No. 312038

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

Rose Townsend Trust for Donald Townsend, et al.
Plaintiff/Appellant,

vs.

Scott R. Smith,
Defendant/Respondent.

BRIEF OF APPELLANT

Amos R. Hunter
Amos R. Hunter, P.S.
1318 W. College Avenue
Suite 100
Spokane, WA 99201

On behalf of Appellant
Rose Townsend Trust for Donald
Townsend, et al.

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I. INTRODUCTION

This case involves an indivisible financial loss to the Plaintiff Rose Townsend Trust that was jointly caused by the actions or inactions of two attorneys working in quick succession on a single matter. The first attorney created a document with faulty language that ultimately and unintentionally caused Plaintiff to lose the right to collect a judgment worth $83,183.37, plus interest. The second attorney immediately (and correctly) recognized that the very poorly drafted document would cause real legal problems, but he failed to advise his client of the negligence claim against the first attorney. The second attorney's knowledge of the cause of action against the first attorney caused the three year statute of limitations to commence and expire, thereby eliminating a remedy for Plaintiff for the lost judgment. Plaintiff also alleged that the second attorney was negligent concerning other aspects of the loss of the same judgment.

The Plaintiff brought suit against both attorneys (Joseph Delay and Scott R. Smith). However, the trial court dismissed the legal negligence claim against the first attorney (Mr. Delay) on the express bases that (1) the statute of limitations commenced and ran during the second attorney's representation, because (2) the second attorney (Mr. Smith) knew of the

cause of action against the first attorney for more than three years, and (3) the second attorney's knowledge of the cause of action was imputed to the client, despite (4) the second attorney never informing the client of the cause of action.

A year later, in a motion in limine hearing (with no date set for the bench trial), the trial court dismissed the second attorney on the basis that Plaintiff did not have an expert to testify that the second attorney was negligent. The basis of this appeal is the inconsistency and unfairness of the trial court's dismissal of the second attorney, Scott R. Smith.

II. ASSIGNMENTS OF ERROR

A. THE TRIAL COURT ERRED IN DISMISSING TOWNSEND TRUST'S CAUSES OF ACTION AGAINST ATTORNEY SCOTT R. SMITH.

B. THE TRIAL COURT ERRED IN DENYING TOWNSEND TRUST'S MOTION FOR RECONSIDERATION.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue Number 1: Did the Court err in ruling in a motion in limine hearing that an expert was absolutely required in a legal negligence action, where:

(a) This case was set for a bench trial where the judge could determine the duty and applicable standard of care for the attorney;

(b) The plaintiff's indivisible financial loss was caused by the actions or inactions of two attorneys working in quick succession on the same matter;

(c) The trial court had earlier dismissed plaintiff's causes of action against the first attorney on the sole basis that the second attorney allowed the statute of limitations to commence and to pass without informing the client;

(d) The second attorney had a duty to advise his client of the cause of action against the first attorney.

(Assignments of Error A and B).

Issue Number 2: Did the Court err in ruling that the Plaintiff could not amend its Complaint, where the originally scheduled trial date had been stricken and a new trial date had not yet been set, and Defendant Smith could not demonstrate any substantial prejudice with the amendment?

(Assignments of Error A and B).

IV. STATEMENT OF THE CASE

The Rose Townsend Trust is a Trust established for the benefit of Donald Townsend, who is mentally incapacitated. (CP 1). The Townsend Trust acts through Trustees. (CP 1).

On June 2, 2008, the Townsend Trust filed suit in Spokane County Superior Court against Attorney Scott R. Smith, alleging negligence related to the loss of a judgment worth $83,183.37, plus interest. (CP 1-50).

On November 10, 2010, Townsend Trust Amended the Complaint to add attorney Joseph Delay as a Defendant. (CP 51-101). Townsend Trust first learned at Mr. Smith's June 25, 2010 deposition that he had private concerns about the implications of the "very poorly drafted" legal document that Mr. Delay had prepared for the benefit of Townsend Trust in July 2005. (CP 117-120, 224, 225, 848).

That inartfully drafted document is what unintentionally caused the Townsend Trust to lose the right to collect on the valuable $83,183.37 Judgment. (CP 192-193).

In paragraph 5.2 of Plaintiff's Second Amended Complaint, Plaintiff alleged joint liability of Mr. Delay and Mr. Smith for the loss of the judgment:

> 5.2 As a proximate result of Defendants' [plural] negligence and/or breach of contractual obligations, Plaintiff Townsend Trust lost the benefit of collecting monies from the Johnston State Judgment in the amount of $83,183.37, plus interest at 12%, commencing on January 22, 1998.

(CP 67, bracket language added).

Plaintiff also alleged that Mr. Smith was negligent with respect to other parts of the document that Mr. Delay created. In particular, Plaintiff alleged that a judgment (for which Mr. Delay was creating an Assignment of Judgment document in July 2005) did not need to be recorded with the County Auditor in order to have lien priority. Plaintiff alleged that this advice was contrary to RCW 6.13.090, which expressly states as follows:

> A judgment against the owner of a homestead shall become a lien on the value of the homestead property in excess of the homestead exemption **from the time the judgment creditor records the judgment with the recording officer of the county where the property is located.**

The Ninth Circuit Court of Appeals held that Mr. Smith's arguments about that statute (he argued that the judgment did not need to recorded) were incorrect. (CP 46-50).

On March 25, 2011, Mr. Delay filed a Motion for Summary Judgment, alleging that the statute of limitations had run for any climas against him during Scott Smith's representation of the Townsend Trust. (CP 109-133) Mr. Delay argued that Mr. Smith was aware of the cause of action, and therefore the statute of limitations began to run when Mr. Smith first had concerns about the legal document created by Mr. Delay. (CP 115, 223-225). The entire thrust of Mr. Delay's argument was that Mr. Smith was aware of the potential legal malpractice claim by December 2005 or January 2006, and that knowledge was imputed to his client, Townsend Trust:

> Defendant Delay, Curran, Thompson, Pontarolo & Walker P.S.'s Motion for Summary Judgment of Dismissal is based on the fact that **Rose Townsend Trust was aware of a potential legal malpractice claim against Delay, Curran, Thompson, Pontarolo & Walker P.S., in December or 2005 or January of 2006.** The rule in Washington State is that the **knowledge of an attorney is the knowledge of a client**. Regardless of this knowledge of a potential legal malpractice claim, Rose Townsend Trust did not file a cause of action against Defendant Delay, Curran, Thompson, Pontarolo & Walker P.S. until November 10, 2010.
>
> ***
>
> The **attorney of record for the Rose Townsend Trust in 2005 was Scott R. Smith.** At his deposition on June 25, 2010, **Mr. Smith testified that he was aware of the July 2005 Assignment of Judgment**. In this regard, **Mr. Smith testified**

that he knew in December of 2005 or January of 2006 about the Assignment of Judgment, and that he thereafter took no action with regard to that 2005 Assignment of Judgment as part of a Complaint for Lien Priority that was thereafter filed in U.S. Bankruptcy Court.

> Q. When did you first obtain a copy of that July 2005 Assignment of Judgment signed by Jack Reeves.?
>
> A. I believe it was late 2005.....
>
> ***
>
> Q. **When you saw that language in that assignment, did you believe that the Townsend Trust had waived their right to collect in the 1998 Judgment?**
>
> A. **I thought that the document was very poorly drafted...**
>
> ***
>
> **A. ...What I believe is that it was sloppy language and drafting by the parties involved.**
>
> **Q. Joe Delay and Jack Reeves.**
>
> **A. Correct.....**

(CP 115, 222-223, bold added).

Mr. Delay further noted that Mr. Smith did not dispute Mr. Delay's version of the facts or the legal implications:

> Defendant Delay, Currant, Thompson, Pontarolo & Walker, P.S. established that **attorney Scott Smith reviewed the July 2005 Assignment of Judgment for the Rose Townsend Trust in December 2005 or January of 2006. This is undisputed by any party to this action....**
>
> **Scott Smith, in fact, was the attorney for the Rose Townsend Trust. Scott Smith's knowledge is therefore imputed to that of his clients.** As held by the Supreme Court of the State of Washington, '**The attorney's knowledge is deemed to be the client's knowledge, when the attorney acts on his behalf.**" *Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d

1302 (1978)...The holding of *Haller* is referenced as "the **general rule in Washington that knowledge of an attorney is knowledge of his or her client...**

In this case, **Scott Smith, attorney for the Rose Townsend Trust, was aware of issues and risks with the 2005 Assignment of Judgment in December 2005 or January of 2006....**

Scott Smith was aware of the issues and risks relative to the 2005 Assignment of Judgment in December of 2005 or January of 2006. Scott Smith determined than rather than pursue a potential legal malpractice claim against Defendant Delay, Curran, Thompson, Pontarolo & Walker, P.S., or advise the Rose Townsend Trust that a legal malpractice claim could be pursued, the different course of filing a Complaint for Lien Priority was instead instituted and followed by Mr. Smith in behalf of the Rose Townsend Trust. As a result, a potential legal malpractice claim existed in January of 2006, and the three year statute of limitations to bring a legal malpractice claim against Delay, Curran, Thompson, Pontarolo & Walker, P.S. ran in January of 2009.

(CP 226-227 bold added).

In response to that Motion, Townsend Trust submitted testimony from the Trustees indicating they were never informed by Mr. Smith about his concerns about the legal document, nor were they ever advised by Mr. Smith of any cause of action against Mr. Delay. (CP 194). Co-trustee Robert Moe stated as follows in his April 12, 2011 Declaration:

> I have never been informed by Scott Smith (or anyone at his law firm) that he thought that the July 2005 "Assignment of Judgment" document was poorly written, or that the waiver in the Assignment of Judgment could have negative legal consequences, or that the

Townsend Trust had a potential claim against Joe Delay or his law firm.

(CP 194).

Attorney Scott Smith did not resist Mr. Delay's motion for summary judgment, and he did not file any opposing declarations to the above testimony.

On May 31, 2011, the trial court granted Mr. Delay's motion for summary judgment on the sole basis that the statute of limitations had expired (during Mr. Smith's representation of the Townsend Trust). (CP 279-281). The trial court stated as follows in the April 29, 2011 hearing:

> THE COURT: And **Mr. Smith** says, "Gee, **I think this assignment of judgment was poorly drafted and could cause trouble for the estate." And he's thinking this or saying this, but he doesn't tell Riley, right?**
>
> MR. HUNTER: Right.
>
> THE COURT: **So isn't Riley's recourse against Mr. Smith and not Delay? And I'm not -- I'm obviously making no findings as to any culpability on the part of Smith, but why bring Delay into it? Smith is the one who arguably had the knowledge and didn't do anything.**
>
> MR. HUNTER: **We think it's both is why we brought them both in and we thought that Mr. Delay essentially created the problem in the first place that—**
>
> ***

We think they [Delay and Smith] are both responsible. They are both negligent is our theory to the extent that a jury[1] would apportion fault between the two or say, no at some point it was fully Mr. Smith's fault and that any—in fact, that's part of the argument is there was superseding cause. But for the meantime, we have alleged fault, duty fault, all the elements on both.

***

THE COURT: What about Mr. Hunter's argument that the knowledge of the attorney—**let's assume hypothetically that I accept that Smith saw the problem, knew the problem; didn't do anything about** it. Let's assume that. Mr. Hunter says it doesn't matter. You say it does matter that the knowledge of the attorney is imputed to the client.

***

MR. THORNER: …."the attorney's knowledge is deemed to be the client's knowledge when the attorney acts on his client's behalf."

And so what we have here, Your Honor is a very clear situation. If **Mr. Smith at that time that he reviewed this document in the fall of 2005 was clearly acting, it's undisputed, as the attorney for the Rose Townsend Trust, his testimony is from his deposition that he had major concerns concerning the language in the assignment.** That knowledge is clear under the authority of the Washington State Supreme Court in this case, which has been cited repeatedly in other cases, as we pointed out, that an **attorney acting in the course of his employment or activity as the attorney for a client who has knowledge of something, that knowledge regardless of whether it's**

[1] Plaintiff's Counsel misspoke. Neither party to this action has ever requested a jury in this matter.

communicated to the client starts the running of the statute of limitations.

THE COURT: But 2005, **when Mr. Smith realizes there is a problem who could have** -- apparently no one foresaw this was waiving a substantial right. Things were going along well through the appellate courts.

MR. HUNTER: I agree. But who is in the best position, **which is why we have a claim against Mr. Smith, as well. We have alleged negligence on his part.**

CP 708-709, 711; bold added; April 29, 2011 Hearing; entire Summary Judgment Transcript at CP 711-730).

The trial court stated further at the same hearing:

THE COURT: That's important. It's not just this was poorly drafted, it's poorly drafted and this might be a problem for the estate. , affect the estate's rights.

(CP 718))

The scheduled bench trial date of April 2, 2012 was later stricken due to the Court's scheduling conflict. Nevertheless, the parties proceeded with a motion in limine hearing on April 10, 2012. (CP 731-751). Even though there was no motion to dismiss made by Mr. Smith, the Court nevertheless dismissed Plaintiff's remaining causes of action against Mr. Smith. (CP 794 799).

The Court held that because Plaintiff did not have expert testimony to proceed against Mr. Smith, the case could not proceed. (CP 794 799). The Court also held that Plaintiff could not amend its Complaint to clear up any confusion that Plaintiff was alleging that Mr. Scott failed to advise the Trust about the cause of action Mr. Delay. (CP 794 799.)

The Court acknowledged that it may have made an error in earlier dismissing Mr. Delay:

> And I'm dismissing your case, but I also feel very badly because I wonder if I made a mistake in dismissing out Mr. Delay

(CP 798).

On May 15, 2012, the trial court entered an Order of Dismissal. (CP 903-905). On May 31, 2012, the trial court entered its Judgment of Dismissal of Defendants. (CP 876-878).

On July 19, 2012, the trial court denied Plaintiff's Motion for Reconsideration. (CP 899). Plaintiff filed a Notice of Appeal, which the Commissioner ruled was timely. (CP 900, 908).

V. ARGUMENT

A. THE COURT ERRED IN RULING THAT AN EXPERT WAS ABSOLUTELY REQUIRED IN THIS PARTICULAR LEGAL NEGLIGENCE ACTION.

The trial court erred in ruling in a pre-bench trial motion in limine hearing that an expert was absolutely required in this legal negligence action.

1. This legal negligence case was set as bench trial, where the judge had the expertise to understand the evidence, determine the duty and the appropriate standard of care.

The trial court dismissed this action against attorney Scott R. Smith on the sole basis that Plaintiff did not list an expert witness to testify in this legal negligence action. The Court held that expert testimony was required in this bench trial to determine the standard of care for both the action against Mr. Smith and the underlying action against the first attorney, Joseph Delay.

However, especially for a bench trial, that decision is contrary to Washington law, as well as black letter law, as stated in Corpus Juris Secundum regarding legal negligence cases:

> Expert testimony is not required in all cases. Thus, the trial court, which is of necessity familiar with the standards of practice in its community, is competent to make the determination as to the standard of care an attorney must meet, without the assistance of expert witnesses.

CJS, *Attorney and Client*, Section 330, page 368.

There is no Washington case that states that an expert is required in a bench trial of a legal negligence action. Even in reported cases that involved jury trials of legal negligence actions, the Washington Supreme Court has not absolutely required expert testimony. In *Walker v. Bangs*, 92 Wash.2d 854, 858, 601 P.2d 1279 (1979) (bold added), the Washington Supreme Court expressly stated that expert testimony is not always required to establish a prima facie case of legal malpractice:

> A few courts have held that expert testimony on the standard of care is *mandatory*. *See, eg. Dorf v. Relles*, 355 F.2d 488 (7th Cir. 1966); *Walters v. Hastings*, 84 N.M. 101, 500 P.2d 186 (1972); *Baker v. Beal*, 225 N.W. 2d 106 (Iowa 1975). The **general rule is to permit but not require expert testimony**. See Admissibility And Necessity of Expert Evidence As To Standards of Practice and Negligence in Malpractice Action Against Attorneys, Annot, 17 A.L.R. 3d 1442 (1968).[2]

Moreover, in *Brust v. Newton*, 70 Wash.2d 286, 862 P.2d 1092 (1993), the Court emphasized that certain matters in legal negligence cases required expertise, but that the expertise is provided by the judge. In distinguishing another legal negligence case, (*Daugert v. Pappas,* 104 Wash.2d 254, 704 P.2d 600 (1985), the *Brust* court stated: "...the proximate cause issue in that case **required special expertise and was therefore a question of law for the court...**" *Brust*, 70 Wash.2d at 291-292 (bold added). Both *Brust* and *Newton* involved jury trials.

---

[2] The *Walker* case involved a jury, and the Supreme Court overturned the trial court's order rejecting an out-of-state attorney's expert opinion, saying that an expert opinion in that case was "both proper and necessary in this instance." *Id.*, 92 Wash.2d at 858.

Moreover, the entire bases for experts being allowed to testify—Evidence Rule 702-- expressly discusses experts as being helpful, but not mandatory:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, **may** testify thereto in the form of an opinion or otherwise.

ER 702 (bold added).

This is consistent with the rationale of the CJS article, cited above, to assist the lay person juror. A judge is not a lay person juror. In *Watkins v. Sheppard*, 278 S.2d 890, 892 (1973), the Court stated as follows:

> Expert testimony is certainly admissible to establish the standard of care based on practices of attorneys in the community. In certain cases the opinions of experts may be essential to prove the standard of care an attorney must meet. In many cases, however, the trial court, which is of necessity familiar with the standards of practice in its community, is competent to make such a determination without the assistance of expert witnesses.

In the present case, the rule that experts are not mandatory in a bench trial is especially relevant where the trial court has earlier dismissed the first attorney (without any expert testimony) on the express basis that the second attorney knew or should have known of a cause of action against the first attorney before a statute of limitations passed

2. The plaintiff's indivisible financial loss was caused by the actions or inactions of two attorneys working in quick succession on the same matter.

The trial court clearly acknowledged that Mr. Smith (the "second attorney" considered the document created by Mr. Delay ("the first attorney") to be "very poorly drafted" and likely to cause problems for his client:

> THE COURT: That's important. It's not just this was poorly drafted, it's poorly drafted and this might be a problem for the estate, affect the estate's rights.

(CP 718).

The trial court understood that all matters concerning the document were handled or reviewed by Mr. Delay and Mr. Smith. The trial court understood that the "very poorly drafted" document in fact caused the Townsend Trust to lose the right to collect the judgment. There was thus one indivisible harm—the loss of the right to collect that judgment—caused by the actions or inactions of the two attorneys.

3. The trial court had earlier dismissed plaintiff's causes of action against the first attorney on the basis that the second attorney's knowledge of the cause of action for three years allowed the statute of limitations to commence and pass, even though the client was not aware of the cause of action against the first attorney.

The only implication from the trial court's earlier dismissal of Mr. Delay is that the trial court held that Mr. Smith knew or should have known of a cause of action against Mr. Delay and never informed his client. In other words, in resisting Mr. Delay's Motion for Summary Judgment, the Townsend Trust submitted declarations from its trustees stating that they were never advised by Mr. Smith of a potential cause of action against Mr. Delay and they were never advised by Mr. Smith that he considered the document to be "very poorly drafted" by Mr. Delay. Even if there had been any disputed facts on theses points, they would have been construed in favor of the nonmoving party. The trial court accepted the fact that the Trustees were never advised of the potential cause of action, but the trial court held that the knowledge of Mr. Smith was imputed to his client..

The Court held that the knowledge of the cause of action caused the statute of limitations to commence against Mr. Smith client, and the three year statute of limitations period expired during Mr. Smith's representation.

4. The second attorney had a duty to advise his client of the cause of action against the first attorney.

Mr. Smith was handling matters directly related to the document that Mr. Delay had prepared earlier. Because duty is a question for the court, Plaintiff sought a motion in limine ruling as follows:

> 1. Attorney Scott R. Smith had a duty to advise his client, Rose Townsend Trust for Donald Townsend, that it had a potential legal negligence claim against Joseph Delay.

(CP 644-645, 672-677, 809-811). This was a reasonable implication of the trial court's earlier dismissal of Mr. Delay. That is, if Mr. Smith had no duty to advise his client of a potential cause of action against Mr. Smith, then he had no duty to pass on his knowledge of his serious concerns about the "very poorly drafted" document. Thus, Mr. Smith's knowledge could not be 'imputed" to the client. In light of the Trustees' testimony that they had no knowledge of a possible cause of action against Mr. Delay, the trial court should have not dismissed Mr. Delay. However, because the trial court did dismiss Mr. Delay, and neither Mr. Smith nor Plaintiff appealed that decision, that is "the law of the case." The court denied Plaintiff's Motion in Limine. (CP 809-811).

Plaintiff also sought to have a second Motion in Limine, namely:

> 2. Attorney Smith breached his duty to advise his client, Rose Townsend Trust for Donald Townsend, that it had a potential legal negligence claim against Joseph Delay.

(CP 644-645, 672-677, 809-811).

Mr. Smith never disputed the fact that he failed to advise Townsend Trust that it had a potential legal negligence claim against Joseph Delay.

Finally, Plaintiff did list attorney Smith as a witness in this matter, and he would be questioned regarding his understanding of the standard of care. While Plaintiff did not expect Mr. Smith "to give away the farm," Mr. Smith would be questioned regarding his understanding of the proper standard of care in relation to the Court's April 2011 decision. Of course he would attempt to educate the Court as to why he did not deviate from the standard of care for the alleged acts of negligence in this matter. It is Plaintiff's position that the standard of care was set by this Court in April 2011 when it held that the statute of limitations began to run for any claims against Attorney Joseph Delay when Mr. Smith knew or should have known that the Townsend Trust had a potential cause of action against Mr. Delay. While Mr. Smith may attempt to explain why he did not think he had deviated from the standard of care, his explanation must square against the Court's ruling in April 2011 that Mr. Smith knew or should have known of the potential legal negligence action. A duty to advise of the potential legal negligence cause of action is a direct implication of that standard of care imposed upon Mr. Smith at the time he knew or should have known of the potential cause of action.

Nevertheless, the trial court denied Plaintiff's Second Motion in Limine. (CP 809-911).

B. THE TRIAL COURT ERRED IN NOT ALLOWING PLAINTIFF TO AMEND ITS COMPLAINT TO MAKE CLEAR TO DEFENDANT SMITH THAT PLAINTIFF WAS ALLEGING FAULT ON THE PART OF ATTORNEY SMITH FOR FAILURE TO ADVISE THE TOWNSEND TRUST OF THE CAUSE OF ACTION AGAINST THE OTHER ATTORNEY.

Plaintiff did not seek to amend the Second Amended Complaint after the April 29, 2011 hearing. It was Plaintiff's belief that an amendment was not necessary, as the Court's ruling made it clear that a statute of limitations had commenced and run during Mr. Smith's representation (of which Mr. Smith was aware and Townsend Trust was not). (CP 837, 845-847). As discussed above, Plaintiff sought a motion in limine to clarify the earlier court's ruling. Plaintiff expected there to be other issues for trial, which was why Plaintiff did not consider the motions in limine to be dispositive of the entire case against Mr. Smith.

Next, with regard to the Proposed Amendment of the Complaint, Mr. Smith had not even argued that he would be prejudiced by an Amendment. In a phone call on February 24, 2012, Mr. Smith's counsel was clearly on notice that Plaintiff was alleging

fault for allowing a statute of limitations to run. Plaintiff's counsel later sent a confirming email as follows:

> **From:** Amos Hunter
> **Sent:** Tuesday, February 28, 2012 3:16 PM
> **To:** James King
> **Cc:** Kathy Schulman
> **Subject:** Rose Townsend Trust v. Smith.
>
> Dear Jim,
>
> I do not believe that you provided an Answer to the Second Amended Complaint, and I did not see on in the Court file.
>
> If you did, would you kindly email me a copy?
>
> Also, as we discussed last Friday, the Court has set our pre-trial meeting to March 30, 2012.
>
> Finally, I wanted to make it clear that we are alleging that Scott Smith was also negligent with respect to his failure to advise the Townsend Trust trustees of a potential claim against Joe Delay. As part of Judge Eitzen's reasoning in dismissing Joseph Delay from the lawsuit, she noted that we had a remedy against Mr. Smith, as the SOL ran against Mr. Delay during Mr. Smith's representation. Mr. Smith became aware of the negligent act by Mr. Delay as early as November 2005 (but did not communicate that to the Trustees). In my Second Amended Complaint, we alleged in paragraph 2.25: "when Scott Smith first viewed the 'Assignment of Judgment," he believed that it was improperly drafted." The Court ruled that the knowledge of the attorney was the knowledge of the client, so the 3 year SOL period began to run from Nov 2005. Paragraph 6.1 of the Second Amended Complaint seeks Judgment against both Mr. Delay and Mr. Smith for the loss of the Jan 1998 judgment. The loss of the 1998 judgment occurred in the July 2005 Assignment of Judgment.
>
> Amos Hunter

(CP 678-680). Plaintiff's Counsel sent a follow up letter to Mr. Smith's counsel, stating in relevant part:

> In light of Judge Eitzen's decision last April, it is our position that the 1998 Judgment was lost in 2005 with the July 2005 Assignment of Judgment, and that Mr. Smith was aware of the elements of a cause of action against Mr. Delay by November 2005, and that a suit should have been brought against Mr. Delay by November 2008.
>
> We argued at the April 2011 hearing that the clients did not have discovery of the cause of action until Mr. Smith's deposition, but the Court held that Mr. Smith's knowledge in November 2005 of the elements of a cause of action against Mr. Smith was imputed to his client. Therefore, the Court held that the SOL ran against Mr. Delay, and the Court dismissed our cause of action against him. The Judge did ask me at the hearing if we had alleged negligence against Mr. Smith, and I said that we did.
>
> While I could have amended our complaint again to make perfectly clear that we were also alleging negligence against Mr. Smith for his failure to advise his client of the potential cause of action against Mr. Smith, I thought (and still think) the Court's ruling was clear and that you had sufficient notice of this particular part of our negligence claim against Mr. Smith.

(CP 788-680).

By the time of the Motions in Limine hearing, a new trial date had not yet been set. Defendant cannot demonstrate prejudice.

Next, Mr. Smith asserted to the trial court that Plaintiff's claim was an "unplead cause of action." However, Plaintiff alleged that the loss of the 1998 State Court Judgment was the same element of damage against both Mr. Smith and Mr. Delay for which they were jointly liable. Plaintiff

alleged in paragraph 5.2 of the Second Amended Complaint that both Mr. Smith and Mr. Delay were responsible for the loss of the 1998 Judgment, valued at $83,183.37, plus 12% interest. Plaintiff was not seeking the same element of damage twice—it was one indivisible harm. Plaintiff's counsel made crystal clear to Defendant's counsel by February 24, 2012 that Plaintiff was alleging negligence for Mr. Smith's failure to advise the Townsend Trust of the potential negligence claim against Mr. Delay.

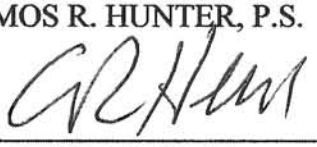
Plaintiff argued to the trial court that the remedy was to allow Plaintiff to Amend the Complaint, similar to allowing the Plaintiff to Amend the Complaint at trial to conform to the proof presented at trial. Defendant cannot demonstrate prejudice, as Defendant has been aware well before trial of that particular aspect of the negligence claim (and the new trial date not yet been set). There is one set of facts surrounding Plaintiff's negligence claim, namely, the loss of the 1998 State Court Judgment.

VI. CONCLUSION

For the reasons expressed above, this case should be remanded for trial.

Respectfully submitted this 19th day of February, 2013.

AMOS R. HUNTER, P.S.



AMOS R. HUNTER,
WSBA #20846
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

Amos Hunter, certifies as follows:

I am a citizen of the United States of America, over the age of 18 years, and competent to be a witness herein.

That on the 19th day of February, 2013, I caused to be served a copy of the foregoing Brief of Appellant to the following by the method indicated below:

James King
Evans, Craven & Lackie
818 W. Riverside
Suite 200
Spokane, WA 99201

[X] Via hand delivery

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

February 19, 2013, Spokane, WA

AMOS HUNTER