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Division I
State of Washington

No. 74765-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RALPH HOWARD BLAKELY,

Appellant,

vs.

MICHAEL CHARLES KAHRS,

Respondent.

AMENDED RESPONDENT'S BRIEF

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I. INTRODUCTION

Michael C. Kahrs represented appellant Ralph Howard Blakely for two limited purposes: to investigate whether Mr. Blakely (1) had a basis to seek post-conviction relief and (2) was receiving appropriate medical care in prison. Orders from the Spokane County Superior Court defined the scope of Mr. Kahrs' representation of Mr. Blakely. The orders also authorized disbursements for the representation from a Trust established for Mr. Blakely's benefit, allocating funds to each purpose.

Throughout the time Mr. Kahrs represented him, Mr. Blakely sought Mr. Kahrs' assistance for tasks other than those defined by the Spokane court's orders. Mr. Kahrs wrote to Mr. Blakely repeatedly, reminding him of the limited scope of Mr. Kahrs' representation, detailing what he could and what he could not do under the court's orders. On occasion, Mr. Kahrs sought permission from the Trustee of Mr. Blakely's Trust to assist Mr. Blakely in civil matters Mr. Blakely filed pro se.

Ultimately, Mr. Kahrs concluded he could not help Mr. Blakely in seeking post-conviction relief and that Mr. Blakely generally had been receiving appropriate and timely care for his medical conditions. When Mr. Blakely lost confidence in Mr. Kahrs and filed a grievance with the Washington State Bar Association, Mr. Kahrs formally terminated the

attorney-client relationship with Mr. Blakely, accounted for all funds he had held in trust, and returned file materials Mr. Blakely requested.

Mr. Kahrs asks the Court to affirm the trial court's January 25, 2016 order dismissing Mr. Blakely's Verified Complaint for Legal Malpractice, Breach of Fiduciary Duty and striking materials submitted in opposition to the motion because Mr. Kahrs breached no duty owed to Mr. Blakely as his attorney and proximately caused him no damage.

II. STATEMENT OF ISSUES

1. Did the trial court properly dismiss Mr. Blakely's lawsuit for legal malpractice and breach of fiduciary duty against his former attorney, Michael C. Kahrs, on summary judgment where Mr. Blakely cannot show prima facie evidence to support each of the essential elements of his causes of action?

2. Did the trial court properly strike materials Mr. Blakely submitted in opposition to Mr. Kahrs' summary judgment motion where the materials violated the requirements of CR 56(e)?

III. STATEMENT OF THE CASE

A. Mr. Blakely Appeals Only the Trial Court's Order Granting Defendants' Motion for Summary Judgment.

Mr. Blakely's Notice of Appeal seeks review only of the trial court's January 25, 2016 order dismissing all claims against Mr. Kahrs. The order included a ruling on Mr. Kahrs' motion to strike materials Mr.

Blakely submitted in opposition to the summary judgment motion. CP 159-61. Although Mr. Blakely identifies four issues for the Court's review in his opening brief, only the issues decided in the trial court's January 25, 2016 order are properly before this Court.

B. Summary of Facts From the Underlying Representation.

Ralph Howard Blakely is incarcerated as a result of his conviction for solicitation of first degree murder. CP 23. In 2009, Mr. Blakely sought legal assistance from Mr. Kahrs to pursue post-conviction relief related to that conviction and to obtain medical care in prison for his many medical conditions. Mr. Kahrs agreed to assist Mr. Blakely with these two matters. CP 23.

1. The Spokane Court Order Disbursing Funds From the Blakely Special Needs Trust Defined the Scope of Mr. Kahrs' Representation.

Mr. Blakely is the beneficiary of a Special Needs Trust that is administered by the Spokane County Superior Court. Mr. Kahrs worked with the Trustee of Mr. Blakely's Trust to ask the court to disburse funds from the Trust to fund the legal services Mr. Kahrs would provide. Mr. Blakely supported the motion. CP 31-32. The court entered an Order Approving Disbursement of Funds From Special Needs Trust on December 3, 2009 (2009 Order). CP 31-32. The Order defined the scope of representation in its findings:

1. Ralph H. Blakely Jr. is in need of funds for the purposes of [pursuing] post-conviction litigation in his criminal conviction and sentence in Grant County, *State v. Blakely*, No. 04-1-00369-8.

* * *

4. Ralph H. Blakely is in need of funds for the purposes of obtaining medical care for a multitude of serious medical conditions.

CP 32.

Noting that Mr. Blakely consented to the disbursement of funds from his Special Needs Trust for these purposes and that the amount requested was reasonable, the Court ordered the Trustee to disburse \$35,000 to Mr. Kahrs from Mr. Blakely's Trust to be held in an individual trust account. Mr. Kahrs was to request the Trustee's approval of disbursements from the individual trust account before expenditure.

CP 23, 32.

Mr. Kahrs established the trust account for Mr. Blakely and deposited the check from the Trust into the account. CP 23.

2. Mr. Kahrs Investigated the Matters Within the Scope of Representation Allowed by the Court's Order and Regularly Communicated With Mr. Blakely.

From late 2009 through May 2014, Mr. Kahrs worked on Mr. Blakely's behalf to find support for Mr. Blakely's contention that a witness who testified at his criminal trial gave false testimony and would recant. CP 26. Mr. Kahrs hired an investigator to interview the witness.

The investigator wrote a report summarizing his investigation and interview with the witness. The witness declined to sign the affidavit that would recant his trial testimony and told the investigator that his trial testimony was truthful. CP 26. Two years later, Mr. Blakely told Mr. Kahrs the witness had moved to Texas and would sign the affidavit. He refused to authorize Mr. Kahrs to engage another investigator in Texas. CP 27. Mr. Kahrs was unable to obtain sufficient evidence to make a post-conviction challenge for Mr. Blakely. Consequently, he made no post-conviction request for relief. CP 26-27.

From late 2009 to May 2013, Mr. Kahrs also investigated whether Mr. Blakely was receiving appropriate medical care for his many serious medical conditions while incarcerated. He had a medical expert review Mr. Blakely's medical records. The nurse expert concluded that the medical care Mr. Blakely received in prison appeared to be timely and appropriate. Until May 2014, Mr. Kahrs also assisted Mr. Blakely in seeking to have vitamin B₁₂ supplements provided to Mr. Blakely as allowed by Department of Corrections policy. CP 27.

At Mr. Blakely's request, Mr. Kahrs retained a neuropsychologist and neurobehavioral toxicologist to review Mr. Blakely's records and prepare a report on the effect of Mr. Blakely's chemical exposure on his mental status. Mr. Blakely hoped to use the report to challenge his

conviction at the solicitation trial and to obtain the vitamin B₁₂ supplements. The toxicologist prepared a draft report, but needed additional information from Mr. Blakely. Mr. Kahrs attempted to facilitate a conference call between Mr. Blakely and the toxicologist for that purpose to no avail. CP 27-28, 83-86. Mr. Blakely's declaration in opposition to the summary judgment motion suggests that the toxicologist would support his civil actions, cases in which Mr. Kahrs did not represent Mr. Blakely. He does not, however, refute the facts stated in Mr. Kahrs' declaration. CP 129-30.

Mr. Kahrs communicated with Mr. Blakely by telephone, in person, and by written correspondence to keep him informed of the work Mr. Kahrs was doing on his behalf and to remind Mr. Blakely of the scope of his representation. CP 25, 34-60. Mr. Kahrs reminded Mr. Blakely many times that he did not represent Mr. Blakely on his civil matters, including Mr. Blakely's civil rights and medical malpractice claims. CP 25. The first time Mr. Kahrs wrote to Mr. Blakely reminding him of the scope of his work was in late January 2010. CP 25, 74. Other correspondence went to Mr. Blakely reminding him of the limited scope of Mr. Kahrs representation in May 2010, CP 26, 76, 78; and in February 2011, CP 26, 80. Mr. Kahrs' invoices detail the many telephone conversations and written communications Mr. Kahrs had with Mr.

Blakely. CP 34-61. By way of example and not an exhaustive list, Mr. Kahrs met with Mr. Blakely regarding the medical and post-conviction relief issues on January 29, 2010. CP 36, 53. He made four telephone calls to Mr. Blakely in June and July 2010. CP 38. On December 20, 2010, Mr. Kahrs read correspondence from Mr. Blakely and sent a letter in response the same day. CP 43. Mr. Kahrs made 12 telephone calls to Mr. Blakely between July 22, 2011 and March 30, 2012. CP 46. He made nine telephone calls and wrote two letters between September 5, 2012 and October 30, 2012. CP 48. Mr. Kahrs telephoned Mr. Blakely seven times between February 9, 2011 and March 8, 2011. CP 57.

3. With the Trustee's Prior Approval, Mr. Kahrs Gave Mr. Blakely Limited Assistance in His Civil Matters.

Mr. Kahrs did not represent Mr. Blakely in any of his civil matters. When asked, however, he would advise Mr. Blakely regarding procedure in some of his matters and, on occasion, assisted Mr. Blakely in service of documents or other procedural matters. Each time he did so, Mr. Kahrs sought and received the Trustee's advance approval. As an example, the Thurston County Superior Court dismissed three of Mr. Blakely's lawsuits on summary judgment in early 2013. The Trustee approved Mr. Kahrs' assisting Mr. Blakely in perfecting his appeals in those three matters. Mr. Kahrs made a limited appearance in those cases for the express purpose of

seeking an extension of time for Mr. Blakely to perfect the appeals. CP 24, 63-68. Correspondence to Mr. Blakely made clear the limited nature of the representation in those cases. CP 25, 70, 72.

4. Mr. Kahrs Submitted Invoices for Legal Fees and Related Costs to the Trustee for Approval Before Transferring or Disbursing Funds From the Individual Trust Account.

Before transferring any funds from Mr. Blakely's trust account to pay for legal services, Mr. Kahrs submitted his invoices to the Trustee for approval. He transferred funds to pay the invoices only after receiving permission from the Trustee to pay the billings. Similarly, Mr. Kahrs asked the Trustee to approve disbursements to pay for experts, medical and court records, and for an investigator who provided services on the post-conviction matter. Mr. Kahrs made those disbursements only after receiving the Trustee's approval. CP 24.

5. Mr. Kahrs Made a Full Accounting to Mr. Blakely Regarding the Trust Funds Upon Mr. Blakely's Request in May 2014.

Mr. Blakely apparently lost confidence in Mr. Kahrs in May 2014. He asked Mr. Kahrs for an accounting for the trust funds and filed a grievance with the Washington State Bar Association.¹ CP 28. Mr. Kahrs provided the accounting by letter dated May 18, 2014, along with an explanation of the work he did on Mr. Blakely's behalf and a copy of the

¹ The WSBA dismissed the grievance without action in November 2014. CP 28.

trust account statement. CP 88-89. Upon receiving notification of Mr. Blakely's grievance, Mr. Kahrs declined to do additional work on Mr. Blakely's behalf. CP 28. Mr. Kahrs refunded the \$8,560.59 balance of trust funds remaining in the individual trust account to the Trustee of Mr. Blakely's Special Needs Trust by correspondence dated June 2, 2014. He sent Mr. Blakely a copy of that correspondence. CP 28, 91. Another small sum that Mr. Blakely had sent to Mr. Kahrs remained in the trust account. Mr. Blakely directed Mr. Kahrs where to send those funds. Mr. Kahrs complied with the request and wrote to Mr. Blakely confirming disbursement as directed. CP 28, 93, 97.

After making those disbursements, the balance in the individual trust account for Mr. Blakely's benefit was zero and Mr. Kahrs closed the account. CP 29, 93, 95-97.

Mr. Kahrs also sent Mr. Blakely all file materials that Mr. Blakely requested. CP 29.

C. Procedural History of the Lawsuit for Legal Malpractice and Breach of Fiduciary Duty.

1. Ralph Howard Blakely Commenced a Lawsuit Against Michael Kahrs in May 2015, Alleging Legal Malpractice and Breach of Fiduciary Duty Related to Mr. Kahrs' Representation from 2009 to 2014.

Mr. Blakely filed his Verified Complaint for Legal Malpractice and Breach of Fiduciary Duty in King County Superior Court on May 28,

2015. CP 29, 99-104. The suit seeks return of trust funds and “compensatory damages for prolonged incarceration (sic) of painful torture, loss of liberty, loss of expert medical care due to illegal restraint.” CP 104. The Complaint contains no allegations regarding a Consumer Protection Act violation, a cause of action for conversion, or related to establishment of the Special Needs Trust.² Mr. Kahrs answered the Complaint and responded to Mr. Blakely’s discovery requests. CP 105-06.

2. On October 15, 2015, Michael Kahrs Filed a Motion for Summary Judgment Seeking Dismissal of the Verified Complaint.

After responding to Mr. Blakely’s discovery requests, Mr. Kahrs filed a motion for summary judgment asking the trial court to dismiss all claims against him on the basis that Mr. Blakely could not make a prima facie showing on all essential elements of his causes of action. CP 1-21. The motion was supported by Mr. Kahrs’ declaration and exhibits thereto. CP 22-104. Hearing on the motion was noted for November 20, 2015. CP 1. Mr. Blakely responded to the motion by serving a motion to stay the hearing on Mr. Kahrs’ motion to allow additional discovery. He also served a motion to extend time to amend the complaint, but did not file either motion. CP 105-07; RP 4. Mr. Blakely did not file a proposed amended complaint. RP 5.

² Mr. Blakely raised these claims in opposition to the summary judgment motion. CP 110-37; RP 31-33.

3. The Trial Court Heard Argument on November 20, 2015, and Continued the Hearing on the Summary Judgment Motion to Allow Mr. Blakely Additional Time to Conduct Discovery.

The trial court held a hearing on November 20, 2015, but did not rule on Mr. Kahrs' summary judgment motion. Mr. Blakely appeared by telephone and argued his motion for more time that he served in lieu of an opposition. RP 1-20. The trial court granted Mr. Blakely's motion for more time to conduct discovery "to make sure that there is a complete airing of Mr. Blakely's concerns prior to resolving the matter either way." RP 16-17. The hearing on Mr. Kahrs' summary judgment motion was continued for 60 days to January 22, 2016. RP 17. The trial court denied Mr. Blakely's motion to amend his complaint. RP 18.

4. Mr. Blakely's Opposition to the Summary Judgment Motion Failed to Meet His Burden of Production on the Causes of Action Pled in His Complaint.

Mr. Blakely served and filed his opposition to Mr. Kahrs' summary judgment motion dated January 5, 2016. He supported his opposition with his own declaration. The declaration refers to exhibits that were filed separately. CP 129-37. The exhibits are not part of the record on appeal. Mr. Blakely's opposition failed to meet his burden on summary judgment to produce facts to show he could prove the essential elements of his causes of action for legal malpractice and breach of fiduciary duty. CP 110-37. Mr. Blakely did not have a legal standard of care expert.

Instead, he submitted fellow prisoners' opinions regarding Mr. Kahrs' legal services and fiduciary duties. CP 139. The opposition did not produce evidence that Mr. Kahrs had a duty to represent Mr. Blakely on matters other than the post-conviction relief and medical care issues as allowed in the 2009 Order. CP 139-40. Mr. Blakely referred to two general representation agreements that he signed: one dated January 2009 and the other dated May 2009. CP 152-53. Mr. Kahrs signed neither agreement. *Id.* Mr. Blakely supported the motion to disburse funds from his Special Need Trust that Mr. Kahrs prepared in November 2009 seeking representation to pursue post-conviction litigation and regarding his medical care. He submitted a declaration in connection with the motion consenting to disbursement of funds from his Trust for these two purposes and for no other purpose. CP 31-32.

Mr. Blakely did not produce evidence that Mr. Kahrs misused any funds entrusted to him. CP 140; CP 110-37. Nor did he show proof of any damage proximately caused by Mr. Kahrs during his representation. CP 140-41. In early 2013, the Trustee asked the Spokane County Superior Court to modify its 2009 Order by reallocating the funds it had authorized. On March 15, 2013, the court entered its Order Approving Reallocation of Funds for Medical and Post-Conviction Relief (2013 Order). The 2013

Order allowed the \$35,000 previously disbursed to be used for either of the matters authorized without restriction. CP 148-150.

Mr. Blakely's opposition contained documentary evidence that both failed to address the summary judgment motion and was otherwise inadmissible on summary judgment. CP 138-42.

5. Mr. Kahrs Moved to Strike Mr. Blakely's Evidence That Failed to Meet the Requirements of CR 56.

At the same time that Mr. Kahrs filed his reply brief on January 16, 2016, he filed a Motion to Strike Portions of Plaintiff's Opposition to Motion for Summary Judgment Dismissal. CP 154-58. Mr. Kahrs argued that many of the declarations and exhibits filed in opposition to his motion were inadmissible on summary judgment because the declarants lacked personal knowledge, the declarations contained legal opinions and legal conclusions by lay witnesses, the declarations and documents were uncertified and many were irrelevant to the issues before the court on Mr. Kahrs' summary judgment motion. CP 156-57. For example, fellow inmates provided Mr. Blakely with declarations opining on Mr. Kahrs' legal duties.

6. The Trial Court Granted Mr. Kahrs' Motion to Strike and Granted His Motion for Summary Judgment, Dismissing All Claims.

The trial court heard argument on Mr. Kahrs' summary judgment motion on January 22, 2016. RP 21-43. Mr. Blakely appeared and argued

by telephone. RP 23. The trial court took the matter under advisement to re-review the materials submitted before making a decision. RP 42.

The trial court issued an Order Granting Defendants' Motion for Summary Judgment Dismissal on January 25, 2016. The order dismissed all claims against Mr. Kahrs with prejudice. The order also addressed Mr. Kahrs' motion to strike portions of Mr. Blakely's opposition. CP 159-61. In granting the motion to strike, the court noted that the motion was well-taken, and that a substantial portion of the materials Mr. Blakely submitted violated CR 56(e) in that they (1) were not made on personal knowledge; (2) did not set forth facts that would be admissible in evidence; and, (3) did not affirmatively show the affiant was competent to testify to the matters stated. For example, the court noted that lay testimony is not competent to opine on the legal standard of care. CP 161.

Mr. Blakely filed his Notice of Appeal on February 23, 2016 challenging the trial court's order granting summary judgment and dismissing all claims with prejudice.

IV. ARGUMENT

A. Standard of Review.

This court's review is de novo. The trial court dismissed Mr. Blakely's causes of action on summary judgment. The trial court's order striking Mr. Blakely's materials submitted in violation of CR 56(e) is also

reviewed de novo. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (“The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.”). Questions of law are reviewed de novo. *Yong Tao v. Heng Bin Li*, 140 Wash. App. 825, 830, 166 P.3d 1263, 1266 (2007).

“A defendant in a civil action is entitled to summary judgment when that party shows that there is an absence of evidence supporting an element essential to the plaintiff’s claim.” *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992); *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 22, 770 P.2d 182 (1989). If the moving party has carried the initial burden of production, the burden then shifts to the non-moving party to show an issue of material fact. To make this showing, the party opposing summary judgment “must submit competent testimony setting forth specific facts, as opposed to general conclusions to demonstrate a genuine issue of material fact.” *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993).

A nonmoving party attempting to resist a summary judgment may not rely on speculation, argumentative assertions that unresolved factual matters remain, or in having its affidavits considered at their face value...

Halvorsen v. Ferguson, 46 Wn. App. 708, 721, 735 P.2d 675 (1986).

To defeat summary judgment, Mr. Blakely must go beyond the pleadings and “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed.2d 538 (1986). The non-moving party cannot withstand summary judgment based on the mere hope that evidence will turn up before trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). While the evidence must be viewed in the light most favorable to the non-moving party, if such evidence is merely “colorable” or is not “significantly probative,” summary judgment may be granted in the moving party’s favor. *Id.* at 249.

Mr. Blakeley failed to introduce competent evidence on every essential element of each cause of action as required to survive summary judgment dismissal. *Geer v. Tonnon*, 137 Wn. App. 838, 851 n.11, 155 P.3d 163 (2007) (“To defeat Tonnon’s summary judgment motion, Geer was required to introduce evidence on every element of his claim.”). When reasonable minds could reach but one conclusion, any questions of fact can be decided as matters of law. *Douglas v. Jepson*, 88 Wn. App. 342, 945 P.2d 244 (1997).

Washington courts frequently resolve claims for legal negligence and breach of fiduciary duty on summary judgment. Mr. Blakely failed to

submit competent evidence on his claims in opposition to Mr. Kahrs' motion. He did not (and cannot) produce evidence to support breach, proximate cause or damage as required to survive the motion. The trial court correctly struck certain materials that Mr. Blakely submitted with his opposition because they violated CR 56(e). The materials not stricken fail to raise an issue of fact. The trial court correctly dismissed Mr. Blakely's claims because no genuine issue of material fact exists and Mr. Kahrs is entitled to judgment as a matter of law. This Court should affirm.

B. Mr. Blakely Failed to Make a Prima Facie Showing of the Essential Elements of His Cause of Action for Legal Malpractice Under Washington Law as Required in Opposition to Mr. Kahrs' Summary Judgment Motion.

To prove his claim for legal malpractice, Mr. Blakely must prove each of the following essential elements of his cause of action:

- (1) The existence of an attorney-client relationship giving rise to a duty of care on the part of the attorney to the client;
- (2) An act or omission by the attorney in breach of the duty of care;
- (3) Damage to the client; and,
- (4) Proximate causation between the attorney's breach of duty and the damage incurred.

Hizey v. Carpenter, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992).

There is no dispute that Mr. Blakely had an attorney-client relationship with Mr. Kahrs. What duties Mr. Kahrs owed to Mr. Blakely,

however, depends on the scope of his representation. Where an attorney-client relationship exists, one must determine the scope of the relationship to determine the attorney's duty. Duty is a question of law. *Cummins v. Lewis County*, 156 Wn.2d 844, 852, 133 P.3d 458 (2006).

Here, Mr. Kahrs' duty of care to Mr. Blakely is defined by the 2009 Order authorizing disbursement of funds for only two matters and not for general representation on any and all matters.

C. **The Scope of the Attorney-Client Relationship Between Ralph Blakely and Michael Kahrs is Limited as Defined in the 2009 Order Permitting Disbursement of Funds for the Post-Conviction and Medical Care Matters.**

Washington courts apply the same test to determine scope of representation as they apply in determining the existence of the attorney-client relationship. *Leipham v. Adams*, 77 Wn. App. 827, 833-834, 894 P.2d 576 (1995). An attorney-client relationship can be created only where the individual seeks and receives the attorney's advice or assistance on legal matters. *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992) ("The essence of the attorney/client relationship is whether the attorney's advice or assistance is sought and received on legal matters."). The belief that such a relationship exists must be objectively reasonable under the circumstances. *Dietz v. Doe*, 131 Wn.2d 835, 844, 935 P.2d 611 (1997). That is, Mr. Blakely's subjective belief alone "does not control the issue."

Bohn, 119 Wn.2d at 363. To show that his attorney-client relationship with Mr. Kahrs encompassed all of his civil litigation matters and the two matters described in the 2009 Order, Mr. Blakely was charged with producing evidence showing his belief was objectively reasonable in the circumstances. Mr. Blakely produced no such evidence in opposition to Mr. Kahrs' summary judgment motion.

The facts are similar to those in *Leipham v. Adams*. In *Leipham*, the court analyzed the reasonableness of a client's belief about the scope of representation. A decedent who had engaged an attorney's services to prepare powers of attorney and file a life insurance claim, and subsequently reported to "several people" that the lawyer was her attorney, did not have a reasonable basis to believe that the scope of their relationship exceeded the bounds of the "concrete legal tasks" the lawyer was initially retained to perform. *Leipham*, 77 Wn. App. at 833-34. Even where the parties arguing for the expanded scope of the legal relationship submitted an affidavit from the client's nephew that he had heard the decedent say the attorney was "handling her legal affairs," the court determined that the client's belief about the scope of representation was unreasonable. *Leipham*, 77 Wn. App. at 833 ("A client's subjective belief is only one of the factors to be considered in determining the scope of representation."). The court considered the attorney's "two concrete legal

tasks” (drafting documents and assisting in filing a life insurance claim) and found the evidence insufficient to impose on the attorney a general duty to oversee the client’s estate planning. *Id.* at 834.

Mr. Kahrs repeatedly reminded Mr. Blakely that his representation was limited by the 2009 Order, and Mr. Kahrs declined Mr. Blakely’s requests to represent him in his civil matters. CP 22-104. On the rare occasions that Mr. Kahrs assisted Mr. Blakely with procedural matters in his civil appeals, Mr. Kahrs expressly showed the limited purpose for which he appeared on Mr. Blakely’s behalf and obtained Mr. Blakely’s express consent to using funds for the limited purpose. CP 24-25, 62-72.

No competent evidence was presented in opposition to the summary judgment motion to show that Mr. Kahrs failed to competently represent Mr. Blakely for the two limited purposes defined in the 2009 Order. Because Mr. Blakely failed to produce prima facie evidence of breach, he did not sustain his burden and could not avoid summary judgment dismissal.

D. Michael Kahrs Owed No Duty to Prosecute Any of Ralph Blakely’s Civil Matters and Thus Breached No Duty of Care Owed to Mr. Blakely on Any Matter.

Mr. Kahrs demonstrated in his moving papers that he met his duties to Mr. Blakely vis-à-vis the matters authorized by the 2009 Order. Mr. Blakely failed to raise an issue of fact to the contrary. Mr. Kahrs

described his efforts to obtain evidence sufficient to challenge Mr. Blakely's conviction. He hired an investigator to interview the witness Mr. Blakely thought would recant his trial testimony. The witness told the investigator his trial testimony was truthful. Mr. Blakely again urged Mr. Kahrs to interview the witness after the witness moved to Texas, but refused to authorize Mr. Kahrs to hire an investigator in Texas for that purpose. Mr. Blakely submitted an uncertified affidavit by the witness in opposition to the summary judgment motion, claiming other investigators had obtained the affidavit. CP 130. An uncertified affidavit is not admissible on summary judgment. CR 56(e); *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 878-79, 431 P.2d 216 (1967). The trial court properly struck the evidence.

At Mr. Blakely's request, Mr. Kahrs also pursued a potential challenge to the conviction based on Mr. Blakely's mental status at his solicitation trial. Mr. Kahrs retained a neuropsychologist and neurobehavioral toxicologist to review Mr. Blakely's records and prepare a report on the effect on his mental status of Mr. Blakely's exposure to farm chemicals in years past. Mr. Blakely failed to follow through in response to the expert's requests for additional information, precluding use of the toxicologist for either post-conviction relief or to obtain medication in prison.

E. Mr. Blakely Failed to Show He Sustained Any Damage as a Proximate Result of Any Act or Omission by Mr. Kahrs.

In his Verified Complaint, Mr. Blakely asks the court (1) to require Mr. Kahrs “to return \$20,000 actual funds from the initial \$35,000.00 that was paid to Kahrs Law Firm Trust Account”; (2) to order Mr. Kahrs “to pay \$20,000.00 compensatory damages for prolonged incarceration (sic) of painful torture, loss of liberty, loss of expert medical care due to illegal restraint”; (3) for costs and disbursements; and, (4) for additional or further relief the court finds equitable, appropriate or just. CP 104.

The evidence shows that Mr. Kahrs fully accounted for all funds entrusted to him, returning funds remaining at the end of his representation. Mr. Blakely submitted no evidence to show that Mr. Kahrs retained any funds, much less \$20,000 belonging to the Special Needs Trust. Mr. Kahrs cannot show any damage from Mr. Kahrs’ handling of the trust funds.

Mr. Blakely steadfastly maintains that he is wrongfully incarcerated. However, no damages lie against Mr. Kahrs for Mr. Blakely’s conviction. Mr. Kahrs did not represent Mr. Blakely in his trial for the crime of conviction. Even if he had, Washington law requires a criminal malpractice plaintiff, such as Mr. Blakeley, to demonstrate a successful post-conviction challenge and prove his actual innocence by a

preponderance of the evidence before he is able to bring a legal malpractice action. *Piris v. Kitching*, 185 Wn.2d 856, 375 P.3d 627 (2016). Mr. Kahrs investigated whether a post-conviction challenge was feasible and concluded he had insufficient evidence to challenge Mr. Blakely's conviction. Because Mr. Blakely was and remains incarcerated for his conviction in the solicitation of murder trial, his legal malpractice claim must fail. Under the rationale of *Piris*, Mr. Blakely should be precluded from bringing a legal malpractice action against Mr. Kahrs for not mounting a successful post-conviction challenge.

Nor has Mr. Blakely demonstrated that he has sustained any damage for breach of the duty of care related to obtaining appropriate medical care while in prison. Mr. Blakely complains that Mr. Kahrs failed to get approval for him to take vitamin B₁₂. The evidence shows that Mr. Kahrs was assisting Mr. Blakely to have that supplement provided to him at his expense up until May 2014 when the attorney-client relationship ended. CP 27.

In summary, even if Mr. Blakely had submitted competent evidence on summary judgment to show breach of a duty, which he did not, he sustained no damage as a proximate result of any act or omission by Mr. Kahrs. Mr. Blakely's proof fails on this essential element of his cause of action for legal malpractice.

F. Michael Kahrs Accounted for All Funds Entrusted to Him and Thus Breached No Fiduciary Duty Owed to Ralph Blakely.

A plaintiff claiming breach of fiduciary duty must prove (1) existence of a duty owed, (2) breach of that duty, (3) resulting injury, and (4) that the claimed breach proximately caused the injury. *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 433-34, 40 P.3d 1206 (2002).

Mr. Blakely's Complaint alleges breach of fiduciary duty related to disbursement and use of the \$35,000 in trust funds Mr. Kahrs held on Mr. Blakely's behalf, return of file materials, and lack of communication with Mr. Blakely. CP 99-104. The only evidence before the trial court regarding the trust funds shows that Mr. Kahrs fully complied with the 2009 Order regarding maintaining an individual, interest-bearing trust account for Mr. Blakely and obtaining the Trustee's approval before any expenditure was made from that trust account. Mr. Kahrs did not pay his invoices or any other invoices for experts or investigators or anything else without the express approval of the Trustee. On occasion, Mr. Kahrs also obtained Mr. Blakely's express permission to expend funds.

At the conclusion of his representation and at Mr. Blakely's request, Mr. Kahrs sent Mr. Blakely an accounting of the trust funds. CP 28-29, 87-97, 33-61. Mr. Kahrs provided a written explanation of how

the funds were used. CP 88-89. He sent a check to the Trustee representing the balance remaining in the individual trust account. Mr. Kahrs sent a check representing other funds as directed by Mr. Blakely. The trust account balance was then zero. He provided Mr. Blakely copies of all his invoices in this litigation. CP 34-61.

In his opposition to the summary judgment motion, Mr. Blakely provided no evidence to contradict Mr. Kahrs' accounting.

Mr. Kahrs returned all documents in his possession that Mr. Blakely requested at the end of the attorney-client relationship and in response to Mr. Blakely's discovery requests. He has nothing further to send to Mr. Blakely. CP 29.

Mr. Kahrs fully communicated with Mr. Blakely throughout his representation, explaining what he could do for Mr. Blakely consistent with the 2009 Order, what he was not authorized to do for Mr. Blakely, and detailing the investigations he undertook and the results of them. Mr. Kahrs' invoices reflect his many telephone calls and letters to Mr. Blakely throughout his representation.

Mr. Blakely failed to produce any evidence in opposition to Mr. Kahrs' motion for summary judgment to raise a genuine issue of material fact that would preclude summary judgment on his breach of fiduciary duty claim.

G. The Motion to Strike Certain Declarations and Other Documents Mr. Blakely Submitted in Opposition to the Summary Judgment Motion Was Correctly Decided.

Mr. Blakely failed to properly identify his Clerk's Papers to support his arguments on appeal in accordance with RAP 9.6. The evidence Mr. Blakely submitted to support his opposition to Mr. Kahrs' summary judgment motion and was the subject of the motion to strike was confusing and consisted of inadmissible evidence. CR 56(e); *Melville v. State*, 115 Wn.2d 34, 36, 793 P.2d 952 (1990) ("The explicit, but plain standards of CR 56(e) must be complied with in summary judgment proceedings."). The declarants lacked personal knowledge of the matters they addressed and the declarations contained speculation and conjecture. ER 602. Lay witnesses gave legal opinions and made legal conclusions. ER 701; *King County Fire Protection Dists. v. Housing Auth.*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994) ("The legal opinions of witnesses are inadmissible."); *Leipham v. Adams*, 77 Wn. App. 827, 836, 894 P.2d 576 (1995) ("This court cannot treat as evidence legal opinions contained in affidavits."). Many of the documents were uncertified and thus inadmissible. *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 878-79, 431 P.2d 216 (1967). Others were irrelevant to the issues before the trial court on the summary judgment motion. *Tortes v. King County*, 119

Wn. App. 1, 15, 84 P.3d 252 (2003) (“The affidavit was stricken because it did not pertain to the issues before the trial court at the time.”).

The trial court properly struck the inadmissible evidence and disregarded it in deciding the summary judgment motion. This Court should affirm that ruling.

V. CONCLUSION

Michael C. Kahrs asks the Court to affirm dismissal of all claims against him by Ralph Howard Blakely and to affirm the order on his motion to strike. Mr. Blakely sued Mr. Kahrs for legal malpractice and breach of fiduciary duty. An attorney-client relationship existed between Mr. Blakely and Mr. Kahrs. The scope of the representation was defined by the 2009 Order of the Spokane County Superior Court and was limited to pursuing post-conviction relief and medical care for Mr. Blakely in prison. The duties Mr. Kahrs owed to Mr. Blakely were determined by the scope of the representation. Mr. Kahrs did not have a general representation agreement with Mr. Blakely. He represented Mr. Blakely only for those two purposes.

Mr. Kahrs moved the trial court for an order granting summary judgment dismissal of Mr. Blakely’s causes of action for legal malpractice and breach of fiduciary duty. His moving papers met his burden to show that Mr. Blakely could not prove all essential elements of his causes of

action. The burden shifted to Mr. Blakely to submit to the trial court competent evidence supporting each element of the claims. Mr. Blakely failed to submit the required evidence. Instead, he submitted inadmissible declarations and documents that could not meet his burden of proof. Mr. Blakely also submitted information and documents that were tangential to or irrelevant to the issues before the trial court: whether he could show sufficient evidence to prove his causes of action for legal malpractice and breach of fiduciary duty.

The trial court granted Mr. Kahrs' summary judgment motion and motion to strike the inadmissible evidence. The trial court dismissed all claims with prejudice. Mr. Kahrs was entitled to judgment as a matter of law because Mr. Blakely neither raised a genuine issue of material fact to preclude summary judgment nor met his burden to show he had evidence to support each essential element of his causes of action. Mr. Kahrs asks this court to affirm the trial court.

DATED this 5th day of October, 2016.

FORSBERG & UMLAUF, P.S.

By: 
Susan K. McIntosh, WSBA #26138
Roy A. Umlauf, WSBA #15437
Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing AMENDED RESPONDENT'S BRIEF on the following individuals in the manner indicated:

Ralph Howard Blakely, #817995
Stafford Creek Correction Center, H4 B36
191 Constantine Way
Aberdeen, WA 98520-9504
(X) Via U.S. "Legal Mail"

SIGNED this 6th day of October, 2016, at Seattle,
Washington.



Lynda T. Ha