counterclaimed for declaratory relief as to Etcetera's obligations for reimbursement. *Id.* Etcetera, while represented by Estudillo, settled with Columbia, and Columbia was dismissed from the lawsuit with prejudice on May 15, 2007. CP 732-733; CP 795-800.

**b. Etcetera Retained Helm After Etcetera Took A Default Judgment.**

Etcetera, also while represented by Estudillo, obtained a default judgment on July 25, 2007, against Rohner, Mybia, and Insuremax. CP 735-737. The judgment entered by the Honorable Joan DuBuque was based on Estudillo's declaration regarding his claimed fees, and Usoro's

declaration regarding Etcetera's alleged business loss. *Id.* Usoro submitted a declaration identifying the damages that comprised the judgment. Despite the fact that the allegations in the underlying complaint pertained only to Rohner's alleged failure to procure liability insurance, the judgment awarded damages for property damage to the 1998 Lincoln, loss of use of the 1998 Lincoln and lost revenue from the 1998 Lincoln. CP 670-683<sup>1</sup>.

The principal amount of the judgment was \$166,338 and attorneys' fees and costs were awarded in the amount of \$14,141.67, for a total of \$180,479.67. CP 735-737. The underlying default judgment was entered on Etcetera's behalf only; Usoro was not named as a judgment creditor. *Id.*

After the default judgment was entered, Estudillo referred Etcetera to Helm to collect the judgment. Helm consulted with Etcetera, through Usoro, and advised that, based on his legal experience and professional opinion, it would be best to wait one year before collecting on the judgment. CP 662, ¶ 9. After a year, a court would not vacate the judgment on grounds of excusable neglect—a common defense for defendants facing collection of a default judgment. *Id.*

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<sup>1</sup> Notably, Usoro and Etcetera still have not produced any evidence that Rohner improperly failed to obtain first party property insurance, or that there was any first party property insurance in place at the time of the motor vehicle accident for the 1998 Lincoln. CP 435-437.

On August 18, 2008, Helm appeared as counsel for Etcetera, as the sole judgment creditor. CP 739. Helm never appeared on behalf of Usoro individually, and Usoro was neither a party to the underlying lawsuit nor a judgment creditor. CP 662-663, ¶ 10-11. Helm and Etcetera verbally agreed to a contingency fee, whereby Helm's fee would be 20% of whatever amount of the judgment that was collected. CP 662, ¶ 10.

**c. The Underlying Defendants Moved to Vacate the Default Judgment.**

On September 3, 2008, Helm obtained an order for supplemental examination for Rohner to be conducted on October 29, 2008. CP 741-742. Rohner was served with the Order on September 28, 2008. CP 744. On October 27, 2008, Steven Rockey wrote to Helm with an informal notice of appearance of representation of Rohner. CP 746. In his letter, Rockey advised that there were meritorious grounds for vacating the default judgment. *Id.* Helm promptly telephoned Rockey to discuss the case, and Rockey asked Helm if he would agree to strike the supplemental hearing. CP 663, ¶ 15.

Helm determined, in his professional judgment, that a motion to strike or continue the supplemental examination would be granted by the court. CP 663, ¶ 15. In his experience, judges were hesitant to allow supplemental proceedings if there was an unresolved question as to the propriety of the default judgment, and would continue or strike the supplemental examination to provide the defendant with an opportunity to

move to vacate the judgment. *Id.* Helm therefore agreed to strike, and did strike, the supplemental examination. *Id.*

Rohner subsequently moved to vacate the default judgment. CP 748-772. A hearing was set for December 16, 2008. A copy of the motion was served on both Helm and Etcetera. CP 774-775. Rohner's bases for the vacation of the default judgment, which are incorporated herein, are summarized as follows:

- The only type of damages alleged in Etcetera's complaint, filed by Estudillo, were related to the third-party liability claims against Etcetera. The complaint did not identify or refer to loss of personal property or consequential damages from loss of personal property, or make any allegations that Rohner improperly failed to obtain first party property insurance on the 1998 Lincoln. Therefore, the judgment was void under CR 54(c) and CR 60(b)(5) because it awarded relief different in kind from that which was asked for in the complaint. CP 748-772.
- Rohner was only served with the summons, not the summons and complaint, and so the judgment was void under CR 60(b)(5). *Id.*
- Etcetera did not follow the proper procedures for entering a default judgment under CR 55(b). Etcetera's alleged damages were for sums uncertain because they were not readily calculable from the face of the complaint. The court had not entered findings and conclusions of law as required by CR 55(b)(2). *Id.*

- Because Rohner did not move to vacate the default judgment pursuant to CR 60(b)(1), (2), or (3), her motion to vacate filed 13 months after entry of judgment was timely. *Id.*

The Motion to Vacate was supported by Rohner's Declaration, which set forth her prior interactions with Usoro regarding adding the 1998 Lincoln to Etcetera's insurance, and Rockey's declaration that attached public documents regarding the 1998 Lincoln and Etcetera. CP 685-690; CP 777-780.

Helm reviewed Rohner's Motion to Vacate and was immediately concerned about the validity of the judgment. CP 664, ¶ 19. Helm's subsequent research revealed that Rohner's argument that the judgment obtained by Estudillo awarded relief beyond that asked for in the complaint was correct. *Id.* Helm also discovered that Etcetera had not followed the proper procedure for entering a default judgment. *Id.* Based on his professional judgment and experience, Helm concluded that responding to these two arguments would be futile. *Id.*

At the same time, Helm concluded that Rohner's argument that she was not served with both the summons and complaint was weak, as the declaration of service signed under penalty of perjury by a professional process server clearly and unambiguously showed that Rohner was served with both the summons and complaint. CP 664, ¶ 20. Accordingly, Helm opposed the Motion to Vacate on those grounds. CP 816-817.

Helm attended and presented oral argument at the hearing on the Motion to Vacate. CP 664, ¶ 21. Judge DuBuque ruled from the bench

and vacated the default judgment as to all defendants. *Id.* Judge DuBuque stated that she was vacating the judgment because the relief awarded went beyond what was sought in the complaint. *Id.* She also commented that she did not know what she had been thinking when she entered the default judgment in the first place and that she had made a mistake doing so. *Id.*

**d. Helm's Representation of Etcetera After the Judgment was Vacated.**

After the default judgment was vacated, a new case schedule was issued and a trial date was set. CP 665, ¶ 23. Rockey communicated to Helm that the underlying defendants, all of whom he now represented, would be willing to settle the case for nuisance value--\$5,000 to \$10,000. *Id.* Rockey reiterated the facts in the underlying defendants' favor: Rohner would testify consistent with her declaration that Usoro knew that the 1998 Lincoln was not insured by Columbia; that Usoro wanted the 1998 Lincoln on Cornhusker's insurance; and that Usoro was advised that the Cornhusker policy could not be rewritten before the subject accident. *Id.* Rockey also advised of his serious doubts as to the validity of Etcetera's alleged damages: Usoro purchased a second 1998 Lincoln in June 2005, after the accident; a new corporation was formed by Usoro two months after the accident with the trade name "Etcetera Transportation"; and Usoro had registered the second 1998 Lincoln with the new entity and not with Etcetera. CP 665, ¶ 23; CP 788-793; CP 802-814.

Helm recommended to Usoro that Etcetera should accept the \$5,000 to \$10,000 offered to settle the case. CP 665, ¶ 24. The reasoning

was conveyed to Usoro on or about April 10, 2009. *Id.* During this same conversation, Helm advised Usoro that he would not fund any further litigation for Etcetera. *Id.* Helm expressly told Usoro that all costs would have to be paid by Etcetera up front, including expert costs. *Id.* Helm also advised Usoro that a damages expert would be required and suggested that Usoro contact an actuary. *Id.*; CP 822.

On May 5, 2009, Etcetera had still not located a damages expert. CP 665, ¶ 25. Helm wrote to Usoro and advised that Etcetera must locate and retain an expert within the next two weeks. *Id.*; CP 824. Helm wrote, “If action is not taken to engage the appropriate experts, I will have no alternative but to withdrawal [sic] as I was only engaged to attempt enforcement of the judgment which has now been vacated.” CP 824.

On May 18, 2009, the deadline for disclosing primary witnesses passed. Helm did not disclose any witnesses because Usoro had not given him names of any witnesses to disclose. CP 666, ¶ 26.

On June 10, 2009, accountant Kevin Grambush (“Grambush”) sent a retention letter to Helm, indicating he had been contacted by Usoro. CP 826-827. Grambush had agreed with Usoro that three payments would be made for Grambush’s services-\$500 in June, July, and August. *Id.*

On or about June 17, 2009, Usoro sent \$500 to Helm for Grambush’s services for Etcetera. Usoro also identified Tbbebu Getachew as a witness. CP 666, ¶ 28; CP 829.

On July 15, 2009, Helm agreed to a limited trial continuance, and the case schedule was amended slightly. CP 831-832. The discovery

cutoff date was continued to September 28, 2009, and the trial was continued to November 9, 2009. *Id.*; CP 834-835. The Honorable Michael C. Hayden was assigned as the trial judge. *Id.*

Helm did not file a jury demand because, in his professional opinion, he did not think the case warranted a jury as the trier of fact. CP 666, ¶ 31. Helm did not conduct discovery because, in his professional opinion, anything that he would have hoped to discover was already provided in support of Rohner's Motion to Vacate. *Id.*

**e. Helm's Withdrawal and Defendants' Motion for Summary Judgment**

Helm did not receive a \$500 payment from Etcetera for Grambush's services in July, as called for in Grambush's retention letter and promised by Usoro in his June 2009 letter. CP 666, ¶ 32. Therefore, on August 13, 2009, Helm wrote to Etcetera advising that he did not receive the \$500; he would not fund Etcetera's case; and that he was withdrawing from representation. CP 837. Helm served Etcetera and Rockey with a Notice of Withdrawal that was effective 10 days later, on August 23, 2009. CP 666, ¶ 32; CP 839-840. No objection was made to the withdrawal. CP 666, ¶ 33.

Helm was advised of the underlying defendants' Motion For Summary Judgment (the "Underlying Defendants' Motion"), which was originally noted for September 18, 2009. CP 666-667, ¶ 33. Helm advised Etcetera of the Underlying Defendants' Motion, and told Usoro that he needed to respond and appear, or hire an attorney to appear, on

Etcetera's behalf. CP 666-667, ¶ 33. The Underlying Defendants' Motion was re-noted for September 22, 2009, and Etcetera was served with the re-note. CP 842-844.

The Underlying Defendants' arguments in support of dismissal are summarized as follows:

- Etcetera failed to create a genuine issue of material fact that Rohner breached her duty of care.
- Etcetera failed to create a genuine issue of material fact that Rohner caused Etcetera any damages.
- Etcetera failed to create a genuine issue of material fact as to damages.

CP 846-858.

On September 22, 2009, Judge Hayden heard the Underlying Defendants' Motion. CP 860. Usoro appeared on behalf of Etcetera, *pro se*. *Id.* Etcetera had not submitted any written response, and the court granted summary judgment. *Id.*

Less than 10 days later, attorney Paul W. Routt appeared on behalf of Etcetera and filed a motion for reconsideration. CP 862-864. The crux of Etcetera's argument was that Etcetera had not responded because it was unrepresented at the time of summary judgment. *Id.*

Judge Hayden denied the motion for reconsideration, finding:

- Helm gave notice of intent to withdraw on August 13, 2009.
- Etcetera was *pro se* at the time of the Motion for Summary Judgment on September 22, 2009.

- Etcetera filed no response to the Summary Judgment Motion.
- Plaintiff did not request a continuance or make a Rule 56(f) motion.
- The pleadings filed with the motion to reconsider provided no basis to do so.

CP 866-867.

Thereafter, Etcetera appealed. No decision has yet been rendered.

## **2. Suit Filed Against Helm**

On December 15, 2009, Etcetera and Usoro, individually, initiated this lawsuit against Helm. CP 1-21. Etcetera alleged that Helm is liable for legal malpractice and breach of contract. *Id.* Etcetera's allegations of malpractice can be summarized as follows: (1) Helm should have opposed the Motion to Vacate differently; (2) Helm did not adequately prepare Etcetera's case; and (3) Helm's withdrawal was improper. *Id.* Usoro asserted claims against Helm for legal malpractice, breach of contract, and negligent infliction of emotional distress. *Id.*

## **B. Procedural History of Suit Against Helm**

On March 23, 2010, Usoro and Etcetera filed a motion for summary judgment on the claims for legal malpractice and breach of contract. CP 22-43. On April 19, 2010, Helm filed cross-motions for summary judgment dismissal of Etcetera's and Usoro's claims. CP 617-625; CP 626-650. Helm argued that Usoro had no personal claims against Helm because no attorney-client relationship existed between Helm and Usoro personally. CP 617-625. Helm also argued that Etcetera's claims

failed because of the lack of evidence on the essential elements of breach of duty and causation. CP 626-650.

On April 19, 2010, Helm also filed a motion to strike certain portions of the Declaration of Usoro submitted with Etcetera's and Usoro's motion for summary judgment, and an exhibit attached thereto. CP 898-904. The request to strike portions of the declaration was based on the inclusion of inadmissible legal conclusions and opinions, and lack of foundation. The objectionable exhibit was not properly authenticated and was inadmissible hearsay. CP 873-875.

On April 21, 2010, the trial court continued the hearing on Helm's motion for summary judgment to June 18, 2010. CP 905-906. The continuance was ordered by the court to provide Etcetera time to respond to Helm's argument that Etcetera had presented no expert testimony to support the elements of breach of duty and causation, which were essential to its claims against Helm.

On April 30, 2010, the trial court issued its order on Etcetera's and Usoro's motion for summary judgment, and on Helm's motion for summary judgment dismissal of Usoro's claims. CP 251-253. The trial court denied Etcetera's and Usoro's motion for summary judgment. *Id.* The trial court also dismissed with prejudice Usoro's claims on the basis that Helm owed no duty to Usoro individually and no contract was entered into between Usoro and Helm. *Id.*

Helm re-noted its motion for summary judgment for June 18, 2010. CP 270-271. Etcetera's response was due on June 7, 2010. *Id.* No

response was received and Helm filed its reply on June 14, 2010 indicating that no response was received. *Id.*

Subsequently, on June 14, 2010, Etcetera submitted a “response” to Helm’s motion for summary judgment. CP 258-263. This “response” only addressed Helm’s motion to strike portions of Usoro’s declaration and an exhibit submitted therewith, which was filed by Helm in conjunction with its motion for summary judgment dismissal of Usoro’s claims. *Id.* On the same day, Helm submitted a reply pointing out the untimeliness of the response and the lack of responsiveness. CP 876-879. Etcetera then submitted a second response on June 15, 2010. CP 355-372. The second response attached a new declaration of Usoro, with attachments; a declaration by Etcetera’s counsel; a new declaration by Anders Olin purporting to authenticate an objectionable exhibit; and a proposed order that requested the trial court grant *Etcetera’s* motion for summary judgment despite the fact that it was denied by the court on April 30, 2010, and no motion for reconsideration was ever filed. *Id.*

Consequently, Helm submitted a second reply on June 16, 2010. CP 880-886. The reply requested the trial court strike the untimely pleadings submitted by Etcetera and strike the second declaration of Usoro and the declarations of Olin and Nwokike, along with the exhibits attached thereto as the declarations contained inadmissible hearsay, improper lay opinions and conclusions lacking foundation. *Id.*

On June 21, 2010, the trial court ruled on Helm’s motion for summary judgment dismissal of Etcetera’s claims as follows:

1. Helm's motion to strike is granted to the extent the court will not consider hearsay, improper lay opinion testimony or legal conclusions in the declarations submitted by plaintiff.
2. The court previously dismissed the claims of Usoro and no timely reconsideration was sought, so the court will not consider the opinions of Mr. Ganz on whether an attorney-client relationship between Helm and Usoro existed.
3. Plaintiff submitted no evidence to contradict the conclusion that the vacation of the default judgment in the underlying case was inevitable. Etcetera's legal malpractice claim is limited to allegations of Helm's conduct between the period following the vacation of the default up to the time of his withdrawal.
4. Etcetera is granted additional time to obtain expert testimony from Mr. Ganz or another expert on the issue of proximate cause.
5. Helm's motion for summary judgment dismissal of Etcetera's claims is denied without prejudice and may be re-noted any time after 60 days have elapsed. Discovery is limited to one issue: evidence to establish that Helm proximately caused damage to Etcetera by causing it to lose a claim that had a value that would have been realized had the attorney performed non-negligently between the dates of December 16, 2008 and August 23, 2009.

CP 417-420.

Helm re-noted the motion for summary judgment dismissal of Etcetera's claims for August 20, 2010 in compliance with the court order.

Etcetera also noted a motion for summary judgment for hearing on the same day. CP 476-492. Etcetera's motion was virtually identical to and requested the same relief as its motion for summary judgment that was denied by the trial court on April 30, 2010. CP 887-891.

On August 26, 2010, the trial court issued its order on Helm's motion for summary judgment dismissing all of Etcetera's claims and ruled as follows:

1. The underlying judgment was set aside through no negligence on the part of Helm;
2. Malpractice liability should not be extended to cases in which it cannot be established that a better outcome would have been obtained but for the negligence in question. Expert testimony that a claim could have survived summary judgment is not adequate. It must be established that the complaining party would have prevailed;
3. Etcetera has not established an entitlement to any further damages under the claim brought in the underlying lawsuit;
4. Etcetera's claims against Helm are dismissed with prejudice;
5. Portions of the Usoro and Olin declarations that contain inadmissible hearsay, opinions and conclusions are stricken.

CP 593-596.

Etcetera submitted a motion for reconsideration of the trial court's dismissal of its claims, which was denied by the trial court on September 16, 2010. CP 597-609; CP 611. On October 6, 2010, Etcetera

and Usoro filed the notice of appeal of the trial court's orders of April 30, 2010, June 21, 2010, August 26, 2010, and September 16, 2010.

#### IV. LEGAL ARGUMENT AND ANALYSIS

##### A. Standard for Review

The Court of Appeals reviews orders on summary judgment de novo, engaging in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 93 P.3d 108 (2004); *Sea-Pac Co., Inc. v. United Food & Comm. Workers Local Union*, 103 Wn.2d 800, 699 P.2d 217 (1985). Summary judgment is appropriate if the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). Summary judgment may be entered if reasonable persons could reach but one conclusion from all the evidence. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 109 P.3d 805 (2005).

The dismissal of Usoro's and Etcetera's claims on summary judgment was the appropriate result in this case. There is no evidence to support all essential elements of Usoro's and Etcetera's claims against Helm.

The Court reviews orders involving the trial court's decision to exclude inadmissible evidence for abuse of discretion. *State v. C.J.*, 148 Wn.2d 672, 63 P.3d 765 (2003); *Jenkins v. Snohomish County Pub. Util. Dist. No. 1*, 105 Wn.2d 99, 713 P.2d 79 (1986).

The trial court did not abuse its discretion when it struck certain portions of the declarations submitted by Usoro and Etcetera that constitute inadmissible hearsay, improper lay opinions and conclusions.

**B. The Trial Court Properly Struck Inadmissible Evidence.**

The trial court did not abuse its discretion when it struck certain portions of the declarations submitted by Usoro and Etcetera that constituted hearsay, improper lay opinions and conclusions, or attached exhibits that were improperly authenticated. CP 417-420; CP 593-596. Evidence submitted with a motion for summary judgment must comply with Washington's Rules of Evidence. *King County Fire Prot. Dist. No. 16 v. Hous. Auth.*, 123 Wn.2d 819, 825, 872 P.2d 516 (1994). Under CR 56(e), affidavits and declarations must be based on personal knowledge and must affirmatively show that the affiant is competent to testify as to his or her averments. *Snohomish County v. Rugg*, 115 Wn. App. 218, 224, 61 P.3d 1184 (2003). Affidavits and declarations all must "set forth such facts as would be admissible in evidence." *Fire Prot. Dist. No. 16*, 123 Wn.2d at 825.

Contrary to Usoro and Etcetera's assertions, the trial court did not strike or disregard all portions of the declarations and evidence identified in Appellant's Brief at page 27; rather, the trial court expressly stated in its orders that it was disregarding only the inadmissible portions and considered the remainder. CP 418 and 596. Because the trial court acted within its authority to strike inadmissible testimony and evidence, the rulings of the trial court should be affirmed. Moreover, even if the

objectionable evidence was considered, Usoro and Etcetera could still not meet their burden of proof on the legal issues in this case.

Usoro and Etcetera claim that the trial court improperly declined to consider the following evidence or improperly struck the following testimony and evidence:

1. Declaration of Joseph Ganz submitted with Usoro's declaration of 6/11/10. CP 333-342. See Brief of Appellant at p. 27.
2. Declaration of Joseph Ganz submitted with Usoro's declaration of 7/15/10. CP 474-475. See Brief of Appellant at p. 27.
3. Berg financial report attached to Usoro's declaration of 6/11/10. CP 327-331. See Brief of Appellant at page 27.
4. Espey report dated 8/4/10. CP 522-530. See Brief of Appellant at p. 27.
5. Olin affidavit and exhibits attached to Usoro's declaration of 6/11/10 (CP 309-318) and declaration of 6/2/10. See Brief of Appellant at pp. 28 and 33.
6. Usoro's declarations of 3/22/10, 4/25/10, 6/11/10 and 7/15/10. See Brief of Appellant at pp. 31-32; CP 167-182; CP 236-240; CP 265-269; CP 293-303; CP 427-433.

**1. Declarations of Joseph Ganz**

The trial court did not strike the two declarations of Joseph Ganz. Rather, the court states in detail its consideration of Ganz' declarations

and their failure to present evidence sufficient to support Etcetera's claims. See discussion below. CP 417-420; CP 593-596.

The trial court did decline to consider the portions of Ganz' opinions in his declaration of 6/11/10 that address whether an attorney-client relationship existed between Usoro and Helm. CP 417-420. That decision was not an abuse of discretion. The Ganz declaration of 6/11/10 was submitted with Etcetera's response in opposition to Helm's motion for summary judgment dismissal of Etcetera's claims. *Id.* At the time of its submission, the trial court had already dismissed Usoro's individual claims on summary judgment. *Id.* Usoro did not file a motion for reconsideration of the trial court's order and therefore the issue was not pending before the court. *Id.*

## **2. Berg Report, and Espey Declaration and Report**

Etcetera submitted a report from Tawni Berg purporting to address Etcetera's damages sustained as a result of Helm's alleged conduct. CP 327-331. This report was authenticated by Usoro, not its maker, Ms. Berg. CP 301, ¶ 28. Etcetera also submitted a declaration and report by Bret Espey dated August 4, 2010, that purported to address Etcetera's claimed damages and relies upon the Berg report. CP 522-530<sup>2</sup>.

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<sup>2</sup> Both the Berg and Espey reports and declaration present many issues impacting the credibility of the opinions expressed therein. For example, the Berg report relies upon information generally not relied upon by CPAs or upon self-serving information supplied by Usoro, and the Espey report relies upon numerous inaccurate assumptions and ignores the fact that Usoro incorporated a new company with a new fleet of vehicles shortly after the motor vehicle accident. CP 523.

The trial court did not strike either the Berg report or the Espey declaration or report, or decline to consider this evidence in its ruling on summary judgment. CP 417-420; CP 593-596. These documents were not material to the issues before the trial court on summary judgment. Helm did not challenge the Berg and Espey calculations in his motion. Helm's motion instead asserted an absence of evidence that Etcetera would have prevailed in the underlying case. Accordingly, there is no ruling by the trial court subject to Usoro and Etcetera's appeal.

### **3. Declaration of Olin and Exhibits**

The declaration of Olin purports to authenticate a letter written by Olin that addresses "an investigation" of Rohner's conduct in the issues that led to the underlying lawsuit. CP 309-312. The letter constitutes inadmissible hearsay and lacks necessary foundation in that it contains statements by others offered for their truth, and opinions as to which Olin did not demonstrate necessary expertise. ER 801 and 802. Specifically, although the Olin letters make the general statement that "Rohner was negligent in handling the coverage which she later canceled without informing Usoro." CP 311-312, Olin does not establish any factual foundation for expressing an opinion on how Rohner's conduct compared with the standard of care for an insurance agent.

Additionally, Olin's declaration and accompanying letter are solely comprised of statements or information obtained from other individuals about the status of Etcetera's insurance coverage, which were the crux of the liability issues in the underlying case. CP 311-312. These statements

are offered as to the truth on the issues of insurance coverage. This is the very definition of inadmissible hearsay testimony. ER 801 and 802. The Olin declaration is not admissible evidence.

Olin's authentication of his letter and report does not render its contents admissible. The authentication of the exhibit merely verifies that the letter itself is what it purports to be. The contents are still hearsay and lack foundation, and are inadmissible.

#### **4. Declarations of Usoro and Exhibits**

All declarations submitted by Usoro contain inadmissible testimony that constitutes hearsay, speculation and improper lay opinions. CP 167-182; CP 236-240; CP 265-269; CP 293-303; CP 427-433. The trial court properly declined to consider the objectionable testimony. Contrary to Etcetera's and Usoro's arguments, it is the province of the court, not a jury, to determine the admissibility of evidence. ER 104.

Usoro and Etcetera are correct that ER 701 provides that a court will only consider opinions of lay witnesses that are (1) rationally based on the actual perception of the witness, and (2) helpful to the understanding of the witness' testimony or the determination of a fact in issues. Additionally, pursuant to ER 701, a lay witness cannot testify in the form of opinion or inference on "scientific, technical, or other specialized knowledge within the scope of rule 702." The law is a "highly technical field beyond the knowledge of the ordinary person." *Geer v. Tonnon*, 137 Wn. App. 838, 851, 155 P.3d 163 (2007) (quoting *Lynch v. Republic Publ'g Co.*, 40 Wn.2d 379, 389, 243 P.2d 636 (1952)).

Additionally, courts may not consider legal conclusions in declarations submitted on summary judgment. *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 791, 150 P.3d 1163 (2007) (citing *Keates v. City of Vancouver*, 73 Wn. App. 257, 265, 869 P.2d 88 (1994)).

In his declarations of March 22, 2010 and April 25, 2010, Usoro makes multiple statement regarding the standard of care for attorneys, actions that Helm allegedly should have taken or failed to take, statements about discovery and pleadings in the underlying case, as well as legal conclusions that Helm is liable for legal malpractice and breach of contract. CP 167-182. These improper legal conclusions and lay opinion testimony were properly stricken by the trial court.

Similarly, Usoro's declarations of June 11, 2010 contain very little testimony by Usoro that is admissible as personal knowledge, and mostly constitute inadmissible lay witness opinions, speculative and conclusory statements, and inadmissible hearsay. CP 265-269; CP 293-303. For example, Usoro states that, "there was something sinister about [the] Insurance carriers"; that a report concluded that Rohner "made a big mess and mistake"; that Rohner "hesitated to cover-up her mistakes"; and that Rohner "tried her trick on everybody to conceal her failure". Usoro also states that Helm is "disingenuous and deceptive"; "played along with Steven Rockey"; was "unhappy that [Usoro's] company was awarded damages in the underlying case"; "connived with Steven Rockey and Kathleen Rohner and destroyed [his] company and [his] livelihood"; that

Helm “turned around and messed [the collection of the judgment] up in other (sic) to conceal his inadequacy”; “did not want to see Etcetera Engineering succeed in wining (sic) the case against [Helm’s] friend, Steven Rockey”; and “was happy that [his] company has (sic) been finally nailed”. *Id.* Usoro also submits statements on the motivations and actions of Helm, Columbia, Insuremax, Rohner, and Mybia of which he has absolutely no personal knowledge. CP 265-269; CP 293-303. All of these assertions are unsupported, conclusory and speculative. The trial court appropriately declined to consider the inadmissible testimony.

The declarations also contain an interpretation of Washington statutes regarding the cancellation of insurance. *Id.* Usoro is not an insurance expert and provides no foundation for his ability to present such opinions. Likewise, Usoro opines on the experience and conduct of Helm and on the underlying trial court’s legal basis for vacating the default judgment. Again, Usoro is not an attorney, nor an expert on the standard of care of an attorney, and offers no foundation to support his ability to present such opinions. The trial court properly disregarded such statements.

**C. Etcetera’s Legal Malpractice Claims were Properly Dismissed.**

Summary judgment was properly granted as Etcetera cannot produce evidence to support all essential elements of its claim for legal malpractice. To succeed on a claim for legal malpractice, Etcetera must set forth evidence of (1) the existence of an attorney-client relationship giving rise to a duty of care by the attorney to the client; (2) breach of the

duty of care by the attorney; (3) damages; and (4) proximate causation between the attorney's breach of the duty and the damages. *Hizey v. Carpenter*, 119 Wn.2d 251, 260-62, 830 P.2d 646 (1992).

To establish causation in a legal malpractice claim, Etcetera must show that the outcome of the underlying litigation would have been more favorable to Etcetera "but for" the attorney's negligence. *Geer*, 137 Wn. App. at 840; *Paradise Orchards Gen. P'ship v. Fearing*, 122 Wn. App. 507, 514, 94 P.3d 372 (2004). Essentially, Etcetera is required to prove the "case within a case" in order to establish proximate causation—i.e., to prove that he would have prevailed against Rohner but for Helm's alleged negligence. *Geer v. Tonnon*, 137 Wn. App. 838, 851, 155 P.2d 163 (2007).

#### **1. No Evidence of Proximate Cause**

Etcetera cannot establish that Helm proximately caused any harm, as it has no evidence that it was entitled to recover from Rohner or any defendant in the underlying case. In order to establish proximate causation, Etcetera must present evidence that it would have prevailed in the underlying case but for Helm's negligent conduct. To do so, Etcetera was required to establish that but for Helm's negligent conduct the underlying judgment would not have been vacated or that it would have prevailed on its claims against Rohner, including evidence that Rohner breached the standard of care for an insurance agent or broker; evidence that the insurance requested through Rohner would have covered Etcetera's alleged losses; and evidence that Etcetera would have prevailed

at trial but for Helm's negligence. The trial court properly concluded that (1) the vacation of the underlying judgment was inevitable, (2) there was no evidence that Rohner breached the standard of care for an insurance agent or broker, and (3) that there was no evidence that Etcetera would have prevailed on its claims in the underlying case.

**a. Vacation of Judgment was Inevitable.**

The default judgment was flawed, and was vacated because it awarded improper relief to Etcetera. The arguments made by the underlying defendant that the default judgment awarded relief beyond what was alleged and prayed for in the complaint were well-supported by case law. *See Johnson v. Johnson*, 107 Wn. App. 500, 503-04, 27 P.3d 654 (2001); *Davis v. Bafus*, 3 Wn. App. 164, 166, 473 P.2d 192 (1970); *Columbia Valley Credit Exch., Inc. v. Lampson*, 12 Wn. App. 952, 954-55, 533 P.2d 152 (1975); *State ex rel. Adams v. Superior Court of State, Pierce County*, 36 Wn.2d 868, 871-72, 220 P.2d 1081 (1950).

CR 54(c) requires that a judgment by default "not be different in kind" and that it not "exceed in amount" that which is prayed for in the complaint. The limitation contained in CR 54(c) is jurisdictional, and a default judgment awarding relief in violation of CR 54(c) is void because it raises procedural due process issues. *Marriage of Leslie*, 112 Wn.2d 612, 617, 772 P.2d 1013 (1989) (citations omitted).

Etcetera's underlying complaint filed by Estudillo makes no claim for first party loss. There is no mention of claims for property damage, loss of use, or consequential damages as a result of the alleged acts of the

underlying defendants. CP 184-195. The relief requested in the underlying complaint is limited solely to Etcetera's losses as a result of the alleged improper denial of liability insurance as it related to the third-party claims. *Id.*; CP 664, ¶19.

The vacation of the default judgment was inevitable and required. No act of Helm could have changed this outcome. CP 419. Etcetera presented no evidence, through expert opinion or otherwise, that the underlying judgment was not required to be vacated on the merits. The trial court in the present matter therefore correctly concluded that the conduct of Helm was not the proximate cause of the vacation of the default judgment.

**b. Etcetera Has No Evidence That It Would Have Prevailed on Its Claims in the Underlying Lawsuit.**

**1) Etcetera Offered No Evidence that Rohner Fell Below the Standard of Care.**

As noted above, the causation element of the present legal malpractice claim requires Etcetera to produce evidence that it would have prevailed on the underlying claims but for Helm's alleged negligence. *Geer* 137 Wn. App at 851; *Smith v. Preston Gates Ellis LLP*, 135 Wn. App. 859, 865, 147 P.3d 600 (2006); *Griswold v. Kilpatrick*, 107 Wn. App. 757, 762-63, 27 P.3d 246 (2001). Etcetera's claims in the underlying lawsuit were dismissed because there was no evidence to support all elements of Etcetera's claims in that suit. Even today, Etcetera has no

evidence that Rohner breached the standard of care, or that it would have prevailed but for Helm's alleged failings.

Rohner successfully argued in the underlying case that, as a professional insurance agent, expert evidence was required to show that she breached her duty of care to Etcetera. CP 846-857; *See, e.g., Suter v. Virgil R. Lee & Son, Inc.*, 51 Wn. App. 524, 526, 754 P.2d 155 (1980); *Brock v. Tarrant*, 57 Wn. App. 562, 568-69, 789 P.2d 112 (1990). Helm also asserted the lack of such evidence, and Etcetera failed to present admissible expert testimony on this issue in response to Helm's motion for summary judgment. Etcetera offered no evidence that Rohner, or any other defendant in the underlying suit, failed to act in accordance with the obligations an insurance agent owes to a client, or failed to meet the standard of care for an insurance agent.

**2) Etcetera Offered No Evidence that Rohner Was to Obtain First Party Insurance.**

The claims Etcetera pursued against Rohner involved damage to Etcetera's 1998 Lincoln and alleged resultant financial losses. Such damage would have been covered, if at all, by first party collision or comprehensive insurance. Etcetera admits that the only type of insurance Etcetera requested from Rohner for the 1998 Lincoln was third-party liability insurance and not first party coverage. See Appellant's Brief at p. 34; CP 671, ¶ 3; CP 688, ¶ 9; CP 698; CP 436. Etcetera has offered no evidence that the third-party liability insurance requested would have covered the first party property claims for which it sought to hold Rohner

liable—and, as a matter of simple insurance law, it is clear that it would not. Therefore, even if Etcetera had evidence that Rohner fell below the standard of care, her failure did not damage Etcetera because the losses for which it sought to recover would not have been within the coverage of the insurance she was requested to obtain<sup>3</sup>.

In sum, Etcetera still cannot present evidence necessary to support its claims in the underlying lawsuit. Consequently, Etcetera cannot meet its burden of proof on causation *in this case*—that but for Helm’s alleged breach of duty, Etcetera would have defeated the underlying defendant’s motion for summary judgment and prevailed on its claims in the underlying matter.

**3) Ganz’ Opinion Does Not Create an Issue of Material Fact.**

Ganz’ proffered opinion that Etcetera would probably have avoided summary judgment in the underlying action absent Helm’s alleged negligence does not create an issue of material fact on proximate causation for two reasons. First, whether Etcetera’s underlying case would have survived summary judgment is a legal issue to be decided by the court, not by expert opinion. Second, even if an expert opinion was appropriate to create an issue of fact, Ganz’ declaration is not adequate to do so.

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<sup>3</sup> Rohner could not be liable even if she failed to place the liability coverage requested. Etcetera’s first party claims would not have been within the requested coverage; Columbia paid for Etcetera’s defense in the third-party litigation; and Columbia funded the settlement of all claims in that lawsuit.

The evaluation of the merits and likelihood of success of the underlying litigation, or “case within a case”, requires a hypothetical ruling by the trial court, or appellate court, on the legal issues presented therein. *Daugert v. Pappas*, 104 Wn.2d 254, 257-58, 704 P.2d 600 (1985). This responsibility is placed in a judge’s hands because a judge is in a “much better position” than a jury to make determinations that depend on an analysis of the law. *Id.* at 258-59. If the court determines that the claimant could not have prevailed on the legal issues in the underlying case, there is nothing remaining for the trier of fact to evaluate.

Here, Ganz’ declaration is simply incorrect. Given the absence of evidence that Rohner’s conduct fell below the standard of care, and the evidence that Etcetera requested only liability coverage for the 1998 Lincoln, Etcetera could not have survived summary judgment against Rohner. The trial court’s decision to that effect was correct.

In addition, the proximate cause element requires evidence that the plaintiff would have prevailed in the action below absent the negligence of the defendant attorney. *Geer*, 137 Wn. App. at 851. Ganz opines *only* that the underlying case could have survived summary judgment and proceeded to trial. CP 474-475. Ganz notably does not opine that Etcetera would have prevailed at trial in the underlying lawsuit. This opinion is inadequate under *Geer*.

This deficiency in Ganz’ opinion is not insignificant. Ganz states in his declaration that he has 40 years of experience with legal malpractice cases and has represented hundreds of attorneys in legal malpractice

lawsuits. CP 333-334. Given that background, Ganz' would certainly be aware of the requirement for Etcetera to offer evidence that it would have prevailed on its claims—and would have offered such an opinion if he believed that to be the case. The trial court correctly held that Etcetera failed to produce legally sufficient evidence to survive summary judgment dismissal.

Etcetera' only response is to argue that it is not required to prove the “case within a case.” Etcetera claims without any legal support that a “more sensible and equitable rule” based on “common sense” would be to present a prima facie underlying case and malpractice case through expert testimony on the reasonable settlement value of a case, then allow the trier of fact to establish that the case would have prevailed at trial, and then calculate damage from what a hypothetical award would have been in the underlying case. Appellants brief at 35-36. This proposal has no merit and is contrary to long established law in Washington state. It would ask jurors to determine the answers to legal questions. It should simply be rejected by this Court.

**D. No Evidence of Breach of Contract by Helm**

There is no evidence that Helm breached any contract with Etcetera or Usoro. In addition, a breach of contract claim is no different from a legal malpractice claim unless the claimant points to a failure by Helm to fulfill a specific term of the contract for representation. *Owens v. Harrison*, 120 Wn. App. 909, 86 P.3d 1266 (2004). Usoro and Etcetera do not point to any specific contractual term that was breached by Helm. See

Appellant's brief at pp. 22-23. Therefore, all claims against Helm sound in tort, not breach of contract. See *Owens v. Harrison*, 120 Wn. App. 909, 915-16, 86 P.3d 1266 (2004); *Davis v. Davis Wright Tremaine, LLP*, 103 Wn. App. 150, 154-55, 32 P.3d 146 (2000). Etcetera's breach of contract claim fails for the same reasons as its legal malpractice claim.

Etcetera argues that non-recovery of the judgment constitutes a breach of contract. See Appellant's Brief at pp. 22-23. The agreement between Helm and Etcetera was that Helm would collect 20% of whatever was recovered. CP 662-663, ¶ 10-11. Etcetera does not argue, and there is no evidence, that any term in the agreement guaranteed recovery. In addition, the judgment was properly vacated and dismissed on summary judgment through no negligence of Helm. CP 417-420. Accordingly, the trial court properly dismissed Etcetera's breach of contract claim.

**E. Usoro Has No Individual Claims Against Helm.**

**1. Helm Owed No Duty to Usoro.**

Usoro's individual claims are without merit and were properly dismissed by the trial court<sup>4</sup>. A legal malpractice claim requires the existence of an attorney client relationship that gives rise to a duty of care. *Hizey v. Carpenter*, 119 Wn.2d 251, 260-62, 830 P.2d 646 (1992); *Hunsley v. Giard*, 87 Wn.2d 424, 436, 553 P.2d 1096 (1976). Helm never

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<sup>4</sup> In addition to the reasons argued in this section, any individual claims by Usoro would fail on their merits for the same reasons as Etcetera's claims.

represented or contracted with Usoro individually in any capacity, and owed no duties to Usoro individually.

Helm was retained to collect the judgment obtained by Estudillo. Etcetera was the only plaintiff in the underlying matter. CP 719-730. The insurance policy at issue in the underlying lawsuit only named Etcetera, and not Usoro, as an insured. CP 655-660. The sole judgment-creditor to the judgment Helm was retained to collect was Etcetera. CP 735-737. As Helm was retained to collect the judgment, and the only judgment creditor was Etcetera, Helm never represented Usoro individually. CP 347, RFA 8. There was no agreement entered into between Usoro, acting in his individual capacity, and Helm.

Even though Usoro is an officer and shareholder of Etcetera, Helm did not owe any obligation to Usoro. Whether an attorney owes a duty to a non-client/claimant depends on the threshold question of whether the attorney's services were intended to benefit the claimant. Incidental beneficiaries of the attorney's services are owed no duty by the attorney. *Trask v. Butler*, 123 Wn.2d 835, 841-42, 872 P.2d 1080 (1994) (no duty owed to estate beneficiaries by an attorney hired by the estate administrator); *Leipham v. Adams*, 77 Wn. App. 827, 832, 94 P.2d 576 (1995) (no duty owed to estate beneficiaries by their parents' estate attorney where attorney failed to advise of filing a disclaimer); *Strait v. Kennedy*, 103 Wn. App. 626, 630-31; 13 P.3d 671 (2000) (no duty owed to children by their mother's divorce attorney where attorney had failed to finalize divorce prior to mother's death).

At best, Usoro, as a shareholder and officer of Etcetera, was an incidental beneficiary of Helm's representation. Any and all amounts that would have been collected on the judgment would be the property of Etcetera. The fact that Etcetera operated through Usoro in his capacity as an officer of Etcetera in the retention of Helm (CP 661-667) does not render Usoro, individually, Helm's client—particularly where Usoro was not a party in the underlying lawsuit or to the judgment Helm was retained to collect.

Usoro argues that the trial court overlooked Usoro's status as an "interested party" in the underlying lawsuit. See Appellant's Brief at p. 21. Helm does not dispute that Usoro had an interest in the outcome of the underlying litigation as a shareholder of Etcetera; all corporate shareholders have such an "interest" in litigation involving a corporation. But, whether a person is an "interested party" has no legal significance. The fact remains that in representation of corporation, the client in that representation is the corporation itself.

Allowing Usoro's individual claim to proceed should also be rejected because it would allow him to take advantage of the benefits and protection of incorporation but to ignore the corporate veil when convenient to him. Etcetera was the only intended beneficiary of Helm's representation in the underlying matter. Usoro's status as an incidental beneficiary requires dismissal of his claims.

Usoro's alleged subjective belief that Helm represented him personally cannot create an issue of fact on the question of whether an

attorney-client relationship was formed. An attorney-client relationship is created only if the subjective belief is “reasonably formed based on the attending circumstances.” *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). In the present matter, given that Helm was retained only to collect a judgment as to which Etcetera was the only creditor, any subjective belief by Usoro that Helm represented him individually was unreasonable and could not have been based on the attending circumstances.

**2. Usoro Abandoned His Emotional Distress Claims.**

The trial court also dismissed Usoro’s claims for negligent infliction of emotional distress. CP 417-420. Usoro does not contest the dismissal of these claims in his brief. Accordingly, these claims have been abandoned.

**3. Ganz Declarations Do Not Support Usoro’s Claims.**

Ganz’ declarations do not support Usoro’s claims. CP 333-341; CP 374-375. The trial court properly declined to consider Ganz’ opinions regarding the existence of an attorney-client relationship between Usoro and Helm, as those claims had been dismissed prior to the submission, or creation, of the Ganz declaration. CP 417-420. The trial court dismissed Usoro’s claims on April 30, 2010. CP 251-253. Pursuant to CR 59, a motion for reconsideration of a trial court’s order must be filed within 10 days of the order. If a motion for reconsideration is based on affidavits, the affidavits must be served with the motion. CR 59(c).

No motion for reconsideration of the order dismissing Usoro's claims was filed. The Ganz declaration was not filed, or served, until June 15, 2010, 46 days after the court's order dismissing Usoro's claims. CP 333-341. The declaration did not accompany a motion for reconsideration of the dismissal of Usoro's claims. Accordingly, the trial court properly declined to consider the Ganz declaration to the extent it purported to opine on the attorney-client relationship between Usoro and Helm.

**F. The Court Should Deny Usoro's Request for Attorney Fees.**

Usoro's request for attorney fees should be denied. First, Usoro has no claims in this lawsuit; all claims belong to Etcetera and Etcetera makes no request for an award of attorney fees. See Appellant's brief at p. 42. Second, a party may only recover attorney fees on appeal where the applicable law provides for such an award. RAP 18.1(a). A party must devote a section of its opening brief to identify the basis for such an award of fees and costs or else the request must be denied. RAP 18.1(b). *Wilson Court Ltd P'ship v. Tony Maroni's Inc.*, 134 Wn.2d 692, 952 P.2d 590 (1998); *Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 915 P.2d 1146 (1996); *Austin v. U.S. Bank of Wash.*, 73 Wn. App. 293, 896 P.2d 404, *rev. den.*, 124 Wn.2d 1015, 880 P.2d 1005 (1994); *Thweatt v. Hommell*, 67 Wn. App. 135, 834 P.2d 1058, *rev. den.*, 120 Wn.2d 1016, 844 P.2d 436 (1992). Usoro, and Etcetera, failed to identify any basis for the Court to award attorney fees on appeal even though the appropriate standard for an award was identified therein. See Appellants' Brief at p. 42.

## V. CONCLUSION

The trial court properly dismissed Usoro's and Etcetera's claims against Helm. There is no evidence to support all essential elements of the claims for legal malpractice or that Helm breached any contract. The trial court properly struck inadmissible evidence from the submissions of Usoro and Etcetera. Accordingly, Helm respectfully requests that this Court affirm the rulings by the trial court.

DATED this 27 day of January, 2011.

BETTS, PATTERSON & MINES, P.S.

By   
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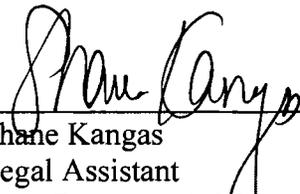
CERTIFICATE OF SERVICE

I certify that on the 27th day of January, 2011, I caused a true and correct copy of this Brief of Respondents Helm and Helm & Helm, Inc., P.S., to be served on the following in the manner indicated below:

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