IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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<tr><td>UWEM USORO and ETCETERA ENGINEERING TRANSPORTATION & ALLIED SERVICES, INC., a Washington corporation,

Appellants,

v.

CHARLES HELM and JANE DOE HELM, husband and wife, and the marital community thereof, and HELM & HELM, INC., PS, a Washington corporation,

Respondents.</td><td>DIVISION ONE

No. 66100-1-I

UNPUBLISHED OPINION

FILED: October 24, 2011</td></tr>
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Dwyer, C.J. — Etcetera Engineering Transportation & Allied Services, Inc. (Etcetera) and Uwem Usoro brought suit against Charles Helm, alleging legal malpractice, breach of contract, and negligent infliction of emotional distress. Because Etcetera failed to present evidence creating an issue of material fact as to the essential element of proximate cause, the trial court properly dismissed on summary judgment the corporation's legal malpractice claims against Helm. As Usoro and Etcetera's other claims are also without merit, we affirm.

I

In February of 2005, Etcetera, a Washington corporation, purchased a 1998 Lincoln Town Car. On February 10, 2005, Usoro, an officer and

shareholder of Etcetera, contacted Etcetera's insurance agent, Kathleen Rohner, to request that the 1998 Lincoln be added to Etcetera's existing commercial automobile policy with Columbia Insurance Company (Columbia). On that same day, Rohner provided Usoro with a Certificate of Liability Insurance and a liability insurance card for Etcetera's policy with Columbia.

Rohner and Usoro disagree regarding the events that followed. According to Rohner, upon determining that the addition of another vehicle to the Columbia policy would substantially increase Etcetera's insurance premiums, she suggested that Etcetera instead insure the 1998 Lincoln with a different company. Thereafter, Rohner maintains, Etcetera decided to insure the vehicle with Cornhusker Insurance, and Rohner withdrew the request to Columbia. When Rohner learned that Cornhusker had refused to issue a liability policy to Etcetera, she advised Usoro that there was no coverage on the 1998 Lincoln. According to Usoro, Rohner simply failed to forward the necessary documents to Columbia, and Usoro was shocked to learn the vehicle was not insured. In any event, Rohner and Usoro agree that (1) Etcetera requested only liability insurance for the 1998 Lincoln and (2) no such policy was ever issued by any insurance company.

On March 19, 2005, the 1998 Lincoln was involved in a motor vehicle collision. The driver of the other automobile was injured and filed a lawsuit against Etcetera and the driver of the 1998 Lincoln. Etcetera tendered the

defense of the suit to Columbia, who agreed to defend under a reservation of rights. Columbia paid $95,000 to settle the personal injury lawsuit, reserving its right to seek reimbursement from Etcetera.

After the settlement of the personal injury suit, Etcetera filed a lawsuit against Columbia, Rohner, and Rohner's employer, MYBIA Corporation/Insuremax, Inc.[1] Etcetera alleged breach of contract, bad faith, and violations of the Consumer Protection Act (CPA) against Columbia, and negligence, negligent misrepresentation, and violations of the CPA against Rohner and MYBIA/Insuremax. The complaint made no claim for any first party loss such as personal property damage, loss of use, or other consequential economic losses. The complaint also did not allege that Rohner or any other defendant improperly failed to obtain first party property insurance on the 1998 Lincoln. Etcetera was the only plaintiff.

Columbia counterclaimed against Etcetera for reimbursement of the $95,000 that it had paid to the third party driver on Etcetera's behalf. On April 13, 2007, Etcetera settled with Columbia. Columbia abandoned its counterclaim for reimbursement and was dismissed from the lawsuit with prejudice on May 15, 2007.

On July 25, 2007, Etcetera obtained a default judgment against Rohner, MYBIA, and Insuremax. The default judgment was based upon a declaration

[1] Although Usoro identified MYBIA and Insuremax as two separate corporations in his complaint, Rohner believed them to be the same entity.

submitted by Usoro that purported to identify Etcetera's damages. Although the allegations in the underlying complaint pertained only to Rohner's alleged failure to procure liability insurance, the judgment awarded damages for property damage to the 1998 Lincoln, loss of use of the 1998 Lincoln, and lost revenue from the 1998 Lincoln. The principal amount of the judgment was $166,338. Attorney fees and costs were awarded in the amount of $14,141.67, for a total judgment of $180,479.67.

Etcetera retained Helm to collect the default judgment.[2] Helm filed his notice of appearance as counsel for Etcetera on August 18, 2008. Rohner thereafter moved to vacate the default judgment. On December 16, 2008, the trial court vacated the default judgment as to all defendants, explaining that the judgment was void because the relief awarded went beyond that which was prayed for in the complaint. Rohner and MYBIA/Insuremax subsequently informed Helm that they would be willing to settle the case for nuisance value—$5,000 to $10,000.

On or around April 10, 2009, Helm recommended to Usoro that Etcetera accept settlement within the range offered. Usoro refused. Four months later, on August 13, 2009, Helm gave notice to Etcetera that he had not received payment for expert witness fees, was not prepared to fund Etcetera's case, and was withdrawing as counsel. His withdrawal became effective on August 23,

[2] Helm and Etcetera verbally agreed to a contingency fee, whereby Helm's fee would be 20 percent of whatever amount was collected. Helm recommended that the company wait a year before attempting to collect the judgment in order to avoid vacation of the judgment based upon excusable neglect.

2009. No objection was made to his withdrawal.

On August 21, 2009, Rohner and MYBIA/Insuremax filed a motion seeking summary judgment dismissal of Etcetera's claims. At the ensuing hearing held on September 22, 2009, Usoro appeared pro se on behalf of Etcetera.[3] Etcetera submitted no written response to the motion, and the trial court granted summary judgment. Etcetera filed a motion for reconsideration, which was denied on October 9, 2009. Etcetera's appeal of these rulings is currently pending.

On December 15, 2009, Etcetera and Usoro initiated this lawsuit against Helm. Etcetera asserted claims against Helm for legal malpractice and breach of contract. Usoro asserted individual claims against Helm for legal malpractice, breach of contract, and negligent infliction of emotional distress. The plaintiffs moved for summary judgment and Helm filed cross motions for summary judgment dismissal of Etcetera's and Usoro's claims.

The trial court issued four orders related to these motions. On April 30, 2010, the court dismissed Usoro's individual claims with prejudice, finding that Helm owed no duty to Usoro individually and that no contract was entered into between Usoro and Helm. Usoro did not move for reconsideration of these rulings.

On June 21, 2010, the court ruled on Helm's motion for summary

[3] The record does not reflect a challenge to Usoro's lawful ability to represent a corporation in superior court. See, e.g., Dutch Village Mall v. Pelletti, 162 Wn. App. 531, 256 P.3d 1251 (2011) (a corporation appearing in a court proceeding must be represented by a licensed attorney).

judgment dismissal of Etcetera's claims. The court dismissed Etcetera's claims pertaining to vacation of the default judgment, but granted to Etcetera additional time to establish its claims relating to dismissal of the underlying claims against Rohner and MYBIA/Insuremax.

On August 26, 2010, the trial court issued its third order, dismissing all of Etcetera's remaining claims. The court determined that Etcetera had failed to produce sufficient evidence to establish that Helm's conduct proximately caused damages to the corporation.

On September 16, 2010, the trial court denied Etcetera's motion for reconsideration.

Etcetera and Usoro appeal.

II

Etcetera contends that the trial court erred in dismissing on summary judgment its legal malpractice suit against Helm.[4] We disagree.

When reviewing a summary judgment order, we undertake the same inquiry as the trial court. Thompson v. Peninsula Sch. Dist., 77 Wn. App. 500, 504, 892 P.2d 760 (1995). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to a judgment as

[4] Etcetera and Usoro also contend that the trial court erred by dismissing their claims against Helm for breach of contract. Where a plaintiff alleges that an attorney has breached his duty of care, but does not allege breach of a specific contract term, the claim is not properly characterized as breach of contract. Owens v. Harrison, 120 Wn. App. 909, 915-16, 86 P.3d 1266 (2004); G.W. Constr. Corp. v. Prof'l Serv. Indus., Inc., 70 Wn. App. 360, 364, 853 P.2d 484 (1993). Here, because Etcetera and Usoro asserted only that Helm had failed to exercise the standard of care required for an attorney in Washington, the trial court properly dismissed their breach of contract claims.

a matter of law. CR 56(c). "A material fact is one upon which the outcome of the litigation depends." Barrie v. Hosts of Am., Inc., 94 Wn.2d 640, 642, 618 P.2d 96 (1980). The nonmoving party cannot rely on speculation but must assert specific facts in order to defeat summary judgment. Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). All facts and inferences are considered in the light most favorable to the nonmoving party. Ashcraft v. Wallingford, 17 Wn. App. 853, 854, 565 P.2d 1224 (1977).

In general, the moving party on summary judgment bears the initial burden of showing the absence of an issue of material fact.[5] Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). However, where a plaintiff "'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,'" the trial court should grant the motion. Young, 112 Wn.2d at 225 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex, 477 U.S. at 322–23.

A legal malpractice claim requires a showing of (1) the existence of an attorney-client relationship giving rise to a duty of care to the client, (2) an act or

[5] The moving defendant may meet the initial burden by "'showing'—that is, pointing out to the [trial] court—that there is an absence of evidence to support the nonmoving party's case." Young v. Key Pharm., Inc., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989) quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

omission by the attorney in breach of the duty, (3) damages to the client, and (4) proximate causation between the attorney's breach and the damages incurred. Hizey v. Carpenter, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992). For the purposes of summary judgment, Helm did not contest the elements of duty, breach of duty, or damages. Instead, Helm's motion focused solely on causation.

Proximate cause in a legal malpractice case is determined by the "but for" test. Griswold v. Kilpatrick, 107 Wn. App. 757, 760, 27 P.3d 246 (2001). The client bears the burden of demonstrating that, "but for" the attorney's negligence, the client would have obtained a better result.[6] Daugert v. Pappas, 104 Wn.2d 254, 263, 704 P.2d 600 (1985). This showing requires proof of the "case within a case"—the plaintiff must prove that, but for the attorney's negligence, the outcome of the underlying litigation would have been more favorable. Schmidt v. Coogan, 135 Wn. App. 605, 610, 145 P.3d 1216 (2006), rev'd on other grounds, 162 Wn.2d 488, 173 P.3d 273 (2007) (citing Daugert, 104 Wn.2d at 263). Ordinarily, this entails a "trial within a trial," Kommavongsa v. Haskell, 149 Wn.2d 288, 300, 67 P.3d 1068 (2003)—the trial court hearing the malpractice claim "retries, or tries for the first time, the client's cause of action that the client contends was lost or compromised by the attorney's negligence, and the trier of

[6] This necessarily involves two steps. The first question is whether the client's initial cause of action was lost or compromised by the attorney's alleged negligence. The second question is whether the client would have fared better in the absence of the attorney's mishandling of the initial cause of action. Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson, 95 Wn. App. 231, 235-36, 974 P.2d 1275 (1999).

fact decides whether the client would have fared better but for the alleged mishandling." Aubin v. Barton, 123 Wn. App. 592, 608, 98 P.3d 126 (2004); Daugert, 104 Wn.2d at 257. However, because proximate cause is an essential element on which the plaintiff bears the burden of proof at trial, there must be a sufficient showing to establish the existence of this element in order to survive summary judgment.[7] Geer v. Tonnon, 137 Wn. App. 838, 851-52, 155 P.3d 163 (2007). Accordingly, a plaintiff in a legal malpractice suit must produce evidence to support each element of the underlying case on summary judgment.[8] See, e.g., Schmidt, 162 Wn.2d at 492.

Here, Helm's actions were not the proximate cause of vacation of the default judgment entered against Rohner. It is a well-settled rule that in entering a default judgment, a court may not grant relief in excess of or substantially different from that described in the complaint. In re Marriage of Leslie, 112 Wn.2d 612, 617, 772 P.2d 1013 (1989); Sceva Steel Bldgs., Inc. v. Weitz, 66

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[7] Usoro contends that proximate cause should always be determined by a jury. Although he is correct that determining proximate cause is usually the province of the jury, Brust v. Newton, 70 Wn. App. 286, 291-92, 852 P.2d 1092 (1993), the court can determine proximate cause as a matter of law if "reasonable minds could not differ." Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Proximate cause is frequently decided on summary judgment in legal malpractice actions. See, e.g., Estep v. Hamilton, 148 Wn. App. 246, 201 P.3d 331 (2008), review denied, 166 Wn.2d 1027 (2009); Powell v. Associated Counsel for Accused, 146 Wn. App. 242, 191 P.3d 896 (2008); Griswold v. Kilpatrick, 107 Wn. App. 757, 27 P.3d 246 (2001).

[8] The trial court relied on Geer, 137 Wn. App. at 851, in determining that Etcetera was required to produce expert testimony in order to establish proximate cause in its legal malpractice case. The trial court explained that "[i]n this case, as with most medical or legal malpractice cases, proof of damages and causation require expert testimony. . . . The viability of a legal claim and its likely merits, like the progression of a medical condition, are not matters within the ken of ordinary jurors." Clerk's Papers at 418. However, Geer requires that a plaintiff produce "expert testimony *or* other evidence" in order to demonstrate proximate cause. 137 Wn. App. at 851 (emphasis added). This requirement was stated in the disjunctive; expert testimony is not always required.

Wn.2d 260, 262, 401 P.2d 980 (1965); Stablein v. Stablein, 59 Wn.2d 465, 466, 368 P.2d 174 (1962).[9] To grant such relief without notice and an opportunity to be heard denies the defendant procedural due process. Thus, to the extent that a default judgment exceeds the relief requested in the complaint, that portion of the judgment is void. Leslie, 112 Wn.2d at 617-18.

Here, the trial court in the underlying case vacated the default judgment because the relief awarded exceeded that sought in the complaint. There are no issues of material fact. Etcetera's complaint against the underlying defendants made no claim for first party loss. The relief prayed for was limited to Etcetera's losses resulting from the underlying defendants' alleged negligence in failing to procure liability insurance. Nevertheless, the judgment entered against Rohner awarded damages for property damage, lost revenue, and consequential damages based on the loss of use of the 1998 Lincoln. Given that the default judgment granted relief substantially exceeding the relief prayed for in the complaint, the vacation of the default judgment was unavoidable. Because Helm could not have changed this outcome, the trial court herein correctly concluded, as a matter of law, that Helm's conduct was not the proximate cause of the vacation of the default judgment. Accordingly, the court did not err in dismissing this claim on summary judgment.

Similarly, the trial court properly determined that Helm's actions were not

[9] CR 54(c) also stipulates that a judgment by default "shall not be different in kind from or exceed in amount that prayed for in the demand for judgment."

the proximate cause of the dismissal of Etcetera's underlying lawsuit. In order to establish proximate cause, Etcetera was required to prove that, but for Helm's negligence, the corporation would have prevailed in its negligence suit against Rohner. To recover against an insurance agent based on negligence, a plaintiff must prove that (1) the agent had a duty of care to protect the plaintiff against a certain risk, (2) the agent breached that duty, (3) the plaintiff suffered damages, and (4) the agent's breach was a proximate cause of those damages. Peterson v. Big Bend Ins. Agency, Inc., 150 Wn. App. 504, 515, 202 P.3d 372 (2009). Accordingly, in order to survive summary judgment on its legal malpractice claim, Etcetera was required to produce evidence that was sufficient to establish the existence of each of these elements. Here, Etcetera's evidence was insufficient to establish the existence of proximate cause.[10]

Where negligent failure to procure insurance is alleged, the plaintiff must show that, had the insurance requested been obtained, the loss would have been within the risks insured against in the policy. Pac. Dredging Co. v. Hurley, 65 Wn.2d 394, 400, 397 P.2d 819 (1964). As our Supreme Court explained in Hurley, in "ordinary negligence terminology," the insured must prove a "causal

[10] Usoro and Etcetera contend that the trial court erred by not fully considering the declarations of Joseph Ganz, Anders Olin, and Usoro. The trial court explained that it would not consider hearsay, improper lay opinions, or legal conclusions contained in these materials. Because the court did not err in making these determinations, we will not disturb its rulings. The plaintiffs further contend that it was error for the court to disregard the Berg financial report and the Espey report. However, as these reports relate only to Etcetera's damages, they were irrelevant to the court's rulings, which were based solely on the issue of causation. Accordingly, with respect to the Berg and Espey reports, there is no ruling by the trial court that is subject to Etcetera and Usoro's appeal.

connection between the negligence of the insurance broker and the damage to the insured." 65 Wn.2d at 400.

Here, the evidence establishes that Etcetera requested only third party liability insurance for the 1998 Lincoln. There is no evidence in the record—nor does Etcetera attempt to point to any—that any other type of insurance was requested. Nevertheless, Etcetera's claims against Rohner were for property damage to Etcetera's 1998 Lincoln and consequential damages resulting from loss of the vehicle's use.[11] This damage would have been covered, if at all, by first party collision or comprehensive insurance. Because the third party liability insurance requested by Etcetera would not have covered the first party property claims for which Etcetera sought to hold Rohner liable, Etcetera could not establish a "causal connection between the negligence of the insurance broker and the damage to the insured." Hurley, 65 Wn.2d at 400. Even if Rohner breached a duty in failing to obtain the liability policy, because Etcetera's claimed losses were not within the coverage of the insurance requested, this breach was not the proximate cause of the corporation's damages.[12] Because

[11] Etcetera's claims against Rohner necessarily excluded its liability for third party damages stemming from the initial collision and subsequent lawsuit. Columbia paid for Etcetera's defense and funded the settlement of all claims in the third party lawsuit. Accordingly, the only potential damage flowing from Rohner's failure to procure liability insurance was the possibility that Etcetera would be required to reimburse Columbia for its expenses. This possibility was eliminated on April 13, 2007, when Columbia agreed to abandon its claim that it was entitled to reimbursement from Etcetera. As a result, Etcetera could prove no damages resulting from its lack of liability insurance.

[12] Helm is correct that the declaration of Joseph Ganz, opining that, but for Helm's breach of duty, Etcetera's claims against Rohner would have survived summary judgment, fails to create an issue of material fact. "Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded." Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha, 126 Wn.2d 50, 103, 882 P.2d 703, 891 P.2d 781 (1994). Because the

Etcetera's underlying suit fails as a matter of law, the trial court properly dismissed the corporation's legal malpractice claims against Helm.[13]

III

Usoro additionally contends that the trial court erred by dismissing his individual claim for legal malpractice against Helm.[14] We disagree.

A legal malpractice claim generally requires the existence of an attorney-client relationship. Hizey, 119 Wn.2d at 260-61. Whether an attorney-client relationship exists is a factual question, and summary judgment is proper only if reasonable minds could reach but one conclusion as to that question. Bohn v. Cody, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). Although the existence of such a relationship turns largely on the client's subjective belief that a relationship exists, this belief must be "reasonably formed based on the attending circumstances." Bohn, 119 Wn.2d at 363.

Here, because Usoro's subjective belief that Helm represented him individually was unreasonable under the circumstances, no attorney-client relationship was formed. Reasonable minds could not disagree that Etcetera was Helm's only client in the underlying case. Helm was retained to collect the

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evidence established that Etcetera requested only liability insurance for the 1998 Lincoln, Rohner's actions could not be the proximate cause of Etcetera's first party damages. Ganz's opinion is simply incorrect.

[13] Because we determine that the issue of proximate cause is dispositive, we need not address Helm's alternative arguments that Etcetera failed to produce expert witness testimony as to Rohner's standard of care or as to the corporation's likelihood of success in the underlying case.

[14] The trial court also dismissed Usoro's claims for negligent infliction of emotional distress. Usoro assigns no error to this ruling and abandons this claim on appeal.

default judgment obtained in Etcetera's lawsuit against Rohner. Etcetera was the only plaintiff in this underlying matter and the disputed Columbia insurance policy named Etcetera, and not Usoro, as the insured party. Moreover, Etcetera was the sole judgment-creditor to the judgment that Helm was retained to collect. Usoro entered into no individual agreement with Helm on any matter. As Helm was retained to collect the judgment, and the only judgment creditor was Etcetera, it was unreasonable for Usoro to believe that Helm represented him individually. Accordingly, the trial court's determination that no attorney-client relationship existed between Usoro and Helm was not erroneous.[15]

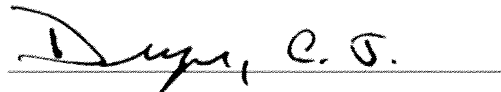
Similarly, the trial court properly concluded that Helm owed no duty to Usoro as a nonclient. Although generally only an attorney's client may file a claim for legal malpractice, an attorney may owe a duty to a nonclient in certain circumstances. Trask v. Butler, 123 Wn.2d 835, 839-41, 872 P.2d 1080 (1994). Whether an attorney owes a duty to a nonclient is a question of law for the court. Trask, 123 Wn.2d at 841. The threshold question is whether the attorney's services were intended to benefit the claimant. Trask, 123 Wn.2d at 843. Where no such intent exists, no further inquiry is required. Trask, 123 Wn.2d at 843. It is not enough that the plaintiff is an incidental beneficiary of the transaction. Strait v. Kennedy, 103 Wn. App. 626, 631, 13 P.3d 671 (2000).

[15] The trial court did not err when it declined to consider the declaration of Joseph Ganz insofar as Ganz's opinions concerned the existence of an attorney-client relationship between Usoro and Helm. These claims had been dismissed on April 30, 2010, prior to the submission of the Ganz declaration. As no motion for reconsideration was filed, the trial court properly declined to consider those portions of the Ganz declaration that addressed a matter previously dismissed.

Here, Helm's services were intended to benefit Etcetera—not Usoro. As the sole judgment-creditor, Etcetera, and not Usoro, was entitled to any monies that Helm collected on the judgment. Usoro's interest in the litigation stemmed entirely from his status as a corporate shareholder of Etcetera. Because Usoro was at most an incidental beneficiary of Helm's representation of Etcetera, the trial court properly dismissed his individual claims on summary judgment.

Etcetera's legal malpractice and breach of contract claims against Helm were properly dismissed on summary judgment. Etcetera failed to produce sufficient evidence to establish that Helm's conduct was the proximate cause of the corporation's damages. Usoro's individual claims against Helm were likewise properly dismissed. The trial court correctly determined that no attorney-client relationship existed between Helm and Usoro and that Helm owed no duty to Usoro individually. Accordingly, we affirm the trial court's dismissal of Usoro's and Etcetera's claims on summary judgment.[16]

Affirmed.



[16] Usoro seeks an award attorney fees and costs on appeal. A party may only recover attorney fees on appeal where the applicable law provides for such an award. RAP 18.1(a). Argument and citation to authority are required in order to advise the court of the appropriate grounds for such an award. Austin v. U.S. Bank of Wash., 73 Wn. App. 293, 313, 869 P.2d 404 (1994). Here, because Usoro neither cited to authority nor identified any basis for the court to award attorney fees on appeal, and because Usoro is not a prevailing party, we deny Usoro's request.

No. 66100-1-I/16

We concur:

Ellington, J. Becker, J.