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Court of Appeals
Division III
State of Washington

No. 32921-6

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

TAMMY WOLF SLACK,

Appellant,

v.

LUCINDA LUKE, Attorney at Law, and COWAN MOORE STAM
LUKE & PETERSON, Law Firm,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY
THE HONORABLE STEVEN DIXON

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION1

II. ASSIGNMENTS OF ERROR 2

III. STATEMENT OF ISSUES 2

IV. STATEMENT OF FACTS..... 4

A. After hiring Ms. Slack as a Community Victim Liaison, the Washington State Department of Corrections failed to accommodate Ms. Slack’s multiple disabilities. 4

1. The DOC ignored Ms. Slack’s reports that her workstation caused her sciatica and carpal tunnel, and that the DOC’s mold-ridden office caused her intense, daily migraines and nausea. 4

2. Ms. Slack resigned from the DOC because her disabilities precluded her from working without accommodation.10

B. After Ms. Slack hired Ms. Luke to represent her on a failure to accommodate claim against the DOC, Ms. Luke failed to file suit within the statute of limitations.....12

C. The trial court dismissed Ms. Slack’s complaint for legal malpractice against Ms. Luke because she did not have an “expert” opine on the merits of her underlying claim against the DOC.....17

V. ARGUMENT19

A.	This Court views the record in the light most favorable to Ms. Slack, cognizant that summary judgment is rarely appropriate on issues of causation, especially in cases implicating the Washington Law Against Discrimination.	19
B.	A legal malpractice plaintiff is not required to present “expert” testimony on the merits of the underlying cause of action – the legal malpractice jury resolves that question of fact by weighing the evidence in the “trial within a trial.”	20
C.	The alternative grounds for summary judgment asserted by Ms. Luke below are without merit.	27
1.	The conflicting testimony of Ms. Slack and Ms. Luke, as well as the unrestricted fee agreement, creates an issue of fact regarding the scope of Ms. Luke’s representation.	27
2.	Ms. Slack established a prima facie failure to accommodate claim that was lost as a result of Ms. Luke’s negligence.	32
3.	The Industrial Insurance Act did not bar Ms. Slack’s failure to accommodate claim.	37
VI.	CONCLUSION	39

TABLE OF AUTHORITIES

FEDERAL CASES

<i>First Union Nat. Bank v. Benham</i> , 423 F.3d 855 (8th Cir. 2005)	23
--	----

STATE CASES

<i>Bernardini v. Fedor</i> , 2013 WL 5701670, 2013- Ohio-4633 (2013)	23
<i>Boulette v. Boulette</i> , 627 A.2d 1017 (Me. 1993)	25
<i>Brust v. Newton</i> , 70 Wn. App. 286, 852 P.2d 1092 (1993), <i>rev. denied</i> , 123 Wn.2d 1010 (1994).....	22
<i>Daugert v. Pappas</i> , 104 Wn.2d 254, 704 P.2d 600 (1985)	19, 21-22
<i>Davis v. W. One Auto. Grp.</i> , 140 Wn. App. 449, 166 P.3d 807 (2007), <i>rev. denied</i> , 163 Wn.2d 1040 (2008).....	19
<i>Frisino v. Seattle Sch. Dist. No. 1</i> , 160 Wn. App. 765, 249 P.3d 1044, <i>rev. denied</i> , 172 Wn.2d 1013 (2011).....	32-35
<i>Geer v. Tonnon</i> , 137 Wn. App. 838, 155 P.3d 163 (2007), <i>rev. denied</i> , 162 Wn.2d 1018 (2008).....	24-25
<i>Harrell v. Washington State ex rel. Dep't of Soc. Health Servs.</i> , 170 Wn. App. 386, 285 P.3d 159 (2012), <i>rev. granted</i> , 176 Wn.2d 1011 (2013).....	33
<i>Hinman v. Yakima Sch. Dist. No. 7</i> , 69 Wn. App. 445, 850 P.2d 536 (1993), <i>rev. denied</i> , 125 Wn.2d 1010 (1994).....	38

<i>In re Disciplinary Proceeding Against Egger</i> , 152 Wn.2d 393, 98 P.3d 477 (2004)	28
<i>James v. Robeck</i> , 79 Wn.2d 864, 490 P.2d 878 (1971)	23
<i>Leibel v. Johnson</i> , 291 Ga. 180, 728 S.E.2d 554 (2012)	23
<i>Nika v. Danz</i> , 199 Ill. App. 3d 296, 556 N.E.2d 873 (1990)	25
<i>Phillips v. City of Seattle</i> , 111 Wn.2d 903, 766 P.2d 1099 (1989)	37
<i>Piscitelli v. Friedenber</i> g, 87 Cal. App. 4th 953, 105 Cal. Rptr. 2d 88 (2001).....	23
<i>Postema v. Pollution Control Hearings Bd.</i> , 142 Wn.2d 68, 11 P.3d 726 (2000)	30
<i>Prather v. McGrady</i> , 261 Ill. App. 3d 880, 634 N.E.2d 299, <i>appeal denied</i> by 157 Ill.2d 521 (1994).....	25
<i>Pulcino v. Fed. Express Corp.</i> , 141 Wn.2d 629, 9 P.3d 787 (2000), <i>overruled in part on other grounds by McClarty v. Totem Elec.</i> , 157 Wn.2d 214, 137 P.3d 844 (2006).....	33
<i>Reese v. Sears, Roebuck & Co.</i> , 107 Wn.2d 563, 731 P.2d 497 (1987)	37-38
<i>State v. Hudson</i> , 150 Wn. App. 646, 208 P.3d 1236 (2009)	24
<i>Stephens v. City of Seattle</i> , 62 Wn. App. 140, 813 P.2d 608, <i>rev. denied</i> , 118 Wn.2d 1004 (1991)	30
<i>Teja v. Saran</i> , 68 Wn. App. 793, 846 P.2d 1375, <i>rev. denied</i> , 122 Wn.2d 1008 (1993).....	28

<i>Versuslaw, Inc. v. Stoel Rives, LLP</i> , 127 Wn. App. 309, 111 P.3d 866 (2005), <i>rev. denied</i> , 156 Wn.2d 1008 (2006)	19, 21
<i>Ward v. Arnold</i> , 52 Wn.2d 581, 328 P.2d 164 (1958).....	21
<i>Whitley v. Chamouris</i> , 265 Va. 9, 574 S.E.2d 251 (2003)	23
<i>Williams v. Beckham & McAliley, P.A.</i> , 582 So.2d 1206, <i>rev. denied</i> , 592 So.2d 683 (1991).....	25

STATUTES

RCW ch. 49.60	32
RCW 49.60.040	33
RCW 49.60.180.....	32

RULES AND REGULATIONS

CR 56.....	19
------------	----

CONSTITUTIONAL PROVISIONS

Wash. Const. Article 1 § 21.....	24
----------------------------------	----

OTHER AUTHORITIES

DeWolf & Allen, 16 Washington Practice: Tort Law and Practice (3d ed. 2006).....	22, 26, 38
Ronald Mallen, 4 Legal Malpractice (2015 ed.)	22-23, 26
WPI 330.33	33

I. INTRODUCTION

Tammy Slack appeals the dismissal of her legal malpractice claim against her former lawyer Lucinda Luke. After hiring appellant Tammy Slack, the Washington Department of Corrections ignored her repeated requests to accommodate her disabilities – sciatica, carpal tunnel, and an acute sensitivity to mold and other environmental toxins. On September 15, 2009, after the DOC’s lack of accommodations forced her to resign, Ms. Slack met with Ms. Luke, who agreed to represent Ms. Slack in a failure to accommodate lawsuit. Ms. Slack expressed concern to Ms. Luke that “time may be running out on this case,” but Ms. Luke failed to file a lawsuit before the statute of limitations expired on October 30, 2009. Ms. Slack then brought this malpractice action against Ms. Luke, which the trial court dismissed on summary judgment because Ms. Slack did not have an “expert” opine that her underlying failure to accommodate claim was meritorious.

The trial court erred. Juries – not attorneys masquerading as “experts” – resolve the merits of an underlying claim by reviewing the evidence presented in the “trial within a trial” held in a legal malpractice action. Far from being beyond the common

knowledge of the average layperson, weighing the merits of a claim is the quintessential jury task.

Nor did any other grounds justify summary judgment. Whether the scope of Ms. Luke's representation of Ms. Slack included filing a lawsuit was an issue of fact that could not be resolved on summary judgment. Likewise, issues of fact regarding the DOC's lack of accommodation precluded summary judgment. This Court should reverse the trial court's summary judgment order and remand for a trial of Ms. Slack's legal malpractice claim.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its Order On Cross-Motions For Summary Judgment. (CP 1571-73)

2. The trial court erred in entering its Order Denying Plaintiff's Motion For A New Trial And Reconsideration. (CP 1601-02)

III. STATEMENT OF ISSUES

1. Does the "trial within a trial" held in a legal malpractice action provide the mechanism for resolving the merits of a claim lost or compromised as the result of attorney negligence, or must a legal malpractice plaintiff present "expert" testimony from an attorney opining on the merits of the underlying claim?

2. Where a client and attorney present conflicting testimony on whether the attorney was retained to file a lawsuit on the client's behalf, can the scope of the attorney-client relationship be resolved on summary judgment?

3. Does a former employee create genuine issues of material fact on whether her employer failed to accommodate her disabilities by demonstrating that 1) despite the employee's repeated complaints, her employer never obtained an ergonomic workstation to alleviate her sciatica and carpal tunnel, and 2) when the employee protested that she could not return to her office because of a sensitivity to molds and other environmental toxins, the employer responded by refusing to perform any remediation – even the minimal steps recommended by its own indoor air quality survey – instead insisting “[t]here isn't anything that has to be done”?

4. Is an employer's failure to accommodate an employee's disability that arose in the workplace an injury distinct from the underlying disability that the employee may recover for under the Washington Law Against Discrimination?

IV. STATEMENT OF FACTS

Because the trial court dismissed Ms. Slack's claim on summary judgment, this statement of facts recounts the facts in the light most favorable to Ms. Slack:

A. After hiring Ms. Slack as a Community Victim Liaison, the Washington State Department of Corrections failed to accommodate Ms. Slack's multiple disabilities.

1. The DOC ignored Ms. Slack's reports that her workstation caused her sciatica and carpal tunnel, and that the DOC's mold-ridden office caused her intense, daily migraines and nausea.

Tammy Slack was hired by the Department of Corrections (DOC) in August 2002 as a Community Victim Liaison for its Southeast Region. (CP 51, 638) Community Victim Liaisons provide safety and support services to crime victims, including speaking with victims when the offender nears release or parole, and they play a critical role in protecting victims and the community. (CP 48-49) Ms. Slack's contact often reopened victims' emotional scars and prompted them to reveal horrific details of the crime. (CP 49)

Five months after her hire, the DOC assigned Ms. Slack to its Kennewick office. (CP 638) In April 2004, Ms. Slack informed

her supervisor, Mr. Eckstrom, that after “spen[ding] more hours at my desk than usual my wrist and back now hurt all day and night.” (CP 553-54, 1893) In 2005, Ms. Slack was diagnosed with sciatica and carpal tunnel with right shoulder impingement. (CP 639, 1420, 1428, 1640, 1642-43) In the summer of 2005, on multiple occasions, Ms. Slack requested leave because of “sciatica and joint pain,” as well as “tingling hand/feet.” (CP 1880-81, 1883-85)¹

Mr. Eckstrom instructed Ms. Slack to contact the DOC’s ergonomics consultant, Glenn Johnson, and promised to get a new workstation “ordered as soon as possible.” (CP 1641-43, 1893) Mr. Johnson evaluated Ms. Slack’s workstation, but then “dropped the ball” by failing to complete a report and forward it to Mr. Eckstrom. (CP 1898) Ms. Slack followed up with Mr. Johnson in June 2005, emphasizing that she has “great difficulty sitting in chairs in general at this point.” (CP 1643, 1898)

Shortly after moving to the Kennewick office, Ms. Slack began experiencing recurrent migraines, nausea, and sinus

¹ Ms. Slack filed claims with the Department of Labor and Industries for her sciatica and carpal tunnel/right shoulder impingement. (CP 1657) At the time of the trial court’s summary judgment order, she had not received any compensation on those claims. (CP 1390, 1644, 1657)

infections. (CP 1858-64, 1869, 1872, 1875-79) In June of 2005, Ms. Slack believed that she had multiple sclerosis, but ultimately received a negative diagnosis. (CP 639, 1837-40, 1897) Between 2002 and 2006, Ms. Slack's ongoing symptoms caused her to use over a thousand hours of sick leave, including a five month leave of absence in the last half of 2005 under the Family Medical Leave Act. (CP 1651, 1837-49, 1900)

At the same time Ms. Slack's symptoms caused her to repeatedly miss work, the Kennewick office experienced repeated floods and sewage backups. (CP 639-40, 783-86, 789, 1377, 1387, 1918-20, 1974) For example, on January 31, 2006, the toilets in the building overflowed, causing raw sewage to seep into the surrounding hallway, kitchen, and an adjacent office. (CP 783-86, 1010-11, 1062-63, 1387) After several of the floods/backups, including the January 2006 sewage overflow, the DOC failed to properly remediate the office. (CP 783-86, 1365, 1373-74, 1387)

Even prior to the January 2006 overflow, the Kennewick office had ongoing problems associated with damp indoor environments, including mold-infested ceiling tiles, soggy insulation, bubbling paint, and oxidized/stained gypsum wallboard. (CP 783-86, 994, 1033, 1363, 1370, 1375) As a result of the repeated

water intrusions, as well as the lack of proper remediation and general maintenance, mold grew throughout the Kennewick office. (CP 159-60, 371-72, 639, 783-85, 994) Testing of ceiling tiles confirmed the presence of mold, including *stachybotrys*, a toxic mold indicative of ongoing moisture problems. (CP 784-85, 994, 1655)

Beginning in January 2006, Ms. Slack repeatedly reported to Mr. Eckstrom that she was sensitive to the mold and accompanying “musty/moldy” smell, as well as other environmental toxins in the Kennewick office, and that her sensitivity caused her persistent migraines, nausea, and dizziness. (CP 1915, 1918-19, 1973; *see also* CP 641) At the same time, Ms. Slack’s doctor diagnosed mold’s potentially negative effect on Ms. Slack. (CP 2044) On January 20, 2006, Ms. Slack told Mr. Eckstrom that she could not work in her office “until someone tells me my office is clean of toxic molds or other health hazards.” (CP 1915; *see also* CP 565) Although Ms. Slack then worked primarily from home, she was still required to go into the Kennewick office at least twice a week. (CP 2049) In March 2006, Ms. Slack reiterated to Mr. Eckstrom that “I do not want to move out of the office, I want the mold moved out of the office.” (CP 1973)

On March 16, 2006, the DOC performed an “indoor air quality” survey of the Kennewick office. (CP 888-891) The survey was limited in scope, collecting only a few samples on a single date, and narrowly focused on mold; it did not consider other contaminants, toxins, or irritants, such as sewage-associated bacteria, dust mite allergens, chemicals, or volatile organic compounds. (CP 781-83, 1343-48, 1354) The report found mold growth in one of the offices, as well as “trace surface mold contamination.” (CP 888) Nonetheless, the report concluded that there was not “airborne amplification of specific mold species unique to the indoor environment at significant levels in the office areas.” (CP 891)

Relying on the air quality survey, the DOC refused to take any steps to address Ms. Slack’s concerns regarding mold, including those suggested by the air quality survey, insisting “[n]o fix is necessary; the air quality is typical of what we would find in any office.” (CP 1010-12, 1918 (April 26, 2006 email to Ms. Slack from DOC’s Senior Facilities Planner stating “There isn’t anything that has to be done.”)) In May of 2006, Ms. Slack sent her supervisor a 42-page report explaining her concerns regarding the deficiencies in the air quality survey. (CP 1029-72, 1920)

After DOC refused to remediate the mold, on May 23, 2006, Ms. Slack filed an “Alleged Safety or Health Hazards” report with the Department of Labor and Industries. (CP 1974-75) Ms. Slack expressed her frustration that “[t]here has been a blatant lack of response to the mold/water intrusion issues by both DOC management and the building owner which is [a]ffecting occupants health in a negative manner.” (CP 1974) The Department of Labor and Industries investigated and relied on the previous air quality survey to conclude that the “mold spore count in the building [was] not significant.” (CP 1073) In May of 2006, Ms. Slack also filed a claim for benefits with the Department of Labor and Industries for her ongoing symptoms from mold exposure. (CP 1249)

Ms. Slack continued to suffer from migraines, nausea, and dizziness whenever she visited the Kennewick office. On June 14, 2006, Ms. Slack told her supervisor that after being at the office for a few hours she “suddenly became very dizzy” and “then got a headache that lasted (with meds) until I went to bed last night.” (CP 1927) On July 6, 2006, Ms. Slack took sick leave because of “mold exposure related sinus face pain and headache.” (CP 1952) In July 2006, Ms. Slack’s physician signed a letter supporting her mold-related worker’s compensation claim stating that she

“continues to suffer with the effects of the exposure to molds and their airborne toxins in the building that she works or worked in.” (CP 1250; *see also* CP 1444, 1446) Ms. Slack was later diagnosed with a gene variance that prevents her body from processing toxins, such as volatile organic compounds, and places her at risk from being in moldy/wet environments. (CP 160, 641, 1658)

2. Ms. Slack resigned from the DOC because her disabilities precluded her from working without accommodation.

Despite its promises to do so, the DOC never accommodated Ms. Slack’s disabilities. For instance, in March 2006, Mr. Eckstrom told Ms. Slack that he would “follow up” on a possible alternative office space in Pasco; he never did. (CP 1656, 1980) Likewise, in June 2006, Mr. Eckstrom again told Ms. Slack that he would “follow up” on obtaining a new office for her, this time in the local courthouse. (CP 1656, 1977) Again, Mr. Eckstrom never did. (CP 1656) In addition, as of August 2006, the DOC still had not obtained an ergonomically correct workstation for Ms. Slack, despite her obtaining workstation specifications from a furniture specialist in January 2006. (CP 49, 1640-41, 1925, 1954-60)

Working primarily from home required Ms. Slack to absorb the details of violent crime, including rape and murder, and threats

of violence against victims while in her home. (CP 49) In one instance, Ms. Slack was told of the brutal slaying of a six month baby while sitting on her couch. (CP 49) As a result, Ms. Slack no longer felt “what used to be the relative safety and security of my own living room.” (CP 49) Without a formal office, Ms. Slack could not reliably send or retrieve mail, access the DOC’s intranet system, make phone calls, or ensure the security of confidential victim files. (CP 49)

In August 2006, Mr. Eckstrom informed Ms. Slack that he would not be finding her a new office. (CP 640) Instead, Mr. Eckstrom told Ms. Slack that she would split her time between the field offices, prisons, and work release sites of the nine counties she covered as a Community Victim Liaison. (CP 640, 1645) Depending on the location, this could require Ms. Slack to commute more than four hours, and would generally require more than two hours of commuting, as opposed to her 35-minute commute (round-trip) to and from the Kennewick office. (CP 640) When Ms. Slack expressed concern that the long driving distances would exacerbate her sciatica, Mr. Eckstrom told her to buy a heating pad. (CP 640-41, 1788)

Because Ms. Slack's disabilities prevented her from commuting such long distances on a daily basis or from returning to the Kennewick office, on August 7, 2006, she resigned. (CP 71-72, 639-41) In her resignation letter, Ms. Slack explained that she did not want to leave her job and that it was "a very difficult decision," but given the dilemma the DOC placed her in – drive long-distances or return to the moldy Kennewick office – she had no choice but to resign. (CP 71-72; *see also* CP 48-49, 1644-45, 1792) As Ms. Slack put it: "I do not feel I have any options left but to resign my CVL position with DOC." (CP 1792)

B. After Ms. Slack hired Ms. Luke to represent her on a failure to accommodate claim against the DOC, Ms. Luke failed to file suit within the statute of limitations.

On August 7, 2009, Ms. Slack filed a Standard Tort Claim Form with the Washington Office of Financial Management (OFM). (CP 46-69) Ms. Slack alleged that the DOC had "failed to make work accommodations for my disabilities." (CP 48) On August 12, 2009, OFM investigator Michael Hopkins sent Ms. Slack a letter stating that the OFM had received her claim and it was beginning its investigation. (CP 170)

On August 28, 2009, Ms. Slack met with an Olympia attorney, Gregory Rhodes, for an initial evaluation of her claim. (CP 341, 642) Due to Ms. Slack's distance, Mr. Rhodes declined to represent her. (CP 642) In a subsequent letter confirming that he had declined to represent her, Mr. Rhodes informed Ms. Slack he lacked enough information to advise her on the limitations period for her claim, but nonetheless cautioned her that the "period may be very short." (CP 177, 342)

On September 15, 2009, Ms. Slack met with attorney Lucinda Luke to discuss whether Ms. Luke would represent Ms. Slack on her tort claim. (CP 1, 44-45, 642) Ms. Luke told Ms. Slack that she believed the case had merit and that she would follow-up with Mr. Hopkins. (CP 375-76, 642) The same day, Ms. Slack and Ms. Luke signed a retainer agreement providing that Ms. Slack would pay Ms. Luke at an hourly rate for "the services provided on behalf of the Client." (CP 45, 643) The one-page retainer agreement did not limit the scope of Ms. Luke's representation and provided that Ms. Luke would use her "best efforts to accomplish the Client's objectives within the limits of the law and professional ethics." (CP 45) At the bottom of the firm's separate "Client Intake Sheet" was the handwritten note "4-5 hrs for initial review." (CP

44) This note was placed in the “For Office Use Only” section of the form and was added after Ms. Slack filled out the form; Ms. Slack never saw it. (CP 44, 643, 1638) At the end of the meeting, Ms. Slack left a set of documents with Ms. Luke to review. (CP 642, 1644)

On October 5, 2009, Ms. Luke canceled a scheduled meeting with Ms. Slack, postponing it until October 20, 2009. (CP 162) Based on Mr. Rhodes previous warning that the limitations period “may be very short,” a week later, on October 13, 2009, Ms. Slack sent an email to Ms. Luke confirming that Mr. Rhodes had declined to represent her, and expressing concern that Ms. Luke had not responded to the state investigator, Mr. Hopkins, and that the time for bringing suit against the DOC may run out:

I am sorry to bother you before our next scheduled meeting but I have some concerns. The other attorney who decided he would not take the case due to my location did not contact the Risk management person regarding his letter last month. I filed the tort, per the other attorney, early August. I am afraid time may be running out on this case.

(CP 162, 176, 644) Ms. Slack then asked Ms. Luke, “should I write back to the Risk management person to let him know that I have hired you to represent me?” (CP 176) Ms. Luke never responded. (CP 644-45)

Ms. Slack met with Ms. Luke on October 20, 2009, and they continued to discuss the next steps on the tort claim. (CP 163, 378, 645) Ms. Luke requested additional documents from Ms. Slack, some of which Ms. Slack had already provided, and again stated that she would contact Mr. Hopkins. (CP 163, 645, 1659) On October 29, 2009, Ms. Slack paid Ms. Luke the current balance of \$720, which included a \$250 charge for the October 20th “[c]onference with client” and a \$260 charge for reviewing documents on the same day Ms. Slack sent her email expressing concern over the limitations period. (CP 164, 422, 645, 2064)

On October 30, 2009, the statute of limitations ran on Ms. Slack’s tort claim against the DOC. (CP 41, 179, 646) On November 18, 2009, Ms. Luke and Ms. Slack held a teleconference to discuss the claim. (CP 164) Ms. Luke made no mention of the limitations period expiring and told Ms. Slack that she had not yet contacted Mr. Hopkins, but would do so. (CP 164)

On December 21, 2009, Ms. Luke finally contacted Mr. Hopkins. (CP 41, 1814, 2056) Mr. Hopkins told Ms. Luke that he believed the statute of limitations had already expired on Ms. Slack’s claim. (CP 41, 646, 1814) Ms. Luke called Ms. Slack the same day and informed her that the limitations period on her claim

had expired nearly two months earlier. (CP 41, 646) Ms. Luke then told Ms. Slack that the scope of her representation did not include filing a tort claim and that she believed she had been retained only to provide a “second opinion.” (CP 647) At no point prior to the statute of limitations expiring did Ms. Luke inform Ms. Slack, in writing or otherwise, that her claim lacked merit or that Ms. Luke believed she had been retained only to provide a “second opinion.” (CP 647; *see also* CP 181-83) Had Ms. Luke done so, Ms. Slack would have immediately sought different counsel. (CP 647, 1659-60)

Ms. Slack and Ms. Luke met again on January 5, 2010, and Ms. Luke alleged that she had in fact contacted Mr. Hopkins on October 20, 2009, but that he had failed to return her call. (CP 41, 473, 646, 754-58) However, documents Ms. Slack obtained through a public records request confirmed that Ms. Luke only contacted Mr. Hopkins on December 21, 2009. (CP 166, 772, 1814, 1818) At the January 5th meeting, Ms. Luke agreed that Ms. Slack’s October 13th email expressing concern over the limitations period was sent to her address, but denied seeing it. (CP 646, 668)

In a letter dated January 6, 2010, Ms. Luke told Ms. Slack that “there apparently was a miscommunication between us from

our initial meeting going forward.” (CP 185) Ms. Luke continued, “It was my understanding that I had been retained to review your documents and to give you an evaluation of your potential claims.” (CP 185) Ms. Luke “apologize[d] for our miscommunication about the scope of my representation.” (CP 185) Based on their “miscommunication,” Ms. Luke refunded the fees Ms. Slack had paid. (CP 166, 186)

C. The trial court dismissed Ms. Slack’s complaint for legal malpractice against Ms. Luke because she did not have an “expert” opine on the merits of her underlying claim against the DOC.

On December 19, 2012, Ms. Slack sued Ms. Luke for legal malpractice. (CP 1-19) Ms. Luke moved for summary judgment, and Ms. Slack moved for partial summary judgment dismissing Ms. Luke’s affirmative defense that Mr. Rhodes caused her damages. (CP 504-26, 799-821) Ms. Slack filed declarations from two attorneys opining that Ms. Luke breached the standard of care by, among other things, not clearly detailing the scope of her representation and allowing the limitations period to expire. (CP 204-13; *see also* CP 735-48 (excerpts from deposition of Ms. Slack’s expert)) In her summary judgment motion, Ms. Luke argued that Ms. Slack could not avoid summary judgment without an expert to

refute her own expert's opinion that Ms. Slack's underlying failure to accommodate claim "was meritless and had no chance of success." (CP 808)

At the August 28, 2014, summary judgment hearing, Benton County Superior Court Judge Steven Dixon pressed Ms. Slack on whether she had "an opinion from a qualified attorney that [you] had a chance, even a small chance, of prevailing in [the underlying] action had it been filed in a timely basis?" (RP 34) The trial court persisted, "What attorney do you have who has supplied you with a declaration that had the WLAD claim been filed in a timely manner that [you] had a chance of prevailing? Do you have such a declaration?" (RP 35) Holding that such a declaration was "required in order . . . to avoid summary judgment," the trial court granted Ms. Luke's summary judgment motion. (CP 1571-73; RP 35) The trial court denied Ms. Slack's motion for reconsideration. (CP 1601-02) Ms. Slack appeals. (CP 1603-15)

V. ARGUMENT

A. This Court views the record in the light most favorable to Ms. Slack, cognizant that summary judgment is rarely appropriate on issues of causation, especially in cases implicating the Washington Law Against Discrimination.

This court reviews the trial court's summary judgment order de novo and "view[s] all facts and reasonable inferences in the light most favorable to the nonmoving party." *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 320, ¶ 22, 111 P.3d 866 (2005), *rev. denied*, 156 Wn.2d 1008 (2006). Summary judgment is proper only "if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Versuslaw*, 127 Wn. App. at 319, ¶ 22 (citing CR 56). "In most instances the question of cause in fact is for the jury." *Daugert v. Pappas*, 104 Wn.2d 254, 257, 704 P.2d 600 (1985). Likewise, in cases involving allegations of discrimination, summary judgment "is often inappropriate because the evidence will generally contain reasonable but competing inferences of both discrimination and nondiscrimination that must be resolved by a jury." *Davis v. W. One Auto. Grp.*, 140 Wn. App. 449, 456, ¶ 12, 166 P.3d 807 (2007), *rev. denied*, 163 Wn.2d 1040 (2008).

Because Ms. Slack was the nonmoving party, this Court views the evidence in the light most favorable to her in determining whether a reasonable jury could have found in Ms. Slack's favor on her malpractice claim.

B. A legal malpractice plaintiff is not required to present "expert" testimony on the merits of the underlying cause of action – the legal malpractice jury resolves that question of fact by weighing the evidence in the "trial within a trial."

Juries – not experts – resolve the merits of an underlying claim in the "trial within a trial" held in a legal malpractice action. The trial court erred in dismissing Ms. Slack's malpractice claim because she did not have "expert" testimony that she would have prevailed on her tort claim had Ms. Luke timely filed it. This Court should reverse the trial court's summary judgment order and remand for a trial at which a jury will resolve the merits of Ms. Slack's forfeited tort claim.

"To establish a claim for legal malpractice, a plaintiff must prove the following 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." *Versuslaw*, 127 Wn. App. at 320, ¶ 23.

"The principles of proof and causation in a legal malpractice action usually do not differ from an ordinary negligence case." *Daugert*, 104 Wn.2d at 257 (citing *Ward v. Arnold*, 52 Wn.2d 581, 584, 328 P.2d 164 (1958)). "[T]he plaintiff must demonstrate that he or she would have achieved a better result had the attorney not been negligent." *Versuslaw*, 127 Wn. App. at 328, ¶ 42. Where an attorney's error prevents or undermines the trial of a client's claim, "the causation issue in the subsequent malpractice action is relatively straightforward." *Daugert*, 104 Wn.2d at 257. The court hearing the malpractice claim holds a "trial within a trial" that asks the jury to decide whether the client would have fared better in the underlying case but for the attorney's negligence:

The trial court hearing the malpractice claim merely retries, or tries for the first time, the client's cause of action which the client asserts was lost or compromised by the attorney's negligence, and the trier of fact decides whether the client would have fared better but for such mishandling. . . . In effect the second trier of fact will be asked to decide what a reasonable jury or fact finder would have done but for the attorney's negligence. Thus, it is obvious that in most legal malpractice actions the jury should decide the issue of cause in fact.

Daugert, 104 Wn.2d at 257²; see also DeWolf & Allen, 16 Washington Practice: Tort Law and Practice § 15.46 at 498 (3d ed. 2006); Ronald Mallen, 4 Legal Malpractice § 37:85 at 1662 (2015 ed.) (“The accepted approach in establishing whether the lawyer’s act or omission caused an injury is by a trial-within-a-trial”). The “trial within a trial” procedure is particularly appropriate for cases involving a missed statute of limitations. Mallen, *supra*, § 37:137 at 1809 (“Causation may be obvious, if the lawyer’s error was an affirmative act or for some omissions, such as the failure to file a lawsuit.”).

Because the “trial within a trial” procedure “provides the objective mechanism for resolving the underlying case,” expert testimony opining on whether the plaintiff would have prevailed on the underlying claim is not required – or even permitted. Mallen, *supra*, § 37:138 at 1813-14 (courts “have refused or have been

² In *Daugert* the issue of proximate cause was a question of law because it turned on whether the Supreme Court would have granted a petition for review had the lawyer timely filed one, and if so, whether the Supreme Court’s ruling would have been favorable to the client. 104 Wn.2d at 258-59. As *Daugert* and subsequent cases make clear, the issue of causation is for a jury except in the limited cases that require the trier of fact to “engage in an analysis of the law.” *Brust v. Newton*, 70 Wn. App. 286, 292, 852 P.2d 1092 (1993), *rev. denied*, 123 Wn.2d 1010 (1994); *Daugert*, 104 Wn.2d at 258 (causation “depend[ed] on an analysis of the law and the rules of appellate procedure”).

reluctant to require or admit” “expert testimony to establish whether the underlying action would have been settled or won”) (listing cases).³ Far from being beyond the common knowledge of the average layperson, resolving the merits of an underlying claim is the quintessential – and constitutional – jury task. *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971) (“To the jury is consigned under the constitution the ultimate power to weigh the evidence and determine the facts.”); *Mallen, supra*, § 37:126 at 1768 (“The rationale is that resolving the underlying case ordinarily is within the expertise of the jury.”). Expert testimony on the merits of the underlying claim undermines the constitutionally “inviolable” right to a jury trial by withdrawing from the jury and delegating to

³ *Accord Whitley v. Chamouris*, 265 Va. 9, 11, 574 S.E.2d 251, 253 (2003) (“The expert testimony Whitley maintains was necessary requires either a prediction of what some other fact finder would have concluded or an evaluation of the legal merits of Chamouris’ claims. No witness can predict the decision of a jury and, therefore, the former could not be the subject of expert testimony.”); *Piscitelli v. Friedenber*, 87 Cal. App. 4th 953, 973, 105 Cal. Rptr. 2d 88 (2001) (experts are not permitted “to tell the jury what a reasonable trier of fact would have done”); *Bernardini v. Fedor*, 2013 WL 5701670, 2013-Ohio-4633, ¶ 6 (2013) (“Although expert testimony is required as to the standard of conduct and breach of duty in a legal malpractice claim . . . there is no corresponding requirement with respect to proximate cause.”); *Leibel v. Johnson*, 291 Ga. 180, 183, 728 S.E.2d 554, 556 (2012) (deciding the merits of the underlying claim “is a task that is solely for the jury, and that is not properly the subject of expert testimony”); *First Union Nat. Bank v. Benham*, 423 F.3d 855, 864 (8th Cir. 2005) (expert testimony is not “required to prove whether the outcome of the underlying case would have been different”).

“experts” the role of weighing evidence and deciding facts. Wash. Const. Article 1 § 21; *cf. State v. Hudson*, 150 Wn. App. 646, 652, ¶ 16, 208 P.3d 1236 (2009) (expert opinion on defendant’s guilt violates constitutional right to jury trial).

Here, the trial court erred in dismissing Ms. Slack’s malpractice claim because she did not present “expert” “opinion from a qualified attorney that [she] had a chance, even a small chance, of prevailing in [the underlying] action had it been filed in a timely basis.” (RP 34-35) A jury could resolve without expert testimony whether Ms. Slack would have prevailed on her tort claim – had it been filed – by weighing the evidence presented in the “trial within a trial.” Ms. Luke’s “expert” testimony that Ms. Slack’s underlying claim lacked merit was nothing more than argument. Indeed, it simply parroted the arguments made by Ms. Luke in her summary judgment motion. (*Compare* CP 153 *with* CP 811 (using identical language to argue that Slack’s discrimination claim lacked merit))

The cases relied on by Ms. Luke below do not require the presentation of “expert” testimony on the merits of an underlying claim. For example, in *Geer v. Tonnon*, 137 Wn. App. 838, 155 P.3d 163 (2007), *rev. denied*, 162 Wn.2d 1018 (2008) (cited at CP 808), the Court affirmed the summary judgment dismissal of a

malpractice claim because the client “failed to provide expert testimony *or other evidence* to demonstrate that . . . a breach of [the attorney’s] duty of care was the cause in fact of [the client’s] claimed damages.” 137 Wn. App. at 851, ¶ 24 (emphasis added). *Geer* was based on the lack of *any* evidence establishing that the client would have prevailed on the underlying claim and stands only for the unremarkable proposition that a malpractice plaintiff must present *some* evidence that she would have prevailed on her underlying claim. 137 Wn. App. at 851, ¶ 24 (“[client] introduced *no evidence* to show that had [attorney] . . . filed suit . . . within the one-year limitation period, [client] would have obtained a favorable judgment”) (emphasis added).⁴ Here, in contrast to *Geer*, Ms. Slack presented sufficient evidence to raise a question of fact on the

⁴ The other cases cited below were likewise inapposite. *Prather v. McGrady*, 261 Ill. App. 3d 880, 634 N.E.2d 299, *appeal denied by* 157 Ill.2d 521 (1994) stated in passing without analysis that “a legal expert [needed] to testify that the attorneys breached their standard of care and but for that negligence, [the plaintiff] would have succeeded in the underlying medical malpractice suit,” but then affirmed summary judgment because plaintiff did not have “expert testimony to show the proper standard of care and a breach of that standard.” *Williams v. Beckham & McAliley, P.A.*, 582 So.2d 1206, *rev. denied*, 592 So.2d 683 (1991), did not address whether expert testimony was required; it held on undisputed facts that the defendant attorneys were not negligent as a matter of law. *Nika v. Danz*, 199 Ill. App. 3d 296, 556 N.E.2d 873 (1990), held that the trial court did not err in *admitting* expert testimony on the “ultimate issue” in the case, whether plaintiff’s contributory negligence was fatal to his underlying claim, not that such testimony was *required*. *Boulette v. Boulette*, 627 A.2d 1017 (Me. 1993) is not a malpractice case.

merits of her underlying claim. (See § IV.C.2) That question must be resolved in the trial within a trial.

The trial court erred for the additional reason that *no* expert testimony, even regarding the attorney's standard of care and breach, is necessary where, as here, "the area of claimed malpractice is within the common knowledge of laymen." DeWolf & Allen, *supra*, § 15.44 at 495. Courts routinely apply this rule to cases involving a missed statute of limitations. Mallen, *supra*, § 37:128 at 1776-77 ("The most frequent situation, not requiring expert testimony, is a statute of limitations or other time limitation missed") (listing cases). Thus, Ms. Slack was not required to present *any* expert testimony to survive summary judgment. Regardless, Ms. Slack did present testimony from two experienced attorneys stating that Ms. Luke's conduct breached the standard of care and caused Ms. Slack's damages. (CP 204-13)

The trial court erred in dismissing Ms. Slack's claim because she did not present "expert" testimony that her underlying tort claim was meritorious. Such a rule conflicts within the well-established "trial within a trial" methodology for resolving legal malpractice claims. This Court should reverse and remand for trial of Ms. Slack's malpractice claim.

C. The alternative grounds for summary judgment asserted by Ms. Luke below are without merit.

The trial court relied solely on Ms. Slack's failure to present an expert opinion on the merits of her underlying claim for disability discrimination. However, none of the other arguments asserted by Ms. Luke in her summary judgment motion – she was not retained to file a tort lawsuit, Ms. Slack's failure to accommodate claim lacked merit, and that it was barred by the Industrial Insurance Act – justified summary judgment on Ms. Slack's legal malpractice claim. This Court should reject any reliance on these arguments as alternative grounds for affirming summary judgment.

1. The conflicting testimony of Ms. Slack and Ms. Luke, as well as the unrestricted fee agreement, creates an issue of fact regarding the scope of Ms. Luke's representation.

Whether an attorney-client relationship has been formed and scope of that relationship is a question of fact that turns on the client's reasonable subjective belief – not the attorney's belief, as Ms. Luke argued repeatedly below. Whether filing a tort action was within the scope of Ms. Luke's representation of Ms. Slack is an issue that must be resolved by a jury.

“[T]he essence of the attorney-client relationship is whether the attorney’s assistance or advice is sought and received on legal matters.” *In re Disciplinary Proceeding Against Egger*, 152 Wn.2d 393, 410, 98 P.3d 477 (2004). “The existence of an attorney/client relationship is a question of fact, the essence of which may be inferred from the parties’ conduct.” *Teja v. Saran*, 68 Wn. App. 793, 795, 846 P.2d 1375, *rev. denied*, 122 Wn.2d 1008 (1993). “Even a short consultation may suffice to create an attorney/client relationship.” *Teja*, 68 Wn. App. at 795-96. “[A]n important factor in determining the existence of the relationship is the client’s subjective belief.” *Teja*, 68 Wn. App. at 796.

Here, the evidence more than establishes an issue of fact whether Ms. Slack reasonably believed that she had retained Ms. Luke to file a tort action on her behalf. It is undisputed that Ms. Luke agreed to serve as Ms. Slack’s attorney; Ms. Slack and Ms. Luke signed a “Fee Agreement” providing that Ms. Slack would pay Ms. Luke for “the services provided on [her] behalf.” (CP 45) That agreement in no way limited the scope of Ms. Luke’s representation, but instead required Ms. Luke to use her “best efforts to accomplish [Ms. Slack’s] objectives within the limits of the law and professional ethics.” (CP 45) Ms. Slack’s “objective” was, as Ms. Luke conceded,

to prevail in her tort action against the Department of Corrections. (CP 34) Indeed, on the “Client Intake Sheet” Ms. Slack indicated that she sought recovery against the Department of Corrections. (CP 44)

Ms. Slack’s conversations with Ms. Luke confirm that Ms. Slack had a reasonable belief that Ms. Luke would file a lawsuit on her behalf. At their initial meeting, Ms. Luke told Ms. Slack that her claim had merit. (CP 375-76) Over the next two months, Ms. Slack and Ms. Luke discussed the next steps in Ms. Slack’s claim, including that Ms. Luke would contact the Washington State Office of Financial Management on Ms. Slack’s behalf. (CP 163-64, 378, 645, 1661) Far from telling Ms. Slack that her claim had no merit and was not worth pursuing, Ms. Luke continued to request and review documents from Ms. Slack. (CP 163, 645, 1659)

When Ms. Slack emailed Ms. Luke about whether time for filing a lawsuit may be running out, rather than clarify the purportedly limited scope of her representation, Ms. Luke simply failed to respond, and later billed Ms. Slack for work she did on the very same day. (CP 162, 176, 644-45, 2064) A day before the statute of limitations expired, Ms. Slack paid Ms. Luke for her ongoing services. (CP 164, 422, 645, 2064) Only *after* the statute

of limitations ran did Ms. Luke first assert that her representation of Ms. Slack did not include filing a lawsuit. (CP 647) Moreover, when informing Ms. Slack of the “significant problems” with her claim – two months after the statute of limitations ran – Ms. Luke made no mention of their “previous” or “prior” discussions of those problems, instead emphasizing their discussions “today.” (CP 181)

Indeed, Ms. Slack was not the only party that thought Ms. Luke was representing Ms. Slack on her tort claim. In response to Ms. Slack’s public records requests, the Washington Office of Financial Management disclosed an email from its investigator to Ms. Luke, explaining that “since it was sent to your attorney it is discloseable.” (CP 1818; *see also* CP 1809, 1821, 1824) That OFM believed Ms. Luke was representing Ms. Slack underscores that the issue could not be resolved on summary judgment.

Ms. Luke’s self-serving assertions that Ms. Slack was only looking for a “second opinion” did not entitle her to summary judgment. (CP 33-34) To the contrary, conflicting testimony cannot be resolved on summary judgment. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 119-20, 11 P.3d 726 (2000) (conflicting expert declarations precluded summary judgment); *Stephens v. City of Seattle*, 62 Wn. App. 140, 144, 813 P.2d 608

(conflicting testimony regarding motorist's speed precluded summary judgment), *rev. denied*, 118 Wn.2d 1004 (1991). Likewise, a jury could have easily found that Ms. Luke's assertion that she "determined fairly rapidly" Ms. Slack's claim was meritless and one she would not take on conflicted with her promise to use her "best efforts" to represent Ms. Slack, and that had Ms. Luke truly believed that the claim lacked merit – as she now asserts – she would have declined any representation of Ms. Slack. (CP 34)

Nor does the unexplained notation on the Client Intake Sheet stating "4-5 hrs for initial review" – placed in the "Office Use Only" section and never seen by Ms. Slack – limit *as a matter of law* the scope of Ms. Luke's representation to providing a second opinion. (CP 44, 551-52, 643) If anything it suggests that Ms. Luke's review of the documents was only the "initial" step in her representation and that more was to follow, including filing a lawsuit on Ms. Slack's behalf. Moreover, that notation was nowhere mirrored on the Fee Agreement that actually establishes the terms of Ms. Luke's representation. (CP 45) As is almost always the case, the scope of Ms. Luke's representation of Ms. Slack is a question of fact for a jury to resolve.

2. Ms. Slack established a prima facie failure to accommodate claim that was lost as a result of Ms. Luke's negligence.

Ms. Slack presented substantial evidence the DOC failed to accommodate her disabilities, contrary to the assertions of Ms. Luke's "expert." This evidence was more than enough to preclude summary judgment in favor of Ms. Luke.

The Washington Law Against Discrimination, RCW ch. 49.60, "requires an employer to reasonably accommodate a disabled employee unless the accommodation would pose an undue hardship." *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 777, ¶ 14, 249 P.3d 1044, *rev. denied*, 172 Wn.2d 1013 (2011) (citing RCW 49.60.180(2)). An employee establishes a failure to accommodate claim by showing that 1) she had an impairment that is medically recognizable or diagnosable, or exists as a record or history; 2) that she gave notice of the impairment or the employer knew of the impairment; 3) the impairment had a substantially limiting effect on her ability to perform her job or her ability to access equal benefits, privileges, or terms or conditions of employment; 4) that she would have been able to perform the essential functions of the job with reasonable accommodation; and

5) that the employer failed to reasonably accommodate the impairment. WPI 330.33.

“To accommodate, the employer must affirmatively take steps to help the disabled employee continue working at the existing position or attempt to find a position compatible with the limitations.” *Frisino*, 160 Wn. App. at 778, ¶ 14. “Generally, the best way for the employer and employee to determine a reasonable accommodation is through a flexible, interactive process.” *Frisino*, 160 Wn. App. at 779, ¶ 19 (citing RCW 49.60.040(7)(d)). “Reasonable accommodation claims often involve disputed facts best left for a jury to decide.” *Harrell v. Washington State ex rel. Dep’t of Soc. Health Servs.*, 170 Wn. App. 386, 398, ¶ 22, 285 P.3d 159 (2012), *rev. granted*, 176 Wn.2d 1011 (2013); *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 644, 9 P.3d 787 (2000) (“Generally, whether an employer made reasonable accommodation or whether the employee’s request placed an undue burden on the employer are questions of fact for the jury.”), *overruled in part on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006).

Frisino stresses the importance of the “interactive process” an employer must engage in when attempting to accommodate an

employee's disability. In that case, a teacher notified her school district that she could not work in her current building because of a "respiratory sensitivity to molds, chemicals, and other environmental toxins." 160 Wn. App. at 771, ¶ 2. The district transferred her to another school; however, the new classroom had "visible mold as well as blackened and missing ceiling tiles," including *stachybotrys*. 160 Wn. App. at 771, ¶ 2. The district hired a private firm to investigate the building, which "reported no active mold growth" and that airborne fungal concentration inside the building was lower than outdoors. 160 Wn. App. at 771, ¶ 3. The district then attempted to remediate the building. The teacher disputed that the remediation was effective and requested a transfer to a different building, at which point the district terminated her.

The trial court granted summary judgment in favor of the district, but the Court of Appeals reversed, holding that whether the district's accommodation was reasonable was an issue of fact for a jury. The Court of Appeals rejected the district's position that its air quality survey demonstrated that it had reasonably accommodated the teacher because, unlike cases in which strict time or weight limitations are imposed, there was no "objective standard" for determining whether the employee could return to work and "be

free from substantially limiting symptoms.” 160 Wn. App. at 781-82, ¶¶ 21-23. Thus, an interactive process involving “trial and error [of accommodations] was appropriate *and necessary*.” 160 Wn. App. at 781-82, ¶¶ 22-23 (emphasis added).

Here, as in *Frisino*, the DOC would not have been entitled to summary judgment, and thus neither was Ms. Luke. Like the teacher in *Frisino*, Ms. Slack notified the DOC that she had a sensitivity to molds and other environmental toxins that substantially limited her ability to do her job, and sought a reasonable accommodation – an office “clean of toxic molds or other health hazards.” (CP 51, 1915, 1918-19, 1973) But unlike *Frisino*, where the employer at least attempted to remediate the air quality, the DOC made no effort to engage in the “interactive process” of attempting accommodations, instead insisting that “[t]here isn’t anything that has to be done” because “the air quality is typical of what we would find in any office.” (CP 1010-12, 1918)

Frisino requires more. An employer cannot – as the DOC did – rely on an air quality survey that purportedly determines air quality is “normal” without also engaging in the interactive process to determine whether the disabled employee can return to work “free from substantially limiting symptoms.” 160 Wn. App. at 782,

¶ 23. Because the DOC made *no attempt* to engage in the “interactive process” mandated by the WLAD, Ms. Slack’s disability claim based on her sensitivity to mold and other toxins would have easily survived summary judgment – had Ms. Luke filed it.

Ms. Slack’s failure to accommodate claim related to her sciatica and carpal tunnel likewise would have survived summary judgment. In April 2004, Ms. Slack informed her supervisor that after “spen[ding] more hours at my desk than usual my wrist and back now hurt all day and night.” (CP 553-54, 1893) Ms. Slack also repeatedly requested leave because of her sciatica and wrist pain. (CP 1880-81, 1883-85) Rather than address Ms. Slack’s disability by obtaining an ergonomically correct workstation, the DOC admittedly “dropped the ball” on her request, never obtaining a workstation in the more than two years following Ms. Slack’s request, despite Ms. Slack’s repeated requests and reminders that she had “great difficulty sitting in chairs in general at this point.” (CP 556, 1643, 1898)

Near the end of Ms. Slack’s employment, the DOC confirmed that it would not accommodate either of her disabilities. It presented her with an impossible dilemma – return to her moldy office or drive up to four hours while working out of numerous

makeshift DOC offices. Recognizing that her disabilities precluded either option, Ms. Slack had no choice but to resign. Unfortunately, because of Ms. Luke's negligence Ms. Slack's failure to accommodate claims are now forever barred.

3. The Industrial Insurance Act did not bar Ms. Slack's failure to accommodate claim.

The Industrial Insurance Act does not bar a worker from recovering on a disability discrimination claim under the WLAD, even where the disability arose in the workplace. *Reese v. Sears, Roebuck & Co.*, 107 Wn.2d 563, 571-74, 731 P.2d 497 (1987).⁵ Ms. Luke's contrary arguments below are without merit.

Reese held that disability discrimination necessarily causes "separate injury" from an underlying industrial injury "[b]ecause the injuries (1) are of a different nature, (2) must arise at different times in the employee's work history, and (3) require different causal factors (an IIA claim is indifferent to employer fault, a discrimination claim requires such fault)." 107 Wn.2d at 574. Accordingly, there is no "double recovery" problem presented when an employee brings a disability discrimination claim based on a

⁵ Overruled in part on other grounds by *Phillips v. City of Seattle*, 111 Wn.2d 903, 766 P.2d 1099 (1989).

disability that arose in the workplace.⁶ *Reese*, 107 Wn.2d at 574; see also *Hinman v. Yakima Sch. Dist. No. 7*, 69 Wn. App. 445, 451, 850 P.2d 536 (1993) (“*Reese* held there are no double recovery problems with simultaneous IIA and LAD actions because there are two distinct wrongs involved.”), *rev. denied*, 125 Wn.2d 1010 (1994). Under the WLAD, a plaintiff may recover the reasonable value of lost past and future earnings and fringe benefits, as well as emotional distress, humiliation, and pain and suffering. Dewolf and Allen, 16A Wash. Prac.: Tort Law and Practice, § 24.19 at 148 (3d ed. 2006); *Hinman*, 69 Wn. App. at 452 (reversing summary judgment dismissal of discrimination plaintiff’s claim because claims for emotional distress were distinct damages from industrial insurance claim).

As *Reese* established over twenty years ago, claims such as Ms. Slack’s seeking recovery for the separate and distinct injury of disability discrimination are not barred by the Industrial Insurance Act. In her Tort Claim form Ms. Slack detailed the “mental health issues . . . and extreme stress” caused by “research[ing] files and

⁶ *Reese* also noted that industrial insurance benefits received after the date a disability discrimination claim has matured “can be deducted from the[] discrimination damages wherever necessary to prevent double recovery.” 107 Wn.2d at 574.

talk[ing] with victims while sitting at home absorbing all the details of rape, attempted murder, murder and current threats towards victims” and how that destroyed “what used to be the relative safety and security of my own living room.” (CP 49-50; *see also* CP 49 (“I heard, while sitting on my living room couch where I watched TV with my children, stories of a mother whose boyfriend beat her 6 month old baby to death. . . 12 years earlier.”) Ms. Slack explained, “I do not feel the same way about my home as I did before I had to bring the details of the outrageous evil that exists in some offenders.” (CP 49) In addition to these emotional damages, Ms. Slack has not been paid for her past or future wages, and to the extent she ever is, that would only require a deduction from her damages after trial – not dismissal of her entire claim on summary judgment. This Court should reject any argument that the IIA bars Ms. Slack’s claim.

VI. CONCLUSION

This Court should reverse and remand for a trial of Ms. Slack’s legal malpractice claim.

Dated this 9th day of April, 2015.

SMITH GOODFRIEND, P.S.

By  _____

Howard M. Goodfriend
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Attorneys for Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 9, 2015, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division III 500 N. Cedar Street Spokane, WA 99201	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-File
Raphael Nwokike Law Office of Raphael Nwokike, P.S. 30640 Pacific Highway South, Suite E-3 Federal Way, WA 98003	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Stephen C. Smith Hawley Troxell Ennis & Hawley LLP 877 Main Street, Suite 1000 P.O. Box 1617 Boise, Idaho 83701-1617	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Philip A. Talmadge Talmadge/Fitzpatrick 2775 Harbor Avenue SW Third Floor, Suite C Seattle, WA 98126	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 9th day of April, 2015.



Victoria K. Vigoren

2013 WL 5701670

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Ninth District, Wayne County.

Robert BERNARDINI, Appellant

v.

Robert FEDOR, Esq., Appellee.

No. 12CA0063. | Decided Oct. 21, 2013.

Appeal from Judgment Entered in the Court of Common Pleas
County of Wayne, Ohio, Case No. 11-CV-0128.

Attorneys and Law Firms

Donald Gallick, Attorney at Law, for appellant.

James O'Connor and Holly Marie Wilson, Attorneys at Law,
for appellee.

Opinion

BELFANCE, Presiding Judge.

*1 ¶ 1 Appellant, Robert Bernardini, appeals the order of the Wayne County Court of Common Pleas that granted summary judgment to Appellee, Robert Fedor. This Court affirms in part and reverses in part.

I.

¶ 2 Mr. Bernardini hired attorney Robert J. Fedor to represent him with regard to a civil administrative action by the Internal Revenue Service to collect unpaid tax penalties and interest. Once the IRS issued a determination of Mr. Bernardini's liability, Mr. Fedor perfected an administrative appeal and attended an appeal conference on Mr. Bernardini's behalf. According to Mr. Bernardini, however, Mr. Fedor was unprepared for that meeting and did not represent him adequately. In addition, Mr. Bernardini alleged that Mr. Fedor failed to notify him when the IRS Appeals office sent correspondence to Mr. Fedor regarding the appeal and that Mr. Fedor failed to communicate with him despite Mr. Bernardini's multiple efforts to do so. Mr. Bernardini ultimately terminated their attorney-client relationship and

retained a different attorney. He subsequently conceded and paid his penalties and accumulated interest to the IRS in full.

¶ 3 Mr. Bernardini sued Mr. Fedor for legal malpractice and fraud, alleging that Mr. Fedor negligently represented him and, by failing to communicate with him, fraudulently concealed his negligent acts. Both Mr. Bernardini and Mr. Fedor retained experts whose reports supported their positions regarding the adequacy of Mr. Fedor's representation. Mr. Fedor moved for summary judgment, arguing that because Mr. Bernardini's expert did not express an opinion about causation, Mr. Bernardini's legal malpractice claim failed as a matter of law. The trial court granted Mr. Fedor's motion for summary judgment, and Mr. Bernardini appealed.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT SHOULD BE REVERSED BECAUSE [MR. FEDOR'S] NEGLIGENCE DIRECTLY AND PROXIMATELY CAUSED MONETARY DAMAGE TO [MR. BERNARDINI].

¶ 4 In his first assignment of error, Mr. Bernardini has argued that the trial court erred by concluding that Mr. Fedor was entitled to summary judgment on his malpractice claim because Mr. Bernardini's expert did not opine on the element of proximate cause. We agree.

¶ 5 This Court reviews an order granting summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). Under Civ.R. 56(C), "[s]ummary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law." *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, ¶ 10. The substantive law underlying the claims provides the framework for reviewing motions for summary judgment, both with respect to whether there are genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Burkes v. Stidham*, 107 Ohio App.3d 363, 371 (8th Dist.1995).

*2 {¶ 6} A claim of legal malpractice requires the plaintiff to prove that the attorney owed a duty to the plaintiff, that the attorney breached that duty and failed to conform to the standard of care, and that the failure proximately caused damages to the plaintiff. See *Vahila v. Hall*, 77 Ohio St.3d 421 (1997), syllabus. “If a plaintiff fails to establish a genuine issue of material fact as to any of the elements, the defendant is entitled to summary judgment on a legal-malpractice claim.” *Shoemaker v. Gindlesberger*, 118 Ohio St.3d 226, 2008–Ohio–2012, ¶ 8. Although expert testimony is required as to the standard of conduct and breach of duty in a legal malpractice claim unless “the breach is so obvious that it can be determined by the court or is within the ordinary knowledge and experience of laymen,” there is no corresponding requirement with respect to proximate cause. *Morris v. Morris*, 9th Dist. Summit No. 21350, 2003–Ohio–3510, ¶ 17. See also *Wayside Body Shop, Inc. v. Slaton*, 2d Dist. Montgomery No. 25219, 2013–Ohio–511, ¶ 30. In other words, expert testimony on the element of proximate cause is not required in every case, and the determination of whether it is required in an individual case must be based on the nature of the malpractice claim and the attendant circumstances. See, e.g., *Yates v. Brown*, 185 Ohio App.3d 742, 2010–Ohio–35, ¶ 18, 24 (9th Dist.) (observing that expert testimony was necessary to establish causation in a case in which damages could have been attributed to more than one attorney). In stating the basis for his motion for summary judgment, however, Mr. Fedor took the opposite position:

Here, Plaintiff's expert has not opined on the proximate causation element of his claim for legal malpractice. It is well settled, however, that expert testimony is required to establish the proximate causation element of a legal malpractice claim. * *
* Accordingly, because Plaintiff's expert, Terri Brunson, has not opined on the proximate causation of Plaintiff's claim, Plaintiff's legal malpractice claim fails as a matter of law.

Although in his merit brief, Mr. Fedor attempts to retreat from this position, his arguments in the motion were precise. Mr. Fedor moved for summary judgment on Mr. Bernardini's legal malpractice claim on the basis that because Mr. Bernardini's expert did not express an opinion about proximate cause, the malpractice claim failed as a matter of

law. Because expert testimony about proximate cause is not required in every case, however, the legal premise underlying Mr. Fedor's motion is incorrect, and the trial court erred in granting the motion on that basis. Mr. Bernardini's first assignment of error is sustained.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THE TRIAL COURT'S RULING AGREED THAT DEFENDANT COMMITTED NEGLIGENCE, THEREFORE PLAINTIFF HAD A CONSTITUTIONAL RIGHT TO HAVE A JURY DETERMINE THE APPROPRIATE AMOUNT OF FINANCIAL DAMAGES.

*3 {¶ 7} In his second assignment of error, Mr. Bernardini argues that the trial court erred by concluding that Mr. Fedor committed negligence, but granting summary judgment to Mr. Fedor nonetheless. The trial court did not conclude that Mr. Fedor committed negligence, however. Instead, the trial court assumed for purposes of discussion that the first two elements of the legal malpractice claim were present and granted summary judgment on the issue of proximate cause as discussed above. See *Shoemaker*, 118 Ohio St.3d 226, 2008–Ohio–2012, at ¶ 8. Mr. Bernardini's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED AS A MATTER OF LAW BY DECLARING THAT A CLAIM FOR COMMON LAW FRAUD CANNOT BE BROUGHT WITHIN A LEGAL MALPRACTICE CASE.

{¶ 8} In his final assignment of error, Mr. Bernardini argues that the trial court erred by granting summary judgment to Mr. Fedor on his claim for fraud based on the conclusion that a fraud claim cannot be stated apart from a claim for legal malpractice. The trial court concluded, however, that “the fraud claim is in reality a legal malpractice claim[,]” so it is unclear whether the trial court actually decided that “a claim for common law fraud cannot be brought within a legal malpractice case.” For that reason, and in light of our resolution of Mr. Bernardini's first assignment of error, his third assignment of error is premature, and we decline to address it at this time.

III.

{¶ 9} Mr. Bernardini's first assignment of error is sustained. His second assignment of error is overruled. His third assignment of error is premature, and we decline to address it at this time. The judgment of the Wayne County Court of Common Pleas is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

Judgment affirmed in part, reversed in part, and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A

certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

CARR, J. and WHITMORE, J. concur.

Parallel Citations

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