NO. 42864-II

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

CLARK COUNTY FIRE DISTRICT NO. 5 and AMERICAN ALTERNATIVE INSURANCE CORPORATION

Appellants,

v.

BULLIVANT HOUSER BAILEY, P.C., and RICHARD G. MATSON

Respondents.

RESPONDENTS' BRIEF ON PROXIMATE CAUSE AND SUMMARY JUDGMENT

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ANALYSIS

Pursuant to this Court's June 17, 2014 order requesting additional briefing on "proximate cause and summary judgment", Attorney defendants Bullivant Houser Bailey, P.C. and Richard Matson [collectively hereinafter "BHB"] submit the following additional briefing.[1]

A. Statements Made by Plaintiffs in Oral Argument.

Germane to understanding the failure of plaintiffs to adequately support opposition to preclude the trial court's summary judgment dismissal of plaintiffs claim for malpractice based on BHB's evaluation of potential settlement and resulting jury verdict is the misstatement made by counsel during oral argument that the underlying plaintiffs "would have settled" their claims for $1.5 million. Nowhere in the record is any such fact present. The only facts in the record regarding settlement negotiations and demands are that the underlying plaintiffs made a combined tort claim for $6 million [CP 640], these same plaintiffs made a mediation demand for $8.5 million [CP 540], underlying plaintiffs never reduced their demand, Plaintiff AAIC never offered one dollar in settlement [CP 543] and following a month long trial a jury returned a verdict for $3.531 million [CP 548-552], approximately $5 million less than the last

[1]BHB understands that the request for additional briefing on proximate cause and summary judgment relates only to the claimed malpractice involving Mr. Matson's case evaluation and trial objections.

settlement demand.

Counsel's argument before the court that the underlying case "could have been settled" for $1.5 million is contrary to the record.

B. Neither Plaintiffs Evidence at Trial Nor on Appeal Establish the Existence of Proximate Cause Sufficient to Survive Summary Judgment Dismissal.

Washington courts recognize that the purpose behind a summary judgment motion is to "examine the sufficiency of the evidence behind a plaintiff's formal allegations in the hope of avoiding unnecessary trials where no genuine issue as to a material fact exists." *Young v. Key Pharmaceuticals,* 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

In a legal malpractice case, the burden is on the plaintiff to show that the attorney's negligence was the proximate cause of the injury. *Hansen v. Wightman,* 14 Wn. App. 78, 88, 538 P.2d 1238 (1975). Proximate cause has two elements: cause in fact and legal causation. *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985). Cause in fact refers to acts or omissions without which the injury would not have occurred—cause in fact is "but for" causation. Legal causation refers to the policy considerations regarding how far the consequences of a defendant's acts or omissions should extend. *Christen v. Lee*, 113 Wn.2d 479, 780 P.2d 1307 (1989).

In a legal malpractice case, proximate cause is determined by the

"but for" test. *Griswold v. Kilpatrick*, 107 Wn. App. 757, 760, 27 P.3d 246 (2001). Plaintiff must demonstrate that "but for" the attorney's negligence he would have obtained a better result. *Sherry v. Diercks*, 29 Wn. App. 433, 438, 628 P.2d 1336 (1981). The "but for" test requires a party to establish that the act or omission complained of probably caused the subsequent injury. *Nielson v. Eisenhower & Carlson*, 100 Wash. App. 584, 591, 999 P.2d 42 (2000). *Schmidt v. Coogan*, 135 Wn. App. 605, 610, ¶10, 145 P.3d 1216 (2006) ("Under the 'case within a case' principle, the plaintiff in a legal malpractice claim must prove that, but for the attorney's negligence, the plaintiff would probably have prevailed in the underlying claim.").[2] On summary judgment, the plaintiff must submit "competent testimony setting forth specific facts, as opposed to general conclusions to demonstrate a genuine issue of material fact." *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993). The record before the trial court and this appellate courts related to "potential settlement" is solely that the underlying plaintiffs wanted "millions" and the plaintiff carrier AAIC litigation position was that "...if the plaintiffs want these kind of numbers a jury is going to have to give it to them." [CP 546.]

[2]To establish proximate cause, Plaintiffs must...: [I]ntroduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough. . . . W. Prosser, The Law of Torts #41, p. 269 (5th ed. 1984) (citations omitted).

1. The "Lost Chance of Settlement" Theory Does Not Support a Proximate Cause Analysis And Does Not Apply In Washington Legal Malpractice Cases.

At the January 17, 2014 oral argument of their appeals Plaintiffs / Appellants asserted they suffered damage proximately caused by alleged professional negligence of the defendants, because BHB failed to perfect any pre-trial settlement with the underlying plaintiffs in some lesser amount than the underlying jury verdict – asserted to be what the underlying plaintiffs "would" have taken prior to trial.

Plaintiffs assert that the BHB settlement evaluation was incorrect, and thus proximately caused plaintiffs a "lost chance of pre-trial settlement" of the underlying plaintiffs' claims for an amount less than the ultimate trial judgment.

The theory of "lost chance of settlement" is not a valid legal theory under Washington law in a legal malpractice action and does not evidence any causal nexus to support the element of proximate cause. The malpractice claims by plaintiffs was properly dismissed by the trial court as a matter of law as no causation exists in the record.

General principles of causation are no different in a legal malpractice action than in an ordinary negligence case. *Sherry v. Diercks*, 29 Wash. App. 433, 437, 628 P.2d 1336 (1981). In order to raise issues of triable fact that are sufficient to defeat motions for summary judgment on

the issue of proximate cause in legal malpractice cases, a non-moving plaintiff is required to present definitive evidence that goes beyond conclusory or speculative assertions of value, even by expert opinion.[3]

Legal causation rests on considerations of policy determining how far a party's responsibility should extend. *Blume*, 134 Wash.2d at 252, 947 P.2d 223. It involves the question of whether liability should attach as a matter of law, even if the proof establishes cause in fact. *Id.* Proximate cause may be determined as a matter of law when reasonable minds could reach but one conclusion. *Kim v. Budget Rent A Car Systems, Inc.*, 143 Wash.2d 190, 203-04, 15 P.3d 1283 (2001). "[W]hen reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law." *Ruff v. County of King*, 125 Wash.2d 697, 704, 887 P.2d 886 (1995).

To create any triable factual issue of proximate cause, evidence must "rise above speculation, conjecture, or mere possibility. *Attwood v. Albertson's Food Center*, 92 Wash. App. at 331, 966 P.2d 351 (1998) ... That the defendant's actions 'might have,' 'could have,' or 'possibly did'

[3]Contrary to plaintiffs' argument, conflicting expert opinions do not create issues of fact that preclude the Court from determining application of judgmental immunity as a matter of law. "[T]estimony by the lawyer-expert witnesses, concerning how they would have resolved the issue cannot create an issue of fact, Ronald E. Mallen, Jeffrey M. Smith, *Legal Malpractice* (2012 ed.) (hereinafter "*Mallen & Smith*"), Vol. 2, §19.7, p. 1171, (citing Halverson v. Fergusson, 46 Wn. App. 708, 717-718, 735 P.2d 675 (1986) (emphasis added).

cause the subsequent condition, [i.e. a higher jury verdict], is insufficient" to establish an issue of fact barring summary judgment based on a lack of proximate cause. *Shellenbarger v. Brigman*, 101 Wash. App. 339, 348, 3 P.3d 211 (2000).

In legal malpractice actions, Washington courts have firmly established that even where a non-moving party presents expert opinion on the purported value of a "lost" underlying settlement, such testimony fails to present triable issues of material fact necessary to defeat a defendant's motion that is based on the defendant's assertion of a lack of proximate cause. *Griswold v. Kilpatrick*, 107 Wash. App. 757, 761-62, 27 P.3d 246 (2001).

The Washington Supreme Court has dispositively rejected the theory of "lost chance of settlement" in legal malpractice cases. *Daugert v. Pappas*, 104 Wn .2d 254, 260-62, 704 P.2d 600 (1985). *Daugert* remains the controlling case on this issue with respect to legal malpractice cases and causation. Thus, any claim based on "lost chance of settlement" in a Washington legal malpractice action fails to state a cause of action, cannot support the element of proximate cause. BHB is and was entitled to a dismissal of AAIC's claims as a matter of law by the trial court judge.

To the extent the theory might otherwise be argued, the issue of "lost chance" is a theory which requires sufficient evidence to prove that the

causation element of the claim is not speculative. "[D]etermination of proximate cause may not rest on speculation or conjecture." *Schneider v. Rowell's, Inc.*, 5 Wn. App. 165, 167- 68, 487 P.2d 253 (1971). Nothing in record goes beyond the level of speculation or conjecture regarding an alternative jury verdict or what underlying plaintiffs may or possibly would have taken if any settlement monies were offered by AAIC, which were not.

2. Proximate Cause and Decision Not to Object at Plaintiffs Summation.

To the extent necessary to address "but for" causation with regard to plaintiffs assertions that Mr. Matson's non-objection during underlying plaintiffs summation, was the proximate cause of the jury verdict, reference to both the record on appeal and this court's opinion in *Collins v. Clark County Fire District, et al.*, 155 Wash. App 48, 231 P.2d 1211 (2010) is determinative.

In *Collins*, the underlying defendants moved for a new trial based on two statements made by the underlying plaintiffs' counsel during summation. Those statements were purported to reference "insurance" and contained a "sending a message" component. This Court denied the motion for new trial clearly disagreeing with the underlying defendants' contention that the statements made in summation "...constituted irregularity or misconduct that materially affected their substantial rights

and caused the jury to base its verdict on passion and prejudice." [Underline added.][4]

Specifically, the Collins court found that:

With respect to insurance

- The underlying defendants failed to support their argument with any briefing or legal authority that "...Boothe's comments "urged the jurors to disregard the evidence before them" and to award a higher verdict than what they would have awarded..."[5]

With respect to "sending a message"

- The trial court was correct that "Boothe's "argument was indirect" and "not addressed in such a manner as to incite the jury on beyond reasonable awards."[6]

With respect to passion and prejudice

- Although not deciding this issue, in footnote 25 this court stated: "Nevertheless, even were we to consider this issue, Defendants fail to show that Boothe's comment or passion or prejudice influenced the jury's verdict."[7]

With respect to the damage award

- The evidence supported the quantum of the jury's award of both economic and non-economic damages.

There was nothing in the record in the first appeal to this court requesting a new trial which supported a factual determination that the result arising from the summation statements and the lack of objection

[4] *Collins v. Clark County Fire District, et al.*, 155 Wash. App 48, at 93, 231 P.2d 1211 (2010). [CP 559-593.]
[5] *Id.* at 95.
[6] *Id.* at 96 – 97.
[7] *Id.* at 97.

would have been different had an objection been made. Similarly, there is no evidence in the record in our case which supports any lack of objection as the "but for" causation for the jury verdict.

As for the presence of legal causation, the trial court judge in examining the "totality of circumstances" in application of judgmental immunity to an attorney's decision not to object aptly stated:

> It's a question of tactics. You know, everything Mr. Matson did in this case, he acted in good faith toward his client. He did in fact make reasonable decisions. And I do not believe it's appropriate for me to second guess that decision.
>
> * * *
>
> But the bottom line is that the decision to object or not object rests with the trial attorney. That's his judgment. Does he want to draw attention to it or not? There is no automatic rule that says you must object to everything that's objectionable. You make trial choices that sometimes you let it go by because it's not important to you. Okay. And that's the bottom line in this case.

[RP (Aug. 17, 2013) at 70, 72.]

This Court should affirm the lower court dismissal of plaintiffs' legally and factually unsupported legal malpractice claims. No proximate cause is supported by the record with respect to any action in evaluation of settlement/verdict amounts or decisions regarding summation objections which would have resulted in a different verdict than that rendered.

DATED this 31st day of January, 2014.

FORSBERG & UMLAUF, P.S.

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Matson

CERTIFICATE OF SERVICE

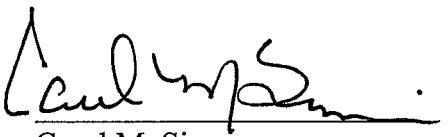
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action,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

On the date given below I caused to be served the foregoing RESPONDENTS' BRIEF ON PROXIMATE CAUSE AND SUMMARY JUDGMENT on the following individuals in the manner indicated:

Mr. Michael A. Patterson
Mr. Daniel P. Crowner
Patterson, Buchanan, Fobes, Leitch & Kalzer, Inc., P.S.
2112 Third Ave., Suite 500
Seattle, WA 98121

(X) Via Hand Delivery on February 3, 2014

SIGNED this 31st day of January, 2014, at Seattle, Washington.



Carol M. Simpson

SUPERIOR COURT OF WASHINGTON

FOR CLARK COUNTY

CLARK COUNTY FIRE DISTRICT NO. 5, and AMERICAN ALTERNATIVE INSURANCE CORPORATION,	)	
Plaintiffs,	)	
vs.	)	No. 09-2-03892-2
BULLIVANT HOUSER BAILEY, P.C., and RICHARD G. MATSON,	)	
Defendants.	)	

MOTION FOR SUMMARY JUDGMENT

BEFORE THE HONORABLE JOHN WULLE

DATE: August 17, 2012
TIME: 10:54 a.m.
PLACE: Clark County Courthouse
Vancouver, WA

Transcribed by: Michael R. King, WA CCR No. 2655

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attorneys over the years. In the Attorney General's office, that was my function more than anything else was to train the new trial attorneys because that's what I was. I was a trial attorney. I was in court every single day. And I sit on the bench and I'll be looking at the sky and I'll hear something in my ear that is objectionable to me under the rules of evidence and I'll glance down at the attorneys without even thinking about it. And a new attorney will go, What? What? And the old-time attorney will sit there and go, No, that's not important to me. And he makes that decision because he says, If I bring it up again, I'm really pointing it out to the jury. And I've been in that position a bazillion times.

And to call Mr. Matson on the carpet to say, You should have objected, he's probably evaluated that particular thing and saying, I don't want to emphasize that.

I don't know. I need to see the recording. I'm giving you a preliminary decision, but I'm going to hold the final decision for three weeks until I've seen two things: Those email thingamajiggies and how bad were they so I get a sense of what evaluation was made about the value of the case; and, two, the actual closing argument so I can evaluate what occurred in

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trial. I'll be curious to see if the camera caught Mr. -- caught counsel's expressions, you know.

MR. COX: It did, Your Honor.

THE COURT: Because I've been there 100 times myself, a bazillion times myself, you know. And studying jury verdicts, excuse me if I'm quoting General Schwarzkopf correctly, That is pure bovine scatology. There is no way that somebody else's verdict is going to tell me what my jury's going to do.

And speaking of juries, we predict -- myself and my staff -- predict what a jury will do, and we get it wrong 90 percent of the time. I've got a jury out now on a civil case. We have no idea what they're going to do with this case. There are certain rules we have learned. The only time I can predict a jury is in a criminal case. When they walk back into the courtroom and they smile at the defendant, that's when I know it's not guilty. But now I'm back, I can make no predictor about what a jury will do. And they have shocked and surprised me again and again and again in 30 years of practicing law, so I see no value looking at what jury verdicts do.

What I see is the value of what did I do in the court of law in front of that jury to make them believe myself and my client or not believe the other side.

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It's a question of tactics.

You know, everything Mr. Matson did in this case, he acted in good faith toward his client. He did in fact make reasonable decisions. And I do not believe it's appropriate for me to second-guess that decision.

I'll also point out to you as an aside, which has no effect on my decision in this case, well, I've seen Mr. Matson in court. He's been in front of me numerous times. He's a first-class attorney. That's the only way I can put it. He's in the upper crust --

MR. CROWNER: I disagree.

THE COURT: -- of those people who I admire their skill level, people I try to learn from by observation. But the bottom line is you cannot learn from observation. I cannot do what another attorney can do in front of a jury. I can only meld my professionalism and my personal personality into how I present myself to a jury. And every one of us is doing that process. We're all evaluating our cases as they're happening.

And I would point out to you that most of the decisions we make in trial are snap decisions, spur of the moment. Do I react to this? Don't I react to that? And I've got a split second to decide.

You know, I might develop nuances as a trial

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attorney. For example, if the other side has got a witness on that I didn't like, I used to always go just like that. And that was communicating to the jury just through my physical being my thought on that process. But I was not doing it orally so, therefore, there was no way to object to what I was doing. And that was just something I learned over the years from an old-timer. Okay. But I cannot second-guess Mr. Matson in this -- this realm. He did a reasonable job.

And estimating the value of the case -- let me point out something to you. There's no scientific studies out on this. There's no jury verdict decisions and looking at that. But all of us in our profession in Clark County know that Clark County juries are cheap. We just inherently accept that fact because we've seen it again and again, either small awards or no awards where there should have been something. So we have this mystique -- call it a mystique -- this belief, this observation that we call cheap Clark County juries. And we actually say that to each other when decisions come in. And I don't mean me the -- we the judges. I mean we the profession say that to each other. I've seen attorneys saying it all the time. It's something we've passed down through the generations.

And evaluating the value of this case, again, I

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want to see what those emails were all about so I can make an independent evaluation of what I think it was worth. But I sure as heck would never have guessed in a consensual environment, the sharing of naked pictures or -- or explicitly -- sexually explicit emails would be valued at bazillions of dollars.

I mean, I would be surprised -- I would have guessed that less than 365,000 just as a knee jerk, knowing that Clark County juries are cheap, I would have suggested that they probably would have given at the most 50 grand to each one of the plaintiffs and no more. I could not have -- I mean, I think that decision of that jury was no way anyone could predict that decision. We just would not have seen that among ourselves under any evaluation of the facts of this case. And those things we just accept.

But the bottom line is that the decision to object or not object rests with the trial attorney. That's his judgment. Does he want to draw attention to it or not? There is no automatic rule that says you must object to everything that's objectionable. You make trial choices that sometimes you let it go by because it's not important to you. Okay. And that's the bottom line in this case.

The only other thing I would might change is

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the evaluation of the case. And when I have that data, I'll give you a second opinion, a final decision on this. And I'll also give you a chance to be heard a second time. But right now, today, that's my decision.

MR. COX: Thank you, Your Honor. I have --

THE COURT: And would you send that. That stuff needs to be --

MR. COX: I'll have it messengered and sealed and it'll come --

THE COURT: Oh, please seal it because I don't want to expose other people to that.

MR. COX: Thanks, Your Honor.

THE COURT: It's like I'm one of the few people -- well, of all the judges that have to look at child pornography. We don't want to. It's disgusting. And I assume I'm going to be disgusted by this stuff, too, but neither here nor there. I have an obligation to make sure I'm making the right choices here.

MR. COX: Thank, Your Honor.

MR. CROWNER: Right.

MR. COX: I'll have that sent to you on Monday.

MR. CROWNER: Can you give us a copy of that, too, just for --

MR. COX: Sure.

THE CLERK: Is that on the 7th?

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THE COURT: That's a docket in three weeks, on your own docket. So if you want to go a little later in the morning, is it more convenient for you to go later in the morning?

MR. COX: Well, I was going to get that stuff to you on Monday. Is that what we're talking about?

THE COURT: Here's the --

MR. CROWNER: I think we're talking about setting the next --

THE COURT: You're traveling --

MR. COX: Oh, the next --

MR. CROWNER: Yeah.

THE COURT: Where are you traveling from?

MR. CROWNER: Both Seattle.

MR. COX: Both Seattle, Your Honor.

THE COURT: Okay. Let's do this. Why don't we have a conference call in three weeks at, like, 4:00 in the afternoon. Somebody set up a conference call and call me because I can't do it from my end. And then I'll just tell you if I'm changing my decision.

MR. COX: All right, Your Honor.

THE COURT: And if I am changing my decision, then we need to come back to court and do that. And that way you gentlemen won't have to travel.

MR. COX: All right, Your Honor.

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MR. CROWNER: Okay.

THE COURT: Is that convenient for both of you?

MR. CROWNER: Yeah.

MR. COX: Yes, Your Honor.

THE COURT: Okay.

MR. CROWNER: Thank you.

THE COURT: Where do you stay when you come down here?

You can take us off, Rhonda.

(COURT ADJOURNED.)