NO. 92778-2

SUPREME COURT
OF THE STATE OF WASHINGTON

RONALD AUER and JOHN TRASTER,

Petitioners,

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.,

Respondents.

ANSWER TO PETITION FOR REVIEW

Philip R. Meade, WSBA #14671
Rossi R. Maddalena, WSBA #39351
pmeade@mhlseattle.com
rmaddalena@mhlseattle.com

Attorneys for Respondents

MERRICK, HOFSTEDT
& LINDSEY, P.S.
3101 Western Ave., Suite 200
Seattle, WA 98121
Phone: 206-682-0610
Fax: 206-467-2689

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I. IDENTITY OF RESPONDING PARTIES

Responding parties 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; and Anderson Hunter Law Firm, P.S., Inc., ask the Court to deny the Petition for Review filed February 10, 2016 by Petitioners Auer and Traster.[1]

II. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in deciding Plaintiffs had failed to show sufficient evidence the conduct they alleged was professional negligence proximately caused them damages, where the Plaintiffs failed to offer any admissible evidence that, if defendants had proceeded in the manner Plaintiffs alleged they should have, they would have succeeded or otherwise obtained a better outcome, and therefore a jury or other trier of fact could only find the lawyers had proximately caused the damages alleged by speculation?

2. Whether the trial court abused its discretion when it declined to consider new or additional evidence presented with a motion for reconsideration of a ruling on summary judgment,[2] including a

[1] The case caption lists SAFECO Insurance as an additional Respondent. That reference is vestigial. SAFECO Insurance Company was named a defendant in the Complaint, but SAFECO Insurance was never joined in the action by process service or otherwise.

[2] See *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002) (ruling on motion for reconsideration is a decision within the sound discretion of the trial court and will be overturned only if the court abused its

supplemental declaration of an expert, where the court had previously excused untimely disclosure of the expert's opinions submitted in opposition to summary judgment after considering the *Burnet* factors,[3] but determined those same factors supported its discretionary decision to not accept the new or additional evidence offered in conjunction with the motion for reconsideration?

III. COUNTERSTATEMENT OF THE CASE

After settling litigation about their purchase of real estate, Auer and Traster sued their previous attorneys, claiming they sustained damages because the litigation should have been handled differently. The trial court dismissed Petitioners' claims for legal malpractice, determining they failed to raise genuine issues of material fact on

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discretion); *Martini v. Post*, 178 Wn. App. 153, 164, 313 P.3d 473 (2013)(same, and decision to consider new or additional evidence presented with motion for reconsideration is reviewed to determine if the decision was manifestly unreasonable or based on untenable grounds); *Adams v. Western Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989) (additional evidence submitted with the reconsideration motion was properly rejected where the evidence had been available before the summary judgment hearing and was offered after the summary judgment ruling determined the first declaration was insufficient).

[3] *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 497-98, 933 P.2d 1036 (1997). In *Keck v. Collins*, 184 Wn.2d 358, 362, 357 P.3d 1080 (2015), this Court held that when deciding whether to strike untimely evidence filed *before* a summary judgment ruling, the trial court must consider the factors from *Burnet*, on the record, before striking the evidence. The trial court's decision is then reviewed for an abuse of discretion. In this case, the trial court *allowed* Plaintiffs' untimely expert declaration submitted *before* the summary judgment hearing (RP 62; CP33), but decided to not accept and consider the supplemental expert declaration filed *after* it had made its ruling. (CP 35-39). In exercising its discretion to not accept the additional declaration *on reconsideration*, the trial court explained the decision by reference to this Court's decision in *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 590-91, 220 P.3d 191 (2009) – which reiterated the *Burnet* factors. (CP 37).

essential elements of their claim.[4] CP 360-61; RP 67; CP 33-34. The court determined that Auer and Traster had not established evidentiary facts sufficient to meet their burden of showing each of the four elements required to succeed on a claim of legal malpractice. RP 66; CP 34. In particular, the court ruled that Auer and Traster had not offered evidence that would show they would have prevailed or obtained a better result in the underlying case without the acts or omissions they alleged constituted defendants' malpractice. RP 66; CP 34. The court decided that, given that lack of evidence to link the conduct complained of to the alleged damages, expert testimony was necessary to establish causation. CP 360-61; RP 65-66. Otherwise the jury could only find the alleged negligence had proximately caused Auer's and Traster's claimed losses by resort to speculation. See RP 66. In the declaration of their attorney expert, Paul Brain, they submitted in opposition to summary judgment, Mr. Brain expressly declined to offer an opinion on causation. CP 34; CP 600.

Auer and Traster moved for reconsideration, submitting several additional declarations, including a supplemental declaration of their attorney-expert, Paul E. Brain. CP 321. The trial court declined to accept the evidence newly submitted with the reconsideration motion, and denied reconsideration of its order dismissing the malpractice claim. CP 31-39. The court's order explained that none of the

[4] Petitioners have challenged dismissal of their claim for professional negligence, but not the dismissal of claims based on RCW 19.86.090.

evidence Auer and Traster submitted before summary judgment or with the motion for reconsideration created a genuine issue of material fact that two of the attorneys breached any standard of care **or** caused damages to Plaintiffs. CP 32. See RP 64. The court reiterated that the evidence Plaintiff submitted before the summary judgment ruling, which included the late-disclosed opinion of their attorney expert, Paul E. Brain, raised a question of fact whether a third attorney's alleged inaction breached a duty of care. CP 34. But the court noted there was a "lack of any evidence that had Defendant ... proceeded as Mr. Brain suggested the Plaintiffs would have succeeded on a request for injunctive relief or [been] granted specific performance." ... "Given the complex facts related to the acquisition of the real estate ... the Court concluded that expert testimony was necessary to establish a causal link between the alleged breach... and Plaintiffs' damages. Mr. Brain, in his declaration, explicitly stated he was not sure that offering an opinion on causation was appropriate." CP 34. See CP 600.

With the supplemental declaration of Paul E. Brain submitted in support of reconsideration (CP 321-325), Plaintiffs tried to provide the missing causal link.[5] The trial Court carefully considered whether to accept Mr. Brain's supplemental declaration and additional

[5] Defendants objected to this new declaration as conclusory, speculative, and lacking factual foundation for the opinions stated, in addition to not being submitted before the summary judgment hearing. CP 140-153; CP 158-163.

opinions, and in her discretion[6] decided to not do so. She explained her decision by citing her oral ruling that allowed Plaintiffs' untimely expert declaration submitted before the summary judgment hearing (CP33-34; RP 62[7]), but decided to not accept and consider the supplemental expert declaration filed after she had made her ruling. (CP 35-39). In exercising her *discretion to not accept* the additional declaration on reconsideration, the trial court explained the decision by reference to this Court's decision in *Magana v. Hyundai Motor America,* 167 Wn.2d at 590-91 – which reiterated the *Burnet* factors. (CP 37).

In its unpublished decision, the Court of Appeals affirmed the trial court. *Auer v. Leach*, 190 Wn. App. 1043 (Oct. 27, 2015). [8]

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[6] The trial court recognized that she had discretion to consider additional evidence on reconsideration, but determined in the exercise of that discretion to not do so. CP 37.

[7] Plaintiff had cited *Burnet*, RP 27, and the trial court cited *Jones v. City of Seattle*, 179 Wn.2d 322, 338, 314 P.3d 380 (2013) (which applied the *Burnet* approach to review of an order excluding a witness as a sanction for failing to timely disclose violating a discovery order), in explaining why she did not exclude Mr. Brain's first declaration even though she determined Plaintiffs violated their discovery obligations by not disclosing Mr. Brain's expert opinions. RP 61. See CP 33-34.

[8] On January 12, 2016, the Court denied Plaintiffs' motion for reconsideration, but amended the Opinion to revise a sentence, stating that Mr. Brain's supplemental declaration had not been provided until Petitioner's moved for reconsideration of the court's summary judgment decision, despite having all information necessary to provide that opinion with their response to the summary judgment motion. The amendment changed page 26, lines 14-16, of the October 27, 2015 unpublished opinion. *Auer v. Leach*, 190 Wn. App. 1043 (Wn. App. Oct. 27, 2015, Amended, Jan. 12, 2016). The original decision is available at 2015 WL 6506549 (2015).

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals Decision is Not in Conflict With Any of this Court's Precedents or with Another Decision of the Court of Appeals, and Does Not Involve an Issue of Substantial Public Interest; Review is Unwarranted under RAP 13.4(b)(1), RAP 13.4(b)(2), or RAP 13.4(b)(4)

In challenging the unpublished Court of Appeals decision that affirmed the trial court's discretionary decision to not accept additional evidence submitted with a motion for reconsideration of a summary judgment ruling, Petitioners inaccurately recite the rulings of both the trial court and the Court of Appeals on this issue, as well as the underlying facts. Stated simply, the trial court had discretion whether to consider new or additional evidence submitted *after* the summary judgment ruling. Petitioners have not shown that the decisions of the lower courts conflict with decisions of this Court or the Court of Appeals, or raise an issue of substantial public interest that warrants review.

Petitioners also assert incorrectly that the trial court and Court of Appeals "erroneously found that in order to establish the element of causation in a legal malpractice case ... Petitioners were *required* to provide expert testimony to establish a causal link, which is contrary to existing legal authority." Petition for Review at 11 (emphasis in petition).

However, Washington cases consistently hold that a plaintiff alleging malpractice must demonstrate the ability to introduce

evidence of each element of his or her claim to avoid summary judgment. Otherwise, a jury or other trier of fact could only speculate in finding that a defendant had proximately caused the damages alleged. Neither the trial court nor the Court of Appeals held that expert testimony is always required to meet the burden of demonstrating a genuine issue of material fact that alleged misconduct proximately caused damages. The lower courts simply applied the consistent rules set out in the Washington decisions cited by each court: Where Plaintiffs have presented no admissible evidence that would directly show, or allow the inference, that they would have prevailed or obtained a better result in the underlying trial without the defendants' alleged malpractice, 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. *See Auer v. Leach*, 190 Wn. App. 1043, at 20-21. CP 34; RP 66.

Contrary to Petitioners' argument, Washington cases do not hold that the "case within a case" determination in a legal malpractice case cannot be decided without a trial; the underlying case elements may be challenged before trial as in any other case, and when the underlying case involves questions of duty or causation that require expert testimony or a legal decision, the court may require expert testimony to guide the jury, and may decide the questions that would be decided by a judge. Nothing in the decisions of the trial court or the Court of Appeals stated an absolute rule that expert testimony is

required in all cases to show a causal link between alleged legal malpractice and damages claimed and supported by evidence.

Instead, the lower courts applied general rules for deciding a summary judgment motion to the specific circumstances of a claim involving legal negligence: the Plaintiff must be able to defend a pretrial challenge as to whether there is sufficient evidence for a trier of fact to determine the Plaintiff can show each of the four elements of a legal malpractice claim: (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. The Plaintiff must have sufficient evidence to prove each element without inviting the trier of fact to speculate in reaching a decision. Petitioners have not shown that the decisions of the trial court of the Court of Appeals conflict with decisions of this Court or the Court of Appeals, or raise an issue of substantial public interest that warrants review.

1. The Court Of Appeals Properly Determined that the Trial Court Did Not Abuse Its Discretion in Excluding Evidence, Including an Expert's Second Declaration, Submitted in Support of a Motion for Reconsideration of the Summary Judgment Ruling.

The court determined that, after withholding the experts' opinions during discovery, "Plaintiffs made a tactical or strategic decision to withhold Mr. Brain's causation opinions when they

submitted his initial declaration... a willful violation of the discovery rules." CP 36. *Auer v. Leach*, 190 Wn. App. 1043, at 9. After reviewing Mr. Brain's supplemental declaration, the court observed that a key question on reconsideration is whether the court should permit a non-moving party to supplement the factual record after losing on summary judgment and learning through the Court's oral ruling what the court believed to be the crucial missing expert evidence. CP 35.[9] Although the court previously extended considerable leniency to the Plaintiffs regarding their failure to disclose the opinions of their expert witness, after reviewing the expert's supplemental declaration the court noted:

> Plaintiffs admit that Mr. Brain's causation opinions are not 'newly discovered evidence' under CR 59(a)(4). His causation opinions could have been included in the first declaration. In fact, Mr. Brain testifies that "[t]he fact that I did not address causation in my previous declaration only represents the fact that I was not asked to offer an opinion on causation in that declaration, not that I did not form an opinion on causation." This statement indicates that Plaintiffs made a tactical or strategic decision to withhold Mr. Brain's causation opinions when they submitted his initial declaration. The tactical or strategic withholding of such important evidence was clearly a willful violation of the discovery rules.

CP 36. The court noted:

> The case was scheduled for trial on March 10, 2014. The discovery cut off was set...for January 31, 2014. Defendants had received no expert opinions on any topic through discovery by late December 2013 and submitted a

[9] See *Adams v. Western Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989).

summary judgment motion challenging the evidentiary support for the malpractice ... claims as a result. Plaintiffs did not disclose crucial causation opinions until it filed its motion for reconsideration on January 13, 2014, without any explanation for the untimely disclosure, with only two weeks remaining in discovery and only two months to trial. The failure to disclose Mr. Brain's causation opinions is a violation that prejudiced Defendants because the evidence goes to the heart of Plaintiffs' claim of malpractice. Withholding this type of expert opinion evidence interferes with a defendant's ability to conduct... discovery in a prompt and efficient manner, to determine if in fact the opinions are factually or legally well-founded, and to work with a defense expert to develop rebuttal opinions before the dipositive motion deadline.

The Court has also considered whether it should consider the Plaintiffs' untimely declarations and instead impose a lesser sanction in lieu of rejecting the evidence. As the Supreme Court said in *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 590-91, 220 P.3d 191 (2009), any less severe sanction must not be so minimal that it undermines the purpose of discovery. Nor should a lesser sanction allow the wrongdoer [to profit] from the wrong. *Id.* This Court considered continuing the trial to give the Defendants time to address Mr. Brain's untimely opinions as well as the new factual evidence in the three other declarations. The Court also considered imposing monetary sanctions in lieu of exclusion of the new evidence. But this Court concludes that either lesser sanction would undermine the purpose of discovery and allow the Plaintiffs to profit from their failure to comply with their discovery obligations. Thus the Court deems any lesser sanction inappropriate to address the tactical or strategic withholding of critical expert opinion evidence.

Under these circumstances, it would be inappropriate for this Court to consider Mr. Brain's second declaration in conjunction with the motion for reconsideration and in its exercise of discretion, declines to do so....

CP 37-38. The Court of Appeals affirmed this exercise of discretion, observing that the trial court had applied the *Burnet* factors in making her ruling. *Auer & Traster,* 190 Wn. App. 1043, at 9.

Petitioners argue the Court of Appeals decision "materially contravenes this Court's recent decision in *Keck v. Collins.*" Petition at 11. In *Keck v. Collins*, 184 Wn.2d 358, 357 P.3d 1080 (2015), this Court said that "[a]n order striking untimely evidence *at summary judgment* requires a *Burnet* analysis and is reviewed for an abuse of discretion." *Id.* at 368 (emphasis added).[10]

Petitioners make no distinction between the trial court's consideration of the declarations they submitted with their motion for reconsideration, *after* the summary judgment ruling, and the trial court's consideration of evidence offered *at summary judgment* that was not timely disclosed in discovery. *Keck* did not require a *Burnet*

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[10] The Court added:

> Our precedent establishes that trial courts must consider the factors from *Burnet*, 131 Wn.2d 484, 933 P.2d 1036 [(1985)], *before excluding untimely disclosed evidence;* rather than de novo review under *Folsom [v. Burger King,* 135 Wn.2d 658, 663, 958 P.2d 301 (1998))], we then review a decision to exclude for an abuse of discretion. *See, e.g., Blair v. Ta–Seattle E. No. 176,* 171 Wn.2d 342, 348, 254 P.3d 797 (2011) (holding trial court abused its discretion by not applying *Burnet* factors before excluding witnesses disclosed after court's deadline). We have said that the decision to exclude evidence that would affect a party's ability to present its case amounts to a severe sanction. *Id.* And before imposing a severe sanction, the court must consider the three *Burnet* factors on the record: whether a lesser sanction would probably suffice, whether the violation was willful or deliberate, and whether the violation substantially prejudiced the opposing party. *Jones v. City of Seattle,* 179 Wash.2d 322, 338, 314 P.3d 380 (2013).

Keck, 184 Wn.2d at 368-369.

analysis when a trial court decides whether, in its discretion, to accept new or additional evidence offered *after* its summary judgment decision, *with a motion for reconsideration.* Irrespective of Petitioners' conflated discussion, the trial court actually applied the *Burnet* analysis in explaining why, in the exercise of her discretion, she decided to not consider the new declarations submitted *after the summary judgment ruling* in deciding the motion to reconsider the ruling.

Petitioners' contrary discussion does not fairly reflect the trial court's analysis. CP 36-38. The references to *Keck* and *Burnet* in the decision of the Court of appeals did not suggest those decisions properly guided an analysis of the trial court's reconsideration decision; rather the Court noted that Auer and Traster had accurately characterized the trial court's ability to consider new evidence on reconsideration as a decision involving the court's discretion. *Auer v. Leach*, 190 Wn. App. 1043, at 26. The Court remarked that the trial court explained her decision to not accept the additional declarations filed with the motion for reconsideration by discussing her decision to exclude the supplemental expert declaration under a discovery sanction "*Burnet*" analysis. *Id.* See CP 36-37, citing *Magana.* The Court then noted that Petitioners had failed to address that *Burnet* analysis until their Reply Brief, and declined to address their untimely argument. While Petitioners' appear to contend they did challenge the trial court's *Burnet* (*Magana*) analysis (CP 36-37), at least indirectly,

in their Opening Brief (Petition at 13-14), their Opening Brief simply did not address the trial court's *Burnet* explanation for its exercise of discretion.

In any event, *Keck* does not apply to the decision made *on reconsideration*, and *Keck* held that the trial court's decision whether to exclude untimely disclosed evidence *before* summary judgment is reviewed for an abuse of discretion. A trial court's decision whether to accept new or additional evidence submitted *on reconsideration* also is reviewed for an abuse of discretion, but no case holds that the decision whether to accept new or additional evidence *after* the summary judgment ruling must follow the same considerations as the decision *before* summary judgment whether to accept evidence that was not timely disclosed in discovery. The Court of Appeals did not err in deciding the trial court acted within her discretion when she declined to consider the declarations Petitioners submitted *after* summary judgment, in support of their reconsideration motion.

2. The Trial Court and the Court of Appeals Correctly Held That a Legal Malpractice Claim is Subject to the Same Summary Judgment Standards as Other Negligence Claims, and Expert Testimony May Be Necessary to Enable the Trier of Fact to Determine Whether an Alleged Breach of Duty Could Be Shown to Cause Provable Damages Without Resort to Speculation.

Petitioners also assert that the trial court and Court of Appeals "erroneously found that in order to establish the element of causation in a legal malpractice case ... Petitioners were *required* to provide expert testimony to establish a causal link, which is contrary to

existing legal authority." Petition for Review at 11 (emphasis in petition). Nothing in the trial court's rulings (CP 31-39; RP 64-66) or the decision of the Court of Appeals supports that contention. The Court of Appeals rejected Petitioners' similar argument when it explained that the trial court *had not* based its ruling on an evidentiary standard that mandates 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[11], and a treatise on

[11] *Geer v. Tonnen*, 137 Wn. App. 838, 840, 155 P.3d 163 (2007), *rev. denied*, 162 Wn.2d (2008).

> 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 v. Leach, 190 Wn. App. 1043, at 20-21. Contrary to Petitioners' argument, *Daugert v. Pappas*, 104 Wn.2d 254, 257, 704 P.2d (1985) and other Washington cases,[12] did not create a rule unique to legal malpractice cases that relieves the Plaintiff from a pre-trial challenge, as in other negligence cases, as to whether Plaintiffs can present evidence at trial that would not merely invite a jury or other trier of fact to speculate in deciding whether the elements of a Plaintiff's negligence claim were established.

Rather, Washington cases require that in a legal malpractice case the Plaintiffs demonstrate (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

[12] The Petition cites *Brust v. Newton*, 70 Wn. App. 286, 293, 852 P.2d 1092 (1993), *rev. denied*, 123 Wn.2d 1010 (1994) and *VersusLaw v. Stoel Rives*, 127 Wn. App. 309, 111 P.3d 866 (2005), *rev. denied*, 156 Wn.2d 1008 (2006). Petition at 12. In *Brust*, the Court held that where a claim alleged damages resulted from negligence in drafting a prenuptial agreement, the action was not a dissolution action that must be decided by the court, but a negligence action, and the damages proximately caused should be decided by the jury rather than the court. In *VersusLaw*, the court held that general principles of causation are no different in a legal malpractice action than in an ordinary negligence case, and that under the facts presented there were questions of fact regarding damages and causation. Those cases follow rules of decision consistent with the trial court's rulings and the cases cited by the trial court and Court of Appeals in this matter, but involved different facts that resulted in different outcomes on summary judgment.

(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, *rev. denied*, 141 Wn.2d 1016 (2000). Here, the Court of Appeals noted:

> 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.
>
> 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).

Auer v. Leach, 190 Wn. App. 1043, at 19-20. The Court properly determined that the trial court's summary judgment decision was correct. *Id.* at 22-24.

Petitioners cite generally to cases that indicate proximate cause is often a question of fact for the jury, and appear to suggest legal malpractice cases require greater deference to jury determinations than other negligence claims. Petition for Review at 11-12. However, they do not cite *any* decision that disputes a trial court may determine whether a Plaintiff's evidence of causation and damages may be ruled insufficient by the court before the evidence is submitted for determination by a jury or other trier of fact.

Washington decisions support summary judgment determinations in legal malpractice cases where the evidence is not sufficient to support a finding that damages were proximately caused by alleged legal malpractice. *See, e.g., Estep v. Hamilton*, 148 Wn. App. at 256 (where Plaintiff's expert testimony and other evidence failed to show she would have had a better outcome if she had litigated rather than settled, she failed the "but for" test for causation, and summary judgment was proper); *Geer v. Tonnon*, 137 Wn. App. at 850-52 (claim based on failure to pursue equitable claim in underlying case required proof it would have been successful, which is an issue to be determined by the trial court, and it was properly dismissed for absence of proof on the element of causation; claim based on failure to file suit to pursue legal claim was dismissed because Plaintiff lacked

expert testimony or other evidence to show the breach of duty of care was a cause in fact of the damages claimed, so legal negligence claim failed as a matter of law); *Smith v. Preston Gates Ellis LLP*, 135 Wn.2d at 865 (where trial court struck expert's testimony as outside his disclosed area of expertise, nothing in the record tied the alleged deficiencies to the claimed damages, and plaintiff's evidence to prove causation was insufficient to prevent summary judgment); *Griswold v. Kilpatrick,* 107 Wn. App. at 763 (expert testimony was insufficient to raise a genuine issue of material fact on the element of proximate "but for" causation of damages, and summary judgment dismissal of legal malpractice claim was affirmed); *Nielson v. Eisenhower & Carlson,* 100 Wn. App. at 589 (whether an appellate court would have ruled favorably should be resolved by the court, and summary judgment was proper because the lawyer's alleged negligence was not a "but for" cause of the Plaintiff's loss); *Sherry v. Diercks,* 29 Wn. App. at 437 (the principles and proof of causation in a legal malpractice action do not differ from an ordinary negligence case") (*citing Ward v. Arnold,* 52 Wn.2d 581, 584, 328 P.2d 164 (1958).

A recent published decision from Division III states:

> A legal malpractice trial effectively requires a trial within a trial on the causation element. The trier-of-fact must decide if the underlying cause of action would have resulted in a favorable verdict for the client; only then is the suit against the attorney viable. *Daugert v. Pappas*, 104 Wn.2d 254, 258, 704 P.2d 600 (1985). Where the underlying cause of

> action presents a legal question, a judge must decide the case rather than a jury. *Id.* at 258-259.[13]

Slack v. Luke, et al., No. 32921-6-III, 2016WL917310 (March 10, 2016), at 7-8.

> ...[T]he defendant's argument did present a legal question for the judge rather than a factual question for a jury. When a plaintiff presents insufficient evidence to support her claim for relief, the trial court will dismiss the action instead of presenting it to the jury. CR 50(a)(1); *Alejandre v. Bull*, 159 Wn.2d 674, 689-91, 153 P.3d 864 (2007). This is essentially the same function performed at summary judgment. If there is no legal basis for a case to proceed, summary judgment is proper. *Lybbert*, 141 Wn.2d at 34 [*Lybbert v. Grant County*, 141 Wn.2d 29, 1 P.3d 1124 (2000)].
>
> Many states apply this summary judgment standard to the causation element of the plaintiff's legal malpractice case, thereby requiring the plaintiff to demonstrate that her underlying claim would itself survive summary judgment. *E.g., Niehoff v. Shankman & Assocs. Legal Ctr.*, 2000 ME 214, 763 A.2d 121 [(2000)]; *Rouse v. Dunkley & Bennett, PA*, 520 N.W.2d 406 (Minn. 1994). *See generally* 4 RONALD E. MALLEN, LEGAL MALPRACTICE § 37:78, at 1649-50 (2016 ed.). We conclude that this standard is appropriate for use in Washington. At a trial on the merits of the WLAD claim, the trial court would be required under CR 50 to dismiss a legally insufficient case at the conclusion of the plaintiff's case. There is no reason to require a useless trial in a malpractice action involving a meritless underlying case. Accordingly, we hold that when the legal malpractice defendant presents evidence that the unfiled underlying action was without merit, the plaintiff must establish that her underlying case would survive a motion for summary judgment. ...

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[13] In the instant case, the trial court followed this holding from *Daugert* in deciding that Plaintiff had not shown a trial was necessary to determine whether an action seeking specific performance or for an injunction would have been successful. RP 65-66. See also CP 34.

> ...
> ... Her WLAD accommodation claim would not have survived a CR 50 motion at trial and did not establish a viable claim in response to the summary judgment motion. Accordingly, we agree with the trial court that summary judgment was proper in this case.

Slack v. Luke, et al., No. 32921-6-III, at 10 - 11. The trial court properly determined that Petitioners had not met their burden of showing "but for" causation, and the Court of Appeals properly affirmed the trial court's summary judgment rulings.

V. CONCLUSION

Petitioner cannot meet the RAP 13.4(b) requirements for review. The Petition for Review should be denied.

DATED this 11th day of March, 2016.

MERRICK, HOFSTEDT & LINDSEY, P.S.

By 

Philip R. Meade, WSBA #14671
Ross F. Maddalena, WSBA # 39351
pmeade@mhlseattle.com
rmaddalena@mhlseattle.com
3101 Western Avenue, Suite 200
Seattle, WA 98121
Phone: 206-682-0610

Attorneys for Respondents

DECLARATION OF SERVICE

On said day below, I e-mailed a true and accurate copy of the **Answer to Petition for Review** in Supreme Court Cause No. 92778-2 to the following:

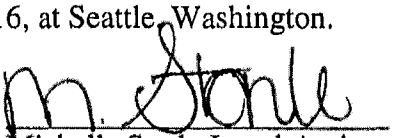
Brian H. Krikorian
Law Offices of Brian H. Krikorian
4100 194th Street SW, Suite 215
Lynnwood, WA 98036
bhkrik@bhklaw.com

Philip A. Talmadge
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
phil@tal-fitzlaw.com

Original E-filed with:
Washington Supreme Court
Clerk's Office
415 12th Street W
Olympia, WA 98504-0929

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: March 11, 2016, at Seattle, Washington.



Michelle Stark, Legal Assistant
Merrick, Hofstedt & Lindsey, P.S.

OFFICE RECEPTIONIST, CLERK

To: Michelle Stark
Cc: Philip R. Meade; Rossi F. Maddalena; Marci L. Brandt; bhkrik@bhklaw.com; phil@tal-fitzlaw.com
Subject: RE: Auer & Taster v. J. Robert Leach, et al.; Supreme Court No. 92778-2

Received 3-11-16

Supreme Court Clerk's Office

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Sent: Friday, March 11, 2016 2:43 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Philip R. Meade <pmeade@mhlseattle.com>; Rossi F. Maddalena <rmaddalena@mhlseattle.com>; Marci L. Brandt <mbrandt@mhlseattle.com>; bhkrik@bhklaw.com; phil@tal-fitzlaw.com
Subject: Auer & Taster v. J. Robert Leach, et al.; Supreme Court No. 92778-2

Good afternoon,
Attached please find the Answer to Petition for Review in Supreme Court Cause No.92778-2.

Thank you,
Michelle

MERRICK | HOFSTEDT | LINDSEY

Michelle Stark
Legal Assistant to Peter Steilberg, Gary R. Eliasen, Philip R. Meade & Tamara K. Nelson
Merrick, Hofstedt & Lindsey, P.S.
3101 Western Avenue, Suite 200
Seattle, WA 98121

Telephone: (206) 682-0610
Facsimile: (206) 467-2689
Email: mstark@mhlseattle.com
Visit our website: www.mhlseattle.com