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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

EDWARD MC ELMURRY and EVA
MC ELMURRY, INDIVIDUALLY and
the marital community thereof,

Plaintiffs,

v.

RUSSELL INGEBRITSON and JANE
DOE INGEBRITSON
INDIVIDUALLY, and the marital
community thereof and AGENTS/
OWNERS OF INGEBRITSON and
ASSOCIATES, A MINNESOTA
ENTITY,

Defendants.

No. 2:16-cv-00419-SAB

**ORDER DENYING
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

Before the Court is Plaintiffs' Motion for Summary Judgment, ECF No. 20. The Court held a hearing on November 7, 2017, in Spokane, Washington. Plaintiffs were represented by Troy Nelson and Ryan Best, and Defendants by Markus Louvier. The Court took the motion under advisement. For the reasons stated herein, Plaintiffs' motion is denied.

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**ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT + 1**

1 **Background**

2 On November 30, 2017, Plaintiffs Edward and Eva McElmurry filed a
3 Complaint for Legal Malpractice against Russel and Jane Doe Ingebritson and
4 Agents/Owners of Ingebritson and Associates. ECF No. 1. Plaintiffs allege that
5 Edward McElmurry (“Plaintiff”) was injured in a car accident on the job while
6 employed with BNSF Railroad (“BNSF”). Plaintiff contends that Russell
7 Ingebritson (“Defendant”) agreed to represent him on a contingent fee basis in a
8 Federal Employers Liability Act (“FELA”), 45 U.S.C. § 51, et seq., lawsuit
9 against BNSF. Plaintiff further alleges that Defendant failed to file a FELA action
10 prior to the expiration of the statute of limitations. Accordingly, Plaintiff brings a
11 legal malpractice action to recover damages from the injuries he suffered.

12 **Disputed Facts**

13 Plaintiff was an electronic technician working in the telecommunications
14 department for BNSF. In June 2012, the BNSF Pasco yard was short staffed and
15 Plaintiff was ordered to drive to Pasco to assist in a projects completion. For
16 travel, Plaintiff was provided a 1997 BNSF Jeep Cherokee. On June 15, 2012,
17 Plaintiff was driving to Spokane from Pasco in the work vehicle and was on-the-
18 clock. Near the Cheney-Tyler exit, Plaintiff slowed his speed due to an accident
19 when he was rear-ended by a large SUV traveling at full highway speed. He was
20 injured in the accident. Plaintiff notes that the Jeep did not have reflective tape on
21 the back and was not equipped with a strong metal mesh barrier between the
22 driver compartment and the rear like several other BNSF vehicles.

23 After the accident, Plaintiff hired Jim Sweetser to represent him in an
24 underinsured motorist lawsuit against the other driver. Sweester, however, was
25 unfamiliar with FELA and advised Plaintiff to retain a different attorney; the
26 union recommended Defendant.

27 Plaintiff proffers the following. Plaintiff spoke to Defendant around
28 October or November of 2014. Defendant stated he would pursue a FELA action

1 on behalf of Plaintiff on a contingency fee basis. In late 2014, Plaintiff gave
2 Andrew Day of BNSF a settlement demand letter drafted by Sweester, which
3 Defendant later asked to see, along with medical records. Plaintiff had several
4 additional phone calls with Defendant and told his coworkers that Defendant was
5 representing him in a FELA action. Defendant later became aware that Plaintiff
6 may have a claim against BNSF for asbestosis and advised Plaintiff on the same.
7 When Day asked Plaintiff to give a statement, Plaintiff called Defendant, who
8 advised Plaintiff not to give a statement. The statute of limitations expired in June
9 2015; no lawsuit was filed.

10 Defendant offers the following version of the facts. Defendant received a
11 call from Plaintiff in 2014. Due to Defendant's membership in DLC (full name
12 unknown), he is obligated to provide free assistance to union members.
13 Defendant agreed to hear Plaintiff out. Plaintiff stated that a former attorney
14 obtained a \$300,000 settlement on his behalf and Plaintiff was angry about the
15 one-third contingency fee collected. Defendant stated it was unlikely anything
16 could be done with the settlement and proceeded to explain FELA and noted that
17 BNSF's negligence would have to be the cause of Plaintiff's injuries. Defendant
18 expressed doubt that Plaintiff had a viable FELA claim, stating that it was
19 unlikely that reflective tape would have any impact on the occurrence of an
20 accident that occurred in broad-daylight.

21 From the outset, Plaintiff understood the three-year statute of limitations.
22 Defendant was clear that he would not represent Plaintiff, but would help him
23 explore other potential claims. Plaintiff never asked for Defendant's formal
24 representation, nor did the parties enter into a fee agreement. Plaintiff and
25 Defendant exchanged more phone calls. Defendant explained any future claim
26 would be accompanied by a standard written fee agreement. At the time
27 Defendant was engaged in an epidemiological study with the union because
28 potential conditions and diseases could arise out of workplace exposures.

1 Defendant stated he would explore to see if Plaintiff may have a claim and
2 considered the current and future health of his wife. The parties engaged in no
3 discussions about a fee arrangement or the handling of costs. Plaintiff stopped
4 calling Defendant and while the parties did interact from time to time, Defendant
5 never agreed to act as Plaintiff’s attorney, the firm did not represent Plaintiff, and
6 Defendant did not open or begin the process of opening a litigation file.
7 Defendant did not ask to contact Plaintiff’s prior attorney nor did he receive any
8 file materials from the prior case. Plaintiff never asked what Defendant was
9 doing, ask for copies of papers, ask Defendant to do something or inquire as to
10 what Defendant had done on his behalf. Indeed, Plaintiff interacted directly with
11 BNSF, as he would be free to do as an unrepresented employee; he never asked
12 Defendant to contact BNSF.

13 **Legal Standard**

14 Summary judgment is appropriate if the pleadings, discovery, and
15 affidavits demonstrate there is no genuine issue of material fact and that the
16 moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*,
17 477 U.S. 317, 323 (1986) (citing Fed. R. Civ. P. 56(c)). There is no genuine issue
18 for trial unless there is sufficient evidence favoring the nonmoving party for a
19 jury to return a verdict in that party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477
20 U.S. 242, 250 (1986). The moving party has the burden of showing the absence of
21 a genuine issue of fact for trial. *Celotex*, 477 U.S. at 325.

22 When considering a motion for summary judgment, the Court neither
23 weighs evidence nor assesses credibility; instead, “[t]he evidence of the non-
24 movant is to be believed, and all justifiable inferences are to be drawn in his
25 favor.” *Anderson*, 477 U.S. at 255. When relevant facts are not in dispute,
26 summary judgment as a matter of law is appropriate, *Klamath Water Users*
27 *Protective Ass’n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999), but “[i]f
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1 reasonable minds can reach different conclusions, summary judgment is
2 improper.” *Kalmas v. Wagner*, 133 Wn. 2d 210, 215 (1997).

4 **Discussion**

5 Plaintiff asks the Court to enter summary judgment in its favor that an
6 attorney-client relationship between Plaintiff and Defendant existed; Defendant
7 breached his duty to Plaintiff by failing to file a FELA claim before the expiration
8 of the statute of limitations; and BNSF is liable for Plaintiff’s injuries under
9 FELA by failing to install reflective tape on the back of the Jeep and failing to
10 provide mesh netting to secure tools inside the vehicle. Primarily at issue in this
11 case is whether an attorney-client relationship was ever formed.

12 In order to establish a legal malpractice claim, plaintiff must demonstrate
13 “(1) [t]he existence of an attorney-client relationship which gives rise to a duty of
14 care on the part of the attorney to the client; (2) an act or omission in breach of
15 the duty of care; (3) damage to the client; and (4) proximate causation between
16 the attorney’s breach of the duty and the damage incurred.” *Hizey v. Carpenter*,
17 119 Wn.2d 251, 260-61 (1992). “To comply with the duty of care, an attorney
18 must exercise the degree of care, skill, diligence, and knowledge commonly
19 possessed and exercised by a reasonable, careful, and prudent lawyer in the
20 practice of law in this jurisdiction”; in Washington, the standard of care is
21 statewide. *Id.* at 261.

22 “The existence of an attorney/client relationship is a question of fact, the
23 essence of which may be inferred from the parties’ conduct or based upon the
24 client’s reasonable subjective belief that such a relationship exists.” *Teja v.*
25 *Saran*, 68 Wn. App. 793, 795 (citing *Bohn v. Cody*, 119 Wn.2d 357, 363 (1992)).
26 As the Washington State Supreme Court has noted, “[t]he essence of the
27 attorney/client relationship is whether the attorney’s advice or assistance is
28 sought and received on legal matters.” *Bohn*, 119 Wn.2d at 363. “The relationship

1 need not be formalized in a written contract,” and “[w]hether a fee is paid is not
2 dispositive.” Id. “The existence of the relationship ‘turns largely on the client’s
3 subjective belief that it exists’” but that belief “does not control the issue unless it
4 is reasonably formed based on the attending circumstances, including the
5 attorney’s words and actions.” Id. (quoting *In re McGlothlen*, 99 Wn.2d 515, 522
6 (1983)).

7 At summary judgment, all reasonable inference must be taken in the light
8 most favorable to the non-moving party. *Anderson*, 477 U.S. at 250. Plaintiff
9 attests that he believed Defendant to be his attorney with regard to a FELA
10 action. He told several of his coworkers that Defendant was representing him, and
11 relied on Defendant’s advice that he should not give a statement to BNSF. Fees
12 were never discussed and no formal fee agreement was executed. Defendant
13 contends that he told Plaintiff that no viable FELA claim existed and told Plaintiff
14 that he was not his attorney. Plaintiff never inquired as to what Defendant was
15 doing on his behalf, no documents were exchanged or requested, and no
16 investigation was made. Defendant never exchanged communications with BNSF
17 or medical providers. Additionally, Plaintiff interacted with his employer
18 personally, presenting a settlement demand letter. Defendant argues that
19 Plaintiff’s actions are indicative of Plaintiff’s belief that he was unrepresented.
20 Plaintiff previously retained counsel and knew how an attorney-client relationship
21 worked; no relationship was formed here. The Court cannot rule, as a matter of
22 law, that Plaintiff’s subjective belief as to the existence of an attorney-client
23 relationship was reasonable.

24 Because genuine issues of material facts exist as to whether an attorney-
25 client relationship was ever formed, whether Defendant had, or breached, a duty
26 of care is also in dispute. Furthermore, Defendant has not shown that BNSF’s
27 failure to install reflective tape and metal barrier were the proximate cause of his
28 injuries. In a legal malpractice action, proximate cause exists if the client would

1 have fared better but for the attorney’s negligence. *Lavigne v. Chase, Haskell,*
2 *Hayes & Kalamon, P.S.*, 112 Wn. App. 677, 683 (2002). This requires a trial
3 within a trial wherein the trier of fact must decide if the underlying cause of
4 action would have resulted in a favorable verdict for the client. *Brust v. Newton,*
5 *70 Wn. App.* 286, 293 (1993). Under FELA, a railroad is liable in damages to any
6 person it employs for such injury or death resulting in whole or in part from the
7 negligence of any of the officers, agents, or employees of such carrier. 45 U.S.C.
8 § 51. The FELA standard “is simply whether the proof justify with reason the
9 conclusion that employer negligence played any part, even the slightest, in
10 producing the injury or death for which damages are sought.” *CSX Transp., Inc.*
11 *v. McBride*, 564 U.S. 685, 692 (2011).

12 As Defendant notes, the accident occurred in broad-daylight. It is doubtful
13 that reflective tape would have prevented the accident. Indeed, Plaintiff’s own
14 expert, William Schroeder, opined that given the legal standards under FELA and
15 the relevant facts, Plaintiff “possessed sufficient facts to state a FELA claim
16 against BNSF vis-à-vis the reflective striping issue, and that that these facts
17 would be sufficient to resist a summary judgment motion and present a jury
18 question for trial.” ECF No. 23. Mr. Schroeder does not opine that Plaintiff is
19 entitled to judgment as a matter of law, or that he would have succeeded in a
20 FELA action. Defendant believed that Plaintiff’s claim lacked merit. Because
21 Plaintiff has not offered facts sufficient to demonstrate that he is entitled to
22 judgment as a matter of law, Plaintiff’s motion is denied.

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1 Accordingly, **IT IS ORDERED:**

2 1. Plaintiffs' Motion for Summary Judgment, ECF No. 20, is **DENIED.**

3 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to enter
4 this Order and to provide copies to counsel.

5 **DATED** this 13th day of November 2017.



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11 Stanley A. Bastian
12 United States District Judge
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