IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DAVID K. FRANK and PATRICIA L. FRANK, individually and as a marital community, and DAVID K. FRANK, as personal representative for the estates of Kenneth and Catherine Frank, Appellants, v. GEORGE AKERS, individually and as part of his marital community, and MONTGOMERY, PURDUE, BLANKINSHIP & AUSTIN PLLC, a Washington corporation, Respondents.	)	No. 66843-9-I DIVISION ONE UNPUBLISHED OPINION FILED: October 15, 2012

Spearman, A.C.J. — David Frank, Patricia Frank, and the estates of Kenneth and Catherine Frank (collectively "the Franks") appeal the dismissal of their legal malpractice action against George Akers and Montgomery, Purdue, Blankinship & Austin, PLLC (collectively "Akers"). Akers had represented Kenneth, Catherine, their son David, and David's wife Patricia[1] in an action ("underlying lawsuit") that included a rescission claim against the Frank Family Foundation regarding Kenneth and Catherine's gift of real property ("Cranberry Lake") to the Foundation approximately ten years before. In addition to gifting Cranberry Lake to the Foundation, Kenneth and Catherine also devised the

[1] For clarity, first names will be used when referring to specific members of the Frank family; no disrespect is intended.

property to the Foundation in their wills. After Kenneth and Catherine died, the Foundation's motion to dismiss the rescission claim was granted. The trial court concluded that the Franks lacked standing because even if the rescission claim was successful, the property would go to the Foundation by will. The Franks then sued Akers for legal malpractice based, in pertinent part, on his alleged failure to take action to alter article VII, section 2. The trial court dismissed the Franks' claims against Akers in three summary judgment proceedings. The Franks appeal. We hold the evidence fails to create a disputed issue of material fact as to the element of causation and affirm.

FACTS

In 1993, Kenneth and Catherine sought estate planning advice from accountant Laurie McClanahan, accountant/attorney John Clees, and attorney Mary Gentry. On December 30, 1993, based on advice from McClanahan, Clees, and Gentry, Kenneth and Catherine established the Frank Family Foundation as a Washington nonprofit corporation, organized under chapter 24.03 RCW.[2] Kenneth and Catherine conveyed four percent of their interest in Cranberry Lake to the Foundation at that time. A year later, on December 28, 1994, they quitclaimed their remaining interest in the property to the Foundation, with an after-acquired title clause. At the time Cranberry Lake was conveyed to the Foundation it was Kenneth's separate property because the couple had revoked

[2] The Foundation's purpose, according to its articles of incorporation, was to "[p]reserve [Cranberry Lake] in its natural state for the use of youth groups for organized recreation and educational purposes."

a prior community property agreement in 1991. On August 30, 1996, Kenneth and Catherine executed substantially identical wills with Gentry. Article VII, section 2 of their wills gave to the other spouse the testator's interest in Cranberry Lake should the other survive by a period of 30 days; if the other spouse failed to survive by 30 days, or survived and disclaimed, the testator's interest in Cranberry Lake went to the Foundation.

For years after the Foundation was created, Kenneth, Catherine, and their family continued to make personal use of Cranberry Lake. Sometime in 2002, certain members of the Frank family met with Gentry and Foundation president Norm Eveleth about the family's ability to continue using the property. The family wanted a guarantee of free, ready, and unrestricted access. On February 26, 2003, Eveleth wrote to Gentry that the Foundation's Board of Directors did not wish to enter into a written agreement regarding the family's use of Cranberry Lake at that time. Eveleth also stated that although the Foundation did not wish to interfere with Kenneth or Catherine's use of the cabin, such use was "not included within the stated perimeters of the Trust" and would not be permitted beyond Kenneth and Catherine's lifetime.[3]

Around March 2003, the Frank family consulted with attorney Gerald Treacy regarding the Foundation and Cranberry Lake. Treacy sent David a memorandum of engagement dated March 17 in the name of "Treacy Law Group, pllc" [sic], confirming an "agreement with you for legal counsel with

[3] Around 2004, the Foundation learned that the Frank family's personal use of Cranberry Lake for the ten years prior violated Internal Revenue Service regulations.

regard to the charitable foundation created by your parents." On March 29, David informed Treacy that the family had retained attorney Rob Johnson of Settle and Johnson, who added codicils to Kenneth and Catherine's wills that gave David power of attorney and medical power of attorney.[4] He also wrote, in response to Treacy's question whether his parents' wills directed their entire estate to him, "I am not certain at this point but will attempt to locate a copy of the will, which is prior to the inception of the foundation."

In late March 2003, Treacy asked Akers of Montgomery Purdue, where Treacy was of counsel, to assist in representing Kenneth and Catherine. On May 8, 2003, Kenneth and Catherine formally retained Akers and Montgomery Purdue. Akers negotiated with the Foundation in the spring and summer of 2003 to restore Cranberry Lake to Kenneth and Catherine. The negotiations were unsuccessful; the Foundation was resistant because it believed David would develop the property after Kenneth and Catherine's deaths, contrary to the couple's stated wishes.

On August 20, 2003, Kenneth and Catherine, through Johnson, executed a third set of codicils.[5] Article VII, section 2 of the wills was left unchanged. In November 2003, Akers wrote to the Foundation to request certain documents.

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[4] Johnson began estate-planning work for Kenneth and Catherine no later than May 2, 2002, when Gentry forwarded copies of documents to him.

[5] The first set of codicils was executed on October 2, 2000 through Gentry. The second set was executed on July 8, 2002 through Johnson. The second set substantially changed some provisions of the wills, including provisions affecting the distribution of certain real property, but not Cranberry Lake. Johnson sent a letter to David on August 20, 2003 enclosing copies of the third codicil. He sent originals of the new durable power of attorney for Kenneth and Catherine to David on August 1, 2003.

By this time, Kenneth was suffering from dementia to a degree affecting his competency. By February 13, 2004, Kenneth's doctor found that he lacked capacity to sign a power of attorney. In March, David sent Akers original copies of his parents' wills so that they could be stored in Montgomery Purdue's will safe.[6] On April 23, Akers filed an action against the Foundation in superior court to obtain records.

On November 4, 2005, Catherine, Kenneth, David, and Patricia, through Akers, filed the underlying lawsuit in superior court against the Foundation (seeking rescission of the deeds conveying Cranberry Lake) and against McClanahan, Clees, and Gentry (alleging negligence). On November 15, Kenneth died. See In re Estate of Frank, 146 Wn. App 309, 317, 189 P.3d 834 (2008). Catherine died a few weeks later, on December 3. Id. David was appointed personal representative of the estate, and substituted as the party in interest in the underlying lawsuit. Akers was retained to handle the probate of the wills. Akers read the wills and became aware of article VII, section 2 shortly

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[6] David emailed Akers on March 31, 2004:

> Per one of our discussions in our last meeting, you suggested that we send the original copies of Mom and Dad's wills to MPBA to store in your Will Safe. Patti is sending these out today, so you can expect them by Friday or Monday. This will include:
>
> -the latest Wills for both Mom and Dad, dated 1996 (older copies from several years earlier are probably irrelevant so I did not bother to send them)
> -all three codicils to the wills
> -the document from Settle and Johnson that replaced Laurie with Me as DPA.

Clerk's Papers (CP) 205. Akers' response to David on April 1 confirmed that he received the documents, including: (1) Kenneth's will, (2) the second and third codicils, and (3) the power of attorney appointing David. He noted that he had placed the originals in a fireproof safe.

after Kenneth's death. Kenneth's 1996 will and the three codicils were filed for probate on December 30, 2005. Catherine's 1996 will and the three codicils were filed for probate on January 20, 2006. On April 1, Akers was replaced as counsel in the underlying lawsuit.

With the wills probated, the Foundation moved for dismissal of the rescission claim in the underlying lawsuit based on lack of standing and the statute of limitations. The trial court granted the Foundation's motion for summary judgment, ruling that the Franks lacked standing because even if rescission was successful, Cranberry Lake would be returned to the Foundation under the wills. This court affirmed on appeal. In re Frank, 146 Wn. App at 325-27.

The Franks filed the instant legal malpractice action against Akers on March 20, 2009. They alleged Akers was negligent because he failed to:

> (1) timely file a will contest and rescission action, and
> (2) fully advise the Franks concerning:
> (a) the need to amend their 1996 wills to delete article VII, section 2;
> (b) the statute of limitations applicable to rescission claims;
> (c) the importance of filing suit when[Kenneth] and [Catherine] could give testimony; and
> (d) the need to file a timely will contest to challenge the enforceability of article VII, section 2 in their 1996 wills.

CP at 7. On December 9, 2009, the Franks settled the underlying lawsuit with McClanahan, Clees, and Gentry for $1,050,000.00.

On June 24, 2010, Akers moved for partial summary judgment dismissal of the Franks' claims that he failed to: (1) timely file a will contest; (2) fully advise

the Franks concerning the need to timely file a will contest to challenge the enforceability of article VII, section 2; and (3) fully advise the Franks about the need to amend their wills to delete article VII, section 2. The trial court granted the motion on the first two claims but denied the motion as to the third.

Akers filed a second motion for partial summary judgment seeking, among other things, dismissal "of plaintiffs' claim of negligence that defendant's conduct deprived them of a right to recover Cranberry Lake." The court denied the motion, specifically declining to dismiss (1) the negligence claim based on Akers' failure to advise Kenneth and Catherine of the statute of limitations applicable to rescission and (2) the negligence claim that Akers' conduct deprived the Franks of a right to recover Cranberry Lake.

Akers moved for reconsideration of the order denying dismissal of the claim that his conduct deprived the Franks of a right to recover Cranberry Lake. On October 20, 2010, the trial court granted Akers' motion for reconsideration and dismissed the claim.

On January 19, 2011, Akers filed a third motion for summary judgment dismissal of the Franks' sole remaining claim and requested the court to find that its October 20 order had dismissed all remaining claims. The trial court granted Akers' motion and dismissed the lawsuit with prejudice. The Franks appeal.

DISCUSSION

A trial court's decision on summary judgment is reviewed de novo. York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 302, 178 P.3d 995 (2008).

Summary judgment is proper if, viewing the facts and reasonable inferences most favorably to the nonmoving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. CR 56(c); Versuslaw, Inc. v. Stoel Rives L.L.P, 127 Wn. App. 309, 319-20, 111 P.3d 866 (2005). A genuine issue of material fact exists where reasonable minds could differ regarding the facts controlling the outcome of the litigation. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The nonmoving party cannot rely on speculation but must assert specific facts to defeat summary judgment. Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

This appeal involves only the Franks' allegations that Akers was negligent for failure to review, alter, amend, or eliminate article VII, section 2.[7] The Franks contend Akers' negligence in this respect caused them to lose the rescission claim. Akers responds that the Franks' claim fails because: (1) estate planning

[7] To the extent the Franks argue that the trial court erred in dismissing their claims based on (1) Akers' failure to challenge the 1996 wills in a will contest or (2) Akers' failure to fully advise the Franks concerning (a) the statute of limitations applicable to rescission claims and (b) the importance of filing suit when Kenneth and Catherine could give testimony, the issues are not properly before us and we decline to consider them. Akers moved the trial court to dismiss the will contest claim on several grounds in the first summary judgment motion. The Franks failed to respond to those arguments. We decline to consider arguments not raised in the trial court. Brower v. Pierce County, 96 Wn. App. 559, 567, 984 P.2d 1036 (1999); Sowers v. Twin City Foods, Inc., 37 Wn. App. 400, 403, 680 P.2d 1060 (1984). Furthermore, the Franks did not identify the order dismissing the probate claim in their assignments of error or as an issue pertaining to an assignment of error. The Franks did not brief the probate claim, other than to cite to Culbertson's opinion that he believes Akers should have filed the 1991 wills in probate instead of the 1996 wills and challenged the validity of the 1996 wills. Nor did they brief whether Akers was negligent by failing to fully advise them about (a) the statute of limitations applicable to rescission claims and (b) the importance of filing suit when Kenneth and Catherine could give testimony.

was beyond the scope of Akers' duty and (2) the Franks do not show proximate cause where it is speculation to argue that (a) they would have prevailed in the underlying lawsuit on the rescission claim, and/or (b) they could have obtained a judgment beyond what they received in the settlement with McClanahan, Clees, and Gentry.

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 omission by the attorney in breach of the duty of care; (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). To avoid dismissal, the plaintiff must show an issue of material fact as to each element. Craig v. Wash. Trust Bank, 94 Wn. App. 820, 824, 976 P.2d 126 (1999).

Duty

The existence of a duty is a question of law. Folsom v. Burger King, 135 Wn.2d 658, 671, 958 P.2d 301 (1998) (citing, Pedroza v. Bryant, 101 Wn.2d 226, 228, 677 P.2d 166 (1984)). Here, there was undisputedly an attorney-client relationship giving rise to a duty of care by Akers. The parties only disagree as to whether the scope of Akers' duty extended to reviewing the wills. The Franks do not assert that Akers' representation involved estate planning generally but claim that his duty extended to reviewing the wills because they asked him to do so in connection with the underlying lawsuit. As evidence, they point to the

declarations of David and Patricia, in which they allege that Akers had agreed, as part of his representation, to review the wills "and to straighten them out as

needed."[8] Akers concedes that he owed a duty of care in litigating the underlying lawsuit and, after the deaths of Kenneth and Catherine, in conducting the probate. But he contends that estate planning was beyond his duty. He points out that Kenneth and Catherine had estate-planning attorneys who drafted wills and codicils prior to and during Akers' representation in the underlying lawsuit.

Because we view the evidence in a light most favorable to the Franks, we conclude the declarations of David and Patricia are sufficient to create a disputed issue of fact as to whether Akers' duty of care extended to a review of the wills.

Breach

Breach is a failure 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 this jurisdiction. Hansen v. Wightman, 14 Wn. App. 78, 90, 538 P.2d 1238 (1975). To establish breach in a legal malpractice claim, it is generally necessary to provide expert testimony stating

[8] David's declaration stated, in pertinent part:

> 5. On or about March, 2003 I met for the first time with George Akers with my parents and my wife Patti Frank at which the representation began.
> 6. The focus of the meeting was the my parents [sic], inter vivos transfer of the Cranberry Lake property to the Frank Family Foundation based on the deficient advice certain estate planning practitioners (McClanahan, Clees and Gentry) had given them between 1993 and 1997.
> 7. However, it was also discussed that those same practitioners had advised my parents on and developed a larger estate plan than the Foundation, including multiple trusts and wills. Therefore, it was discussed that George Akers was to review the wills and other estate planning documents which were prepared by the same practitioners, including the wills prepared by Gentry, and to straighten them out as needed.

Patricia's declaration alleged substantially the same facts as David's.

what the standard of care is and how the standard was allegedly breached. Geer v. Tonnon, 137 Wn. App. 838, 851, 155 P.3d 163 (2007); Lynch v. Republic Publ'g Co., 40 Wn.2d 379, 389, 243 P.2d 636 (1952). Law is a highly technical field beyond the knowledge of the ordinary person. Lynch, 40 Wn.2d at 389.

The Franks contend Culbertson's declaration provided evidence of the standard of care and Akers' breach of that standard. Culbertson testified:

> Regardless of whether the Defendants were retained to do estate planning for the Franks, it was essential to the Franks' goal of recovering the property for the benefit of the family to avoid the effect of the specific bequest in their wills. This should not have been left to the Franks and or another estate planning attorney who may not have known what was being done by way of a rescission action or what the Franks' intentions in that regard were.
>
> Especially in light of the fact that the Franks were in their nineties at the time, it is my opinion on a more probable than not basis that the Defendants' failure to warn the Franks of the consequences of the Cranberry Lake will provisions, and failure to attempt to avoid the effect of the wills […] fell below the professional standard of care.

CP at 341-47, 867-70.

We conclude Culbertson's declaration is sufficient to create a disputed issue of fact on the element of breach. The crux of the Franks' negligence claim is that Akers failed to meet the standard of care by not reviewing the wills once they were in his custody, failing to notice the purported inconsistency between the bequest of Cranberry Lake to the Foundation and the rescission action, and failing to take action to ensure that Kenneth and Catherine changed article VII, section 2 of their wills. Culbertson's declaration, viewed in a light most favorable

to the Franks, was sufficient to create an issue of material fact about whether Akers breached a standard of care owed to the Franks in the course of his representation.

Causation

The next issue is causation. We restate the applicable standard from Smith v. Preston Gates Ellis, 135 Wn. App. 859, 864, 147 P.3d 600 (2006) (internal citations and quotation marks omitted):

> 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. Proximate causation has two elements, cause in fact and legal causation. Cause in fact refers to the "but for" consequences of an act, that is, the immediate connection between an act and an injury. Legal causation is based on policy considerations determining how far the consequences of an act should extend. Proximate cause is determined by the "but for" test. The plaintiff must demonstrate that "but for" the attorney's negligence he would have obtained a better result. Proximate cause is usually the province of the jury. However, the court can determine proximate cause as a matter of law if reasonable minds could not differ.

Here, the Franks must meet two distinct causation requirements to prevail in their claim against Akers. They must show that (1) that Akers' alleged acts and omissions caused the Franks to lose standing, i.e., caused the dismissal of the rescission action and (2) they would have prevailed in their rescission action but for Akers' negligence.[9] They fail to meet the first.

[9] Culbertson opined that Akers should have done one or more of the following:
(1) Have the Franks execute new wills (or codicils) leaving any interest they might have in Cranberry Lake property to their intended beneficiary rather than to the foundation.
(2) Since Akers contends that Kenneth lost testamentary capacity after he retained Akers, have David, as attorney-in-fact for his father, quit claim any interest (including any after-acquired interest) in Cranberry Lake to Catherine, who still had testamentary capacity and could still change her will.

As an initial matter in 1991, Kenneth and Catherine executed a revocation of community property agreement, which caused Cranberry Lake to revert as Kenneth's separate property. Given this fact, which the Franks do not dispute,[10] the Franks must provide evidence showing an issue of fact that but for Akers' failure to review the wills promptly, notice article VII, section 2, and take further action, Cranberry Lake would not have passed to the Foundation under Kenneth's will and the Franks would not have lost standing.

The Franks assert two alternative courses of action that Akers should have taken, as stated in Culbertson's declaration: (1) he should have had Kenneth change his will and (2) he should have had David, as Kenneth's attorney-in-fact, quit-claim Kenneth's interest in Cranberry Lake to Catherine, who had capacity to change her will. The second course of action is suggested in response to Akers' assertion that Kenneth lost capacity to change his will during Akers' representation. The Franks' negligence lawsuit is based on Akers' alleged failure to act; therefore, they must show that either of these courses of action would have resulted in the wills being changed and in the preservation of

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> (3) Determine whether, in executing a revocation of their community property agreement, Catherine intended to relinquish her interest in Cranberry Lake (which seems unlikely given the bequest of her interest in it in her will). Assuming she never intended to relinquish her interest in it, have her sign a statement to that effect and change her will.

CP at 867-70, 341-46.

[10] The Franks only suggest that Akers could have determined whether Catherine, in executing a revocation of the community property agreement, intended to relinquish her interest in Cranberry Lake, and then have her sign a statement to that effect and change her will. The Franks cite no authority for the proposition that one party to such an agreement may, after the other party (to whom the separate property has returned) has died, have the agreement revoked.

standing.

But causation in this case is speculative. More than speculation is required to sustain a legal malpractice claim. Smith, 135 Wn. App. at 864-65 (no proximate cause where plaintiff's statement of what he might have done if advised of problems with contract was speculation). Here, both courses of action depend on three critical but speculative assertions: First, that Kenneth and Catherine were unaware of article VII, section 2 of their wills. Second, that had Akers made them aware, they would have altered their wills to devise Cranberry Lake to a person or entity other than the Foundation. And third, the Franks suggest that Akers could simply "[h]ave [Kenneth and Catherine] execute new wills (or codicils)…." CP at 867-70, 341-46. Neither of these assertions is viable.

It is self evident that Akers did not have the authority to change the wills or to direct Kenneth and Catherine to do so. Thus, any alleged negligence of Akers is necessarily limited to his alleged failure to bring to Kenneth and Catherine's attention the purported inconsistency between the rescission action and article VII, section 2. But even if Akers had done so, it is speculative whether Kenneth and Catherine would have changed their wills. First, we presume Kenneth and Catherine were aware of the contents of their own wills. See In re Estate of Bussler, 160 Wn. App. 449, 461, 247 P.3d 821 (2011) ("'Where a will, rational on its face, is shown to have been executed in legal form, the law presumes [. . .] that the will speaks to [the testator's] wishes.'") (quoting In re Estate of Riley, 78 Wn.2d 623, 646, 479 P.2d 1 (1970)). Second, it

is undisputed that they executed three codicils after the 1996 will, including in August 2003, after Akers was retained in the effort to rescind the gift of Cranberry Lake to the Foundation. Although Kenneth and Catherine had the opportunity to change article VII, section 2, they did not. Under these circumstances, it is speculative to conclude either that Kenneth and Catherine were unaware of article VII, section 2 or that they would have decided to change their wills based on Akers' advice.

The Franks argue that the filing of the rescission action is evidence that Kenneth and Catherine would have decided to deleted article VII, section 2 from their wills if they had been aware of it. But again, this is speculative because the filing of the rescission action is not inconsistent with article VII, section 2. It is quite possible that Kenneth and Catherine wished for the property to be back in their possession during their lifetimes, but wished to leave it to the Foundation upon their deaths.

Moreover, even assuming there was sufficient, competent evidence to show that Kenneth and Catherine would have deleted article VII, section 2 from their wills, causation under either of the Franks' suggested courses of action is still speculative. Under either course of action, the main disputed fact is when Akers received the wills and first had the opportunity to review them. Akers claims he did not have the wills in hand until January 12, 2004, when he received the Bean & Gentry file. The Franks claim he had the wills in May 2003, citing David's declaration as evidence. But even viewed in a light most favorable

to the Franks, David's declaration cannot support a reasonable inference that Akers received the files in May 2003. The declaration does not expressly state that Akers received the wills in May 2003 or that anyone in the Frank family gave Akers the wills in May 2003. Instead, the pertinent section of David's declaration states:

> I understand that Akers and MPBA have taken the position in the pending motion that Aker [sic] and MPBA never saw my parents' wills in the year 2003, and so knew nothing of the Cranberry Lake provision in my parents' wills to know of a need to revise them in 2003. Attached hereto as Exhibit 1 is a copy of an email from Aker's [sic] file in which, [on] April 2, 2003, Gerry Treacy (of counsel to MPBA) in the third paragraph is obviously referring to Akers that the provision[sic] in my parents' wills would devise the Cranberry Lake property to the Foundation on the death of the Foundation [sic].

The email mentioned on in David's declaration is a response from Treacy to Akers, after Akers wrote in an email, "[J]ust got the deed and interestingly enough the legal only transfers an undivided 4% interest. Where is the other 96%? We clearly do not have the whole picture." In response, Treacy wrote, "As to the 4% transfer, I wonder whether the parents are keeping from Dave the fact that they plan to devise the rest of the property at the second death to the Foundation?" CP at 376. The Franks contend that Treacy must have been referring to article VII, section 2 in the email and that, therefore, Akers must have known the will devised Cranberry Lake to the Foundation. This is purely speculative. Treacy's statement could have been based on conversations with Kenneth and Catherine. There is no evidence in the record as to what Treacy

was referring when he wrote this.

Moreover, other uncontradicted evidence in the record establishes that Treacy first received the wills in late December 2003 at the earliest. In a November 10, 2003 email to David and Akers, Treacy noted that documents he had received from David reflected that Bean & Gentry had prepared Kenneth and Catherine's wills in 1996 and stated, "It is also possible that [McClanahan] persuaded the Franks to make other changes in their 1996 [w]ills and/or other estate planning documents." CP at 337. He indicated the original instruments were likely held by Bean & Gentry or McClanahan, and should be obtained to determine "exactly what instruments are Mr. and Mrs. Frank's current and binding instruments." Id. At that time, therefore, it was unclear to the parties what Kenneth and Catherine's most recent wills and codicils stated. On December 18, 2003, Treacy wrote to David and Akers that letters seeking file transfers from Gentry and Clees went out the previous day, so "we should be seeing those files shortly." CP at 201. Therefore, although according to Akers' declaration, he received Gentry's files and first saw copies of the 1996 wills on January 12, 2004, looking at the evidence in the light most favorable to the Franks, Treacy and Akers received the files by late December 2003 at the earliest.

Thus, the first course of action the Franks argue Akers should have taken–getting Kenneth to change his will–could not have succeeded because Kenneth was suffering from dementia to a degree that affected his competency by November 2003.[11]. The Franks cannot show that Akers could have asked

Kenneth to change his will by the time Akers received the wills and could have reviewed them.

The second strategy, asserted by the Franks alternatively in light of Kenneth's loss of competency, also relies on speculation. Under this strategy, Akers should have had David, as attorney-in-fact for his father, quitclaim any and all of Kenneth's interest (including after-acquired interest) in Cranberry Lake to Catherine, who did have testamentary capacity and could have changed her will. Again, this strategy would require a jury to speculate about how quickly these actions could have occurred (i.e., whether they could have been completed before Kenneth and Catherine died) and whether, as we have already explained, Kenneth and Catherine would have chosen to take these steps had they been advised of these options.

In sum, although the Franks' evidence showed an issue of material fact in dispute as to the elements of duty and breach, the evidence showing causation as to the Franks' lack of standing would require impermissible speculation.[12] The trial court properly dismissed the Franks' malpractice claims on summary judgment.

Affirmed.

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[11] A letter from David to Akers states that Kenneth's assessments indicated that he exhibited symptoms of mental incapacity of a type and degree that would affect competency in November 2003. Kenneth's doctor officially determined that he lacked capacity on February 13, 2004.

[12] Given our holding that the evidence fails to show an issue of material fact that Akers' alleged breach of the standard of care caused the loss of standing, we do not reach the issues of (1) whether the Franks would have prevailed in the rescission action but for the loss of their claim or (2) whether the Franks' damages would have exceeded the amount of the settlement.

WE CONCUR:

Appelwick, J.

Cox, J.