No. 97101-3

SUPREME COURT

OF THE STATE OF WASHINGTON

TERENCE BUTLER,

Petitioner,

vs.

RANDALL T. THOMSEN, Individually and on Behalf of the Marital Community Comprised of RANDALL THOMSEN and JANE DOE THOMSEN, and CALFO HARRIGAN LEYH & EAKES, LLP, a Washington Professional Limited Liability Partnership, f/k/a DANIELSON HARRIGAN LEYH & TOLLEFSON, LLP,

Respondents.

PETITION FOR REVIEW FROM COURT OF APPEALS
CASE NO. 76536-1-I

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I. Introduction

The Petition of Terry Butler poses two legal issues critical to protection of clients victimized by the legal malpractice of their attorneys: (1) Would a manifest injustice occur, thus preventing application of collateral estoppel, if Washington courts allow negligent attorneys to enforce in a follow-on legal malpractice case, an erroneous legal decision by an underlying ("first-in-time") court, when the attorney's malpractice created the risk of such an erroneous decision? (2) Do Washington trial courts err by granting summary judgment establishing an attorney's breach of the standard of care when no dispute exists relative to the attorney's conduct but an "expert" nevertheless opines that those undisputed facts do not constitute a breach of the standard of care?

II. Identity of Petitioner

Petitioner Terence ("Terry") Butler filed this legal malpractice lawsuit against his former attorneys, Randall Thomsen and the Calfo Harrigan law firm (jointly referred to as "Calfo Harrigan").

III. Decisions Below

In its first appeal, Division I affirmed denial of Calfo Harrigan's motion to compel arbitration. App. 42. On remand, both sides filed motions for partial summary judgment (on different issues) which the trial court considered together. App. 23, 28. The trial court granted Butler's

motion for partial summary judgment, holding (in pertinent part) that Thomsen had breached the standard of care as a matter of law, and; denied Calfo Harrigan's motion for partial summary judgment on collateral estoppel and proximate cause. *Id.* Division I granted Calfo Harrigan's motion for discretionary review and this Court denied Butler's motion for discretionary review of that decision. Case no. 94939-5.

In an unpublished decision, Division I held that collateral estoppel bars Butler from re-litigating in this legal malpractice lawsuit the Wage Act and derivative claims that had been dismissed in *Butler v. ImageSource* [App. 52], because "Butler had sufficient opportunity to bring the *LaCoursiere* decision to the attention of the trial court, to seek discretionary review in light of the *LaCoursiere* decision, or to proceed with the litigation and file an appeal subsequent to final judgment on all claims." App. 010. The lower court expressed concern that "Butler's decision to settle his claim against his former co-owners and shift his litigation efforts to a lawsuit against his former lawyer. . .appears[1] to be the result of a tactical decision, rather than borne of an inability to see the *Butler* litigation through to fruition." App. 9 n. 5. The Court of Appeals thus reasoned that Butler "had a full and fair opportunity to litigate the

[1] Petitioner respectfully objects to the Court of Appeals' reliance on *appearances,* rather than evidence, when ruling on summary judgment issues.

issue of *LaCoursiere's* applicability" [App. 11 n. 10] and "cannot now use his decision not to [seek discretionary review or appeal to] obtain a second bite at the litigation apple." App. 010 n. 6.

Based on that reasoning, the Court of Appeals held that no manifest injustice would occur if collateral estoppel bars Butler from re-litigating in this case the Wage Act and derivative claim decisions by the trial court in *Butler v. ImageSource,* even though Thomsen's error relative to the *White* Release had created the very risk that the court in *Butler v. ImageSource* relied upon to dismiss those claims.

The Court of Appeals further held that Mr. Thomsen's failure to notice significant changes in the *White* Release from the parties' CR 2A Agreement, which the trial court in *Butlerv. ImageSource* had relied upon when it dismissed most of Butler's claims in *Butler v. ImageSource* [App. 53] and which the trial court in this case concluded had breached the standard of care as a matter of law [App. 26, 35], "can hardly be considered within the common knowledge of laypersons" and thus required expert testimony. App. 015. The Court of Appeals thus overturned the trial court determination that Thomsen had breached the standard of care as a matter of law.

IV. Issues Presented for Review

1. Would a manifest injustice occur if Washington courts

allow negligent attorneys to enforce an erroneous legal decision against the attorney's client in an underlying ("first-in-time") court, when the attorney's malpractice created the risk of such an erroneous decision?

2. Were the defendant attorney's errors within the common knowledge of a layperson and, if so, may a Washington trial court disregard an "expert" opinion on the ultimate issue of whether the attorney breached the standard of care?

V. The Petition Warrants Review Under RAP 13.4(b)

The Court should grant review of whether collateral estoppel should bar a client victimized by legal malpractice from re-litigating issues decided against the client in first-in-time litigation pursuant to RAP 13.4 (b)(1) because the lower court opinion conflicts with this Court's decisions in *Barr v. Day* and *City of Seattle v. Blume* [pp. 12-15, *infra*]; pursuant to RAP 13.4(b)(2) because the lower court opinion conflicts with published appellate decisions in *Flint v. Hart, Mastro v. Kumakichi Corp., Bullard v. Bailey,* and *Rabbage v. Lorella.* [pp. 14-18, *infra*], and; pursuant to RAP 13.4(b)(4) because this issue arises routinely in legal malpractice litigation and this Court should decide this issue of Washington law in the first instance rather than defer to the 9th Circuit Court of Appeals to decide it in *Setterquist v. Billbe,* 9th Cir. Case no. 18-35880 [pp. 15-19, *infra*].

The Court should also grant review whether the lower court correctly overruled trial court determination that the defense expert's opinion on the ultimate issue of the breach of the standard of care did *not* create a genuine issue of material fact, pursuant to RAP 13.4(b)(1) because the the lower court opinion is inconsistent with this Court's decisions in *Walker v. Bangs, Anderson v. Akzo Nobel Coatings, Inc.,* and *Volk v. DeMeerleer,* and; pursuant to RAP 13.4(b)4) this issue frequently arises in Washington legal malpractice cases, the lower court decision imposes a significant and unnecessary burden on victims of legal malpractice and the Washington trial courts, and this Court should decide this issue in the first instance rather than defer to the 9th Circuit in *Setterquist v. Billbe.*

VI. Statement of the Case

This Petition for Review arises out of summary judgment rulings. Two Division I opinions related to this case establish the relevant, undisputed facts, which petitioner adopts and summarizes next, except as otherwise noted. App. 001 (Case no. 74258-2-I, pp. 2-4) and App. 42 (Case no. 76536-1-I, pp. 2-5).[2]

[2] The opinion states that "Butler neither sought discretionary review of the rulings nor chose to litigate the case to final judgment and appeal the reverse rulings" [App. 004], and "Butler's counsel conceded that Butler had an opportunity to seek discretionary review in the *Butler* litigation but decided not to do so." App. 0009. Butler's counsel made no such concession. The audio recording of oral argument confirms that Butler's counsel told the Court the opposite, *i.e.,* Butler had, in fact, filed a notice of discretionary review. Audio recording of oral argument @ 13:30. The docket in Division I Case no.

Terence Butler was a founder of ImageSource and one of its four co-owners, along with Shadrach White, Victor Zvirzdys and Terry Sutherland. White sued ImageSource and its three other owners, *i.e.*, Butler, Zvirzdys, and Sutherland. On June 13, 2011, Butler, Zvirzdys, Sutherland and ImageSource retained Randall Thomsen and his law firm to jointly represent them in defense of the *White* lawsuit. Thomsen continued to jointly represent all four clients, including Butler, through and including execution of the *White* Release on or about January 2, 2013.

In June 2012, Thomsen negotiated the settlement of the *White* lawsuit, which counsel reduced to a CR 2A Agreement that provided, in pertinent part [App. 62]:

> 9. Mr. White agrees to release all defendants from any claims that he may possess against them. Defendants agree to release Mr. White from any claims that they may possess against him....

White's attorney, Stephanie Bloomfield, prepared the initial draft of the formal Release and Settlement Agreement, which she emailed to Thomsen on June 21, 2012. In contrast with the CR 2A Agreement, the Release provides in pertinent part [App. 64-70] :

724606-I, to which counsel referred the Court, also confirms that fact. Butler, however, agrees that he did not pursue discretionary review to conclusion. See n. 11, *infra.*

Parties[3]....This Agreement involves a resolution of the litigation commenced under Thurston County Cause No. 11-2 01309-7 (the "Lawsuit") **and related matters.**

Recitals....C. The Parties...**agreed to settle** fully and finally **all differences among them**..including, but not limited to, all allegations in the lawsuit and other issues.

. . .

10. Complete Release. In consideration of the promises set forth herein, **the Parties** agree to release **one another**, their spouses, their respective heirs, agents, attorneys, employees, directors, heirs, assigns and personal representatives from any and all charges, claims, and actions, whether known or unknown, arising prior to the date of this Agreement and arising directly or indirectly out of the Lawsuit or their previous dealings. This release specially includes and releases all claims that were asserted or could have been asserted in the Lawsuit by White relating to ImageSource (including employment issues) and any claims or counterclaims that were asserted or could have been asserted by Defendants in the Lawsuit against White. . . [Emphasis added where underlined].

Thomsen did *not* notice the difference between CR 2A §9 and Release §10 and drew no distinction between the two. App. 72 (42:10-22, 44:24-46:13); App. 74 (50:13-52:12).[4] Indeed, Thomsen conceded that the idea that the *White* Release might also release Butler's claims against

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[3] "The Parties" to the Settlement Agreement included Butler, Sutherland, Zvirzdys, White and ImageSource. App. 64

[4] **It is this obvious error by Thomsen that, in the opinion of Division I, requires expert testimony to establish a breach of the attorney's standard of care**. Such reasoning imposes unnecessary expense and litigation burdens on clients victimized by attorney negligence and on trial courts if required to allow such reasoning to proceed to trial. It also fosters the public the perception that even obvious attorney errors are above the law. In that context, the theory of "judgmental immunity" or the "attorney judgment rule" do *not* apply in this case because Mr. Thomsen did not notice the changes and thus failed to exercise any judgment. See, *Clark Cty. Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.,* 180 Wn. App. 689, 704, 324 P.3d 743 (2014).

Zvirzdys, Sutherland and ImageSource never crossed his mind between June 21, 2012 and January 2, 2013. App. 76 (82:23-83:14); App. 78 (208:21-209:19). He thus did *not* advise Mr. Butler (or his other jointly–represented clients) that, by signing the *White* Release, they would also release (or potentially release) all claims they might have against each other. App. 72 (42:23-44:5); App. 78 (206:6-209:19). The parties thus agree that no changes material to this dispute were made in the *White* Release, relative to identification of "the Parties," Recital C, or Release §10, between the initial draft on June 21, 2012 and the final version executed on January 2, 2013. App. 073-074 (47:4-50:12).

After settlement of the *White* lawsuit, Butler commenced a new lawsuit ("the *Butler* lawsuit") against Sutherland, Zvirzdys and ImageSource, which alleged financial misconduct and misappropriation of corporate funds, as well as claims for non-payment of compensation due him from ImageSource. In response to Butler's motion for summary judgment, the defendants, *i.e.,* Zvirzdys, Sutherland and ImageSource (through its receiver) asserted that §10 of the *White* Release had also released Butler's claims against them. The trial court in *Butler v. ImageSource* agreed with the defendants and held [App. 55]:

> The plain and unambiguous language of the release contained in paragraph 10 of the above-mentioned Release and Settlement Agreement applies to all claims by and between the Parties thereto, arising out of their previous dealings. The

> claims for relief asserted in the Motion arise from the dealings of the Parties pre-dating the January 2, 2013 date of the Release and Settlement Agreement. Those claims have therefore been released as a matter of law. [Citations omitted].

That trial court also concluded that Butler could not recover on his Wage Act claims in any event, reasoning that [App. 55 ¶E]:

> Plaintiff's claims as asserted within the Motion are not "wages" within the meaning of RCW ch. 49.52 because they are not based upon a contract or implied contract for the regular payment by ImageSource, or a defined amount of money to plaintiff.[5]

However, two months *after* the trial court dismissed Butler's Wage Act claims in *Butler v. ImageSource,* this Court issued *Lacoursiere v. Camwest Development, Inc.,* 181 Wn. 2d 734, 339 P.3d 963 (2014).[6] Butler thus maintained that collateral estoppel should not bar him from re-litigating his Wage Act claims in this lawsuit because the trial court analysis of his Wage Act claims in *Butler v. ImageSource* was in direct conflict with this Court's later decision in *LaCoursiere* and application of collateral estoppel to his Wage Act claims in this case would thus result in a manifest injustice.

The trial court in *Butler v. ImageSource* similarly concluded that

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[5] Butler had introduced extensive documentation in the *Butler* lawsuit in support of his Wage Act claim. Division I declined to decide whether *LaCoursiere* would have required a different result on Butler's Wage Act claims. App. 011 n. 10.

[6] *Kalmanovitz v. Stander,* 2015 WL 9273611 (W.D. Wash. 12/21/15)(Lasnik, J.) further elaborates on *LaCoursiere* and also supported Butler's assertion that the trial court in *Butler v. ImageSource* had reached a legally erroneous decision on his Wage Act claims.

Butler could not pursue derivative claims on behalf of ImageSource, because "Plaintiff Butler has shown no grounds upon which he has or should be granted standing to pursue claims for breach of fiduciary duty based on harm to ImageSource." App. 54-55 ¶C. However, the trial court in that case had overlooked the Division I decision in *Donlin v. Murphy,* 174 Wn. App. 288, 300 P.3d 424 (Div. I 2013). Butler thus maintained that collateral estoppel barring him from re-litigating his derivative claims on behalf of ImageSource would similarly result in a manifest injustice due to trial court legal error in the first-in-time litigation and thus preclude application of collateral estoppel.

On summary judgment, the trial court in this case held that Thomsen owed Butler a duty of care relative to the *White* Release and that Thomsen had breached that duty. App. 23, 28. The trial court also denied Thomsen's motion for summary judgment on Thomsen's affirmative defenses of collateral estoppel and causation. *Id.*

Thomsen sought discretionary review in Division I, and Butler sought cross-review. Division I granted review and reversed, holding that: (1) collateral estoppel barred Butler from re-litigating the Wage Act and derivative claims dismissed in *Butler v. ImageSource* because Butler had settled that lawsuit when he should have continued to litigate those

issues through appeal, and; (2) Thomsen's mistake, in failing to notice the changes in the terms of the *White* Release from the terms of the CR 2A Agreement, was not within the common knowledge of a layperson.

Petitioner timely moved for rehearing and publication, which the Court of Appeals denied on March 20, 2019. App. 21, 22. Petitioner now seeks discretionary review by this Court of the Division I decision.

VII. ARGUMENT

A. Manifest Injustice Will Occur if Clients Victimized by Attorney Malpractice Cannot Make Reasonable Decisions to Resolve the Risks of Harm Created by the Malpractice, Based on Recommendations of Replacement Counsel Considering of the Risk, Expense, and Likelihood of Success of Continuing Litigation.

Butler concurs in the lower court conclusion that collateral estoppel does *not* preclude a party from re-litigating an issue if a decision in the first-in-time litigation would result in manifest injustice. App. 008.[7]

Petitioner further concurs with the lower court's implicit recognition that a manifest injustice will occur, and thus prevent application of collateral estoppel, if 'a new determination is warranted in

[7] "Collateral estoppel is, in the end, an equitable doctrine that will not be applied mechanically to work an injustice." "[T]he party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the first forum." Not only must there have been an opportunity to fully litigate, the party against whom the estoppel is asserted must have had "'interests at stake that would call for a full litigational effort.'" Indeed. . ."for collateral estoppel to apply the party must have had 'sufficient motivation for a full and vigorous litigation of the issue.'" [Citations omitted].

order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws.'" *Estate of Hambleton,* 181 Wn.2d 802, 834-835, 335 P.3d 398 (2014), *quoting Restatement (Second) of Judgments* § 28(2)(b)(1982).

Accordingly, "[c]ollateral estoppel is only meant to apply in situation that 'have remained substantially static, factually and legally....[and] reflects the well-established principle that an "'intervening change in the applicable legal context'...prohibits the application of collateral estoppel." *Dot Foods, Inc. v. State Dept. of Revenue,* 185 Wn.2d 239, 256, 372 P.3d 747 (2016).[8]

Barr v. Day, 124 Wn.2d 318, 326, 879 P.2d 912 (1994) thus held that collateral estoppel does *not* prevent a client from re-litigating the reasonableness of an attorney's fee that had been decided in the underlying matter because manifest injustice would occur if it were to prevent the client from re-litigating an issue that had been decided "based on attorney misfeasance or nonfeasance."

Why then should a different result occur when the attorney's

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[8] *Quoting Comm'r v. Sunnen,* 333 U.S. 591, 599, 68 S. Ct. 715, 92 L.Ed. 898 (1948); accord, *Billings v. Town of Steilacoom,* 2 Wn. App. 2d 1, 15, 408 P.3d 1123 (2017) ("'only if the issue raised in the second case 'involves substantially the same bundle of legal principles that contributed to the rendering of the first judgment,' even if the facts and the issue are identical"), *quoting LeMond v. State DOL,* 143 Wn. App. 797, 805, 180 P.3d 829 (2008) and *Standlee v. Smith,* 83 Wn. 2d 405, 408, 518 P.2d 721 (1974).

negligence created the precise (and foreseeable) risk of harm that occurred in the client's subsequent litigation? And how is justice served by allowing the negligent attorney to prevent his/her client from re-litigating a foreseeable risk[9] of harm that the attorney's negligence created and thus escape liability for the attorney's error?

In that context, Washington long-ago rejected the "'independent business judgment rule'. . .[because it] discourages settlement, favors those who can afford lengthy litigation, and serves as a potential shield from liability for those who would otherwise be found liable for a legal wrong."[10] Indeed, the express public policy of Washington strongly encourages settlement. *E.g., City of Seattle v. Blume, supra,* 134 Wn.2d at 259. Here, in contrast, the Division I opinion strongly discourages settlement. Butler and the lower court thus diverge on whether a client victimized by an attorney's malpractice may *ever* settle the underlying

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[9] The "foreseeable risk" in this case is that a court or arbitrator might conclude that the *White* Release approved by Thomsen also released Butler's claims against Zvirzdys, Sutherland and ImageSource. That precise harm occurred in *Butler v. ImageSource.*

[10] *City of Seattle v. Blume,* 134 Wn.2d 243, 259-260, 947 P.2d 223 (1997); accord, *Versuslaw, Inc. v. Stoel Rives, LLP,* 127 Wn. App. 309, 327, 111 P.3d 866 (2005) (settlement of underlying matter did not break chain of causation); *Flint v. Hart,* 82 Wn. App. 209, 220-221, 917 P.2d 590 (1996)("[P]laintiff has an obligation to mitigate damages. The reasonableness of his or her conduct. . . is a question for the jury"); *Mastro v. Kumakichi Corp.,* 90 Wn. App. 157, 160, 951 P.2d 817, 819 (Div. I 1998)(settlement of underlying matter did not break chain of causation); 3 Mallen, *Legal Malpractice* §22:72, pp. 332 (2019 ed.)("Usually, the attorney whose negligence is a proximate cause of the client's injury cannot complain that the client made a good faith compromise of the claim for less than full value rather than pursue the matter to judgment").

litigation or risk created by the attorney's malpractice without interrupting the chain of causation through application of collateral estoppel, regardless of the reasonableness of the client's settlement decision based on long-recognized factors such as the recommendations of the client's replacement counsel, or the expense or likelihood of success, or other risks (*e.g.,* exposure to an attorney fee award) associated with continued litigation in the underlying matter.

These are not imaginary or hypothetical problems; victims of attorney malpractice in Washington must *routinely* decide whether to continue to pursue the underlying litigation in performance of the duty to mitigate, how far to litigate the underlying matter (*i.e.,* Rule 60 motion, reconsideration, discretionary review, appeal, or voluntary dismissal),[11] or whether to settle the underlying claim if feasible. Other real-life cases further illustrate the dilemma Butler faced when he had to decide whether to continue to litigate, abandon or settle *Butler v. ImageSource*:

- *Setterquist v. Billbe*, 2018 WL 4566050 (W.D. Wash), appeal pending (9th Cir. Case no. 18-35880) in which replacement counsel advised the client not to appeal the underlying decision that modified her ex-husband's maintenance obligation, due to the cost of appeal, exposure to attorney fees and unlikely success. The District Court dismissed the client's case for failure to state a claim for relief because the client should have sought relief through CR

[11] The Division I opinion admits of *no* limit on the obligation to continue litigation. Must the client file a CR 60 motion in the underlying matter? Seek discretionary review (to conclusion)? Appeal to the Court of Appeals? File a Petition for Review in this Court? Where does that obligation to continue litigation end? Division I does not say.

60 and/or through appeal in the underlying case. Setterquist's motion to certify four (4) issues to this Court is under submission as of this writing.

- *Bullard v. Bailey,* 91 Wn. App. 750, 959 P.2d 1122 (1998) in which the Court held that the client had no duty to seek CR 60 relief against a co-tortfeasor, regardless of whether CR 60 relief could have been obtained.

- *Rabbage v. Lorella,* 5 Wn. App.2d 289, 426 P.3d 768 (2018) in which Division I overturned dismissal of the client's complaint and held that the conduct of replacement counsel did *not* interrupt causation when the risk of harm created by the attorney's negligence was foreseeable.

Unfortunately, the lower court opinion denigrates the difficult decision-making process faced by victims of attorney negligence, relying instead on a grossly flawed and cynical understanding of the differing roles of legal malpractice counsel, who must steadfastly refuse to advise the legal malpractice client in the underlying litigation (or transaction), because any other course of action risks: (1) turning the legal malpractice attorney into a witness in the legal malpractice action on the issue of the reasonableness of the client's decision on whether to settle or continue to litigate the underlying case (with potential disqualification under RPC 3.7),[12] and; (2) waiving the client's attorney-client privilege and work

[12] For example, the legal malpractice client's implied waiver of privilege vis-à-vis replacement counsel subjects the client's settlement-related communications with and advice from replacement counsel (*e.g.,* Mr. Bianchi in *Butler v. ImageSource*) to

product protections with malpractice counsel under *Pappas v. Holloway,* 114 Wn.2d 198, 787 P.2d 30 (1990); *Dana v. Piper,* 173 Wn. App. 761, 295 P.3d 305 (2013); *Leen v. DeFoe,* 2018 WL 582448 (Div. I).

For these reasons, the lower court's concern that the victim of legal malpractice can blithely "pivot" from litigating the underlying matter as a tactic to instead pursue the legal malpractice claim is unfounded and contrary to actual legal practice, because the client must establish the reasonableness of the client's settlement decision at trial of the legal malpractice claim. See discussion, *supra* p. 14-15.

The Court thus based its Opinion on a fundamentally-flawed presumption about the relationship between the role of replacement counsel[13]--who advises the client relative to the reasonableness of settlement of the underlying matter and is subject to discovery in the legal malpractice case--with the role of legal malpractice counsel, who does not advise the client relative to settlement of the underlying matter and is not subject to discovery.

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discovery so the Court (or jury) can evaluate the reasonableness of that decision in the legal malpractice case. *Flint v. Hart, supra* 82 Wn. App. at 219-221.

[13] Or, as often occurs, the client appears *pro se*, because victims of legal malpractice often cannot find replacement counsel due to risks associated with potential allegations of fault by the first attorney and becoming a witness in a legal malpractice case.

Therefore, the different decision-making role of replacement counsel (or the client *pro se*) in the underlying matter, as contrasted with the role of legal malpractice counsel who has *no* role in the decision-making process in the underlying matter, solves the lower court's concern about a perceived unfairness in "shifting" responsibility from the underlying at-fault party onto the negligent attorney. Furthermore, the ramifications of trying to strategically manipulate settlement and assertion of a legal malpractice are so serious that the legal malpractice defendant has ample means to protect him/herself from such purported "unfairness."

Washington courts should not prevent clients victimized by legal malpractice from re-litigating issues decided in an underlying (first-in-time) litigation, when the risk of an erroneous decision arose, as here, due to the attorney's negligence. The Court should therefore grant review.

B. Trial Courts Properly Disregard an Expert's Conclusion on the Ultimate Issue When the Ultimate Issue Is Within the Common Knowledge of a Layperson.

To meet the standard of care, a Washington attorney must exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in this jurisdiction. *E.g., Hizey v. Carpenter*, 119 Wn.2d 251, 261, 830 P.2d 646, 652 (1992). Petitioner agrees with the lower court that

Washington does *not* require, expert testimony to establish a breach of the standard of care if the attorney's breach is within the common knowledge of a layperson. *Walker v. Bangs,* 92 Wn.2d 854, 858, 601 P.2d 1279 (1979); *Slack v. Luke,* 192 Wn. App. 909, 918, P.3d 370 P.3d 49 (2016); accord, 4 Mallen, *Legal Malpractice, supra* §37:127 (2019 ed).

Expert testimony is usually admitted under ER 702 if it will be helpful to the jury in understanding matters outside the competence of ordinary lay persons. *Anderson v. Akzo Nobel Coatings, Inc.,* 172 Wn.2d 593, 600, 260 P.3d 857, 861 (2011).[14] However, Washington courts may disregard expert testimony if "the issue involves a matter of common knowledge about which inexperienced persons are capable of forming a correct judgment." *City of Seattle v. Personeus,* 63 Wn. App. 461, 464, 819 P.2d 821 (1991), *quoting State v. Smissaert,* 41 Wn. App. 813, 815, 706 P.2d 647 (1985). Thus, although an expert opinion on an "ultimate issue of fact" *may* defeat a motion for summary judgment,[15] "[u]nreliable testimony. . .[and] speculation and conclusory statements will not preclude summary judgment." *Volk v. DeMeerleer*, 187 Wn.2d 241, 277, 386 P.3d

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[14] Washington has never expresly adopted *Frye* for application to civil cases. *Id.*

[15] *Eriks v. Denver,* 118 Wn.2d 451, 457, 824 P.2d 1207, 1210 (1992)(conflict of interest presented an issue of law; controverting expert testimony excluded).

254, 273 (2016)(citations omitted).[16]

Here, Thomsen admitted that he did not notice the change from the clear and unambiguous language of the CR 2A Agreement §9, to the materially broader and ambiguous language in *White* Release §10. See n. 4, *supra.* No expert testimony can change those facts. The trial court concluded that those undisputed facts established Thomsen's breach of the standard of care, as a matter of law. App. 26, 35. This Court, just like the trial court, can readily determine whether such an obvious error by the attorney met the standard of care without the aid of expert testimony. Division I nevertheless concluded that Thomsen's error "can hardly be considered within the common knowledge of laypersons." App. 15. Why not? Division I nevertheless now requires that clients victimized by legal malpractice must incur the significant expense and litigation time required to present expert testimony to establish an attorney's breach of the standard of care for even the most obvious of attorney mistakes. App. 015.

This issue, like the collateral estoppel issue, arises routinely in legal malpractice cases. The 9th Circuit appeal in *Setterquist v. Billbe,* for example, also involves the issue of whether Setterquist must introduce

[16] Petitioner properly objected in the trial court to much of the opinion testimony of Thomsen and his "expert" witness, pursuant to KCSC LCR 56(e).

expert testimony on attorney's breach of the standard of care, even though the defendant/attorney's sworn testimony admits the facts related to his error and the only "disputed fact" is the ultimate issue of whether those undisputed facts constitute a breach of the standard of care.

The Court should therefore grant review and decide this issue in the first issue rather than defer to the 9th Circuit or another federal court).

VIII. CONCLUSION

Petitioner Terry Butler thus asks that the Court grant his Petition for Review of the decision by the Court of Appeals, vacate that opinion, reinstate the trial court order establishing that Mr. Thomsen had breached the standard of care, and hold that collateral estoppel does *not* bar Butler from re-litigating in this legal malpractice case the underlying Wage Act and derivative claims decided against him in *Butler v. ImageSource.*

DATED: April 18, 2019.

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BY: /s/ Brian J. Waid
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PROOF OF SERVICE

I hereby certify that on this 18th day of April 2019, I caused a copy of the foregoing Petitioner's Motion for Discretionary Review to be delivered to Respondents, through their attorneys on the following in the manner indicated below:

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WAID LAW OFFICE, PLLC

BY: __/s/ Brian J. Waid_____
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PETITIONER'S APPENDIX IN SUPPORT OF PETITIONER'S MOTION FOR DISCRETIONARY REVIEW

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Terence Butler

Petitioner Terence Butler, by and through his undersigned counsel of record, respectfully submits the attached Appendix containing the order appealed from and parts of the record relevant to Petitioners' Motion for Discretionary Review, pursuant to RAP 17.3(8).

DATED: April 15, 2019.

WAID LAW OFFICE, PLLC

BY: /s/ Brian J. Waid
BRIAN J. WAID
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Attorney for Petitioner

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PROOF OF SERVICE

I hereby certify that on this 15th day of April 2019, I caused a copy of the foregoing Petitioner's Appendix in Support of Petitioner's Motion for Discretionary Review to be delivered to Respondents, through their attorneys on the following in the manner indicated below:

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Dated: April 15, 2019.

WAID LAW OFFICE, PLLC

BY: __/s/ Brian J. Waid_____
BRIAN J. WAID
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TERENCE BUTLER, Respondent/Cross-Petitioner, v. RANDALL T. THOMSEN, individually and on behalf of the marital community comprised of RANDALL THOMSEN and JANE DOE THOMSEN, and CALFO HARRIGAN LEYH & EAKES, LLP, a Washington Professional Limited Liability Partnership, f/k/a/ DANIELSON HARRIGAN LEYH & TOLLEFSON, LLP, Petitioners/Cross-Respondents.	DIVISION ONE No. 76536-1-I UNPUBLISHED OPINION FILED: December 31, 2018

DWYER, J. — Terence Butler sued his former attorney, Randall Thomsen, and his former attorney's firm, Calfo Harrigan Leyh & Eakes, LLP (collectively Thomsen), for legal malpractice. Following hearings on cross motions for summary judgment, the trial court ruled that Thomsen breached the standard of care as a matter of law, but declined to dismiss Thomsen's affirmative defense of third party fault or to rule that collateral estoppel barred certain of Butler's alleged theories of causation. We granted discretionary review and now reverse the trial court's rulings that Thomsen breached the standard of care and that collateral

estoppel did not bar Butler's alleged theories of causation arising from breach of fiduciary duty and statutory wage claims.

I

In 2010, ImageSource, a document imaging company, had four equal shareholders: Shadrach White, Victor Zvirzdys, Terry Sutherland, and Terence Butler. Butler discovered that his co-owners had received substantially greater personal payments from the company than he had received. In 2011, the co-owners all agreed to "level out" Butler by having ImageSource pay him amounts to match the expenditures the company had made to the other owners. Butler agreed to wait to receive the payments until the company was performing well.

Shortly thereafter, White left the company and filed a lawsuit (White) against ImageSource and his three former co-owners. Butler, Sutherland, and Zvirzdys retained Thomsen to jointly represent them in defense of the White lawsuit. In mediation, the parties successfully reached an agreement to settle the lawsuit. They memorialized their settlement in a written CR 2A agreement. In pertinent part, this agreement stated that "Mr. White agrees to release all defendants from any claims that he may possess against them. Defendants agree to release Mr. White from any claims that they may possess against him."

White's attorney offered to draft a more detailed agreement that would "be consistent with the CR 2A, but include the more detailed language and items we did not include in the summary agreement." The final release and settlement agreement (White Release) stated:

> In consideration of the promises set forth herein, the Parties agree to release one another, their spouses, their respective heirs,

> agents, attorneys, employees, directors, heirs, assigns and personal representatives from any and all charges, claims and actions, whether known or unknown, arising prior to the date of this Agreement and arising directly or indirectly out of the Lawsuit or their previous dealings.

Butler, Sutherland, White, and Zvirzdys all signed the White Release.

After the settlement of the White lawsuit, Butler believed that ImageSource was performing sufficiently well to commence paying him pursuant to the "level out" agreement he had reached with his co-owners. Sutherland and Zvirzdys objected. Butler hired an attorney, Mario Bianchi, who filed a lawsuit (Butler) against Sutherland, Zvirzdys, and ImageSource. In this suit, Butler demanded payment pursuant to the level out agreement and advanced several other claims, including breach of fiduciary duty and statutory wage claims.

Butler brought a motion seeking summary judgment against his co-owners on his breach of fiduciary duty and his statutory wage claims. In response, Sutherland and Zvirzdys argued that the trial court should grant summary judgment against Butler on his breach of fiduciary duty and statutory wage claims and should also dismiss all of Butler's claims that arose prior to the White lawsuit. According to Sutherland and Zvirzdys, Butler voluntarily released all such claims by signing the White Release.

In reply, Butler argued that Sutherland and Zvirzdys were misinterpreting the release and that the White Release did not release his claims against them. Butler contended that there was no consideration for the release of claims amongst Butler, Sutherland, Zvirzdys, and ImageSource in the White Release. However, Butler did not assert that Washington law, as explained in Berg v.

Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990), permitted him to introduce extrinsic evidence of the intent of the signatories to the White Release.

The Butler court rejected Butler's arguments and granted partial summary judgment against him. The court granted summary judgment against Butler as to his breach of fiduciary duty and statutory wage claims and also held that Butler released any claims related to the "level out" agreement when he signed the White Release. Butler neither sought discretionary review of the rulings nor chose to litigate the case to final judgment and appeal the adverse rulings. Rather, 11 months later, he settled the case.

Butler then filed suit against Thomsen, claiming that he committed malpractice in reviewing and approving the White Release by failing to notice that its language released Butler's claims against Sutherland, Zvirzdys, and ImageSource.[1] In the trial court, Butler moved for summary judgment dismissal of various affirmative defenses raised by Thomsen, including third party fault,[2] and for summary judgment that Thomsen breached the standard of care as a matter of law when reviewing the White Release. Thomsen filed his own motion for summary judgment on the issue of causation, asserting that Butler should be collaterally estopped from relitigating his breach of fiduciary duty and statutory wage claims. Both parties provided declarations from experts in support of their motions and in opposition to those of their opponents.

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[1] This is not the first time we have been asked to resolve an issue in this matter. In an unpublished opinion, Butler v. Thomsen, No. 74258-2-I (Wash. Ct. App. Aug. 29, 2016) (unpublished), http://www.courts.wa.gov/opinions/pdf/742582.pdf, we held that the White Release did not compel Butler to resolve this dispute with Thomsen through arbitration.

[2] Specifically, that Butler's attorney in the Butler litigation, Mario Bianchi, committed malpractice.

The trial court granted partial summary judgment, holding that Thomsen breached the standard of care as a matter of law, but refused to strike Thomsen's affirmative defense of third party fault. The trial court denied Thomsen's motion for summary judgment based on collateral estoppel. We granted discretionary review.

II

Thomsen contends that the trial court erred by denying his motion for summary judgment on certain issues of causation. This is so, Thomsen asserts, because collateral estoppel barred Butler from relitigating his underlying breach of fiduciary duty and statutory wage claims from the Butler litigation. In response, Butler avers that application of the doctrine of collateral estoppel is inappropriate herein because there was no final judgment in the Butler litigation and because the application of the doctrine would work an injustice. We disagree.

We "review a summary judgment ruling de novo and consider the same evidence heard by the trial court, viewing that evidence in a light most favorable to the party responding to the summary judgment [motion]." Slack v. Luke, 192 Wn. App. 909, 915, 370 P.3d 49 (2016) (citing Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000)). "A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Lybbert, 141 Wn.2d at 34. "A material fact is one that affects the outcome of the litigation." Owen v. Burlington N. & Santa Fe R.R., 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). "While questions of fact typically are left to the trial

process, they may be treated as a matter of law if 'reasonable minds could reach but one conclusion' from the facts." Slack, 192 Wn. App. at 916 (quoting Hartley v. State, 103 Wn.2d 768, 775, 698 P.2d 77 (1985)).

In a professional negligence action alleging legal malpractice, "the plaintiff must show (1) the existence of an attorney-client relationship that gives rise to a duty of care, (2) an act or omission by the attorney in breach of that duty, (3) damage to the client, and (4) proximate causation between the breach of duty and the damage incurred." Slack, 192 Wn. App. at 916 (citing Hizey v. Carpenter, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992)). "General principles of causation are no different in a legal malpractice action than in an ordinary negligence case." Halvorsen v. Ferguson, 46 Wn. App. 708, 719, 735 P.2d 675 (1986). Proximate cause is shown through proof that, but for the attorney's negligence, the plaintiff would have prevailed or at least achieved a better result. Halvorsen, 46 Wn. App. at 719.

The doctrine of collateral estoppel applies when the following four elements are met: "(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied." Malland v. Dep't of Ret. Sys., 103 Wn.2d 484, 489, 694 P.2d 16 (1985). "Whether collateral estoppel applies to preclude relitigation of an issue is a question of law that we review de novo." LeMond v. Dep't of Licensing, 143 Wn.

App. 797, 803, 180 P.3d 829 (2008) (citing State v. Vasquez, 109 Wn. App. 310, 314, 34 P.3d 1255 (2001)).

The finality required for a judgment to be appealed is not the same as the finality required for purposes of applying collateral estoppel. Cunningham v. State, 61 Wn. App. 562, 566, 811 P.2d 225 (1991). To determine whether a judgment is sufficiently final to invoke collateral estoppel, we consider whether the decision was adequately deliberated, whether it was firm rather than tentative, whether the parties were fully heard, whether the court supported its decision with a reasoned opinion, and whether the decision was subject to appeal or was reviewed on appeal. Cunningham, 61 Wn. App. at 567 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 13, cmt. g (AM. LAW INST. 1982)). Issues that have been decided on summary judgment may, depending on an analysis of the different factors, be considered to have been decided with sufficient finality. Cunningham, 61 Wn. App. at 567-68. That a party settles a case following a judgment does not prevent said judgment from satisfying the final judgment requirement. Nielson v. Spanaway Gen. Med. Clinic, Inc., 135 Wn.2d 255, 263-64, 956 P.2d 312 (1998). See also In re Dependency of H.S., 188 Wn. App. 654, 660-61, 356 P.3d 202 (2015); Bunce Rental, Inc. v. Clark Equip. Co., 42 Wn. App. 644, 648, 713 P.2d 128 (1986).

"Collateral estoppel is, in the end, an equitable doctrine that will not be applied mechanically to work an injustice." Hadley v. Maxwell, 144 Wn.2d 306, 315, 27 P.3d 600 (2001). "[T]he party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the first forum."

Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 299, 309, 96 P.3d 957 (2004). Not only must there have been an opportunity to fully litigate, the party against whom the estoppel is asserted must have had "'interests at stake that would call for a full litigational effort.'" Hadley, 144 Wn.2d at 312 (quoting LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE: TRIAL PRACTICE, CIVIL § 373, at 763 (5th ed. 1996)). Indeed, as we have recently reiterated, "for collateral estoppel to apply, the party must have had 'sufficient motivation for a full and vigorous litigation of the issue.'" Weaver v. City of Everett, 4 Wn. App. 2d 303, 316, 421 P.3d 1013 (2018) (quoting Hadley, 144 Wn.2d at 315).

However, it would work an injustice to apply collateral estoppel when "'a new determination is warranted in order to take account of an intervening change in the applicable legal context.'" In re Estate of Hambleton, 181 Wn.2d 802, 835, 335 P.3d 398 (2014) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 28(2)(b) (AM. LAW INST. 1982)). "[C]ollateral estoppel is meant to apply only in situations that 'have remained substantially static, factually and legally.'" Dot Foods, Inc. v. Dep't of Revenue, 185 Wn.2d 239, 256, 372 P.3d 747 (2016) (quoting C.I.R. v. Sunnen, 333 U.S. 591, 599, 68 S. Ct. 715, 92 L. Ed. 898 (1948)).

The parties dispute whether collateral estoppel bars Butler from asserting a theory of causation premised upon breach of fiduciary duty and statutory wage claims previously dismissed on summary judgment by the Butler court.[3] The

[3] Thomsen seeks the application of collateral estoppel to Butler's breach of fiduciary duty and statutory wage claims because application of the doctrine strips Butler of a significant portion of his claimed damages. If Butler had lost on his breach of fiduciary duty and statutory wage claims because of the White Release, he could bring a claim against Thomsen to recover what he would otherwise have recovered for such claims in the Butler litigation. However, when, as occurred here, Butler's breach of fiduciary duty and statutory wage claims failed for reasons other

parties agree that the first and third elements of collateral estoppel are met, but Butler incorrectly asserts that there was no final judgment and that the application of collateral estoppel would work an injustice.

The partial summary judgment[4] in Butler was not tentative, Butler provided full briefing on the issues to the Butler court, and the judge supported her ruling with a reasoned written decision. Furthermore, Butler had the opportunity to seek discretionary review of the decision or to file an appeal after entry of final judgment on all claims. The Butler court's ruling was therefore sufficiently firm to constitute a final judgment for the purpose of applying collateral estoppel.

Similarly, the application of collateral estoppel to Butler's causation claims would not work an injustice because Butler had a full and fair opportunity to litigate the issues in Butler. Butler brought the motion which resulted in the summary judgment order he now seeks to avoid. There can be no doubt that he was properly motivated to engage in a full litigational effort to prevail on his motion as he was seeking over one million dollars in damages. While before the trial court in this matter, Butler's counsel conceded that Butler had the opportunity to seek discretionary review in the Butler litigation but decided not to do so. Furthermore, Butler could have seen the matter through to final judgment and then appealed the decisions as a matter of right.[5] See RAP 2.2.

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than the White Release, Butler cannot then seek to recover for those claims on the ground that Thomsen committed malpractice when reviewing the language of the White Release.

[4] Butler, citing to an unpublished case from Division Two, mistakenly addresses most of his argument on this issue toward the notion that settlements cannot constitute final judgments. One reason this argument is inapposite is because the final judgment relied upon by Thomsen to argue for the application of collateral estoppel is the partial summary judgment order, not the subsequent settlement agreement.

[5] Indeed, Butler's decision to settle his claims against his former co-owners and shift his litigation efforts to a lawsuit against his former lawyer, with the hope or expectation that he would

Butler asserts that substantive changes in the law regarding his statutory wage claims would make the application of collateral estoppel to a ruling made prior to the change unjust.[6] Specifically, Butler avers that our Supreme Court's holding in LaCoursiere v. Camwest Dev., Inc., 181 Wn.2d 734, 339 P.3d 963 (2014), published subsequent to the Butler court's ruling, changed the law upon which the Butler court based its ruling.[7] Therefore, according to Butler, it would be unjust to hold him to the Butler court's now legally erroneous ruling.

However, the LaCoursiere decision was published only a few months subsequent to the Butler court's ruling and almost a year *before* Butler settled the Butler litigation.[8] Butler had sufficient opportunity to bring the LaCoursiere decision to the attention of the trial court,[9] to seek discretionary review in light of the LaCoursiere decision, or to proceed with the litigation and file an appeal subsequent to final judgment on all claims. He chose not to exercise those

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be able to litigate anew the issues presented, appears to be the result of a tactical decision, rather than one borne of an inability to see the Butler litigation through to fruition.

[6] Butler also contends that the Butler court made a substantive error in its ruling regarding his breach of fiduciary duty claim, specifically by ruling that the cause of action belonged to the business and, thus, he lacked standing to bring such a claim. He asserts that it would be unjust to hold him to such an erroneous ruling. However, the inquiry we conduct herein is concerned only with the opportunity and incentive to fully litigate issues, not with the quality of the decision reached. Butler had the opportunity to seek review of any rulings he believed to be erroneous, and cannot now use his decision not to do so as a shield to block the application of collateral estoppel and obtain a second bite at the litigation apple.

[7] Such an argument mistakes a change in the law with a change in the interpretation of existing law. No new statute was passed; the only change in the applicable legal context was the interpretation of an existing statute.

[8] The Butler ruling in question was dated August 15, 2014. The LaCoursiere decision was published on October 23, 2014. 181 Wn.2d 734. Butler did not settle the Butler case until September of 2015.

[9] Pursuant to CR 54(b), the Butler court retained the power to revise its interlocutory rulings at any time prior to the final adjudication of all claims.

options.[10] The application of collateral estoppel to these claims works no injustice.

III

Thomsen next contends that the trial court erred by ruling that he breached the applicable standard of care as a matter of law. This is so, Thomsen asserts, because he presented expert testimony that established a genuine dispute of material fact regarding whether Thomsen breached the standard of care under the circumstances. In response, Butler asserts that Thomsen's expert's testimony is inadmissible evidence and that expert testimony was unnecessary to establish a breach of the standard of care under the circumstances. Thomsen has the better argument.

The standard of care applicable to all cases of professional negligence involving the practice of law is "that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction." Cook, Flanagan & Berst v. Clausing, 73 Wn.2d 393, 395, 438 P.2d 865 (1968). Thus, to breach the duty of care, an attorney "must fail to exercise 'the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law'" in Washington. Geer v. Tonnon, 137 Wn. App. 838, 850-51, 155 P.3d 163 (2007) (quoting Hizey, 119 Wn.2d at 261). Breach of the standard of care is generally a question of fact, but if reasonable minds could

[10] Because Butler had, despite choosing to forgo it, a full and fair opportunity to litigate the issue of LaCoursiere's applicability to his statutory wage claims, we need not reach the parties arguments regarding the applicability of LaCoursiere to the claims raised.

not differ on the question, breach may also be determined as a matter of law. Smith v. Preston Gates Ellis, LLP, 135 Wn. App. 859, 864, 147 P.3d 600 (2006).

Because the law can be a "highly technical field beyond the knowledge of the ordinary person," Walker v. Bangs, 92 Wn.2d 854, 857, 601 P.2d 1279 (1979) (citing Lynch v. Republic Publ'g Co., 40 Wn.2d 379, 389, 243 P.2d 636 (1952)), expert testimony is often required to determine whether an attorney's duty of care was breached in a legal professional negligence action. Geer, 137 Wn. App. at 851. However, such expert testimony is not required where the breach is such that it could fairly be considered within the common knowledge of laypersons. Walker, 92 Wn.2d at 858.

Several other common principles inform our inquiry. "[E]vidence submitted in opposition to summary judgment must be admissible." SentinelC3, Inc. v. Hunt, 181 Wn.2d 127, 141, 331 P.3d 40 (2014). "[T]o preclude summary judgment, an expert's affidavit must include more than mere speculation or conclusory statements." Cho v. City of Seattle, 185 Wn. App. 10, 20, 341 P.3d 309 (2014).

In addition, "[t]he cardinal rule with which all [contract] interpretation begins is that its purpose is to ascertain the intention of the parties." Berg, 115 Wn.2d at 663 (quoting Corbin, The Interpretation of Words and the Parol Evidence Rule, 50 CORNELL L. QUAR. 161, 162 (1965)). In Berg, our Supreme Court held that "extrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent." 115 Wn.2d at 667. The court quoted directly from the Restatement (Second) of

Contracts, stating that the correct interpretation of a contract is determined "'by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence.'" Berg, 115 Wn.2d at 668 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 212(2) (AM. LAW INST. 1981)). Again quoting from the Restatement, the court explained that this rule "is not limited to cases where it is determined that the language used [in the contract] is ambiguous." Berg, 115 Wn.2d at 668 (quoting RESTATEMENT § 212 cmt. b).

Thomsen first asserts that he presented evidence to show that he did not breach the standard of care. This is so, he avers, because his expert witness opined that the White Release did not release claims amongst Butler, Sutherland, and Zvirzdys. To support his opinion, Thomsen's expert relied upon extrinsic evidence, including the prior CR 2A agreement, an e-mail exchange between Thomsen and White's attorney specifying that the White Release be consistent with the CR 2A agreement, and the preamble to the settlement agreement.

In response, Butler contends that such evidence contradicts the writing and is inadmissible here because the language of the White Release is not ambiguous. To Butler, it follows that expert testimony based upon such extrinsic evidence must also be inadmissible.

To the contrary, Berg clearly states that extrinsic evidence may be admissible to interpret unambiguous contract language. 115 Wn.2d at 668. Thus, the extrinsic evidence was properly relied upon by Thomsen's expert,

whose opinion raised questions of fact regarding the appropriate inferences to draw from the language of the CR 2A agreement and the White Release. This evidence was sufficient to establish a disputed genuine issue of material fact regarding the correct interpretation of the White Release.[11]

Thomsen next asserts that he presented expert opinion evidence tending to prove that, under the circumstances, Thomsen did not breach the applicable standard of care even if the White Release did release claims amongst Butler, Sutherland, and Zvirzdys.[12] Thomsen's expert opined that, given the circumstances of joint representation in a complex business litigation matter, if there was a mistake made in drafting or accepting the White Release, such a mistake was reasonable. Thomsen's expert based this opinion primarily on facts alleged in Thomsen's affidavit, specifically that Butler told Thomsen that there

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[11] Butler appears to also suggest that we should place at least some weight on the Butler court's ruling that the Release did, in fact, release all claims amongst Butler, Sutherland, and Zvirzdys. However, that ruling is not binding on Thomsen as he was not a party to the Butler litigation and did not have an opportunity to litigate the issue in that case.

[12] Thomsen also asserts that he exercised judgment when reviewing and approving the White Release and that such judgment is protected by the attorney judgment rule expressed in Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey PC, 180 Wn. App. 689, 324 P.3d 743 (2014). Thomsen presumably seeks to qualify the alleged mistake as an exercise of judgment because "[i]n general, mere errors in judgment or in trial tactics do not subject an attorney to liability for legal malpractice." Halvorsen, 46 Wn. App. at 717. In response, Butler contends that Thomsen merely failed to notice the difference between the language of the CR 2A agreement and the White Release and to take appropriate measures to address the differences. Butler further reasons that such failure did not involve an exercise of judgment and, thus, the attorney judgment rule is inapplicable. Our review of the record indicates that Butler is correct; Thomsen did not consider that the pertinent section of the White Release may have expressed something different than the intent expressed in the CR 2A agreement before advising his clients to sign.

However, regardless of whether such an alleged mistake required the exercise of judgment, that does not change the standard of care or that which constitutes a breach of the standard of care in a professional negligence action. The question of breach remains the same: Was Thomsen's alleged failure to notice the difference (if any) between the CR 2A agreement and the White Release an unreasonable mistake under the circumstances? In other words, could an attorney exercising "the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law" in Washington make such a mistake? Hizey, 119 Wn.2d at 261.

were no unresolved disputes between him and Sutherland and Zvirzdys, that Butler told Thomsen that he had independent counsel, and that Thomsen's engagement letter limited the scope of the engagement to the claims asserted in the White litigation.

Although Butler presented his own expert witness testimony countering that of Thomsen's expert, he asserts that such testimony was unnecessary in this case because the breach was of the type within the common knowledge of laypersons. This is so, Butler contends, because Thomsen's failure to notice that the language of the White Release might release Butler's claims against Sutherland and Zvirzdys is something that laypersons could readily understand. However, the question is not merely whether Thomsen made a mistake in reviewing the language of the White Release but, rather, whether such a mistake is one that no reasonable attorney in Washington would make under the same circumstances. See Geer, 137 Wn. App. at 851 (requiring expert witness testimony tending to prove that attorney breached duty in the specific circumstances where the client failed to disclose information to the attorney). The circumstances herein, a joint representation in a complex business litigation matter, can hardly be considered within the common knowledge of laypersons. Expert opinion evidence on these complex legal circumstances is both appropriate and necessary. See Geer, 137 Wn. App. at 851-52.

Thomsen and Butler presented conflicting expert opinion evidence on the issue of Thomsen's breach of the standard of care. Thus, we conclude that the trial court erred when it granted summary judgment to Butler on that issue.

IV

Next, Butler contends that the trial court should have granted summary judgment against Thomsen precluding Thomsen from arguing the affirmative defense of third party fault. In response, Thomsen asserts that he met his burden by offering evidence sufficient to show a genuine question of material fact regarding each element of a legal professional negligence claim against Bianchi, Butler's attorney in the Butler litigation.

The defense of third party fault is an affirmative defense. See Wuth v. Lab. Corp. of Am., 189 Wn. App. 660, 701-02, 359 P.3d 841 (2015). The party asserting an affirmative defense bears the burden of proving the elements of the defense. Fulle v. Boulevard Excavating, Inc., 20 Wn. App. 741, 743, 582 P.2d 566 (1978). For a third party fault defense, the party asserting third party fault must present evidence of the third party's negligence constituting fault. See e.g., Adcox v. Children's Ortho. Hosp & Med. Ctr., 123 Wn.2d 15, 25-26, 864 P.2d 921 (1993). Thus, because Thomsen asserts that Bianchi's malpractice, or professional negligence, was responsible for any harm to Butler in the Butler litigation, to survive summary judgment Thomsen must show that there is a question of material fact regarding each element of a malpractice claim against Bianchi.

Thomsen contends that he met his burden to offer evidence sufficient to create a question of material fact regarding each element of his third party fault defense through Thomsen's declaration, his expert witness's declaration, and the underlying testimony from the Butler proceedings upon which his expert based

his opinions. Butler does not assert that such evidence fails to meet Thomsen's burden but, rather, asserts that some of the evidence from Thomsen's expert witness is inadmissible. Specifically, Butler avers that Thomsen's expert's opinions regarding Bianchi's choice of forum[13] are inadmissible and that, therefore, Thomsen failed to meet his burden of proof on the issue of causation. Thus, Butler asserts that Thomsen failed to meet his burden to show that Bianchi's actions were the proximate cause of the harm to Butler.[14]

Butler first contends that Thomsen's expert witness's opinions regarding Bianchi's choice of forum are inadmissible because such a consideration is impermissibly speculative. Washington courts' standard "trial within a trial" method of determining cause in fact in a legal malpractice action supports Butler's argument because it necessarily presumes that different fact finders would reach the same conclusion when presented with the same evidence and law. See Brust v. Newton, 70 Wn. App. 286, 293, 852 P.2d 1092 (1993) ("[T]he purpose of the 'trial within a trial' that occurs in a legal malpractice action is not to recreate what a particular judge or fact finder would have done. Rather, the jury's task is to determine what a reasonable judge or fact finder would have done."); See also Daugert v. Pappas, 104 Wn.2d 254, 257, 704 P.2d 600 (1985) ("[W]hen an attorney makes an error during a trial, the causation issue in the

[13] Thomsen asserts that Bianchi erred by not insisting that the dispute in Butler be submitted to arbitration before the White case mediator, as allowed in the White Release. Thomsen's theory is that such an arbitration would have advantaged Butler because the mediator/arbitrator had personal knowledge of the White settlement and of the parties' intentions in entering into the settlement.

[14] Indeed, Butler does not dispute Thomsen's expert's opinion regarding whether Bianchi breached the standard of care. The only dispute is whether Bianchi's alleged malpractice proximately caused Butler's alleged damages.

subsequent malpractice action is relatively straightforward. The trial court hearing the malpractice claim merely retries, or tries for the first time, the client's cause of action which the client asserts was lost or compromised by the attorney's negligence."). Furthermore, as noted by courts in other jurisdictions, permitting legal malpractice claims to proceed upon the ground that the attorney should have sought a different venue is to allow claims that are entirely speculative. See e.g., Mitchell v. Transamerica Ins. Co., 551 S.W.2d 586, 588 (1977) ("Trying to predict what a jury might do at any given time or place is hazardous and is one of the vagaries of life.").

Thomsen asserts that the aforementioned policy concerns are addressed herein because arbitration has different evidentiary rules than does superior court and because the arbitration agreement specifies that the mediator who helped negotiate the agreement would act as the arbitrator.[15] We disagree with Thomsen that these reasons are sufficient to overcome the policy concern that testimony, even expert testimony, regarding what a decision-maker might or might not have decided, is speculative. It cannot matter that the decision-maker in arbitration may have had greater background knowledge of the White litigation or that the rules of evidence are different in arbitration. Even if true, testimony regarding what could have been the outcome in such a forum remains speculative. The "trial within a trial" mechanism is the proper method by which to determine what may or may not have happened in prior litigation but for the

[15] The White Release actually specifies that the mediator "or a single arbitrator as agreed by the Parties" will arbitrate. It does not state that the parties would necessarily use the services of the mediator.

alleged malpractice. Brust, 70 Wn. App. at 293. Thus, we hold that speculative expert testimony regarding what may have or not have happened in a different forum is inadmissible.

We further hold that Thomsen's expert may not present opinion evidence regarding whether the Butler court would have ruled differently but for Bianchi's tactical decisions. The proper method for determining what a trier of fact would have determined absent Bianchi's alleged mistakes is to present the case to the jury free of such mistakes. See Brust, 70 Wn. App. at 293. For example, Thomsen may present evidence to the jury that Bianchi did not present extrinsic evidence of the intent of the White Release's language in Butler and then may present said extrinsic evidence. However, Thomsen is not permitted to present speculative expert testimony that Bianchi's failure to present such extrinsic evidence and argue for its admissibility under Berg caused the Butler court's rulings regarding the correct interpretation of the White Release. That is for the jury to decide.

Although we hold that Thomsen's speculative expert opinion evidence as to hypothetical results is inadmissible, the underlying evidence upon which said expert opinion evidence is based shows that there is a genuine dispute of material fact on the issue of causation. Butler's reply to Sutherland's and Zvirzdys's response to Butler's motion for summary judgment in the Butler litigation did not in any way refer to Berg and the rules it set forth regarding the

admissibility of extrinsic evidence.[16] Whether such failure resulted in the Butler court's ruling—in other words, whether the extrinsic evidence not considered by the Butler court would establish that the White Release did not release claims amongst Butler, Sutherland, and Zvirzdys—is a disputed factual question. See Berg, 115 Wn.2d at 668 ("A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence." (quoting RESTATEMENT (SECOND) OF CONTRACTS § 212(2))). We conclude that there is a genuine dispute over a question of material fact regarding whether Bianchi's alleged malpractice proximately caused Butler's alleged damages. The trial court properly denied summary judgment on this issue.

Reversed and remanded for proceedings consistent with this opinion.

We concur:

[16] Butler asserts that the extrinsic evidence Thomsen contends should have been introduced is inadmissible under Berg and subsequent cases applying the Berg rules. Butler appears to argue that the evidence is inadmissible simply because it contradicts his and the Butler court's interpretations of the White Release. While Butler lists several principles that courts consider when interpreting contract language (that he asserts show extrinsic evidence should not be admissible when contract language is clear), he fails to acknowledge that the Berg court held both that extrinsic evidence is admissible even in situations in which the contract language is not ambiguous and that "the various principles of [contract] interpretation should not be applied as absolutes." 115 Wn.2d at 664, 669.

FILED
3/20/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TERENCE BUTLER, Respondent/Cross-Petitioner, v. RANDALL T. THOMSEN, individually and on behalf of the marital community comprised of RANDALL THOMSEN and JANE DOE THOMSEN, and CALFO HARRIGAN LEYH & EAKES, LLP, a Washington Professional Limited Liability Partnership, f/k/a/ DANIELSON HARRIGAN LEYH & TOLLEFSON, LLP, Petitioners/Cross-Respondents.	DIVISION ONE No. 76536-1-I ORDER DENYING MOTION FOR RECONSIDERATION

The respondent/cross-petitioner, Terence Butler, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

Dwyer, J.

FILED
3/20/2019
Court of Appeals
Division I
State of Washington

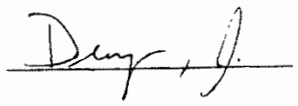
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TERENCE BUTLER, Respondent/Cross-Petitioner, v. RANDALL T. THOMSEN, individually and on behalf of the marital community comprised of RANDALL THOMSEN and JANE DOE THOMSEN, and CALFO HARRIGAN LEYH & EAKES, LLP, a Washington Professional Limited Liability Partnership, f/k/a/ DANIELSON HARRIGAN LEYH & TOLLEFSON, LLP, Petitioners/Cross-Respondents.	DIVISION ONE No. 76536-1-I ORDER DENYING MOTION TO PUBLISH

The respondent/cross-petitioner, Terence Butler, having filed a motion to publish opinion, and the hearing panel having considered its prior determination and finding that the opinion will not be of precedential value; now, therefore, it is hereby

ORDERED that the unpublished opinion filed December 31, 2018, shall remain unpublished.

FOR THE COURT:



APPENDIX

SUMMARY JUDGMENT ORDER

Hon. Suzanne Parisien
Date of Hearing: February 3, 2017
Time of Hearing: 9:00 A.M.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

TERENCE BUTLER, Plaintiff, vs. RANDALL T. THOMSEN, and CALFO HARRIGAN LEYH & EAKES, LLP, a Washington Professional Limited Liability Partnership f/k/a DANIELSON HARRIGAN LEHY & TOLLEFSON, LLP, Defendants.	NO. 15-2-17996-9 SEA ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT, AND DENYING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter came before the Court for hearing on the 3rd day of February 2017, on Plaintiff Terence Butler's Motion for Partial Summary Judgment and Defendants' Motion for Partial Summary Judgment. The Court heard the oral arguments of counsel for Plaintiff, Brian J. Waid, and for Defendant, Keith D. Petrak. The Court also considered the following documents and evidence which were brought to the Court's

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206-388-1926

attention before the order on summary judgment was entered.

On behalf of Plaintiff Terence Butler:

1. Plaintiff's First Amended Complaint;

2. Defendants' Answer to First Amended Complaint;

3. Declaration of Brian J. Waid dated October 2, 2015, with Exhibits 1 through 8 attached thereto;

4. Declaration of Keith D. Petrak dated September 28, 2015, with Exhibits A through D attached thereto;

5. Declaration of Brian J. Waid dated January 6, 2017, with Exhibits 9 through 30 attached thereto;

6. Declaration of Kevin Steinacker dated January 5, 2017, with Exhibit A attached thereto;

7. Plaintiff's Motion for Partial Summary Judgment;

8. Notice of Errata to Plaintiff's Motion for Partial Summary Judgment, dated January 17, 2017;

9. Plaintiff's Reply in Support of Plaintiff's Motion for Partial Summary Judgment and KCLR 56(e) Objection to Inadmissible Evidence;

10. Plaintiff's Opposition to Defendants' Motion for Partial Summary Judgment, KCLR 56(e) Objection to Inadmissible Evidence;

11. Plaintiff's Notice of Errata to Plaintiff's Motion for Partial Summary Judgment, dated January 17, 2017;

12. Declaration of Jessica M. Creager in Support of Plaintiff's Opposition to Defendants' Motion for Partial Summary Judgment, dated January 23, 2017, with Exhibits 31 through 33 attached thereto;

13. Declaration of Jessica M. Creager in Support of Plaintiff's" (1) Motion to Seal, and; (2) Opposition to Defendants' Motion for Partial Summary Judgment dated January 23, 2017, with Exhibit 34 attached thereto;

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On Behalf of Defendants:

1. Defendants' Motion for Partial Summary Judgment;

2. Declaration of Keith D. Petrak dated January 6, 2017, with Exhibits A through CC attached thereto.

3. Defendants' Opposition to Motion for Partial Summary Judgment;

4. Supplemental Declaration of Keith D. Petrak dated January 23, 2017;

5. Declaration of Robert J. Adolph dated January 23, 2017;

6. Declaration of Randall T. Thomsen dated January 20, 2017.

7. Defendants' Reply in Support of Defendants' Motion for Partial Summary Judgment;

Based on the arguments of counsel, and the pleadings and evidence, the Court **GRANTS** Plaintiff's Motion for Partial Summary Judgment in part and Orders that the following issues have been decided, as a matter of law:

A. Defendant Randall Thomsen breached the standard of care he owed to Plaintiff Terence Butler in connection with Thomsen's drafting and approval of the Release and Settlement Agreement in the *White* lawsuit, and;

B. The following affirmative defenses asserted by Defendants Thomsen and Calfo Harrigan Leyh & Eakes, LLP are stricken: (a) lack of jurisdiction; (b) failure to state a claim; (c) laches; (e) statute of limitations relative to Butler's claims against Defendants; (f) unclean hands/public policy/ illegality; (h) res judicata; (i) release; (j) waiver; (k) collectability.

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AND IT IS FURTHER ORDERED that the Court **DENIES** Plaintiff's motion for partial summary judgment as to the following affirmative defenses: (c) third party fault; (d) accord and satisfaction; (e) statute of limitations applicable to Butler's claims against the underlying defendants in *Butler v. ImageSource*; (g) set off, and; (h) collateral estoppel.

AND IT IS FURTHER ORDERED that the Court **DENIES** Defendants' Motion for Partial Summary Judgment on causation and collateral estoppel.

AND IT IS FURTHER ORDERED that the Court **DENIES** Plaintiff's KCLR 56(e) Objections to Inadmissible Evidence; provided however, that the Court will not consider any evidence it determines to be inadmissible.

DATED this 7th day of February, 2017, at Seattle, Washington.

Hon. Suzanne Parisien, Judge

PRESENTED BY:

WAID LAW OFFICE

BY: /s/ Brian J. Waid
BRIAN J. WAID
WSBA No. 26038
JESSICA M. CREAGER
WSBA No. 42183
Attorneys for Plaintiff

SERVICE ACCEPTED; NOTICE OF PRESENTATION WAIVED:

BYRNES KELLER CROMWELL, LLP

WAID LAW OFFICE
5400 California Avenue SW, Suite D
Seattle, WA 98136
206-388-1926

APPENDIX

REPORT OF PROCEEDINGS
(Trial Court Decision: pp. 90-101)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

TERENCE BUTLER, Plaintiff, vs. RANDALL THOMSEN, individually, and CALFO HARRIGAN LEYH & EAKES, LLP, a Washington Professional Limited Liability Partnership, fka DANIELSON HARRIGAN LEYH & TOLLEFSON, LLP, Defendants.	)))))No.15-2-17996-9 SEA))COA No. 76536-1-I)))))

Verbatim Transcript of Proceedings
Transcribed from Audio Recording

The above-entitled matter came on for hearing February 3, 2017, at King County Courthouse, Seattle, Washington.

BEFORE:

HONORABLE SUZANNE PARISIEN

APPEARANCES:

BRIAN J. WAID, on behalf of the Plaintiff

KEITH D. PETRAK, on behalf of the Defendants

REPORTED BY: Yvonne A. Southworth, CCR No. 2129.

And I apparently didn't anticipate Your Honor's concern. There really isn't any dispute that those are W-2 wages.

And, Your Honor, I would -- you already have this attached to our brief. But I would hand up the Kalmanovitz decision by Judge Lasnik, because it explains and it quotes LaCoursiere. And I think it gives helpful context.

THE COURT: Okay. Thank you.

MR. WAID: Counsel has that.

THE COURT: Okay. So I said ten minutes, but now I do want to go back and look at that case to make sure -- by that, I mean LaCoursiere one more time, and I'm going to read Judge Lasnik's interpretation of it. And then we'll be back in 15 minutes or so.

MR. WAID: Thank you so much, Your Honor.

MR. PETRAK: Thank you, Your Honor.

THE CLERK: All rise. The Court is in recess.

(Recess taken.)

THE COURT: Okay. I -- the Court has reviewed a lot of materials in this case. Very well written and well argued as I would expect from folks who are here today. I would compliment you both and

your associates and assistants with all of these materials.

I have considered everything. I'm going to start with what I think to be the most easier of this, which is I want to go through the affirmative defenses and make sure that I have gotten them right. I have a lot of orders. Some old, some new. Here is my ruling on the affirmative defenses.

So the following affirmative defenses asserted by the defendants are stricken and either because they have been agreed upon or because the Court has made a ruling. Lack of jurisdiction, I understand that was conceded. B, failure to state a claim. With regard to third party fault, I am not striking that affirmative defense. With regard to accord and satisfaction, I'm also not striking that affirmative defense.

I am striking laches as I understand that was agreed. Correct?

MR. WAID: Correct.

THE COURT: Okay. Statute of limitations relative to Butler's claims against defendants, I think both parties agree that is alive and well. Correct, Mr. Waid?

MR. WAID: Could I --

THE COURT: Statute of limitations relative to the claim against the law firm, right, no issue on that?

MR. WAID: That -- that's supposed to be granted. The motion should be granted. There's -- there's no issue. It should be stricken.

THE COURT: Should be stricken. Do you agree with that?

MR. PETRAK: Calfo Harrigan isn't claiming that his claims are barred by the statute. We are claiming that there is that affirmative defense as to the underlying case. I believe they agree on that one.

THE COURT: But the statute of limitations relative to Butler's claims against defendants, I'm striking that.

MR. PETRAK: Um-hum.

THE COURT: Okay. Wait a minute. So now I have got a double negative here. We're striking lack of jurisdiction. We're striking failure to state a claim. We're striking statute of limitations as to Calfo Harrigan.

MR. PETRAK: But not as to the underlying case.

THE COURT: Right. Okay. So -- okay. So I

made a mistake here. Okay. With regard to unclean hands and public policy, the Court is striking that as I don't believe that the unclean hands, public policy affirmative defense is appropriate here given who the parties are and that there have been no assertions with regard to Calfo Harrigan.

And also collectibility, I believe that you folks agreed on that, right?

MR. PETRAK: Correct.

THE COURT: And waiver, you agree on that. And release, you agree on that.

MR. PETRAK: I would -- again, we're getting into the affirmative defense in our case versus the underlying case. I would say that waiver is alive in the underlying case, just as I would say unclean hands, public policy is alive in the underlying case. I understand you're ruling on that in our case.

THE COURT: Okay. So I think I may have crossed of things that I shouldn't have on this order. Do you have another copy of this final order?

MR. WAID: I'm sorry, Your Honor --

THE COURT: You don't?

MR. WAID: We can email it.

THE COURT: Okay. Okay. As long as you folks know what I'm doing here, that's all that really

matters. And the -- I'm not striking the affirmative defense of collateral estoppel.

And then further on this point, it's further ordered that the Court denies plaintiff's motion for partial summary judgment on the following affirmative defenses: Statute of limitations, applicable to Butler's claims against the underlying defendants in Butler versus Imagesource and set off. And the Court agrees with that.

Are we clear on that piece of this?

MR. PETRAK: Unclean hands, public policy as could have been raised by the defendants in the Butler case?

THE COURT: Well, I'm striking that as well. I'm striking that as well. Did I address all of them now?

MR. WAID: Yes, Your Honor.

MR. PETRAK: I believe so.

THE COURT: Okay, okay. So now I want to go to plaintiff's motion with regard to breach of the standard of care. And I am so loathe to make sports analogies. In fact, I never make them, but in this case, maybe it's because Super Bowl is coming up, but I thought it was appropriate in this case. You know, I see a release, and I'm sure most attorneys see a

release, and most clients do too, as really the Super Bowl of all the proceedings in -- in the course of litigation. It is the culmination of every motion. In which case, the analogy would be every play that's made in a game. Every hearing is a game. Everything leads to the release, because -- I don't know what the stats are, but 98 percent of all cases, somewhere around there, end up resolving, and they resolve with a release. It is the singular most important document that will come out of a case.

And I have reviewed everything. There are frankly very good arguments on both sides. I do understand that if you look at the totality of everything, that perhaps a different Court would resolve this differently. But I -- I believe that the standard of care was breached. I believe that -- particularly, how I came to that conclusion was, you know, the length of time, I think six months between the CR 2(A) agreement and the final release. That gave Mr. Thomsen and anyone else, Mr. Butler as well, ample opportunity to look this document over. And the care with which the initial retainer letter was written really recognized that, you know, there's -- you know, could be pitfalls here. I'm representing, you know, all the defendants. I do know about this

settlement agreement. I know there's questions of fact about what he knew and what he knew about, whether it was, you know, he thought all was fine, and that's great. It just -- it doesn't matter.

The release is the most important document that any attorney is duty-bound to read word for word for word for word. Double read it. What can it possibly mean? Can it be interpreted this way? This release was so broad, so completely all-encompassing, that to not have noticed that it was significantly different from the CR 2(A) agreement and to not have pointed this out to Mr. Butler, say, hey, I know you guys think you're all good with each other, but I need to make sure, because you need to look at this release. It is, you know, forevermore, you are saying good-bye to claims against your fellow business associates. So if you want to do that, great, but just know that this release is quite broad. You might want to take this to Mr. Kunold. You know, whether or not Mr. Kunold breached or something, I have no idea. Not before me today. But to say that, well, we thought he had another lawyer, so it takes the duty off of us, clearly, Mr. Butler -- I'm sorry, Mr. Thomsen had an independent duty independent of any other attorney who may have had eyes on this, or

perhaps should have had eyes on this.

So I do find a breach. The harder question for this Court is what to do with the other portions of the motions, those brought by defendant. Having looked at the cases -- and it was helpful to read the Kalmanovitz versus Standen -- I'm sure I'm misstating it -- and to reread how it interpreted the LaCoursiere case. You know, I do not find that the law on what his wage is is sufficiently clear. It is not. One of the sentences in the Kalmanovitz case says -- I'm looking at page four here. It says, these are not gratuitous gifts or payments wholly within the discretion of the employer, but rather moneys owed to the employee to offset expenses incurred during his employment if in benefit of the employer.

It cannot be said of this case. There are just too many questions of fact to the nature of those payments. And frankly, they do look more to me like gratuitous gifts or payments. I remember reading all these documents, and I forget whether Mr. Zvirzdys -- some intelligent attorney started calling him Mr. Z. I will do that as well. Between his statements and Mr. Sutherland's statements, the way they talked about, this is a generous company, we were a generous company, we treated our people well, we're a generous

company, that doesn't sound to me like wages. It just doesn't. So I think there are just simply too many questions of fact here despite the very excellent advocacy for this Court to grant the defendant's motion as to causation and as to collateral estoppel. So I'm denying the defendant's motion on those two grounds.

MR. PETRAK: And the question of fact as to collateral estoppel is on the wage issue?

THE COURT: That's the one that comes to me mostly, but I don't want to limit myself. I'm not making any specific rulings about, you know, other issues of fact. I mean, I think that there are -- I think there are going to be -- I don't know what will happen in this case in the future, but I think there would be -- that a jury would potentially have a difficult time finding damages, causation. I think this is -- it would be very tricky. Not just that cases within a case is difficult for juries. I believe that is. But the facts of this case, I think, would make it significantly difficult for them to parse this out.

MR. PETRAK: What I want to make sure I understand is, collateral estoppel as an issue is still in the case, but it just presents factual

questions as opposed to no collateral estoppel.

THE COURT: That's correct. That's absolutely correct. I'm not granting it on anyone's behalf. I'm just denying it, because I think that there are frankly too many questions of fact. I've honed in on the one with regard to wages, but I think there are others too. I think that there are significant issues with regards to causation, and I think that there are going to be significant hurdles with regard to damages as well. Not just the attorney's fees. I know we have not addressed that here today. But as to other damages, I think there are significant hurdles.

Is there anything that you folks believe is unruled upon?

MR. WAID: I think you've covered it, Your Honor, as far as I can -- I don't think there's anything.

MR. PETRAK: I think we understand your ruling. Obviously, there's aspects we don't agree with.

THE COURT: Of course. Here's what I would like. I would like the two of you to take back your orders, if you would, and maybe you can craft one right now. It can be handwritten. I prefer to have

folks leave with an order today.

MR. WAID: Could -- can you email that --

THE CLERK: I don't have it on my system. And I don't know who's in the office.

THE COURT: Okay. If you folks want to go back to work and work on it together, that's fine, but I want it by Monday. I get when there's complicated cases with a lot of different things, and when I have kind of competing orders, none of them really work. I just like to keep it close in time, because otherwise, I forget. So that would be helpful for me to have it by Monday.

MR. WAID: We will.

MR. PETRAK: We'll knock it out this afternoon.

THE COURT: Terrific. Thanks for your time everyone. Certainly very challenging issues. I will join in how many judges now have had a piece of this? Judge Linde, Judge North. I think I'm missing somebody.

MR. PETRAK: Court of Appeals.

MR. WAID: Division 1.

THE COURT: Yeah, Division 1, right.

MR. PETRAK: I'm sure there's a few others.

THE COURT: I think there might be. But

anyway, I will join the esteemed -- plus the six different firms involved. Anyway, I hope that you all have a good weekend. Thank you for your hard work on this case. You did a very good briefing, and I'll look forward to receiving the order.

MR. PETRAK: Thank you for the time.

THE COURT: Yeah. Of course.

THE CLERK: All rise. Court is in recess.

(Proceedings adjourned.)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

TERENCE BUTLER, Respondent, v. RANDALL T. THOMSEN, individually and on behalf of the marital community comprised of RANDALL T. THOMSEN and JANE DOE THOMSEN; CALFO HARRIGAN LEYH & EAKES, LLP, a Washington Professional Limited Liability Partnership, f/k/a DANIELSON HARRIGAN LEYH & TOLLEFSON, LLP, JOHN JOHNSON, Appellants	)	No. 74258-2-I UNPUBLISHED OPINION FILED: August 29, 2016

VERELLEN, C.J. — When Terence Butler filed this legal malpractice lawsuit against his former attorney, Randall Thomsen and Thomsen's law firm, Calfo Harrigan Leyh & Eakes (Thomsen), Thomsen sought to invoke an arbitration provision contained in a settlement agreement drafted by Thomsen resolving claims between Butler and third parties. The arbitration clause extends to "[a]ny dispute arising out of" the settlement agreement.[1] Because the malpractice claim is based upon an allegedly overbroad release provision drafted by Thomsen, Thomsen argues the scope of Butler's release is a dispute arising out of the settlement agreement. But Thomsen does not

[1] Clerk's Papers (CP) at 68, ¶ 19.

establish an objective manifestation of intent to extend arbitration to any portion of a subsequent malpractice claim against him. Neither does he establish any disclosure to Butler that by signing the settlement agreement, he was agreeing to arbitrate any portion of a malpractice claim he might have against Thomsen. We conclude Thomsen is not entitled to invoke arbitration and affirm the trial court.[2]

FACTS

I. White v. ImageSource, Zvirzdys, Sutherland, and Butler

Terence Butler, Shadrach White, Victor Zvirzdys, and Terry Sutherland were equal co-owners of ImageSource, a company that sells and services document imaging software and equipment. In 2011, White resigned from the company and sued ImageSource and the remaining three owners, asserting claims for wrongful (constructive) termination, breach of fiduciary duty, and shareholder oppression, among others. Butler, Zvirzdys, Sutherland, and ImageSource retained Randall Thomsen and his law firm Calfo Harrigan Leyh & Eakes to jointly represent them in defense of White's claims.[3]

In 2012, the parties to the White lawsuit mediated and signed a CR 2A agreement by which White was to release all claims against the defendants and the defendants to release all claims against White. Seven months later, Thomsen drafted and circulated the final settlement documents contemplated by the CR 2A agreement. The resulting release and settlement agreement provided in pertinent part:

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[2] We also grant Butler's motion to strike the portions of Thomsen's briefs containing matters outside the record.

[3] The fee agreement did not include an arbitration clause.

> 10. Complete Release. In consideration of the promises set forth herein, the Parties agree to release one another, their spouses, their respective heirs, agents, attorneys, employees, directors, heirs, assigns and personal representatives from any and all charges, claims, and actions, whether known or unknown, arising prior to the date of this Agreement and arising directly or indirectly out of the Lawsuit or their previous dealings. This release specially includes and releases all claims that were asserted or could have been asserted in the Lawsuit by White relating to ImageSource (including employment issues) and any claims or counterclaims that were asserted or could have been asserted by Defendants in the Lawsuit against White.
>
> . . . .
>
> 19. Dispute Resolution. *Any dispute arising out of this Agreement* shall be settled by arbitration before Judicial Dispute Resolution ("JDR") in Seattle, using Paris Kallas or a single arbitrator as agreed by the Parties.[4]

II. Butler v. ImageSource, Zvirzdys, and Sutherland

Several months later, ImageSource terminated Butler's employment. Butler then commenced a separate lawsuit against Sutherland, Zvirzdys, and ImageSource alleging claims for breach of fiduciary duty, oppression of minority shareholder, conversion, and willful failure to pay wages, among others. None of the defendants demanded arbitration in their answers to Butler's lawsuit.[5] Instead, in response to Butler's motion for partial summary judgment on his breach of fiduciary duty and failure to pay wages claims, the defendants asserted that Butler's claims against them were barred by virtue of the release in the White settlement agreement. The trial court agreed and denied Butler's motion:

> The plain and unambiguous language of the release contained in paragraph 10 of the [White] Release and Settlement Agreement applies to all claims by and between the Parties thereto, arising out of their previous dealings. The claims for relief asserted in the Motion arise from dealings

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[4] CP at 67-68 (emphasis added).

[5] See CR 8(c) (arbitration is an affirmative defense).

> of the Parties pre-dating the January 2, 2013 date of the Release and Settlement Agreement. Those claims have therefore been released as a matter of law.[6]

No one sought review.

III. Butler v. Thomsen and Calfo Harrigan

Thereafter, while Butler's remaining claims against Sutherland, Zvirzdys, and ImageSource were still pending (shareholder oppression, conversion, conspiracy, unjust enrichment, accounting, removal of directors, declaratory relief, criminal profiteering, and derivative liability), Butler brought this legal malpractice action against his former lawyer Thomsen and the Calfo Harrigan law firm based in part on the trial court's partial summary judgment in Butler v. ImageSource that the White release covered his breach of fiduciary duty and failure to pay wages claims.[7] Thomsen then moved to compel arbitration based on the arbitration clause he drafted as part of the White settlement agreement. The trial court denied his motion.

Thomsen appeals.[8]

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[6] CP at 74. The court also determined Butler's breach of fiduciary duty claim was based on the alleged wrongful use of corporate funds and thus, was based on harm to the corporation. The court therefore concluded Butler did not have standing to pursue that claim because it belonged to the corporation. Butler later amended his complaint to assert derivative claims.

[7] Butler also asserted claims against Thomsen for breach of contract and breach of fiduciary duty.

[8] An order denying a motion to compel arbitration is appealable as a matter of right under RAP 2.2(a)(3). Stein v. Geonerco, Inc., 105 Wn. App. 41, 44-45, 17 P.3d 1266 (2001).

ANALYSIS

Arbitrability

Thomsen does not contend that the White settlement agreement constituted a release of Butler's legal malpractice claims against Thomsen. Neither does he contend that the malpractice claim itself is subject to arbitration. Rather, Thomsen contends that the broad language of the arbitration clause—"[a]ny dispute arising out of" the settlement agreement—extends to the question of whether the release Butler signed encompassed his claims against other shareholders and the corporation. According to Thomsen, even though that question is critical to Butler's malpractice claim against him, it is a discrete dispute subject to arbitration, and Thomsen can invoke arbitration even though he is a nonsignatory to the White settlement agreement.

We review the decision on a motion to compel arbitration de novo.[9] A trial court's determination regarding the arbitrability of a dispute is also reviewed de novo.[10]

"Washington law vests courts with the power to determine 'whether . . . a controversy is subject to an agreement to arbitrate.'"[11] "The arbitrability of a dispute is determined by examining the arbitration agreement between the parties."[12] "'Although it is the court's duty to determine whether the parties have agreed to arbitrate a particular dispute, the court cannot decide the merits of the controversy, but may determine only

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[9] Saleemi v. Doctor's Assocs., Inc., 176 Wn.2d 368, 375, 292 P.3d 108 (2013); Wiese v. CACH, LLC, 189 Wn. App. 466, 473, 358 P.3d 1213 (2015).

[10] Heights at Issaquah Ridge, Owners Ass'n v. Burton Landscape Grp., Inc., 148 Wn. App. 400, 404, 200 P.3d 254 (2009).

[11] Saleemi, 176 Wn.2d at 376 (quoting RCW 7.04A.060(2)).

[12] In re Marriage of Pascale, 173 Wn. App. 836, 842, 295 P.3d 805 (2013) (citing Heights, 148 Wn. App. at 403).

whether the grievant has made a claim which *on its face* is governed by the contract.'"[13] "If the reviewing court 'can fairly say that the parties' arbitration agreement covers the dispute, the inquiry ends because Washington strongly favors arbitration.'"[14]

"In interpreting an arbitration clause, the intentions of the parties as expressed in the agreement control."[15] This court follows the "objective manifestation theory" of contract interpretation, focusing on the "reasonable meaning of the contract language to determine the parties' intent."[16] In Washington, the intent of the parties to the agreement may be discovered not only from the actual language of the agreement but also from "'the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations advocated by the parties.'"[17]

The arbitration clause in the White settlement agreement provided that "[a]ny dispute arising out of this Agreement shall be settled by arbitration before Judicial Dispute Resolution ('JDR') in Seattle, using Paris Kallas or a single arbitrator as agreed

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[13] Heights, 148 Wn. App. at 405 (quoting Peninsula Sch. Dist. No. 401 v. Pub. Sch. Employees of Peninsula, 130 Wn.2d 401, 413, 924 P.2d 13 (1996)).

[14] Pascale, 173 Wn. App. at 842 (quoting Davis v. Gen. Dynamics Land Sys., 152 Wn. App. 715, 718, 217 P.3d 1191 (2009)).

[15] Tacoma Narrows Constructors v. Nippon Steel-Kawada Bridge, Inc., 138 Wn. App. 203, 216, 156 P.3d 293 (2007).

[16] Viking Bank v. Firgrove Commons 3, LLC, 183 Wn. App. 706, 712-13, 334 P.3d 116 (2014); Berg v. Hudesman, 115 Wn.2d 657, 663, 801 P.2d 222 (1990) ("'The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties.'" (quoting Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L. QUAR. 161, 162 (1965))).

[17] Tanner Elec. Co-op. v. Puget Sound Power & Light Co., 128 Wn.2d 656, 674, 911 P.2d 1301 (1996) (quoting Scott Galvanizing, Inc. v. Nw. Enviroservices, Inc., 120 Wn.2d 573, 580-81, 844 P.2d 428 (1993)).

by the Parties."[18] The settlement agreement specifically defined "the Parties" to consist of "Shadrach White (individually and on behalf of his marital community), ImageSource, Inc., a Washington corporation ('ImageSource'), Terry Sutherland ('Sutherland'), Terrence Butler ('Butler') and Victor Zvirzdys ('Zvirzdys') (each individually and on behalf of their respective marital communities), and CloudPWR LLC, a Washington limited liability company *(collectively, "the Parties")*."[19]

We are unpersuaded by Thomsen's contentions. First, the objective manifestation of intent in signing the arbitration clause is not so broad that "any dispute" includes a critical portion of a legal malpractice claim based on the theory that Thomsen drafted an overbroad release clause.[20] The provisions for selecting an alternative arbitrator are entirely inconsistent with Thomsen's broad reading of the arbitration clause. The parties, as defined in the settlement agreement, agreed to use Paris Kallas as the arbitrator, "or a single arbitrator as agreed by the Parties."[21] If Thomsen is correct that the arbitration clause extends to a portion of Butler's malpractice claim against him, then the settlement agreement would contemplate his participation in the selection of an arbitrator. And the lack of any role in that selection is an objective manifestation of intent that no portion of the malpractice claim is subject to arbitration.

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[18] CP at 68.

[19] CP at 64 (emphasis added). Thomsen concedes he is not a party to the settlement agreement. Reply Br. at 1.

[20] See Nelson v. Westport Shipyard, Inc., 140 Wn. App. 102, 113-14, 163 P.3d 807 (2007) (disputes "arising out of this Agreement" is "much narrower" than disputes "arising from or relating to this Agreement"); Wiese, 189 Wn. App. at 477 ("an arbitration provision that encompasses any controversy 'relating to' a contract is broader than language covering only claims 'arising out' of a contract" (quoting McClure v. Tremaine, 77 Wn. App. 312, 314-15, 890 P.2d 466 (1995))).

[21] CP at 68, ¶ 19.

Second, although "Washington has long favored arbitration of disputes, [and] contract law still provides that 'parties to a contract may determine the specific terms of the agreement, but . . . the contract provisions are subject to limitation and invalidation if they contravene public policy.'"[22] An agreement is contrary to public policy if it has a tendency to be against the public good.[23] Even assuming that Thomsen qualifies as a nonsignatory entitled to invoke arbitration of a client's malpractice claim, there is a public policy concern. Thomsen represented Butler when he drafted the arbitration clause he now seeks to invoke.

An attorney has a fiduciary duty to advise a client of the substance of an agreement with a third party drafted by the attorney.[24] And Washington State Bar's Ethics Opinion 1670 expressly provides that the inclusion of an arbitration provision in a fee agreement requires it be "done only with full disclosure to the client."[25] RPC 1.4(b)

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[22] Tjart v. Smith Barney, Inc., 107 Wn. App. 885, 901, 28 P.3d 823 (2001) (quoting Whitaker v. Spiegel Inc., 95 Wn.2d 661, 667, 623 P.2d 1147 (1981), amended, 95 Wn.2d 661, 637 P.2d 235 (1981)).

[23] Id. at 899.

[24] See Perez v. Pappas, 98 Wn.2d 835, 840-41, 659 P.2d 475 (1983) ("the attorney-client relationship is a fiduciary one as a matter of law and thus the attorney owes the highest duty to the client"); accord Versuslaw, Inc. v. Stoel Rives, LLP, 127 Wn. App. 309, 333, 111 P.3d 866 (2005); see also Burien Motors, Inc. v. Balch, 9 Wn. App. 573, 577, 513 P.2d 582 (1973) ("A fiduciary such as an attorney must exercise reasonable care. He must protect his client's interest out of a sense of loyalty, good faith, and duty to exercise reasonable care. Such protection may well involve the duty to investigate the law and facts applicable to the transaction and to disclose the results to his clients. The duty is similar to the duty to disclose imposed upon a trustee who must disclose all material facts concerning the transaction the trustee knows or should know.").

[25] WASHINGTON STATE BAR ASS'N Advisory Opinion 1670 (1996) (issued before adoption of the amended RPC); see generally Am. Bar Ass'n Comm. on Ethics & Prof'l Responsibility, Formal Op. 02-425 (2002) (emphasizing that the client must be "fully apprised of the advantages and disadvantages of arbitration" and have "been given

provides, "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Comment 5 to the rule states:

> The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued . . . . For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. . . . The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

"[T]he relationship of attorney-client places upon the attorney the strict duty of full disclosure."[26]

> "The relation of attorney and client has always been regarded as one of special trust and confidence. The law therefore requires that all dealings between an attorney and his client shall be characterized by the utmost fairness and good faith, and it scrutinizes with great closeness all transactions had between them. So strict is the rule on this subject that dealings between an attorney and his client are held, as against the attorney, to be prima facie fraudulent, and to sustain a transaction of advantage to himself with his client the attorney has the burden of showing not only that he used no undue influence but that he gave his client all the information and advice which it would have been his duty to give if he himself had not been interested, and that the transaction was as beneficial to the client as it would have been had the client dealt with a stranger."[27]

Consistent with his fiduciary duty and the ethics opinion, we conclude Thomsen had a duty to disclose to Butler that, by signing the agreement with the third party, Butler was agreeing to arbitration of what might be a critical part of a potential

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sufficient information to permit [him] to make an informed decision about whether to agree to the inclusion of the arbitration provision in the retainer agreement").

[26] Transcon. Ins. Co. v. Faler, 9 Wn. App. 610, 612, 513 P.2d 864 (1973).

[27] In re Beakley, 6 Wn.2d 410, 423-24, 107 P.2d 1097 (1940) (quoting 7 C.J.S. *Attorney and Client*, § 127).

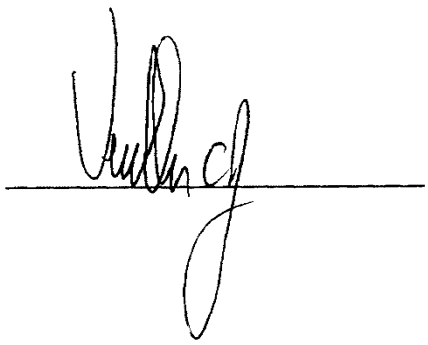
malpractice claim against Thomsen. Absent a showing of some disclosure to Butler at the time he signed the settlement agreement, we conclude Thomsen is not entitled to invoke the arbitration clause he drafted.

The trial court did not err in denying Thomsen's motion to compel arbitration.

Motion to Strike

Butler moves to strike references in Thomsen's opening brief that are not supported by the record. Specifically he challenges Thomsen's references to the dismissal of Butler's remaining claims in Butler v. ImageSource following settlement, and that Butler had separate counsel review the settlement agreement before Butler signed it. Neither of those facts are part of the record on appeal. Thomsen does not satisfy the demanding requirements of RAP 9.11, and judicial notice is not available under these circumstances. The motion to strike is granted.

Affirmed.



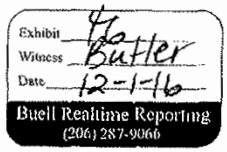
WE CONCUR:

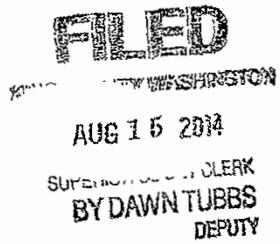
Trickey, J

Cox, J.

APPENDIX

BUTLER LAWSUIT TRIAL COURT ORDER





The Honorable Barbara Linde
Hearing Date: July 18, 2014
Hearing Time: 10:00 a.m.
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

TERENCE BUTLER, a Washington resident, Plaintiff, vs. IMAGESOURCE, INC., a Washington corporation; TERENCE SUTHERLAND, A Washington resident; and VICTOR ZVIRZDYS and JANE DOE ZVIRZDYS, and the marital community comprised thereof, Defendants.	No. 13-2-41133-4 SEA ~~[PROPOSED]~~ ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT RE : WILLFUL WRONGFUL WITHHOLDING OF WAGES AND BREACH OF FIDUCIARY DUTIES

THIS MATTER arises upon Plaintiff's Motion for Summary Judgment re: Willful Wrongful Withholding of Wages and Breach of Fiduciary Duties dated June 19, 2014 [the "Motion"] and was duly heard in open court on July 18, 2014. The Court, having considered the Motion, all declarations, papers, testimony and other evidence offered in support of or response to the Motion, and the records and files of the above-captioned case, and deeming itself fully advised, finds and concludes that the Motion should be denied, ~~for the reasons stated in the Court's oral ruling upon the same, which are incorporated herein by~~

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~~In reference. Without limiting the foregoing,~~ The Court finds and concludes:

A. The claims for breach of fiduciary duty asserted by plaintiff Terence Butler in the Motion are based upon the alleged wrongful use of corporate funds and property of ImageSource, Inc., by defendants Terence Sutherland and Victor Zvirzdys as officers and/or directors in ImageSource, Inc. Such claims belonged to the corporation, ImageSource, Inc., prior to the appointment of a general receiver in this case on April 4, 2014. With the appointment of a general receiver, the receiver, Aebig & Johnson Business Resolutions, LLC ["Receiver"], succeeded to the power of ImageSource, Inc. to bring such claims for breach of fiduciary duty.

B. Plaintiff Butler has shown no grounds upon which he has or should be granted standing to pursue claims for breach of fiduciary duty based on harm to ImageSource, Inc. Without limitation, ImageSource, Inc. is an operating business with obligations to suppliers, employees, customers, and its bank and the protection of the interests of stakeholders in ImageSource, Inc. other than the plaintiff or the individual defendants (each of whom are shareholders in ImageSource, Inc.) requires and justifies the preservation of exclusive standing in the Receiver, to determine whether to pursue such claims for breach of fiduciary duty, and if such claims are successfully pursued, to administer any recoveries based thereupon.

C. Each of the parties in this action, including plaintiff Butler and defendants ImageSource, Inc.; Sutherland, and Zvirzdys, executed a Release and Settlement Agreement dated January 2, 2013, arising from litigation captioned *White v. ImageSource, Inc., et al.*,

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No. 11-2-01309-7, Superior Court of Washington for Thurston County. Each of the parties in this action is specifically identified as a "Party" in the Release and Settlement Agreement.

Paragraph 10 of the Release and Settlement Agreement provides:

> 10. **Complete Release.** In consideration of the promises set forth herein, the Parties agree to release one another, their spouses, their respective heirs, agents, attorneys, employees, directors, heirs, assigns and personal representatives from any and all charges, claims, and actions, whether known or unknown, arising prior to the date of this Agreement and arising directly or indirectly out of the Lawsuit or their previous dealings. This release specially includes and releases all claims that were asserted or could have been asserted in the Lawsuit by White relating to ImageSource (including employment issues) and any claims or counterclaims that were asserted or could have been asserted by Defendants in the Lawsuit against White.

(emphasis added).

D. The plain and unambiguous language of the release contained in paragraph 10 of the above-mentioned Release and Settlement Agreement applies to all claims by and between the Parties thereto, arising out of their previous dealings. The claims for relief asserted in the Motion arise from dealings of the Parties pre-dating the January 2, 2013 date of the Release and Settlement Agreement. Those claims have therefore been released as a matter of law. See McGuire v Bates, 169 Wn 2d 185 (2010); Hearst Communications Inc. v. Seattle Times, 154 Wn 2d 493 (2005).

E. (By) ~~Alternatively~~ Additionally ~~to the foregoing paragraph~~, plaintiff has failed in its Motion to establish a claim for unpaid wages within the meaning of RCW ch. 49.52, as a matter of law. Plaintiff's claims as asserted within the Motion are not "wages" within the meaning of RCW ch. 49.52 because they are not based upon a contract or implied contract for the regular payment by ImageSource, of a defined amount of money to plaintiff.

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Based upon the foregoing, and for good cause otherwise shown, it is hereby

ORDERED, ADJUDGED AND DECREED:

1. The Motion is denied in its entirety and with prejudice; and

2. This Order is without prejudice to such claims, if any, as the Receiver or any party hereto may have one against another, arising from acts or omissions occurring after January 2, 2013.

DATED this 15 day of ~~July~~ August, 2014.

Honorable Barbara Linde
Superior Court Judge

Presented by:

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APPENDIX

King County Superior Court LCR 56

King County

LCR 56. Summary Judgment
Local Civil Rule

(c) Motions and Proceedings

(1) Argument. The court shall decide all summary judgment motions after oral argume unless the parties waive argument. The assigned judge shall determine the length of oral argu

(2) Dates of Filing and Hearing. The deadlines for moving, opposing, and reply docur shall be as set forth in CR 56 and the Order Setting Case Schedule. In all other regards, parti file and deliver documents and the court shall set all hearings in conformance with LCR 7.

(3) Form of Motion and Opposition Documents. The parties shall conform all movin opposing, and reply memoranda to the requirements of LCR 7(b)(4), except that moving and opposing memoranda shall not exceed 8,400 words. Reply memoranda shall not exceed 1,75(without authority of the court. The word count includes all portions of the memorandum, incl headings and footnotes except 1) the caption; 2) tables of contents and/or authorities, if any, the signature block. The signature block shall include the certification of the signer as to the of words, substantially as follows: "I certify that this memorandum contains _____ words, ir compliance with the Local Civil Rules."

(4) Motions to Reconsider. The parties shall conform all motions to reconsider to the requirements of CR 59 and LCR 7(b)(5).

(5) Reopening. Reopenings are subject to the requirements of LCR 7(b)(6).

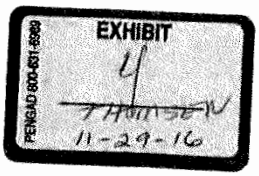
(e) Form of Affidavits; Nonconforming Evidence. A party objecting to the admissibility evidence submitted by an opposing party must state the objection in writing in a responsive p a separate submission shall only be filed if the objection is to materials filed in the reply.

[Note: Judgment upon multiple claims or involving multiple parties, see CR 54(b).]

Official Comment

[Amended effective September 1, 2011, Subsection (e) is added to obviate the filing of motio strike objectionable evidence, to relieve parties of the need to file such motions six days in ad and thus, under LCR 7, to file an accompanying motion to shorten time for a timely considera the objection. This rule is intended to clarify local practice and to conform to Cameron v. Murr Wash.App 646,658, 214 P.3d 150 (Div. I, 2009.]

[Amended effective September 1, 1983; September 1, 1984; May 1, 1988; January 1, 1990; September 1, 1992; September 1, 1993; September 1, 1994; September 1, 1996; Septembe 2001; September 1, 2004; September 1, 2005; September 1, 2008; September 1, 2011; Sep 1, 2016.]



CR 2A - Agreement

Following a mediation conducted on June 18, 2012, in which the Honorable Paris K. Kallas served as mediator, the parties agree that a full and complete settlement was reached and that the following are essential terms of the full settlement pursuant to CR 2A:

1. ImageSource, Inc. agrees to pay $800,000 to plaintiff Shad White payable according to the following terms:

- $30,000 within 4 days of the execution of this agreement;
- $10,000 on July 1, August 1, September 1, October 1, November 1, December 1, 2012, and January 1, 2013;
- The remaining $700,000 in equal 90 monthly payments;
- Payment shall be evidenced by a promissory note reflecting the above terms; and
- ImageSource shall have the right to pre-pay the promissory note but only by payment of all interest otherwise due throughout the term of the note.

Interest shall be calculated in the following manner. Interest shall be calculated at 3.1% per annum on $770,000 for a 96 month term. Said interest shall then be added to the payments commencing on February 1, 2013, to allow for equal amortized payments over the remaining 90 months until the Promissory Note is paid in full.

2. The above promissory note shall be secured by a pledge agreement as to the shares acquired by Mr. White per the requirements under paragraph 2.4.3 of the Shareholders Agreement. The pledge agreement shall be in a form prepared by ImageSource's corporate counsel. The pledge agreement shall allow for the pro rata release of shares from the pledge agreement based on the payments detailed above. ImageSource shall possess all voting and dividend rights in the pledged shares.

3. If, within the next 60 months from the date of the finalization of this settlement, 100% interest in ImageSource is sold to a third party unaffiliated with Terry Sutherland, Victor Zvirzdys, or Terry Butler, in which the share price obtained as a result of the sale exceeds $1,100/share, Mr. White shall be entitled to receive as a closing of that sale that amount per the following schedule, in recognition of his former ownership interest in ImageSource of 1,000 shares:

- If within 24 months of the finalization of this settlement, that amount of the share price in excess of $1,100/share;

- If within 36 months of the finalization of this settlement, that amount of the share price in excess of $1,450/share;

- If within 48 months of the finalization of this settlement, that amount of the share price in excess of $1,800/share; and

- If within 60 months of the finalization of this settlement, that amount of the share price in excess of $2,150/share.

Bloomfield Dec'l
EXHIBIT A

With respect to all the above amounts, all amounts shall be capped at $2,500/share. It being the intention of the parties that Mr. White shall receive up to, but not in excess, $2,500/share, of which $1,100/share has previously been paid to him as a consequence of this agreement.

4. If 100% interest in ImageSource is sold to a third party unaffiliated with Terry Sutherland, Victor Zvirzdys, or Terry Butler, Mr. White shall be entitled to payment of the remaining balance of any promissory note then existing at the time of the sale. Payment shall be made as part of the closing of the sale.

5. ImageSource releases Mr. White from any obligation he possesses under his Shareholders Account at ImageSource.

6. ImageSource agrees to assume responsibility for repayment of any obligation under a Promissory Note between Mr. White and defendant Terry Butler. In turn, Terry Butler releases Mr. White from any obligation under the Promissory Note or Pledge Agreement between Mr. White and Mr. Butler.

7. ImageSource shall indemnify and hold harmless Mr. White from any tax obligation related to or arising out of his status as an ImageSource shareholder for the calendar year 2012.

8. Mr. White and CloudPwr, LLC represent and warrant that neither of them possess any intellectual property or proprietary information related to the ILINX suite of products. In reliance on that representation and warranty, ImageSource releases CloudPwr from any all claims that it may possess.

9. Mr. White agrees to release all defendants from any claims that he may possess against them. Defendants agree to release Mr. White from any claims that they may possess against him.

10. Mr. White agrees to resign from ImageSource's Board of Directors upon finalization of this agreement.

11. ImageSource represents that it will use its best efforts to remove Mr. White from all guaranties, letters of credit, or other obligations with its lenders.

12. Mr. White agrees to assign to ImageSource the "ILINX.com" domain name upon final payment from ImageSource for his purchase of the domain name.

13. The parties agree to enter into a mutual non-disparagement clause and agree to keep the terms and nature of this settlement confidential except as necessary to reveal for purposes of their professional advisors, such as tax consultants, key members of their respective companies, bankers, and corporate counsel.

14. Mr. White agrees to release his interests if any in the following limited liability companies, Greendridge LLC, Whatever Aviation, LLC, SWZ, LLC, and SVT Squared LLC. Defendants Terry Sutherland and Victor Zvirzdys agree to use reasonable good faith efforts to

remove Mr. White from any mortgage related to the rental home owned by Greenridge LLC, it being recognized that removing Mr. White may not be possible in the near interim. Defendants Terry Sutherland and Victor Zvirzdys agree that as soon as it becomes financially feasible to refinance the rental home owned by Greenridge LLC that they will do so, provided that the current mortgage rate (30-year, fixed) does not exceed the current existing mortgage by greater than 2 percentage points. Defendant Victor Zvirzdys will use good faith efforts to release Mr. White from any loan or obligation Mr. White may possess related to his interest in Whatever Aviation, LLC or to reach suitable resolution with Mr. White to resolve any ongoing liability that Mr. White may have related to Whatever Aviation, LLC.

15. This action shall be dismissed with prejudice and without the award of costs or attorneys fees to any party.

16. The parties agree that they shall reasonably cooperate in preparing and completing any paperwork required to effectuate this settlement.

17. The parties agree that both have been jointly represented and the above terms were prepared jointly by both parties.

18. Any disputes arising out of this agreement, including but not limited to the drafting of final papers, shall be submitted to the Honorable Paris K. Kallas, Judicial Dispute Resolution, for binding arbitration.

19. The parties agree that this represents the full agreement and understanding of the parties and supplements all agreements expressed or implied.

20. This agreement shall become binding upon signature of all parties. Signatures can be evidenced by facsimile.

Dated this 18th day of June, 2012.

SHADRACH WHITE

IMAGESOURCE, INC.

By _____
Its CEO

TERRY BUTLER

TERRY SUTHERLAND

VICTOR ZVIRZDYS

CLOUDPWR, LLC

By _____
Its CEO, President

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RELEASE AND SETTLEMENT AGREEMENT

PARTIES

This Agreement is entered into this 2nd day of January 2013, among Shadrach White (individually and on behalf of his marital community), ImageSource, Inc., a Washington corporation ("ImageSource"), Terry Sutherland ("Sutherland"), Terrence Butler ("Butler") and Victor Zvirzdys ("Zvirzdys") (each individually and on behalf of their respective marital communities), and CloudPWR LLC, a Washington limited liability company (collectively, "the Parties"). This Agreement involves a resolution of the litigation commenced under Thurston County Cause No. 11-2-01309-7 (the "Lawsuit") and related matters.

RECITALS

A. White, Sutherland, Butler and Zvirzdys are all of the shareholders of ImageSource and own all of its issued and outstanding shares of stock. The stock is owned as follows:

Shareholder	Shares Owned
Shadrach White	1,000
Terry Sutherland	1,000
Terrence Butler	1,000
Victor Zvirzdys	1,000

B. Certain disputes arose among the Parties in connection with White's employment and ownership interest in ImageSource. White filed the Lawsuit asserting claims against ImageSource, Sutherland, Butler and Zvirzdys. ImageSource filed a counterclaim against White.

C. The Parties participated in mediation on June 18, 2012, with Judge Paris Kallas (Retired) of Judicial Dispute Resolution and at the close of mediation, the parties agreed to settle fully and finally all differences among them, up to the date of execution of this Agreement, including, but not limited to, all allegations in the Lawsuit and other issues.

D. The Parties entered into a CR 2A Agreement at the close of mediation and the Parties have prepared this Settlement Agreement to more fully memorialize and finalize the CR 2A Agreement.

TERMS OF SETTLEMENT

NOW, THEREFORE, in consideration of the terms, conditions, mutual covenants, and promises set forth herein, it is agreed as follows:

1. Nonadmission of Liability. This Agreement is entered into in compromise of disputed claims and solely to avoid the expense, risks, delay, and burden of further litigation. The Parties acknowledge that the execution and performance of this Agreement are not in any way an admission of wrongdoing or liability on the part of any party and the Parties specifically disclaim any liability.

2. Purchase of Stock. The Parties agree that White will convey all of his interest in ImageSource to ImageSource and ImageSource agrees to acquire such stock on the terms and conditions set forth herein. The Parties further agree that the transfer will be effective on January 1, 2012.

2.1. Initial Cash Payment. ImageSource has wired to the Gordon Thomas Honeywell LLP ("GTH") trust account THIRTY THOUSAND DOLLARS ($30,000). Upon execution of this Agreement by all Parties, GTH may immediately disburse such funds from its trust account to or for the benefit of White.

2.2. Promissory Note. Contemporaneously with this execution of this Agreement by all Parties, ImageSource shall execute and deliver to White a Promissory Note in favor of White in the amount of SEVEN HUNDRED SEVENTY THOUSAND DOLLARS ($770,000), which Note shall be in the form of Exhibit A, incorporated herein by this reference.

2.3. Pledge Agreement. The Promissory Notes shall be secured by a Pledge Agreement in the form attached as Exhibit B. Contemporaneously with the execution of this Agreement by all Parties, White agrees to execute said Pledge Agreement and deliver it to ImageSource.

2.4. Conveyance of Shares. Contemporaneously with the execution of this Agreement by all Parties, White agrees to execute and deliver to ImageSource a Stock Power in the form of Exhibit C, transferring his 1,000 shares of ImageSource stock to ImageSource. This transfer will be effective as of January 1, 2012.

2.5. Resignation of Officers and Directors. Contemporaneously with the execution of this Agreement by all Parties, Shadrach White shall resign as a director of ImageSource and shall execute the resignation notice in the form attached as Exhibit D.

3. Sale of ImageSource.

3.1. Premium. Upon sale of all of the stock or assets of ImageSource to a third party not affiliated with Sutherland, Zvirzdys, or Butler within 60 months from June 12, 2012, then ImageSource, Sutherland, Zvirzdys and Butler jointly and severally agree that, White will be paid an amount representing the per share purchase price to the extent it exceeds the applicable benchmark set forth below, except that, in any case, for purposes of these calculations the per share purchase price will not exceed $2,500. The per share purchase price will be the total net compensation paid to the Parties in connection with such sale divided by 4,000. For purposes of this Agreement, a third party is not affiliated with Sutherland, Zvirzdys, or Butler ("S, V or B") if they are not a family member of S, V or B, they are not a trust for the benefit of S, V or B or family members of S, V or B, or are not an entity in which S, V or B has a controlling interest. The benchmarks are set forth below:

If the sale closes within 24 months after the date of this Agreement, the benchmark is $1,100;

If the sale closes after 24 months but before the end of 36 months after the date of this Agreement, of the benchmark is $1,450;

If the sale closes after 36 months but before the end of 48 months after the date of this Agreement, the benchmark is $1,800; and

If the sale closes after 48 months but before the end of 60 months after the date of this Agreement, the benchmark is $2,150.

3.2. Due on Sale. Upon sale of all of the stock or assets of ImageSource to a third party not affiliated with Sutherland, Zvirzdys, or Butler at any time during the term of the Promissory Note described in section 2.2, White shall be entitled to payment of the remaining balance owed under the Promissory Note at the time the sale closes, together with an amount representing the undiscounted interest that would have otherwise accrued for the balance on the original term of the Note.

4. **Indemnification for Taxes.** ImageSource, Sutherland, Zvirzdys, and Butler hereby agree to indemnify and hold harmless White from any tax obligation related to or arising out of his status as an ImageSource shareholder for the calendar year 2012.

5. **Shareholder Account.** ImageSource releases White from any obligations under his Shareholder Account at ImageSource. The Parties agree that White's Shareholder Account balance was $143,468.75 as of the June 1, 2011.

6. **Butler Promissory Note.** ImageSource hereby agrees to assume responsibility for repayment of any obligation under a Promissory Note between White and Butler the "Butler Note"). In turn, Butler hereby releases White from any obligation under the Promissory Note or Pledge Agreement between White and Butler. White and Butler agree that the outstanding balance of the Butler Note is $150,000 as of the date of this Agreement. Contemporaneously with the execution of this Agreement by all Parties, Butler agrees to deliver the original of the Butler Note to White marked "Cancelled." If Butler is not able to deliver the original of the Butler Note then he will execute and deliver to White an Affidavit and Indemnification of Lost Note in the form attached as **Exhibit E** hereto.

7. **Release on ImageSource Liabilities.** ImageSource agrees that it will use its best efforts to have White released from all obligations pertaining to ImageSource, including any guaranties, or other obligations of White in favor of ImageSource's lenders including the SBA Loan and the Line of Credit. Moreover, if any loan upon which the Guaranty, letter of credit or other collateral provided by White is to be renewed or modified, then, before such is renewed or modified, then ImageSource agrees that White's Guaranty and letter of credit will be released. In any case, ImageSource agrees to indemnify and hold White harmless from all claims, liabilities, damages, losses, and charges, including, without limitation, attorneys' fees, costs and expert witness fees, arising with respect (a) the operations of ImageSource, (b) the liabilities of ImageSource, and (c) White's ownership of an interest in ImageSource.

8. ILINX. White will transfer ownership of the "ILINX.com" domain name to ImageSource upon execution of this Agreement

9. Issues re Ancillary LLCs.

9.1. Release of Interest. White is a part owner of SWZ, LLC and SVT Squared LLC. Both of these entities are not doing business, have no assets and are deemed by the Parties as having no value. Effective upon execution of this Agreement by all Parties, and in consideration of resolving the disputes with the Parties, White hereby releases his ownership interests in SWZ, LLC, and SVT Squared LLC and agrees to execute such documents as are appropriate to further confirm his withdrawal from those entities.

9.2. Greenridge LLC.

9.2.1. White has an ownership interest in Greenridge LLC. which owns a building whose current value is equal to or less than the amount owing to Greenridge's lender. Effective upon execution of this Agreement by all Parties, and in consideration of resolving the disputes with the Parties, White hereby releases his ownership interests in Greenridge LLC and agrees to execute such documents as are appropriate to further confirm his withdrawal from that entity.

9.2.2. White and Sutherland and Zvirzdys further agree to use reasonable good faith efforts to cause White to be removed from any liability to Greenridge's lender, it being recognized that removing White may not be possible in the near term. Consequently, Sutherland and Zvirzdys agree to indemnify and hold White harmless for all claims, liabilities, damages, losses, and charges incurred in connection with loans heretofore made in favor of Greenridge, LLC. Sutherland and Zvirzdys further agree that as soon as it becomes financially feasible to refinance the rental home owned by Greenridge LLC that they will do so, provided that the current mortgage rate (30-year, fixed) does not exceed the current existing mortgage by greater than 2 percentage points.

9.3. Whatever Aviation LLC.

9.3.1. White has an ownership interest in Whatever Aviation LLC ("Whatever LLC"). Effective upon execution of this Agreement by all Parties, and in consideration of resolving the disputes with the Parties, White hereby releases his ownership interests in Whatever LLC and agrees to execute such documents as are appropriate to further confirm his withdrawal from that entity.

9.3.2. Zvirzdys will use good faith efforts to cause White to be released from any liability to Whatever LLC's lender and from any liability to the other members of Whatever LLC. Zvirzdys further agrees to indemnify and hold White harmless for all claims, liabilities, damages, losses, and charges incurred in connection with loans heretofore made in favor of Whatever, LLC and for any liabilities to other members of Whatever LLC.

10. Complete Release. In consideration of the promises set forth herein, the Parties agree to release one another, their spouses, their respective heirs, agents, attorneys, employees, directors, heirs, assigns and personal representatives from any and all charges, claims, and actions, whether known or unknown, arising prior to the date of this Agreement and arising directly or indirectly out of the Lawsuit or their previous dealings. This release specially includes and releases all claims that were asserted or could have been asserted in the Lawsuit by White relating to ImageSource (including employment issues) and any claims

or counterclaims that were asserted or could have been asserted by Defendants in the Lawsuit against White.

11. **CloudPWR Release.** White and CloudPwr, LLC represent and warrant that they do not possess any intellectual property or proprietary information related to the ILINX suite of products. In reliance on that representation and warranty, ImageSource and the other Parties hereby release CloudPWR its officers, agents, employees, directors, heirs, assigns and representatives from any and all charges, claims, and actions, whether known or unknown, arising prior to the date of this Agreement.

12. **Dismissal of Lawsuit.** The Parties agree that within five business days following execution of this Agreement their respective counsel shall execute and file the Stipulation and Order of Dismissal with Prejudice attached as **Exhibit F**.

13. **Confidentiality.** The Parties agree to keep the terms of this Agreement confidential, except they may be disclosed to lawyers, key members of their respective companies, bankers, and tax advisors, or where necessary to enforce the provisions of this Agreement, or where otherwise required by law or court order.

14. **Nondisparagement.** The Parties each agree that each party will not make disparaging or defamatory statements about the other party.

15. **Successors.** This Agreement shall be binding upon the parties, and their heirs, representatives, executors, administrators, successors, and assigns, and shall inure to the benefit of each and all of the Releasees, and to their heirs, representatives, executors, administrators, successors, and assigns.

16. **Full and Independent Knowledge.** The parties represent and agree that they have thoroughly discussed all aspects of this Agreement with their attorneys, that they have carefully read and fully understand all the provisions of the Agreement, and that they are voluntarily entering into this Agreement.

17. **No Representations.** The parties acknowledge that, except as expressly set forth herein, no representations of any kind or character have been made by the other party or their agents, representatives, or attorneys to induce the execution of this Agreement.

18. **Entire Agreement/Amendment.** This Agreement sets forth the entire agreement between the parties and fully supersedes any and all prior agreements and understandings between the parties pertaining to the subject matter of this Agreement. This Agreement may not be and shall not be deemed or construed to have been modified, amended, rescinded, cancelled, or waived, in whole or in part, except by written instrument signed by the parties hereto.

19. **Dispute Resolution.** Any dispute arising out of this Agreement shall be settled by arbitration before Judicial Dispute Resolution ("JDR") in Seattle, using Paris Kallas or a single arbitrator as agreed by the Parties. Judgment on the award may be filed as provided in JDR's rules or those of the courts of the State of Washington. The arbitrator may award injunctive or other equitable relief. No demand for arbitration may be made after the date

when institution of legal or equitable proceedings based on such dispute would be barred by the applicable statute of limitations.

20. Miscellaneous. This Agreement is made and entered into the State of Washington and shall in all respects be interpreted, enforced, and governed under the laws of this State. The language of this Agreement shall be construed as a whole, according to its fair meaning, and not strictly for or against either party. This Agreement may be executed in counterparts and facsimile signatures shall be valid.

SHADRACH WHITE

By:_____
SHADRACH WHITE

CLOUDPWR, LLC

By:_____
SHADRACH WHITE
Its President and CEO

TERRY SUTHERLAND

By:_____
TERRY SUTHERLAND

IMAGESOURCE, INC

By:_____
TERRY SUTHERLAND
Its President and CEO

VICTOR ZVIRZDYS

By:_____
VICTOR ZVIRZDYS

TERRENCE BUTLER

By:_____
TERRENCE BUTLER

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SHADRACH WHITE

By: _____
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CLOUDPWR, LLC

By: _____
SHADRACH WHITE
Its President and CEO

TERRY SUTHERLAND

By: _____
TERRY SUTHERLAND

IMAGESOURCE, INC

By: _____
TERRY SUTHERLAND
Its President and CEO

VICTOR ZVIRZDYS

By: _____
VICTOR ZVIRZDYS

TERRENCE BUTLER

By: _____
TERRENCE BUTLER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

TERENCE BUTLER, Plaintiff, vs. RANDALL T. THOMSEN, Individually and on Behalf of the Marital Community Comprised of RANDALL THOMSEN and JANE DOE THOMSEN, and CALFO HARRIGAN LEYH & EAKES, LLP, a Washington Professional Limited Liability Partnership f/k/a DANIELSON HARRIGAN LEYH & TOLLEFSON, LLP, Defendants.	)	No. 15-2-17996-9

Deposition Upon Oral Examination of

RANDALL T. THOMSEN

REPORTED AT:	5400 California Avenue SW Seattle, Washington 98136
REPORTED BY:	Lori A. Thompson, CCR #2606
REPORTED ON:	November 29, 2016

Treece, Shirley & Brodie
Phone: (206) 624-6604
Email: Lthompsonccr@msn.com

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Q. You were not?
A. Stephanie Bloomfield drafted this language and proposed it as part of a more robust settlement and release agreement.
Q. But you were involved in the sense that you reviewed it?
A. I received it and reviewed it, correct.
Q. And you commented on it?
A. I don't believe I actually commented on this.
Q. We'll come back to that. Now, the CR 2A Agreement in Exhibit 4 doesn't say anything about releasing one another; correct?
MR. PETRAK: Object to the form.
A. It doesn't use the words "one another," no.
Q. (By Mr. Waid) Have you ever used the phrase "one another" in a release before?
A. I may have. I don't recall.
Q. Do you recall noticing that language when Ms. Bloomfield sent you the original draft of the release in June?
A. I don't recall having any specific recollection exactly of that phrase.
Q. Did you advise any of your jointly represented clients, Mr. Butler, Mr. Zvirzdys, Mr. Sutherland, or ImageSource about the difference in the language of

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paragraph ten in Exhibit 5 as compared to paragraph nine in the CR 2A Agreement?
A. Well, the differences are self-evident in that paragraph -- paragraph ten that's in the Release and Settlement Agreement is much broader -- excuse me, it is more robust than the CR 2A Agreement. I certainly did talk about the release with all of those parties, though.
Q. Did you ever explain to Mr. Butler that by signing Exhibit 5 he was releasing all claims against Mr. Sutherland?
A. I do not have that specific recollection of that, and that was not the parties' intent, at least my understanding of what the effect of this agreement and release would be.
Q. And did you have any meeting with Mr. Sutherland in which you advised him that Exhibit 5 -- by signing Exhibit 5 that he would be released from any potential claims by Mr. Butler -- or that he would be released from any potential claims by Mr. Butler against him?
A. Yeah. Again, the context of this release was bilateral between Mr. White on the one side and the other parties on the other side. And certainly there was no existing dispute between the parties. So, no, I would not have had that conversation with Mr. Sutherland.
Q. Same question relative to Mr. Zvirzdys.

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A. Again, in the context it was a bilateral release between Mr. White on the one side and the other parties on the other side. And given that I was not aware of any existing or ongoing dispute between the parties, it's not a discussion I would have had with Mr. Zvirzdys either.
Q. You're familiar with a guy named Brian Garner?
A. It doesn't ring a bell.
Q. He's a law professor and author and has the best seminar in the world on writing, if you ever get a chance.
So I looked up the term "one another" in his dictionary, Garner's Modern American Usage, and "one another" says "see each other."
Does that comport with your understanding of the meaning of "one another"?
(Document proffered to witness.)
MR. PETRAK: Object to the form.
A. I'd have to use it in the context. That's -- the context is the way I've described it previously that the purpose of that release was a bilateral release of Mr. White on the one side, the other parties on the other side. And I think that the context of the CR 2A Agreement and the settlement release agreement is fairly self-evident of that.
Q. (By Mr. Waid) Well, my question to you is, what's your understanding of the meaning of the phrase

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"one another"?
A. I don't think I have any understanding right now of "one another" other than, again, to my mind if you were to focus solely on that phrase, it would seem to me to be a bilateral type of one versus another.
Q. I mean, you are a top-notch litigator in complex cases, and you're telling me you've never run into the phrase "one another"?
MR. PETRAK: Object to the form.
A. I don't recall saying that. I can't recall whether I've used that phrase before or not. I've seen a lot of releases.
Q. (By Mr. Waid) Have you ever briefed the meaning of the phrase "one another"?
A. I'm fairly confident I have not.
Q. Okay. So then I took that and I went back and I saw "each other" in the dictionary. Usage authorities have traditionally suggested that "each other" should refer to two people or entities, "one another" to more than two, all of them to "one another." That's from the dictionary.
A. Okay.
Q. So, what I'm trying to understand is whether you drew any distinction between the language in paragraph nine of the CR 2A Agreement as compared to the language in

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paragraph ten of the Release and Settlement Agreement?
MR. PETRAK: Object to the form.
A. No. Again, the Settlement and Release Agreement was meant to be a more robust version of the CR 2A Agreement.
Q. That's not responsive.
MR. PETRAK: It was responsive.
Q. (By Mr. Waid) Did you draw any distinction between the language in the two documents?
MR. PETRAK: Asked and answered.
A. I think I answered. I said no because, again, the Settlement and Release Agreement was to be a more robust version of the CR 2A Agreement.
Q. (By Mr. Waid) What do you mean by robust?
A. Well, Stephanie Bloomfield talks about it in her declaration, which I agree with, that she had requested at the conclusion of the mediation -- excuse me, about a couple days later -- that she wanted to take the CR 2A Agreement and flush out some of the terms. And that's what the purpose of the settlement release agreement was, to flush out the terms of the CR 2A Agreement. So to provide some additional detail, for instance, about the transfer of shares, how those payments would occur, how I think my recollection is calculation of how the interest would be done, et cetera. So it was the expectation that

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the Settlement Release Agreement was, frankly, to be a more robust version of the CR 2A Agreement.
[EXHIBIT NO. 6 MARKED FOR IDENTIFICATION]
Q. Showing you what's been marked as Exhibit 6, you were just referring to Ms. Bloomfield's Declaration. Is this the Declaration to which you just referred to?
A. It is.
Q. And if you would look at Exhibit B attached to the Declaration, it bears a Bates number CHLE_IS_0018732. A June 19, 2012, email to you from Ms. Bloomfield; correct?
A. Correct.
MR. KELLER: I thought he said he didn't get any emails between him and Ms. Bloomfield.
MR. PETRAK: I was going to point out this is the Bates number from the production.
MR. WAID: I think we're -- you and I are talking about two different concerns. But, nevertheless, yes, then let's deal with the Bates number.
Q. (By Mr. Waid) Bates number, the CHLE refers to Calfo, Harrigan, Leyh & Eakes; correct?
A. That would be my understanding. I wasn't involved in the Bates numbering, but that seems to be a standard way that we would identify documents being produced from my firm.

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Q. And do you know whether that was produced in this litigation or was it produced in other litigation?
MR. PETRAK: I could probably be the better person to answer that, Brian, if you want to know the answer.
MR. WAID: I'm just asking him what he knows.
A. My recollection is that it would have been produced in response to the subpoena from Mario Bianchi. And my understanding, of course, was that the parties in this litigation had just agreed that they would use the Pearly Productions to avoid us having to go back through our firm's catacombs to find responsive documents.
Q. (By Mr. Waid) Now, she sent you the email on June 19, 2012. And then the next Exhibit C is dated June 21, 2012, to you; correct? Subject matter "Correct Settlement Agreement."
Do you see that?
A. I'm sorry, you're referring to the email from Ms. Bloomfield on June 21, 2012, at 11:05 a.m.?
Q. Yes, sir.
A. Okay. I'm assuming then that the Release and Settlement Agreement draft that is attached was the exhibit then. Okay, I'll make that assumption with you.
Q. Okay. And you'll see in paragraph six of her

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Declaration she states, "On June 21, 2012, I emailed Mr. Thomsen a first draft of a more formal Settlement Agreement and Release for his review and consideration."
Do you see that?
A. I'm sorry, you're back at her Declaration then?
Q. Yeah, page two of her Declaration.
A. And what page, I'm sorry?
Q. Paragraph six.
A. Yes, I see that.
Q. And when you look at the draft that she sent you which is part of Exhibit C titled Release and Settlement Agreement with the blank day of June 2012 in the first paragraph, you'll see that the language in paragraph ten "Complete Release," if you would compare that to the language in paragraph ten of Exhibit 5, you'll see it includes the same language in the two paragraphs, "In consideration of the promises set forth herein, the parties agree to release one another, their spouses," et cetera.
Do you see that?
A. Okay.
Q. That language appears both in this first draft in June 2012 and in the final draft as signed by the parties; correct?
A. Okay.

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Q. You agree?
A. Based on what you've shown me, yes, that makes sense.
Q. Now, between June 21, 2012, and execution of Exhibit 5, which is dated June -- or January 2, 2013, to your knowledge was there any change made in the language of the Complete Release paragraph in the two documents relative to the scope of the release being extended to one another, their spouses, and others?
A. I don't recall any changes from what Ms. Bloomfield originally proposed to that release language.
Q. Did you notice the use of the phrase "one another" at any time during that period June 2012 to January 2013?
A. I don't recall specifically looking at the "one another" language. My recollection is consistent with Ms. Bloomfield, though, that this was for the purpose of memorializing in more complete terms what was agreed to in the CR 2A Agreement as she points out in her June 19th email to me.
Q. And if you had not noticed the use of the phrase "one another" in the formal Release, Exhibit 5, as well as the initial draft of the Release, Exhibit 6, would it be fair to conclude then that you did not advise Mr. Butler

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about the import of the phrase "one another"?
MR. PETRAK: Object to the form; asked and answered.
A. I recall specifically sitting down with Mr. Butler and going through each provision of the CR 2A Agreement, including the Release that was in the CR 2A Agreement and explaining to him what that was, the implications of that.
Q. (By Mr. Waid) And during that discussion about the CR 2A Agreement, Exhibit 4, did you specifically discuss whether he may have other claims against Zvirzdys or Sutherland or ImageSource?
A. My recollection is that at that time there was no indication from Mr. Butler or anyone else that there was any dispute or disagreement as to them. In fact, to the contrary, they had represented on multiple occasions, all of them, that they had come to a final agreement among themselves and so there was no dispute. But we certainly did talk about the Release that was in the CR 2A Agreement, which was a bilateral release between Mr. White on the one side and the parties on the other side.
Q. I don't think you answered my question, with all due respect.
A. Okay, fair enough.
Q. Do you recall on the day that you had this

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meeting with Mr. Butler to discuss the terms of the Release that the two of you expressly discussed whether he had other claims against Zvirzdys or Sutherland or ImageSource?
MR. PETRAK: Asked and answered.
A. I don't know. We went through the CR 2A Agreement and there was no reason to have any discussion with Mr. Butler about that if I wasn't aware that there was any claims. That would be something that would have been followed within the purview of his current counsel, Robert Kunold, who was representing him as relates to any of those issues.
Q. (By Mr. Waid) I'm trying to understand why Mr. Butler would need to consult with Mr. Kunold about the Release when your understanding was that the -- Exhibit 5, Settlement and Release -- when your understanding is that Exhibit 5 and Exhibit 4 the Release was effectively the same.
A. Well, I'm not -- Okay, let's back up. Mr. Kunold was told -- Mr. Butler told me that Mr. Kunold was the one that he had been consulting on individual matters. And so when individual things such as the acquisition of this $150,000 promissory note from Mr. White came up, Mr. Kunold consulted on that. So, to the extent there was any questions or issues as to

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vis-a-vis Mr. Butler and the other individuals, my expectation is that Mr. Kunold would have been the one that was providing any advice as to that.
Now, as to the consulting on the Release, Mr. Zvirzdys, my recollection is that his declaration talks about how Mr. Butler explained to him that he had consulted with Mr. Kunold about the final settlement agreement, which would have invariably included that release.
Q. And you've seen Mr. Kunold's declaration?
A. I have seen Mr. Kunold's declaration.
Q. Have you ever talked to Mr. Kunold about his declaration?
A. I have not.
Q. When Mario Bianchi got involved, did he ever ask you to sign a declaration?
A. You know, I don't recall whether he asked me to sign a declaration or not. I have some vague recollection that I would have told him that I think it would have been best for all parties if they just simply take my deposition as opposed to having a declaration. I wanted to avoid an incidence where I was giving competing declarations back and forth, and probably it would just be best to take my deposition.
Q. Do you recall whether he sent you an email?

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how we would value our response to that.
I also recall doing some internal memos where I would have walked through the weaknesses of my view of Grambush's valuation, and there's probably some other memos that talk about what I call the waterfall provision in the shareholders' agreement.
Q. Are you aware as to whether those internal memos to which you've just referred were provided to Mr. Bianchi?
A. My understanding is that they've been provided.
Q. And who gave you that understanding?
A. Well, that would have been my instructions to my IT person to say the complete file needs to be produced to Mr. Bianchi.
Q. Do you know whether anything was withheld from the production to Mr. Bianchi?
A. Not to my knowledge.
Q. Do you know whether any privilege log was created relative to the production to Mr. Bianchi?
A. I'm not aware of any privilege log. The reason why I'm pausing and scratching my head about what would have been privileged. My understanding was that we produced our entire file to him.
Q. Would you agree with the proposition that an attorney who is jointly representing multiple parties

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cannot maintain secrets in favor of one client as against the others?
MR. PETRAK: Object to the form.
A. I certainly know in the letter of representation that I had with Mr. Butler, Mr. Zvirzdys, Mr. Sutherland, and ImageSource I made that clear that there would be no confidences as between those groups. As to the overall, whether that's ordinary or not, I don't know, I can't comment about that. But certainly that's the approach I followed in this matter.
Q. (By Mr. Waid) Is that your understanding of the Rules of Professional Conduct when an attorney is jointly representing multiple clients?
A. Yeah, I'm not an expert as it comes to the Rules of Professional Conduct. I can tell you that that's the practice I followed in this instance that I didn't feel that there were any confidences that could be withfield from any one of them. And I believe I made that pretty clear in our engagement letter with them.
[EXHIBIT NO. 8 MARKED FOR IDENTIFICATION]
(Document proffered to witness.)
Q. I'm showing you what's been marked as Exhibit 8. Is this, in fact, the engagement letter to which you just referred?
A. Let me pause for a second and do this before

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Keith kicks me under the table. (Pause.)
MR. PETRAK: Brian, one thing, I don't know how much you are familiar with the subpoena response. The entire file was produced in hard copy to them to come pick whatever they wanted. And I believe people from Mr. Bianchi's office and Mr. Sutherland's -- or not Sutherland -- Mr. Butler's girlfriend, whatever, however we're referring to her -- went through and reviewed the entire file and took whatever they wanted. And then those disks, the electronic stuff is what they copied. So that's what was -- how that production was handled.
MR. WAID: Well, I know that you and Ms. Creager have been going back and forth about this issue for a year, and we've absolutely got to get to the bottom of it.
MR. PETRAK: Absolutely.
Q. (By Mr. Waid) Okay, you've had a chance to look at Exhibit 8?
A. I have.
Q. And what is that document, please?
A. This appears to be the second representation letter that I had sent to them. That was at the beginning of my engagement with them.
Q. So as far as you are aware is Exhibit 8 the only letter of representation signed by the jointly represented

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clients?
A. No.
Q. You believe there is another letter of representation?
A. Like I said, there was a first letter I sent to them. And I think the difference between that letter and this one is that one did not refer to ImageSource. But subsequently when they got sued and ImageSource got sued as well, we included ImageSource as a party to this engagement letter.
Q. Perhaps I misunderstood, but I thought you said earlier that you did not know whether the first letter of engagement was signed by the client.
A. Yeah, I don't know whether it was signed or not. All I'm saying is that this was the second letter.
Q. So listen to my question. So far as you know, is Exhibit 8 the only letter of engagement that you know of signed by all the clients?
MR. PETRAK: Asked and answered.
A. No. I don't know whether the first one was signed or not. It wouldn't surprise me if it was signed. Again, that letter would be the best representation of it.
Q. (By Mr. Waid) Okay. You know, one of the problems relative to Mr. Sutherland in particular and Mr. Zvirzdys is that he spent a lot of money on

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that they had an agreement in place.
Q. An agreement which you never saw; correct?
A. Each one of them testified -- my understanding what they testified about is they had not written it down, but each of them testified as to the existence of the agreement in sworn testimony, and had represented that to me on many, many occasions.
Q. I want to be really clear on this point. And with that in mind, so would it be your testimony -- is it your testimony that the use of the phrase "one another" as you understood it had no possibility of being interpreted as releasing Butler's claims against Sutherland and Svirzdys and ImageSource?
MR. PETRAK: Object to the form and incomplete hypothetical.
A. I think in the context of where this agreement is and the relationship to the CR 2A, no, that's not an appropriate way of interpreting that release.
Q. (By Mr. Waid) Was that an issue you thought about between June 21, 2012, and January 2, 2013?
A. You're going to have to ask that question again. I'm sorry.
Q. Did you at any time between June 21, 2012, and January 2, 2013, have the thought, idea, concept, the gist of which is, gee, that language "one another" might

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release their claims against each other including Butler's claims against ImageSource, Zvirzdys, and Sutherland? Did it ever cross your mind?
A. No, because the context of this Settlement and Release Agreement was to embody what was agreed to in the CR 2A Agreement, which was a bilateral release.
But, in addition to that, as of January of 2013 it had never been brought to my attention that there was any dispute or disagreement to the parties among them. Rather to the contrary, there remained an agreement in place that both of them were performing under. So, as a consequence, no, I would not have thought that this would have the effect of releasing some inchoate claim that had never been articulated to me.
Q. Have you had any conversations with Stephanie Bloomfield since Exhibit 5 was signed about the Shad White litigation?
A. I believe we probably had one or two telephone calls. There continued to be some logistic issues that had to be resolved or taken care of. And I recall in particular, maybe it was an email exchange with her, where I had just suggested that she work directly with Victor as opposed to me because there was a question about transfer of payments by wire transfer, those kinds of things.
Q. You did attend the deposition of Shad White;

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correct?
A. I conducted it, yes.
Q. And you attended the deposition of Richard Wilson; right?
A. Correct.
Q. The deposition of Mike Flemm; right?
A. Yes, I defended it.
Q. And you reviewed Mr. Flemm's report?
A. Well, I wouldn't call it a report. You must be referring to his Excel spreadsheets?
Q. Yes, sir.
A. Yeah, I'm very familiar with those spreadsheets.
Q. You attended the deposition of Mr. Zvirzdys; correct?
A. Yes.
Q. And is it your testimony that none of the information that came out of those depositions about the use of ImageSource money for use in settling sexual harassment claims, using company money to build and remodel homes, going to strip joints, none of the information that came out of that testimony prompted you to consider that you might have a potential conflict of interest in jointly representing Mr. Butler along with the remainder of the defendants?
MR. PETRAK: Object to the form;

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overbroad.
A. The context of my original representation where I only agreed to represent them all was based on the discussions I had with Mr. Butler and with the other individuals. And Mr. Butler was very well informed about every one of those issues that you mentioned. He was aware of the expenses, he had been involved in comprehensive reviews of the expenses with Mr. Flemm on almost a weekly basis, and he had reached an agreement with them as to resolving those issues. During the course of the representation every single deposition was provided to Mr. Butler. I recall talking with him on the specifics about each of those details, and never one iota from him that there was any dispute or any issue that remained lingering that was outside of the agreement that he had originally entered into with them in January of 2013 -- excuse me, January 2011.
Q. (By Mr. Waid) Did you ever become aware that ImageSource was using at least two sets of books?
A. I don't believe I've ever learned that one way or the other whether they were using two sets or not. To my knowledge there was only one set of books -- or, excuse me, there was only one source of information that was being provided to me on the financial information.
Q. The Flemm report, or the Flemm spreadsheets more

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correctly, reflected, what, a million three, approximately, in questionable expenditures?
MR. PETRAK: Object to the form.
A. I disagree with that characterization.
Q. (By Mr. Waid) Which part?
A. My understanding -- and again, Mr. Flemm testified about this in his deposition about exactly what was the genesis of him creating those spreadsheets -- was his effort to identify in various buckets of categories of what expenditures had been done by certain individuals and what people had received as salaries for certain individuals. And, frankly, what had been reflected in various shareholder accounts for each of the individuals.
Q. Do you disagree with the amount involved?
A. I never made any effort to scrub those numbers. I thought there was -- I think I wrote a memo to the file because this was a criticism -- Excuse me, let me back up.
I had some real question given what Mr. Flemm had described to me about the validity of the numbers that were represented there, which Mr. Flemm also testified about that he really didn't give them much substance to. And I believe I wrote a memo to the file that described my evaluation of those spreadsheets.
Q. Were his conclusions too high or too low in your

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opinion?
A. Depends on what you're using them for. As to some validity, some legal obligation or something of that sort, I thought that they didn't represent anything of that sort. I thought they represented a best effort by someone who's been tasked with the responsibility of finding out what the numbers were in four different buckets and then putting it on the spreadsheet.
Q. I don't think you answered my question. Were they too high or too low?
A. I don't -- again, it depends on what you're using them for.
Q. Well, you expressed an opinion. You just said you wrote a memo about it.
A. I think as to the claims that were being asserted by Shad White, they absolutely represented nothing. Mr. White was allegations somehow thinking that they represented that his need to get some additional money from ImageSource, I thought they had no legal validity at all because they didn't represent anything of the sort. So, in that respect, they were much too high.
Q. Were you aware of an offer to purchase ImageSource in 2008 for $22 million?
A. Yeah, I've seen the offer. I wouldn't even call it an offer, I think it was a letter of intent or some

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email that might have been sent to Mr. Sutherland. And I've seen the deposition testimony which they described that as being ultimately going nowhere.
Q. And of what importance was that -- that letter of -- whatever it was -- Was that letter from Wave Imaging to you and your work?
A. To me personally I don't think it had any validity, and I suspect that none of the valuation experts had any validity either because none of them mentioned it.
Q. When did you learn that the language of Exhibit 5, paragraph ten, the Complete Release language, was being interpreted as extending to release of claims by Butler against ImageSource and Zvirzdys and Sutherland?
MR. PETRAK: Object to the form. Interpreted by?
MR. WAID: By anybody.
A. I don't recall the particular date. What stands in my mind is I guess a letter I got from Mario Bianchi.
Q. (By Mr. Waid) Prior to that, had anybody raised that issue with you prior to the letter from Bianchi?
A. I don't recall. I don't recall when my exchange or communication I had with the receiver was in relationship to that letter.
Q. Okay. And part of the reason I had you identify the invoices is so that you can refer to them if it's

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helpful as we go through some of the other details here.
A. Okay.
MR. PETRAK: I don't want him to have to every time you ask a question to then have an obligation to have to go through those.
MR. WAID: He doesn't have an obligation to. To the extent that it might be helpful to him, I'm trying to make it easy. And if he doesn't want to do that, he doesn't have to do that.
MR. PETRAK: Right. But I don't want you to later say that there was some obligation on him every time you ask a question to check that and refer to it. He may not do that right now, he may do that later, that's up to him. He's going to do his best to answer your questions. But I don't want to have that lobbed out there like he was expected to do that in response to every question you asked.
Q. (By Mr. Waid) I'm not placing any obligation on you. It's available if it might be of assistance.
MR. PETRAK: Same point.
[EXHIBIT NO. 9 MARKED FOR IDENTIFICATION]
(Document proffered to witness.)
Q. (By Mr. Waid) Showing you what's been marked as Exhibit 9, have you seen this document? And let me point out in the heading Emily Fiso. Ms. Fiso is a clerk in our

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understand is, other than Exhibit 32, what other communications did you have about the settlement agreement after June 21, 2012?

MR. PETRAK: With?

Q. (By Mr. Waid) With Mr. Butler.

A. I don't have the degree of specificity to recall exactly, so I wouldn't be able to answer that question. Probably the best evidence of any communications I would have had, if any, would have been reflected in emails or notes. I see my billing records, there wasn't much going on.

Q. Did you talk to Mr. Zvirzdys about the scope of the release in the final settlement and release document, Exhibit 5?

A. I don't have a specific recollection of talking about it with him the release. I certainly talked with all of them about the release by virtue of the CR 2A Agreement.

Q. Do you recall discussing with Mr. Zvirzdys the ramifications of the use of the phrase "one another"?

A. Yeah, again, the context of that release that's in the final settlement and release agreement is that there was a bilateral release between Mr. White on the one side and the other individuals on the other side. And, obviously, I was not aware of any dispute or issue as

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between the parties at the time their signatures were entered in January of 2013.

So the answer to your question is no, I didn't have any particular discussion that I recall about that phrase.

Q. Same question relative to Mr. Sutherland.

A. It would be the same answer.

Q. Did you meet Mr. Zvirzdys and Mr. Sutherland together when you went over the releases with them?

A. Well, Mr. Sutherland was in the room with me when we went to the CR 2A Agreement, which had all the provisions. So he was there. And then I can't recall whether -- it might have been sent to Mr. Zvirzdys, or Mr. Sutherland took a copy with him down to Olympia in which that's when Mr. Zvirzdys would have signed it or what-have-you. I can't recall that level of detail. And then they informed me that Mr. Butler would be in my office the next morning, which he was.

Q. Well, did Mr. Sutherland sign the settlement and release document, Exhibit 5, in your office?

A. You're talking about the CR 2A Agreement?

Q. No.

A. The final settlement agreement?

Q. Exhibit 5, the final settlement and release.

A. I don't believe anyone signed that in my office.

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Q. Did you give Mr. Zvirzdys or Mr. Sutherland, or both of them, any reason to believe that the CR 2A -- or not the CR 2A -- the settlement and release document, Exhibit 5, did you give them any reason to believe that document released and absolved them of any potential liability to Mr. Butler and ImageSource?

A. Again, the context of that Settlement and Release Agreement was, by virtue of the CR 2A Agreement, a bilateral release between Mr. White on the one hand and then the ImageSource folks on the other hand. And at the time that we entered into both the CR 2A Agreement and the final signatures in the January agreement, there was no dispute between the parties as to any issue that was brought to my attention. So, no, I would not have told them or given them any assurances that they would somehow be alleviated from any claims that might exist.

Q. Okay. That's a very long answer. I'm going to try again, and I'm going to try and phrase it slightly different and maybe you and I can make sure we're communicating.

Mr. Zvirzdys and Mr. Sutherland have both testified, as I think you're aware, that they understood that this -- that the release and settlement agreement, deposition Exhibit 5 in this case, released them from all liability to ImageSource and Butler.

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Did you say anything to either one of them to suggest the idea, a concept, a belief that deposition Exhibit 5, the settlement and release document, released them from liability to Butler and ImageSource?

A. And, again, I guess I rely on my same answer in that, given the purpose and intention that I understood it, the fact there was going to be a bilateral release and I was not aware of any dispute that was in existence between the parties, that is not something that I would have told them before January 2013 when the parties executed the final settlement agreement. So the answer is no.

Q. So if they had that understanding, they got it from someone else and not from you; correct?

MR. PETRAK: Object to the form; foundation.

A. Again, as of January 2013, that is not something that I would have expressed to them as the purpose of the agreement.

MR. WAID: Let me have a couple minutes to confer with my client, and hopefully we're about done.

[BRIEF RECESS TAKEN]

MR. WAID: Back on the record.

Q. (By Mr. Waid) Subsequent to January 2 of 2013,

WAID LAW OFFICE

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