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COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

ADIL LAHRICHI, REGINE CSIPKE, T.L., M.L.,
Y.L., A.L., Y.L., AZIZA BENAZZOUZ,

Appellants,

v.

KATRIN E. FRANK and MacDONALD HOAGUE & BAYLESS,

Respondents.

BRIEF OF RESPONDENTS

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Defendants/respondents MacDonald Hoague & Bayless and Kay Frank submit this response to the Brief of Plaintiffs/Appellants, filed August 18, 2011 (hereafter “Opening Br”). The plaintiffs, in moving below to seal/redact pleadings and exhibits and for a preliminary injunction, argued for an extreme degree of present, and future, sealing in the court file, including of documents in the public record of the underlying federal District Court for which they had been unsuccessful in their requests to seal or redact. Regarding substantive matters, their legal malpractice claim against defendants, for allegedly confidential information’s being in the federal District Court file in the underlying employment discrimination lawsuit, and other alleged inadequate representation, lacked *prima facie* proof due to the lack of expert witness testimony. Plaintiffs also knew, or should have known, the purported bases of their claim more than three years before commencing this action. For the plaintiffs other than Adil Lahrichi, who were not clients of defendants, no duty was owed. The Superior Court therefore was correct in its denial of plaintiffs’ motions and its granting summary judgment.

I. ISSUES

1. Did the court below correctly deny plaintiffs’ motion to seal and for a preliminary injunction because plaintiffs’ inability to meet the GR 15(c) requirement of an “identified compelling . . . concern” that

“outweighs the public interest” in access to the court record.

2. Was the court below within its discretion to deny plaintiffs’ motions for “Enlargement of Time” and to “Late File Declarations?”

3. Did the court below correctly grant summary judgment based on (1) the plaintiffs’ lack of expert testimony to show the attorney standard of care and the alleged breach of it in this legal malpractice action, (2) the three-year statute of limitations, and (3) the absence of any duty to plaintiffs other than Adil Lahrichi, who were not clients of defendants?

II. STATEMENT OF THE CASE

This action arises from MacDonald Hoague & Bayless and Kay Frank’s representation, during 2004-06, of plaintiff/appellant Adil Lahrichi (“Lahrichi”) in his federal court Title VII employment discrimination lawsuit. The plaintiffs herein appeal from three orders entered by the court below on August 6, 2010, CP 826-28, 831-33, 823-25, that respectively (1) denied plaintiffs’ Motion To Seal Documents and for a Preliminary Injunction; (2) denied plaintiffs’ Motion to Late File Declarations of Adil Lahrichi and Regine Csipke; and (3) granted defendants’ Motion for Summary Judgment. This Statement of the Case contains three parts, addressed to the substantive background facts, the

facts relating to plaintiffs' motion to seal and for an injunction, and the facts relating to their motion to late file declarations.

A. Substantive Background Facts

1. Overview of Lawsuits in Which Lahrichi Is a Party

Defendants/respondents MacDonald Hoague & Bayless and Kay Frank (hereafter, "defendants") represented Lahrichi in an employment discrimination lawsuit against Lumera Corporation ("Lumera"), its CEO, and its parent company. CP 131. Lahrichi was the sole plaintiff. *Id.* He had been the Vice President of Technology Development at Lumera. CP 197. He holds a Ph.D. in electrical engineering. *Id.*¹

The federal District Court entered two discovery orders ruling against Lahrichi, on November 1, 2005 and January 4, 2006. *See infra* at 5-7. The first granted a motion to compel by Lumera and the second a motion for sanctions. CP 141-50, 152-62. Both motions addressed Lahrichi's refusal to produce pre-2000 medical records related to post-traumatic stress disorder and "dystonia," *i.e.*, involuntary facial movements. On March 2, 2006, the District Court granted summary judgment against Lahrichi. CP 196-230; *see infra* at 9.

¹ The underlying action was *Adil Lahrichi v. Lumera Corp., et al.*, United States District Court for the Western District of Washington No. 2:04-cv-02124-JCC. On appeal, the underlying case was Ninth Circuit No. 06-35382.

Lahrichi appealed. In April 2007, the Ninth Circuit ordered a limited remand “to consider [Lahrichi’s] motion to seal” documents in the District Court file. CP 234, 582. In May 2009, the limited remand ended when the District Court denied Lahrichi’s motion to stay portions of its prior dispositive rulings on his requests to seal. CP 236-38. Lahrichi then appealed those rulings, CP 451, which was combined with his still pending appeal from the summary judgment, *id.*, CP 582.

On April 27, 2009, Lahrichi signed and filed the Superior Court complaint herein. CP 1-21.² On the same day, he filed a similar but separate state court action against the Stoel Rives firm and individual attorneys at it who had defended Lumera against Lahrichi.³ This latter action caused Stoel Rives to file a lawsuit against Lahrichi⁴ under the “Anti-Injunction Act,” 28 U.S.C. § 2283, seeking to enjoin him from

² The co-plaintiffs listed in the caption did not sign the complaint or the amended complaint filed July 2009, either individually or through an attorney. CP 21, 44.

³ *Lahrichi, et al., v. Curran, et al.*, King County Superior Court Cause No. 09-2-17151-3 SEA.

⁴ *Curran, et al., v. Lahrichi*, U.S. District Court for the Western District of Washington No. 2:09-cv-01227. Judge John Coughenour ultimately denied a motion by Stoel Rives for a preliminary injunction and in the same order dismissed the anti-injunction suit. The state court suit against Stoel Rives and individuals at it then proceeded, leading to dispositive rulings on February 5, 2010 and March 1, 2010 dismissing the action, denying reconsideration, and denying a motion by Lahrichi to allow filing under seal. CP 240-42, 244-46, 248. An appeal by Lahrichi, *et al.* from the dismissal is pending in this Court as No. 651447-I.

prosecuting his state court action against them. The anti-injunction suit is pertinent because several pleadings that Lahrichi signed and filed in it contain his statements on material aspects of the limited remand in the underlying lawsuit and indicate his views on the extensive volume of pleadings that should be under seal.

2. The District Court's Discovery Orders of November 1, 2005 and January 4, 2006

The November 1, 2005 federal court order pointed out Lahrichi seeks emotional distress damages as a result of wrongful termination, as well as damages resulting from an increase of involuntary facial movements (a preexisting condition allegedly exacerbated by Defendants' conduct).

CP 142. Lumera sought his pre-2000 medical records related to those conditions. The order directed Lahrichi to produce those records

related to his preexisting involuntary movement disorder and/or 'dystonia,' including PTSD, psychological, or other stress condition records discussing, documenting, or diagnosing any potential link between (a) PTSD, psychological or other stress conditions and (b) Plaintiff's involuntary movement disorder and/or 'dystonia,'"

CP 148. The November 1, 2005 order did not grant the entirety of Lumera's motion to compel, stating that "any past records pertaining *only* to past PTSD or other treatment for past psychological conditions that are *not* related to the involuntary movement disorder are not discoverable" CP 144 (italics by court). The order also stated that those medical

records “produced pursuant to [it]” would be deemed “highly confidential” and, if the records themselves were submitted to the court in future pretrial filings, the records would be required to be filed under seal, CP 149 — such as would have been the case under an earlier, more general stipulated protective order. The November 1, 2005 order goes much further, however, stating that “[a]ny pleadings and court filings that incorporate, disclose, or refer to the documents produced pursuant to [this order] shall be . . . filed under seal.” CP 149. The earlier December 22, 2004 stipulated protective order, CP 175-81, had not contained such a requirement. It defines medical records and certain other specific types of records as “confidential” and states such records shall (if filed) be under seal. It does not direct that any pleadings be under seal. CP 175.

Lahrichi did not produce the medical records required by the November 1, 2005 order, thus necessitating a follow-up motion by Lumera for sanctions, filed November 15, 2005. CP 134. On January 4, 2006, the court ruled. Its order pointed out Lahrichi’s failure to produce any records, labeling such failure “inexplicable” and “a violation of the November 1, 2005 Order.” CP 156. The court further stated:

More troubling than [Lahrichi’s] violation of the November 1, 2005 Order is his unilateral decision to withhold records and provider identities without submitting to the Court any support whatsoever from any medical professional that justifies his position as he

opposes the instant motion for sanctions. [Lahrichi] is not a medical doctor, but evidently he has decided that he alone may decide what records must be produced pursuant to the Court's November 1, 2005 Order. . . . The Court now sees that [Lahrichi] has not presented a medically or legally defensible reasons for his total failure to produce records or provider identities pursuant to this Court's Order, and the Court finds [Lahrichi's] own declaration regarding the causes and effects of his involuntary movement disorder unconvincing and incredible. [Lahrichi's] failure to comply with the November 1, 2005 Order is sanctionable.

Further, by his discovery conduct, [Lahrichi] has forfeited any right to the distinction drawn in the November 1, 2005 Order (which compelled *all* records about the involuntary movement disorder but only *psychological* records involving a link between the involuntary movement disorder and PTSD or other psychological conditions). [Lahrichi] has forfeited the protection of psychological records that involve no such link. Accordingly, the Court now orders production additional to that order on November 1, 2005. [Lahrichi] is now ordered to produce *all* psychological *and* medical records dating back to January 1, 1989, because the Court finds that any of these may lead to the discovery of admissible evidence on the involuntary movement disorder exacerbation claim. To be clear, [Lahrichi] must now produce all psychological and medical records *whether or not* they discuss, document, or diagnose any potential link between (a) PTSD, psychological, or other stress conditions and (b) [Lahrichi's] involuntary movement disorder and/or "dystonia." This production necessarily includes all records relating to the involuntary movement disorder.

CP 156-57 (footnote omitted; italics by the court). The order further stated that if the medical records were not produced within one week, then "[Lahrichi's] damage claim for exacerbation of his involuntary

movement disorder will be dismissed with prejudice,” CP 159. This order had protective provisions substantially identical to the November 1, 2005 order. CP 160-61.

Seven days later, on January 12, 2006, Lahrichi provided signed medical records releases to Lumera’s lead attorney. CP 135. Whether she used the releases to obtain all the disputed records is not known for certain. What is known is that there were no exhibits filed in the public record, between January 4, 2006 and February 10, 2006, that included any of those records. CP 135. Nor has Lahrichi pointed to any pleadings filed in that period whose text violates the two discovery orders.

The two discovery orders were entered after contested, hard-fought litigation and discovery proceedings. CP 132, 134. Lahrichi was fully informed on the motions and orders (involved to a “high degree” personally in the litigation, CP 133) and was provided copies of them promptly on their filing or entry, CP 133-35, 653-54, 657-60, 666-69.

3. Termination of the Attorney-Client Relationship

On February 10, 2006, defendants’ attorney-client relationship with Lahrichi ended upon the District Court’s granting leave for them to withdraw. CP 680-81, 132. Defendants withdrew because of major differences between them and Lahrichi in the conduct the litigation, to the extent that the relationship had broken down and it was apparent Lahrichi

had lost confidence in them. CP 132-33, 676 & 692-94.⁵

During the time they represented Lahrichi, defendants provided contemporaneous copies to him of all pleadings filed in the underlying action. *See* CP 133 (generally), CP 134-35, 675-76 (the two discovery orders), CP 653-54 (Lumera's motions and supporting papers that led to the discovery orders). Upon withdrawal, defendants also provided copies of their files to Lahrichi, which again included all the pleadings filed in the District Court. CP 133.⁶

4. Entry of Summary Judgment in Underlying Case

The March 2, 2006 summary judgment order, CP 196-230, reviewed Lahrichi's allegations and evidence at length, addressed the merits of the claims, and concluded as a matter of law there was no unlawful discrimination, CP 222-23. Parts of the order discuss aspects of Lahrichi's case germane to the present appeal: specifically, the references to one of Lahrichi's five children's having been diagnosed with leukemia, CP 221, 223, 225 & 228, which was a fact alleged in the complaint, CP 136-35 & 168, bearing on damages and other issues, *id.*,

⁵ Lahrichi had no objection to Kay Frank's withdrawing as his attorney but did object unsuccessfully to her firm's withdrawal. CP 676, 685. He filed his objection himself under seal. CP 676, 681.

⁶ The withdrawal date was nine weeks after the briefing had been completed on Lumera's summary judgment motion. There was no activity of record between February 10, 2006 and the March 2, 2006 ruling on that motion. CP 232.

CP 221, 223. The Ninth Circuit recently affirmed; *see* note 18 *infra*.

5. The Limited Remand Phase of the Underlying Suit

The limited remand phase of the underlying action lasted over two years. CP 582, 234, 236-38 (April 11, 2007 to May 27, 2009).⁷ It was “complex,” plaintiffs state. CP 820. According to Lahrichi, there were “hundreds of documents that were improperly filed unsealed in violation of [the judge’s] heightened protective orders and clearly established privacy laws,” CP 259 (ll. 3-4); *see also* CP 292-93 (ll. 24-2). In the submission that specified Lahrichi’s requests for sealing, the volume of “plaintiff’s arguments alone totalled nearly one thousand single-spaced pages.” CP 238 (ll. 3-4). Lahrichi has stated his efforts in the limited remand were “herculean,” that he had “to climb Mt. Everest,” and that it was “a colossal and complex project.” CP 274 (ll. 10-11), CP 284 (ll. 1-2), CP 294 (ll. 16-17), CP 295 (ll. 24-25), CP 300 (ll. 10-11). The relief granted Lahrichi in the limited remand was much less than he requested. Lahrichi states it was “less than minimal and left most of the information unprotected” and that it “essentially trivializ[ed] what happened.” CP 284 (ll. 8-9), CP 294 (ll. 19-20), CP 275 (ll. 2-3).

⁷ The limited remand was “to the dc to enable the dc to consider [Lahrichi’s] motion to seal,” CP 582 (no. 41), in response to Lahrichi’s request for leave to bring a motion in the District Court. *Id.* (no. 31). To prevent confusion, it should be noted that an earlier limited remand was made for the District Court to retax costs. CP 233 (no. 179).

Lahrichi states that in the limited remand Judge John Coughenour “granted some relief to seal/redact over 70 documents.” CP 259 (ll. 4-5). These comprise “23 docket entries,” however. Opening Br. at 15.⁸ The numerical difference is not material but appears to arise because Lahrichi counts exhibits (to a declaration) in which a redaction occurred as distinct documents. The District Court also unsealed 18 documents previously under seal. CP 237.

One other aspect of Judge Coughenour’s dispositive rulings on March 23, 2009 is important. He denied Lahrichi’s requests that he seal his own orders or make redactions in them, to which denial Lahrichi has repeatedly and in strong words taken great exception. *See* CP 283 (ll. 6-8) (stating “he himself repeatedly filed said information improperly unsealed in violation of his own protective orders, . . . , privacy laws, court rules, and disregard to [Lahrichi’s] and his family’s privacy and constitutional rights”); CP 295 (l. 2) and CP 293 (ll. 12-13) (orders “are filled with medical information” and “included . . . detailed medical information in violation of [Lahrichi’s] privacy and constitutional

⁸ On January 1, 2009, the District Court’s Local Rule 5(g) was amended to permit redaction. CP 311, 193. Previously, only sealing was addressed by the rule. CP 309, 193. Not all the redactions in the limited remand were to Lahrichi’s benefit or liking. He states some “redact[ions] [were] information regarding [Lumera’s attorneys’] misconduct that is of interest to the general public,” CP 276 (ll. 8-9); *see also* CP 295 (ll. 14-16).

rights”); *see also* CP 294 (ll. 20-21), CP 257 (ll. 16-18), CP 264 (ll. 24-25), CP 274 (ll. 14-15).⁹ Lahrichi appealed that denial (and other rulings) to the Ninth Circuit, which recently affirmed. *See* n. 18, *infra*.

B. Statement of Case Relating to the Order Below Denying Plaintiffs’ Motion To Seal and for Preliminary Injunction

In defendants’ CR 56 motion, filed July 9, 2010, the supporting declarations attached four District Court pleadings — three orders from 2005-06 and the 2004 complaint. All four were publicly available in the District Court. CP 575, CP 675-76, CP 135-36.¹⁰ The orders were that granting summary judgment and the two above-quoted discovery orders.

On July 26, 2010, plaintiffs filed their Motion To Seal Documents and for Preliminary Injunction, CP 385-98, and noted it for August 3. CP 385. It sought (a) to seal in the Superior Court the two federal discovery orders; (b) to make redactions in the summary judgment order and the underlying complaint; (c) to redact text portions of the CR 56 motion and a supporting declaration that discussed or quoted the orders or

⁹ The District Court’s order of March 23, 2009, which ruled on Lahrichi’s requests for sealing, is not in the Superior Court record below because the District Court sealed it at the time it was issued. It apparently addressed in detail many of Lahrichi’s arguments, as it was 40 pages long. CP 299. The evidence that Lahrichi requested but was denied redactions in sealing of the District Court’s prior orders was therefore taken from Lahrichi’s own statements in his later filed pleadings in his litigation with Stoel Rives in the “anti-injunction” suit.

¹⁰ The complaint is also publicly available in the King County Superior Court clerk’s file containing pleadings filed before removal to federal court (cause no. 04-2-23849-8). CP 135-36.

complaint; and (d) issuance of a preliminary injunction

prohibiting Defendants from filing, unsealed/unredacted, Plaintiffs' confidential information, including medical, and ordering them to comply with the existing applicable Federal Protective Orders, privacy rules, and with the directives of the Ninth Circuit Court of Appeals to seal and/or not unseal such information until resolution of Lahrichi's pending federal appeal.

Id. The court below denied the motion, CP 828, ruling:

1. Plaintiffs . . . fail[ed] to specify compelling privacy or safety concerns that outweigh the public interest in access to the court record under GR 15(c).

2. Plaintiffs . . . fail[ed] to provide a specified form of injunction which describes "in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained," as required pursuant to CR 65(d).

Plaintiffs sought reconsideration, CP 906-17, which was denied, CP 107.

On appeal, the plaintiffs argue two additional documents filed below should be sealed.¹¹ These are two pages from Lumera's motion to compel (that led to the November 1, 2005 order) and a supporting declaration, which are publicly available in the District Court. CP 631. The pages became relevant to the CR 56 motion when Lahrichi selectively quoted snippets from them, while using ellipses to denote

¹¹ Opening Br. at 56, 59, citing CP 634 & 636. Lahrichi's motion to seal clerk's papers in this Court (denied July 1, 2011 by Commissioner Verellen, *see infra* at 14) sought sealing of these pages.

omitted parts in order to argue Lumera's attorney had waved a "red flag" in front of defendants by including in the text of her papers "confidential" information, and to imply the District Court later sealed or redacted them during the limited remand. CP 468. In fact, the passages had not been redacted, CP 624-25, 630-31, 634, 636, as defendants pointed out in reply.¹²

During this appeal, the plaintiffs filed a motion to seal, directed at those of the Clerk's Papers that contain the pleadings at issue below. Commissioner Verellen denied that motion by order dated July 1, 2011. Plaintiffs did not seek any modification of his order under RAP 17.7.

**C. Statement of Facts re Plaintiffs' Motion To Late File
Declarations in Opposition to Summary Judgment**

Defendants filed their motion for summary judgment on July 9, 2010, fourteen months after the action commenced. The following detail regarding service of the motion is stated due to Lahrichi's belated argument (*i.e.* not made in opposing the CR 56 motion) of purportedly delayed "service" on him. Service on Lahrichi occurred

¹² The publicly available text passages in the two pages to which Lahrichi objects contain references to "post-traumatic stress syndrome," similar to the November 1, 2005 discovery order. CP 634, 636. (To prevent any confusion, it is noted that the District Court in the limited remand had made a short redaction of different text on the page from the attorney declaration, which redaction was faithfully reproduced in the exhibit below that is CP 636. Similarly, two redactions of different text that the District Court made on the page from Lumera's motion to compel were faithfully reproduced in the exhibit below that is CP 634.)

contemporaneously, through the Superior Court's electronic filing/service system, CP 949, as shown in the court's E-Service confirmation and in a certificate of service, CP 128, 139, 194, 1084-85.¹³ As a backup, the pleadings were also sent, via private emails from defendants' attorneys to plaintiffs. CP 949, 957-61, 1084-85. Lahrichi did not assert there was any delay in service on him in his several filings relating to the CR 56 motion between July 9 and August 6, 2010,¹⁴ nor does he contend he did so at the August 6, 2010 hearing. Ten days later, Lahrichi for the first time said there was a delay in his receipt (though not plaintiff Csipke's) of the private email from defendants' attorney that transmitted a duplicate of the CR 56 motion. CP 846 & 852. He did not, however, ever deny he received timely service via the court's "E-Service" system. CP 941.

Turning to other procedural facts, the plaintiffs' response to the CR 56 motion was due on July 26, 2010. On July 19, 2010, they filed their Motion for Enlargement of Time To File a Response. CP 343-49. It sought an extension of "a minimum of six (6) weeks." CP 343. They

¹³ Further confirming the date of service, Lahrichi stated (in a declaration) that "[s]ince July 9, 2010, my wife and I worked diligently to prepare the response to the motion for summary judgment" CP 807-08.

¹⁴ *Viz.*, his memorandum opposing summary judgment, CP 399-422, his later declaration in opposition, CP 463-73, his surreply, CP 819-22, the Motion for Enlargement of Time [for CR 56 Response], CP 343-51, and his three memoranda seeking to late file declarations against the CR 56 motion, CP 543-51, 798-809, 812-15.

noted the motion for July 23, 2010, CP 343, and did not at any time amend that date. The motion did not cite CR 56(f) or argue CR 56(f) criteria, but rather asserted plaintiffs were busy on other matters, in this action and two other lawsuits they had on appeal. CP 344-48. The court below denied the requested enlargement by order of July 23, 2010. CP 377-78. The plaintiffs did not appeal that denial. *See* CP 1064-83.

On July 26, 2010, the plaintiffs electronically filed their memorandum opposing the CR 56 motion. CP 399-422. On July 27, 2010, Lahrichi e-filed his declaration in opposition, CP 463-534, at about 1:45 p.m. CP 553. The next day, plaintiff Csipke e-filed her declaration, CP 537-42, at about 4:20 p.m., CP 553. On July 29, 2010, plaintiffs filed their Motion To [Allow] Late File[d] Declarations of Lahrichi and Csipke, CP 543-51,¹⁵ which they noted for August 6, 2011 without oral argument. CP 1088-89. The court denied that motion. CP 823-25. Plaintiffs moved for reconsideration, CP 918-29, eleven days later, CP 938, 931, which the court denied, CP 1060-61.

¹⁵ The defendants filed a concurrent motion to strike the same two declarations as untimely. CP 552-58 & 823. The two competing motions essentially crossed each other in the court's electronic filing and service system.

III. AUTHORITY & ARGUMENT

A. The Court Below Correctly Denied the Motion To Seal Documents and for a Preliminary Injunction

Plaintiffs/appellants assign error to the order, CP 826-28, denying Plaintiffs' Motion To Seal Documents and for a Preliminary Injunction. The standard of review is stated in *Waremart, Inc. v. Progressive Campaigns, Inc.*, 139 Wn.2d 623, 628, 989 P.2d 524 (1999):

[W]e are mindful of the principle that the “granting or withholding of an injunction is addressed to the sound discretion of the trial court to be exercised according to the circumstances of each case.” Furthermore, the “trial court’s decision exercising that discretion will be upheld unless it is based upon untenable grounds, or is manifestly unreasonable, or is arbitrary.”

A decision on whether to seal pleadings in the Superior Court is reviewed under the same standard, *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 540, 114 P.3d 1182 (2005).¹⁶ The burden of proof was on plaintiffs, as the moving party, to show the required elements for injunctive relief, see *Quinn Constr. Co., L.L.C. v. King County Fire Protection Dist. No. 26*, 111 Wn. App. 19, 26-27, 44 P.3d 865 (2002), *i.e.*, (1) a clear legal or equitable right, (2) a “well grounded fear of immediate invasion of that right,” and (3) “actual and substantial injury” that would result.

¹⁶ The only exception is that if the trial court employed an improper legal standard in sealing records, then the legal standard is reviewed *de novo*. *Dreiling v. Jain*, 151 Wn.2d 900, 907, 93 P.3d 861 (2004).

Washington Fed'n of State Employees, Council 28, AFL-CIO v. State, 99 Wn.2d 878, 888, 665 P.2d 1337 (1983). The court below properly exercised its discretion in denying plaintiffs' motion.

1. **The Exhibits Plaintiffs Wanted Sealed Below Were and Are Publicly Available in the Federal District Court**

Plaintiffs moved to seal the District Court's discovery orders of November 1, 2005 and January 4, 2006. CP 385 (¶ 2). Both orders are publicly available, unredacted, in the federal court file. CP 575, 675-76; *see supra* at 11. If the requested sealing or redacting will not actually protect the "threatened interests" of the moving party because the information at issue is already available, then the rationale for granting the request fails to exist even if other requirements are met. *Indigo Real Estate Services v. Rousey*, 151 Wn. App. 941, 953, 215 P.3d 977 (2009).

Plaintiffs wanted redactions in Lahrichi's complaint against Lumera and in the summary judgment order of March 2, 2006. *See* CP 385 (¶ 1), 737-41, 754, 757, 769-77. Both are publicly available in the District Court file, with no redactions. CP 575. Lahrichi has not stated that he ever asked the District Court to redact his complaint. He has not disputed that he knew the content of the complaint prior to its filing and

did not voice objection. *See* CP 135-36.¹⁷ Further redactions, which plaintiffs sought in the text of the CR 56 motion and a supporting declaration, were no more than quotations from, or references to, the publicly available federal court orders and complaint. CP 700-06, 727-29. The two pages plaintiffs later asked be sealed, CP 634 & 636, are in the District Court's public file. *See supra* at 13-14.

2. The 9th Circuit Did Not Seal District Court Documents

The thrust of plaintiffs' argument to seal and for injunctive relief was their assertion that the Ninth Circuit would reverse and rule for Lahrichi on his unsuccessful requests for sealing in the limited remand. Plaintiffs essentially conceded that if the Ninth Circuit affirmed, they would lack a basis for their motion. CP 385 (¶ 3), CP 394. Lahrichi's predictions were speculative and overlooked the standard of review — abuse of discretion — that applied. CP 563. The Ninth Circuit earlier this year affirmed the District Court in all respects.¹⁸

¹⁷ The content Lahrichi wanted redacted in his underlying complaint (at CP 168) and the federal summary judgment order (at CP 208, 221, 223, 225 & 228) was primarily any references to his son's leukemia, which, however, was relevant to Lahrichi's damages allegations and was known to Lumera without any reference to medical records. CP 135, 168. A secondary subject on which redactions were sought in the summary judgment (at CP 205, 220) were certain references to Lahrichi's spouse (Regine Csipke).

¹⁸ *See* July 1, 2011 notation ruling by Commissioner J. Verellen on appellants' Motion To Seal Clerk's Papers at 3. The May 11, 2011 Ninth Circuit decision was provided to Commissioner Verellen at his request and is attached to the Notice of Ninth Circuit Decision in Underlying Case, filed July 7, 2011 in this Court.

His ancillary arguments on the Ninth Circuit were mooted as a result, but they were never sound in the first place. Lahrichi cited two early procedural orders he obtained from the Ninth Circuit. Neither helped his position. The first, issued July 1, 2009, CP 451, was on Lahrichi's emergency stay request because the District Court had declined to stay one part of its dispositive order in the "limited remand," which unsealed 18 pleadings, *id.*; *see also* CP 237, 451. It did not, however, place under seal any public documents in the District Court.

The other Ninth Circuit order of March 29, 2010, simply allowed Lahrichi "to maintain the . . . opening brief, and its excerpts of record, under seal" in the Ninth Circuit. CP 453. The fact that the three orders and complaint were within the 19 volumes of excerpts of record, CP 580, along with a great many other documents, did not mean the Ninth Circuit regarded the orders or complaint as confidential.

3. **The "Heightened" Protective Provisions in the Two Discovery Orders Applied Only to Records Produced Pursuant to the Orders**¹⁹

The "heightened" protective provisions in the two discovery

¹⁹ Plaintiffs make reference at some points to three "heightened protective orders," *e.g.*, Opening Br. at 37. The third order is another discovery order, of September 30, 2005, that dealt with certain bank, tax and bonus records of Lumera's CEO and certain bank records and one tax return of Lahrichi's. CP 184-90. Its protective provisions applied only to documents produced pursuant to it. CP 188-89. It has no application to any of the documents plaintiffs sought to seal in the court below.

orders have nothing to do with the documents that plaintiffs wanted sealed or redacted below. Those provisions applied only to limited class of documents, specifically, only to the pre-2000 medical records to be produced **pursuant to the two orders themselves**. *See supra* at 6, 8.

Until January 12, 2006, Lahrichi was unwilling to produce the pre-2000 medical records addressed by the two orders. *See supra* at 8. The federal court pleadings plaintiffs wanted sealed or redacted below all precede that date, save only the summary judgment order seven weeks after it. Lahrichi has not identified any federal court filing on or after January 12, 2006 whose text or exhibits came within the protective provisions of the two discovery orders, much less that there was any violation of those provisions by any person, including the District Court when it publicly entered the summary judgment.²⁰

As to the earlier stipulated protective order, Lahrichi has not contended that his medical records are in the public file in violation of that order. Rather, his position is that any text reference made in orders, motions, declarations, or other pleadings to his symptoms or condition, no matter how general, has to be sealed because it is “copied or

²⁰ Lahrichi makes a new argument, without support, that Kay Frank had the pre-2000 medical records in her possession. Opening Br. at 59. The clerk’s paper he cites, CP 877, does not show that. He did not make any such argument below (and to the contrary, said only he “provided [her] . . . my medical records from 2000.” CP 465-66). The argument’s purpose is not apparent.

paraphrased” from medical records. *See, e.g.*, Opening Br. at 56. His argument ignores the plain language of the stipulated protective order regarding filing, in its paragraph 8, which said nothing about pleadings that refer to such medical records having to be under seal. CP 176. *See supra* at 6. He also argues the words “compilations” and “summaries” of medical records should be treated as if they are in that paragraph 8, Opening Br. at 57, even though they are not. Even if they were, the words do not embrace general references to symptoms or conditions, but rather mean the digesting of medical records into condensed forms, which attorneys or legal assistants commonly prepare in litigation for their own internal use.²¹ Lahrichi may wish that the stipulated protective order had “heightened” restrictions on the filing of pleadings similar to those of the two later discovery orders, but it plainly does not.

4. **Plaintiffs Did Not Demonstrate an “Identified Compelling Concern” Sufficient To Permit Sealing**

General Rule 15(c)(2) provides in pertinent part:

(2) After the hearing, the court may order the court files and records in the proceeding, or any part thereof, to be sealed or redacted if the court makes and enters written findings that the specific sealing or redaction is justified by **identified compelling** privacy or safety concerns that outweigh the public interest in access

²¹ Those two words appear in a different paragraph (no. 14) of the stipulated protective order. CP 177.

to the court record. Agreement of the parties alone does not constitute a sufficient basis for the sealing or redaction of court records. . . . [Boldface in the original.]

If the threshold test is met that an “identified compelling privacy or safety concern” exists, the further test that it “outweigh the public interest” serves an important policy:

As the public’s right of access ‘serves to enhance the basic fairness of the proceedings and to safeguard the integrity of the fact-finding process,’ this right ‘may be limited only to protect significant interests, and any limitation must be carefully considered and specifically justified.

Indigo, 151 Wn. App. at 948; *see also Dreiling*, 151 Wn.2d at 908-09.²²

The first of the five parts of the well-known *Ishikawa* test²³ requires a showing of “need,” similar to the “identified compelling . . . concern” criterion in GR 15(c)(2), and requires further, that “[i]f closure and/or sealing is sought to further any right or interest besides the defendant’s right to a fair trial, a ‘**serious and imminent** threat to some other important interest’ must be shown.” *Ishikawa*, 97 Wn.2d at 37 (emphasis added). The standard of a “serious and imminent threat” requires a showing that is even “more specific, concrete, certain and definite than a ‘compelling concern.’” *State v. Waldon*, 148 Wn. App.

²² The interest of the public is also a factor to be considered in a motion for an injunction. *Mains Farm Homeowners Ass’n v. Worthington*, 64 Wn. App. 171, 179, 824 P.2d 495 (1992).

²³ *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982).

952, 963, 202 P.3d 325 (2009). The *Ishikawa* holding is based on a constitutional requirement of open courts. *Waldon*, 148 Wn. App. at 960-61. While GR 15(c) is strict, in isolation it “does not fully comply with the constitutional benchmark defined in *Ishikawa*.” *Id.* at 967. However, GR 15(c) is to “be harmonized” with the *Ishikawa* factors to meet the concern for the public interest. *Id.*; *see also Rufer*, 154 Wn.2d at 544.

The court below stated plaintiffs’ motion was “DENIED for Plaintiffs’ failure to specify compelling privacy or safety concerns that outweigh the public interest in access to the court record as required under GR 15(c).” CP 828. The same failure exists in plaintiffs’ present arguments on appeal. Their highly subjective view is that any reference, no matter how general, to a symptom or condition must be sealed or redacted and that the lawsuit must be conducted in secrecy as to such matters. Their premise is that all such references must have originated in a medical record. The premise is doubtful. But even if it were valid, their conclusion would not follow that pleadings must have all such references redacted or sealed. To do so would impose a heavy practical burden on courts and litigants, and also impair broadly the public right of access. Even apart from particularized issues in a case that may be of public concern, our state Supreme Court has articulated the broader importance of public access to the judicial system generally:

[T]he right [to “the open administration of justice”] is not concerned with merely whether our courts are generating legally-sound *results*. Rather, we have interpreted this constitutional mandate as a means by which the public’s trust and confidence in our *entire judicial system* may be strengthened and maintained. To accomplish such an ideal, the public must—absent any overriding interest—be afforded the ability to witness the complete judicial proceeding, including all records the court has considered in making *any* ruling, whether “dispositive” or not.

Rufer, 154 Wn.2d at 549 (italics by the court; citations omitted).

Plaintiffs’ view that this case is solely about their personal claims has two major defects. It would mean that any lawsuit seeking recovery for alleged personal injury must be similarly regarded as being confidential, with pleadings being sealed or redacted to a major degree to conceal any reference to the injury. This would be true regardless of the other issues in the case and the linkage between those issues and the injury. Second, this case is also about the attorney standard of care — specifically, whether attorneys in litigation should assert, to the maximum degree possible, the right to have pleadings sealed or redacted. These are matters in which there is substantial interest not only of the legal community but of the public generally. The court below acted properly within its discretion in finding plaintiffs had not satisfied GR 15(c).

5. **There Was a Complete Lack of the Specificity Required by CR 65(d) in the Proposed Injunction**

The factors and law discussed *supra* at 18-25 indicate a failure by

plaintiffs to carry their burden of proof on the required elements for an injunction, listed *supra* at 17. In addition, the dispositive factor for the court below was the form of injunction plaintiffs belatedly²⁴ proposed:

Defendants must comply with the existing applicable Federal Protective Orders, privacy rules, and with the directives of the Ninth Circuit Court of Appeals regarding Plaintiffs' confidential information. Defendants are prohibited from filing, unsealed or unredacted, Plaintiffs' medical, financial, personnel, personal, and mediation information. This preliminary injunction EXPIRES when Lahrichi's federal appeal is resolved.

The court below was within its discretion to find such language failed to satisfy CR 65(d). CP 828. The first sentence was self-evidently indefinite as to the documents it invokes. It further used "the outside document[s] . . . to describe the act or acts to be restrained," which "CR 65(d) prohibits." *Snyder v. Haynes*, 152 Wn. App. 774, 782, 217 P.3d 787 (2009). The second sentence is even more indefinite. It goes further in its purported scope, since nothing in any of the federal court's orders contain such a broad prohibition on the filing of pleadings in the public record. Plaintiffs presumably intend the second sentence to cover everything Lahrichi argued should be sealed or redacted in his "nearly one thousand single spaced pages" submitted to the District Court, *see*

²⁴ Plaintiffs did not provide the proposed injunction until three days after their motion. CP 574, 827. It is not in the record below, but was as quoted at CP 565.

supra at 10, but defendants have no way to know how far that extends. Its failure to be “specific in its terms,” CR 65(d), violates “the letter and spirit” of that rule. *Snyder*, 152 Wn. App. at 782 (holding the words “heirs, successors, invitees and assigns” to be not sufficiently specific).

B. The Court Below Did Not Err in Denying Plaintiffs’ Motions for Additional Time and To Late File Declarations

In their procedural objections to summary judgment, Opening Br. at 24-31, plaintiffs argue (1) the court below should have granted their request for more time; (2) defendants “thwarted” them from obtaining a “protective order”; and (3) the court below should have granted their motion to late file their declarations. None of the arguments has merit.

1. The Court Below Properly Denied the Motion To Enlarge Time; Plaintiffs Did Not Appeal It

Plaintiffs moved for “a minimum of six (6) weeks” of enlarged time to respond to the CR 56 motion. CP 343. They did not appeal the order, CP 377-78, denying the motion. *See* CP 1064-65. Furthermore, the denial was proper and would “be upheld absent a showing of manifest abuse of discretion.” *Gross v. Sunding*, 139 Wn. App. 54, 67-68, 161 P.3d 380 (2007). Plaintiffs’ argument for the six-week extension was that it was necessary for their personal schedule, not for a CR 56(f) continuance to take discovery. CP 344-47. As defendants pointed out, CP 365, plaintiffs’ motion did not cite or argue CR 56(f) or the three-part

test under it, much less present proof the test was met.²⁵

In arguing the court below erred, plaintiffs also assert without support that the “trial court overlooked that Dr. Lahrichi was served two days late with the SJ Motion.” Opening Br. at 28. Lahrichi was served through the Superior Court’s electronic filing system on July 9, 2011, *see supra* at 14-15, a fact he has never contested. He did not at any time before (or at) the CR 56 hearing assert a delay in service. *Id.*

2. Plaintiffs’ Argument They Were “Thwarted” in Getting a “Protective Order” and that Discovery Was Therefore Delayed Is Spurious

Plaintiffs say repeatedly that defendants “thwarted” their efforts to have a stipulated “protective order” entered, which they say they needed to conduct discovery. *See, e.g.*, Opening Br. at 25. The argument is spurious. First, the order plaintiffs wanted was not a protective order under CR 26(c). No discovery was propounded to plaintiffs. Their depositions were not noted. Rather, what they wanted was broad advance permission to file under seal, indeed, broad **requirements** to file under

²⁵ *See, e.g., Butler v. Joy*, 116 Wn. App. 291, 299, 65 P.3d 671 (2003). The required showing is (1) “good reason for the delay in obtaining the evidence,” (2) “what evidence would be established by further discovery,” and (3) that “the evidence would . . . raise a genuine issue of fact.” *Id.*; *see also Gross*, 139 Wn. App. at 68. Even when plaintiffs later (in opposing summary judgment) cited CR 56(f), albeit without moving under it, CP 409, they failed to show those criteria, or even to argue them beyond contending defendants “hampered their efforts” to obtain a stipulated “protective order,” thus preventing them from conducting discovery. *Id.* As to that contention, *see* discussion *infra* at 28-30.

seal. Such an order, if plaintiffs had moved for (they were free to do so) and obtained it, would have applied regardless of whether discovery was propounded. Plaintiffs were also free to seek discovery of defendants (they never did) and keep the fruits of it as confidential as they desired.

Second, the record shows not that defendants' attorney "thwarted" plaintiffs, but rather that he stated clear disagreement. The plaintiffs initially proposed a stipulation and order on March 25, 2010. CP 576, 325. Defendants' attorney responded on April 2, stating why he objected to it. CP 317-18.²⁶ A month later, on May 3, Lahrichi wrote, taking issue with the "unfounded objections" and stating "[p]laintiffs will seek one [a protective order] in due time." CP 319-21. Defendants' attorney provided more detail on his objections by letter on May 31. CP 323-27. Lahrichi did not answer until July 13, 2010, and then did so by attaching to a pleading his letter disputing the May 31 objections. CP 339-42.

Plaintiffs wrongly say they were unable to submit confidential documents to the court below without a "protective order." They have not identified any such documents. Furthermore, they were free to move

²⁶ The objections should not have surprised Lahrichi, given that an earlier letter of defendants' attorney on January 8, 2010, CP 584-85, had addressed similar issues, albeit in a different context.

below for their desired order at any time, or to use LGR 15(c)(3)²⁷ if they believed such protection was legally supportable. They did not do so.

3. The Denial of Plaintiffs' Motion To Accept Late-Filed Declarations Was Within the Court's Discretion

Plaintiffs contend that the court below erred in denying, CP 823-25, their motion to accept late filed declarations opposing the CR 56 motion. The denial was within the discretion of trial courts on “[w]hether to accept or reject untimely filed affidavits.” *O’Neill v. Farmers Ins. Co. of Washington*, 124 Wn. App. 516, 521, 125 P.3d 134 (2004).²⁸

At the outset, plaintiffs have not shown how their late-filed declarations, even if accepted by the court, would have made any difference on the motion for summary judgment. They did not provide expert testimony. They did not offer evidence to support their invoking the “discovery rule” to avoid the statute of limitations. *See infra* at 44.

Their argument to the court below, as here, was a mixture of (a) it should have granted their Motion for Enlargement of Time, (b) they had

²⁷ Local General Rule 15(c)(3) provided a procedure for plaintiffs to submit putatively confidential documents to the court *in camera* and contemporaneously move for an order to maintain them under seal, keeping the documents out of the public file while the motion was determined. Plaintiffs attempted to do that in their state court action against Stoel Rives. CP 244-45.

²⁸ Their Notice of Appeal, CP 1065, also listed and attached the later order (CP 1060-61) denying their motion for reconsideration of the exclusion of the late declarations, CP 918-29. That motion was filed 11 days after the August 6, 2010 order it challenged, CP 930-31, 938, and accordingly was untimely anyway under CR 59. Plaintiffs have not argued the reconsideration denial in their brief. *See* note 29, *infra*.

been unable to get defendants to agree to a “protective order,” and (c) they had been exceedingly busy preparing their Motion To Seal Documents and for Preliminary Injunction. *See* CP 543-551. The court acted properly within its discretion to deny the motion. The plaintiffs had made a deliberate decision to delay preparing a response to the CR 56 motion, and instead work on bringing their motion for a preliminary injunction and to seal/redact the CR 56 motion papers. They continued to direct their efforts to the injunction/sealing motion even after learning, in the morning of July 23, 2011 (three days before their CR 56 opposition papers were due), that the court had denied their Motion for Enlargement of Time. CP 553. This was not “excusable neglect,” but rather plain disregard of the time frames in CR 56 and the July 23 order.

Plaintiffs also argue defendants were under some obligation to abstain from or delay filing a CR 56 motion, *see* Opening Br. at 26. But the action had been pending over 14 months. Preparation of that motion was underway for some time prior to the July 9, 2010 filing of it. Defendants were under no duty to delay filing the motion. And in particular, there was no obligation that arose simply because Lahrichi purportedly wanted to keep “negotiating” more on his proposal for wide-scale sealing, when defendants had stated their disagreement.

C. Summary Judgment Was Properly Granted

The court below granted summary judgment on three independent grounds, CP 832: first, plaintiffs lacked a *prima facie* case because they did not submit expert testimony on the attorney standard of care and furthermore had not shown damages; second, the statute of limitations had run; and third, the plaintiffs other than Lahrichi were not clients of defendants and no duty was owed to them. These rulings were correct, as was the denial of the later reconsideration motion. CP 1058-59.²⁹

“[R]eview [is] de novo [of] a trial court’s order granting summary judgment,” which entails “engag[ing] in the same analysis as the trial court. Accordingly, [the Court] examine[s] the evidence—and only that evidence—in the record before the trial court when the summary judgment motion and any responsive memoranda were filed. . . .

The party moving for summary judgment bears the burden of demonstrating there is no genuine dispute as to any material fact. If the moving party is the defendant, it may meet this burden by pointing out that there is an absence of evidence to support an essential element of the

²⁹ The standard of review for an order denying reconsideration under CR 59 is the abuse of discretion standard. *See Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 497, 183 P.3d 283 (2008). Plaintiffs have not in their opening brief argued any purported error by the court below in denying by their motions for reconsideration brought under CR 59, which is an abandonment of that portion of their appeal. *See, e.g., League of Women Voters of Washington v. King County Records, Elections and Licensing Services Div.*, 133 Wn. App. 374, 377, 135 P.3d 985 (2006). All citations to the record by plaintiffs with clerk’s paper numbers greater than 834 are from the record on the motions for reconsideration and responses to same, and not in the record before the court below at the time of summary judgment.

plaintiff's claim. To avoid summary judgment, the plaintiff must make out a *prima facie* case concerning the essential element of its claim. If, at this point, the plaintiff fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, then the trial court should grant the motion. Summary judgment in this context is warranted since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Boguch v. Landover Corp., 153 Wn. App. 595, 608-09, 224 P.3d 795 (2009) (citations and internal quotation marks omitted).

1. **Plaintiffs Lacked a *Prima Facie* Case Because Expert Testimony Was Required**

Plaintiffs' opening brief does not address the first ground which the court's order below cited for granting summary judgment, the absence of expert testimony required to *prima facie* show the attorney standard of care.³⁰ In this respect it resembles their memorandum and declarations opposing summary judgment below, which likewise avoided the issue.³¹

³⁰ Prior to the CR 56 motion, the parties had served their respective disclosures of primary witnesses and disclosures of additional witnesses under the Superior Court's Local Civil Rule (26)(b)(1),(2). The CR 56 motion pointed out the absence of any expert witness in plaintiffs' witness disclosures. CP 120.

³¹ The two declarations of plaintiffs Lahrachi and Csipke were stricken by the court below as untimely, CP 823-25, and accordingly not listed in the summary judgment order among the materials reviewed by the court, CP 831-32. It would not have made a difference if the declarations had been considered. However, in referring to the declarations in this section of their response brief on appeal, defendants do not waive their position, *supra* at 30-31, that the decision of the court below to exclude the declarations should be affirmed.

Plaintiffs' amended complaint alleged Lumera's attorneys improperly filed and used confidential information of Lahrichi's in the underlying lawsuit and that defendants took no action against them. CP 31-41 (¶¶ 46, 50-51, 53-54, 56, 61-68, 80-81, 83, 85, 89, 91, 95, 98, 108, 110, 115). To a lesser extent, plaintiffs complain that defendants opposed Lumera's filings by "re-quot[ing] protected information from Defendant's [Lumera's] said pleadings," and otherwise used confidential information in responding to Lumera. CP 32-39 (¶¶ 52, 55, 66; *see also* ¶¶ 86, 89 & 96). Lastly, they alleged that defendants performed inadequately in discovery and otherwise in litigating with Lumera, CP 32-42 (¶¶ 47-49, 58-59, 69, 71, 90, 104, 106-07, 109, 117).

In an action for legal malpractice, the plaintiff must show:

(a) The existence of an attorney-client relationship; (b) the existence of a duty on the part of the lawyer; (c) failure to perform the duty; and (d) the negligence of the lawyer must have been a proximate cause of the damage to the client.

Halvorsen v. Ferguson, 46 Wn. App. 708, 711, 735 P.2d 675 (1986); *see also Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992).

"An attorney has a duty to exercise 'that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction.'"

Halvorsen, 46 Wn. App. at 712, quoting *Cook, Flanagan & Berst v. Clausing*, 73 Wn.2d 313, 395, 438 P.2d 865 (1968); see also *Hizey*, 119 Wn.2d at 261. The standard is that of “lawyers acting in the same or similar circumstances” as the defendant. *Hansen v. Wightman*, 14 Wn. App. 78, 91-92, 538 P.2d 1238 (1975). “In general, mere errors in judgment or in trial tactics do not subject an attorney to liability for legal malpractice.” *Halvorsen*, 746 Wn. App. at 717.

Furthermore, “the degree of care, skill and learning which constitutes the recognized standard of practice of a profession must be proved by testimony of a member of that profession . . . [unless] the area of claimed malpractice is within the common knowledge of laymen.” *Hansen*, 14 Wn. App. at 93. Litigation procedure and tactics are beyond the common knowledge of laypersons. *Walker v. Bangs*, 92 Wn.2d 854, 857-58, 601 P.2d 1279 (1979). The *Walker* court held:

Law is admittedly a highly technical field beyond the knowledge of the ordinary person. By its very nature, an action for professional negligence in the preparation and conduct of specific litigation involves matters calling for special skill or knowledge – proper subjects for expert testimony. . . .

This case involves allegations of negligence pertaining to trial tactics and procedure, matters frequently difficult to prove. . . . Further, the case involves a maritime claim a special area of practice. While expert testimony is not necessary when the negligence charge is within the

common knowledge of lay persons, we believe that expert testimony was both proper and necessary in this instance.

Id. at 858-59 (emphasis added), citing *Lynch v. Republic Pub. Co.*, 40 Wn.2d 379, 389, 243 P.2d 636 (1952). Based on these principles, in *Geer v. Tonnon*, 137 Wn. App. 838, 155 P.3d 163 (2007), the court held:

The trial court ruled that Geer's legal professional negligence claim against Tonnon based upon the retroactive endorsement failed because Geer did not provide expert testimony or other evidence to show that Tonnon's failure to file suit under this theory constituted a breach of Tonnon's duty of care, or that this breach was the cause in fact of Geer's claimed damages. The trial court's ruling was correct. . . .

Geer never provided Tonnon with notice of the retroactive endorsement issued by the insurance underwriter following the fire. As a result, expert testimony was necessary to establish that Tonnon breached the duty of care owed to Geer by failing to independently discover the existence of the endorsement, a fact that his client failed to disclose to him, in order to commence suit to enforce the endorsement against Lloyd's within the one-year limitation period. However, Geer failed to proffer any such expert testimony. Thus, there was no evidence that attorney Tonnon breached any applicable duty to Geer.

In addition, Geer failed to provide expert testimony or other evidence to demonstrate that such a breach of Tonnon's duty of care was the cause in fact of Geer's claimed damages. Specifically, Geer introduced no evidence to show that had Tonnon discovered the retroactive endorsement and filed suit seeking its enforcement against Lloyd's within the one-year limitation period, Geer would have obtained a favorable judgment against Lloyd's. Geer's assertion that Tonnon erred, without evidence that Geer would have obtained a

favorable judgment at trial in the absence of the error, is insufficient to withstand Tonnon's motion for summary judgment.

Id. at 850-51, citing *Hizey*, 119 Wn.2d at 261, *Lynch*, 40 Wn.2d at 389, and *Halvorsen*, 46 Wn. App. at 721-22.

The plaintiffs' claims here involve alleged attorney errors in a federal court employment discrimination lawsuit, *viz.*, whether defendants should have assessed differently the purported confidentiality of pleadings being filed, moved for relief against the opposing counsel/parties for their filings, and/or sought to have placed under seal pleadings filed by such other parties or themselves. Such assessments involve professional judgment. They entail consideration of the degree of the purported confidentiality, the effect of any such motions or requests on overall objectives and strategy, the interpretation of court orders, the importance of the interests served, the prudent utilization of available resources, and the likelihood of positive results. The sealing for which plaintiffs argue is broad, extending to the most general references to any health condition or symptoms. The issue in this action is whether "reasonable, careful and prudent" attorneys in the position of defendants would necessarily conclude that orders, motions or other documents with such general statements affect any significant confidentiality interests of Lahrichi, and whether such attorneys would determine that sealing of

those documents in the court file and/or sanctions against Lumera's attorneys had to be sought. Lahrichi's personal and subjective views are not evidence that establishes any such standard.

The ambiguity in plaintiffs' arguments also stands out. They assert "confidential" information is in the federal court file but do not describe it, even in summary fashion. Lahrichi never says that he asked for any particular pleading to be put under seal or was told any particular pleading was under seal or asked for a motion against Lumera or its attorney for sanctions to remedy alleged improper filings.

And if it is plaintiffs' contention that the mere existence of some redactions and sealing granted during the limited remand shows defendants erred, the argument is untenable. First, they have not shown what information was redacted. And much about which they complain was not redacted or sealed — the majority, it appears, given Lahrichi's appeal and his extreme unhappiness with the federal judge's rulings and the "less than minimal" relief granted. *See supra* at 10-12.³² Second, the limited remand indicates nothing about the standard of care in actual litigation. It stretched over two years. It involved voluminous

³² The fact Lahrichi could not get sealed the passages in CP 634, 636 that he believes confidential, *see supra* at 13-14, illustrates the point. If, after two years' effort in the limited remand (where he had counsel), Lahrichi could not get these items sealed, there is no basis for him to argue now that defendants were supposed to get them sealed during the much faster pace of contested complex litigation.

submissions to the court. The submissions were not made during contested litigation under the pressure of pretrial deadlines and subject to the overall objective of prevailing in the case and not burdening the judge with satellite disputes, but rather in a non “real-time” proceeding in which counsel had no tasks other than to deal with limited remand issues.

Plaintiffs now argue in Part IV.E of their opening brief (at 31-47) that the “trial court erred in considering and ruling only on the [legal] malpractice claim” and that the “Lahrichis have separate claims against Respondents.” *Id.* at 31. This is an action for legal malpractice, notwithstanding that one paragraph of the complaint contains a long list of other purported legal theories, albeit without pleading any of their elements or otherwise alleging any differentiation among them. CP 43 (¶ 124). Numerous published decisions hold that giving multiple labels or names to a claim will not change the true nature of the claim. CP 119; *see, e.g., G.W. Constr. Corp. v. Professional Service Industries, Inc.*, 70 Wn. App. 360, 853 P.2d 484 (1993).³³ This section of plaintiffs’ brief then goes on to make argument that increasingly get more heated and

³³ *See also, e.g., Owens v. Harrison*, 120 Wn. App. 909, 915-16, 86 P.3d 1266 (2004); *Thao v. Control Data Corp.*, 57 Wn. App. 802, 790 P.2d 1239 (1990); *Davis v. Davis Wright Tremaine, L.L.P.*, 103 Wn. App. 638, 652, 14 P.3d 146 (2000); *Hansen*, 14 Wn. App. at 92-93; *see also Boguch*, 153 Wn. App. at 616-17. “A party’s characterization of the theory of recovery is not binding on the court. It is the nature of the claim that controls.” *Pepper v. J.J. Welcome Constr. Co.*, 73 Wn. App. 523, 546, 871 P.2d 601 (1994).

extreme, culminating in completely unsupported and truly excessive accusations of “incompetence,” “fraud” and “false testimony.” The allegations in this section are overwhelmingly made either without reference to anything in the record, which is self-evident throughout, or with citations to the complaint or amended complaint³⁴ (and, in two instances, similarly, to papers that were Lahrichi motions and not evidence³⁵), contrary to CR 26(e). There also are erroneous cites to Lahrichi’s declaration, in arguing defendants filed names of all five Lahrichi children and confidential mediation information unsealed, when the declaration said it was Lumera’s attorney who did so. Opening Br. at 41 (l. 5), citing CP 468 (¶ 18); *id.* at 11 (l. 9), citing CP 469 (¶ 19). There are also stray citations to the record that simply do not support the assertions made. Opening Br. at 38 (ll. 8-11); *id.* at 44, ll. 10-12; *id.* at 44-45 (ll. 21-2). There is citation to obvious hearsay, a July 2005 letter of Lumera’s attorney (which plaintiffs did not submit below until ten days after the CR 56 order), that plaintiffs argue “shows that Frank

³⁴ All references in plaintiffs’ opening brief to CP 1-44 are to their complaint or amended complaint. Plaintiffs make 23 separate citations to the complaint or amended complaint, starting at page 33 of their opening brief. (Many more citations to the complaint as purported support occur elsewhere in the opening brief, in plaintiffs’ statement of the case.)

³⁵ For example, Opening Br. at 39, ll. 16-18, citing to CP 259, which was Lahrichi’s own motion (unsuccessful) to disqualify the judge in the anti-injunction action brought by Stoel Rives; *see also id.* at 33 (ll. 5-6), citing CP 837, a motion below by plaintiffs.

indisputably knew she was violating protective orders.” Opening Br. at 44, citing CP 875.³⁶ This letter from Lumera’s attorney was not related to any medical records.³⁷ Defendants disagree with plaintiffs’ contentions regarding the letter, but, regardless, plaintiffs did not meet their burden to show an exception to the hearsay rule applies. *Ebel v. Fairway Park II Homeowners’ Ass’n*, 136 Wn. App. 787, 792, 150 P.3d 1163 (2007); *Spokane Research & Defense Fund v. Spokane County*, 139 Wn. App. 450, 462-63, 160 P.3d 1096 (2007). Plaintiffs also refer to a generic and uncaptioned “general order” on “personal identifiers” signed by Judge Coughenour in May 2003 that they printed from a web site in 2010, but they did not indicate whether or how it was issued, disseminated, or made available in 2003 or any later years (prior to 2009) to attorneys or any other persons. The record below showed that none of its text or substance appeared in the local rules of the District Court prior to the January 1, 2009 promulgation of the federal LCR 5.2. CP 311, 193.

³⁶ If “evidence was available but not offered until after that opportunity passes [to oppose the underlying motion], the parties are not entitled to another opportunity to submit that evidence.” *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 500, 183 P.3d 283 (2008); *see also supra* at 32, quoting *Boguch*, 153 Wn. App. at 608; *King v. Rice*, 146 Wn. App. 662, 672, 191 P.3d 946 (2008). Lahrichi’s vague allusion of purported “conceal[ment],” Opening Br. at 43, is unsupported in the record. He has had the letter since obtaining defendants’ files in February 2006 if not before. CP 133.

³⁷ The redactions plaintiffs made in the letter were to block out the name of Lahrichi’s former employer, not a health care provider.

Plaintiffs nevertheless say, without any support, Opening Br. at 42, that it was in the District Court's rules.

None of these allegations help plaintiffs with respect to their lack of expert witness testimony needed to establish a *prima facie* case. If anything, they reinforce the critical shortcoming in their case, that no expert testimony was presented. Plaintiffs referred below to the present case as "complex." CP 344. The underlying case by comparison had a much greater scope of discovery, motion practice, and complicated substantive law (federal and state employment discrimination statutes involving various types of burden-shifting, as discussed in the federal court's Rule 56 order). Plaintiffs did not dispute the Washington authority that they must present competent proof from an expert witness in the legal malpractice action to establish the attorney standard of care in litigation. Undisputedly, no expert testimony was submitted. The court below correctly granted summary judgment on that ground.

2. The Statute of Limitations Has Run

"In Washington, the statute of limitations period for a legal malpractice claim is three years, and the period begins to accrue when the plaintiff has a right to seek legal relief." *Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.*, 129 Wn. App. 810, 816, 120 P.3d 605 (2005). Ordinarily, upon "entry of an adverse judgment," the "client is charged

with knowledge, or at least put on notice, that his or her attorney may have committed malpractice in connection with the representation.” *Janicki Logging & Constr. Co., Inc. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 660, 37 P.3d 309 (2001) (rejecting argument that claim did not accrue until appeals in the underlying action were exhausted). However, the claim accrues in advance of an adverse judgment if the clients have knowledge or are on notice that the attorney’s error “invad[ed] their legal interests.” *Huff v. Roach*, 125 Wn. App. 724, 731-32, 106 P.3d 268 (2005).³⁸

Lahrichi’s attorney-client relationship with defendants had ended February 10, 2006. The federal court on March 2, 2006 entered judgment dismissing Lahrichi’s employment discrimination lawsuit. The alleged wrongful acts by defendants occurred (if at all) prior to February 10, 2006. Plaintiffs commenced this action on April 27, 2009.

Lahrichi asserts that it was on April 28, 2006 that he learned that “confidential” information on him was publicly accessible in the federal court file. Opening brief at 52. He cites to a hearsay declaration of his attorney, Ms. Gunther, CP 900, who states she did not become his

³⁸ If an attorney maintains “continuous representation” of the client in the same matter where the error occurred, the limitations period is tolled during such representation. *Janicki Logging*, 109 Wn. App. at 663. But the exception is limited and does not extend to a “continuous relationship,” where the attorney’s client relationship continues only on unrelated matters. *Id.* at 663-64; *Cawdrey*, 129 Wn. App. at 819-20.

counsel until May 24, 2006, *id.* She says her “records and notes” indicate April 28, 2006 was Lahrichi’s date of discovery. CP 900. The declaration³⁹ lacked any foundation to indicate personal knowledge, and implied clearly the contrary. Plaintiffs Lahrichi and Csipke did not ever state, in their own declarations, that it was after April 27, 2006 they discovered their claims. Their only even remotely related statement was in their legal memorandum opposing the CR 56 motion, CP 405, where with conspicuous vagueness they say “[s]ometime later, Lahrichi coincidentally learned that his confidential information was publicly accessible,” CP 405. “Sometime later” meant later than March 2, 2006, from the context set by the preceding sentences.⁴⁰

This absence of proof on a fact that, if it existed, would be within their knowledge, defeats their attempt to use the discovery rule. Plaintiffs bear **“the burden of proving that the facts constituting the claim were not and could not have been discovered by due diligence within the applicable limitations period.”** *Clare v. Saberhagan Holdings, Inc.*, 129

³⁹ The Gunther declaration was filed below on August 16, 2010 as part of plaintiffs’ reconsideration motion. Plaintiffs argue Lahrichi attempted to submit it to the court below during the August 6, 2010 CR 56 hearing and that the court wrongly declined to accept it. It was within the court’s discretion to exclude it as untimely.

⁴⁰ These three preceding sentences were: “On February 10, 2006, Lahrichi involuntarily became pro se. On March 2, 2006, Lahrichi’s claims were dismissed. Lahrichi attempted to represent himself while looking for counsel, but was unqualified to do so.” CP 404-05.

Wn. App. 599, 603, 123 P.3d 465 (2005) (emphasis added).⁴¹

And even if Lahrichi had attested to a lack of actual knowledge prior to April 27, 2006, he certainly had sufficient information that, by the exercise of reasonable diligence, he should have known the facts giving rise to his claims. A “plaintiff is charged with what a reasonable inquiry would have discovered.” *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 581, 146 P.3d 423 (2006). He received the pleadings filed in his lawsuit against Lumera contemporaneously with their filing, as well as a duplicate set of them provided to him at or about the time of defendants’ withdrawal as his attorneys in February 2006. CP 133.⁴² He was not disengaged from or inattentive to his lawsuit but rather paid close attention to it, *id.*, particularly during the critical phase in the fall of 2005, when Lumera filed motions to obtain Lahrichi’s pre-2000 medical records. The court filings to which he presumably paid the most attention were those motions and the resulting court orders on same, the specific pleadings that, in his view, contain publicly available content he

⁴¹ See also *Rivas v. Overlake Hosp. Medical Center*, 164 Wn.2d 261, 267, 189 P.3d 753 (2008); *Burns v. McClinton*, 135 Wn. App. 285, 300, 143 P.3d 630 (2006); *Giraud v. Quincy Farm and Chemical*, 102 Wn. App. 443, 449, 6 P.3d 104 (2000); *Douglass v. Stanger*, 101 Wn. App. 243, 256, 2 P.3d 998 (2000).

⁴² Lahrichi says opaquely that he did not get “all the filings,” CP 470, but he did not identify directly or indirectly a single pleading containing confidential information that he did not contemporaneously receive.

asserts was obviously confidential and violated his privacy.

He received the September 15, 2005 motion to compel and supporting declaration the day after Lumera filed them. CP 653. They showed what parts were sealed and which were not through the use of “placeholder” pages that were explicitly labeled as substituting for sealed exhibits. CP 653-54, 662 & 664. The remainder of the papers lacked any indication of being under seal. CP 653-54. The same was true of Lumera’s follow-on motion for sanctions and the declaration and exhibits for it, filed November 15, 2005. CP 654, 672 & 674. These two motions were major matters to Lahrichi. CP 133-35, 466.⁴³ He has never denied that he received them at the time of filing. And he showed well before April 27, 2006 he knew what filing under seal meant. On February 6, 2006, he personally filed under seal his two pleadings in response to defendants’ request for leave to withdraw as counsel. CP 676, 681.

Turning to alleged wrongful acts apart from those about information in the public record, if Lahrichi contends he lost against Lumera due to attorney error, the limitations period has run. The adverse judgment was entered on March 2, 2006. He then was on notice of any

⁴³ As noted *supra* at 13-14, certain pages from that motion and declaration, CP 634 & 636, are among those Lahrichi argues should be under seal and that the purportedly confidential statements — references to PTSD — “could not have been missed,” CP 624. In the limited remand, however, Lahrichi did not succeed getting those references sealed. CP 625, 630-31.

such claim. *Janicki Logging*, 109 Wn. App. at 660-61.

Plaintiffs argue the court below “ignored that Lahrichi’s breach of contract claims are governed by a six-year statute of limitations,” Opening Br. at 51, apparently referring to the fee agreement with defendants. Such an argument was addressed and rejected in *Davis*, 103 Wn. App. at 655 (holding the six-year period does not apply unless the client points to a specific undertaking in the agreement that was breached, because the source of the duty of care imposed on the attorney is external to the agreement). See CP 125. The fee agreement is not in the record below.⁴⁴ Nor have plaintiffs specified any undertaking in it that allegedly was breached. Plaintiffs also allude to a mediation agreement, CP 499, and apparently the stipulated protective order, CP 173-81, in the underlying case as creating a six-year limitations period. Opening Br. at 53. Neither is a contract between defendants and Lahrichi.⁴⁵

⁴⁴ As appellants, plaintiffs “ha[ve] the burden to provide an adequate record to review [their] issues; the trial court decision must stand if this burden is not met.” *Stevens County v. Loon Lake Property Owners Ass’n*, 146 Wn. App. 124, 131, 187 P.3d 846 (2008).

⁴⁵ The reasoning and ruling in *Marine Power & Equipment Co., Inc. v. State, Dept. of Transp.*, 107 Wn.2d 872, 876, 734 P.2d 480 (1987) (stating criteria for modifying a protective order after the litigation has ended), indicates that a stipulated protective order would not be regarded as a contract even between the two opposing sides in litigation, much less between one side and that side’s attorney. As to the mediation agreement, it likewise was between the two opposing sides in the underlying case, not the litigants here. It is doubtful that Lahrichi’s view of what constitutes a breach of it would pass legal muster in light of CP 244-46 (order in plaintiffs’ state court suit against Stoel Rives denying motion to seal a purportedly confidential mediation document because “it is simply introductory mediation material and does not include

3. The Plaintiffs Other than Adil Lahrichi Lack Standing

Lahrichi was defendants' only client, CP 131-32, and the only plaintiff against Lumera. The other plaintiffs appear⁴⁶ to allege that a duty of care was owed to them. A high threshold applies, however, before any duty can be owed by an attorney to a non-client. *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994). In *Trask*, the attorney represented a personal representative. The non-client children of the decedent claimed the attorney erred. The court held:

[U]nder the modified multi-factor balancing test, the threshold question is whether the plaintiff is an intended beneficiary of the transaction to which the [attorney's] advice pertained. While the answer to the threshold question does not totally resolve the issue, **no further inquiry need be made unless such an intent exists.**

Trask, 123 Wn.2d at 843 (emphasis added). The *Trask* court did not deny that the attorney's services to the personal representative provided some benefit to the estate and the heirs but concluded that "the estate and its beneficiaries are *incidental*, not intended, beneficiaries of the attorney-personal representative relationship." 123 Wn.2d at 847 (emphasis by the

specific facts of the underlying case or any private information"). Lahrichi did not sign either document.

⁴⁶ None of these other persons have submitted a complaint signed by them or by an attorney on their behalf. Under CR 11, such signature was required on any complaint by these individuals. Defendants pointed this out to the court below. CP 123 & 126, 628.

court). The same is true in the present case, for persons other than Lahrichi. If Lahrichi recovered against Lumera, it potentially would benefit his spouse, mother and children, a benefit, however, of the same “incidental” nature as that which flowed to the heirs of an estate in *Trask*.

In the court below, the plaintiffs did not cite or discuss the *Trask* test in opposing the CR 56 motion. *See* CP 399-422. Their argument regarding *Trask* on appeal, Opening Br. at 50-51, has accordingly been waived. *Bloor v. Fritz*, 143 Wn. App. 718, 738-39, 180 P.3d 805 (2008) . Plaintiffs contend that Ms. Csipke asserts causes of action other than legal malpractice, *id.* at 50, but her purported other claims all sound in legal malpractice (*see supra* at 39). Furthermore, the *Trask* plaintiffs had likewise asserted other theories (breach of contract, breach of fiduciary duty), which the *Trask* court treated as subsumed in the legal malpractice claim and held properly dismissed due to the absence of any duty. 123 Wn.2d at 837, 845. To have ruled otherwise would permit easy circumvention of the thrust of the *Trask* holding, *viz.*, to limit the chilling effect on attorneys from the threat of non-client claims.

CONCLUSION

For the reasons stated herein, the orders of the court below denying plaintiffs’ motion to seal and for a preliminary injunction and granting summary judgment should be affirmed.

RESPECTFULLY SUBMITTED this 4th day of October, 2011.

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CERTIFICATE OF SERVICE

I certify that service of a copy of this Brief of Respondents is being made on the 4th day of October, 2011 by mailing same via the United States Postal Service to plaintiffs/appellants Adil Lahrichi, Regine Csipke, and Aziza Benazzouz, first class postage prepaid.

DATED this 4th day of October, 2011.

ROCKEY STRATTON, P.S.



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