

72655-2

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Court of Appeals No. 72655-2-1

**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 OPENING BRIEF

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COURT OF APPEALS
STATE OF WASHINGTON

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I. INTRODUCTION

Tammy Beck, in the capacity of Personal Representative of the Estate of Claud Goll, deceased, filed suit in August 2010 against Attorney Darren Grafe, for legal malpractice.

Grafe represented Beck's father, Claud Goll, between August 2001 and May 2003, in the defense of litigation brought by Nancy Chrisp, regarding a purchase and sale agreement for residential real estate ("the underlying litigation"). The basis for the claim of legal malpractice in the underlying litigation was Grafe's failure to preserve negligence claims against Goll's real estate agent, Prudential Northwest Realty, for failing to properly advise him and provide guidance as to completing the real estate purchase and sale agreement forms in such a way that the remedies for a breach would be limited solely to \$2,000.00, the amount of his earnest money deposit. Because Prudential had not properly assisted Goll in ensuring that the parties' agreed that the remedy was limited, Chrisp filed suit against Goll for her "actual" damages, claiming over \$100,000.00.

In defense of the legal malpractice claim, Grafe filed a motion for summary judgment, seeking to dismiss Beck's claims on the grounds that the legal malpractice claim was not timely filed within three years of the date of Grafe's withdrawal of representation, in June 2003. (Defendant

also sought dismissal on the grounds that the deadman's statute precluded the admission of necessary evidence to support Plaintiff's claim, but the trial court denied dismissal based upon those grounds.)

This is the second occasion in which the Court of Appeals will rule on his matter. The first appeal resulted in a reversal of the trial court's summary judgment dismissal. The issue on appeal at that time was, "whether Grafe is entitled to avoid liability because he turned the case over to a successor attorney before the statute of limitations expired." *Beck v. Grafe*, slip op. at 1 (April 8, 2013). The Opinion stated "Grafe and Middleton committed malpractice as a single continuous course of inaction, making Middleton's negligence a concurrent cause of the damage rather than an independent intervening cause." *Beck v. Grafe*, slip op. at 16 (April 8, 2013).

Beck now seeks review of the trial court's decision to dismiss her case for the second time, based upon the fact that the three-year statute of limitations does not preclude filing a malpractice case against Grafe, when his malpractice continued after Middleton took over as successor counsel.

The statement of issue as posed by the Defendants that is now on appeal was: "Whether Plaintiff's legal malpractice action asserted against Mr. Grafe ... is barred by the three year statute of limitations where Mr. Grafe withdrew from representation of Mr. Goll on June 5, 2003, and no

lawsuit was started against him until August 5, 2010.” (CP 330).

Notably, the statute of limitations issue in this second appeal is not different in any meaningful way from the statute of limitations issue in the first appeal.

II. ASSIGNMENTS OF ERROR

- A. Beck assigns error to the trial court’s entry of the Order Granting Defendants’ Motion for Summary Judgment, filed September 19, 2014, dismissing Beck’s claims. (CP 433-434)
- B. Beck assigns error to the trial court’s entry of the Order Denying Plaintiff’s Motion for Reconsideration of September 19, 2014 Order Granting Defendants’ Motion for Summary Judgment. (CP 449-450)

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1. Did the trial court err by concluding as a matter of law, that the evidence presented to the trial court relating to the attorney’s motion for Summary Judgment demonstrated no genuine issue of material fact such that the attorney, as the moving party, was entitled to judgment as a matter of law? (Assignment of Error 1.)

2. Did the trial court err when it failed to view all facts and inferences in the light most favorable to Beck, the non-moving party, when it granted the Motion for Summary Judgment? (Assignments of Error 1 and 2.)

IV. APPELLANT'S STATEMENT OF THE CASE

A. Facts Regarding Goll's Claims Against Third-Party Prudential

In 2001, Nancy Chrisp listed her residential home for sale, which included a separate "guest" house. CP 90. Claud Goll's real estate agent, who was employed by Prudential Northwest Realty, showed him the property, and Goll decided to make an offer to purchase it. CP 162. In July 2001, Goll and Chrisp entered into a purchase and sale agreement. Goll paid \$2,000.00 as an earnest money deposit. CP 162; CP 190.

Prior to the closing, Goll discovered that an unattached structure on the property did not satisfy required code as a separate "guest" house as advertised, but was, in fact, simply a detached garage or shop. CP 191. As a result, Goll elected not to move forward with the purchase, with an expectation that his loss would be limited to the \$2,000.00 earnest money amount. CP 191-192.

Chrisp claimed she had been damaged by Goll's failure to complete the purchase and sought to recover damages in excess of the earnest money

deposit. CP 193. Chrisp sought more than a forfeiture of the \$2,000.00 earnest money deposit claiming moving and storage expenses, months of mortgage payments, and a significant reduction in the sale price, with total alleged damages exceeding \$100,000.00. CP 156.

The basis for Chrisp's claim that she was entitled to more than the earnest money deposit of \$2,000.00 was that the parties did not comply with the statutory requirements of RCW 64.04.005, in which both the purchaser and seller must separately initial the forfeiture of earnest money provision in order to limit the remedy for breach of contract. CP 162. Chrisp was, in fact, correct, that the parties failed to strictly comply with the statute. CP 188.

Despite the fact that Goll had retained the professional services of Prudential Northwest Realty to assist him with the purchase of the residential property and the completion of the purchase and sale agreement, Prudential failed to protect Goll and exposed him to damages in excess of the earnest money deposit. First, in the purchase and sale agreement's summary of terms section entitled "SPECIFIC TERMS," only one of the two required initials was secured. CP 162. Second, in paragraph 'p' there was no designation or execution of the sections allowing for limitation of recourse against Buyer and no initials, as mandated by statute, were obtained. CP 165. Third, the standard form,

the so-called Statutory Safe Harbor clause [NWMLS Form 22D Optional Clauses addendum] was neither provided, nor executed. CP 266. This Statutory Safe Harbor clause specifically provides places for the parties to initial. CP 266.

The deficiencies in the work of Prudential in this transaction must be viewed through the filter of regarding their work as constituting the “unauthorized practice of law.” Put another way, Prudential’s work on this documentation clearly failed to protect the legal interests of Goll, whom they represented; this occurred through a breach of the standard of care that, in an attorney, would have constituted professional negligence and in Prudential’s case constitutes both negligence and the unauthorized practice of law. CP 221.

A sound cause of action arose against Prudential for failure to effectively to preserve the limitation of remedy against the Buyer to his earnest money. Limiting recourse to the \$2,000 earnest money was a material consideration in this transaction, the express agreement of Chrisp was obtained, but Goll’s omission of setting forth his initials constituted a failure to comply with the statutory mandates of RCW 64.04.005 left Goll exposed to additional liability beyond his intention or expectation. CP 221-222.

B. Retention of Attorney Grafe in Underlying Litigation

On or about August 6, 2001, Goll and his daughter, Tammy Beck, met with attorney Darren Grafe to seek legal advice regarding the real estate transaction and potential subsequent litigation. CP 190. During that initial meeting with Grafe, Goll and Beck spoke about filing a “counter suit” against the real estate brokers who were involved in the transaction. CP 191. Grafe told Goll that suit could not be filed against the real estate brokerage firms until Goll had been harmed and could show damages. CP 193.

On or about August 16, 2001, Beck and Goll met with Grafe a second time because they received a demand that Goll purchase the real property at issue, or “pay the consequences.” Chrisp’s attorney was demanding far more than the \$2,000 earnest money deposit from Goll, claiming that Chrisp’s remedies were not limited to forfeiture of the earnest money. Beck was upset because Prudential refused to return her father’s earnest money deposit. Beck asserted to Grafe that Goll should file suit against Windermere for misrepresentation in the listing, and Prudential and/or Ms. Curran because they failed to protect her father by not having him sign the ‘safe harbor’ clause in the purchase and sale agreement. CP 191-92.

After a couple months passed without any further contact from Chrisp, Beck and Goll met with Grafe on or about October 22, 2001 to close the file.

Despite having received threats, no lawsuit had been commenced at that time by Chrisp. Goll paid Grafe what he thought would be his final bill for attorneys' fees. CP 192.

Within two weeks of the October 2001 meeting, on or about November 2, 2001, Grafe wrote Goll a letter to notify him that he received notice that a lawsuit had been filed by Chrisp. CP 192. In his letter, Grafe advised Goll to retain counsel, whether his firm or another firm, to defend him in the action and to advise him of his rights. CP 123. Grafe further stated, in writing:

Based upon my knowledge of your case, and my conversations with you, you may have legal claims against others involved as named parties and against those not named as parties. If you intend to pursue these matters further, you should do so promptly. If not properly brought, in responding to this lawsuit, certain claims may be barred. Further, the law sets certain time limits for pursuing legal claims called statutes of limitation. The time periods vary depending upon the type of legal claim and are strictly enforced. If you do not bring your claim within the time period set by the statute of limitations, then your claim is barred. Again I would like to emphasize that you should hire an attorney who can more thoroughly advise you as to how to proceed in this matter. (CP 123.)

On or about that same day, November 2, 2001, Goll received a copy of the lawsuit pleadings in the mail. Beck and Goll immediately telephoned Grafe to recommence his legal services. Beck and Goll again spoke with Grafe during that conversation about their desire to bring the two real estate brokerage firms in the lawsuit. CP 192.

Each and every time that Plaintiff Beck and Goll met or conversed with Grafe, they brought up the topic of suing the real estate brokerage firms. CP 193. Goll was extremely upset at having to use his retirement funds to defend himself. CP 192. He and Plaintiff Beck repeatedly asserted that the real estate brokerage firms should have to pay Goll's attorneys' fee bill. CP 193. Each time, Grafe would explain that a lawsuit could not be filed against the real estate brokerage firms until Goll had been harmed and could show damages. CP 193. Grafe made it clear that Goll had to wait until the underlying lawsuit was finished before he could pursue a lawsuit against Prudential and Windermere. CP 193. Grafe made it clear that the statute of limitations would not start until the current lawsuit was finished because that was the time in which Goll would have, in fact, suffered damages as a result of their roles in the purchase and sale transaction. CP 193.

Beck and Goll relied upon Grafe to provide legal advice to them regarding the dispute with Chrisp, as well as regarding claims against other parties. CP 192.

On November 6, 2001, Grafe filed a Notice of Appearance indicating that he represented Claud Goll and Ritter, Goll's other daughter who had been named in the suit. CP 126-127. Grafe did not file an Answer for months, until faced with a Motion for Default on April 4, 2002. CP 129.

When Grafe filed the answer on behalf of Goll, he did not name any

third party defendants. CP 135-140. Instead, his answer merely provided:

Defendants Goll and Ritter allege that the conduct of unknown persons or entities; employees, agents, and/or representatives of Windemere Real Estate; and/or employees, agents, and/or representatives of Prudential Northwest Realty; who are not parties to this action, contributed to Plaintiff's damages, and as such, the Plaintiff's damages should be reduced by the proportionate share of liability of the other entities that cause or contributed to Plaintiff's damages. (CP 137.)

On or about April 24, 2002, Goll and Beck met with Grafe to discuss options to dismiss the lawsuit. Beck informed Grafe that Prudential continued to hold Goll's earnest money check, and refused to speak with her about it. Beck also informed Grafe that she felt Prudential's real estate agent was not responsive because she knew she "screwed up" and knew that Goll could name her in the current lawsuit. Grafe continued to maintain that Goll could not sue either party's real estate broker because Goll had not yet suffered any harm as a result of their actions. Beck then pointed out the amount of attorneys' fees expended to date as evidence of how Goll had been harmed. In addition, Beck asserted that if Goll was found to owe money to Chrisp as a result of the failed transaction, any liability over the \$2,000 earnest money deposit should be paid by the real estate brokers due to their own negligence. Grafe represented that it was his opinion that a Motion to Dismiss would resolve the case, and then Goll could recover his attorneys' fees. CP 193-194.

On or about July 5, 2002, the Court dismissed Ritter from the lawsuit,

pursuant to Grafe's Motion to Dismiss. However, the Court denied the motion to dismiss Goll from the case. CP 194. Grafe wrote to his clients to let them know of the Court's ruling. Notably, his letter of July 5, 2002 stated, "For now we will move forward with a motion to allow us to amend our answer and to file a third party complaint." CP 142.

Beck, Goll, and Grafe participated in a telephone conference on July 8, 2002, regarding the "outcome of [the] hearing" and the "next steps in [the] case." CP 145. Beck and Goll discussed with Grafe, again, their desire to file suit against the real estate brokers and brokerage firms. CP 194. Soon thereafter, Grafe charged Goll for 0.60 hours on July 10, 2002, to "[c]onsider issues related to third party complaint and potential parties to list." CP 145. Grafe then charged Goll for 0.90 hours on July 15, 2002, for "Preparation of pleadings; work on motion to amend." CP 145.

Despite his client's repeated instructions, and despite the fact that Grafe affirmatively stated that he would file a motion and amend Goll's answer, Grafe never filed a motion to amend Goll's Answer to name Prudential or its agents as third party defendants. CP 129-133.

On or about November 26, 2002, Chrisp's attorney filed a Joint Pretrial Report, stating that "All essential parties have been named." CP 149. Grafe did not sign the Joint Pretrial Report; instead, Chrisp's attorney noted Grafe's failure to respond on multiple occasions. CP 148-151. Grafe never objected or

moved to modify the Joint Pretrial Report to add any third-party defendants.
CP 129-133.

Grafe never informed his client that this Joint Pretrial Report had been filed, potentially foreclosing the ability to add other essential parties. Grafe never informed his client that he took no subsequent action to protect his client's ability to add the brokerage firms into the lawsuit. Grafe never informed his client of the actual date of the statute of limitations which would prohibit the filing of a separate lawsuit against the real estate brokerage firms.
CP 194-195.

Goll and Beck understood Grafe's legal advice, which was repeatedly given, to mean that only after suffering a judgment in excess of \$2,000, would a claim ripen against the real estate brokerage firms, enabling suit to be filed by Goll against them. Goll and Beck relied upon that advice. Grafe never informed Goll that the statute of limitations would require him to file a separate lawsuit against Prudential prior to a particular date in 2004. CP 194 - 195.

On or about May 27, 2003, Grafe notified Goll that he was leaving the law firm and would no longer represent Goll. CP 39. At the time of Grafe's withdrawal at the end of May 2003, the trial date was less than two and one-half months away. In his notice, Grafe did not disclose his failure to preserve the ability to bring in third-party defendants at that time, as had been

repeatedly requested by Goll and Beck, nor did he inform them of any statute of limitations against the real estate firms that would require a separate lawsuit filing. CP 195.

C. Underlying Litigation Leaves Goll Exposed to Excess Damages Without Recourse Against Prudential

Attorney David Middleton, of the same law firm, then commenced legal representation of Goll in the dispute with Chrisp. During their initial meetings with Middleton, Beck explained the way in which she thought that Prudential had harmed Goll and that they had instructed Grafe to sue them as a result. Middleton explained that he could not change the course of action that Grafe had started. Middleton also adopted Grafe's conclusion that Goll could sue the real estate brokerages once Goll sustained damages, stating that Goll had not sustained damages at that point. CP 195.

Under Middleton's representation, Goll prevailed at trial against Nancy Chrisp, and his liability was limited to the \$2,000 earnest money deposit. CP 154-160. Goll was also awarded a substantial amount of attorneys' fees in the underlying litigation. CP 195.

However, Nancy Chrisp appealed the trial court decision. On January 5, 2005, the appellate court reversed the trial court's decision, holding that Goll failed to comply with the statute to limit the seller's remedy to the forfeiture of the earnest money deposit and that the doctrine of substantial compliance did

not apply. CP 197.

Middleton died in 2008. Goll retained new legal counsel to continue the defense of the lawsuit and to pursue claims against Prudential. Upon retaining new counsel, Goll discovered that he had no ability to assert claims against Prudential because the statute of limitations had run. CP 198. Goll then settled the claim with Chrisp without having any legal recourse against Prudential to recover damages sustained as a result of the negligence of the brokers and brokerage firms. CP 3.

D. Attorney Grafe Failed to Satisfy the Standard of Care of a Washington Attorney in his Legal Representation of Goll

When Goll died in June 2009, his daughter, Tammy Beck, was appointed as the personal representative of his estate. Beck filed this action for negligence and professional malpractice and breach of contract against Grafe on August 6, 2010. CP 1-5.

On February 11, 2011, Grafe filed a Motion for Summary Judgment seeking to dismiss Beck's claims. CP 12. In response to the motion, Beck set forth her legal theories to support her claims that Grafe breached his duties and obligations. CP 89-116. At that time, it was early in the case, discovery had not been had, and Beck had not yet obtained an expert opinion of an attorney to submit in opposition to the motion, and Beck moved for a continuance to permit her sufficient time to obtain such an expert opinion. CP 112-14.

On March 11, 2011, the trial court heard oral argument regarding the Defendants' Motion for Summary Judgment and the Plaintiff's Motion for Continuance. The Court specifically inquired as of Beck's counsel what an expert would likely testify to regarding the facts of this case. Beck's counsel responded that she anticipated her expert would testify regarding when the underlying case's statute of limitations would have run, that Grafe failed to meet the standard of care in his legal representation of Goll, that Grafe failed to bring in a necessary third-party defendant, that Grafe failed to act with the required diligence during his representation, that Grafe failed to follow Goll's express instructions, that Grafe breached his duty to inform Goll that he had failed to timely bring in a third-party, and that failure required Goll to file a separate lawsuit, that Grafe failed to inform his client or his successor attorney of this fact when Grafe formally withdrew from representation, and that it was reasonable for Goll to rely upon Grafe's representations and advice, thereby, satisfying the burden to show proximate cause, among other potential breaches by Grafe. After learning the breadth and scope of the issues to be addressed by the expert witness, the trial court ruled that the Motion for Continuance was granted and that Beck must submit an expert opinion to support her opposition to the Motion for Summary Judgment no later than March 25, 2011. CP 308-309.

Thereafter, Beck immediately retained and paid for the services of

Randolph I. Gordon, a prominent local attorney, to analyze the underlying litigation and the representation of Goll by Grafe, and to draft and submit an expert opinion to address the standard of care required of Grafe, and whether Grafe met that standard of care or not. CP 309.

On March 25, 2011, Beck filed the expert opinion of Randolph I. Gordon in opposition to the Motion for Summary Judgment. In addition to setting forth his qualifications, Mr. Gordon set forth the relevant facts of the underlying litigation, and provided his expert opinion opining that the statute of limitations would not have been tolled, that Grafe was negligent in his legal representation, that his attempt to shift the blame to a successor attorney was without merit because there was concurrent negligence, that Grafe's acts and/or omissions proximately caused damages to Goll, that Grafe's withdrawal of representation did not alleviate him of liability, and that Grafe's claim that his acts and/or omissions were a strategic decision, and not negligence, was unsupported by the facts and evidence, among other things. CP 213-296.

On June 27, 2011, the trial court filed an order that reflected it considered all of the pleadings in the case, including the expert Declaration of Randolph I. Gordon, but that it granted Defendants' Motion for Summary Judgment and dismissed Beck's claims. CP 312-313.

The first appeal followed that dismissal. On April 8, 2013, this Court reversed the trial court's decision and remanded the case for trial. *Beck v.*

Grafe, slip op. at 17 (April 8, 2013).

On August 22, 2014, Defendant filed another motion for summary judgment. The trial court dismissed the case for the second time, based upon the fact that this claim for legal malpractice was filed more than three years after Grafe had withdrawn from representation. This appeal follows.

V. SUMMARY OF ARGUMENT

In response to Grafe's first motion for summary judgment, Beck asserted several theories of negligence, professional malpractice, and breach of contract against attorney Grafe. The expert testimony of attorney Randolph I. Gordon supported the action for professional negligence and demonstrated several ways in which Grafe's conduct fell below the requisite standard of care.

Attorney Gordon submitted analysis and testimony that Grafe failed to act diligently in filing a claim against Prudential. Grafe disputed this material fact, and without submitting competent evidence, asserted that he made a strategic decision not to pursue Prudential as a third-party defendant. This Court held that "Grafe cannot be excused from liability on the basis that he made a reasonable strategic decision in an uncertain area of the law." *Beck v. Grafe*, slip op. at 8 (April 8, 2013).

Attorney Gordon then submitted analysis and testimony that Grafe breached his duty of care by advising Goll that a lawsuit against Prudential could not be maintained until “actual damages” had been sustained. Grafe disputed this material fact and maintained that his legal advice was accurate and that the statute of limitations would not run until the underlying litigation was resolved in a manner that was unfavorable to Goll. This Court held that “Grafe failed to realize that the element of damages, a necessary prerequisite to a negligence suit, is satisfied in an ABC scenario by the payment of attorney fees.” *Beck v. Grafe*, slip op. at 8 (April 8, 2013).

Attorney Gordon also submitted analysis and testimony that Grafe breached his duty of care by failing to disclose that he missed the opportunity to add Prudential as a third-party defendant into the underlying litigation, and by failing to advise Goll that a separate lawsuit would have to be filed prior to the running of the statute of limitations. Grafe disputed this material fact and attempted to shift the blame to his client and successor counsel, Middleton. This Court held that “[b]ecause Grafe did not recognize that Goll’s potential claim against Prudential was based on the ABC theory... he did not advise [his client] Goll or [successor counsel] Middleton that action needed to be taken soon to preserve that claim.” *Beck v. Grafe*, slip op. at 16 (April 8, 2013).

Finally, and most significantly in terms of this second appeal, Attorney Gordon submitted analysis and testimony that Grafe cannot avoid liability by blaming Middleton's negligent acts and omissions, as concurrent liability applies. Grafe disputed this and asserted that his 2003 withdrawal absolved him of any responsibility whatsoever, even for his own negligence that occurred prior to withdrawal. This Court held, "Grafe and Middleton committed malpractice as a single continuous course of inaction, making Middleton's negligence a concurrent cause of the damage rather than an independent intervening cause." *Beck v. Grafe*, slip op. at 16 (April 8, 2013).

The trial court failed to recognize that the specific issue addressed by the Court of Appeals Opinion, whether or not Grafe was absolved from liability because of his 2003 withdrawal, was identical to the specific issue in the second motion for summary judgment, whether Grafe was absolved from liability for negligence occurring more than three years after his 2003 withdrawal. The trial court failed to view all facts and reasonable inferences, including the unrefuted testimony of expert attorney Gordon, in the light most favorable to Beck. Additionally, the trial court failed to acknowledge the numerous genuine issues of material fact that precluded summary judgment. Negligence includes issues of fact not properly determined through Summary Judgment. *Preston v. Duncan*, 55 Wn.2d

678, 681-82, 349 P.2d 605 (1960). In general, an affidavit containing admissible expert opinion on an ultimate issue of fact is sufficient to create a genuine issue as to that fact, precluding summary judgment.” *J.N. By and Through Hager v. Bellingham School Dist. No. 501*, 74 Wn. App. 49, 60-61, 871 P.2d 1106 (1994).

VI. ARGUMENT

A. Three-Year Statute of Limitations Does Not Bar This Legal Malpractice Claim

1. Standard of Review

The standard of review of an order of summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court." *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

2. Elements of Legal Malpractice Claim

To establish a claim for legal malpractice, a plaintiff must prove the following elements: (1) The existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred.

Hizey v. Carpenter, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992). “Once an attorney-client relationship is established, the elements for legal malpractice are the same as for negligence.” *Bowman v. Two*, 104 Wn.2d 181, 185, 704 P.2d 140 (1985).

Grafe again challenges the legal element of proximate cause, by asserting that his withdrawal in 2003 prohibited the filing of this claim after 2006, as three years had passed.

3. Concurrent Negligence Claim May Be Pursued Against One Party

Plaintiff's legal theory, as supported by her expert witness and as set forth in this Court's Opinion on page 16, is that Grafe was negligent in failing to recognize that the statute of limitations against Prudential was running. As a result of that negligence, Grafe did not advise Goll or Middleton that action needed to be taken against Prudential to preserve that claim. In taking over representation of the matter from his associate, Middleton relied upon and adopted the erroneous theory put forth by Grafe. Thus, Grafe and Middleton were both negligent and are concurrent tortfeasors.

In dismissing the case on summary judgment, the trial court erred in concluding that Middleton and/or his law firm must also be named as Defendants. CP 437. In a case in which there is concurrent negligence, the Plaintiff does not need to name all of the negligent parties.

When concurrent tort-feasors are treated as if solely responsible for the injury brought about by their concurring negligent acts, only one tort-feasor need be sued if the plaintiff so desires.

Brown v. Spokane Cnty. Fire Prot. Dist. No. 1, 21 Wn. App. 886, 894, 586 P.2d 1207 (1978).

The responsibility of Grafe and Middleton is in the nature of a concurrent negligence in that the acts of two persons acting independently or successively both produced the injury for which damages are claimed. Moreover, an original act of negligence as primary causation may be so continuous that a concurrent wrongful act will be regarded *not as independent but as conjoining with the original act*. “It is the well-established law that the original wrongful act may be so continuous that the act of a third person precipitating the disaster will, in law be regarded, not as independent, but as conjoining with the original act to produce the accident. “ *Richey & Gilbert Co. v. Northwestern Natural Gas Corp.*, 16 Wn.2d 631, 642, 134 P.2d 444 (1943).

When the negligence of a person (Middleton) concurs with that of another negligent person (Grafe), the plaintiff may sue both or just one; neither can interpose the defense that the prior or concurrent negligence of the other contributed to the injury. “[I]t is settled, seemingly without dispute, that, if the concurrent or successive negligence of two persons results in an injury to a third person, he may recover damages of either or both and neither can interpose the defense that the prior or concurrent negligence of the other contributed to the injury.” *Seibly v. City of Sunnyside*, 178 Wash. 632, 633, 35 P.2d 56 (1934)

As this Court of Appeals concluded, a trier of fact could find that Grafe

or Middleton, or both were the proximate causes of Goll's damage.

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)

(emphasis added). Plaintiff's decision not to name the deceased Middleton has no bearing on the viability of her claims against Grafe. Instead, Grafe could have named Middleton as a third-party defendant, which ironically, is what he failed to do in the underlying litigation as well.

4. Continuous Representation Rule is Unique to Legal Malpractice and Exists Because Clients Deserve Protection Against a Statute of Limitations Defense From Attorneys Who Commit Legal Malpractice

There are policy considerations for tolling the statute of limitations of a legal malpractice claim. One is called the "continuous representation rule," which was first adopted by the Washington Court of Appeals in *Janicki Logging & Const. Co. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 662, 37 P.3d 309 (2001). The continuous representation rule has two purposes.

The continuous representation rule avoids disruption of the attorney-client relationship and gives attorneys the chance to remedy mistakes before being sued. The rule also prevents an attorney from defeating a malpractice claim by continuing representation until the statute of limitations has expired. Courts adopting the rule have found it to be consistent with the purpose of the statute of limitations, which is to prevent stale claims and enable the defendant to preserve evidence. The attorney-client relationship is maintained and speculative malpractice litigation is avoided.

Id. (internal citations and quotations omitted).

The pertinent facts in *Janicki* are similar to the facts in our case. In *Janicki*, the attorney failed to timely file an action, resulting in dismissal of the client's claims. However, the attorney continued to represent the client through a series of unsuccessful appeals in an attempt to revive and preserve the claims, over a seven year period. The client then filed a malpractice lawsuit within three years of the appellate court's final decision, which had dismissed the client's claims. The *Janicki* court held that the client did not have an obligation to file a lawsuit against his attorney while the attorney was attempting to remedy the wrong, and that the continuous representation rule applied to toll the statute of limitations until three years after termination of the legal representation of that matter.

In this case, if Attorney Middleton had been ultimately successful in pursuing the "substantial compliance" theory, (which would have limited Ms.

Chrisp's total damages to Goll's earnest money deposit) instead of being reversed by the Court of Appeals, then Goll would have no reason to sue Prudential. If Middleton had been successful at the second trial on any theory, then Goll would have no reason to sue Prudential. Until Middleton's efforts ceased, Goll did not have an obligation to file a lawsuit against his attorneys. Just as in *Janicki*, this court should also hold that the continuing representation rule applies to toll the statute of limitations for Goll's legal malpractice action.

The purpose of the continuing representation rule also serves to prevent an attorney, who obviously is in the best position to ascertain whether legal malpractice had been committed, from "outsmarting" an innocent client by continuing the legal representation for more than three years after the malpractice was committed, in order to protect himself against liability. This is a policy decision – to protect clients as opposed to attorneys. *Hipple v. McFadden*, 161 Wn. App. 550, 557, 255 P.3d 730 (2011) analyzes the policy of the continuous representation rule, which was first established in *Janicki, supra*. *Hipple* stands for the proposition that the "continuous representation rule" tolls the statute of limitations for a legal malpractice action until the end of an attorney's representation of a client in the same matter in which the alleged malpractice occurred. *Id.* More importantly, *Hipple* also stands for the proposition that the "continuous representation rule" should be applied whenever policy considerations (i.e., protection of a client) are furthered by its

application.

Running the statute of limitations from the first break in continuity of the relationship does not protect an injured client where the attorney abandons representation. The *Gonzalez* rule, which accounts for the client's reasonable expectations, is an appropriate standard to apply because it furthers the stated objective of preventing an attorney from being able to wait out an alleged malpractice claim.

Hipple at 560 (citing *Gonzalez v. Kalu*, 140 Cal.App.4th 21, 31, 43 Cal.Rptr.3d 866 (2006)).

It was Middleton's death in June 2008 that prompted Goll to retain new counsel. When Goll did, he discovered that the legal advice he had been given from Grafe and Middleton was erroneous; he could not file a claim against Prudential in 2008 (or later) for negligence committed in 2001, even though the Chrisp lawsuit was still ongoing. The purpose of the continuous representation rule is served by tolling the statute of limitations to commence three years after the termination of representation by Middleton & Associates, which termination occurred in June 2008. As Plaintiff filed the instant case against Grafe within three years of June 2008, the statute of limitations does not bar Goll's claims of legal malpractice, as the continuous representation rule applies to protect him.

5. *Discovery Rule Also Tolls the Statute of Limitations for Legal Malpractice*

Alternatively, the discovery rule tolls the applicable statute of limitations in this case.

The discovery rule states that the statute of limitations does not start to run on an attorney malpractice claim until the client discovers, or in the exercise of reasonable diligence should have discovered, facts that give rise to his cause of action.

Hipple at 560. In this case, Goll was relying upon the legal advice of his attorneys with respect to the ripening of his claim against Prudential. To this day, Grafe continues to assert an erroneous legal opinion and takes a position contrary to the Court of Appeals and asserts that the statute of limitations against Prudential did not run until 2008, three years after the Court of Appeals reversal of the trial court decision.

Q But it's your testimony that Mr. Goll could have filed a new lawsuit against Prudential in the year 2008?

A Yes.

Q And the basis for that is that you believe the discovery rule would apply to allow him to do that?

MR. SANDERS: Object to the form of the question; misstates prior testimony.

A Certainly I think counsel for me in this action adequately researched that. I have no reason to disbelieve what was stated. CP 405.

Grafe testified that he is not sure he ever *considered* that the statute of limitations was running against Prudential, much less did he calculate when it

would run. CP 405. Today, Grafe still believes that the statute of limitations against Prudential ran in 2008, seven years after the original transaction. CP 405. It is ironic that Grafe still does not know what the correct statute of limitations was for filing a claim against Prudential, yet he expects that his own client, who was not an attorney, should have been able to correctly assess it himself, against and contrary to Grafe's own legal advice. Grafe repeatedly informed Plaintiff and Goll that a claim could not be made against Prudential unless and until Goll sustained damages. Since Goll was entitled to rely upon his attorney's legal advice and guidance, there is no realistic expectation that he would discover Grafe's error, persisting through the representation by Middleton, until after their course of legal representation ended.

The discovery rule tolls the date of accrual until the plaintiff knows or, through the exercise of due diligence, should have known all the facts necessary to establish a legal claim. The discovery rule can apply when a defendant has fraudulently concealed a material fact from a plaintiff, depriving the plaintiff of the knowledge of the accrual of the cause of action. It can also apply where the nature of the plaintiff's injury makes it extremely difficult for the plaintiff to learn the factual elements of the cause of action. It is an available argument in breach of contract claims as well as tort claims.

Burns v. McClinton, 135 Wn.App. 285, 300, 143 P.3d 630, 636 (2006), as amended (Feb. 13, 2008) (internal quotations and citations omitted).

Notably, as supported by Plaintiff's expert, 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 231. 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. Mr. Gordon opined:

5.18 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.

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, as there was no court decision made on that claim against Prudential to provide Goll with any notice.

The statute of limitations for legal malpractice does not begin to run until the client discovers, or in the exercise of reasonable diligence should have discovered the facts that give rise to his cause of action (“discovery rule”). If an attorney's errors or omissions occur during the course of litigation, as a matter of law, a client is deemed to possess knowledge of all the facts that give rise to his cause of action **upon entry of judgment**.

Simburg, Ketter, Sheppard & Purdy, L.L.P. v. Olshan, 97 Wn. App. 901, 988

P.2d 467 (1999) *order amended on denial of reconsideration sub nom.*

Simburg, Ketter, Sheppard & Purdy, LLP v. Olshan, 109 Wn. App. 436, 33

P.3d 742 (2000) (emphasis added; internal citations omitted).

The pertinent facts in this case, with respect to the application of the discovery rule, differ from those in *Janicki*, supra. In *Janicki*, the untimely filing of a claim resulted in an affirmative dismissal of that claim by the court. “As a matter of law, *Janicki* was on notice that it had been damaged when the Court of Claims dismissed its case.” *Janicki* at 660. In contrast, the running of the statute of limitations in this case occurred passively, absent a ruling by the court, and was instead a negligent omission on the part of the attorneys. Unlike the *Janicki* client, there was no way for Goll to have been put on notice that he would not later be able to pursue claims against Prudential, as his attorneys were advising him.

The facts of *Huff v. Roach*, 125 Wn. App. 724, 728, 106 P.3d 268 (2005) are also particularly instructive as to the application of the discovery

rule in a legal malpractice action. In that case, the clients were involved in a motor vehicle collision on February 13, 1993. Their attorney failed to file a personal injury lawsuit within the statute of limitations, by February 13, 1995. A couple of months after the statute ran, the Huffs retained new counsel, who identified and informed the Huffs of the fact that the prior attorney missed the statute of limitations. As a result of their new counsel's advice in 1995, the Huffs had notice of the facts necessary to establish a legal claim against their prior attorney. Nevertheless, the Huffs proceeded with the filing of their underlying personal injury lawsuit in 1998, until they were confronted with the affirmative defense that the claims were barred by the statute of limitations. Thereafter, the Huffs did not file a legal malpractice lawsuit until 2002. The court held that the Huffs were not diligent in pursuing their rights because they had known the facts underlying the malpractice suit seven years before it was filed. *Id.* at 732. In contrast with the Huffs, Goll was not put on notice that the statute of limitations ran against Prudential until after Middleton's representation ended in 2008. Instead, Goll was repeatedly (erroneously) advised that he could not bring any claims against Prudential because he had not yet sustained damages. Goll did not lack diligence in pursuing his rights; only his attorneys did. Once Goll learned that his claims against Prudential were time-barred, he filed this action against his former attorney in a timely fashion.

Wagner v. Sellinger, 847 A. 2d 1151 (DC, 2004) involves similar facts and the court's application of the continuous representation and discovery rules to permit the filing of a legal malpractice case more than three years after termination of legal services. In *Wagner*, the client was unsatisfied with her counsel and terminated his representation on July 21, 1994. Through subsequent counsel of another firm, she proceeded with her medical malpractice case through trial. Unfortunately, for the Wagners, they lost at trial on August 27, 1996, because the physician was using a different instrument than had been presumed; the Wagner's first counsel had conducted insufficient discovery, failing to ascertain the precise tool that had been used in the medical procedure. The Wagners filed a legal malpractice complaint against their first attorney on August 8, 1997, more than three years after termination of legal representation. Just as in the instant case, the trial court wrongfully ruled that the cause of action began to run on the date of termination of legal representation, dismissing the case. *Id.* at 1154. The appellate court reversed that decision, holding: a) as of the date of termination of legal services, no real injury had yet occurred, b) knowledge that the clients were receiving poor representation did not necessarily reflect actual, rather than potential injury, c) defendant had not pointed to anything in the record that could trigger the commencement of the limitations period as early as the date of termination of legal representation, and d) no injury could be

ascertained until the unfavorable trial outcome had been realized.

Just as in *Wagner*, this Court should hold that a) the date of termination of legal service by Grafe is of no legal significance, as no injury had yet occurred, b) Goll never had knowledge of actual injury until 2008, at a time in which he would no longer have legal recourse against Prudential; c) Grafe cited nothing in the record to trigger the commencement of the limitations period as early as 2003, and d) Goll never had any conclusive outcome at trial to put him on notice of an injury, since the passing of the statute of limitations in 2004 was silent.

Grafe cannot shift his fiduciary duty to anyone else by citing his withdrawal as Goll's attorney of record in 2003. 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.

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).

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.

“The application of the discovery rule is generally a factual question.” *Hipple* at 561. A reasonable trier of fact could certainly conclude that Goll was unable to discover the facts necessary to establish a legal claim against his attorneys until the termination of the Middleton firm’s representation in 2008. As all reasonable inferences are to be considered in a light most favorable to the non-moving party, this material issue of fact precluded summary judgment.

VII. CONCLUSION

The ability of Beck to bring this lawsuit against her father’s former attorney, Darren Grafe, is the same issue that has already been decided by this Court. Even though more than three years passed from the time that Grafe withdrew from representation, Grafe’s negligence continued as Middleton was a concurrent cause of the damage suffered by Mr. Goll. Therefore, this action for legal malpractice may be brought against either Grafe or Middleton, or both of them, and was timely filed within three years of the termination of their legal representation.

In viewing all facts and inferences in the light most favorable to Beck, the claims should not have been dismissed on summary judgment, as a matter of law. The trial court further erred by denying Beck's motion for reconsideration, in which Beck raised these very issues. Beck satisfied her burden to show that dismissal of the claims was not proper and that the trial court's decision should be reversed.

Respectfully submitted this 25th day of February, 2014.

SINGLETON & JORGENSEN, INC. PS

By



Jean Jorgensen

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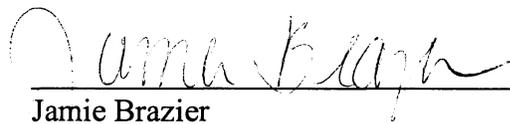
CERTIFICATE OF SERVICE

Jamie Brazier declares: I am a citizen of the United States and of the State of Washington; that I am over the age of 18 years and competent to be a witness in this cause. That on February 25, I delivered one copy of the APPELLANT'S OPENING BRIEF, to the address(es) listed below by messenger service:

Joel Wright
LEE SMART PS INC.
1800 One Convention Place
701 Pike Street
Seattle, WA 98101-3929

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Renton, Washington, on: February 25th, 2015.



Jamie Brazier