

No. 925372

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 72533-5-I

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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 REPLY IN SUPPORT OF HIS MOTION TO
CONSOLIDATE PURSUANT TO RAP 3.3(B)

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

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ORIGINAL

Petitioner Haitham Joudeh replies to the Oppositions and Joinder to his Motion to Consolidate his case with *Auer* as follows:

A. The Division III Opinion in *Slack v. Luke* and this Court's Acceptance of ALPS' *Amicus Curiae* Motion in *Auer*, Both on March 10, 2016, Highlight the Need for Supreme Court Review and the Propriety of Consolidation.

Petitioner's Motion to Consolidate noted that the 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," was also pending in the Division III case of *Slack v. Luke*, Case no. 32921-6. Mot. to Cons., p. 2. On March 10, 2016, Division III issued its published opinion in *Slack*, which (a) adopted the "general rule...to permit but not require expert testimony" at least "when the negligence charged is within the common knowledge of lay persons," and; (b) rejected Ms. Slack's claim that she had presented a *prima facie* case sufficient to defeat summary judgment on the merits of her underlying cause of action. *Slack v. Luke*, __ Wn. App. __, __ P.3d __ (Div. III, 03/10/16), quoting, *Walker v. Bangs*, 92 Wn.2d 854, 601 P.2d 1279 (1979).

Also on March 10, 2016, this Court granted the Motion by ALPS Property & Casualty Insurance Company to file an *Amicus* Memorandum in *Auer*, which urges review because the case "involves the necessity of expert testimony to sustain the causation element of a legal malpractice

claim...[which] is an issue that frequently emerges in legal malpractice cases in Washington” and is “a recurring issue in professional negligence litigation in ALPS’ experience.” ALPS’ Mem. Support of Rev. in *Auer*, pp. 1, 2 (emphasis added).

The issues decided in *Slack* and *Auer* thus mirror, and highlight, the importance¹ of the issues posed in *Joudeh*. Unfortunately, the holding in *Slack*, like the Division I opinion in *Joudeh* and the Division II opinion in *Auer*, leaves the parameters of circumstances which require expert testimony to establish a genuine issue as to proximate cause in Washington legal malpractice cases unstated and uncertain. See, 4 Mallen & Smith, *Legal Malpractice* §§37:136-137, pp. 1824-1833 (2016 ed.).²

B. The Court Has Authority to Consolidate Petitions for Review.

Cochran asserts that “nothing in RAP 3.3 authorizes litigants to seek consolidation of cases before this Court has accepted review.”

¹ Cochran argues that consolidation is inappropriate because the *Joudeh* and *Auer* opinions were unpublished and “Supreme Court review...is exceedingly unlikely.” Cochran Ans. to Mot., p. 3. Petitioner is aware of the statistics relative to this Court’s review of unpublished decisions; nevertheless, the review criteria listed in RAP 13.4(b) do *not* refer to “published” or “unpublished” but instead refer to *conflict* among decisions of the various courts and whether the petition involves an issue of “*substantial* public interest.” The *Joudeh* Petition satisfies those standards.

² Division II also repeated a fundamental error in its reliance on medical malpractice cases for its conclusion that expert testimony on proximate cause is normally required. *Auer* Op., p. 21 n. 12. Medical malpractice cases are inapposite to legal malpractice cases on this issue. See, *Joudeh* Pet. for Rev., p. 12 n. 6. See further, *State ex rel Carroll v. Junker*, 79 Wn.2d 12, 20-21, 482 P.2 775 (1971).

Cochran Ans. to Mot., p. 3. To the contrary, this Court has the “inherent authority to control and manage...[its] calendars, proceedings, and parties.” *State v. Gassman*, 175 Wn.2d 208, 211, 283 P.3d 1113 (2012). See further, RCW 2.04.020 and 2.04.190. Respondent Cochran is therefore mistaken.

Petitioner Joudeh nevertheless agrees with the Leach Respondents [Leach Opp. to Mot., p. 4] that the Court also has the authority to “link” the two cases for purposes of future proceedings. Petitioner nevertheless suggests that consolidation makes more sense for the following reasons.

C. The Court’s Inherent Authority Also Extends to Management of the Consolidated Cases for Purposes of Efficiency.

Leach Respondents assert that consolidation is too complicated for this Court and counsel to manage, because “[c]onsolidation of separate actions under CR 42(a) results in a single new action in the trial court,”³ and “adds complexity,” and “limits a party’s autonomy in advocacy...”. *Id.*, pp. 3-4.

However, the Court and the experienced counsel in this case are

³ Regardless of whether the same standards apply to consolidation under RAP 3.3(b) and in the trial court under CR 42, the general practice is that consolidated cases “retain their separate identity. Even though they are tried together, separate judgments will be entered.” 14A Teglund, *Wash. Prac, Civil Procedure* §28.2 (2d ed. updated through 08/2015). Although *Jeffery v. Weintraub*, 32 Wn. App. 536, 648 P.2d 914 (1982) held to the contrary, and *Rash v. Prov. Health & Servs.*, 183 Wn. App. 612, 334 P.3d 1154 (Div. III 2014) relied on *Jeffery*, Petitioner respectfully suggests that *Jeffery* erred on this issue.

quite capable of managing Leach's parade of horrors [Leach Ans. to Mot., pp. 3-4], by allocating briefing and oral argument responsibilities among themselves. Indeed, considering the substantial overlap of issues in *Joudeh* and *Auer*, "adopt[ing] by reference any part of the brief of another" is likely to be of significant benefit to both sides in *Joudeh* and *Auer* regardless of whether Petitioners and/or Respondents in each case opt to file separate briefs as RAP 10.1(g) allows. Consolidation will also allow the Court to avoid duplication in its decision-making process (even as to the Petitions for Review), oral argument and preparation for oral argument, and opinion-writing relative to such closely related issues.

D. *Joudeh* and *Auer* Present Variations on the Same Issue: How Does a Victim of Legal Malpractice Prove Proximate Cause?

Respondent Cochran asserts, without analysis, that *Auer* raises only the "narrow question" of whether "expert testimony is required to defeat summary judgment on the issue of proximate cause," but that *Joudeh* involves a completely unrelated question of "(1) whether Mr. Joudeh's own nonfeasance...precluded him from meeting his burden of proving proximate cause, and; whether his total failure of proof that he would have fared better...defeats his claim."⁴ Cochran Ans. to Mot., p. 4-5.

⁴ The *Joudeh* Petition for Review does indeed raise important issues of client mitigation and superseding cause in legal malpractice cases. *Joudeh* Pet. for Rev., pp. 13-19. The

Thus, as should be obvious, the issue of how a victim of legal malpractice proves proximate cause, as presented in *Joudeh*, and the issue of whether (or when) expert testimony is required to prove proximate cause, as presented in *Auer*, are inextricably intertwined. Indeed, Division I at least implicitly, and we suggest erroneously, approved the admissibility of expert testimony as to the result in the underlying matter. See *Joudeh* Pet. for Rev., p. 12 n. 6. Furthermore, the fact that the Division I opinion in *Joudeh* and the Division II opinion in *Auer* cite a nearly identical set of Washington cases relative to the proximate cause issue, *objectively* confirms the close relationship of the issues involved in both cases.⁵

Division II Opinion in *Auer* similarly addressed client mitigation in the context of a post-malpractice settlement. *Auer v. Leach*, 2015 WL 6506549 *12.

⁵ With the Court's indulgence, Petitioner lists case names only (which are well-known), but omits the case citations for purposes of brevity. In *Joudeh*, Division I relied on *Daugert v. Pappas*, *Geer v. Tonnen*, *Griswold v. Kilpatrick*, *Halvorsen v. Ferguson*, *Nielsen v. Eisenhower & Carlson*, *Paradise Orchards Gen'l Partnership v. Fearing*, *Smith v. Preston Gates & Ellis, LLP*, *VersusLaw, Inc. v. Stoel Rives, LLP*, *White v. Kent Medical Center, Inc.*, *Young v. Key Pharmaceuticals*. In *Auer*, Division II relied on those same cases, but did *not* cite *Daugert*, *Paradise Orchards*, or *Versuslaw*. *Joudeh*, in turn, cited the same cases as Division II in *Auer*, except that *Auer* also cited *Clark Cnty. Fire Dist. No. 5 v. Bullivant Houser Bailey, P.C.*, *Estep v. Hamilton*, *Kim v. Budget Rent-a-Car Systems, Inc.*, and *Sorensen v. Pyeatt*. However, the parties in *Joudeh* briefed both *Clark Cnty. Fire Dist. no. 5* and *Estep* in Division I, and *Cochran* cites both cases in its Answer to the *Joudeh* Petition for Review. The two appellate Courts' reliance on common legal authorities for their legal analysis is no coincidence; it instead confirms the close relationship of the issues in the two cases on appeal.

While a legal malpractice plaintiff may be required to introduce the same type of expert testimony in the trial-within-the-trial that would or should have been offered *the underlying matter* (including summary judgment) to establish proximate cause, that does *not* mean that the legal malpractice plaintiff must introduce expert or other testimony to predict the result of that underlying matter.

Thus, as its first and paramount issue, the *Joudeh* Petition for Review poses the issue as: “Consistent with *Daugert v. Pappas*, how does a legal malpractice victim prove causation in a legal malpractice action?” *Joudeh* Pet., p. 2. The Petition then argues that legal malpractice plaintiffs prove causation through inferences drawn from the evidence in a trial-within-a-trial *and* that expert testimony about what a judge, jury or tribunal would have decided in the underlying matter is *not* admissible.” *Joudeh* Pet. for Rev. pp. 10-13. In similar fashion, the first and paramount issue posed in *Auer* is: “Did the Court of Appeals (i) erroneously find that plaintiffs required expert witness testimony, in a legal malpractice action, to establish a causal link....”? *Auer* Pet. for Rev., pp. 1, 11-13.

The Leach Respondents, in contrast, grossly misstate and thus attempt to trivialize⁶ the issue raised by Petitioner *Joudeh*, asserting that

⁶ We contrast the Leach Respondent’s trivialization of this issue with ALPS’ motion to publish *Auer* and its *Amicus* Memorandum in this Court urging review because of the importance of this issue.

“Petitioner appears to contend that the issue of proximate cause in an attorney professional negligence case may not be decided except by trial.” Leach Ans. to Mot. to Consolidate, p. 5. Petitioner Joudeh makes no such assertion, either directly or implicitly; instead, consistent with well-established Washington law [Pet. for Rev., pp. 11-12 and 18 n. 11], legal malpractice victims prove proximate cause through inferences drawn from the evidence. While that may require the legal malpractice plaintiff to introduce the same type of expert testimony in the trial-within-the-trial relative to *the underlying matter*, rather than introduction of expert or other testimony to predict the result of that underlying matter.

In this case, Mr. Joudeh introduced ample evidence from which a jury could reasonably have concluded that he would have recovered additional damages but for the attorney’s negligence. See, Pet. for Rev. pp. 12-13 (and related Record references). He thus established that a genuine issue of material fact remained relative to proximate cause, **in the only way a legal malpractice victim could**, considering that he could *not* have introduced expert testimony (such as trial attorney’s or judge’s testimony) to express an opinion as to the “value” of his case. See, Pet. for Rev., p. 18 n. 11, *citing, Griswold v. Kilpatrick*, 107 Wn. App. 757, 27 P.3d 246 (2001). Accord, 5 Mallen & Smith, *Legal Malpractice* §37:138, p. 1833 (2016 ed.) (“[u]sually, rejected as

speculative...the attorney would have to know everything that would have happened in the untried action....”).

The Petitions in *Joudeh* and *Auer* thus raise important and inextricably intertwined issues which the Court should consolidate for purposes of efficiency in further proceedings.

E. Conclusion

Petitioner Haitham Joudeh thus asks that the Court grant his Motion to Consolidate his 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: March 11, 2016.

WAID LAW OFFICE

BY: /s/ Brian J. Waid

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 11th day of March, 2016, I caused a copy of the foregoing Petitioner's Reply in Support of His 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: (X) U.S. Mail
Jeffrey P. Downer () Hand Delivery
Spencer N. Gheen (X) Email
Lee Smart, P.S., Inc.
One Convention Place, Suite 1800
701 Pike Street
Seattle, Washington 98101

I further hereby certify that on this 11th day of March, 2016, I caused a copy of the foregoing Petitioner's Reply in Support of His 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 (X) U.S. Mail
Law Offices of Brian Krikorian () Hand Delivery
4100 194th Street SW, Suite 215 (X) Email
Lynnwood, Washington 98036

Counsel for Respondents in *Auer v. Leach*:
Philip Meade (X) U.S. Mail
Merrick, Hofstedt & Lindsey, P.S. () Hand Delivery
3101 Western Avenue, Suite 200 (X) Email
Seattle, Washington 98121

Dated: March 11, 2016.

WAID LAW OFFICE

BY: /s/ Brian J. Waid
BRIAN J. WAID
WSBA No. 26038
One of Petitioner's Attorneys

OFFICE RECEPTIONIST, CLERK

To: shidalgo@waidlawoffice.com
Cc: bjwaid@waidlawoffice.com; jcreager@waidlawoffice.com; 'Jeffrey P. Downer'; sng@leesmart.com; bhkrik@bhklaw.com; pmeade@mhlseattle.com; phil@tal-fitzlaw.com; 'Christie A. Williams'
Subject: RE: Filing in Joudeh v. Pfau Cochran Vertetis Amala, PLLC [Case No. 925372]

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Cc: bjwaid@waidlawoffice.com; jcreager@waidlawoffice.com; 'Jeffrey P. Downer' <Jpd@leesmart.com>; sng@leesmart.com; bhkrik@bhklaw.com; pmeade@mhlseattle.com; phil@tal-fitzlaw.com; 'Christie A. Williams' <cxw@leesmart.com>
Subject: Filing in Joudeh v. Pfau Cochran Vertetis Amala, PLLC [Case No. 925372]

Good afternoon,

Please see the attached document 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].

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

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