72533-5

72533-5

No. 72533-5-I

COURT OF APPEALS

DIVISION I

STATE OF WASHINGTON

HAITHAM JOUDEH,

Appellant,

vs.

PFAU COCHRAN VERTETIS AMALA, PLLC, a Washington Professional Limited Liability Company d/b/a PFAU COCHRAN VERTETIS KOSNOFF, PLLC; DARRELL L. COCHRAN, Individually and on behalf of the Marital Community comprised of DARRELL L. COCHRAN and JANE DOE COCHRAN,

Respondents.

APPELLANT'S OPENING BRIEF

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I. Introduction

This is an appeal of a summary judgment dismissal of a legal malpractice action. The Defendants/ Respondents Darrell Cochran and his law firm, Pfau Cochran Vertetis Amala, PLLC (collectively "Cochran"), represented Plaintiff/Appellant Haitham Joudeh in the underlying personal injury action. Mr. Joudeh' Complaint alleged causes of action for: (a) legal malpractice; (b) breach of contract; (c) breach of fiduciary duty, and; (d) violation of the Washington Consumer Protection Act. CP 481-487. The trial court dismissed Mr. Joudeh's case on summary judgment. CP 930-935. The trial court erred in multiple respects, including:

- In violation of fundamental summary judgment standards, the trial court did *not* restrict Cochran to their initial summary judgment "showing" in reply and oral argument, but instead granted summary judgment based on arguments not included in Cochran's initial "showing;"
- Erroneously "finding" that Mr. Joudeh's extensive mitigation efforts were "insufficient" and thus broke the chain of causation as a matter of law;

- Erroneously concluded that no genuine issue of material fact remained in dispute relative to proximate cause as to any of Mr. Joudeh's causes of action;
- Erroneously concluded that Mr. Joudeh must establish proximate cause to obtain fee disgorgement as a remedy for Mr. Cochran's uncontroverted breaches of fiduciary duty.

On summary judgment, the burden to establish the existence of a genuine issue of material fact does *not* shift to the non-mover *except* in regard to those issues on which the moving party makes a sufficient showing in the initial moving papers. Based on basic due process principles, a party may not expand its initial summary judgment "showing" in reply or oral argument. The trial court nevertheless allowed Cochran to do that in this case, over the objections of Mr. Joudeh. Restricted to their initial "showings," Cochran did *not* establish the absence of genuine issues of material fact.

In the underlying personal injury action, Cochran settled out the "easy" money of Mr. Joudeh's personal injury case (opening the door for the remaining defendants to obtain summary judgment based on the release of their agents/employees) and withdrew from representation. Mr.

Joudeh then contacted roughly fifty (50) different law firms to represent him against the remaining defendants, without success. The Court in the underlying personal injury matter then granted the remaining defendants summary judgment based on the prior releases. The trial court in this case held that Mr. Joudeh's mitigation efforts were "insufficient," as a matter of law, because he did *not* appear in opposition to the remaining defendants' summary judgment motions. However, Washington only requires that tort victims pursue "reasonable" mitigation efforts, and whether the tort victim's mitigation efforts are "reasonable" is an issue for the jury. Furthermore, even if Joudeh's mitigation efforts were "negligent," that alone would not constitute a superseding cause that cuts off Cochran's liability.

Moreover, Mr. Joudeh testified that he would not have entered into the underlying partial settlements but for Mr. Cochran's multiple breaches of the standard of care. Mr. Joudeh's testimony established genuine issues of material fact relative to proximate cause, consistent with well-established Washington case law. The trial court thus erred in holding that he had not established the existence of genuine issues of material fact relative to proximate cause, even if it had not erred in allowing Cochran to expand their initial summary judgment "showing" on

the proximate cause issue.

Washington recognizes disgorgement and forfeiture of fees as an appropriate remedy for an attorney's breach of fiduciary duty. The client is *not* required to prove causation. Mr. Joudeh offered uncontroverted evidence that Mr. Cochran breached his fiduciary duties to Mr. Joudeh in multiple respects. The trial court nevertheless dismissed Mr. Joudeh's breach of fiduciary duty cause of action, based on causation.

The trial court committed multiple obvious errors. It should be reversed on all causes of action.

II. Assignments of Error and Issues on Appeal

A. Assignments of Error

1. The trial court erred when it failed to limit Cochran to issues fairly raised in their initial summary judgment "showing."

2. The trial court erred when it held as a matter of law that no genuine issue of material fact remained on the issue of proximate cause in his legal malpractice cause of action.

3. The trial court erred when it held as a matter of law that Mr. Joudeh's unsuccessful mitigation attempts constituted a superseding cause that cut off Cochran's malpractice liability.

4. The trial court erred when it held as a matter of law that

Mr. Joudeh must prove causation as an essential element of a claim for fee disgorgement/forfeiture.

5. The trial court erred when it held as a matter of law that no genuine issue of material fact remained relative to Mr. Joudeh's breach of fiduciary duty cause of action.

6. The trial court erred when it held as a matter of law that no genuine issue of material fact remained relative to Mr. Joudeh's breach of contract cause of action.

7. The trial court erred when it held as a matter of law that no genuine issue of material fact remained relative to Mr. Joudeh's Consumer Protection Act cause of action.

B. Issues Pertaining to Assignments of Error

1. Does this Court review summary judgment orders *de novo*? [All Assignments of Error]

2. On summary judgment, does this Court draw all reasonable inferences in favor of the non-moving party? [All Assignments of Error]

3. Are trial court Findings of Fact and Conclusions of Law superfluous to appellate review of summary judgment? [All Assignments of Error]

4. Is the party moving for summary judgment limited to the issues raised in its initial "showing,"? [Assignment of Error no. 1]

5. Consistent with *Daugert v. Pappas* and *VersusLaw v. Stoel Rives,* how does a legal malpractice victim prove proximate causation in a legal malpractice action? [Assignments of Error nos. 2, 5, 6, 7]

6. Does the reasonableness of a tort victim's mitigation attempts constitute an issue for the jury? [Assignments of Error nos. 2, 3]

7. Under what circumstances, do a legal malpractice victim's (allegedly) negligent mitigation attempts constitute a superseding cause that cuts off the liability of a negligent attorney? [Assignments of Error nos. 2, 3]

8. Under *Flint v. Hart* and *City of Seattle v. Blume,* were Mr. Joudeh's mitigation attempts so "unreasonable" as to take the issue from the jury? Assignments of Error nos. 2, 3]

9. On summary judgment, who (*i.e.,* the victim or the tortfeasor) carries the burden of showing that the legal malpractice mitigation efforts would have succeeded? [Assignments of Error nos. 3, 4]

10. Under *Eriks v. Denver,* must the client prove causation as an essential element of the client's claim for fee disgorgement as a remedy for the attorney's breach of fiduciary duty? [Assignment of Error no. 4]

11. Is an attorney strictly liable for disregarding the client's lawful instructions? [Assignment of Error no. 6]

12. Does an attorney commit an unfair or deceptive act or practice by using the threat to stop funding litigation expenses as a means of coercing the client into acceding to the attorney's settlement recommendations? [Assignment of Error no. 7]

13. Does an attorney's admission that his custom and practice related to the law firm's form fee agreement and other "unreasonable" clients demonstrate a ""a real and substantial potential for repetition"? [Assignment of Error no. 7]

14. Does an attorney's decision to stop prepaying the client's litigation expenses and demand, instead, that the client prepay the expenses come within the entrepreneurial aspects of the practice of law? [Assignment of Error no. 7]

15. Does an attorney's practice of using a clause in a form fee agreement as a means to coerce "unreasonable" clients to accede to his settlement recommendations satisfy the public interest element of the CPA under RCW 19.86.093(3) adopted in 2009? [Assignment of Error no. 7]

16. Does a client sustain "injury," within the meaning of the Washington Consumer Protection Act, when the client is forced to incur time and expense in seeking replacement counsel in the client's pending case? [Assignment of Error no. 7]

III. STATEMENT OF THE CASE

A. Procedural Posture in Trial Court.

Haitham Joudeh's Complaint alleged causes of action for legal malpractice, breach of fiduciary duty, and breach of contract, arising out of the Attorney Darrell Cochran's representation of Haitham in an underlying personal injury action. CP 13-16 ¶¶4.0-6.2. After Mr. Cochran's deposition, Haitham's First Amended Complaint added a cause of action for violation of the Washington Consumer Protection Act. CP 485 ¶¶7.0-7.8. Cochran Answered both the Complaint and Amended Complaint. CP 21, 489.

Cochran moved for summary judgment. CP 82. Mr. Joudeh

opposed Cochran's motion. CP 504. Citing Cochran's opening motion [CP 82-83], Haitham pointed out that Cochran was limited to his four (4) initial summary judgment "showings" [CP 505] that:

> Defendants' motion for summary judgment purports to make four (4) summary judgment showings: (1) plaintiff cannot prove a breach of the standard of care because he "does not possess any expert testimony;" (2) plaintiff cannot prove proximate cause because he "failed to challenge or appeal the adverse ruling in the underlying personal-injury action;" (3) plaintiff cannot prove a breach of contract because "Mr. Cochran in fact obtained plaintiff's informed consent," and; (4) the court should "dismiss any such CPA claim as a matter of law."

In Reply, Cochran *conceded* that "**Mr. Cutler's testimony creates an issue of fact whether Mr. Cochran violated the standard of care or fiduciary duties to plaintiff**." CP 924 [Emphasis added].

The trial court heard Cochran's motion for summary judgment on August 29, 2014 and, at the conclusion of argument, dismissed Joudeh's entire case and issued Findings of Fact and Conclusions of Law. CP 930.

B. Statement of Facts

Mr. Joudeh entered into a consumer loan agreement with Spokane Firefighters Credit Union ("the Credit Union"). CP 469 ¶3.0; CP 490 ¶1.7. The Credit Union subsequently pursued a non-judicial repossession of the truck. CP 470 ¶3.1; CP 491 ¶1.8. The Credit Union retained Auto Trackers and Recovery ("Auto Trackers") to repossess the truck. CP 469

¶3.2; CP 491¶1.9. Auto Trackers, in turn, retained Joshua Strickland of Strickland Recovery, LLC to assist in the repossession. CP 469 ¶3.3; CP 490 ¶1.10. See further, CP 705-706 (pp. 45:14-46:16). Matthew Mayo and Trisha Matthews also participated. *Id.* [1]

On August 19, 2010, Plaintiff Haitham Joudeh was traveling in the pickup truck in Pierce County, with his minor son, when he was accosted by Mayo and Matthews (in one vehicle) and Strickland in a large tow-truck, threatening to collide with it. CP 469 ¶3.4; CP 491 ¶1.11; see further, CP 868-882, 900-907. This led to a high speed chase over 30 city blocks, which ended when Mayo and Matthews blocked Plaintiff's truck, and Strickland rear-ended it, pushing it into the vehicle in which Mayo and Matthews were driving. *Id.* The police arrested Mayo and Strickland on charges of reckless driving. CP 470 ¶3.8; CP 492.

Mr. Joudeh was seriously injured and his son also sustained injuries. *E.g.,* CP 628-629. Haitham's medical expenses totaled approximately $70,000. CP 630-631, 656-659.

The Strickland defendants had $1MM of liability insurance

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[1] A question arose in the Underlying tort case about whether Mayo and Matthews were "employees" of Auto Trackers. For purposes of this appeal, that distinction makes no difference because Auto Trackers had a $1MM liability policy that provided coverage regardless of whether they were "employees." CP 688, 695, 749, 814-816, 829-840.

coverage for Mr. Joudeh's claims. CP 748, 803-804 Auto Trackers, Mayo and Matthews also had $1MM of liability insurance coverage, and Mayo and Matthews had an additional $100,000 of coverage through their individual policy. *Id.*; CP 688, 695, 749, 814-818, 829-839.[2] They were therefore "solvent." CP 563-564 ¶20-21.

Haitham first met with Mr. Cochran on August 26, 2010, and retained the Pfau Cochran law firm on October 25, 2010. CP 471 ¶3.9; CP 492 ¶1.14. Mr. Joudeh's fee agreement with Cochran provides, in part, that "[a]t their sole discretion, Attorneys will advance payment of Costs." CP 375. The fee agreement further provides that "Attorneys will obtain Client's informed consent prior to any settlement arising from this agreement." CP 376. Mr. Cochran assured Haitham that he and his law firm would advance the necessary litigation expenses. CP 408 (23:4-6), 530 ¶3. Cochran advanced Mr. Joudeh's litigation expenses until January 30, 2012 (when a disagreement arose over Mr. Cochran's unauthorized settlement offer). CP 471 ¶¶3.9-3.10; CP 492 ¶1.15.

From the outset of representation, Haitham had wanted to take his case to trial. *E.g.,* 531 ¶6, 613-617 (Ans. to 'Rog. no. 7), and 680 (113:12-

[2] Mr. Cochran erroneously told Mr. Joudeh that Mayo and Matthews's policy limits were only $100,000. CP 215; CP 615 (Ans. to 'Rog. no. 7).

14). Mediation of the underlying matter was scheduled on Monday, January 30, 2012. CP 473 ¶3.17; CP 494 ¶1.22. On January 24, 2012, Haitham wrote to Mr. Cochran, authorizing settlement within a range of $2,500,000 to $3,000,000. *Id.* Mr. Cochran nevertheless submitted a mediation brief on Friday, January 27, 2012, in which he communicated an opening settlement offer in the amount of $552,500. CP 473 ¶3.18; CP 494 ¶1.23; CP 655-659. Mr. Cochran had *not* allowed Haitham an opportunity to see the mediation brief prior to its submission, and Haitham had *not* authorized that settlement offer. CP 530-531 ¶¶4-5. Mr. Joudeh's expert, Philip Cutler, opines that Mr. Cochran breached the standard of care and his fiduciary duties, by making unauthorized settlement offers, including this one. CP564-568.

During and immediately after mediation of the Underlying Matter on January 30, 2012, Mr. Cochran changed his position about advancing costs *because*, in his words, Mr. Joudeh had "rejected my [settlement] advice;" he thereupon demanded that Mr. Joudeh deposit $10,000 and pay all future litigation expenses. CP 408-412 (pp. 21:17-25:13, 26:17-28:13, 29:1-21, 92:15-94:9), CP 414, 416-417, 419. See further, CP 473-476

¶¶3.17-3.27; CP 494-495 ¶1.27. Mr. Cochran also decided that he must settle Mr. Joudeh's case and not take it to trial regardless of Mr. Joudeh's desire to do so. *E.g.,* CP 680 (113:4-114:4). Mr. Cochran demanded prepayment of costs, he said, because he was "no longer interested in carrying the loan for you on this case" and had "no interest in losing [his] money."[3] CP 409 (27:16-28:12); CP 414, 416-417, 419. Mr. Cutler opines that Mr. Cochran's demand that Haitham deposit $10,000 and pay litigation expenses breached Mr. Cochran's fiduciary duties to Haitham. CP 568-569. Mr. Cochran himself confirmed that he has used this same form fee agreement and improper practice with other "unreasonable" clients. CP 409 (25:3-13), CP 412 (94:4-9).

On February 10, 2012, Mr. Cochran offered to "settle the claims against Jack [Strickland's attorney] for $300,000." CP 660-662. Haitham had not authorized that offer. CP 533 ¶9. On February 13, 2012, Mr. Cochran sent Haitham an email stating that the Strickland defendants had offered to settle for $100,000. CP 664-666. He wrote that this $100,000

[3] On March 26, 2012, Mr. Cochran demanded that Mr. Joudeh authorize a $175,000 settlement offer to the Strickland defendants "or [send] a check for costs." CP 673-677.

offer was "a good offer" and "[i]f we can get them to $150,000, the offer should be accepted." *Id.* Mr. Joudeh rejected Mr. Cochran's advice to accept $150,000. CP 533 ¶8. Mr. Cochran assured Mr. Joudeh that he could settle with only the Strickland defendants without endangering his claims against the remaining defendants. CP 531-532 ¶6; CP 613-617 (Ans. to 'Rog. no. 7).[4]

Mr. Cochran subsequently issued another unauthorized settlement offer to the Strickland defendants in the amount of $250,000 on March 13 and, when Strickland did not accept it, went further and offered that "we can come off $250,000" on March 14, 2012. CP 668. Mr. Joudeh had not authorized those offers. CP 633-634 ¶¶10-11. Mr. Cutler opines that Mr. Cochran's unauthorized settlement offers again breached the standard of care and his fiduciary duties to Haitham. CP 564-568. Based on Mr. Cochran's threats relative to litigation expenses, as well as his assurances that Haitham's claims against the remaining defendants would *not* be

[4] *E.g.,* in a March 26, 2012 email, Mr. Cochran told Haitham "Let's get Strickland in now and that will enable us to keep pounding everyone else." CP 673, 534 ¶12.

affected, Mr. Joudeh finally relented and agreed to a $250,000 settlement with the Strickland defendants. CP 86, 216.

Mr. Cochran next negotiated a $100,000 settlement with Mayo and Matthews. *Id.* As with the Strickland settlement, Mr. Cochran assured Haitham that this settlement would not endanger his claims against the Credit Union and Auto Trackers. CP 532-533 ¶7. Haitham would not have authorized settlement with Mayo and Matthews if Mr. Cochran had explained the risks posed by the partial settlement. *Id.*

Mr. Cochran next tried to negotiate with Auto Trackers and the Credit Union; however, Mr. Joudeh refused to consider the settlement amounts Mr. Cochran recommended. CP 616-617. Mr. Cochran and his law firm then withdrew from representation effective October 31, 2012 because Haitham would not accept their settlement recommendations. CP 259-262, 265-267; CP 682. Mr. Joudeh contacted an estimated 50 personal injury law firms in the area, 23 of which are identified by name in Mr. Joudeh's discovery responses. CP 534-535 ¶13; CP 620-624, 626-627 (Ans. to 'Rog. nos. 10, 13). At least two of those attorneys called Mr.

Cochran for information. CP 680 (115:11-116:14). Haitham could not get any attorney to represent him as replacement counsel. CP 627 (Ans. to 'Rog. no. 13).

The remaining defendants (Auto Trackers and the Credit Union) thereafter moved for summary judgment, each successfully arguing that Haitham's releases of the Strickland defendants, and Mayo and Matthews, effectively released them as well. CP 684-923.[5]

IV. ARGUMENT

A. The Court Reviews All Issues *De Novo* and Draws All Reasonable Inferences in Mr. Joudeh's Favor.

This Court reviews the trial court summary judgment order *de novo*, and considers the evidence and all reasonable inferences in the light most favorable to Mr. Joudeh. *E.g., Dania, Inc. v. Skanska USA Building, Inc.*, __Wn. App. __ ¶11, __P.3d __, 2014 WL 7404005 *2 (12/30/14); *Taylor v. Bell*, __Wn. App. __ ¶37, __P.3d __, 2014 WL 7387790 *6 (12/29/14). As a result, the trial court Findings of Fact and Conclusions of Law [CP 931-936] are superfluous. *E.g., Old City Hall, LLC v. Pierce*

[5] Auto Trackers filed two separate motions, the first sought dismissal of vicarious liability claims and the second seeking dismissal of all remaining claims. CP 684-692, 742-744, 844-848. The Court in that case granted both motions. CP 921-923.

County AIDS Found., 181 Wn. App. 1, 14, 329 P.3d 83 (2014).

B. The Trial Court Erred by Not Limiting Cochran to Their Initial Summary Judgment "Showing."

As the moving party, Cochran had the initial burden to "show" that no genuine issue of material fact remained. *Young v. Key Pharm.,* 112 Wn.2d 216, 225 and n.1, 770 P.2d 182 (1989). Cochran was required to "identify 'those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *White v. Kent Medical Center, Inc., PS,* 61 Wn. App. 163, 170, 810 P.2d 4 (1991), *quoting Celotex,* 477 U.S. at 322-323. If the moving party fails to make a sufficient initial "showing," then the burden does *not* shift to the non-moving party and "summary judgment may not be entered, regardless of whether the opposing party submitted responding materials." *White, supra,* 61 Wn. App. at 170. Moreover, in the absence of a sufficient initial "showing," the moving party may *not* correct deficiencies for the first time in reply. *Id.* at 168.

Here, Cochran's opening Motion included only four (4) specific "showings" [CP 82-83] and made no "showing" whatsoever relative to Plaintiff's cause of action for breach of fiduciary duty. CP 505, 526-527.

Cochran's four (4) "showings" included the following:

1. Haitham cannot prove a breach of the standard of care because "he does not possess any expert testimony." CP 82, 90-91. Cochran's assertion was frivolous [CP 505-508, 517-518, 585-587 ¶¶2-12],[6] and they abandoned it in Reply. CP 924.

2. Haitham cannot prove proximate cause because he "failed to challenge or appeal the adverse ruling in the underlying personal injury action." CP 82-83, 92-95. Significantly, Cochran made no "showing" relative to whether the underlying trial court was in error when it dismissed Mr. Joudeh's claims against the remaining defendants. Nevertheless, Mr. Joudeh's Opposition also established the existence of genuine issues of material fact relative to proximate cause. CP 508-514, 519-522. See discussion, *infra,* pp. 20-23.

3. Haitham cannot prove his breach of contract cause of action because "Mr. Cochran in fact obtained plaintiff's informed

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[6] Incredibly, Cochran invoked CR 11, asserting that legal malpractice plaintiffs must "possess the necessary expert [standard of care] testimony at the outset of his lawsuit...". CP 96. Cochran's assertion is contrary to established Washington precedent and forced Plaintiff's counsel to respond. CP 508, 517, 587-590 ¶¶13. In Reply, Cochran referred to its *ad terrorem* abuse of CR 11 as "immaterial," but did *not* withdraw it. CP 924.

consent...". CP 83, 97-99. Mr. Joudeh established the existence of genuine issues of material fact relative to this cause of action as well. CP 508-514, 522-523. See discussion, *infra*, pp. 38-39.

4. Cochran did *not* engage in a deceptive act or practice, his conduct did not occur in trade or commerce and did not impact the public interest, and Mr. Joudeh did not sustain any damage. CP 99-104. Mr. Joudeh established the existence of genuine issues of material fact relative to this cause of action as well. CP 508-514, 523-526. See discussion, *infra*, pp. 34-38.

Cochran's initial Motion made no "showing" relative to Mr. Joudeh's cause of action for breach of fiduciary duty. See, CP 515-516, 526-527.[7] Mr. Joudeh brought that omission to the trial court's attention, including during oral argument. *Id.* and CP 959. The trial court nevertheless dismissed Mr. Joudeh's breach of fiduciary cause of action. CP 935 ¶16.

Cochran's initial "showing" also said *nothing* about the

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[7] Cochran's initial "showing" relative to Joudeh's breach of fiduciary cause of action consisted of their mistaken assertion that Joudeh did not have an expert on the alleged breaches of fiduciary duty. CP 90-91, 972:12-15. Cochran conceded their error in Reply, admitting that "Mr. Cutler's testimony creates an issue of fact whether Mr. Cochran violated the standard of care or **fiduciary duties** to plaintiff." CP 924.

value of Mr. Joudeh's underlying personal injury; nor did it assert that Mr. Joudeh could never have recovered a greater amount of damages beyond the settlements negotiated by Mr. Cochran. Nevertheless, during oral argument, Cochran's counsel asserted that Mr. Joudeh had the burden to show "whether the plaintiff ever could have received a dime more than the $350,000 that he did receive in settlement." CP 955, 965. Mr. Joudeh objected that "[Cochran] made no showing about that. We could have come in with all the medical records and all...but that wasn't part of their showing." CP 962. That issue is, therefore, also *not* properly before this Court, either.

The trial court erred when it failed to limit Cochran and its decision to the issues raised in Cochran's initial "showing." This Court should therefore reverse the trial court on all issues not raised in Cochran's initial "showing."

C. Mr. Joudeh Established the Existence of Genuine Issues of Material Fact Relative to Proximate Cause.

1. Proximate Cause Presents an Issue for the Jury

Washington jealously protects against infringement on the constitutional province of the jury (including relative to proximate cause and damages). *E.g., Sofie v. Fibreboard Corp.,* 112 Wn.2d 636, 771 P.2d

711 (1989); *State v. Warren,* 134 Wn. App. 44, 52-3, 138 P.3d 1081 (2006).

Washington courts apply the same *general* principles of causation in legal malpractice actions as in ordinary negligence cases, *e.g., VersusLaw, Inc. v. Stoel Rives, LLP,* 127 Wn. App. 309, 328-329, 111 P.3d 1 (2005), and determine proximate cause as a matter of law "only when the facts are undisputed and inferences therefrom are plain and incapable of reasonable doubt or difference of opinion." *Daugert v. Pappas,* 104 Wn.2d 254, 257, 704 P.2d 600(1985). Thus, **proximate cause almost always represents an issue for the jury to decide.** *Id.* Accord, *Physicians Ins. Exch. v. Fisons Corp.,* 122 Wn.2d 299, 314, 858 P.2d 1054 (1993)("*Fisons*").

2. Legal Malpractice Plaintiffs Prove Proximate Cause Through Inferences Drawn by the Jury.

Proximate cause in a legal malpractice case requires a "trial-within-a-trial" or "case-within-a-case" to determine whether the defendant's client would have fared better but for the lawyer's negligence. *Daugert* explains [104 Wn.2d at 257-258]:

> [W]hen an attorney makes an error during a trial, the causation issue in the subsequent malpractice action is relatively straightforward. The trial court hearing the malpractice claim merely retries, or tries for the first time, the client's cause of action which the client asserts was lost or compromised by the attorney's negligence, and the trier of fact decides whether the client would have fared better but for such mishandling. [Citation omitted]. 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.** (Emphasis added).

When the fact finder in a legal malpractice case must determine what would have occurred but for the defendants' negligence, **the plaintiff establishes proximate cause through *inferences drawn by the fact finder.*** *Daugert, supra*, 104 Wn.2d at 257-8; *Bishop v. Jefferson Title Co.,* 107 Wn. App. 833, 848-9, 28 P.3d 802 (2001)(reversing summary judgment in legal malpractice case); *Hetzel v. Parks,* 93 Wn. App. 929, 939-41, 971 P.2d 115 (1999) (reversing dismissal of legal malpractice case); *Brust v. Newton,* 70 Wn. App. 286, 290-94, 852 P.2d 1092 (1993); *Clark Cnty. Fire Dist. No. 5 v. Bullivant Houser Bailey, P.C.,* 180 Wn. App. 689 ¶44, 324 P.3d 743, 754 (2014) (summary judgment reversed; Court "inferred that the [plaintiff's] experts believed that no reasonable

prudent attorney would have agreed with [defendant's] evaluation based on their opinions that Matson breached the standard of care").

Furthermore, in contrast to medical malpractice cases in which expert testimony is critical to proving what would have occurred but for the malpractice, expert testimony as to what a judge, jury or tribunal would have decided in the underlying matter is *not* admissible. *E.g.,* 4 Mallen & Smith, *Legal Malpractice* § 37:24, p. 1685 and §37:25, pp. 1727-1732 (2014 ed.); *Hickey v. Scott,* 796 F. Supp.2d 1, 5-6 (D.D.C. 2011)(excluding predictions of what some other fact finder would have concluded and evaluations of the legal merits' of the underlying claims, which would be impermissible legal opinion), *citing*, *Whitley v. Chamouris,* 265 Va. 9, 574 S.E. 2d 251 (Va. 2003)("No witness can predict the decision of a jury and, therefore, the former could not be the subject of expert testimony").

Washington case law provides many examples of the type of evidence sufficient to establish a genuine issue of material fact that defeats summary judgment when the issues is "what the plaintiff would have

done" but for the defendant's negligence. For example, in *Fisons, supra,* 122 Wnd 2d. at 314, a failure to warn case, the defendant drug manufacturer "argue[d] that the trial court erred in failing to dismiss the physician's claims on the basis that there was insufficient evidence of proximate cause *because only the physician testified how he would have acted differently if he had been adequately warned.*" (Emphasis added). On that evidence, the Washington Supreme Court held that "there was sufficient evidence to justify the proximate cause issue being submitted to the jury." *Id.*[8]

Similarly, in *Ayers v. Johnson & Johnson Baby Products Co.,* 117 Wn.2d 747, 818 P.2d 1337 (1991), another failure to warn case, the Court considered whether the plaintiff had submitted sufficient evidence that

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[8] See further, *Hartley v. State,* 103 Wn.2d 768, 775-776, 698 P.2d 77 (1985)(driver's testimony that he "would not have driven if his license had been suspended...is a proper question for jury determination"); *Strother v. Capitol Bankers Life Ins. Co.,* 68 Wn. App. 224, 239, 842 P.2d 504 (1992), *reversed sub nom on other grounds, Ellis v. Wm. Penn Life Assur. Co. of Am.,* 124 Wn.2d 1, 873 P.2d 1185 (1994)("Although **it is impossible to have direct evidence as to what Mark would have done** [because he had died], we do **not** consider the question to be so **speculative** as to defeat liability. **It is analogous to proving causation in products liability actions where the defendant is charged with failure to provide adequate warnings.**")(emphasis added); *Weatherbee v. Gustafson,* 64 Wn. App. 128, 133-4, 822 P.2d 1257 (1992)(reversing summary judgment based on "reasonable inferences" that smoke alarm would have gone off and victim would have reacted differently).

"had there been an adequate warning, David never would have inhaled the [baby] oil because the Ayerses would have kept it out of his reach." *Ayers, supra,* 117 Wn.2d at 753-55. The plaintiff/mother testified that she "made a practice of reading labels" and if she had been aware of the dangers, "the baby oil would have been kept up high in the medicine box" and she "would have alerted other members of the family." *Id.* at 754. The plaintiff/mother also testified that she had warned family members of other dangers in the past. The Supreme Court reinstated the jury verdict, explaining (*id.* at 755):

> Johnson & Johnson asserts that under these circumstances it is "rank speculation" to suppose a warning would have prevented the injury.
>
> We reject this argument. All the Ayerses apparently knew was that baby oil could cause diarrhea if swallowed. They did not know of the risks of aspiration, and the evidence they presented, as described above, is sufficient to support the jury's conclusion that if they had been alert to those risks, they would have treated the product more carefully. **At most, Johnson & Johnson's argument suggests that reasonable persons might disagree as to whether a warning would have made any difference.** For this court to uphold the trial court's judgment notwithstanding the verdict, however, more is required. **This court must be prepared to conclude that no reasonable person could infer, as did the jury, that a warning would have altered the Ayerses' behavior. The evidence presented at trial was not so weak as to permit such a conclusion.** [Emphasis added].

Here, Mr. Joudeh testified that if he had known about the risks posed by the partial settlements with the Strickland defendants, and with Mayo and Matthews, then he would have rejected Mr. Cochran's settlement recommendations despite Mr. Cochran's demands that he pay future litigation expenses. CP531-532 ¶¶6-7.[9] Indeed, his testimony to that effect is entirely consistent with his well-established desire to take his case to trial, *and* would have protected against the risk of loss of his claims against the Credit Union and Auto Trackers. See further, n. 8, *supra.*[10]

Consistent with *Fisons* and *Ayers*, Cochran's arguments are insufficient to take proximate cause from the jury; thus, genuine issues of material fact remain in dispute relative to the issue of proximate cause, which only the jury can decide.

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[9] *Griswold v. Kilpatrick,* 107 Wn. App. 757, 27 P.3d 246 (2001) is obviously inapposite on this issue. In *Griswold,* the witness tried to speculate about decisions (relative to settlement) under the control of *others*. Here, as in *Ayers* and *Fisons,* Mr. Joudeh testified about what *he* would have done.

[10] *Nielsen v. Eisenhower & Carlson,* 100 Wn. App. 584, 999 P.2d 42 (2000), relied on by the trial court, arose out of a judgment for plaintiffs which they settled on appeal. The legal malpractice plaintiffs alleged that they settled on appeal to avoid the risk that the verdict would be overturned on appeal. The plaintiffs then sued their original attorneys for the difference between what they settled for and the original verdict. *Nielsen* is thus reminiscent of "loss of chance" claims that Washington does *not* allow relative to legal malpractice claims.

3. After an Attorney's Malpractice, the "Reasonableness" of the Client's Mitigation Efforts Presents a Jury Issue.

In the trial court, Cochran argued [CP 957], and the trial court agreed [CP 832-933 ¶¶6-8], that Mr. Joudeh did *not* establish the existence of a genuine issue of material fact relative to proximate cause because he did *not* successfully contest the summary judgment motions of the Credit Union and Auto Trackers while *pro* se in the trial court or through an appeal.. The trial court's conclusion conflicts with *City of Seattle v. Blume,* 134 Wn.2d 243, 259-260, 947 P.2d 223 (1997), which held:

> [W]e find that the 'independent judgment rule,' which rests on tenuous underpinnings, discourages settlement, favors those who can afford lengthy litigation, and serves as a potential shield from liability for those who would otherwise be found liable for a legal wrong.
>
> Thus, we find that the 'independent business judgment rule' can no longer serve as a bar to the proximate cause element of a legal claim.

Blume also approved the observation by *Flint v. Hart,* 82 Wn. App. 209, 219-221, 917 P.2d 590 (1996) "**that in many cases the tortious acts of another necessitate a person's decision to remove themselves from the legal process, to settle a claim, to dismiss an action, etc.**" *Blume,*

supra, 134 Wn.2d at 259 (emphasis added).[11] Thus, whether Mr. Joudeh opposed the summary judgment motion, or whether he might have prevailed if he had appealed the underlying matter, is irrelevant; instead, the "reasonableness" of his conduct when having to deal with Mr. Cochran's breaches of duty is "a question for the jury." *Flint, supra,* 82 Wn. App. at 221- 222.

In that context, Mr. Joudeh contacted an estimated 50 personal injury attorneys (23 of whom he named) in hopes of obtaining an attorney after Mr. Cochran abandoned him. CP 534 ¶13. Mr. Cochran admitted that at least two of those attorneys contacted him as well. CP 534-535 ¶13. None of those attorneys would take Mr. Joudeh's case. CP 534-535.

Mr. Joudeh's efforts appear eminently reasonable on their face. Genuine issues of material fact thus existed concerning whether Haitham's mitigation efforts in seeking replacement counsel were "reasonable."

4. The Post-Malpractice Negligence of Replacement

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[11] *Paradise Orchards Gen'l Partnership v. Fearing,* 122 Wn. App. 507, 94 P.3d 372 (2004) does *not* address mitigation and *City of Seattle v. Blume*, presumably because of the odd stipulation between the parties that "if the trial court revisited the [underlying] ruling...[and]...if the court determined that 'repossession was additive of other remedies ...then the Court will...enter judgment for the defendants...". *Id.* 122 Wn. App. at 512. Thus, when the Court in the legal malpractice action concluded that collateral estoppel did *not* bar re-determination of the legal issue *and* concluded that "repossession was additive of other remedies," then the Court had no choice but to enter judgment pursuant to the stipulation dismissing the case, without considering the issue presented here.

Counsel (or the *Pro Se* Client) Is Not A Superseding Cause Except in Extraordinary Circumstances.

Cochran's Answer alleged the affirmative defense of Mr. Joudeh's negligence. CP 501 ¶2.2 ("caused in whole or in part"). The defendant, *not* plaintiff, carries the burden of proof on affirmative defenses involving allocation of fault. *E.g.,* 16 DeWolf and Allen, *Wash. Tort Law and Prac.* §13.7 (updated through 9/2014). See further, *Schmidt v. Coogan,* __Wn.2d __¶¶9-10, 225 P.3d 424 (2014). Cochran thus had the burden of proving their affirmative defense of a superseding cause.

In that context, Cochran argued orally that Mr. Joudeh's mitigation efforts were insufficient because he was "held to the standard of an attorney ....[and] he did nothing of record in writing to respond to summary judgment...[of] what may well have been an erroneous ruling." CP 957. Relying on Cochran's arguments, the trial court premised its summary judgment on its conclusion that "Plaintiff's actions in the underlying matter were insufficient mitigation and broke the chain of causation from any breach of duty by Defendants' conduct during settlement negotiations." CP 933, 967.

However, particularly since the advent of comparative fault, the original negligent actor (*i.e.,* Cochran) remains liable even though a third

person (*e.g.,* replacement counsel or the client acting *pro se*) negligently fails to take affirmative action which would have prevented the harm if the third person's conduct is reasonably foreseeable. *McCoy v. American Suzuki Motor Corp.,* 136 Wn.2d 350, 358, 961 P.2d 952 (1998); *Cline v. Watkins,* 66 Cal. App.3d 174, 178-180, 135 Cal. Rptr. 838 (1977)(legal malpractice case). Accord, *Maltman v. Sauer,* 84 Wn.2d 975, 982, 530 P.2d 254 (1975); 16 DeWolf & Allen, *Wash. Prac. Tort Law and Prac.* §5.15 and n. 9 (4th ed. 9/2014); 1 Mallen & Smith, *supra,* §8.5, pp. 989-993 (2014 ed). An independent intervening act is a superseding cause relieving the actor of liability for his negligence only if the intervening act is highly unusual or extraordinary and hence not reasonably foreseeable. 16 *Wash. Prac., supra* §5.15 and n. 14. Accord, *Cline, supra,* 66 Cal. App.3d at 178.

Accordingly, whether a particular act is "foreseeable" and whether it constitutes a "superseding cause," or merely a "concurrent cause" constitutes still another issue for the jury. *E.g., Travis v. Bohannon,* 128 Wn. App. 231, 242, 115 P.3d 342 (2005); *McCoy, supra,* 136 Wn.2d at 358; 16 *Wash. Prac., supra* §5.15 and n. 4.

Regardless of what Mr. Joudeh could or should have done, Mr. Cochran should reasonably have foreseen that Mr. Joudeh would be

unable to retain replacement counsel after Cochran had settled for the "easy money" in the case (indeed, Cochran admits he had actual knowledge of that situation because he personally spoke with prospective replacement counsel, who then did not take the case) and that Joudeh, acting *pro se*, would be unable to defend the summary judgment motions by the remaining defendants. The trial court thus erred in deciding that issue as a matter of law.

5. Joudeh's Position Is Consistent with *Nielson*; After He Proved that the Underlying Trial Court Had Dismissed His Claims; the Burden Then Shifted to Cochran to Prove the Underlying Trial Court Wrong.

Washington does *not* require that legal malpractice plaintiffs appeal every adverse decision after the defendant lawyer's malpractice. See discussion, *supra*, pp. 26-27. Tension thus naturally exists between a client's mitigation choices required following an attorney's malpractice, and the ramifications of *Nielson, supra.* See, n. 10, above. Resolution of that tension requires careful analysis of *Nielson.*

The legal malpractice claims in *Nielson* arose out of an underlying personal injury trial, after which the defendant appealed on statute of limitations grounds and the plaintiffs cross-appealed seeking additional damages. The plaintiffs (who were also the legal malpractice plaintiffs)

had *won* in the trial court. 100 Wn. App. at 587-588.

Fearing that they might lose their case entirely, the plaintiffs settled on appeal, without having obtained *any* determination by any court that they would have indeed lost the appeal; indeed, they had *won* on the statute of limitations in the trial court. The Plaintiffs then filed a legal malpractice action, in which they sought damages for (1) the difference between the original judgment and the amount for which they settled, and (2) additional damages not awarded by the trial court.

Under those circumstances, *Nielson* held that the plaintiffs had to prove that the Ninth Circuit Court of Appeals would have *affirmed* the district court's statute of limitations decision in their favor." *Id.* at 592. See further, *id.* at 595. The Court thus placed the burden of proving that the district court was correct on the plaintiff *because it was the plaintiffs who were claiming the risk of loss on appeal.*

Mr. Joudeh faced exactly the opposite situation. He had already lost in the underlying trial court. Thus, in this case, Joudeh was *not* claiming that the trial court was correct; he had already lost. Instead, it is Cochran who argues that Joudeh that the legal malpractice plaintiff must appeal and prove the trial court wrong. Cochran's position thus has far-

reaching implications for the legal malpractice victim's mitigation choices.

Moreover, Cochran made no showing, in either his original Motion, or in Reply, to prove that Joudeh would have won if he had appealed the underlying matter. (The trial court also did *not* address that issue). Cochran instead relied on the mere fact that Joudeh had *not* opposed and appealed the underlying summary judgments as sufficient to defeat proximate cause.

Nevertheless, Mr. Joudeh's Opposition included the entire trial court record relative to the underlying summary judgment motions (including the summary judgment orders). CP 592-595 ¶¶22-32, 684-923. Joudeh thus proved that his claims had been rejected based on the piecemeal settlements. At the very least, his showing shifted the burden of proof to *Cochran, because it is Cochran who claims that the underlying trial court rulings were in error.* See discussion, *supra,* pp. 28-30.

This Court should therefore hold, as a matter of law, that the victims of legal malpractice are *not* required to appeal every adverse decision that follows their lawyer's malpractice; they instead retain the right to make reasonable decisions about whether to appeal. Furthermore, consistent with traditional concepts of burden shifting, when a

defendant/lawyer asserts that the client should have appealed an *erroneous* decision, the lawyer must prove the client's decision was unreasonable *and* that the client would have prevailed on such an appeal. *Nielson* is not to the contrary.

D. The Trial Court Erred When It Required Proof of Causation as a Condition of Fee Disgorgement for an Attorney's Breach of Fiduciary Duty.

Upon accepting representation, Washington attorneys undertake the duties of fiduciaries to their clients, bound to act with utmost fairness and good faith toward the client in all matters. *E.g., Perez v. Pappas,* 98 Wn.2d 835, 840-841, 659 P.2d 475 (1983)(highest duty); *VersusLaw, supra,* 127 Wn. App. at 333("highest duty"); *In re Beakley,* 6 Wn.2d 410, 423, 107 P.2d 1097 (1940)("one of the strongest fiduciary relationships known to the law"); *Bovy v. Graham, Cohen & Wampold,* 17 Wn. App. 567, 570, 564 P.2d 1175 (1977)("'the punctilio of an honor the most sensitive'"). The Court may properly consider the RPC's in an action for breach of fiduciary duty. *E.g., Behnke v. Ahrens,* 172 Wn. App. 281, 297-298, 294 P.3d 729 (2012).

Here, ample, uncontroverted evidence established that Cochran breached his fiduciary duties to Mr. Joudeh, including multiple breaches

of RPC 1.2(a). See pp. 10-14, *supra.*

Washington recognizes fee forfeiture and disgorgement as appropriate remedies for an attorney's breach of fiduciary duty. *Eriks v. Denver,* 118 Wn.2d, 451, 462-463, 824P.2d 1207(1992). Accord, *Shoemake v. Ferrer,* 168 Wn.2d 193, 202-203, 225 P.2d 990 (2010); *Ross v. Scannell,* 97 Wn.2d 598, 610, 647 P.2d 1004 (1982). **No evidence of causation is necessary.** *E.g., Corporate Dissolution of Ocean Shores Park v. Rawson-Sweet,* 132 Wn. App. 903, 914, 134 P.3d 1188 (2006); *Cogan v. Kidder, Mathews & Segner, Inc.,* 97 Wn.2d 658, 662-663, 648 P.2d 875 (1982), *quoting, Mersky v. Multiple Listing Bureau of Olympia, Inc.,* 73 Wn.2d 225, 231, 437 P.2d 897 (1968)(real estate agents).

Mr. Joudeh's Complaint [CP 15, 484], briefing [CP 526-527] and argument [CP 959] expressly raised these issues (as well as the absence of any initial "showing"). The trial court nevertheless dismissed his breach of fiduciary duty cause of action for failure to prove causation. CP 35 ¶16. That decision was erroneous and should be reversed.

E. Genuine Issues of Material Fact Remain Relative to Mr. Joudeh's Consumer Protection Act Cause of Action.

The essential elements of Mr. Joudeh's Consumer Protection Act cause of action include: (1) an unfair or deceptive practice; (2) occurring

in trade or commerce; (3) affecting the public interest; (4) injury to a person's business or property, and; (5) causation. *E.g., Behnke, supra,* 172 Wn. App. at 290.

1. Mr. Cochran's Conduct Was Unfair and Deceptive.

To meet the unfair or deceptive act or practice element, "a plaintiff 'need not show that the act in question was *intended* to deceive, but that the alleged act had the *capacity* to deceive a substantial portion of the public.'" *Behnke, supra,* 172 Wn. App. at 290. The "Washington courts have not tried to decide as a matter of law whether the potential victims of a deceptive act or practice are sufficiently numerous to qualify as 'a substantial portion of the public'...[instead,] the concern...has been to rule out those deceptive acts and practices that are unique to the relationship between plaintiff and defendant." *Id.,* at 292-293. The purpose of the capacity to deceive requirement is "to deter deceptive conduct *before* injury occurs." *Id.,* 172 Wn. App. at 293. See, *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.,* 162 Wn.2d 59, 75, 170 P.3d 10 (2007). Moreover, there must be "a real and substantial potential for repetition." *Behnke, supra,* 172 Wn. App. at 295.

The Washington Rules of Professional Conduct require that attorneys "shall abide by a client's decision whether to settle a matter."

RPC 1.2(a). The client's sole right to make settlement decisions includes the right to make those decisions *without economic coercion by the attorney* related to the attorney's fees and charges.[12] Mr. Cochran's own testimony admits that he used the terms of his firm's form fee agreement for the improper purpose of coercing "unreasonable" clients into accepting his settlement recommendations. See, p. 12, *supra.*

Cochran's problem is *not* that they had reserved the right to require Mr. Joudeh to pay costs, but that they exercised that right for the improper purpose of coercing Mr. Joudeh (and other clients) into accepting Mr. Cochran's settlement recommendations. Doing so was both unfair and deceptive, and satisfies the first CPA element.

2. Cochran's Conduct Occurred in the Entrepreneurial Aspects of the Practice of Law.

An attorney's entrepreneurial conduct in "how the price of legal services is determined, billed, and collected, and the way a law firm

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[12] See, WSBA Ethics Advisory Op. 191 (1994)(rejecting contingent fee provision that, "[i]n very real terms. . .functions to **economically coerce** the client into accepting an offer. . .")[CP431]; *Nehad v. Mukasey,* 535 F.3d 962, 970-971 (9th Cir. 2008)("**lawyer may not burden the client's ability to make settlement decisions by structuring the representation agreement so as to allow the lawyer...to ratchet up the cost of representation, if the client refuses an offer of settlement**")(emphasis added)[CP 446];*Compton v. Kittleson*, 171 P.3d 172 (Alaska 2007)(hybrid fee agreement with conversion trigger impermissibly burdened client's right to settle). CP435.

obtains, retains, and dismissed clients" satisfies the "trade or commerce" CPA element. *Short v. Demopolis,* 103 Wn. 2d 52, 61, 691 P.2d 163 (1984). Mr. Cochran explained that he demanded prepayment of costs because he was "no longer interested in carrying the loan for you on this case" and had "no interest in losing [his] money." CP 409 (27:16-28:12); CP 414, 416-417, 419CP (27:16-28:12). Mr. Joudeh thus satisfied the "trade or commerce" element of his CPA cause of action. See further, Andrews, Arsonson, Fucile, Lachman, *The Law of Lawyering in Washington,* Ch. 15, pp. 15-16, 17 (WSBA 2012)[CP 461-462].

3. Mr. Joudeh Satisfied the Public Interest Element.

RCW 19.86.093(3), adopted in 2009, has the "practical effect of making it easier for claimants" to establish the "public interest" element of a CPA cause of action. *Law of Lawyering in Wash., supra,* p. 15-17 [*id*]. Moreover, in this case involving the law firm's form fee agreement, Mr. Cochran himself confirmed that he has used this same improper practice with other "unreasonable" clients. CP 409 (25:3-13), CP 412 (94:4-9). Mr. Joudeh thus proved the public interest element of his CPA cause of action.

4. Mr. Joudeh Sustained "Injury" Within the Meaning of the Consumer Protection Act; the Extent of His Injury and Proximate Cause Are for the Jury.

The "injury" element of a CPA claim is minimal. *Frias v. Asset Foreclosure Services, Inc.,* 181 Wn.2d 412 ¶¶38-43, 334 P.3d 529 (2014)("quantifiable loss is not required"); *Mason v. Mtg. Am., Inc.,* 114 Wn.2d 842, 854, 792 P.2d 142 (1990). Moreover, whether a defendants' conduct proximately caused damage to the victim presents an issue for the jury. WPI 310.07. See discussion, *supra,* pp. 19-20.

F. Genuine Issues of Material Fact Remain Relative to Mr. Joudeh's Breach of Contract Cause of Action.

In addition to their duties as fiduciaries and under RPC 1.2(a), attorneys undertake a contractual duty to follow their client's instructions. See, 1 Mallen & Smith, *supra*, §8.9, pp. 1005-1008 and n.1 (2014 ed.) ("[t]he undertaking then becomes **contractual** in nature, and the [attorney's] failure to perform can result in **virtual strict liability** for any resulting injury" to the client. (Emphasis added). Accord, *Foothills Dev. Co. v. Clark Co., Bd. of Co. Comm'rs*, 46 Wn. App. 369, 376, 730 P.2d 1369 (1986); *In Re: Discipline of Eugster,* 166 Wn.2d 293, 317, 209 P.3d 435 (2009)(discipline for violating RPC 1.2(a)); *Cultum v. Heritage House Realtor, Inc.*, 103 Wash.2d 623, 632, 694 P.2d 630 (1985) ("attorney is liable for all losses caused by his or her failure to follow the explicit instructions of the client"). **The attorney's failure to follow the client's**

instructions results in liability *regardless of whether the attorney's conduct also fell below the standard of care.* *Cultum, supra,* 103 Wn.2d at 632. Expert testimony is therefore unnecessary because "[n]egligence usually is irrelevant to the question of a breach of contract to follow the client's instructions." 1 Mallen & Smith, *supra,* §8.9, p. 1007.

Here, ample and uncontroverted evidence establishes that Cochran disregarded Joudah's express instructions relative to settlement on numerous occasions. See, pp., 10-14, *supra.* Those acts constitute both breaches of contract *and* of fiduciary duty. CP 566-568 ¶¶25-27.

In the trial court, Cochran raised the same proximate cause argument relative to Mr. Joudeh's breach of contract cause of action, *i.e.*, that "[h]ad plaintiff opposed those summary judgment motions, the claims would not have been dismissed." CP 98-99. Cochran's proximate cause argument fails for the same reasons discussed above (pp. 20-33), which are incorporated here by reference.

Accordingly, genuine issues of material fact also remain relative to Mr. Joudeh's cause of action for breach of contract.

V. Conclusion

The trial court erred on every issue, as a matter of law. Haitham

Joudeh thus asks the Court to reverse the judgment in favor of Cochran in all respects, remand his case for trial on the merits, and award him all taxable costs of this appeal.

DATED: January 13, 2015.

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I hereby certify that on this 13 day of January, 2015, I caused a copy of the foregoing Appellant's Opening Brief to be delivered to Respondents, through their attorneys on the following in the manner indicated below:

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