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No. 70434-6-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

SUSAN E. SHOLLY, LORNA L. STEWART, and LINDA
A. MULLINS

Appellants,

v.

CYNTHIA WORTH, M. JOHN WAY, and WORTH LAW
GROUP, P.S., INC., a Washington Professional Services
Corporation, d/b/a WORTH LAW GROUP,

Respondents.

**BRIEF OF RESPONDENTS CYNTHIA WORTH, M. JOHN WAY,
AND WORTH LAW GROUP, P.S., INC.**

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ORIGINAL

TABLE OF CONTENTS

	<u>Pages</u>
I. INTRODUCTION	1
II. COUNTER STATEMENT OF ISSUES.....	1
III. COUNTER STATEMENT OF CASE.....	2
A. Appellants Did Not Trust Their Stepmother and Stepsister.	2
B. Shortly After His Death, Ms. Sholly Estimated the Value of Her Father’s Assets at \$1.48 Million.	4
C. Appellants Retain Worth Law Group.	5
D. Appellants File a Trust Accounting Action Against Their Stepmother and She Responds by Demanding Mediation Under TEDRA.	7
E. Appellants File Suit Against Worth Law Group.....	9
F. In Response to Worth Law Group’s Motion for Summary Judgment, Appellants Produced No Evidence of “Hidden Trust Assets.”	11
IV. ARGUMENT.....	13
A. Summary Judgment Standard.	13
B. Appellants Have No Proof That They Suffered Any Damages by Settling for \$1.32 Million in January 2010.	14
1. Appellants Offered No Evidence They Suffered a Loss... ..	15
2. Appellants Presented No Evidence as to Collectability....	20
C. Appellants Produced No Evidence of Causation.	21
V. CONCLUSION.....	23

TABLE OF AUTHORITIES

	<u>Page(s)</u>
CASES	
<i>Boguch v. The Landover Corporation</i> , 153 Wn. App. 595, 224 P.3d 795 (2009).....	14, 15, 16, 22
<i>City of Seattle v. Blume</i> , 134 Wn.2d 243, 947 P.2d 223 (1997).....	23
<i>Daugert v. Pappas</i> , 104 Wn.2d 254, 704 P.2d 600 (1985).....	14
<i>Geer v. Tonnon</i> , 137 Wn. App. 838, 155 P.3d 163 (2007).....	14
<i>Grimwood v. Univ. of Puget Sound, Inc.</i> , 110 Wn.2d 355, 753 P.2d 517 (1988).....	14
<i>Griswold v. Kilpatrick</i> , 107 Wn. App. 757, 27 P.3d 246 (2001).....	15, 19, 22
<i>Jones v. State of Washington</i> , 170 Wn.2d 338, 242 P.3d 825 (2010).....	16
<i>Lavigne v. Chase, Haskell</i> , 112 Wn. App. 677, 50 P.3d 306 (2002).....	20
<i>Martin v. Wash. Legal Servs.</i> , 43 Wn. App. 405, 717 P.2d 779 (1986).....	15
<i>Matson v. Weidenkopf</i> , 101 Wn. App. 472, 3 P.3d 805 (2000).....	14, 15, 20
<i>Nielson v. Eisenhower & Carlson</i> , 100 Wn. App. 584, 999 P.2d 42 (2000).....	21
<i>Pugel v. Monheimer</i> , 83 Wn. App. 688, 922 P.2d 1377 (1996).....	25
<i>Ranger Ins. Co. v. Pierce County</i> , 164 Wn.2d 545, 192 P.3d 886 (2008).....	13, 14

<i>Schmidt v. Coogan</i> , 177 Wn. App. 602, 609-10, 287 P.3d 681 (2012).....	20
<i>Smith v. Preston Gates Ellis. LLP</i> , 135 Wn. App. 859, 147 P.3d 600 (2006).....	22
<i>Unifund CCR Partners v. Sunde</i> , 163 Wn. App. 473, 260 P.3d 915 (2011).....	14
RULES	
RAP 9.12.....	13
RAP 18.1 and 18.9.....	2, 4, 12

I. INTRODUCTION

This case involves a baseless legal malpractice action brought against Respondents Cynthia Worth, John Way and their firm, The Worth Law Group (collectively “Worth Law Group”) arising from a \$1.3 million settlement they achieved for Appellants. Now that Appellants have received the benefits of the settlement and face none of the risks of continuing to litigate, they allege that they should not have been counseled to settle. However, Appellants have failed to come forward with any competent evidence to support key elements of their legal malpractice claim: proximate cause, damages, and collectability. On May 3, 2013, the Honorable Mary Roberts properly granted the Worth Law Group’s Motion for Summary Judgment and dismissed Appellants’ claims. Respondents respectfully request that this court affirm the grant of summary judgment of dismissal.

II. COUNTER STATEMENT OF ISSUES

1. The trial court properly granted summary judgment of dismissal because Appellants failed to come forward with sufficient evidence to create a genuine issue of material fact on the essential elements of their legal malpractice claim, including causation, damages and collectability.

III. COUNTER STATEMENT OF CASE

The following facts are undisputed.

A. Appellants Did Not Trust Their Stepmother and Stepsister.

Appellants Susan Sholly, Lorna Stewart and Linda Mullins are sisters and are the adult children of the late James Stewart and his first wife. CP 133. Their father James Stewart married his second wife Dorothy Dunson in 1982. CP 133. From the very first time Appellants met their stepmother Dorothy Dunson and their stepsister Barbara Dunson,¹ Appellants did not trust them. CP 134; CP 428 p.19:12-25; CP 433 p.27:4-11.

In 1996, Appellants' father and stepmother executed a series of estate planning documents, which included James Stewart's Last Will & Testament and the Stewart-Dunson Revocable Living Trust. CP 151-191. Under the Trust, Mr. Stewart's and Ms. Dunson's separate and community property was to be placed in trust for their primary benefit during their lives CP 164-65 Art. 2; CP 134; 153 ¶ 2.5. Upon the last of their deaths, any remaining funds in the Trust were to be divided among Appellants and their stepsister Barbara according to the Trust provisions. CP 134; CP 165-175.

¹ Dorothy Dunson will be referred to throughout as "Ms. Dunson" or "Appellants' stepmother." To avoid confusion, her daughter Barbara Dunson will be referred to as "Barbara" or "Appellants' stepsister."

At the time the Stewart-Dunson Trust was executed in 1996, there were three attached schedules (Schedules A, B and C) which should have listed the separate and community property of Mr. Stewart and Ms. Dunson. CP 134; CP 187-189. However, these schedules were left blank, apparently to be completed at a later date. CP 134; CP 187-189.

Mr. Stewart died on March 5, 2009. CP 133; CP 406 p.18:10-11. At that time, Mr. Stewart and Ms. Dunson had been married for nearly 27 years. CP 133. Under the terms of the Trust, Ms. Dunson became the sole Trustee and the primary beneficiary of the Trust with the power to invest and distribute trust funds at her sole discretion. CP 164; CP 133-134; CP 152 ¶ 2.2; CP 156 ¶ 3.1; CP 175-181 Art. 9. Appellant Sue Sholly contends that at her father's memorial service, she overheard her stepmother and stepsister telling each other that "my sisters [Lorna and Linda] would not get a dime of [our] father's money."² CP 405 p.14:11-18.

² Appellants Linda Mullins and Lorna Stewart testified that their stepmother and stepsister stopped speaking to them in 2008 after they reported their stepsister Barbara Dunson to DSHS for elder abuse of her mother Dorothy Dunson. CP 415; CP 428. They reported Barbara for elder abuse because she pressed her mother to receive chemotherapy when she was diagnosed with cancer. *Id.*

B. Shortly After His Death, Ms. Sholly Estimated the Value of Her Father's Assets at \$1.48 Million.

On March 16, 2009, eleven (11) days after her father's death, Ms. Sholly went to her father and stepmother's house, and compiled summaries of her father's assets. CP 405 p.16:6-12; CP 406 p.17:19-23. While she was there, she confronted her stepmother and told her "not to [screw] us over." CP 405 p.16:18-22. Ms. Sholly prepared her own versions of Schedules A, B, and C for the Trust based upon her knowledge of her father and stepmother's finances. CP 413 pp.66:24-25, 67:1-25, 68:1-25; CP 420-422. According to Ms. Sholly's calculations, the value of her father's separate and community property when he died was approximately \$1.48 million. CP 136; CP 420-422.

Notably, for two years prior to her father's death, Ms. Sholly had assisted her father and stepmother with their finances, including paying bills, filing financial records and completing tax returns. CP 404 pp. 9:20-25, 10:1-15, 12:18-25; CP 405 p.13:1. Ms. Sholly was familiar with reading financial statements and records as she had worked as a retirement benefits auditor for the State of Washington for many years.³ CP 403 p.8:19-25, 9:1-19. Similarly, Appellant Linda Mullins had also assisted

³ Ms. Sholly testified at her deposition that she was so proficient at reading financial records that as a retirement benefits auditor, she could "retire 10 people a day." CP 403 p.8:15-16.

her father with filing his financial records prior to his death. CP 404 p.12:18-25; CP 405 p.13:1.

Ms. Sholly provided her version of Schedules A, B, and C to her father's attorney Mike Regeimbal along with back-up documentation. CP 405 p.16:7-12; CP 406 p.17:19-24; CP 413 pp.66:24-25, 67:1-25, 68:20. When pressed, Mr. Regeimbal advised Ms. Sholly that he could not act as her attorney.⁴ CP 414 p. 87:2-22.

C. Appellants Retain Worth Law Group.

Ms. Sholly retained Worth Law Group on March 30, 2009, approximately twenty-five (25) days after her father died. CP 142-143; CP 407 p.1-21. Ms. Sholly testified that her stepmother Dorothy was irate that she had retained an attorney. CP 406 p.17:2-15. Shortly thereafter, Dorothy Dunson appointed her daughter Barbara as Co-Trustee of the Stewart-Dunson Trust. CP 193; CP 416 p.113:1-14.

In their first meeting, Ms. Sholly advised Cynthia Worth that she was concerned that her stepmother and stepsister were spending her father's money and wanted to know her rights as a beneficiary. CP 133-134; CP 409 p.40:24-25; CP 410 pp.41:1-10, 42:13-15; CP 416 p.114:13-17. Among other documents, Ms. Sholly provided the Worth Law Group

⁴ Ms. Sholly subsequently filed a bar complaint against Mr. Regeimbal. CP 414 pp.87:23-25, 88:1-23.

with her version of Schedules A, B, and C to the Trust along with bank statements and records supporting her calculations. CP 133-134; CP 413 pp. 66:24-25, 67:1-25, 68:1-25; CP 414:1-19; CP 420-422.

Cynthia Worth advised Sue Sholly that under her father's Will and Trust neither Ms. Sholly nor her sisters were entitled to their father's separate and community property until after their stepmother died. CP 134-137; CP 416 p.115:2-4. However, given Ms. Sholly's concerns, the Worth Law Group worked with Ms. Dunson's attorney to verify the assets to be placed in the Trust. CP 133-134. As part of this process, the Worth Law Group were able to convince Ms. Dunson (and her attorney) to voluntarily "disclaim" the following assets to Ms. Sholly and her sisters:

- their father's IRA, valued at \$144,652 (CP 134; CP 138-139; CP 195-198; CP 419 p.125:14-18);

- their father's coin collection, valued at \$29,564 (CP 138-139; CP 200-204; CP 419 p.125:19-21);

- a truckload of furniture and other heirlooms (CP 135; CP 138-140; CP 210-212; CP 419 p.125:19-21);

- \$21,492 in cash from Mr. Stewart's bank accounts, some of which Sue Sholly had already taken without her stepmother's permission. (CP 133; CP 138-140; CP 214-216; CP 413 p.68:22-25; CP 414 p.85:1-22; CP 419 p.125:22-25)

In May of 2009, the Worth Law Group also convinced Appellants' stepmother Dorothy Dunson to deed one-half of the family home over to the Trust even though Ms. Dunson was entitled to keep the house under the terms of James Stewart's Will, which gave all his property that was not in the Trust to her. CP 134, CP 206-208.

As part of the delivery of the truckload of furniture and heirlooms in November of 2009, Sue Sholly and her sisters received a file cabinet, which contained an April 2009 Smith Barney statement which reflected the various accounts holding the Trust funds and their stepmother's separate accounts. CP 412 pp. 58:19-25, 59:1-25, 60:1-25.

D. Appellants File a Trust Accounting Action Against Their Stepmother and She Responds by Demanding Mediation Under TEDRA.

Between March of 2009 and November of 2009, the Worth Law Group made numerous requests to Ms. Dunson and her attorney for an accounting of the funds in the Trust.⁵ CP 135. Although the discussions were initially cooperative, the process broke down, and on November 25, 2009, the Worth Law Group filed a Petition under Washington's Trust Accounting and Dispute Resolution Act (TEDRA), seeking an accounting of the Trust, the appointment of a third-party trustee and other relief.

⁵ Under the terms of the Trust, the Trustee was required to prepare an annual accounting. CP 178. However, during this time period, the annual accounting was not yet due since Mr. Stewart had died in March of 2009.

CP 135. Dorothy Dunson and her attorney responded by demanding mediation under TEDRA. CP 135. Recognizing that mediation would likely be ordered by the Court, the parties agreed to attend a day-long mediation on January 18, 2010, before retired Judge Daniel Berschauer. CP 135.

Judge Berschauer presented the parties with a mediation agreement which provided in pertinent part:

We understand that any agreements reached during the mediation are entered into voluntarily and by mutual acceptance of the parties. We also understand that anyone can choose to terminate the mediation at any time during the proceedings.

CP 389.

At the day-long mediation, Appellants agreed to resolve their dispute with their stepmother and stepsister in exchange for an additional \$1.1 million in assets, plus certain personal items, and \$25,000 for the Worth Law Group's fees. CP 225-227; CP 409 pp.39:24-25, 40:1-23; When combined with the amounts previously received, the total value of the funds received by Appellants from their stepmother was more than \$1.32 million. CP 261-262. Appellants each testified that the decision to settle was voluntary and that they met privately over the course of the day to discuss whether they wanted to settle or to continue to litigate with their stepmother and stepsister. CP 409 p.40:11-25; CP 410 p.41:1-10; CP 429

p.95:8-15; CP 434 pp.66:16-25, 67:1-3. In deciding to settle, Appellants noted that had they continued to litigate, they were concerned that the money would be spent and it would be very hard to get it back. CP 409 p.40:11-25; CP 410 p.41:1-10; 416 pp.114:13-17, 116:6-25; CP 430 pp.102:23-25, 103:1-4, 103:17-21. They also noted that it might be years before their stepmother died and they were entitled to receive anything. CP 416 p.115:2-4. Finally, Appellants acknowledged that they knew they were settling without a full accounting of the Trust. CP 409 p.39:10-23; 410 pp.41:24-25, 42:1-19; CP 418 p.124:13-25; CP 419 p.125:1-13; CP 425; CP 429 p.95:8-15; CP 434 p.66:16-19.

In the days after the mediation, Appellant Sue Sholly sent a thank-you note to the Worth Law Group in which she acknowledged that she was grateful that they had “gotten 1.1 [million] out of Dorothy.” CP 418 p.124:13-25; CP 419 p.125:1-13; CP 424-425.

E. Appellants File Suit Against Worth Law Group.

On August 11, 2011, Appellants filed this lawsuit, contending that they should not have been counseled to settle. CP 1-6. Appellants allege that they learned after the mediation that there were other assets they were entitled to inherit that were not part of the settlement. CP 5 ¶ 3.21; CP 407 p.27:1-7. However, after more than a year of litigation and repeated attempts by the Worth Law Group to discover the basis for their

claim, Appellants failed to produce a single financial record showing that there were additional assets that were not known at the time of the mediation. CP 261 ¶ 7; CP 264 ¶ 15.

The Worth Law Group moved for summary judgment, supported by Declarations from its two experts – attorney Robin Balsam and CPA Mark Newton. CP 69-92; CP 230-235; CP 258-264. Ms. Balsam opined that the Worth Law Group met the standard of care in recommending settlement and noted that the settlement was remarkable in that it was achieved years before the Appellants were entitled to receive anything. CP 232-234 ¶ 9; CP 234 ¶¶ 11-12. Ms. Balsam also noted that there were many factors supporting the settlement, including the long history of distrust between the parties, the fact that a court was likely to support Ms. Dunson as the surviving spouse of nearly twenty-seven years, the fact that the mediator had verified that \$1.33 million was in the trust accounts shortly before the mediation, the fact that the sisters had extensive knowledge of their father’s assets at the time of his death, the fact that the sisters were not entitled to receive anything until their stepmother died, the emotional and legal cost of the dispute, the fact that the stock market was highly volatile during this time period, and the fact that the sisters did not trust their stepmother or stepsister to properly invest the trust assets. CP 232-234 ¶ 9.

The Worth Law Group also introduced the testimony of CPA Mark Newton, who reviewed over 5,000 pages of financial records, and opined that the valuation of Mr. Stewart's assets at the time of his death was \$1.48 million, that there was no evidence that any assets had been concealed at the time of the mediation, and that the 2009 and 2010 Trust tax returns supported these valuations. CP 258-264.

F. In Response to Worth Law Group's Motion for Summary Judgment, Appellants Produced No Evidence of "Hidden Trust Assets."

In response to Worth Law Group's dispositive motion, Appellants contended that their belatedly disclosed experts created an issue of fact as to their allegations.⁶ CP 352. However, even a cursory review of those expert opinions demonstrate that the expert testimony did not assist the Appellants in meeting their legal and factual burdens. The testimony of attorney Karolyn Hicks was offered on the standard of care. CP 371-374. However, Ms. Hicks did not even address whether Appellants could have prevailed in the TEDRA action against their stepmother, or how they could have recovered more had they continued to litigate. *Id.*

⁶ Appellants' experts had been previously excluded from testifying due to repeated discovery violations and non-disclosure. CP 392-394. However, the trial court nevertheless considered the testimony of the excluded experts on summary judgment. CP 390-391.

Appellants also offered the “preliminary opinion” in the form of a “report” of CPA Neal Beaton as their damages expert. CP 361-363. Notably, Appellants gave Mr. Beaton only three documents to review: a spreadsheet Appellant Lorna Stewart created, one month of their stepmother’s Smith Barney account statements, and James Stewart’s monthly retirement benefit information. CP 361. Mr. Beaton was not asked to audit or verify any of the documents he received or any of the assumptions he was asked to make. CP 363. Mr. Beaton did not review the 2009 or 2010 Trust tax returns (which Sue Sholly testified were key to their case), nor the financial records Lorna Stewart allegedly used to create the spreadsheet, nor any of the thousands of pages of financial records produced in this litigation. CP 361-362. Moreover, Mr. Beaton provided no opinion regarding what amount, if any, Appellants could have recovered from their stepmother or stepsister had they continued to pursue the TEDRA action, or whether any of that amount would have been collectible based upon the current assets of Appellants’ stepmother or stepsister. CP 361-363.

Finally, Appellants also submitted their own Declarations in opposition to the Worth Law Group’s motion which baldly stated that “there were additional financial accounts that we likely would have inherited.” CP 365 ¶ 10; CP 368 ¶ 9; CP 370 ¶ 9. Appellants produced

no financial records or documentation to support these self-serving statements. CP 364-370.

On May 3, 2013, after hearing oral argument, Judge Mary Roberts granted the Worth Law Group's Motion for Summary Judgment of Dismissal. CP 390-391.

IV. ARGUMENT

A. Summary Judgment Standard.

A motion for summary judgment is properly granted where “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” CR 56(c); *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008); *see also* RAP 9.12. To avoid summary judgment, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact. *Ranger Ins. Co.*, 164 Wn.2d at 552. Speculation or argumentative assertions that unresolved factual issues remain cannot defeat summary judgment. *See id*; *see also Unifund CCR Partners v. Sunde*, 163 Wn. App. 473, 483 n.1, 260 P.3d 915 (2011). “A fact is an event, an occurrence, or something that exists in reality. . . . It is what took place, an act, an incident, a reality as distinguished from supposition or opinion.” *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988) (emphasis added).

The trial court properly adhered to these principles when it granted Worth Law Group's motion for summary judgment.

B. Appellants Have No Proof That They Suffered Any Damages by Settling for \$1.32 Million in January 2010.

To establish damages in a legal malpractice action, Appellants have a two-fold burden. First, it is the Appellants' burden to show that "the outcome... would have been more favorable to [them] than the result actually obtained but for the defendant attorney's negligence." *Geer v. Tonnon*, 137 Wn. App. 838, 840, 155 P.3d 163 (2007) *review denied* 162 Wn.2d 1018 (2008); *see also Daugert v. Pappas*, 104 Wn.2d 254, 257, 704 P.2d 600 (1985). Second, it is the Appellants' burden to show that had they received a more favorable result in the underlying action, that judgment was collectible from the underlying defendant. *Matson v. Weidenkopf*, 101 Wn. App. 472, 484, 3 P.3d 805 (2000); *see also Boguch v. The Landover Corporation*, 153 Wn. App. 595, 611-12, 224 P.3d 795 (2009) (*quoting Sherry v. Diercks*, 29 Wn. App. 433, 438, 628 P.2d 1336 (1981))("A client must show that, if the client's attorney had not committed the alleged malpractice, the client 'would have prevailed or at least would have achieved a better result' than that actually obtained"). Here, Appellants have proffered no evidence to establish either of these requirements.

1. Appellants Offered No Evidence They Suffered a Loss.

The measure of damages for legal malpractice is the amount of loss actually sustained as a proximate result of the attorney's conduct. *Matson*, 101 Wn. App. at 484 (citing *Tilly v. Doe*, 49 Wn. App. 727, 732, 746 P.2d 323 (1987)); *Martin v. Wash. Legal Servs.*, 43 Wn. App. 405, 412, 717 P.2d 779 (1986)). Dismissal is warranted where Appellants have produced no competent evidence to establish that they would have achieved a greater result but for the attorney's conduct. *Griswold v. Kilpatrick*, 107 Wn. App. 757, 760-61, 27 P.3d 246 (2001). Appellants cannot overcome summary judgment "by relying on conclusory allegations, speculative statements, or argumentative assertions." See *Boguch*, 153 Wn. App. at 610. Appellants produced no evidence that they suffered a loss by settling for \$1.32 million in assets at the January 2010 mediation and dismissal was therefore warranted.

It is uncontroverted that the value of James Stewart's separate property and his share of the community property he shared with his wife of nearly 27 years was approximately \$1,479,530 at the time of his death. CP 261 ¶ 7. For purposes of the mediation, the Worth Law Group estimated the valued of the estate at approximately \$1.5 million, based upon information supplied by the Appellants. CP 218. The Worth Law Group was able to secure a total settlement of \$1,320,708 for the

Appellants, years before they could have received any amount from the Trust. CP 261 ¶ 8.

Appellants offered no evidence, aside from pure speculation, to support an inference that they could or would have received a better result if they proceeded with litigation, and thereby suffered compensable damages. Appellants did not identify a single asset that was not considered as part of the settlement, nor have they come forward with any evidence that their father's Trust was undervalued as part of the settlement negotiations.⁷

Further, Appellants offered no expert testimony to establish that they would have achieved a greater result. Ms. Hicks, Appellants' standard of care expert, was silent on this issue. *See* CP 371-374. Mr. Beaton, Appellants' damages expert, was likewise silent on this issue. *See* CP 361-363. Mr. Beaton was not even asked by Appellants to determine what amount could have recovered from their stepmother or stepsister had they continued to pursue the TEDRA action. Instead, Appellants told Mr. Beaton to assume that their father's estate was worth a

⁷ Appellants' own Declarations which baldly stated that "there were additional financial accounts that we likely would have inherited," are based on nothing in the record, merely their own speculation. CP 365 ¶ 10; CP 368 ¶ 9; CP 370 ¶ 9. Appellants cannot create an issue of fact by submitting self-serving Declarations that are purely speculative. *Jones v. State of Washington*, 170 Wn.2d 338, 242 P.3d 825 (2010); *Boguch*, 153 Wn. App. at 610.

certain amount at the time of his death in March 2009, and then to “measure the potential value [in December 2012] of Mr. Stewart's separate estate assuming those assets had been distributed to his three daughters [in March 2009].” CP 361-363.

This calculation is entirely irrelevant to the issues in this case. First, Mr. Beaton was not asked to establish the value of Mr. Stewart’s property in 2009. Instead, Mr. Beaton was given limited records (a spreadsheet prepared by Appellant Stewart, one month of Smith Barney account statements, and James Stewart's monthly retirement benefit information). CP 361. Mr. Beaton did not audit the material given to him by Appellants, and instead, “relied upon such materials, and the response to my inquiries, as being substantially true and correct.” CP 363. Appellants did not provide Mr. Beaton with the more than 5,000 pages of financial records ultimately obtained via discovery, nor even the 2009 and 2010 Trust Tax Returns, which Appellant Sue Sholly testified were the key evidence supporting their claims. CP 361; CP 407 p.27:1-7.

Second, as Appellants acknowledge, they were not entitled to any amount of money from their father's estate under the Will or Trust until after the death of their stepmother Dorothy Dunson (which occurred in January of 2013). CP 416 p.115:2-4. Thus, the hypothetical scenario

presented to Mr. Beaton whereby they received their father's assets when he died was never a possibility.

Third, Appellants acknowledged that their stepmother was accessing the Trust funds (as she was entitled to do under the Trust document) after their father's death in March 2009 until they settled with her in January of 2010. CP 409 p.40:11-25; 410 p.41:1-10. Thus, even assuming that their father's share of the Trust was worth the value Appellants asked their expert to assume (for which there is not one shred of evidence in the record), Appellants knew their stepmother was spending money from that amount and could continue to do so until (1) they settled with her, or, (2) she died. *Id.*

In contrast, the Worth Law Group's damages expert Mark Newton received and reviewed all financial documents that Appellants and the Worth Law Group had at the time of the January 2010 mediation, as well as the voluminous records obtained and produced by Appellants in discovery (listed, in detail, in his report). CP 259-260 ¶ 4. Mr. Newton also reviewed the Trust Tax Returns for 2009 and 2010. CP 260 ¶ 4(c). Based upon his review of all of the records, Mr. Newton concluded that the value of Mr. Stewart's separate property and his half of the community property he shared with Ms. Dunson was approximately \$1,479,530.00 at

the time of his death on March 5, 2009. CP 261 ¶ 7. Mr. Newton also verified that the Trust tax returns supported this valuation. *Id.*

This is not a case where two experts reviewed the same documents and reached different conclusions, thereby creating an issue of disputed fact. The valuation posited in Mr. Beaton's report (which he admits he received from the Appellants and never audited) has never been documented by Appellants in any fashion. Instead, it was based on unfounded assumptions and speculation. A party cannot create an issue of fact by submitting conclusory or speculative expert testimony. *Griswold v. Kilpatrick*, 107 Wn. App. 757, 27 P.3d 246 (2001). The trial court properly looked beyond these speculative and unfounded assertions of "other assets" and granted summary judgment.

It is uncontroverted that Appellants received the bulk of their father's assets in the settlement in January of 2010 – more than \$1.32 million of an estate with a total value of approximately \$1.48 million. CP 419 pp.125:14-25, 126:3-6. Appellants have offered no competent evidence that there were assets not accounted for at the time of mediation or that "there were additional financial accounts we likely would have inherited." Accordingly, summary judgment of dismissal was appropriate.

2. Appellants Presented No Evidence as to Collectability.

In Washington, “the collectability of the underlying judgment is a component of damages in a legal malpractice action.” *Matson*, 101 Wn. App. at 484 (citing *Tilly*, 49 Wn. App. at 732-33); see also *Schmidt v. Coogan*, 177 Wn. App. 602, 609-10, 287 P.3d 681 (2012) review granted 177 Wn.2d 1019 (2013). “Courts consider the collectability of the underlying judgment to prevent the plaintiff from receiving a windfall: ‘It would be inequitable for the plaintiff to be able to obtain a judgment, against the attorney, which is greater than the judgment that the plaintiff could have collected from the third party[.]’” *Lavigne v. Chase, Haskell*, 112 Wn. App. 677, 687, 50 P.3d 306 (2002) (citing *Matson*, 101 Wn. App. at 484 (quoting *Kituskie v. Corbman*, 452 Pa. Super. 467, 682 A.2d 378, 382 (1996), aff’d, 552 Pa. 275, 714 A.2d 1027 (1998))). Absent adequate proof of collectability, the plaintiff could unjustifiably receive a windfall, and summary judgment is appropriate in favor of defendant. *Lavigne*, 112 Wn. App. at 687.

In this case, Appellants offered no proof that if they had continued with the TEDRA action, any judgment they hypothetically could have received was collectable from their stepmother and/or stepsister. Appellants produced no records regarding the assets of Ms. Dunson or Barbara. Moreover, Appellants’ own testimony supported the conclusion

that collectability was a significant concern. Specifically, Ms. Sholly testified that, had they continued with the TEDRA litigation, they were concerned that Ms. Dunson and Barbara would have continued to spend the Trust assets, and, “the concern was is, once [Dorothy and Barbara] spent it, it would be very hard to get it back.” CP 410. Appellants made no effort to meet their burden of proof to establish the fact of their damages or the collectability of any such damages. Moreover, they offered no argument on collectability in their briefing before this Court or below. This Court should affirm the dismissal of Appellants’ suit on this basis alone.

C. Appellants Produced No Evidence of Causation.

Appellants’ claims were also aptly dismissed because they cannot meet the proximate cause element of their claim. In the legal malpractice context, the element of proximate cause consists of two parts: cause in fact and legal causation. *Nielson v. Eisenhower & Carlson*, 100 Wn. App. 584, 591, 999 P.2d 42 (2000), *review denied* 141 Wn.2d 1016 (2000). In the legal malpractice context, “proximate cause boils down to whether the client would have fared better but for the attorney's [alleged] malpractice.” *Smith v. Preston Gates Ellis. LLP*, 135 Wn. App. 859, 147 P.3d 600 (2006) *review denied* 161 Wn.2d 1011 (2007) (citing *Sherry v. Diercks*, 29 Wn. App. 433, 437, 628 P.2d 1336 (1981)); *see also Boguch v. The*

Landover Corporation, 153 Wn. App. 595, 224 P.3d 795 (2009) (quoting *Sherry*, 29 Wn. App. at 438) (“A client must show that, if the client’s attorney had not committed the alleged malpractice, the client ‘would have prevailed or at least would have achieved a better result’ than that actually obtained”). Appellants bear the burden of proffering admissible evidence that they would have fared better, and theoretical speculation is not sufficient, as a matter of law. *Griswold v. Kilpatrick*, 107 Wn. App. 757, 760-61, 27 P.3d 246 (2001) (plaintiff produced insufficient proof that, but for the delay in prosecuting the case, the claim would have settled for a larger sum). Accordingly, a plaintiff in a legal malpractice action who alleges an inadequate settlement in the underlying action must prove that, if not for the alleged malpractice, she would have received more money in a later settlement or at trial. *Griswold*, 107 Wn. App. at 758.

Again, Appellants have offered no evidence that they would have achieved a better result if they had not settled in January 2010. It is undisputed that Appellants were not entitled to receive any money from the Trust until Ms. Dunson’s death, which did not occur until nearly three years later on January 5, 2013. CP 416 p.115:2-4 [“Q. When would you have been able to get the assets that were in the trust? A. After Dorothy died.”]). The undisputed record shows that if Appellants had not settled, Ms. Dunson and/or Barbara likely would have retained control over the

Trust assets until Ms. Dunson's death, and Appellants were confident that Ms. Dunson and Barbara were going "to spend the money." CP 409 p.40:11-25; CP 410 p.41:1-10.

In addition, Appellant's voluntary, informed decision to settle severs any potential causal link between the advice to settle and Appellants' alleged damages.⁸ Where Appellants' decision to accept the settlement was the cause of their alleged injuries, liability does not extend to Respondents, as a matter of law. *City of Seattle v. Blume*, 134 Wn.2d 243, 251-52, 947 P.2d 223 (1997). To the extent Appellants suffered any injury as a result of the settlement (which Respondents strongly dispute), they themselves were the cause of that injury.

V. CONCLUSION

Appellants received a remarkably good settlement worth more than \$1.32 million in January 2010 by virtue of the Worth Law Group's efforts. Appellants never discovered nor produced any evidence of any "additional assets." Based on all of the evidence before the Court, it is hard to

⁸ CP 429 p.95:8-15 ["Q. ...[A]s you were sitting there at the mediation, though, you knew you didn't have a final accounting, and you knew you didn't have the values, yet you agreed to settle; is that correct?

A. (Lorna L. Stewart): Yes.

Q. And you testified earlier that your decision to settle was voluntary, is that right?

A. Reluctantly, yes."]

imagine a better result than the settlement obtained for them by the Worth Law Group in January 2010.

The Worth Law Group respectfully requests that this Court affirm the trial court's order granting Worth Law Group's motion for summary judgment. Appellants' claim of legal malpractice must fail because they cannot establish proximate cause, damages, or that they could have collected more had they chosen not to settle. The trial court should be affirmed on each of these bases.

RESPECTFULLY SUBMITTED this 2nd day of February, 2014.

COZEN O'CONNOR

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DECLARATION OF SERVICE

The undersigned states:

I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 18 years, I am not a party to this action, and I am competent to be a witness herein.

On this 3rd day of February, 2014, I caused to be filed the foregoing BRIEF OF RESPONDENTS CYNTHIA WORTH, M. JOHN WAY, AND WORTH LAW GROUP, P.S., INC. by sending the original and one copy via U.S. mail, first-class postage prepaid, to Division I of the Court of Appeals for the State of Washington. I also served a copy of said document on the following party as indicated below:

Parties Served	Manner of Service
<i>Counsel for Appellants:</i> Jeffrey Parker, Esq. Parker Law Firm, PLLC 1524 Alaskan Way, Suite 109 Seattle, WA 98101	() Via Legal Messenger () Via Overnight Courier (X) Via U.S. Mail (X) Via Email

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 3rd day of February, 2014.


Leslie Nii Yamashita

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