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Supreme Court No. 88460-9
Court of Appeals, Division II No. 41279-9-II

SUPREME COURT
OF THE STATE OF WASHINGTON

TERESA SCHMIDT,

Petitioner,

vs.

TIMOTHY P. COOGAN, et al.

Respondent.

Respondent's

APPELLANT/CROSS-RESPONDENT COOGAN'S
SUPPLEMENTAL BRIEF

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ORIGINAL

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I. INTRODUCTION

In the issue statement regarding this case, which can be found in the Washington Court's website, the following is stated:

Whether in a legal malpractice action based on an attorney's mishandling of personal injury action, the plaintiff must prove that the underlying action was collectible in order to establish damages.

In light of such an issue statement, and the fact that all other issues in this case, which were generated following the second trial of this matter have already were exhaustively briefed before the Court of Appeals, and in Coogan's Answer to Ms. Schmidt's Petition for Review, this Supplemental Brief will primarily focus on that issue. Nevertheless, it is noted that within Respondent's Petition for Review, which was granted, there are a number of disingenuous assertions. As discussed in Mr. Coogan's Answer to the Petition for Review, Ms. Schmidt's efforts to misdirect blame towards the defense in this matter, for her failure to put on **any proof** regarding an essential component of a damages claim are specious. It is respectfully suggested that Plaintiff's counsel's failings in that regard had nothing to do with any actions of the part of the defense.

What is noticeably absent from the record of this case is any effort on the part of Plaintiff's counsel to conduct discovery and to gather insurance or

asset information from the Grocery Outlet store, who was the defendant, in the underlying lawsuit which Mr. Coogan ultimately failed to perfect. Such a lack of diligence is touched upon in the Court of Appeals' first opinion in this matter, which was set forth in 135 Wn.App 605, 613, 145 P.3d 1216 (2006), reversed on other grounds, 162 Wn.2d 488, 173 P.3d 273 (2007). In that opinion, the Court of Appeals observed, (at Page 613), that there was no evidence of any failure on Mr. Coogan's part to investigate the Grocery Outlet's liability which had any impact on this case, nor could Ms. Schmidt show that any evidence was lost, or could not be procured due to any actions of Mr. Coogan.

Similarly, on the issue of "collectability," the record in this case is absolutely devoid of any evidence or effort on the part of the Plaintiff to gather relevant information. For example, a subpoena was never issued to the Grocery Outlet in order to acquire a copy of any applicable insurance policies.¹

¹ Within the various briefs filed since the second trial of this matter, the plaintiff has asserted, among other things, that the defense somehow prevented the presentation of evidence regarding "collectability." According to the plaintiff, because the defense filed a routine Motion in Limine seeking to exclude insurance evidence under the terms of ER 411, (as well as a wealth of other authority), that somehow the defense "ambushed" the plaintiff and, (somehow), waived the issue of collectability. The problem with this analysis is that there was nothing preventing the defense from seeking to admit "insurance" evidence for the limited purpose of establishing "collectability."

Further, the plaintiff's position is fatally flawed in that, at the time of the second trial, the

It is respectfully suggested that, if one is going to sue another lawyer for "malpractice," that at least one should be familiar with the core elements of such a claim. As will be discussed in more detail below, consistent with a number of opinions already generated by our Appellate Courts, this Court should also conclude that collectability is an essential component of damages, (due to proximate cause concerns), in a legal malpractice case involving a personal injury claim.

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plaintiff **did not possess** any evidence on the issue of what insurance the Grocery Outlet did or did not have at the time of Ms. Schmidt's injury. All the plaintiff had was a copy of Mr. Coogan's original file, which had the word "Safeco" written upon it, and nothing else. That is far from the kind of information necessary to establish "collectability" and, even if such a document was admitted, standing alone, it would have been insufficient to establish this necessary element. It is respectfully suggested that, at a minimum, a jury verdict must be supported based upon "substantial evidence," i.e., evidence which is something more than just mere speculation and conjecture. See, *Nejin v. City of Seattle*, 40 Wn. App 414, 421, 698 P. 2d 615 (1985).

There is no evidence within the record that the reference to "Safeco" was a specific reference to the Grocery Outlet's insurance carrier and, even if it was, such a notation provides no information as to what insurance was or was not available to pay the claim.

Additionally, it is significantly noted that one of the grounds for the grant of a new trial, limited to damages was the initial Trial Judge's determination that he inappropriately admitted lack of insurance evidence in the first trial. See, *Cramer v. Van Parys*, 7 Wn. App 584, 593-94, 500 P. 2d 1255 (1972); *Nollmeyer v. Tacoma Ry. and Power Co.*, 95 Wn. 595, 164 P. 229 (1917), ("financial hardship" and/or the inability to pay for medical care is irrelevant and immaterial). Despite the fact that plaintiff's Motion in Limine regarding "pleas of poverty" and lack of insurance were granted by the Trial Court, nevertheless, **once again**, plaintiff submitted evidence before the jury that she lacked insurance to pay her medical bills. That was among the issues raised by Appellant in the current appeal, which was not addressed by the Court of Appeals, given its dispositive determination regarding "collectability."

II. ARGUMENT

A. **Plaintiff's Argument Without Citation to Authority, or Meaningful Analysis, Should Be Disregarded.**

Within the Plaintiff's Petition for Review, a number of arguments are asserted upon which there is no meaningful citation to any authority, nor meaningful legal analysis. Thus, such argument should be disregarded. See, *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 821 P.2d 549 (1999). For example, commencing at Page 16 of Plaintiff's Petition for Review, she argues that her failure to prove the essential elements of her damage claim should not have resulted in dismissal, but rather should have generated a new trial. In making such an assertion, Plaintiff does not cite to a scintilla of legal authority in support.

It is also extremely troubling that Plaintiff would go to extraordinary efforts to try to mislead the Court by parsing the record in a deceptive manner. It can be observed that, at Page 6 of Plaintiff's Petition for Review, only a short snippet of a rather long argument regarding "collectability" is actually quoted. If one actually looks at the entirety of the argument presented to the Trial Court, in support of Defendant's Motion for Judgment as a Matter of Law, at the close of Plaintiff's case-in-chief it becomes crystal clear that the Plaintiff in order to support a misguided argument that the

defense counsel did not appropriately argue the "collectability" issue because he utilized the words "proximate cause," as opposed to arguing that "collectability" is an element of damages. If one actually examines the entirety of the record, which is set forth at the Report of Proceedings, Pages 503 through 507, one will be left without a shred of doubt that the defense was arguing that because of "proximate cause" principles, "collectability" is an essential element of damages in the legal malpractice context. Such a position is consistent with the law.

It is further mystifying that the Plaintiff is contending that the defense failed to properly "assign error" to the Trial Court's refusal to grant Defendant's Motion for Judgment as a Matter of Law at the close of Plaintiff's Case-in-chief, and in Response to Plaintiff's Motion for JNOV/New Trial. Plaintiff's first assignment of error, set forth within Appellant's Opening Brief, which was before Division II, provides:

1. The trial court erred in failing to grant the defendant's motion for judgment as a matter of law at the close of plaintiff's case in chief, and after the jury's verdict in this case, when the plaintiff, in this legal malpractice case, related to the failure to perfect a personal injury lawsuit, failed to establish the essential element that any judgment in the underlying case, had it been properly perfected, would have been 'collectable'.

It is respectfully submitted that such an assignment of error, along with the substantial briefing which was before the Appellate Court, was more than adequate to preserve for review the Trial Court's fundamental error on this issue. It has long been recognized that technical violation of the rules requiring assignment of errors do not ordinarily bar an appellate review, when the nature of the challenge is perfectly clear and the challenged ruling is set forth within the appellate briefing. See, *Goehle v. Fred Hutchinson Cancer Research Center* 100 Wn. App 609, 613-14 1 P.3d 579 (2000); *Polygon Northwest Co. v. American Nat. Fire Ins. Co.*, 143 Wn. App 753, 189 P.3d 777, review denied, 164 Wn.2d 1033, 197 P.3d 1184 (2008).

Simply because defense counsel did not state the issues, either before the Trial Court, or the Appellate Court, in a manner to Plaintiff's counsel's liking, does not mean that issues were not appropriately preserved in this case. Apparently, despite the commands of RAP 1.2, Plaintiff's counsel would prefer to have a return to the "sporting theory of justice" contrary to the purposes which animate both our civil and appellate rules. See, *Curtis Lumber Co. v. Sortor*, 83 Wn.2d 764, 766-67, 522 P. 2d 822 (1974). It is respectfully suggested that the appellate court would have been remiss in not reviewing an issue of which was clearly preserved at every level.

B. Whether Characterized as an Issue of Proximate Cause or an Issue of Damages, or Both, Collectability Is an Essential Element in a Legal Malpractice Case Involving a Personal Injury Claim.

It is interesting to note that recently pattern jury instructions have been adopted addressing claims of legal malpractice. Significantly, WPI 107.07 under the heading of "legal malpractice - proximate cause," provides:

If you determine that [the attorney] was negligent in handling [the client's] case in his representation of [client], then you must decide whether the negligence was a proximate cause of injury or damage to [the client].

The term "proximate cause" means a cause which in a direct sequence produces the injury or damage complained of and without which the injury or damages would not have happened. In this case, you should make this determination of proximate cause by deciding whether [the client] would have achieved a better outcome in her original case if her attorney [Mr. Coogan] had not been negligent.
(Emphasis added).

The notion that damages in a legal malpractice setting are measured on whether or not the client would have received a better result "but for" the attorney's negligence is further echoed in WPI 107.8 which, under the heading of "legal malpractice - negligence - damages," provides:

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages, the court does not mean to suggest for which party a verdict should be rendered. If your verdict is for [the client] then you must determine the amount of money that will reasonably and fairly compensate the client for such damages as you find were proximately caused by the negligence of [the attorney]. If you find for the client you should consider the following types of damages: (1) The difference between the amount actually recovered by [the client] in the original case and the amount that you determine would have been recovered if [the attorney] had not been negligent in handling the original case; and (2) Expenses that the client reasonably incurred to avoid or reduce the loss caused by [the attorney's negligence]. The burden of proving damages rests with [the client] it is for you to determine, based on the evidence, whether any particular type of or amount of damages has been proved by the preponderance of the evidence. Your Awards must be based on evidence and not upon speculation, guess or conjecture. (Emphasis added).

It is respectfully suggested although the pattern jury instructions are not infallible, they certainly are preferred. See, CR 51(d)(1) and (3).

It is noted that the language in the above-referenced pattern jury instructions make no distinction as to whether or not the underlying matter involved any particular kind of claim or defense. This is because the proximate cause/damage principles recognized within the pattern jury instructions universally apply to most, if not all, claims of attorney malpractice. This Court has long recognized that the measure of damages in

the legal malpractice context is determined on whether or not the client would have fared better “but for” the attorney's mishandling of the case. See, *Daugert v. Pappas*, 105 Wn.2d 254, 257, 704 P. 2d 600 (1985).

Following *Daugert*, our Appellate Courts were quick to recognize that when an attorney mishandles a matter, which ultimately would result in an award of money damages to the client, the true damages, **is not** the value of the underlying claim, but rather what the client would have in fact realized had the case been properly pursued. See, *Tilly v. Doe*, 49 Wn. App 727, 732-33, 746 P. 2d 323 (1988). In *Tilly*, the Appellate Court noted:

Washington courts have not yet addressed the issue of collectability in attorney malpractice actions, however most jurisdictions require proof of collectability in order to establish 'the amount of loss actually sustained as a proximate result of the conduct of the attorney. Taylor Oil Co. v. Weisensee, 334 N.W. 2d 27, 29 (S.D. 1983) (quoting 7A C.J.S. attorney client Sections 273a (1980), and citing cases). Thus since collectability is essentially an extension of proximate cause analysis, and since the plaintiff normally has the burden of proving proximate cause in a legal malpractice action, Martin v. Northwest Legal Services, 143 Wn. App. 405, 712 P. 2d 779 (1986) [we hold that the trial court did not err in requiring a proof of collectability, and evidence relevant to collectability was properly admitted on the issue of proximate cause.

Following *Tilly*, the Appellate Court revisited the issue in *Nielson v. Eisenhower and Carlson*, 100 Wn. App 584, 999 P. 2d 42 (2000), which reiterated that in the malpractice context injuries and/or damages are measured on whether or not the "the client would have prevailed or achieved a better result if the attorney had performed competently." Citing to *Sherry v. Diercks*, 29 Wn. App 43, 437-38 628 P. 2d 1336, reviewed denied, 96 Wn.2d 1003 (1991).

Again, this issue is addressed, (as recognized by the Court of Appeals in this case), in the *Matson v. Weidenkopf*, 101 Wn. App 472, 484, 3 P.3d 805 (2000) case. Consistent with the prior *Tilly* opinion, the Court of Appeals in *Matson* provided, at Page 484:

The measure of damages for legal malpractice is the amount of loss actually sustained as a proximate result of the attorney's conduct. Courts consider collectability of the underlying judgment to prevent the plaintiff from receiving a windfall: 'It would be inequitable for the plaintiff to be able to obtain a judgment, against the attorney, which is greater than the judgment that the plaintiff could have collected from the third party'" (Citations omitted).

Since *Matson*, Washington's appellate courts have consistently applied such principles in a wide variety of contexts. See, *Lavigne v. Chase, Haskell, Hayes and Kalamon, P.S.*, 122 Wn. App 677, 684, 50 P.3d 306

(2002), (surveying available case law and rejecting an approach taken in a minority of jurisdictions that makes the issue of collectability an "affirmative defense," with the burden of proof onto the attorney); *Kim v. O'Sullivan*, 133 Wn. App 557, 564-65, 137 P.3d 61 (2006) (plaintiff has the burden of proving that the underlying damage are collectable); *Estep v. Hamilton*, 148 Wn. App 246, 256-57, 201 P.3d 331 (2009).

To the extent that the defense is trying to contend that there is a conflict amongst the Courts of Appeal as to whether or not "collectability" issue is an element of damages, or an issue of proximate cause, is patently wrong. Again, it is reiterated that it is an issue of damages because of proximate cause principles.

In the personal injury context, our Appellate Courts have not addressed the issue of collectability. However, the Appellate Courts in a number of other jurisdictions have done so. On this issue, the case of *Koeller v. Reynolds*, 344 N.W. 2d. 556 (Iowa App. (1983) is instructive. In *Koeller*, the attorney failed to file a lawsuit for injuries sustained in an automobile accident within the applicable statute of limitations. The jury ultimately awarded the plaintiff in *Koeller* damages. The Appellate Court reversed due to the absence of any evidence of "collectability." They did so despite the

fact that there was evidence that the underlying defendant had insurance, but the amount of such insurance was never established. The Court reasoned, relying on the case of *Pickens, Barnes and Abernathy v. Heasley*, 328 N.W. 2d 524, 525-26 (Iowa 1983) that "if the prior defendant was an individual or other entities whose solvency is not known beyond question, **the client must introduce substantial evidence from which a jury could reasonably find that a prior judgment would have been collectable and full, or could reasonably find a portion of the judgment which would have been collectable or reasonably could find that find a portion of the judgment which reasonably could be collectable.** In malpractice cases of this sort the client is limited in any event to the amount which could have been collectable." In *Koeller*, the Court went on to hold that "because a judgment is limited to the amount which could have been collectable **it would have been necessary for Koeller to provide evidence of the exact limits of any insurance policy or that a judgment was collectable from the negligent driver defendant.**" *Id.* at 562. See also, *McKenna v. Forsyth and Forsyth*, 280 A.D. 2d 79, 720 N.Y.S. 2d 654 (N.Y. App. 2001) N.Y.A.P. (2001) (*Klump v. Duffus*, 71 F. 3d 1368 (7th Cir. 1995) (collecting cases and finding

the burden of establishing collectability is on the plaintiff in malpractice cases involving the failure to properly perfect a personal injury action).

The Plaintiff failed to put on **any proof** from which a reasonable jury could have concluded one way or another whether the underlying Defendant had any insurance and/or other assets with which to pay any Judgment, had Mr. Coogan properly perfected Ms. Schmidt's lawsuit. It is respectfully suggested, given the wealth of authority already generated by Washington's appellate courts, such a failure of proof was inexcusable and fatally dispositive.

C. The Issue of Collectability Was Properly Before the Trial Court and the Appellate Court Following the Second Trial in this Case.

Following the first trial in this matter, Defendant Coogan raised a number of issues which were adopted by the Trial Court in granting a Motion for a New Trial Limiting the Issues of Damages. Such issues included the misconduct of Plaintiff's counsel during closing argument, as well as the fact that "plea of poverty," (lack of insurance) evidence had been admitted at time of trial. Ultimately, the grant of a new trial was affirmed by way of unpublished opinion located at WL 5752059 (Wn. App. II 2008). In upholding the original Trial Judge's grant of a new trial, the Appellate Court

found dispositive the fact that there had been an award of special damages unsupported by the evidence. It is noted that the Court of Appeals did not reach a number of other issues raised by Mr. Coogan in the first appeal. The same also occurred in this second appeal, and had this case not been dismissed by the Court of Appeals, a number of remaining issues would justify a grant of a new trial - a third trial.

It is noted that, although the Court of Appeals found dispositive the fact that the special damage award was unsupported by the evidence, it did not limit the new trial on the issue of damages solely to the question of special damages. Thus, all aspect of Ms. Schmidt's damages were subject to full examination during the course of the second trial.

When a Court grants a new trial, the procedural posture in the case is as if the first trial had never occurred. See, *Hudson v. Hapner*, 146 Wn. App 280, 287, 187 P.3d 311 (2008), reversed on other grounds, 170 Wn.2d, 239 P.3d 579 (2010):

... although a trial has occurred, our reversal of the judgment returns the proceedings to the same posture as if it had not. See Weber v. Biddle 72 Wn.2d 22, 28, 431 P. 2d 705 (1967); cf. 15A Karl v. Tegland and Douglas J. Ende, Washington Practice; Civil Procedures § 67.18 at 514 (2007) if a trial court dismisses plaintiff's case but is reversed on appeal, the case simply proceeds as if it was never dismissed).

As discussed by our Supreme Court long ago in the case of *Godefroy v. Reilly*, 140 Wn. 650, 250 P. 59 (1926), when an Appellate Court reverses or remands a case for a retrial on the grounds that the evidence was insufficient to take a particular issue to the jury, such actions do not restrict the retrial to that issue alone. Under such circumstances, the parties are at liberty to retry the case on all issues, including issues that were decided in the parties' favor in the first trial, as well as those issues which had already been determined. *Id.* As indicated by Professor Tegland's article, at 3 WAPRAC-RAP 12.2 (7th Ed. 2013), there is a presumption that when an Appellate Court reverses and remands without specifying the purpose of the remand, it is presumed the Appellate Court meant the case should be tried anew, with all issues being litigated. Here, although the Court did limit the retrial to the issue of damages, it did not limit damage-related issues in any way shape or form. A contrary intent has to be "unmistakable." *Id.*, citing to *Godefroy v. Reilly, supra*.

Under such circumstances, a party should be free to address every aspect of the issue of damages, including the ability to present alternative theories relating to damage issues unless such issues had been specifically removed from the case by a prior Appellate Court decision. *Lewis River*

Golf, Inc. v. O.M. Scott and Sons, 120 Wn.2d 713, 726, 845 P.2d 987 (1993). In the *Lewis River* case, liability was affirmed in a first appeal. The case was remanded for a determination of damages, and the plaintiff in that case, due to changing circumstances, presented a damage case that was predicated on an entirely new theory, and an entirely new set of assumptions and calculations. The Court determined that, based on the changing circumstances, the presentation of such a new theory did not offend the Appellate Court's previous Mandate.

In the first appeal in this case, the Appellate Courts never could have considered whether or not the Plaintiff adequately proved collectability in the second trial, because the issue at that time did not exist. Further, there is nothing within the Appellate Mandate, nor the operative decision which affirmed the grant of a new trial, which in any way limited the theories and/or evidence upon which the defense could rely upon in challenging Ms. Schmidt's claimed damages. It is also well settled that a decisions in a former appeal are not necessarily applicable to a different factual situation presented by the record in a second appeal. See, *Schofield v. Northern Pac. Ry. Co.* 13 Wn.2d 18, 22-3, 123 P.2d 755 (1942). Further, it is well established that when there has been a substantial change in the evidence,

during the course of a second determination of the case, even questions which might have been determined in a first appeal can be subject to review. See, *Clark v. Fowler*, 61 Wn.2d 211, 377 P.2d 998 (1963); *Zorich v. Billingsley*, 55 Wn.2d 865, 350 P.2d 1010 (1960).

By the time retrial occurred in this case, the evidence presented was significantly different. Defendant retained a CR 35 examiner and actively defended against Ms. Schmidt's claimed damages. In addition, a whole host of different evidentiary rulings were made, many of which formed the basis of Defendant's second appeal, but were issues which were not reached by the Court of Appeals given dispositive nature of the "collectability" issue. Additionally, the Trial Court's evidentiary rulings, (some of which were gravely erroneous), nevertheless were quite different than in the first case. For example, in the first case, Plaintiff was able to keep from the jury the fact that shortly after the slip and fall which underlies this case, the Plaintiff had a significant automobile accident wherein she received injuries to the exact same parts of her body which she claimed were injured at the Grocery Outlet Store. In fact, by the time this case was subject to retrial, Ms. Schmidt had
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a number of re-injuries, or new injuries, which had nothing to do with Mr. Coogan.²

As such, it is respectfully suggested that there is nothing procedurally barring the defense from raising the dispositive issue of collectability during the course of retrial. The Mandate from the Court of Appeals was for a retrial on all aspect of damages, and it was error for the Trial Court to rule otherwise.

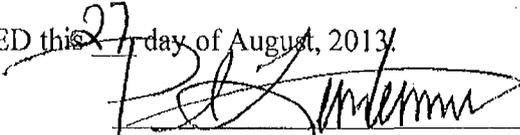
III. CONCLUSION

For the reasons stated above, the Supreme Court should affirm the decision of the Court of Appeals dismissing Plaintiff's case due to insufficient evidence. It is humbly submitted that there is no question that "collectability" is an essential component of a legal malpractice case which cannot be ignored. Under the facts of this case, there was no evidence presented with
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² Despite the fact that the Plaintiff failed to submit any proof linking, on a more probable than not basis, any symptoms suffered by Ms. Schmidt at time of trial to the slip and fall which happened in 1995, the Court nevertheless instructed the jury with respect to future general damages. This is just one of the many issues that will need to be resolved should this proceeding not end this matter. Presumptively, if the Court is inclined to reverse the Appellate Court, then the remaining issues should be remanded to the Court of Appeals,, Division II, for a determination of an issue. As before, there remains a wide variety of issues generated by the actions of Plaintiff and her counsel during the course of retrial, that have yet to be addressed.

respect to this essential element, thus, the determination of the Court of Appeals was entirely justified.

DATED this ²⁷~~7~~ day of August, 2013



Paul Lindenmuth, WSBA# 15817
Of Attorney for Appellant/Cross-Respondent

DECLARATION OF SERVICE

I, Marilyn DeLucia, hereby declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on this 27th day of August, 2013, a true and correct copy of: **APPELLANT/CROSS-RESPONDENT COOGAN'S SUPPLEMENTAL BRIEF** was e-filed with the Supreme Court.

E-mailed to the Supreme Court, via:

supreme@courts.wa.gov

And e-mailed to:

Dan@mcbdlaw.com

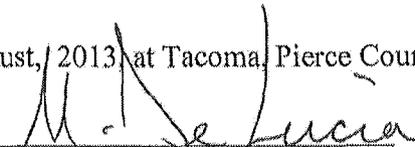
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