72533-5

72533-5

NO. 72533-5-I

COURT OF APPEALS STATE OF WASHINGTON

HAITHAM JOUDEH,

Appellant,

v.

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.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 MAR 30 PM 2:48

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Defendants-respondents, Pfau Cochran Vertetis Amala, PLLC, d/b/a Pfau Cochran Vertetis Kosnoff, PLLC, Darrell L. Cochran, and Jane Doe Cochran (collectively Mr. Cochran), ask that this court affirm the superior court's entry of summary judgment of dismissal in their favor.

In this action, plaintiff-appellant Haitham Joudeh alleges legal malpractice and related claims. He alleges that Mr. Cochran mishandled his underlying personal-injury action and then damaged Mr. Joudeh by wrongfully withdrawing from representing Mr. Joudeh in that action. The superior court in this action correctly dismissed his claims on summary judgment because as a matter of law, Mr. Joudeh presented no proof of proximate cause under any legal theory. In the words of settled Washington law, he must prove that he "would have fared better but for" the attorney's alleged errors. *See*, *e.g.*, *Daugert v. Pappas*, 104 Wn.2d 254, 257, 704 P.2d 600 (1985). Mr. Joudeh utterly failed to meet his burden of proving proximate cause, in part because after Mr. Cochran withdrew from the underlying action, Mr. Joudeh failed to raise any competent opposition to the summary judgment motions of the defendants in that action. As the superior court rightly observed:

> I find in this case that the plaintiff's actions in the underlying matter were insufficient mitigation. He failed to respond. That's what separates this case from many of the other cases cited is that it's not just a request of he should

> have appealed, or he should have filed a motion for reconsideration or a CR 60 motion, but an absolute failure to respond at all, which then puts any reviewing court in a position of having to look at the previous success of the defense of the summary judgment by Mr. Cochran on behalf of Mr. Joudeh as well as the inability to necessarily review the erroneous ruling of the trial court because the trial court wasn't given that opportunity. There was no – There was no defense. There was no objection. And even after that nothing subsequently happened. Yes, while contacting 500 attorneys is an action, it's not – It is not sufficient to then decide that you're simply not going to participate in the proceedings. The idea that you can separate yourself out, or in looking at the case involving *Blume*[1] that talks specifically about accepting settlements or negotiating causes or agreeing to dismissal is not what happened here. What happened here is essentially a failure to show up. And Mr. Joudeh as a pro se litigant is held to the same standard as counsel.

RP 18. This same "failure to show up" likewise defeated Mr. Joudeh's claims for breach of contract, violation of the Consumer Protection Act (CPA), and breach of fiduciary duty, and the superior court properly dismissed those claims as well.

II. ASSIGNMENTS OF ERROR

Assignments of Error

Mr. Cochran assigns no error to the superior court's decision.

Issues Pertaining to Assignments of Error

Mr. Joudeh presents an over-the-top attempt to posit 16 separate issues on appeal stemming from this one summary judgment motion. To

[1] *City of Seattle v. Blume*, 134 Wn.2d 243, 947 P.2d 233 (1977), which Mr. Joudeh cited in opposition to Mr. Cochran's summary judgment motion. CP 519, RP 11.

the contrary, this case presents a single issue on appeal, which Mr. Cochran believes is more correctly stated as follows.

Whether this court should affirm summary judgment of dismissal of Mr. Joudeh's claims of legal malpractice, breach of fiduciary duty, breach of contract, and violation of the CPA, where:

1. Mr. Cochran withdrew as counsel for Mr. Joudeh six months before the court in the underlying personal-injury action considered defendants' motions for summary judgment;
2. As a matter of law, while representing himself as plaintiff in the underlying action, Mr. Joudeh was held to the standard of a reasonably prudent attorney;
3. When defendants in the underlying action moved for summary judgment, Mr. Joudeh obtained an extension of his deadline for responding to the summary judgment motions;
4. Counsel did appear for Mr. Joudeh to respond to the motions;
5. Despite obtaining that extension, and despite having 60 total days to respond to the summary judgment motions, Mr. Joudeh failed to respond in writing to those motions;
6. Even after Mr. Joudeh secured counsel who "specially" appeared for him for the limited purpose of responding to the summary judgment motions, that attorney failed to respond in writing to the

summary judgment motions;

7. Mr. Joudeh failed to appeal the entry of summary judgment against him in the underlying action;

8. In such circumstances, Washington courts hold as a matter of law that there is no proximate causation of damages resulting from alleged legal malpractice;

9. As to breach of fiduciary duty, Mr. Joudeh offered no proof of causation or any fees he claims Mr. Cochran must disgorge;

9. As to breach of contract, Mr. Joudeh offered no proof of causation; and

10. As to his CPA claim, Mr. Joudeh offered no proof of (a) a deceptive act or practice; (b) that Mr. Cochran's alleged conduct impacted the public interest; (c) that Mr. Joudeh suffered a loss in his business or property; or (d) proximate cause.

III. STATEMENT OF THE CASE

A. Mr. Joudeh alleged several causes of action against Mr. Cochran that required proof of proximate cause.

On November 7, 2013, Mr. Joudeh sued Mr. Cochran, alleging that he settled the underlying claims in a negligent manner, failed to fully inform plaintiff of the purported effects of settlement, and failed to act consistently with plaintiff's wishes, and thus damaged his claims against non-settling defendants. CP 1, 13-15. Mr. Joudeh alleged causes of action

for (1) legal malpractice, (2) breach of fiduciary duty, and (3) breach of contract. *Id.* On August 8, 2014, Mr. Joudeh amended his complaint to add a fourth claim for violation of the CPA. CP 466, 481-86.

B. In the underlying action, Mr. Joudeh consented to settlements with two of the defendants but later disagreed with Mr. Cochran over the strategy for resolving the remaining claims.

In the underlying personal-injury action, Mr. Joudeh alleged claims against four groups of defendants: Joshua Strickland and Strickland Recovery, LLC ("Strickland"); Matthew Mayo and Trisha Matthews ("Mayo and Matthews"); Auto Trackers & Recovery Inc. ("Auto Trackers"); and Spokane Firefighters Credit Union ("SFCU"). CP 197.

After extensive litigation, Mr. Joudeh settled his claims against defendant Strickland for $250,000 and later settled his claims against Mayo and Matthews for $100,000. CP 215-16. It is undisputed that Mr. Joudeh specifically consented to those settlements. CP 219-224. However, he contends Mr. Cochran failed to inform him adequately of the legal effect of settling with Strickland and Mayo and Matthews and that, as a result, his claims against Auto Trackers and SFCU were later lost. CP 1, 13-15. In fact, Mr. Cochran did explain the ramifications of all aspects of settlement. CP 237-241, 244-48. And in fact, the settlements did not have the adverse consequences that Mr. Joudeh now alleges. CP 236-37, 242-43.

After the initial settlements, Auto Trackers and SFCU both continued to make large settlement offers. CP 254, 257. Mr. Joudeh refused to consider these offers, even though Mr. Cochran had frequently advised him that his chances of succeeding at trial were slim and that trial made no economic sense. CP 233, 249-51. Mr. Joudeh and Mr. Cochran thus developed an irreconcilable conflict about the strategy of pursuing the claims against the remaining defendants, Auto Trackers and SFCU. CP 249-51, 259-63. As a result, Mr. Cochran obtained a trial continuance for Mr. Joudeh and then withdrew as his counsel. CP 265-75.

C. After Mr. Cochran withdrew in the underlying action, Mr. Joudeh allowed six months to pass without retaining new counsel or otherwise prosecuting his case.

Several months after Mr. Cochran withdrew from representation, Auto Trackers and SFCU filed a series of summary judgment motions. CP 292, 301, 277. At the first scheduled hearing, Mr. Joudeh personally appeared and obtained an extension to respond to those motions. CP 312-14. Despite the extension that was granted, Mr. Joudeh never filed an opposition to those summary judgment motions. CP 316-18, 322-26. Instead, he belatedly retained an attorney to appear at the re-noted summary judgment hearing and simply asked for another extension. *Id.*; CP 320. Neither the attorney nor Mr. Joudeh ever presented any substantive opposition to the defendants' motions. CP 316-18, 322-26.

Accordingly, the court dismissed the remaining claims. *Id.*; CP 327-32. Mr. Joudeh also failed to pursue his counterclaims that he concurrently alleged against SFCU in a related lawsuit, and that eventually were dismissed for failure to prosecute. CP 334-36. Mr. Joudeh never appealed the adverse rulings. *Id.*; CP 338-48.

The following chronology of events in the underlying action shows that Mr. Cochran's withdrawal as Mr. Joudeh's counsel did not prejudice Mr. Joudeh's claims against Auto Trackers or SFCU. **Six months** passed between Mr. Cochran's withdrawal and the deadline for responding to defendants' summary judgment motions. As the superior court aptly noted, "[w]hat happened here is essentially a failure to show up. And Mr. Joudeh as a pro se litigant is held to the same standard as counsel."

Date	**Event**
April 21, 2012	$250,000 settlement between Mr. Joudeh and Strickland defendants. CP 216.
August 17, 2012	$100,000 settlement offer from Mayo and Matthews. CP 215, 223-24.
August 20, 2012	$100,000 settlement between Mr. Joudeh and Mayo and Matthews. CP 215.
September 28, 2012	$50,000 settlement offer from defendant Auto Trackers. CP 257.
October 15, 2012	Mr. Cochran notifies Mr. Joudeh that he intends to withdraw. CP 263.
October 17, 2012	$75,000 settlement offer reiterated by defendant SFCU. CP 253-54.
October 18, 2012	Mr. Cochran files Notice of Intent to Withdraw. CP 265-68.

Date	Event
October 18, 2012	Mr. Cochran moves to continue the November 1, 2012 trial date to a date in 2013. CP 272.
October 25, 2012	Defendants Mayo and Matthews move to compel completion of settlement documents.
November 6, 2012	Pursuant to court order, Mr. Joudeh executes release in favor of Mayo and Matthews.
February 15, 2013	Defendant Auto Trackers moves for summary judgment as to vicarious liability. CP 292-300.
February 15, 2013	Defendant SFCU moves for summary judgment. CP 301-10.
March 15, 2013	Hearing date for defendants Auto Trackers and SFCU's motions for summary judgment; court continues motions to April 26, 2013. CP 312-314.
April 15, 2013	Deadline for responding to defendants' summary judgment motions passes without any response from Mr. Joudeh.
April 17, 2013	Attorney Steve Bobman files a "Limited Notice of Appearance Solely for the Purpose of Opposing Summary Judgment Motions." CP 320. No opposition is filed.
April 26, 2013	Court hears oral argument on summary judgment motions. Attorney Bobman moves for continuance of motion. Court denies continuance and grants unopposed summary judgment. CP 316-18, 322-26.
May 17, 2013	Defendant Auto Trackers moves for summary judgment as to all remaining claims. CP 277-91.
June 15, 2013	Hearing date for defendant Auto Trackers' motion for summary judgment as to all remaining claims. Mr. Joudeh fails to oppose it or to appear, and court grants the motion. CP 327-32.

D. During the underlying action, Mr. Cochran asked but did not require Mr. Joudeh to deposit costs to help defray mounting expenses, which the fee agreement allowed.

At the outset of the representation, Mr. Joudeh and Mr. Cochran entered into a written fee agreement. That fee agreement provides, in part:

> Client agrees to reimburse Attorneys ... for all Costs incurred by the same in pursuit of this matter. **At their sole discretion**, Attorneys will advance payment of Costs.... **Attorneys may require Client to pay for all such advanced Costs before additional Costs are incurred by Attorneys**.
>
> ....
>
> Client understands and agrees that the Fees and Costs contained and addressed herein are not set by law but by this agreement, which has been fully and voluntarily negotiated between Attorneys and Client. By signing this agreement, Client acknowledges that Client understands Client may have this agreement reviewed by an independent attorney prior to signing it. Client further understands that Client may have any Fees, Costs, other payments, or any other details arising from this agreement reviewed by a court of law, including a review to ensure that the Fees and Costs are reasonable.

CP 375-76 (emphasis added). Mr. Joudeh signed the fee agreement. CP 379. Thus the agreement gave Mr. Cochran the clear right, in his discretion, to ask Mr. Joudeh at any time to pay costs Mr. Cochran had advanced.

Mr. Cochran advanced the costs of litigating the underlying action. CP 233-35. During the second year of the long and contentious litigation, Mr. Cochran requested that Mr. Joudeh deposit $10,000 in costs for ongoing litigation expenses. *Id.* Mr. Cochran made that request, as the fee agreement plainly allowed, after Mr. Joudeh, in Mr. Cochran's opinion, had unreasonably withheld settlement authority in the face of obvious risks of losing. *Id.*

Mr. Joudeh rejected Mr. Cochran's settlement recommendation at that time. CP 533. Settlement occurred only much later. CP 215-16. Despite asking Mr. Joudeh to pay, Mr. Cochran actually continued advancing costs, did not make Mr. Joudeh pay any part of costs previously incurred, and continued to litigate the underlying action anyway. Mr. Joudeh never advanced any costs in the litigation whatsoever. Contrary to Mr. Joudeh's arguments, there is no testimony or other evidence that Mr. Cochran's request for costs caused or "coerced" him into accepting a settlement offer. His own declaration establishes the opposite. CP 533 ("I would have rejected Mr. Cochran's settlement recommendations despite his demands that I pay future litigation expenses").

E. Mr. Joudeh never alleged, or presented any proof, that Mr. Cochran ever received a fee to be disgorged.

Mr. Joudeh raised a fact dispute as to whether Mr. Cochran had violated his fiduciary duties. Mr. Joudeh argues that Mr. Cochran therefore must disgorge all fees Mr. Joudeh paid him. As a legal issue, that argument is contrary to a long line of Washington cases. *See* § V.E., *infra.* More fundamentally, as a factual issue, Mr. Joudeh's argument fails because this record contains zero proof, or even allegation, of any fee to Mr. Cochran that would be subject to such disgorgement.

Mr. Joudeh's original Complaint did allege that disgorgement of fees was a proper remedy, CP 15, but never specifically alleged that Mr.

Cochran had actually received any such fee. *Id.* Likewise, Mr. Joudeh's Amended Complaint did allege that disgorgement of fees was a proper remedy, CP 484, but never specifically alleged that Mr. Cochran had actually received any such fee. *Id.*

Mr. Joudeh answered an interrogatory in this action that asked him to itemize "each and every element of damages you claim as a result of the events alleged in your complaint." Mr. Joudeh listed a wide range of items, including "hundreds of hours trying to find an attorney to take the case to replace Mr. Cochran," CP 427; "at least $250,000" that he alleges he would have recovered from the defendants in the underlying action that won summary judgment; and as much as $577,500 in special medical damages and general damages. CP 428. However, nowhere does Mr. Joudeh allege that he paid any fee to Mr. Cochran or that he is entitled to reimbursement of any such fee. *See* CP 427-28.

In opposition to Mr. Cochran's summary judgment motion in this action, Mr. Joudeh offered a seven-page declaration. CP 529-34. That declaration was highly critical of Mr. Cochran, yet it contains no mention of any fee that he ever actually paid Mr. Cochran. *Id.* Mr. Joudeh also offered the declaration of standard-of-care expert Phil Cutler. CP 536-83. That lengthy declaration is silent as to what if any fee Mr. Cochran received in representing Mr. Joudeh. The remainder of the record on

appeal is likewise silent as to whether Mr. Joudeh paid Mr. Cochran any fee, and if so, in what amount.

F. Mr. Cochran moved for summary judgment in this action on several grounds, including that Mr. Joudeh could not prove proximate cause as to any of his claims.

After Mr. Joudeh sued Mr. Cochran and the parties engaged in discovery, Mr. Cochran moved for summary judgment on several grounds. CP 82-104. Mr. Joudeh's appeal brief repeatedly mischaracterizes the grounds for that motion. The record, however, clearly shows that Mr. Cochran argued that: (1) Mr. Joudeh had failed to identify or disclose the opinions of a standard-of-care expert to support his legal malpractice and fiduciary duty claims, CP 82, 90-92; (2) Mr. Joudeh could not prove the proximate cause element of any of his claims, CP 82-83, 92-95, 98-99, 100, 103-04; (3) Mr. Joudeh's breach-of-contract claim additionally failed because Mr. Cochran obtained his informed consent to settle, CP 98-99; and (4) Mr. Joudeh's CPA claim failed on all five elements, CP 99-104.

In the superior court and to this court, Mr. Joudeh goes to great lengths to deride Mr. Cochran's argument regarding the absence of expert testimony to show a breach of the standard of care. *See* App. Br. at 17 (calling this argument "frivolous") and 18 (claiming that Mr. Cochran's argument was a "mistaken assertion" that he "conceded [was] error"). This argumentative rhetoric by Mr. Joudeh is utterly false. At the time

Mr. Cochran moved for summary judgment, Mr. Joudeh had failed to produce any expert testimony whatsoever to support his legal-malpractice or breach-of-fiduciary duty claims, despite numerous demands by Mr. Cochran to provide such necessary testimony. CP 83-86. It was only after Mr. Cochran filed his motion that Mr. Joudeh obtained expert testimony, several months behind schedule. CP 924. Thus, the argument was neither frivolous nor error. In his Reply, Mr. Cochran frankly acknowledged that Mr. Joudeh's newly produced evidence "creates an issue of fact whether Mr. Cochran violated the standard of care or fiduciary duties to plaintiff." *Id.* In other words, fact disputes existed, but only on the **breach** element of the legal-malpractice and fiduciary-duty claims. Mr. Cochran did not withdraw any other argument in support of his summary judgment motion.

More importantly for purposes of appeal, Mr. Cochran argued that Mr. Joudeh lacked proof of proximate cause for each of his claims. Mr. Cochran expressly argued that claims of legal malpractice and breach of fiduciary duty both required proof of proximate cause, CP 91, and that Mr. Joudeh lacked proof of proximate cause as to either claim:

> Here, to survive summary judgment, plaintiff first must show that his underlying action was lost or compromised by Mr. Cochran's alleged breach of duty. Plaintiff then must show that he would have fared better in the absence of Mr. Cochran's alleged breach – that is, that he would have prevailed and obtained a better recovery. Plaintiff cannot make the requisite showing because, as a matter of law, the loss of his claims against SFCU and Auto Trackers was not

> caused by Mr. Cochran's conduct but, rather, by plaintiff's own failure to oppose those defendants' summary judgment motions.

CP 93. The Superior court clearly understood this argument to apply both to the legal-malpractice and breach-of-fiduciary-duty claims. CP 948. The record refutes Mr. Joudeh's contentions to the contrary.

Mr. Joudeh also wrongly states that Mr. Cochran did not "assert that Mr. Joudeh could never have recovered a greater amount of damages beyond the settlements negotiated by Mr. Cochran." App. Br. at 19. Mr. Cochran made that argument in his opening motion, in his reply, and at oral argument:

> Plaintiff ... cannot show how settlement constituted a loss. In fact, the settlements totaling $350,000 were a great windfall to plaintiff. He cannot show that he would have obtained more.

CP 104. *See also* CP 927 ("Plaintiff offers zero expert testimony, other proof, or authority ... that plaintiff would have achieved a better outcome had Mr. Cochran acted differently"); CP 955, 965 (arguing that Mr. Joudeh had the burden to, but did not, show that he "ever could have received a dime more than the $350,000 that he did receive in settlement").

In response to Mr. Cochran's summary judgment motion, Mr. Joudeh failed to offer any evidence on the issue of proximate cause. Instead, he offered evidence on the issues of breach of duty and

"mitigation." Neither his own declaration, nor that of his expert, nor any documentary evidence he submitted on summary judgment, shows that Mr. Cochran's conduct caused Mr. Joudeh's claims to be lost or that Mr. Joudeh could have obtained a better result in the absence of the settlements. CP 529-34, 536-83. The material facts regarding proximate cause are undisputed: Mr. Joudeh's claims against Auto Trackers and SFCU were still viable at the time of Mr. Cochran's withdraw, yet in the underlying action, Mr. Joudeh did not oppose defendants' motions for summary judgment or otherwise attempt to prosecute his case.

IV. SUMMARY OF ARGUMENT

The Superior court properly granted summary judgment of dismissal because Mr. Joudeh failed to offer the requisite proof of proximate cause on any cause of action alleged in his complaint. Mr. Joudeh did not present any evidence showing that his underlying action was lost or compromised by Mr. Cochran's conduct or that he would have fared better in the absence of Mr. Cochran's alleged breach. This is fatal to his claims.

Rather than point to any evidence in the record establishing proximate cause, Mr. Joudeh mischaracterizes Mr. Cochran's arguments to the superior court, belabors and misconstrues the "showing" that Mr. Cochran must make to prevail on summary judgment, and misinterprets

the bases for the trial court's ruling. A defendant moving for summary judgment need show only the absence of an issue of material fact to shift the burden to the nonmoving party. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d. 182 (1989). This initial "showing" is met by simply "pointing out to the ... court ... that there is an absence of evidence to support the nonmoving party's case." *Id.* at 225, n.1. Mr. Cochran "pointed out" to the superior court that Mr. Joudeh lacked competent evidence of proximate cause as to each of his claims. CP 82-83, 92-95, 98-99, 100, 103-04. It was therefore Mr. Joudeh's burden to put forth competent evidence of proximate cause. As the trial court concluded, he failed to do so. Mr. Joudeh's brief nevertheless mentions "showing" or a variant thereof some 22 times and twists the meaning of that term. He misuses that term to mean, incorrectly, the legal ground on which a party moves for summary judgment and to imply, also incorrectly, that Mr. Cochran won summary judgment on grounds that he did not argue to the court at the outset of his motion. Mr. Cochran plainly moved for summary judgment on several grounds, including specifically that Mr. Joudeh "failed to challenge or appeal the adverse ruling in the underlying personal-injury action. As a matter of law, that failure defeats plaintiff's proof of proximate cause here." CP 82-83. That is why the superior court granted Mr. Cochran's motion. RP 18.

Mr. Cochran argued that Mr. Joudeh lacked proof of proximate cause not only as to his legal-malpractice claim, but also as to his other claims for breach of fiduciary duty, breach of contract, and violation of the Consumer Protection Act (CPA). CP 82-83, 92-95, 98-99, 100, 103-04. He advanced arguments from the very beginning, in his summary judgment motion. Thus, Mr. Joudeh's contention that Mr. Cochran impermissibly "expanded" his initial argument is false.

As Mr. Cochran argued below, Mr. Joudeh "offers zero expert testimony, other proof, or authority that Mr. Cochran caused plaintiff to lose his claims or that plaintiff would have achieved a better outcome had Mr. Cochran acted differently. The only proof before this court shows that plaintiff proximately caused the loss of his claims." CP 927. This necessarily defeats Mr. Joudeh's claims for legal malpractice, breach of fiduciary duty, breach of contract, and violation of the CPA.

Mr. Joudeh insists that he was not required to prove proximate cause as an element of his breach-of-fiduciary duty claim. However, ample case law — including recent opinions by this court — demonstrates that the elements of a claim for breach of fiduciary duty mirror those of a legal malpractice claim. *See, e.g.*, *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 433–34, 40 P.3d 1206 (2002); *Taylor v. Bell*, __ Wn. App. __, 340 P.3d 951, 959-60 (Div. I

2014) (proximate cause is "an essential element of [plaintiff's] claims for malpractice and breach of fiduciary duty"). It is beyond dispute that proximate cause is an element of a breach-of-fiduciary duty claim. Because Mr. Joudeh put forward no argument or evidence on proximate cause for his breach of fiduciary duty claim — but simply argued in a single sentence that no such evidence was required — his claim for breach of fiduciary duty was properly dismissed. CP 527.

The record on summary judgment is clear: Mr. Joudeh entirely failed to meet his burden of proof of proximate cause. This failure is fatal to each of his claims. The superior court properly dismissed the action.

V. ARGUMENT

A. The standard of review is *de novo.*

This court reviews an order granting summary judgment de novo, performing the same inquiry as the trial court. *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006); *Smith v. Safeco Ins., Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003). The court may affirm a judgment on any ground established by the pleadings and supported by the evidence. *Green v. A.P.C. (Am. Pharmaceutical Co.)*, 136 Wn.2d 87, 94, 960 P.2d 912 (1998); *Stieneke v. Russi*, 145 Wn. App. 544, 559-60, 190 P.3d 60 (2008). "[A]n appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it." *LaMon v. Butler*, 112 Wn.2d 193, 200-01,

770 P.2d 1027 (1989), *cert. denied*, 493 U.S. 814, 110 S. Ct. 61, 107 L. Ed. 2d 29 (1989); *see also Northwest Collectors, Inc. v. Enders*, 74 Wn.2d 585, 595, 446 P.2d 200 (1968) ("[t]he trial court can be sustained on any ground within the proof"); *Kirkpatrick v. Dept. of Labor & Indust.*, 48 Wn.2d 51, 53, 290 P.2d 979 (1955) ("[w]here a judgment or order is correct, it will not be reversed because the court gave a wrong or insufficient reason for its rendition").

Here, the record supports the trial court's ruling that Mr. Joudeh failed to prove the proximate cause element of each of his claims.

B. Mr. Cochran showed the absence of genuine issues of material fact on summary judgment, shifting the burden to Mr. Joudeh to present competent evidence to support the elements of his claims, which he failed to do.

The purpose of summary judgment is to avoid useless trials on issues that cannot be factually supported, or, if factually supported, could not, as a matter of law, lead to an outcome favorable to the non-moving party. *Burris v. General Ins. Co. of America*, 16 Wn. App. 73, 75, 553 P.2d 125 (1976). If the moving party shows the absence of a genuine issue of material fact, the non-moving party must set forth facts showing that a genuine issue exists for trial. *Young,* 112 Wn.2d at 225.

A moving defendant bears the initial burden of showing that either (1) the plaintiff lacks competent evidence to support an essential element of his case or (2) there is no genuine issue of material fact. *Fisher v. Aldi*

Tire, Inc., 78 Wn. App. 902, 906, 902 P.2d 166 (1995); *Guile v. Ballard Community Hosp.*, 70 Wn. App. 18, 21-22, 851 P.2d 689 (1993). A defendant may support its motion for summary judgment by "merely challenging the sufficiency of the plaintiff's evidence as to any material issue." *Las v. Yellow Front Stores*, 66 Wn. App. 196, 198, 839 P.2d 744 (1992). If the defendant meets this initial burden, "then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' then the trial court should grant the motion." *Young*, 112 Wn.2d at 225 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). In *Celotex*, the United States Supreme Court explained:

> In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of a non-moving party's case necessarily renders all other facts immaterial.

Celotex, 477 U.S. at 322-23.

The plaintiff may not rely on the bare allegations in her pleadings to defeat summary judgment, but must set forth specific, admissible facts showing that there is a genuine issue for trial. *Las*, 66 Wn. App. at 198; *Baldwin v. Sisters of Providence, Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989); *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355,

359, 753 P.2d 517 (1988). A summary judgment cannot be defeated with speculation, conjecture, or mere possibility. *Chamberlain v. Dep't of Transp.*, 79 Wn. App. 212, 215-16, 901 P.2d 344 (1995); *Curran v. City of Marysville,* 53 Wn. App. 358, 367, 766 P.2d. 1141 (1989).

On appeal, Mr. Joudeh repeatedly misconstrues these summary judgment standards to raise the false implications that Mr. Cochran had the burden of disproving the elements of Mr. Joudeh's claims and that Mr. Cochran won summary judgment on grounds that his motion did not raise the onset. Both implications are false. Mr. Joudeh obfuscates the legal standards and the arguments to the superior court only because he entirely failed to prove proximate cause or to meet his burden to present competent evidence to defeat summary judgment.

Before the superior court, Mr. Cochran challenged the sufficiency of Mr. Joudeh's evidence of proximate cause — an element essential to his case — on all claims: legal malpractice, breach of fiduciary duty, breach of contract, and violation of the CPA. CP 82-83, 92-95, 98-99, 100, 103-104. Thus, it was Mr. Joudeh's burden to present specific, admissible facts showing proximate cause. Mr. Joudeh submitted no evidence that Mr. Cochran lost or compromised Mr. Joudeh's claims or that he could have obtained a better outcome in the underlying action. Indeed, the only evidence on the issue of proximate cause showed that,

when Mr. Cochran withdrew from representation, Mr. Joudeh's claims were still viable, and that months later Mr. Joudeh simply allowed his claims to be dismissed by failing to oppose the remaining defendants summary judgment motions. These undisputed facts — and the absence of material facts supporting proximate cause — entitled Mr. Cochran to summary judgment of dismissal.

C. The superior court correctly dismissed Mr. Joudeh's legal-malpractice claim on summary judgment because he did not and could not prove Mr. Cochran's conduct proximately caused his claimed damages.

Proximate cause in a legal malpractice case is determined by the "but for" test. *Griswold v. Kilpatrick*, 107 Wn. App. 757, 760, 27 P.3d 246 (2001). The plaintiff-client bears the burden of demonstrating that, "but for" the attorney's negligence, the client would have obtained a better result. *Daugert*, 104 Wn.2d at 263. This necessarily involves two steps. The first question is whether the lawyer's alleged conduct caused the client's underlying action to be lost or compromised. *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 235–36, 974 P.2d 1275 (1999). The second question is whether the client would have fared better but for the lawyer's alleged mishandling of the underlying cause of action. *Id.* Expert testimony may be required to prove proximate cause in a legal-malpractice action. *Geer v. Tonnen*, 137 Wn. App. 838, 155 P.3d 163 (2009).

Therefore, Washington law required Mr. Joudeh to show (1) that Mr. Cochran's conduct lost or compromised Mr. Joudeh's claims; and (2) that Mr. Joudeh would have fared better but for Mr. Cochran's alleged malpractice – that is, that he would have prevailed and obtained a better recovery. Mr. Joudeh failed to show either. As a matter of law, the loss of his claims against SFCU and Auto Trackers resulted not from Mr. Cochran's conduct, but from Mr. Joudeh's own failure to oppose those defendants' summary judgment motions.

Mr. Joudeh resorts to platitudes about the sanctity of the jury and cites inapposite cases outside the realm of legal malpractice to suggest that the superior court cannot decide proximate cause on summary judgment. These arguments are unavailing. As this court has observed, the unique characteristics of a legal-malpractice action may make the issue of proximate cause in those cases more suitable to summary adjudication. *Brust v. Newton*, 70 Wn. App. 286, 290, 852 P.2d 1092 (1993), *rev. den.*, 123 Wn.2d 1010, 869 P.2d 1085 (1994); *see also Nielson*, 100 Wn. App. at 594. Indeed, proximate cause is frequently decided on summary judgment in legal-malpractice actions. *See, e.g.*, *Estep v. Hamilton*, 148 Wn. App. 246, 256-57, 201 P.3d 331 (2008), *review denied*, 166 Wn.2d 1027 (2009) (where legal-malpractice plaintiff "merely speculates what may have been the outcome of divorce litigation had she elected to litigate

rather than agree to final papers ..., she fails the 'but for' test"); *Powell v. Associated Counsel for Accused*, 146 Wn. App. 242, 249, 191 P.3d 896 (2008); *Griswold*, 107 Wn. App. at 760-63 (plaintiff's speculative evidence that she could have obtained a better settlement in the absence of attorney's negligence was insufficient to establish proximate cause); *Smith v. Preston Gates Ellis, LLP*, 135 Wn. App. 859, 864-70, 147 P.3d 600 (2006) (plaintiff failed to establish "but for" element of legal malpractice); *Sherry v. Diercks*, 29 Wn. App. 433, 628 P.2d 1336 (1981) (plaintiff failed to establish proximate cause in legal malpractice action against attorney who allowed default judgment to be taken against him, where plaintiff did not show that, had the underlying action been defended, he would have prevailed or achieved a better result); *Nielson v. Eisenhower & Carlson*, 100 Wn. App. 584, 594, 999 P.2d 42 (2000) (plaintiff failed to establish that attorney's incorrect advice, which led client to accept allegedly unfavorable settlement, proximately caused loss where as a matter of law the underlying court would not have rendered a more favorable judgment if the claim had been further litigated); *Daugert*, 104 Wn.2d at 260. This is especially true where, as here, the dispositive facts are undisputed: several months after Mr. Cochran withdrew, plaintiff failed to oppose the remaining defendants' summary judgment motions or to seek relief from the court's orders. The legal effect of those failures is a question of law

that the superior court properly decided on summary judgment.

1. The claims against SFCU and Auto Trackers were still viable at the time of Mr. Cochran's withdrawal.

Mr. Joudeh's entire case is premised on the notion that the settlements with Strickland, Mayo, and Matthews destroyed the claims against SFCU and Auto Trackers and that Mr. Cochran was therefore negligent in failing to concurrently settle with all defendants (or pursue some other strategy of settlement). This is based on an assumption that Strickland, Mayo, and Matthews were agents of the other defendants and that the claims against SFCU and Auto Trackers did not depend solely on vicarious liability claims. This assumption is incorrect. The claims against SFCU and Auto Trackers were not rooted — at least exclusively — in vicarious liability. *See* CP 197. Mr. Cochran pleaded a claim against Auto Trackers for negligent hiring, training, and supervision. *Id.* Similarly, the claims against SFCU were not based on a theory of vicarious liability. In fact, Mr. Cochran had already successfully survived a summary judgment motion by SFCU by arguing, in part, that SFCU had a non-delegable duties and was directly liable for breach of the peace. CP 381, 340. Mr. Cochran also asserted a negligence claim against SFCU alleging that it was liable for failure to properly investigate the persons it hired. CP 197.

Thus, the settlements with Strickland, Mayo, and Matthews did not harm the remaining case against SFCU and Auto Trackers. (Indeed, SFCU and Auto Trackers continued to negotiate the settlement of the remaining claims even after those parties knew that the other defendants had settled. At the time Mr. Cochran withdrew, he had obtained handsome settlement offers from both of those defendants. CP 253-4, 257.) Therefore, to the extent Mr. Joudeh's claims against SFCU and Auto Trackers were lost, Mr. Cochran's conduct did not cause that loss. As a matter of law, Mr. Joudeh failed to prove proximate cause.

Mr. Joudeh argues that Mr. Cochran did not show that the court in the underlying action erred in granting the summary judgment motions and would have decided the motions differently had Mr. Joudeh opposed them. He is wrong for two reasons. First, Mr. Cochran did show that Mr. Joudeh could have successfully opposed those motions, and this court can easily make that determination from the record. *See* CP 381, 340, 932 ("Plaintiff had the means and opportunity to oppose the motions, including the materials from a prior successful proceeding upon which he could rely"). Second, Mr. Joudeh again attempts improperly to shift the burden of proof on summary judgment. Mr. Joudeh, not Mr. Cochran, had the burden to prove causation. *Laguna v. State Dep't of Transp.*, 146 Wn. App. 260, 266 n. 12, 192 P.3d 374 (2008) (defendant moving for summary

judgment need show only that plaintiff lacks proof of an element of his claim). Mr. Joudeh could have attempted to prove proximate cause by showing that his opposition to the motions in the underlying action would have been futile as a matter of law. But Mr. Joudeh made no effort to prove that, as he was required to do. He therefore entirely failed prove that Mr. Cochran caused the loss of his claims.

2. Mr. Joudeh's own failure to oppose Auto Trackers' and SFCU's summary judgment motions caused the loss of his claims.

In the underlying action, after Mr. Cochran withdrew from representing him, Mr. Joudeh abandoned his remaining claims. He did nothing to oppose Auto Trackers' and SFCU's motions for summary judgment. Because Mr. Joudeh had claims against each of those defendants that did not depend on vicarious liability, he could have defeated summary judgment if he had put forward an opposition. Mr. Cochran is not legally responsible for Mr. Joudeh's loss, which resulted from his own acts or omissions or those of his successor counsel. *Nielson*, 100 Wn. App. at 593 ("showing the plaintiff is the sole cause of his or her injury is one of several ways to break the chain of causation").

The circumstances here are analogous to those cases where a plaintiff fails to appeal an erroneous judgment and instead sues his attorney for malpractice. *See Paradise Orchards General Partnership v.*

Fearing, 122 Wn. App. 507, 94 P.3d 372 (2004), *review denied*, 153 Wn.2d 1027 (2005). In *Paradise Orchards*, attorney Fearing drafted documents for orchard seller Paradise. When the deal fell through, Paradise sought specific performance, but the trial court ruled its contract allowed no specific performance. Paradise failed to appeal that decision and, instead, settled with the buyer on unfavorable terms. It then sued Fearing for legal malpractice. The Court of Appeals in the malpractice action held that the court in the underlying action had erred and that the contract allowed specific performance; because Paradise gave up the opportunity to challenge that erroneous ruling through appeal, it could not prove causation in its malpractice claim. *Id.* at 520. An aggrieved party must challenge an erroneous ruling rather than sue counsel for that error.

Similarly, here Mr. Joudeh failed to challenge the remaining defendants' summary judgment motions, allowed judgment to be taken against him, and did not appeal the adverse ruling. He asserts only that he tried to retain a new lawyer and that those attempts were reasonable. However, the reasonableness of Mr. Joudeh's attempts to retain new counsel are immaterial and cannot excuse his failure to oppose the motions. The law does not distinguish between one who conducts his own legal affairs and one represented by counsel – "both are subject to the same procedural and substantive laws." *In re Marriage of Olson*, 69 Wn.

App. 621, 626, 850 P.2d 527 (1993) (citation omitted). His damages, if any, stem from his own failures and not from Mr. Cochran's conduct. Mr. Joudeh's remedy was to oppose the motions and appeal any adverse ruling. Because he failed to do either, as a matter of law he failed to prove proximate cause. These failures are fatal to his malpractice claims.

3. Mr. Joudeh failed to offer any evidence that he would have obtained a more favorable result in the absence of Mr. Cochran's alleged negligence.

Mr. Joudeh offers his own testimony that, had he known about the alleged risks posed by settlements with defendant Strickland and defendants Mayo and Matthews, he would not have accepted the settlements. CP 531-32. However, this testimony does not create an issue of fact on proximate cause because it fails to prove (1) that Mr. Cochran's conduct defeated his claims, as discussed above, or (2) that he would have fared better had he rejected the $350,000 in settlement and pursued his claims by another strategy. The record is totally silent as to whether Mr. Joudeh could have achieved a more favorable result. To the extent Mr. Joudeh contends otherwise, it is mere speculation, rather than any actual evidence to meet his burden of proof.

Several cases are illustrative. In *Diercks*, 29 Wn. App. at 437, the plaintiff-client sued his former attorney for allowing a default judgment to be taken against him. The trial court granted summary judgment to the

attorney on the issue of proximate cause. The Court of Appeals affirmed, holding that the plaintiff failed to establish that, had the case been defended, he would have prevailed or achieved a better result in the action. Here, too, Mr. Joudeh failed to show that, had he rejected the settlement offers, he could have achieved a better result.

Similarly, in *Nielson*, 100 Wn. App. at 594, the plaintiff-clients obtained a favorable judgment against a hospital at trial, but settled the matter while it was on appeal for a portion of the total award to avoid the risk of losing on a statute-of-limitations issue. In the later legal-malpractice action, the plaintiffs sought (among other things) the difference between the judgment and the settlement amount, claiming that the attorney negligently advised them about the applicable limitations period. The superior court dismissed the malpractice claim on summary judgment, and the Court of Appeals affirmed, reasoning that the plaintiffs had failed to prove proximate cause because, as a matter of law, the underlying court would have rendered the same judgment "with or without" the attorney's negligence. *Id.* at 599.

In *Estep*, 148 Wn. App. 246, 256-57, a plaintiff-client in a dissolution action sued her attorney for failing to preserve her beneficiary interest in her ex-husband's life insurance policy. The superior court granted summary judgment to the attorney, and the Court of Appeals

affirmed, concluding that plaintiff could not prove proximate cause because she had elected to settle rather than litigate the issue and, therefore, could only speculate as to whether she would have prevailed. *Id.* at 256-57; *see also Griswold*, 107 Wn. App. at 760-63 (plaintiff's speculative evidence that she could have obtained a better settlement in the absence of attorney's negligence was insufficient to establish proximate cause); *Smith v. Preston Gates Ellis*, 135 Wn. App. at 864-70 (plaintiff failed to establish "but for" element of legal malpractice).

This case resembles all of the preceding cases. Mr. Joudeh settled some of his claims in the underlying action based on allegedly incomplete advice and then elected not to litigate the remainder of his claims and failed to oppose summary judgment motions in any way. Instead, he chose to sue his attorney. Yet he offers no expert testimony, other proof, or authority that Mr. Cochran caused him to lose his claims or that he would have achieved a better outcome had Mr. Cochran acted differently. The only proof before this court shows that Mr. Joudeh proximately caused the loss of his own claims. Accordingly, the superior court properly granted summary judgment to Mr. Cochran.

D. The superior court correctly dismissed Mr. Joudeh's breach-of-fiduciary-duty claim on summary judgment because he did not and could not prove that such conduct by Mr. Cochran proximately caused his claimed damages.

Washington law requires that to establish liability for breach of fiduciary duty, the plaintiff has the burden of proving

> (1) existence of a duty owed, (2) breach of that duty, (3) resulting injury, and (4) that the claimed breach proximately caused the injury.

Micro Enhancement, 110 Wn. App. at 433-34 (citing *Miller v. U.S. Bank of Wash.*, 72 Wn. App. 416, 426, 865 P.2d 536 (1994)). *See also Taylor,* __ Wn. App. at __, 340 P.3d at 951, 959-60 (proximate cause is "an essential element of [plaintiff's] claims for malpractice and breach of fiduciary duty"); *Senn v. Northwest Underwriters, Inc.*, 74 Wn. App. 408, 414, 875 P.2d 637 (1994) (citing *Interlake Porsche + Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 509, 728 P.2d 597 (1986), *rev. denied* 107 Wn.2d 1022 (1987)) (claims for breach of fiduciary duty against corporate officer and director required proof of causation of harm); *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 895, 167 P.3d 610 (2007), *rev. den.*, 163 Wn.2d 1042, 187 P.3d 270 (2008) (proximate cause is necessary element of breach-of-fiduciary duty claim); DeWolf, 29 *Wash. Prac., Wash. Elements of an Action* § 12:1 (2014-15 ed.) (essential elements of a breach of fiduciary-duty cause of action under Washington law include "[t]hat the damages were proximately caused by the fiduciary's breach of

the standard of care").

For the reasons discussed above with respect to Mr. Joudeh's legal-malpractice claim, as a matter of law he cannot prove proximate cause as to his breach-of-fiduciary-duty claim. Mr. Joudeh nevertheless argues that the trial court erred because it ignored "uncontroverted" evidence that Mr. Cochran breached his fiduciary duty, entitling him to disgorgement of fees. First, there were no "uncontroverted" breaches of fiduciary duty as Mr. Joudeh contends. Mr. Cochran conceded that expert testimony raised fact disputes as to the element of breach on summary judgment, but he did not agree that breaches had in fact occurred, and he would vehemently dispute that if the case were to go to trial. Rather, the element of breach was simply no longer a basis for summary judgment.

Second, Mr. Joudeh argues that he need not present proof of causation to obtain a remedy of fee disgorgement for a breach of fiduciary duty. This is contrary to the settled Washington law cited above. Moreover, the three cases Mr. Joudeh cites for that proposition do not say anything of the sort; in fact, none addresses the issue of proximate cause. Only one of those cases involves an attorney-client relationship — *In re Corporate Dissolution of Ocean Shores Park, Inc.*, 132 Wn. App. 903, 134 P.3d 1188 (2006) — and that case states only that business transactions between and attorney and client are presumptively fraudulent

and unenforceable as violative of public policy. That issue has no bearing on this case. The other cases involve conflicts between brokers and clients and are similarly inapposite. Mr. Joudeh must prove proximate cause as an element of his breach-of-fiduciary-duty claim.

Finally, even if Mr. Joudeh could otherwise prove a breach of fiduciary duty, he wholly failed to submit any evidence in the record that he paid fees to Mr. Cochran. Thus, this court cannot conclude that Mr. Joudeh would be entitled to the remedy of fee disgorgement. *Leppaluoto v. Eggleston*, 57 Wn.2d 393, 408, 357 P.2d 725 (1960) ("Obviously, no court can require a fiduciary to disgorge ill-gotten gains unless and until such gains are proved to exist"). Nor is disgorgement of fees required in cases of breach of fiduciary duty. *Kelly v. Foster*, 62 Wn. App. 150, 154, 813 P.2d 598, *rev. den.*, 118 Wn.2d 1001, 822 P.2d 287 (1991) (breach of fiduciary duty does not require reimbursement of attorney fees; trial court properly denied request for disgorgement where attorney did not engage in fraudulent acts or gross misconduct).

E. The superior court correctly dismissed Mr. Joudeh's breach-of-contract claim on summary judgment because he failed to prove causation.

A claim for breach of contract presents a question of law that the superior court properly may decide on summary judgment. *See, e.g., Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn. App. 416, 909 P.2d

1323 (1995); *Voorde Poorte v. Evans*, 66 Wn. App. 358, 362, 832 P.2d 105 (1992); *Marquez v. Univ. of Wash.*, 32 Wn. App. 302, 306, 648 P.2d 94 (1982). "A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant." *Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995).

Here, a single provision of the parties' contract is at issue: "Attorneys will obtain Client's informed consent prior to any settlement arising from this agreement." CP 125. Mr. Joudeh alleges that he did not give "informed" consent because the implications of settling with some but not all of the defendants supposedly was not explained to him.

As with Mr. Joudeh's other claims, his breach-of-contract claim depends on the speculation that settlements with other defendants squandered his causes of action against Auto Trackers and SFCU. To survive summary judgment, Mr. Joudeh must show that Mr. Cochran's alleged breach caused him to lose those claims. As set forth in detail above, the initial settlements did not harm Mr. Joudeh's claims against the remaining defendants, rather, those claims were dismissed because he wholly failed to oppose the summary judgment motions by Auto Trackers and SFCU. Had Mr. Joudeh opposed those summary judgment motions, the claims would not have been dismissed. He therefore cannot prove

that, even if Mr. Cochran did breach the fee agreement, that breach proximately caused a dismissal of the remaining claims. Mr. Joudeh's breach-of-contract claim failed as a matter of law.

F. The trial court properly dismissed Mr. Joudeh's CPA claim as a matter of law for failure to establish proximate cause or cognizable injury.

Mr. Joudeh alleged that Mr. Cochran violated the CPA "by having first agreed to advance Plaintiff Joudeh's litigation expenses, but then, when Plaintiff Joudeh rejected Defendant Cochran's settlement recommendations, demanding that Plaintiff Joudeh deposit $10,000 toward litigation expenses as a means of coercing Mr. Joudeh into accepting Defendants' settlement recommendations." This claim is groundless.

Under the CPA, RCW 19.86.020, a plaintiff must establish that (1) the defendant engaged in an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) that impacts the public interest, (4) the plaintiff has suffered injury to business or property, and (5) the injury is causally linked to the unfair or deceptive act. *Michael v. Mosquera-Lacy,* 165 Wn.2d 595, 602, 200 P.3d 695 (2009). Failure to support even one of the five elements is fatal to a CPA claim. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531 (1986). In this case, Mr. Joudeh's CPA claim fails at least on the first,

third, fourth, and fifth elements.

1. Mr. Cochran did not engage in a deceptive act or practice.

Under the CPA, deception exists if "there is a representation, omission, or practice that is likely to mislead a reasonable consumer." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 50, 204 P.3d 885, 895 (2009) (internal quotation marks and citation omitted). "The definition of 'unfair' and 'deceptive' must be objective to prevent every consumer complaint from becoming a triable violation of the act." *Behnke v. Ahrens*, 172 Wn. App. 281, 293, 294 P.3d 729 (2012). Moreover, to "establish the first element of a private CPA action, plaintiff must show that the act in question had 'the capacity to deceive a substantial portion of the public.'" *Roger Crane & Assoc. v. Felice*, 74 Wn. App. 769, 780, 875 P.2d 705 (1994) (quoting *Hangman Ridge*, 105 Wn.2d at 785) (italics omitted). Only acts that have the capacity to deceive a substantial portion of the public are actionable. *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 744, 935 P.2d 628 (1997) (citation omitted)

Mr. Joudeh did not establish that Mr. Cochran's act in requesting that he pay some costs of litigation midway through the representation was unfair or deceptive. In fact, the fee agreement that Mr. Joudeh read, signed, and was bound by expressly permitted it: "At their sole discretion, Attorneys will advance payment of Costs .... Attorneys may require

Client to pay for all such advanced Costs before additional Costs are incurred by Attorneys." CP 375-76. Mr. Cochran clearly reserved the right to change the cost structure at any time, and that right was communicated to Mr. Joudeh at the outset of litigation. Moreover, Mr. Cochran did not alter the scope or extent of Mr. Joudeh's obligation — he was ultimately responsible for paying the costs of litigation regardless. *Id.* A reasonable consumer would not be misled under those circumstances. There was no unfair or deceptive act.

In addition, Mr. Joudeh did not show that the conduct at issue had the capacity to deceive a substantial portion of the public. "In applying the requirement that the allegedly deceptive act has the capacity to deceive 'a substantial portion of the public,' the concern of Washington courts has been to rule out those deceptive acts and practices that are unique to the relationship between plaintiff and defendant." *Behnke*, 172 Wn. App. at 292-93; *see also Burns v. McClinton*, 135 Wn. App. 285, 303-06, 143 P.3d 630 (2006), *review denied*, 161 Wn.2d 1005, 166 P.3d 718 (2007) (even if accountant's breach of fee agreement was deceptive to client, it was not a practice with the potential to deceive other members of the public). Here, Mr. Joudeh can only speculate that a substantial portion of the public would be deceived by the practice at issue. Thus, he cannot prove an unfair or deceptive act under the CPA.

2. Mr. Joudeh cannot show any impact on the public interest.

The third element of a CPA claim requires plaintiff to show an impact on the public interest. "Ordinarily, a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest." *Hangman Ridge*, 105 Wn.2d at 790. "This is often the case with legal services." *Behnke*, 172 Wn. App. at 293. In a case arising out of a private dispute, like this one, a plaintiff must prove the public-interest-impact element by showing a likelihood that "additional plaintiffs **have been or will be injured in exactly the same fashion**." *Hangman Ridge*, 105 Wn.2d at 791 (emphasis added). "There must be shown a real and substantial potential for repetition, as opposed to a hypothetical possibility of an isolated unfair or deceptive act's being repeated." *Michael*, 165 Wn.2d at 604-05 (citation and internal quotation marks omitted).

Here, Mr. Joudeh did not allege, much less prove, that additional plaintiffs have been or will be injured in precisely the same manner as he was allegedly injured. He presented no proof of other claims against Mr. Cochran or instances in which the facts match the unique factual circumstances of this case. Indeed, there have been no other such claims against Mr. Cochran. Mr. Joudeh simply speculates that, because Mr. Cochran has used the same fee agreement with other clients, which allows

him not to advance costs, an allegedly deceptive act could be repeated. Speculation and conclusory allegations are insufficient to defeat a summary judgment motion. *Kyreacos v. Smith*, 89 Wn.2d 425, 429, 572 P.2d 723 (1977). There is no evidence that other clients were or will be harmed. *Michael v. Mosquera-Lacy,* 165 Wn.2d 595, 604-05, 200 P.3d 695 (2009) (hypothetical possibility that deceptive act will cause harm to others is insufficient). Mr. Joudeh's alleged injury arises out of unique factual circumstances relating to a private contract with Mr. Cochran. There is no real and substantial potential for repetition. This private matter has no effect on the public interest. Mr. Joudeh's CPA claim therefore failed as a matter of law, and the superior court rightly dismissed it on summary judgment.

3. Mr. Joudeh did not prove injury to business or property or any causal link between Mr. Cochran's conduct and his alleged injury.

Without a showing of injury, there is no CPA claim. *Ledcor Ind. (USA), Inc. v. Mut. of Enumclaw Ins. Co.*, 150 Wn. App. 1, 12-13, 206 P.3d 1255 (2009). Under the CPA, there must be an injury to business or property. *Ambach v. French*, 167 Wn.2d 167, 171-72, 216 P.3d 405 (2009). Personal injury damages are not compensable under the CPA. *Id.* at 173. Furthermore, a plaintiff's injury must be causally related to the deceptive act or practice. *Michael*, 165 Wn.2d at 602.

Mr. Joudeh alleges that he was "coerced" into accepting Mr. Cochran's settlement recommendations but does not identify what damages this alleged violation of the CPA supposedly caused. Indeed, on appeal, he does not even argue that he suffered a loss as a result of the CPA violation, but suggests only that a quantifiable loss is not required to prove his claim. *See* App. Br. at 38. This omission is unsurprising, since Mr. Joudeh cannot show how the settlements totaling $350,000 constituted a loss. He made no attempt on summary judgment to prove that he could have obtained more. This record contains no evidence showing a cognizable injury. His CPA claim fails on this basis.

There is similarly no evidence that Mr. Joudeh was, in fact, "coerced" into accepting a settlement recommendation. After Mr. Cochran requested that Mr. Joudeh make a cost deposit, he continued to reject Mr. Cochran's settlement recommendations. Mr. Joudeh's own declaration states this. CP 533. Mr. Cochran nevertheless did not enforce his request for costs. The claims were eventually settled several months after Mr. Cochran had made the request for costs. The connection between the request and Mr. Joudeh's decision to settle is so attenuated as to be nonexistent. Moreover, it is not clear how Mr. Joudeh could have been "coerced" when he was obligated to pay the costs and knew that Mr. Cochran could request payment of costs at any time. In these

circumstances, no reasonable person could conclude that Mr. Cochran's request had a causal link to Mr. Joudeh's decision to settle. This defeats proximate cause. To the extent he alleges that the settlements compromised his other claims, such a claim would also be defeated by lack of proximate cause, as set forth in the arguments above.

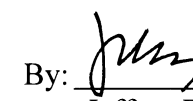
As a matter of law, Mr. Joudeh cannot prove essential elements of his CPA claim. That claim must was properly dismissed.

VI. CONCLUSION

The superior court properly granted summary judgment of dismissal because Mr. Joudeh failed to offer the requisite proof of proximate cause on any cause of action alleged in his complaint. Specifically, Mr. Joudeh failed to present any evidence showing that his underlying action was lost or compromised by Mr. Cochran's conduct or that he would have fared better in the absence of Mr. Cochran's alleged breach. Accordingly, this court should affirm the superior court's summary judgment of dismissal.

Respectfully submitted this 30th day of March, 2015.

LEE SMART, P.S., INC.

By: 

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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on March 30, 2015, I caused service of the foregoing pleading on each and every attorney of record herein:

VIA LEGAL MESSENGER

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DATED this 30th day of March, 2015 at Seattle, Washington.

Christie A. Williams, Legal Assistant