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**Court of Appeals No. 676415-I**

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**IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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TAMMY BECK,

Appellant,

v.

DARREN GRAFE and JANE DOE GRAFE

Respondents.

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**APPELLANT'S OPENING BRIEF**

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## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERROR.....	2
III.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	2
IV.	APPELLANT’S STATEMENT OF THE CASE.....	3
	A. Facts Regarding Goll’s Claims Against Third-Party Prudential.....	3
	B. Retention of Attorney Grafe in Underlying Litigation.....	6
	C. Underlying Litigation Leaves Goll Exposed to Excess Damages Without Recourse Against Prudential.....	12
	D. Attorney Grafe Failed to Satisfy the Standard of Care of a Washington Attorney in his Legal Representation of Goll...	13
V.	SUMMARY OF ARGUMENT.....	16
VI.	ARGUMENT.....	18
	A. Beck Sets Forth a Prima Facie Case of Legal Malpractice to Survive Summary Judgment .....	18
	1. Standard of Review.....	18
	2. Elements of Legal Malpractice Claim.....	18
	3. An Attorney-Client Relationship Existed.....	19

4.	Grafe Breached the Duty of Care by Failing to Act Diligently with Respect to Claims Against Prudential.....	20
5.	Grafe Breached the Duty of Care by Negligently Misrepresenting that a Cause of Action Against Prudential Had Not Yet Arisen.....	22
6.	Grafe Breached the Duty of Care by Failing to Ascertain and Advise his Client Regarding the Applicable Statute of Limitations.....	25
7.	Goll Sustained Damages as a Result of Grafe’s Acts and Omissions.....	29
8.	Grafe’s Acts and Omissions, Not those of Others, were the Proximate Cause of Goll’s Damage.....	30
VII.	CONCLUSION.....	36

## TABLE OF AUTHORITIES

### *Cases*

<i>Atherton Condominium Apartment Owners Ass’n Bd. Of Dirs. v. Blume Dev. Co.</i> , 115 Wn.2d 505, 799 P.2d 250 (1990).....	36
<i>Bowman v. Two</i> , 104 Wn.2d 181, 185, 704 P.2d 140 (1985).....	19
<i>Campbell v. ITE Imperial Corp.</i> , 107 Wn.2d 807, 733 P.2d 969 (1987)..	34
<i>DePhillips v. Zolt Constr. Co.</i> , 136 Wn.2d 26, 959 P.2d 1104 (1998)....	36
<i>Ensley v. Mollmann</i> , 155 Wn. App. 744, 230 P.3d 599 (2010).....	30
<i>Esmieu v. Schrag</i> , 88 Wn.2d 490, 498, 563 P.2d 203 (1977).....	28
<i>Guarino v. Interactive Objects, Inc.</i> , 122 Wn. App. 95, 115 86 P.3d 1175 (2004).....	28
<i>Hizey v. Carpenter</i> , 119 Wn.2d 251, 830 P.2d 646 (1992).....	19
<i>In re Beakley</i> , 6 Wn.2d 410, 423, 107 P.2d 1097 (1940).....	26
<i>J.N. By and Through Hager v. Bellingham School Dist. No. 501</i> , 74 Wn. App. 49, 60-61, 871 P.2d 1106 (1994).....	18
<i>Jones v. Allstate Ins. Co.</i> , 146 Wn.2d 291, 45 P.3d 1068 (2002). ....	18
<i>Lawyers Title Ins. Corp. v. Baik</i> , 147 Wn.2d 536, 55 P.3d 619 (2002)....	24
<i>Manning v. Loidhamer</i> , 13 Wn. App. 766, 538 P.2d 136 (1975).....	22
<i>Mersky v. Multiple Listing Bureau of Olympia</i> , 73 Wn.2d 225, 437 P.2d 897 (1968).....	27
<i>Morgan Bros., Inc. v. Haskell Corp., Inc.</i> , 24 Wn. App. 773, 604 P.2d 1294 (1979).....	30
<i>Perez v. Pappas</i> , 98 Wn.2d 835, 659 P.2d 475 (1983).....	26
<i>Preston v. Duncan</i> , 55 Wn.2d 678, 349 P.2d 605 (1960).....	18

<i>Richey &amp; Gilbert Co. v. Northwestern Natural Gas Corp.</i> , 16 Wn.2d 631, 134 P.2d 444 (1943).....	32
<i>Ringard v. Allen Lubricating Co.</i> , 147 Wash. 653, 267 P. 43 (1928).....	31
<i>Seibly v. City of Sunnyside</i> , 178 Wash. 632, 35 P.2d 56 (1934).....	34
<i>Shoemake v. Ferrer</i> , 143 Wn. App. 819, 182 P.3d 992 (2008) .....	29
<i>Van Noy v. State Farm Mut. Auto. Ins. Co.</i> , 142 Wn.2d 784, 16 P.3d 574 (2001).....	26
<i>Versuslaw, Inc. v. Stoel Rives, LLP</i> , 127 Wn. App. 309, 111 P.3d 866 (2005).....	26, 29
<i>Walker v. Bangs</i> , 92 Wn.2d 854, 601 P.2d 1279 (1979).....	20
<b><i>Other Authorities</i></b>	
Dennis Hynes, <i>Freedom of Contract, Fiduciary Duties, and Partnerships: The Bargain Principle and the Law of Agency</i> , 54 Wash. & Lee L.Rev. 439, 441-42 (1997) .....	27
Restatement (Second) of Torts § 442 (1965).....	34
Restatement (Second) of Torts § 552 (1977).....	24
<b><i>Rules</i></b>	
CR 56(c).....	36
<b><i>Treatises</i></b>	
<i>Wright and Miller, Federal Practice and Procedure: Civil</i> § 1442 .....	23

***I. INTRODUCTION***

Tammy Beck, in the capacity of Personal Representative of the Estate of Claud Goll, deceased, filed suit in August 2010 against Attorney Darren Grafe, for legal malpractice.

Grafe represented Beck's father, Claud Goll, between August 2001 and May 2003, in the defense of litigation brought by Nancy Chrisp, regarding a purchase and sale agreement for residential real estate ("the underlying litigation"). The basis for the claim of legal malpractice in the underlying litigation was Grafe's failure to preserve negligence claims against Goll's real estate agent, Prudential Northwest Realty, for failing to properly advise him and provide guidance as to completing the real estate purchase and sale agreement forms in such a way that the remedies for a breach would be limited solely to \$2,000.00, the amount of his earnest money deposit. Because Prudential had not properly assisted Goll in ensuring that the parties' agreed that the remedy was limited, Chrisp filed suit against Goll for her "actual" damages, claiming over \$100,000.00.

In defense of the legal malpractice claim, Grafe filed a motion for summary judgment, seeking to dismiss Beck's claims on several grounds involving the merits of her claim. In response to the motion for summary judgment, Beck sought a continuance to enable her to obtain an expert

opinion to support her claim for legal malpractice. The trial court granted the continuance and permitted the filing of an expert opinion by Randolph I. Gordon, a Washington licensed attorney. That opinion strongly supported Beck's contention that Grafe committed malpractice.

Thereafter, in ruling on the motion for summary judgment, the trial court considered the expert opinion of Randolph I. Gordon, which was unrefuted by any expert on behalf of Grafe. Nevertheless, the trial court granted Grafe's Motion for Summary Judgment, dismissing Beck's claims.

Beck now seeks review of the trial court's decision to dismiss her case on summary judgment by this Appellate Court.

***II. ASSIGNMENTS OF ERROR***

- A. Beck assigns error to the trial court's entry of the Order Granting Defendants' Motion for Summary Judgment, dismissing Beck's claims. (CP
- B. Beck assigns error to the trial court's entry of the Order Denying Plaintiff's Motion for Reconsideration. (CP

***III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR***

- 1. Did the trial court err by concluding as a matter of law, that

the evidence presented to the trial court relating to the attorney's motion for Summary Judgment demonstrated no genuine issue of material fact such that the attorney, as the moving party, was entitled to judgment as a matter of law? (Assignment of Error 1.)

2. Did the trial court err when it failed to view all facts and inferences in the light most favorable to Beck, the non-moving party, when it granted the Motion for Summary Judgment? (Assignments of Error 1 and 2.)

#### ***IV. APPELLANT'S STATEMENT OF THE CASE***

##### ***A. Facts Regarding Goll's Claims Against Third-Party Prudential***

In 2001, Nancy Chrisp listed her residential home for sale, which included a separate "guest" house. CP 187. Claud Goll's real estate agent, who was employed by Prudential Northwest Realty, showed him the property, and Goll decided to make an offer to purchase it. CP 193. In July 2001, Goll and Chrisp entered into a purchase and sale agreement. Goll paid \$2,000.00 as an earnest money deposit. CP 162.

Prior to the closing, Goll discovered that an unattached structure on the property did not satisfy required code as a separate "guest" house as advertised, but was, in fact, simply a detached garage or shop. CP 193. As a result, Goll elected not to move forward with the purchase, with an

expectation that his loss would be limited to the \$2,000.00 earnest money amount. CP 193.

Chrisp claimed she had been damaged by Goll's failure to complete the purchase and sought to recover damages in excess of the earnest money deposit. CP 193. Chrisp sought more than a forfeiture of the \$2,000.00 earnest money deposit claiming moving and storage expenses, months of mortgage payments, and a significant reduction in the sale price, with total alleged damages exceeding \$100,000.00. CP 276.

The basis for Chrisp's claim that she was entitled to more than the earnest money deposit of \$2,000.00 was that the parties did not comply with the statutory requirements of RCW 64.04.005, in which both the purchaser and seller must separately initial the forfeiture of earnest money provision in order to limit the remedy for breach of contract. CP 187 – 191. Chrisp was, in fact, correct, that the parties failed to strictly comply with the statute. CP 188.

Despite the fact that Goll had retained the professional services of Prudential Northwest Realty to assist him with the purchase of the residential property and the completion of the purchase and sale agreement, Prudential failed to protect Goll and exposed him to damages in excess of the earnest money deposit. First, in the purchase and sale agreement's summary of terms section entitled "SPECIFIC TERMS," only

one of the two required initials was secured. CP 162. Second, in paragraph 'p' there was no designation or execution of the sections allowing for limitation of recourse against Buyer and no initials, as mandated by statute, were obtained. CP 165. Third, the standard form, the so-called Statutory Safe Harbor clause [NWMLS Form 22D Optional Clauses addendum] was neither provided, nor executed. CP 188. This Statutory Safe Harbor clause specifically provides places for the parties to initial. CP 272.

The deficiencies in the work of Prudential in this transaction must be viewed through the filter of regarding their work as constituting the "unauthorized practice of law." Put another way, Prudential's work on this documentation clearly failed to protect the legal interests of Goll, whom they represented; this occurred through a breach of the standard of care that, in an attorney, would have constituted professional negligence and in Prudential's case constitutes both negligence and the unauthorized practice of law. CP 227.

A sound cause of action arose against Prudential for failure to effectively to preserve the limitation of remedy against the Buyer to his earnest money. Limiting recourse to the \$2,000 earnest money was a material consideration in this transaction, the express agreement of Chrisp was obtained, but Goll's omission of setting forth his initials constituted a

failure to comply with the statutory mandates of RCW 64.04.005 left Goll exposed to additional liability beyond his intention or expectation. CP 227-28.

***B. Retention of Attorney Grafe in Underlying Litigation***

On or about August 6, 2001, Goll and his daughter, Tammy Beck, met with attorney Darren Grafe to seek legal advice regarding the real estate transaction and potential subsequent litigation. CP 192. During that initial meeting with Grafe, Goll and Beck spoke about filing a “counter suit” against the real estate brokers who were involved in the transaction. CP 193. Grafe told Goll that suit could not be filed against the real estate brokerage firms until Goll had been harmed and could show damages. CP 195.

On or about August 16, 2001, Beck and Goll met with Grafe a second time because they received a demand that Goll purchase the real property at issue, or “pay the consequences.” Chrisp’s attorney was demanding far more than the \$2,000 earnest money deposit from Goll, claiming that Chrisp’s remedies were not limited to forfeiture of the earnest money. CP 193. Beck was upset because Prudential refused to return her father’s earnest money deposit. Beck asserted to Grafe that Goll should file suit against Windermere for misrepresentation in the listing, and Prudential and/or Ms. Curran because they failed to protect her father by not having him sign the ‘safe harbor’ clause

in the purchase and sale agreement. CP 193-94.

After a couple months passed without any further contact from Chrisp, Beck and Goll met with Grafe on or about October 22, 2001 to close the file. Despite having received threats, no lawsuit had been commenced at that time by Chrisp. Goll paid Grafe what he thought would be his final bill for attorneys' fees. CP 194.

Within two weeks of the October 2001 meeting, on or about November 2, 2001, Grafe wrote Goll a letter to notify him that he received notice that a lawsuit had been filed by Chrisp. In his letter, Grafe advised Goll to retain counsel, whether his firm or another firm, to defend him in the action and to advise him of his rights. CP 123. Grafe further stated, in writing:

Based upon my knowledge of your case, and my conversations with you, you may have legal claims against others involved as named parties and against those not named as parties. If you intend to pursue these matters further, you should do so promptly. If not properly brought, in responding to this lawsuit, certain claims may be barred. Further, the law sets certain time limits for pursuing legal claims called statutes of limitation. The time periods vary depending upon the type of legal claim and are strictly enforced. If you do not bring your claim within the time period set by the statute of limitations, then your claim is barred. Again I would like to emphasize that you should hire an attorney who can more thoroughly advise you as to how to proceed in this matter. (CP 123.)

On or about that same day, November 2, 2001, Goll received a copy of the lawsuit pleadings in the mail. Beck and Goll immediately telephoned

Grafe to recommence his legal services. Beck and Goll again spoke with Grafe during that conversation about their desire to bring the two real estate brokerage firms in the lawsuit. CP 194.

Each and every time that Plaintiff Beck and Goll met or conversed with Grafe, they brought up the topic of suing the real estate brokerage firms. CP 195. Goll was extremely upset at having to use his retirement funds to defend himself. CP 194. He and Plaintiff Beck repeatedly asserted that the real estate brokerage firms should have to pay Goll's attorneys' fee bill. CP 195. Each time, Grafe would explain that a lawsuit could not be filed against the real estate brokerage firms until Goll had been harmed and could show damages. CP 195. Grafe made it clear that Goll had to wait until the underlying lawsuit was finished before he could pursue a lawsuit against Prudential and Windermere. CP 195. Grafe made it clear that the statute of limitations would not start until the current lawsuit was finished because that was the time in which Goll would have, in fact, suffered damages as a result of their roles in the purchase and sale transaction. CP 195.

Beck and Goll relied upon Grafe to provide legal advice to them regarding the dispute with Chrisp, as well as regarding claims against other parties. CP 194.

On November 6, 2001, Grafe filed a Notice of Appearance indicating that he represented Claud Goll and Ritter, Goll's other daughter who had been

named in the suit. CP 126-127. Grafe did not file an Answer for months, until faced with a Motion for Default on April 4, 2002. CP 129.

When Grafe filed the answer on behalf of Goll, he did not name any third party defendants. CP 135-140. Instead, his answer merely provided:

Defendants Goll and Ritter allege that the conduct of unknown persons or entities; employees, agents, and/or representatives of Windemere Real Estate; and/or employees, agents, and/or representatives of Prudential Northwest Realty; who are not parties to this action, contributed to Plaintiff's damages, and as such, the Plaintiff's damages should be reduced by the proportionate share of liability of the other entities that cause or contributed to Plaintiff's damages. (CP 137.)

On or about April 24, 2002, Goll and Beck met with Grafe to discuss options to dismiss the lawsuit. Beck informed Grafe that Prudential continued to hold Goll's earnest money check, and refused to speak with her about it. Beck also informed Grafe that she felt Prudential's real estate agent was not responsive because she knew she "screwed up" and knew that Goll could name her in the current lawsuit. Grafe continued to maintain that Goll could not sue either party's real estate broker because Goll had not yet suffered any harm as a result of their actions. Beck then pointed out the amount of attorneys' fees expended to date as evidence of how Goll had been harmed. In addition, Beck asserted that if Goll was found to owe money to Chrisp as a result of the failed transaction, any liability over the \$2,000 earnest money deposit should be paid by the real estate brokers due to their own negligence. Grafe represented that it

was his opinion that a Motion to Dismiss would resolve the case, and then Goll could recover his attorneys' fees. CP 195-96.

On or about July 5, 2002, the Court dismissed Ritter from the lawsuit, pursuant to Grafe's Motion to Dismiss. However, the Court denied the motion to dismiss Goll from the case. CP 196. Grafe wrote to his clients to let them know of the Court's ruling. Notably, his letter of July 5, 2002 stated, "For now we will move forward with a motion to allow us to amend our answer and to file a third party complaint." CP 142.

Beck, Goll, and Grafe participated in a telephone conference on July 8, 2002, regarding the "outcome of [the] hearing" and the "next steps in [the] case." CP 144. Beck and Goll discussed with Grafe, again, their desire to file suit against the real estate brokers and brokerage firms. CP 196. Soon thereafter, Grafe charged Goll for 0.60 hours on July 10, 2002, to "[c]onsider issues related to third party complaint and potential parties to list." CP 145. Grafe then charged Goll for 0.90 hours on July 15, 2002, for "Preparation of pleadings; work on motion to amend." CP 145.

Despite his client's repeated instructions, and despite the fact that Grafe affirmatively stated that he would file a motion and amend Goll's answer, Grafe never filed a motion to amend Goll's Answer to name Prudential or its agents as third party defendants. CP 129-133.

On or about November 26, 2002, Chrisp's attorney filed a Joint Pretrial

Report, stating that “All essential parties have been named.” Grafe did not sign the Joint Pretrial Report; instead, Chrisp’s attorney noted Grafe’s failure to respond on multiple occasions. CP 148-151. Grafe never objected or moved to modify the Joint Pretrial Report to add any third-party defendants. CP 129-133.

Grafe never informed his client that this Joint Pretrial Report had been filed, potentially foreclosing the ability to add other essential parties. Grafe never informed his client that he took no subsequent action to protect his client’s ability to add the brokerage firms into the lawsuit. Grafe never informed his client of the actual date of the statute of limitations which would prohibit the filing of a separate lawsuit against the real estate brokerage firms. CP 195-96.

Goll and Beck understood Grafe’s legal advice, which was repeatedly given, to mean that only after suffering a judgment in excess of \$2,000, would a claim ripen against the real estate brokerage firms, enabling suit to be filed by Goll against them. Goll and Beck relied upon that advice. Grafe never informed Goll that the statute of limitations would require him to file a separate lawsuit against Prudential prior to a particular date in 2004. CP 196.

On or about May 27, 2003, Grafe notified Goll that he was leaving the law firm and would no longer represent Goll. CP 39. At the time of Grafe’s withdrawal at the end of May 2003, the trial date was less than two and one-

half months away. In his notice, Grafe did not disclose his failure to preserve the ability to bring in third-party defendants at that time, as had been repeatedly requested by Goll and Beck, nor did he inform them of any statute of limitations against the real estate firms that would require a separate lawsuit filing. CP 197.

***C. Underlying Litigation Leaves Goll Exposed to Excess Damages Without Recourse Against Prudential***

Attorney David Middleton, of the same law firm, then commenced legal representation of Goll in the dispute with Chrisp. During their initial meetings with Middleton, Beck explained the way in which she thought that Prudential had harmed Goll and that they had instructed Grafe to sue them as a result. Middleton explained that he could not change the course of action that Grafe had started. Middleton also adopted Grafe's conclusion that Goll could sue the real estate brokerages once Goll sustained damages, stating that Goll had not sustained damages at that point. CP 197.

Under Middleton's representation, Goll prevailed at trial against Nancy Chrisp, and his liability was limited to the \$2,000 earnest money deposit. CP 154-160. Goll was also awarded a substantial amount of attorneys' fees in the underlying litigation.

However, Nancy Chrisp appealed the trial court decision. On January 5, 2005, the appellate court reversed the trial court's decision, holding that Goll

failed to comply with the statute to limit the seller's remedy to the forfeiture of the earnest money deposit and that the doctrine of substantial compliance did not apply. CP 197.

Middleton died in 2008. Goll retained new legal counsel to continue the defense of the lawsuit and to pursue claims against Prudential. Upon retaining new counsel, Goll discovered that he had no ability to assert claims against Prudential because the statute of limitations had run. CP 198. Goll then settled the claim with Chrisp without having any legal recourse against Prudential to recover damages sustained as a result of the negligence of the brokers and brokerage firms. CP 3.

***D. Attorney Grafe Failed to Satisfy the Standard of Care of a Washington Attorney in his Legal Representation of Goll***

When Goll died in June 2009, his daughter, Tammy Beck, was appointed as the personal representative of his estate. Beck filed this action for negligence and professional malpractice and breach of contract against Grafe on August 6, 2010. CP 1-5.

On February 11, 2011, Grafe filed a Motion for Summary Judgment seeking to dismiss Beck's claims. CP 14. In response to the motion, Beck set forth her legal theories to support her claims that Grafe breached his duties and obligations. CP 91-118. At that time, it was early in the case, discovery had not been had, and Beck had not yet obtained an expert opinion of an attorney

to submit in opposition to the motion, and Beck moved for a continuance to permit her sufficient time to obtain such an expert opinion. CP 112-14.

On March 11, 2011, the trial court heard oral argument regarding the Defendants' Motion for Summary Judgment and the Plaintiff's Motion for Continuance. VRP; CP 306. The Court specifically inquired as of Beck's counsel what an expert would likely testify to regarding the facts of this case. Beck's counsel responded that she anticipated her expert would testify regarding when the underlying case's statute of limitations would have run, that Grafe failed to meet the standard of care in his legal representation of Goll, that Grafe failed to bring in a necessary third-party defendant, that Grafe failed to act with the required diligence during his representation, that Grafe failed to follow Goll's express instructions, that Grafe breached his duty to inform Goll that he had failed to timely bring in a third-party, and that failure required Goll to file a separate lawsuit, that Grafe failed to inform his client or his successor attorney of this fact when Grafe formally withdrew from representation, and that it was reasonable for Goll to rely upon Grafe's representations and advice, thereby, satisfying the burden to show proximate cause, among other potential breaches by Grafe. After learning the breadth and scope of the issues to be addressed by the expert witness, the trial court ruled that the Motion for Continuance was granted and that Beck must submit an expert opinion to support her opposition to the Motion for Summary Judgment no later than

March 25, 2011. CP 306-07.

Thereafter, Beck immediately retained and paid for the services of Randolph I. Gordon, a prominent local attorney, to analyze the underlying litigation and the representation of Goll by Grafe, and to draft and submit an expert opinion to address the standard of care required of Grafe, and whether Grafe met that standard of care or not. CP 307.

On March 18, 2011, Grafe filed a Motion for Reconsideration, seeking a reversal of the trial court's ruling that permitted Beck time to obtain and submit an expert opinion. CP 209-218.

On March 25, 2011, Beck filed the expert opinion of Randolph I. Gordon in opposition to the Motion for Summary Judgment. In addition to setting forth his qualifications, Mr. Gordon set forth the relevant facts of the underlying litigation, and provided his expert opinion opining that the statute of limitations would not have been tolled, that Grafe was negligent in his legal representation, that his attempt to shift the blame to a successor attorney was without merit because there was concurrent negligence, that Grafe's acts and/or omissions proximately caused damages to Goll, that Grafe's withdrawal of representation did not alleviate him of liability, and that Grafe's claim that his acts and/or omissions were a strategic decision, and not negligence, was unsupported by the facts and evidence, among other things. CP 219-302.

Due to the Beck's counsel's personal medical situation, the trial court

permitted Beck to file a response to the Defendants' Motion for Reconsideration on June 3, 2011. CP 305-312. Grafe filed a reply on June 10, 2011. CP 313-317.

On June 27, 2011, the trial court filed an order that reflected it considered all of the pleadings in the case, including the expert Declaration of Randolph I. Gordon, but that it granted Defendants' Motion for Summary Judgment and dismissed Beck's claims. CP 318-319. The trial court then denied Beck's Motion for Reconsideration, without providing any insight as to the reason for its decision to dismiss Beck's claims. CP 331-32.

#### ***V. SUMMARY OF ARGUMENT***

In response to Grafe's motion for summary judgment, Beck asserted several theories of negligence, professional malpractice, and breach of contract against attorney Grafe. The expert testimony of attorney Randolph I. Gordon supports this action for professional negligence and demonstrates many ways in which Grafe's conduct fell below the requisite standard of care. Not surprisingly, Grafe disputes all of Beck's asserted theories and denies any wrongdoing or liability.

First, Attorney Gordon submitted analysis and testimony that Grafe failed to act diligently in filing a claim against Prudential. Grafe disputes this material fact, and without submitting competent evidence,

asserts that he made a strategic decision not to pursue Prudential as a third-party defendant.

Second, Attorney Gordon submits analysis and testimony that Grafe breached his duty of care by advising Goll that a lawsuit against Prudential could not be maintained until “actual damages” had been sustained. Grafe disputes this material fact and maintains that his legal advice was accurate and that the statute of limitations would not run until the underlying litigation was resolved in a manner that was unfavorable to Goll.

Third, Attorney Gordon submits analysis and testimony that Grafe breached his duty of care by failing to disclose that he missed the opportunity to add Prudential as a third-party defendant into the underlying litigation, and by failing to advise Goll that a separate lawsuit would have to be filed prior to the running of the statute of limitations. Grafe disputes this material fact and attempts to shift the blame to his client and successor counsel, Middleton.

Fourth, Attorney Gordon submits analysis and testimony that Grafe cannot avoid liability by blaming Middleton’s negligent acts and omissions, as concurrent liability applies. Grafe disputes this and asserts that his withdrawal absolves him of any responsibility whatsoever, even for his own negligence that occurred prior to withdrawal.

The trial court correctly permitted Beck with the opportunity to obtain an expert opinion, but then failed to view all facts and reasonable inferences, including the unrefuted testimony of expert attorney Gordon, in the light most favorable to Beck. Additionally, the trial court failed to acknowledge the numerous genuine issues of material fact that precluded summary judgment. Negligence includes issues of fact not properly determined through Summary Judgment. *Preston v. Duncan*, 55 Wn.2d 678, 681-82, 349 P.2d 605 (1960). In general, an affidavit containing admissible expert opinion on an ultimate issue of fact is sufficient to create a genuine issue as to that fact, precluding summary judgment." *J.N. By and Through Hager v. Bellingham School Dist. No. 501*, 74 Wn. App. 49, 60-61, 871 P.2d 1106 (1994).

## **VI. ARGUMENT**

### **A. Beck Sets Forth a Prima Facie Case of Legal Malpractice to Survive Summary Judgment**

#### ***1. Standard of Review***

The standard of review of an order of summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court." *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

#### ***2. Elements of Legal Malpractice Claim***

To establish a claim for legal malpractice, a plaintiff must prove

the following elements: (1) The existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred.

*Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992). “Once an attorney-client relationship is established, the elements for legal malpractice are the same as for negligence.” *Bowman v. Two*, 104 Wn.2d 181, 185, 704 P.2d 140 (1985).

To comply with the duty of care, an attorney must exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in this jurisdiction. In Washington, the standard of care for lawyers is a statewide, rather than a local or community standard.

*Hizey* at 261 (internal citations omitted).

### ***3. An Attorney-Client Relationship Existed***

The first element of an attorney malpractice action is that there was an attorney-client relationship that gave rise to a duty. *Id.* In this case, Goll retained the legal services of a Washington licensed attorney, Grafe, in 2001 because he was being sued by Chrisp regarding a purchase and sale agreement for residential real estate. Grafe does not dispute that he had an attorney-client relationship with Claud Goll. Thus, the Plaintiff satisfies the first element of the legal malpractice claim.

#### ***4. Grafe Breached the Duty of Care by Failing to Act Diligently with Respect to Claims Against Prudential***

The second element required to establish an attorney malpractice action is “an act or omission by the attorney in breach of the duty of care.” *Hizey* at 260. Grafe does not dispute the existence of his duty to Claud Goll; instead, he disputes the fact that he breached this duty of care. “To comply with the duty of care, an attorney must exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in this jurisdiction.” *Id.* at 261.

When an attorney’s alleged malpractice arises out of trial tactics or procedure, the client must ordinarily submit expert testimony to establish the attorney’s breach of the standard of care. *E.g., Walker v. Bangs*, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979). Nevertheless, expert testimony need not be submitted to establish the breach of the standard of care when the negligence charged is within the common knowledge of lay persons. *Id.*

In this case, Goll and Beck repeatedly requested that Grafe bring Prudential and its agent into the lawsuit to hold them legally responsible for failing to properly advise Goll to complete the purchase and sale agreement in a manner that would limit his liability to the amount of the earnest money. Grafe was well aware of the consequences of failing to name a party in terms of the running of the statute of limitations barring such claims. He notified

Goll of this consequence even before being retained, although he failed to ever notify Goll of the date the statute would run. Grafe recognized that Goll had valid legal claims against Prudential and its agents, as evidenced by the Answer and Affirmative Defenses filed in the underlying litigation. Grafe committed to his client by letter of July 5, 2002 that he would move forward to file a third-party complaint. Grafe billed his client between July 8, 2002 and July 15, 2002 for work on the third-party complaint. Despite billing his client, Grafe never prepared a motion to amend to add a third-party complaint. Grafe failed to participate in the Joint Pretrial Report that represented to the trial court “All essential parties have been named” and Grafe failed to object to, or move the court to amend the answer or the Joint Pretrial Report.

Grafe continued to represent Goll for over ten months after he wrote a letter dated July 5, 2002 that designated his plan to file a third-party complaint, although he failed to do so. Grafe ignored his promise to Goll and simply withdrew from the case a mere two and one-half months prior to trial. This withdrawal does not alleviate Grafe of responsibility for negligently failing to execute his duties to his client. Although expert witness testimony may not be necessary under this compelling set of facts, Beck has submitted expert witness testimony to support her contention that Grafe failed to act diligently to preserve Goll’s claims against Prudential and that this was a breach of Grafe’s standard of care. Expert Gordon opined that billing the client several hundred

dollars for services that were not performed is itself sufficient to give rise to a cause of action against Grafe.

Grafe disputes the material fact that he failed to act diligently, with no competent evidence in the record, in his Reply Memorandum in Support of Motion for Summary Judgment and asserts that the failure to file the third-party complaint was a “reasonable tactical and decision making process[ ] during the course of litigation supported by case law.” CP 201. However, contrary to Grafe’s unsupported assertion, this was not a affirmative judgment call or tactical decision made by an attorney; this was purely a lack of diligence and a breach of the duty of care owed to a client. Nevertheless, this dispute of a material fact precludes summary judgment.

***5. Grafe Breached the Duty of Care by Negligently Misrepresenting that a Cause of Action Against Prudential Had Not Yet Arisen***

Another act or omission by Grafe that supports Beck’s claim for professional malpractice is his representation, oddly and directly contrary to his actions set forth above, that no cause of action could be maintained against Prudential because no “damages” had yet been incurred. Grafe failed to recognize that damages had been incurred as a matter of law pursuant to *Manning v. Loidhamer*, 13 Wn. App. 766, 769, 538 P.2d 136 (1975):

It is equally well settled that when the natural and proximate consequences of a wrongful act of defendant involve plaintiff in litigation with others, there may as a general rule be a recovery

of damages for reasonable expenses incurred in the litigation, including attorney's fees.

In this case, Prudential's failure to limit the remedy for breach of the purchase and sale agreement subjected Goll to being sued by Chrisp. Even Beck, a layperson, recognized that Goll's having to pay attorneys' fees to defend a lawsuit that arose due to Prudential's negligence constituted "damages," as did the ultimate exposure for an judgment for damages in excess of \$2,000.00.

As Beck's expert witness asserts, this legal advice was not merely erroneous, but was extraordinarily damaging because it reasonably deterred Goll from taking action to protect his claim. CP 237. As a result of Grafe's failure to determine the proper statute of limitations, the most cost-effective, logical opportunity to pursue Prudential by tolling the statute of limitations by filing a third-party complaint was forever lost. CP 244.

The very purpose of permitting a defendant to bring in a third-party into pending litigation is to achieve judicial efficiency, as well as to eliminate the potential harm in waiting to commence subsequent litigation. As stated in *Wright and Miller, Federal Practice and Procedure: Civil* § 1442, (footnotes omitted) (emphasis added):

The primary purpose of any procedure authorizing the impleader of third parties is to promote judicial efficiency by eliminating "circuitry of actions." The objective of Rule 14 is to avoid the situation that arises when a defendant has been held liable to plaintiff and then finds it necessary to bring a separate action against

a third individual who may be liable to defendant for all or part of plaintiff's original claim. When the rights of all three parties center upon a common factual setting, economies of time and expense can be achieved by combining the suits into one action. Doing so eliminates duplication in the presentation of evidence and increases the likelihood that consistent results will be reached when multiple claims turn upon identical or similar proof. Additionally, **the third-party practice procedure is advantageous in that a potentially damaging time lag between a judgment against defendant in one action and a judgment in his favor against the party ultimately liable in a subsequent action will be avoided.** In short, Rule 14 is intended to provide a mechanism for disposing of multiple claims arising from a single set of facts in one action expeditiously and economically.

Because Goll's claims against Prudential centered upon a common factual setting, Goll could name Prudential and its agents as third-party defendants upon commencement of the underlying lawsuit, in accordance with Civil Rule 14.

To establish negligent misrepresentation, a plaintiff must show by clear, cogent, and convincing evidence that the defendant negligently supplied false information the defendant knew, or should have known, would guide the plaintiff in making a business decision, and that the plaintiff justifiably relied on the false information.

*Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002); RESTATEMENT (SECOND) OF TORTS § 552(1) (1977). Goll, as the client in an attorney-client relationship, sought legal advice in order to make informed decisions regarding his legal options; Goll had an absolute right to

rely upon the advice given to him by Grafe, his attorney. By making negligent misrepresentations to his client about the ability to bring suit against Prudential, Grafe breached the duty of care owed to Goll. CP 244.

Grafe again disputes the material fact that he his failure to add Prudential as a third-party defendant was erroneous because Goll had not yet sustained damages. Obviously Grafe did not truly believe that during his representation of Goll given Grafe's repeated references and attorney fees charged relating to filing a third-party complaint. Nevertheless, this dispute of a material fact precludes summary judgment.

***6. Grafe Breached the Duty of Care by Failing to Ascertain and Advise his Client Regarding the Applicable Statute of Limitations***

Initially in his Motion, Grafe took the position that the statute of limitations ran on July 19, 2004, three years after Goll's rescission of the purchase and sale agreement. CP 19. However, in Grafe's Reply, he took a different position and asserted that Goll would not have incurred damages until the Court of Appeals reversed the trial court's ruling that the parties substantially complied with the earnest money forfeiture statute in January 2005.

Beck's expert witness analyzed the statute of limitations and found that it would have run between July 2, 2004 and October 29, 2004. The exact time within that period would be a question of fact based upon when the costs of

litigation would have first accrued. CP 233. Regardless of the precise date when the statute of limitations would have run, Grafe failed to ascertain even the year of the applicable statute of limitations, and also failed to inform his client that the cause of action against Prudential would be time barred if a separate lawsuit was not filed prior to July 2004. Given the repeated and consistent discussions about Prudential and Goll's repeated requests that the real estate firms be brought into the lawsuit because they should be held accountable for their negligence, Grafe was well-aware of the fact that bringing claims against Prudential was highly material to Goll.

When an attorney accepts representation, the attorney undertakes the duties of a fiduciary to the client, bound to act with utmost fairness and good faith toward the client in all matters. *E.g., Perez v. Pappas*, 98 Wn.2d 835, 840-41, 659 P.2d 475 (1983) (attorney-client relationship characterized as "a fiduciary one as a matter of law and thus the attorney owes the highest duty to the client"); *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 333, 111 P.3d 866 (2005) ("highest duty"); *In re Beakley*, 6 Wn.2d 410, 423, 107 P.2d 1097 (1940) ("one of the strongest fiduciary relationships known to the law").

The concurring opinion of Justice Talmadge in *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wn.2d 784, 797-98, 16 P.3d 574 (2001) provides a seminal explanation concerning the nature of the "true fiduciary" in Washington:

In the most basic sense, a fiduciary duty arises out of a trust relationship:

A leading authority defines a fiduciary as “a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking.” The usual expectation, based on the nature of the relationship, is that a fiduciary will discharge this undertaking to act on behalf of another in a selfless manner and will indeed act “primarily” for the benefit of the other, which includes keeping the interests of the other foremost in mind (through loyalty and **full disclosure**) and acting with care.

A fiduciary relationship is a relationship of trust, which necessarily involves vulnerability for the party reposing trust in another. One's guard is down. **One is trusting another to take actions on one's behalf.** Under such circumstances, to violate a trust is to violate grossly the expectations of the person reposing the trust. Because of this, the law creates a special status for fiduciaries, imposing duties of loyalty, care, and **full disclosure** upon them. One can call this the fiduciary principle. To recognize such duties and enforce a reasonable expectation of trust, requiring a person granted the trust of another to honor and respect that trust is both understandable and of utmost importance.

*Quoting J. Dennis Hynes, Freedom of Contract, Fiduciary Duties, and Partnerships: The Bargain Principle and the Law of Agency, 54 Wash. & Lee L.Rev. 439, 441-42 (1997) (footnotes omitted).*

The fiduciary's duty of prompt disclosure extends to facts “which are, or *may be* material... and which *might* affect the principal's rights and interests or influence his actions.” *Mersky v. Multiple Listing Bureau of Olympia*, 73

Wn.2d 225, 229, 437 P.2d 897 (1968) (emphasis added). A “ ‘material fact’ is on ‘to which a reasonable [person] would attach importance in determining his or her choice of action in the transaction in question.’ ” *Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 114, 115 86 P.3d 1175 (2004).

The attorney’s duty of disclosure is consistent with the duty of fiduciaries, generally, “to inform the beneficiaries **fully of all facts which would aid them in protecting their interests.**” *Esmieu v. Schrag*, 88 Wn.2d 490, 498, 563 P.2d 203 (1977) (emphasis added). In this case, Grafe erroneously informed his client that he had to wait to file a lawsuit against the real estate brokerage firms. By the time of his withdrawal in May 2003, Grafe had not informed his client that he had failed to act diligently in moving to add in the third-party defendants, nor had he informed his client that he would have to file a separate lawsuit before the statute of limitations ran, nor the date when the statute of limitations would run.

Goll expected that Grafe would protect his interests by fully disclosing all material facts about his case, including the very issue addressed in his first November 2, 2001 letter: the applicable statute of limitations against third parties. However, Grafe never advised Goll that it was too late to bring third-parties into the underlying litigation, nor did he ever advise Goll that a separate lawsuit would have to be filed no later than July 2004. Instead, Grafe attempts to shift the responsibility imposed upon him as a fiduciary, to Goll, the client,

by claiming that Goll knew that the third-parties had not been joined at the time of withdrawal in 2003, and that his November 2, 2001 letter informed Goll that a statute of limitations may bar an untimely claim against non-parties. However, this falls far short of being fully informed of all facts that would enable Goll to protect his interests. Goll is entitled to leave his “guard down” by reposing trust in his attorney. There can be no duty placed upon Goll to ascertain or comprehend material facts that his attorney failed to disclose.

#### ***7. Goll Sustained Damages as a Result of Grafe’s Acts and Omissions***

The general rule is that the measure of damages for legal malpractice is the amount of loss actually sustained as a proximate result of the attorney's conduct. The aim of any legal malpractice damage award must thus be to place successful plaintiffs, as nearly as possible, in the position they would have occupied had their attorneys capably and honestly represented them.

*Shoemake v. Ferrer*, 143 Wn. App. 819, 825, 182 P.3d 992, 995-96 (2008) *aff’d sub nom.*, *Shoemake ex rel. Guardian v. Ferrer*, 168 Wn.2d 193, 225 P.3d 990 (2010) (internal quotation and citation omitted). Damages may even include simple interest on a delayed recovery. *VersusLaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 328-29, 111 P.3d 866 (2005). In this case, as a result of Grafe’s failure to preserve claims against Prudential, Goll was left without recourse to seek contribution from Prudential for

damages in excess of the earnest money deposit once the underlying litigation was resolved.

**8. *Grafe's Acts and Omissions, Not those of Others, were the Proximate Cause of Goll's Damage***

Grafe cannot shift his fiduciary duty to anyone else by citing his withdrawal as Goll's attorney of record in 2003. Grafe argues that since the statute of limitations did not run until July 19, 2004, he cannot be liable for his client's failure to file suit by that date. However, Grafe ignores the fact that it was his own lack of diligence, erroneous advice, and failure to disclose material facts, and his acts alone, that proximately caused his client to fail to file suit prior to the statute of limitations. Grafe does not stand in the same shoes as his client as an equal party; instead he owed an affirmative duty to his client to thoroughly advise him of material facts.

Grafe also attempts to shift his fiduciary duty to his successor, attorney David Middleton. Mr. Middleton commenced legal representation of Goll only two and one-half months before trial, which was well beyond the timeframe for adding in third-party defendants. *See, e.g., Morgan Bros., Inc. v. Haskell Corp., Inc.*, 24 Wn. App. 773, 604 P.2d 1294 (1979) (Proper denial of motion to amend five weeks before trial to include third-party claims, without sufficient showing of why third-party defendant was not brought in before,

which would have further delayed case which had been pending for 17 months); *Ensley v. Mollmann*, 155 Wn. App. 744, 230 P.3d 599 (2010) (denial of motion to amend to add party filed two years after original complaint, several months after depositions had been taken, two weeks before the discovery cutoff, and two months before trial).

Unfortunately, because of Grafe's sudden departure from his firm, Mr. Middleton was severely restricted in his ability to pursue the real estate brokerage firms. Discovery, including the depositions of the real estate brokers, had already taken place. Mr. Middleton explained to his client that he could not change the course of action that Grafe had started. Mr. Middleton also adopted Grafe's opinion that until damages were sustained by Goll, an action against Prudential was not viable. CP 238.

Grafe's effort to shift responsibility for his negligence entirely to the successor lawyer within the same law firm, now deceased, is not supportable as a matter of law.

The principle of law relative to the liability of joint tort-feasors the appellant invokes is well settled in this jurisdiction. Whatever may be the rule elsewhere, we have uniformly held that where the concurrent or successive negligence of two or more persons combined together results in an injury or loss to a third person, and the negligence of the one without the concurring negligence of the other would not have caused the injury or loss, the third person may recover from either or both for the damages suffered.

*Ringgaard v. Allen Lubricating Co.*, 147 Wash. 653, 655-56, 267 P. 43 (1928). The responsibility of Grafe and Mr. Middleton is in the nature of a concurrent negligence in that the acts of two persons acting independently or successively both produced the injury for which damages are claimed. Moreover, an original act of negligence as primary causation may be so continuous that a concurrent wrongful act will be regarded *not as independent but as conjoining with the original act*. “It is the well-established law that the original wrongful act may be so continuous that the act of a third person precipitating the disaster will, in law be regarded, not as independent, but as conjoining with the original act to produce the accident. “ *Richey & Gilbert Co. v. Northwestern Natural Gas Corp.*, 16 Wn.2d 631, 642, 134 P.2d 444 (1943).

Grafe had an opportunity to add negligent co-defendants in the underlying litigation but did not do so, and now attempts to blame Mr. Middleton for his own omission. Here, there was a continuous course of action (or inaction) that led to the injury. If, for analytical purposes, a different lawyer handled a case every day, it would not only be the lawyer who had the case the last day who would be liable for letting the statute of limitations lapse. There are questions of fact necessary to address in this inquiry. For instance, each litigation presents logical times to file third-party complaints or to bring claims against non-parties. Here, Grafe, after

committing to amend the complaint to add Prudential, failed to do so, handing over to Mr. Middleton a case with a Joint Pretrial Order already entered failing to name any third parties. The most logical and cost-effective opportunity to add Prudential as a third-party defendant was lost on Grafe's watch. Grafe's failure directly and proximately led to the harm experienced by plaintiff: loss of the claim against Prudential.

The term "proximate cause" is defined by WPI 15.01 as "a cause which in a direct sequence, unbroken by any new independent cause, produces the injury complained of and without which such injury would not have happened. There may be more than one proximate cause of injury."

Any action or inaction by Mr. Middleton was simply a seamless, continuation of the action or inaction of Mr. Grafe. There was no breaking of the chain of causation by any *independent* cause. To the contrary, a fair viewing of the evidence supports the conclusion that Mr. Middleton's options and choices were shaped and limited by the actions and inactions of Mr. Grafe: in other words, there was no independent cause, but, rather, concurrent causes.

Under such circumstances, when there is the negligence of a third person (Mr. Middleton) concurring with that of the negligent Grafe, the plaintiff may sue both together or separately and neither can interpose the

defense that the prior or concurrent negligence of the other contributed to the injury. “[I]t is settled, seemingly without dispute, that, if the concurrent or successive negligence of two persons results in an injury to a third person, he may recover damages of either or both and neither can interpose the defense that the prior or concurrent negligence of the other contributed to the injury.” *Seibly v. City of Sunnyside*, 178 Wash. 632, 633, 35 P.2d 56 (1934)

The allocation of fault between Mr. Middleton and Grafe is a question of fact to be addressed by the trier of fact should Grafe bring Mr. Middleton into this action as an additional party. As it stands, however, Grafe’s conduct by itself proximately caused the injury conjoining with the successor lawyer or lawyers in a continuous fashion.

Grafe seeks to suggest that the conduct of Mr. Middleton constituted a superseding cause that breaks the chain of causation between Grafe’s actions and inactions and the harm to plaintiff. “In determining whether an intervening act constitutes a superseding cause, the relevant considerations under Restatement (Second) of torts § 442 (1965) are, inter alia, whether (1) the intervening act created a different type of harm than otherwise would have resulted from the actor’s negligence; (2) the intervening act was extraordinary or resulted in extraordinary consequences; (3) the intervening act operated independently of any

situation created by the actor's negligence.” *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 812-13, 733 P.2d 969 (1987).

Here, the actions or inactions of Mr. Middleton did not create a different type of harm, but simply continued the course set by Grafe, based on the reasoning that the statute of limitations against Prudential had not yet begun to run. There was nothing extraordinary about the conduct of Mr. Middleton; it was a continuation of the claim in the manner established by Grafe. The intervening act (appearance of Mr. Middleton) was not only *not independent*, but, to the contrary, built upon and was *dependent* upon the case architecture set by Grafe and the case theory established by Grafe.

The factual context facing Mr. Middleton was quite different from the one facing Grafe. Here, the failure to file a third-party complaint against Prudential left Mr. Middleton with the less attractive choice of commencing a separate action against Prudential for the damages of which would be contingent on the outcome of the *Chrisp v. Goll* appeal. It is a factual issue as to whether Grafe is equitably estopped from asserting negligence of Mr. Middleton alone where, as here, Mr. Middleton, a lawyer in the same firm, relied upon Grafe respecting case preparation. As a result, Mr. Middleton was left with a Joint Pretrial Order that did not allow for the addition of third-party defendants; the opportunity to file a

third-party complaint had likely passed, particularly where, as here, Grafe had already identified by name the third parties in ¶X of the Answer filed over seven months before. Mr. Middleton likely was led to adopt the erroneous theory advanced by Grafe as to when the action against Prudential accrued.

This allocation of fault between a defendant and a non-party is typically a question for the trier of fact and not resolvable as a matter of law once the conclusion is reached that liability is concurrent.

## **VII. CONCLUSION**

Summary judgment is appropriate only in pleadings and when the evidence show 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 court may not weigh the evidence, find facts, or decide credibility; it must view all facts and inferences in the light most favorable to the non-moving party. *Atherton Condominium Apartment Owners Ass'n Bd. Of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 505, 515-516, 799 P.2d 250 (1990). Any doubts are resolved against the moving party. If reasonable minds could differ, summary judgment is not proper. *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 30, 959 P.2d 1104 (1998). Beck presented the factual basis and legal theories to support her claims for professional malpractice and

negligence by Grafe. Beck's expert witness, a prominent Washington attorney, set forth a detailed factual and legal analysis of the underlying litigation against Prudential, and the manner in which Grafe's conduct fell below the standard of care to support Beck's claims. In viewing all facts and inferences in the light most favorable to Beck, the claims should not have been dismissed on summary judgment, as a matter of law. The trial court further erred by denying Beck's motion for reconsideration, in which Beck raised these very issues. Beck satisfied her burden to show that dismissal of the claims was not proper and that the trial court's decision should be reversed.

Respectfully submitted this 12th day of December, 2011.

SINGLETON & JORGENSEN, INC. PS

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