NO. 35790-9

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

BRIAN HALQUIST and AMY HALQUIST, Appellants

vs.

ROBERT C. FREEBY, EILEEN MOSHER and ROBERT C. FREEBY ATTORNEY AT LAW P.S., Respondents

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RESPONDENT'S BRIEF

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ORIGINAL

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I. INTRODUCTION

This is a legal malpractice case dismissed on summary judgment because plaintiff/appellant was unable to create an issue of triable fact on causation. He was unable--and indeed scarcely attempted--to show evidence that, but for the claimed negligence of his lawyer in a personal injury case, he would have obtained more money than he in fact did obtain.

The plaintiff, Brian Halquist, recovered $207,000 in the settlement of his personal injury claim against the manufacturer of a defective hip implant. That recovery was in the context of a nationwide class-action against the manufacturer. The basis for plaintiffs' professional negligence suit against the defendant, Robert C. Freeby, was the claimed failure of Mr. Freeby to advise him of a deadline to "opt-out" of the underlying class action. The issue, for summary judgment purposes, was causation; i.e., the question of whether or not, had plaintiff "opted out" of the class action, he would have fared better; in short, whether he would have received more than the $207,000 he in fact obtained.

The defendant/respondent, Mr. Freeby, in support of his summary judgment motion, along with his own declaration filed the declarations of two practicing attorneys familiar with the legal subject matter in question, establishing a lack of causation. The plaintiffs filed no attorney or other

expert declarations to contravene these. The defendant established the uncontested fact that of approximately 30,000 claimants in the underlying products-liability class action, fewer than 90 (a tiny fraction of a single percent) "opted out" of the class, and none of that vanishingly small number were shown to have in any way fared better than those who did not.

The plaintiff/appellant's brief is remarkable mostly by its silence concerning these and the other determinative facts. As will be demonstrated, the trial court was manifestly correct in dismissing plaintiff's case, and that decision should be affirmed.

II. STATEMENT OF THE CASE

The plaintiff, Brian Halquist, was a personal friend of the defendant, Robert C. Freeby, for several years. CP 38-39. Mr. Freeby is a Tacoma attorney, licensed to practice in Washington in 1988, who practices primarily in the field of criminal law. CP 38-39. Mr. Halquist knew Mr. Freeby and the nature of his practice quite well. CP 38.

Mr. and Mrs. Halquist are the owners of a corporation known as Brian Halquist Productions, Inc., by which Mr. Halquist is employed. CP 225, 223. Brian Halquist Productions, Inc. promotes local events, such as concerts and boxing matches, many of them at the Emerald Queen casino in Tacoma. CP 225-226.

Mr. Halquist had a degenerative condition in his left hip, which dated to his high school wrestling days, of which Mr. Freeby was aware through their friendship. CP 38-39, 225-226. In late November of 2000, Mr. Halquist underwent a total left hip replacement surgery. The hip joint was replaced with an implant manufactured by Sulzer Orthopedics. *Id.*, CP 73. Shortly after surgery was completed, Sulzer announced a voluntary recall of its implants, due to an oily residue left on the replacement joints from the manufacturing process which reduced the likelihood of bone growth around the implant. Because of this condition, Mr. Halquist's new hip joint did not graft to the bone. Five months later, on May 10, 2001, Mr. Halquist underwent hip revision surgery, and his hip joint was replaced with a non-Sulzer appliance. The orthopedic surgeon who performed the hip revision surgery was Steven Teeny, M.D. Mr. Halquist's recuperation from the second hip revision surgery was normal. CP 39.

Several lawsuits were filed in both state and federal courts throughout the country against Sulzer for the recalled defective hip and knee prosthesis implants. These cases were consolidated and transferred to a single U.S. District Court, in Ohio. In August of 2001, the court certified a class and granted preliminary approval to the class-manufacturer Settlement Agreement. CP 34-34, 40.

Mr. Halquist retained Mr. Freeby to represent him in a claim against Sulzer Orthopedics arising out of the defective original implant. CP 39-41, 44. The nature and scope of the agreed representation is disputed by Mr. Halquist and Mr. Freeby, and issues of fact exist on that question. Mr. Freeby has testified that because of his limited experience in litigation of this type, he agreed only to process the claim within the class action, and that if Mr. Halquist desired something else, he would have to be referred to other counsel. CP 39-41. Indeed, Mr. Freeby made such referrals, but Mr. Halquist did not follow up on them. *Id.*, CP 39-41. Because of this lack of follow-up, Mr. Freeby determined to terminate the attorney-client relationship, but allowed himself to be talked out of it by his friend. CP 41. Mr. Freeby further maintains that plaintiff never gave him any indication of wanting to "opt out" of the class action. CP 39-41. This is disputed by Mr. Halquist. CP 226-228. Mr. Halquist testifies that he would have opted out of the Sulzer class action and pursued a lawsuit against Sulzer if he had been advised of the opt-out deadline of March 15, 2002 by Mr. Freeby, and that Freeby did not so advise him. *Id.*

Accordingly, defendant's motion for summary judgment was based upon lack of proximate causation alone; a "failure to advise" of the opt-out deadline was deemed admitted for the purposes of summary judgment only, and defendant asserted in the motion that, as a matter of law,

plaintiff could not show that, had he opted out, he would have fared better-- in short, that he would have had a larger recovery than the $207,000 which was received from the class action settlement. CP 24-32; CP 230-240.

In support of the motion for summary judgment, Mr. Freeby submitted, in addition to his own declaration, the declarations of two attorneys as expert witnesses on the issues: John A. Barlow, and Richard Levandowski. CP 34-36; CP 57-60. As will be discussed below, the plaintiff never controverted these declarations, nor did he submit any attorney or other expert declarations at all in opposition to the motion. More remarkably, the plaintiff avoids any discussion of the undisputed facts established by these declarations, as well he might, as they are fatal to his case.

John Barlow is a Longview attorney, a plaintiff's personal injury lawyer of many years experience. Mr. Barlow was personally very familiar with the Sulzer Orthopedics implant recall/products liability litigation. He himself represented ten clients in that nationwide litigation. CP 34. Mr. Barlow's declaration established the following facts, none of which were ever controverted by plaintiff in the summary judgment proceedings:

1. After extensive discovery by plaintiffs' attorneys regarding the liability of Sulzer for the affected products, and extensive discovery regarding the financial condition of Sulzer, the class action parties eventually entered into a revised settlement, very advantageous to the class claimants. CP 34-35.

The provisions of the revised settlement set forth various deadlines and provided that the deadline to opt-out of the class was May 15, 2002. Those who did not opt-out by to the May 15, 2002 deadline were deemed class members and were bound by the terms and conditions of the class action settlement. CP 34-35.

2. Under the terms of the settlement, Sulzer, its affiliates, and its insurance company, placed over one billion dollars in a Settlement Trust that was established for the administration of the Settlement. Those class members who did not have surgery to replace their prostheses were awarded $1,000 from the Settlement Trust. Those class members who underwent "revision surgery"--a second hip replacement surgery to replace the Sulzer implant--were entitled to $160,000 plus $46,000 in attorneys fees from the Settlement Trust as guaranteed payment. Derivative claimants were entitled to receive $1,600. *See* CP 34-35.

In addition to the guaranteed payment, class members who suffered extraordinary injury or extraordinary wage loss were eligible for

additional relief under an Extraordinary Injury Fund ("EIF") established for payment of such claims. After class members submitted a claim form and supporting documentation, a Claims Administrator made the determination as to whether relief under the EIF was warranted on a case-by-case basis. CP 34-35.

3. During the pendency of the class action, Sulzer's financial condition was grim. It was publicly known that Sulzer was considering filing bankruptcy around the time of the opt-out deadline. Its financial condition was publicly documented and well known to the attorneys representing individuals in the class action. CP 34-35. The general understanding was that Sulzer's financial condition was precarious, due to the number of claimants in the Sulzer class action. *Id.* During the pendency of the Sulzer class action, a team of attorneys was assigned to examine and analyze Sulzer's financial liabilities, which included taking numerous depositions. CP 34-35.

4. In light of the extreme uncertainty of recovery if a claimant decided to opt out, taken together with the substantial amount of money which was funding the class action settlement pool, not only did Mr. Barlow advise each of his ten clients to remain in the class, and not opt out, he expressed his professional opinion that the standard of care as it related to the "opt out" issue: *a reasonably prudent and careful lawyer in*

the State of Washington representing Sulzer claimants would and should have advised his clients not to opt out of the class action. CP 36. All of Mr. Barlow's clients remained within the class.

5. The culmination of these uncontested facts is found in the ineluctable reality of the resolution of the Sulzer claims litigation.

Of the approximately 30,000 Sulzer class members nationwide, only 87 opted out of the class, and of these, only 16 were those who had revision surgery (i.e., similarly situated to plaintiff here). In other words, the number of "opt outs" represented about one-hundredth of one percent of the class members. CP 35. And as to this vanishingly small number of "opt outs", plaintiff presented no evidence whatever that *a single one of them* fared better in any respect than those who remained in the class.

In addition to the declaration of John Barlow, the defendant also submitted the declaration of Richard Levandowski, an experienced plaintiffs' attorney who had wide experience in the representation of persons in cases involving hip implant surgeries. His declaration demonstrated that in fact the sums obtained by the Halquists from the Sulzer class action settlement were entirely commensurate with the settlement value of hip implant cases in the relevant local jurisdictions in Superior Court jury actions. CP 58-60.

While plaintiffs had evidently retained expert attorneys, they chose not to submit any declarations from them in opposition to the summary judgment motion, a likely indicator of the reality that the foregoing facts were not only uncontroverted, they were uncontrovertable. See RP 14 (Nov. 17, 2006).

The sole approach chosen by plaintiffs to argue against the motion for summary judgment was a contention that the Halquists had suffered high economic losses during the five-month period of time between the first hip replacement surgery at the end of November of 2001 and the replacement of the Sulzer implant in the surgery of early May, 2001.[1] Thus, they argued, their case was "different from" those of the other 30,000 members of the class (although they provided no comparisons), and that this assertion should have been regarded as creating an issue of fact that they would have "fared better" had Mr. Halquist opted out of the class action.

However, this argument was nothing more than that: a bare assertion with no factual support bearing upon the issue of causation. In support of the assertion, the plaintiffs submitted information about what they claimed was a loss of a purported contract at the Emerald Queen

[1] It should be borne in mind that the underlying claim is in essence a claim for a second surgery and a 5-month delay in "expected" recovery had the original implant not been defective. The original hip replacement surgery was of course medically necessary, and Mr. Halquist recovered normally after the second surgery.

casino for certain shows. CP 222-224. But (quite apart from the speculative nature of that assertion) plaintiffs never even attempted to establish any economic loss to themselves as a result. They only tried to show loss of gross revenues to their corporation, Brian Halquist Productions, Inc. Id. Indeed, it is striking that nowhere in their responses to the summary judgment motion, or upon their motion for reconsideration, did plaintiffs make the least effort to show any net income loss to themselves personally. The trial court noted this significant failure. RP 23 (Nov. 2006). The same shortcoming, as it happens, underlay Mr. Halquists' failed attempt to obtain extra money from the "extraordinary injury fund" in the class action, which required that income loss above a $20,000 threshold be established. CP 52-55.

This attempt to show high income losses as a means of showing causation failed, not least because no substantial evidence at all of actual personal income loss at all was proffered.

The trial court rightly observed in a well-reasoned oral opinion that plaintiffs had failed to create an issue of fact that they would have fared better had they "opted out" of the class action RP 21-23. Judgment of dismissal was entered accordingly, and reconsideration was later denied. CP 279-281; 318-319.

III. ARGUMENT

A. SUMMARY JUDGMENT STANDARD

The relevant standard on summary judgment, and on appellate review of trial court summary judgments, is clear: to survive summary judgment, a plaintiff must create a triable issue of fact as to each material element of his case. The plaintiff must do so with substantial, admissible evidence. The appellate court reviews the same record as the trial court, and applies the same standard de novo. *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1323 (1993); *Green v. A.P.C.*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998); *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 641, 618 P.2d 96 (1980); *City of Lakewood v. Pierce County*, 144 Wn.2d 118, 125, 30 P.3d 446 (2001).

B. PLAINTIFFS FAILED TO CREATE AN ISSUE OF FACT REGARDING CAUSATION, AND THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT

1. Preliminary observations.

A few general comments about plaintiff/appellants' brief are in order. The plaintiffs devote six pages of their brief to argument in support of their position that the trial court erred in granting summary judgment to defendants. (Brief of Appellants pp. 11-16). However, of this, only two are devoted specifically to the question at issue in this case: whether or not

there was an issue of fact created as to causation. (Brief pp. 15-16) Four pages of the argument are devoted to issues which have no bearing at all on the case: plaintiffs' arguments that Mr. Freeby "obtained no recovery" for his client, and that Mr. Halquist had to obtain new counsel in order to receive his class-action recovery. However, these points are obviously immaterial, because plaintiffs in fact did obtain the class action recovery. This is why the issue for the motion was causation alone. It is at the very least perplexing why any "argument" is made on these points, except as a distraction from the failure of plaintiffs' causation arguments.

Appellants' brief is also revealing in the phraseology it employs in regard to the causation issue; directly and tangentially it reflects the wholly speculative nature of plaintiffs' claims that there had been a sufficient showing on causation to survive summary judgment. For example, plaintiff states at the bottom of page 13 of the brief, "[a]rguably, Halquist would have received a substantially higher award for damages", and at p. 14, he states that "perhaps" his physicians may have known of problems with the implant before the recall (a supposition which is both without evidentiary support and immaterial to any issue in the case).

However, the most telling shortcoming of appellants' brief is its complete silence about the most salient undisputed fact in the litigation: that only approximately one-hundredth of one percent of the 30,000 Sulzer

claimants opted out of the class, and of that number (about as close to zero as might be possible to find in a real-world setting) none at all were shown to have gotten more money by virtue of opting out. One might reasonably conclude, in light of the testimony of John Barlow, that this was because both of the adequacy of the class-action funding and the factors that would lead any prudent lawyer to advise against opting out; but in any event, it is the overwhelming reality at the heart of the case, never contradicted by plaintiffs because beyond contradiction. In the end, what plaintiffs' case against Mr. Freeby amounts to is a speculative hope that they could turn his claimed omission into a recovery greater than anyone else among the tens of thousands of claimants actually, in fact, received.

The basic flaw in appellants' brief is found in the reasoning found at the bottom of page 14 and the top of page 15. The plaintiff/appellant comments there on the trial court's observation that ordinarily professional malpractice cases will require expert testimony. The brief then states the following, evidently as an attempt to explain the lack of controversion of defendant's expert declarations: "[H]owever, expert testimony is unnecessary to understand that Halquist incurred costs and recovered nothing as a result of Freeby's negligent representation. The limited amount Halquist scrambled to obtain as a class member does not

adequately compensate him and his family for their injuries. But for Freeby's negligence, Halquist would have fared better." Apart from its unsupported non sequitur conclusion, the plaintiffs' argument here appears to be that because Halquist's $207,000 recovery was obtained by counsel retained after Mr. Freeby, and that thus Halquist recovered nothing as a result of the Freeby representation, that the missing causation element is supplied! But of course, the issue is whether or not, but for the actions of Mr. Freeby, Halquist would have probably done better than $207,000, regardless of who "obtained" that sum for him. This curious misdirection highlights the fatal weaknesses in plaintiffs' case.

2. Appellant failed to raise an issue of fact as to causation, a necessary element of his case.

In order to sustain any claim of legal malpractice, a plaintiff must show, (a) the existence of an attorney/client relationship; (b) the existence of a duty on a part of the lawyer; (c) failure to perform the duty; and (d) the negligence of the lawyer must have been the proximate cause of damage to the client. *Halvorsen v. Ferguson*, 46 Wn. App. 708, 735 P.2d 675 (1986) (emphasis added); *Griswold v. Kilpatrick*, 107 Wn. App. 757, 27 P.3d 246 (2001); *Ahmann-Yamane, L.L.C. v. Tabler*, 105 Wn. App. 103, 19 P.3d 436 (2001); *Lavigne v. Chase Haskell*, 112 Wn. App. 677, 50 P.3d 306 (2002).

Our Supreme Court has held that although in most legal malpractice actions, as in most actions, the jury should decide causation, that determination can often be made as a matter of law. *Dougert v. Pappas*, 104 Wn.2d 254, 704 P.2d 600 (1985).

Plaintiff, to defeat summary judgment, must also create an issue of fact, beyond mere speculation, that had he opted out of the Sulzer class action he would probably have received more money than if he stayed in the class:

> In order for an attorney's negligent conduct to constitute legal malpractice, the breach of duty must be a proximate cause of the resulting injury....general principals of causation are no different in a legal malpractice action than in an ordinary negligence case....to recover, the plaintiff must demonstrate that he or she would have prevailed or at least would have achieved a better result had the attorney not been negligent.

Halvorsen v. Ferguson, *supra*, 46 Wn. App. at 719. (Citations omitted)

In *Halvorsen*, the Court of Appeals upheld a summary judgment dismissing a legal malpractice action because as a matter of law the plaintiff could not show proximate cause; in short, could not show that but for the claimed negligence she would have had a better result. In connection with this ruling, the court went on to say: "a non-moving party attempting to resist a summary judgment <u>may not rely on speculation, argumentative assertions that unresolved factual issues remain</u>, or in

having its affidavits considered at their face value, for upon the submission by the moving party of adequate affidavits, the non-moving party must set forth specific facts that sufficiently rebut the moving parties contentions and disclose that a genuine issue as to material fact exist." *Halvorsen*, 46 Wn. App. 708 at 721. (Emphasis added)

In this case, as a matter of law, Mr. Halquist completely failed this test of causation.

As has been pointed out repeatedly, the plaintiff made no attempt to contradict the declarations of Barlow and Levandowski, that all prudent lawyers would have counseled remaining in the class action, that all but a tiny number, near zero, remained within the class, that the tiny number of "opt outs" were not shown to have fared better than class members, and in any event, that the class recovery represented the range of jury verdicts and settlement values locally. *Sherry v. Diercks*, 29 Wn. App. 433, 628 P.2d 1336 (1981).

As said by the Court of Appeals in a legal malpractice case, "Causation is the sometimes fragile thread which must connect the concept of fault to the reality of damage." *Sherry*, 29 Wn. App. at 437. The court then upheld a challenge to the sufficiency of the evidence to establish causation in that case, and affirmed a dismissal.

Griswold v. Kilpatrick, 107 Wn. App. 757, 27 P.2d 246 (2001) is a case with several points of resemblance to this one. There, the plaintiff settled a medical malpractice suit for $1.2 million dollars. She then sued her attorney on the theory that the settlement figure would have been higher but for delays by the attorney in initiating settlement negotiations. The court held that because the evidence brought forward in support of this theory was entirely speculative, the trial court rightly dismissed the case on summary judgment.

In *Griswold*, for purposes of summary judgment, it was assumed that the defendant lawyer breached the standard of care by delay in prosecution of the case. The issue was whether or not the record contained sufficient evidence to support a finding that the delay proximately caused damage to the plaintiffs, the Griswolds. The defendant's motion for summary judgment placed at issue only the element of causation, just as in the instant case. The appellate court held that the Griswolds could not prove in terms of probability, beyond mere speculation, that had a different scenario of negotiation of the settlement taken place, that they would have received any more money whatsoever. This was held to be true notwithstanding the affidavit of an attorney filed in opposition of the motion for summary judgment that the delays had

reduced the settlement value if the case. *See Griswold,* 107 Wn. App. 757 at 761.

A similar situation was involved in *Ahmann-Yamane, L.L.C. v. Tabler*, 105 Wn. App. 103, 19 P.3d 436 (2001), where the attorney, Michael Tabler, filed an untimely petition for a review of a county board of commissioners land use ruling, and filed it in the wrong county's superior court. The incorrect finding precluded judicial review of the board's land use ruling. The court held as a matter of law that the plaintiff could not establish that the superior court would have granted the plaintiff's petition had it been properly filed, that there was thus no causation, and dismissal of the legal malpractice claim on summary judgment was affirmed. The court observed as follows:

> Whether this breach caused harm to Ahmann is the pivotal question in this appeal. We are concerned only with cause in fact, the "but for" consequences of Mr. Tabler's negligent act....Under the "but for" test the plaintiff must establish that the attorney's act or omission caused the plaintiff's damages....This showing must be based on more than speculation.

Ahmann-Yamane, L.L.C., 105 Wn. App. 103 at 110.

The issue of causation in the context of legal malpractice cases is addressed in several other recent cases (none of which are cited in appellant's brief). One such is *Geer v. Tonnon*, 137 Wn. App. 838; 155

P.3d 163 (Apr. 2007), a Div. I case in which the court held that the trial court had properly granted summary judgment for the defendant lawyer on the grounds that plaintiff had failed to submit expert testimony on the "cause in fact" issue, and where the plaintiff could not establish that he would have prevailed had his lawyer filed the particular insurance-related claim at issue within a one-year limitation period.

The necessity of proof of causation was upheld in *Schmidt v. Coogan*, 135 Wn. App. 605, 145 P.3d 1216 (Sept.2006), a Div. II case in which a verdict against a lawyer was overturned on the ground that as a matter of law there had been no proof of causation.

The relevant principle is also well-restated in *Smith v. Preston Gates Ellis LLP,* 135 Wn. App. 859, 147 P.3d 600 (Oct. 2006) as follows:

> "To complete a prima facie case for legal malpractice, Smith needs to show the deficiencies caused the harm. Smith needs to demonstrate that a better contract or full disclosure would have prevented the injury or <u>improved his recovery</u> (emphasis added).

Smith, 135 Wn. App.859 at 864.

The court in *Smith* further pointed out that no attorney declaration in opposition to the motion supported the element of causation (such a declaration had been stricken by the trial court for lack of foundation). *Smith*, 135 Wn. App. 859 at 865. The opinion emphasizes that speculative suppositions that plaintiff would have "fared better" had the malpractice

not occurred are not sufficient to survive summary judgment. *Smith*, 135 Wn. App. 859 at 865, 870.

Lastly, plaintiffs' sole effort at trying to raise an issue of fact as to causation were their declarations concerning purported losses of gross revenues to their corporation. CP 222-224, 228-229. As previously discussed, not only was this claim rejected in the class action itself for failure to show losses in excess of $20,000 by objective evidence, it failed before the trial court because no effort was made to demonstrate a personal loss to the plaintiffs; indeed, the absence of this effort, and any documentation in support of it, is glaring. As in other matters, evidence of claims of economic loss must go beyond speculation and conjecture. *Xieng v. Peoples Bank*, 63 Wn. App. 572, 821 P.2d 520 (1991).

IV. CONCLUSION

"Causation is the sometimes fragile thread which connects the concept of fault to the reality of damage." This precept, so aptly stated in *Sherry v. Diercks*, supra, is the touchstone of this case. It is supported by a great body of case law; law from which the plaintiff cannot escape.

The plaintiff in this case recovered $207,000. Thirty thousand other people similarly situated made a like recovery, pursuant to what amounted to a universal determination to remain within the class action. In this case, Mr. Halquist claims that he would have opted out, in the face of

this uncontradicted fact, and notwithstanding the uncontroverted testimony that all prudent and experienced lawyers would have advised remaining within the class. His position is to try to turn this utter speculation into a recovery achieved by none other. But, even were his claim that he would have opted out taken at face value, the finally inescapable reality is that he never was or has been able to create any issue of fact at all that had he opted out he would have gotten more money. He cannot show that a single one of the perhaps 16 opt outs, out of the 30,000 claimants, did any better. In the end, plaintiff wants to weave a speculative theory into an issue of fact, without coming up with a single material declaration to oppose the motion for summary judgment.

The trial judge's judgment of dismissal was mandated by law, and should be affirmed.

DATED this 24th day of September, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of September, 2007. I caused a copy of the original of **Respondent's Brief** to be delivered to the below listed at their respective addresses:

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