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COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

DAVID K. FRANK and PATRICIA L. FRANK, individually and as a marital community, and David K. Frank, as Personal Representative for the Estates of Kenneth and Catherine Franks,

Appellants.

v.

GEORGE AKERS, individually and as part of his marital community; and MONTGOMERY, PURDUE, BLANKINSHIP & AUSTIN PLLC, a Washington corporation,

Respondents.

BRIEF OF RESPONDENTS

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ORIGINAL

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I. INTRODUCTION

Plaintiffs-appellants David Frank, Patricia Frank, and the Estates of Kenneth and Catherine Frank (collectively the “Franks”) appeal dismissal of their legal malpractice action against defendants-respondents George Akers and Montgomery, Purdue, Blankinship & Austin, PLLC (collectively “Akers”).

The Franks’ malpractice claim has three parts: (1) probate, (2) an underlying lawsuit seeking rescission of the 1993 and 1994 gifts of the Cranberry Lake real property (“Property”) to the Frank Family Foundation (“Foundation”) and/or damages from the Franks’ professional advisors who counseled them to make the gifts (“Underlying Case”), and (3) estate planning. The superior court dismissed all claims against Akers in three summary judgment motions. The primary focus of the Franks’ appeal relates to “estate planning”. A summary of the reasons why the superior court dismissals should be affirmed is set forth below.

1. Probate.

The Franks allege Akers failed to challenge the 1996 wills. CP 7. The Franks did not respond to Akers’s arguments on this issue at summary judgment. CP 366-67. The superior court thus rightfully dismissed this claim. CP 914.

On appeal, the Franks suggest Akers should have offered the Franks' 1991 wills rather than their 1996 wills. App. Br. at 13. They do not present argument or authority showing they could have prevailed by taking these illegal and unethical actions.

2. Underlying Case.

The Franks allege Akers was negligent in handling the Underlying Case, which settled for \$ 1,050,000.00. CP 261-71, 849-54. The Franks argue the result would have been better if the lawsuit had been filed earlier thus avoiding any statute of limitations argument and possibly having the benefit of Ken Frank's testimony. The Franks did not support with expert testimony the elements of breach or proximate cause as to this claim. The superior court properly dismissed the claim as to the handling of the Underlying Case. CP 990-91, CP 1105, 1126, 1721-23.

3. Estate Planning.

The Franks appeal "estate planning" issues, arguing the result in the Underlying Case would have been better if Akers had advised them to change their 1996 wills. Akers did not have a duty to advise the Franks to change their wills, because the Franks retained other counsel, including Gerald Treacy ("Treacy"), to assist them with estate planning, and revisions to their wills.

Akers was not vicariously liable for the acts or omissions of Treacy, who was “of counsel” at Montgomery Purdue for his review of the tax and estate planning aspects of the Underlying Case since he was released by the Franks. CP 916-18. Also, by the time Akers received a copy of the 1996 wills, Ken Frank was diagnosed with dementia and was not competent to amend his will. Catherine Frank who was competent did not have an interest in the property following the 1991 revocation of the Franks’ community property agreement. CP 64.

Even if Akers had a duty in regard to estate planning, the Franks cannot support the element of proximate cause. The Foundation was gifted the Property ten years before the Franks tried to recover it. The Foundation had concerns David Frank was exerting undue influence on his elderly parents, who wanted to leave the Property in its natural state. CP 66, 69. David wanted to rescind the gift so he could convert the Property into a tree farm for his personal gain. *See In re Estate of Frank*, 146 Wn. App. 309, 316, 189 P.3d 834 (2008).¹ In her deposition testimony, Catherine Frank reflected concern that David Frank might develop the Property contrary to her and Ken Frank’s wishes. CP 1219-21. To show

¹ This opinion provides useful facts on the underlying case, in which claims against the Foundation were dismissed, but continued on against Laurie McClanahan, John Clees, and Mary Gentry. Akers is not bound by estoppel in regard to this opinion, as he was not a party to the underlying case. *See Paradise Orchards v. Fearing*, 122 Wn. App. 507, 514-15, 94 P.3d 372 (2004).

the requisite proximate cause i.e. rescission of the 1993 and 1994 gifts, the Franks sought an extension of Washington law. It is speculation to assume they could have prevailed in extending the law.

Even if the Franks could show they would have been successful at trial in the Underlying Case, it is speculation to assume they could have obtained more than the \$ 1,050,000.00 they received in settlement of the Underlying Case. CP 261-71, 849-54.

The Franks acknowledge this is a complex case but urge this court to resolve it in a simple way. App. Br. at 33. They divert attention from subtle, but important, distinctions to reach a generalized theory. The Franks present a generalized assignment of error and fail to distinguish among the three facets of the case. For example, while the Franks argue Akers owed them a duty of care, Akers's duty related to the Underlying Case and later the probate. Akers did not have a general duty to conduct the Franks' estate planning. While the Franks claim to have an expert, their expert relates only to estate planning and probate. They do not have an expert on the standard of care for a litigation attorney. Contrary to the Franks' desire to gloss over important distinctions, this court should reject that simplistic approach and fully analyze all relevant aspects of this case.

II. ASSIGNMENTS OF ERROR

Assignments of Error

Akers does not assign error to the trial court's decisions.

Issues Pertaining to Assignments of Error

Akers disagrees with the Franks' statement of issues, and believes the issues on appeal are more properly stated as follows:

Whether this court should affirm the superior court's dismissal of the Franks' legal malpractice claim against Akers, where:

1. The Franks did not challenge in superior court the alleged failure to contest the 1996 wills, and fail to offer argument or authority here or show such action is appropriate and would achieve a better result;
2. The Franks did not challenge on appeal dismissal of the alleged negligent handling of the Underlying Case, especially where the Franks do not have an expert to testify as to the standard of care of a litigation attorney; and
3. The Franks' claims based on the alleged failure to advise Ken and Catherine Frank to amend their wills fails, primarily because:
 - a. Estate planning was beyond the scope of Akers's duty;
 - b. Even if it had been within Akers scope of duty, the Franks do not support the element of proximate

cause where it is speculation to argue that: (1) they would have prevailed in the Underlying Case on the rescission claim, and/or (2) they believe they could have obtained a judgment beyond the million dollars they have already received.

III. STATEMENT OF THE CASE

A. The Franks allege that Akers was negligent in the Underlying Case, in which they received a settlement of more than \$1,000,000.00.

This action arises out of Akers's representation of the Franks in *Frank v. McClanahan et al.*, Mason County Superior Court Cause No. 05-2-01057-0, which resulted in a settlement in which the Franks received \$1,050,000.00. CP 849-54, 1255-65.

1. The Franks established the Frank Family Foundation, to which they gifted *inter vivos* the Property.

The Property, commonly known as Cranberry Lake is a section of Mason County land, situated at sec. 28, Township 21 N., Range 3 W., consisting of forest, a lake and cabin. Ken and Catherine Frank executed a Revocation of Community Property Agreement on August 16, 1991, CP 64, which caused the Property to revert back to its original state as Ken Frank's separate property.

The Franks sought estate-planning advice from their long-time accountant Laurie McClanahan, accountant and attorney John Clees, and attorney Mary Gentry. CP 44-47, 1350-60.

On December 30, 1993, on advice of these professional advisors, the Franks established the Foundation as a Washington nonprofit corporation, organized under RCW 24.03. CP 66-70. The Franks then conveyed in late 1993 four percent of their interest in the Property to the Foundation. CP 72. A year later, on December 28, 1994, they quit claimed all remaining interest in the Property to the Foundation, with an after-acquired title clause. CP 73. The purpose of the Foundation was to preserve the Property in its natural state. CP 66. Although they gifted the Property to the Foundation, the Franks were permitted to use the Property during this time period.

2. Prior to and after retaining Akers, the Franks retained a series of attorneys to review and draft estate-planning instruments.

On August 30, 1996, the Franks executed wills with their estate planning attorney, Mary Gentry of Bean & Gentry, which left the Property to the Foundation. CP 80, 97.

On October 2, 2000, Bean & Gentry prepared a first codicil to the Franks 1996 wills. CP 111-18. This first codicil altered the distribution of money and real property to various beneficiaries, including a provision

that split the residual 50/50 between David Frank and the Foundation. CP 112, 116.

On May, 2, 2002, Ms. Gentry forwarded copies of estate-planning documents to the Franks' new estate planning attorney Robert Johnson of Settle & Johnson, PLLC. CP 142, 160, 162. Settle & Johnson's billing records reflect that, in spring 2002, they undertook to review estate plan documents, which, over the next 18 months, resulted in the drafting and execution of two new sets of codicils, revocations of powers of attorney, and new powers of attorney. CP 144-157.

On July 8, 2002, attorney Robert Johnson prepared a second codicil to the Franks 1996 wills. CP 120-140. This codicil substantially changed a number of provisions of the 1996 wills, including provisions affecting the distribution of real property, including the "Matlock" property, the "Lost Lake" property, and the "Palace at Limerick Lake" property, CP 120, 123, 126, 129, but did not alter distribution of the Property.

As discussed below, Robert Johnson also prepared a third codicil to the Franks' 1996 wills during the time Akers represented them which was executed August 20, 2003. CP 133-40. The Franks, in consultation with attorney Johnson, left Article VII of the wills unchanged in both sets of codicils he prepared. CP 320-21. The scope of Settle & Johnson's

retainer was limited to estate planning. Akers was not consulted in regard to this work.

3. IRS rules created issues with the Franks' access to the Property, Treacy assisted the Franks with this and estate planning issues related to the Foundation, Akers explored settlement with the Foundation and commenced litigation to obtain records.

The IRS and the Foundation corresponded regarding the Foundation's tax classification, which communication clarified that the Foundation had to restrict the Franks' use of the Property to qualify for its intended tax-exempt classification. *Frank*, 146 Wn. App. at 315. In light of this information, the Foundation's board began to think about how to manage the Property after the Franks' eventual deaths. *Id.* at 315. The Franks were pondering the same question. *Id.* The Franks wrote to the board in 2003, inquiring about use of the Property after their eventual deaths. *Id.* The board responded that the Franks could likely use the Property if there was a reciprocal benefit to the Foundation, but they would have to deal with the board in terms of access. *Id.*

Around March 2003, the Franks retained Treacy to work with them on taxation and estate planning as it related to the Foundation. CP 406, 173-78. Treacy asked David Frank whether Ken and Catherine Frank's wills left the Property to him. David indicated he would locate the wills to determine the answer to that question. CP 178.

On May 8, 2003, the Franks formally retained Treacy to assist in tax and estate planning issues relating to the Foundation and retained Akers to try to recover the Property through settlement or litigation. CP 5, 388, 1156; App. Br. at 5. Treacy continued to work on estate planning and tax issues. CP 337, 379-82, 388-90, 406, 756-58. Akers negotiated with the Foundation in the spring and summer of 2003 to restore the Property to the Frank family. CP 1157.

The negotiations with the Foundation proved unsuccessful, as the Foundation was resistant to settle by returning the Property to the Franks because they believed David would develop the Property after Ken and Kitty's deaths, contrary to his parents' stated wishes. CP 1157.

¶10 David presented the board with two powers of attorney, one that Kenneth executed and one that Catherine executed. The board then provided David an opportunity to speak at the meeting. According to board members, **David expressed that the Foundation was not in the best interest of the Frank family; he sought to redeem Cranberry Lake from the Foundation; and he hoped to retire on the property and run it as a tree farm. The board was concerned that David was exercising influence over his elderly parents, that he desired to oust the board, and that he sought to redeem Cranberry Lake for his personal benefit.**

Frank, 146 Wn. App. at 316 (emphasis added).

On August 20, 2003, Ken and Catherine Frank, through their estate planning attorney Robert Johnson, and not Akers, amended their wills with a Third Codicil to Last Will. CP 133-40.

On November 10, 2003, Treacy sent an email to David Frank. CP 337. In ¶ 3 of this email, Treacy notes that some documents received reflect that Bean & Gentry had drafted the Franks' 1996 wills and, in ¶ 4, he states: "It is also possible that Laurie persuaded the Franks to make other changes in their 1996 Wills and/or other estate planning documents." *Id.* He indicates the instruments would be held by Bean & Gentry, and they should be obtained. *Id.*

In November 2003, Akers sent a letter to the Foundation setting forth the Franks' concerns from a tax perspective, and requesting documents from the Foundation. CP 1157. Around this time, Ken Frank began to suffer from dementia that impaired his mental capacity. CP 187-193, 408-09. Documents were also requested from Mary Gentry, John Klees and Lauri McClanahan. Obtaining records proved difficult. Akers did not see the 1996 wills until February 12, 2004, when he received the Bean & Gentry file. CP 203. Akers passed on the 1996 wills to Treacy, since Treacy was handling tax and estate planning issues. CP 422-24. By February 13, 2004, the very next day, Ken Frank's doctor felt Ken Frank lacked capacity to sign a Power of Attorney. CP 187 – 193, 408-409.

On April 23, 2004, Akers filed an action against the Foundation in Mason County, cause no. 04-2-00374-5, to obtain records the Foundation had not provided despite repeated requests. CP 1202.

4. When settlement stalled, Akers advised David Frank regarding the underlying case and filed it, Ken and Kitty Frank die and the Foundation is dismissed from the Underlying Case.

On October 26, 2004, Akers sent an email to David Frank indicating his opinion that the professional malpractice lawsuit against Gentry, Clees, and McClanahan was a good suit, but the rescission claim had several problems. CP 684. Although rescission was not an easy claim, it was the best option to attempt to obtain the Property back, potentially in a settlement. *Id.* While the rescission argument could be made in good faith, and met the requirements of CR 11, the Franks were advised the rescission claim was not particularly strong. *Id.*

On November 12, 2004, Catherine Frank's testimony reflected concern that David Frank might develop the Cranberry Lake property contrary to her and Ken Frank's wishes. CP 1219-21.

On November 4, 2005, Akers filed the Underlying Case, Mason County Superior Court, cause no. 05-2-010507-0, against the Foundation, Ms. McClanahan, Mr. Clees, and Ms. Gentry. CP 10-20.

On November 15, 2005, Ken Frank died. *Frank*, 146 Wn. App. at 317. Catherine Frank died a few weeks later, on December 3, 2005. *Id.*

After their deaths, David Frank retained Akers to handle the probate of the wills. Ken Frank's 1996 will, including the three codicils, was filed for probate on December 30, 2005. *Id.* Catherine Frank's 1996 will, including the three codicils, was filed for probate on January 20, 2006. *Id.*

On April 1, 2006, the Franks replaced Akers as counsel in the Underlying Case with Robert Windes, of Moran, Windes & Wong (now Moran, Wong & Keller, PLLC). CP 1158.

The Foundation was dismissed from the Underlying Case because the Franks' 1996 wills bequeathed the Property to the Foundation, so even if the Franks prevailed in voiding their *inter vivos* gift, the Property would go to the estate and be returned to the Foundation. CP 1158; *Frank*, 146 Wn. App. at 325-27. The Underlying Case continued against the professional defendants.

On October 29, 2008, the Franks executed an Agreement RE: Continued Engagement, with Treacy, whereby they released Treacy and Montgomery Purdue of all claims arising from his work performed in the Underlying Case. CP 257-59.

B. The superior court properly dismissed this case after a series of summary judgment motions.

On March 20, 2009, the Franks filed this action against Akers, alleging legal malpractice based on several claims. CP 6-7. The Franks allege Akers failed to: (A) timely file a will contest and rescission action,

and (B) fully advise the Franks concerning (i) the need to amend their 1996 wills to delete Article VII(2), (ii) the statute of limitations applicable to rescission claims, (iii) the importance of filing suit when Ken and Catherine Frank could give testimony, and (iv) the need to file a timely will contest to challenge enforceability of Article VII(2) in their 1996 wills. CP 7.

On December 9, 2009, the Franks received \$1,050,000.00 in settlement of the Underlying Case. CP 1255-65. If kept in its natural state and subject to a conservation easement, as intended by the Franks, CP 1197, the undeveloped Property is worth \$585,000.00. CP 1267-69. Therefore, the Franks received almost twice the value of the Property by settling with the defendants in the Underlying Case.

On June 24, 2010, Akers moved for partial summary judgment. CP 272-99. In an order, dated September 17, 2010, the superior court granted the motion to dismiss the claim that Akers failed to advise the Franks to challenge the 1996 wills and failed to file a challenge to the Franks' 1996 wills. CP 913-15.

On August 10, 2010, Akers filed a second motion for partial summary judgment. CP 442-65. Akers sought “[d]ismissal of plaintiff’s claim of negligence that defendant’s conduct deprived them of a right to recover Cranberry Lake.” CP 445. Akers argued he did not lose the

recession claim, which had survived summary judgment in the Underlying Case, the Franks had failed to show a breach in the standard of care of a professional and that they probably would not have prevailed in their Underlying Claim. CP 452-59, 907-08.

While the two summary judgment motions were heard separately, the superior court entered two orders on these motions, each dated September 17, 2010. In a first Order, dated September 17, 2010, the superior court granted a motion to dismiss the claim that Akers failed to advise the Franks to challenge the wills by a probate contest and failed to file a challenge on the Franks' wills. CP 913-15.

In the second order, dated September 17, 2010, the superior court, dismissed (1) the vicarious liability claim for the conduct of Treacy; (2) the Franks' damage claim for the value of financial securities allegedly transferred to the Foundation; and (3) and allowed for deduction of the \$1,050,000.00 settlement from the Underlying Case from damages awarded in this action, if any. CP 916-18.

On September 27, 2010, Akers moved for reconsideration on the portion of the Order on the second summary judgment motion, which denied dismissal of the Frank's claim that Akers's conduct deprived them of a right to recover the Property. CP 919-26. The Franks relied on Mr. Culbertson's declaration. CP 961, 867-70. Akers presented testimony

that Mr. Culbertson does not have opinions on whether the rescission claim could have succeeded on its merits, CP 975, 982-89, 1293-1301; his proposed strategies did not affect the likelihood of success of the rescission action, because the strategies are premised on success of the rescission case, *id.*, and he was not a standard-of-care expert who could testify as to breach of the standard of care in a litigation setting. Akers did provide expert testimony from Mitch Cogdill. CP 1045-67.

On October, 20, 2010, the superior court reconsidered its second order and dismissed the Franks' claim that negligence by Akers deprived them of a right to recover the Property. CP 990-91.

On November 10, 2010, the Franks filed a motion for reconsideration. CP 999-1015. Although untimely, the Judge requested more briefing, which Akers provided. CP 1024-38, 1042-69.

On November 29, 2010, the superior court clarified its order of October 20, 2010, holding it had "entered an order broadly granting defendants' motion to dismiss plaintiffs' claim of negligence" but that "it remain[ed] a question of fact whether it is negligence for an attorney not to argue that the law should be extended." CP 1105.

On December 23, 2010, the Franks filed a second motion for reconsideration, conceding they never claimed that Akers had failed to argue for an extension of the law of rescission. CP 1111.

On January 5, 2010, the superior court denied the Franks' second motion for reconsideration. CP 1126.

On January 19, 2011, Akers moved for summary judgment of the final claim identified by the superior court in its November 29, 2010 order. CP 1105, 1127-50.

On February 25, 2011, the superior court granted summary judgment. CP 1721-23.

IV. SUMMARY OF ARGUMENT

This court should affirm the superior court's dismissal of the Franks' lawsuit. In superior court, the Franks did not challenge dismissal of the alleged failure to contest the 1996 wills, and fail on appeal to offer argument or authority on this issue or show that such action would achieve a better result.

The Franks also did not challenge dismissal of alleged negligent handling of the Underlying Case with expert testimony as to the standard of care of a litigation attorney.

The Franks' appeal is primarily based on an alleged failure to advise Ken and Catherine Frank to amend their 1996 wills. This claim fails. First, estate planning was beyond the scope of Akers' duty. The Franks do not challenge the order dismissing vicarious liability claims for Treacy's acts and omissions. Also, by the time Akers received the 1996

wills it was too late to amend Ken Frank's 1996 will due to capacity issues. Even if they could show Akers had a duty to provide estate-planning advice, the Franks do not support the element of proximate cause, because it is speculation to argue they could have prevailed in the rescission claim through an extension of law or obtained a judgment beyond the million dollars they already received in settlement. Finally, estate planning was not argued in the second or third motions for summary judgment in which the orders at issue were entered. The Franks should not be able to raise it now.

V. ARGUMENT

A. The Franks fail to show genuine issues of fact to support elements of a professional-negligence claim.

1. Summary judgment orders are reviewed *de novo*.

An order granting summary judgment is reviewed *de novo* and may be affirmed on any basis supported by the record. *Electrical Workers v. Trig Electric*, 142 Wn.2d 431, 434-435, 13 P.3d 622 (2000). The summary judgment standard is well established. Summary judgment is proper if papers on file show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party bears the burden of showing the absence of an issue of fact or evidence to support the nonmoving party's case. *Hash v. Children's*

Orthopedic Hosp. and Med. Ctr., 110 Wn.2d 912, 915, 757 P.2d 507 (1988); *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225-26, n1, 770 P.2d 182 (1989). If the moving party carries its burden, the burden shifts to the nonmoving party to show a genuine issue of fact remaining for trial. *Hash*, 110 Wn.2d at 915. The nonmoving party may not rely on the pleadings, but must set forth specific evidence to show a genuine issue exists. *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992). A moving party is entitled to summary judgment when the non-moving party fails to make a sufficient showing on an essential element of its case in which it has the burden of proof. *Young*, 112 Wn.2d at 216.

2. The Franks failed to raise genuine factual disputes as to every element of their claim.

To establish a claim for legal malpractice, a plaintiff must prove: (1) the existence of an attorney-client relationship which gives rise to a duty of care by the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate cause between the breach of duty and damage incurred. *Hizey v. Carpenter*, 119 Wn.2d 251, 260-261, 830 P.2d 646 (1992). If an attorney-client relationship is established, the elements for legal malpractice are the same as for negligence. *Id.* at 261. To avoid dismissal, the plaintiff must show an issue of material fact as to each

element. *Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992); *Craig v. Wash. Trust Bank*, 94 Wn. App. 820, 824, 976 P.2d 126 (1999).

B. This court should affirm the superior court’s dismissal of the Franks’ probate claim against Akers.

1. This court should ignore arguments the Franks failed to make to the superior court regarding the probate claim.

In regard to the “probate,” the Franks allege that Akers failed to challenge the 1996 wills or advise them to do so. CP 7. Akers moved to dismiss this claim on several grounds. CP 292-94. The Franks did not respond to Akers’s arguments in the first summary judgment motion. CP 366-67. The superior court dismissed this claim. CP 914.

This court should ignore arguments by the Franks that they did not raise in the superior court. *Brower v. Pierce County*, 96 Wn. App. 559, 567, 984 P.2d 1036 (1999); *Sowers v. Twin City Foods, Inc.*, 37 Wn. App. 400, 403, 680 P.2d 1060 (1984).

Furthermore, the Franks did not identify the Order dismissing the probate claim in their Assignments of Error or as an Issue Pertaining to Assignments of Error. App. Br. at 4. The Franks did not present briefing on the probate issue, other than to cite to the opinion of Mr. Culbertson that he believes Akers should have filed the 1991 wills in probate instead of the 1996 wills and should have challenged the validity of the 1996 wills. *Id.* at 8. If the Franks attempt to correct these deficiencies in their

reply brief, this court should not consider any argument in regard to the superior court's dismissal of claims related to probate activities. *See McKee v. Am. Home Products, Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989) (citing RAP 10.3; the superior court "will not consider issues on appeal that are not raised by an assignment of error or are not supported by argument and citation of authority"); *Bullard v. Bailey*, 91 Wn. App. 750, 760, n2, 959 P.2d 1122 (1998) (citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("this is a new argument raised in a reply brief that we will not consider").

2. Even if this court considers the Franks' claims on the "probate" issue they fail.

Even if this court were to consider the probate issue, the Franks' claim fails because: (1) seeking to admit the 1991 will in probate when Akers knew of the 1996 will would have been unethical and illegal, and (2) the Franks cannot support the elements or breach or proximate cause in regard to this claim.

First, Mr. Culbertson opined that Akers breached the standard of care because he should have offered the probate court the Franks' 1991 wills rather than their later 1996 wills. App. Br. at 13. RCW 11.20.010 required presentation of the 1996 wills to the superior court. It would have been unethical under RPC 3.3, as well as illegal, for Akers, to offer the 1991 wills to the superior court in place of the 1996 wills.

Mr. Culbertson also opined that Akers should have filed will contests seeking to invalidate the 1996 wills, but conceded that judicial estoppel could have barred such a claim. App. Br. at 13.

RCW 11.24.010 would have barred a challenge to the effect of Article VII(2) of the wills; thus any such challenge would have failed as a matter of law. Where a will, rational on its face, is shown to have been executed in legal form, the law presumes testamentary capacity in the testator, that the will is valid, and that it speaks to the testator's wishes. *In re Riley's Estate*, 78 Wn.2d 623, 646, 479 P.2d 1 (1970). One asserting invalidity of a will has the burden of proof by clear, cogent, and convincing evidence. *In re Martinson's Estate*, 29 Wn.2d 912, 913-14, 190 P.2d 96 (1948). When a party has the burden of proving a claim by clear, cogent, and convincing evidence and the claim is reviewed on summary judgment, the party having that burden of proof must present clear, cogent, and convincing evidence in response to the summary judgment motion. *Guntheroth v. Rodaway*, 107 Wn.2d 170, 175-76, 727 P.2d 982 (1986).

In order to have a will set aside on the grounds that its execution was produced by undue influence, it must be shown that the influence exerted was such as overcame the will of the testator. To put it in other words, the influence must have destroyed the free will of the testator so that the will spoke the intent and desire of the one exerting the influence, and not the intent and desire of the testator.

Id.

Mere suspicion, even when accompanied by opportunity and motive, is insufficient to raise a substantial inference of undue influence. Neither will mere suspicion, unaccompanied by evidentially supported implicating circumstances, give rise to a presumption of undue influence sufficient in strength to require rebuttal evidence.

In re Hansen's Estate, 66 Wn.2d 166, 172, 401 P.2d 866 (1965).

Here, the wills, as well as the *inter vivos* gifts, stood for more than a decade before being challenged. The Franks were pleased with their gifts until they discovered their family would no longer be able to use the Property after their death. CP 1031-33. There is hardly clear, cogent, and convincing evidence that Ms. McClannahan exerted such influence as to overcome the Franks' ability to think for themselves.

The Franks also argue the 1996 wills should have been challenged on the ground of mistake. But the Franks briefed and argued this issue in the Underlying Case. *See, e.g.*, CP 631-43. This court also considered the voluntariness of the Franks' gift to the Foundation, holding:

Here, Kenneth and Catherine executed their wills leaving Cranberry Lake to the Foundation nearly 18 months after they conveyed their entire interest in the property to the Foundation. They executed three subsequent codicils, none of which modified the Cranberry Lake bequest in Article VII, section 2 of the wills. The legal conclusion we draw from these events is that Kenneth and Catherine intended to ensure that any remaining interest in Cranberry Lake that they did not transfer to the Foundation by *inter vivos* deed would pass to the Foundation under their wills.

Frank, 146 Wn. App. at 325.

The superior court cannot rewrite the 1996 wills. Unjust enrichment could not be used to challenge the wills, since under RCW 11.24.010 the superior court is not permitted to determine the validity of specific dispositions. *Richardson v. Danson*, 42 Wn.2d 149, 253 P.2d 954 (1953). Nor is the court permitted to determine the operative effect of the will's provisions. *Elliott*, 22 Wn.2d at 334. There appears to be no reported decision in Washington in which a gift was voided on grounds of unjust enrichment. This is not surprising, since unjust enrichment is based on law related to contracts and quasi-contracts, not gifts. Out-of-state authority holds a party may **not** recover damages for unjust enrichment pursuant to a gift relationship. See *Liautaud v. Liautaud*, 221 F.3d 981, 988 (7th Cir. 2000) (“a party may not recover damages for unjust enrichment pursuant to a gift relationship”); *Bereenergy Corp. v. Zab, Inc.*, 94 P.3d 1232, 1238 (Colo. Ct. App. 2004) (“there is nothing unjust about retaining a benefit conferred gratuitously”). See also CP 1035-37.

There is no need for extended analysis of constructive trusts, since a constructive trust is a remedy for unjust enrichment, not a cause of action. *City of Lakewood v. Pierce County*, 144 Wn.2d 118, 126, 30 P.3d 446 (2001). This court need not consider constructive trusts unless it first

finds unjust enrichment. The Franks cannot show that their 1993 and 1994 gifts unjustly enriched the Foundation.

The Franks make the same misrepresentation argument they did in superior court, which fails for the same reasons. CP 1033-35. The Franks argue, “A gift can be rescinded if it was induced by material misrepresentation.” App. Br. at 20. The Franks base their argument on the Restatement of Restitution §§ 26, 39, which no Washington court has cited. The Franks cite no Washington law for this proposition, because there is none. The Franks’ arguments, interspersed with foreign law and treatise sections, sought to extend the law of rescission in Washington as it applies to gifts. Since the Franks sought extension of unsettled law, this case falls under *Halvorsen v. Ferguson*, 46 Wn. App. 708, 735 P.2d 675 (1986), which holds a claim for legal malpractice cannot be based on an attorney’s judgment or trial tactics when arguing unsettled law. *Id.* at 717-18. Regardless of whether this court would extend Washington law given the opportunity, the Franks’ malpractice claim is based on an attorneys conduct in an area of unsettled law so dismissal of this claim was proper.

3. The Franks do not appeal dismissal of the alleged negligent handling of the Underlying Case, and lack any expert testimony as to the standard of care of a litigation attorney.

The Franks initially alleged Akers was negligent in handling the Underlying Case because he failed to adequately advise the Franks in

regard to the statute of limitations applicable to rescission claims and the importance of filing suit when Ken and Catherine Frank could give testimony. CP 7. The Franks did not identify the Order dismissing these claims in their Assignments of Error or as an Issue Pertaining to Assignments of Error. App. Br. at 4. The Franks again failed to present briefing on the handling of the Underlying Case. This court should not consider argument in a reply brief regarding the superior court's dismissal of claims related to handling of the Underlying Case. *McKee*, 113 Wn.2d at 705. Nor should this court consider the issue if the Franks attempt to correct these deficiencies in their reply brief, as it would deprive Akers of any opportunity to respond. *Bullard*, 91 Wn. App. at 760, n2.

Even if this court were to consider argument on the alleged mishandling of the Underlying Case, the claim fails on its merits, because the Franks lack the testimony of an expert that can speak to the standard of care of a litigator. To establish the element of breach in a legal malpractice claim, it is necessary to provide expert testimony stating what the standard of care is and how the standard was allegedly breached. *McKee*, 113 Wn.2d at 706-08; *Walker v. Bangs*, 92 Wn.2d 854, 858 (1979); R. Mallen & V. Levit, *Legal Malpractice* § 345 (1977); 5A, K. Tegland, *Wash. Prac., Evidence*, § 300, at 435-37 (3d ed. 1989). Law is a highly technical field beyond the knowledge of the ordinary person.

Lynch v. Republic Pub. Co., 40 Wn.2d 379, 389, 243 P.2d 636 (1952). By its nature, a claim of professional negligence in the conduct of specific litigation involves matters calling for special skill or knowledge which requires expert testimony. *Id.*

The Franks retained Mr. Culbertson as an estate planning expert. However, Mr. Culbertson has no opinion whether the rescission claim could have succeeded. CP 975, 982-89, 1293-1301. None of his proposed alternative strategies would affect the likelihood of success of the rescission action, because the strategies are all premised on success of the rescission action, *id.*, and he is not a litigator. *Id.* Therefore he is not qualified to testify as to a litigator's standard of care or whether any alleged act or omission by Akers was a cause of damages. *Queen City Farms v. Cent. Nat'l Ins. Co.*, 126 Wn.2d 50, 102-103, 882 P.2d 703 (1994) ("An expert must stay within the area of his expertise").

The Franks also offer Treacy's testimony in support of their position on rescission. App. Br. at 19 (citing CP 871-900). But when Treacy's declaration is considered, it does not state Franks could have prevailed in a rescission action. CP 871-900. Rather, the testimony relates to the professional defendants, Gentry, Clees, and McClanahan. Even if the Treacy Declaration may support an action by the Franks against professionals who gave the Franks bad advice, it contains nothing

that would show that a rescission action would be successful. Treacy also does not opine on whether Akers met standard of case.

Contrary to the Franks' argument, Akers did provide expert testimony from attorney Mitch Cogdill, which specifically indicates that success on the rescission claim in the Underlying Case would have been unlikely. CP 1045-67. Even if the Franks had raised this issue in their appeal, this court should affirm the superior court's dismissal of claims based on the litigation of the Underlying Case for failure to show breach or proximate cause.

- 4. The Franks' estate planning claims based on the alleged failure to advise them to amend their 1996 wills fails because estate planning was beyond Akers' duty, and there is no proof of causation.**
 - a. Estate planning was beyond the scope of Akers' duty.**

The first element of negligence is a legal duty. If there is no duty, there can be no negligence. *LaPlante v. State*, 85 Wn.2d 154, 159, 531 P.2d 299 (1975); *Sumner K. Prescott Co. v. Sumner*, 117 Wash. 283, 294, 201 P. 308 (1921). "The plaintiff must state and prove facts sufficient to show what the duty is, and that the defendant owes it to him." *Id.* at 294. The existence of a duty is a question of law for the court. *Folsom v. Burger King*, 135 Wn.2d 658, 671, 958 P.2d 301 (1998)).

Akers does not dispute that, during his representation of the Franks in the Underlying Case, he owed a standard duty of reasonable care to them in regard to litigating the Underlying Case and, after the deaths of Ken and Catherine Frank, duties in the probate action. However, the Franks' estate planning was outside the scope of Akers's duty.

This case is similar to *Leipham v. Adams*, 77 Wn. App. 827, 833-34, 894 P.2d 576 (1995). In *Leipham*, an attorney was retained to prepare durable powers of attorney for a couple. *Id.* at 829. The attorney was later retained to assist the wife in filing for life insurance benefits for the husband. *Id.* Later still, the attorney was retained to probate the estate. *Id.* at 830. Shortly after the attorney's appointment, it was discovered the wife possessed a Cash Management Account, but this was after the nine-month period for filing a disclaimer of the joint tenancy interest under both the IRC and RCWs. *Id.* A legal-malpractice suit was commenced against the attorney. On summary judgment, the *Leipham* court held:

When Adams' affidavit is taken into consideration, there appears to be some dispute regarding Ms. Morris' subjective belief as to his role. Nonetheless, this dispute standing alone is not sufficient to generate a genuine issue of material fact as to whether Adams engaged in estate planning intended to benefit the Leiphams. A client's subjective belief is only one of the factors to be considered in determining the scope of representation. Moreover, the client's subjective belief does not control unless it is reasonably formed based on the attending circumstances, including the attorney's words or actions. The Leiphams

offer no evidence that any words or actions of Adams led Ms. Morris to believe that he was undertaking general estate planning on her behalf.

Id. at 833-34 (citation and quotation marks omitted).

The Franks had their own estate-planning attorneys who drafted the Franks' 1996 wills and three codicils relating to distribution of real property, executed both prior to and during Akers's representation in the Underlying Case. It is undisputed Treacy began representing the Franks before Akers. Treacy was retained to work on tax and estate-planning issues related to the Foundation. The Franks do not appeal the superior court's order dismissing claims of vicarious liability for Treacy's acts and omissions, CP 917, so liability here cannot be based on his conduct.

Akers denies that his representation included estate planning. CP 422-24. The Franks themselves characterize his representation by stating that they "retained George Akers to rescind Ken and Kitty Franks' *inter vivos* gift of their Cranberry Lake Property to the Frank Family Foundation." App. Br. at 5. As in *Leipham*, the Franks do not present evidence, other than subjective belief, that Akers was retained for estate-planning purposes. An attorney-client relationship is not created merely because an attorney discusses the subject matter of a transaction with a non-client. *Sherman v. State*, 128 Wn.2d 164, 189, 905 P.2d 355 (1995); 1 R. Mallen & J. Smith at § 8.2 n. 12. The Franks do not offer evidence that

Akers's own words led them to believe he was undertaking general estate planning on their behalf. This court should affirm dismissal of the Franks' negligence claim based on this evidence.

b. The Franks fail to show proximate cause.

i. By the time Akers received the 1996 wills, it was too late to make amendments to Ken Frank's will, because his capacity was impaired.

In a legal-malpractice case, there are two causation issues: (1) whether the attorney's negligence caused a loss of the claim, and (2) whether the loss of the cause of action caused damage to the client. *See* Mallen & Smith, § 33.11 at 95 (5th Ed. 2000). The second of these issues is the one that requires the trial-within-a-trial. *Kommavongsa v. Haskell*, 149 Wn.2d 288, 300, 67 P.3d 1068 (2003). To prove causation, a client must show the outcome of the underlying litigation would have been more favorable, "but for" the attorney's negligence. *Halvorsen*, 46 Wn. App. at 719. "Although questions of negligence and proximate causation are usually for the jury, the unique characteristics of a legal malpractice action may render the general rule inapposite in certain instances." *Id.* at 712-13. "Since the determination of whether an attorney erred raises a question of law, the opinions of expert witnesses on the issues are irrelevant." *Id.*

While Ken Frank appeared lucid when Akers first met him, he was diagnosed with dementia shortly thereafter. CP 187-93. It was a
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challenge obtaining records, and Akers did not have an opportunity to see the Franks' 1996 wills until at least February 12, 2004, when he received the Bean & Gentry file. CP 203. Estate-planning material was included in this file, which Akers passed on to Treacy, since Treacy was handling tax and estate-planning issues. CP 422-24. The next day, February 13, 2004, Ken Frank's doctor felt he lacked capacity to sign a Power of Attorney. CP 409. By the time Akers received a copy of the 1996 wills, it was too late to have Ken Frank amend his will or to change the revocation of community property agreement that made the Property the separate property of Ken Frank. CP 64. Therefore, Akers was not the proximate cause of the Property going to the Foundation. The cause was the Franks' own decision not to timely revise this portion of their 1996 wills in coordination with their specific estate planning attorneys.

The Franks make an unsubstantiated assertion that Akers possessed the 1996 wills from May 2003. App. Br. at 7. They do not support this assertion with evidence, but cite only a Declaration of David Frank attaching an email from Treacy to Akers, which does not include any attachments to Akers. CP 349, 352. It is speculation to assume that Treacy possessed the 1996 wills by this time. This email was sent on April 2, 2003, only four days after David Frank sent the March 29, 2003 email to Treacy stating he would attempt to locate a copy of his parents'

wills. CP 178. David Frank does not submit evidence that he provided Treacy with the 1996 wills in that four-day period. Moreover, in responding to Treacy's email, David Frank began searching for the 1996 wills specifically to identify to whom the Property was bequeathed. *Id.* Had he located the 1996 wills in this four-day period for the purpose of providing them to Treacy, David Frank certainly would have noted in correspondence that the Property was being left to the Foundation.

Even more telling is an email sent from Treacy to David Frank on November 10, 2003. CP 337. In this email, in ¶ 3, Treacy notes that some documents received reflect Bean & Gentry had drafted the Franks' wills in 1996 and, in ¶ 4, he states: "It is also possible that that Laurie persuaded the Franks to make other changes in their Wills and/or other estate planning documents." *Id.* He indicates the instruments would be held by Bean & Gentry, and that they should be obtained. *Id.* Akers and Treacy worked together on the Underlying Case. If either of them obtained the 1996 wills by May 2003, they would not be discussing obtaining the wills in November 2003 for the purpose of determining their contents.

"A summary judgment motion will not be denied on the basis of an unreasonable inference." *Marshall v. AC & S Inc.*, 56 Wn. App. 181, 184, 782 P.2d 1107, 1109 (1989). "Unreasonable inferences that would contradict those raised by evidence of undisputed accuracy need not be so

drawn.” *Snohomish County v. Rugg*, 115 Wn. App. 218, 229, 61 P.3d 1184, 1190 (2002). The Franks’ argument here relies on speculation contrary to such evidence, the superior court was correct to enter summary judgment, and this court should affirm that ruling

- ii. **The Franks cannot argue “unjust enrichment,” where they did not assert it in the Underlying Case, and “constructive trust” is a remedy, not a cause of action.**

The Franks prepared an Amended Complaint in the Underlying Case when they replaced Akers with their current counsel that was substantially the same as the complaint that Akers filed on their behalf regarding grounds for rescission. Grounds for rescission alleged by the Franks in the Underlying Case were: “Unilateral Mistake, Undue Influence, and Negligent Misrepresentation.” CP 51-52, 1427-29. These were the only grounds argued by the Franks’ current counsel in opposition to summary judgment in the Underlying Case. CP 634-41.

The Franks devote extensive argument to supposed “unjust enrichment.” App. Br. at 26-30. The Franks never alleged or argued unjust enrichment in the Underlying Case. The Franks allege no negligence claim based on any failure to plead unjust enrichment in the Underlying Case. CP 51-52, 1427-29. Even if they had, it would not be actionable here, because successor counsel did not raise it below despite

sufficient time to do so. *See Lockhart v. Greive*, 66 Wn. App. 735, 741, 834 P.2d 64 (1992) (proximate cause broken where successor had sufficient time to correct alleged error). The Franks cannot prevail in a trial-within-a-trial based on a theory they did not allege below.

Even if this court considered the Franks' unjust-enrichment argument here, unjust enrichment claims arise from contractual relationships, not gift relationships. *See Truckweld Equip. Co., Inc. v. Olson*, 26 Wn. App. 638, 646, 618 P.2d 1017 (1980) (unjust enrichment is a contract implied at law requiring a person to make restitution to the extent he has been unjustly enriched). There is no Washington authority where unjust enrichment arose from a gift relationship, but out-of-state authorities hold that a party may not recover damages for unjust enrichment pursuant to a gift relationship. *Liataud*, 221 F.3d at 988 (“a party may not recover damages for unjust enrichment pursuant to a gift relationship”); *Bereenergy Corp.*, 94 P.3d at 1238 (“there is nothing unjust about retaining a benefit conferred gratuitously”).

There does not appear to be any Washington law on claims of unjust enrichment arising from a gift relationship. Since this would be an extension of currently unsettled Washington law, the Franks cannot claim malpractice based on this argument. A cause of action for legal malpractice cannot be based on an attorney's judgment or in trial tactics

when arguing unsettled law. *Halvorsen*, 46 Wn. App. at 717-18. Regardless of whether this court would extend Washington law given the opportunity, the Franks' malpractice claim is based on an attorneys conduct in an area of unsettled law so dismissal of this claim was proper.

The Franks' claim regarding constructive trust does not require much discussion, as constructive trust is a remedy for unjust enrichment, not a cause of action. *City of Lakewood*, 144 Wn.2d at 126. This court need not consider constructive trusts unless it first finds unjust enrichment, and the Franks cannot show their gifts unjustly enriched the Foundation.

iii. The Franks could not have prevailed on the rescission claim, and they knew this before commencing the Underlying Case.

The Franks devote the majority of their brief to arguing they could have prevailed on the merits on the rescission claim in the Underlying Case. App. Br. at 19-33. This is speculation that will not overcome summary judgment. The Franks offer Treacy's testimony in support of their position on rescission. App. Br. at 19 (citing CP 871-900). But when Treacy's declaration is considered, it does not state the Franks could have prevailed in a rescission action. CP 871-900. Rather, the testimony relates to the professional defendants, Gentry, Clees, and McClanahan. Even if the Treacy declaration may support an action by the Franks against

professionals who gave the Franks bad advice, it contains nothing to show that a rescission action against the Foundation would be successful. Treacy also does not opine on whether Akers met standard of care.

W. Mitch Cogdill, Akers's expert, provided extensive testimony as to why the rescission claim was difficult and probably would fail. CP 1045-67. The claims against the professional defendants in the Underlying Case presented the best opportunity to make a recovery. These claims were, in fact, the basis of the million-dollar settlement that the Franks received in the Underlying Case. CP 261-70. This is consistent with the analysis that Akers provided to the Franks prior to commencing the Underlying Case. CP 684.

On October 26, 2004, before commencing the Underlying Case, Akers sent an email to David Frank indicating the claims against Gentry, Clees, and McClanahan appeared to be strong claims, but the rescission claim was not strong. CP 684. Although it was not strong, it was the best option to attempt to obtain the Property, potentially in a settlement. *Id.* While the argument could be made in good faith, and met the requirements of CR 11, no one went into this portion of the Underlying Case believing that the rescission claim was strong. It is speculative to now assert it is a claim that would have prevailed.

The Franks make the same arguments regarding misrepresentation they did in superior court, which fail for the same reasons. CP 1033-35. The Franks argue: “A gift can be rescinded if it was induced by material misrepresentation.” App. Br. at 20. The Franks base their argument on Restatement of Restitution §§ 26, 39, which no reported Washington decision has cited. They do not cite Washington law for this proposition, because there is none. *Halverson* also applies to bar this claim, since mere errors in judgment or trial tactics do not subject an attorney to liability for legal malpractice when the error involves an uncertain, unsettled, or debatable proposition of law. *Halvorsen*, 46 Wn. App. at 717-18.

Generally, one seeking to set aside an *inter vivos* gift has the burden of showing its invalidity. *Lewis v. Estate of Lewis*, 45 Wn. App. 387, 388-89, 725 P.2d 644 (1986). The burden may shift if the donor and donee shared a confidential relationship. *Id.* The existence of a fiduciary relationship alone, absent other factors, is not sufficient to impose upon the fiduciary the burden of proving the absence of undue influence. *White v. White*, 33 Wn. App. 364, 369, 655 P.2d 1173 (1982). If the burden does shift, then the donee must show that the gift was intended and that it was not the product of undue influence. *Lewis*, 45 Wn. App. at 388-89. In order to do this, the donee shows that the gift was made freely, voluntarily,

and with an understanding of the facts. *Endicott v. Saul*, 142 Wn. App. 899, 922, 176 P.3d 560 (2008).

In the Underlying Case, both parties asserted undue influence. The Franks argued the professional defendants used a fiduciary relationship to influence Ken and Catherine Frank to gift the Property to the Foundation. Conversely, the Foundation's position was the Franks had intended to preserve the Property in its natural state, CP 66, 69, and David Frank was using the undue influence of a confidential relationship as a child and potential heir to push his elderly parents into abandoning their wishes to preserve the Property for his own personal benefit. *Frank*, 146 Wn. App. at 316. It was a contest between one party with a fiduciary relationship and another with a confidential relationship. There does not appear to be legal authority as to what to do in such a case in regard to burden-shifting.

This court can resolve that dilemma by following its own prior ruling, in which it held that "the record does not contain any evidence ... that Kenneth and Catherine mistakenly bequeathed Cranberry Lake to the Foundation." *Frank*, 146 Wn. App. at 323.

Kenneth and Catherine executed their wills leaving Cranberry Lake to the Foundation nearly 18 months after they conveyed their entire interest in the property to the Foundation. They executed three subsequent codicils, none of which modified the Cranberry Lake bequest in Article VII, section 2 of the wills. The legal conclusion we draw from these events is that Kenneth and Catherine intended to ensure that any remaining interest in

Cranberry Lake that they did not transfer to the Foundation by *inter vivos* deed would pass to the Foundation under their wills.

Id. at 325.

After making *inter vivos* gifts of the Property to the Foundation, the Franks had ten years to dispute the transaction. CP 66, 72-73. Everyone, including David Frank, was aware the Property had been gifted to the Foundation. The Franks were pleased with their gifts, until they discovered many years later that the IRS code was going to prevent them from having unrestricted use of the Property. The Franks may have received poor advice from Gentry, Clees, and McClanahan, giving rise to professional negligence claims against them, but no evidence supports a claim for undue influence.

More than speculation is required to sustain a legal-malpractice claim. *Smith v. Preston Gates Ellis*, 135 Wn. App. 859, 864-65, 147 P.3d 600 (2006) (summary judgment proper where plaintiff's statement of what he might have done if advised of problems with contract was speculation); *Griswold v. Kilpatrick*, 107 Wn. App. 757, 27 P.3d 246 (2001) (summary judgment proper where plaintiff's claim result would be better if attorney worked up case earlier was speculative). As a result, dismissal of this claim was appropriate and should be affirmed.

- iv. It is speculation to assume the Franks could obtain a judgment beyond the million dollars they already received in settlement.**

The Franks cite *Griswold*, 107 Wn. App. at 757. App. Br. at 18. *Griswold* is similar to this case in regard to the Franks' claim. *Griswold*, 107 Wn. App. at 759-60. In that case, in November 1992, Mr. Griswold underwent heart surgery at UW Medical Center. Griswold's wife hired attorney Kilpatrick in 1993 to represent the couple in a medical-malpractice claim against the Medical Center and individual surgeons. They alleged the medical staff was negligent by not acting immediately upon detection of neurological abnormalities in the hours following surgery. They signed a fee agreement with Kilpatrick in the fall of 1993. By the spring of 1994, Griswold had been discharged from the Medical Center's care. Kilpatrick obtained medical records from the Medical Center. In November 1994, Kilpatrick filed a claim for damages. In June 1996, Griswold suffered a heart attack. In September 1996, mediation produced a settlement agreement in which the Griswolds released the defendants in exchange for \$ 1.2 million.

In January 1997, Griswold died, and Ms. Griswold filed a legal-malpractice suit against Kilpatrick on behalf of herself and her husband's estate. She alleged the case would have settled for a larger amount if

Kilpatrick had prosecuted the case more energetically, so that it would have been in a settlement posture before Mr. Griswold had the heart attack. Kilpatrick moved for summary judgment, which was granted, and affirmed on appeal. In affirming summary judgment of dismissal, the *Griswold* court held it is very difficult to escape the realm of speculation when a legal-malpractice plaintiff tries to prove that counsel's handling of negotiations and litigation caused harm to the plaintiff. *Id* at 762.

Akers, and others, initially gathered information and engaged in settlement negotiations with the Foundation prior to filing suit. CP 1157. The Franks allege Akers failed to fully advise them concerning the importance of filing suit when the Franks could give testimony and Ken Frank could amend his 1996 will so that the Property would not go to the Foundation. The Franks' claim mirrors that of Ms. Griswold in that they argue the case would have had more value if Akers had prosecuted the case more energetically, so it would have been in a better posture before Ken Frank became incompetent or died. This is complete speculation, and cannot be supported by the expert testimony provided by the Franks. In *Griswold*, the court struck similar declarations, ruling:

Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded. The factual, informational, or scientific basis of an expert opinion, including the principle or procedures through which the expert's conclusions are reached, must

be sufficiently trustworthy and reliable to remove the danger of speculation and conjecture and give at least minimal assurance that the opinion can assist the trier of fact. Our courts have excluded expert opinions that are based on unsubstantiated assumptions.

Id. at 761-62 (citations omitted). *See also Boguch v. Landover Corp.*, 153 Wn. App. 595, 611-15, 224 P.3d 795 (2009) (summary judgment proper where plaintiff speculated he could have sold property at a better price if not for inaccurate photograph); *Smith*, 135 Wn. App. at 864-65 (summary judgment proper where plaintiff's statement of what he might have done if advised of problems with contract was speculation).

Here, like *Griswold*, the Franks settled the Underlying Case for over \$1,000,000.00. CP 1256. It is speculation to assume they could have obtained a larger settlement or judgment, if any.

Proof only of an attorney's negligence is insufficient for malpractice liability to attach. A client must show that, if the client's attorney had not committed the alleged malpractice, the client "would have prevailed or at least would have achieved a better result" than that actually obtained.

Boguch, 153 Wn. App. at 611.

The Franks argue that Ken and Catherine Frank were elderly and it was foreseeable they might die during the litigation process. But this is no different than the supposed foreseeability that Mr. *Griswold*, who was suing on medical issues related to his heart, would suffer a heart attack some time during the litigation. It is speculation to assume the case would

have had more value, or been in a better posture, had Akers taken the steps the Franks assert were required.

c. The Franks cannot raise estate-planning arguments regarding the second and third summary judgment motions where they did not raise them before the superior court.

The Franks may not make arguments on appeal that they did not raise in the superior court. *Brower*, 96 Wn. App. at 567; *Sowers*, 37 Wn. App. at 403. In response to Akers's first summary judgment motion, the Franks argued the estate planning issue. However, in response to the second and third summary judgment motions, when Akers moved to dismiss the legal malpractice claim that Akers's acts and omissions allegedly caused the Franks to lose the right to recover the Property, the Franks did not argue the estate planning issue.

Akers second partial summary judgment motion, CP 442-65, requested "[d]ismissal of plaintiff's claim of negligence that defendant's conduct deprived them of a right to recover Cranberry Lake." CP 445. In response, the Franks argued that the motion should fail based on the handling of the underlying rescission claim. CP 691-701. The Franks argued Akers's representation consisted in handling the rescission action. *Id.* They did not argue against dismissal based on estate planning issues. In arguing against Akers' motion for reconsideration, the Franks again

argued regarding only the probate and rescission issues, not estate-planning issues. CP 960-69. The motion was granted. CP 445. The superior court had discretion not to grant further reconsideration of this order. Finally, in response to Akers's third summary judgment motion, the Franks again made arguments regarding the handling of the rescission action that they had previously made, and did not raise as an issue the estate planning arguments they now raise on appeal. CP 1312-26. As a result, the Franks may not raise this argument for the first time on appeal as to this claim.

5. The Franks do not challenge the superior court's orders granting or denying reconsideration.

Orders granting or denying motions for reconsideration are reviewed for an abuse of discretion. *Drake v. Smersh*, 122 Wn. App. 147, 151, 89 P.3d 726 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.* The Franks did not assign error to the superior court's orders granting or denying reconsideration, or identify these decisions as an issue, so this court should not consider argument, if made, in the Franks' reply brief in regard to these orders. *McKee*, 113 Wn.2d at 705 (citing RAP 10.3; court "will not consider issues on appeal that are not raised by an assignment of error or are not supported by argument and citation of authority").

VI. CONCLUSION

Akers respectfully requests this court affirm dismissal of the Franks' legal malpractice claim. The Franks do not have any expert to testify that Akers fell below the standard of care in regard to how he handled the Underlying Case. Akers did not have a duty to assist Kenneth and Catherine Frank in their estate planning and, even if he did, the Franks do not raise any genuine issue of material fact supporting the element of proximate cause where it is speculation to argue that they would have prevailed in the rescission claim, and/or they believe they could have obtained a judgment beyond the million dollars they have already received in settlement. In addition, the Franks should not be permitted to make arguments for the first time in this court on issues that they did not contest or raise in the superior court. The record provides more than adequate grounds to affirm the decision of the superior court.

Respectfully submitted this 30th day of June, 2011.

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