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Court of Appeals No. 676415-I

**IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

TAMMY BECK,

Appellant,

v.

DARREN GRAFE and JANE DOE GRAFE

Respondents.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

I.	REPLY IN SUPPORT OF APPELLANT’S OPENING BRIEF....	1
II.	MR. GORDON’S EXPERT OPINION IS ADMISSIBLE TO ESTABLISH THAT GRAFE BREACHED THE STANDARD OF CARE.....	1
III.	GRAFE MISSTATES BECK’S THEORY AND IN DOING SO, EMPHASIZES MATERIAL ISSUES OF FACT THAT PRECLUDE SUMMARY JUDGMENT.....	4
IV.	GRAFE’S ARGUMENTS ARE COMPLETELY UNSUPPORTED BY COMPETENT EVIDENCE.....	6
V.	GRAFE’S NEGLIGENCE OCCURRED DURING HIS REPRESENTATION OF GOLL.....	7
VI.	GRAFE’S NEGLIGENCE PROXIMATELY CAUSED GOLL’S DAMAGES.....	9
VII.	CONCLUSION.....	16

TABLE OF AUTHORITIES

Cases

<i>Daly v. Lynch</i> , 24 Wn. App. 69, 600 P.2d 592 (1979).....	15, 16
<i>Daugert v. Pappas</i> , 104 Wn.2d 254, 704 P.2d 600 (1985).....	10, 11
<i>Diamond v. Sokol</i> , 468 F. Supp. 2d 626, 642 (S.D.N.Y. 2006).....	14
<i>Ensley v. Mollmann</i> , 155 Wn. App. 744, 230 P.3d 599 (2010).....	11, 12
<i>ESCA Corp. v. KPMG Peat Marwick</i> , 86 Wn.App. 628, 939 P.2d 1228 (1997).....	7
<i>Hetzel v. Parks</i> , 93 Wn. App. 929, 971 P.2d 115 (1999).....	4
<i>Lamon v. McDonnell Douglas Corp.</i> , 91 Wn.2d 345, 588 P.2d 1346 (1979).....	2, 4
<i>Land v. Greenwood</i> , 133 Ill. App. 3d 537 (1985).....	15
<i>Meadows v. Grant's Auto Brokers, Inc.</i> , 71 Wn.2d 874, 431 P.2d 216 (1967).....	2
<i>Manning v. Loidhammer</i> , 3 Wn. App. 766, 769, 538 P.2d 136 (1975).....	9
<i>Marks v. Benson</i> , 62 Wn. App. 178, 813 P. 2d 180 (1991).....	6, 7
<i>Morgan Bros., Inc. v. Haskell Corp., Inc.</i> , 24 Wn. App. 773, 604 P.2d 1294 (1979)	11
<i>Phennah v. Whalen</i> , 28 Wn. App. 19, 621 P.2d 1304 (1980).....	13
<i>Raymond v. Pac. Chem.</i> , 98 Wn.App. 739, 992 P.2d 517 (1999).....	1
<i>Ringgaard v. Allen Lubricating Co.</i> , 147 Wash. 653, 267 P. 43 (1928).....	12, 13
<i>Ward v. Arnold</i> , 52 Wn.2d 581, 584, 328 P.2d 164 (1958).....	8

Statutes

RCW 64.50.005.....5

Rules

CR 561, 2, 6

ER 7033

Other Authority

Karl B. Tegland, *Courtroom Handbook on Washington Evidence*
(2008-2009 ed.)3, 4

I. REPLY IN SUPPORT OF APPELLANT'S OPENING BRIEF

Attorney Grafe offers a number of arguments in response to Beck's request that this Court reverse the trial court's dismissal of her claims on summary judgment. However, these arguments simply emphasize the multitude of material issues of fact that preclude dismissal as a matter of law on summary judgment. Given the standard on summary judgment, Beck presented sufficient reasonable inferences of Grafe's failure to meet the standard of care, supported by an expert opinion, and therefore, she should survive summary judgment and be permitted to present evidence and legal theories as to Grafe's legal malpractice to a jury.

II. MR. GORDON'S EXPERT OPINION IS ADMISSIBLE TO ESTABLISH THAT GRAFE BREACHED THE STANDARD OF CARE

Although in his response brief, Grafe repeatedly argues that the expert opinion of Attorney Randolph I. Gordon is "inadmissible and irrelevant,"¹ this issue was never raised before the trial court. In fact, it was the trial court which granted Beck's counsel additional time pursuant to CR 56(f) to obtain an expert opinion to support Beck's opposition to Grafe's motion. Notably, Grafe never challenged Mr. Gordon's status as

¹ Respondent's Brief at 25.

an expert, nor did Grafe move to strike any portion of his expert opinion and report. As such, the report is admissible: If a party believes opposing affidavits or declarations do not conform to the evidentiary requirements of CR 56(e), that party must file a motion to strike the documents.

Raymond v. Pac. Chem., 98 Wn.App. 739, 744, 992 P.2d 517 (1999); *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 881, 431 P.2d 216 (1967). Failure to file a motion to strike waives any deficiency in the declaration or affidavit. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979). Grafe waived any argument that any portion of Mr. Gordon's declaration is inadmissible and he cannot now raise that argument for the first time on appeal.

Moreover, despite Grafe's contentions to the contrary, Mr. Gordon's in-depth analysis fully support the conclusions contained in his expert report. Grafe ignores the appropriate opinions given by this eminently qualified attorney. Based upon Grafe's acts and omissions, Mr. Gordon concludes, "Grafe breached the standard of care respecting preservation of the claims against Prudential, proximately causing damages to [Goll]." CP 244.

It cannot be disputed that the opinion of this well known and respected Washington attorney was being offered in opposition to summary judgment in order to provide standard of care testimony in this

legal malpractice case. ER 703 which speaks to this precise issue allows his opinion:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If a type reasonably relied upon by expert in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Significantly, Mr. Gordon further states, “The loss of [Goll’s] claims against Prudential cannot be excused as a legitimate ‘strategic’ decision, without the assent, informed consent, and waiver of [Goll], particularly where contrary intentions has been expressed by [Goll] to [Grafe] in writing.” CP 246. Grafe overlooks this important portion of Mr. Gordon’s Declaration which is the crux of Beck’s claims against Grafe.

Certainly this experienced attorney in giving his expert opinion, and measuring the conduct of Grafe, is allowed to take into consideration the applicable law. This expert opinion is not being offered in any attempt or manner to try and instruct the trial court what the law is or may be, but rather is to establish the predicate and foundation upon which this expert witness bases his opinions. Indeed, one of the state's leading experts on evidence, Karl B. Tegland, *Courtroom Handbook on Washington Evidence* (2008-2009 ed.), states precisely that:

Similarly, in a legal malpractice action, expert testimony is necessary to establish the standard of care, and an expert may express an opinion on the ultimate issue of whether the standard was violated.

Tegland, *supra*, p.353, citing *Hetzel v. Parks*, 93 Wn. App. 929, 971 P.2d 115 (1999).

While the jury will not be bound by the expert opinion of Mr. Gordon, in consideration of his training, education, experience, and the bases for his opinions, he will be a credible expert witness. *See* WPI 2.10. This will be even more compelling in light of the total lack of rebuttal expert testimony by Grafe.

Mr. Gordon's declaration is competent evidence that Grafe breached the standard of care and committed legal malpractice.

Viewing the inferences created by the affidavit of plaintiff's [expert] witness in a light most favorable to plaintiff, we are satisfied it created an issue of material fact which necessitated the denial of summary judgment.

Lamon at 353. Just as the Washington Supreme Court held in *Lamon*, *supra*, this Court should similarly hold that Mr. Gordon's declaration confirmed that there is an issue of material fact to defeat summary judgment.

III. GRAFE MISSTATES BECK'S THEORY AND IN DOING SO, EMPHASIZES MATERIAL ISSUES OF FACT THAT PRECLUDE SUMMARY JUDGMENT

In his response brief, Grafe asserts that the complaint for legal malpractice is based upon his pursuit of a legal theory in an unsettled area of law; namely, the application of substantial compliance to RCW 64.50.005. However, the complaint does not arise because Grafe was ultimately unsuccessful in his novel legal theory, but instead arose because a) Grafe failed to preserve a meritorious cause of action against Prudential, b) took no action to protect against the running of the statute of limitations, c) failed to properly advise his client of the applicable statute of limitations, and d) affirmatively and wrongfully asserted that the statute of limitations against Prudential did not begin to run until his client incurred damages. This was not a conscious “decision not to sue Prudential”; this was a breach of the duty of care owed to a client. Even Grafe’s own counsel continued to further the erroneous theory that the statute of limitations did not run until three years after this Court of Appeals issued its opinion reversing the trial court in the underlying litigation. CP 200. This is error as a matter of law, as set forth in detail by Mr. Gordon in his expert witness report. CP 237.

Grafe’s response brief, at page 20, emphasizes the multitude of material issues of fact that exist to preclude summary judgment; namely, 1) was failure to pursue Prudential a strategic decision [NO]; 2) were Grafe’s clients aware of this strategic decision [NO]; 3) did Grafe’s clients

consent to this strategic decision [NO]; 4) were Grafe's clients sufficiently informed of this strategic decision so as to be put on notice that they needed to seek new counsel to pursue Prudential [NO]; 5) did Grafe properly inform his clients of the applicable statute of limitations [NO]. In contrast, Grafe asserts that the answers to these questions are all in the affirmative, which reveals that these issues of material fact preclude summary judgment.

***IV. GRAFE'S ARGUMENTS ARE COMPLETELY
UNSUPPORTED BY COMPETENT EVIDENCE***

Grafe never submitted any competent evidence in support of his motion for summary judgment to form the basis for any of his counsel's present arguments. Notably, Grafe's declaration does **not** state that he made a strategic decision not to pursue Prudential, does **not** state that he obtained his client's informed consent not to pursue Prudential, and does **not** state that he properly informed his clients that the statute of limitations against Prudential would run in 2004. These assertions are purely based upon unsupported argument by counsel instead of competent or admissible evidence. CR 56(e) requires that summary judgment motions be supported by affidavits "made on personal knowledge" that "set forth such facts as would be admissible in evidence." The affiant must "affirmatively show competence to testify to the matters stated" and must be more than

just “familiar” with the facts alleged. *Marks v. Benson*, 62 Wn. App. 178, 182, 813 P. 2d 180 (1991). Evidence is not competent if it requires the trier of fact to base its award on mere speculation or conjecture. *ESCA Corp. v. KPMG Peat Marwick*, 86 Wn.App. 628, 639, 939 P.2d 1228 (1997).

During oral argument at the summary judgment hearing, the trial court held that Grafe’s counsel’s arguments were not supported by competent evidence in the record. VRP 5. Consequently, any arguments that Grafe made a “strategic” decision not to sue Prudential should be disregarded. The only competent evidence in the record, which was presented by Beck’s counsel regarding Grafe’s conduct, acts, and omissions, is Mr. Gordon’s expert opinion that Grafe committed a blatant violation of the standard of care in his legal representation of his client, Mr. Goll.

V. GRAFE’S NEGLIGENCE OCCURRED DURING HIS REPRESENTATION OF GOLL

In his response brief, at page 15, Grafe asserts that his representation of Goll “ceased before his alleged negligence in this matter,” apparently because the statute of limitations ran after his withdrawal from the case. Grafe overlooks the fact that his negligence occurred during his representation of Goll, when he repeatedly informed

Goll that no action against Prudential could yet be pursued, and that Goll would have to wait until he incurred damages. Notably, as supported by Mr. Gordon, Grafe's failure to recognize that damages had been incurred as a matter of law as a result of Prudential's acts and omissions "was not merely an error, but the sort of error that reasonably deterred [Goll] from seeking timely assistance and Mr. Middleton from taking timely action." CP 237. Simply put, Grafe is not relieved of liability for his own negligence and the consequential and adverse effects upon his client because he managed to withdraw before the statute of limitations ran. In fact, it was only after it became too late to pursue an action against Prudential, did Goll discover that Grafe's legal advice was flawed.

An attorney at law, when he enters into the employ of another person as such, undertakes that he possesses a reasonable amount of skill and knowledge as an attorney, and that he will exercise a reasonable amount of skill in the course of his employment, but he is not a guarantor of results and is not liable for the loss of a case **unless such loss occurred by reason of his failure to possess a reasonable amount of skill or knowledge, or by reason of his negligence** or failure to exercise a reasonable amount of skill and knowledge as an attorney.

Ward v. Arnold, 52 Wn.2d 581, 584, 328 P.2d 164 (1958) (emphasis added, internal citation omitted). This claim for legal malpractice is based upon Grafe's failure to possess a reasonable amount of skill and knowledge in advising his client whether and when an action against

Prudential could be asserted and when damages were incurred, in direct contravention of the law set forth in *Manning v. Loidhammer*, 3 Wn. App. 766, 769, 538 P.2d 136 (1975). The negligence occurred during the course of legal representation of Goll by Grafe and the fact that both the attorney and the parties were wholly unaware that the statute of limitations would bar the claims against Prudential as early as 2004 does not absolve Grafe of his negligence. It is for this very reason that Grafe, as a legal professional, was hired to protect Goll's interests.

VI. GRAFE'S NEGLIGENCE PROXIMATELY CAUSED GOLL'S DAMAGES

In his response brief, Grafe asserts that Beck's theory of proximate cause fails as a matter of law. First, this assertion fails because it is again predicated solely upon the argument of counsel, who asserts that failure to preserve claims against Prudential was a "trial strategy". As a result, Beck is entitled to the inference that Goll's claims were forfeited by Grafe's lack of care, diligence, and utter failure to take appropriate steps to bring Prudential into the litigation prior to trial in accordance with his client's instructions.

Second, Grafe's assertion that proximate cause cannot be proven fails because it was Grafe's negligent advice and omissions that prevented Goll from preserving his claims against Prudential. Goll specifically

instructed Grafe to pursue a claim against Prudential. Had Grafe properly brought a third-party claim against Prudential, no legal malpractice would have occurred. Similarly, had Grafe appropriately informed his client of the statute of limitations and the need to file a separate lawsuit prior to mid-2004, Goll could have taken appropriate action to protect his interests. Only in that situation would Grafe's argument have merit; namely, that his acts and omissions were not the proximate cause of a failure to timely file a cause of action against Prudential. As Mr. Gordon states in his expert opinion, "[t]here are questions of fact necessary to address in this inquiry." CP 239.

In most instances the question of cause in fact is for the jury. It is only when the facts are undisputed and inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that this court has held it becomes a question of law for the court. The principles of proof and causation in a legal malpractice action usually do not differ from an ordinary negligence case. For instance, when an attorney makes an error during a trial, the causation issue in the subsequent malpractice action is relatively straightforward. The trial court hearing the malpractice claim merely retries, or tries for the first time, the client's cause of action which the client asserts was lost or compromised by the attorney's negligence, and the trier of fact decides whether the client would have fared better but for such mishandling. In such a case it is appropriate to allow the trier of fact to decide proximate cause. In effect the second trier of fact will be asked to decide what a reasonable jury or fact finder would have done but for the attorney's negligence. Thus, it is obvious that in most legal malpractice actions the jury should decide the issue of cause in fact.

Daugert v. Pappas, 104 Wn.2d 254, 257-58, 704 P.2d 600 (1985) (internal citations omitted).

Grafe cannot shift his fiduciary duty to anyone else by citing his withdrawal as Mr. Goll's attorney of record in 2003. Grafe argues that since the statute of limitations did not run until 2004, he cannot be liable for his client's failure to file suit by that date. However, Grafe ignores the fact that it was his own lack of diligence, erroneous advice, and failure to disclose material facts, and his acts alone, that proximately caused his client to fail to file suit prior to the statute of limitations. Grafe does not stand in the same shoes as his client as an equal party; instead he owed an affirmative duty to his client to thoroughly advise him of material facts.

Grafe attempts to shift his fiduciary duty to his successor, attorney Middleton. Mr. Middleton commenced legal representation of Goll only two and one-half months before trial, which was well beyond the timeframe for adding in third-party defendants. *See, e.g., Morgan Bros., Inc. v. Haskell Corp., Inc.*, 24 Wn. App. 773, 604 P.2d 1294 (1979) (Proper denial of motion to amend five weeks before trial to include third-party claims, without sufficient showing of why third-party defendant was not brought in before, which would have further delayed case which had been pending for 17 months); *Ensley v. Mollmann*, 155 Wn. App. 744, 230 P.3d 599 (2010) (denial

of motion to amend to add party filed two years after original complaint, several months after depositions had been taken, two weeks before the discovery cutoff, and two months before trial).

Unfortunately, because of Grafe's sudden departure from his firm, Mr. Middleton was severely restricted in his ability to pursue the real estate brokerage firms. Discovery, including the depositions of the real estate brokers, had already taken place. Mr. Middleton explained to his client that he could not change the course of action that Grafe had started. Mr. Middleton also adopted Grafe's opinion that until damages were sustained by Goll, an action against Prudential was not viable.

Unfortunately for Mr. Middleton, he was initially successful at trial in limiting Goll's liability to \$2,000, only then to learn two years later, in 2005, that the appellate court overturned that decision. In the meanwhile, the statute of limitations by which to file suit against Prudential had passed. Because Prudential and its agents had not been named in the original lawsuit, Goll's claims against them were barred. Even if Mr. Middleton could be deemed to have been negligent in failing to file litigation prior to July 19, 2004, it would not absolve Grafe of liability for his own negligence while representing Goll.

The principle of law relative to the liability of joint tort-feasors the appellant invokes is well settled in this jurisdiction. Whatever may be the rule elsewhere, we have uniformly held that where the concurrent or successive negligence of two or more persons combined together results in an injury or loss to a

third person, and the negligence of the one without the concurring negligence of the other would not have caused the injury or loss, the third person may recover from either or both for the damages suffered.

Ringgaard v. Allen Lubricating Co., 147 Wash. 653, 655-56, 267 P. 43 (1928).

Grafe's acts and omissions were the proximate cause of Goll's inability to pursue third-parties in a timely manner. Goll repeatedly requested that Prudential be brought into the underlying litigation; Grafe repeatedly failed to abide by those instructions, either because of lack of diligence or lack of skill and knowledge, both of which constitute legal malpractice. However, even if Grafe could shift blame to Mr. Middleton, he does not escape liability for his own actions: "Characterized as concurrent tortfeasors have been those defendants, one of whose negligence set in motion a series of events upon which the other's acted so as to produce the end result." *Phennah v. Whalen*, 28 Wn. App. 19, 23, 621 P.2d 1304 (1980). Mr. Gordon agrees:

Equitable estoppel theory recognizes that it would be a strange and inequitable argument indeed for Mr. Grafe to assert, in effect: Mr. Middleton is solely liable between he relied to his detriment on the erroneous legal theory that I foisted upon him, failed to see through my erroneous representations respecting the accrual of the cause of action against Prudential, and failed to overcome the procedural burdens of belatedly attempting to assert a third-party complaint – burdens which I had created by not filing a third-party complaint as promised to the client and by failing to respond to a Joint Pretrial Report. Such an argument would not immunize defendant or Mr. Middleton from legal action by plaintiff, but it would certainly be a factor, along with other factual circumstances, in allocating fault between the two. (CP 242)

Grafe cites *Diamond v. Sokol*, 468 F. Supp. 2d 626, 642 (S.D.N.Y. 2006) for the proposition that once Grafe withdrew from representation, his liability was extinguished. However, Grafe disregards the actual holding of the case in which the dispute centered on the argument as to whether or not the trial court might have permitted an amendment to the bill of particulars before trial to add another component of damages. The *Diamond* Court stated, at page 643:

In short, Leffler can no more assume that leave to amend would have been granted than Sokol can assume that it would have been denied. In any event, had Leffler included lost earnings in the bills of particulars he prepared, Sokol would not have needed to move to amend, and *Diamond* would not have been exposed to any risk of denial of leave to do so. A jury must determine whether either lawyer was negligent and if so, the proportion of responsibility borne by each.

Just as in our case, Grafe prepared the pleadings and positioned the case so that Prudential was not a named third-party defendant. Beck contends that it was highly unlikely that a trial court would have permitted her father to amend his answer to add a third-party defendant just two months prior to trial. Beck's expert witness agrees. Just as in *Diamond*, properly preparing the pleadings the first time, by naming Prudential, would eliminate the client's exposure to any risk of denial of leave by the trial

court. Just as in *Diamond*, the jury should determine the proportion of liability between the two attorneys.

Grafe also cites *Land v. Greenwood*, 133 Ill. App. 3d 537 (1985) for the proposition that a prior attorney cannot be held negligent. However, in that case, the court found, “plaintiff can prove no set of facts which connect [the prior attorney’s] conduct with any damage sustained by plaintiff. In sharp contrast, there is a strong connection between the negligence of Grafe and the continuing negligence of Middleton in adopting Grafe’s erroneous advice that claims could not be pursued against Prudential until damages were incurred by Goll, as well as a strong connection between Grafe’s failure to timely name Prudential as a third-party defendant and Mr. Middleton’s loss on appeal after the statute of limitations ran against Prudential. The unsuccessful efforts of Mr. Middleton fell within the risk created by the negligence of Grafe.”

Given Grafe’s failure to timely join the third-party defendants during the two year period he represented Goll, he could be considered a concurrent tortfeasor, at best, and cannot be relieved of complete liability. For the purposes of summary judgment, this is another disputed issue of material fact, as “generally it is for the trier of fact to determine whether an intervening act breaks the causal connection between defendant’s

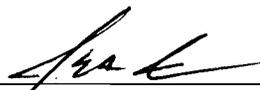
negligence and the plaintiff's injury." *Daly v. Lynch*, 24 Wn. App. 69, 76, 600 P.2d 592 (1979).

VII. CONCLUSION

To defeat Grafe's motion for summary judgment, Beck must merely show that on the present record, it cannot be said that Grafe's representation was adequate as a matter of law. Grafe did not present competent evidence to overcome Beck's theory that his lack of diligence resulted in the failure to name third-party defendant Prudential in the underlying lawsuit, and the eventual loss of that viable claim. Consequently, Beck has sustained her burden to show the existence of reasonable inferences that may be found by the trier of fact to support her theories of legal malpractice.

Respectfully submitted this 10th day of February, 2012.

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