

No. 65668-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

WILLIAM M. EDLEMAN and KATHIE A. EDLEMAN, husband and
wife, and the marital community comprised thereof,

Respondents/Cross-Appellants,

v.

BRIAN PAUL RUSSELL and JANE DOE RUSSELL, his wife, and
the marital community comprised thereof; and BRIAN P. RUSSELL,
ATTORNEY AT LAW, PLLC, a Washington professional limited
liability company, f/k/a BRIAN P. RUSSELL, ATTORNEY AT LAW,
P.S., a Washington professional services corporation,

Appellants/Cross-Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE ANDREA DARVAS

REPLY BRIEF OF APPELLANTS/
RESPONSE TO CROSS-APPEAL

SMITH GOODFRIEND, P.S.

By: Howard M. Goodfriend
WSBA No. 14355
Ian C. Cairns
WSBA No. 43210

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

Attorneys for Appellants/Cross-Respondents

2011 JUN -6 AM 11:17
FILED
COURT OF APPEALS
DIVISION I
KING COUNTY
SEATTLE

TABLE OF CONTENTS

I. REPLY IN SUPPORT OF STATEMENT OF THE CASE..... 1

 A. The Edlemans Hired Russell Because The Home They Sought To Build Violated The Neighborhood Covenants. 2

 B. The Club And Neighbors Rejected Each Of The Edlemans' Settlement Offers, Many Of Them Made By Russell..... 3

 C. The Edlemans Disregarded Judge Cayce's Warning That If They Built Their Home In Violation Of The Covenants, They Could Be Ordered To Tear It Down. 4

 D. The Edlemans Criticize Russell's Litigation Strategy..... 5

II. REPLY ARGUMENT 7

 A. The Trial Court Erroneously Allowed The Jury To Hold Russell Liable For \$1 Million In Damages That Were Not Proximately Caused By Russell's Breach of The Standard Of Care..... 8

 1. The Jury Never Decided The "Case Within The Case" Because It Was Allowed To Find Proximate Cause Based On Judge Middaugh's Findings And This Court's Decision In *Green*. 9

 2. The Trial Court Invaded The Jury's Province To Decide How A Reasonable Fact Finder Would Have Ruled In The Underlying Case..... 13

3.	The Jury Was Allowed To Find Russell Responsible For Damages Caused By Judge Middaugh's Error Of Law, And Not By Any Malpractice.	15
4.	The Edlemans May Not Recover As Consequential Damages The Fees Paid To Successor Counsel And To The Club In Settlement.	17
B.	The Trial Court's Flawed Instructions Allowed The Jury To Find Russell Liable Without Finding A Breach Of The Standard Of Care.	20
1.	The Health Care Doctrine Of Informed Consent Has No Place In Legal Malpractice Claims Based On Breach Of The Standard Of Care.	20
2.	The Trial Court Erred In Refusing To Instruct The Jury That An Attorney Cannot Be Liable For Actions That Do Not Violate The Standard Of Care	24
III.	RESPONSE TO CROSS-APPEAL	27
A.	Restatement Of Issues On Cross-Appeal	27
B.	Procedural History Relevant To Cross-Appeal.....	28
C.	Argument In Response To Cross-Appeal.	31
1.	The Edlemans Were Not Entitled To Recover Russell's Attorney Fees As An Element Of Damages In A Malpractice Case Alleging Litigation Negligence.....	31
2.	The Trial Court Did Not Abuse Its Discretion In Refusing To Order Disgorgement.....	36

3.	The Trial Court Did Not Err By Refusing Plaintiffs' Proposed Instruction On Damages That Did Not Accurately State The Law.	38
4.	The Trial Court's Instruction Directing The Jury To Award Those Damages Proximately Caused By Russell's Negligence And Including Nonexclusive Elements Of Those Damages Was A Correct Statement Of The Law.....	40
5.	The Edlemans Cannot Establish Any Prejudice From The Instruction Limiting Damages To \$1.1 Million Where The Jury Awarded Less Than \$1 Million In An Undifferentiated General Verdict.....	42
IV.	CONCLUSION.....	45

TABLE OF AUTHORITIES

CASES

<i>Biggs v. Vail</i> , 119 Wn.2d 129, 830 P.2d 350 (1992).....	5
<i>Brust v. Newton</i> , 70 Wn. App. 286, 852 P.2d 1092 (1993), <i>rev. denied</i> , 123 Wn.2d 1010 (1994).....	14
<i>City of Bellevue v. Kravik</i> , 69 Wn. App. 735, 850 P.2d 559 (1993)	38
<i>Daugert v. Pappas</i> , 104 Wn.2d 254, 704 P.2d 600 (1985).....	12
<i>Eriks v. Denver</i> , 118 Wn.2d 451, 824 P.2d 1207 (1992).....	22, 33, 34, 36
<i>Flint v. Hart</i> , 82 Wn. App. 209, 917 P.2d 590 (1996).....	18, 19
<i>Goehle v. Fred Hutchinson Cancer Research Center</i> , 100 Wn. App. 609, 1 P.3d 579, <i>rev. denied</i> , 142 Wn.2d. 1010 (2000).....	40
<i>Green v. Normandy Park</i> , 137 Wn. App. 665, 151 P.3d 1038 (2007), <i>rev. denied</i> , 163 Wn.2d 1003 (2008)	4, 9, 11, 13-15
<i>Halvorsen v. Ferguson</i> , 46 Wn. App. 708, 735 P.2d 675 (1986), <i>rev. denied</i> , 108 Wn.2d 1008 (1987)	13
<i>Hawkins v. Marshall</i> , 92 Wn. App. 38, 962 P.2d 834 (1998)	39
<i>Hizey v. Carpenter</i> , 119 Wn.2d 251, 830 P.2d 646 (1992).....	21, 22, 37

Hue v. Farmboy Spray Co., Inc. , 127 Wn.2d 67, 896 P.2d 682 (1995)	42
Jain v. J.P. Morgan Securities, Inc. , 142 Wn. App. 574, 177 P.3d 117 (2008), <i>rev. denied</i> , 164 Wn.2d 1022 (2008), <i>cert. denied</i> , 129 S.Ct. 1584 (2009).	18, 19
Kelly v. Foster , 62 Wn. App. 150, 813 P.2d 598 (1991), <i>rev. denied</i> , 118 Wn.2d 1001 (1991).....	33
Lange v. Raef , 34 Wn. App. 701, 664 P.2d 1274, <i>rev. granted</i> , 100 Wn.2d 1013 (1983)	44
Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S. , 112 Wn. App. 677, 50 P.3d 306 (2002).....	37
Mackay v. Accord Custom Cabinetry, Inc. , 127 Wn.2d 302, 898 P.2d 284 (1995)	23
Magana v. Hyundai Motor America , 123 Wn. App. 306, 94 P.3d 987 (2004)	24
Matson v. Weidenkopf , 101 Wn. App. 472, 3 P.3d 805 (2000)	41
Meissner v. City of Seattle , 14 Wn. App. 457, 542 P.2d 795 (1975)	39
Menne v. Celotex Corp. , 861 F.2d 1453 (10th Cir. 1988)	43
Nichols v. Lackie , 58 Wn. App. 904, 795 P.2d 722 (1990), <i>rev. denied</i> , 116 Wn.2d 1024 (1991).....	39
Paradise Orchards General Partnership v. Fearing , 122 Wn. App. 507, 94 P.3d 372 (2004), <i>rev. denied</i> , 153 Wn.2d 1027 (2005)	14, 16

Ross v. Scannell , 97 Wn.2d 598, 647 P.2d 1004 (1982).....	34
Shoemake ex rel. Guardian v. Ferrer , 168 Wn.2d 193, 225 P.3d 990 (2010).....	32-36
Simburg, Ketter, Sheppard & Purdy, L.L.P. v. Olshan , 109 Wn. App. 436, 33 P.3d 742 (1999), <i>rev. granted</i> , 141 Wn.2d 1001 (2000).....	37
State v. Grier , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	12
Tradewell Group, Inc. v. Mavis , 71 Wn. App. 120, 129, 857 P.2d 1053 (1993)	18
Walker v. Bangs , 92 Wn.2d 854, 601 P.2d 1279 (1979) (Resp. Br. at 26)	13
Wheeler v. Catholic Archdiocese of Seattle , 124 Wn.2d 634, 880 P.2d 29 (1994).....	43
Wines v. Engineers Limited Pipeline Co. , 51 Wn.2d 487, 319 P.2d 563 (1957).....	44
Winslow v. Mell , 48 Wn.2d 581, 295 P.2d 319 (1956).....	45
Yousoufian v. Office of Ron Sims , 152 Wn.2d 421, 98 P.3d 463 (2004).....	9

STATUTES

RCW 4.84.185.....	6
-------------------	---

RULES AND REGULATIONS

ER 408	26
RPC 1.4.....	10

OTHER AUTHORITIES

Restatement (Third) Law Governing Lawyers
§ 37..... 31, 34

Restatement (Third) Law Governing Lawyers
§ 53..... 31, 34

WPI 30.01.01..... 41

WPI 105.04..... 21

I. REPLY IN SUPPORT OF STATEMENT OF THE CASE

Much of the Edlemans' restatement of the case in support of their million dollar judgment against Russell is not supported, or is flatly contradicted, by the record. Some of the more flagrant examples include their citation to exhibits that were not introduced into evidence,¹ to "testimony" that is in reality their trial counsel's questions, rather than a statement by a witness,² or to evidence that flatly contradicts the statement in their brief.³

To the extent the record provides any support for the Edlemans' restatement of the case, it confirms that the jury's \$1 million verdict was driven by flawed instructions that allowed the jury to find liability based on Russell's choice of litigation tactics, on an unprecedented theory of breach of the duty of informed consent that had nothing to do with the applicable standard of care, and without a determination that the Edlemans would have been able to build their "dream home" but for Russell's alleged litigation malpractice.

¹ See, e.g., Ex. 23 (cited in Resp. Br. at 3).

² See e.g., 5/26 RP 142-44 (Resp. Br at 15).

³ See, e.g., 6/7 RP 169-71 (cited in Resp. Br. at 7 for the proposition that Russell "lacked knowledge of the appropriate law concerning the doctrine of cross-lot building, as expressed in *Weld v. Bjork*." In the cited testimony, Edelmans' expert acknowledges that Russell cited *Weld* to Judge Middaugh during their trial.

A. The Edlemans Hired Russell Because The Home They Sought To Build Violated The Neighborhood Covenants.

The Edlemans hired Russell because they wanted to build a house that violated neighborhood covenants, that was much larger than nearly every other home in their neighborhood, and that included an eight-car garage. (6/7 RP 145; 6/8 (a.m.) RP 95; 6/8 (p.m.) RP 70, 103-05; 6/9 RP 32) While the Edlemans argue that their initiation of litigation to challenge the covenants that prevented them from building their dream home “was Russell’s strategy, not the clients,” (Resp. Br. at 3),⁴ building a home that was prohibited by their covenants was the Edlemans’ idea, not Russell’s. The Edlemans had prepared and submitted plans to build a home in violation of neighborhood covenants, and their neighbors and the Riviera Section Community Club had already objected to the construction of the Edlemans’ dream home, before the Edlemans first contacted Russell in February 2002. (Ex. 3; 6/1 RP 140)

⁴ For this proposition the Edlemans cite to the testimony of their contractor, who testified to his “understanding in conversations with Mr. Edleman . . . that this [litigation] was a way to bring them to the negotiating table.” (6/3 RP 38-39)

B. The Club And Neighbors Rejected Each Of The Edlemans' Settlement Offers, Many Of Them Made By Russell.

Russell did not advise the Edlemans to refuse to cooperate with the club or their neighbors. The Edlemans assert that *they* made “numerous and repeated unsuccessful efforts during the period 2002 and 2003 to try and peacefully resolve this matter with those neighbors,” (Resp. Br at 4), but make no mention of the multiple settlement offers signed or drafted by Russell. (Exs. 42, 43, 79, 179, 204; CP 49, 50, 264-67; 6/1 RP 186; 6/3 RP 23-24; 6/10 RP 217-19; 6/11 RP 142) It was undisputed that the Club and the Benways rejected each of Edlemans' offers. (Ex. 15; 6/2 (a.m.) RP 136) Edlemans' expert confirmed that Russell's advice to negotiate from a position of strength was a reasonable litigation strategy. (6/8 (p.m.) RP 25)

The Edlemans' assertion that litigation was “Russell's strategy, not the clients” also ignores their admission that the Edlemans told Russell that their neighbors had filed suit against the Club, and suggested to Russell that they join the Greens' lawsuit challenging the Club's standing as a valid successor to the original

developer that imposed the covenants. (6/8 (p.m.) RP 85-86) After joining the Green litigation the Edlemans were then forced to *defend* a lawsuit seeking injunctive relief instigated by the Benways after the Edlemans, with Russell's assistance, obtained a permit from the City of Normandy Park and prepared their lot for construction of their dream home. (Ex. 17 at 2; 5/25 RP 110) Russell defeated the temporary injunction sought by the Benways from Judge Cayce in that lawsuit. (CP 49)

C. The Edlemans Disregarded Judge Cayce's Warning That If They Built Their Home In Violation Of The Covenants, They Could Be Ordered To Tear It Down.

The Edlemans do not allege that Russell advised them to build in violation of the covenants. The Edlemans knew that their dream home and eight-car garage could be torn down if the covenants were enforced. Edleman admitted that he had "made up my mind" to build his home knowing of the potential consequences. (Ex. 44 at 22; 5/27 RP 168-169; 6/1 RP 173-75; CP 73, 115, 362)

Edleman complains that Russell "never affirmatively told him not to build," (Resp. Br. at 5) but ignore what Russell *did* tell them. Edleman's "informed consent" theory is substantially undermined

by his admission that he and Russell discussed Judge Cayce's ruling and its implications. Edleman testified that after Judge Cayce warned him that he might have to tear down his completed home, Russell told him, "I don't know if I would [build], but we have a great case, do what you want." (5/27 RP 169; 6/1 RP 51) Edleman admitted that Russell did not encourage him to continue construction. (6/8 (p.m.) RP 102-03)

D. The Edlemans Criticize Russell's Litigation Strategy.

As illustrated by their assertion that expert testimony showed that "Russell's *actions* betrayed his lack of understanding in this land-use homeowner's association" litigation, (Resp. Br. 3-4, emphasis added), the Edlemans' theory of litigation malpractice was based on Russell's choice of litigation strategy and tactics. This court must reject the Edlemans' assertion that Russell's initiation of litigation against the homeowner's association, in and of itself, breached the standard of care.

First, the Court of Appeals reversed Judge Middaugh and held as a matter of law that the covenant prohibiting building across an interior lot line was unenforceable. Thus, as a matter of law, the Edlemans' lawsuit was not frivolous. *Biggs v. Vail*, 119 Wn.2d 129, 133-37, 830 P.2d 350 (1992) (where a portion of litigation has

merit, the lawsuit as a whole cannot be deemed frivolous under RCW 4.84.185).⁵ Judge Middaugh did not find that the lawsuit as a whole was filed “in bad faith and for an improper purpose,” as the Edlemans assert (Resp. Br. at 3)⁶, but that the Edlemans named their neighbors the Cooks and Fawcetts for the “improper purpose” of applying pressure on the Club, without determining whether they were also in violation of the covenants, as the Edlemans alleged in the complaint filed by Russell. (6/7 RP 74)

The record similarly fails to support Edlemans’ assertion that the Edlemans’ three “expert witnesses, . . . all testified that the institution of such a lawsuit fell below the standard of care, that it was frivolous, without good cause . . .” (Resp. Br. 3) Talmadge criticized Russell’s failure to preserve the issue of the Club’s authority for appeal. (6/8 p.m. RP 22-24) Aramburu testified that

⁵ Given their concession that Russell raised the interior lot line issue before Judge Middaugh, the Edlemans’ argument that Russell was negligent because Edlemans’ construction manager brought the relevant case law to Russell’s attention, is specious. (Resp. Br. at 8) See Reply Arg., at 15-16, *infra*.

⁶ The Edlemans cite to Judge Middaugh’s findings for this proposition. (Ex. 23) Not only were the findings not in evidence, they do not support the Edlemans’ characterization of Judge Middaugh’s findings.

“the Edleman[s] should have been advised to go through the process.” (5/26 RP 120) Aramburu never offered an opinion that initiation of litigation, by itself, violated the standard of care, because the Edlemans’ counsel withdrew this question after Russell objected that such testimony was beyond the scope of Aramburu’s disclosed expertise. (5/26 RP 142-44, 165-66)

As discussed below, the Edlemans’ factual assertions, even when they are accurate, only underscore the trial court’s legal errors in allowing the jury to impose liability without a determination of proximate cause or a violation of the applicable standard of care.

II. REPLY ARGUMENT

The Edelmans argue both that Russell was liable for starting and continuing litigation on their behalf without their “informed consent,” and that the manner in which he conducted that litigation breached the standard of care. In their responsive brief the Edlemans confuse these theories, arguing, frequently in the same paragraph, both that Russell is liable because the Edlemans’ challenge to the Club’s covenants was doomed and should never have been filed, and that Russell is liable because a competent trial lawyer would have won that challenge. While a plaintiff may plead

alternative theories of recovery, here each theory was not only inconsistent but presented under flawed instructions that deprived Russell of his right to a fair determination of his liability under settled principles of legal malpractice.

A. The Trial Court Erroneously Allowed The Jury To Hold Russell Liable For \$1 Million In Damages That Were Not Proximately Caused By Russell's Breach of The Standard Of Care.

The Edlemans assert that Russell conducted the litigation against the Club in a negligent manner, but the jury was never asked to determine whether the Edlemans would have been able to build their nonconforming house had Russell performed as their experts claimed he should have. Russell's performance, adequate or inadequate, could not change the covenants' set back requirements. Rather than deciding the "trial within the trial," the jury was instead allowed to hold Russell responsible for Judge Middaugh's prior decision, even though this court reversed her decision as an error of law. The trial court erred by allowing the jury to find Russell liable for judicial error based on previous decisions in the underlying case.

1. The Jury Never Decided The “Case Within The Case” Because It Was Allowed To Find Proximate Cause Based On Judge Middaugh’s Findings And This Court’s Decision In *Green*.

Citing this court’s refusal to consider the Edlemans’ argument that the Club’s Board members were disqualified in ***Green v. Normandy Park***, 137 Wn. App. 665, 151 P.3d 1038 (2007), *rev. denied*, 163 Wn.2d 1003 (2008), the Edlemans contend that the jury found Russell liable for abandoning a winning argument in the underlying action. (Resp. Br. at 12, 23, 30-31) But the trial court in this case held on summary judgment that Russell’s alleged “abandonment” of the Edlemans’ challenge to the composition of the Board could not have caused the Edlemans’ damages because any of Edlemans’ neighbors could have independently enjoined a violation of the covenants. (CP 13) As the Edlemans have not challenged that decision on appeal, it is the law of the case. See ***Yousoufian v. Office of Ron Sims***, 152 Wn.2d 421, 439, 98 P.3d 463 (2004) (issue on which respondent does not cross-appeal or assign error will not be considered on appeal).

The Edlemans ignore this partial summary judgment order entirely, arguing that “Russell’s negligence caused the

abandonment of the argument that the club was not properly constituted.” (Resp. Br. at 30) The trial court, after entering summary judgment and over Russell’s objection, allowed Edlemans’ experts to expound on their theory, that even though it did not “cause[] damage,” abandonment was “one of the numerous issues that show Russell’s lack of knowledge, lack of preparation, and lack of compliance with RPC 1.4(b).” (CP 641, 1009)⁷ Without modifying the prior summary judgment, the trial court then denied Russell’s proposed limiting instruction, which it had recognized was a necessary condition to the jury’s consideration of this “abandonment” evidence. (CP 1009; 6/9 RP 4-12; 6/11 RP 152-53)⁸ Edleman improperly used his expert’s testimony of Russell’s alleged “abandonment” to establish liability for legal malpractice after this claim had been dismissed. The improper admission of evidence under a theory that had earlier been dismissed prejudiced Russell and, standing alone, warrants reversal.

⁷ Russell’s expert testified, consistent with the trial court’s summary judgment ruling, that arguing the Club’s power to enforce the covenant would have made no difference because the Benways could have independently enforced the covenants. (6/10 RP 54-55)

⁸ Russell’s proposed limiting instruction was read into the record in open court at 6/11 RP 152, and is attached as Appendix A to this Reply Brief.

Worse, the jury was never asked to consider as a matter of fact whether the “abandonment” theory was the proximate cause of Edleman’s damages. If the trial court could have submitted this theory to the jury despite the earlier summary judgment, it was required to do so with proper instructions to determine the consequence of the claimed “abandonment” of this legal theory. The trial court refused Russell’s proposed instruction that would have required the jury to determine, as a factual matter, whether the board members were disqualified from considering the Edlemans’ proposal because they were directly and financially “affected by the plans under consideration.” (CP 1100, attached as App. E to App. Br.)

The Edlemans argue that the jury did not need to decide whether Russell’s alleged abandonment cost them a winning argument because this issue was resolved as a matter of law by this court’s earlier decision in *Green*. They also claim (without addressing Russell’s argument that this was not a proper subject for expert testimony) that their experts’ explanation of Russell’s alleged abandonment and this court’s decision in *Green* allowed “the jury . . . to see within the trial within a trial . . . the clarity of what Russell did wrong.” (Resp. Br at 25) But this court in *Green* did

not address the merits of the Edlemans' due process argument when it affirmed Judge Middaugh's ruling that the Edlemans had abandoned below their challenge to the board's composition. The Edlemans' attempt to equate counsel's failure to preserve an issue for appellate review with a finding that the client suffered damages would radically alter established principles that require a lawyer's deficient performance to result in actual prejudice to the client. See **State v. Grier**, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (defendant claiming ineffective assistance of counsel "must show that the deficient performance prejudiced the defense") (quotation omitted); **Daugert v. Pappas**, 104 Wn.2d 254, 257, 704 P.2d 600 (1985) (in legal malpractice action, "the trier of fact decides whether the client would have fared better but for such mishandling.").

The element of proximate cause requires the jury in a legal malpractice case to conduct "a trial within a trial" to determine whether a reasonable fact finder would have ruled in the plaintiff's favor but for litigation counsel's alleged breach of the standard of care. **Daugert**, 104 Wn.2d at 257 (legal malpractice jury "retries, or tries for the first time, the client's cause of action which the client

asserts was lost or compromised by the attorney's negligence"); ***Halvorsen v. Ferguson***, 46 Wn. App. 708, 719, 735 P.2d 675 (1986), *rev. denied*, 108 Wn.2d 1008 (1987). Consistent with the trial court's summary judgment, no objective factfinder has determined that the Edlemans would have succeeded in defeating enforcement of the covenants. Russell's alleged "abandonment" of an issue cannot support a \$1 million judgment in the absence of a determination of proximate cause.

2. The Trial Court Invaded The Jury's Province To Decide How A Reasonable Fact Finder Would Have Ruled In The Underlying Case.

Although the trial court excluded Judge Middaugh's findings of fact and this court's decision in ***Green*** as exhibits, it allowed the Edlemans' counsel to display portions of those previous decisions to the jury and allowed Edlemans' experts to read from those decisions verbatim. (e.g., 5/26 RP 137-41, 5/27 RP 93-96) This is not simply a matter of admitting "the record of proceedings from [the] underlying trial," as was the case in ***Walker v. Bangs***, 92 Wn.2d 854, 861, 601 P.2d 1279 (1979) (Resp. Br. at 26). Allowing the jury to consider the prior judicial decisions was an error that deprived Russell of his due process right to an independent determination of the fundamental factual issue of causation. The

Edlemans' experts used Judge Middaugh's findings and the decision in **Green** to improperly and incorrectly tell the jury that other judges had already determined that Russell's litigation errors caused the Club to enforce its covenants. Combined with its instructional error, the trial court thus prevented the jury from deciding the issue of proximate cause.

The "trial within a trial" in a legal malpractice case serves several purposes. Beyond the general tort purpose of providing a mechanism for proving causation, it requires the jury to base proximate cause on what a reasonably prudent decision maker would find, rather than on the idiosyncrasies and predilections of the particular judge or jury that decided the underlying litigation. 4 *Mallen and Smith* § 35.28 at p. 1428; **Brust v. Newton**, 70 Wn. App. 286, 293, 852 P.2d 1092 (1993), *rev. denied*, 123 Wn.2d 1010 (1994). Additionally, the "trial within the trial" protects the due process right of the defendant attorney to an independent determination of factual issues, rather than binding the defendant to a previous adjudication to which he or she was not a party. See **Paradise Orchards General Partnership v. Fearing**, 122 Wn. App. 507, 515, 94 P.3d 372 (2004), *rev. denied*, 153 Wn.2d 1027 (2005).

Here, the trial court allowed the jury to consider Judge Middaugh's determination that the neighbors Cook and Fawcett were sued for an improper purpose, and that the manner in which Russell conducted the lawsuit made Judge Middaugh so hostile to the Edlemans and their counsel that she would have not modified her injunction, even after it was vacated by this court in *Green*. Evidence concerning the prior judicial decisions and expert speculation on how Judge Middaugh would have ruled on remand deprived Russell of his right to have the jury determine the issue of proximate cause.

3. The Jury Was Allowed To Find Russell Responsible For Damages Caused By Judge Middaugh's Error Of Law, And Not By Any Malpractice.

The Edlemans recognize that the Court of Appeals reversed Judge Middaugh's order requiring removal of the Edlemans' home on the ground that she "erred by concluding that the Edlemans were required to meet the covenants setback requirements regulating the area along the boundaries between their two adjoining lots." (Resp. Br. at 28-29, *quoting Green*, 137 Wn. App. at 692, ¶ 63) In light of this acknowledged judicial error, their contention that "Russell's flawed strategy and ignorance of the law

set the momentum for the Order requiring demolition of Edlemans' home," (Resp. Br. at 29) is misplaced, not only because the order was vacated, but because the order was the result of judicial error that Russell had timely brought to the attention of the court below.

The Edlemans do not address *Paradise Orchards*, 122 Wn. App. at 520, or the other cases establishing the principle that a lawyer is not responsible for a judge's error of law. (App. Br. at 40-41) If a lawyer identifies a legal issue by timely raising the issue before the trial court and preserving the issue for appeal, as Russell did here, and the trial court nonetheless rules incorrectly, it is the trial court's error that is the proximate cause of the client's loss, not the lawyer's, regardless whether the lawyer's tactics caused the judge's "unreasoning hostility" or "complete[] exasperat[ion]." (Resp. Br. at 8) Allowing a jury to find malpractice liability on the basis of how a particular judge views a particular attorney fosters disrespect for the rule of law and for the judiciary's duty and ability to adhere to it. Russell was entitled to judgment as a matter of law where the Edlemans' damages – including appellate counsel's fees, and money paid in settling this lawsuit on remand – were the product of an error of law, and not legal malpractice.

4. The Edlemans May Not Recover As Consequential Damages The Fees Paid To Successor Counsel And To The Club In Settlement.

Citing their expert testimony, the Edlemans argue that they acted “reasonably” in paying attorney fees to the Club and to successor counsel in order to “mitigate their damages.” (Resp. Br. 31-32) This factual contention again illustrates the trial court’s error in allowing the jury to determine causation in a legal vacuum because the jury was never instructed on the legal principles that apply to a party challenging the enforcement of neighborhood covenants. It was impossible for the jury to determine whether the settlement was reasonable where the only legal criteria given to the jury were the previous court’s decisions and their expert’s testimony that Judge Middaugh’s “hostility” to Russell would have made a remand a risky proposition for the Edlemans. (Reply Argument at A.1-2, *supra*)

Moreover, the Edlemans’ contention that the fees they paid to successor counsel to appeal and to settle this litigation were “reasonable” ignores the threshold inquiry of whether they had any right to recover these attorney fees as a matter of law. A plaintiff seeking attorney fees incurred in litigation with a third party must show not only that those damages “flowed from” the wrongful

conduct of the defendant, but also that the plaintiff's own actions did not "cause[] it to be 'exposed' or 'involved' in litigation with" the third party. **Jain v. J.P. Morgan Securities, Inc.**, 142 Wn. App. 574, 587, ¶ 39, 177 P.3d 117 (2008) (quoting **Tradewell Group, Inc. v. Mavis**, 71 Wn. App. 120, 129, 857 P.2d 1053 (1993)), *rev. denied*, 164 Wn.2d 1022 (2008), *cert. denied*, 129 S.Ct. 1584 (2009).

Both Division Three in **Flint v. Hart**, 82 Wn. App. 209, 917 P.2d 590, 598 (1996) (Resp. Br. at 33-34) and Division One, 13 years later in **Jain**, analyzed the recovery of successor counsel fees by malpractice plaintiffs under the "ABC test." Both courts thus required proof that the plaintiff would not have been involved in litigation with a third party "apart from [defendant's] conduct" as a predicate to recovering attorney fees as damages. **Flint**, 82 Wn. App. at 224; **Jain**, 142 Wn. App. at 587, ¶ 39.

In **Flint**, the plaintiff became involved in litigation with the purchaser of his business "only because" his transaction attorney negligently failed to perfect his security interest:

Mr. Flint became involved in the litigation only because he did not have a secured interest in the goodwill and could not take back the funeral home. Had he been able to take the business back, he would have done so. At the least, he would have been

a fully secured creditor in the bankruptcy. The fact that there may have been other reasons for the Meyers' bankruptcy, or that the Meyers prolonged the litigation, is not the relevant inquiry. The focus is whether Mr. Flint would have been involved in litigation with the Meyers, apart from Hart & Winfree's conduct.

82 Wn. App. at 224. This is not a case like *Flint*, where plaintiff can claim that the litigation was caused solely by his attorney's failure to secure an interest in property.

Instead, as in *Jain*, the advice of their lawyers and advisors was not the "sole reason" that the Edlemans became involved in litigation. Jain had voluntarily signed documents that exposed him to potential liability under federal securities laws. As a result, this court held that he could not as a matter of law recover attorney fees against his attorneys and other advisors based on an allegation that they failed to competently advise Jain about the consequences of his voluntary actions. 142 Wn. App. at 587-88, ¶¶ 40-41. Like *Jain* and in contrast to *Flint*, the Edlemans engaged in voluntary conduct that contributed to their injury – attempting to build a house in violation of neighborhood covenants.

The Edlemans, not Russell, demanded to join the Greens' lawsuit against the Club to strike down the covenants. The Edlemans, not Russell, decided to build a home in violation of the

covenants, were forced to defend against a threatened preliminary injunction, and decided to continue building after Judge Cayce's warnings that they could be required to tear down the offending improvements. The issue is not simply whether the Edlemans' settlement was "wise and reasonable," (Resp. Br. at 34), but whether the Edlemans can shift liability for their attorney fees and those they paid in settlement to the Club and the Benways when their own actions indisputably contributed to the litigation with these third parties. Russell was not liable for the Edlemans' attorney fees because Edlemans' own actions contributed to the litigation with their neighbors and the Club.

B. The Trial Court's Flawed Instructions Allowed The Jury To Find Russell Liable Without Finding A Breach of The Standard Of Care.

1. The Health Care Doctrine Of Informed Consent Has No Place In Legal Malpractice Claims Based On Breach Of The Standard Of Care.

The Edlemans fail to address the trial court's flawed instruction on the doctrine of informed consent. This was a legal malpractice case, not a case for injury arising from health care. Instruction 13 (CP 748, App. A to App. Br.), which the trial court copied from Health Care WPI 105.04, was erroneous as a matter of law because the duty to advise the plaintiff "of all material facts,

including risks and alternatives, which a reasonably prudent client would need to make an informed decision,” allowed the jury to find Russell liable for legal malpractice regardless whether his advice comported with the standard of care of a reasonable lawyer practicing in Washington state.

Rather than defend the trial court’s informed consent instruction as an accurate statement of the law, the Edlemans argue that there was evidence from which the jury could have found Russell liable for breaching the standard of a reasonably prudent lawyer based on his advice to the Edlemans. (Resp. Br. at 16-17) While the jury was separately instructed on the standard of care, the jury was *not* instructed that a lawyer’s duty to communicate with a client is governed by the reasonably prudent lawyer standard. Instruction No. 13 authorized the jury to find that Russell was liable for breach of a duty distinct from that established by the reasonable lawyer standard and is unsupported in the law. See ***Hizey v. Carpenter***, 119 Wn.2d 251, 261-68, 830 P.2d 646 (1992) (rejecting liability based upon alleged noncompliance with Rules of Professional Conduct, or with “specialist” standard of care.)

The Edelmans cite the Rules of Professional Conduct for the proposition that a lawyer has a duty to explain a matter to the client

in order to allow the client to make an informed decision. (Resp. Br. at 13, 20-21) But the Rules are not independently actionable as a breach of the standard of care. (App. Br. at 29, *citing Hizey*, 119 Wn.2d at 265-66) And although *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992) (Resp. Br. at 20) allows a court (not a jury) to forfeit a lawyer's fee for breach of a duty imposed by the Rules, the Edlemans had no claim against Russell for breach of a fiduciary duty. Instruction No. 13 wrongly allowed the jury to find Russell liable even if it rejected the contention that Russell's failure to "communicate adequately" (as Edlemans' expert put it) breached the standard of care. (See 6/7 RP 81-84; 6/8 (p.m.) RP 24-26).

The Edlemans' experts testified that Russell's clients were entitled to know "that the abandoned issue was important," as well as the "upside and downside" of being aggressive. (Resp. Br at 15-16; 6/8 (p.m.) RP 25) But Instruction No. 13 authorized the jury to find Russell liable based on whether "a reasonably prudent person in the position of" the Edlemans "would attach significance" to these issues regardless whether these alleged communication lapses breached the standard of care.

An instruction that clearly misstates the law is presumed prejudicial. *MacKay v. Accord Custom Cabinetry, Inc.*, 127

Wn.2d 302, 311-12, 898 P.2d 284 (1995). Instruction No. 13 was prejudicial because it allowed the jury to find Russell liable even if it accepted the testimony of Russell's defense expert Chris Brain that Russell met the standard of care. Brain testified that if, as Edleman claimed, Russell told him that, "I wouldn't do it if it were me," the standard of care was met, because Edleman understood that if he continued building and lost, his house might be torn down – just as Judge Cayce had warned him moments earlier. (6/10 RP 81-84) Brain further testified that Russell did not have a duty to explain the doctrine of "balancing of the equities" to comply with the standard of care, so long as the Edlemans understood the risks of continuing construction. (6/10 RP 116-17)

The trial court's instruction did not require the jury to weigh this conflicting expert testimony on compliance with the standard of care because it allowed the jury to find Russell liable if it believed the Edlemans' assertion that they did not comprehend the full extent of the risks they faced. Further, because it told the jury that the duty of informed consent "cannot be delegated," the trial court allowed the jury to impose liability even if, as Edleman stated, he took Judge Cayce's warning "seriously." (6/1 RP 173)

Because the jury was told that it could find Russell breached his duty to his clients regardless of his compliance with the standard of care, this court cannot deem the instructional error harmless. See *Magana v. Hyundai Motor America*, 123 Wn. App. 306, 317-18, 94 P.3d 987 (2004) (instructional error regarding liability not harmless where evidence of liability was disputed; prejudice must be evaluated by looking at “entire record” rather than “counting lines of testimony.”) Russell is entitled to a new trial where the jury is not instructed on a flawed theory of informed consent.

2. The Trial Court Erred In Refusing To Instruct The Jury That An Attorney Cannot Be Liable For Actions That Do Not Violate The Standard of Care

Russell’s proposed instructions would have properly told the jury that an attorney could be held liable only for a breach of the standard of care. The trial court erroneously refused Russell’s proposed instructions that would have told the jury that a lawyer is not a guarantor and is not liable for errors in the choice of litigation tactics, and that it may not impose liability with the benefit of hindsight. (CP 1097-99; 6/11 RP 154-58) The Edlemans’ focus on Russell’s trial tactics and his alleged “abandonment” of an

argument that could not have defeated enforcement of the covenants demonstrates why Russell's proposed instructions, refused by the trial court, were necessary for him to argue his theory of the case.

The Edelmans do not argue that Russell's proposed instructions were a misstatement of the law, but instead contend that a "no guarantee" instruction conflicted with *their* theory of the case. For instance, they cite to their contractor's testimony that Russell had "guaranteed" a favorable outcome by allegedly telling the Edlemans that the case was a "slam dunk," and that "there is no way we could lose." (Resp. Br. at 17) But the issue is not whether the jury was entitled to credit this hearsay, as improbable as it may be. To the contrary, the Edlemans' contention that Russell advised them to expect a favorable outcome, notwithstanding their recognition that their dream home violated the covenants, only illustrates the importance of the "no guarantee" instruction to *Russell's* theory of the case, particularly in light of the trial court's directive to the jury to evaluate Russell's advice, not from the standpoint of a reasonable lawyer but from the standpoint of the Edlemans. (Inst. 13, CP 748)

The Edlemans also contend that the trial court properly refused Russell's proposed Instruction No. D15, (CP 1099), because their case was "not grounded on flawed litigation strategies – of which there are many." (Resp. Br. at 17) But the Brief of Respondent recounts at length the Edlemans' experts' criticism of a host of Russell's tactical decisions for no other reason than to allege Russell's breach of the standard of care, for example, not asking for a site view, not taking depositions, choosing not to pursue a non-dispositive issue, submitting Edelmans' plans to the Club under ER 408, or the manner in which Mr. Russell argued that the covenants had not been evenly enforced by the Club.

Russell's proposed instruction D15, (CP 1099), as well as his proposed instruction D14, (CP 1098), would have properly instructed the jury to avoid hindsight in evaluating Russell's tactical advice and litigation strategy in determining whether Russell met the standard of care of a reasonable lawyer practicing in the state of Washington. The jury was instead allowed to base its verdict on an improper standard of informed consent and on an argument that Russell had essentially guaranteed the Edlemans' ability to build a home that they, in fact, had no right to build under their

homeowners' covenants. This court should reverse and remand for a new trial before a properly instructed jury.

III. RESPONSE TO CROSS-APPEAL

A. Restatement Of Issues On Cross-Appeal

1. In the absence of a claim for breach of fiduciary duty, must a jury in a legal malpractice action be instructed to award plaintiff the fees paid to the defendant lawyer as well as all fees paid to successor counsel for concluding the underlying claim?

2. Did the trial court abuse its discretion in refusing to direct the forfeiture of the fees paid to plaintiff's former counsel in the absence of any allegation or evidence that former counsel committed a clear and serious breach of an ethical duty, and after finding that the plaintiff was made whole by a malpractice award that included successor counsel's fees, the settlement of the underlying litigation and the reduced value of plaintiff's property?

3. Did the trial court correctly refuse a proposed instruction that told the jury that its verdict "*must* include . . . undisputed items" of damages, including successor counsel fees and the value of real property, where those damages were in fact disputed?

4. Did the trial court correctly instruct the jury in a legal malpractice action to award those damages that were proximately

caused by attorney negligence, where the instruction did not preclude the jury from considering any particular element of damages?

5. Can the Edlemans show prejudice from the trial court's supplemental instruction limiting damages to \$1,099,000 given that the jury's undifferentiated general verdict awarded the Edlemans less than \$1 million?

B. Procedural History Relevant To Cross-Appeal.

The evidence at trial on damages was disputed. (*Compare* 6/8 RP 56-115 *with* 6/9 RP 14-72 (conflicting expert testimony on change in value of the Edlemans' house); *compare* 6/7 RP 5 and 6/8 RP 20 *with* 6/10 RP 100-02 and 6/11 RP 58-60 (conflicting testimony on the reasonableness of successor counsel's fees)) During both opening and closing argument, the Edlemans' counsel used a demonstrative exhibit to list Edlemans' claimed damages, including \$388,000 in successor counsel fees, \$20,000 for re-architectural engineering, \$350,000 in settlement funds, \$241,000 to demolish and rebuild the garage, and \$100,000 for the diminution in value of the house. (CP 1039) This exhibit labeled these items as "nonexclusive damages." (CP 1039) It was not offered or admitted into evidence.

Russell moved in limine to exclude evidence of the amount of fees he received from the Edlemans. (CP 651-53, 1119-31) The trial court initially granted Russell's motion (CP 1001), but later allowed the amount of Russell's fees into evidence. (6/11 RP 54, 64; Ex. 1)

The Edlemans proposed an instruction that would have told the jury that if it found for the Edlemans then its verdict "must include the following undisputed items," listing the fees paid to "Russell for those services that you find fell below the standard of care and were negligent," successor counsel's fees, the amounts reasonably paid to settle the underlying dispute, and the diminution in the value of the Edlemans' property. (CP 967) The trial court rejected the Edlemans' proposed instruction. The trial court instead instructed the jury that if it found for the Edlemans it "must determine the amount of money that will reasonably and fairly compensate the plaintiffs for such damages as you find were proximately caused by the negligence of the defendant" and suggested three items of damages that the jury "should consider." (CP 750) These items were (1) "the amount of monies that you find were reasonably expended by the plaintiffs for successor counsel and/or to mitigate their damages through settlement," (2) "the cost

of redesign, demolition or reconstruction reasonably incurred,” and (3) “the diminution in value to plaintiffs’ house, if any.” (CP 750)

While deliberating, the jury sent out two questions asking if it could “add ‘others’ fee’s [sic],” and whether it could award “more than \$1,099,000.” (CP 753, 755) In response, the trial court instructed the jury, “The amount of damages is for you to determine, based upon the evidence + the jury instructions. However, your award may not exceed \$1,099,000.” (CP 754) The trial court’s response did not preclude an award of “others’ fees.”

The jury awarded the Edlemans \$999,000. (CP 1021-23) After the trial court accepted the jury’s \$999,000 verdict, the Edlemans asked the trial court to order Russell to disgorge his fees as a matter of equity. (CP 1046-54, 1058-60, 1160-65) The trial court denied the motion, finding that the Edlemans were “made whole” by the jury’s award of all damages proximately caused by Russell’s actions and that, “in the absence of evidence of unethical conduct,” any additional award “would result in a windfall”:

[T]he jury awarded to the Edlemans the fees they paid to successor counsel . . . , the amounts they paid in settlement of the underlying controversy, . . . and their cost to demolish and rebuild their garage. As a result,

the plaintiffs were able to recover all of the damages that were “actually sustained as a proximate result of the defendant’s negligence.” Plaintiffs were thus made whole. Allowing them additionally to recover the fees they paid to defendant Russell would result in a windfall to the plaintiffs.

(CP 1065-66) (citations omitted)

C. Argument In Response To Cross-Appeal.

1. The Edlemans Were Not Entitled To Recover Russell’s Attorney Fees As An Element Of Damages In A Malpractice Case Alleging Litigation Negligence.

The trial court did not err in refusing to instruct the jury that it must award the Edlemans the attorney fees paid to Russell, on top of successor counsel’s fees, the amount paid in settling the underlying litigation, and diminution of the value of their property, in the absence of a breach of fiduciary duty. A plaintiff in a legal malpractice action may not recover attorney fees that have been paid in underlying litigation except upon entry of a finding that the lawyer has engaged in a serious breach of fiduciary duty. *Restatement (Third) Law Governing Lawyers* §§ 37, 53, comment c.

The Edlemans’ proposed instruction, which would have instructed the jury, as a matter of law, to award the Edlemans the attorney’s fees paid to Russell, as well as successor counsel’ fees,

is based largely on a misreading of *Shoemake ex rel. Guardian v. Ferrer*, 168 Wn.2d 193, 225 P.3d 990 (2010). The Court in *Shoemake* authorized the recovery of interest on the full amount of a settlement lost because of the lawyer's admitted nonfeasance and admitted breach of fiduciary duty. It did not hold that a legal malpractice plaintiff could avoid paying attorney fees for completion of the underlying claim, as the Edlemans argue here.

In *Shoemake*, the plaintiffs retained a lawyer to pursue recovery from a drunk driver on a 40% contingent fee. The Shoemakes' claim was dismissed after the lawyer failed to show up for trial. The lawyer did not tell the Shoemakes about the dismissal, or that the driver's insurer had offered a \$100,000 settlement, and then lied to them for years about why their case had not been heard. Once they learned of the lawyer's default and deception, the Shoemakes retained another attorney, who recovered the settlement and filed suit against former counsel. The defendant lawyer "admitted negligence and a fiduciary breach" and made "no argument of entitlement to fees under a theory of quantum meruit." *Shoemake*, 168 Wn.2d at 202-03, ¶¶ 18, 19 n.4. The Supreme Court held that the Shoemakes were entitled to recover interest on

the entire \$100,000 settlement, reversing the trial court's decision to award interest only on the amount the Shoemakes would have received after paying the defendant's bargained-for contingent fee.

Shoemake is inapposite for several reasons. First, Shoemake sued for breach of fiduciary duty, as well as negligence, and the defendant lawyer admitted liability under both theories. "Disgorgement of fees is a reasonable way to discipline specific breaches of professional responsibility, and to deter future misconduct of a similar type." *Eriks v. Denver*, 118 Wn.2d 451, 462-63, 824 P.2d 1207 (1992) (fee disgorgement was proper where attorney did not disclose actual conflict of interest between clients) As **Shoemake** recognized, the remedy of disgorgement is appropriate where an attorney is guilty of serious professional misconduct. 168 Wn.2d at 203, ¶ 19 ("Our legal system has a particular interest in deterring lawyers from breaching their ethical duties to their clients.") (internal quotation omitted); *Kelly v. Foster*, 62 Wn. App. 150, 156, 813 P.2d 598 (1991) ("It is apparent that while attorney misconduct can be so egregious as to constitute a complete defense to a claim for fees, not every act of misconduct will justify such a serious penalty."), *rev. denied*, 118 Wn.2d 1001 (1991).

Thus fee forfeiture is not appropriate in a case alleging simple negligence. As the *Restatement* (cited in Resp. Br. 44) confirms, whether an attorney may retain the fee paid by the client alleging a breach of duty is “determined under standards of § 37 governing fee forfeiture” in cases involving a “clear and serious violation of duty” and willful misconduct. *Restatement*, § 53 at comment c, §37. “A lawyer’s negligent research, for example might constitute malpractice, but will not necessarily lead to fee forfeiture.” *Restatement*, § 37, comment a.

The Edlemans made no claim for breach of fiduciary duty, let alone for the type of “clear and serious violation” that justifies fee forfeiture under the Restatement. The Edlemans would extend the remedy of fee disgorgement far beyond its intended scope of deterring serious ethical violations, not negligence. See **Ross v. Scannell**, 97 Wn.2d 598, 604, 647 P.2d 1004 (1982) (“The charges of unethical conduct herein are grave.”) (cited in BR at 45-46); **Eriks**, 118 Wn.2d at 463. The **Shoemake** Court refused to adopt such a “bright line rule” that would impose fee forfeiture in all cases of legal malpractice, regardless of the nature of the allegations. 168 Wn.2d at 202, ¶ 19 n.4.

Second, the Edlemans were fully compensated for successor counsel to complete the litigation undertaken by Russell, including the fees they incurred in correcting Judge Middaugh's legal error. In ***Shoemake***, plaintiff paid malpractice counsel to "finish the job" out of her own recovery from the malpractice claim. 168 Wn.2d at 201, ¶15. As the trial court properly recognized, awarding the fees paid to Russell on top of successor counsel's fees would be a windfall. (CP 1065-66)

Third, Shoemake's former lawyer admitted that his malpractice cost Shoemake, who was injured because of a third party's liability, the right to recover on a \$100,000 UIM claim. "The only issue then was the amount of damages." ***Shoemake***, 168 Wn.2d at 197, ¶6. By contrast, the Edlemans were not entitled, as a matter of law, to build a home exceeding the restrictions imposed by neighborhood covenants, and the jury never resolved the "trial within the trial." The Edlemans conceded that their house exceeded the restrictive covenants (6/7 RP 145; 6/8 RP 103-05), that they required a lawyer's assistance to construct their house as they envisioned (5/27 RP 149-50), that the underlying decision was the result of judicial error, and that Russell advanced their interests

in successfully opposing the Club's preliminary injunction motion and contesting application of the interior lot line. (5/27 RP 40, 166)

At most, **Shoemake** suggests that an attorney who breaches a fiduciary duty and performs no beneficial services for his client is not entitled to a setoff against a malpractice judgment for the hypothetical contingent fee he would have earned had he been successful. **Shoemake**, 168 Wn.2d at 200 n.2 (issue on review was limited to "a choice between disregarding the negligent attorney's hypothetical fee or reducing the plaintiff's award by that amount.") It does not hold that any attorney who commits litigation malpractice must disgorge or forfeit all fees as a matter of law, particularly in the absence of a serious breach of an ethical duty. The trial court correctly refused to instruct the jury to award the Edlemans the fees paid to Russell.

2. The Trial Court Did Not Abuse Its Discretion In Refusing To Order Disgorgement.

Because a violation of the Rules of Professional Conduct is a question of law, only the trial court may order disgorgement. **Eriks**, 118 Wn.2d at 457-58. Even where a court finds a breach of an ethical rule, its refusal to order disgorgement is a discretionary

decision. See ***Simburg, Ketter, Sheppard & Purdy, L.L.P. v. Olshan***, 109 Wn. App. 436, 445, 33 P.3d 742 (1999) (“It is within the trial court’s discretion to decide what impact, if any, lawyer misconduct will have on a claim for attorney fees.”), *rev. granted*, 141 Wn.2d 1001 (2000). The Edlemans cannot establish that the trial court abused its discretion in finding that the Edlemans were “made whole [and that] [a]llowing them additionally to recover the fees they paid to defendant Russell would result in a windfall to the plaintiffs.” (CP 1066)

“A trial court abuses its discretion when the ruling is manifestly unreasonable or based on untenable grounds.” ***Hizey v. Carpenter***, 119 Wn.2d 251, 268, 830 P.2d 646 (1992). In denying disgorgement, the trial court found that “the jury awarded the Edlemans the fees paid they paid to successor counsel . . . the amounts they paid to settle the underlying controversy on which defendant Russell represented them, and their cost to demolish and rebuild their garage.” (CP 1065-66) The purpose of damages is to make the plaintiff whole, not grant a windfall. ***Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S.***, 112 Wn. App. 677, 687, 50 P.3d 306 (2002) (“The damages awarded the plaintiff should accurately reflect his or her actual loss so as to avoid a windfall.”).

Because it did not manifestly abuse its discretion in refusing to award an additional windfall, the trial court's denial of disgorgement should be affirmed.

3. The Trial Court Did Not Err By Refusing Plaintiffs' Proposed Instruction On Damages That Did Not Accurately State The Law.

"A party objecting to a jury instruction has an affirmative obligation to offer a correct statement of the law on the issue." *City of Bellevue v. Kravik*, 69 Wn. App. 735, 740, 850 P.2d 559 (1993). Even if this court holds that the fees paid to Russell were an appropriate element of damages, the Edlemans' proposed instruction would have erroneously instructed the jury that if it found for the Edlemans the "verdict *must* include the following undisputed" damages, that specifically included successor counsel's fees, the diminution of Edlemans' property, amounts "reasonably necessary to settle the underlying litigation," as well as, fees paid to Russell for "services that fell below the standard of care." (CP 967) (emphasis added) Because it instructed the jury that it "must" award damages that were in fact disputed, the Edlemans' proposed instruction was not a correct statement of the law.

A trial court errs by instructing the jury that its verdict should include items of "undisputed" damages when those items in fact are

disputed. See **Hawkins v. Marshall**, 92 Wn. App. 38, 962 P.2d 834 (1998). In **Hawkins**, the trial court instructed the jury that if it found for the plaintiff, its verdict “should include” the amounts reflected in medical bills, even though the defendant disputed damages. After receiving a jury question, the court further instructed the jury that if it found for plaintiff its award “must include all items listed” in the previous instruction. 92 Wn. App. at 42 n.2. This court reversed, holding the jury instruction “improperly restricted the jury’s discretion to decide the amount of damages.” 92 Wn. App. at 45. See also **Nichols v. Lackie**, 58 Wn. App. 904, 907, 795 P.2d 722 (1990) (“the phrase ‘should include’ is to be followed by *undisputed* past economic damages.”), *rev. denied*, 116 Wn.2d 1024 (1991); **Meissner v. City of Seattle**, 14 Wn. App. 457, 460, 542 P.2d 795 (1975) (“the phrase ‘should include’ is to be followed by *undisputed* items and amounts”) (both emphases in original). Instructing the jury that it must award damages that are disputed interferes with the jury’s constitutional role as “sole and exclusive fact finder.” (Resp. Br. at 43)

The Edlemans cite only to a demonstrative exhibit used by their counsel during opening and closing arguments, which was never admitted into evidence, to support their contention that

damages were “undisputed.” (BR 40 n.4; CP 1039) In fact, Russell disputed these damages, as well as proximate cause. The parties’ experts differed on the change in value of the Edlemans’ house as a result of the remodeling (See 6/8 a.m. RP 26, 56-116 and 6/9 RP 14-73), and Russell challenged the reasonableness of both the fees paid to successor counsel and the Edlemans’ settlement after the Court of Appeals reversed Judge Middaugh’s injunction. (6/10 RP 100-02; 6/11 RP 58-60) The trial court did not err by refusing a damages instruction that misstates the law.

4. The Trial Court’s Instruction Directing The Jury To Award Those Damages Proximately Caused By Russell’s Negligence And Including Nonexclusive Elements Of Those Damages Was A Correct Statement Of The Law.

Since the Edlemans failed to propose their own proper instruction on damages, this court need not decide whether the trial court’s damages instruction was correct. (Instruction # 15, CP 750) See ***Goehle v. Fred Hutchinson Cancer Research Center***, 100 Wn. App. 609, 614, 1 P.3d 579, *rev. denied*, 142 Wn.2d. 1010 (2000) (“If a party is not satisfied with an instruction, it has a duty to propose an appropriate instruction.”) In any event, the trial court properly instructed the jury to award all damages that were proximately caused by Russell’s negligence, and did not by

suggesting specific items for consideration preclude the award of any other element of damages supported by the evidence.

“The measure of damages for legal malpractice is the amount of loss actually sustained as a proximate result of the attorney’s conduct.” *Matson v. Weidenkopf*, 101 Wn. App. 472, 484, 3 P.3d 805 (2000). The instruction given by the trial court was modeled on Washington Pattern Instruction 30.01.01. (CP 750) The jury was instructed that if it found for the Edlemans it “must determine the amount of money that will reasonably and fairly compensate the plaintiffs for such damages as you find were proximately caused by the negligence of the defendant” (CP 750) The instruction then suggested three items of damages that the jury “should consider.” (CP 750)

This instruction did not restrict the jury’s ability to consider other damages proximately caused by Russell’s alleged negligence; all it did was direct the jury’s attention to three particular items. Indeed, counsel for the Edlemans labeled the items in the instruction as “nonexclusive damages” in a demonstrative exhibit used during opening and closing arguments. (CP 1039) Contrary to Edlemans’ argument, the jury was never told that it could not consider Russell’s fees as damages.

“Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied.” *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). Because the jury was told to consider all damages proximately caused by Russell’s negligence, the trial court’s instruction was a correct statement of the law, and not grounds for reversal.

5. The Edlemans Cannot Establish Any Prejudice From The Instruction Limiting Damages To \$1.1 Million Where The Jury Awarded Less Than \$1 Million In An Undifferentiated General Verdict.

The Edlemans challenge the trial court’s supplemental instruction that the damages award could not exceed \$1,099,000. To be entitled to relief on cross-appeal, the Edlemans must establish not only that the trial court’s instruction misstated the law, but also that it prejudiced the ultimate award of damages. *Hue*, 127 Wn.2d at 91. They can establish neither.

In response to a question from the jury whether it could “add ‘others’ fee’s [sic]” (CP 755) and whether it could award “more than \$1,099,000,” (CP 753) the trial court instructed the jury, “The amount of damages is for you to determine, based upon the

evidence + the jury instructions. However, your award may not exceed \$1,099,000.” (CP 754) The Edlemans assert that this instruction prevented the jury from awarding the Edlemans the fees paid to Russell. (BR 42-43) But the jury awarded the Edlemans only \$999,000. (CP 1021-23)

The Edlemans can show no prejudice from an instruction limiting damages to a certain amount when the jury awarded less than that amount. See *Menne v. Celotex Corp.*, 861 F.2d 1453, 1474 (10th Cir. 1988) (instruction limiting damages to \$5,000,000 was harmless error where jury awarded \$2,500,000). The trial court's supplemental instruction did not preclude an award of fees paid to Russell, and told the jury only that it could not award more than \$1,099,000 in damages. Because the jury's general verdict awarded \$999,000, the Edlemans are not prejudiced.

The Edlemans did not propose a special verdict that would have called out the elements of damages awarded. (CP 970-72) This court may not dissect this jury's general verdict in order to determine its components. *Wheeler v. Catholic Archdiocese of Seattle*, 124 Wn.2d 634, 641-42, 880 P.2d 29 (1994) (where the jury awarded general verdict on damages, “there is no way for any court to now determine whether the jury in fact awarded Plaintiff

back pay damages subject to an offset.”); **Lange v. Raef**, 34 Wn. App. 701, 705-06, 664 P.2d 1274, *rev. granted*, 100 Wn.2d 1013 (1983) (trial court erred by reducing plaintiffs’ general verdict award by insurance payments where neither party requested a special verdict segregating the elements of damages). As the evidence of damages was disputed, it is impossible to divine how the jury arrived at its general verdict and whether it included Russell’s fees. Because the trial court did not expressly bar the jury from awarding as damages the fees paid to Russell, the Edlemans can only speculate that the jury’s general verdict did not include the fees they paid to Russell.

Finally, there is no authority for the relief the Edlemans seek on appeal – a remand with instructions to add to the judgment the amount of attorney fees paid to Russell. (Resp. Br. 47-48) This Court cannot simply direct an additur to increase the jury’s award of \$999,000 by the amount of Russell’s “undisputed” fees, as the Edlemans ask. The court would have to order a new trial in which the jury could make a new award of damages. See **Wines v. Engineers Limited Pipeline Co.**, 51 Wn.2d 487, 496, 319 P.2d 563 (1957) (court could not apportion lump-sum verdict based on

erroneous damages instruction; new trial was required); *Winslow v. Mell*, 48 Wn.2d 581, 586-87, 295 P.2d 319 (1956) (a new trial was required where jury was erroneously instructed to consider two items of damages and returned a general verdict).

The Edlemans conceded in their proposed instruction that they would be entitled to recover only “the amount of monies paid by plaintiffs to defendant Russell for those services that you find fell below the standard of care and were negligent.” (CP 967) Even if this court holds that the fees paid to Russell are recoverable, contrary to the trial court’s finding that the Edlemans were made whole by an award of almost \$1 million and in the absence of a claim for breach of fiduciary duty, the court would be required to remand for a new trial, rather than dissect the undifferentiated general verdict to direct an appellate additur.

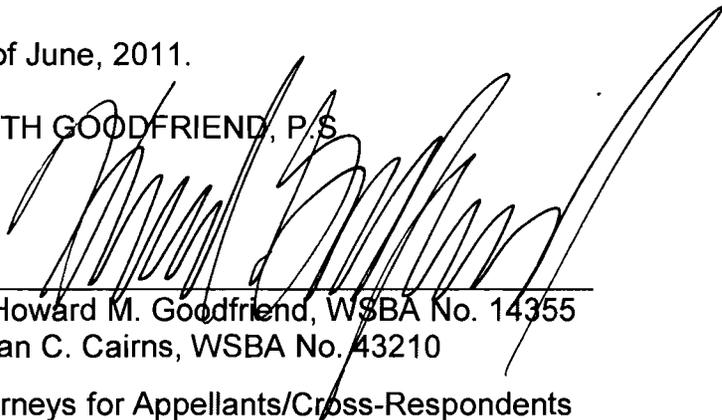
IV. CONCLUSION

This court should reverse the judgment against Russell for as a matter of law because Russell is not liable for damages caused by judicial error or by the Edlemans’ decision to build a house in violation of neighborhood covenants. At a minimum, Russell is entitled to a new trial at which a properly instructed jury determines in a “trial within a trial” whether Russell’s alleged

violation of the standard of care proximately caused the Edlemans' damages. The court should reject the Edlemans' cross-appeal for a windfall forfeiture of Russell's fees in the absence of a serious ethical violation.

Dated this 3rd day of June, 2011.

SMITH GOODFRIEND, P.S.

By: 

Howard M. Goodfriend, WSBA No. 14355
Ian C. Cairns, WSBA No. 43210

Attorneys for Appellants/Cross-Respondents

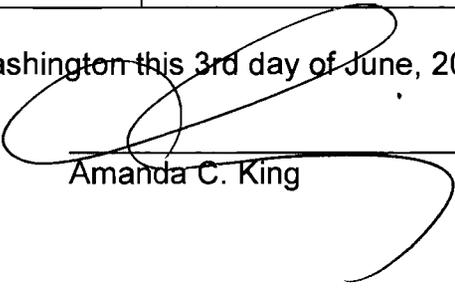
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 1, 2011, I arranged for service of the foregoing Reply Brief of Appellants/Response to Cross Appeal, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Marc Rosenberg Lee Smart PS Inc 701 Pike St Ste 1800 Seattle, WA 98101-3929	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Robert Gould Law Offices of Robert B. Gould 2110 N. Pacific St., Suite 100 Seattle, WA 98103-9181	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

DATED at Seattle, Washington this 3rd day of June, 2011.


Amanda C. King

2011 JUN -6 AM 11:48

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON

1 regard. Thank you, your Honor, for your attention.
2 That concludes plaintiff's exceptions.

3 THE COURT: Thank you Mr. Gould. Defendant's
4 exceptions?

5 MR. ROSENBERG: Thank you, your Honor.
6 Defendants are here to except to the giving and
7 failure to give the following instructions. However,
8 prior to that, we would like to ask the Court whether
9 the Court will entertain and add to the jury
10 instructions, defendant's instruction No. 31, which
11 has been requested throughout the trial, and which has
12 recently been presented to the Court.

13 THE COURT: All right. I received from the
14 bailiff via E-mail this afternoon, my bailiff received
15 the E-mail at 1:15 this afternoon, of a requested
16 instruction No. D-31, from defense counsel. That
17 instruction is actually printed on pleading paper,
18 really smart pleading paper, and it reads as follows:
19 "The Court has ruled that the abandoned due process
20 claim has been dismissed and did not cause damages to
21 the Edlemans because the Benways had an independent
22 right to enforce the covenants." For reasons that I
23 stated, which I guess I will just briefly summarize on
24 the record, since I believe I explained it to counsel
25 off the record during discussions on the jury

Michael P. Townsend
Official Court Reporter
253-347-4015