No. 925372

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

Court of Appeals No. 72533-5-I

HAITHAM JOUDEH,

Petitioner/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.

PETITIONER'S RAP 3.3 MOTION TO CONSOLIDATE THIS CASE WITH *AUER v. LEACH,* SUPREME COURT CASE NO. 927782

Brian J. Waid
WSBA No. 26038
Jessica M. Creager
WSBA No. 42183
WAID LAW OFFICE
5400 California Ave. S. W., Ste D
Seattle, Washington 98136
Counsel for Petitioner/Appellant

I. Identity of Moving Party:

Petitioner Haitham Joudeh was the plaintiff in the underlying King County Superior Court legal malpractice case, and the appellant in the underlying Division I appeal.

II. Relief Sought:

Petitioner Joudeh asks the Court to consolidate this case, including his pending Petition for Review, with the similarly-pending Petition for Review in *Auer v. Leach,* Washington Supreme Court Case no. 927782, pursuant to RAP 3.3(b). Both cases raise the same, fundamental issue of how a legal malpractice plaintiff proves proximate cause, and more particularly whether the legal malpractice plaintiff must offer expert testimony to prove proximate cause. This fundamental issue is also pending in *Slack v. Luke,* a Division III Court of Appeals Case no. 32921-6. See n. 1, *infra.*

III. Parts of the Record Relevant to the Motion:

The parts of the Record in this case relevant to this Motion include:

1. *Joudeh* Petition for Review, p. 2 (Issue no. 1: "Consistent with *Daugert v. Pappas,* how does a legal malpractice victim prove causation in a legal malpractice action?").

2. *Joudeh* Petition for Review, pp. 10-13 ("Victims of legal malpractice prove causation through inferences drawn from Evidence in

the trial-within-the-trial").

3. Court of Appeals Opinion, Appendix A to *Joudeh* Petition for Review, pp. 9-12.

In addition, the following parts of the Record in *Auer v. Leach,* Washington Supreme Court Case no. 927782 are relevant to this Motion:[1]

1. *Auer* Petition for Review, pp. 1-2, 11-13 (Is expert testimony required to establish proximate cause)?

2. Court of Appeals Opinion in *Auer v. Leach,* Appendix B to *Auer* Petition for Review, pp. 18-24.

3. Motion to Publish filed by Attorneys Liability Protection Society in *Auer v. Leach,* Div. II Case no. 46105-6-II. See n. 1.

IV. STATEMENT OF GROUNDS FOR RELIEF SOUGHT

RAP 3.3(b) authorizes consolidation of cases pending in this Court if doing so "would save time and expense and provide for a fair review of the cases." The Petitions for Review in *Joudeh* and *Auer* both raise essentially the same, fundamental issue of how a legal malpractice plaintiff proves proximate cause. *Joudeh* Pet. for Rev. pp. 2, 10-13; *Auer* Pet. for Rev., pp. 1-2, 11-13. Indeed, the Motion to Publish, filed by the Attorneys Liability Protection Society ("ALPS") in the Division II *Auer* in

[1] To obviate any issue related to whether the Court can or should take judicial notice of pleadings from other cases, copies of the referenced pleadings from *Auer v. Leach* and *Slack v. Luke* are attached as Exhibits to the Declaration of Brian J. Waid submitted in support of this Motion.

case, explained that "this is an issue that frequently emerges in legal malpractice cases in Washington" and urged publication to "assist counsel in legal malpractice cases, as well as professional liability insurers like ALPS." Waid Decl., Ex. B, pp. 2, 3.

Furthermore, the Petitions for Review in *Joudeh* (Pet., pp. ii-iii) and *Auer* (Pet., p. ii), as well as the Answer to the Petition for Review in *Joudeh* (Ans., pp. 11-16), cite many of the same key Washington appellate decisions related to proximate cause in legal malpractice cases, as do the Court of Appeals opinions in both *Joudeh* (Opinion, pp. 9-12) and *Auer* (Opinion, pp. 19-24). These same issues and authorities are also currently under submission in the Division III case of *Slack v. Luke,* Case no. 32921-6,[2] which is the case referenced by Mr. Talmadge in the Motion to Publish in *Auer.* Waid Decl., Ex. B, pg. 2 ¶3.

The Petitions for Review in both *Joudeh,* a Division I case, and *Auer,* a Division II case, involve the same issue, *i.e.,* how a legal malpractice plaintiff proves proximate cause, and more particularly whether the legal malpractice plaintiff must offer expert testimony to prove proximate cause. The same issue is also currently awaiting decision in Division III.

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[2] Pertinent excerpts from the appellate briefs in *Slack v. Luke* are attached as Exhibits C, D, and E to the Declaration of Brian J. Waid. See n. 1 above relative to ER 201(f).

The Court should therefore consolidate this case with *Auer v. Leach,* Washington Supreme Court Case no. 927782 because doing so will allow for the most efficient consideration of the issues involved, and will be fair to all parties.

DATED: February 22, 2016.

WAID LAW OFFICE

BY: _____

BRIAN J. WAID
WSBA No. 26038
JESSICA M. CREAGER
WSBA No. 42183
5400 California Ave. SW, Suite D
Seattle, Washington 98136
Telephone: 206-388-1926
Attorneys for Petitioner

PROOF OF SERVICE

I hereby certify that on this 22nd day of February, 2016, I caused a copy of the foregoing Petitioner's RAP 3.3(b) Motion to Consolidate This Case With *Auer v. Leach,* Washington Supreme Court Case No. 927782 to be delivered to Respondents, through their attorneys on the following in the manner indicated below:

Counsel for Respondents:
Jeffrey P. Downer
Spencer N. Gheen
Lee Smart, P.S., Inc.
One Convention Place, Suite 1800
701 Pike Street
Seattle, Washington 98101

(X) U.S. Mail
( ) Hand Delivery
(X) Email

I further hereby certify that on this 22nd day of February, 2016, I caused a copy of the foregoing Petitioner's RAP 3.3(b) Motion to Consolidate This Case With *Auer v. Leach,* Washington Supreme Court

Case No. 927782 to be delivered to Counsel of Record in *Auer v. Leach*, through their attorneys on the following in the manner indicated below:

Counsel for Petitioners in *Auer v. Leach*:
Brian H. Krikorian
Law Offices of Brian Krikorian
4100 194th Street SW, Suite 215
Lynnwood, Washington 98036

(X) U.S. Mail
( ) Hand Delivery
(X) Email

Counsel for Respondents in *Auer v. Leach*:
Philip Meade
Merrick, Hofstedt & Lindsey, P.S.
3101 Western Avenue, Suite 200
Seattle, Washington 98121

(X) U.S. Mail
( ) Hand Delivery
(X) Email

Dated: February 22, 2016.

WAID LAW OFFICE

BY: _____

BRIAN J. WAID
WSBA No. 26038
One of Petitioner's Attorneys

No. 925372

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

Court of Appeals No. 72533-5-I

HAITHAM JOUDEH,

Petitioner/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.

DECLARATION OF BRIAN J. WAID IN SUPPORT OF PETITIONER'S RAP 3.3(b) MOTION TO CONSOLIDATE THIS CASE WITH WITH *AUER v. LEACH,* SUPREME COURT CASE NO. 927782

Brian J. Waid
WSBA No. 26038
Jessica M. Creager
WSBA No. 42183
WAID LAW OFFICE
5400 California Ave. S. W., Ste D
Seattle, Washington 98136
Counsel for Petitioner

Brian J. Waid, under penalty of perjury, testifies as follows:

1. I am one of the attorneys of record for Petitioner/Appellant Haitham Joudeh in the above-captioned matter, and make this Declaration as authorized by RPC 3.7, based on my personal knowledge.

2. Attached hereto, marked as Exhibit A and incorporated by this reference, is a true and accurate copy of the Petition for Review filed in *Auer v. Leach,* Washington Supreme Court Case no. 927782. A copy of the Court of Appeals opinion issued in that case is attached to the Petition for Review as an Appendix.

3. Attached hereto, marked as Exhibit B and incorporated by this reference, is a true and accurate copy of the Motion to Publish filed by Attorneys Liability Protection Society ("ALPS") in *Auer v. Leach,* Washington Court of Appeals, Division II Case no. 46105-6-II.

4. Attached hereto, marked as Exhibit C and incorporated by this reference, is a true and accurate copy of an **excerpt** from the Brief of Appellant filed in the case entitled *Slack v. Luke,* Washington Court of Appeals, Division III Case no. 32921-6, consisting of the title page, pp. i-v, and pp. 1-2, 20-26.

5. Attached hereto, marked as Exhibit D and incorporated by this reference, is a true and accurate copy of an **excerpt** from the Brief of Respondents filed in the case entitled *Slack v. Luke,* Washington Court of

Appeals, Division III Case no. 32921-6, consisting of the title page, pp. i-vi, and pp. 1-2, 16-23.

6. Attached hereto, marked as Exhibit E and incorporated by this reference, is a true and accurate copy of an **excerpt** from the Reply Brief of Appellant filed in the case entitled *Slack v. Luke,* Washington Court of Appeals, Division III Case no. 32921-6, consisting of the title page, pp. i-iv, and pp. 3-10.

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

Dated: February 22, 2016.

/s/ Brian J. Waid
BRIAN J. WAID, WSBA No. 26038

PROOF OF SERVICE

I hereby certify that on this 22nd day of February, 2016, I caused a copy of the foregoing Declaration of Brian J. Waid in Support of Petitioner's RAP 3.3(b) Motion to Consolidate This Case With *Auer v. Leach,* Washington Supreme Court Case No. 927782 to be delivered to Respondents, through their attorneys on the following in the manner indicated below:

Counsel for Respondents:
Jeffrey P. Downer
Spencer N. Gheen
Lee Smart, P.S., Inc.
One Convention Place, Suite 1800
701 Pike Street
Seattle, Washington 98101

(X) U.S. Mail
( ) Hand Delivery
(X) Email

I hereby certify further that on this 22nd day of February, 2016, I caused a copy of the foregoing Petitioner's RAP 3.3(b) Motion to Consolidate This Case With *Auer v. Leach,* Washington Supreme Court Case No. 927782 to be delivered to Counsel of Record in *Auer v. Leach,* through their attorneys on the following in the manner indicated below:

Counsel for Petitioners in *Auer v. Leach*:
Brian H. Krikorian
Law Offices of Brian Krikorian
4100 194th Street SW, Suite 215
Lynnwood, Washington 98036

(X) U.S. Mail
( ) Hand Delivery
(X) Email

Counsel for Respondents in *Auer v. Leach*:
Philip Meade
Merrick, Hofstedt & Lindsey, P.S.
3101 Western Avenue, Suite 200
Seattle, Washington 98121

(X) U.S. Mail
( ) Hand Delivery
(X) Email

Dated: February 22, 2016.

WAID LAW OFFICE

BY: _____
BRIAN J. WAID
WSBA No. 26038
One of Petitioner's Attorneys

OFFICE RECEPTIONIST, CLERK

To: shidalgo@waldlawoffice.com
Cc: 'Brian J. Wald'; 'Jessica Creager'
Subject: RE: Filing in Joudeh v. Pfau Cochran Vertetis Amala, PLLC [Case No. 925372]

Received on 02-22-2016

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Sarah Hidalgo [mailto:shidalgo@waldlawoffice.com]
Sent: Monday, February 22, 2016 3:23 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: 'Brian J. Wald' <bjwald@waldlawoffice.com>; 'Jessica Creager' <jcreager@waldlawoffice.com>
Subject: Filing in Joudeh v. Pfau Cochran Vertetis Amala, PLLC [Case No. 925372]

Good afternoon,

Please see the attached documents for filing in JOUDEH 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 [Case No. 925372].

A hardcopy of the Declaration Exhibits (A-E) will be mailed via USPS today.

Thank you,

Sarah K. Hidalgo
Assistant to Brian J. Wald and Jessica Creager

Wald Law Office
5400 California Ave SW, Suite D
Seattle, WA 98136
P: 206.388.1926
F: 206.388.1925
shidalgo@waldlawoffice.com

EXHIBIT A

Supreme Court No. 927782
Court of Appeals No. 46105-6-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RONALD AUER and JOHN TRASTER
Appellants/Cross-Respondents

vs.

J. ROBERT LEACH and JANE DOE LEACH, his wife; CHRISTOPHER KNAPP and JANE DOE KNAPP, his wife; GEOFFREY GIBBS and JANE DOE GIBBS, his wife; ANDERSON HUNTER LAW FIRM, P.S., INC., and SAFECO INSURANCE,
Respondents/Cross-Appellants

On Appeal from the Snohomish County Superior Court
SCSC Case No. 11-2-03105-3

APPELLANTS' PETITION FOR REVIEW

BRIAN H. KRIKORIAN, WSBA #27861
Law Offices of Brian H. Krikorian
4100 194th Street SW, Suite 215
Lynnwood, WA 98036
(206) 547-1942
Fax: (425) 732-0115
Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

I. IDENTITY OF PETITIONERS

Ronald Auer and John Traster (hereinafter collectively "plaintiffs") ask this court to accept review of the Court of Appeals decision designated in Section II below.

II. COURT OF APPEALS DECISION

Petitioners appeal from the decision of *Ronald Auer and John Traster v. James Leach, et al.,* Division II. The decision was filed October 27, 2015, a copy of which is attached hereto as Appendix "A". Auer and Traster filed a motions for reconsideration. Division II denied the motion on January 12, 2016. A copy of the Court's order and amended decision is attached hereto as Appendix "B".

III. ISSUES PRESENTED FOR REVIEW

Did the Court of Appeals, (i) erroneously find that plaintiffs required expert witness testimony, in a legal malpractice action, to establish a causal link between the breach of duty of the defendants (which the trial court acknowledged was met by the evidence), and the damages suffered; and that the trial court did not abuse its discretion by failing to consider the expert's opinion on plaintiffs' motion for reconsideration; (ii) err by failing to properly apply the standard set forth in this Court's decision in *Keck v. Collins.*

With regard to (i) above, this is an issue of first impression in

Washington. There is no authority in Washington for the notion that an expert is *required* to establish the element of causation in a legal malpractice case.[1] Both the trial court and the appellate court held that such testimony was "required". With regard to (ii) above, the Court of Appeals erred by concluding that Appellants waived the argument that the Court improperly excluded the supplemental declaration of Paul Brain. Again, the crux of Petitioners' argument throughout this case was the trial court's refusal to consider the *supplemental* Brain declaration once it concluded that an expert witness was required to prove "causation". The Court of Appeals declined to apply this Court's decision in *Keck v. Collins,* which was decided months after briefing and oral argument. Had the Court of Appeals applied the principals of *Keck*, even the Court of Appeals conceded that an issue of fact was raised (see Original Decision, page 27).

IV. STATEMENT OF THE CASE

1. INTRODUCTION AND PROCEDURAL BACKGROUND

This appeal originates from an order by King County Superior Court Judge Beth Andrus, who was assigned as a special judge hearing this matter venued in the Snohomish County Superior Court.[2] Plaintiffs

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1 To the contrary, in *Walker v. Bangs*, 92 Wn.2d 854, 858, 601 P.2d 1279, 1282 (1979) this Corut held that "expert testimony is not necessary when the negligence charged is within the common knowledge of lay persons" and only required where the conduct "involves matters calling for special skill or knowledge."

2 Because all but one judge of the Snohomish County Superior Court recused

filed a lawsuit against their former attorneys J. Robert Leach ("Leach")[3], Christopher Knapp, Geoffrey Gibbs, and Anderson Hunter Law Firm, P.S., Inc. (collectively "defendants").

On December 6, 2013, defendants filed and served a fourteen (14)-page motion for summary judgment as to all causes of actions. Defendants' motion was primarily directed at plaintiffs' alleged failure to have a standard of care expert, as well as plaintiffs' inability to meet the elements of a Consumer Protection Act violation. Defendants spent approximately 1-½ pages in total addressing causation.[4] In response to this motion, plaintiffs submitted the declaration of Ronald Auer, the Declaration of Paul Brain (plaintiffs' expert witness), multiple evidentiary documents from the underlying case, including emails between the parties, a demand letter from subsequent counsel Ben Wells, and other evidentiary proof establishing the elements of legal malpractice and violation of the Consumer Protection Act.[5]

On January 3, 2014, the court denied defendants' motion for summary judgment regarding legal malpractice as to the elements of duty and breach of the standard of care, but granted the motion as to the issue

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themselves (the remaining judge was disqualified by plaintiffs), the Snohomish County Superior Court assigned the matter to Judge Andrus.

3 Defendant J. Robert Leach was appointed to Division 1 of the Court of Appeals at the end of the defendants' representation of plaintiffs. Defendant Safeco Insurance company was never served.

4 CP (II) 701-714 (see Defendants' motion pages 7 and 8)

5 CP (I) 433-500; CP (II) 599-604; 745-769

of proximate cause. The court found that there was "no causal link" between Mr. Brain's opinions of a breach of the standard of care, including the delay of the defendants and the failure of defendants to obtain alternative remedies including an injunction or specific performance and that Mr. Brain was required to provide an expert opinion regarding the causal link.[6] The court also granted the Motion for Summary Judgment as to the Consumer Protection Act finding no public interest impact and causal link.

Plaintiffs timely moved for reconsideration pursuant to CR 59, and argued that the court erred in its ruling on the issue of proximate cause.[7] Plaintiffs' expert Paul Brain submitted a *supplemental* declaration wherein he opined that he always believed there was a causal link between defendants' breaches of the standard of care and the damages sustained by the plaintiffs.[8] Upon requesting briefing from defendants, Judge Andrus refused to consider any of the additional evidence submitted by plaintiffs (erroneously finding that they should have been presented sooner), and

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6 In her written order denying plaintiffs' motion for reconsideration, Judge Andrus stated that she believed the facts were "too complex" for a a reasonable juror to figure out cause in fact without an opinion from an expert as to causation. See CP 34. This observation, however, ignores the fact that an attorney standard of care expert will not opine as to the technical complications of "building a road." Such evidence was presented by plaintiffs in opposition to the Motion for Summary Judgment (and as part of the motion for reconsideration) in the form of declarations from plaintiffs as well as declarations from Messrs. Seal and Murray. The court simply refused to consider that evidence.

7 CP (I) 344-359

8 CP (I) 321-325

denied the motion for reconsideration.[9] Division II of the Court of Appeals affirmed Judge Andrus' decision, and denied Petitioner's motion for reconsideration. The Court of Appeals affirmed that expert testimony was necessary to establish causation, erroneously found that the trial court did not abuse its discretion, and also refused to apply this Court's recent ruling in *Keck v. Collins*, 184 Wash. 2d 358, 357 P.3d 1080 (2015), claiming Petitioners had "waived" that argument—even though the *Keck* decision was issued after briefing and oral argument occurred here.

2. BACKGROUND FACTS

Plaintiff Ron Auer ("Ron") was an inventor and product developer, with a broad background in engineering and product incubation. In 2002, John Traster ("John") and Ron were looking for real property to build homes on, which also included commercial quality buildings on acreage so that Ron could begin work on his hydroponics business. In early 2003, Ron located the property in the Granite Falls area that he believed would work for both John's and his residences and home based business. Stephen Westland handled the sale of the property for the estate of Margaret Westland, and the real estate broker was Tom Rhinevault. Mr. Rhinevault began acting as a "dual agent" for Westland, and John and Ron. Ron had never purchased property, and relied exclusively on Mr. Rhinevault's

9 CP (I) 31-39

expertise as a real estate broker.[10]

In the course of negotiations, Mr. Rhinevault drafted an addendum to the Purchase and Sale Agreement ("PSA") that indicated Westland would build a road to the property within 60 days of the close of escrow. Mr. Rhinevault presented Ron with the PSA and the Addendum. After closing, Westland constructed a rough road that was not in compliance with the contract, or local Snohomish County Code requirements, and was constructed in an inferior, unsafe and illegal manner. Eventually the County placed a "Stop Work Order " on the project. The "Stop Work Order" and lack of an approved access road to service the two, five acre lots resulted in both properties being ineligible for issuance of building permits. This caused delay in the development of the property, which caused delay in the development of Ron's business, both residences and auxiliary buildings, which continued through 2009.[11] In 2003, Ron and John retained J. Robert Leach and the Anderson Hunter law firm to represent them in pursuing legal claims against both Westland and Rhinevault. Ron and John impressed upon defendant Leach that they wanted to move the case along quickly because the development of the property was instrumental in the development of Ron's hydroponics business, and to both John's and his homes. In October of 2003, suit was filed against Westland to obtain compliance with the terms of the

10 *Id.* (Declaration of Ronald Auer, ¶¶6-7)
11 *Id.* (Declaration of Ronald Auer, ¶¶8-9)

contract.[12]

Defendant Leach and Anderson Hunter dragged out and delayed the matter for 5 years—doing virtually nothing. By the end of 2005, and with the trial date approaching, little had been done by Leach to prepare the case, despite repeated requests no review of the damages was conducted, and plaintiffs were facing a motion for summary judgment. At this point, Leach recommended that plaintiffs drop the lawsuit to avoid summary judgment and re-file a separate lawsuit. Once again, John and Ron raised the issue of Leach's lack of performance to Anderson Hunter management, which resulted in a meeting between defendant Leach and defendant Knapp, the managing partner. At this meeting, plaintiffs were once again assured that Leach intended to communicate better and to attend to the case.[13]

In January of 2006, Leach filed a new lawsuit on the plaintiffs' behalf. Ron and John were assured by Leach that he would stay on the case and be more proactive. Despite his promises, very little was done on the case over the next 2 years to move it to a conclusion. In fact, over a 5-year period, defendants only billed plaintiffs 72 hours in time. In 2003 defendants billed a total of 10.7 hours to proceed with the litigation; in 2004 defendants billed only 6.1 hours; in 2004, 37 hours; in 2005, 12.8

12 *Id.* (Declaration of Ronald Auer, ¶10)
13 *Id.* (Declaration of Ronald Auer, ¶11)

hours; in 2007, *only* 2 hours; in 2008, 7. 5 hours.[14]

In early 2008 plaintiffs were suddenly advised that Leach had been named to the appellate court effective March 1, 2008, and that they could either seek new counsel, or that they could "interview" Mr. Gibbs of the firm to see if he would handle the matter. At this point in time, the trial date was scheduled for June 2008 (less than 2 1/2 months a way), yet the defendant law firm had taken virtually no action to secure depositions or discovery from an extensive list of candidates previously discussed with both Mr. Leach and Mr. Gibbs. A meeting was scheduled with defendants Leach and Gibbs at the Anderson Hunter firm on February 20, 2008, wherein Mr. Gibbs (1) acknowledged that the case had significant merit, (2) was "all about the damages" because of the strong basis in evidence, and (3) agreed to take over the handling of representation from Leach. Mr. Gibbs assured plaintiffs that he had adequate time to prepare the case for trial, which was coming up in June of 2008. This was the first, and only, time plaintiffs met with Mr. Gibbs.[15]

Within 30 days of this meeting, however, defendant Gibbs advised plaintiffs that he felt there was a "conflict of interest" between John and Ron due to the difference in magnitude between their claims, and he further questioned the success of their claims, and particularly the amount

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14 CP (I) 433-500 (Declaration of Ronald Auer, ¶¶12-15; Exhibit 8)

15 CP (I) 439-444 (Declaration of Ronald Auer, ¶¶12-15)

of damages they could recover.[16] After representing plaintiffs for nearly five (5) years, filing two lawsuits, dropping one, and accomplishing virtually nothing, on April 7, 2008, Gibbs joined with the Anderson Hunter law firm in withdrawing as attorneys of record for the plaintiffs. Since taking over the case from defendant Leach, Mr. Gibbs had only worked eight hours on the case, never met with the plaintiffs after the hand-off meeting, did not conduct any pre-trial depositions, and pursued no discovery. Plaintiffs objected to the withdrawal, and requested that Gibbs and Anderson Hunter not be permitted to withdraw. After a hearing on the motion to withdraw, defendant's motion to withdraw was granted on April 16, 2008.[17]

After the Anderson Hunter firm was permitted to withdraw by the court, the trial was continued until June of 2009. At that point plaintiffs were forced to hire new counsel, Ben W. Wells. Mr. Wells submitted information to the opposing defendants indicating plaintiffs' provable damages as of September 2005 (at the time Leach dismissed the first lawsuit) were approximately $2,733.360.21.[18] By this time, plaintiffs had been in litigation for over 6 years, and it had taken its toll on their health, marriage, business and income. On March 30, 2009, plaintiffs participated

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16 CP (I) 433-500 (Exhibits 4 and 5). Defendant Leach testified he never identified, nor believed there to be, any "non-waivable" conflict between Ron and John. *Id.* (Exhibit 14 thereto)

17 CP (I) 439-444 (Declaration of Ronald Auer, ¶¶18-22)

18 CP (I) 433-500 (Declaration of Brian H. Krikorian, ¶16; Exhibit 10 thereto)

in a settlement conference with the underlying defendants. Although they had been counseled that their damages were well in excess of $8 million as of March 2009, they had now spent almost $200,000 in attorney's fees related to the Anderson firm's withdrawal, as well as for Mr. Wells to come "up to speed." Plaintiffs were no longer in a financial position to continue. As such, despite their reluctance, plaintiffs agreed to accept the defendant's offer of settlement of $500,000.[19] The settlement actually netted plaintiffs only approximately $170,000, which went to satisfy debt obligations and cost they had incurred outside of the legal case. Plaintiffs' damages for expenses alone exceeded $800,000 (not including economic damages which conservatively increased plaintiffs' damages by 1.5 to 8 million dollars).[20]

V. ARGUMENT

1. GOOD CAUSE EXISTS TO GRANT REVIEW

RAP 13.4 (b) provides that a petition for review will be accepted by the Supreme Court: (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; (2) if the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; (3) if a significant question of law under the Constitution of the State of Washington or of the United States is

19 CP (I) 439-444 (Declaration of Ronald Auer, ¶23)
20 *Id.* CP (I) 329-344

involved; or, (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

As will be established herein, Petitioners respectfully submit that good cause exists for this Court to grant this petition for review under subdivisions (1), (3) and (4). First—the Court of Appeals division materially contravenes this Court's recent decision in *Keck v. Collins*. Second—both the trial court's decision and the Court of Appeals decision affirming the decision, erroneously found that in order to establish the element of causation in a legal malpractice case, that Petitioners were required to provide expert testimony to establish a causal link, which is contrary to existing legal authority.

2. THE TRIAL COURT AND COURT OF APPEALS ERRED IN FINDING THAT EXPERT TESTIMONY IS REQUIRED TO ESTABLISH CAUSATION

In granting defendants' motion on the element of causation, the trial court erroneously found that, absent a "causal link" created by an expert, plaintiffs could not establish causation.[21] Cause in fact is usually a question for the trier of fact and is generally not susceptible to summary judgment. *Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wash.2d 780, 788, 108 P.3d 1220 (2005) (quoting *Ruff v. King County*, 125 Wash.2d 697, 703, 887 P.2d 886 (1995)); *Martini v. Post*, 178 Wash.App. 153, 164, 313 P.3d 473, 479 (Wash.App. Div. 2,2013); See also *Nielson v.*

21 *Id.* page 35: "The summary judgment ***was based*** on Plaintiffs' failure to submit ***expert evidence to establish causation in the first instance.***" (Emphasis added).

Eisenhower & Carlson, 100 Wash.App. 584, 999 P.2d 42 (2000); *Daugert v. Pappas*, 104 Wash.2d 254, 704 P.2d 600 (1985). However, it is the general rule in Washington that in a legal malpractice action, whether a plaintiff would have prevailed in an underlying matter, is a question of fact for the jury. See *Brust v. Newton,* 70 Wash.App. 286, 293, 852 P.2d 1092 (1993); *VersusLaw v. Stoel Rives,* 127 Wash. App. 309, 111 P.3d 866 (2005).

Both the trial court and the Court of Appeals relied upon, among others, *Griswold v. Kilpatrick* 107 Wash.App. 757, 760, 27 P.3d 246 (2001), *Smith v. Preston Gates Ellis, L.L.P., 135 Wash.App.* 859, 863–64, 147 P.3d 600 (2006), review denied, 161 Wash.2d 1011, 166 P.3d 1217 (2007) and *Estep v. Hamilton*, 148 Wn. App. 246, 256, 201 P.3d 331, 336 (2008). The court's reliance upon these decisions, however, for the notion that an expert is required to establish causation was misplaced, in that they are not analogous to this matter. It should also be observed, that in the State of Washington, there is no "requirement" that an expert witness be used *even* as to the standard of care in some instances. See *Walker v. Bangs*, 92 Wn.2d 854, 858, 601 P.2d 1279, 1282 (1979) holding that in Washington, "expert testimony is not necessary when the negligence charged is within the common knowledge of lay persons" and only required where the conduct "involves matters calling for special skill or knowledge." There is simply no legal basis to "require" an expert witness

to establish the element of causation in a legal malpractice case. Moreover, as argued below, once the trial court determined that an expert "opinion" as to causation was required, it then erred when it refused to consider a supplemental declaration by attorney Paul Brain opining to causation.

3. APPELLANTS DID NOT FAIL TO ADDRESS THE EXCLUSION OF PAUL BRAIN'S SUPPLEMENTAL DECLARATION BY THE TRIAL COURT

In its decision affirming the findings of the lower court, relying upon *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 809, 828 P.2d 549 (1992), the Court of Appeals found that "only in their reply brief do Auer and Traster cite *Burnett [v. Spokane Ambulance,* 131 Wn.2d 484, 497-98, 933 P.2d 1036 (1997)] or argue that the trial court erred by excluding Brain's supplemental declaration as a discovery sanction." In *Cowiche Canyon,* this Court held that: "An ***issue*** raised and argued for the first time in a reply brief is too late to warrant consideration." (Emphasis added). *Cowiche Canyon Conservancy v. Bosley*, 118 Wash. 2d 801, 809, 828 P.2d 549, 553 (1992). While *Burnett* was not specifically cited in the opening brief, the Court of Appeals incorrectly concluded that Appellants never raised the ***issue*** of an abuse of discretion in the exclusion of the Supplemental Brain declaration. By doing this, the Court of Appeals was clearly elevating form over substance. To the contrary, Appellants did in fact raise the issue of the trial courts' initial rejection and refusal to

exclude the original declaration of Paul Brain based upon it not being a discovery sanction;[22] the trial court's notation that both parties made "strategic decisions" to hold off making or requesting complete expert disclosures" as a basis for not "striking" the original declaration;[23] and, the inconsistent and improper exclusion to consider the *supplemental* declaration once Appellants submitted it—even though the Court had relied upon and permitted the original Brain declaration to be admitted.[24]

Of greater significance is that the *Keck* decision was not decided until after the parties briefed and argued the matter in this case. The Court of Appeals acknowleged the applicability of *Keck*, but then refused to apply that decision by erroneously stating that the failure to "cite" *Burnett* in an opening brief written over 17 months earlier (and 14 months before *Keck* was decided) relieved the reviewing court from fully analyzing the issue in this matter—and in light of recent Supreme Court authority. In *Keck*, this Court held that "[b]efore excluding untimely evidence submitted in response to a summary judgment motion, the trial court ***must*** consider the *Burnett* factors on the record. On appeal, a ruling to exclude is reviewed for an abuse of discretion." *Id.* at page 374. Had *Keck* been decided prior to June of 2014, Appellants certainly would have relied upon it and cited it as well as *Burnett* in its opening brief. However, at the time,

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22 See Footnote 5, page 5 of the Opening Brief
23 See Footnote 27, page 18
24 See pages 39-49 of the Opening Brief

the only direct authority on this issue was that cited by Appellants related to evidence submitted as "untimely"—not excluded under *Burnett*. Also, and as argued both in their opening brief, reply brief, and *infra*, Judge Andrus specifically rejected applying the *Burnett* factors during oral argument, and only did so in her final ruling—after Appellants submitted the supplemental declaration to the trial court.

4. APPLYING *KECK* AND *BURNETT* THE TRIAL COURT ABUSED ITS DISCRETION

A. The Court of Appeal Erroneously Concluded Appellants' Submission of Mr. Brain's Information was "Untimely"

In rendering its decision, the Court of Appeals *materially* erred by concluding that the exclusion of the supplemental Brain declaration was an "appropriate" sanction since "Auer and Traster had not provided Brain's opinion as required by the discovery rules ***until long after the discovery cutoff***."[25] This was simply not correct, and the record is contrary to this (and was fully cited in the opening brief and reply brief).[26] When this was raised to the Court of Appeals in Petitioner's Motion for Reconsideration, the Court merely changed the opinion to comport to its ruling—and again erroneously stated that Petitioners did not provide Mr.

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25 See page 26 of the Original Decision

26 Discovery was not cutoff at the time of the motion for summary judgment hearing and when the motion for reconsideration was filed. On December 4, 2013, the parties stipulated to a trial continuance of March 10, 2014, and a discovery cut-off of January 31, 2014. This means that at the time of the hearing on the Motion for Summary Judgment, defendants had almost a month to depose Mr. Brain before the cut-off, and almost 2 months before trial.

Brian's opinion "until they moved fo reconsideration of the court's decision on summary judgment."[27] Again, this is simply erroneous and not supported by the record. In late November 2013, plaintiffs amended their discovery response and provided a basis for Mr. Brain's opinion on November 27, 2013, and produced additional documents responsive to the expert discovery at the same time. Plaintiffs also agreed, at defendants' counsel's request, to continue the trial 45 days to permit him additional time to take depositions. Petitioners then provided Mr. Brain's opinion in December 2013.[28]

Finally—Judge Andrus specifically found that she did not believe that Appellants had committed a "sanctionable" discovery abuse.[29] First—during the summary judgment hearing, Judge Andrus rejected defendants' untimely motion to exclude Mr. Brain's declaration.[30] In Judge Andrus's order denying the motion for reconsideration, she confirmed her oral ruling that "[t]he court ultimately decided not to exclude Mr. Brain's initial declaration *because Defendants did not move to compel answers to expert interrogatories and waited months before asking Plaintiffs to supplement the expert interrogatory.* The Court concluded ***that both parties*** had made strategic decisions to hold off on

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27 See Appendix B
28 CP 433-435 (¶¶3-6)
29 See CP 34; RP 58:2 to 62:24.
30 RP 62:7-24

making or requesting complete expert disclosures." (Emphasis added).[31]

The record clearly refutes the Court of Appeal's erroneous conclusion that Auer and Traster waited until after the Motion for Summary Judgment decision to provide Mr. Brain's testimony, and the Court of Appeals therefore erred by not fully analyzing this issue under *Keck* and *Burnett.*

B. Applying Keck and Burnett The Decision Should Be Reversed

As this Court noted in *Keck*, the purpose of a Motion for Summary Judgment is not to cut litigants from their right to a trial by jury if "they really have evidence which they will offer on a trial." *Keck*, at 369. In doing so, this Court *extended* the *Burnett* factors from a discovery sanction to the exclusion of untimely evidence submitted in support of a Motion for Summary Judgment opposition. *Id.* Because the Court of Appeals erroneously found that the plaintiffs waived this argument, and further incorrectly found that this was an appropriate discovery sanction (which it was not), the Court summarily held that "[w]ithout Brain's supplemental declaration" any new evidence did not change the analysis of causation.[32] In effect, then, the Court of Appeals acknowledged that Petitioners had created an issue of fact with Brain's testimony—but instead chose to penalize Petitioners because *Keck* was decided well after the briefing and

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31 See CP 34

32 Decision, page 27

oral argument in this case. The Court of Appeals then refused to reconsider that finding, and refused to analyze the Brain declaration under both *Burnett* and the de novo factors of summary judgment review.

In his supplemental declaration, Mr. Brain concluded that he "would draw a direct and proximate causal link between the failure" of defendants "to exercise due diligence and any damage after the voluntary dismissal [of the first action in 2005]."[33] Mr. Brain further opined that a properly framed motion for injunctive relief would have had a very high chance of success because "interests in property under Washington law are putatively unique as a practitioner involved in a property rights case should be aware. The fact that there may be an accessory damages remedy does not preclude injunctive relief because the interest being protected is unique, in this case the use and enjoyment of the property."[34] Finally, Mr. Brain opined that based upon his experience as a practitioner in the same area, as well as his review of the material in this case, his opinion is the defendants would have been successful in obtaining some form of equitable remedy in the first instance, and this would have substantially mitigated the damages suffered by the plaintiffs, as well as eliminate further damages resulting from the dismissal of the 2003 lawsuit.[35] This is supported by the evidence, and the declarations of Mr. Seal and Murray

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33 CP (I) 321-325 (Supplemental Declaration of Paul Brain ¶2)
34 *Id.* at ¶3
35 *Id. at* ¶¶4-5

(both engineers, and current and/or former employees of Snohomish County), which were also submitted as part of the motion for reconsideration. Both men testified that a road could have been built, and the road *permitted* without the need for easements or other concessions.[36]

As noted by this Court in *Keck*, there is no *greater* "sanction" than excluding evidence. In light of the fact that Petitioners *had* provided Mr. Brains opinions ***prior*** to the Discovery cut-off, and that discovery was not cut-off at the time of the Motion for Summary Judgment, Appellants could suggest numerous "lesser sanctions", including monetary, discovery remedies and others (including another trial continuance), which would have ameliorated any alleged "prejudice" to the defendants. When a trial court excludes testimony in response to a party's failure to obey a discovery order, the record must demonstrate that: (1) the trial court found the disobedient party's ***refusal to obey a discovery order was willful or deliberate*** and *substantially* prejudiced the opponent's ability to prepare for trial; and (2) the Court *explicitly considered* whether a lesser sanction would probably have sufficed. *Burnett*, 131 Wn.2d at 494 (citing *Snedigar v. Hodderson*, 53 Wn.App. 476, 487, 768 P.2d 1 (1989)).

There was no "discovery order" that plaintiffs "willfully" or "deliberately" refused to obey. Second—plaintiffs ***did*** disclose their expert as required by the Court's scheduling order, and further

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36 CP (I) 194-297; 392-344 (Declarations of Ron Auer and John Traster)

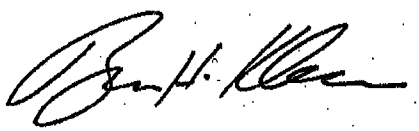
supplemented its discovery when finally requested to do so by the defendants. Finally—Judge Andrus specifically found that (i) both counsel for plaintiffs and defendants made "strategic" decisions to delay discovery disclosures; and (ii) that defendants' ***failure*** to move to compel and to seek supplementation for several months did not justify the exclusion of Mr. Brain's testimony. In other words, there was no *willful disobedience* of a court order by plaintiffs. For Judge Andrus to take inconsistent positions on this is a clear, manifest abuse of discretion and certainly could have considered a "lesser sanction" rather than exclude Mr. Brain's supplemental testimony, as well as the other evidence which addressed issues raised solely in defendants' reply brief.

IV. CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that this Court grant their Petition for Review, and reverse the Court of Appeals and trial court.

Dated: February 10, 2016

LAW OFFICES OF BRIAN H. KRIKORIAN



By_____
Brian H. Krikorian, WSBA # 27861

On February 10, 2016, I caused to be served a copy of the document described as **Appellant's Opening Brief** on the interested parties in this action, by United States, First Class Mail and email, addressed as follows:

Philip Meade
Merrick, Hofstedt & Lindsey, P.S.
3101 Western Avenue, Suite 200
Seattle, WA 98121

Attorney for Defendants

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

Executed this 10th day of February, 2016.

Brian H. Krikorian

Exhibit A

Filed
Washington State
Court of Appeals
Division Two

October 27, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RONALD AUER and JOHN TRASTER, Appellants/Cross Respondents, v. J. ROBERT LEACH and JANE DOE LEACH, his wife; CHRISTOPHER KNAPP and JANE DOE KNAPP, his wife; GEOFFREY GIBBS and JANE DOE GIBBS, his wife; ANDERSON HUNTER LAW FIRM, P.S., INC.; and SAFECO INSURANCE, Respondents/Cross Appellants.	No. 46105-6-II UNPUBLISHED OPINION

BJORGEN, A.C.J. — Ronald Auer and John Traster sued the Anderson Hunter Law Firm P.S., J. Robert Leach,[1] Jane Doe Leach, Geoffrey Gibbs, Jane Doe Gibbs, Christopher Knapp, and Jane Doe Knapp (collectively lawyers[2]) alleging legal malpractice and violation of Washington's Consumer Protection Act (CPA), chapter 19.86 RCW. The trial court first denied the lawyers' summary judgment motion seeking dismissal of the malpractice claim as time-barred under RCW 4.16.080(2). The trial court then granted the lawyers' motion for summary judgment on both the malpractice and CPA claims, determining that Auer and Traster failed to raise genuine issues of material fact on essential elements of each claim. After Auer and Traster moved for reconsideration on the malpractice claim and filed a supplemental declaration by their

[1] Leach's representation of Auer and Traster in the underlying suit involved in this appeal began when he was in private practice and ended with his appointment to an open position on Division One of the Court of Appeals.

[2] We refer to individuals by name when discussing claims pertaining only to them.

expert, Paul Brain, the trial court struck this declaration and denied reconsideration of its order dismissing the malpractice claim.

Auer and Traster appeal, arguing that the grant of summary judgment in favor of the lawyers was improper, because genuine issues of material fact exist as to whether the lawyers' alleged malpractice proximately caused Auer and Traster their injuries and whether the lawyers committed deceptive acts that affected the public interest. Auer and Traster also argue that the trial court erred or abused its discretion by refusing to consider the new evidence offered on reconsideration and by denying their motion for reconsideration. The lawyers cross-appeal the trial court's denial of their summary judgment motion to dismiss the malpractice claim on grounds of untimeliness.

We affirm the trial court's grant of summary judgment in favor of the lawyers on the malpractice and CPA claims. We also affirm the trial court's order striking Brain's supplemental declaration and its order denying reconsideration of its summary judgment order on the malpractice claim. As to the cross-appeal, we affirm the trial court's denial of summary judgment dismissing the malpractice claim against Anderson Hunter, Leach, Jane Doe Leach, Gibbs and Knapp as time-barred. However, we reverse the trial court's denial of summary judgment dismissing the malpractice claim against Jane Doe Gibbs and Jane Doe Knapp as time-barred. Accordingly, we affirm in part, reverse in part, and remand for the trial court to enter an order granting summary judgment dismissing the malpractice claim against Jane Doe Gibbs and Jane Doe Knapp.

FACTS

A. The Underlying Lawsuit

In 2003, Auer and Traster purchased two lots to "construct upper scale single family

residences, as well as large commercial quality shop structures."[3] Clerk's Papers (CP) at 441. Auer wanted his commercial shop to operate his business in; Traster wanted his for the pursuit of "various activities and hobbies." CP at 441.

The agreements for the purchase and sale of the lots each required the seller, the estate of Margaret Westland, to obtain certain permits and construct a driveway to the properties within 60 days of closing escrow. After closing, the estate began constructing that driveway. However, the estate failed to obtain the necessary permits and the driveway did not conform to the Snohomish County Code, causing the county to issue a stop work order for the project. That order, along with the lack of an "approved access road" to the two properties, rendered the properties ineligible for building permits and disrupted Auer's and Traster's plans for the lots.

Auer and Traster retained Leach and the Anderson Hunter Law Firm to pursue legal claims against the Westland estate, the realtor who drafted the purchase and sale agreements, and the realtor's employer. Auer and Traster filed suit for breach of contract against those defendants in 2003.

Auer's and Traster's relationship with Leach was a difficult one. Auer and Traster frequently complained to Christopher Knapp, Anderson Hunter's managing partner, about perceived failures to communicate, to take requested action, and to diligently pursue their claims. Knapp assured Auer and Traster that Leach would do a better job communicating with them and

[3] Traster apparently purchased both lots and Auer then purchased his from Traster. The lawyers argue that this makes Auer Traster's assignee and limits the liability of the lawyers in the underlying suit, and consequently their liability. Because the lawyers give the issue only passing treatment, we do not address it. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 416, 120 P.3d 56 (2005) (quoting *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004)).

promised that he would monitor the situation. Nevertheless, Auer and Traster became dissatisfied with Knapp's monitoring of Leach's work.

The acrimony between Leach, Knapp, Auer, and Traster eventually caused Anderson Hunter to try to end the attorney-client relationship. Knapp e-mailed Leach, telling him that "[t]his client is very rude. I would withdraw." CP at 470. Knapp also repeatedly told Auer and Traster that they might want to seek representation that would work better for them, but they refused.

By 2005, the estate had filed a motion for summary judgment. Leach recommended that Auer and Traster voluntarily dismiss the suit under CR 41 to avoid summary judgment and then refile the claim as a new lawsuit. Auer and Traster maintain that Leach's lack of preparation necessitated the nonsuit, but they agreed to the plan. Accordingly, the original suit was dismissed and a new one filed in 2006.

Effective March 1, 2008, the governor appointed Leach to an open seat on Division One of the Washington State Court of Appeals. Accordingly, Leach withdrew from representing Auer and Traster. However, they remained Anderson Hunter's clients and Geoffrey Gibbs, another attorney from the firm, began representing them.

Later in March, Gibbs informed Auer and Traster that his pretrial preparations had uncovered a potential conflict of interest that complicated his representation of both of them.[4] Auer and Traster told Gibbs that they had already discussed the potential conflict with Leach and had "come to an agreement to resolve" it. CP at 444.

[4] The alleged conflict of interest arose from the disparate size of Auer's and Traster's claims. Traster claimed a small amount of damages related to inconveniences caused by the delay in getting the building permits. Auer claimed similar damages plus large business losses. Gibbs informed Auer and Traster that the difference in the value of their claims created a potential conflict in deciding whether to accept any possible settlement offer.

Gibbs announced that Auer and Traster had failed to address his concerns and served a notice of withdrawal to terminate his and Anderson Hunter's representation of them. When Auer and Traster objected to the withdrawal, Gibbs filed a motion before the superior court, which then granted the withdrawal.

Auer and Traster eventually retained new counsel to represent them. Gibbs had previously informed Auer and Traster that, after taking over representation of them for Leach, he would only need to bill approximately $50,000 in order to take the matter through trial. Auer and Traster's new counsel billed them approximately $200,000 for time spent preparing for, and taking them to, a scheduled mediation.

The mediation resulted in a settlement between Auer and Traster and the defendants in the underlying suit. Although Auer and Traster valued their claims as worth over $8,000,000, they received only $500,000 in the settlement and a construction easement so that they could get a permit and complete the road required by the purchase and sale agreement. Auer maintains that he and Traster settled because the protracted legal battle caused by the defendants' lack of diligence had drained them of the financial resources necessary to continue to assert their claims.

B. The Lawsuit Against the Lawyers

On February 14, 2011, Auer and Traster appeared pro se and filed summonses and a complaint in Snohomish County Superior Court. These named Anderson Hunter, Leach and his wife, Gibbs and his wife, and Knapp and his wife as defendants.

The complaint's first cause of action was malpractice. Auer and Traster alleged:

> That the said Defendants failed to fully advise Plaintiffs of their rights and appropriate tactics and strategy, failed to diligently pursue the litigation, had undisclosed conflicts of interest, served their own interest at the expense of the Plaintiffs, failed to pursue necessary discovery, failed to prepare the case for trial, necessitated dismissal of the 2003 case and refiling of the 2006 case, then withdrew from the 2006 case in 2008 as trial approached, made multiple misrepresentations

> to Plaintiffs and claimed a wrongfully asserted conflict of interest between the two Plaintiffs herein as justification for withdrawal. That Defendants refused to disgorge payments wrongfully received and Plaintiffs were impaired in retaining replacement counsel and incurred additional litigation expenses as a consequence of the withdrawal of said Defendants.

CP at 1133.

The complaint's second cause of action was for violation of the CPA. Auer and Traster alleged:

> That the said Defendants' conduct set forth above was unfair and deceptive within the meaning of the Consumer Protection Act, implicated the entrepreneurial aspects of the practice of law, is likely to be repeated, and constituted business practices of the Defendants.

CP at 1134.

In April 2011, Auer and Traster retained new counsel and on April 26 served the summonses, complaint, notice of appearance, and the superior court case summary printout on Anderson Hunter, Leach, Gibbs, and Knapp. However, the summonses and the notice of appearance were mistakenly captioned for King County Superior Court. The superior court case summary showed the action as filed in Snohomish County. On April 29, due to an impending scheduled vacation, Auer's and Traster's counsel filed a notice of unavailability listing the Snohomish County cause number of Auer's and Traster's action served on the defendants.

The lawyers served a special notice of appearance captioned for Snohomish County Superior Court on May 4, 2011. Further, the lawyers' counsel served a notice of withdrawal and substitution captioned for Snohomish County Superior Court on the parties and filed it in the Snohomish County Superior Court.

In early June 2011, the lawyers filed a motion to dismiss the action. They alleged that Auer and Traster had failed to properly serve them with process, warranting dismissal under CR

12(b)(4) and (5). Specifically, the lawyers contended that Anderson Hunter, Gibbs, and Knapp had never been served with a Snohomish County summons as required to complete commencement of the action and that Leach and the three Jane Doe defendants had never been served with any process at all.

On June 16, 2011, the lawyers' counsel accepted service of a summons and complaint on behalf of Leach and his wife. That summons listed Snohomish County as the action's venue.

With the service of a Snohomish County summons on Leach and his wife, the lawyers struck their original motion to dismiss and filed a motion for summary judgment seeking dismissal of the malpractice claim as time-barred under RCW 4.16.080(2). The lawyers argued that the summonses served on Anderson Hunter, Gibbs, and Knapp began commencement of an action in King County rather than completed commencement of the action in Snohomish County. They contended that the Snohomish County action was never fully commenced as required by RCW 4.16.170 until service of the summonses on Leach and his wife, which occurred outside both the three-year statute of limitations generally applicable to tort claims and the 90-day tolling period initiated by the filing of the complaint under RCW 4.16.170.

The trial court denied the lawyers' summary judgment motion requesting dismissal of the malpractice claim as time-barred, reasoning that the summonses substantially complied with the governing rules and that the failure to correctly identify the court was an amendable defect. Because the summonses served their purposes, namely notifying the lawyers of the deadline to answer Auer's and Traster's complaint and of the consequences for failing to do so, the trial court found that the defect in the summonses did not prejudice the lawyers. Given the lack of prejudice, the trial court granted Auer and Traster leave to amend the summonses to correctly

identify Snohomish County, rather than King County, as the court where they would litigate the action.

The lawyers then moved for summary judgment on both Auer's and Traster's claims, contending that no genuine issues of material fact existed on at least two of the elements of legal malpractice: the breach of a legal duty and causation. The lawyers also maintained that no genuine issues of material fact existed on at least three of the elements of the CPA claim: that their acts had occurred in trade or commerce, that their acts impacted the public interest, and that their acts had been unfair.

Auer and Traster responded by submitting additional evidence that they claimed showed the existence of genuine issues of material fact, including a declaration by their expert, Paul Brain. After reciting the elements of a legal malpractice claim, Brain stated that he assumed the existence of an attorney-client relationship that would create a duty of care, but that "[c]ausation may not be a proper subject for [his] opinion." CP at 600. Brain then opined that the lawyers had breached their duty of care by pursuing legal remedies rather than equitable ones, given Auer's and Traster's goals with the suit. Brain also declared that the lawyers had breached their duty of care by failing to diligently pursue Auer's and Traster's interests, failing to engage in timely discovery, and recommending that Auer and Traster take a nonsuit to avoid summary judgment. Finally, Brain opined that Gibbs' proffered reasons for withdrawing as counsel were pretextual.

The trial court granted the lawyers' motion for summary judgment on both of Auer's and Traster's claims. Though finding that Brain's declaration raised genuine issues of material fact about several breaches of duty by the lawyers, the trial court found no evidence that indicated or supported an inference that any breach caused Auer's and Traster's injuries. Specifically, the

trial court determined that Auer and Traster had failed to create a genuine issue of material fact regarding whether they would have succeeded in the underlying action absent the alleged malpractice. The trial court granted the motion for summary judgment on the CPA claim after determining that Auer and Traster had failed to establish that the withdrawal had affected the public interest.

Auer and Traster moved for reconsideration under CR 59(a)(1), (7)-(9) on the malpractice claim, submitting new evidence in conjunction with that motion. One of these new pieces of evidence was a supplemental declaration from Brain. In it Brain stated that "[t]he fact that [he] did not address causation in [his] previous declaration only represent[ed] the fact that [he] was not asked to offer an opinion on causation in that declaration." CP at 321. Brain then declared that he "would draw a direct and proximate causal link between the" lawyers' alleged negligence and the damages Auer and Traster suffered. CP at 321-22.

The lawyers moved to strike Brain's supplemental declaration. Applying the *Burnet*[5] factors, the trial court found that (1) Brain's statement that he had not been asked to opine about causation in his first declaration reflected a tactical or strategic decision to withhold his opinion until trial, (2) the willful decision to withhold Brain's opinion prejudiced the defendants' trial preparation, and (3) no lesser sanction would vindicate the purposes of discovery. Consequently, the trial court granted the lawyers' motion and refused to consider Brain's supplemental declaration with Auer's and Traster's motion for reconsideration. Given the exclusion of Brain's supplemental declaration, the trial court denied reconsideration.

[5] *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 497-98, 933 P.2d 1036 (1997).

Auer and Traster appeal the order granting summary judgment and the order denying reconsideration. The lawyers cross appeal the order denying them summary judgment on the malpractice claim based on the alleged insufficient service of process.

ANALYSIS

I. SUMMARY JUDGMENT

A. Applicable Legal Principles

We review a trial court's decision to grant or deny a motion for summary judgment de novo. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013). We perform the same inquiry as the trial court and may affirm a trial court's order on summary judgment on any ground supported by the record. *Lakey*, 176 Wn.2d at 922; *Washburn v. City of Federal Way*, 178 Wn.2d 732, 753 n.9, 310 P.3d 1275 (2013). We view the evidence, and all reasonable inferences allowed by that evidence, in the light most favorable to the nonmoving party when reviewing an order of summary judgment. *Lakey*, 176 Wn.2d at 922. Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c). "'A material fact is one upon which the outcome of the litigation depends.'" *In re Estate of Black*, 153 Wn.2d 152, 160, 102 P.3d 796 (2004) (quoting *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963)).

"Summary judgment is subject to a burden-shifting scheme." *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.2d 886 (2008). The party moving for summary judgment "bears the initial burden of showing the absence of an issue of material fact." *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A defendant moving for summary judgment may show the absence of an issue of material fact by pointing out the lack of evidence

supporting an essential element of the plaintiff's case. *Young*, 112 Wn.2d at 225, 225 n.1 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). If the defendant successfully shows the lack of support for an essential element of the plaintiff's claim, the plaintiff must produce evidence that raises a genuine issue of material fact or show why further discovery is warranted; the plaintiff's failure to do so entitles the defendant to judgment as a matter of law. *See Young*, 112 Wn.2d at 225-26, 226 n.2 (quoting *Celotex*, 477 U.S. at 332 n.3 (Brennan, J., dissenting)).

B. The Cross Appeal: Whether the Malpractice Claim is Time-Barred

The lawyers cross appeal the trial court's denial of their motion for summary judgment to dismiss the malpractice claim, arguing that Auer and Traster failed to timely commence it. First, they contend that Anderson Hunter, Gibbs, and Knapp were served with a summons that commenced an action in King County rather than the correct county of Snohomish. Second, they claim that the Snohomish County action was not properly commenced until Auer and Traster served a summons on Leach and his wife, time-barring the malpractice claim against all defendants. The lawyers also argue that the trial court erred by refusing to order summary judgment on the malpractice claim with respect to Jane Doe Gibbs and Jane Doe Knapp because they were never served with any process. We agree that the trial court erred by not dismissing the malpractice claim against Jane Doe Gibbs and Jane Doe Knapp, but affirm the order denying summary judgment on these grounds with respect to Anderson Hunter, Leach, Jane Doe Leach, Gibbs, and Knapp.

1. Applicable Legal Principles

Proper service of process has both constitutional and statutory dimensions. *Scanlan v. Townsend*, 181 Wn.2d 838, 847, 336 P.3d 1155 (2014). The nonconstitutional dimension, at

issue here, is governed by both statute and court rules. RCW 4.16.170; chapter 4.28 RCW; CR 3-5. We review the meaning of statutes and court rules de novo. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) (statute); *see State v. Chhom*, 162 Wn.2d 451, 458, 173 P.3d 234 (2007) (court rules).

Generally a plaintiff must commence an action to recover damages to personal property or for personal injury within three years or the claim is barred.[6] RCW 4.16.080(2); *Brown v. Vail*, 169 Wn.2d 318, 328, 237 P.3d 263 (2010). To commence a civil action, the plaintiff must either (1) file the complaint with the superior court or (2) serve a copy of the summons and complaint on the defendant. CR 3. Filing the complaint or serving the summons and complaint tolls, for purposes of commencing the action, the statute of limitations for 90 days. RCW 4.16.170.[7] During that 90-day period the plaintiff must either (1) file the complaint if he or she first served a summons and complaint or (2) serve a summons and complaint if he or she first filed the complaint. RCW 4.16.170. If the plaintiff fails to both file the complaint and serve a summons and complaint within that 90-day period, the action is not deemed commenced for purposes of tolling the statute of limitations. RCW 4.16.170. By the explicit terms of RCW

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[6] CPA claims are exempt from this general rule and instead must be commenced within four years. RCW 19.86.120.

[7] RCW 4.16.170 reads:

> For the purposes of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.

4.16.170, serving any one of multiple defendants tolls the statute of limitations against all the defendants. *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 329, 815 P.2d 781 (1991). However, plaintiffs must still proceed with their cases in a timely manner and must serve a defendant in order to proceed with the action against that defendant. *Sidis*, 117 Wn.2d at 329-30.

CR 4 governs the form and content of a summons. *Quality Rock Prods., Inc. v. Thurston County*, 126 Wn. App. 250, 264, 108 P.3d 805 (2005) (citing CR 4(a) and (b)). It provides, as relevant to the lawyers' cross appeal:

> (b) Summons.
> (1) Contents. The summons for personal service shall contain:
> (i) the title of the cause, specifying the name of the court in which the action is brought, the name of the county designated by the plaintiff as the place of trial, and the names of the parties to the action, plaintiff and defendant;
> (ii) a direction to the defendant summoning the defendant to serve a copy of the defendant's defense within a time stated in the summons; [and]
> (iii) a notice that, in case of failure so to do, judgment will be rendered against the defendant by default. It shall be signed and dated by the plaintiff, or the plaintiff's attorney, with the addition of the plaintiff's post office address, at which the papers in the action may be served on him by mail.

We review the sufficiency of service de novo. *Streeter-Dybdahl v. Nguyet Huynh*, 157 Wn. App. 408, 412, 236 P.3d 986 (2010). The plaintiff bears the burden of making a prima facie case of sufficient service of process. *Streeter-Dybdahl*, 157 Wn. App. at 412.

2. The Nature of the Summons Served on Anderson Hunter, Gibbs, and Knapp

If the lawyers are correct that the summonses should be deemed King County summonses, then Auer and Traster failed to complete commencement of the Snohomish County action. If Auer and Traster are correct that the summonses were defective Snohomish County summonses, then they completed commencement of the Snohomish County action if they substantially complied with the rules and statutes governing service of process. We hold for

three reasons that the summonses were defective Snohomish County summonses and then turn to whether they nonetheless substantially complied with governing standards.

First, as a general matter, "the law favors the resolution of legitimate disputes brought before the court rather than leaving parties without a remedy." *In re Estate of Palucci*, 61 Wn. App. 412, 416, 810 P.2d 970 (1991). This legal preference may only be served by viewing the summonses as completing the commencement of the Snohomish County action, although defectively. Doing otherwise would bar Auer and Traster from bringing their claims before the court. *Palucci*, 61 Wn. App. at 416.

Second, and more importantly, the lawyers' argument runs contrary to "the civil rules' emphasis that substance trumps formality." *Quality Rock Prods.*, 126 Wn. App. at 265. The lawyers ask us to elevate the form of the caption of the summonses, the obvious result of a scrivener's error, over its actual function. That function is readily discernable from the documents served with the summons: a complaint which made clear that venue was proper only in Snohomish County and a superior court case summary showing that the action was filed in Snohomish County. The summonses served here were plainly associated with the action already filed in Snohomish County. The scrivener's error in the caption could not have reasonably led the lawyers to believe that the summonses were for some unknown action proceeding in King County Superior Court.

Third, service of a summons only commences an action under RCW 4.28.020, thereby initially invoking the jurisdiction in the trial court named in the summons, when service occurs before the plaintiff files the complaint with the court. Otherwise, it is the filing of the complaint that invokes the trial court's jurisdiction. RCW 4.28.020. A summons that commences an action would not have a cause number because it is only when a complaint is filed with the court that a

cause receives a number. *Cf. Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 548, 815 P.2d 798 (1991). The summonses served on Anderson Hunter, Gibbs, and Knapp all contained a cause number, specifically the one assigned to the Snohomish County action. These summonses could not have commenced an action already commenced. They therefore did not act to confer jurisdiction on the King County Superior Court. For these three reasons, the summonses served on Anderson Hunter, Gibbs, and Knapp were defective summonses for Snohomish County Superior Court.

3. Substantial Compliance and Amendability of the Summonses Served on Anderson Hunter, Gibbs, and Knapp

Having determined that the summonses served on Anderson Hunter, Gibbs, and Knapp were defective Snohomish County summonses, we now examine whether the summonses substantially complied with the relevant rules and statutes and whether the defect in the caption was amendable. We hold that the summonses substantially complied with the rules and statutes governing service and that any defect did not prejudice the lawyers, making the defect amendable.

The requirements as to the form of a summons laid out in CR 4 ensure that the summons serves its function, namely "'giv[ing] certain notice of the time prescribed by law to answer and to advise the defendant of the consequences of failing to do so.'" *Quality Rock Prods.*, 126 Wn. App. at 264 (quoting *Sprincin King St. Partners v. Sound Conditioning Club, Inc.*, 84 Wn. App. 56, 60, 925 P.2d 217 (1996)). Citing these purposes, Washington's Supreme Court has held that "'[a]ny summons . . . which definitely and certainly gives notice of these things must be held a substantial, hence a sufficient, compliance with that form.'" *Codd v. Westchester Fire Ins. Co.*, 14 Wn.2d 600, 605, 128 P.2d 968 (1942) (quoting *Spokane Merch. Ass'n v. Acord*, 99 Wash. 674, 170 P. 329, 8 A.L.R. 835 (1918)).

Both court rule[8] and statutory authority[9] permit the amendment of defective, but substantially compliant, process. These amendments are permissible "so long as the defendant is not prejudiced." *Sammamish Pointe Homeowners Ass'n v. Sammamish Pointe LLC*, 116 Wn. App. 117, 124, 64 P.3d 656 (2003). If the defect is amendable, the trial court should permit the amendment, and deny any motion seeking dismissal of the claims based on the defect, so long as the plaintiff moves to amend. *In re Marriage of Morrison*, 26 Wn. App. 571, 573-75, 613 P.2d 557 (1980).

The summonses served on Anderson Hunter, Gibbs, and Knapp substantially complied with their purpose. The summonses informed the defendants of the time prescribed by law to answer and the consequences of a default. Any defect in the summonses did not prejudice the lawyers. The complaint not only specified that Auer and Traster had filed suit in Snohomish County, but its factual allegations make clear that no venue other than Snohomish County was proper. The superior court case summary also confirmed that the action was filed in Snohomish

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[8] CR 4(h) provides that

> At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

[9] RCW 4.32.250 provides that

> A notice or other paper is valid and effectual though the title of the action in which it is made is omitted, or it is defective either in respect to the court or parties, if it intelligently refers to such action or proceedings; and in furtherance of justice upon proper terms, any other defect or error in any notice or other paper or proceeding may be amended by the court, and any mischance, omission or defect relieved within one year thereafter; and the court may enlarge or extend the time, for good cause shown, within which by statute any act is to be done, proceeding had or taken, notice or paper filed or served, or may, on such terms as are just, permit the same to be done or supplied after the time therefor has expired.

County. The lawyers appeared pro se in Snohomish County after receiving the summonses. When they retained an attorney, he appeared there as well. Most importantly, the lawyers timely filed answers to the complaint filed in Snohomish County Superior Court. As was proper, Auer and Traster moved to amend the summonses.

The lawyers claim that the trial court erred by allowing an amendment to the summonses, because proper summonses were already on file with the court and Auer and Traster did not serve those summonses. CR 5(d)(1) requires, in effect, that plaintiffs must file the summons and complaint served in accordance with CR 4 with the court. We have held that the summons filed need not be identical to the one served and that the plaintiff complies with RCW 4.16.170 by filing a summons "substantially identical" to the one served. *Nearing v. Golden State Foods Corp.*, 52 Wn. App. 748, 752, 764 P.2d 242 (1988). The unamended summonses here were substantially identical to the ones on file with the court: they had the same case name, cause number, and parties. More importantly, they had identical response times and contained identical language about the effect of a default. The summonses served by Auer and Traster complied with CR 5(d)(1). For all of these reasons, we hold that the trial court did not err by denying the summary judgment motion to dismiss Auer's and Traster's claims against Anderson Hunter, Knapp, and Gibbs due to untimely commencement. *Morrison*, 26 Wn. App. at 573-75.

4. Service on Leach and Jane Doe Leach

Auer and Traster served Leach and Jane Doe Leach with a summons on June 16, 2011. That summons properly listed Snohomish County as the action's venue, but was served outside the 90-day tolling period initiated by the filing of the complaint under RCW 4.16.170. The lawyers argue that the Snohomish County action was not properly commenced until this

summons was served on Leach and Jane Doe Leach and that this time-barred the malpractice claim against all defendants.

This argument fails under *Sidis*. That decision held that under RCW 4.16.170, serving any one of multiple defendants tolls the statute of limitations against all the defendants, subject to the restriction that a defendant must in fact be served before the action may proceed against that defendant. *Sidis*, 117 Wn.2d at 329-30. As held above, Anderson Hunter, Gibbs, and Knapp were served on April 26, 2011 in compliance with CR 5(d)(1), well within 90 days of filing the complaint. Leach and Jane Doe Leach were served in June 2011, before Auer and Traster proceeded against them. Thus, under *Sidis*, Auer and Traster properly commenced their action against Anderson Hunter, Leach, Jane Doe Leach, Gibbs and Knapp.

5. Service on Jane Doe Gibbs and Jane Doe Knapp

No affidavit of service or any other evidence shows service of process on Jane Doe Gibbs or Jane Doe Knapp. Under *Sidis*, 117 Wn.2d at 329-30, a defendant must be served at some point to maintain an action against her. Therefore, we reverse the order of summary judgment as far as it denied Jane Doe Knapp and Jane Doe Gibbs dismissal of Auer's and Traster's malpractice claim as time-barred. We remand for the trial court to enter an order granting summary judgment dismissing the malpractice claim against Jane Doe Gibbs and Jane Doe Knapp on those grounds.

C. The Malpractice Claim

Auer and Traster argue that the trial court erred by dismissing their malpractice claim on summary judgment because (1) the trial court applied an incorrect evidentiary standard when it required expert testimony on causation to survive the motion for summary judgment and (2) they

offered evidence that created genuine issues of material fact as to whether the lawyers' malpractice proximately caused Auer's and Traster's injuries.[10] We disagree.[11]

1. Applicable Legal Principles

A plaintiff must show four elements to succeed on a claim of legal malpractice:

> (1) the existence of an attorney-client relationship giving rise to a duty of care on the part of the lawyer; (2) an act or omission breaching that duty; (3) damage to the client; and (4) the breach of duty must have been a proximate cause of the damages to the client.

Nielson v. Eisenhower & Carlson, 100 Wn. App. 584, 589, 999 P.2d 42 (2000).

Proximate cause provides "the nexus between breach of duty and resulting injury." *Estep v. Hamilton*, 148 Wn. App. 246, 256, 201 P.3d 331 (2008). Establishing proximate cause requires showing that the alleged breach of a duty was both a cause-in-fact and a legal cause of the claimed injury. *Nielson*, 100 Wn. App. at 591.

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[10] Auer and Traster also argue that the trial court erred by granting the lawyers summary judgment because they failed to show the absence of genuine issues of material fact with citations to the record as required by *White v. Kent Medical Center, Inc.*, 61 Wn. App. 163, 170, 810 P.2d 4 (1991). The lawyers, however, *did* point to the record to show that Auer and Traster had failed to support the essential elements of their claims with evidence.

[11] The lawyers raise a number of issues related to the dismissal of the malpractice claim that we do not address on their merits.

First, the lawyers argue, for the first time on appeal, that the attorney judgment rule that we recognized in *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, 180 Wn. App. 689, 701-04, 324 P.3d 743, *review denied*, 181 Wn.2d 1008 (2014), shields them from liability. The lawyers failed to raise this issue to the trial court and we decline to consider it. RAP 2.5(a).

Second, the lawyers also assign error to the trial court's refusal to exclude certain evidence. They have waived this assignment of error because they fail to make any argument as to how or why the trial court erred. Instead, they simply incorporate their trial briefing. We do not allow parties to argue issues in that manner. *U.S. W. Commc'ns, Inc. v. Wash. Utils. & Transp. Comm'n*, 134 Wn.2d 74, 111-12, 949 P.2d 1337 (1997); *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1988).

Finally, the lawyers give passing treatment to arguments that Auer and Traster have not supported their claims of damages. Again, we generally do not reach the merits of issues given passing treatment. *Habitat Watch*, 155 Wn.2d at 416 (quoting *Thomas*, 150 Wn.2d at 868-69).

Auer's and Traster's appeal concerns the cause-in-fact prong of proximate causation. An act is a cause-in-fact of an injury, if, "'but for'" the act, the injury would not have occurred. *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 203, 15 P.3d 1283 (2001) (quoting *Hertog v. City of Seattle*, 138 Wn.2d 265, 282-83, 979 P.2d 400 (1999)). A cause-in-fact, in other words, is one that provides an "'immediate connection between an act and an injury.'" *Nielson*, 100 Wn. App. at 591 (quoting *City of Seattle v. Blume*, 134 Wn.2d 243, 251-52, 947 P.2d 223 (1997)). Where the injury would occur regardless of any breach by the attorney, there is no "but for" connection between the breach and the injury; consequently, in malpractice cases the plaintiff must show that, absent the breach, he or she "'would have prevailed or at least would have achieved a better result.'" *Estep*, 148 Wn. App. at 256 (quoting *Halvorson v. Ferguson*, 46 Wn. App. 708, 719, 735 P.2d 675 (1986)); *Geer v. Tonnen*, 137 Wn. App. 838, 840, 155 P.3d 163 (2007); *Smith v. Preston Gates Ellis, LLP*, 135 Wn. App. 859, 864, 147 P.3d 600 (2006); *Griswold v. Kilpatrick*, 107 Wn. App. 757, 760-61, 27 P.3d 246 (2001); *see Sherry v. Diercks*, 29 Wn. App. 433, 438, 628 P.2d 1336 (1981).

2. Expert Testimony

Auer and Traster first contend that summary judgment was inappropriate because the trial court held them to an improper burden of proof by requiring expert testimony about causation in order to survive summary judgment. We disagree.

Auer and Traster contend that the trial court "did not find . . . that [the] plaintiffs had not established evidentiary facts to meet their burden." Appellant's Reply Br. at 5 (emphasis omitted). To the contrary, the trial court found no evidence in the record that would directly show, or allow the inference, that Auer and Traster would have prevailed or obtained a better result in the underlying trial without the defendants' malpractice. As discussed below, it was

correct in that assessment. Given that lack of evidence, the trial court concluded that expert testimony was necessary to establish causation; otherwise the jury could only find the lawyers had proximately caused Auer's and Traster's losses by pure speculation.

The trial court did not apply an incorrect evidentiary burden. Washington has recognized that expert testimony is usually necessary where the jury could otherwise only find an element of negligence by pure speculation. *See Estate of Bordon v. Dep't of Corr.*, 122 Wn. App. 227, 243-44, 95 P.3d 764 (2004). An opinion from Division One of this court, *see Geer*, 137 Wn. App. at 851, and a treatise on legal malpractice, 4 *R. Mallen & J. Smith, Legal Malpractice* § 34:20, at 1172 (2008 ed.), have recognized this principle's application in the context of legal malpractice. The trial court's order on summary judgment reflects the logic of this authority and the principle that a plaintiff alleging malpractice must introduce evidence of each element of his or her claim to avoid summary judgment. *Geer*, 137 Wn. App. at 851 n.11.

Auer and Traster also contend, in their reply brief, that the trial court erred by requiring expert testimony on causation because any such testimony would be speculative and impermissible. Auer and Traster, however, waived this argument by failing to raise it in their opening brief.[12] *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

[12] Regardless, their argument lacks merit. The type of expert testimony the trial court found necessary given the lack of other evidence of causation is analogous to the type of expert testimony about causation not only accepted, but generally required, in other types of professional malpractice claims. *E.g., Harris v. Robert C. Groth, M.D., Inc.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983); *see Hill v. Sacred Heart Med. Ctr.*, 143 Wn. App. 438, 448, 117 P.3d 1152 (2008).

3. Causation

Auer and Traster next contend that the trial court erred by granting summary judgment, because they created genuine issues of material fact about causation. They contend that they showed (1) the failure to seek equitable relief, (2) the failure to seek timely discovery, and (3) the lawyers' lack of diligence caused them damages. They also argue that (4) the lawyers' pretextual withdrawal from representing them so soon before trial required them to retain a new attorney, resulting in higher attorney fees than they otherwise would have needed to pay. We consider these in turn.

Auer and Traster did not present sufficient evidence to create a genuine issue of material fact that the lawyers' failure to pursue equitable relief caused them damages. While Brain did opine that the pursuit of monetary damages breached the duty of care, he did not opine that this caused Auer and Traster any injury until his supplemental declaration. That declaration, however, was not before the trial court at the time of summary judgment, and we cannot consider it when reviewing the order on summary judgment. RAP 9.12. Without that declaration, Auer and Traster fail to create a genuine issue of material fact as to whether they would have prevailed in the underlying action, or at least have fared better than they did. Further, establishing causation based on the failure to seek equitable relief requires Auer and Traster to show that the trial court would have found their remedies at law inadequate. *Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006) (equitable remedies unavailable unless damages at law inadequate). Brain never opined, in his original or supplemental declaration, that monetary damages were inadequate and Auer and Traster had no difficulty monetizing their losses.

Auer's and Traster's second argument, alleging the failure to seek timely discovery, also fails. Nothing in the record shows or allows an inference that Auer's and Traster's knowledge of

the underlying defendants' insurance coverage limits would have affected how the parties would have proceeded in the underlying suit. Instead, Auer and Traster offer only speculation that the outcome of the underlying suit would have differed had the lawyers timely obtained discovery. That speculation is insufficient to create a genuine issue of material fact on the element of causation. *Smith*, 135 Wn. App. at 864; *Young*, 112 Wn.2d at 225-26.

Auer's and Traster's third argument fares no better. Evidence in the record does create a genuine issue of material fact as to whether Auer and Traster settled because the lawyers' lack of diligence left them without the resources necessary to continue pursuing their claims. There is a difference, though, between the lawyers' actions causing Auer and Traster to accept the settlement and the lawyers' actions causing them an injury. Any lack of diligence only caused Auer and Traster an injury if they would have received more than the settlement they accepted had they gone to trial, *e.g.*, *Estep*, 148 Wn. App. at 256 (quoting *Halvorson*, 46 Wn. App. at 719), and no evidence indicates or allows the inference that they would have.

Auer's and Traster's fourth argument is that Gibbs offered pretextual reasons for withdrawing from his representation of them. Brain opined that Gibbs offered those pretextual reasons to advance the lawyers' interests, instead of those of Auer and Traster. Auer and Traster also point out that Leach had testified in his deposition that he did not believe the disparity in damages to be a conflict.

This evidence, however, does not controvert the validity of Gibbs' proffered reason for withdrawal: that the difference between the individual amounts at risk for Auer and Traster created a conflict of interest. Further, an attorney representing a client in a civil matter may only withdraw from representation with the permission of the court if the client objects to the withdrawal. *Kingdom v. Jackson*, 78 Wn. App. 154, 158, 896 P.2d 101 (1995); CR 71. The

attorneys presented the court with their reasons for withdrawing and received the trial court's permission over Auer's and Traster's objections. Thus, the immediate cause of the withdrawal was the order of the trial court.

We recognize that Auer and Traster alleged that in his argument on withdrawal Gibbs made inaccurate representations to the court about Auer's and Traster's payment status and their failure to respond to his communications. We make no determination of the truth of these allegations. These representations, however, do not raise factual issues as to whether the asserted reason for withdrawal, the presence of a conflict, was an artifice or pretext. Rather, at most they may raise an issue as to the validity of the order of withdrawal. The validity of that action, though, is not before us.

Auer and Traster raise no genuine issues of material fact about causation as to their malpractice claim. The court properly entered summary judgment for the lawyers on that claim.

D. The CPA Claim

Auer and Traster also contend that the trial court erred by dismissing their CPA claims on summary judgment because they offered evidence that would create a genuine issue of material fact as to (1) whether the lawyers acted deceptively or unfairly in withdrawing from representation and (2) whether these deceptive or unfair acts affected the public interest. We affirm the order of summary judgment on the CPA claim on different grounds, because the evidence did not raise a genuine issue of material fact as to whether the lawyers' actions related to withdrawal caused Auer and Traster injury.

1. Applicable Legal Principles

The CPA proscribes "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. The CPA contains a

private right of action allowing individuals to enforce its proscriptions. RCW 19.86.090. Success on a CPA claim requires a plaintiff to establish five elements: "(1) [an] unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) [a] public interest impact, (4) injury to [the] plaintiff in his or her business or property[, and] (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). The failure to make the necessary showing on any of the elements defeats a CPA claim. *Hangman Ridge*, 105 Wn.2d at 784.

2. Causation

For the reasons set out above in the analysis of the malpractice claim, the lawyers' withdrawal from representation was not the proximate cause of injury to Auer and Traster. Once Auer and Traster opposed it, withdrawal could only be granted by court order. After hearing from both sides, the trial court granted the withdrawal. Gibbs' claimed misrepresentations to the court in arguing for withdrawal may raise a question about the basis for the order, but the validity of the court's withdrawal order is not before us. Because the court ordered withdrawal in an action we must presume valid, the evidence does not show the needed causal link between the lawyers' actions and Auer's and Traster's increased expenses due to the withdrawal.

We may affirm a challenged decision on any grounds supported by the record. Accordingly, we affirm the order of summary judgment on the CPA claim.

II. RECONSIDERATION

Auer and Traster claim that the trial court improperly (1) excluded Brain's supplemental declaration on reconsideration and (2) denied the motion for reconsideration. Again, we disagree.

A. Applicable Legal Principles

We review a trial court's decision on a motion for reconsideration for an abuse of discretion. *Landstar Inway, Inc. v. Samrow*, 181 Wn. App. 109, 120-121, 325 P.3d 327 (2014). We review a trial court's "decision to consider new or additional evidence presented with a motion for reconsideration" for an abuse of discretion. *Martini v. Post*, 178 Wn. App. 153, 162, 313 P.3d 473 (2013). A trial court abuses its discretion where it exercises its discretion in a manifestly unreasonable manner or on untenable grounds or for untenable reasons. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 144, 331 P.3d 40 (2014).

B. Brain's Supplemental Declaration

Auer and Traster first contend that the trial court abused its discretion when it refused to consider Brain's supplemental declaration, which they offered in conjunction with their motion for reconsideration, claiming that nothing in CR 59 or case law interpreting that rule prevented the trial court from considering new evidence on reconsideration. Auer and Traster correctly characterize the trial court's ability to consider new evidence. The court, however, excluded Brain's supplemental declaration as a discovery sanction: Auer and Traster had not provided Brain's opinion as required by the discovery rules until long after the discovery cutoff.

In *Keck v. Collins*, No. 90357-3, 2015 WL 5612829 (Sept. 24, 2015), the Supreme Court held that the trial court must consider the factors from *Burnet*, 131Wn.2d at 497-98, on the record before striking untimely filed evidence submitted in response to a summary judgment motion. *Keck*, No. 90357-3, 2015 WL 5612829 at *8. Our review of the trial court's decision is for an abuse of discretion. *Id.* Only in their reply brief do Auer and Traster cite *Burnet* or argue that the trial court erred by excluding Brain's supplemental declaration as a discovery sanction.

Under *Cowiche Canyon Conservancy*, 118 Wn.2d at 809, Auer and Traster waived this claim of error by failing to raise it until their reply brief.

C. Denial of Reconsideration

Without Brain's supplemental declaration, any new evidence considered by the trial court did not change the analysis of the causation issue: nothing before the court on reconsideration showed that Auer and Traster would likely have prevailed or obtained a better result in the underlying matter. With that, any claim of malpractice fails for lack of evidence to support the causation element, and reconsideration was unwarranted. *Cf. Martini*, 178 Wn. App. at 164 (reconsideration of summary judgment warranted where all the evidence before the court establishes a genuine issue of material fact).

CONCLUSION

We affirm the trial court's grant of summary judgment in favor of the lawyers on the malpractice and CPA claims. We also affirm the trial court's order striking Brain's supplemental declaration and its order denying reconsideration of the malpractice claim. On the cross-appeal, we affirm the trial court's denial of summary judgment dismissing the malpractice claim against Anderson Hunter, Leach, Jane Doe Leach, Gibbs and Knapp as time-barred, but reverse the trial court's denial of summary judgment dismissing the malpractice claim against Jane Doe Gibbs and Jane Doe Knapp on the same grounds. Accordingly, we remand for the trial court to enter an order granting summary judgment dismissing the malpractice claim against Jane Doe Gibbs and

Jane Doe Knapp as time-barred.

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

Bjorgen, A.C.J.

BJORGEN, A.C.J.

We concur:

LEE, J.

Sutton, J.

SUTTON, J.

Exhibit B

Filed
Washington State
Court of Appeals
Division Two

January 12, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RONALD AUER and JOHN TRASTER,

Appellants/Cross Respondents,

v.

J. ROBERT LEACH and JANE DOE LEACH, his wife; CHRISTOPHER KNAPP and JANE DOE KNAPP, his wife; GEOFFREY GIBBS and JANE DOE GIBBS, his wife; ANDERSON HUNTER LAW FIRM, P.S., INC.; and SAFECO INSURANCE,

Respondents/Cross Appellants.

No. 46105-6-II

ORDER DENYING RECONSIDERATION AND AMENDING OPINION

The appellants filed a motion for reconsideration of the unpublished opinion filed on October 27, 2015. After review, it is hereby

ORDERED that appellants' motion for reconsideration is denied; it is further

ORDERED that the filed unpublished opinion is amended as follows:

On page 26, lines 14 – 16, the following text is deleted:

The court, however, excluded Brain's supplemental declaration as a discovery sanction: Auer and Traster had not provided Brain's opinion as required by the discovery rules until long after the discovery cutoff.

On page 26, line 14, the following text is inserted in its place:

The court, however, excluded Brain's supplemental declaration as a discovery sanction: Auer and Traster had not provided Brain's opinion until they moved for reconsideration of the court's decision on summary judgment despite having all information necessary to provide that opinion with their response to the summary judgment motion.

IT IS SO ORDERED.

Panel: Jj. Bjorgen, Lee, Sutton

DATED this 12th day of January, 2016.

Bjorgen, A.C.J.
BJORGEN, A.C.J.

We concur:

LEE, J.

Sutton, J.
SUTTON, J.

Filed
Washington State
Court of Appeals
Division Two

October 27, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RONALD AUER and JOHN TRASTER,

Appellants/Cross Respondents,

v.

J. ROBERT LEACH and JANE DOE LEACH, his wife; CHRISTOPHER KNAPP and JANE DOE KNAPP, his wife; GEOFFREY GIBBS and JANE DOE GIBBS, his wife; ANDERSON HUNTER LAW FIRM, P.S., INC.; and SAFECO INSURANCE,

Respondents/Cross Appellants.

No. 46105-6-II

UNPUBLISHED OPINION

BJORGEN, A.C.J. — Ronald Auer and John Traster sued the Anderson Hunter Law Firm P.S., J. Robert Leach,[1] Jane Doe Leach, Geoffrey Gibbs, Jane Doe Gibbs, Christopher Knapp, and Jane Doe Knapp (collectively lawyers[2]) alleging legal malpractice and violation of Washington's Consumer Protection Act (CPA), chapter 19.86 RCW. The trial court first denied the lawyers' summary judgment motion seeking dismissal of the malpractice claim as time-barred under RCW 4.16.080(2). The trial court then granted the lawyers' motion for summary judgment on both the malpractice and CPA claims, determining that Auer and Traster failed to raise genuine issues of material fact on essential elements of each claim. After Auer and Traster moved for reconsideration on the malpractice claim and filed a supplemental declaration by their

[1] Leach's representation of Auer and Traster in the underlying suit involved in this appeal began when he was in private practice and ended with his appointment to an open position on Division One of the Court of Appeals.

[2] We refer to individuals by name when discussing claims pertaining only to them.

expert, Paul Brain, the trial court struck this declaration and denied reconsideration of its order dismissing the malpractice claim.

Auer and Traster appeal, arguing that the grant of summary judgment in favor of the lawyers was improper, because genuine issues of material fact exist as to whether the lawyers' alleged malpractice proximately caused Auer and Traster their injuries and whether the lawyers committed deceptive acts that affected the public interest. Auer and Traster also argue that the trial court erred or abused its discretion by refusing to consider the new evidence offered on reconsideration and by denying their motion for reconsideration. The lawyers cross-appeal the trial court's denial of their summary judgment motion to dismiss the malpractice claim on grounds of untimeliness.

We affirm the trial court's grant of summary judgment in favor of the lawyers on the malpractice and CPA claims. We also affirm the trial court's order striking Brain's supplemental declaration and its order denying reconsideration of its summary judgment order on the malpractice claim. As to the cross-appeal, we affirm the trial court's denial of summary judgment dismissing the malpractice claim against Anderson Hunter, Leach, Jane Doe Leach, Gibbs and Knapp as time-barred. However, we reverse the trial court's denial of summary judgment dismissing the malpractice claim against Jane Doe Gibbs and Jane Doe Knapp as time-barred. Accordingly, we affirm in part, reverse in part, and remand for the trial court to enter an order granting summary judgment dismissing the malpractice claim against Jane Doe Gibbs and Jane Doe Knapp.

FACTS

A. The Underlying Lawsuit

In 2003, Auer and Traster purchased two lots to "construct upper scale single family

residences, as well as large commercial quality shop structures."[3] Clerk's Papers (CP) at 441. Auer wanted his commercial shop to operate his business in; Traster wanted his for the pursuit of "various activities and hobbies." CP at 441.

The agreements for the purchase and sale of the lots each required the seller, the estate of Margaret Westland, to obtain certain permits and construct a driveway to the properties within 60 days of closing escrow. After closing, the estate began constructing that driveway. However, the estate failed to obtain the necessary permits and the driveway did not conform to the Snohomish County Code, causing the county to issue a stop work order for the project. That order, along with the lack of an "approved access road" to the two properties, rendered the properties ineligible for building permits and disrupted Auer's and Traster's plans for the lots.

Auer and Traster retained Leach and the Anderson Hunter Law Firm to pursue legal claims against the Westland estate, the realtor who drafted the purchase and sale agreements, and the realtor's employer. Auer and Traster filed suit for breach of contract against those defendants in 2003.

Auer's and Traster's relationship with Leach was a difficult one. Auer and Traster frequently complained to Christopher Knapp, Anderson Hunter's managing partner, about perceived failures to communicate, to take requested action, and to diligently pursue their claims. Knapp assured Auer and Traster that Leach would do a better job communicating with them and

[3] Traster apparently purchased both lots and Auer then purchased his from Traster. The lawyers argue that this makes Auer Traster's assignee and limits the liability of the lawyers in the underlying suit, and consequently their liability. Because the lawyers give the issue only passing treatment, we do not address it. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 416, 120 P.3d 56 (2005) (quoting *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004)).

promised that he would monitor the situation. Nevertheless, Auer and Traster became dissatisfied with Knapp's monitoring of Leach's work.

The acrimony between Leach, Knapp, Auer, and Traster eventually caused Anderson Hunter to try to end the attorney-client relationship. Knapp e-mailed Leach, telling him that "[t]his client is very rude. I would withdraw." CP at 470. Knapp also repeatedly told Auer and Traster that they might want to seek representation that would work better for them, but they refused.

By 2005, the estate had filed a motion for summary judgment. Leach recommended that Auer and Traster voluntarily dismiss the suit under CR 41 to avoid summary judgment and then refile the claim as a new lawsuit. Auer and Traster maintain that Leach's lack of preparation necessitated the nonsuit, but they agreed to the plan. Accordingly, the original suit was dismissed and a new one filed in 2006.

Effective March 1, 2008, the governor appointed Leach to an open seat on Division One of the Washington State Court of Appeals. Accordingly, Leach withdrew from representing Auer and Traster. However, they remained Anderson Hunter's clients and Geoffrey Gibbs, another attorney from the firm, began representing them.

Later in March, Gibbs informed Auer and Traster that his pretrial preparations had uncovered a potential conflict of interest that complicated his representation of both of them.[4] Auer and Traster told Gibbs that they had already discussed the potential conflict with Leach and had "come to an agreement to resolve" it. CP at 444.

[4] The alleged conflict of interest arose from the disparate size of Auer's and Traster's claims. Traster claimed a small amount of damages related to inconveniences caused by the delay in getting the building permits. Auer claimed similar damages plus large business losses. Gibbs informed Auer and Traster that the difference in the value of their claims created a potential conflict in deciding whether to accept any possible settlement offer.

Gibbs announced that Auer and Traster had failed to address his concerns and served a notice of withdrawal to terminate his and Anderson Hunter's representation of them. When Auer and Traster objected to the withdrawal, Gibbs filed a motion before the superior court, which then granted the withdrawal.

Auer and Traster eventually retained new counsel to represent them. Gibbs had previously informed Auer and Traster that, after taking over representation of them for Leach, he would only need to bill approximately $50,000 in order to take the matter through trial. Auer and Traster's new counsel billed them approximately $200,000 for time spent preparing for, and taking them to, a scheduled mediation.

The mediation resulted in a settlement between Auer and Traster and the defendants in the underlying suit. Although Auer and Traster valued their claims as worth over $8,000,000, they received only $500,000 in the settlement and a construction easement so that they could get a permit and complete the road required by the purchase and sale agreement. Auer maintains that he and Traster settled because the protracted legal battle caused by the defendants' lack of diligence had drained them of the financial resources necessary to continue to assert their claims.

B. The Lawsuit Against the Lawyers

On February 14, 2011, Auer and Traster appeared pro se and filed summonses and a complaint in Snohomish County Superior Court. These named Anderson Hunter, Leach and his wife, Gibbs and his wife, and Knapp and his wife as defendants.

The complaint's first cause of action was malpractice. Auer and Traster alleged:

> That the said Defendants failed to fully advise Plaintiffs of their rights and appropriate tactics and strategy, failed to diligently pursue the litigation, had undisclosed conflicts of interest, served their own interest at the expense of the Plaintiffs, failed to pursue necessary discovery, failed to prepare the case for trial, necessitated dismissal of the 2003 case and refiling of the 2006 case, then withdrew from the 2006 case in 2008 as trial approached, made multiple misrepresentations

> to Plaintiffs and claimed a wrongfully asserted conflict of interest between the two Plaintiffs herein as justification for withdrawal. That Defendants refused to disgorge payments wrongfully received and Plaintiffs were impaired in retaining replacement counsel and incurred additional litigation expenses as a consequence of the withdrawal of said Defendants.

CP at 1133.

The complaint's second cause of action was for violation of the CPA. Auer and Traster alleged:

> That the said Defendants' conduct set forth above was unfair and deceptive within the meaning of the Consumer Protection Act, implicated the entrepreneurial aspects of the practice of law, is likely to be repeated, and constituted business practices of the Defendants.

CP at 1134.

In April 2011, Auer and Traster retained new counsel and on April 26 served the summonses, complaint, notice of appearance, and the superior court case summary printout on Anderson Hunter, Leach, Gibbs, and Knapp. However, the summonses and the notice of appearance were mistakenly captioned for King County Superior Court. The superior court case summary showed the action as filed in Snohomish County. On April 29, due to an impending scheduled vacation, Auer's and Traster's counsel filed a notice of unavailability listing the Snohomish County cause number of Auer's and Traster's action served on the defendants.

The lawyers served a special notice of appearance captioned for Snohomish County Superior Court on May 4, 2011. Further, the lawyers' counsel served a notice of withdrawal and substitution captioned for Snohomish County Superior Court on the parties and filed it in the Snohomish County Superior Court.

In early June 2011, the lawyers filed a motion to dismiss the action. They alleged that Auer and Traster had failed to properly serve them with process, warranting dismissal under CR

12(b)(4) and (5). Specifically, the lawyers contended that Anderson Hunter, Gibbs, and Knapp had never been served with a Snohomish County summons as required to complete commencement of the action and that Leach and the three Jane Doe defendants had never been served with any process at all.

On June 16, 2011, the lawyers' counsel accepted service of a summons and complaint on behalf of Leach and his wife. That summons listed Snohomish County as the action's venue.

With the service of a Snohomish County summons on Leach and his wife, the lawyers struck their original motion to dismiss and filed a motion for summary judgment seeking dismissal of the malpractice claim as time-barred under RCW 4.16.080(2). The lawyers argued that the summonses served on Anderson Hunter, Gibbs, and Knapp began commencement of an action in King County rather than completed commencement of the action in Snohomish County. They contended that the Snohomish County action was never fully commenced as required by RCW 4.16.170 until service of the summonses on Leach and his wife, which occurred outside both the three-year statute of limitations generally applicable to tort claims and the 90-day tolling period initiated by the filing of the complaint under RCW 4.16.170.

The trial court denied the lawyers' summary judgment motion requesting dismissal of the malpractice claim as time-barred, reasoning that the summonses substantially complied with the governing rules and that the failure to correctly identify the court was an amendable defect. Because the summonses served their purposes, namely notifying the lawyers of the deadline to answer Auer's and Traster's complaint and of the consequences for failing to do so, the trial court found that the defect in the summonses did not prejudice the lawyers. Given the lack of prejudice, the trial court granted Auer and Traster leave to amend the summonses to correctly

identify Snohomish County, rather than King County, as the court where they would litigate the action.

The lawyers then moved for summary judgment on both Auer's and Traster's claims, contending that no genuine issues of material fact existed on at least two of the elements of legal malpractice: the breach of a legal duty and causation. The lawyers also maintained that no genuine issues of material fact existed on at least three of the elements of the CPA claim: that their acts had occurred in trade or commerce, that their acts impacted the public interest, and that their acts had been unfair.

Auer and Traster responded by submitting additional evidence that they claimed showed the existence of genuine issues of material fact, including a declaration by their expert, Paul Brain. After reciting the elements of a legal malpractice claim, Brain stated that he assumed the existence of an attorney-client relationship that would create a duty of care, but that "[c]ausation may not be a proper subject for [his] opinion." CP at 600. Brain then opined that the lawyers had breached their duty of care by pursuing legal remedies rather than equitable ones, given Auer's and Traster's goals with the suit. Brain also declared that the lawyers had breached their duty of care by failing to diligently pursue Auer's and Traster's interests, failing to engage in timely discovery, and recommending that Auer and Traster take a nonsuit to avoid summary judgment. Finally, Brain opined that Gibbs' proffered reasons for withdrawing as counsel were pretextual.

The trial court granted the lawyers' motion for summary judgment on both of Auer's and Traster's claims. Though finding that Brain's declaration raised genuine issues of material fact about several breaches of duty by the lawyers, the trial court found no evidence that indicated or supported an inference that any breach caused Auer's and Traster's injuries. Specifically, the

trial court determined that Auer and Traster had failed to create a genuine issue of material fact regarding whether they would have succeeded in the underlying action absent the alleged malpractice. The trial court granted the motion for summary judgment on the CPA claim after determining that Auer and Traster had failed to establish that the withdrawal had affected the public interest.

Auer and Traster moved for reconsideration under CR 59(a)(1), (7)-(9) on the malpractice claim, submitting new evidence in conjunction with that motion. One of these new pieces of evidence was a supplemental declaration from Brain. In it Brain stated that "[t]he fact that [he] did not address causation in [his] previous declaration only represent[ed] the fact that [he] was not asked to offer an opinion on causation in that declaration." CP at 321. Brain then declared that he "would draw a direct and proximate causal link between the" lawyers' alleged negligence and the damages Auer and Traster suffered. CP at 321-22.

The lawyers moved to strike Brain's supplemental declaration. Applying the *Burnet*[5] factors, the trial court found that (1) Brain's statement that he had not been asked to opine about causation in his first declaration reflected a tactical or strategic decision to withhold his opinion until trial, (2) the willful decision to withhold Brain's opinion prejudiced the defendants' trial preparation, and (3) no lesser sanction would vindicate the purposes of discovery. Consequently, the trial court granted the lawyers' motion and refused to consider Brain's supplemental declaration with Auer's and Traster's motion for reconsideration. Given the exclusion of Brain's supplemental declaration, the trial court denied reconsideration.

[5] *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 497-98, 933 P.2d 1036 (1997).

Auer and Traster appeal the order granting summary judgment and the order denying reconsideration. The lawyers cross appeal the order denying them summary judgment on the malpractice claim based on the alleged insufficient service of process.

ANALYSIS

I. SUMMARY JUDGMENT

A. Applicable Legal Principles

We review a trial court's decision to grant or deny a motion for summary judgment de novo. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013). We perform the same inquiry as the trial court and may affirm a trial court's order on summary judgment on any ground supported by the record. *Lakey*, 176 Wn.2d at 922; *Washburn v. City of Federal Way*, 178 Wn.2d 732, 753 n.9, 310 P.3d 1275 (2013). We view the evidence, and all reasonable inferences allowed by that evidence, in the light most favorable to the nonmoving party when reviewing an order of summary judgment. *Lakey*, 176 Wn.2d at 922. Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c). "'A material fact is one upon which the outcome of the litigation depends.'" *In re Estate of Black*, 153 Wn.2d 152, 160, 102 P.3d 796 (2004) (quoting *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963)).

"Summary judgment is subject to a burden-shifting scheme." *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.2d 886 (2008). The party moving for summary judgment "bears the initial burden of showing the absence of an issue of material fact." *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A defendant moving for summary judgment may show the absence of an issue of material fact by pointing out the lack of evidence

supporting an essential element of the plaintiff's case. *Young*, 112 Wn.2d at 225, 225 n.1 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). If the defendant successfully shows the lack of support for an essential element of the plaintiff's claim, the plaintiff must produce evidence that raises a genuine issue of material fact or show why further discovery is warranted; the plaintiff's failure to do so entitles the defendant to judgment as a matter of law. *See Young*, 112 Wn.2d at 225-26, 226 n.2 (quoting *Celotex*, 477 U.S. at 332 n.3 (Brennan, J., dissenting)).

B. The Cross Appeal: Whether the Malpractice Claim is Time-Barred

The lawyers cross appeal the trial court's denial of their motion for summary judgment to dismiss the malpractice claim, arguing that Auer and Traster failed to timely commence it. First, they contend that Anderson Hunter, Gibbs, and Knapp were served with a summons that commenced an action in King County rather than the correct county of Snohomish. Second, they claim that the Snohomish County action was not properly commenced until Auer and Traster served a summons on Leach and his wife, time-barring the malpractice claim against all defendants. The lawyers also argue that the trial court erred by refusing to order summary judgment on the malpractice claim with respect to Jane Doe Gibbs and Jane Doe Knapp because they were never served with any process. We agree that the trial court erred by not dismissing the malpractice claim against Jane Doe Gibbs and Jane Doe Knapp, but affirm the order denying summary judgment on these grounds with respect to Anderson Hunter, Leach, Jane Doe Leach, Gibbs, and Knapp.

1. Applicable Legal Principles

Proper service of process has both constitutional and statutory dimensions. *Scanlan v. Townsend*, 181 Wn.2d 838, 847, 336 P.3d 1155 (2014). The nonconstitutional dimension, at

issue here, is governed by both statute and court rules. RCW 4.16.170; chapter 4.28 RCW; CR 3-5. We review the meaning of statutes and court rules de novo. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) (statute); *see State v. Chhom*, 162 Wn.2d 451, 458, 173 P.3d 234 (2007) (court rules).

Generally a plaintiff must commence an action to recover damages to personal property or for personal injury within three years or the claim is barred.[6] RCW 4.16.080(2); *Brown v. Vail*, 169 Wn.2d 318, 328, 237 P.3d 263 (2010). To commence a civil action, the plaintiff must either (1) file the complaint with the superior court or (2) serve a copy of the summons and complaint on the defendant. CR 3. Filing the complaint or serving the summons and complaint tolls, for purposes of commencing the action, the statute of limitations for 90 days. RCW 4.16.170.[7] During that 90-day period the plaintiff must either (1) file the complaint if he or she first served a summons and complaint or (2) serve a summons and complaint if he or she first filed the complaint. RCW 4.16.170. If the plaintiff fails to both file the complaint and serve a summons and complaint within that 90-day period, the action is not deemed commenced for purposes of tolling the statute of limitations. RCW 4.16.170. By the explicit terms of RCW

[6] CPA claims are exempt from this general rule and instead must be commenced within four years. RCW 19.86.120.

[7] RCW 4.16.170 reads:

> For the purposes of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.

4.16.170, serving any one of multiple defendants tolls the statute of limitations against all the defendants. *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 329, 815 P.2d 781 (1991). However, plaintiffs must still proceed with their cases in a timely manner and must serve a defendant in order to proceed with the action against that defendant. *Sidis*, 117 Wn.2d at 329-30.

CR 4 governs the form and content of a summons. *Quality Rock Prods., Inc. v. Thurston County*, 126 Wn. App. 250, 264, 108 P.3d 805 (2005) (citing CR 4(a) and (b)). It provides, as relevant to the lawyers' cross appeal:

> (b) Summons.
> (1) Contents. The summons for personal service shall contain:
> (i) the title of the cause, specifying the name of the court in which the action is brought, the name of the county designated by the plaintiff as the place of trial, and the names of the parties to the action, plaintiff and defendant;
> (ii) a direction to the defendant summoning the defendant to serve a copy of the defendant's defense within a time stated in the summons; [and]
> (iii) a notice that, in case of failure so to do, judgment will be rendered against the defendant by default. It shall be signed and dated by the plaintiff, or the plaintiff's attorney, with the addition of the plaintiff's post office address, at which the papers in the action may be served on him by mail.

We review the sufficiency of service de novo. *Streeter-Dybdahl v. Nguyet Huynh*, 157 Wn. App. 408, 412, 236 P.3d 986 (2010). The plaintiff bears the burden of making a prima facie case of sufficient service of process. *Streeter-Dybdahl*, 157 Wn. App. at 412.

2. The Nature of the Summons Served on Anderson Hunter, Gibbs, and Knapp

If the lawyers are correct that the summonses should be deemed King County summonses, then Auer and Traster failed to complete commencement of the Snohomish County action. If Auer and Traster are correct that the summonses were defective Snohomish County summonses, then they completed commencement of the Snohomish County action if they substantially complied with the rules and statutes governing service of process. We hold for

three reasons that the summonses were defective Snohomish County summonses and then turn to whether they nonetheless substantially complied with governing standards.

First, as a general matter, "the law favors the resolution of legitimate disputes brought before the court rather than leaving parties without a remedy." *In re Estate of Palucci*, 61 Wn. App. 412, 416, 810 P.2d 970 (1991). This legal preference may only be served by viewing the summonses as completing the commencement of the Snohomish County action, although defectively. Doing otherwise would bar Auer and Traster from bringing their claims before the court. *Palucci*, 61 Wn. App. at 416.

Second, and more importantly, the lawyers' argument runs contrary to "the civil rules' emphasis that substance trumps formality." *Quality Rock Prods.*, 126 Wn. App. at 265. The lawyers ask us to elevate the form of the caption of the summonses, the obvious result of a scrivener's error, over its actual function. That function is readily discernable from the documents served with the summons: a complaint which made clear that venue was proper only in Snohomish County and a superior court case summary showing that the action was filed in Snohomish County. The summonses served here were plainly associated with the action already filed in Snohomish County. The scrivener's error in the caption could not have reasonably led the lawyers to believe that the summonses were for some unknown action proceeding in King County Superior Court.

Third, service of a summons only commences an action under RCW 4.28.020, thereby initially invoking the jurisdiction in the trial court named in the summons, when service occurs before the plaintiff files the complaint with the court. Otherwise, it is the filing of the complaint that invokes the trial court's jurisdiction, RCW 4.28.020. A summons that commences an action would not have a cause number because it is only when a complaint is filed with the court that a

cause receives a number, *Cf. Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 548, 815 P.2d 798 (1991). The summonses served on Anderson Hunter, Gibbs, and Knapp all contained a cause number, specifically the one assigned to the Snohomish County action. These summonses could not have commenced an action already commenced. They therefore did not act to confer jurisdiction on the King County Superior Court. For these three reasons, the summonses served on Anderson Hunter, Gibbs, and Knapp were defective summonses for Snohomish County Superior Court.

3. Substantial Compliance and Amendability of the Summonses Served on Anderson Hunter, Gibbs, and Knapp

Having determined that the summonses served on Anderson Hunter, Gibbs, and Knapp were defective Snohomish County summonses, we now examine whether the summonses substantially complied with the relevant rules and statutes and whether the defect in the caption was amendable. We hold that the summonses substantially complied with the rules and statutes governing service and that any defect did not prejudice the lawyers, making the defect amendable.

The requirements as to the form of a summons laid out in CR 4 ensure that the summons serves its function, namely "'giv[ing] certain notice of the time prescribed by law to answer and to advise the defendant of the consequences of failing to do so.'" *Quality Rock Prods.*, 126 Wn. App. at 264 (quoting *Sprincin King St. Partners v. Sound Conditioning Club, Inc.*, 84 Wn. App. 56, 60, 925 P.2d 217 (1996)). Citing these purposes, Washington's Supreme Court has held that "'[a]ny summons . . . which definitely and certainly gives notice of these things must be held a substantial, hence a sufficient, compliance with that form.'" *Codd v. Westchester Fire Ins. Co.*, 14 Wn.2d 600, 605, 128 P.2d 968 (1942) (quoting *Spokane Merch. Ass'n v. Acord*, 99 Wash. 674, 170 P. 329, 8 A.L.R. 835 (1918)).

Both court rule[8] and statutory authority[9] permit the amendment of defective, but substantially compliant, process. These amendments are permissible "so long as the defendant is not prejudiced." *Sammamish Pointe Homeowners Ass'n v. Sammamish Pointe LLC*, 116 Wn. App. 117, 124, 64 P.3d 656 (2003). If the defect is amendable, the trial court should permit the amendment, and deny any motion seeking dismissal of the claims based on the defect, so long as the plaintiff moves to amend. *In re Marriage of Morrison*, 26 Wn. App. 571, 573-75, 613 P.2d 557 (1980).

The summonses served on Anderson Hunter, Gibbs, and Knapp substantially complied with their purpose. The summonses informed the defendants of the time prescribed by law to answer and the consequences of a default. Any defect in the summonses did not prejudice the lawyers. The complaint not only specified that Auer and Traster had filed suit in Snohomish County, but its factual allegations make clear that no venue other than Snohomish County was proper. The superior court case summary also confirmed that the action was filed in Snohomish

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[8] CR 4(h) provides that

> At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

[9] RCW 4.32.250 provides that

> A notice or other paper is valid and effectual though the title of the action in which it is made is omitted, or it is defective either in respect to the court or parties, if it intelligently refers to such action or proceedings; and in furtherance of justice upon proper terms, any other defect or error in any notice or other paper or proceeding may be amended by the court, and any mischance, omission or defect relieved within one year thereafter; and the court may enlarge or extend the time, for good cause shown, within which by statute any act is to be done, proceeding had or taken, notice or paper filed or served, or may, on such terms as are just, permit the same to be done or supplied after the time therefor has expired.

County. The lawyers appeared pro se in Snohomish County after receiving the summonses. When they retained an attorney, he appeared there as well. Most importantly, the lawyers timely filed answers to the complaint filed in Snohomish County Superior Court. As was proper, Auer and Traster moved to amend the summonses.

The lawyers claim that the trial court erred by allowing an amendment to the summonses, because proper summonses were already on file with the court and Auer and Traster did not serve those summonses. CR 5(d)(1) requires, in effect, that plaintiffs must file the summons and complaint served in accordance with CR 4 with the court. We have held that the summons filed need not be identical to the one served and that the plaintiff complies with RCW 4.16.170 by filing a summons "substantially identical" to the one served. *Nearing v. Golden State Foods Corp.*, 52 Wn. App. 748, 752, 764 P.2d 242 (1988). The unamended summonses here were substantially identical to the ones on file with the court: they had the same case name, cause number, and parties. More importantly, they had identical response times and contained identical language about the effect of a default. The summonses served by Auer and Traster complied with CR 5(d)(1). For all of these reasons, we hold that the trial court did not err by denying the summary judgment motion to dismiss Auer's and Traster's claims against Anderson Hunter, Knapp, and Gibbs due to untimely commencement. *Morrison*, 26 Wn. App. at 573-75.

4. Service on Leach and Jane Doe Leach

Auer and Traster served Leach and Jane Doe Leach with a summons on June 16, 2011. That summons properly listed Snohomish County as the action's venue, but was served outside the 90-day tolling period initiated by the filing of the complaint under RCW 4.16.170. The lawyers argue that the Snohomish County action was not properly commenced until this

summons was served on Leach and Jane Doe Leach and that this time-barred the malpractice claim against all defendants.

This argument fails under *Sidis*. That decision held that under RCW 4.16.170, serving any one of multiple defendants tolls the statute of limitations against all the defendants, subject to the restriction that a defendant must in fact be served before the action may proceed against that defendant. *Sidis*, 117 Wn.2d at 329-30. As held above, Anderson Hunter, Gibbs, and Knapp were served on April 26, 2011 in compliance with CR 5(d)(1), well within 90 days of filing the complaint. Leach and Jane Doe Leach were served in June 2011, before Auer and Traster proceeded against them. Thus, under *Sidis*, Auer and Traster properly commenced their action against Anderson Hunter, Leach, Jane Doe Leach, Gibbs and Knapp.

5. Service on Jane Doe Gibbs and Jane Doe Knapp

No affidavit of service or any other evidence shows service of process on Jane Doe Gibbs or Jane Doe Knapp. Under *Sidis*, 117 Wn.2d at 329-30, a defendant must be served at some point to maintain an action against her. Therefore, we reverse the order of summary judgment as far as it denied Jane Doe Knapp and Jane Doe Gibbs dismissal of Auer's and Traster's malpractice claim as time-barred. We remand for the trial court to enter an order granting summary judgment dismissing the malpractice claim against Jane Doe Gibbs and Jane Doe Knapp on those grounds.

C. The Malpractice Claim

Auer and Traster argue that the trial court erred by dismissing their malpractice claim on summary judgment because (1) the trial court applied an incorrect evidentiary standard when it required expert testimony on causation to survive the motion for summary judgment and (2) they

offered evidence that created genuine issues of material fact as to whether the lawyers' malpractice proximately caused Auer's and Traster's injuries.[10] We disagree.[11]

1. Applicable Legal Principles

A plaintiff must show four elements to succeed on a claim of legal malpractice:

> (1) the existence of an attorney-client relationship giving rise to a duty of care on the part of the lawyer; (2) an act or omission breaching that duty; (3) damage to the client; and (4) the breach of duty must have been a proximate cause of the damages to the client.

Nielson v. Eisenhower & Carlson, 100 Wn. App. 584, 589, 999 P.2d 42 (2000).

Proximate cause provides "the nexus between breach of duty and resulting injury." *Estep v. Hamilton*, 148 Wn. App. 246, 256, 201 P.3d 331 (2008). Establishing proximate cause requires showing that the alleged breach of a duty was both a cause-in-fact and a legal cause of the claimed injury. *Nielson*, 100 Wn. App. at 591.

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[10] Auer and Traster also argue that the trial court erred by granting the lawyers summary judgment because they failed to show the absence of genuine issues of material fact with citations to the record as required by *White v. Kent Medical Center, Inc.*, 61 Wn. App. 163, 170, 810 P.2d 4 (1991). The lawyers, however, *did* point to the record to show that Auer and Traster had failed to support the essential elements of their claims with evidence.

[11] The lawyers raise a number of issues related to the dismissal of the malpractice claim that we do not address on their merits.

First, the lawyers argue, for the first time on appeal, that the attorney judgment rule that we recognized in *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, 180 Wn. App. 689, 701-04, 324 P.3d 743, *review denied*, 181 Wn.2d 1008 (2014), shields them from liability. The lawyers failed to raise this issue to the trial court and we decline to consider it. RAP 2.5(a).

Second, the lawyers also assign error to the trial court's refusal to exclude certain evidence. They have waived this assignment of error because they fail to make any argument as to how or why the trial court erred. Instead, they simply incorporate their trial briefing. We do not allow parties to argue issues in that manner. *U.S. W. Commc'ns, Inc. v. Wash. Utils. & Transp. Comm'n*, 134 Wn.2d 74, 111-12, 949 P.2d 1337 (1997); *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1988).

Finally, the lawyers give passing treatment to arguments that Auer and Traster have not supported their claims of damages. Again, we generally do not reach the merits of issues given passing treatment. *Habitat Watch*, 155 Wn.2d at 416 (quoting *Thomas*, 150 Wn.2d at 868-69).

Auer's and Traster's appeal concerns the cause-in-fact prong of proximate causation. An act is a cause-in-fact of an injury, if, "'but for'" the act, the injury would not have occurred. *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 203, 15 P.3d 1283 (2001) (quoting *Hertog v. City of Seattle*, 138 Wn.2d 265, 282-83, 979 P.2d 400 (1999)). A cause-in-fact, in other words, is one that provides an "'immediate connection between an act and an injury.'" *Nielson*, 100 Wn. App. at 591 (quoting *City of Seattle v. Blume*, 134 Wn.2d 243, 251-52, 947 P.2d 223 (1997)). Where the injury would occur regardless of any breach by the attorney, there is no "but for" connection between the breach and the injury; consequently, in malpractice cases the plaintiff must show that, absent the breach, he or she "'would have prevailed or at least would have achieved a better result.'" *Estep*, 148 Wn. App. at 256 (quoting *Halvorson v. Ferguson*, 46 Wn. App. 708, 719, 735 P.2d 675 (1986)); *Geer v. Tonnen*, 137 Wn. App. 838, 840, 155 P.3d 163 (2007); *Smith v. Preston Gates Ellis, LLP*, 135 Wn. App. 859, 864, 147 P.3d 600 (2006); *Griswold v. Kilpatrick*, 107 Wn. App. 757, 760-61, 27 P.3d 246 (2001); *see Sherry v. Diercks*, 29 Wn. App. 433, 438, 628 P.2d 1336 (1981).

2. Expert Testimony

Auer and Traster first contend that summary judgment was inappropriate because the trial court held them to an improper burden of proof by requiring expert testimony about causation in order to survive summary judgment. We disagree.

Auer and Traster contend that the trial court "did not find . . . that [the] plaintiffs had not established evidentiary facts to meet their burden." Appellant's Reply Br. at 5 (emphasis omitted). To the contrary, the trial court found no evidence in the record that would directly show, or allow the inference, that Auer and Traster would have prevailed or obtained a better result in the underlying trial without the defendants' malpractice. As discussed below, it was

correct in that assessment. Given that lack of evidence, the trial court concluded that expert testimony was necessary to establish causation; otherwise the jury could only find the lawyers had proximately caused Auer's and Traster's losses by pure speculation.

The trial court did not apply an incorrect evidentiary burden. Washington has recognized that expert testimony is usually necessary where the jury could otherwise only find an element of negligence by pure speculation. *See Estate of Bordon v. Dep't of Corr.*, 122 Wn. App. 227, 243-44, 95 P.3d 764 (2004). An opinion from Division One of this court, *see Geer*, 137 Wn. App. at 851, and a treatise on legal malpractice, 4 *R. Mallen & J. Smith, Legal Malpractice* § 34:20, at 1172 (2008 ed.), have recognized this principle's application in the context of legal malpractice. The trial court's order on summary judgment reflects the logic of this authority and the principle that a plaintiff alleging malpractice must introduce evidence of each element of his or her claim to avoid summary judgment. *Geer*, 137 Wn. App. at 851 n.11.

Auer and Traster also contend, in their reply brief, that the trial court erred by requiring expert testimony on causation because any such testimony would be speculative and impermissible. Auer and Traster, however, waived this argument by failing to raise it in their opening brief.[12] *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

[12] Regardless, their argument lacks merit. The type of expert testimony the trial court found necessary given the lack of other evidence of causation is analogous to the type of expert testimony about causation not only accepted, but generally required, in other types of professional malpractice claims. *E.g.*, *Harris v. Robert C. Groth, M.D., Inc.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983); *see Hill v. Sacred Heart Med. Ctr.*, 143 Wn. App. 438, 448, 117 P.3d 1152 (2008).

3. Causation

Auer and Traster next contend that the trial court erred by granting summary judgment, because they created genuine issues of material fact about causation. They contend that they showed (1) the failure to seek equitable relief, (2) the failure to seek timely discovery, and (3) the lawyers' lack of diligence caused them damages. They also argue that (4) the lawyers' pretextual withdrawal from representing them so soon before trial required them to retain a new attorney, resulting in higher attorney fees than they otherwise would have needed to pay. We consider these in turn.

Auer and Traster did not present sufficient evidence to create a genuine issue of material fact that the lawyers' failure to pursue equitable relief caused them damages. While Brain did opine that the pursuit of monetary damages breached the duty of care, he did not opine that this caused Auer and Traster any injury until his supplemental declaration. That declaration, however, was not before the trial court at the time of summary judgment, and we cannot consider it when reviewing the order on summary judgment. RAP 9.12. Without that declaration, Auer and Traster fail to create a genuine issue of material fact as to whether they would have prevailed in the underlying action, or at least have fared better than they did. Further, establishing causation based on the failure to seek equitable relief requires Auer and Traster to show that the trial court would have found their remedies at law inadequate. *Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006) (equitable remedies unavailable unless damages at law inadequate). Brain never opined, in his original or supplemental declaration, that monetary damages were inadequate and Auer and Traster had no difficulty monetizing their losses.

Auer's and Traster's second argument, alleging the failure to seek timely discovery, also fails. Nothing in the record shows or allows an inference that Auer's and Traster's knowledge of

the underlying defendants' insurance coverage limits would have affected how the parties would have proceeded in the underlying suit. Instead, Auer and Traster offer only speculation that the outcome of the underlying suit would have differed had the lawyers timely obtained discovery. That speculation is insufficient to create a genuine issue of material fact on the element of causation. *Smith*, 135 Wn. App. at 864; *Young*, 112 Wn.2d at 225-26.

Auer's and Traster's third argument fares no better. Evidence in the record does create a genuine issue of material fact as to whether Auer and Traster settled because the lawyers' lack of diligence left them without the resources necessary to continue pursuing their claims. There is a difference, though, between the lawyers' actions causing Auer and Traster to accept the settlement and the lawyers' actions causing them an injury. Any lack of diligence only caused Auer and Traster an injury if they would have received more than the settlement they accepted had they gone to trial, *e.g.*, *Estep*, 148 Wn. App. at 256 (quoting *Halvorson*, 46 Wn. App. at 719), and no evidence indicates or allows the inference that they would have.

Auer's and Traster's fourth argument is that Gibbs offered pretextual reasons for withdrawing from his representation of them. Brain opined that Gibbs offered those pretextual reasons to advance the lawyers' interests, instead of those of Auer and Traster. Auer and Traster also point out that Leach had testified in his deposition that he did not believe the disparity in damages to be a conflict.

This evidence, however, does not controvert the validity of Gibbs' proffered reason for withdrawal: that the difference between the individual amounts at risk for Auer and Traster created a conflict of interest. Further, an attorney representing a client in a civil matter may only withdraw from representation with the permission of the court if the client objects to the withdrawal. *Kingdom v. Jackson*, 78 Wn. App. 154, 158, 896 P.2d 101 (1995); CR 71. The

attorneys presented the court with their reasons for withdrawing and received the trial court's permission over Auer's and Traster's objections. Thus, the immediate cause of the withdrawal was the order of the trial court.

We recognize that Auer and Traster alleged that in his argument on withdrawal Gibbs made inaccurate representations to the court about Auer's and Traster's payment status and their failure to respond to his communications. We make no determination of the truth of these allegations. These representations, however, do not raise factual issues as to whether the asserted reason for withdrawal, the presence of a conflict, was an artifice or pretext. Rather, at most they may raise an issue as to the validity of the order of withdrawal. The validity of that action, though, is not before us.

Auer and Traster raise no genuine issues of material fact about causation as to their malpractice claim. The court properly entered summary judgment for the lawyers on that claim.

D. The CPA Claim

Auer and Traster also contend that the trial court erred by dismissing their CPA claims on summary judgment because they offered evidence that would create a genuine issue of material fact as to (1) whether the lawyers acted deceptively or unfairly in withdrawing from representation and (2) whether these deceptive or unfair acts affected the public interest. We affirm the order of summary judgment on the CPA claim on different grounds, because the evidence did not raise a genuine issue of material fact as to whether the lawyers' actions related to withdrawal caused Auer and Traster injury.

1. Applicable Legal Principles

The CPA proscribes "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. The CPA contains a

private right of action allowing individuals to enforce its proscriptions. RCW 19.86.090. Success on a CPA claim requires a plaintiff to establish five elements: "(1) [an] unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) [a] public interest impact, (4) injury to [the] plaintiff in his or her business or property[, and] (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). The failure to make the necessary showing on any of the elements defeats a CPA claim. *Hangman Ridge*, 105 Wn.2d at 784.

2. Causation

For the reasons set out above in the analysis of the malpractice claim, the lawyers' withdrawal from representation was not the proximate cause of injury to Auer and Traster. Once Auer and Traster opposed it, withdrawal could only be granted by court order. After hearing from both sides, the trial court granted the withdrawal. Gibbs' claimed misrepresentations to the court in arguing for withdrawal may raise a question about the basis for the order, but the validity of the court's withdrawal order is not before us. Because the court ordered withdrawal in an action we must presume valid, the evidence does not show the needed causal link between the lawyers' actions and Auer's and Traster's increased expenses due to the withdrawal.

We may affirm a challenged decision on any grounds supported by the record. Accordingly, we affirm the order of summary judgment on the CPA claim.

II. RECONSIDERATION

Auer and Traster claim that the trial court improperly (1) excluded Brain's supplemental declaration on reconsideration and (2) denied the motion for reconsideration. Again, we disagree.

A. Applicable Legal Principles

We review a trial court's decision on a motion for reconsideration for an abuse of discretion. *Landstar Inway, Inc. v. Samrow*, 181 Wn. App. 109, 120-121, 325 P.3d 327 (2014). We review a trial court's "decision to consider new or additional evidence presented with a motion for reconsideration" for an abuse of discretion. *Martini v. Post*, 178 Wn. App. 153, 162, 313 P.3d 473 (2013). A trial court abuses its discretion where it exercises its discretion in a manifestly unreasonable manner or on untenable grounds or for untenable reasons. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 144, 331 P.3d 40 (2014).

B. Brain's Supplemental Declaration

Auer and Traster first contend that the trial court abused its discretion when it refused to consider Brain's supplemental declaration, which they offered in conjunction with their motion for reconsideration, claiming that nothing in CR 59 or case law interpreting that rule prevented the trial court from considering new evidence on reconsideration. Auer and Traster correctly characterize the trial court's ability to consider new evidence. The court, however, excluded Brain's supplemental declaration as a discovery sanction: Auer and Traster had not provided Brain's opinion as required by the discovery rules until long after the discovery cutoff.

In *Keck v. Collins*, No. 90357-3, 2015 WL 5612829 (Sept. 24, 2015), the Supreme Court held that the trial court must consider the factors from *Burnet*, 131Wn.2d at 497-98, on the record before striking untimely filed evidence submitted in response to a summary judgment motion. *Keck*, No. 90357-3, 2015 WL 5612829 at *8. Our review of the trial court's decision is for an abuse of discretion. *Id.* Only in their reply brief do Auer and Traster cite *Burnet* or argue that the trial court erred by excluding Brain's supplemental declaration as a discovery sanction.

Under *Cowiche Canyon Conservancy*, 118 Wn.2d at 809, Auer and Traster waived this claim of error by failing to raise it until their reply brief.

C. Denial of Reconsideration

Without Brain's supplemental declaration, any new evidence considered by the trial court did not change the analysis of the causation issue: nothing before the court on reconsideration showed that Auer and Traster would likely have prevailed or obtained a better result in the underlying matter. With that, any claim of malpractice fails for lack of evidence to support the causation element, and reconsideration was unwarranted. *Cf. Martini*, 178 Wn. App. at 164 (reconsideration of summary judgment warranted where all the evidence before the court establishes a genuine issue of material fact).

CONCLUSION

We affirm the trial court's grant of summary judgment in favor of the lawyers on the malpractice and CPA claims. We also affirm the trial court's order striking Brain's supplemental declaration and its order denying reconsideration of the malpractice claim. On the cross-appeal, we affirm the trial court's denial of summary judgment dismissing the malpractice claim against Anderson Hunter, Leach, Jane Doe Leach, Gibbs and Knapp as time-barred, but reverse the trial court's denial of summary judgment dismissing the malpractice claim against Jane Doe Gibbs and Jane Doe Knapp on the same grounds. Accordingly, we remand for the trial court to enter an order granting summary judgment dismissing the malpractice claim against Jane Doe Gibbs and

Jane Doe Knapp as time-barred.

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

Bjorgen, A.C.J.

BJORGEN, A.C.J.

We concur:

J.

LEE, J.

Sutton, J.

SUTTON, J.

EXHIBIT B

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

RONALD AUER and JOHN TRASTER, Appellants/Cross-Respondents, v. J. ROBERT LEACH and JANE DOE LEACH, his wife; CHRISTOPHER KNAPP and JANE DOE KNAPP, his wife; GEOFFREY GIBBS and JANE DOE GIBBS, his wife; ANDERSON HUNTER LAW FIRM, P.S., INC.; and SAFECO INSURANCE, Respondents/Cross-Appellants.	No. 46105-6-II MOTION TO PUBLISH OPINION

1. Identity of Moving Parties

Attorneys Liability Protection Society ("ALPS") asks for the relief set forth in Part 2.

2. Statement of Relief Sought

The Court should publish its decision filed on January 12, 2016.

3. Facts Relevant to Motion

ALPS is a professional liability insurer. It has been the endorsed professional liability carrier of a number of state bar associations in providing coverage to attorneys. It is actively aware of legal malpractice

Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue
Third Floor, Suite C
Seattle, Washington 98126
(206) 574-6661

law in Washington and other states. It is involved presently in a case in Division III that involves the necessity of expert testimony to sustain the causation element of a legal malpractice claim. In ALPS's experience, this is an issue that frequently emerges in legal malpractice cases in Washington.

This Court filed its unpublished opinion on January 12, 2016. In that opinion, the Court discusses the necessity of expert testimony in connection with the causation element of a legal malpractice claim.

4. Grounds for Relief and Argument

RAP 12.3(e) sets forth the criteria that must be addressed by anyone requesting that the Court's opinion be published:

> (1) if not a party, the applicant's interest and the person or group applicant represents; (2) applicant's reasons for believing that publication is necessary; (3) whether the decision determines an unsettled or new question of law or constitutional principle; (4) whether the decision modifies, clarifies or reverses an established principle of law; (5) whether the decision is of general public interest or importance; or (6) whether the decision is in conflict with a prior opinion of the Court of Appeals.

This case merits publication because the Court's opinion affirms that expert testimony is necessary to establish the causation element of a legal malpractice claim, a recurring issue in professional negligence litigation in ALPS's experience. The publication of the Court's opinion

Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue
Third Floor, Suite C
Seattle, Washington 98126
(206) 574-6661

will assist counsel in legal malpractice cases, as well as professional liability insurers like ALPS.

For all of the foregoing reasons, ALPS respectfully requests that this Court order the publication of its decision in this case.

DATED this 14th day of January, 2016.

Respectfully submitted,

Philip A. Talmadge

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661
Attorneys for ALPS

DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Motion to Publish Opinion in Court of Appeals Cause No. 46105-6-II to the following parties:

Brian Haig Krikorian
Law Offices of Brian Krikorian
4100 194th Street SW, Suite 215
Lynnwood, WA 98036
bhkrik@bhklaw.com

Philip Randolph Meade
Merrick Hofstedt & Lindsey PS
3101 Western Avenue, Suite 200
Seattle, WA 98121-1024
pmeade@mhlseattle.com

Original efiled with:
Court of Appeals, Division II
Attn: David Ponzoha
950 Broadway, Suite 300
Tacoma, WA 98402-4427

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

DATED: January 14, 2016, at Seattle, Washington.

Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

EXHIBIT C

No. 32921-6

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

TAMMY WOLF SLACK,

Appellant,

v.

LUCINDA LUKE, Attorney at Law, and COWAN MOORE STAM LUKE & PETERSON, Law Firm,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY
THE HONORABLE STEVEN DIXON

BRIEF OF APPELLANT

SMITH GOODFRIEND, P.S.

By: Howard M. Goodfriend
WSBA No. 14355
Ian C. Cairns
WSBA No. 43210

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorneys for Appellant

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I. INTRODUCTION

Tammy Slack appeals the dismissal of her legal malpractice claim against her former lawyer Lucinda Luke. After hiring appellant Tammy Slack, the Washington Department of Corrections ignored her repeated requests to accommodate her disabilities – sciatica, carpal tunnel, and an acute sensitivity to mold and other environmental toxins. On September 15, 2009, after the DOC's lack of accommodations forced her to resign, Ms. Slack met with Ms. Luke, who agreed to represent Ms. Slack in a failure to accommodate lawsuit. Ms. Slack expressed concern to Ms. Luke that "time may be running out on this case," but Ms. Luke failed to file a lawsuit before the statute of limitations expired on October 30, 2009. Ms. Slack then brought this malpractice action against Ms. Luke, which the trial court dismissed on summary judgment because Ms. Slack did not have an "expert" opine that her underlying failure to accommodate claim was meritorious.

The trial court erred. Juries – not attorneys masquerading as "experts" – resolve the merits of an underlying claim by reviewing the evidence presented in the "trial within a trial" held in a legal malpractice action. Far from being beyond the common

knowledge of the average layperson, weighing the merits of a claim is the quintessential jury task.

Nor did any other grounds justify summary judgment. Whether the scope of Ms. Luke's representation of Ms. Slack included filing a lawsuit was an issue of fact that could not be resolved on summary judgment. Likewise, issues of fact regarding the DOC's lack of accommodation precluded summary judgment. This Court should reverse the trial court's summary judgment order and remand for a trial of Ms. Slack's legal malpractice claim.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its Order On Cross-Motions For Summary Judgment. (CP 1571-73)

2. The trial court erred in entering its Order Denying Plaintiff's Motion For A New Trial And Reconsideration. (CP 1601-02)

III. STATEMENT OF ISSUES

1. Does the "trial within a trial" held in a legal malpractice action provide the mechanism for resolving the merits of a claim lost or compromised as the result of attorney negligence, or must a legal malpractice plaintiff present "expert" testimony from an attorney opining on the merits of the underlying claim?

Because Ms. Slack was the nonmoving party, this Court views the evidence in the light most favorable to her in determining whether a reasonable jury could have found in Ms. Slack's favor on her malpractice claim.

B. A legal malpractice plaintiff is not required to present "expert" testimony on the merits of the underlying cause of action – the legal malpractice jury resolves that question of fact by weighing the evidence in the "trial within a trial."

Juries – not experts – resolve the merits of an underlying claim in the "trial within a trial" held in a legal malpractice action. The trial court erred in dismissing Ms. Slack's malpractice claim because she did not have "expert" testimony that she would have prevailed on her tort claim had Ms. Luke timely filed it. This Court should reverse the trial court's summary judgment order and remand for a trial at which a jury will resolve the merits of Ms. Slack's forfeited tort claim.

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

proximate causation between the attorney's breach of the duty and the damage incurred." *Versuslaw*, 127 Wn. App. at 320, ¶ 23.

"The principles of proof and causation in a legal malpractice action usually do not differ from an ordinary negligence case." *Daugert*, 104 Wn.2d at 257 (*citing Ward v. Arnold*, 52 Wn.2d 581, 584, 328 P.2d 164 (1958)). "[T]he plaintiff must demonstrate that he or she would have achieved a better result had the attorney not been negligent." *Versuslaw*, 127 Wn. App. at 328, ¶ 42. Where an attorney's error prevents or undermines the trial of a client's claim, "the causation issue in the subsequent malpractice action is relatively straightforward." *Daugert*, 104 Wn.2d at 257. The court hearing the malpractice claim holds a "trial within a trial" that asks the jury to decide whether the client would have fared better in the underlying case but for the attorney's negligence:

> The trial court hearing the malpractice claim merely retries, or tries for the first time, the client's cause of action which the client asserts was lost or compromised by the attorney's negligence, and the trier of fact decides whether the client would have fared better but for such mishandling.... In 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.

Daugert, 104 Wn.2d at 257[2]; *see also* DeWolf & Allen, 16 Washington Practice: Tort Law and Practice § 15.46 at 498 (3d ed. 2006); Ronald Mallen, 4 Legal Malpractice § 37:85 at 1662 (2015 ed.) ("The accepted approach in establishing whether the lawyer's act or omission caused an injury is by a trial-within-a-trial"). The "trial within a trial" procedure is particularly appropriate for cases involving a missed statute of limitations. Mallen, *supra*, § 37:137 at 1809 ("Causation may be obvious, if the lawyer's error was an affirmative act or for some omissions, such as the failure to file a lawsuit.").

Because the "trial within a trial" procedure "provides the objective mechanism for resolving the underlying case," expert testimony opining on whether the plaintiff would have prevailed on the underlying claim is not required – or even permitted. Mallen, *supra*, § 37:138 at 1813-14 (courts "have refused or have been

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[2] In *Daugert* the issue of proximate cause was a question of law because it turned on whether the Supreme Court would have granted a petition for review had the lawyer timely filed one, and if so, whether the Supreme Court's ruling would have been favorable to the client. 104 Wn.2d at 258-59. As *Daugert* and subsequent cases make clear, the issue of causation is for a jury except in the limited cases that require the trier of fact to "engage in an analysis of the law." *Brust v. Newton*, 70 Wn. App. 286, 292, 852 P.2d 1092 (1993), *rev. denied*, 123 Wn.2d 1010 (1994); *Daugert*, 104 Wn.2d at 258 (causation "depend[ed] on an analysis of the law and the rules of appellate procedure").

reluctant to require or admit" "expert testimony to establish whether the underlying action would have been settled or won") (listing cases).[3] Far from being beyond the common knowledge of the average layperson, resolving the merits of an underlying claim is the quintessential – and constitutional – jury task. *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971) ("To the jury is consigned under the constitution the ultimate power to weigh the evidence and determine the facts."); Mallen, *supra*, § 37:126 at 1768 ("The rationale is that resolving the underlying case ordinarily is within the expertise of the jury."). Expert testimony on the merits of the underlying claim undermines the constitutionally "inviolate" right to a jury trial by withdrawing from the jury and delegating to

[3] *Accord Whitley v. Chamouris*, 265 Va. 9, 11, 574 S.E.2d 251, 253 (2003) ("The expert testimony Whitley maintains was necessary requires either a prediction of what some other fact finder would have concluded or an evaluation of the legal merits of Chamouris' claims. No witness can predict the decision of a jury and, therefore, the former could not be the subject of expert testimony."); *Piscitelli v. Friedenberg*, 87 Cal. App. 4th 953, 973, 105 Cal. Rptr. 2d 88 (2001) (experts are not permitted "to tell the jury what a reasonable trier of fact would have done"); *Bernardini v. Fedor*, 2013 WL 5701670, 2013-Ohio-4633, ¶ 6 (2013) ("Although expert testimony is required as to the standard of conduct and breach of duty in a legal malpractice claim . . . there is no corresponding requirement with respect to proximate cause."); *Leibel v. Johnson*, 291 Ga. 180, 183, 728 S.E.2d 554, 556 (2012) (deciding the merits of the underlying claim "is a task that is solely for the jury, and that is not properly the subject of expert testimony"); *First Union Nat. Bank v. Benham*, 423 F.3d 855, 864 (8th Cir. 2005) (expert testimony is not "required to prove whether the outcome of the underlying case would have been different").

"experts" the role of weighing evidence and deciding facts. Wash. Const. Article 1 § 21; *cf. State v. Hudson*, 150 Wn. App. 646, 652, ¶ 16, 208 P.3d 1236 (2009) (expert opinion on defendant's guilt violates constitutional right to jury trial).

Here, the trial court erred in dismissing Ms. Slack's malpractice claim because she did not present "expert" "opinion from a qualified attorney that [she] had a chance, even a small chance, of prevailing in [the underlying] action had it been filed in a timely basis." (RP 34-35) A jury could resolve without expert testimony whether Ms. Slack would have prevailed on her tort claim – had it been filed – by weighing the evidence presented in the "trial within a trial." Ms. Luke's "expert" testimony that Ms. Slack's underlying claim lacked merit was nothing more than argument. Indeed, it simply parroted the arguments made by Ms. Luke in her summary judgment motion. (*Compare* CP 153 *with* CP 811 (using identical language to argue that Slack's discrimination claim lacked merit))

The cases relied on by Ms. Luke below do not require the presentation of "expert" testimony on the merits of an underlying claim. For example, in *Geer v. Tonnon*, 137 Wn. App. 838, 155 P.3d 163 (2007), *rev. denied*, 162 Wn.2d 1018 (2008) (cited at CP 808), the Court affirmed the summary judgment dismissal of a

malpractice claim because the client "failed to provide expert testimony *or other evidence* to demonstrate that . . . a breach of [the attorney's] duty of care was the cause in fact of [the client's] claimed damages." 137 Wn. App. at 851, ¶ 24 (emphasis added). *Geer* was based on the lack of *any* evidence establishing that the client would have prevailed on the underlying claim and stands only for the unremarkable proposition that a malpractice plaintiff must present *some* evidence that she would have prevailed on her underlying claim. 137 Wn. App. at 851, ¶ 24 ("[client] introduced *no evidence* to show that had [attorney] . . . filed suit . . . within the one-year limitation period, [client] would have obtained a favorable judgment") (emphasis added).[4] Here, in contrast to *Geer*, Ms. Slack presented sufficient evidence to raise a question of fact on the

[4] The other cases cited below were likewise inapposite. *Prather v. McGrady*, 261 Ill. App. 3d 880, 634 N.E.2d 299, *appeal denied by* 157 Ill.2d 521 (1994) stated in passing without analysis that "a legal expert [needed] to testify that the attorneys breached their standard of care and but for that negligence, [the plaintiff] would have succeeded in the underlying medical malpractice suit," but then affirmed summary judgment because plaintiff did not have "expert testimony to show the proper standard of care and a breach of that standard." *Williams v. Beckham & McAliley, P.A.*, 582 So.2d 1206, *rev. denied*, 592 So.2d 683 (1991), did not address whether expert testimony was required; it held on undisputed facts that the defendant attorneys were not negligent as a matter of law. *Nika v. Danz*, 199 Ill. App. 3d 296, 556 N.E.2d 873 (1990), held that the trial court did not err in *admitting* expert testimony on the "ultimate issue" in the case, whether plaintiff's contributory negligence was fatal to his underlying claim, not that such testimony was *required*. *Boulette v. Boulette*, 627 A.2d 1017 (Me. 1993) is not a malpractice case.

merits of her underlying claim. (See § IV.C.2) That question must be resolved in the trial within a trial.

The trial court erred for the additional reason that *no* expert testimony, even regarding the attorney's standard of care and breach, is necessary where, as here, "the area of claimed malpractice is within the common knowledge of laymen." DeWolf & Allen, *supra*, § 15.44 at 495. Courts routinely apply this rule to cases involving a missed statute of limitations. Mallen, *supra*, § 37:128 at 1776-77 ("The most frequent situation, not requiring expert testimony, is a statute of limitations or other time limitation missed") (listing cases). Thus, Ms. Slack was not required to present *any* expert testimony to survive summary judgment. Regardless, Ms. Slack did present testimony from two experienced attorneys stating that Ms. Luke's conduct breached the standard of care and caused Ms. Slack's damages. (CP 204-13)

The trial court erred in dismissing Ms. Slack's claim because she did not present "expert" testimony that her underlying tort claim was meritorious. Such a rule conflicts within the well-established "trial within a trial" methodology for resolving legal malpractice claims. This Court should reverse and remand for trial of Ms. Slack's malpractice claim.

EXHIBIT D

No. 32921-6-III

COURT OF APPEALS, DIVISION III
FOR THE STATE OF WASHINGTON

TAMMY WOLF SLACK,

Appellant,

v.

LUCINDA LUKE, Attorney at Law, and COWAN MOORE
STAM LUKE & PETERSON, Law Firm,

Respondents.

BRIEF OF RESPONDENTS

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Stephen C. Smith, WSBA #15414
Hawley Troxell Ennis &
Hawley LLP
877 Main Street, Suite 1000
PO Box 1617
Boise, ID 83702-5884
(208) 344-6000

Attorneys for Respondents
Lucinda Luke and Cowan Moore Stam Luke & Peterson

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A. INTRODUCTION

Tammy Wolf Slack, a former Department of Corrections ("DOC") employee, was told by two capable attorneys that she did not have a claim against DOC under Washington's Law Against Discrimination, RCW 49.60 ("WLAD") for DOC's alleged failure to accommodate her claimed disability. She decided to sue Lucinda Luke, then of the Richland law firm of Cowan Moore Stam Luke & Peterson ("Cowan Moore"),[1] for malpractice because Luke declined to file an action on her behalf against DOC, despite Luke's belief, confirmed by expert testimony, that Slack's claim was baseless.

The trial court here correctly granted summary judgment to Luke. While there was no attorney-client relationship between Slack and Luke to undertake the filing of an action against DOC, even if there were, Slack cannot prove causation here, the so-called "case within a case," because Luke was under no legal obligation to file a meritless claim based on the materials Slack provided her in 2009, as unrebutted expert testimony stated. Moreover, Slack's claim against DOC was meritless.

In seeking to reverse the trial court's well-reasoned decision, Slack conflates the information regarding her claim against DOC that she

[1] Cowan Moore Stam Luke & Peterson, P.S. is now Cowan Moore, PLLC.

provided to Luke in 2009 with information, and expert testimony, she generated *nearly five years later* to support her putative claim. Failing to obtain expert testimony on causation, both as to whether she had a legitimate reasonable accommodation claim against DOC based on the materials that she possessed in late 2009 *and* after she filed the present action, Slack asserts that such expert testimony was unnecessary. She is wrong.

This Court should affirm the trial court's summary judgment decision.

B. ASSIGNMENTS OF ERROR

Luke acknowledges Slack's assignments of error, br. of appellant at 2, but believes the issues pertaining to those assignments of error are more appropriately formulated as follows:

> 1. Was the trial court correct in concluding that a legal malpractice claimant failed to state a prima facie case against an attorney where the claimant failed to offer expert testimony that when the claimant consulted the attorney she had a sufficient basis for filing a reasonable accommodation claim in court?
>
> 2. Was the trial court correct in concluding that such a legal malpractice claimant also failed to state a prima facie claim against the attorney by failing to establish that she would have prevailed on a reasonable accommodation claim?
>
> 3. Under the facts in this case, was the legal malpractice claimant's assertion that she had an attorney-client relationship with the attorney to file an action in court unreasonable as a matter of law?

(2) Slack Failed to Establish Causation, the Case-Within-a-Case, as a Matter of Law

Luke will address the other elements of a legal malpractice claim that Slack failed to establish as a matter of law *infra*, but the most glaring failure in Slack's contention below is her failure to prove causation, the *Pappas* "case within a case." To establish causation, Slack had an affirmative burden to demonstrate that but for any alleged negligence on Luke's part, she "would have prevailed or achieved a better result." *Halvorsen v. Ferguson*, 46 Wn. App. 708, 719, 735 P.2d 675 (1986), *review denied*, 108 Wn.2d 1008 (1987).

A case involving a failure to file a claim within the statute of limitations is treated under the same analysis as a failure to timely file a notice of appeal. *Nielson v. Eisenhower & Carlson*, 100 Wn. App. 584, 999 P.2d 42, *review denied*, 141 Wn.2d 1016 (2000).[22]

Slack alleged four "Counts" in her complaint – negligence, "Due Diligence [sic]," "Breech [sic] of Contract," and malpractice, CP 13-17, the facts alleged by Slack in connection with those counts essentially state only a claim for legal malpractice, a claim that Luke failed to meet the applicable standard of care. *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d (1992). "Due Diligence [sic]" is simply not a valid cause of action; rather it is simply another formulation of Slack's legal malpractice claim against Luke/Cowan Moore. Finally, while Washington courts have allowed "an action for legal malpractice [to] be framed conceptually either as a tort or a breach of contract," Slack's claim here clearly sounds in tort. *Peters v. Simmons*, 87 Wn.2d 400, 404, 552 P.2d 1053 (1976).

[22] There, Division II, in a case not cited by Slack, held that although an attorney gave the clients erroneous advice about the statute of limitations for a federal tort claim and, based on that advice, they settled their case rather than risk a Ninth Circuit appeal, the plaintiffs failed to establish that but for the attorney's negligence they would have obtained a more favorable result. The court determined the causation issue was *a*

In addressing the causation element of her claim, Slack erroneously treats the need for expert testimony. Br. of Appellant at 20-27. Slack also fails to differentiate between Luke's two bases for asserting that Slack failed to meet her obligation to prove the causation element of her professional negligence claim. First, Luke and her expert John Schultz properly concluded that Luke had no basis in law or fact in the fall of 2009 from the facts then in existence to sue DOC on Slack's behalf. *Slack failed to offer any expert testimony to rebut that evidence.* Second, Slack could not establish a reasonable accommodation claim against DOC as a matter of law.

Instead, Slack contends that in professional negligence cases, there will *always* be a "trial-within-a-trial" on the claimant's underlying claim. Br. of Appellant at 21-22.[23] That argument is belied by Washington law.[24]

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question of law. Id. at 594-95. The court further concluded that the clients would not have obtained a more favorable result on appeal. *Id.* at 598-99.

[23] Slack cites to the Third Edition of *Washington Practice* for her conclusion. Br. of Appellant at 22. The proper citation is to David DeWolf/Keller Allen: 16 *Wash. Prac.* § 16.33 (4th ed. 2013).

[24] Washington courts have routinely rejected professional negligence cases on summary judgment for failure to prove the causation element as a matter of law. In *Sherry v. Diercks*, 29 Wn. App. 433, 628 P.2d 1336, *review denied*, 96 Wn.2d 1003 (1981), for example, a client sued his attorney when the attorney told the client prior to trial that he had no defense to a claim brought against him by his commodities futures broker. The attorney allowed a default and default judgment to be taken against the client. Ultimately, the trial court dismissed the legal malpractice claim at the close of the client's case. Division I affirmed because the client had no legitimate defense to the broker's claim for moneys owing as a matter of law. *See also, Halvorsen v. Ferguson*, 46 Wn. App. 708, 735 P.2d 675, *review denied*, 108 Wn.2d 1008 (1987) (no relitigation of

For example, in *Daugert*, our Supreme Court distinguished between a situation where the lawyer made an error during trial and where the lawyer failed to file a timely appeal. In the former situation, 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." *Daugbert*, 104 Wn.2d at 257. When the malpractice is the failure to timely file a notice of appeal, the "cause in fact inquiry becomes whether the frustrated client would have been successful if the attorney had timely filed the appeal." *Id.* at 258. This is a *question of law* for the court as the

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factual basis for client's malpractice theory that attorney failed to present theory for property split in divorce action; summary judgment for attorney upheld); *Leipham v. Adams*, 77 Wn. App. 827, 894 P.2d 576, *review denied*, 127 Wn.2d 1022 (1995) (summary judgment for attorney affirmed where estate beneficiary did not prove that attorney should have disclaimed decedent's joint tenant interest in cash management account in a bank); *Griswold v. Kilpatrick*, 107 Wn. App. 757, 27 P.3d 246 (2004) (summary judgment for attorney affirmed where causation element was not established; client claimed earlier initiation of settlement discussions would have improved settlement of case); *Soratsavong v. Haskell*, 133 Wn. App. 77, 134 P.3d 1172 (2006), *review denied*, 159 Wn.2d 1007 (2007) (summary judgment for attorney affirmed where client failed to prove causation element; attorney allegedly failed to timely file motion to vacate default order but court concluded as a matter of law that client had no legitimate defense to liability and stipulated to amount of damages); *Smith v. Preston Gates Ellis, LLP*, 135 Wn. App. 859, 147 P.3d 600 (2006), *review denied*, 161 Wn.2d 1011 (2007) (Court indicated it could decide causation element where reasonable minds could not differ, and, where an attorney poorly drafted a construction contract, its deficiencies had no impact on later suit by client against building contractor); *Estep v. Hamilton*, 148 Wn. App. 246, 201 P.3d 331, *review denied*, 166 Wn.2d 1027 (2009) (this Court affirmed summary judgment where client failed to prove causation element; client failed to demonstrate that she would have done better had the beneficiary designation on her ex-husband's life insurance policy been re-designated post-dissolution).

client must prove that the appellate court would have granted review and rendered a judgment in the client's favor, as Slack ultimately acknowledges, albeit in a footnote. Br. of Appellant at 22 n.2. Division I refined this analysis in *Brust v. Newton*, 70 Wn. App. 286, 292, 852 P.2d 1092 (1993), *review denied*, 123 Wn.2d 1010 (1994). There, the court indicated that expert testimony is critical on *questions involving issues of law*. The present case is precisely the type of case where the trier of fact must "engage in an analysis of the law."

First, Luke's determination that Slack did not have a sufficient basis in law and fact to file an action in court in 2009 against DOC is decidedly a question of law requiring legal analysis of CR 11.

Second, even as to whether there is a basis for a WLAD reasonable accommodation case, legal issues are present as to whether Slack had a basis for such a claim.

(a) Attorney's Decision Whether to File An Action Is a Question of Law Requiring Expert Testimony

An attorney's decision whether to file an action implicates that attorney's duties under CR 11/RCW 4.84.185 and RPC 3.1.[25] Such a

[25] In pertinent part, RPC 3.1 states: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

decision involves the attorney's professional expertise, requiring expert testimony.[26]

Slack cites *Geer v. Tonnon*, 137 Wn. App. 838, 155 P.3d 163 (2007), *review denied*, 162 Wn.2d 1018 (2008), br. of appellant at 24, but misstates its actual holding. Far from being limited to a case in which no facts were adduced on whether the client would have obtained a more favorable result if the lawyer had filed suit against homeowner's insurer within one year, the court held that causation was a *question of law* and court concluded that the clients failed to establish that they would have obtained a favorable judgment but for the attorney's negligence. More particularly, the court discussed the necessity of expert testimony on whether an attorney's decision not to file a case constituted a breach of the standard of care or that the breach was the cause in fact of the client's alleged damages. The court noted that the plaintiff failed to provide any expert support for the proposition that the attorney's failure to file suit on a chancy legal theory breached the standard of care. *Id.* at 850-51.

In *Watson v. Maier*, 64 Wn. App. 889, 891 827 P.2d 311, *review denied*, 120 Wn.2d 1015 (1992), a CR 11 case, then – Judge Gerry Alexander observed: "A famous lawyer once said: 'About half the practice of a decent lawyer is telling would be clients that they are damned fools and should stop.'"

[26] As our Supreme Court noted in *In re Disciplinary Proceedings Against Jones*, 182 Wn.2d 17, 338 P.3d 842 (2014), frivolousness turns on whether a lawyer of ordinary competence would recognize the issue's lack of merit. *Id.* at 41. Clearly, what an ordinarily competent lawyer would know is a question for expert testimony.

Similarly, on causation, the court observed that the law is a highly technical field beyond the knowledge of the ordinary person, *id.* at 851, and affirmed dismissal of the case because "...Geer failed to provide expert testimony or evidence to demonstrate that such a breach of Tonnon's duty of care was the cause in fact of Geer's claimed damages." *Id.* at 852.

The law from other jurisdictions supports the need for expert testimony on such a legal issue. "Obviously, an attorney commits no negligence concerning the statute of limitations by failing to file a *frivolous* lawsuit or one which otherwise would not produce a satisfactory result." *Boyle v. Welsh*, 589 N.W.2d 118, 127 (Neb. 1999).[27]

Ultimately, the decision about whether to file an action is entrusted to the professional judgment of the attorney and is subject to the attorney's ethical obligation under the RPCs, court rules like CR 11, and statutes like RCW 4.84.185. As the *Boyle* court noted: "Whether a suit should be

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[27] *See also, Koeller v. Reynolds*, 344 N.W.2d 556, 561 (Iowa App. 1983) (plaintiff argued that it was malpractice not to file case within statute of limitations, but court responded that the "argument begs the question of negligence by assuming she had a good case.") "Thus, determining whether there was a suit that should be filed is a predicate to determining whether the failure to file such a suit within the period provided for in the statute of limitations constituted a violation of an attorney's standard of conduct." *Boyle*, 589 N.W.2d at 127. *See also, Procanik v. Cillo*, 543 A.2d 985 (N.J. Super. 1988), *cert. denied*, 113 N.J. 357 (1988) (attorney not culpable for malpractice in declining representation in a wrongful birth action where, in exercising his professional judgment, the attorney concluded that the law at the time disfavored such claims; court also concluded no attorney-client relationship was created).

instituted against a particular defendant is an issue that is within the province of an attorney's professional skill and judgment, and is not within the ordinary knowledge and experience of laypersons." 589 N.W.2d at 127. This is fully consistent with *Geer*, 137 Wn. App. at 851 (the law is a highly technical field beyond the knowledge of the ordinary person). Moreover, because this decision about whether a case has sufficient merit is so plainly one that involves professional judgment, expert testimony is essential to establish the standard of care and its breach. *Boyle*, 589 N.W.2d at 127.

Accordingly, where an attorney in a malpractice action presents expert testimony on summary judgment that an underlying case should not have been filed, the non-moving party *must* submit expert testimony to the contrary to defeat summary judgment. *Boyle*, 589 N.W.2d at 128. This is entirely consistent with Washington's standard for summary judgment referenced *supra*.

(b) Evidence in Luke's Possession in 2009 Indicated Slack Did Not Have an Actionable Reasonable Accommodation Claim

The records provided by Slack to Luke in 2009, CP 157, were limited in scope, and are found in the Clerk's Papers annexed to Luke's declaration. CP 33-149.[28]

As part of her obligation on summary judgment, Slack had to present evidence that she would have prevailed on her WLAD reasonable accommodation claim against DOC, but for Luke's negligence. Specifically, she had to demonstrate that Luke and Schultz were wrong in concluding that she did not have a legitimate reasonable accommodation claim against DOC based on the evidence she gave to Luke in 2009.

To properly understand this issue, it is important to understand a WLAD reasonable accommodation claim because many of the issues associated with such a claim involve questions of law for the trial court, requiring expert testimony to establish them as part of the causation element of Slack's prima facie professional negligence case. *Brust, supra.*

(i) WLAD Reasonable Accommodation Claim

WLAD protects employees from discrimination based on disability. RCW 49.60.030(1).[29] Under WLAD, employers must

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[28] The records Slack provided to Luke are distinct from subsequent evidence developed by Slack and her attorneys in the present action in 2014 to attempt to support a professional negligence cause of action against Luke.

[29] A disability is defined in RCW 49.60.040(7):

EXHIBIT E

No. 32921-6

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

TAMMY WOLF SLACK,

Appellant,

v.

LUCINDA LUKE, Attorney at Law, and COWAN MOORE STAM LUKE & PETERSON, Law Firm,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY
THE HONORABLE STEVEN DIXON

REPLY BRIEF OF APPELLANT

SMITH GOODFRIEND, P.S.

By: Howard M. Goodfriend
WSBA No. 14355
Ian C. Cairns
WSBA No. 43210

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorneys for Appellant

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B. "Expert" testimony is not required to raise a genuine issue of material fact regarding causation in a legal malpractice action, particularly where the malpractice involves a missed statute of limitations.

Ms. Luke confuses the need for expert testimony on the standard of care and causation. Expert testimony is not required to establish causation because it is a question of fact within the understanding of a layperson. This Court should reject Ms. Luke's argument that causation is a question of law for "experts."

To establish causation in a legal malpractice action the plaintiff must show that she would have achieved a better result in the underlying suit but for the defendant's negligence. *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 328, ¶ 42, 111 P.3d 866 (2005), *rev. denied*, 156 Wn.2d 1008 (2006). That question is answered by holding a "trial within a trial" in the legal malpractice action in which the jury is "asked to decide what a reasonable jury . . . [in the underlying action] would have done but for the attorney's negligence." *Daugert v. Pappas*, 104 Wn.2d 254, 258, 704 P.2d 600 (1985).

Thus, "in most legal malpractice actions the jury should decide the issue of cause in fact." *Daugert*, 104 Wn.2d at 258; *see also Versuslaw*, 127 Wn. App. at 329, ¶ 43 ("Whether Stoel Rives' alleged negligence caused VersusLaw's damages is a question of fact

for a jury"). The only exception is where causation "depends on an analysis of the law," such as in *Daugert* where it turned on whether a petition for review would have been granted. 104 Wn.2d at 258; *Brust v. Newton*, 70 Wn. App. 286, 291, 852 P.2d 1092 (1993) ("*Daugert* is an exception to the rule that issues of fact be determined by a jury."), *rev. denied*, 123 Wn.2d 1010 (1994).[1]

Here, determining whether Ms. Slack would have prevailed on her failure to accommodate claim against the DOC (had Ms. Luke filed it) did not require analysis of the law. Resolution of her underlying claim required the jury to do only what it would do in any case – decide whether a plaintiff established the elements of her claim. That is the quintessential and constitutional jury task. Ronald Mallen, 4 Legal Malpractice § 37:126 at 1768 (2015 ed.) ("resolving the underlying case ordinarily is within the expertise of the jury."); *Brust*, 70 Wn. App. at 289 ("Article 1, section 21 of our constitution provides that the right to a jury trial shall remain inviolate.").

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[1] *Nielson v. Eisenhower & Carlson*, 100 Wn. App. 584, 999 P.2d 42, *rev. denied*, 141 Wn.2d 1016 (2000) nowhere states that the "failure to file a claim within the statute of limitations is treated under the same analysis as a failure to timely file a notice of appeal." (Resp. Br. 16) *Nielson* applied the *Daugert* exception because the case turned on how the Court of Appeals would have resolved a timely appeal. 100 Wn. App. at 594-95.

Ms. Luke's argument confuses the requirement of expert testimony on the standard of care, which may be a "highly technical" issue if the error is not obvious (unlike a missed statute of limitations). *Geer v. Tonnon*, 137 Wn. App. 838, 851, ¶ 22, 155 P.3d 163 (2007), *rev. denied*, 162 Wn.2d 1018 (2008). Ms. Luke's argument that causation is a question of law requiring expert testimony in a legal malpractice action relies almost exclusively on a misreading of *Geer*. In *Geer*, the mortgagee of a house required the mortgagors to insure the property on his behalf. The mortgagors obtained insurance, but did not list the mortgagee as a named insured. After the house burned down, the mortgagee's attorney did not file suit to collect the insurance proceeds within a year of the fire, as required by the policy. The mortgagee sued his attorney for malpractice and the trial court dismissed on summary judgment.

Division One affirmed, rejecting the mortgagee's argument that he would have prevailed in a suit against the insurer because Washington law does not provide "a person who is not a named insured with a cause of action to sue an insurer directly to enforce an equitable lien on insurance policy proceeds." 137 Wn. App. at 845, ¶ 12. Thus, as in *Daugert*, causation required an analysis of

the law because the court had to assess whether any legal authority authorized the allegedly forfeited cause of action. 137 Wn. App. at 850, ¶ 20 (malpractice claim failed "[b]ecause no statute, reported decision, or 'bedrock principle of equity' provided Geer with a cause of action to enforce an equitable lien directly against Lloyd's"). In contrast, a failure to accommodate claim is well-established, as both parties recognize. (App. Br. 32-37; Resp. Br. 23-30)

Geer also rejected the plaintiff's secondary argument that he could have recovered the insurance proceeds based on a retroactive endorsement because he failed to provide "expert testimony . . . to establish that [the attorney] *breached the duty of care* . . . by failing to independently discover the existence of the endorsement." 137 Wn. App. at 851, ¶ 23 (emphasis added). The Court then opined that the plaintiff also failed to establish causation because he "failed to provide expert testimony *or other evidence* . . . to show that had [the attorney] discovered the retroactive endorsement and filed suit . . . [he] would have obtained a favorable judgment." 137 Wn. App. at 851, ¶ 24 (emphasis added). *Geer's* passing reference to "expert testimony" when holding the claim failed because of a total lack of causation evidence did not establish the rule of law Ms. Luke advances here – a legal malpractice plaintiff's claim fails as a matter

of law without expert testimony stating she would have prevailed in the underlying action. *See In re Stockwell*, 179 Wn.2d 588, 600, ¶ 22, 316 P.3d 1007 (2014) ("Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis") (quotation omitted).[2]

The only legal issue relevant to causation is whether Ms. Slack presented sufficient evidence supporting her underlying claim to avoid summary judgment. However, this question of law is for the trial court not "experts" to address, just as it would in the underlying case. Mallen, 4 Legal Malpractice § 37:101 ("if the evidence is undisputed or so conclusive that reasonable persons would not disagree, the resolution presents a question of law for the court"). A court could not dismiss Ms. Slack's underlying claim or her malpractice claim based on "expert" testimony that it lacked

[2] The other case Ms. Luke primarily relies on confirms expert testimony is required to establish the standard of care, not causation. (*See* Resp. Br. 21-22, citing *Boyle v. Welsh*, 256 Neb. 118, 589 N.W.2d 118 (1999)) *Boyle* involved an attorney who sued a client's physician, but not the physician's partner or partnership. *Boyle* held expert testimony was necessary to establish it was a breach of the standard of care to sue only the primary physician, noting "[w]hether a suit should be instituted against a particular defendant is an issue that is within the province of an attorney's professional skill and judgment, and is not within the ordinary knowledge and experience of laypersons." 589 N.W.2d at 127.

merit or violated CR 11, RCW 4.84.185, or RPC 3.1. (Resp. Br. 19, 41) *See Washington State Physicians Ins. Exch. & Assn v. Fisons Corp.*, 122 Wn.2d 299, 344, 858 P.2d 1054 (1993) (trial court erroneously "considered the opinions of attorneys and others as to whether" counsel's actions violated court rules); *Stenger v. State*, 104 Wn. App. 393, 407, 16 P.3d 655 ("Experts may not offer opinions of law in the guise of expert testimony."), *rev. denied* 144 Wn.2d 1006 (2001).[3]

"Testimony" that a claim is meritorious is little more than vouching for one's own legal arguments. It is not evidence whether presented by a party's counsel or its "expert." 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 1.02 (6th ed.) ("arguments are not evidence"). Indeed, here the "expert testimony" added nothing – it was a nearly word for word repetition of argument in Ms. Luke's summary judgment motion. (*Compare* CP 153 (cited at Resp. Br. 40) *with* CP 811) Ms. Luke is free to argue (and has) that she did not cause Ms. Slack any harm because her lost cause of action would have failed – but that is a question first for the trial court on

[3] Ms. Luke contradicts herself by asserting that Ms. Slack's claim fails as a matter of law because she did not have experts opine about compliance with RPC 3.1, and then later asserting that "[c]ompliance with [RPC 1.2] is a matter for the courts." (*Compare* Resp. Br. 19 *with* Resp. Br. 53)

summary judgment and then for a jury in the "trial within a trial," not for "experts" presenting the rehashed arguments of the parties as "testimony."

Even if viewed as an issue of standard of care, no expert testimony is needed where, as here, the causal link between the attorney's negligence and the client's harm is obvious, as when an attorney misses the statute of limitations. "The most frequent situation, not requiring expert testimony, is a statute of limitations . . . missed." Mallen, *supra*, § 37:128 at 1776-77; *see also* § 37:137 at 1809 ("Causation may be obvious, if the lawyer's error was an affirmative act or for some omissions, such as the failure to file a lawsuit."). Even though none was required, Ms. Slack nevertheless provided expert testimony that Ms. Luke's conduct fell below the standard of care. (CP 204-13)[4]

Ms. Luke provides no reason for disregarding the well-established "trial within a trial" procedure for resolving causation in

[4] Ms. Slack's experts did not impermissibly render opinions about whether Ms. Luke satisfied RPC 1.2, but instead pointed out only that it is the rule governing limiting the scope of representation. (Resp. Br. 53; CP 207, 212) Indeed, Ms. Luke cites it herself in arguing she did not commit malpractice. (Resp. Br. 49) Likewise, Ms. Slack's experts properly relied on facts supplied by Ms. Slack, just as Ms. Luke's experts relied on facts provided by her. (*Compare* Resp. Br. 53 *with* CP 151 ("It is my understanding, based [on] Luke's testimony . . ."), ER 703 (experts need not have personal knowledge of facts on which they base their opinions))

legal malpractice cases. This Court should reverse and remand for a jury to weigh the merits of Ms. Slack's malpractice claim.

C. No alternative grounds support summary judgment.

1. Ms. Luke's self-serving testimony cannot negate the existence of an attorney-client relationship as a matter of law, particularly in light of the unrestricted fee agreement.

Ms. Luke cannot justify summary judgment by pointing to only the evidence favorable to her and ignoring the evidence that Ms. Slack hired her to file an action against the DOC. *See Taylor v. Bell*, 185 Wn. App. 270, 289-95, ¶¶ 45-60, 340 P.3d 951 (2014), *rev. denied*, 352 P.3d 188 (2015) (conflicting testimony of client and attorney created issue of fact on scope of representation) (Resp. Br. 49). Yet, that is precisely what Ms. Luke does, repeatedly citing her own statements as "fact," while ignoring Ms. Slack's. This Court should reject Ms. Luke's one-sided account and reverse because it is an issue of fact whether filing a tort action was within the scope of Ms. Luke's representation of Ms. Slack.

The objective facts, at a minimum, create an issue of fact whether Ms. Slack retained Ms. Luke to file suit. On December 21, 2009 – two months after she purportedly told Ms. Slack she would not pursue a claim on her behalf – Ms. Luke called the state investigator to ascertain the status of Ms. Slack's claim. (CP 41,

Sarah Hidalgo

From: Sarah Hidalgo <shidalgo@waidlawoffice.com>
Sent: Monday, February 22, 2016 3:23 PM
To: 'Supreme@courts.wa.gov'
Cc: 'Brian J. Waid'; 'Jessica Creager'
Subject: Filing in Joudeh v. Pfau Cochran Vertetis Amala, PLLC [Case No. 925372]
Attachments: Pet.Motion to Consolidate.pdf; Decl.BJW.Mot to Consolidate.pdf

Good afternoon,

Please see the attached documents for filing in JOUDEH 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 [Case No. 925372].

A hardcopy of the Declaration Exhibits (A-E) will be mailed via USPS today.

Thank you,

Sarah K. Hidalgo
Assistant to Brian J. Waid and Jessica Creager

Waid Law Office
5400 California Ave SW, Suite D
Seattle, WA 98136
P: 206.388.1926
F: 206.388.1925
shidalgo@waidlawoffice.com