

COURT OF APPEALS NO. 62954-9-I  
KING COUNTY SUPERIOR COURT NO. 07-2-04479-5 SEA

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

TUYEN D. NGUYEN and MAI T. VAN,  
Appellants,

v.

CASCADE LAW GROUP, P.L.L.C., a Professional Limited  
Liability Corporation; ROBERT M. CLEGG and JANE DOE  
CLEGG; SIMON STOCKER and JANE DOE STOCKER; LISA F. MOORE  
and JOHN DOE MOORE,

Respondents.

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STATE OF WASHINGTON  
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APPELLANTS' OPENING BRIEF

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**ORIGINAL**

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2. The Trial Court Erred by Deducting the \$25,000 the Appellants Received from Amrik Singh to Settle the Underlying Case from the Jury's Award of Construction Repair Costs in the Legal Malpractice Case over the Appellants' Objection That Such an Offset Was Barred by the Collateral Source Doctrine..... 9

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*Assignments of Error.*

1. The trial judge erred by refusing to award the Appellants their reasonable attorney fees and expenses to establish that Amrik Singh breached the Real Estate Purchase and Sale Agreement which contained such a fee-shifting provision, where the jury found that they would have prevailed on that contract claim in the underlying case, but for the negligence of the Defendant attorneys, including the Respondent.

2. The trial judge erred by deducting the

\$25,000 the Appellants received from Amrik Singh to settle the underlying case from the jury's award of construction repair costs in the legal malpractice case, over the Appellants' objection that such an offset was barred by the collateral source doctrine.

*Issues Pertaining to Assignments of Error.*

1. Did the trial court err by failing to award the Appellants their reasonable attorney fees and expenses to establish that Amrik Singh breached the Real Estate Purchase and Sale Agreement, where the jury found that they would have prevailed on that contract claim in the underlying case, but for the negligence of the Defendant attorneys, including the Respondent?

2. Did the trial court err by deducting the \$25,000 the Appellants received from Amrik Singh to settle the underlying case from the jury's award of construction repair costs in the legal malpractice case over the Appellants' objection

that such an offset was barred by the collateral source doctrine?

*Statement of the Case.*

See Agreed Report of Proceedings.

*Argument.*

1. **The Trial Court Erred by Failing to Award the Appellants Their Reasonable Attorney Fees and Expenses To Establish That Amrik Singh Breached the Real Estate Purchase and Sale Agreement Where the Jury Found That They Would Have Prevailed On That Contract Claim in the Underlying Case, but for the Negligence of the Defendant Attorneys, Including the Respondent.**

When the jury awarded \$40,721.51 of the \$47,086.51 which the Nguyens had paid Lisa Moore for legal services and costs in the underlying case against Amrik Singh, APR 14, it did so based on the Nguyens' claim of professional negligence against Lisa Moore<sup>1</sup>, not on the basis that the

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In Jury Instruction No. 23, CP 1148, the trial court instructed the jury in pertinent part as follows:

If you find that Ms. Moore was negligent and proximately

Nguyens established that Amrik Singh breached the Real Estate Purchase and Sale Agreement which is the basis of their claim for reasonable attorney fees and expenses in this appeal.

Paragraph q. of the General Terms of the Real Estate Purchase and Sale Agreement, entered into between the Nguyens and Amrik Singh, provides in pertinent part:

**Attorneys' Fees.** If the Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses.

ARP 2. An award of reasonable attorney fees to the prevailing party is mandatory where, as here, the contract so provides. RCW 4.84.330; *Singleton v. Frost*, 108 Wn.2d 723, 729, 742 P.2d

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caused damages to the plaintiffs, you may award attorney fees and costs incurred in the underlying action against the Singhs, after Lisa Moore became involved in the case as an element of damage.

1224 (1987).

Prior to submitting the case to the jury, and following a colloquy with counsel, the trial judge indicated that she would determine the amount of reasonable attorney fees and expenses the Nguyens would have recovered in their underlying case against Amrik Singh, if the jury found that the Nguyens would have prevailed on their contract claims against Mr. Singh, but for the negligence of the Defendants.<sup>2</sup> APR 12. This is the very reason Questions 2 and 3 of the Special Jury Verdict were submitted to the jury.

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RCW 4.84.020 states:

In all cases of foreclosure of mortgages and in all other cases in which attorneys' fees are allowed, the amount thereof shall be fixed by the court at such sum as the court shall deem reasonable, any stipulations in the note, mortgage or other instrument to the contrary notwithstanding; but in no case shall said fee be fixed above contract price stated in said note or contract.

The jury found that the Nguyens would have prevailed on their contract claims in the underlying case against Amrik Singh, but for the negligence of the Defendant attorneys, including the Respondent. APR 12-13: Special Jury Verdict Award, Questions 2 and 3. Accordingly, the Nguyens are entitled to recover the reasonable attorney fees and expenses to establish those breach of contract claims.

Such a recovery is not limited to the legal services and costs the Nguyens incurred after Lisa Moore became involved in the case against Amrik Singh, as was the award based on their claim of professional negligence.

Rather, since a legal malpractice action is a "case within a case", an award of attorney fees and expenses is based on what the trial judge determines was reasonable and necessary to establish those breach of contract claims, looking at the legal services rendered in both the

underlying and malpractice cases.<sup>3</sup>

Recovery of their reasonable attorney fees and expenses was a major part of the Nguyens' contract claims against Amrik Singh. That item of recovery was lost as a result of the negligence of the Defendant attorneys. Accordingly, it is an item of damage they were and are entitled to recover in the legal malpractice action.

The trial judge in the malpractice action erred in failing to make that award.

**2. The Trial Court Erred by Deducting the \$25,000 the Appellants Received from Amrik Singh to Settle the Underlying Case from the Jury's Award of Construction Repair Costs in the Legal Malpractice Case over the Appellants' Objection That Such an Offset Was Barred by the Collateral Source Doctrine.**

As the party seeking the offset, Respondent Lisa Moore bears the burden of proving her

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The Respondent objected only to the Appellants' right to recover any reasonable attorney fees or expenses, CP 1300-1311, 1312-1335, but did not object to the Appellants' segregation of their attorney fees, or the amount requested. CP 1153-1282, 1347-1348.

contention that the \$25,000 the Appellants received from Amrik Singh to settle the underlying case should be applied to reduce the jury's award for the costs to repair the defects in the Nguyens' home. *Maziarski v. Blair*, 83 Wn.App. 835, 841, 924 P.2d 409(1996).

Yet, no evidence was presented at trial that this settlement was intended to pay the costs to remedy or repair the construction defects in the Nguyens' home, or for any other purpose than to settle the underlying case.

Notwithstanding what the Nguyens may have alleged in their pleadings about how the settlement monies they received from Amrik Singh should be deducted from any jury award, the Respondent does not allege that she relied on these pleadings in any way, much less, that she somehow changed her position to her detriment by justifiably relying upon these allegations. Absent proof of such detrimental reliance, the

court is required to apply the law to the facts of the case, regardless of what a party may have alleged.

Similarly, the mere fact that the trial judge told the jury that she would take the various "settlements into consideration into entering any judgment based on any award you may make in this case" does not mean that she was thereby bound to deduct those settlements, including the one with Amrik Singh, from the jury's award.

The collateral source rule prohibits deducting these settlement monies from the jury's award.

The collateral source rule applies when an injured party is compensated for his or her injuries from a source other than the tortfeasor. *Petersen-Gonzales v. Garcia*, 120 Wash.App. 624, 635-36, 86 P.3d 210 (citing *Ciminski v. SCI Corp.*, 90 Wash.2d 802, 804, 585 P.2d 1182 (1978)), review denied, 152 Wash.2d 1027, 101 P.3d 421 (2004).

The rule exists so that the wrongdoer does not benefit from collateral payments to the person he has wronged. *Id.* at 636, 86 P.3d 210 (citing *Wash. Ins. Guar. Ass'n v. Mullins*, 62 Wash.App. 878, 886, 816 P.2d 61 (1991)).

The collateral source rule provides that a claimant can receive and retain payments from a source independent of the tortfeasor, even if the claimant thereby receives and retains more than 100 percent of his or her legally recoverable damages, *Johnson v. Weyerhaeuser Co.*, 134 Wash.2d 795, 798, 953 P.2d 800 (1998); *Ciminski v. SCI Corp.*, 90 Wash.2d 802, 804, 585 P.2d 1182 (1978); *Maziarski v. Bair*, 83 Wash.App. 835, 841 n. 8, 924 P.2d 409 (1996), because, 'as between an injured plaintiff and a defendant-wrongdoer, the plaintiff is the appropriate one to receive the windfall.' *Xieng v. Peoples Nat'l Bank of Wash.*, 120 Wash.2d 512, 523, 844 P.2d 389 (1993). As the Washington

Supreme Court ruled in *Mazon v. Krafchick*, 158

Wn.2d 440, 452, 144 P.3d 1168 (2006):

The collateral source rule is an evidentiary principle that enables an injured party to recover compensatory damages from a tortfeasor without regard to payments the injured party received from a source independent of a tortfeasor. *Johnson v. Weyerhaeuser Co.*, 134 Wash.2d 795, 798, 953 P.2d 800 (1998). The rule comes from tort principles as a means of ensuring that a fact finder will not reduce a defendant's liability because the claimant received money from other sources, such as insurance carriers.

As the Court held in *Cox v. Spangler*, 141

Wn.2nd 431, 5 P.3d 1265 (2000):

This Court has long held that "payments, the origin of which is independent of the tortfeasor, received by a plaintiff because of injuries will not be considered to reduce the damages otherwise recoverable." [quoting *Ciminski v. SCI Corp.*, 90 Wash.2d at 804].

Amrik Singh's settlement payment to the Nguyens was independent of the Defendant attorneys, including Respondent Lisa Moore.

Thus, the collateral source rule prohibits reducing the liability of the Defendant attorneys, including the Respondent Lisa Moore, by the \$25,000 the Nguyens received to settle their underlying case against Amrik Singh.

Accordingly, that settlement sum should not have been considered here, much less deducted from the jury's award of construction repair costs, regardless of what the Nguyens may have stated in their pleadings.

**3. The Appellants Are Entitled To Recover Their Reasonable Attorney Fees And Expenses Incurred In The Course Of This Appeal.**

When the jury found that the Nguyens would have prevailed on their RESPA claims against Amrik Singh, but for the negligence of the Defendant attorneys, including the Respondent, the Nguyens became entitled to recover their reasonable

attorney fees and expenses to establish those RESPA claims, pursuant to Paragraph q. of the General Terms of the Real Estate Purchase and Sale Agreement. Pursuant to that same contractual fee shifting provision, they are entitled to recover their reasonable attorney fees and expenses incurred on this appeal to establish that right. *Bloor v. Fritz*, 143 Wn.App. 718, 750, 180 P.3d 808 (2008); *RAP* 18.1.

*Conclusion.*

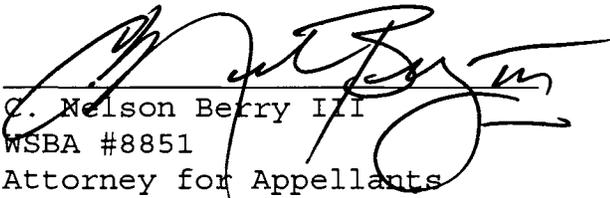
For each of the foregoing reasons, this Court should reverse and hold that the Nguyens are entitled to recover the reasonable attorney fees and expenses they incurred to establish that Amrik Singh breached the Real Estate Purchase and Sale Agreement, including the reasonable attorney fees and expenses they incurred in the course of this appeal to establish their right to recover those fees and expenses.

In addition, this Court should reverse and

hold that the collateral source doctrine precludes the trial judge from reducing the jury's award of the reasonable costs to correct the construction defects in their home by the \$25,000 they received from Amrik Singh to settle the underlying case.

This case should then be remanded to the trial court for further proceedings consistent with these rulings.

Respectfully submitted this 29th day of June, 2009.

  
C. Nelson Berry III  
WSBA #8851  
Attorney for Appellants

*Appendix.*

1. Jury Instruction No. 22..... A-1

INSTRUCTION NO. 23

It is the duty of the court to instruct you as to the proper measure of damages if find that Lisa Moore's professional negligence was a proximate cause of damage to Tuyen Nguyen and Mai Van.

If your verdict is in favor of Tuyen Nguyen and Mai Van, they are entitled to recover their actual damages caused by that negligence.

As I instructed you earlier, a professional negligence case is often referred to as a "case within a case" because the clients' damages, if any, are those the client would have recovered in the underlying action but for the underling negligence of the attorney, apart from any consideration of contributory negligence.

A party may recover those damages for breach of contract or promissory estoppel which may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract or promise itself, including those discovered after litigation has commenced, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract or promise, including any incidental or consequential losses caused by the breach, as the probable result of the breach.

In other words, the injured party should have the benefit of his or her bargain by being put in as good an economic

position as he or she would have attained had the contract been performed.

With regard to the plaintiffs' breach of contract and/or promissory estoppel claims, you are to use the following measure of damages in your determination of damages, in the amounts proved by the plaintiffs:

The reasonable cost to correct the construction defects in the plaintiffs' home, including any incidental or consequential costs or losses caused by the breach, as the probable result of the breach; or

The diminution of the fair market value of their home caused by the construction defects.

If you find that Ms. Moore was negligent and proximately caused damages to the plaintiffs, you may award attorney fees and costs incurred in the underlying action against the Singhs, after Lisa Moore became involved in the case as an element of damage.

The burden of proving damages for breach of contract or promissory estoppel rests with the party claiming to be damaged. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

While a party claiming to be entitled to damages need not show the precise amount of damages with mathematical certainty, an award of damages must be supported by evidence which affords a reasonable basis to allow the jury to estimate the loss. You must be governed by your own judgment, by the evidence in the

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case, and by these instructions, rather than by mere speculation, guess, or conjecture.

Finally, as I instructed you previously, you are not to concern yourself with the fact that Tuyen Nguyen and Mai Van have settled their claims with Amrik Singh, the Cascade Law Group, P.L.L.C., and Simon Stocker. The court will take those settlements into consideration into entering any judgment based on any award you may make in this case. Accordingly, you award, if any, should be in the full amount of damages you find the Nguyens would have recovered in the underlying lawsuit against Amrik Singh, after Lisa Moore became involved in this case, but for the negligence of Lisa Moore, the Cascade Law Group, P.L.L.C., Robert Clegg and Simon Stocker.