

NO. 73895-0-I

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

HATSUYO "SUE" HARBORD,

Appellant.

v.

SAFEWAY, INC.; DANIEL P. HURLEY, MATTHEW BEAN; MIKE
LAGRANGE; SUE BONNETT; KEN BURNS,

Defendants/Respondents.

BRIEF OF RESPONDENT MATTHEW BEAN

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I. INTRODUCTION

Respondent Matthew Bean (“Mr. Bean”) represented appellant Hatsuyo Harbord (“Ms. Harbord”) in a lawsuit she filed in King County Superior Court in 2013 against Safeway, Inc. for wrongful termination. Safeway successfully removed the case to federal court. In federal court, Mr. Bean agreed to a Stipulated Protective Order (“SPO”) with counsel for Safeway, Daniel Hurley (“Mr. Hurley”). The SPO governed how confidential information would be treated during litigation, and was patterned off of the model protective order published by the Western District of Washington. Ms. Harbord stopped communicating with Mr. Bean after the SPO was entered, started filing documents on her own behalf, and claimed she did not understand the SPO. The court allowed Mr. Bean to withdraw and held the SPO did not hinder the presentation of Ms. Harbord’s case. The court vacated the SPO. Ms. Harbord’s case was remanded to King County Superior Court on her own motion, where it was dismissed. Ms. Harbord sued Mr. Bean for legal malpractice in 2014. The trial court dismissed the action because Ms. Harbord did not present any evidence that Mr. Bean breached the standard of care. Ms. Harbord cannot establish breach, proximate cause, or damages, essential elements of her legal malpractice claim. The trial court’s entry of summary judgment of dismissal in Mr. Bean’s favor should be affirmed.

II. ASSIGNMENTS OF ERROR

Assignments of Error

Mr. Bean assigns no error to the superior court's entry of summary judgment of dismissal in his favor.

Issues Pertaining to Assignments of Error

1. Whether this court should affirm the superior court's summary judgement of dismissal where:

- (a) Agreeing to a Stipulated Protective Order is a "judgment decision" under *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey, P.C.*, 180 Wn. App. 689, 324 P.3d 743 (2014);
- (b) Ms. Harbord presented no evidence or expert testimony that no reasonable Washington attorney would have made the same decision as Mr. Bean;
- (c) Ms. Harbord presented no evidence of any damage she sustained because Mr. Bean entered into the SPO, which the federal court vacated and held did not affect the presentation of her case;
- (e) Ms. Harbord did not move to continue under CR 56(f) and the trial court properly ruled upon Mr. Bean's motion;
- (f) Ms. Harbord's complaint amounts at most to a communication issue between her and Mr. Bean, but communication issues in and of themselves do not create a private cause of action.

III. STATEMENT OF THE CASE

A. Mr. Bean represented Ms. Harbord in a case filed with the Washington State Human Rights Commission.

Mr. Bean began representing Ms. Harbord approximately five years ago, after Ms. Harbord filed a complaint against Safeway with the Washington State Human Rights Commission. CP 111. When the Human Rights Commission did not take prompt action, Mr. Bean and Ms. Harbord decided to file a lawsuit against Safeway in King County Superior Court for wrongful termination. CP 111. The lawsuit was filed on May 24, 2013. CP 36. On July 1, 2013, Safeway filed a motion to remove the lawsuit to federal court, alleging diversity of citizenship. CP 36, 185, 291-294, 397. The motion was granted, and Safeway answered Ms. Harbord's complaint in federal court on July 8, 2013. CP 187-188. A status conference was held on August 6, 2013. CP 187-188. Mr. Bean attended the status conference on behalf of Ms. Harbord. CP 187-188.

B. Mr. Bean agreed to file a stipulated protective order in federal court with counsel for Safeway.

In September of 2013, Mr. Bean's associate, Christine Porter, exchanged correspondence with Mr. Hurley, counsel for Safeway, about a proposal to enter a stipulated protective order. CP 116-117. The stipulated protective order would govern how confidential information would be treated by both parties. CP 116-117. Mr. Bean and Mr. Hurley

agreed to the SPO, which was filed by Safeway on September 24, 2013 and entered by the court on October 1, 2013. CP 90-99, CP 189.

The SPO differs very little from the Model Stipulated Protective Order (“model order”) published by the Western District of Washington. Compare CP 80-88 and 90-99; Western District Local Rule 26(c)(1). In fact, there are just three differences: (1) the SPO describes the confidential material to be protected (Compare CP 81 and 91); (2) the SPO allows confidential information to be disclosed to certain witnesses before their depositions rather than during their depositions (Compare CP 82, 93); and (3) the SPO describes in greater detail how confidential documents should be designated. (Compare CP 83-84, CP 94-95). The changes were submitted in redlines to the federal court. CP 212-223. Mr. Bean initiated the change to allow confidential information to be disclosed to certain witnesses before their depositions. CP 117, 215.

C. The federal court finds the SPO does not hinder the presentation of Ms. Harbord’s case and allowed Mr. Bean to withdraw as Ms. Harbord’s counsel.

After the SPO was entered, Ms. Harbord began to file documents on her own behalf. CP 106. Ms. Harbord also stopped communicating with Mr. Bean. CP 113. Concerned about a conflict, Mr. Bean moved to withdraw as Ms. Harbord’s counsel on November 19, 2013. CP 106-107.

The court allowed Mr. Bean to withdraw as counsel on January 6, 2014.

CP 36, 119-121. In its order, the Court stated:

The Court recognizes that the Stipulated Protective Order will not hinder Plaintiff's presentation of her case.

CP 120. The court also vacated the SPO, citing Ms. Harbord's claim that she signed Exhibit A of the SPO under "duress." CP 101-104, 120. Ms. Harbord continued representing herself in federal court, eventually filing a motion to remand to state court on February 21, 2014. CP 192.

D. Ms. Harbord's case is dismissed after it is remanded to King County Superior Court.

The federal court granted Ms. Harbord's motion to remand on April 1, 2014. CP 196, 399-406. The federal court found that it lacked subject matter jurisdiction because Safeway had not provided sufficient evidence that the amount in controversy exceeded \$75,000. CP 400. The case was officially received by King County Superior Court on May 8, 2014. CP 198. Within a week, Mr. Bean removed himself as attorney of record in King County Superior Court. CP 36. Ms. Harbord's case was dismissed on summary judgment sometime after Safeway filed a motion to compel discovery and Ms. Harbord was ordered to finish discovery by September 18, 2014. CP 37, RP 7/24/15 at 35.

E. Ms. Harbord files suit against Mr. Bean, but does not have evidence to establish the essential elements of her legal malpractice claim.

Ms. Harbord filed suit against Mr. Bean, Safeway, three individuals related to Safeway, and Mr. Hurley on September 23, 2014. CP 33-44. Against Mr. Bean, Ms. Harbord made allegations related to the SPO that was entered during the 2013 lawsuit. CP 33-44. Safeway filed a separate motion to dismiss Ms. Harbord's claim against it, which is separate from the claim against Mr. Bean. RP 7/24/15.

Mr. Bean filed a motion for summary judgment on January 28, 2015 in lieu of answering the complaint. CP 68-76. The motion was served with a Declaration of Service and a "Second Amended Notice of Hearing," which noted the hearing for April 3, 2015. CP 68, 138-139, RP 4/3/15. Ms. Harbord claimed she did not receive notice of the summary judgment hearing, CP 61-62, but the trial court rejected her argument. RP 4/3/15 at 9-13. The trial court observed Ms. Harbord had refused delivery of Mr. Bean's reply to the motion for summary judgment, but was provided with Mr. Bean's reply documents in court. RP 4/3/15 at 9-13. The trial court granted summary judgment of dismissal to Mr. Bean on April 3, 2015 because Ms. Harbord did not present any evidence that Mr. breached the standard of care. CP 1186-1187, RP 4/3/15 at 17-18, 21.

F. Mr. Bean attempted to explain the SPO to Ms. Harbord after it was entered.

Ms. Harbord appears to allege that the SPO was filed and entered without her knowledge and without her signature. CP 36, 43-44, 102, 169-171, 378. Significantly, there is no place for the client's signature in addition to counsel's signature on the model protective order or the SPO, as there would be for interrogatories, which require verification. (Compare CP 87 and CP 98); Fed. R. Civ. P. 33(b)(5). Instead, the model order and the SPO state that "Exhibit A" (entitled "Acknowledgement and Agreement to be Bound") must be signed by any witness to whom disclosure of confidential information is reasonably necessary, but only before confidential information is disclosed to them. CP 82, 93.

Ms. Harbord signed Exhibit A on November 13, 2013, about two months after the SPO was entered. CP 104. Ms. Harbord also signed a "supplemental response" filed with the federal court on November 15, 2013 stating that she had read the SPO, understood the SPO, and agreed to abide by it:

Plaintiff Hatsuyo Harbord hereby submits that she has read the ORDER REGARDING HANDLING OF CONFIDENTIAL MATERIAL. Harbord understands the [SPO] and will abide by it."

CP 103. Mr. Bean also signed the supplemental response. CP 103.

Ms. Harbord claims she did not understand the significance of Exhibit A when she signed it, and that she signed the Exhibit A under “duress,” along with the document stating that she understood the SPO. CP 44, CP 101-104. The “duress” appears to be that Mr. Bean would not continue to represent her unless the SPO was entered. CP 112. Mr. Bean regularly enters into stipulated protective orders and understands from experience that discovery disputes are frowned upon by the court if the dispute is not reasonable. CP 112.

Mr. Bean spent more than an hour explaining the purpose of the SPO to Ms. Harbord and her husband after it was entered. CP 112, CP 1204, CP 1206-08. Ms. Harbord agreed to sign the “supplemental response” indicating that she would abide by the terms of the order. CP 112. Additionally, Mr. Bean sent an email to Ms. Harbord on September 24, 2013 regarding the SPO. CP 111, 115. The email states:

I apologize if we did not send these to you. What happens next is that we file a motion with the judge keeping certain documents confidential and to be used for litigation purposes only.

CP 111, 115. The SPO was filed by Safeway the same day; it was entered by the court on October 1, 2013. CP 36, 189.

In addition to the SPO, Ms. Harbord appears to take issue with how she and Mr. Bean communicated, as well as Safeway’s motion to

remove to federal court. *E.g.*, CP 169-171, 286, 1202-03, 1209. Ms. Harbord claims she raised the issue of the amount in controversy at or before the initial status conference on August 6, 2013 and questioned Safeway's motion to remove. CP 171-172, 286.

G. Ms. Harbord's suspicion of Safeway affects her understanding of the SPO, which does not hide Ms. Harbord's medical records from the court.

Ms. Harbord's suspicion of Safeway undergirds her complaints regarding the SPO. CP 380. Ms. Harbord believes the SPO favors Safeway, because it describes Ms. Harbord's medical records as "confidential." CP 91, 102. Ms. Harbord claims these "confidential" medical records pertain to work-related injuries. CP 349, 1205-1206, RP 7/24/15 at 39-44. Ms. Harbord claims Safeway "intimidated" its employees to not file an injury report at work. CP 285-286, 342-343. Ms. Harbord is particularly upset about a meeting or investigation into an alleged act of stealing by her. RP 7/24/15 at 39. Ms. Harbord claims she was not immediately permitted to use the bathroom during this meeting, but when she was, she got injured and went to the hospital. RP 7/24/15 at 39. Whatever the merit Ms. Harbord's claim against Safeway, the SPO did not hide Ms. Harbord's medical records from the court by labeling them as "confidential." CP 90-99.

IV. SUMMARY OF ARGUMENT

This court should affirm the trial court's summary judgment of dismissal in Mr. Bean's favor. Procedurally, Ms. Harbord fails to assign error or provide legal authority to support her position, and large portions of the clerk's papers are not properly before the court under RAP 9.12. Substantively, Ms. Harbord fails to establish the essential elements of her legal malpractice claim against Mr. Bean. First, agreeing to the SPO was a "judgment decision" under *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey, P.C.*, 180 Wn. App. 689, 324 P.3d 743 (2014). Ms. Harbord's case was properly dismissed because Ms. Harbord presented no evidence or expert testimony that no reasonable Washington attorney would have made the same decision as Mr. Bean. Well before Ms. Harbord's underlying case against Safeway was dismissed, the federal court recognized that the SPO she complains of did not hinder the presentation of her case. Second, Ms. Harbord presents no evidence of what damage she sustained, or that a breach by Mr. Bean proximately caused any damage. Ms. Harbord did not move to continue Mr. Bean's motion for summary judgment under CR 56(f), and the trial court ruled properly on the evidence before it. Third, Ms. Harbord's complaint amounts, at most, to a communication issue. Communication issues in and of themselves do not create a private cause of action against Mr. Bean.

V. ARGUMENT

A. **This court should strike or disregard the portions of Ms. Harbord's brief that violate the Rules of Appellate Procedure and are not properly before the court under RAP 9.12**

This court may consider only those materials brought to the trial court's attention on summary judgment. RAP 9.12; CR 56(h). Ms. Harbord relies heavily on matters outside the record in asserting her claim of legal malpractice against Mr. Bean. This court must ignore it. For the court's benefit, the materials brought to the trial court's attention in the order granting summary judgment (CP 1186-1187) or referenced in the Report of Proceedings from April 3, 2015 are as follows.

- Defendant Matthew J. Bean's Motion for Summary Judgment: CP 68-76.
- Declaration of Marlena Dietzway in Support of Bean's Motion for Summary Judgment and the exhibits attached thereto: CP 77-110.
- Declaration of Matthew J. Bean in Support of Bean's Motion for Summary Judgment and the exhibits attached thereto: CP 111-121.
- Notice to the Court "Surprised 2nd Amended Notice for Hearing without first hearing Notice" CP 61-62 (see RP 4/3/15 at 4).
- Opposition to Motion for Summary Judgment: CP 163-406.
- Defendant Bean's Reply to Plaintiff's Opposition: CP 124-126.

- Declaration of Marlena Dietzway in Support of Reply and the exhibits attached thereto: CP 127-141.
- Declaration of David Harbord in Support Plaintiff's Hatsuyo Harbord Motion for Opposing Summary Judgment: CP 1202-1212.

The hearing on Mr. Bean's motion for summary judgment is in the record at RP 4/3/15, and the hearing on Safeway's motion for summary judgment is at RP 7/24/15. Beyond that, the summons and complaint are found at CP 33-49. An amended complaint filed by Ms. Harbord on March 27, 2015, just days before the summary judgment hearing, is at CP 142-162.

B. This court must affirm the trial court because Ms. Harbord fails to assign error or provide legal authority to support her position.

An appellant's brief must provide "[a] separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error." RAP 10.3(a)(4). "[W]hen an appellant fails to raise an issue in the assignments of error, in violation of RAP 10.3(a)(3), and fails to present any argument on the issue or provide any legal citation, an appellate court will not consider the merits of that issue." *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995) (emphasis in original). "Appellate courts will only review a claimed error that is included in the assignment of error or clearly disclosed in the associated issue pertaining thereto and is supported by

argument and citations to legal authority.” *Vern Sims Ford, Inc. v. Hagel*, 42 Wn. App. 675, 683, 713 P.2d 736 (1986). See RAP 10.3(a)(4), (6); *McKee v. Am. Home Products, Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989) (appellate courts “will not consider issues on appeal that are not raised by an assignment of error or are not supported by argument and citation of authority); *Ang v. Martin*, 154 Wn.2d 477, 487, 114 P.3d 637 (2005) (when appellant fails to raise issue in the assignments of error and fails to present argument on the issue or provide legal citation, an appellate court will not consider the merits of that issue).

Here, Ms. Harbord’s brief consists of a long introduction which might also be construed as a statement of the case. See RAP 10.3(a)(3), RAP 10.3(a)(5). There are, however, no identifiable “assignments of error” or issues pertaining to the assignments of error. RAP 10.3(a)(4). It is hard to discern Ms. Harbord’s argument, and she does not address the trial court’s holding that she did not present evidence that no reasonable Washington attorney would have made the same decision as Mr. Bean. See RAP 10.3(a)(6). The brief also includes statements related to alleged acts by co-defendants, even though Mr. Bean filed his own separate motion for summary judgment against Ms. Harbord. While Ms. Harbord may attempt to remedy the aforementioned issues in her reply, the rule is well settled that the court will not consider issues raised for the first time

in a reply brief. *E.g., In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990); *Stevens v. Security Pac. Mortgage Corp.*, 53 Wn. App. 507, 519, 768 P.2d 1007 (1989). The reply brief must be limited to a response to the issues in the Response Brief. RAP 10.3(c).

C. This court must disregard any issues and facts Ms. Harbord raises for the first time on appeal.

This court may dispose of issues solely because the appellant raises them for the first time on appeal. RAP 2.5(a); *N. Pac. Bank v. Pierce Cty.*, 24 Wn.2d 843, 857-58, 167 P.2d 454 (1946). To the extent Ms. Harbord does so, the court must disregard these issues or facts.

D. The trial court's order on summary judgment is reviewed *de novo*, and this court may affirm on any ground that the record supports.

This court reviews summary judgment orders *de novo*, engaging in the same inquiry as the trial court when reviewing a summary judgment order. *Highline School Dist. No. 401, King County v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976). Summary judgment is appropriate if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. CR 56(c). A trial court's decision "will be affirmed on appeal if it is sustainable on any theory within the pleadings and the proof." Tegland, 2A *Wash. Prac.: Rules Practice* RAP 2.5 (6th ed. 2010); *see also Burnet v. Spokane Ambulance*,

131 Wn.2d 484, 493, 933 P.2d 1036 (2007). This court, however, ordinarily may not reverse a trial court on a theory not raised before that court. *State v. Peterson*, 29 Wn. App. 655, 663, 630 P.2d 480 (1981).

Mr. Bean moved for summary judgment on the basis that Ms. Harbord did not present evidence of breach of the standard of care, and that an action based solely on purported violations of the Rules of Professional Conduct does not create a private cause of action. CP 68-76. In reply, Mr. Bean also argued that Ms. Harbord presented no evidence of harm connected with the SPO, and Ms. Harbord had no proof of breach, causation, or damages. CP 126. The trial court ruled only on the issue of breach, and did not reach the issues of proximate cause, damages, or purported violations of the Rules of Professional Conduct. RP 4/3/15 at 17-21. This court may affirm summary judgment of dismissal in favor of Mr. Bean on any ground supported by the record.

E. Summary judgment was proper because Ms. Harbord lacked evidence to establish each of the essential elements of her legal malpractice claim.

Summary judgment is appropriate where the evidence presented demonstrates that “no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law.” *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 830, 92 P.3d 243 (2004); *see also* CR 56(c). Material facts are those facts on which the outcome of the

litigation depends. *Seattle Police Officers Guild*, 151 Wn.2d at 830. Facts and all reasonable inferences therefrom are considered in the light most favorable to the nonmoving party, here Ms. Harbord. *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). Plaintiffs such as Ms. Harbord must make a showing sufficient to establish the existence of an element essential to her case, and on which she bears the burden of proof at trial. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d. 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, (1986)).

A plaintiff in a legal malpractice case must prove four 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). The absence of any element precludes recovery. *See Bowman v. Two*, 104 Wn.2d 181, 185-86, 704 P.2d 140 (1985). To survive summary judgment, Ms. Harbord was required to demonstrate a genuine issue of fact as to **each** element to avoid dismissal. *See See Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey, P.C.*, 180 Wn. App. 689, 699, 324 P.3d 743 (2014). This burden exists because the failure of a party seeking relief to

prove an essential element of his case necessarily renders all other facts immaterial. *Young*, 112 Wn.2d at 225. The trial court was correct in granting summary judgment in favor of Mr. Bean, because Ms. Harbord failed to present evidence to support each of the essential elements of her claim. *Id.* Mr. Bean demonstrated the absence of a genuine issue of material fact by pointing out the absence of evidence to support Ms. Harbord's case in his pleadings and papers. CP 68-76, CP 77-121, 124-141. Ms. Harbord did not respond with evidence sufficient to show a genuine issue for trial in her pleadings and papers. CP 163-406, 1202-1212. See also CR 56(e); *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 795, 64 P.3d 22 (2003). Ms. Harbord cannot rest solely on the allegations in her pleadings and papers, because allegations are not evidence or testimony; they must be proven. See *Attwood v. Albertson's Food Ctrs., Inc.*, 92 Wn. App. 326, 330, 966 P.2d 351 (1988).

1. Ms. Harbord offered no evidence of a breach by Mr. Bean to support her cause of action.

Mr. Bean exercised 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 Washington State. *Cook, Flanagan and Berst v. Clausing*, 73 Wn.2d 393, 395-96, 438 P.2d 865 (1968). There is no evidence to the contrary. Mr. Bean agreed to the SPO

with Mr. Hurley, who filed it in federal court. CP 90-99, 189. Mr. Bean regularly enters into stipulated protective orders and understands from experience that disputes over discovery matters are frowned upon by the court if they are not reasonable. CP 112. The SPO differs very little from the model order published by the Western District of Washington. CP 80-88, 90-99. The same day the SPO was filed, Mr. Bean sent an email to Ms. Harbord regarding the SPO. CP 111, 115. Mr. Bean spent more than an hour explaining the purpose of the SPO to Ms. Harbord and her husband after it was entered. CP 112, CP 1204, CP 1206-08.

Significantly, there is no place for the client's signature on the SPO in addition to counsel's signature as there would be for interrogatories, which require verification. CP 98; Fed. R. Civ. P. 33(b)(5). Perhaps most telling, the federal court allowed Mr. Bean to withdraw when Ms. Harbord started filing her own documents and stopped communicating with Mr. Bean after the SPO was filed. CP 119-121. In its order, the Court stated:

The Court recognizes that the Stipulated Protective Order will not hinder Plaintiff's presentation of her case.

CP 120. The court also vacated the SPO. CP 101-104, 120.

2. The trial court properly granted summary judgment to Mr. Bean based on the "attorney judgment" rule.

Mr. Bean's decision to agree to the SPO involved the exercise of professional judgment. An attorney cannot be liable for making a decision

involving honest, good faith judgment as long as (1) that decision was within the range or reasonable alternatives from the perspective of a reasonable, careful and prudent attorney in Washington; and (2) in making that judgment decision the attorney exercised reasonable care. *Clark*, 180 Wn. App. at 704.

As a threshold matter, agreeing to an stipulated protective order is a judgment decision because it involves the exercise of professional judgment, such as deciding whether to adhere to model language or to depart from it, selecting the terms and conditions of the protective order itself, and evaluating whether to stipulate to a protective order rather than be compelled to follow one. *See Clark*, 180 Wn. App. at 708-09. Some reasons to enter into a stipulated protective order might be to facilitate the client's reasonable objectives, reduce the overall cost and length of the litigation, and position the case so that it may be decided on the merits. CP 111-112. Mr. Bean exercised sound professional judgment here, including initiating the change to allow confidential information to be disclosed to certain witnesses before their depositions. CP 117, 215.

Mr. Bean's decision to agree to an SPO was also reasonable. Ms. Harbord presented no evidence or expert testimony that no reasonable Washington attorney would have made the same decision as Mr. Bean. Ms. Harbord cannot rely on her assertions that Mr. Bean breached the

standard of care. *Young*, 112 Wn.2d at 225; *Attwood*, 92 Wn. App. at 330. Expert testimony is generally needed to establish whether there has been a breach of the applicable standard of care in a legal malpractice action, unless the alleged breach is a matter within the common knowledge of the ordinary public, does not involve matters which are difficult to prove, or does not involve a highly particularized area of legal practice. *See Walker v. Bangs*, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979); *Geer v. Tonnon*, 137 Wn.App. 838, 858, 155 P.3d 163 (2007). Expert testimony is often needed because “the law is admittedly a highly technical field.” *Geer v. Tonnon*, 137 Wn. App. 838, 155 P.3d 163 (2007). The general rule, however, is to permit rather than to require expert testimony. *Walker*, 92 Wn.2d at 858; *Lynch v. Republic Publishing Co.*, 40 Wn.2d 379, 389, 243 P.2d 636 (1952) (expert testimony is proper when the discussion calls for some special skill or knowledge). In *Geer*, for example, the plaintiff did not provide expert testimony or any other evidence to demonstrate that a breach of the lawyer’s duty of care was the cause in fact of the plaintiff’s claimed damages. *Geer*, 137 Wn. App. at 851. Because Ms. Harbord did not produce any evidence to support her legal malpractice claim, let alone expert testimony, dismissal was proper.

Finally, Mr. Bean did not breach the duty of care in making the decision to agree to the SPO. To avoid liability under the attorney

judgment rule, the attorney's judgment must be an informed one. *Halvorsen v. Ferguson*, 46 Wn. App. 708, 718, 735 P.2d 675 (1986). Ms. Harbord presented no evidence that Mr. Bean was negligent in how the decision to agree to the SPO was made. Mr. Bean entered into the SPO based on his prior experience. CP 112.

F. Ms. Harbord failed to present evidence of damages to support her cause of action.

Ms. Harbord presented no evidence that she suffered any damage to support a legal malpractice claim. In a legal-malpractice claim, the burden of proving damages remains squarely with the plaintiff. *Daugert v. Pappas*, 104 Wn.2d 254, 258-60, 704 P.2d 600 (1985); *Cf. Schmidt v. Coogan*, 181 Wn.2d 661, 665, 335 P.3d 424 (2014) (holding that the collectability of an underlying judgment is an affirmative defense). The measure of damages for legal malpractice is the amount of loss actually sustained as a result of the attorney's conduct. *Id.* at 683 (citations omitted). Even if Ms. Harbord did provide evidence of damage, she did not establish it was because of a lack of skill or knowledge on Mr. Bean's part. An attorney is not liable for the loss of a case unless such loss occurred by reason of his failure to possess a reasonable amount of skill or knowledge, or by reason of his negligence or failure to exercise a reasonable amount of skill and knowledge as an attorney. *Cook*, 73

Wn.2d at 395; *Ward v. Arnold*, 52 Wn.2d 581, 584, 328 P.2d 164 (1958);
Bank of Anacortes v. Cook, 10 Wn. App. 391, 400, 517 P.2d 633 (1974).

G. Ms. Harbord failed to provide evidence that any breach by Mr. Bean proximately caused any damages.

Ms. Harbord presented no evidence to support the element of proximate cause. Proximate cause in a legal malpractice case is determined by the “but for” test. *Griswold v. Kilpatrick*, 107 Wn. App. 757, 760, 27 P.3d 246 (2001). The plaintiff-client bears the burden of demonstrating that “but for” the attorney’s negligence, the client would have obtained a better result. *Daugert*, 104 Wn.2d at 263. This necessarily involves two steps. The first question is whether the lawyer’s alleged conduct caused the client’s underlying action to be lost or compromised. *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 235-36, 974 P.2d 1275 (1999). The second question is whether the client would have fared better but for the lawyer’s alleged mishandling of the underlying cause of action. *Id.*

Ms. Harbord’s case was dismissed on summary judgment sometime after Safeway filed a motion to compel discovery and Ms. Harbord was ordered to finish discovery by September 18, 2014. CP 37, RP 7/24/15 at 35. There is no evidence, however, that the dismissal of Ms. Harbord’s case had anything to do with the SPO, or more particularly,

that the dismissal occurred because of any breach by Mr. Bean. Similarly, Ms. Harbord presented no proof that the removal of her case to federal court resulted in any damages. Ms. Harbord has no proof that any act by Mr. Bean lost or compromised her underlying lawsuit or that she would have fared better in her underlying case but for Mr. Bean. Other than a declaration from her husband, the only support for Ms. Harbord's claim of legal malpractice is her allegation that Mr. Bean committed malpractice, which is insufficient as a matter of law. *See, e.g., Griswold*, 107 Wn. App. at 760-63 (plaintiff's speculative evidence that she could have obtained a better settlement in the absence of attorney's negligence was insufficient to establish proximate cause); *Sherry v. Diercks*, 29 Wn. App. 433, 628 P.2d 1336 (1981) (plaintiff failed to establish proximate cause in legal malpractice action against attorney who allowed default judgment to be taken against him). Mr. Harbord's declaration does not establish or make the necessary links between breach, proximate cause, and damages. Because Ms. Harbord offered no evidence of breach, proximate cause, or damages, the trial court properly dismissed her claim.

H. Ms. Harbord did not request a continuance under CR 56(f) or demonstrate by affidavit why she could not present facts essential to her opposition.

Under CR 56(f), the trial court may refuse the application for summary judgment or order a continuance to permit affidavits to be

obtained or depositions to be taken or discovery to be had, should the party opposing summary judgment explain in an affidavit why it cannot present facts essential to justify its opposition. Ms. Harbord did not ask for a continuance under CR 56(f) to demonstrate why she could not present facts essential to her opposition, such as testimony that no reasonable Washington State attorney would have made the same decision as Mr. Bean. Therefore, the trial court therefore ruled properly on the evidence before it.

A party must affirmatively seek a continuance under CR 56(f). CR 56(f). Ms. Harbord did not do so. Nevertheless, it is worth noting that a trial court's decision on a motion for a continuance under CR 56(f) will not be disturbed on appeal absent a manifest abuse of discretion. *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989) (trial court's grant or denial of a motion for continuance under CR 56(f) will not be disturbed absent a showing of manifest abuse of discretion); *Lewis v. Bell*, 45 Wn. App. 192, 196, 724 P.2d 425 (1986). *See also Davies v. Holy Family Hospital*, 144 Wn. App. 483, 500, 183 P.3d 283 (2008) (under CR 6, trial court's decision to enlarge a time period is also reviewed for an abuse of discretion). A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases it upon untenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997),

cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998).

The trial court's decision to rule on Mr. Bean's motion for summary judgment was reasonable and based on tenable grounds. Furthermore, relief under CR 56(f) is not automatic. The party requesting a continuance has the burden of proof, and this relief should be denied when:

(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.

Vant Leven v. Kretzler, 56 Wn. App. 349, 352-53, 783 P.2d 611 (1989);

see also Turner, 54 Wn. App. at 693 (the court should deny a request for continuance when plaintiff cannot satisfy these elements.) Ms. Harbord (1) did not offer a good reason for delay in obtaining the desired evidence; (2) did not state what evidence would be established through additional discovery; and (3) did not show that any desired evidence will raise a genuine issue of material fact. In light of this absence of evidence, the trial court was well within its authority to rule upon Mr. Bean's motion for summary judgment.

I. Communication issues and the Rules of Professional Conduct do not establish a private cause of action.

Ms. Harbord cites to several Rules of Professional Conduct in her pleadings, which appear to coalesce on her allegation that the SPO was filed and entered without her knowledge and without her signature. The

RPCs, however, do not create a standard of care for the purpose of a legal malpractice claim. *Hetzel v. Parks*, 93 Wn. App. 929, 935, 971 P.2d 115 (1999); *Burg v. Shannon & Wilson, Inc.*, 110 Wn. App. 798, 807, 43 P.3d 526 (2002). As section 20 of the Preamble to the Rules of Professional Conduct states:

Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached . . . The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability . . .

RULES OF PROF. CONDUCT, Section 20 (Preamble). The court in *Hizey*, moreover, held that violations of the RPCs may not be used as evidence of malpractice, despite language in the RPCs to the contrary. *Hizey*, 119 Wn.2d at 260; RULES OF PROF. CONDUCT Section 20 (Preamble) (“since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.”). Under *Hizey*, Ms. Harbord fails to make the connection between an alleged violation of the RPCs and a breach of the standard of care, in large part because she does not have any expert testimony to support her allegations. Experts on an attorney’s duty of care may base their opinion on a failure to conform to an ethics rule but cannot explicitly refer to the RPCs. *Hizey*, 119 Wn. at 265. *See also Hetzel v. Parks*, 93

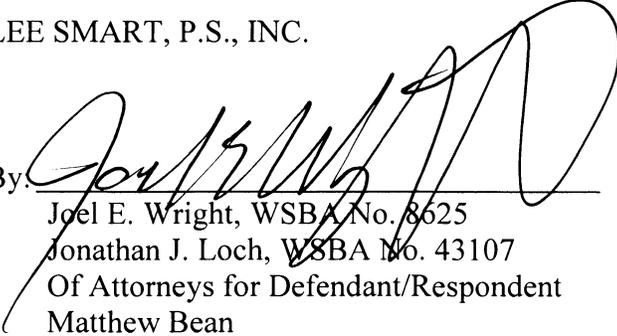
Wn. App. 929, 935, 971 P.2d 115 (1999). Ms. Harbord's complaint amounts, at most, to a communication issue between her and Mr. Bean. Communication issues in and of themselves do not create a private cause of action.

VI. CONCLUSION

Ms. Harbord presented no evidence at the trial court level to support essential elements of her claim of legal malpractice against Mr. Bean – breach, proximate cause, and damages. Ms. Harbord's complaint amounts, at most, to a communication issue between attorney and client and do not create a private cause of action against Mr. Bean, nor support any of the essential elements of Ms. Harbord's legal malpractice claim. Ms. Harbord did not move for a continuance under CR 56(f), and the trial court ruled properly on the evidence before it. Mr. Bean asks this court to affirm the trial court's summary judgment of dismissal in his favor.

Respectfully submitted this 11th day of July, 2016.

LEE SMART, P.S., INC.

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Of Attorneys for Defendant/Respondent

Matthew Bean

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on July 8, 2016, I caused service of the foregoing pleading on each and every attorney of record herein:

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DATED this 11th day of July, 2016 at Seattle, Washington.



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