90161-9

No. 312038

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

Rose Townsend Trust for Donald Townsend, et al.
Plaintiff/Appellant,

vs.

Scott R. Smith,
Defendant/Respondent.

PETITION FOR REVIEW (corrected)

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On behalf of Appellant
Rose Townsend Trust for
Donald Townsend, et al.

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IDENTITY OF PETITIONER & CITATION TO DECISION

Petitioner Rose Townsend Trust for Donald Townsend ("Trust") asks this Court to accept review of the Court of Appeals decision, ***Rose Townsend Trust for Donald Townsend v. Scott R. Smith***, Washington State Court of Appeals No. 312038 (January 23, 2014); Motion for Reconsideration Denied, March 18, 2014 (copies attached).

INTRODUCTION

This Court should accept review under RAP 13.4(b)(1), (2) & (4). The appellate decision conflicts with decisions of this Court and of other appellate courts. The appellate court also misapprehended the facts and the law on three important points: (1) an expert is not required where a lawyer simply misses a statute of limitation – the Trust's only claim against Respondent Smith; (2) Respondent Smith was unquestionably a party to this action when another party--Joseph Delay--was dismissed, and Mr. Smith did not appeal from that order, so he is bound by it; and (3) the trial court never ruled "that without expert witnesses the Trust would be unable to establish that Smith breached the standard of care by failing to record the Assignment" – it never so ruled because the Trust never so argued.

ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in ruling that an expert was absolutely required in an action alleging legal malpractice for missing a statute of limitations?

2. Did the trial court err in dismissing Townsend Trust's action before trial when Townsend Trust proffered evidence of the applicable standard of care via Respondent's own deposition testimony?

3. Did the trial court err in not binding Respondent Smith to the trial court's earlier decision in the same action dismissing a co-defendant on the sole basis that Mr. Smith allowed a statute of limitations to pass without informing his client?

4. Did the trial court err in making no distinction between the necessity of expert testimony in this bench trial versus a jury trial in the context of a legal malpractice action, particularly where the trial court had previously ruled on the subject of an attorney's actions or inactions?

STATEMENT OF THE CASE

A. Respondent Scott Smith missed a statute of limitations while representing Townsend Trust.

In this action, the trial court had earlier ruled as a matter of law that the Townsend Trust had missed the statute of limitations for an action against attorney Joseph Delay. (CP 280) The trial court left no doubt that while representing the Townsend Trust, Respondent Smith knew or should have known of the cause of action against Mr. Joseph Delay (CP 719-728)

The Trust had alleged joint liability of Mr. Smith and Mr. Delay with regard to the unintended loss of a 1988 $83,187 Judgment held by the Trust. (CP 67-68, 719-720)

B. Attorney Scott Smith is bound by the decision of the trial court dismissing Attorney Joseph Delay.

The Court of Appeals misapprehended the facts in stating that Respondent Smith "was not a party to Delay Curran's motion for summary judgment." Slip Op. at 12 n. 4. Mr. Smith was a named defendant from the beginning of the action. (CP 1, 51) He was also a party to the earlier motion to dismiss Mr. Delay from the Trust's action against both attorneys over the loss of the recorded 1998 $83,183.37 judgment. (CP 109, 279) He received all of the memoranda and declarations, and his counsel was present at the

hearing dismissing Mr. Delay. (CP 279-281) Mr. Smith's counsel signed the April 29, 2011 Order Granting Defendant Delay, Curran, Thompson, Pontarolo & Walker P.S.'s Motion for Summary Judgment of Dismissal and Summary Judgment. (CP 281) Neither Mr. Smith nor the Trust appealed the judgment entered on April 29, 2011 in favor of Mr. Delay. (CP 784)[1] As such, the trial court's earlier decision (good or bad) was the "law of the case" or "res judicata" against the two remaining parties, the Trust *and* Mr. Smith. (CP 784)

C. The Court of Appeals misapprehended the facts and the trial court's basis for dismissing the Townsend Trust's action.

The Court of Appeals misapprehended the trial court's ruling in stating that the "trial court granted the motion to dismiss, concluding that without expert witnesses the Townsend Trust would be unable to establish that Smith breached the standard of care by failing to record the Assignment." (Slip Op at 6). The trial court never made that ruling. (CP 809-822) Indeed, the Townsend Trust never argued that Mr. Smith had a duty to record the July 2005

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[1] The trial court stated in the April 10, 2012 hearing: The COURT: In reading, Mr. King's briefing today, I think it's entirely possible I made a mistake when I ruled as I did last April. But you didn't appeal that ruling, so we're kind of stuck with it. So that's the law of the case. That's res judicata on the Mr. Delay issue in this case, right or wrong. (CP 784)

Assignment of Judgment. (CP 51-68) This misapprehension further highlights why this matter should not have been dismissed in a pre-trial motion in limine hearing. The matter should have been allowed to proceed to the bench trial, where the Townsend Trust would have been allowed to further educate the trial court about the merits of the case by way of a trial brief, opening statement, presentation of evidence, cross examination of defense witnesses, and closing arguments.

The Court of Appeals suggests that the Townsend Trust's malpractice claim centers on Mr. Smith's advice about gray areas of law in a complex federal bankruptcy matter. (Slip Op at 9) That is not the Trust's claim. The Townsend Trust's claim was that Mr. Smith and Mr. Delay were both responsible for their actions or inactions relating to the unintentional[2] loss of the recorded 1988 $83,187 State Court Judgment. (CP 67-68, 719-720) In paragraph 5.2 of Plaintiff's Second Amended Complaint, Plaintiff alleged joint liability of Mr. Delay and Mr. Smith for the loss of the judgment:

> 5.2 As a proximate result of Defendants' [plural] negligence and/or breach of contractual obligations, Plaintiff Townsend Trust lost the benefit of collecting monies from the Johnston State Judgment in the

[2] No one is alleging intentional wrongdoing on the part of Mr. Delay.

amount of $83,183.37, plus interest at 12%, commencing on January 22, 1998.

(CP 67, bracket language added.) In the Prayer for Relief, the Trust claimed that both Mr. Delay and Mr. Smith were jointly liable for the loss of $83,183.37, plus interest at 12%, commencing on January 22, 1998 (when the judgment was recorded). (CP 68)

The Townsend Trust is not alleging fault relating to the lien priority arguments pertaining to the other judgments at issue in the bankruptcy litigation. And, the "complex" arguments about lack of recordation of judgments in the federal matter did not relate to the 1988 $83,187 State Court Judgment, because it had been recorded before any other judgment at issue. (CP 86-87) The Townsend Trust simply alleges that Mr. Smith missed a statute of limitations for a viable cause of action.

Contrary to the appellate court's decision, this case was not about any complexities in the underlying federal bankruptcy matter—the standard of care for two separate negligent acts had been established: Mr. Smith himself set the standard of care regarding the initial negligent act by Mr. Delay (Mr. Smith testified at his deposition that the 2005 Assignment was "very poorly drafted" and had "sloppy language and drafting" by Mr. Delay). (CP

234, 241). Mr. Smith also knew that the Assignment did not reflect the intent of his Client (which was to add judgments, not exchange). (CP 234) Mr. Smith also knew that Mr. Delay had a conflict of interest in drafting the document for the Townsend Trust (because Mr. Delay was making a claim against the same debtor and the Assignment allowed Mr. Delay to obtain the debtor's proceeds). (CP 207, 246) Mr. Smith (Townsend Trust's attorney), knew that both the Townsend Trust and Mr. Delay were "creditors holding unsecured nonpriority claims" against the same debtor, and that it would be a conflict of interest for Mr. Delay to create a document as a favor to the Trust that essentially cleared the way for Mr. Delay's firm to get monetary proceeds from the debtor's estate. (CP 206-214). Second, the standard of care as to whether and when Mr. Smith should have informed the Townsend Trust about the cause of action was set by the trial court in April 2011 when it ruled that Mr. Smith was aware of the cause of action while representing the Trust and allowed the statute of limitations to pass. (CP 280, 719-728).[3]

[3] The Trust presented evidence that the two trustees were never made aware by Respondent Smith of a cause of action against Mr. Delay, but the Court held that knowledge of a cause of action by Mr. Smith was imputed to his client, Townsend Trust. (CP 151, 194-195

In short, this case was not about any complexities in the underlying federal bankruptcy matter, because Mr. Smith provided testimony about the standard of care pertaining to Mr. Delay's initial negligence, and the trial judge set the standard in April 2011 for Mr. Smith's omissions when she implicitly held that Mr. Smith knew of the cause of action, had a duty to inform his client of the cause of action, and failed to do so. (CP 207, 234, 242, 246, 719-728).

Moreover, the Court of Appeals has apparently overlooked that for the initial negligent act by Mr. Delay (the Assignment) there was expert testimony provided as to the standard of care for Mr. Delay's actions *from Mr. Smith himself.* Mr. Smith (whom this Court accurately characterized as a "veteran attorney") described the Assignment as "very poorly worded," with "sloppy language and drafting." (CP 222-223, 234, 241) He thus clearly indicated that Mr. Delay's actions fell well below the standard of care.

Neither the trial court nor the Court of Appeals ever stated what an expert would be required to testify about concerning a missed statute of limitations. If the Court is going to require expert testimony in this particular context, as a guide for practitioners, the

Court should state specifically what an expert would have been required to state.

The Townsend Trust, which exists solely for the benefit of Donald Townsend, a disabled man, deserves its day in court. (CP 51) The loss of the valuable judgment, along with other massive legal expenditures related to Mr. Smith's representation of the Townsend Trust, has depleted the Townsend Trust's finances. (CP 67, 151)

ARGUMENT WHY THIS COURT SHOULD ACCEPT REVIEW

A. The appellate decision conflicts with a decision of this court, applying an unheard of and incorrect legal standard.

This is the first decision in Washington State holding that an expert is absolutely required in a legal malpractice action for simply missing a statute of limitations. Prior courts have held that an attorney's malpractice for missing a statute of limitations is well within the ken of lay jurors. The present case was actually set for a bench trial before the same judge who had implicitly ruled that Mr.

Smith had missed a statute of limitations.[4] The Court should accept review of under RAP 13.4(b)(1) (conflict with this Court's precedent), (2) (conflict with other appellate courts) & (4) (substantial public interest).

The appellate court has entered new territory in holding that an expert was absolutely required in a legal malpractice action to set the standard of care for an attorney who simply missed a statute of limitations. There is no Washington case – published or unpublished – so stating.

It is undisputed that Scott Smith missed a statute of limitations for an action against another attorney while representing the Townsend Trust. (CP 207, 234, 242, 246, 717-728) The trial court had earlier ruled as a matter of law that Mr. Smith had missed the statute of limitations. (CP 280) In dismissing the Townsend Trust's action against the attorney who committed the original

[4] The trial court was not asked to make a finding in the earlier decision as to whether Mr. Smith was liable for the running of the statute of limitations. However, the trial court agreed with the moving party that the knowledge of the attorney is imputed to the client. (CP 207, 234, 242, 246, 717-728) Mr. Smith did not file any opposing declarations or memoranda to Mr. Delay's motion for dismissal. The two co-trustees for Townsend Trust submitted declarations stating that they were never advised by Mr. Smith of a possible cause of action against Mr. Delay. (CP 151, 194-195) Neither party appealed that earlier dismissal of the co-defendant. (CP 784)

negligent act, the trial court itself left no doubt that Mr. Smith knew or should have known of the cause of action against Mr. Delay. (CP 207, 234, 242, 246, 717-728) On April 29, 2011, the trial court granted Mr. Delay's motion for summary judgment on the sole basis that the statute of limitations had expired (during Mr. Smith's representation of the Townsend Trust). (CP 279-281).

The trial court stated as follows in the April 29, 2011 hearing:

> THE COURT: I'm sorry to keep interrupting you, but it seems to me if – so Mr. Smith is the lawyer.
>
> MR. HUNTER: Yes
>
> THE COURT: And **Mr. Smith** says, "Gee, **I think this assignment of judgment was poorly drafted and could cause trouble for the estate." And he's thinking this or saying this, but he doesn't tell Riley[5], right?**
>
> MR. HUNTER: Right.
>
> THE COURT: **So isn't Riley's recourse against Mr. Smith and not Delay? And I'm not -- I'm obviously making no findings as to any culpability on the part of Smith, but why bring Delay into it? Smith is the one who arguably had the knowledge and didn't do anything.**

[5] Jack Riley was the co-trustee for the Townsend Trust (CP 148)

MR. HUNTER: **We think it's both is why we brought them both in and we thought that Mr. Delay essentially created the problem in the first place that—**

(CP 718, bold added)

Moreover, at oral argument in the Court of Appeals on December 3, 2013, Mr. Smith's Counsel conceded that an expert was not necessary in a legal malpractice action against an attorney who simply missed a statute of limitations. (Transcript of December 3, 2013 Oral Argument at 17:09). This is consistent with existing Washington law.

The Court of Appeals has misapprehended *Walker v. Bangs*, 92 Wn.2d 854, 601 P.2d 1279 (1979), which states the general truth that a plaintiff can prove legal malpractice without expert testimony, "when the negligence charged is within the common knowledge of lay persons." 92 Wn.2d at 858. Contrary to the Court of Appeals' decision, the Supreme Court did not expressly "require" an expert in *Walker*. (Slip Op. at 8). Rather, *Walker* holds only that the trial court erred in *not permitting* the plaintiff to present an out of state expert to testify in the maritime case, an expressly "narrow" holding: the "narrow question before us pertains to the

qualifications of an expert to testify in this case." *Walker*, 92 Wn.2d at 860.

Walker – which followed a jury trial – found error in *not* allowing the plaintiff's legal expert (an out-of-state attorney who was not licensed to practice in Washington) to testify at the trial. 92 Wn.2d at 860. The case was then remanded for a new trial. While the Court did comment that an expert would be "proper and necessary," that was not essential to the holding, but was *dictum*. *Id.* at 858. *Walker* does not support the Court of Appeals' unprecedented decision.

B. The appellate decision conflicts with an unpublished decision in the court of appeals, a significant conflict that this court should resolve.

By contrast, there is an unpublished decision in the Division II Court of Appeals that is directly on point for the facts in this case, but with the exact opposite ruling. *Schmidt v. Coogan,* Washington State Court of Appeals No. 312038 (July 2, 2008) (a copy of which is attached). While the *Schmidt* decision is not binding, and the Trust of course is not citing it as authority, it nonetheless shows a conflict among the appellate courts on this issue.

In *Schmidt,* the attorney failed to timely file Ms. Schmidt's personal injury case against the grocery store where the plaintiff allegedly slipped and fell. Her attorney, Timothy Coogan, had failed to properly and timely locate and serve the proper defendant. As a consequence, the plaintiff's suit was dismissed. The plaintiff then sued Mr. Coogan for malpractice. The plaintiff did not present any expert evidence. Instead, she presented the deposition testimony of her attorney, Timothy Coogan, who said at his deposition that he could not imagine a scenario where the attorney's failure to sue the correct defendant would not be negligent. Mr. Coogan did not testify at trial, much less testify that his deposition testimony was wrong. Mr. Coogan moved for dismissal on the basis that the plaintiff did not present any expert testimony regarding the standard of care. The trial court denied Mr. Coogan's motion to dismiss on the basis that Mr. Googan's admission at his deposition was sufficient to establish the applicable standard of care. Relying on *Walker v. Bangs*, the Court of Appeals affirmed the trial court's denial of Mr. Coogan's motion to dismiss.[6]

[6] The Court of Appeals did grant a new trial on damages.

Moreover, the entire basis for experts being allowed to testify—Evidence Rule 702-- expressly discusses experts as being helpful, but not mandatory:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, **may** testify thereto in the form of an opinion or otherwise.

ER 702 (bold added).

A judge is not a lay-person juror. In *Watkins v. Sheppard*, 278 S.2d 890, 892 (1973), the Court stated as follows:

> Expert testimony is certainly admissible to establish the standard of care based on practices of attorneys in the community. In certain cases the opinions of experts may be essential to prove the standard of care an attorney must meet. In many cases, however, the trial court, which is of necessity familiar with the standards of practice in its community, is competent to make such a determination without the assistance of expert witnesses.

This Court should grant review due to the conflicts it creates with supreme and appellate court decisions. This is an issue of substantial public interest that this Court should review, particularly in light of its plenary authority over supervision of attorneys in this state.

CONCLUSION

The Court of Appeals has issued an unprecedented decision that conflicts with other appellate decisions. This Court should grant review.

RESPECTFULLY SUBMITTED this 18th day of April, 2014.

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APPENDIX

A. ***Rose Townsend Trust for Donald Townsend v. Scott R. Smith***, Washington State Court of Appeals No. 312038 (January 23, 2014)

B. Motion for Reconsideration Denied, March 18, 2014. ***Rose Townsend Trust for Donald Townsend v. Scott R. Smith***, Washington State Court of Appeals No. 312038

C. ***Schmidt v. Coogan,*** Washington State Court of Appeals No. 312038 (July 2, 2008) (UNPUBLISHED)

CERTIFICATE OF SERVICE

I certify that on April 18, 2014 I hand delivered a copy of the foregoing **PETITION FOR REVIEW (Corrected)** at the following address:

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APPENDIX A:

Rose Townsend Trust for Donald Townsend v. Scott R. Smith, Washington State Court of Appeals No. 312038 (January 23, 2014)

FILED
JAN 23, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

ROSE TOWNSEND TRUST FOR DONALD TOWNSEND, by and through JACK RILEY and ROBERT MOE, Appellant, v. SCOTT R. SMITH, Attorney at Law; DELAY, CURRAN, THOMPSON, PONTAROLO, & WALKER, P.S. Respondent.	)	No. 31203-8-III UNPUBLISHED OPINION

KORSMO, C.J. — The trial court dismissed this lawyer malpractice action at summary judgment for lack of evidence that the attorney breached the standard of care. Although expert witness testimony is not necessary for all Washington legal malpractice actions, such testimony was essential and missing in this case. We affirm.

FACTS

The procedural history of this action is lengthy. It had its beginnings in the mid-1990s when the Rose Townsend Trust for Donald Townsend (Trust) leased commercial space to Daryl Johnston. Johnston later breached and defaulted on the lease and an accompanying promissory note. The Trust, represented by its longtime counsel Scott R.

Smith (Smith), ultimately obtained a judgment against Johnston for $76,147.31 (Johnston State Court Judgment). Smith recorded the judgment with the Spokane County Auditor on October 27, 1998. Smith obtained a second judgment for $700 in attorney fees and costs. That judgment was not recorded.

Johnston filed for bankruptcy the next year under chapter 7 of the bankruptcy code. She was co-owner with Sally Arney of real estate in Spokane County that served as their primary residence. The two owned the land as joint tenants with right of survivorship. On April 9, 2004, Smith filed a creditor's claim on behalf of the Trust in the amount of $83,183.37 as an unsecured claim in the bankruptcy action.

The trustee in the Johnston 1999 bankruptcy proceeding obtained a default judgment against Ms. Johnston because she had committed fraud and concealed property of the bankruptcy estate—an inheritance Ms. Johnston had received from her mother in the amount of $132,044.73. Thus, the same amount was awarded in the default judgment (Johnston Bankruptcy Judgment). Additionally, because Ms. Johnston had transferred $80,000 of that $132,044.73 inheritance to Ms. Arney, the chapter 7 trustee secured a default judgment in the amount of $80,000 against Ms. Arney as a part of Ms. Johnston's chapter 7 proceeding (Arney Bankruptcy Judgment). The chapter 7 trustee held both judgments.

On January 24, 2001, the chapter 7 trustee faxed a cover sheet to attorney Smith that stated "Judgments for Sale! Judgments for Sale! Note: The $80,000 is included in

the $132,044.73." The chapter 7 trustee continued to urge the Trust to purchase the Johnston Bankruptcy Judgment and the Arney Bankruptcy Judgment into March of 2004.

Ms. Johnston and Ms. Arney refinanced their home in October 2004 receiving a distribution from the refinance of $81,270.89. They refinanced again through New Century in April 2005 and received a distribution of $16,808.73. Neither the Johnston State Court Judgment nor the Johnston or Arney Bankruptcy Judgments were satisfied during the two refinancing processes.

Around July 2005, the Trust contacted attorney Joseph Delay of the law firm Delay, Curran, Thompson, Pontarolo & Walker, P.S. (Delay Curran), requesting his assistance in purchasing the two bankruptcy judgments. Delay and the attorney for the bankruptcy trustee drafted an "Assignment of Judgment" for both bankruptcy judgments (Assignment). The Assignment stated that the Trust waived its creditor's claim against Ms. Johnston in exchange for the Assignment of the bankruptcy judgments.[1] On July 25, 2005, the attorney for the chapter 7 trustee filed the Assignment. Neither the Assignment nor the bankruptcy judgments for $132,044.73 and $80,000 were recorded with the Spokane County Auditor.

[1] The exact language stated "attorney for Chapter 7 Trustee in consideration of the Assignee waiving its Creditor's Claim filed in the above entitled estate, does hereby assign, transfer and convey over unto the Rose Townsend Trust the judgment entered in the above-entitled cause." Clerk's Papers (CP) at 269.

On October 13, 2005, Ms. Johnston filed a chapter 13 action in the United States Bankruptcy Court for Eastern Washington. Ms. Arney filed a chapter 7 action on the same day. The Trust filed a secured proof of claim in the chapter 13 proceeding in the amount of $206,973.79 against Ms. Johnston's homestead property.

A dispute arose regarding priority of liens as between the Trust and New Century, the last mortgagor on the homestead property. This dispute went through two federal district court judges: Patricia Williams and, on appeal, Lonny R. Suko. Both judges found that the Trust had priority over New Century by way of the recorded Johnston State Court Judgment, and that the Assignment did not waive the Trust's right to enforce that judgment. Both judges also ruled that the Assignment did not have to be recorded to be a lien against the property by virtue of RCW 4.56.200(1).

New Century appealed to the Ninth Circuit, which reversed both district court judges and found in favor of New Century. The Ninth Circuit concluded that the waiver language of the Assignment cost the Trust the priority of its 1998 Johnson State Court Judgment. The court also ruled that the failure to record either the Assignment or the bankruptcy judgments meant that they were not perfected against the homestead by operation of RCW 6.13.090.[2] The Ninth Circuit concluded that RCW 6.13.090 governed

[2] In part, RCW 6.13.090 provides that a judgment "shall become a lien on the value of the homestead property in excess of the homestead exemption from the time the judgment creditor records the judgment with the recording officer of the county where the property is located."

rather than RCW 4.56.200(1), which provides that judgments entered in the county where the debtor's real property is located become liens on the realty. *See In re Johnston* No. 07-36035 (9th Cir. May 20 2009) (unpublished).

In the aftermath of the Ninth Circuit ruling, the Trust filed a legal malpractice action against both Smith and Delay Curran in June 2010. The second amended complaint filed that November alleged that Delay Curran had improperly drafted the Assignment. That complaint also alleged that Smith was negligent in his handling of the judgments and should have been aware that the Assignment would cost the Trust its judgment priority.

Discovery ensued over the next two years. In 2011, Delay Curran successfully sought summary judgment of dismissal on the basis that the statute of limitations had run on the claim against it, with the court determining that the Trust was on notice from the time Smith voiced concerns about the Assignment. The court rejected the Trust's argument that no cause of action arose until the Ninth Circuit ruling since there was no harm to the Trust until that point. The Trust did not appeal from the order dismissing Delay Curran from the case.

In 2012, Smith also sought summary judgment, arguing that the Trust could not show that he had violated the standard of care. The Trust contested the motion and also sought permission to amend its complaint again to assert that Smith also was negligent in

failing to advise the Trust to file a malpractice action against Delay Curran within the statute of limitations.

The trial court granted the motion to dismiss, concluding that without expert witnesses the Trust would be unable to establish that Smith breached the standard of care by failing to record the Assignment. With the trial date in the offing, it was too late to add witnesses, so the court declined to permit an amendment. The action against Smith was dismissed. In the course of the oral ruling, the trial judge commented that she had perhaps erred in dismissing Delay Curran from the case. She also noted that as trial judge, she would have needed expert testimony to determine whether or not counsel erred. After reconsideration was denied, the Trust timely appealed to this court.

ANALYSIS

The Trust argues that the trial court erred in granting summary judgment and in denying the motion to amend. We address those two arguments in the noted order.

Summary Judgment

The Trust argues that summary judgment was inappropriate in this bench trial action because no expert witness was necessary and Smith would himself establish the standard of care with respect to the claim against Delay Curran. We agree with the trial court that expert testimony concerning the standard of care was necessary in this case.

Appellate courts review appeals from dismissals on summary judgment under well settled standards. The moving party bears the initial burden of establishing that it is

entitled to judgment because there are no disputed issues of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If a defendant makes that initial showing, then the burden shifts to the plaintiff to establish there is a genuine issue for the trier of fact. *Id.* at 225-26. The plaintiff may not rely on speculation or having its own affidavits accepted at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Instead, it must put forth evidence showing the existence of a triable issue. *Id.*

The elements of a legal malpractice action are: (1) an attorney-client relationship that gives rise to a duty of care, (2) an act or omission by the attorney in breach of that duty, (3) damage to the client, and (4) proximate causation between the breach of duty and the damage incurred. *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992). A legal malpractice trial effectively requires a trial within a trial. The trier of fact must decide if the underlying cause of action would have resulted in a favorable verdict for the client; only then is the suit against the attorney viable. *Daugert v. Pappas*, 104 Wn.2d 254, 258, 704 P.2d 600 (1985). The standard of care is uniform throughout the state of Washington: "that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction." *Cook, Flanagan & Berst v. Clausing*, 73 Wn.2d 393, 395, 438 P.2d 865 (1968).

Some states require expert testimony to establish the standard of care in a legal malpractice action. *Walker v. Bangs*, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979). However, the "general rule is to permit but not require expert testimony." *Id.* Washington does not require expert testimony "when the negligence charged is within the common knowledge of lay persons." *Id.* The court concluded that establishing the malpractice alleged there, involving negligence in the trial of a maritime case, did require testimony from an expert. *Id.*

Both parties find comfort in the *Walker* rule and contend that it supports their position. The Trust notes that expert testimony is not required, while Smith relies on the holding of *Walker* that an expert was required due to the complexity of federal maritime law and likens it to the federal bankruptcy law at issue in this case. We agree with Smith and the trial judge that an expert was required here.

The facts of this case demonstrate that it was at least as complex as those at issue in *Walker*. Here, two veteran attorneys and two local federal judges did not believe that the Assignment needed to be recorded or that it had extinguished the prior state judgments. In what appears to be a question of first impression, the Ninth Circuit disagreed after considering the interplay of two Washington statutes and federal bankruptcy regulations. These were not matters "within the common knowledge of lay persons." If five federal judges can split three to two over the effect of the Assignment, then certainly expert testimony was necessary to establish the attorney's standard of care.

Although the Ninth Circuit ruling established the legal effect of the Assignment, it does not inform about what local attorneys should have known or how they should have acted in advance of that ruling.

The Trust emphasizes that the pending trial would have been to the bench and that the Ninth Circuit ruling had established that the Assignment was defective, effectively determining the breach element as a matter of law and making the matter comparatively easy for the trial judge who then would not need expert testimony. We disagree. The purpose of expert testimony would be to establish the attorney's standard of care. The Ninth Circuit ruling did not do that. The standard needed to be established by expert testimony in light of the complex facts of this action.

We agree with the trial court that in light of legal complexities of federal bankruptcy law as it interacted with Washington judgment and homestead law, the standard of care for Washington attorneys dealing in these matters was subject to proof by experts. It was not a matter within the common knowledge of lay persons or a state trial judge. For these reasons, we agree that the trial court correctly dismissed this action on summary judgment.[3]

[3] The Trust also argues that its action against Smith for his failure to recommend that suit be brought against Delay Curran would have survived summary judgment if the court had granted its request to amend the action. We do not address that claim in light of the trial court's decision not to include it in the case.

Amendment of the Complaint

The Trust also argues that the trial court erred in refusing to grant its motion to again amend the complaint to add the theory that Smith committed malpractice by failing to recommend that it bring a malpractice action against Delay Curran concerning the drafting of the Assignment. The Trust has failed to establish that the court abused its discretion in denying the request.

A party has the right to amend a pleading once as a matter of right, provided that the amendment is timely; in all other circumstances, an amendment must be granted by the trial court. CR 15(a). The decision to permit or deny an amendment to the pleadings is reviewed for abuse of discretion. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The denial of a motion for leave to amend does not constitute an abuse of discretion where the proposed amendment was futile. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 729, 189 P.3d 168 (2008).

Smith argues that the proposed amendment was untimely, futile, and would have failed for lack of expert testimony concerning the standard of care just as the existing complaint did. We do not address the standard of care related argument for the same reasons we did not discuss it previously—the amendment was not granted, so there was no need to address the hypothetical question of whether or not it would have survived

summary judgment if the amendment had been permitted and subsequently challenged by Smith for evidentiary insufficiency.

The futility argument appeared to have some traction before the trial court. The trial judge noted that she may have erred in dismissing Delay Curran from the case. Smith argued, as the Trust had in opposing Delay Curran's motion for summary judgment, that no malpractice cause of action accrued prior to the Ninth Circuit's ruling in 2009 established that the Trust had been harmed. A change in ruling by a trial court was similarly at issue in *Paradise Orchards General Partnership v. Fearing*, 122 Wn. App. 507, 94 P.3d 372 (2004), *review denied*, 153 Wn.2d 1027 (2005). There the attorney representing a seller had drafted the sales agreement, including a remedies clause. When the sale fell through, litigation resulted and the trial judge interpreted the clause as limiting the remedies available to the seller. The seller then settled with the buyer on less favorable terms than desired and sued its attorney for malpractice. *Id.* at 511-13. The trial court ruled that the first judge had erred in the interpretation of the remedies clause and found no legal malpractice. *Id.* at 513. This court agreed that the client's remedy was to challenge the judge's ruling rather than sue the attorney. *Id.* at 515, 520. The judgment in favor of the attorney was affirmed. *Id.* at 520.

If the trial court had changed its mind about the timing of the malpractice action against Delay Curran, it could easily decide that amending the complaint would have been futile because Delay Curran had been timely sued and Smith's alleged failure to

pick up on the issue in 2005 was irrelevant since the harm did not arise until 2009.[4] Given the court's commentary, we are not certain if the court relied upon that reasoning in its rejection of the request for leave to amend and therefore do not further analyze that point.

It does appear that the trial court denied the motion on timeliness grounds. We believe that was a tenable basis for ruling. Delay Curran received its summary judgment in late April 2011. The deadline for amendments under the case scheduling order was August 1, 2011. The request for leave to amend was not made until 2012 in response to Smith's motion for summary judgment. The Trust had time after Delay Curran was dismissed to seek an amendment before the scheduling order's deadline. It did not.

On that basis, we conclude the trial court did not abuse its discretion by declining permission to amend the complaint once again. Although it may have had additional reasons for denying the request, its determination that the motion was untimely was a tenable reason for doing so. Again, we see no trial court error.

[4] Contrary to the Trust's arguments, the law of the case doctrine would not apply against Smith who was not party to Delay Curran's motion for summary judgment. The Trust was the only other party to that action and Smith was not bound by its results since he did not take part in the motion.

The judgment is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, C.J.

WE CONCUR:

Kulik, J.

Siddoway, J.

APPENDIX B:

Motion for Reconsideration Denied, March 18, 2014. ***Rose Townsend Trust for Donald Townsend v. Scott R. Smith***, Washington State Court of Appeals No. 312038

FILED
MARCH 18, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

ROSE TOWNSEND TRUST FOR DONALD TOWNSEND, by and through JACK RILEY and ROBERT MOE,

Appellant,

v.

SCOTT R. SMITH, Attorney at Law; DELAY, CURRAN, THOMPSON, PONTAROLO, & WALKER, P.S.

Respondent.

No. 31203-8-III

ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of January 23, 2014, is hereby denied.

DATED: March 18, 2014

PANEL: Judges Korsmo, Kulik, Siddoway

FOR THE COURT:

KEVIN M. KORSMO, Chief Judge

APPENDIX C:

Schmidt v. Coogan, Washington State Court of Appeals No. 312038 (July 2, 2008) (UNPUBLISHED)

TERESA SCHMIDT, an individual, Appellant/Cross-Respondent,

v.

TIMOTHY P. and "JANE DOE" COOGAN, and the marital community comprised thereof; and THE LAW OFFICES OF TIMOTHY PATRICK COOGAN, and all partners thereof, Respondents/Cross-Appellants.

No. 32840-2-II

Court of Appeals of Washington, Division 2

July 2, 2008

UNPUBLISHED OPINION

Armstrong, J.

A jury awarded Teresa Schmidt $212,000 in damages on her legal malpractice claim against her attorney, Timothy Coogan. The claim arises from Coogan's failure to timely file Schmidt's personal injury case against the grocery store where she allegedly slipped and fell. Schmidt now appeals the trial court's order granting Coogan's motion for a new trial on damages. Coogan cross-appeals, arguing that the trial court should have dismissed the action because Schmidt presented insufficient evidence of (1) the store's notice, an essential element of the underlying "case within a case" and of (2) the standard of care applicable to attorneys practicing in Washington. The Supreme Court took review of the first issue, holding that there was sufficient evidence to submit it to the jury.[1] The Court remanded to us to consider the remaining issues. We affirm the trial court's denial of Coogan's motion to dismiss and its grant of a new trial on damages.

FACTS

One day in December 1995, Teresa Schmidt, while grocery shopping, allegedly stepped in a puddle of shampoo and fell. As a result, Schmidt suffered pain and numbness in her arm, migraines, and back spasms that prevented her from engaging in her usual activities.

Schmidt retained Timothy Coogan to take her case against the grocery store where she fell. In part because he failed to identify the proper defendant, Coogan was unable to file and serve the complaint within the statutory period. After the court dismissed Schmidt's personal injury action, she sued Coogan for malpractice. As part of her case, Schmidt presented excerpts of Coogan's videotaped deposition in which he stated that he could not imagine a situation where an attorney's failure to sue the correct defendant would not be negligent. She also presented evidence that she incurred $3,840 in medical bills, plus interest and finance charges of over $2,000, as a result of her injuries. She offered no other evidence of economic damages.

Coogan moved for judgment as a matter of law at the end of Schmidt's case, arguing that Schmidt had failed to establish the standard of care in the malpractice claim because she presented no expert testimony. The trial court denied the motion, ruling that Coogan's admission was sufficient to establish the applicable standard of care.

The jury found Coogan liable and awarded Schmidt $32,000 for past economic damages and $180,500 for non-economic damages. Coogan moved for (1) reconsideration of his previous motion for judgment as a matter of law, (2) remittitur, or (3) a new trial. The trial court granted the motion for a new trial limited to damages.

ANALYSIS

I. Standard of Care for Legal Malpractice

We review de novo a trial court's decision to deny judgment as a matter of law. *Alejandre v. Bull*, 159 Wn.2d 674, 681, 153 P.3d 864 (2007). The court may grant judgment as a matter of law only if "there is neither evidence nor reasonable inference therefrom sufficient to sustain the verdict." *Goodman v. Goodman*, 128 Wn.2d 366, 371, 907 P.2d 290 (1995) (quoting *Brashear v. Puget Sound Power & Light Co.*, 100 Wn.2d 204, 208-09, 667 P.2d 78 (1983) (quotations omitted)).

Generally, a plaintiff can prove legal malpractice without expert testimony "when the negligence charged is within the common knowledge of lay persons." *Walker v. Bangs*, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979). Here, Coogan, himself, admitted that he could not imagine a scenario in which the failure to identify the proper defendant in a personal injury case would not be negligent. As a licensed attorney, Coogan presumptively had the level of "knowledge, skill, experience, training, or education" justifying an opinion on standards of practice in Washington. *See* ER 702. He argues on appeal that his deposition testimony was an incorrect statement of the law. But Coogan could have testified at trial that his deposition testimony was wrong, leaving the jury to resolve the dispute. Coogan did not testify at trial, so the jury had only his uncontroverted deposition testimony on the applicable standard. No legal rule prevented the jury from basing its negligence finding on such "common knowledge" evidence; thus, the trial court did not err.

II. New Trial Regarding Damages

Schmidt claims that the trial court erred in granting Coogan's motion for a new trial on damages.

CR 59(a) allows a trial court to grant a motion for a new trial for several enumerated "causes materially affecting the substantial rights of [the] parties." We review the trial court's ruling on such a motion for abuse of discretion. *Bunch v. King County Dep't of Youth Servs.*, 155 Wn.2d 165, 178, 116 P.3d 381 (2005). And we give greater deference to a trial court's decision to *grant* a new trial than a decision to deny one because denial of a new trial concludes the parties' rights. *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997); *Mega v. Whitworth Coll.*, 138 Wn. App. 661, 671, 158 P.3d 1211 (2007).

One valid basis to grant a new trial is where "there is no evidence or reasonable inference from the evidence to justify the verdict." CR 59(a)(7). Here, the trial court found that the jury's award of $32,000 for past economic damages was "absolutely unsupported by any evidence presented." Clerk's Papers at 235. We agree.

"Economic damages" are objectively verifiable monetary losses. RCW 4.56.250(1)(a).[2] Here, Schmidt proved no economic damages other than $3,840 in medical bills plus interest and finance charges that no more than doubled that amount.

Schmidt argues that we may not question the jury's "deci[sion] to segregate its aggregate award of $212,000 into $180,000 for general damages and $32,000 for special damages" because that decision "inheres in the verdict." Br. of Appellant at 49. According to Schmidt, "[the jury] could have determined that $32,000 represented the value of the underlying claim and $180,000 represented the value of the abuse to which Mr. Coogan subjected Ms. Schmidt." Br. of Appellant at 49. This argument lacks merit; the trial court correctly instructed the jury on the definitions of both economic and non-economic damages, and the jury was bound to use only those categories in separating its verdict. And while Schmidt is correct that we do not "delve into the jury's thought processes," she overlooks our proper inquiry of "identifying the factual basis for the jury's award." *Conrad v. Alderwood Manor*, 119 Wn. App. 275, 292, 78 P.3d 177 (2003) (citing *Gujjosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001)). Because Schmidt proved *no* factual basis for $32,000 in special damages, the trial court did not abuse its discretion in granting a new trial.

We affirm the trial court's denial of Coogan's motion to dismiss and its grant of a new trial on damages.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

We concur: Hunt, J. Van Deren, C.J.

Notes:

[1] *See Schmidt v. Coogan*, 162 Wn.2d 488, 173 P.3d 273 (2007).

[2] Providing that, "'[e]conomic damages' means objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities."
