

No. 41279-9-II

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STATE OF WASHINGTON
BY 

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

TERESA SCHMIDT,
Respondent/Cross-Appellant,

vs.

TIMOTHY P. and JANE DOE COOGAN and the martial community
comprised thereof, and THE LAW OFFICES OF TIMOTHY PATRICK
COOGAN and all partners thereof,

Appellant/Cross-Respondent.

TERESA SCHMIDT'S REPLY BRIEF
IN SUPPORT OF CROSS-APPEAL

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A. Overview

Mr. Coogan's response is primarily an attempt to persuade this Court that Washington has specifically considered and rejected general damages for attorney malpractice. He errs. The clearest proof of that is he is unable to provide a single quote simply stating that proposition.

Lacking such authority, he makes a series of citations to cases where general damages were never once at issue or mentioned, either pro or con, and concludes that because general damages were never mentioned that "must mean" they have been rejected. The flaw of such analysis is obvious. As a back-up he argues that there may be no general damage because (in essence) 'we all know' there are none. Such logic is the classic form of argumentum ad populum fallacy: because some people believe it is true (or at least, according to Mr. Coogan) it must be true.

In light of the long history of this case, if there was a Washington case on point, one of the parties would have found it by now. That neither have amply demonstrates this is an issue of first impression and arguing only that it is not, Mr. Coogan's response does not reply to the matter at hand: whether as a matter of first impression, this Court should resolve the question in the affirmative.

However, being a matter of first impression does not mean there is a lack of authority for the proposition. Mr. Coogan offers neither authority nor

policy considerations why a victim of legal malpractice should have fewer rights and receive less recompense than those injured by the violation of less protected relationships such as with their bankers or insurance agents. The reason general damages are available in those other examples is the basis of the relationship; a fiduciary duty. As cited in the opening brief with no reply from Mr. Coogan, because of that elevated duty, the law assumes its breach will give rise to general damages. Attorneys actually owe a higher duty with an in-fact fiduciary duty whereas insurance agents only owe a quasi-fiduciary duty. Despite that, Mr. Coogan would have this Court treat people injured by attorneys less favorably – or said another way – treat attorneys more favorably. That places the elevated duty on its head.

It is an unequal application of law, a failure of due process, and an injury itself to not compensate those injured by attorney malpractice for the general damages they sustain by the act of malpractice. It guarantees a lack of inadequate compensation. It suggested no reasonable person would say that (1) putting an injured client to the distress of having lost a valid claim by an attorney's negligence, (2) subjecting the client to years of delay and uncertainty, and (3) only giving the client that which they would have had if the attorney had done their job in the first place years earlier, is full compensation for the injury sustained by the attorney's negligence, much less "returning them" to the position they would have occupied "but for" the

attorney's negligence. Indeed, as the case law cited in the opening brief demonstrates, such an award guarantees the injured client is inadequately compensated.

This case presents an excellent opportunity and strong record for this Court to clearly articulate a rule that a client subjected to attorney malpractice may recover for the emotional distress suffered by the attorney's misconduct. It is suggested to be time for there to be clear Washington law on this issue and that this Court should make it clear that attorneys who commit malpractice shall be held responsible for the full injury their negligence causes, no differently than any other professional.

B. Reply

1. GENERAL DAMAGES FOR ATTORNEY MALPRACTICE ARE CONSISTENT WITH WASHINGTON LAW; IMMUNITY FROM THEM IS CONTRARY TO BASIC TORT PRINCIPLES

a. Mr. Coogan Provided No Response To Compelling Authority Explicitly Acknowledging General Damages For Legal Malpractice

The entirety of Mr. Coogan's response on the subject of general damages is to attempt to convince this Court that Washington law has already resolved this issue in the negative. If he is correct, he prevails. But if he is not correct, and having put all of his eggs in one basket, he has offered no response or opposition to Ms. Schmidt's compelling authority from other

states that general damages should be provided.

Mr. Coogan also provides no response to Ms. Schmidt's authority based on Washington law that general damages are consistent with Washington law in related areas and that rejecting general damages is actually inconsistent with the breach of the fiduciary duty that malpractice is acknowledged to be.

Whether this Court views this as a matter of first impression or simply an argument for the extension or modification of current law, Ms. Schmidt has presented legal authority and policy reasons why general damages should be available in Washington for attorney malpractice. As Mr. Coogan offers simply no response at all to that authority and analysis, Ms. Schmidt will rely on her opening brief for those matters. They need not be repeated here.

b. **Mr. Coogan's Authority Is Not Persuasive And Actually Demonstrates General Damages Are More Consistent With Washington Law**

Mr. Coogan cites a number of cases, none of which are on point to the issue at hand. None make any mention of general damages. They were never before the Court and are of no import on the issue presented.

Mr. Coogan cites Shoemake v. Ferrer, 168 Wn.2d 193 (2010). It is sufficient to say that at no time does Shoemake make mention of, nor provide a single piece of analysis, as to whether general damages are available for attorney malpractice. Plaintiff did not put them at issue.

What is interesting about Shoemake however, is that as late as 2010, the Supreme Court noted the question on damages that was presented, whether there should be an offset for the negligent attorney's contingency fee, presented an "issue of first impression." Id. at 195. Clearly, attorney malpractice is a little explored area of law in this State.

Shoemake carefully identified the only issue presented, the contingency fee offset, and resolved it. It is clear the question before this Court regarding general damages was simply not raised or decided. Admittedly, that is unfortunate. If so, the parties and this Court would have the answer to the issue presented here. However, the Supreme Court did provide guidance:

The guiding principle of tort law is to make the injured party as whole as possible through pecuniary compensation. Simply stated, a plaintiff is entitled to that sum of money that will place him in as good a position as he would have been but for the defendant's tortious act.

Id. at 198.

Mr. Coogan wrongly focuses on the loss of the client's money as the only damage sustained. This is not well taken. Simply giving Ms. Schmidt in 2012 the money Mr. Coogan lost for her in 1995 does not put her "in as good a position" as she would have been "but for" Mr. Coogan's tortious act. She endured the distress of his lying to her about having lost her claim, the distress of his one day telling her that her case had merit and she would

recover damages to pay her medical bills, and the distress of him telling her that the case was worthless and blaming her for his own act in losing the case. She has sat wondering for years whether she was going to ever recover for her injury. Ms. Schmidt agrees that a malpractice plaintiff should not “receive a windfall.” However, to suggest that simply giving her the money Mr. Coogan lost in 1995 makes all of what he put her through “right” or puts Ms. Schmidt in the same position she would have been had those things not taken place, is asking This Court to close its eyes; Lady Justice may be blind but asking her to ignore the reality of what a client endures in such cases is not well placed.

Mr. Coogan argues general damages in the rubric of Shoemaker “simply would not make sense” because it would make it difficult to calculate the fee of the second attorney representing the client on the malpractice claim. Respectfully, it is suggested it is Mr. Coogan’s argument that does not “make sense.”

Mr. Coogan next cites Aubin v. Barton, 123 Wn. App. 592 (2004), asserting general damages would “eviscerate the notion of proximate cause applicable to legal malpractice cases.” The issue in Aubin was the Trial Court’s refusal to allow plaintiff to present an expert witness. Id. at 595.

The fallacy of Mr. Coogan’s citation to portions of Aubin and its discussion of proximate cause and damages is that general damages were

simply never raised, never discussed, and never considered. Thus, it is to be expected that within the context of that opinion or any other like it, the Court will discuss proximate cause and damage with the absence of general damages: they were not at issue.

However, that does nothing to address whether, as an issue of first impression, they should be. Another case cited by Mr. Coogan, Lavigne v. Chase, Haskell, Hayes and Kalamian, 112 Wn. App. 677 (2002), makes that clear, even within the portion cited by Mr. Coogan in his brief:

The measure of damages for legal malpractice (is) the amount of loss actually sustained as a proximate result of the attorney's conduct.

Id. at 685. That statement does not limit damages. If anything, it emphasizes that attorneys shall be fully liable for “the amount of loss actually sustained.”

Id. To make attorneys immune for the general damages caused by their malpractice is contrary to Lavigne, not consistent with it

Ultimately, there appears to be no dispute but that Ms. Schmidt sustained general damages proximately caused by Mr. Coogan's negligence. That issue went to the jury without objection from Mr. Coogan at the first trial. As a matter of judicial notice, the Court may comprehend the distress a client endures when they learn their attorney has caused them to lose their case – not on the merits – but by the attorney's avoidable neglect; and if not by judicial notice, Ms. Schmidt testified to it at length at the first trial, the

transcript of which is a part of the record.

When an attorney so mishandles a client's case as to lead to its dismissal a double injury is sustained, and indeed, the second at the hands of the attorney may be the greater of the two. Car accidents happen. Slip and falls happen. We accept that as a consequence of living in an industrialized society.

However, the public rightly trusts the Bar to vindicate wrongs and facilitate recompense for loss. When an attorney breaches that trust – that fiduciary duty every other segment whom owes it is liable in general damages for its breach – the client is faced with not only the original injury, but the distress that it will be an injury without remedy. They will suffer the financial distress that medical bills they have already incurred and cannot afford will go unpaid. They will suffer the uncertainty that needed medical treatment cannot be obtained. They also sustain the duress fundamentally caused by the breach of duty itself. And in a case such as the one at bar, where the attorney adds insult to the injury he caused by the callous indifference he showed his client, the injury is magnified.

Clearly, those things are injuries. The tort system compensates every other person injured in that situation. There is no reason not to hold attorneys to the same standard.

To return to Lavigne, Mr. Coogan argues based on that case that Ms.

Schmidt's request for general damages is "seeking a windfall" because "collectability" is an element of proof in legal malpractice claims. Ms. Schmidt addressed collectability at length in her memorandum in response to Mr. Coogan's cross-appeal; she need not repeat the same arguments here and adopts them by cross-reference.

Ms. Schmidt is only asking to be compensated for her general damages caused by Mr. Coogan's negligent handling of her case. That is not seeking a windfall; it is only seeking damages for the injury Mr. Coogan's negligence caused. There can be no windfall because the jury will only award those damages that are proven. If she sustained none, she will be awarded none. It is Mr. Coogan whom is seeking a special immunity as an attorney to be held harmless from them.

Mr. Coogan argues that if general damages were available then a Court would have clearly said so by now and references Daugert v. Pappas, 104 Wn.2d 254 (1985) as an example. Daugert involved a ranch suing a developer for a design defect. Id. at 255. Principally, the only issue before the Court was whether the question of proximate cause is one for the judge or the jury and whether the Court should adopt the "loss of chance" doctrine when the subject of the malpractice is a failure of appellate practice; in that case failing to timely file a notice of appeal. Id. at 604-605. It is not possible to say too many times that Mr. Coogan's citation to cases where general

damages were clearly not even on the proverbial radar of the deciding Court are not well taken.

Shifting gears, Mr. Coogan next urges that Washington has rejected treating attorneys and malpractice cases similarly to insurance bad faith and therefore that general damages are available in those other cases is of no relevance in the context of a negligence action against an attorney. To digress, to even frame the issue in that manner is to understate it. As demonstrated in the original brief, attorneys plainly owe a much higher duty than mere insurance adjusters, etc. But in any event.

For his proposition, Mr. Coogan cites Kommavongsa v. Haskell, 149 Wn.2d 288 (2003) as “rejecting” analogizing attorney malpractice cases to “insurance bad faith cases.” Mr. Coogan stretches the case well beyond its holding. The only point of law Kommavongsa stands for is that attorney malpractice cases cannot be assigned. Id. at 291. Although again, it is notable that in 2003 this was yet another issue the Supreme Court determined was one of “first impression.” Id. The Court engaged in an exhaustive discussion of why attorney malpractice claims should not be assignable; ultimately determining they are too personal to the client and that allowing assignment (such as to the adverse party against whom the attorney was defending his client) could lead to an “erosion of public confidence in the legal system...” Id. at 299. Other reasons were discussed at 307.

Not only do those reasons have nothing to do with the propriety of general damages in such matters, the reasons the Court found such claims are not assignable are actually more consistent with allowing general damages. The Court was clearly concerned with the appearance of fairness, the integrity of the process, and most notably not wanting to encourage the perception that “lawyers will take any position, depending on where the money lays...” *Id.* at 307. It is suggested there is no greater illustration of the danger of that policy consideration than this case.

Mr. Coogan agreed to represent an injured person. He indicated in his file it had value and he certified a lawsuit under CR 11 on behalf of Ms. Schmidt that it did. He failed to take any action within the statute of limitations, rebuffing his client with horribly profane rebukes when she asked him about the case’s status, pleading with him not to let the statute expire. Despite that, he allowed the statute of limitations to expire. He sued the wrong party, had to agree to a non-suit, and then lied to his client by first concealing from her that he had to dismiss the case and when she later found out on her own that he had, told her not only that the case was not worth anything, but that she had fault for the case being filed against the wrong person in the first place.

This case presents precisely the ill the Supreme Court warned about: the perception that lawyers will take any position and will say what is

expedient “depending on where the money lays”.

In that light, not only are general damages necessary for consistency with Washington law, but to hold attorneys immune from them is to (if not incentivize, as it is assumed no attorney “wants” to commit malpractice) at least not sufficiently deter malpractice.

It is well settled that “the deterrent effect of tort law” is “diminished” when a segment of society is “absolved” of “tort liability.” See Jackson v. City of Seattle, 158 Wn. App. 647, 658 (2010); Mohr v. Grantham, 172 Wn.2d 844, 856 (2011).

It seems evident Mr. Coogan in this matter was not deterred. He was not deterred in his negligent practice nor the distress he caused his client during the course of his malpractice. He could swear at her, rebuke her, tell her to not ask him about the case, etc., because (by his thinking) he could have no liability for it; his greatest downside was simply paying the judgment he lost. In his mind, he was “absolved” of responsibility for those breaches of his duty, so it is little surprise the “deterrent effect of tort law” was lost on him. See Jackson. To merely require him to pay 15 years later what he undertook an ethical and contractual duty to obtain for Ms. Schmidt before is both to undercompensate Ms. Schmidt and not deter him as to his “next” client. Nor does it deter any number of other attorneys who would think it appropriate to treat their client similarly.

Mr. Coogan, in the words of Kommavongsa treated his representation of Ms. Schmidt throughout as “a mere game and not a search for truth, thereby demeaning the legal profession.” Id.

Mr. Coogan’s citation to Kim v. O’Sullivan, 133 Wn. App. 557 (2006) is no different. Kim was simply the application of Kommavongsa, rejecting a former client’s subterfuge in trying to circumvent the non-assignability of a malpractice claim contrary to Kommavongsa. Id. at 559. Mr. Coogan argues Kim rejects any and all analogy between malpractice claims and bad faith claims. He stretches Kim too far. Kim merely rejected “presumed damages” for attorney malpractice claims in reliance on Tank v. State Farm, 105 Wn.2d 381 (1986), holding that the “responsibilities” between an attorney and an insurance company are “distinct.” Id. at 566. That is true and Ms. Schmidt has never contended otherwise. However, while those specific responsibilities are different, Tank is notable for its recognition that a carrier is but a quasi-fiduciary and general damages are available for a breach of that duty whereas an attorney is an actual fiduciary with higher duty. Liebergesell v. Evans, 93 Wn.2d 881, 889 (1980).

Mr. Coogan argues “there is no support for the proposition that insurance bad faith damage principles have any application in the attorney malpractice context.” Ms. Schmidt has never suggested the two are a straight-across analogy. However, what Mr. Coogan has never explained is a

basis in law to allow general damages for the breach of the mere quasi-fiduciary relationship involving an insurance adjuster and not for the higher in-fact fiduciary relationship involving an attorney.

To paraphrase Shakespeare: the law acknowledges the emotional harm endured by an insured, but not a client? Hath a client not “eyes.” Hath a client not “senses.” Is a client not “hurt with the same weapons, subject to the same” distress as an insured, or every other person injured by the negligence of another. See The Merchant Of Venice, Act 3, Scene 1.

It is paradoxical and a contradiction of law and common sense to treat injured clients of attorneys less favorably than every other litigant in the courthouse simply because the cause of the injury was a person holding a bar certificate. And yet, that is the sum total of Mr. Coogan’s argument: I am an attorney, I cannot be held responsible for the emotional distress I caused by the negligent breach of my professional duty. It is suggested that for him to even articulate the argument is the very best reason why his position is wrong.

The Trial Court erred. Ms. Schmidt should have been allowed to seek general damages arising out of Mr. Coogan’s malpractice. A new trial should be ordered on that issue.

Assuming this Court agrees, Ms. Schmidt asks that the Court take care in framing the issue for remand. Clearly, that form of new trial would

not require putting on the full extent of her proof of physical injury again as those damages have now been determined. However, a jury cannot fully appreciate the scope and cause of her distress without context. Here, that context is both her physical injury and the treatment Mr. Coogan subjected her to while his malpractice was ongoing: his poor and reprehensible treatment of Ms. Schmidt, his rebuffing her warnings and pleas to not allow the statute to expire only for him to do so anyway, and the actual physical injury she had that was the subject of the claim she lost are all squarely at issue in his negligence.

Or said another way, Mr. Coogan's negligence did not take place simply on the day the statute ran. His negligence was his conduct leading up to it and his tortious behavior includes the abuse he subjected his client to while concealing his malpractice and then blaming his client for it as well as the physical injury she sustained without recompense for 15 years.

This Court has already ruled on the question of whether "how" a professional treats the person to whom their duty is owed is relevant in determining the quantum of their distress caused by the ultimate breach.

In Sharbono v. Universal Underwriters, 139 Wn.App. 383 (2007) the plaintiffs alleged a variety of causes of action arising out of alleged bad faith in the denial of coverage and for not providing them a copy of their underwriting file. Arguably, if "how" the carrier treated the insured leading

up to the penultimate breach was not relevant and not compensable, the only evidence of general damages that would have been relevant would have been ‘how did you feel when the carrier denied coverage and refused to produce the underwriting file.’

However, neither the Trial Court nor this Court tied the plaintiffs’ hands in that manner. Instead, how the breach was committed and the professional’s treatment while he/she was doing so was found to be relevant with substantial testimony allowed regarding how the plaintiffs were treated throughout including the admission of testimony of comments that were allegedly made by the carrier during mediation with a third party. Id. at 391 – 392. This Court found such evidence was relevant on the plaintiffs’ “state of mind during the time they attempted to obtain the underwriting files.” Id. at 419.

A professional, whether an attorney or an insurance adjuster, cannot breach their duty and then ask the Court to sanitize the injured person’s explanation of it nor seek to so limit the recovery of the distress caused by it as to render the remedy illusory.

The conduct of Mr. Coogan while he was committing malpractice (before, during, and after) all impacted Ms. Schmidt and effected her reaction to his penultimate act of malpractice itself. Attorneys are human and they make mistakes. Clients as a class are no doubt unhappy about that. However,

clients' reaction to such mistakes and how the mistake effects them will be materially different depending on their relationship with their attorney that preceded the penultimate mistake.

Here, had Mr. Coogan been diligent throughout the case, had he been proactive with Ms. Schmidt, not concealed his malpractice, etc., no doubt her distress and reaction to his penultimate act of negligence would not have been as severe. However, that she begged him for an extended period of time to not allow the statute to expire only for him to do so anyway, that he berated her for reminding him, and that he blamed her for his own mistake afterward all had the obvious effect of making her distress to the penultimate fact he lost the case by his neglect that much greater. It would therefore be inappropriate to limit her to testimony merely on the simple fact the case was lost. Her distress over it being lost is nothing without the context that lead up to it. On retrial, she should be allowed to provide that context.

2. THE TRIAL COURT ERRED IN DENYING MS. SCHMIDT'S MOTION TO AMEND HER COMPLAINT

a. The Amendment Did Not Add Anything To The Case That Was Not Already Present For Years

Neither party provided extended briefing on this assignment of error. It is suggested none is necessary as the issue is simple.

It is not disputed general damages were at issue in the case since its

inception. It is not disputed that evidence of general damages was presented at the first trial, argument was made on it, and damages awarded for them.

That said, and despite Mr. Coogan's assertion now to the contrary, he has always been on notice that plaintiff was seeking general damages arising out of his negligence.

It must be conceded the motion to amend the Complaint was a fair amount of time after the original Complaint was filed. However, the issue as to all such matters is less one of counting days, and more one of whether the amendment would give rise to a lack of notice, surprise, or ambush for which there is no reasonable cure. See Caruso v. Local Union No. 690 of International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America, 100 Wn.2d 343 (1983).

It is not well taken for Mr. Coogan to complain of a lack of notice or surprise on general damages for malpractice when the issue has already been tried. He may argue that such damages are not well founded. But to certify to this Court he was not aware they were being sought is not well taken and flies in the face of the record.

Those facts being clear, this Court must consider what the proposed amendment would have done; that is made most clear by identifying what it would not have done: it would not have given rise to any new evidence or damages that were not already at issue in the case for years. The only thing

the amendment would have done was to provide an alternate theory to recover those damages. However, the “facts” and evidence of them would have been precisely the same evidence presented at the first trial.

Mr. Coogan’s argument that the amendment would have injected entirely new issues, required entirely new discovery, and required new witnesses is thus demonstrated to be without basis. It could perhaps be said that as Mr. Coogan has done essentially nothing to defend this case since it was filed, that if he now wanted to defend general damages for his malpractice that he might consider new discovery, new witnesses, etc. However, that such matters would be “new” is not a result of Ms. Schmidt’s seeking to amend her Complaint (she sought them at the first trial), but instead is only a result of his not having defended the case at all (including general damages) to date.

The final point Mr. Coogan makes is to argue the amendment would have been futile. He errs for three reasons.

First, Mr. Coogan’s attempt to frame the claim as one arising out of Ms. Schmidt’s employment is not well taken. Ms. Schmidt has never asserted Mr. Coogan has liability to her as her employer. That she was employed by Mr. Coogan for a time is only incidental to the facts. Her claims against Mr. Coogan rely solely on his status and relationship as her attorney. Mr. Coogan’s attempt to invoke Strong v. Terrell, 147 Wn. App. 376 (2008)

and Hope v. Larry's Markets, 108 Wn. App. 185 (2001) discussing the standards that apply to distress claims founded upon the employment relationship are completely inapposite.

Second, Mr. Coogan's argument that the amendment was futile because general damages are not available for attorney malpractice is a circular tautology. Even if not available under a more basic claim of attorney malpractice, the claims upon which she sought to amend her Complaint would stand alone and if the elements are proven make general damages available. On this point, Mr. Coogan is in a Catch-22. If general damages are not available for attorney malpractice, they must be available through the claims Ms. Schmidt sought to add. If they are not, then attorneys may act with impunity against their clients. That is not a sustainable proposition.

Third, Mr. Coogan argues that the conduct alleged simply does not rise to the level of outrage. Ms. Schmidt will not color this memo with the hateful language employed by Mr. Coogan against his client; the testimony of Ms. Schmidt at the first trial setting it forth is clear enough. It is strongly suggested what Mr. Coogan did is far beyond mere "boorish and crass" behavior as he characterizes it in his brief. Mr. Coogan verbally assaulted Ms. Schmidt with profane tirades. He bullied her into submission. In some sense, as a lay person, she appreciated Mr. Coogan was not being diligent. Yet, he berated her to leave him alone, that "he is the (explicative omitted)

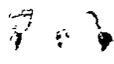
attorney.” He abandoned her, going out of town on a gambling trip on the last day to file the complaint with his yelling at her that if she wanted the complaint filed to do it herself. He concealed his malpractice from her for an extended period of time; to say nothing of not giving her notice of it and the chance to make the decision herself over whether to take a non-suit. I added, he never told her about either his mistake or the non-suit. She only learned of the non-suit after a conformed order was received in the office. Then, he told her (it is suggested that based on the ultimate verdict, again lied to her) that her case was not worth anything anyway and as final insult, blamed her for his malpractice.

It is suggested that in any context, that is behavior that is “outrageous” and goes beyond the bounds of civilized society. For Mr. Coogan to characterize what he did as the mere rough treatment of an employee demonstrates a lack of insight.

b. **The Availability Of Other Claims Does Not Mitigate The Appropriateness Of General Damages For Attorney Malpractice**

Ms. Schmidt is not unaware that an argument could be made that there is no need for general damages for attorney negligence because other remedies are available. While the initial pull of such an argument is understood, it does not withstand scrutiny.

First, the same argument could be made regarding general damages



for the panoply of other acts of negligence arising out of a breach of a fiduciary duty. However, that an insured could (for example) sue their insurance adjuster for both negligence in claims handling (or bad faith for that matter) and negligent or intentional infliction of emotional distress does not obviate the fact that general damages are indeed available merely upon proof of negligence. That multiple legal theories may be available to recover the same quantum of damage is not itself a reason to limit the legal theories a plaintiff has available to do so.

Second, while such claims are admittedly related, the elements are indeed distinct. For instance, there is a higher burden of proof for an outrage claim because, as Mr. Coogan rightly points out the law, the defendant's conduct must indeed be beyond the bounds of decency and society. Thus, the availability of alternate theories under the facts of some cases does nothing to properly compensate a victim of attorney malpractice in every case.

The facts of the case at bar are extreme and beyond the bounds of civilized society. However, not every case involving attorney malpractice is. Indeed, it is suspected the gross majority of malpractice cases involving the violation of a statute of limitations will not meet the elements of outrage or possibly even negligent infliction of emotional distress. And yet, those clients will for a certainty sustain general damage and emotional distress by the loss of their case arising out of their attorney's negligence.

Ultimately, there is no concept of tort law that limits the number of theories available to a plaintiff simply because other remedies may be available. As explained in the opening brief, Washington clearly adheres to the rule that general damages are available for the breach of a mere quasi-fiduciary relationship because a breach of that type of relationship will inherently give rise to emotional distress. That an injured client might, under limited circumstances, and if the facts are present, have alternate theories of recovery such as outrage does nothing to address the inconsistency of not allowing general damages for a breach of not a mere quasi-fiduciary relationship, but a fiduciary relationship in-fact between an attorney and his or her client.

As an aside, the only tort theory the undersigned is aware of that limits recovery if other remedies are available is a claim for discharge in violation of public policy. However, that tort was created by the judiciary specifically because there were some employment wrongs that did not fall within any established tort and the Courts of this State recognized a need to provide a remedy. If anything, that our State's Courts created the tort of discharge in violation of public policy demonstrates the tradition of this State not to allow tortious injuries to pass without recompense. This is yet another reason why this Court should affirm general damages arising out of attorney negligence are recoverable.

Ultimately, the propriety of general damages arising out of attorney malpractice must rise and fall on their own merits. The potential availability of other possible claims, which would not be present in every case of malpractice, are of no weight.

C. Conclusion

Ms. Schmidt has no answer for the question of why general damages have not been squarely addressed by an appellate court in the State of Washington. She only knows that the case law demonstrates that is the state of the law.

It may be true that if a survey of attorneys was taken, asking them if general damages are available upon such a claim, more would say "no" than would say "yes." However, it is suggested that this court should not fall into the same trap of argumentum ad populum reasoning that Mr. Coogan employs.

With no response from Mr. Coogan other than blindly saying "no they are not," Ms. Schmidt has presented substantial Washington authority demonstrating general damages are available for the negligent breach of exactly the same type of relationship in every other area of the law where this type of relationship lays. Although again, the relationship between an attorney and a client is even "higher" than those analogous relationships as most of those are merely quasi-fiduciary relationships. Attorneys have an in-

fact fiduciary relationship and it is an inconsistency without foundation in logic, case law, or common sense for attorneys to enjoy an immunity from liability simply because the damages they caused arose out of their attorney-client relationship.

That an attorney caused the damage does not make the plaintiff any less damaged, nor should the fact that the person who did the damage is an attorney make them any less responsible for it.

There is substantial and thoughtful case law from other States, cited by Ms. Schmidt in her opening brief without any reply from Mr. Coogan, explaining the propriety of such damages.

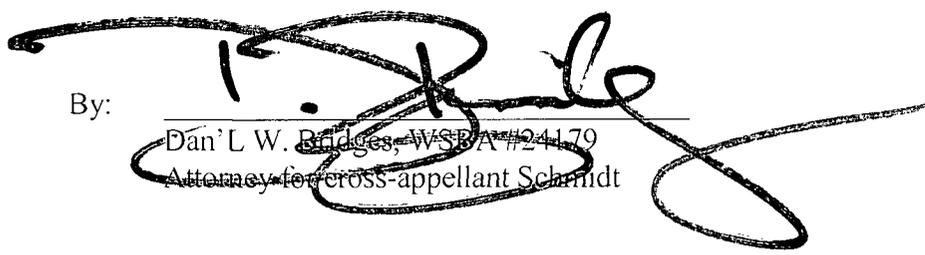
Ms. Schmidt asks for, if not a “new trial” per se, a remand and a trial on the issue of general damages arising out of the negligent behavior of Mr. Coogan. The scope of that behavior is detailed above.

She also asks for leave to file a cost bill and for her statutory fees on appeal.

DATED this 1st day of March, 2012.

McGAUGHEY BRIDGES DUNLAP, PLLC

By:


Dan L. W. Bridges, WSBA #24179
Attorney for cross-appellant Schmidt

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CERTIFICATE OF SERVICE

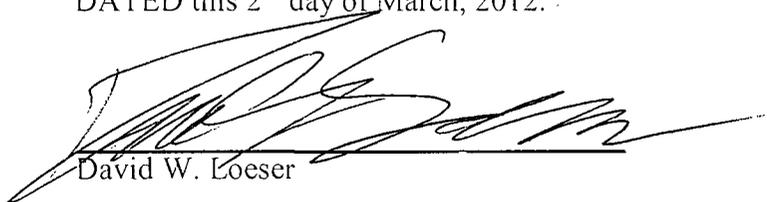
I certify that on March 2nd, 2012, I caused the foregoing TERESA SCHMIDT'S REPLY BRIEF IN SUPPORT OF CROSS APPEAL to be served on the following by the methods indicated:

Paul A. Lindenmuth
Law Offices of Ben F. Barcus & Assoc.
4303 Ruston Way
Tacoma, WA 98402

- Via hand delivery by Legal Messenger
- Via U.S. Mail, 1st Class, Postage Prepaid
- Via FedEx 3-day
- Via Facsimile
- Via Email
- Other: Electronic Pacer

I certify under penalty of perjury that the foregoing is true and correct.

DATED this 2nd day of March, 2012.


David W. Loeser

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