NO. 46991-0-II

COURT OF APPEALS STATE OF WASHINGTON
DIVISION II

ROFF ARDEN and BOBBI ARDEN, adult husband and wife,

Appellants.

v.

FORSBERG & UMLAUF, P.S., a Washington State professional services corporation; JOHN HAYES and "JANE DOE" HAYES, adult Washington State residents including any marital community; WILLIAM "CHRIS" GIBSON and "JANE DOE" GIBSON, adult Washington State residents including any marital community; and DOE DEFENDANTS I through V,

Respondents.

BRIEF OF RESPONDENTS

Sam B. Franklin, WSBA No. 1903
Pamela J. DeVet, WSBA No. 32882
Of Attorneys for Respondents Forsberg & Umlauf, P.S., Hayes and Gibson

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Table of Cases

Federal Cases

Cases

Rules and Regulations

Other Authority

I. INTRODUCTION

Almost exactly a year after Roff Arden shot and killed his neighbors' puppy, the Ardens' insurer retained the law firm of Forsberg & Umlauf, P.S., and attorneys John Hayes and Chris Gibson (collectively "Attorneys" herein), to defend the Ardens in the neighbors' civil suit. Attorneys represented the Ardens for five months, during which time they developed a settlement plan, approved by the Ardens and accepted by the insurer, and engaged in settlement negotiations. When Mr. Arden was charged with criminal animal cruelty, and the insurer failed to fund settlement at the amounts proposed, the Ardens blamed Attorneys and sued them for legal malpractice. Attorneys argued in the trial court that (a) the duty owed the Ardens did not include either the duty to force the insurer to fund settlement or the duty to prevent the prosecutor from charging Mr. Arden with a crime; (b) Attorneys did not breach any of the duties a lawyer owes a client; (c) Attorneys' conduct was not the proximate cause of harm to the Ardens; and (d) the Ardens were not entitled to the damages they sought. The trial court ruled as a matter of law that no alleged violation of duty had caused the exposure to criminal charges and that the Ardens could not recover emotional distress damages or attorneys' fees. The trial court correctly dismissed all claims on summary judgment, and the rulings below should be affirmed.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Attorneys assign no error to the trial court's decisions. Attorneys contend that the Ardens misstate the single issue that this appeal raises and that the issue is more properly stated as follows:

Whether the trial court correctly dismissed claims of negligence and breach of fiduciary duty, where the ex-clients failed to raise a genuine issue of material fact as to multiple essential elements of their causes of action and failed to assign error to the trial court's denial of their first motion for partial summary judgment.

III. STATEMENT OF THE CASE

A. After Roff Arden shot his neighbor's puppy, the neighbor initiated the civil case of *Duffy v. Arden*.

Roff and Bobbi Arden live on a five-acre parcel in Shelton, Washington, where dogs frequently visit the "far edges" of their property. CP 589, (197:12-15).[1] Mr. Arden did not like for dogs to come within 10 yards of his house. CP 589 (197:5-12). Dogs belonging to neighbors Wade and Anne Duffy reportedly came onto the Arden property only three times in the years from February 2005, when the Ardens moved in, to December 2011. CP 537-38 (16:14-17:2); CP 599. Nevertheless, Mr. Arden believed the Duffys failed to "control" their dogs. CP 538

[1] Because the record contains many deposition transcripts reproduced in a four-to-a-page format, Attorneys include page and line citations where appropriate.

(20:9-12); CP 541 (30:17-31:16 ("They're adults. I'm an adult. They already knew they had a problem"), 32:2-3 ("[I]t isn't up to me to tell them. It's up to them to control their dogs").

In late November 2011, when the Ardens drove their garbage and recycling down to the road, they saw the Duffys' black lab beside the street. CP 586 (pp 183:7-16; 185:4); CP 599. The next week, Mr. Arden armed himself before he took out the trash. CP 499. The black lab and the Duffys' new 13-week-old yellow lab puppy were on the street. CP 499. After unloading the trash, the Ardens got back in the truck, where they were safe, and the dogs began to follow the truck. CP 499; CP 744 (11:2-10). When they were still about 175 feet from their house, Mr. Arden stopped the truck, got out, yelled at the dogs to go home, then shot the puppy when it did not immediately leave. CP 499-500, CP 585 (179:22-180:2, 181:4-17); CP 586 (186:10-17).

The Mason County Sheriff's Department investigated. CP 488-94. It referred the investigation to the Mason County Prosecutor's Office, asking the prosecutor to review Animal Cruelty charges. CP 491. The deputy reported Mr. Arden admitted to shooting another of the Duffys' dogs some 15 months before. CP 490. Although Mr. Arden admits he shot the puppy in December 2011, he denies he shot the other dog or admitted that to the deputy. CP 585 (182:2-7). However, he stipulated

that the facts in the investigative reports are sufficient for a trier of fact to find him guilty of the charge of Animal Cruelty. CP 591 (203:12-16).

The Duffys contacted the prosecutor frequently about the status of the criminal case. CP 439-40. In May 2012, they threatened the Ardens with a civil lawsuit. CP 611. When the parties could not reach a pre-suit settlement, the Duffys sued in Mason County Superior Court. CP 536 (10:11-12). Mr. Arden blames the Duffys for his shooting their puppy. *Id.* (12:5-8). The Ardens thought the Duffys should be liable to them, CP 539 (21:16-18), and counterclaimed against the Duffys for emotional distress and filing a frivolous action. CP 537 (14:14-20, 15:3-14).

B. The Ardens' insurer, Hartford, initially denied its duty to defend but belatedly accepted the tender of defense.

The Ardens tendered the claim to their insurer, Hartford. CP 542 (33:14-25). Hartford interviewed Mr. Arden about the matter. CP 125 (37:19-20). Hartford knew that the police were investigating Mr Arden. CP 125 (38, ll. 3-9). Hartford misread the complaint as alleging **only** intentional conduct by Mr. Arden, CP 315, CP 317, and ignored negligence allegations against Mr. Arden and separate negligence allegations against Mrs. Arden. CP 147-48. Hartford denied the tender in June 2012. CP 128 (51:16-18); CP 148 (131:21-23); CP 542 (33:22-23).

In or around October 2012, the Ardens retained attorney Jon

Cushman of Cushman Law Offices to replace their previous defense counsel, to prosecute their counterclaim, and to address coverage issues. CP 539 (24:14-23); CP 587-88 (190:23-191:17). Mr. Cushman analyzed the case and believed Hartford had breached its duty to defend. CP 756. Mr. Cushman re-tendered the claim to Hartford. CP 316; CP 756.

In November 2012 Hartford accepted the tender of defense. CP 601. Mr. Cushman immediately advised his clients:

> Good news. [Hartford] has agreed to appoint defense counsel. [¶]
>
> The Hartford is appointing defense, but they are issuing a reservation of rights letter, which means they continue to dispute coverage. They can't do this as they failed to defend and are now on the hook for coverage by estoppel, which means they can't try to jump out.

CP 601. In fact, Hartford did not issue a reservation of rights letter at that time. CP 119 (16:21-25).

C. Hartford appointed Attorneys to defend *Duffy v. Arden*.

1. Attorneys represented only the Ardens.

Hartford retained Attorneys to defend the Ardens. CP 542 (33:24-25); *see also* CP 119 (16:10-12); CP 139 (60:18-20); CP 483. Mr. Cushman told Hartford he was "ok with panel defending." CP 320. Hartford and Attorneys understood Attorneys represented only the Ardens in *Duffy v. Arden*, not Hartford. CP 144 (113:15-16); CP 155 (158:2-5); CP 166 (21:10-11); CP 167 (26:16-19, 27:5-6). Attorneys and Hartford

understood Mr. Cushman was the Ardens' personal counsel and had full authority to speak for them. CP 134 (76:6-8); CP 166 (22:3-4, 22:13-14); CP 205 (15:12-24). *See also* CP 515. Mr. Cushman told Attorneys the Ardens' coverage position was that Hartford had acted in bad faith and was liable to the Ardens for full indemnity, and that the Ardens would not pay out of pocket for settlement. CP 447; CP 526.

2. Attorneys were not coverage counsel.

Attorneys made it clear to the Ardens they were not representing either the Ardens or Hartford as to coverage. CP 365; CP 506. They did not advise Hartford regarding coverage. CP 157 (165:11-16). Hartford relied on the Attorneys regarding Washington law on the Ardens' liability, not on coverage. CP 127 (45:3-11). Nor did the Ardens expect Attorneys to advise them as to coverage matters, because they expected Mr. Cushman to give them that advice. CP 544 (43:9-16). Indeed, the standard of care in Washington for defense counsel is not to press coverage issues with, and obtain a more favorable reaction from, the insurer. CP 105 (10:8-13). That is the role of personal counsel. CP 105 (10: 13-14); CP 111 (37:11-13); CP 112 (38:22-23).

Forsberg & Umlauf has done coverage work for Hartford. CP 204 (9:13-20). However, the record contains no evidence that it represented Hartford in a coverage matter at the same time it represented the Ardens.

CP 165 (18:17-20:1); CP 203-04 (8:8-10:12). Attorney John Hayes had periodically represented Hartford in coverage matters, but this was not the focus of his practice. CP 203 (8:8-9). Rather, almost all of his work is as appointed defense counsel, and only about 30-35 percent of that appointed by Hartford. CP 204 (9:21-10:4). Mr. Hayes does not always have a coverage case in his portfolio. CP 203 (8:15-19). Likewise, defending Hartford's insureds made up a large portion of attorney Chris Gibson's practice. CP 165 (19:23-20:1). The Ardens do not dispute that the decades-long practice of hundreds of reasonable, careful, and prudent attorneys across Washington has been to represent insurers in coverage and to simultaneously defend that insurer's policyholders in other matters. CP 365.

D. Attorneys immediately began evaluating the defense.

Attorneys immediately began their investigation into the facts and law, including reviewing the police report of the puppy-shooting incident. CP 190 (118:1-8); CP 484; CP 519-20. Within a week or two after Hartford retained them, they sent the Ardens a letter describing the scope of representation and other preliminary issues. CP 167 (25:14-21); CP 505-07; CP 514. By mid-December 2012, the Ardens knew Mr. Cushman and Mr. Gibson were in contact to discuss choice of an arbitrator for mandatory arbitration, to associate Attorneys as co-counsel

of record, and to schedule a client meeting. CP 545 (46:6-18; 48:8-49:14).

E. The Ardens and their defense counsel met and decided on a plan to settle the case with Hartford money.

The Ardens met with Mr. Gibson in late December 2012. CP 545 (47:6-8); CP 546 (51:23-24); CP 484. During the meeting, Mr. Gibson and the Ardens discussed the whole case, including the Ardens' version of the facts. CP 546 (51:10-22). Although he had not seen a reservation of rights letter yet, Mr. Gibson told the Ardens at their initial meeting that he expected there would probably be a coverage dispute in the case based on the allegations of intentional acts:

> I had a conversation with the clients in my initial meeting with them about there are – there could be a coverage dispute between you and the insurance company, and my role as your defense counsel in a *Tank* case: I am not going to give the insurance company anything that could defeat coverage.

CP 169 (35:1-36:24). *Accord* CP 182 (82:18-25); CP 207-08 (24:23-25:14) (Hartford told Hayes there would be a reservation letter; he presumed it was timely sent). Mr. Gibson also explained to them the tripartite relationship in an insurance-appointed defense situation. CP 173 (51:19-52:5). He specifically told the Ardens his goal was for Hartford to pay full indemnity even if it reserved its rights. CP 173 (52:5-10); 183 (92:15-20). The Ardens understood the defense plan: Attorneys would evaluate the case and liability exposure and contact them with that report.

CP 546 (51:25-52:12). Going forward, the Ardens endorsed the settlement position reflected by each settlement offer. CP 110 (33:1-15).

F. Attorneys continued to evaluate the case.

Attorneys served discovery on the Duffys in early January 2013. CP 485. They researched jury verdicts and sought an expert to evaluate the value of the dogs. CP 215 (53:15-17).

1. Attorneys considered Mr. Arden's condition.

Although Mr. Arden had represented that he had Post-Traumatic Stress Disorder (PTSD) and depression, he did not exhibit symptoms of PTSD during the initial meeting or later. CP 485. *See also* CP 216 (57:12-58:1); CP 175 (59:2-9); CP 179 (75:23-76:6). Nevertheless, Attorneys considered Mr. Arden's mental condition in their case evaluation. CP 175-76 (58-62). Attorneys believed his condition could affect either the Ardens' potential justification defense (which was part of Attorneys' defense) or their counterclaim (which Mr. Cushman would pursue). CP 175 (59:22-61:7). Attorneys sought Mr. Arden's medical records to substantiate Mr. Arden's defense. CP 175 (60:20-21); CP 216 (57:17-21). However, Attorneys did not observe that Mr. Arden was "emotionally fragile" during their representation. CP 175 (59:17-22).

2. Attorneys considered possible criminal charges.

In their case evaluation, Attorneys considered Mr. Arden's

possible criminal liability. CP 170 (38-42); CP 174-75; CP 177, CP 194-95; CP 210 (34:6-36:12); CP 213 (47:8-13); CP 484. In November 2012, Attorneys had reviewed the sheriff's report and learned the sheriff's deputy had referred the case to the prosecutor almost a year before. CP 210 (34:6-9); CP 484. They reviewed their clients' previous discovery responses and analyzed whether Mr. Arden had already waived his Fifth Amendment right against self-incrimination. CP 170 (40:15-22). They understood Mr. Arden might have to decide whether to invoke the Fifth Amendment. CP 170 (38-40); CP 220 (75:15-76:3). They did nothing in the civil proceeding that would further expose Mr. Arden to criminal liability, CP 170 (38-39); CP 174 (55:13-18); and had no obligation to extract Mr. Arden from exposure to criminal charges. CP 106 (16:12-18).

G. The Duffys demanded $55,000 in settlement without providing proof of their claimed damages.

The Duffys had reported to the police the dogs were worth $4,500. CP 609. On January 18, 2013, before their discovery responses were due, the Duffys demanded $55,000 to settle. CP 547-48 (56:18-57:21); CP 255. The Ardens did not think the case was worth that much; indeed, Mr. Arden testified, "I didn't think the case was worth a dime." CP 550 (67:9-14). *Accord* CP 551 (71:23-72:3) ("Everybody thought [the demand] was pretty high"). The deadline to respond to the demand was

January 28, 2013, also before the Duffys' discovery responses were due. CP 611. The demand did not include an offer to ask the prosecutor not to charge Mr. Arden. CP 611. Although Mr. Cushman himself received the demand, CP 255, Attorneys sent it to the Ardens and Mr. Cushman very shortly after receiving it. CP 548 (57:1-21); CP 611. The Duffys' counsel sent a follow-up email moments later, which says:

> I meant to add what was implied – all counterclaims by the Ardens are dismissed with prejudice as well. Please note this in the offer.

CP 617. The Ardens received both messages that same day. CP 548 (59:11-17); CP 549 (61:24-62:1); CP 617. Mr. Cushman told Attorneys the Ardens would accept the offer "**provided the carrier pay** this settlement." CP 256 (emphasis added). Mr. Hayes called Hartford to report the Ardens demanded Hartford pay $55,000. CP 214 (52:9-17).

When Attorneys first received the Duffys' $55,000 demand, they had only limited information, because the Duffys had not yet answered discovery. CP 621, CP 328. They informed Hartford, Cushman, and the Ardens that they did "not evaluate damages at this time at or near $55,000." CP 621. Mr. Cushman immediately wrote directly to Hartford conveying the Ardens' conditional acceptance:

> Let me be perfectly clear. Ardens want to accept this offer **provided it is paid by the carrier**. Ardens **demand the Hartford fund this settlement** and relieve them of all

> exposure to liability. They are willing to forsake their counterclaim as part of the deal.

CP 329 (emphasis added).

The Ardens' acceptance of the demand was **always** subject to Hartford funding it. *E.g.*, CP 621; CP 663. The Ardens expected the money for settlement to come solely from Hartford. CP 591 (205:3-7). The Ardens wanted Hartford to "pon[y] up the cash." CP 556 (90:5-7).

H. Hartford refused to fund the $55,000 demand without supporting evidence.

Under the Ardens' policy, Hartford retained the right to determine whether to settle a case with, and for what amount of, Hartford's funds; Hartford believed neither the Ardens nor the Attorneys had the right to make these decisions. CP 159 (173:24-174:8). *See also* 520. Hartford would not accept the $55,000 demand, even when Mr. Cushman insisted Hartford fund it, because Hartford viewed it as inflated and overvalued. CP 155 (158:20-25; 159:3-5). Hartford made it clear on January 22, 2013, that it would not fund the $55,000 demand without the Duffys' discovery responses. CP 624. The Ardens admit the case did not settle that day because Hartford refused to fund the demand. CP 576 (143:22-25).

Attorneys reasonably believed they had no basis at that time to recommend settlement at $55,000. CP 367; CP 518. Mr. Hayes decided to request an extension of the deadline to respond to settlement in order to

obtain answers to discovery. CP 208 (28:9-16); CP 215 (53:13-15). He knew it was in the Ardens' best interest to develop better damages information with the Duffys' discovery. CP 216 (57:9-11). With additional evidence of damages, he would have a basis to recommend a higher number to Hartford. CP 215 (53:22-54:2). An extension would also give the Ardens' personal counsel time to persuade Hartford to fund the $55,000 settlement. CP 366. Attorneys timely told Mr. Cushman they were seeking the extension. *Compare* CP 330, CP 346 (10:25 a.m. request for extension) *with* CP 331 (11:10 a.m. notice to Cushman) *and* CP 332 (11:12 a.m. response); CP 518. *See also* CP 155 (160:4-9); CP 189 (113:24-114:3); CP 190 (120:20-22); CP 624. Mr. Cushman and the Ardens knew about and did not object to the request for a deadline extension before the Duffys had responded to it. CP 551 (71:6-9); CP 552 (75:6-22); CP 624; CP 634. *See also* CP 155 (160:14-22).

The Duffys agreed to a deadline extension of two weeks following service of their answers to discovery. CP 338; 341; CP 628; CP 631. The new deadline was forecast to be March 4, 2013. CP 631; CP 638. The Ardens and Mr. Cushman knew the Duffys agreed to an extension minutes after the agreement was reached. *Compare* CP 341 (3:42 agreement) *with* CP 342 (4:00 notice to Cushman) *and* CP 344 (4:07 response); CP 518. The Duffys memorialized the agreement, reiterating that the offer

pertained to only the civil case, not the criminal case, and that the counterclaim would have to be dismissed with prejudice. CP 638. When Mr. Arden inquired about this message, Mr. Cushman advised him, "The state owns the right to prosecute crimes. This is not something Duffy controls." CP 651. *Accord*, CP 554 (84:8-13 ("[Mr. Cushman] was advising me that [the Duffys] didn't have any influence over the district attorney."). The Ardens understood: Mr. Arden told his counsel, "I realize the county has control over criminal charges." CP 663. The record does not show Mr. Cushman used this time to give Hartford legal and factual bases to fund a $55,000 settlement. CP 366. Nonetheless, on February 5, the Ardens again demanded Hartford fund the $55,000 settlement on those terms. CP 673.

In the midst of this activity, Hartford belatedly drafted and sent a reservation-of-rights letter without Attorneys' knowledge. CP 135-36 (80:17-81:19); CP 215 (56:6-9); CP 216 (59:15-17; 60:6-7). The record does not reflect whether Attorneys learned of or saw this letter.

I. The Ardens approved the plan to attempt to settle with Hartford funds up to $35,000.

After receiving discovery responses, Attorneys properly analyzed them and prepared a case report for the Ardens and their insurer. CP 516; CP 695-710. Attorneys undertook an independent, reasoned analysis,

advocating settlement up to $35,000, which they believed was at the very high point of the recoverable damages spectrum. CP 447; CP 520; CP 706-07; *see also* CP 156 (162:4-6). After reviewing the draft and making comments as to the language on February 25, Mr. Cushman approved the case valuation on behalf of the Ardens, stating, "I bet you can settle the case for the $35,000 you estimate in value." CP 693. Mr. Cushman recognized this number was within the reasonable range to address the Ardens' exposure. CP 762 (62:10-11).

The Ardens also received and read the litigation report. CP 561 (109:10-13); CP 747 (18:9-12). Mr. Cushman told the Ardens he had approved the $35,000 case valuation in the litigation report. CP 560 (108:17-21). Mr. Arden "figured they would get it done probably at 35." CP 562 (113:17). Mr. Cushman and the Ardens approved the strategy to settle with Hartford's money up to $35,000. CP 516. Neither asked Hartford to fund the $55,000 offer after the report. CP 516-17. Attorneys had the Ardens' authority to settle the case in the $35,000 range. CP 517.

J. Hartford agreed to fund settlement up to $35,000.

Attorneys made all Mr. Cushman's suggested changes to the report and sent it to Hartford eight days before the response deadline. CP 447. Hartford accepted the Attorneys' judgment and agreed the case was worth up to $35,000. CP 156 (162: 7-10); CP 520; CP 522. Therefore, it

decided not to fund the settlement demand of $55,000. CP 140 (99:13-23); CP 156 (162:15-21). The deadline expired March 5, 2013. CP 444. On March 4, Hartford told Mr. Cushman it would let the deadline expire without funding the demand, but would extend a $18,000 counteroffer. CP 716; CP 141 (102:6-11); CP 876 (same-day response). When Attorneys told Mr. Cushman the same thing the next day, he did not object, CP 518-19; CP 714, but instead replied, "I hope you succeed. I will stay out of the loop. Keep me posted on all offers and responses." CP 714. It was not until after Attorneys received Mr. Cushman's approval that they made the $18,000 counteroffer on March 5, 2013. CP 517; CP 720-21. The Ardens knew Attorneys were making this counteroffer, thought this would start negotiations, and hoped the matter would settle at $35,000. CP 561-62 (112:25-113:3, 113:12-22).

K. The Duffys next demanded $40,000 to settle the lawsuit.

On March 10, 2013, the Duffys rejected the $18,000 counteroffer and declined to make a new offer. CP 719. Attorneys timely forwarded the communication to their clients. CP 519; CP 880. Although he said he would stay out of the loop, Mr. Cushman contacted the Duffys' counsel directly to ask for a new offer. CP 760 (48:14-22). The Duffys demanded $40,000 on March 12, 2013, to expire at 5:00 p.m. on March 14, 2013. CP 760 (48:23-24); CP 882. The Duffys were still willingly engaged in

settlement negotiations. *See* CP 440. *See also* CP 142 (106:25-107:1); CP 143 (110: 15-19). Mr. Cushman asked that John Hayes "get into the act" with the insurer. CP 184 (95:9-11). Mr. Hayes then spoke to Hartford, pointing out that a mere $5,000 more than the $35,000 recommended settlement value would end the case. CP 158 (170:15-171:5); CP 212-13 (44:19-458); CP 448.

Hartford rejected the new $40,000 demand because Hartford believed it still exceeded the full settlement value of the case. CP 142 (106: 17-23); CP 156 (162:22-163:6); CP 158 (171:6-8). Hartford informed Mr. Cushman it planned to reject the $40,000 offer and counter with $25,000. CP 730. *See also* CP 156 (163:18-23). Although Mr. Cushman castigated Hartford for not funding the $40,000 demand, neither he nor the Ardens instructed Attorneys not to make a $25,000 counteroffer. CP 156 (164:2-7); CP 448; CP 578 (154:22-23); CP 579 (156:1-10); CP 770. Nor did Mr. Cushman ask for any time to discuss with the Ardens the possibility of contributing their own money to the settlement. CP 156 (164:8-11); CP 448; CP 517; CP 770.

Although the Duffys said they had no more room to move, they had said the same before and had come down; it was reasonable to ask them to consider another move. CP 522. However, when Attorneys extended the counteroffer, the Duffys rejected it. CP 890-91. The Ardens

admit the reason the case did not settle on March 14, 2013 is that the insurer did not fund the $40,000 demand. CP 579 (156:11-13).

The Ardens, directly or through Mr. Cushman, authorized every offer Attorneys made to the Duffys, and consented to the negotiation strategy that Attorneys followed. CP 110 (32:16-25); CP 111 (34:14-20).

L. The prosecutor decided to criminally charge Mr. Arden at least eleven days before the Duffys' $40,000 demand.

On March 1, 2013, the Mason County Prosecutor filed a motion for an order determining probable cause to charge Mr. Arden with Animal Cruelty in the First Degree. CP 794-97. *See also* CP 802-03 (probable cause order). The prosecutor then filed the Information. CP 798-99. The Ardens speculated that because *Duffy v. Arden* had not settled before March 1, the prosecutor decided to charge Mr. Arden with a crime. CP 583 (171:6-14); CP 892. However, the prosecutor himself submitted evidence that conclusively shows that his decision to charge Mr. Arden had nothing to do with the settlement negotiations in the civil action:

> I am an attorney with the Mason County Prosecutor's Office. I was assigned the file involving Roff Arden, and I made the decision to criminally charge Mr. Arden. I was unaware that the Duffys were pursuing a civil case against Mr. Arden prior to making my decision to charge Mr. Arden.

CP 441. This evidence remains undisputed.

M. The Ardens sued Hartford for bad faith.

The Ardens blamed Hartford for the criminal prosecution. CP 583 (171:6-14). Therefore, they sued Hartford for bad faith and breach of contract, among other things. *See* CP 326. Mr. Hayes forwarded the complaint to Hartford in order to nudge them to approve settlement, but he did not discuss the bad faith case with Hartford. CP 220-21 (74:25-75:5, 77:15-79:3); CP 368. In April 2013, the Ardens added John Hayes and Forsberg & Umlauf as defendants in the action. *See* CP 899. They alleged Attorneys caused them to lose the opportunity to settle before criminal charges were filed, resulting in legal fees and costs, financial hardship, and emotional distress. CP 735-36.

The parties to this action and to *Duffy v. Arden* mediated in August 2013. CP 432. All claims were settled except the Ardens' claims against Attorneys, with Hartford funding the *Duffy* settlement and obtaining dismissal of the bad faith claim. *Id.* Also in August, Mr. Arden received a "friendship diversion" in lieu of trial in the criminal case. *Id.*; CP 442.

N. The Ardens' legal malpractice claim was dismissed on summary judgment.

The parties filed cross-motions for summary judgment, which were heard before Judge Amber Finlay on September 26, 2014. CP 8-11. Judge Finlay also considered Attorneys' motion to strike considerable

portions of the Ardens' proffered evidence. CP 9.[2] Attorneys' expert, Jeff Tilden, opined that Attorneys satisfied the standard of care with respect to all the issues the Ardens alleged. CP 364; CP 514; CP 112 (38, ll. 19-20) ("I don't believe they mishandled the file in any way here"). However, the trial court stated at oral argument that a genuine issue of material fact arose as to the single allegation that Attorneys violated the standard of care by asking for an extension of time to respond to the $55,000 settlement demand on January 22, 2013 without seeking the clients' permission first. VRP 4:16-25. The judge found no other issue of fact on breach, and she did not rule as a matter of law that Attorneys violated the standard of care. *See id.*

As to the other elements, the trial court specifically ruled as a matter of law (a) no causal connection existed between any alleged violation of duty and the exposure to criminal charges, and (b) no support existed for the recovery of either emotional distress damages or attorneys' fees. CP 11. Judge Finlay denied the Ardens' motion for partial summary judgment and granted Attorneys' motion, dismissing the legal malpractice claim with prejudice. CP 10-11. Mr. Cushman's statements in his declaration dated August 6, 2014 were stricken and were not considered in

[2] The Ardens did not designate this motion to strike, or Attorneys summary judgment reply, in its designation of clerk's papers. Therefore, pursuant to RAP 9.6(a), Attorneys have supplemented the designation of clerk's papers.

the summary judgment rulings. CP 11. The trial court also later denied the Ardens' motion for reconsideration. CP 19-20.

O. The Ardens' breach of fiduciary duty claim was dismissed on summary judgment.

The trial court permitted the Ardens to file a second amended complaint alleging breach of fiduciary duty and adding Chris Gibson as a defendant on September 17, 2014. VRP 2:16. The parties filed cross-motions for summary judgment, heard November 17, 2014. VRP 53. The trial court denied the Ardens' motion for partial summary judgment and granted defendants' motion, dismissing the Ardens' case. CP 24.

IV. SUMMARY OF ARGUMENT

In dismissing the Ardens' claims on summary judgment, and denying reconsideration, the trial court did not err. The rulings below should be affirmed.

A lawyer retained to defend an insured person has no obligation to advocate coverage issues between insured and insurer. Nor is that lawyer a trustee of the funds used for defense and indemnity. Likewise, a lawyer retained to defend a client in a civil suit is not required to prevent the prosecutor from charging the client with a crime. Therefore, dismissal can be affirmed on the element of duty.

Breach is determined as a matter of law – always when breach of fiduciary duty is at issue, and when reasonable minds could reach but one

conclusion when duty of care is at issue. The Ardens have alleged a concurrent conflict of interest and multiple violations of duties of lawyers – none of which is supported by the record. They presented no evidence that Attorneys' judgment decisions were outside the range of those that a reasonable and prudent lawyer would make in this jurisdiction. On the other hand, there is ample evidence to support a determination, as a matter of law, that Attorneys did not breach their duty of care or fiduciary duty to the Ardens. Dismissal can be affirmed on the element of breach.

This court can determine as a matter of law that no legal causation exists. Being charged with a crime is not a compensable injury, and tort law is not designed to permit a plaintiff to foist the consequences of his own bad acts onto another. The record also supports a ruling as a matter of law that Attorneys' conduct was not the cause in fact of the Ardens' claimed harm. The evidence is undisputed that Mr. Arden was charged with a crime because he committed the acts at issue, and the case did not settle during Attorneys' representation because Hartford would not fund the demands. The Ardens failed to produce any evidence that they would have fared better in *Duffy v. Arden* but for Attorneys' claimed negligence. This court can affirm dismissal on the element of proximate cause.

Finally, as a matter of law, the Ardens are not entitled to the damages they seek or to disgorgement. The summary judgment rulings

may be affirmed on the element of damages, and dismissal should stand.

V. ARGUMENT

A. The trial court properly dismissed the Ardens' claims on summary judgment.

Summary judgment is proper where the record before the court shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The defendant is entitled to summary judgment if (1) the defendant shows the absence of evidence to support the plaintiff's case; and (2) the plaintiff fails to come forward with evidence creating a genuine issue of material fact on an essential element of the plaintiff's case. *Clark Cty. Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, 180 Wn. App. 689, 699, 324 P.3d 743 (2014). Review of a summary judgment ruling is de novo. *Id.* at 698. On the other hand, whether to award attorneys' fees and disgorgement of fees is left entirely to the sound discretion of the trial court. *Eriks v. Denver*, 118 Wn. 2d 451, 465, 824 P.2d 1207 (1992); *Cotton v. Kronenberg*, 111 Wn. App. 258, 275, 44 P.3d 878 (2002); *Kelly v. Foster*, 62 Wn. App. 150, 156, 813 P.2d 598 (1991). When reviewing a ruling on summary judgment, this court does not consider issues the appellant did not raise below, RAP 9.12, but can affirm the trial court's ruling for any reason supported by the record. RAP 2.5(a); *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 305, 151 P.3d 201, 207 (2006), *as amended* (2007).

A plaintiff alleging a breach of fiduciary duty "must prove (1) existence of a duty owed, (2) breach of that duty, (3) resulting injury, and (4) that the claimed breach proximately caused the injury." *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn.App. 412, 433-34, 40 P.3d 1206 (2002). Similarly, a plaintiff alleging legal malpractice must prove duty, breach, causation, and damages. *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992). On summary judgment, if the party with the burden of proof at trial fails to come forward with evidence to support any one element, the claim must be dismissed. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). *See also LK Operating, LLC v. Collection Grp., LLC*, 181 Wn. 2d 117, 126, 330 P.3d 190, 195 (2014) (summary judgment dismissal of entire legal malpractice claim affirmed where plaintiff could not show compensable damages); *Clark Cty. Fire Dist. No. 5*, 180 Wn. App. at 699 (summary judgment affirmed as to multiple allegations of breach of the attorney duty of care). Because both causes of action require proof of duty, breach, causation, and damages, arguments on each element are addressed together here.

Like the trial court, the Court of Appeals considers only admissible evidence in reviewing summary judgment. CR 56(e); *Lynn*, 136 Wn. App. at 306. A party cannot rely on inadmissible hearsay in response to a

summary judgment motion. *Lynn*, 136 Wn. App. at 309. Nor can a party rely on speculation to show material factual issues; instead, the nonmoving party must "set forth specific facts that sufficiently ... disclose that a genuine issue as to material fact exists." CR 56(e); *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

B. This court may affirm summary judgment dismissal of the legal malpractice claim as to the duty of care, which is a question of law for the court.

Under *Hizey*, a legal malpractice plaintiff must prove the existence of an attorney-client relationship giving rise to a duty of care. 119 Wn. 2d at 260. Although the Ardens did not move for summary judgment on the question of duty of care, Attorneys did. Attorneys acknowledge an attorney-client relationship existed from November 2012 to April 2013. However, according to the law and this record, the scope of Attorneys' representation did not include advocating the Ardens' coverage position against Hartford or preventing Mr. Arden from being charged.

"The essence of an attorney-client relationship is whether the attorneys' advice or assistance is sought and received on legal matters." *Bohn v. Cody*, 119 Wn. 2d 357, 363, 832 P.2d 71 (1992). *See also* RPC 1.2(c). The record is clear that the Ardens did not seek or receive advice from Attorneys regarding insurance coverage or criminal charges. They knew Attorneys were retained to defend them in *Duffy v. Arden*, and

that Mr. Cushman would represent them as to other matters. They also knew Attorneys could not control the prosecutor's actions.

The existence of an attorney-client relationship "turns largely on the client's subjective belief that it exists," but that belief must be "reasonably formed based on the attending circumstances, including the attorneys' words or actions." *Bohn*, 119 Wn. 2d at 363. Here, the Ardens did **not** believe Attorneys represented them as to coverage or criminal matters. Because the record shows the Ardens' reasonable subjective belief that Attorneys did not represent them as to coverage or criminal matters, the Attorneys' duty of care did not extend to advocating coverage issues against Hartford, and it did not extend to preventing Mr. Arden from being charged with a crime. This court may affirm dismissal of the legal malpractice claim on the element of duty. RAP 2.5(a).

C. An attorney appointed to defend an insured client is not a trustee subject to a trustee's duties and remedies.

The Ardens endorse a novel theory that insurance-assigned defense counsel is the trustee of the "defense asset." They cite no authority for the proposition, and trust law certainly does not fit in this context:

> Express trusts are [t]hose trusts which are created by contract of the parties and intentionally. ... An express trust is one created by the act of the parties; and, **where a person has, or accepts, possession of money, promissory notes, or other personal property with the express or implied understanding that he is not to hold it as his**

> **own absolute property, but to hold and apply it for certain specified purposes**, an express trust exists.

Hartford Fire Ins. Co. v. Columbia State Bank, 183 Wn. App. 599, 334 P.3d 87 (2014) (emphasis added, citations omitted) (no trust where writing did not require general contractor to hold payments for benefit of subcontractors). *Accord*, Restatement (Second) of Trusts § 29 (1959) ("The owner of property can create a trust of the property by transferring it to another person in trust although there is no consideration other than the transfer of the property"). "A claim seeking damages against an attorney for breach of fiduciary duty is legal, not equitable." *Behnke v. Ahrens*, 172 Wn. App. 281, 296, 294 P.3d 729 (2012).

No express trust existed here. The Ardens produce no proof of a contract or intent to act as trustee. The Hartford policy obligated it to defend, but not to create a trust. Attorneys did not hold or manage any asset of the Ardens. No one believed or understood Hartford sent Attorneys money belonging to the Ardens. Hartford paid Attorneys for the Ardens' defense for services rendered; Hartford transferred the payments as Attorneys' absolute property. The Ardens' arguments based on "breach of trust" case law do not withstand scrutiny.

D. Summary judgment of dismissal of both claims may be affirmed on the element of breach.

As set forth above, the causes of action urged here both require a

showing of breach. In the trial court, the parties moved for summary judgment on the issue of breach. The Ardens did not assign error to the trial court's denial of their motion on breach of the standard of care, and that decision need not be reviewed. RAP 10.3(g).

An attorney has a duty to exercise "the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer" in Washington. *Hizey*, 119 Wn. 2d at 261. Under the attorney judgment rule, "an attorney cannot be liable for making an allegedly erroneous decision involving honest, good faith judgment if (1) that decision was within the range of reasonable alternatives from the perspective of a reasonable, careful, and prudent attorney in Washington; and (2) in making that judgment decision, the attorney exercised reasonable care." *Clark Cty. Fire Dist. No. 5*, 180 Wn. App. At 704. To avoid summary judgment, the plaintiff must (a) show with expert testimony the attorney's exercise of judgment was not within the range of reasonable choices from the perspective of a reasonable, careful, and prudent attorney in Washington; or (b) show the attorney was negligent in arriving at that decision. *Id.* at 706. The trial court may determine whether an attorney violated the duty of care on summary judgment where reasonable minds could not differ. *Id.* at 705, 712-15.

An attorney also has a fiduciary duty to his client. *Kelly*, 62 Wn.

App. at 155. The Rules of Professional conduct may be considered to determine whether an attorney is in breach. *Cotton*, 111 Wn. App. at 266. *See also Tank v. State Farm Fire and Cas. Co.*, 105 Wn. 2d 381, 388-89, 715 P.2d 1133 (1986). The question of whether an attorney has breached his fiduciary duty is a question of law. *Eriks*, 118 Wn. 2d at 457-58.

Because the Ardens allege that certain conduct breached the standard of care or the fiduciary duty, or both, Attorneys address the allegations together below. This court may affirm dismissal on the basis that, as a matter of law, Attorneys did not violate **any** duty to the Ardens.

1. Treatises and seminar materials are not authority and were not part of the record below.

The Ardens are required to present "citations to legal authority" in support of their arguments. RAP 10.3(a)(6). In their opening brief, the Ardens allege many of Attorneys' acts are breaches of their fiduciary duty, but they cite no legal authority to support their position. They rely instead upon treatises and continuing education materials by William T. Barker and Charles Silver, who are not listed as attorneys licensed in the State of Washington. This is not the "legal authority" contemplated by RAP 10.3(a)(6), and the court need not consider it. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P.2d 549 (1992).

For two additional reasons, this court should disregard these

statements. First, on review of a summary judgment order, this court considers only "evidence and issues called to the attention of the trial court." RAP 9.12. None of these materials were before the trial court. Second, "[w]hen a trial court is presented with a question of law, the court may properly disregard expert affidavits that contain conclusions of law." *Eriks*, 118 Wn. 2d at 458. *Accord Cotton*, 111 Wn. App. at 267 (properly excluding legal conclusions in a John Strait declaration). These sources are not sworn testimony, and they contain multiple conclusions of law about violations of fiduciary duty. As such, they are better viewed as unsworn, conclusory testimony by undisclosed experts– and disregarded.

2. Attorneys did not violate any duty in accepting the representation.

The Ardens allege Attorneys could not accept the representation without disclosing conflicts of interest and obtaining informed consent under RPC 1.7. However, the record shows as a matter of law that Attorneys did not violate the conflict rules because a "concurrent conflict of interest" never arose. "A concurrent conflict of interest exists if ... there is significant risk that the representation of [a] client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interst of the lawyer." RPC 1.7(a)(2).

The Ardens first allege Attorneys were required to disclose that

Hartford was Attorneys' client under RPC 1.7(a)(2). However, the record contains no evidence that Hartford was a current client when Attorneys began representing the Ardens. The absence of evidence alone defeats this claim of breach. Further, although the Ardens cite Mr. Hayes as testifying that Attorneys "regularly serve[ ] as coverage counsel for the Hartford," App. Br. at 25, that was not his testimony. CP 203-04. The Ardens also do not contend that Attorneys represented Hartford as to coverage as against the Ardens or on a similar coverage issue in any other case.

Next, the Ardens allege Attorneys violated a duty by failing to disclose potential conflicts between Hartford and the Ardens, as *Tank* requires. However, the undisputed evidence is that Mr. Gibson discussed this very issue at his first meeting with them. CP 169. Moreover, the Ardens had personal counsel handling an **existing** coverage dispute before Attorneys were retained. They knew about their conflict with Hartford.

Finally, the Ardens allege Attorneys failed to disclose their business relationship with Hartford, including acting as panel counsel, in violation of RPC 1.7(a)(2). They improperly raise this issue for the first time on appeal. When reviewing summary judgment orders, this court does not consider issues not called to the attention of the trial court. RAP 9.12. RAP 2.5(a) (appellate court need not consider arguments raised for the first time on appeal), *LK Operating*, 181 Wn. 2d at 126

(same). The Ardens did not ask either attorney about this in depositions, so the record is silent about whether they made the disclosure at issue. The record does reveal that Mr. Cushman, who undisputedly spoke with the Ardens' full authority, knew and approved Hartford's plan to retain panel counsel. CP 320. He told the Ardens that Hartford was appointing defense counsel. CP 601. The Ardens most likely knew the relationship existed. As the issue was not raised below, Attorneys had no opportunity to obtain evidence to rebut it. The court should not consider it.

Furthermore, as a matter of law no concurrent conflict of interest existed, because there is no evidence of a "significant risk" that representation of the Ardens would be "materially limited" by Attorneys' responsibilities to Hartford or a personal interest of any of the Attorneys, a showing required under RPC 1.7(a)(2). Instead, there was significant proof that Attorneys' conduct – far from being "materially limited" – in fact met the standard of care in every way. CP 362-69; CP 508-26.

3. Attorneys did not violate any duty throughout the representation.

The Ardens allege many errors of attorney judgment in the course of the litigation. However, they did not produce expert testimony that Attorneys' acts fell outside the reasonable alternatives for lawyers complying with the standard of care. For that reason alone, summary

judgment on the issue of breach of the standard of care would have been proper. *Clark Cty. Fire Dist. No. 5*, 180 Wn. App. At 706.

Further, the record demonstrates there was no breach. The Ardens allege Attorneys allowed Hartford to influence their professional judgment. Specifically, they allege Attorneys failed to consider the Ardens' "interest" in swift resolution of the case and ignored their instructions in settlement negotiations and obeyed Hartford instead. The record simply does not bear this out.

The record establishes that Attorneys attempted to resolve the *Duffy* case swiftly, and there is no evidence they slowed it down. The case was already six months old when Hartford retained Attorneys, and they got to work right away, developing the defense and obtaining evidence. They met with the clients and established an objective to complete their evaluation of exposure and move toward settlement with Hartford dollars, even with a possible reservation of rights pending. They never deviated from that objective. *See* RPC 1.2(a). They considered both Mr. Arden's criminal issues and his health condition as they developed the defense. They served discovery on the Duffys. They kept the Ardens and Mr. Cushman apprised of what was happening, including sending them all communications regarding settlement.

When the $55,000 demand came in, the objective did not change:

the Ardens wanted to settle the case with Hartford's money. Attorneys told Hartford the Ardens wanted to settle at that amount **if** Hartford would pay. However, Attorneys could not force Hartford to approve a swift resolution. Even the Ardens' experienced coverage counsel did not do that, although he held the unique position of being able to settle at that number, then pursue Hartford for bad faith if they would not fund it. CP 367.

When it became clear Hartford would not fund settlement before discovery responses were due, Attorneys sought an extension of the deadline to respond to the $55,000 demand. The Ardens claim they were not consulted, but they knew soon after Attorneys asked for the extension, and they never objected. They knew soon after the Duffys agreed to the extension, and they never objected. Asking for an extension without express permission was not a breach of a lawyer's duty. *See* RPC 1.4(b), (c) (duty to consult with and keep client reasonably informed about status); CP 112 (38:4-15). In fact, it was the best choice given Hartford's refusal to fund. It gave the Ardens' defense and coverage counsel time to find bases for urging settlement at a higher number.

When the Ardens approved Attorneys' case valuation of $35,000, the case objective did not change. The instruction was still, "Try to settle with Hartford money." In fact, the Ardens, through Mr. Cushman, knew

before Attorneys that Hartford accepted the $35,000 valuation, that it was going to let the $55,000 demand expire, and that it was going to recommend starting with a $18,000 counteroffer. CP 876. They did not suggest any other course, and they did not object. When Attorneys conveyed the same message, Mr. Cushman responded, "I hope you succeed," and "Keep me posted on **all** offers and responses." CP 714 (emphasis added). He knew, of course, multiple exchanges within the $35,000 authority were likely. Again, when Hartford refused to fund the second demand of $40,000, Attorneys conveyed the plan to counter with $25,000 to Mr. Cushman, and they were still following the clients' instruction to try and settle the case with Hartford's money. Client and lawyer did not disagree, even though the Ardens were frustrated with Hartford's refusal to "pony up" more cash than either the Ardens or their personal counsel agreed the case was worth.

Breach of fiduciary duty is a question of law for the court. Breach of the standard of care may be determined as a matter of law when reasonable minds could not differ. Attorneys did not breach any duty to the Ardens, and this court can affirm the trial court's summary judgment ruling on the basis of breach. RAP 2.5(a).

4. Attorneys are not liable for Hartford's conduct.

The Ardens paint a bleak picture of Hartford's conduct in this

matter as well, hoping to color Attorneys by association. CP 526. Attorneys are, at most, independent contractors retained by Hartford. *See Tank*, 105 Wn. 2d at 390; *Evans v. Steinberg*, 40 Wn. App. 585, 588, 699 P.2d 797 (1985). Hartford's conduct is not attributable to Attorneys, and they cannot be liable for breach based on Hartford's acts or omissions.

E. This court may affirm summary judgment dismissal of both claims based on lack of legal causation.

The Ardens allege Attorneys' conduct caused Mr. Arden to be charged with a crime. They did not move for summary judgment on proximate cause, but Attorneys did. Proximate cause requires proof of two elements: cause-in-fact and legal causation. *Neilson v. Eisenhower & Carlson*, 100 Wn. App. 584, 591, 999 P.2d 42 (2000); *Micro Enhancement*, 110 Wn.App. at 433-34. "Legal causation rests on policy considerations determining how far the consequences of a defendant's own act should extend. It involves the question of whether liability should attach as a matter of law, even if the proof establishes cause in fact." *Neilson*, 100 Wn. App. at 591. This court should affirm summary judgment on the basis of legal causation. RAP 2.5(a).

This court may determine as a matter of law that, even if Attorneys erred, as a matter of law they are not liable for Mr. Arden being charged. Mr. Arden should not be permitted to benefit from his own bad acts

(shooting a neighbor's pet) by making his civil defense counsel pay for the consequences of them. Cases addressing malpractice of a criminal defense attorney are instructive. In Washington, as in the majority of jurisdictions, a criminal defendant suing his attorney for malpractice must prove by a preponderance of the evidence that he was actually innocent of the underlying criminal charges in order to maintain a malpractice action. *Ang v. Martin*, 154 Wn.2d 477, 486, 114 P.3d 637 (2005). Unless a criminal defendant shows his innocence, his illegal conduct is the cause of injuries flowing from criminal acts, and he *cannot* establish causation in a civil malpractice action. *Falkner v. Foshaug*, 108 Wn. App. 113, 118, 120, 29 P.3d 771 (2001). The rule prevents a defendant from benefiting from his own bad acts. *Ang*, 154 Wn.2d at 485.

Here, Mr. Arden admitted to shooting his neighbor's pet. He cannot prove by a preponderance of the evidence that he was actually innocent of the underlying criminal charges. In fact, he admitted the evidence was sufficient to convict him. His conduct is the cause of being charged with animal cruelty and being sued by the Duffys, and he alone should bear full responsibility for the consequences of shooting the dog. Even if Attorneys' later conduct had been negligent, Mr. Arden's greater culpability supplants it. The reasoning of this line of cases applies with equal or greater force to defeat proximate cause where, as here, civil

counsel has absolutely no control over the prosecutorial decisions or the criminal defense attorney's strategy in the criminal action – and should not be liable for the criminal consequences of his client's actions.

F. This court may affirm summary judgment of dismissal of both claims based on lack of cause in fact.

Cause in fact exists if the act complained of more likely than not caused the subsequent injury, and that the outcome would have been more favorable but for the alleged negligent conduct. *Clark Cty. Fire Dist. No. 5*, 180 Wn. App. at 707. This court may decide cause in fact if reasonable minds could not differ. *Id.* To avoid summary judgment on causation, the Ardens must produce evidence that a breach, including an error in judgment, did in fact affect the outcome. *Id.*; *Paradise Orchards Gen. P'ship v. Fearing*, 122 Wn. App. 507, 514, 94 P.3d 372 (2004).

1. This court should affirm dismissal of the malpractice claim because the undisputed evidence establishes lack of cause in fact.

The trial court properly held that Attorneys' alleged breaches of the duty of care did not cause Mr. Arden to be charged with a crime. The Ardens hypothesized that because the civil case did not settle before March 1, 2013, the prosecutor decided to charge Mr. Arden with a crime for shooting the Duffys' puppy. However, when the prosecutor decided to charge Mr. Arden, he undisputedly did not know the Duffys were suing the Ardens. His decision, therefore, could not have been influenced by the

state of the civil action. Moreover, the Duffys undisputedly planned to pursue the criminal charges even if their civil case settled in early 2013, and the Ardens and their counsel asked Hartford to fund settlement even knowing the Duffys wanted to try and influence the prosecutor to file charges.

Importantly, none of Attorneys' conduct **after** the prosecutor made his decision to charge Mr. Arden could have caused him to make that decision. There is no evidence to support proximate cause between **any** alleged negligence on or after March 1, 2013 and the criminal charge.

The Ardens submitted speculative statements that the status of a civil action might **in theory** have an impact on the prosecutor's decision to charge. However, the prosecutor's testimony that it **in fact** did not remains undisputed. Moreover, the Ardens' proffered testimony was inadmissible. It was inadmissible under ER 602 because the witnesses had no personal knowledge about the prosecutor's decision. Testimony about the Duffys' interactions with the prosecutor was inadmissible under ER 602 and ER 802 because none of the witnesses, Strophy, Whitehead, or Strait, established he had any personal knowledge of the hearsay proffered. The trial court may not consider such evidence in response to summary judgment. CR 56(e). Further, summary judgment is appropriate where proof of factual causation requires inferences that are remote or

unreasonable. *Lynn*, 136 Wn. App. at 310. The record fully supports the trial court's determination that no causal connection existed between Attorneys' alleged negligence and exposure to criminal charges. This court should affirm that decision.

2. The record reveals no causal link between Attorneys' conduct and the failure to settle.

The Ardens failed to meet their summary judgment burden on the broader question of causation: whether they would have fared better absent Attorneys' claimed negligence. As the Ardens conceded below and again on appeal, their "instruction" to settle in January through March 2013 was always conditioned on Hartford's funding the settlement:

> Ardens consistently insisted that Duffys' settlement demands be accepted **with funding from Hartford**.

App. Br. at 28 (emphasis added). However, the Ardens also concede Hartford was absolutely unwilling to fund the $55,000 settlement demand or the $40,000 settlement demand. *Id.* The Ardens admit the *Duffy* case did not settle precisely because of Hartford's refusal to pay either amount. Hartford maintained its position even though Hartford knew the Ardens "insisted" it accept and fund the demands, and even in the face of Mr. Cushman's threats to sue Hartford for bad faith. Although the Ardens say Attorneys ignored their instructions and obeyed Hartford's, they are incorrect. Attorneys obeyed the Ardens' instruction, which was always,

"Settle if you can do so with Hartford's money only." Attorneys could not accept the Duffys' demands without Hartford's agreement to finance the deal: **that** would be disobeying the Ardens' instruction.

In response to summary judgment, the Ardens failed to present any evidence that **any** conduct of Attorneys more likely than not caused a later injury, or that the outcome would have been more favorable but for Attorneys' alleged negligence. Without such evidence, summary judgment based on proximate cause was correct and should be affirmed.

3. The record reveals no causal connection between alleged breach of fiduciary duty and harm.

The Ardens presented no evidence that Attorneys' alleged breach of fiduciary duty caused them any harm. The Ardens' outcome in *Duffy v. Arden* would not have been any more favorable had Attorneys explained more fully its representation of Hartford as to unrelated coverage actions. Attorneys represented the Ardens for approximately five months, and during that time, (a) Attorneys used their independent judgment to develop a defense plan, settlement strategy, and case valuation; (b) Attorneys properly communicated with their clients regarding the case, specifically the settlement communications; and (c) Attorneys recognized the Ardens were its clients, not Hartford, and acted accordingly.

None of Attorneys' conduct, including asking for a deadline

extension, caused Hartford to be able to improve its coverage position. Hartford denied, and probably wrongfully denied, the tender of defense in June 2012. Hartford was required to compare the complaint against the Ardens' to the terms of their policy (the "eight corners" rule) to determine coverage, and there is "a significant burden on the insurer to determine if there are any facts in the pleadings that could give rise to a duty to defend." *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 53-54, 164 P.3d 454 (2007). If the policy conceivably covered any allegations, Hartford was required to defend the case. *Id.* at 53. It could have, but did not, defend under a reservation of rights as of June 2012. *See id.* at 54. Hartford ignored both (a) negligence allegations against Mr. Arden, incorrectly viewing the complaint as alleging only intentional misconduct, and (b) separate negligence allegations against Mrs. Arden. Either of these triggered the defense duty, but Hartford initially denied it. Unreasonable failure to defend is bad faith. *E.g.*, *Woo*, 161 Wn.2d at 68-69; *Griffin v. Allstate*, 108 Wn. App. 133, 146-47, 29 P.3d 777 (2001).

When Hartford agreed to defend about five months after it had denied the defense, the previous conduct estopped it from asserting coverage defenses. *Truck Ins. Exch. V. Vanport Homes, Inc.*, 147 Wn.2d 751, 759, 58 P.3d 276 (2001) (insurer that in bad faith refuses or fails to defend is estopped from denying coverage); *Kirk v. Mt. Airy Ins. Co.*, 134

Wn.2d 558, 563, 951 P.2d 1124 (1998) (same). Mr. Cushman recognized this legal proposition. He believed the Ardens were entitled to coverage by estoppel, and that Hartford could no longer effectively reserve its rights. Then Hartford failed to send a reservation of rights letter when accepting the tender in November 2012. Thus Hartford gave the Ardens a further basis for coverage: Hartford appeared to be defending without reservation of rights.

Because Hartford was already subject to coverage by estoppel for its bad faith denial of the tender in June 2012, sending a reservation of rights on January 30, 2013 would have no legal benefit to Hartford. Instead, its belated attempt to reserve rights, after defending without reservation for several months and following the initial denial of the case, gave the Ardens even more support for a bad faith claim. *See Safeco v. Butler*, 118 Wn.2d 383, 392, 823 P.2d 499 (1992); *Transamerica Ins. Group v. Chubb*, 16 Wn. App. 247, 554 P.2d 1080 (1976) (control of defense for 10 months before issuing reservation of rights). That is, sending the letter several months after accepting the tender actually **improved** the Ardens' coverage position against Hartford.

G. This court should affirm summary judgment of dismissal of both claims for failure to prove damages.

Attorneys moved for summary judgment on the element of

damages, although the Ardens did not. The measure of damages is the amount of loss actually sustained as a proximate result of the attorneys' allegedly negligent conduct. *Schmidt v. Coogan*, 181 Wn. 2d 661, 670, 335 P.3d 424 (2014). Where a legal malpractice plaintiff fails to show compensable damages, it cannot meet a necessary element of the relevant cause of action, and summary judgment for the defendant is appropriate. *LK Operating*, 181 Wn. 2d at 126. Moreover, being charged with a crime is not a compensable injury in a malpractice action. *See Falkner*, 108 Wn. App. at 119 (no compensable injury unless innocent person is wrongly convicted). The Ardens failed to support their claims for damages, and Attorneys ask that the trial court's ruling be affirmed.

1. The Ardens' claim for emotional distress was properly dismissed on summary judgment.

The Washington Supreme Court recently adopted a rule permitting recovery of emotional distress in limited types of legal malpractice cases:

> [T]he plaintiff in a legal malpractice case may recover emotional distress damages when significant emotional distress is foreseeable from the sensitive or personal nature of representation or when the attorney's conduct is particularly egregious. However, simple malpractice resulting in pecuniary loss that causes emotional upset does not support emotional distress damages.

Schmidt v. Coogan, 181 Wn. 2d at 671. In that case, plaintiff had retained counsel to pursue her slip-and-fall claim, and he negligently named the wrong defendant when filing the action. The Court held the subject matter

and pecuniary loss of the attorney-client relationship were not sensitive enough to meet the test. *Id.* at 671, 674. The lawyer's conduct was not "particularly egregious." *Id.* at 671. The Court affirmed the trial court's decision not to award emotional distress damages. *Id.* at 674-75.

In this case, there is no evidence that the nature of Attorneys' representation of the Ardens was "sensitive" or "personal." Attorneys were retained to defend civil claims involving destruction of a neighbor's pet. The scope of the representation is defined by Attorneys' letter and the Ardens' admissions in depositions that they understood that scope. Mr. Arden had admitted to the sheriff he had shot his neighbors' dog. He had been subject to criminal prosecution for almost a year already before Attorneys were appointed to defend him and his wife in the civil case. He had published his claimed PTSD to his neighbors already. Attorneys and the Ardens had no special relationship beyond attorney-client.

There is also no evidence Attorneys' conduct was "particularly egregious." Indeed, an experienced expert has opined that all of their conduct met the standard of care in Washington and was within the range of reasonable options for an attorney in the circumstances. CP 362-69; CP 508-27. The Ardens have alleged that Attorneys failed to get the case settled early, but in reality, Hartford refused to fund the amounts the Duffys demanded. While the Ardens may have been frustrated by their

insurer's decision, this is not the sort of "significant emotional distress" that would be foreseeable from Attorneys' alleged negligence.

Instead, this is a case of alleged emotional upset stemming not from Attorneys' supposed breaches, but from the course of litigation. A plaintiff generally cannot recover for litigation-induced emotional distress. *Lincor Contractors, Ltd. v. Hyskell*, 39 Wn. App. 317, 324, 692 P.2d 903 (1984), *rev. denied* 103 Wn.2d 1036 (1985) (expenses of litigation not recoverable beyond stated exceptions). *See also Knussman v. State of Maryland*, 272 F.3d 625, 642 (4th Cir. 2001) (plaintiffs' evidence was insufficient to justify an award of $375,000 in emotional distress damages; "litigation-induced emotional distress is never a compensable element of damages"); *Stoleson v. U.S.*, 708 F.2d 1217, 1223 (7th Cir. 1983) ("It would be strange if stress induced by litigation could be attributed in law to the tortfeasor"). The Ardens were involved in the litigation, and affected by its stressors, for months before Attorneys were retained – or did anything that the Ardens now claim was tortious.

2. The Ardens' claim for attorneys' fees was properly dismissed on summary judgment.

The Ardens argue that as a result of Attorneys' conduct, they were forced to incur fees in *Duffy v. Arden*, in *State v. Arden*, and in this case. They disregard settled Washington law holding a plaintiff may not recover

attorneys' fees in an action for legal malpractice or for breach of fiduciary duty, absent a contract, statute, or recognized equitable ground. *Schmidt*, 181 Wn. 2d at 679; *Shoemake v. Ferrer*, 143 Wn. App. 819, 831, 182 P.3d 992 (2008). Actions for breach of either fiduciary duty or duty of care are legal actions, not equitable actions, *Benke*, 172 Wn. App. at 296, so the Ardens' trust theory is not a recognized equitable ground.

Without referring to it, the Ardens invoke the ABC Rule, or equitable indemnity, which provides an equitable basis for recovery of attorneys fees when acts of a defendant ("A") exposes or involves plaintiff ("B") in litigation with a third party ("C"). *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 258, 110 P.3d 1145 (2005). The ABC Rule requires a showing of, among other things, "an exceptionally close causal nexus" "greater than in an ordinary tort action" between A's wrongful conduct and B's exposure to litigation. *Woodley v. Benson & McLaughlin*, 79 Wn. App. 242, 247-48, 901 P.2d 1070 (1995) (no recovery where predominant cause of legal expenses was B's tortious conduct). That is, A's conduct must be the **sole cause**:

> **[B] may not recover attorney fees or cost of litigation under the theory of equitable indemnity if, in addition to the wrongful act or omission of A, there are other reasons why B became involved in litigation with C.** [T]he critical inquiry is whether, apart from A's actions, B's own conduct caused it to be exposed or involved in litigation with C."

Jain v. J.P. Morgan Sec., Inc., 142 Wn. App. 574, 587, 177 P.3d 117, *review denied*, 164 Wn.2d 1022, 196 P.3d 135 (2008) (emphasis added), *cert. denied*, 556 U.S. 1105, 129 S.Ct. 1584, 173 L.Ed.2d 676 (2009). *Accord, Blueberry Place*, 126 Wn. App. at 359; *Lyzanchuk v. Yakima Ranches Owners Ass'n, Phase II, Inc.*, 73 Wn. App. 1, 10-11, 866 P.2d 695 (1994). Even the trust-law case the Ardens rely on requires this close causal nexus. *Allard v. Pac. Nat. Bank*, 99 Wn. 2d 394, 408, 663 P.2d 104, 112 (1983) ("Where litigation is **necessitated** by the inexcusable conduct of the trustee, however, the trustee individually must pay those expenses.").

Attorneys' conduct did not necessitate litigation with third parties. Mr. Arden's killing the neighbor's puppy was the principal reason he was embroiled in litigation with both the Duffys and the State. Further, the Duffys sued the Ardens long before Attorneys were even part of the case, and the prosecutor knew nothing about the civil action when he decided to charge Mr. Arden. Additionally, Hartford's refusal to fund the settlement led to litigation with Hartford, not Attorneys' conduct. In any event, Attorneys conduct is not the sole cause of the Ardens' involvement in litigation, and it cannot form a basis for recovery under this theory. The Ardens also provide no grounds on which to recover Mr. Cushman's fees in the instant action as a departure from established precedent. The trial

court did not abuse its discretion when it ruled the Ardens had not supported their claim for attorneys' fees. CP 250.

3. The Ardens' claim for disgorgement was properly dismissed on summary judgment.

A client whose attorney has represented clients in a conflict situation may be entitled to disgorgement of attorney fees. *See Eriks*, 118 Wn.2d at 462–63. A plaintiff seeking disgorgement need not show proximate cause and damages. *Id.* at 462. However, this relief is not available in every case:

> [W]hile attorney misconduct can be so egregious as to constitute a complete defense to a claim for fees, **not every act of misconduct will justify such a serious penalty**.

Kelly, 62 Wn. App. at 156 (emphasis added). Instead, it should only be applied where the claimed attorney misconduct is so egregious as to constitute a complete defense to a claim for fees. *Id.* at 157. The trial court has discretion to award or deny disgorgement. *Id.* at 156. In *Kelly*, the Court of Appeals affirmed the trial court's decision not to award disgorgement of the attorney fees paid by a nonclient. *Id.* at 157.

Here, the Ardens are not entitled to disgorgement. First, Attorneys' conduct is not the sort of egregious conduct contemplated in disgorgement cases. Additionally, as in *Kelly*, the party seeking disgorgement did not pay the fees. CR 17(a) provides, "Every action shall be prosecuted in the name of the real party in interest." Under this rule,

"the real party in interest is the person who, if successful, will be entitled to the fruits of the action." *Northwest Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 716, 899 P.2d 6 (1995). Even if the Ardens could be successful in their request for an order requiring defendants to disgorge the money, they would not be entitled to the fruits of the action. Hartford undisputedly paid Attorneys. The Ardens paid nothing. They are not the real parties in interest. The trial court, in denying the Ardens' bid for disgorgement, did not abuse its discretion.

VI. CONCLUSION

The trial court's decision to deny both of the Ardens' motions for partial summary judgment on breach, and their motion for reconsideration of the first order on summary judgment, should be affirmed. In response to the Ardens' motions, Attorneys produced significant evidence to rebut the Ardens' factual contentions regarding breach of the duty of care and breach of fiduciary duty. Therefore, the Ardens could not establish breach as a matter of law as the moving party.

Additionally, the trial court's decision to grant both of the Attorneys' motions for summary judgment should be affirmed on one or more grounds, each of which is fully supported by the record. For these reasons, Attorneys ask that the Court of Appeals affirm all of the trial court's rulings on appeal.

Respectfully submitted this 9th day of June, 2015.

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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on June 9, 2015, I caused service of the foregoing pleading on each and every attorney of record herein:

VIA EMAIL (Per Prior Agreement)

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