SUPREME COURT
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. 92778-2 ALPS' MEMORANDUM IN SUPPORT OF REVIEW

A. INTRODUCTION

ALPS Property & Casualty Insurance Company ("ALPS") asks this Court to grant review in this case pursuant to RAP 13.4(b).

B. STATEMENT OF FACTS

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 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

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causation element of a legal malpractice claim. In ALPS's experience, this is an issue that frequently emerges in legal malpractice cases in Washington.

The Court of Appeals filed its unpublished opinion on January 12, 2016.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. *Auer v. Leach*, 190 Wn. App. 1043, 2015 WL 6506549 (2015) at *11. The court ruled as a matter of law that the plaintiffs there failed to establish the causation element of their claim.

C. WHY REVIEW SHOULD BE ACCEPTED[1]

This case merits review because the Court of Appeals opinion affirming that expert testimony is necessary to establish the causation element of a legal malpractice claim addresses a recurring issue in professional negligence litigation in ALPS's experience. This Court should definitively state the appropriate principle in legal malpractice cases for the benefit of counsel in legal malpractice cases, professional liability insurers like ALPS, and the public.

[1] This Court is fully familiar with the criteria for review set forth in RAP 13.4(b).

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Washington courts have routinely held that the causation element of a legal malpractice case can be resolved as a matter of law.[2]

In *Daugert v. Pappas,* 104 Wn.2d 254, 704 P.2d 600 (1985), this 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

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[2] *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 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).

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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." *Id.* 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 client must prove that the appellate court would have granted review and rendered a judgment in the client's favor. 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.*

At a minimum, the decision whether to file an action implicates an attorney's duties under CR 11/RCW 4.84.185 and RPC 3.1.[3] Such a

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[3] 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."

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.'"

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decision involves an attorney's professional expertise, requiring expert testimony.[4]

In *Geer v. Tonnon*, 137 Wn. App. 838, 155 P.3d 163 (2007), *review denied*, 162 Wn.2d 1018 (2008), 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. 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

[4] As this 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.

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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).[5]

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 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

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[5] *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).

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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.

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.

D. CONCLUSION

This Court should grant review to firmly establish that the causation element in a legal malpractice claim must be generally supported by expert testimony and the failure to provide such evidence may result in dismissal of a legal malpractice claim as a matter of law.

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DATED this 2d day of March, 2016.

Respectfully submitted,

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