NO. 90351-4

SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 42864-II
COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

BULLIVANT HOUSER BAILEY, P.C., and RICHARD G. MATSON,

Defendants / Petitioners,

v.

CLARK COUNTY FIRE DISTRICT NO. 5 and AMERICAN ALTERNATIVE INSURANCE CORPORATION,

Plaintiffs / Respondents.

DEFENDANTS' / PETITIONERS' PETITION FOR REVIEW

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I. IDENTITY OF THE PETITIONERS

Petitioners, defendants below, are Bullivant Houser Bailey, P.C., a Washington Professional Services corporation, and Richard G. Matson, a shareholder of the Bullivant firm (hereinafter "defendants," "attorney defendants" or "petitioners").

II. THE COURT OF APPEALS DECISION

Petitioners request this Court to accept review of the decision terminating review by Division II of the Washington Court of Appeals in Appeal No. 42864-4-II, *Clark County Fire District No. 5, et. al., Appellants, v. Bullivant Houser Bailey, P.C. and Richard G. Matson, Respondents*; (--- P.3d ---, 2014 WL 1647530, Wn. App. Div. 2, 2014). The court's opinion was entered for publication on April 24, 2014. A copy of the published opinion is included in the Appendix attached to this Petition.

III. ISSUES PRESENTED FOR REVIEW

Issue No. 1: Whether the Court of Appeals' erred by "adoption" of a new overarching rule for legal application of the doctrine of "judgmental immunity" it called the "attorney judgment rule" which requires a factual analysis of the attorney's compliance with the standard of care in every case, and excludes from consideration review of "totality of the circumstances" to determine the question as a matter of law?

Issue No. 2: Whether the Court of Appeals erred in independently creating and adopting "inferences" from trial court declarations of the plaintiffs'/respondents' experts as a basis to overturn the trial court's grant of summary judgment to the defendants, while simultaneously specifically finding that those experts had failed to state such inferences, or, to state facts necessary to support such inferences?

Issue No. 3: Whether the Court of Appeals erred in failing to follow the holding of the Washington Supreme Court in *Halvorsen v. Ferguson,* 46 Wn. App. 708, 735 P.2d 675 (1986), which concluded that a difference of opinion between competing experts on the question of what is a proper litigation strategy does not, as a matter of law, impose liability on an attorney?

Issue No. 4: Whether Division II Erred in Failing to Consider and Resolve Evidence on Issues Relating to Proximate Cause, After It Specifically Requested Supplemental Briefing on the Issue?

IV. STATEMENT OF THE CASE

This case was initially filed in Clark County Superior Court in August 2009. [CP 295-302.] The complaint asserted claims for professional negligence. [CP 300-301.]

On September 6, 2011 respondents, plaintiffs below, moved for summary judgment dismissal of several of the attorney defendants'

defenses, specifically including the Affirmative Defense of Judgmental Immunity.[1] [CP 313, *et. seq.*]

In the motion for summary judgment to dismiss the defendants' affirmative defense of judgmental immunity, respondents argued that the issue of judgmental immunity was to be considered by the trial court as "a matter of law." Plaintiffs' argument in their motion pleading was titled "Defendants' 'Judgmental Immunity' Affirmative Defense Fails as a Matter of Law." [CP 340, lines 17-18.]

The attorney defendants filed cross-motions for summary judgment on their legal defense, requesting that the trial court apply the legal doctrine of judgmental immunity and dismiss petitioner's claims relating to Mr. Matson and his firm's actions in the underlying litigation, including allegations addressing the attorneys' pre-trial settlement evaluation, and issues of pre-trial strategic and tactical handling of that case. [CP 346, *et. seq.*]

A hearing on the plaintiffs' motion and the defendants' cross-motions was initially held in the Clark County trial court on October 14,

[1]The trial court motion for summary judgment also sought dismissal of defendants'/petitioners' defense against plaintiff American Alternative Insurance Company ("AAIC") for lack of standing to bring a claim for legal malpractice against defendants/petitioners. AAIC was Clark County Fire District No. 5's liability insurer who had assigned the defendants/petitioners to defend the Fire District against the claims in the underlying action, which defense forms the basis of the legal malpractice claims in this series of cases.

2011.[2] [CP 691.]

On August 3, 2012 plaintiffs filed an additional pleading with the trial court styled as a "Response in Opposition to Defendants' Motion for Summary Judgment." [CP 718, *et. seq.*] As part of that pleading, appellants filed declarations of additional, new attorney experts they had retained to provide opinions contrary to those of the defendants' experts.

In the revised version of their opposition to the issue of judgmental immunity plaintiffs changed their legal theory and advanced the proposition that the issue of judgmental immunity was to be determined as a "matter of fact", rather than as they had originally asserted, "as a matter of law."

On August 12, 2012, defendants filed a Reply to the plaintiffs' opposition pleading. The Reply cited extensive legal authority for the rule that courts resolving disputes on the issue of judgmental immunity will look to the "totality of the circumstances" to analyze whether, as a matter of law, a legal malpractice defendant has established the existence of the defense of judicial immunity. [CP 1215-1218.]

At the August 17, 2012 trial court hearing the court properly concluded that as evidenced in the record before it, the "totality of the

[2]Based on this hearing, the trial court granted the defendants' motion for summary judgment on the issue of insurer A.A.I.C.'s lack of standing, and dismissed A.A.I.C.'s complaint.

circumstances" established as a matter of law that Mr. Matson "did in fact make reasonable decisions" [RP 70, Appellants' Opening Brief, p. 17] and dictated that the doctrine of judgmental immunity be applied to dismiss the appellants' claims of legal malpractice based on the allegations relating to Mr. Matson's pre-trial settlement evaluation, pre-trial handing, tactics and strategies, and his decisions with respect to not objecting to the content of the underlying plaintiffs' counsel's closing argument.

On September 19, 2012 plaintiffs/respondents filed an appeal of the trial court decision in Division II of the Washington Court of Appeals on the issues relating to defendants' affirmative defense of judgmental immunity. Briefs were submitted, and oral arguments on the appeal were heard on January 16, 2014.

After oral argument, the Court of Appeals issued an order to the parties requiring supplemental briefing on the sole question of proximate cause. Both parties submitted their supplemental briefing on January 24, 2014. [Appendix 2, Appendix 3.]

On April 24, 2014, the Court of Appeals entered its ruling. [Appendix 1.]

V. ARGUMENT

A. The Criteria for this Court to Accept Review

Division II's opinion implicates the following provisions of RAP

13.4(b); the decision:

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

B. <u>Division II Erroneously Modified, and Improperly Applied, the Doctrine of "Judgmental Immunity" by Excluding Examination of the Totality of the Circumstances in Creating the "Attorney Judgment Rule"</u>

In their trial briefing and argument defendants cited the authorities identifying the standard for application of the doctrine of judgmental immunity as a review of "the totality of the circumstances," and also pointed to the authority that such a review would be conducted by the court as a matter of law.

In its opinion Division II said:

> [Defendant] Matson is correct that under certain circumstances, whether an error in judgment constitutes a breach of duty can be decided as a matter of law. But *this is no different than in any other negligence case*, where a defendant can obtain summary judgment on the issue of breach of duty if reasonable minds could reach only one conclusion.

Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C., at 2014 WL 1647530 7-8 (emphasis added). [AP1-013].

The Court's statement is incorrect. The affirmative defense of Judgmental Immunity <u>is</u> in fact "different" from "any other negligence case." An affirmative defense has no meaning if the elements of the

defense do nothing more than serve to disprove the existence of the essential elements of plaintiff's claim, which the plaintiff must prove to sustain its *prime facie* case.

Division II's new "attorney judgment rule," which requires review of the factual evidence relating to the defendant attorney's compliance with the "standard of care" in all instances of the affirmative defense of judgmental immunity, is erroneous, and, indeed, illogical. Requiring universal application of the "attorney judgment" standard of care rule to all assertions in an affirmative defense of judgmental immunity negates the effectivity and viability of the defense by shifting the burden of proof of negligence from the plaintiff to the defendant. "Judgmental immunity" is an affirmative defense. There is no requirement in the law that a defendant plead an affirmative defense as a means of disproving an essential element of the plaintiffs' case, *e.g., Sprague v. Sumitomo Forestry Co., Ltd.* 104 Wn.2d 751, 757, 709 P.2d 1200 (1985) ("If notice of intent to resell is part of the [plaintiff's] *prima facie* case, then lack of such notice would not have to be affirmatively denied.").

If the doctrine of judgmental immunity rests exclusively on a requirement that the defendant affirmatively prove that it did not breach the essential element of "standard of care" in performing actions, the doctrine has no logical use, and becomes a mere vestige.

1. Examination of the "Totality of Circumstances" is an Appropriate Standard for the Court in Determining the Application of the Doctrine of Judgmental Immunity as a Matter of Law

While questions of professional negligence may be generally "left to the trier of fact," there is a recognized exception to this rule. When the "totality of circumstances" demonstrate that a conclusion may be reached that negligence has not been established, judgment may be entered as a matter of law. *Bergstrom v. Noah*, 266 Kan. 847, 875, 974 P.2d 531, 554 (Kan., 1999).

2. Adoption of the "Attorney Judgment Rule" Presents an Issue of "Substantial Public Interest" Justifying Review by the Supreme Court

In and of itself, the Court of Appeals' new "attorney judgment rule" creates an "issue of substantial public interest." The new rule has the potential to affect every legal malpractice case in Washington where challenges to an attorney's proper "handling" of a case, or the "tactics and strategies" employed are at issue. The effective change of the doctrine of judgmental immunity into nothing more than a separate analysis of the defendants' attorney's compliance with the "standard of care" can shift the plaintiffs' burden to the defendant, invite unnecessary litigation, and create confusion generally. As such, the Court of Appeals' decision is appropriate for review in the Supreme Court. *See*, *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005).

C. **Division II Erred by Independently Creating, and then Adopting, "Inferences" from Declarations of the Plaintiffs'/ Respondents' Experts to Overturn the Trial Court Summary Judgment in Favor of the Defendants, While Simultaneously Specifically Finding That Those Experts Had Failed to State Such Inferences, or, to State Facts Necessary to Support Such Inferences**

In applying its new "attorney judgment rule" to the issue the Court of Appeals independently and improperly created, and then adopted, "inferences" from testimony of respondents'/plaintiffs' opposing the motion below, which testimony the court itself acknowledged did not state evidentiary facts which could form the basis of such inferences.

Initially, Division II correctly stated:

> Merely providing an expert opinion that the judgment decision was erroneous or that the attorney should have made a different decision is not enough; *the expert must do more than simply disagree with the attorney's decision. Halvorsen*, 46 Wn. App. at 715–16, 718, 735 P.2d 675 (expert statements that they would have conducted litigation differently cannot as a matter of law support a legal negligence action). The plaintiff must submit evidence that no reasonable Washington attorney would have made the same decision as the defendant attorney. *See Cook*, 73 Wash.2d at 396, 438 P.2d 865 (attorney not liable for a judgment decision, even though it might not meet with unanimous approval).

Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C., at 2014 WL 1647530 8 [AP1-013].

Then, the Court of Appeals inconsistently acknowledged that:

> None of the [respondents'/plaintiffs'] experts specifically stated that the amount of Matson's evaluation was not

> within the range of reasonable alternatives under the facts of this case or that no reasonable attorney would have made the same settlement evaluation. In fact, none of them gave an opinion regarding what they believed was the correct settlement range. Under *Halvorsen*, the mere statements of experts that a judgment decision is erroneous or that they would have evaluated the case differently are not enough to maintain an attorney negligence claim. 46 Wash.App. at 718, 735 P.2d 675. However, *it can be inferred* that *the experts believed* that no reasonably prudent attorney would have agreed with Matson's evaluation based on their opinions that Matson breached the standard of care.

Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C., at 2014 WL 1647530 10 [AP1-015] (emphasis added).

Thus, even though it specifically *acknowledged the absence of supporting evidentiary facts* in the record, ignoring proper analysis, the Court of Appeals independently discovered, *on its own,* "inferences" from "facts" that the plaintiffs' experts' testimony *did not address*. Only on the basis of these self-manufactured "inferences" did Division II overturn the trial court's summary judgment in favor of the defendants on the questions relating to defendants' pre-trial settlement evaluation, and a series of defendants' pre-trial strategic and tactical litigation decisions.

1. Under Washington Law, Bare Speculation by a Party's Experts Is Not Sufficient to Create "Inferences" which Validly Require Denial of Motions for Summary Judgment

Black's Law Dictionary defines an "inference" as follows: "In the law of evidence.... a process of reasoning by which a fact or proposition

sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted." *Black's Law Dictionary* (9th ed. 2009).

An "inference" cannot be based on speculation, which is not fact. While an expert giving testimony may in some cases state opinions which are inferences, even in a *de novo* review of a motion for summary judgment, an appellate court is not entitled to independently create "inferences" to deny the motion, in the absence of facts. It is even more impermissible for any court to declare the existence of an inference where, such as in Division II's opinion, the court specifically acknowledges that no facts exist in the evidence to support such "inferences."

"[T]he legal definition of 'inference' ... is not interchangeable with 'assumption' or 'speculation.'" *State v. Jeffries,* 105 Wn.2d 398, 442, 717 P.2d 722 (1986). Inferences can only be drawn from facts. In the absence of any facts to support mere opinions, such opinions are "conclusory"; they constitute "speculation." The court may not accept such opinions as evidence or base rulings on such fact-barren statements.

A non-moving party attempting to resist a summary judgment may not rely on speculation, argumentative assertions that unresolved factual matters remain, for upon the submission by the moving party of adequate affidavits. "The non-moving party must set forth specific facts that

sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists." *Halvorsen v. Ferguson*, 46 Wn. App. 708, 721-722, 735 P.2d 675 (1986).

"Evidence that merely 'bolsters' an 'inference' that a defendant 'might' have acted [in a specific manner] simply does not rise to the level of proof this court has heretofore demanded. Such evidence does no more than pyramid inference upon inference." *Herron v. KING Broadcasting Co.*, 112 Wn.2d 762, 792, 776 P.2d 98 (1989) (emphasis added).

2. No Valid Evidence Supporting Experts' Challenge To Defendants' Pre-Trial Settlement Evaluation

The Court of Appeals also specifically acknowledged that the plaintiffs' experts' testimony in the record *did not* offer facts which established any reasonable alternative litigation choices available to the defendants. The court said:

> None of the experts specifically stated that the amount of Matson's evaluation was not within the range of reasonable alternatives under the facts of this case or that no reasonable attorney would have made the same settlement evaluation. In fact, none of them gave an opinion regarding what they believed was the correct settlement range. Under *Halvorsen*, the mere statements of experts that a judgment decision is erroneous or that they would have evaluated the case differently are not enough to maintain an attorney negligence claim. 46 Wash.App. at 718, 735 P.2d 675.

Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C., at 2014 WL 1647530 7-8 (emphasis added). [Id.]

Thus, any "opinion," "conclusion" or other comment by any of plaintiffs' experts that the defendants did not meet the standard of care with respect to their pre-trial settlement analysis lacks any factual basis and is wholly, completely, and undisputedly based on the utter speculation by such witnesses.

Where "inferences" are drawn from speculation by experts instead of from actual facts in evidence, refuse to consider such testimony is mandated.

The "non-moving party ... may not rely on speculation or argumentative assertions that unresolved factual issues remain." *Marshall v. Bally's PacWest, Inc.*, 94 Wn. App. 372, 377, 972 P.2d 475 (1999). Applying this basic rule, the Court of Appeals was in error when it independently created inferences that were not based on facts provided in the evidence by the plaintiffs' testifying experts, or, directly stated by the plaintiffs' experts.

3. No Valid Evidence Supporting "Inferences" Challenging Defendants' Strategic and Tactical Pre-Trial Handling of the Litigation

The Court of Appeals also erroneously self-manufactured "inferences" in the plaintiffs' experts' trial declarations regarding the contested issues set out under the topic of "Pre-Trial Handling." Division II said:

> The Fire District argues that Matson was negligent in the handling of the case before trial in multiple respects. In its appellate briefing, the Fire District references the following alleged deficiencies: (1) adopting a strategy that assumed the jury would view James's conduct as light-hearted banter and blamed Collins for James's conduct; (2) failing to provide a settlement evaluation earlier in the case; (3) failing to pursue early settlement/mediation; (4) failing to make individual settlement offers to the different plaintiffs; (5) failing to consult with other attorneys in his firm who were more experienced; (6) failing to arrange for a mock trial or consult with a jury consultant; (7) failing to file a motion to bifurcate; (8) failing to file dispositive motions, particularly on Collins's claim; and (9) failing to file an offer of judgment. [FN omitted] . . .
>
> All of Matson's alleged deficiencies listed above related to *pre-trial tactics and strategy* and involved the exercise of professional judgment. Accordingly, the attorney judgment rule applies."

Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C., at 2014 WL 1647530 10-11 [AP1-015, 016] (emphasis added).

The court improperly applied the "attorney judgment" standard of care rule, instead of the "totality of the circumstances" to legally analyze the defendants' actions which even it recognized constituted "pre-trial tactics and strategies."

Again, the record reveals that there was no factual evidence presented by the respondents' retained experts that the defendants' conduct was negligent. The testimony presented was merely that the various experts' expressed conclusory personal dissatisfaction in what Mr. Matson did in litigating the underlying case.

"[A]n expert must base his or her opinion on standards accepted by the legal community and not merely on the expert's personally held views." *Carbis Sales, Inc. v. Eisenberg*, 397 N.J.Super. 64, 79 (App. Div. 2007). In Washington, it is "necessary that an expert's opinion on the standard of care be based on general professional standards, rather than mere personal opinion." *Leaverton v. Cascade Surgical Partners, P.L.L.C.*, 160 Wn. App. 512, 520, 248 P.3d 136 (2011).

The Court of Appeals should have recognized the fact that in their declarations plaintiff's experts offered no evidential support establishing the existence of any particular standard of care relating to any of the plaintiffs' hindsight laundry list of contested issues of defendants' "pre-trial handling" of the litigation, other than standards that were merely personal to the experts themselves.

A client's mere "dissatisfaction with strategic choices," as a matter of law, cannot serve as the proper basis for a legal malpractice claim. *Bernstein v. Oppenheim & Co., P.C.*, 160 A.D.2d 428, 431, 554 N.Y.S.2d 487, 490 (1990).

Further, as litigation strategies and tactics, each of the actions described above are subject to application of the judgmental immunity doctrine – as a matter of law, separate and apart from the Court of Appeals' "attorney judgment rule."

Such discretionary tactical activities involving strategy and pleading are the clear example of why a "standard of care" analysis required in every case by the "attorney judgment rule" is less appropriate than the court's review of "the totality of the circumstances" of the attorney's conduct as a matter of law. Indeed, in Washington legal malpractice actions, "the determination of what [consequences] would have followed if an attorney had timely filed [pleadings] "is a question of law for the judge, irrespective of whether the facts are undisputed." *Daugert v. Pappas*, 104 Wn.2d 254, 259-260, 704 P.2d 600, 604 (1985).

Further, the evidence in the record does not support the court's determination that "inferences" necessitate overturning the trial court's grant of summary judgment. For each of Mr. Matson's tactical or strategic decisions, the plaintiffs' "expert's" statements are entirely conclusory and fail to offer any facts or specific alternative course, and fail to explain how Mr. Matson might have otherwise met the standard of care.

> (1) "Banter" – Plaintiffs' "experts" only refer to this aspect of the case in several sentences of their declarations. [*See* Bremner at CP 799-800, Cordon at CP 821].
>
> (2)-(3) No "early" settlement offer / no "early mediation" – How an "early" settlement offer or the conduct of an "early" mediation is required so as to comport with the standard of care, is never explained by any of the plaintiff's experts. The experts are simply saying that they would have conducted the litigation themselves in a different way. Such personal opinions fail, *as a matter of law*, to establish malpractice.

(4) Individual settlement offers – Again, the evidence is simply of one attorney arguing with the alternative choice of a second attorney. There is no factual basis in the record that such "individual" settlement offers were required to comport with a defined "standard of care."

(5) No consultations with other attorneys – There is no evidence in the record which factually – or inferentially, discusses any global attorney "standard of care" which requires an attorney is to consult with other lawyers.

(6) Failing to arrange a mock trial – There are no facts articulated establishing, beyond mere speculation, how such actions would have created specific alternative results, or how it was not reasonable to fail to "arrange" such an exercise.

(7), (8), (9) Failing to file discretionary pleadings – The decision whether to file or submit pleadings is a classic example of litigation tactics discretionary to the attorney, and subject to analysis as a matter of law.

Even applying the Court of Appeals' rule, to raise triable issues of fact relating to the defendant attorney's strategies and tactics, the plaintiff must show evidence of alternative conduct. In a legal malpractice case, "[t]estimony reflecting only a personal opinion or testimony of experts that they would have followed a different course ... than that of the defendant is insufficient to establish a standard of care against which a jury must measure a defendant's performance, since the fact finder may not be given the choice of choosing between two standards." *Hayes v. Hulswit,* 73 Wn.2d 796, 800, 440 P.2d 849 (1968).

"[S]election of one among several reasonable courses of action does not constitute malpractice." *Rosner v. Paley*, 65 N.Y.2d 736, 738,

481 N.E.2d 553 (1985).

D. In Overturning the Trial Court Summary Judgment by Use of Expert Testimony that the Court of Appeals Acknowledged Was Not Supported by Relevant Facts, the Court Is in Conflict with the Decision of *Halvorsen v. Ferguson*, 46 Wn. App. 708 (1986)

"The statements by experts that they would have conducted litigation in an uncertain and unsettled legal area differently, standing alone, cannot, as a matter of law, constitute the basis for a legal malpractice action." *Halvorsen v. Ferguson*, 46 Wn. App. 708, 718, 735 P.2d 675, 681 (Wn. App. 1986). "Mere conjecture by experts cannot raise a genuine issue of material fact." *Id.*, at 46 Wn. App. 722.

As discussed above, in overturning the trial court summary judgment based on "inferences" derived without supporting facts in evidence, the court allowed speculation and mere conjecture by plaintiffs' experts to govern its decision.

E. Division II Erred in Failing to Consider and Resolve Evidence on Issues Relating to Proximate Cause, After It Specifically Requested Supplemental Briefing on the Matter

Oral argument on the appeal was heard in Division II on January 16, 2014. Several days later, Division II ordered the parties to file supplemental briefs on the specific issue of "proximate cause." Both parties, including the defendant/respondent filed such briefing. [Appendix 2, Appendix 3.]

In its subsequent opinion, Division II said:

> Proximate cause may be difficult to prove for some of the judgment errors the Fire District alleges. But proximate cause issues were never before the trial court. . . . Matson never generally moved for summary judgment on the Fire District's negligence claim or specifically challenged the existence of proximate cause. Accordingly, we will not address proximate cause in this appeal.

Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C., at 2014 WL 1647530, 9 [AP1-014].

Given the Court of Appeals' order to provide briefing on the issues regarding proximate cause, the issues of proximate cause were before the court, and Division II committed error by not addressing the evidence on that issue.

VI. CONCLUSION

Division II's new "attorney judgment rule," which ignores the "totality of the circumstances" and is entirely based on the precept that in *every* application of the affirmative defense of judgmental immunity, the defendant must disprove existence of facts which are the plaintiffs' burden to establish as a *prime facia* essential element of professional negligence that defendant breached the standard of care, presents substantial issues of public interest.

The decision by Division II to overturn the trial court summary judgment based on the doctrine of "Judgmental Immunity" because it

discovered "inferences" from the underlying experts' testimony, in the absence of supporting facts, is clear error, and conflicts with the prior decision of *Halvorsen v. Ferguson.*

This case deserves to be fully reviewed by the Supreme Court to address these and the other issues articulated in this filing.

DATED this 22nd day of May, 2014.

FORSBERG & UMLAUF, P.S.

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Richard G. Matson

DECLARATION OF SERVICE

I, Elizabeth Sado, declare under penalty of perjury that I am over the age of 18 and competent to testify as to service in this matter.

On the date given below, I caused a copy of Defendants'/ Petitioners' Petition for Review to be hand-delivered on May 23, 2014 by 4:30 p.m. to:

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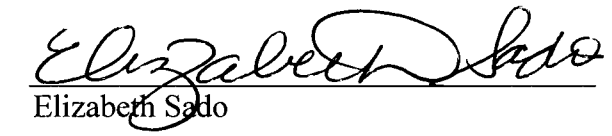
I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of May 2014, at Seattle, Washington.



Elizabeth Sado

Appendix 1

--- P.3d ----, 2014 WL 1647530 (Wash.App. Div. 2), 122 Fair Empl.Prac.Cas. (BNA) 1043
(Cite as: 2014 WL 1647530 (Wash.App. Div. 2))

Only the Westlaw citation is currently available.

Court of Appeals of Washington,
Division 2.
CLARK COUNTY FIRE DISTRICT NO. 5 and American Alternative Insurance Corporation, Appellants,
v.
BULLIVANT HOUSER BAILEY P.C. and Richard G. Matson, Respondent.

Nos. 42864–4–II, 43970–1–II.
April 24, 2014.

Background: County fire district and its insurer, which hired attorney and law firm to defend fire district and an employee of fire district in a lawsuit for gender discrimination and sexual harassment, brought a legal-negligence action against attorney and law firm after a trial of the lawsuit resulted in an adverse jury verdict. The Clark Superior Court, John P. Wulle, J., ordered a dismissal of insurer for lack of standing, certified the order for appeal, and, after insurer appealed, dismissed fire district's negligence claims on summary judgment. Fire district appealed. The appeals were consolidated.

Holdings: The Court of Appeals, Maxa, J., held that:
(1) insurer was not the intended beneficiary of attorney's representation of fire district, and thus insurer lacked standing to maintain a negligence claim, given that attorney was not insurer's client;
(2) genuine issues of material fact precluded summary judgment on the breach-of-duty element of fire district's negligence claim based on attorney's evaluation of the settlement value of the claims in the underlying lawsuit;
(3) genuine issues of material fact precluded summary judgment on the breach-of-duty element of fire district's negligence claim based on attorney's pretrial handling of the underlying case;
(4) attorney was not negligent under the attorney judgment rule for failing to object to certain closing-argument statements at trial of the underlying lawsuit; and
(5) genuine issue of material fact precluded summary judgment on the breach-of-duty element of fire district's negligence claim based on attorney's failure to preserve the closing-argument issue for appellate review.

Affirmed in part, reversed in part, and remanded.

See also 155 Wash.App. 48, 231 P.3d 1211.

West Headnotes

[1] Judgment 228 ⚿181(33)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) k. Tort Cases in General. Most Cited Cases

To avoid summary judgment in a negligence case, the plaintiff must show a genuine issue of material fact on each element of negligence: duty, breach, causation, and damage. CR 56.

[2] Attorney and Client 45 ⚿26

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k26 k. Duties and Liabilities to Adverse Parties and to Third Persons. Most Cited Cases

County fire district's insurer was not the intended beneficiary of representation by attorney, who was retained and paid by insurer but was not insurer's client, of fire district in a lawsuit against fire district, and thus insurer lacked standing to maintain a claim against attorney for legal negligence after a trial in the lawsuit resulted in an adverse jury verdict.

[3] Attorney and Client 45 ⚿26

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k26 k. Duties and Liabilities to Adverse Parties and to Third Persons. Most Cited Cases

Under the six-factor test for determining whether an attorney owes a duty of care to a nonclient third party, whether the representation was intended to benefit the nonclient is the first factor and primary inquiry.

[4] Attorney and Client 45 ⚿105.5

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k105.5 k. Elements of Malpractice or Negligence Action in General. Most Cited Cases

To establish a claim for legal negligence, the plaintiff must prove four elements: (1) the existence of an attorney-client relationship that 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.

[5] Attorney and Client 45 ⚿107

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k107 k. Skill and Care Required. Most Cited Cases

Attorney and Client 45 ⚿112.50

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k112.50 k. Research and Knowledge of Law. Most Cited Cases

To comply with the duty of care owed to a client, an attorney must exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in Washington.

[6] Attorney and Client 45 ⚿112

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k112 k. Conduct of Litigation. Most Cited Cases

In the analysis of any legal-negligence claim, it is important to understand that an attorney is not a guarantor of success and is not responsible for a "bad result" unless the result was proximately caused by a breach of the attorney's duty of care; consequently, the ultimate result of a case generally is irrelevant in evaluating whether an attorney's conduct breached the duty of care.

[7] Attorney and Client 45 ⚿107

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k107 k. Skill and Care Required. Most Cited Cases

Under the "attorney judgment rule" for determining when an attorney's error in professional judgment breaches his or her duty of care to a client, an attorney cannot be liable for making an allegedly erroneous decision involving honest, good-faith judgment if (1) that decision was within the range of reasonable alternatives from the perspective of a reasonable, careful, and prudent attorney in Washington and (2) in making that judgment decision the attorney exercised reasonable care.

[8] Negligence 272 ⚿1693

272 Negligence
272XVIII Actions
272XVIII(D) Questions for Jury and Directed Verdicts
272k1693 k. Negligence as Question of Fact or Law Generally. Most Cited Cases

In a negligence action, whether a defendant has breached the duty of care generally is a question of fact.

[9] Attorney and Client 45 ⚿129(3)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts
45k129(3) k. Trial and Judgment. Most Cited Cases

Whether an attorney's error in judgment has breached a duty of care to a client under the attorney judgment rule is a question for the jury, although an exception is when an attorney is charged with an error regarding a legal question; in the latter situation, whether the attorney erred in interpreting or applying the law is a legal issue reserved for the court.

[10] Attorney and Client 45 ⚿129(3)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts
45k129(3) k. Trial and Judgment. Most Cited Cases

Under certain circumstances, whether an attorney's error in judgment has breached a duty of care to a client under the attorney judgment rule can be decided as a matter of law; this is no different than in any other negligence case, where a defendant can obtain summary judgment on the issue of breach of duty if reasonable minds could reach only one conclusion. CR 56.

[11] Attorney and Client 45 ⚿107

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k107 k. Skill and Care Required. Most Cited Cases

Judgment 228 ⚿181(16)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(16) k. Attorneys, Cases Involving. Most Cited Cases

Under the attorney judgment rule, a plaintiff in a legal-negligence case can avoid summary judgment on breach of duty for an error in judgment in one of two ways; first, the plaintiff can show that the defendant attorney's exercise of judgment was not within the range of reasonable choices from the perspective of a reasonable, careful, and prudent attorney in Washington, and second, the plaintiff can show that the defendant attorney breached the standard of care in making the judgment decision. CR 56.

[12] Judgment 228 ⚿185.3(4)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(4) k. Attorneys. Most Cited Cases

For a plaintiff in a legal-negligence case to show that the defendant attorney's exercise of judgment was not within the range of reasonable choices from the perspective of a reasonable, careful, and prudent attorney in Washington, such that the plaintiff can avoid summary judgment on breach of duty under the attorney judgment rule, merely providing an expert opinion that the judgment decision was erroneous or that the defendant attorney should have made a different decision is not enough; the expert must do more than simply disagree with the defendant attorney's decision. CR 56.

[13] Judgment 228 ⚿185.3(4)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(4) k. Attorneys. Most Cited Cases

For a plaintiff in a legal-negligence case to show that the defendant attorney's exercise of judg-

ment was not within the range of reasonable choices from the perspective of a reasonable, careful, and prudent attorney in Washington, such that the plaintiff can avoid summary judgment on breach of duty under the attorney judgment rule, the plaintiff must submit evidence that no reasonable Washington attorney would have made the same decision as the defendant attorney. CR 56.

[14] Judgment 228 ⚿181(16)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(16) k. Attorneys, Cases Involving. Most Cited Cases

In the context of a motion for summary judgment in a legal-negligence case involving the attorney judgment rule, if there is a genuine issue as to whether the defendant attorney's judgment decision was within the range of reasonable choices from the perspective of a reasonable, careful, and prudent attorney in Washington, the jury must be allowed to decide the issue. CR 56.

[15] Attorney and Client 45 ⚿107

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k107 k. Skill and Care Required. Most Cited Cases

To avoid liability under the attorney judgment rule, the attorney's judgment must be an informed one; in other words, even if the judgment decision itself was within the reasonable range of choices, an attorney can be liable if he or she was negligent based on how that decision was made.

[16] Judgment 228 ⚿185.3(4)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(4) k. Attorneys. Most Cited Cases

In the context of a motion for summary judgment in a legal-negligence case involving the attorney judgment rule, if sufficient evidence exists that the defendant attorney was negligent in making a judgment decision, the jury must decide the issue. CR 56.

[17] Attorney and Client 45 ⚿105.5

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k105.5 k. Elements of Malpractice or Negligence Action in General. Most Cited Cases

Causation in a legal-negligence claim focuses on "cause in fact," the "but for" consequences of an attorney's breach of duty.

[18] Attorney and Client 45 ⚿112

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k112 k. Conduct of Litigation. Most Cited Cases

To prove causation in a legal-negligence case, a plaintiff must prove that but for the defendant attorney's negligence, the plaintiff would have prevailed or obtained a better result in the underlying litigation.

[19] Attorney and Client 45 ⚿129(3)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts
45k129(3) k. Trial and Judgment. Most Cited Cases

Generally, the "but for" aspect of proximate cause in a legal-negligence case is decided by the trier of fact; proximate cause can be determined as a matter of law, however, if reasonable minds could not differ.

[20] Attorney and Client 45 ⚿112

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k112 k. Conduct of Litigation. Most Cited Cases

When an attorney makes an error that affects the outcome of the underlying case, proximate cause can be determined in a legal-negligence case by retrying (or trying for the first time) the underlying case while omitting the alleged error, i.e., conducting a "trial within a trial"; the result of the second trial is then compared to the outcome of the underlying case.

[21] Judgment 228 ⚿185.3(4)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(4) k. Attorneys. Most Cited Cases

For a plaintiff in a legal-negligence case involving the attorney judgment rule to avoid summary judgment for lack of evidence of causation, the plaintiff must produce evidence that the alleged error in judgment did in fact affect the outcome of the underlying case. CR 56.

[22] Judgment 228 ⚿181(16)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(16) k. Attorneys, Cases Involving. Most Cited Cases

Genuine issues of material fact existed as to whether attorney's evaluation of the settlement value of claims against client county fire district was within the range of reasonable alternatives from the perspective of a reasonable, careful, and prudent attorney in Washington and whether the evaluation resulted from attorney's failure to exercise reasonable care, so as to preclude summary judgment on the breach-of-duty element of fire district's claim for legal negligence against attorney based on the evaluation, given that the attorney judgment rule applied to the claim. CR 56.

[23] Attorney and Client 45 ⚿112

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k112 k. Conduct of Litigation. Most Cited Cases

An attorney's opinion regarding the settlement value of a particular case involves the exercise of professional judgment, such that the attorney judgment rule applies to a claim for legal negligence based on the attorney's settlement evaluation.

[24] Judgment 228 ⚿181(16)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(16) k. Attorneys, Cases Involving. Most Cited Cases

Genuine issues of material fact existed as to whether attorney's pretrial handling of a case against client county fire district was within the range of reasonable alternatives from the perspective of a reasonable, careful, and prudent attorney in Washington and whether attorney exercised informed judgment regarding pretrial strategic decisions, precluding summary judgment on the breach-of-duty element of fire district's claim for legal negligence against attorney based on the pretrial handling, given that the attorney judgment rule applied to the claim. CR 56.

[25] Attorney and Client 45 ⚿112

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k112 k. Conduct of Litigation. Most Cited Cases

Alleged deficiencies in an attorney's pretrial adoption of a jury strategy, failure to provide a settlement evaluation earlier in a case, failure to

provide early settlement or mediation, failure to made individual settlement offers to individual plaintiffs, failure to consult more experienced attorneys, failure to arrange for a mock trial or consult with a jury consultant, failure to file a motion to bifurcate, failure to file dispositive motions, and failure to file an offer of judgment involve the exercise of professional judgment, such that the attorney judgment rule applies to a claim for legal negligence based on the attorney's handling of such matters.

[26] Attorney and Client 45 ⇐112

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k112 k. Conduct of Litigation. Most Cited Cases

Attorney was not negligent under the attorney judgment rule to client county fire district for failing to object to certain closing-argument statements at trial of a lawsuit against fire district, absent evidence that the failure to object was not within the range of reasonable alternatives from the perspective of a reasonable, careful, and prudent attorney in Washington or resulted from attorney's failure to exercise reasonable care.

[27] Attorney and Client 45 ⇐112

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k112 k. Conduct of Litigation. Most Cited Cases

An attorney's decision on whether to object to an improper statement in closing argument involves the exercise of the attorney's judgment, such that the attorney judgment rule applies to a claim for legal negligence based on a failure to make such an objection.

[28] Attorney and Client 45 ⇐112

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k112 k. Conduct of Litigation. Most Cited Cases

An attorney's decision on whether to file a motion in limine involves the exercise of the attorney's judgment, such that the attorney judgment rule applies to a claim for legal negligence based on a failure to file such a motion.

[29] Judgment 228 ⇐181(16)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(16) k. Attorneys, Cases Involving. Most Cited Cases

Genuine issue of material fact existed as to whether attorney's failure to preserve a closing-argument issue for appellate review in a case against client county fire district was within the range of reasonable alternatives from the perspective of a reasonable, careful, and prudent attorney in Washington, precluding summary judgment on the breach-of-duty element of fire district's claim for legal negligence against attorney based on the failure to preserve, given that the attorney judgment rule applied to the claim. CR 56.

Appeal from Clark Superior Court; Honorable John P. Wulle, J.Michael Alexander Patterson, Daniel Paul Crowner, Patterson BuchananFobes Leitch PS, Seattle, WA, for Appellants and Other Parties.

Ray P. Cox, Richard R. Roland, Terrence J. Cullen, Forsberg & Umlauf PS, Seattle, WA, for Respondents.

PUBLISHED OPINION

MAXA, J.

*1 ¶ 1 Clark County Fire District No. 5 (Fire District) and its insurer American Alternative Insurance Corporation (AAIC) appeal the trial court's summary judgment dismissals of their legal negligence claims against the law firm Bullivant Houser Bailey PC and attorney Richard Matson (collectively, Matson). AAIC retained Matson to

defend the Fire District and its employee, Martin James, in a gender discrimination and sexual harassment lawsuit. The trial of that lawsuit resulted in a jury verdict in excess of $3.2 million, which was increased to almost $4 million following the award of attorney fees. The Fire District and AAIC subsequently sued Matson, alleging that he was negligent in (1) failing to properly evaluate the case for settlement purposes, (2) mishandling various pretrial matters, and (3) failing to object to improper statements in closing argument and failing to preserve for appeal the ability to challenge these statements. The trial court dismissed AAIC's claims based on its ruling that AAIC had no standing to sue because it was not Matson's client, and later dismissed the Fire District's negligence claims based on its ruling that Matson could not be liable for his judgment decisions.

¶ 2 Initially, we hold that under *Stewart Title Guaranty Co. v. Sterling Savings Bank,* 178 Wash.2d 561, 569–70, 311 P.3d 1 (2013), the trial court correctly ruled that AAIC did not have standing to sue Matson because his representation of the Fire District was not intended for AAIC's benefit. Therefore, we affirm the trial court's dismissal of AAIC's claims. With regard to the Fire District's legal negligence claims, all of the conduct at issue involved the exercise of Matson's professional judgment. We apply the "attorney judgment rule" to hold that (1) the Fire District could avoid summary judgment only if it came forward with sufficient evidence to show that Matson's judgment decisions were not within the range of reasonable alternatives from the perspective of a reasonable, careful and prudent attorney in Washington or that decisions themselves resulted from negligent conduct; and (2) the opinions of the Fire District's experts created questions of fact regarding most of its allegations. Accordingly, we affirm the trial court's grant of summary judgment dismissal of AAIC's claims, but we reverse the trial court's grant of summary judgment in favor of Matson on all the Fire District's claims except for the failure to object to the improper closing argument and the failure to file an appropriate motion in limine regarding the subject of the improper argument.

FACTS

Underlying Lawsuit

¶ 3 In February 2005, Sue Collins, Valerie Larwick, Kristy Mason, and Helen Hayden sued their supervisor (James) and employer (Fire District) for gender discrimination and sexual harassment in violation of the Washington Law Against Discrimination, chapter 49.60 RCW, and for related claims. *Collins v. Clark County Fire Dist. No. 5,* 155 Wash.App. 48, 62–63, 231 P.3d 1211 (2010).

***2** ¶ 4 James admitted to making sexually inappropriate and discriminatory comments while supervising employees, but he also testified that the plaintiffs had not told him that his remarks were inappropriate. *Collins,* 155 Wash.App. at 67, 231 P.3d 1211. From the Fire District's perspective, James's inappropriate comments and actions were part of ongoing banter between James and Collins, which Collins had initiated and encouraged. The Fire District disputed that James acted inappropriately with regard to the other plaintiffs and contended that they joined the lawsuit at Collins's urging.

Matson Case Evaluation and Mediation

¶ 5 In April 2005, AAIC retained Matson to defend its insureds (Fire District and James) in the Collins litigation. Apparently, there were lengthy delays in the discovery process. The plaintiffs did not depose James until February 8, 2007.

¶ 6 On February 26, 2007, Matson provided to AAIC a written evaluation of the plaintiffs' cases in preparation for a mediation. He valued each of the plaintiffs' claims based on past medical expenses, future medical expenses, back pay, front pay, prejudgment interest, general damages, and attorney fees. He also assigned a probability of prevailing for each plaintiff. Then Matson calculated a settlement value for each plaintiff based on the potential recoverable damages and the probability of prevailing. Matson evaluated the combined settlement value of the plaintiffs' claims at $370,000.[FN1]

However, he warned that his approach was conservative, and that potentially recoverable damages could be higher at trial and the settlement values of each case could be as much as 50 percent higher. Matson also advised that exposure to adverse prevailing party attorney fees was a significant issue and could drive the settlement value of the case. Finally, Matson advised that the plaintiffs also could recover an amount that represents their increased income tax exposure.

¶ 7 On March 2, Matson provided a detailed pre-mediation statement to the mediator. Matson explained the facts from the plaintiffs' and defendants' perspectives and set forth his analysis regarding the strengths and weaknesses of each of the plaintiffs' claims.

¶ 8 On the eve of mediation, plaintiffs increased their settlement demand from *$6.6* million to approximately $8.5 million. Consistent with Matson's evaluation of the case, AAIC's representative had $400,000 in settlement authority at the mediation. According to AAIC's representative, the mediator indicated that from her perspective, $1.8 million possibly would be a reasonable demand, but not $8 million, and that the average settlement value was approximately $85,000 per plaintiff. The mediator spoke to the plaintiffs but reported back that their demands remained firm. After a full day of mediation, AAIC decided not make a settlement offer in any amount. The AAIC representative stated at mediation that "if the plaintiffs want these kind of numbers a jury is going to have to give it to them." Clerk's Papers (CP) at 546.

*3 ¶ 9 Matson did not file any dispositive motions or a motion to bifurcate the cases. Matson also did not make an offer of judgment.

Trial and Appeal

¶ 10 The case proceeded to trial. The jury returned a verdict in favor of all four plaintiffs, awarding them substantial judgments that totaled more than $3.2 million. *Collins,* 155 Wash.App. at 73–74, 231 P.3d 1211. The trial court also awarded the plaintiffs more than $750,000 in attorney fees and costs. *Collins,* 155 Wash.App. at 77–80, 231 P.3d 1211.

¶ 11 The Fire District moved for a new trial, arguing that during closing arguments plaintiffs' counsel deliberately interjected evidence of liability insurance and improperly encouraged the jury to award punitive damages to send a message to the Fire District. *Collins,* 155 Wash.App. at 74, 93–94, 231 P.3d 1211. The trial court denied the motion, ruling that "[t]aken together without objection, [the comment] is not so prejudicial to warrant the granting of a new trial." *Collins,* 155 Wash.App. at 95, 231 P.3d 1211 (second alteration in original).

¶ 12 On appeal, we affirmed the trial court's denial of the Fire District's motion for a new trial in a published decision. *Collins,* 155 Wash.App. at 105, 231 P.3d 1211. With regard to the closing argument issue, we held that "[a]lthough such remarks were improper, we agree with the trial court that they were not so prejudicial that a timely instruction could not have cured any prejudicial effect." [FN2] *Collins,* 155 Wash.App. at 95, 231 P.3d 1211. This court also affirmed the trial court's attorney fees award and awarded $116,650.69 in attorney fees and costs on appeal to Collins and Larwick. *Collins,* 155 Wash.App. at 105, 231 P.3d 1211.

¶ 13 The supplemental judgment, for which AAIC indemnified its insureds, totaled more than $4.8 million (not including interest).

Allegation of Legal Negligence

¶ 14 AAIC and the Fire District sued Matson, alleging that he was negligent in failing to properly evaluate the case for settlement purposes, in mishandling various pre-trial matters, and in failing to object to allegedly improper closing arguments. The trial court dismissed AAIC from the lawsuit for lack of standing because AAIC was not Matson's client. The trial court certified its order under CR 54(b) to facilitate immediate appellate review, and AAIC appealed.

¶ 15 Thereafter, the trial court dismissed the Fire District's negligence claims against Matson on summary judgment, holding as a matter of law that Matson could not be liable for his judgment decisions. The Fire District appealed. We consolidated both appeals.

ANALYSIS

A. STANDARD OF REVIEW

¶ 16 We review a trial court's order granting summary judgment de novo. *Loeffelholz v. Univ. of Wash.,* 175 Wash.2d 264, 271, 285 P.3d 854 (2012). "We review the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *Lakey v. Puget Sound Energy, Inc.,* 176 Wash.2d 909, 922, 296 P.3d 860 (2013). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Loeffelholz,* 175 Wash.2d at 271, 285 P.3d 854. "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." *Ranger Ins. Co. v. Pierce County,* 164 Wash.2d 545, 552, 192 P.3d 886 (2008). If reasonable minds can reach only one conclusion on an issue of fact, that issue may be determined on summary judgment. *M.A. Mortenson Co. v. Timberline Software Corp.,* 140 Wash.2d 568, 579, 998 P.2d 305 (2000).

***4** [1] ¶ 17 Under CR 56, a defendant is entitled to summary judgment if (1) the defendant shows the absence of evidence to support the plaintiff's case and (2) the plaintiff fails to come forward with evidence creating a genuine issue of fact on an element essential to the plaintiff's case. *Young v. Key Pharmaceuticals, Inc.,* 112 Wash.2d 216, 225, 770 P.2d 182 (1989). To avoid summary judgment in a negligence case, the plaintiff must show a genuine issue of material fact on each element of negligence—duty, breach, causation and damage. *Martini v. Post,* 178 Wash.App. 153, 164, 313 P.3d 473 (2013).

B. AAIC's STANDING TO SUE

[2] ¶ 18 The parties agree that even though AAIC retained and paid Matson, AAIC was not Matson's client. Matson's only client was the Fire District. The trial court dismissed AAIC's legal negligence claim on this basis. AAIC argues that it does have standing to sue Matson under the facts of this case. We disagree based on our Supreme Court's decision in *Stewart Title,* 178 Wash.2d at 569–70, 311 P.3d 1.

[3] ¶ 19 In *Trask v. Butler,* 123 Wash.2d 835, 842–43, 872 P.2d 1080 (1994), our Supreme Court held that the threshold question for a nonclient's ability to sue an attorney for legal negligence is whether the attorney's representation was intended to benefit the nonclient.[FN3] In *Stewart Title,* our Supreme Court applied this rule in the insurance defense context, holding that a title insurer that hired an attorney to defend its insured was not an intended beneficiary of the attorney's representation. 178 Wash.2d at 563, 569–70, 311 P.3d 1. The court held that the alignment of interests between the insurer and the insured during the representation and the insured's attorney's duty to keep the insurer informed of the progress of the litigation were insufficient to establish that the insurer was an intended beneficiary of the representation and, therefore, the attorney did not owe a duty of care to the insurer. *Stewart Title,* 178 Wash.2d at 567–70, 311 P.3d 1.

¶ 20 AAIC argues that *Stewart Title* does not impose a rule that applies in all insurance defense situations and that the *Trask* intended beneficiary factor must be analyzed on a case-by-case basis. AAIC contends that the facts here support a finding that AAIC was an intended beneficiary of Matson's representation. However, the same tripartite relationship that existed between the parties in *Stewart Title* is present here and AAIC's arguments are very similar to those rejected by our Supreme Court in *Stewart Title.* Our Supreme Court gave no indication in *Stewart Title* that there could be circumstances under which the. representation of an attorney retained to represent an insured would be for the benefit of the insurer. Accordingly, we are con-

strained to hold that *Stewart Title* controls and that AAIC was not the intended beneficiary of Matson's representation. We hold that that AAIC lacks standing to maintain its legal negligence claim against Matson and affirm the trial court's grant of summary judgment on this issue.

C. PRINCIPLES OF LEGAL NEGLIGENCE

*5 ¶ 21 The trial court granted summary judgment dismissal of the Fire District's legal negligence suit against Matson based on the doctrine of judgmental immunity. The Fire District argues that the trial court erred because questions of fact exist regarding Matson's negligence. We agree with the Fire District regarding most of its negligence claims.

1. Legal Negligence Elements

[4][5] ¶ 22 To establish a claim of legal negligence, the plaintiff must prove four 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 Wash.2d 251, 260–61, 830 P.2d 646 (1992). "To comply with the duty of care, an attorney must exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law" in the state of Washington. *Hizey,* 119 Wash.2d at 261, 830 P.2d 646.

[6] ¶ 23 In the analysis of any legal negligence claim it is important to understand that an attorney is not a guarantor of success and is not responsible for a "bad result" unless the result was proximately caused by a breach of the attorney's duty of care. *See McLaughlin v. Cooke,* 112 Wash.2d 829, 839, 774 P.2d 1171 (1989) (regarding malpractice of a medical professional). Consequently, the ultimate result of a case generally is irrelevant in evaluating whether an attorney's conduct breached the duty of care.

¶ 24 Here, an attorney-client relationship existed between Matson and the Fire District that created a duty of care and the jury verdict damaged the Fire District. The issues in this case are whether Matson breached that duty and whether any breach was the proximate cause of the damage to the Fire District.

2. Breach of Duty—Attorney Judgment Rule

¶ 25 The Fire District's legal negligence claims all involve Matson's exercise of professional judgment: settlement evaluation, pre-trial case strategy decisions, and whether to object at trial. Matson argues—and the trial court agreed—that an attorney generally is immune from liability for such judgment decisions. Although we decline to apply a rule of immunity, as discussed below we adopt an "attorney judgment rule" for determining when a judgment decision breaches an attorney's duty of care.

¶ 26 Other jurisdictions have recognized a "judgmental immunity" rule in various forms. 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 31:8, at 421–22 (2008); *see Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker,* 133 Idaho 1, 4 & n. 1, 981 P.2d 236 (1999). This rule dictates that lawyers do not breach their duty to clients as a matter of law when they make informed, good-faith tactical decisions. *See, e.g., Woodruff v. Tomlin,* 616 F.2d 924, 930 (6th Cir.1980); *Paul v. Smith, Gambrell & Russell,* 267 Ga.App. 107, 108–09, 599 S.E.2d 206 (2004); *Sun Valley Potatoes,* 133 Idaho at 4–5, 981 P.2d 236; *Clary v. Lite Machs. Corp.,* 850 N.E.2d 423, 431–32 (Ind.Ct.App.2006); *McIntire v. Lee,* 149 N.H. 160, 168–69, 816 A.2d 993 (2003); *Rorrer v. Cooke,* 313 N.C. 338, 358, 329 S.E.2d 355 (1985). The label " 'judgmental immunity' " is something of a misnomer because it is not a true immunity rule. *Sun Valley Potatoes,* 133 Idaho at 5, 981 P.2d 236; *McIntire,* 149 N.H. at 169, 816 A.2d

993. "Rather than being a rule which grants some type of 'immunity' to attorneys, it appears to be nothing more than a recognition that if an attorney's actions could under no circumstances be held to be negligent, then a court may rule as a matter of law that there is no liability." *Sun Valley Potatoes,* 133 Idaho at 5, 981 P.2d 236.

*6 ¶ 27 Washington courts never have expressly adopted the judgmental immunity rule, but they have applied similar principles. In *Cook, Flanagan & Berst v. Clausing,* our Supreme Court addressed an error of judgment jury instruction, which stated, "An attorney is not liable for a mere error of judgment if he acts in good faith and in an honest belief that his acts and advice are well founded and in the best interest of his client." 73 Wash.2d 393, 394, 438 P.2d 865 (1968) (internal quotation marks omitted). The court did not disagree with this language, but held that the instruction was erroneous because it did not also provide that the error of judgment "must itself fall short of negligence." [FN4] *Cook,* 73 Wash.2d at 394, 438 P.2d 865.

¶ 28 The court in *Cook* did not specifically address the standard for determining when an error of judgment involves negligence. However, the court stated that the following instruction "in essence" was correct:

> [A]n attorney is not to be held liable as for malpractice because of his choosing one of two or more methods of solution of a legal problem when the choosing is the exercise of honest judgment on his part, and the method so chosen is one recognized and approved by reasonably skilled attorneys practicing in the community as a proper method in the particular case, though it might not meet with the unanimous approval of such attorneys. It is enough if the method chosen has the approval of at least a respectable minority of such attorneys who recognize it as a proper method.

Cook, 73 Wash.2d at 396, 438 P.2d 865. The court stated that the instruction was "incomplete" because it failed to incorporate the necessary standard for the performance of professional services. *Cook,* 73 Wash.2d at 396, 438 P.2d 865. In other words, a court must evaluate the exercise of judgment from the perspective of a reasonable, careful and prudent attorney in Washington. *See Cook,* 73 Wash.2d at 395–96, 438 P.2d 865.

¶ 29 In *Halvorsen v. Ferguson,* Division One of this court stated, "In general, mere errors in judgment or in trial tactics do not subject an attorney to liability for legal malpractice." 46 Wash.App. 708, 717, 735 P.2d 675 (1986) (citing *Cook,* 73 Wash.2d at 394, 438 P.2d 865). The court noted that "[t]his rule has found virtually universal acceptance when the error involves an uncertain, unsettled, or debatable proposition of law." *Halvorsen,* 46 Wash.App. at 717, 735 P.2d 675. Accordingly, the court concluded that a difference of opinion among experts regarding litigation strategy was not enough to impose liability on an attorney. *Halvorsen,* 46 Wash.App. at 718, 735 P.2d 675. But like the Supreme Court in *Cook,* the court also indicated that an attorney is protected from liability only if his or her exercise of judgment is free from negligence, "An attorney's immunity from judgmental liability is conditioned upon reasonable research undertaken to ascertain relevant legal principles and to make an informed judgment." *Halvorsen,* 46 Wash.App. at 718, 735 P.2d 675.

*7 [7] ¶ 30 We read *Cook* and *Halvorsen* as establishing an "attorney judgment rule" for determining when an attorney's error in professional judgment breaches his or her duty of care. Under this rule, an attorney cannot be liable for making an allegedly erroneous decision involving honest, good faith judgment if (1) that decision was within the range of reasonable alternatives from the perspective of a reasonable, careful and prudent attorney in Washington; and (2) in making that judgment decision the attorney exercised reasonable care. Our Supreme Court's decision in *Cook* supports this rule because the court approved a jury instruction stat-

ing that an attorney cannot be held liable for malpractice if there is a difference of opinion among reasonably skilled attorneys regarding the attorney's course of action as long as the instruction incorporated the necessary standard of care. 73 Wash.2d at 396, 438 P.2d 865, Legal negligence commentators also support this rule: "The exercise of judgment often contemplates having to choose among other reasonable alternatives. Thus, picking the wrong alternative is not negligence." 4 MALLEN, LEGAL MALPRACTICE § 31:8, at 420 (footnote omitted).

¶ 31 The attorney judgment rule is consistent with a similar error in judgment rule applied in medical negligence cases. When a physician is "confronted with a choice among competing therapeutic techniques or among medical diagnoses" the physician will not be liable for an error of judgment if, in arriving at that judgment, he or she exercised reasonable care and skill within the applicable standard of care. *Watson v. Hockett,* 107 Wash.2d 158, 164–65, 727 P.2d 669 (1986); *Fergen v. Sestero,* 174 Wash.App. 393, 397, 298 P.3d 782, *review granted,* 178 Wash.2d 1001, 308 P.3d 641 (2013).

3. Determining Breach of Duty on Summary Judgment

¶ 32 Matson argues that whether an attorney's error in judgment constitutes a breach of duty is a question of law for the court. We disagree.

[8][9] ¶ 33 The attorney judgment rule addresses whether an attorney's error in judgment has breached the duty of care to his or her client. In a negligence action, whether a defendant has breached the duty of care generally is a question of fact. *Hertog v. City of Seattle,* 138 Wash.2d 265, 275, 979 P.2d 400 (1999); *Bowers v. Marzano,* 170 Wash.App. 498, 506, 290 P.3d 134 (2012). The attorney judgment rule may require the plaintiff to produce additional evidence regarding breach of duty not required when the attorney's error does not involve a judgment decision.[FN5] But no Washington case supports the proposition that an attorney cannot be liable for an error of judgment as a matter of law even when the plaintiff comes forward with evidence sufficient to create factual issues on breach of duty within the parameters of the attorney judgment rule. Whether an attorney has breached a duty of care remains a question for the jury.[FN6]

[10] ¶ 34 Matson is correct that under certain circumstances, whether an error in judgment constitutes a breach of duty can be decided as a matter of law. But this is no different than in any other negligence case, where a defendant can obtain summary judgment on the issue of breach of duty if reasonable minds could reach only one conclusion. *Hertog,* 138 Wash.2d at 275, 979 P.2d 400; *Bowers,* 170 Wash.App. at 506, 290 P.3d 134.

***8** [11][12][13][14] ¶ 35 Under the attorney judgment rule a plaintiff can avoid summary judgment on breach of duty for an error in judgment in one of two ways. First, the plaintiff can show that the attorney's exercise of judgment was not within the range of reasonable choices from the perspective of a reasonable, careful and prudent attorney in Washington. Merely providing an expert opinion that the judgment decision was erroneous or that the attorney should have made a different decision is not enough; the expert must do more than simply disagree with the attorney's decision. *Halvorsen,* 46 Wash.App. at 715–16, 718, 735 P.2d 675 (expert statements that they would have conducted litigation differently cannot as a matter of law support a legal negligence action). The plaintiff must submit evidence that no reasonable Washington attorney would have made the same decision as the defendant attorney. *See Cook,* 73 Wash.2d at 396, 438 P.2d 865 (attorney not liable for a judgment decision, even though it might not meet with unanimous approval). If there is a genuine issue as to whether the attorney's decision was within the range of reasonable choices, the jury must be allowed to decide the issue.

[15][16] ¶ 36 Second, the plaintiff can show that the attorney breached the standard of care in making the judgment decision. For instance, as the court stated in *Halvorsen,* to avoid liability under

the attorney judgment rule the attorney's judgment must be an informed one. 46 Wash.App. at 718, 735 P.2d 675. In other words, even if the decision itself was within the reasonable range of choices, an attorney can be liable if he or she was negligent based on how that decision was made. Again, if sufficient evidence of such negligence exists, the jury must decide the issue.

4. Proximate Cause

[17][18][19] ¶ 37 Causation in a legal negligence claim focuses on "cause in fact", the " 'but for' " consequences of an attorney's breach of duty. *Hippie v. McFadden,* 161 Wash.App. 550, 562, 255 P.3d 730 (2011) (quoting *Geer v. Tonnon,* 137 Wash.App. 838, 844, 155 P.3d 163 (2007)). A plaintiff must prove that but for the attorney's negligence, he or she would have prevailed or obtained a better result in the underlying litigation. *Schmidt v. Coogan,* 162 Wash.2d 488, 492, 173 P.3d 273 (2007); *Smith v. Preston Gates Ellis, LLP,* 135 Wash.App. 859, 864, 147 P.3d 600 (2006). Generally, the but for aspect of proximate cause is decided by the trier of fact. *Smith,* 135 Wash.App. at 864, 147 P.3d 600. However, proximate cause can be determined as a matter of law if reasonable minds could not differ. *Smith,* 135 Wash.App. at 864, 147 P.3d 600.

[20][21] ¶ 38 When an attorney makes an error that affects the outcome of the underlying case, proximate cause can be determined in a legal negligence case by retrying (or trying for the first time) the underlying case while omitting the alleged error. *See Daugert v. Pappas,* 104 Wash.2d 254, 257–58, 704 P.2d 600 (1985). The result of the second trial is then compared to the outcome of the underlying case. *See Daugert,* 104 Wash.2d at 257–58, 704 P.2d 600. This is referred to as a " 'trial within a trial.' " *Kommavongsa v. Haskell,* 149 Wash.2d 288, 300, 67 P.3d 1068 (2003) (quoting *Picadilly, Inc. v. Raikos,* 582 N.E.2d 338, 344 (Ind.1991)). However, in order to avoid summary judgment and reach this stage, the plaintiff must produce evidence that the error in judgment did in fact affect the outcome.

*9 ¶ 39 Proximate cause may be difficult to prove for some of the judgment errors the Fire District alleges. But proximate cause issues were never before the trial court. AAIC and the Fire District filed a summary judgment motion on the applicability of Matson's judgmental immunity affirmative defense. In its response, Matson asked for dismissal as a matter of law on judgmental immunity, and later renoted the issue for trial court consideration. Matson never generally moved for summary judgment on the Fire District's negligence claim or specifically challenged the existence of proximate cause. Accordingly, we will not address proximate cause in this appeal.

D. MATSON'S ALLEGED JUDGMENT ERRORS

¶ 40 The Fire District argues that questions of fact exist as to whether Matson was negligent in providing an inadequate settlement evaluation, in mishandling pre-trial litigation matters, and in failing to object to improper closing arguments and to preserve the issue for appeal.

1. Settlement Evaluation

[22] ¶ 41 Before mediation Matson provided his opinion that the settlement value of the four claims against the Fire District was approximately $370,000, which reflected a gross value of $741,000 (including attorney fees) discounted by various percentages for the different plaintiffs based on liability issues. The Fire District argues that Matson was negligent because his evaluation was inadequate and he underestimated the value of the case. The Fire District also argues that the erroneous evaluation resulted from Matson's negligence. We agree that the Fire District has presented sufficient evidence under both aspects of the attorney judgment rule to create a question of fact regarding whether Matson breached his duty of care in developing his settlement evaluation.

[23] ¶ 42 An attorney's opinion regarding the value of a particular case obviously involves the exercise of professional judgment. Determining case

value necessarily results from a subjective assessment of a variety of case-specific liability and damages factors.

> The settlement process concerns the prospects of success and the value of the recovery or exposure. These considerations can be evaluated objectively but also involve subjective factors. These include the forum in which a case will be tried, the attitude of the trial judge, the likely nature of a jury and a variety of considerations that usually cannot be objectively tested, except by hindsight. For that reason, an informed judgmental decision should not be second-guessed.

4 MALLEN, LEGAL MALPRACTICE § 31:42, at 638. Accordingly, the attorney judgment rule applies, and the Fire District had the burden to come forward with evidence that Matson's settlement evaluation either (1) was not within the range of reasonable alternatives from the perspective of a reasonable, careful and prudent attorney in Washington or (2) resulted from Matson's negligent conduct.

¶ 43 The Fire District submitted similar opinions from three experts—Claire Cordon, Anne Bremner and Robert Gould—that Matson's evaluation was erroneous in that he underestimated the value of the plaintiffs' claims.[FN7] Further, all three expressly stated that Matson's settlement evaluation breached an attorney's standard of care.

***10** ¶ 44 None of the experts specifically stated that the amount of Matson's evaluation was not within the range of reasonable alternatives under the facts of this case or that no reasonable attorney would have made the same settlement evaluation. In fact, none of them gave an opinion regarding what they believed was the correct settlement range. Under *Halvorsen,* the mere statements of experts that a judgment decision is erroneous or that they would have evaluated the case differently are not enough to maintain an attorney negligence claim. 46 Wash.App. at 718, 735 P.2d 675. However, it can be inferred that the experts believed that no reasonably prudent attorney would have agreed with Matson's evaluation based on their opinions that Matson breached the standard of care. When evaluating a summary judgment order the nonmoving party is entitled to all reasonable inferences. *Lakey,* 176 Wash.2d at 922, 296 P.3d 860. Accordingly, we hold that the Fire District came forward with sufficient evidence to show that Matson's settlement evaluation was not within the range of reasonable alternatives from the perspective of a reasonable, careful and prudent attorney in Washington.

¶ 45 In addition, the Fire District produced sufficient evidence to create a question of fact as to whether Matson's evaluation resulted from his failure to exercise reasonable care. Cordon, Bremner, and Gould provided detailed opinions that Matson's evaluation resulted from his negligence in multiple respects: inexperience in handling discrimination cases, misunderstanding of the applicable law, failure to understand that the Fire District would be found liable, improperly assessing Collins's behavior as a mitigating factor, and failing to consult prior jury verdicts and other objective data in developing the evaluation. Using the words of the court in *Halvorsen,* these opinions create questions of fact as to whether Matson's evaluation was "conditioned upon reasonable research undertaken to ascertain relevant legal principles and to make an informed judgment." 46 Wash.App. at 718, 735 P.2d 675.

¶ 46 Accordingly, we hold that summary judgment was not proper on the issue of whether Matson's settlement evaluation constituted a breach of his duty of care.

2. Pre–Trial Handling

[24] ¶ 47 The Fire District argues that Matson was negligent in the handling of the case before trial in multiple respects. In its appellate briefing, the Fire District references the following alleged deficiencies: (1) adopting a strategy that assumed the jury would view James's conduct as light-hearted banter and blamed Collins for James's conduct; (2) failing to provide a settlement evaluation earlier in

the case; (3) failing to pursue early settlement/mediation; (4) failing to make individual settlement offers to the different plaintiffs; (5) failing to consult with other attorneys in his firm who were more experienced, (6) failing to arrange for a mock trial or consult with a jury consultant; (7) failing to file a motion to bifurcate; (8) failing to file dispositive motions, particularly on Collins's claim; and (9) failing to file an offer of judgment.[FN8] We hold that the Fire District has presented sufficient evidence under the attorney judgment rule to create questions of fact regarding Matson's negligence in the pre-trial handling of the case.

***11** [25] ¶ 48 All of Matson's alleged deficiencies listed above related to pre-trial tactics and strategy and involved the exercise of professional judgment. Accordingly, the attorney judgment rule applies, and the Fire District had the burden to come forward with evidence that Matson's judgment decisions either (1) were not within the range of reasonable alternatives from the perspective of a reasonable, careful and prudent attorney in Washington or (2) resulted from Matson's failure to exercise reasonable care.

¶ 49 As with the settlement evaluation issue, the Fire District did not provide any expert testimony that no reasonable attorney would have handled the case like Matson did in these specific respect. The experts only generally asserted that Matson's pre-trial strategy decisions were negligent or breached the duty of care. The expert opinions on these issues are closer to merely stating that Matson should have made different decisions or that the experts would have made different decisions. Nevertheless, resolving all inferences in the Fire District's favor, we hold that the evidence is sufficient to create a question of fact regarding whether Matson's judgment decisions were not within the range of reasonable alternatives from the perspective of a reasonable, careful and prudent attorney in Washington.

¶ 50 In addition, the Fire District's experts stated opinions that Matson's alleged judgment errors resulted from his negligence—primarily, inexperience in handling discrimination cases and misunderstanding the applicable law. These opinions are sufficient to create questions of fact regarding whether Matson exercised *informed* judgment regarding pre-trial strategic decisions.

¶ 51 Accordingly, we hold that summary judgment was not proper on the issue of whether Matson's pre-trial judgment decisions constituted a breach of his duty of care.

3. Plaintiffs' Improper Closing Argument

¶ 52 During closing argument in the *Collins* case, plaintiffs' counsel made the following statements:

> The amount that's being sought will not in any way reduce fire services, hurt the department. It's not going to do anything that will hurt services in any way, or raise taxes, do any of the bogeys that might be mentioned. It will not happen. We know that.
>
> What you need to do, please, is put a value on their suffering that other departments will look up and say, "We can't do that." Put a value on what they have experienced and compensate them to a level that says, "If you do this, serious consequences flow, and we compensate people as they are injured." And in so doing, "help let the" commissioners know the answer to the question they felt had to go to you all to be decided. And in so doing, also let ... [human resources] departments know that there's a better structure, there's a better way to do this.

Collins, 155 Wash.App. at 72–73, 231 P.3d 1211 (emphasis omitted) (alteration in original). Matson did not object to this argument. *Collins,* 155 Wash.App. at 73, 231 P.3d 1211. The Fire District alleges that the argument was improper [FN9] and that Matson was negligent in failing to object, failing to file a motion in limine regarding improper closing arguments, and failing to object after the fact to preserve the issue for appeal.

*12 ¶ 53 We hold that the Fire District did not present sufficient evidence under either part of the attorney judgment rule to create questions of fact regarding Matson's breach of duty in failing to object and in failing to file an appropriate motion in limine. We hold that the Fire District presented sufficient evidence under the attorney judgment rule to create a question of fact regarding Matson's breach of duty in failing to preserve the closing argument issue for appellate review.

a. Failure To Object During Closing Argument

[26][27] ¶ 54 Whether to object to an improper statement in closing argument involves the exercise of the attorney's judgment. "The decision of when or whether to object is a classic example of trial tactics." *State v. Madison,* 53 Wash.App. 754, 763, 770 P.2d 662 (1989). Accordingly, the attorney judgment rule applies and the Fire District had the burden to come forward with evidence that Matson's failure to object either (1) was not within the range of reasonable alternatives from the perspective of a reasonably careful and prudent attorney in Washington or (2) resulted from Matson's failure to exercise reasonable care. We note that "allegations of negligence pertaining to trial tactics and procedure [are] matters frequently difficult to prove." *Walker v. Bangs,* 92 Wash.2d 854, 858, 601 P.2d 1279 (1979).

¶ 55 Although plaintiffs' counsel's comments may have been improper, they were fairly vague. Counsel did not expressly mention "insurance" or explicitly ask the jury to punish the defendants. *Collins,* 155 Wash.App. at 72–73, 231 P.3d 1211. Matson explained that although he interpreted plaintiffs' closing as possibly objectionable in two respects, he did not object and did not want a curative instruction because he did not want to spotlight the issues in front of the jury. Counsel legitimately may decide not to object to avoid the risk of emphasizing an objectionable statement. *See In re Pers. Restraint of Davis,* 152 Wash.2d 647, 714, 101 P.3d 1 (2004).

¶ 56 Gould opined that Matson should have objected during closing argument and that in his opinion Matson's silence was "stupid, if not negligent." CP at 849. But Gould did not expressly state that Matson's failure to object during closing argument breached the standard of care. Moreover, even Gould acknowledged Matson's concern about objecting in the presence of the jury. And Bremner noted that Matson had "a difficult choice" about whether to object when opposing counsel made an improper argument. CP at 808. Neither expert stated that no reasonable attorney would have decided not to object during closing argument under these circumstances. Further, the Fire District does not argue, and its experts do not state, that the decision to not object itself resulted from Matson's negligence. Accordingly, we hold that the Fire District failed to raise a question of fact under either part of the attorney judgment rule that Matson's failure to object during closing argument constituted a breach of duty. Summary judgment was appropriate on this issue.

b. Failure to File Motion in Limine

*13 [28] ¶ 57 The Fire District argues that although Matson may have been faced with a difficult decision as to whether or not to object during closing argument, he never would have been in that position if he had filed a motion in limine barring the plaintiffs' counsel from making improper arguments (or raised the issue right before closing argument). The Fire District argues that Matson was negligent in failing to file such a motion in limine. Because the decision whether to file a motion in limine involved the exercise of Matson's judgment, the attorney judgment rule applies.

¶ 58 Bremner was the only expert that opined about a motion in limine. Although Bremner did not render an opinion that no reasonable attorney would have failed to file the motion, she stated that the failure to file a motion in limine violated the standard of care. However, the trial court actually granted motions in limine excluding from the jury's consideration insurance, lack of insurance, or any direct or implied argument of any adverse financial

effect of a judgment. Because Bremner's opinion was based on an incorrect assumption not supported by the record -that there was no order in limine that addressed the subject of the improper closing argument-it cannot create a question of fact on Matson's breach of duty.

c. Failure To Preserve Issue for Appeal

[29] ¶ 59 The Fire District argues that even if Matson did not want to object in front of the jury, he should have preserved the issue for review by objecting later or moving for a mistrial outside the presence of the jury. Gould stated that Matson breached the standard of care in failing to preserve obvious error for appellate review. He indicated that any reasonable attorney would have objected and requested a curative instruction. Gould also presented an opinion tailored to the attorney judgment rule, stating that "no reasonable Washington attorney would have done *nothing* to protect the client from the improper ... closing arguments." CP at 1080 (emphasis in original). We hold that this opinion is sufficient to create a question of fact under the attorney judgment rule that Matson's failure to do more to preserve the issue for appeal was not within the range of reasonable alternatives from the perspective of a reasonable, careful and prudent attorney in Washington.[FN10]

¶ 60 We affirm the trial court's grant of summary judgment on Matson's failure to object to the improper closing argument and failure to file a motion in limine addressing the subject of the improper argument, but reverse on Matson's alleged failure to preserve the closing argument issue for appeal.

¶ 61 In conclusion, we affirm the trial court's grant of summary judgment in favor of Matson on AAIC's claims, but reverse the grant of summary judgment on all the Fire District's claims except for the failure to object to the improper closing argument and the failure to file an appropriate motion in limine on the subject of the closing argument. We remand for further proceedings consistent with this position.

We concur: LEE, J., and PENOYAR, J.P.T.

FN1. Matson valued Collins's claims at $157,000, her prospect of prevailing at 35 percent, and the settlement value of her claims at $55,000. Matson valued Mason's claims at $130,000, her prospect of prevailing at 60 percent, and her settlement value at $78,000. Matson valued Hayden's claims at $249,000, her prospect of prevailing at 65 percent, and her settlement value at $162,000. Matson valued Larwick's claims at $205,000, her prospect of recovery between 35–60 percent, and her settlement value at $75,000.

FN2. The Fire District also sought remittitur, arguing that the jury's damages award was excessive and that justice had not been done and substantial evidence failed to support the plaintiffs' awards for economic damages. *Collins,* 155 Wash.App. at 74, 231 P.3d 1211. The trial court granted the motion for remitter in part by reducing Larwick's damages. *Collins,* 155 Wash.App. at 75, 231 P.3d 1211. On cross appeal, we reversed the trial court's partial grant of the Fire District's motion to remit and remanded to the trial court to reinstate the jury verdict and damages award. *Collins,* 155 Wash.App. at 87–93, 105, 231 P.3d 1211.

FN3. In *Trash,* our Supreme Court adopted a six-factor test to determine whether an attorney owes a duty of care to a nonclient third party. 123 Wash.2d at 842–43, 872 P.2d 1080. Whether the representation was intended to benefit the nonclient is the first factor and primary inquiry. *Trask,* 123 Wash.2d at 842–43, 872 P.2d 1080.

FN4. This rule has been applied similarly in other jurisdictions. *See Sun Valley Potatoes,* 133 Idaho at 5, 981 P.2d 236 ("An attorney is still 'bound to exercise a reason-

able degree of skill and care in all his professional undertakings.' " (quoting *Woodruff,* 616 F.2d at 930)); *Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein, PC,* 25 Mass.App.Ct. 107, 111, 515 N.E.2d 891 (1987) (no liability for imperfect judgment or mistake if lawyer acted " 'to the best of his skill and knowledge' ", but only if he also acted " 'with a proper degree of attention [and] with reasonable care' " (quoting *Stevens v. Walker & Dexter,* 55 Ill. 151, 153 (1870))).

FN5. Further, as in any attorney negligence case, a plaintiff generally must present expert testimony that the attorney breached the standard of care. *See Geer v. Tonnon,* 137 Wash.App. 838, 851, 155 P.3d 163 (2007).

FN6. An exception is when an attorney is charged with an error regarding a legal question. In this situation, whether the attorney erred in interpreting or applying the law is a legal issue reserved for the court. *Halvorsen,* 46 Wash.App. at 712–13, 18, 728 P.2d 1084 (rejecting a malpractice claim as a matter of law, for an attorney's failure to present or emphasize a certain theory of apportionment of community property in a dissolution case).

FN7. Gould's opinions on this subject were set forth in an unsigned letter that was an exhibit to his deposition and was submitted in an attachment to an attorney's declaration. Because Matson did not object to the trial court's consideration of this letter, we also consider it here. Gould did provide a short declaration, but did not address this issue in that declaration.

FN8. The Fire District's experts may have referenced other alleged deficiencies. However, because they were not argued or mentioned in the Fire District's appellate briefing we need not consider them.

FN9. The Fire District provides no explanation in this case as to why the argument was improper. On appeal in the underlying case, the Fire District argued that the statement amounted to a reference to insurance and urged the jury to send a message with its verdict. *Collins,* 155 Wash.App. at 95–97, 231 P.3d 1211.

FN10. On remand the Fire District will have to show that Matson's failure to properly preserve the closing argument issue for appeal proximately caused harm. However, as noted above we do not address proximate cause because it was not addressed below.

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Appendix 2

NO. 42864-II

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

CLARK COUNTY FIRE DISTRICT NO. 5 and AMERICAN ALTERNATIVE INSURANCE CORPORATION

Appellants,

v.

BULLIVANT HOUSER BAILEY, P.C., and RICHARD G. MATSON

Respondents.

RESPONDENTS' BRIEF ON PROXIMATE CAUSE AND SUMMARY JUDGMENT

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ANALYSIS

Pursuant to this Court's June 17, 2014 order requesting additional briefing on "proximate cause and summary judgment", Attorney defendants Bullivant Houser Bailey, P.C. and Richard Matson [collectively hereinafter "BHB"] submit the following additional briefing.[1]

A. Statements Made by Plaintiffs in Oral Argument.

Germane to understanding the failure of plaintiffs to adequately support opposition to preclude the trial court's summary judgment dismissal of plaintiffs claim for malpractice based on BHB's evaluation of potential settlement and resulting jury verdict is the misstatement made by counsel during oral argument that the underlying plaintiffs "would have settled" their claims for $1.5 million. Nowhere in the record is any such fact present. The only facts in the record regarding settlement negotiations and demands are that the underlying plaintiffs made a combined tort claim for $6 million [CP 640], these same plaintiffs made a mediation demand for $8.5 million [CP 540], underlying plaintiffs never reduced their demand, Plaintiff AAIC never offered one dollar in settlement [CP 543] and following a month long trial a jury returned a verdict for $3.531 million [CP 548-552], approximately $5 million less than the last

[1]BHB understands that the request for additional briefing on proximate cause and summary judgment relates only to the claimed malpractice involving Mr. Matson's case evaluation and trial objections.

settlement demand.

Counsel's argument before the court that the underlying case "could have been settled" for $1.5 million is contrary to the record.

B. Neither Plaintiffs Evidence at Trial Nor on Appeal Establish the Existence of Proximate Cause Sufficient to Survive Summary Judgment Dismissal.

Washington courts recognize that the purpose behind a summary judgment motion is to "examine the sufficiency of the evidence behind a plaintiff's formal allegations in the hope of avoiding unnecessary trials where no genuine issue as to a material fact exists." *Young v. Key Pharmaceuticals,* 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

In a legal malpractice case, the burden is on the plaintiff to show that the attorney's negligence was the proximate cause of the injury. *Hansen v. Wightman,* 14 Wn. App. 78, 88, 538 P.2d 1238 (1975). Proximate cause has two elements: cause in fact and legal causation. *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985). Cause in fact refers to acts or omissions without which the injury would not have occurred—cause in fact is "but for" causation. Legal causation refers to the policy considerations regarding how far the consequences of a defendant's acts or omissions should extend. *Christen v. Lee*, 113 Wn.2d 479, 780 P.2d 1307 (1989).

In a legal malpractice case, proximate cause is determined by the

"but for" test. *Griswold v. Kilpatrick*, 107 Wn. App. 757, 760, 27 P.3d 246 (2001). Plaintiff must demonstrate that "but for" the attorney's negligence he would have obtained a better result. *Sherry v. Diercks*, 29 Wn. App. 433, 438, 628 P.2d 1336 (1981). The "but for" test requires a party to establish that the act or omission complained of probably caused the subsequent injury. *Nielson v. Eisenhower & Carlson*, 100 Wash. App. 584, 591, 999 P.2d 42 (2000). *Schmidt v. Coogan*, 135 Wn. App. 605, 610, ¶10, 145 P.3d 1216 (2006) ("Under the 'case within a case' principle, the plaintiff in a legal malpractice claim must prove that, but for the attorney's negligence, the plaintiff would probably have prevailed in the underlying claim.").[2] On summary judgment, the plaintiff must submit "competent testimony setting forth specific facts, as opposed to general conclusions to demonstrate a genuine issue of material fact." *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993). The record before the trial court and this appellate courts related to "potential settlement" is solely that the underlying plaintiffs wanted "millions" and the plaintiff carrier AAIC litigation position was that "...if the plaintiffs want these kind of numbers a jury is going to have to give it to them." [CP 546.]

[2]To establish proximate cause, Plaintiffs must...: [I]ntroduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough. . . . W. Prosser, The Law of Torts #41, p. 269 (5th ed. 1984) (citations omitted).

1. The "Lost Chance of Settlement" Theory Does Not Support a Proximate Cause Analysis And Does Not Apply In Washington Legal Malpractice Cases.

At the January 17, 2014 oral argument of their appeals Plaintiffs / Appellants asserted they suffered damage proximately caused by alleged professional negligence of the defendants, because BHB failed to perfect any pre-trial settlement with the underlying plaintiffs in some lesser amount than the underlying jury verdict – asserted to be what the underlying plaintiffs "would" have taken prior to trial.

Plaintiffs assert that the BHB settlement evaluation was incorrect, and thus proximately caused plaintiffs a "lost chance of pre-trial settlement" of the underlying plaintiffs' claims for an amount less than the ultimate trial judgment.

The theory of "lost chance of settlement" is not a valid legal theory under Washington law in a legal malpractice action and does not evidence any causal nexus to support the element of proximate cause. The malpractice claims by plaintiffs was properly dismissed by the trial court as a matter of law as no causation exists in the record.

General principles of causation are no different in a legal malpractice action than in an ordinary negligence case. *Sherry v. Diercks*, 29 Wash. App. 433, 437, 628 P.2d 1336 (1981). In order to raise issues of triable fact that are sufficient to defeat motions for summary judgment on

the issue of proximate cause in legal malpractice cases, a non-moving plaintiff is required to present definitive evidence that goes beyond conclusory or speculative assertions of value, even by expert opinion.[3]

Legal causation rests on considerations of policy determining how far a party's responsibility should extend. *Blume*, 134 Wash.2d at 252, 947 P.2d 223. It involves the question of whether liability should attach as a matter of law, even if the proof establishes cause in fact. *Id.* Proximate cause may be determined as a matter of law when reasonable minds could reach but one conclusion. *Kim v. Budget Rent A Car Systems, Inc.*, 143 Wash.2d 190, 203-04, 15 P.3d 1283 (2001). "[W]hen reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law." *Ruff v. County of King*, 125 Wash.2d 697, 704, 887 P.2d 886 (1995).

To create any triable factual issue of proximate cause, evidence must "rise above speculation, conjecture, or mere possibility. *Attwood v. Albertson's Food Center*, 92 Wash. App. at 331, 966 P.2d 351 (1998) ... That the defendant's actions 'might have,' 'could have,' or 'possibly did'

[3]Contrary to plaintiffs' argument, conflicting expert opinions do not create issues of fact that preclude the Court from determining application of judgmental immunity as a matter of law. "[T]estimony by the lawyer-expert witnesses, concerning how they would have resolved the issue cannot create an issue of fact, Ronald E. Mallen, Jeffrey M. Smith, *Legal Malpractice* (2012 ed.) (hereinafter "*Mallen & Smith*"), Vol. 2, §19.7, p. 1171, (citing Halverson v. Fergusson, 46 Wn. App. 708, 717-718, 735 P.2d 675 (1986) (emphasis added).

cause the subsequent condition, [i.e. a higher jury verdict], is insufficient" to establish an issue of fact barring summary judgment based on a lack of proximate cause. *Shellenbarger v. Brigman*, 101 Wash. App. 339, 348, 3 P.3d 211 (2000).

In legal malpractice actions, Washington courts have firmly established that even where a non-moving party presents expert opinion on the purported value of a "lost" underlying settlement, such testimony fails to present triable issues of material fact necessary to defeat a defendant's motion that is based on the defendant's assertion of a lack of proximate cause. *Griswold v. Kilpatrick*, 107 Wash. App. 757, 761-62, 27 P.3d 246 (2001).

The Washington Supreme Court has dispositively rejected the theory of "lost chance of settlement" in legal malpractice cases. *Daugert v. Pappas*, 104 Wn .2d 254, 260-62, 704 P.2d 600 (1985). *Daugert* remains the controlling case on this issue with respect to legal malpractice cases and causation. Thus, any claim based on "lost chance of settlement" in a Washington legal malpractice action fails to state a cause of action, cannot support the element of proximate cause. BHB is and was entitled to a dismissal of AAIC's claims as a matter of law by the trial court judge.

To the extent the theory might otherwise be argued, the issue of "lost chance" is a theory which requires sufficient evidence to prove that the

causation element of the claim is not speculative. "[D]etermination of proximate cause may not rest on speculation or conjecture." *Schneider v. Rowell's, Inc.*, 5 Wn. App. 165, 167- 68, 487 P.2d 253 (1971). Nothing in record goes beyond the level of speculation or conjecture regarding an alternative jury verdict or what underlying plaintiffs may or possibly would have taken if any settlement monies were offered by AAIC, which were not.

2. Proximate Cause and Decision Not to Object at Plaintiffs Summation.

To the extent necessary to address "but for" causation with regard to plaintiffs assertions that Mr. Matson's non-objection during underlying plaintiffs summation, was the proximate cause of the jury verdict, reference to both the record on appeal and this court's opinion in *Collins v. Clark County Fire District, et al.*, 155 Wash. App 48, 231 P.2d 1211 (2010) is determinative.

In *Collins*, the underlying defendants moved for a new trial based on two statements made by the underlying plaintiffs' counsel during summation. Those statements were purported to reference "insurance" and contained a "sending a message" component. This Court denied the motion for new trial clearly disagreeing with the underlying defendants' contention that the statements made in summation "...constituted irregularity or misconduct that materially affected their substantial rights

and caused the jury to base its verdict on passion and prejudice." [Underline added.][4]

Specifically, the Collins court found that:

With respect to insurance

- The underlying defendants failed to support their argument with any briefing or legal authority that "...Boothe's comments "urged the jurors to disregard the evidence before them" and to award a higher verdict than what they would have awarded..."[5]

With respect to "sending a message"

- The trial court was correct that "Boothe's "argument was indirect" and "not addressed in such a manner as to incite the jury on beyond reasonable awards."[6]

With respect to passion and prejudice

- Although not deciding this issue, in footnote 25 this court stated: "Nevertheless, even were we to consider this issue, Defendants fail to show that Boothe's comment or passion or prejudice influenced the jury's verdict."[7]

With respect to the damage award

- The evidence supported the quantum of the jury's award of both economic and non-economic damages.

There was nothing in the record in the first appeal to this court requesting a new trial which supported a factual determination that the result arising from the summation statements and the lack of objection

[4] *Collins v. Clark County Fire District, et al.*, 155 Wash. App 48, at 93, 231 P.2d 1211 (2010). [CP 559-593.]
[5] *Id.* at 95.
[6] *Id.* at 96 – 97.
[7] *Id.* at 97.

would have been different had an objection been made. Similarly, there is no evidence in the record in our case which supports any lack of objection as the "but for" causation for the jury verdict.

As for the presence of legal causation, the trial court judge in examining the "totality of circumstances" in application of judgmental immunity to an attorney's decision not to object aptly stated:

> It's a question of tactics. You know, everything Mr. Matson did in this case, he acted in good faith toward his client. He did in fact make reasonable decisions. And I do not believe it's appropriate for me to second guess that decision.
>
> * * *
>
> But the bottom line is that the decision to object or not object rests with the trial attorney. That's his judgment. Does he want to draw attention to it or not? There is no automatic rule that says you must object to everything that's objectionable. You make trial choices that sometimes you let it go by because it's not important to you. Okay. And that's the bottom line in this case.

[RP (Aug. 17, 2013) at 70, 72.]

This Court should affirm the lower court dismissal of plaintiffs' legally and factually unsupported legal malpractice claims. No proximate cause is supported by the record with respect to any action in evaluation of settlement/verdict amounts or decisions regarding summation objections which would have resulted in a different verdict than that rendered.

DATED this 31st day of January, 2014.

FORSBERG & UMLAUF, P.S.

Ray P. Cox, WSBA # 16250
Richard R. Roland, WSBA # 18588
901 Fifth Avenue, Suite 1400
Seattle, WA 98164
Attorneys for Respondents / Defendants
Bullivant Houser Bailey, P.C. and Richard
Matson

CERTIFICATE OF SERVICE

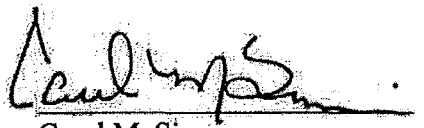
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing RESPONDENTS' BRIEF ON PROXIMATE CAUSE AND SUMMARY JUDGMENT on the following individuals in the manner indicated:

Mr. Michael A. Patterson
Mr. Daniel P. Crowner
Patterson, Buchanan, Fobes, Leitch & Kalzer, Inc., P.S.
2112 Third Ave., Suite 500
Seattle, WA 98121

(X) Via Hand Delivery on February 3, 2014

SIGNED this 31st day of January, 2014, at Seattle, Washington.



Carol M. Simpson

SUPERIOR COURT OF WASHINGTON

FOR CLARK COUNTY

CLARK COUNTY FIRE DISTRICT NO. 5, and AMERICAN ALTERNATIVE INSURANCE CORPORATION,	)	
Plaintiffs,	)	
vs.	)	No. 09-2-03892-2
BULLIVANT HOUSER BAILEY, P.C., and RICHARD G. MATSON,	)	
Defendants.	)	

MOTION FOR SUMMARY JUDGMENT

BEFORE THE HONORABLE JOHN WULLE

DATE: August 17, 2012
TIME: 10:54 a.m.
PLACE: Clark County Courthouse
Vancouver, WA

Transcribed by: Michael R. King, WA CCR No. 2655

Rider & Associates, Inc.

360.693.4111

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attorneys over the years. In the Attorney General's office, that was my function more than anything else was to train the new trial attorneys because that's what I was. I was a trial attorney. I was in court every single day. And I sit on the bench and I'll be looking at the sky and I'll hear something in my ear that is objectionable to me under the rules of evidence and I'll glance down at the attorneys without even thinking about it. And a new attorney will go, What? What? And the old-time attorney will sit there and go, No, that's not important to me. And he makes that decision because he says, If I bring it up again, I'm really pointing it out to the jury. And I've been in that position a bazillion times.

And to call Mr. Matson on the carpet to say, You should have objected, he's probably evaluated that particular thing and saying, I don't want to emphasize that.

I don't know. I need to see the recording. I'm giving you a preliminary decision, but I'm going to hold the final decision for three weeks until I've seen two things: Those email thingamajiggies and how bad were they so I get a sense of what evaluation was made about the value of the case; and, two, the actual closing argument so I can evaluate what occurred in

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trial. I'll be curious to see if the camera caught Mr. -- caught counsel's expressions, you know.

MR. COX: It did, Your Honor.

THE COURT: Because I've been there 100 times myself, a bazillion times myself, you know. And studying jury verdicts, excuse me if I'm quoting General Schwarzkopf correctly, That is pure bovine scatology. There is no way that somebody else's verdict is going to tell me what my jury's going to do.

And speaking of juries, we predict -- myself and my staff -- predict what a jury will do, and we get it wrong 90 percent of the time. I've got a jury out now on a civil case. We have no idea what they're going to do with this case. There are certain rules we have learned. The only time I can predict a jury is in a criminal case. When they walk back into the courtroom and they smile at the defendant, that's when I know it's not guilty. But now I'm back, I can make no predictor about what a jury will do. And they have shocked and surprised me again and again and again in 30 years of practicing law, so I see no value looking at what jury verdicts do.

What I see is the value of what did I do in the court of law in front of that jury to make them believe myself and my client or not believe the other side.

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It's a question of tactics.

You know, everything Mr. Matson did in this case, he acted in good faith toward his client. He did in fact make reasonable decisions. And I do not believe it's appropriate for me to second-guess that decision.

I'll also point out to you as an aside, which has no effect on my decision in this case, well, I've seen Mr. Matson in court. He's been in front of me numerous times. He's a first-class attorney. That's the only way I can put it. He's in the upper crust --

MR. CROWNER: I disagree.

THE COURT: -- of those people who I admire their skill level, people I try to learn from by observation. But the bottom line is you cannot learn from observation. I cannot do what another attorney can do in front of a jury. I can only meld my professionalism and my personal personality into how I present myself to a jury. And every one of us is doing that process. We're all evaluating our cases as they're happening.

And I would point out to you that most of the decisions we make in trial are snap decisions, spur of the moment. Do I react to this? Don't I react to that? And I've got a split second to decide.

You know, I might develop nuances as a trial

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attorney. For example, if the other side has got a witness on that I didn't like, I used to always go just like that. And that was communicating to the jury just through my physical being my thought on that process. But I was not doing it orally so, therefore, there was no way to object to what I was doing. And that was just something I learned over the years from an old-timer. Okay. But I cannot second-guess Mr. Matson in this -- this realm. He did a reasonable job.

And estimating the value of the case -- let me point out something to you. There's no scientific studies out on this. There's no jury verdict decisions and looking at that. But all of us in our profession in Clark County know that Clark County juries are cheap. We just inherently accept that fact because we've seen it again and again, either small awards or no awards where there should have been something. So we have this mystique -- call it a mystique -- this belief, this observation that we call cheap Clark County juries. And we actually say that to each other when decisions come in. And I don't mean me the -- we the judges. I mean we the profession say that to each other. I've seen attorneys saying it all the time. It's something we've passed down through the generations.

And evaluating the value of this case, again, I

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want to see what those emails were all about so I can make an independent evaluation of what I think it was worth. But I sure as heck would never have guessed in a consensual environment, the sharing of naked pictures or -- or explicitly -- sexually explicit emails would be valued at bazillions of dollars.

I mean, I would be surprised -- I would have guessed that less than 365,000 just as a knee jerk, knowing that Clark County juries are cheap, I would have suggested that they probably would have given at the most 50 grand to each one of the plaintiffs and no more. I could not have -- I mean, I think that decision of that jury was no way anyone could predict that decision. We just would not have seen that among ourselves under any evaluation of the facts of this case. And those things we just accept.

But the bottom line is that the decision to object or not object rests with the trial attorney. That's his judgment. Does he want to draw attention to it or not? There is no automatic rule that says you must object to everything that's objectionable. You make trial choices that sometimes you let it go by because it's not important to you. Okay. And that's the bottom line in this case.

The only other thing I would might change is

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the evaluation of the case. And when I have that data, I'll give you a second opinion, a final decision on this. And I'll also give you a chance to be heard a second time. But right now, today, that's my decision.

MR. COX: Thank you, Your Honor. I have --

THE COURT: And would you send that. That stuff needs to be --

MR. COX: I'll have it messengered and sealed and it'll come --

THE COURT: Oh, please seal it because I don't want to expose other people to that.

MR. COX: Thanks, Your Honor.

THE COURT: It's like I'm one of the few people -- well, of all the judges that have to look at child pornography. We don't want to. It's disgusting. And I assume I'm going to be disgusted by this stuff, too, but neither here nor there. I have an obligation to make sure I'm making the right choices here.

MR. COX: Thank, Your Honor.

MR. CROWNER: Right.

MR. COX: I'll have that sent to you on Monday.

MR. CROWNER: Can you give us a copy of that, too, just for --

MR. COX: Sure.

THE CLERK: Is that on the 7th?

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THE COURT: That's a docket in three weeks, on your own docket. So if you want to go a little later in the morning, is it more convenient for you to go later in the morning?

MR. COX: Well, I was going to get that stuff to you on Monday. Is that what we're talking about?

THE COURT: Here's the --

MR. CROWNER: I think we're talking about setting the next --

THE COURT: You're traveling --

MR. COX: Oh, the next --

MR. CROWNER: Yeah.

THE COURT: Where are you traveling from?

MR. CROWNER: Both Seattle.

MR. COX: Both Seattle, Your Honor.

THE COURT: Okay. Let's do this. Why don't we have a conference call in three weeks at, like, 4:00 in the afternoon. Somebody set up a conference call and call me because I can't do it from my end. And then I'll just tell you if I'm changing my decision.

MR. COX: All right, Your Honor.

THE COURT: And if I am changing my decision, then we need to come back to court and do that. And that way you gentlemen won't have to travel.

MR. COX: All right, Your Honor.

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MR. CROWNER: Okay.

THE COURT: Is that convenient for both of you?

MR. CROWNER: Yeah.

MR. COX: Yes, Your Honor.

THE COURT: Okay.

MR. CROWNER: Thank you.

THE COURT: Where do you stay when you come down here?

You can take us off, Rhonda.

(COURT ADJOURNED.)

Appendix 3

NO. 42864-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CLARK COUNTY FIRE DISTRICT NO. 5, and AMERICAN ALTERNATIVE INSURANCE CORPORATION,

Appellants,

v.

BULLIVANT HOUSER BAILEY, P.C., and RICHARD G. MATSON,

Respondents.

ADDITIONAL BRIEFING OF APPELLANTS

Michael A. Patterson, WSBA No. 7976
Daniel P. Crowner, WSBA No. 37136
Of Attorneys for Appellants Clark County Fire District No. 5 and American Alternative Insurance Corporation

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TABLE OF AUTHORITIES

Other Authorities

Rules

I. INTRODUCTION

The issue of proximate cause was not specifically raised by the parties and was not specifically addressed by the trial court below.[1] CP at 313-43, 346-96, 653-65, 695-99, 718-52, 1209-25; 1234-36; RP (October 14, 2011) 1-22; RP (August 17, 2012) 1-75. But based on the pleadings, depositions, and declarations in this case, there nevertheless is a genuine issue of material fact whether Clark County Fire District No. 5 ("the Fire District") and American Alternative Insurance Corporation ("AAIC") would have "fared better"[2] but for the professional negligence of Bullivant Houser Bailey, P.C. ("BHB"), and its attorney Richard G. Matson ("Matson") in defending the underlying case. Therefore, a trial is "absolutely necessary." *See Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977).

II. SUMMARY JUDGMENT

"Under CR 56(c), summary judgment is appropriate if the record presents no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Biggs v. Nova Servs.*, 166 Wn.2d 794, 801, 213 P.3d 910 (2009). A material fact is one on which

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[1] Absent a sufficiently developed record, it is improper for this Court to consider alternative grounds for affirming a trial court's decision. *See* RAP 2.5(a); *Blueberry Place v. Northward Homes*, 126 Wn. App. 352, 362-63, 110 P.3d 1145 (2005); *see also Bernal v. Am. Honda Motor Co.*, 87 Wn.2d 406, 553 P.2d 107 (1976); *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 609, 94 P.3d 961 (2004).

[2] *Daugert v. Pappas*, 104 Wn.254, 257, 704 P.2d 600 (1985).

the outcome of the litigation depends. *Morris v. McNichol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). A genuine issue of material fact exists when there is "sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).[3]

When reviewing a summary judgment order, this Court performs the same inquiry as the trial court. *Ames v. City of Fircrest*, 71 Wn. App. 284, 289, 857 P.2d 1083 (1993). Neither the trial court nor this Court may replace the jury by weighing facts or deciding factual issues. *Babcock v. State*, 116 Wn.2d 596, 598-99, 8009 P.2d 143 (1991); *Ames*, 71 Wn. App. at 289.[4] Instead, "the evidence *and all reasonable inferences therefrom* is considered in the light most favorable to the plaintiff, the nonmoving party." *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 227, 770 P.2d 182 (1989) (emphasis added).

"When material issues of fact exist, *they may not be resolved by the trial court* and summary judgment is inappropriate." *Halvorsen v. Ferguson*, 46 Wn. App. 708, 712, 735 P.2d 675 (1986) (emphasis added), *review denied*, 108 Wn.2d 1008 (1987). "If reasonable persons

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[3] "Washington courts treat as persuasive authority federal decisions interpreting the federal counterparts of our own court rules." *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

[4] This Court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue of material fact for trial. *See Anderson*, 477 U.S. at 249.

might reach a different conclusion, the motion should be denied." *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 932, 653 P.2d 280 (1982). "Where different, competing inferences may be drawn from the evidence, the issue must be resolved by the trier of fact." *VersusLaw, Inc. v. Stoel Rives, L.L.P.*, 127 Wn. App. 309, 320, 111 P.3d 866 (2005).

III. PROXIMATE CAUSE

Our Supreme Court has recognized that "[t]he principles of proof and causation in a legal malpractice action usually do not differ from an ordinary case." *Daugert v. Pappas*, 104 Wn.2d 254, 257, 704 P.2d 600 (1985). "Proximate cause consists of two elements: cause in fact and legal causation." *Nielson v. Eisenhower & Carlson*, 100 Wn. App. 584, 591, 999 P.2d 42, *review denied*, 141 Wn.2d 1016 (2000). "Cause in fact refers to the 'but for' consequences of an act – the physical connection between an act and an injury." *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985); *see also Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 753-55, 818 P.2d 1337 (1991). While a plaintiff's case must be based on more than just speculation, the "but for" test simply requires a plaintiff to establish that the act complained of "probably caused" the alleged injury. *Daugert*, 104 Wn.2d at 260.[5]

[5] Legal causation involves the question of whether liability should attach as a matter of law, even if the evidence establishes cause in fact. *Hartley*, 103 Wn.2d at 779. Given the parties' already extensive briefing on the elements of the modified multi-factor balancing test, as announced by our Supreme Court in *Trask v. Butler*, 123 Wn.2d 835, 842-43, 872 P.2d 1080 (1994), the Fire District and AAIC have limited their additional briefing solely to the issue of cause in fact.

Furthermore, our Supreme Court has consistently held that the question of cause in fact is a question for the jury. *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 935, 653 P.2d 280 (1982); *see also Daugert*, 104 Wn.2d 257; *Hartley*, 103 Wn.2d at 778; *Petersen v. State*, 100 Wn.2d 421, 436, 671 P.2d 230 (1983). Thus, unless the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion, it is inappropriate for either the trial court or this Court to determine the question of cause in fact on summary judgment. *Hartley*, 103 Wn.2d at 778; *see Daugert*, 104 Wn.2d at 257; *Petersen*, 100 Wn.2d at 436.

In a legal malpractice action, the question of cause in fact boils down to whether the former client would have (on a more probable than not basis) "fared better" but for the attorney's negligence. *Daugert*, 104 Wn.2d at 257; *Nielson*, 100 Wn. App. at 594; *Halvorsen*, 46 Wn. App. at 719; *see also Brust v. Newton*, 70 Wn. App. 286, 293-94, 852 P.2d 1092 (1993), *review denied*, 123 Wn.2d 1010 (1994).[6] Typically, such proof

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[6] In analyzing a failure-to-appeal legal malpractice action, our Supreme Court considered alternative tests for determining questions of cause, such as the loss of chance test and the substantial factor test. *Daugert*, 104 Wn.2d at 261-62. Ultimately, our Supreme Court concluded that these other tests were inappropriate. *Daugert*, 104 Wn.2d at 261-63. This Court since has stated that our Supreme Court's reasoning in *Daugert* is "equally applicable to other attorney actions or omissions." *Nielson*, 100 Wn. App. at 592.

But it is important to note that "[t]he holding of *Daugert* rests largely on the court's acceptance that failure-to-appeal cases are different in nature from most legal malpractice actions. *Causation is a question of law in failure-to-appeal cases*, an anomaly largely due to practical

requires a "trial within a trial." *Brust*, 70 Wn. App. at 293; *Kommavongsa v. Haskell*, 149 Wn.2d 28, 300, 67 P.3d 1068 (2003).

"[T]he purpose of the 'trial within a trial' that occurs in a legal malpractice action is not to recreate what a particular judge or factfinder would have done." *Brust*, 70 Wn. App. at 293. Rather, the impact of the attorney's negligence in the underlying case is judged against an objective standard. *Phillips v. Clancy*, 152 Ariz. 415, 733 P.2d 300, 303 (Ariz. Ct. App. 1986). "[T]he jury's task is to determine what a reasonable judge or factfinder would have done, i.e., what the result should have been." *Brust*, 70 Wn. App. at 293. In discussing an attorney's error made during a trial, our Supreme Court stated:

> [T]he causation issue in the subsequent malpractice action is relatively straightforward. The trial court hearing the malpractice claim merely retries, or tries for the first time, the client's cause of action which the client asserts was lost or compromised by the attorney's negligence, and the trier of fact decides whether the client would have fared better but for such mishandling... In such a case it is appropriate to allow the trier of fact to decide proximate cause. *In effect the second trier of fact will be asked to decide what a reasonable jury or fact finder would have done but for the attorney's negligence.* Thus, it is obvious that in most legal malpractice actions the jury should decide the issue of cause in fact.

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considerations of judicial efficiency." Polly A. Lord, Comment, *Loss of Chance in Legal Malpractice*, 61 WASH. L. REV. 1479, 1489-90 (1986) (emphasis added).

And even though Washington courts generally have declined to extend the loss of chance test, our Supreme Court nevertheless acknowledged, "A reduction in one's opportunity to recover (loss of chance) *is a very real injury which requires compensation.*" *Daugert*, 104 Wn.2d at 261 (emphasis added).

Daugert, 104 Wn.2d at 257-58 (citation omitted) (emphasis added).[7]

IV. PROXIMATE CAUSE IS A QUESTION FOR THE JURY IN THIS CASE

Here, considering the evidence and all reasonable inferences therefrom in the light most favorable to the Fire District and AAIC, *Young*, 112 Wn.2d at 227, there is sufficient evidence for a jury to decide, on a more probable than not basis, that the Fire District and AAIC would have "fared better," *Daugert*, 104 Wn.2d at 257, but for the negligence of BHB and Matson.

BHB and Matson held themselves out as competent to defend and try sexual harassment cases. CP at 952, 956-59, 986-87. Yet, in his career, Matson had never tried a sexual harassment case and had never defended a sexual harassment case with multiple plaintiffs. CP at 918-9. And, despite his lack of experience in handling cases of this nature, Matson did not consult with others at BHB who were more experienced than him in handling cases of this nature. CP at 976.

It is not surprising that BHB and Matson proceeded on a defense strategy premised upon a fundamentally erroneous understanding of the law. CP at 799-801, 816-23, 1060-61. Despite being on notice that the

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[7] "[I]f it is for the trier of fact to decide whether the client would have fared better but for [the attorney's] mishandling of his case, it is also for the trier of fact to decide the extent to which that is true." *Brust*, 70 Wn. App. at 293-94 (quotations and citations omitted). And absolute certainty of damages is not required. *Alpine Indus., Inc. v. Gohl*, 30 Wn. App. 750, 755, 637 P.2d 998 (1981), *review denied*, 97 Wn.2d 1013 (1982); *Wilson v. Brand S Corp.*, 27 Wn. App. 743, 745 (1980).

plaintiffs' allegations in the underlying case were serious, and that there was the potential for a multi-million dollar verdict, CP at 941-42, Matson simply assumed that a jury would find the conduct of the Fire District's administrator, Marty James, to be "lighthearted and banter." CP at 937. But as Claire Cordon opined, "A lawyer experienced in this area would recognize most jurors, especially female jurors, would not consider comments [such as "bitch," "bitchy," "on the rag," and "barefoot and pregnant" to be] either "lighthearted" or harmless "banter." CP at 821.

Based on this assumption, Matson placed heavy emphasis on blaming plaintiff Sue Collins for the hostile work environment. CP at 500, 936-37, 948-49. But as Anne Bremner opined, Matson failed to understand that "[t]he emphasis on plaintiff Collins's behavior clearly bolstered plaintiffs' case against defendants." CP at 801. She continued:

> Mr. Matson appears to have placed plaintiff Collins's behavior into a vacuum, failing to recognize that her behavior directly reflected the hostile work environment the plaintiffs were attempting to prove. *Mr. Matson essentially helped prove a significant element of plaintiffs' case and, to date, still does not appear to understand this failed reasoning.*

CP at 801 (emphasis added). Bob Gould succinctly explained why this strategy was negligent: "The more you go after Ms. Collins, the more is the duty of Mr. James, her supervisor, to bring it to a halt." CP at 1061.

Still, Matson admitted that he was in the best position to advise AAIC as to liability and damage exposure in the underlying case. CP at 952. Brian McCormick, a claims specialist for AAIC, testified that AAIC relies on local counsel "a lot" in evaluating sexual harassment

cases. CP at 531. And even Matson testified that "[i]t's true" that the Fire District and AAIC could reasonably rely upon him. CP at 986-87.

But Matson's negligence foreclosed any opportunity to settle. As Bremner opined, "It does not appear that Mr. Matson was familiar with or fully understood the legal theories asserted by plaintiffs and the available defenses. This led to his unreasonable failure to properly assess damages and likely outcomes." CP at 799. Matson's evaluation and settlement recommendations were an insult to the plaintiffs, providing them with a paltry recovery. CP at 504-10, 805-07, 838-39. Yet Matson stubbornly and foolishly stood by his evaluation, leaving no option but to try the underlying case. CP at 898, 894-96, 899, 908-11.

Unfortunately, at trial, BHB and Matson continued with their negligent defense strategy of "point[ing] the finger at plaintiff Collins for the hostile work environment." CP at 450-52, 799, 800-801, 816-23, 1060-61. As Bremner opined, "[H]ighlighting plaintiff Collins's behavior only shined a brighter light on Mr. James' failure to act." CP at 800. As Cordon explained, "Matson knew or should have known this was not a typical 'he said/she said' sexual harassment case," CP at 821, especially with four women providing corroborating testimony. CP at 822. "With more experience in these types of cases, in particular with more expertise with how juries assess cases of this nature, Matson would have known most jurors have little tolerance for the kinds of comments James admitted making, particularly when they are made by someone in a position of authority, such as James, who should know better." CP at

821. In fact, even the trial court *sua sponte* recognized that the defense strategy asserted by BHB and Matson at trial was flawed, noting:

> It is clear that [Sue Collins's] behavior at the employment site was totally inappropriate and should have been corrected by her supervisor Marty James. James had a clear duty and responsibility as director of the Training Center to prevent any such actions from taking place. It was clear from the jury's finding that not only did he permit it to occur, but he helped promote some of the specific activities in question.

CP at 763.[8]

Thus, taking the evidence and all reasonable inferences therefrom in the light most favorable to the Fire District and AAIC, *Young*, 112 Wn.2d at 227, the causation issue in this case becomes relatively straightforward. *See Daugert*, 104 W.2d at 257-58. But for the negligent defense strategy of assuming James's conduct to be "lighthearted" and "banter," CP at 937, what would a reasonable finder of fact have done? But for the negligent defense strategy of blaming Collins for the hostile work environment, what would a reasonable finder of fact have done? But for the negligent failure to object to improper comments made by the plaintiffs' attorney as he ended his

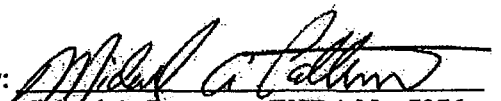
[8] At trial, Matson also failed to preserve any objection to opposing counsel's improper comments made during closing argument. *See Collins v. Clark County Fire District No. 5*, 155 Wn. App. 48, 72-73, 95, 231 P.3d 1211 (2010). Bremner and Gould both expressed the opinion that this failure breached the applicable standard of care. CP at 807-08, 849, 1063-64. Even this Court expressed its opinion that a timely objection and curative instruction could have cured any prejudicial effect. *Collins*, 155 Wn. App. at 95.

closing argument, what would a reasonable finder of fact have done? In other words, the trial court in this case merely retries the underlying case that was compromised by the negligence of BHB and Matson, and the jury decides whether the Fire District and AAIC would have fared better but for such mishandling. *See Daugert*, 104 Wn.2d at 257-58.[9]

Therefore, because the Fire District and AAIC have presented sufficient evidence to allow submission of the question of proximate cause to the jury, it would be inappropriate for either the trial court or this Court to determine the question of cause in fact on summary judgment. *See Hartley*, 103 Wn.2d at 778; *see also Daugert*, 104 Wn.2d at 257; *Petersen*, 100 Wn.2d at 436. And a trial is "absolutely necessary." *See Jacobsen*, 89 Wn.2d at 108.

RESPECTFULLY SUBMITTED this 3rd day of February, 2014.

PATTERSON BUCHANAN
FOBES & LEITCH, INC., P.S.

By: 

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[9] "This trial within a trial avoids the specter that the damages claimed by a plaintiff are a matter of pure speculation and conjecture." *Cal. State Auto. Ass'n Inter-Ins. Bureau v. Parichan*, 84 Cal. App. 4th 702, 101 Cal. Rptr. 2d 72, 78 (Cal. Ct. App. 2000).

CERTIFICATE OF SERVICE

I, Rachel A. West, hereby certify that on this 3rd day of February, 2014, I served the foregoing with the Court of Appeals **VIA E-MAIL** to coa2filings@courts.wa.gov and caused the same to be served upon each and every attorney of record as noted below:

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I certify under penalty of perjury under the laws of the State of Washington that the above is correct and true.

Executed in Seattle, Washington, on February 03, 2014.

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