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No. 65668-6-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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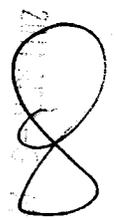
WILLIAM M. EDLEMAN and KATHIE A. EDLEMAN,  
husband and wife, and the marital community comprised  
thereof,

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.



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BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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**Law Offices of Robert B. Gould**  
**Robert B. Gould, WSBA No. 4353**  
**2110 N. Pacific Street, Suite 100**  
**Seattle, WA 98103-9181**  
**(206) 633-4442**  
**Attorney for Respondents/Cross-Appellants**

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**TABLE OF CONTENTS**

|  | <u>Page</u> |
|--|-------------|
| I. INTRODUCTION .....  | 1           |
| II. COUNTER-STATEMENT OF THE CASE.....   | 2           |
| A. Statement of Facts .....  | 2           |
| 1. In February 2002, When The Edlemans<br>Approached Russell, Russell’s Law Practice<br>Was Largely Personal Injury .....  | 2           |
| 2. Attorney Russell Instituted A Part Of The<br>Underlying Lawsuit In September 2002,<br>Improperly Naming Individual Members<br>Of The Community Club And Escalating<br>The Dispute – All Of The Edlemans’<br>Experts Testified This Fell Below The<br>Standard Of Care – And It Was Labeled<br>“Done In Bad Faith And For An Improper<br>Purpose” By The Trial Judge ..... | 3           |
| 3. The Edlemans Made Repeated Efforts To<br>Settle With Their Neighbors.....   | 4           |
| 4. The Edlemans Heeded Judge Cayce’s<br>Warning And In Early 2003 Redesigned<br>Their Home .....   | 4           |
| 5. Attorney Russell Never Affirmatively<br>Advised Or Counseled His Clients Not<br>To Commence Construction Of Their<br>Planned \$2 Million Home And Throughout<br>Advised His Clients Not To Cooperate With<br>The Community Club .....   | 5           |

|     |  |    |
|-----|--|----|
| 6.  | Attorney Russell Sent The Edlemans A November, 2003 Letter Eventually Entered As Trial Exhibit 8 – Which Memorialized Russell’s Flawed Strategy Of Noncooperation With The Community Club And Ignorance Of The Doctrine Of Balancing The Equities . . . . .                            | 6  |
| 7.  | Attorney Russell Was Woefully Unprepared For Trial, Having Taken No Depositions And Failed To Understand The Doctrine Of Balancing The Equities, And Then Failing To Ask The Trial Judge To View The Premises Until It Was Too Late, All Of Which Fell Below The Standard Of Care. . . | 7  |
| 8.  | Attorney Russell Also Lacked Knowledge Of Cross-Lot Building -- <i>Weld v. Bjork</i> – Another Crucial Doctrine In This Case . . .   | 7  |
| 9.  | Attorney Russell’s Lack of Preparation Evoked Concern From The Trial Judge . . . . .   | 8  |
| 10. | The Edlemans First Learned Of The Doctrine Of Balancing The Equities After The Trial . . . . .   | 9  |
| 11. | In Light Of The Enormous Risk Of Demolishing Their Brand New \$2 Million Home, The Edlemans Made A Reasonable Decision To Settle . . . . .   | 9  |
| 12. | The Edlemans Spent Over \$1 Million To Settle . . . . .  | 10 |
| B.  | Procedural History . . . . .   | 11 |

|      |  |    |
|------|--|----|
| 1.   | Attorney Russell Improperly Abandoned<br>The Issue Of The Community Club’s Lack<br>Of Authority To Enforce The Covenants By<br>Failing To Raise It In Response To The<br>Club’s Motion For Summary Judgment . . . . .  | 11 |
| 2.   | The Trial Court Properly Instructed The<br>Jury On The Standard Of Care For Lawyers,<br>Consistent With Washington Law . . . . .   | 12 |
| III. | ARGUMENT . . . . .   | 14 |
| A.   | Contrary To Russell’s Claims That The Trial<br>Court Did Not Require The Jury To Find A<br>Breach Of The Standard Of Care, The Jury Heard<br>Ample Evidence That Russell Breached The<br>Standard Of Care In Numerous Ways, The Trial<br>Court Properly Instructed The Jury Regarding The<br>Standard of Care, The Jury Specifically Found<br>Russell Negligent, And Russell’s Red Herring<br>About Medical “Informed Consent” Is Both<br>Irrelevant And Incorrect . . . . . | 14 |
| 1.   | Jury Instruction No. 12 Properly Stated<br>The Lawyer’s Duty To Possess And<br>Exercise The Degree Of Skill, Care,<br>Diligence And Knowledge Of A<br>Reasonable, Careful And Prudent<br>Washington Lawyer An Accurate<br>Statement Of Washington Law. . . . .   | 14 |
| 2.   | Russell’s Contention That The Court<br>Should Have Given A “No Guarantee”<br>Instruction Is Not Supported By The<br>Facts Or Law . . . . .   | 17 |

|    |  |     |
|----|--|-----|
| 3. | Based On The Ample Evidence And<br>The Trial Court’s Correct Instructions,<br>The Jury Specifically Found Russell<br>Negligent . . . . .   | 18  |
| 4. | Informed Consent Is Simply An Integral<br>Part Of A Lawyer’s Duties To The Client<br>And Standard Of Care Which Russell<br>Breached . . . . .  | 19  |
| B. | The Jury Had No Difficulty In Finding That<br>Russell’s Negligence Was The Proximate Cause<br>Of Damages To The Clients – All Of Which Is<br>In The Exclusive Province Of The Jury . . . . . | .23 |
| 1. | Proximate Cause And Resulting Damages<br>Are All Factual Issues For The Jury . . . . .   | .23 |
| 2. | The Trial Court Did Not Invade The<br>Province Of The Jury . . . . .   | 24  |
| 3. | Plaintiffs Met Their Burden To Show That<br>But For Russell’s Negligence They Would<br>Have Been In A Better Position . . . . .  | .27 |
| 4. | The Damages Found By The Jury Arose<br>From Russell’s Negligence, Not From Judge<br>Middaugh’s Cross-Lot Error . . . . .   | 28  |
| 5. | Russell’s Expert Witness Supported The<br>Edlemans And Concurred In The Standard<br>Of Care Testified To By Edlemans’<br>Experts . . . . .   | 29  |
| 6. | Russell’s Negligence Caused The<br>Abandonment Of The Argument That The<br>Club Was Not Properly Constituted . . . . .   | .30 |

|      |   |    |
|------|---|----|
| 7.   | The Edlemans' Reasonably And Understandably Mitigated The Damages Russell Caused .....  | 31 |
| 8.   | A Significant And Foreseeable Part Of The Edlemans' Damages Were The Fees They Paid To Successor Counsel And The Costs Of That Settlement ..... | 33 |
| 9.   | The Underlying Settlement Was Reasonable And Wise .....   | 34 |
| IV.  | CONCLUSION .....  | 35 |
|      | <b>CROSS-APPEAL</b> .....   | 36 |
| I.   | INTRODUCTION .....  | 36 |
| II.  | ASSIGNMENTS OF ERROR .....  | 36 |
| III. | ISSUES RELATED TO ASSIGNMENTS OF ERROR .....  | 37 |
| IV.  | STATEMENT OF THE CASE .....   | 38 |
| A.   | Statement Of Facts .....  | 38 |
|      | 1. The Edlemans Paid Russell On An Hourly Basis .....   | 38 |
| B.   | Procedural History .....  | 38 |
| V.   | ARGUMENT .....  | 41 |
| A.   | The Trial Court's Failure To Address The Issue Of Payment Of Russell's Attorney's Fees As Damages Is Contrary To The Make-Whole Doctrine .....  | 41 |

|     |   |    |
|-----|---|----|
| 1.  | <i>Shoemake v. Ferrer</i> , 168 Wn.2d 193,<br>225 P.3d 990 (2010) .....   | 41 |
| B.  | The Jury Intuitively Looked Upon Russell’s Fees As<br>Damages Incurred By The Edlemans .....                                  | 42 |
| C.  | The Restatement Of The Law Governing Lawyers (Third)<br>Supports The Edleman’s Position .....                                 | 44 |
| D.  | The Trial Court Failed To Exercise Its Broad Equitable<br>Powers To Examine Russell’s Billings And Disgorge His<br>Fees ..... | 45 |
| E.  | Disgorgement Should Be An Available Remedy<br>Here .....  | 46 |
| VI. | CONCLUSION .....  | 47 |

TABLE OF AUTHORITIES

|  | <u>Page</u>              |
|--|--------------------------|
| <b>Washington Cases</b>  |                          |
| <i>Ahmann-Yamane, LLC v. Tabler</i> , 105 Wn.App. 103,<br>19 P.3d 436 (2001) . . . . .   | 16                       |
| <i>Bach v. Sarich</i> , 74 Wn.2d 575, 445 P.2d 648 (1968). . . . .   | 1                        |
| <i>City of Seattle v. Blume</i> , 134 Wn.2d 243, 947 P.2d 223 (1997) . .   | 32                       |
| <i>Daugert v. Pappas</i> , 104 Wn.2d 254, 704 P.2d 600 (1985) . . . . .  | 27                       |
| <i>Eriks v. Denver</i> , 118 Wn.2d 451, 824 P.2d 1207 (1992). .19, 20, 46  |                          |
| <i>Flint v. Hart</i> , 82 Wn.App. 209,<br>917 P.2d 590 (1996) . . . . .  | 31, 32, 33, 34, 35       |
| <i>Green v. Normandy Park Riviera Section Community Club</i> ,<br>137 Wn.App. 665, 151 P.3d 1038 (2007), <i>rev. denied</i> , 163 Wn.2d<br>1003, 180 P.3d 783 (2008) . . . . . | 1, 8, 10, 11, 28, 29, 30 |
| <i>Griswold v. Kilpatrick</i> , 107 Wn.App. 757, 27 P.3d 246 (2001). .   | 27                       |
| <i>Hizey v. Carpenter</i> , 119 Wn.2d 251,<br>830 P.2d 646 (1992) . . . . .  | 16, 19, 21, 22, 25       |
| <i>Horn v. Moberg</i> , 68 Wn.App. 551, 844 P.2d 452,<br><i>rev. denied</i> , 121 Wn.2d 1025 (1993) . . . . .  | 31                       |
| <i>Ross v. Scannell</i> , 97 Wn.2d 598, 647 P.2d 1004 (1982) . . . . .   | 45                       |
| <i>Sherry v. Diercks</i> , 29 Wn.App. 433, 628 P.2d 1336,<br><i>rev. denied</i> , 96 Wn.2d 1003 (1981) . . . . .   | 23, 24                   |
| <i>Shoemake v. Ferrer</i> , 168 Wn.2d 193,<br>225 P.3d 990 (2010) . . . . .  | 41, 42, 45, 47           |

|   | <u>Page</u>      |
|---|------------------|
| <b>Washington Cases (continued)</b>   |                  |
| <i>State v. Eaker</i> , 113 Wn.App. 111, 53 P.3d 37 (2002),<br><i>rev. denied</i> , 149 Wn.2d 1003 (2003) . . . . .   | 43               |
| <i>Thompson v. King Feed &amp; Nutrition Service, Inc.</i> ,<br>153 Wn.2d 447, 105 P.3d 378 (2005) . . . . .  | 22               |
| <i>VersusLaw, Inc. v. Stoel Rives, LLP</i> , 127 Wn.App. 309, 111 P.3d<br>866 (2005), <i>rev. denied</i> , 156 Wn.2d 1008, 132 P.3d 147<br>(2006) . . . . . | 23, 25           |
| <i>Walker v. Bangs</i> , 92 Wn.2d 854, 601 P.2d 1279 (1979) . . . . .   | 25, 26, 28       |
| <i>Ward v. Arnold</i> , 52 Wn.2d 581, 328 P.2d 164 (1958) . . . . .   | 24               |
| <i>Weld v. Bjork</i> , 75 Wn.2d 410,<br>451 P.2d 675 (1969). . . . .  | 7, 8, 28, 29, 32 |
| <i>Yount v. Zarbell</i> , 17 Wn.2d 278, 135 P.2d 309 (1943) . . . . .   | 45               |
| <b>State Rules</b>  |                  |
| ER 106 . . . . .  | 26               |
| ER 401 . . . . .  | 26               |
| ER 402 . . . . .  | 26               |
| RCW 19.86 . . . . .   | 46               |
| RPC 1.0(e). . . . .   | 20               |
| RPC 1.1 . . . . .   | 46               |
| RPC 1.4(b) . . . . .  | 2, 13, 20, 21    |

**Other Authority**

Constitution of Washington, Art. 4, §16 . . . . . 37

Restatement of the Law Governing Lawyers Third,  
Official Comment (f) to §53 (1998) . . . . . 44

APPENDIX . . . . . A-1

|             |  |
|-------------|--|
| Appendix A: | Trial Exhibit No. 8, Letter<br>From Russell to the<br>Edlemans dated 11/7/03 |
| Appendix B: | Special Verdict Form dated<br>6/14/10  |
| Appendix C: | Inquiry From The Jury And<br>The Court' Response<br>(10:53 a.m.)             |
| Appendix D: | Inquiry From The Jury And<br>The Court's Response<br>(11:48 a.m.)            |
| Appendix E: | Court's Instructions To<br>The Jury  |

## I. INTRODUCTION.

This appeal pulls aside the curtain of *Green v. Normandy Park Riviera Section Comm. Club*, 137 Wn.App. 665, 151 P.3d 1038 (2007), *rev. denied*, 163 Wn.2d 1003 (2008). There, the Edlemans had followed the negligent advice of their attorney, Brian Russell, which inexorably led to a court order to demolish their brand new \$2 million home. Attorney Russell was woefully ignorant of the longstanding doctrine of balancing the equities, and specifically of the holdings in *Bach v. Sarich*, 74 Wn.2d 575, 582, 445 P.2d 648 (1968) and its progeny that the “benefit of the doctrine of balancing the equities, or relative hardship, is reserved for the innocent defendant who proceeds without knowledge or warning that his structure encroaches upon another's property or property rights.” In light of this controlling doctrine, attorney Russell’s advice to the Edlemans not to cooperate with the Community Club was plainly negligent, as the jury found based on testimony from the two attorneys who successfully mitigated the damages Russell caused, Peter J. Eglick and Philip A. Talmadge, and from land-use expert Richard Aramburu.

Thus, and contrary to Russell’s claims, his failure to obtain his client’s informed consent – a duty plainly imposed upon Washington

lawyers under **RPC 1.4(b)** – was only one of the reasons the jury found him liable for malpractice. The jury was properly instructed on the standard of care of a reasonable, careful and prudent Washington lawyer, and the experts testified to Russell’s many failures to meet the standard of care. The jury properly found that Russell breached that standard of care based on substantial evidence.

This Court should affirm as to Russell’s appeal, but reverse and remand as to the Edlemans’ cross appeal, which is briefed below.

## **II. COUNTER-STATEMENT OF THE CASE.**

### **A. Statement of Facts.**

#### **1. In February 2002, When The Edlemans Approached Russell, Russell’s Law Practice Was Largely Personal Injury.**

The primary nature of Russell’s practice as an Eagle member of the Washington State Trial Lawyers Association was plaintiff’s personal injury. (5/25 RP 15-16; 6/8 (p.m.) RP 128).

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**2. Attorney Russell Instituted A Part Of The Underlying Lawsuit In September 2002, Improperly Naming Individual Members Of The Community Club And Escalating The Dispute – All Of The Edlemans’ Experts Testified This Fell Below The Standard Of Care – And It Was Labeled “Done In Bad Faith And For An Improper Purpose” By The Trial Judge.**

Plaintiffs’ expert witnesses, Peter Eglick, J. Richard Aramburu and Philip Talmadge all testified that the institution of such a lawsuit fell below the standard of care; that it was frivolous, without good cause, highly risky, aggressive and improper. (6/7 RP 71-75; 6/8 (p.m.) RP 25-26, 42-44).

It was Russell’s decision and strategy as the attorney for the Edlemans to institute a lawsuit in September 2002, entrenching the Community Club, the Cooks and Fawcetts, against the Edlemans. Judge Middaugh ultimately found this was “done in bad faith and for an improper purpose”. (Ex. 23, p.12, lns. 10-11; p.20, ln.18), (6/2 RP 156-157; 6/3 RP 38-39). It was Russell’s strategy, not the clients. (6/3 RP 38-39).

An expert witnesses in the trial opined that Russell’s actions betrayed his lack of understanding of the legal issues in this land-use

homeowner's association matter which precluded him from representing the Edlemans consistent with the standard of care. (5/26 RP 140-143, 147-151).

**3. The Edlemans Made Repeated Efforts To Settle With Their Neighbors.**

While the Edlemans followed Russell's advice and flawed strategy of not cooperating with the Community Club (Ex. 8) (App. A), they also tried at the same time to settle the dispute with their neighbors. Their following Russell's advice to not cooperate with the Community Club was unbeknownst to them in violation of the doctrine of balancing the equities. (5/27 RP 176; 6/1 RP 90-91). It was the Edlemans who were going to be living in the neighborhood with these neighbors, and the Edlemans made numerous and repeated unsuccessful efforts during the period 2002 and 2003 to try and peacefully resolve this matter with those neighbors. (6/1 RP 144-147, 158-160, 173-174, 185-186, 6/2 RP 39-40; 6/3 RP 27-30, 44-45, 104-108, 118-120).

**4. The Edlemans Heeded Judge Cayce's Warning And In Early 2003 Redesigned Their Home.**

Russell considered Judge Cayce's denying the temporary injunction as a victory. (6/3 RP 44). Contrary to Russell's brief (BA 12),

Bill Edleman did take to heart Judge Cayce's warning and stated repeatedly that he would indeed do everything that was necessary to comply with what the Edlemans understood to be the requirements of the Club at the time. (5/27 RP 169-171; 6/11 RP 141-142). The Edlemans quickly went to their architect to have the plans redrawn. (5/27 RP 170-173; 6/2 RP 36).

**5. Attorney Russell Never Affirmatively Advised Or Counseled His Clients Not To Commence Construction Of Their Planned \$2 Million Home And Throughout Advised His Clients Not To Cooperate With The Community Club.**

Edleman testified that Russell never affirmatively told him not to build. (5/27, RP 175; 6/1 RP 50-51, 70). Russell's testimony differed. (6/9 RP 210-211).

Russell's strategy throughout the underlying period of representation was to counsel his clients not to submit plans to the Club or go through "the process". (5/27 44-45, 92-93, 151-152, 180; 6/3 RP 45-46).

The experts Eglick and Aramburu both testified that this fell below the standard of care. (5/26 RP 141-142; 6/7 RP 18, 40-44, 70-71, 77-78).

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**6. Attorney Russell Sent The Edlemans A November, 2003 Letter Eventually Entered As Trial Exhibit 8 – Which Memorialized Russell’s Flawed Strategy Of Noncooperation With The Community Club And Ignorance Of The Doctrine Of Balancing The Equities.**

Contrary to the statement of Russell (BA 7) Russell’s approach to his client’s matter and his advice to sue individual members of the Normandy Park Community Club was counterproductive and fell below the standard of care. (Ex. 8) (CP 287) (5/26 RP 152; 6/7 RP 71-72; 6/8 (p.m.) RP 42-44).

From the beginning, Russell advised his clients of his strategy not to cooperate with the Community Club. This flawed strategy continued throughout the litigation. (5/27 RP 151-152, 180; 6/3 RP 45-46). On November 7, 2003, Russell wrote his clients a letter (Ex. 8)(App. A). He memorialized the strategy he had been recommending for some time as follows (CP 287):

I think we discussed before our strategy related to the covenants. We can’t on the one hand state that the covenants are unenforceable, yet on the other hand seek compliance and approval of our plans in accordance with the covenants . . . If you think that we should submit plans for approval, I believe that certainly undermines our position that the covenants are unenforceable but we could submit the plans as an ER 408 settlement negotiation.

**7. Attorney Russell Was Woefully Unprepared For Trial, Having Taken No Depositions And Failed To Understand The Doctrine Of Balancing The Equities, And Then Failing To Ask The Trial Judge To View The Premises Until It Was Too Late, All Of Which Fell Below The Standard Of Care.**

Russell conducted no depositions and failed to ask the trial judge, Judge Middaugh, for a view of the premises until the close of the case – which was denied. (6/7 RP 20-21, 54-59, 68-70, 131-133; 6/8 (a.m.) RP 36-40, 52). Expert witness Eglick testified to Russell’s numerous breaches of the standard of care. These included his lack of knowledge of the doctrine of balancing the equities, Russell’s inflaming the situation by improperly suing the neighbors individually, and abandoning the claim of the Club’s lack of authority. (6/7 RP 54-75, 81-84).

**8. Attorney Russell Lacked Knowledge Of Cross-Lot Building -*Weld v. Bjork* – Another Crucial Doctrine In This Case.**

Russell lacked knowledge of the appropriate law concerning the doctrine of cross-lot building, as expressed in *Weld v. Bjork*, 75 Wn.2d 410, 451 P.2d 675 (1969). (6/1 RP 80-82; 6/3 RP 49-56; 6/7 RP 169-171). The concept in *Weld* that setback requirements do not apply to the interior lot lines of two lots was implicated from the beginning as the new home was

always designed to be built across both lots. *See Green*, 137 Wn.App. 665, ¶¶2, 5. *Weld* holds that when a home is built across two lots, the setback requirements do not apply to the interior two lot lines. *Id.* It was Todd McKittrick, the Edleman’s construction manager, who during the course of the trial learned of the case of *Weld v. Bjork*. (6/1 RP 80-82; 6/3 RP 49-56) (Ex. 255). McKittrick learned this by going to his attorney and bringing it to Russell’s attention. *Id.*

**9. Attorney Russell’s Lack Of Preparation Evoked Concern From The Trial Judge.**

Peter Eglick, the Edlemans’ primary attorney at the time of entry of the Judgment in the underlying case and on appeal, exhaustively read and analyzed the Report of Proceedings. (6/7 RP 130, 202-203; 6/8 (p.m.) RP 27-28). Eglick opined after the exhaustive review of the Report of Proceedings that Russell’s unprepared, unfocused and negligent representation in Eglick’s opinion created “hostility” before Judge Middaugh, and that in Eglick’s opinion from the Report of Proceedings she was “completely exasperated with Mr. Russell”. (6/8 (a.m.) RP 51-53).

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**10. The Edlemans First Learned Of The Doctrine Of Balancing The Equities After The Trial.**

It was only after the trial concluded and the Edlemans went to successor counsel Philip Talmadge and Peter Eglick that the Edlemans came to learn for the first time of the doctrine of balancing the equities. (5/27 RP 176). It was at that time that the Edlemans came to know how Russell's advice to do just the opposite of the doctrine, *i.e.*, to not cooperate with the Club, had been so harmful. This strategy was fatally flawed as the experts testified. (5/27 RP 64-65; 6/7 RP 76-78).

**11. In Light Of The Enormous Risk Of Demolishing Their Brand New \$2 Million Home, The Edlemans Made A Reasonable Decision To Settle.**

In anticipation of a hearing on remand, Messrs. Eglick and Talmadge felt, as the Court had not had a view of the premises, that a videotape would be important so that Judge Middaugh could see the Edlemans' home in relationship to other homes in this exclusive part of the Normandy Park community. (Ex. 62) (5/27 RP 118-119, 122-129; 6/7 RP 45-46; 6/8 (a.m.) 27-28). They had such a videotape made which was entered into evidence and shown to the jury. (Ex. 62).

Eglick and Talmadge were well aware of the risks their clients faced upon remand from this Court's decision in *Green*. (6/8 (a.m.) RP 26-28, 33-35, 48-50, 52-53; 6/8 (p.m.) 16-18). The narrow ruling of this Court gave discretion to Judge Middaugh as to what the appropriate remedy should have been on remand (*Green, supra*, ¶89):

On remand, the trial court retains full authority to exercise its discretion in determining the appropriate remedy in light of this decision. It is not properly our role to substitute our judgment for that of the trial court and we do not seek to do so . . . It is to the trial judge that the law gives the authority to exercise discretion in formulating an appropriate remedy. We remand this matter to the trial court for that purpose.

Eglick and Talmadge then negotiated with counsel for the Community Club after remand and negotiated the ultimate settlement. (6/7 RP 46-50; 6/8 (a.m.) 50; 6/8 (p.m.) RP 16-18).

## **12. The Edlemans Spent Over \$1 Million To Settle.**

The Edlemans presented evidence of damages to the jury consisting of the following: (1) the amounts paid on appeal and remand to Messrs. Eglick and Talmadge totaling \$388,000.00 (Ex. Nos. 109 and 110; (CP 1039) (6/1 RP 107); and (2) costs incurred for re-architecture and engineering for the demolition of one-half of the garage totaling \$20,000.00 (CP 1039) (6/1 RP 111); (3) \$350,000.00 paid to the

Community Club for the settlement (CP 1039) (Ex. 73) (CP 321-329); (4) \$241,000.00 for the costs of demolishing and rebuilding the garage (CP 1039) (Ex. 67) (6/3 RP 76-78); and (5) \$100,000.00 diminution in value due to the loss of 4 bays from the garage (CP 1039) (6/8 (a.m.) RP 81).

Plaintiffs and plaintiffs' attorneys, Eglick and Talmadge, all testified as to the reasonableness of the settlement based on a risk-versus-reward analysis and the continuing potentiality of the Edlemans having to tear down their new home. (6/1 RP 113-117; 6/2 RP 157; 6/7 RP 46-50; 6/8 RP (a.m.) 54; 6/8 (p.m.) RP 16-18).

The jury awarded all of the above damages with the exception of the \$100,000.00 in diminution in value. (CP 1021-1023). These damages, sans the diminution in value of the garage, totaled precisely \$999,000.00 which the jury awarded. (App. B)

**B. Procedural History.**

**1. Attorney Russell Improperly Abandoned The Issue Of The Community Club's Lack Of Authority To Enforce The Covenants By Failing To Raise It In Response To The Club's Motion For Summary Judgment.**

This issue was addressed and touched upon by this Court in its decision (*Green, supra*, ¶¶14, 45, 51):

In May, 2002, the Edlemans moved for summary judgment in the first case, arguing that the Community Club is not a valid successor to the interest of the developer and, therefore, lacks the authority to enforce the covenants . . . The Edlemans next contend that the authority to enforce the covenants could not have validly passed to the present-day community club because any such authority was necessarily terminated by the NPRSCC's 1977 administration dissolution. We disagree . . . For some reason, the Edlemans then abandoned this issue. In their pleadings in opposition to the summary judgment motion, the Edlemans never raised this issue. Nor did they raise the issue in their pleadings in support of their motion for summary judgment.

Messrs. Eglick and Talmadge both testified that this abandonment was a breach of the standard of care by Russell. (6/7 RP 21-22, 79-80, 154-156, 191-194; 6/8 (p.m.) RP 23-27, 35-42, 57-60). As Mr. Talmadge testified (6/8 (p.m.) RP 24):

The Court had the opportunity to consider these issues in motions and the issue of due process. The process by which the Community Club did its work was never squarely presented to the Court and ultimately, when they tried to present the issue to Judge Middaugh in the trial, Judge Middaugh said, "This issue has been abandoned, you have waived it," and the Court of Appeals ultimately agreed with that view..

**2. The Trial Court Properly Instructed The Jury On The Standard Of Care For Lawyers, Consistent With Washington Law.**

Contrary to the position of Russell (BA 23-24), the Court gave a

proper instruction regarding the standard of care.<sup>1</sup> (Court's Instruction No. 12, CP 747, App. E):

A lawyer owes to the lawyer's client a duty to possess and exercise the degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer practicing law in the state of Washington. Failure to exercise such skill, care and knowledge constitutes a breach of the standard of care and is negligence. The degree of care actually practiced by members of the legal profession is evidence of what is reasonably prudent. However, this evidence alone is not conclusive on the issue and should be considered by you along with any other evidence bearing on the question.

The Court also gave Instruction No. 13 (CP 748) which mirrors the duties of a lawyer to obtain the client's informed consent under **RPC 1.4(b)**. There was ample expert testimony that Russell breached this discrete duty, which comprises an integral component of the minimum standard of care. (6/7 RP 80-83; 6/8 (p.m.) RP 24-26).

When the trial court in the legal malpractice trial heard testimony from plaintiffs' successor counsel Eglick and Talmadge that the evidence of Russell's abandonment of the lack of standing was further evidence of his negligence, the Court reconsidered its earlier ruling prohibiting reference to the abandonment issue. (6/7 RP 205-215; 6/9 RP 8-12; 6/11

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<sup>1</sup> A complete set of the Court's Instructions to the Jury is attached for the Court's convenience (App. E).

RP 152-153). The trial court upon reconsideration allowed limited testimony in this regard.

There was additional evidence that it was Russell, through his negligence, who caused the Superior Court to deem this issue abandoned. (6/1 RP 73-74; 6/7 RP 21-22, 79-80, 154-156, 191-194; 6/8 (p.m.) RP 35-42, 57-59). It was based upon that evidence that the trial court reconsidered its earlier decision and reversed itself, allowing limited testimony on this issue.

### III. ARGUMENT

- A. **Contrary To Russell’s Claim That The Trial Court Did Not Require The Jury To Find A Breach Of The Standard Of Care, The Jury Heard Ample Evidence That Russell Breached The Standard Of Care In Numerous Ways, The Trial Court Properly Instructed The Jury Regarding The Standard Of Care, The Jury Specifically Found Russell Negligent, And Russell’s Red Herring About Medical “Informed Consent” Is Both Irrelevant And Incorrect.**
  - 1. **Jury Instruction No. 12 Properly Stated The Lawyer’s Duty To Possess And Exercise The Degree Of Skill, Care, Diligence And Knowledge Of A Reasonable, Careful And Prudent Washington Lawyer An Accurate Statement Of Washington Law.**

J. Richard Aramburu testified that Russell’s strategy and lack of

knowledge of the doctrine of the balancing the equities fell below the standard of care. (5/26 RP 118-135; 141-142). He also testified that the second lawsuit fell below the standard of care. (5/26 RP 142-144). He testified that observing and following the doctrine of balancing the equities - what he termed “the process” - would have been in the client’s best interest, and explained his reasoning for those opinions. (5/26 RP 147-151; 5/27 RP 44-45, 92-93).

Peter Eglick, one of the successor counsel and experts, spoke to how the abandonment failed to meet the standard of care. (6/7 RP 21-22). Eglick further testified how and why Russell’s advice not to cooperate was in itself wrong, and resulted in Russell’s failure to get the client’s informed consent. (6/7 RP 81-84). Eglick additionally testified that Russell neither used nor was aware of the documents he had to show the Community Club’s prior approval of cross-lot construction (6/7 RP 31-32) and that Russell’s inaction in the case below resulted in abandonment of the issue of the lack of authority of the Community Club to enforce the covenants (6/7 RP 20-21), as well as Russell’s lack of preparation in taking no depositions.

Philip Talmadge also testified as co-counsel on appeal and an

expert witness that the abandoned issue was important and that it fell below the standard of care. (6/8 (p.m.) 22-24). Russell’s failure to obtain the Edlemans’ informed consent as it relates to the doctrine of balancing the equities also fell below the standard of care. (6/8 (p.m.) 24-26).

The Court properly instructed the jury that to meet the minimum standard of care, a lawyer must “possess and exercise the degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer practicing law in the state of Washington.” (CP 747) (App. E) Such a jury instruction is absolutely consistent with and appropriate under Washington law. “The attorney’s standard of care is that degree of skill, diligence and knowledge commonly possessed and exercised by reasonable, careful, and prudent attorneys in the jurisdiction.” *Ahmann-Yamane, LLC v. Tabler*, 105 Wn.App. 103, 19 P.3d 436 (2001), citing *Hizey v. Carpenter*, 119 Wn.2d 251, 261, 830 P.2d 646 (1992).

While Russell’s brief (BA 28) makes scant mention of this instruction, Russell at least acknowledges that “. . . the jury was separately instructed on the **proper** ‘reasonable attorney’ standard, “. [Emphasis added.] (CP 739-40). The obligation of an attorney to give enough

information to the client so that the client can make an informed decision is part and parcel of the lawyer's standard of care. (See Argument A(4), *infra*.) The jury was properly so instructed in Instruction No. 13 (CP 748).

**2. Russell's Contention That The Court Should Have Given A "No Guarantee" Instruction Is Not Supported By The Facts Or Law.**

Russell raises red herrings to this Court. (BA 31-33). The Edlemans never asked for nor sought a guarantee. Rather, the Edlemans sought that which the law allows and requires: a lawyer with competence and knowledge comporting with the minimum standard of care – not a guarantee. The jury properly found that Russell abysmally failed to meet this standard, based on his lack of knowledge, and his flawed strategy *ab initio*, (to not recognize the authority of the Club; to not cooperate with the Club; and to risk his client's new home). Edleman testified that Russell told him, "I have never, in all my years of practice, been more prepared or more anxious to try a case." (6/1 RP 76). McKittrick testified that Russell told him, "'This is a slam-dunk,' that, 'This is exactly what we needed,' and that, 'There is no way we could lose.'" 6/3 RP 48.

This case ultimately is not grounded on flawed litigation strategies – of which there are many. (BA 23). Rather, it is based on deviations from

the standard of care as testified to by the experts. Consistent with the expert testimony, Russell failed in his initial strategy of non-cooperation, coupled with suing individual members of the Club's architectural Committee.

**3. Based On The Ample Evidence And The Trial Court's Correct Instructions, The Jury Specifically Found Russell Negligent.**

Russell argues, contrary to the facts, that "the trial court erroneously allowed the jury to find Russell liable without finding a breach of the standard of care for lawyers, . . ." (BA 25). As earlier stated, that of course is incorrect. The jury answered the specific question (CP 1021). "QUESTION 1: Was the defendant Brian Paul Russell negligent in his representation of the plaintiffs? ANSWER: Yes." (App. B) The Court gave proper instructions regarding the standard of care. Instruction No. 12 (CP 747), Instruction No. 13 (CP 748). The jury came back based on those instructions and found that Russell was indeed negligent. For Russell to argue that the jury found ". . . Russell liable without finding a breach of the standard of care" is simply a distortion of the record (BA 25-26). The expert testimony addressed his many breaches, and what in fact happened in the underlying trial. This testimony was an important

part of meeting plaintiffs' burden of proof in the trial within a trial.

**4. Informed Consent Is Simply An Integral Part Of A Lawyer's Duties To The Client And Standard Of Care Which Russell Breached.**

Russell repeatedly and at length raises a red herring regarding medical "informed consent". This is irrelevant. What is relevant is the lawyer's mandatory duty to obtain his client's informed consent under the RPC's. The experts testified about Russell's breach of this duty without mentioning the RPC's themselves, consistent with *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992) and *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992). As noted above, this breach was but one of many justifying the jury verdict. This Court should ignore the red herring and affirm the verdict.

Russell ignores expert testimony that defendant Russell was negligent and failed to meet the minimum standard of care of a reasonable attorney in the same or similar circumstances in, *inter alia*, failing to get the Edlemans' informed consent to Russell's flawed and negligent strategy. (5/27 RP 64-68; 6/7 RP 48, 77-78, 80-83; 6/8 (p.m.) RP 24-27, 43). Russell argues to this Court that the Rules of Professional Conduct do not create an independent cause for legal malpractice. (BA 29).

Yet Russell does not reference in the 49 pages of his brief *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992), which held in relevant part as follows:

We have never addressed the question of whether the determination of a violation of the CPR [Code of Professional Responsibility - the predecessor to the Rules of Professional Conduct] is a question of law or fact. Since an attorney's fiduciary duty to a client arises from the same rules of conduct that proscribe an attorney from representing multiple parties with conflicting interests, it is logical to extend the holdings from *Marquardt* and *Stroud* to the determination of whether an attorney's conduct violates the relevant Rules of Professional Conduct. Thus, we hold the question of whether an attorney's conduct violates the relevant Rules of Professional Conduct is a question of law . . . The purpose of the CPR and the disciplinary rules is to protect the public from attorney misconduct . . . We will construe the CPR broadly to achieve that purpose . . . Today, we reaffirm this court's commitment to interpreting attorney discipline rules for the benefit of the public.

*Eriks, supra*, at 457, 459, 461 (1992).

The Rules of Professional Conduct define informed consent as follows:

(e) 'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

**RPC 1.0(e).** Absolutely consistent with the standard of care, and as

testified to by the experts, **RPC 1.4(b)** requires that “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regard the representation.” The Edlemans were never given that opportunity. (5/27 RP 176; 6/1 RP 90-91; 6/7 RP 82-84).

As a result of Russell’s lack of knowledge about the doctrine of balancing the equities, and the Edlemans’ reliance on their attorney’s advice contrary to the balancing the equities, Russell raced the clients to the inevitable consequences of the potential destruction of their home.

But none of the Edlemans’ experts violated *Hizey, supra*, and in no way referenced specifically the Rules of Professional Conduct. However, the experts’ opinions that Russell failed to meet the minimum standard of care as it relates to his nonobservance of obtaining his client’s informed consent, along with many other breaches, is totally consistent with *Hizey*:

To avoid confusion in practice, we point out experts on an attorney’s duty of care **may still properly base their opinion** as Professor Boerner did in this case, on an attorney’s failure to conform to an ethics rule. In so testifying, however, the expert must address the breach of the *legal* duty of care, and not simply the supposed breach of the ethics rules . . . Such testimony may not be presented in such a way that the jury could conclude it was the ethical violations that were actionable, rather than the breach of the legal duty of care. In practice, this can be achieved by allowing the expert to use language from the CPR or RPC, but prohibiting explicit reference to them. The expert must testify generally as to ethical requirements, concluding the attorney’s violations of the ethical

rules constituted a deviation from the legal standard of care. Without this evidentiary link, the plaintiff risks dismissal of the malpractice case for failure properly to establish the breach of the duty of care. [Emphasis added.]

*Hizey, supra*, p.265.

The experts in this case did precisely what *Hizey* envisioned. They testified to Russell’s breach of his duty to the clients – consistent with the RPC’s – but did not specifically allude to them.

The Court’s instructions to the jury, both as to the duty of care and as to the specific portion of that duty relative to informed consent, are a fair and neutral recitation of the law when taken as a whole. (CP 739(1)(d), 748) (App. E). “Jury instructions are sufficient when they allow counsel 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.” *Thompson v. King Feed & Nutrition Service, Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005).

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**B. The Jury Had No Difficulty In Finding That Russell's Negligence Was The Proximate Cause Of Damages To The Clients – All Of Which Is In The Exclusive Province Of The Jury.**

**1. Proximate Cause And Resulting Damages Are All Factual Issues For The Jury.**

Russell argues (BA 43-47) that he should not be liable for the Edlemans' damages. In so arguing, Russell ignores longstanding Washington legal malpractice law and the law relative to proximate cause which is to the contrary. As this Court has stated:

General principles of causation are no different in a legal malpractice action than in an ordinary negligence case. *Sherry v. Diercks*, 29 Wn.App. 433, 437, 628 P.2d 1336 (1981). To recover, the plaintiff must demonstrate that he or she would have achieved a better result had the attorney not been negligent. *Id.* at 438, 628 P.2d 1336. Proximate cause consists of two elements: cause in fact and legal causation . . . .

*VersusLaw, Inc. v. Stoel Rives, LLP*, 127 Wn.App. 309, ¶42, 111 P.3d 866 (2005), *rev. denied*, 156 Wn.2d 1008, 132 P.3d 147 (2006).

When an attorney as Russell takes a client down the path of ignoring balancing the equities; inflames the situation with a suit brought for an improper purpose; is unprepared for trial; abandons an important issue regarding the Community Club's validity and right to enforce its

covenants; is unaware of applicable law on cross-lot construction; and fails to get the client's informed consent, it is not difficult to see how the jury, contrary to Russell's argument, could and did find proximate cause.

It therefore follows that it was solely and exclusively within the province of the finder of fact, the jury, to find the nexus and bridge of proximate cause between Russell's negligence and the Edlemans' considerable damages:

Causation is the sometimes fragile thread which must connect the concept of fault to the reality of damage. The principles and proof of causation in a legal malpractice action do not differ from an ordinary negligence case. Citing *Ward v. Arnold*, 52 Wn.2d 581, 584, 328 P.2d 164 (1958).

*Sherry v. Diercks*, 29 Wn.App. at 437,

**2. The Trial Court Did Not Invade The Province Of The Jury.**

Russell argues (BA 35-40) that this 11-day trial was not a "trial within a trial". This is wrong. "[T]o establish a claim for legal malpractice, a plaintiff must prove the following four elements: (1) the existence of an attorney-client relationship, which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the

damage incurred.” *VersusLaw, Inc. v. Stoel Rives, LLP*, 127 Wn.App. 309, ¶5, 111 P.3d 866 (2005), *rev. denied*, 156 Wn.2d 1008, 132 P.3d 147 (2006), citing *Hizey v. Carpenter*, 119 Wn.2d 251, 260-261, 830 P.2d 646 (1992). Plaintiff, under the control of the trial court, has the ability to prove the four elements without conducting a de novo trial of the underlying case.

In the 11-day trial, the jury was able to see within the trial within a trial conducted by plaintiffs the clarity of what Russell did wrong. The jury in the course of the trial was able to see his numerous breaches of the standard of care and the damages that flowed inexorably to the client from those numerous breaches. The jury was able to understand the doctrine of balancing the equities and how Russell’s lack of knowledge of that doctrine so harmed his clients.

The client can meet its burden of proof in the trial within a trial by introducing in the follow-on legal malpractice case, among other things, the underlying Report of Proceedings. (*See below, Walker v. Bangs*). This is in accordance with longstanding Washington law.

Russell argues (BA 33-40) that the trial court erred in allowing portions of the underlying trial transcript and allied exhibits into evidence.

Yet Russell fails to even cite to this Court the seminal case on this very issue decided by our Supreme Court 32 years ago.

In *Walker v. Bangs*, 92 Wn.2d 854, 601 P.2d 1279 (1979), the Supreme Court addressed this issue with great clarity. In allowing into evidence in the follow on legal malpractice case the underlying trial transcript, the Supreme Court stated as follows:

. . . we address the issue of the admissibility of the transcript of the underlying trial in federal court. In a legal malpractice action alleging negligence in the conduct of litigation, the record of proceedings from that underlying trial may be the best evidence of the events that transpired . . . we are satisfied that the proffered transcript of proceedings of the federal trial is not excludable as hearsay because it was not offered to establish the truth of the matter contained in the record, but rather to establish what evidence was produced in court . . . it should be noted that plaintiff offered only a partial transcript of the proceedings in federal district court, excising the testimony of two witnesses. We are of the view that the report of the underlying trial would be **admissible in its entirety**. ER 106. [Emphasis added.]

*Walker, supra*, pp. 861-62.

There is little if any substantive difference between the trial transcript and the exhibits allowed into evidence by the underlying trial court. In admitting the exhibits, the underlying trial court has scrutinized the documents to ensure their admissibility under ER 401 and ER 402. The Court based on *Walker* appropriately allowed in portions of the underlying

Report of Proceedings and Orders.

**3. Plaintiffs Met Their Burden To Show That  
But For Russell's Negligence They Would Have  
Been In A Better Position.**

Part of the plaintiffs' burden in the follow on legal malpractice case is to show "but for" the attorney's negligence the plaintiff client would be in a better position. Washington's jurisprudence on legal malpractice law has long so held:

Traditionally, cause in fact has referred to the 'but for' consequences of an act – the physical connection between an act and an injury . . . The 'but for' test requires a plaintiff to establish that the act complained of probably caused the subsequent disability.

*Daugert v. Pappas*, 104 Wn.2d 254, 260, 704 P.2d 600 (1985).

In legal malpractice actions, proximate cause is determined by the "but for" test.

*Griswold v. Kilpatrick*, 107 Wn.App. 757, 760, 27 P.3d 246 (2001), citing *Daugert* at 263.

The plaintiffs in the case at bar showed the trier of fact, the jury, through the testimony of Edleman, Russell, the Report of Proceedings, exhibits, and through the summary of the opinions of the expert witnesses and the basis for their opinions in the "trial within a trial" what took place below. As stated previously, it is through this exposition of the "trial within a trial" that the jury

may, with clarity, see how different the results could have been and should have been absent Russell's negligence.

Such foundation is a predicate to allow the jury a basis to determine "but for" causation. The jury cannot properly fulfill its fact-finding function in a vacuum. The Court exercised its discretion – frequently over Edlemans' objection – as to what it was leaving out from the underlying matter.

For Russell to argue that Judge Middaugh's decision “. . . was itself inadmissible hearsay . . .”, (BA 38) flies in the face of *Walker*. Edleman's testimony that the lawsuit against the individual members was brought for strategic purposes was truthful testimony because that was **his lawyer's** strategic purpose who made the legal decision. (6/3 RP 38-39).

**4. The Damages Found By The Jury Arose From Russell's Negligence, Not From Judge Middaugh's Cross-Lot Error.**

Russell again raises a strawman that the Edlemans' damages were caused by Judge Middaugh, not Russell. (BA 40-42). Nothing could be further from the truth. The only error committed by Judge Middaugh was the internal setback contrary to *Weld v. Bjork*. See *Green*, ¶¶58-63. “The trial court 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.” *Green, supra*, ¶63.

The jury decided that it was Russell’s negligence that caused the Edlemans’ damages. It was Russell’s flawed strategy and ignorance of the law that set the momentum for the Order requiring the demolition of Edlemans’ home. Russell never affirmatively advised the clients **not** to build – either verbally or in writing. (5/27 RP 151-152, 180). This negligence on the part of Russell has nothing to do with Judge Middaugh - and everything to do with Russell. With the benefit of hindsight, an “argument” could be made that it was Judge Middaugh’s error regarding *Weld* that opened by a minute amount the door of opportunity on remand for the Edlemans to mitigate the substantial damages caused them by their attorney Russell. (6/7 RP 141-142).

**5. Russell’s Expert Witness Supported The Edlemans And Concurred In The Standard Of Care Testified To By Edlemans’ Experts.**

Russell in his case in chief called as an expert witness land-use attorney Christopher Brain. (6/10 RP 11-17). Brain acknowledged that the standard of care mandated that Russell give adequate information to the Edlemans so that they could make informed decisions and Russell’s failure to do so would fall below the standard of care. (6/10 RP 109). Brain went on to acknowledge that the Edlemans had the right to rely on their attorney Russell’s advice. (6/10 RP

110-111, 117). Brain further acknowledged that if the jury found that Russell did not advise the Edlemans of balancing the equities, he failed to meet the standard of care. (6/10 RP 117). Brain also testified consistent with the Court's Instruction No. 13 (CP 748 – App. E) that it was Russell's duty to give the clients enough information to make informed consent decisions and that Russell could not delegate that to anyone else; it was solely and exclusive his obligation. (6/10 RP 117-118).

Perhaps the most ironic aspect of Brain's testimony was that he represented some clients, Mark Adams and Nancy Adams, in similar claims against the Riviera Section of the Normandy Park Community Club. Brain testified that on behalf of the Adams' they went through "the process" **before instituting suit**. The Community Club ultimately approved his clients the Adams' plans. (6/10 RP 142-150).

**6. Russell's Negligence Caused The Abandonment Of The Argument That The Club Was Not Properly Constituted.**

This Court observed at ¶51 in *Green*. "*For some reason*, the Edlemans then abandoned this issue." This correct observation by this Court was done in light of what this Court called the "disturbing aspects of the board's composition:". *Green, supra*, ¶49. The trial court did not act at all improperly

in regard to the abandonment issue as argued by Russell. (BA 47-48). Rather, as pointed out by successor attorney Philip Talmadge, this most important and timely issue was lost solely through the negligence of Russell. (6/8 (p.m.) RP 22-24, 29-30, 37-41).

It is Russell's negligence that answers this Court's puzzlement as to the appropriate question why "for some reason" the issue was abandoned. This has absolutely nothing to do with the clients, and everything to do with the negligence of the attorney, Russell.

**7. The Edlemans' Reasonably And Understandably Mitigated The Damages Russell Caused.**

The Edlemans clearly had an obligation to take reasonable steps to mitigate their damages. It is uncontroverted that the Edlemans faced the total destruction of their brand new home. Their decision to mitigate by settling for roughly one-quarter of the value of their new home was eminently reasonable.

In the case of *Flint v. Hart*, 82 Wn.App. 209, 917 P.2d 590 (1996), Division III reversed the independent business judgment rule of *Horn v. Moberg*, 68 Wn.App. 551, 558, 844 P.2d 452, *rev. denied*, 121 Wn.2d 1025

(1993).<sup>2</sup> *Flint* teaches us as follows:

Every decision to settle a lawsuit, at any stage of a proceeding, is an exercise of independent judgment. If applied categorically, the independent business judgment rule eliminates any potential for further negligence claims following settlement of a claim . . . While a potential tort plaintiff should not be able to burden another with legal liability by settling in some cases, not every settlement is unwise, ignores the law, or sets up a malpractice case. Many settlements are a reasonable response to a difficult situation **created by another's negligence** . . . For these reasons, we disagree with the rationale of *Horn* and *Marsh*, and the categorical application of the independent business judgment rule. The independent business judgment rule should be applied on a case-by-case basis . . . The plaintiff has an obligation to mitigate damages . . . The reasonableness of his or her conduct in doing so is a **question for the jury**. [Emphasis added.]

*Flint, supra*, pp.220-221.

The jury had no trouble in determining the reasonableness of the Edlemans settling with the Normandy Park Community Club for \$350,000 and tearing down one-half of their garage when a real-world alternative facing the Edlemans on remand was destruction of their brand new \$2 million dollar plus home.

The labors of Messrs. Eglick and Talmadge resulted in a small creaking open of a door of opportunity on remand because of *Weld v. Bjork*. This small opening, coupled with the ultimate agreement on the

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<sup>2</sup> *City of Seattle v. Blume*, 134 Wn.2d 243, 255-260, 947 P.2d 223 (1997) relied heavily on *Flint v. Hart*.

part of the Edlemans to tear down one-half of their garage under the strict supervision and approval of the Club, and the payment of \$350,000, led to the settlement. (Ex. 73)(CP 321-329). That settlement also saved the entirety of the Edlemans' new home and saved it from complete demolition. Both Eglick and Talmadge testified to the eminent reasonableness of such a settlement. (6/7 RP 46-50; 6/8 (a.m.) RP 54; 6/8 (p.m.) RP 16-18).

**8. A Significant And Foreseeable Part Of The Edlemans' Damages Were The Fees They Paid To Successor Counsel And The Costs Of That Settlement.**

The issue of mitigation of damages relative to the attorney's fees incurred with successor counsel as part of the cost of settlement is directly addressed by the case of *Flint v. Hart, supra*. Russell did not address *Flint* this in his brief.

*Flint v. Hart* was a legal malpractice case where the client, the seller of a funeral home business, through the negligence of his attorney, failed to get adequate collateralization in certain of the assets sold to the buyer. The buyer went into bankruptcy and the plaintiff/seller Flint incurred attorney's fees in the follow on bankruptcy action. The issue of Flint's payment of attorney's fees as an element of damages was discussed by Division III

which led it to opine about attorney's fees as an element of damages: "An equitable ground exists 'when the natural and proximate consequences of a wrongful act by defendant involve plaintiff in litigation with others'." *Flint, supra*, pp.223-24.

Russell negligently brought an action in bad faith and for improper purposes against the Cooks, and Fawcetts. This is a part of the trail of proximate cause leading to the Edlemans, hiring Eglick and Talmadge and the ultimate resultant settlement.

What would Russell argue to this Court had the Edlemans not hired Eglick and Talmadge; had not appealed; and had not reached the settlement that was accomplished? Should such have happened clearly Russell would argue in the underlying legal malpractice case that the Edlemans did not reasonably mitigate their damages. Russell cannot have it both ways.

**9. The Underlying Settlement Was Reasonable And Wise.**

The jury found that the underlying settlement was reasonable and that those damages flowed from Russell's numerous breaches of the standard of care. Not only is proximate cause a question of fact for the trier of fact, but the reasonableness of that settlement is also inherently a

fact question. “The reasonableness of his or her conduct in doing so [settling to mitigate damages] is a question for the jury. *Flint, supra*, p.220-221

#### IV. CONCLUSION.

The trial court gave appropriate instructions based on Washington law on the standard of care. That standard of care includes as an integral part thereof the obligation of an attorney to obtain his client’s informed consent. When the attorney does not know the applicable law, and through that ignorance recommends a course of conduct contrary to the law, and in so many other respects breaches the standard of care as addressed by expert testimony, the jury can find negligence. That negligence led the clients into incurring significant damages. There has been a linkage of that “fragile thread”<sup>3</sup> between the breach of the standard of care and the client’s damages. Russell was not found liable for judicial error – he was found liable for his own multiple errors. This Court should uphold this jury verdict and address the important issue raised in Edlemans’ Cross-Appeal.

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<sup>3</sup> In this case, the Edlemans suggest that “thread” is readily apparent and manifest.

## **CROSS APPEAL**

### **I. INTRODUCTION**

The Edlemans paid almost \$160,000.00 in attorney's fees and costs for what the jury unanimously found were services negligently performed.

The able trial judge rejected plaintiffs' instruction, which included this item as a damage category.

The jury, during deliberation, twice asked if they could award more damages – referring to the attorney's fees paid to Russell. The Court prohibited them from doing so.

Post-trial, the Edlemans requested of the Court to exercise its inherent equitable powers and require disgorgement of those fees which the jury found were negligently performed. The Court refused. This cumulative error deprives the Edlemans from being made whole.

### **II. ASSIGNMENTS OF ERROR.**

1. The trial court erred in not giving plaintiffs' proposed jury instruction relative to Russell's fees, Plaintiffs' proposed Instruction No. 21 (CP 967).
2. The trial court erred in giving Instruction No. 15 on damages

(CP 750) which did not allow the jury to consider as damages the amounts paid by Edlemans to Russell for his negligent services.

3. The trial court erred in giving Instruction No. 15 and in her later written comments in answer to the jury questions. The instruction and written comments invaded the jury's province and constituted an impermissible comment on the evidence.

4. The trial court further erred in denying the Edlemans' post trial motion (Motion for Reconsideration – Damages and/or Disgorgement of Defendant Russell's Fees Charged to Plaintiffs) (CP 1046-52; CP 1064-1067) on the equitable issue of disgorgement of Russell's fee.

5. As a result of the foregoing errors, the trial court's ultimate Judgment without addressing the damage item of attorney's fees paid by the Edlemans to Russell for his negligent services is error. (CP 1055-57).

### **III. ISSUES RELATED TO ASSIGNMENTS OF ERROR.**

A. Does our tort law principle of making the injured person whole require that a client who pays a lawyer on an hourly basis for negligent services mandate that those fees paid be considered by the trier of fact as damages?

B. Did the trial court err in failing to instruct the jury to consider

the amounts paid to Russell as damage items? (CP 750; CP 967).

C. Did the trial court invade the jury's province and comment on the evidence by giving Instruction No. 15 and in answering the jury's question?

D. Should the trial court, in the exercise of its equitable powers, after refusing to allow the jury to address Russell's fees as damages, have considered it itself?

E. As the fees paid by the client Edlemans to their attorney Russell were by their very nature liquidated, are the Edlemans entitled to interest on those liquidated sums?

#### **IV. STATEMENT OF THE CASE.**

##### **A. Statement Of Facts.**

###### **1. The Edlemans Paid Russell On An Hourly Basis.**

Russell's engagement was done on an hourly basis. (Ex. No. 1). The Edlemans paid Russell all of his bills submitted to them. (6/11 RP 54-58; 110).

##### **B. Procedural History.**

The trial court allowed into evidence the totality of Russell's bills to the Edlemans. (6/11 RP 54-58).

Consistent with the evidence, plaintiffs' proposed Instruction No. 21 provided in part that "If you find for the plaintiffs, your verdict must include the following undisputed items: (1) the amount of monies paid by plaintiffs to the defendant Russell for those services that you find fell below the standard of care and were negligent;" (CP 967). The Court refused this instruction and gave Court's Instruction No. 15, which did **not** include as a potential damage element the attorney's fees paid by Edlemans to Russell. (CP 750). Plaintiffs properly excepted to the Court's failure to give their Instruction No. 21 on attorney's fees paid as damages and the Court's giving Instruction No. 15 sans attorney's fees. (6/11 RP 149, 151-152).

During the course of deliberations, the jury asked the Court two questions: (1) "Regarding Question 3 [What is the total amount of the plaintiffs' damages?] can we add to the amount of damages or are we required to put [\$]1,099,000 or less?" (CP 753) (App. C); and (2) "Can we add money amount? Another [*sic*, in other] words can we add 'others' fees?" (CP 755) (App. D). The Court replied to the jury: "The amount of damages is for you to determine, based upon the evidence and the jury instructions. **However, your award may not exceed \$1,099,000.**"

(Emphasis added)(CP 754) (App. D-2).

The jury returned its verdict and unanimously found that Russell was negligent and that his negligence was the proximate cause of plaintiffs' damages. (CP 1021-1023) (App. B). Those damages<sup>4</sup> as found by the jury totaled \$999,000.00 (CP 1021-23; CP 1039); the precise mathematical result of all plaintiffs' damages, less the \$100,000.00 diminution in value.

After entry of Judgment, the Edlemans made a post trial Motion for Reconsideration – Damages and/or Disgorgement of Defendant Russell's Fees Charged to Plaintiffs. (CP 1046-1052). The Court denied plaintiffs' motion. (CP 1064-1066).

It is from the Court's refusal to allow the jury to consider the attorney's fees paid for services negligently performed as a damage item, and the concomitant refusal of the Court to exercise its equitable powers to require disgorgement of those fees from which the Edlemans have cross-appealed.

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4 (1) \$388,000 appellate attorney's fees; (2) \$20,000 re-architectural-engineering; (3) \$350,000 settlement ; (4) \$241,000 demolish-rebuild.

## V. ARGUMENT.

### A. **The Trial Court's Failure To Address The Issue Of Payment of Russell's Attorney's Fees As Damages Is Contrary To The Make-Whole Doctrine.**

#### 1. *Shoemake v. Ferrer*, 168 Wn.2d 193, 225 P.3d 990 (2010).

In the recent unanimous decision of the Supreme Court handed down after the conclusion of the trial in his case, the Court in *Shoemake* stated as follows:

"The guiding principle of tort law is to make the injured party as whole as possible through pecuniary compensation." ... Simply stated, a plaintiff is entitled to that sum of money that will place him in as good a position as he would have been but for the defendant's tortious act. **16 DeWolf & Keller**, *supra*, § 5.1, at 172 . . . The plaintiff should be made whole without conferring a windfall.

*Shoemake*, *supra*, ¶10.

*Shoemake* holds that an attorney representing a client on a contingency fee basis who is not negligent cannot have the "benefit" of a credit arising from his hypothetical contingent fee against the total damages. The reasoning of *Shoemake* is impeccable. To allow a hypothetical credit to a negligent attorney creates a windfall for the tortfeasor. Additionally, *Shoemake* at the same time recognizes that the client must retain and pay for a successor counsel to address the damages caused

by the first attorney. The same *ratio decidendi* of *Shoemake* is equally applicable to an attorney who is negligent and charges the client on an hourly basis.

The trial court held “The issue of whether a trier of fact can award as damages the hourly fees that were charged by an attorney who was found to be negligent in a legal malpractice trial has not been addressed directly by any published appellate decision in Washington state.” (CP 1064 – Order Denying Plaintiffs’ Motion for Reconsideration Re: Disgorgement of Russell’s Attorney’s Fees). The decision in *Shoemake* is an answer to the trial court.

**B. The Jury Intuitively Looked Upon Russell’s Fees As Damages Incurred By The Edlemans.**

The jury found Russell negligent. Twelve (12) laymen and women who had in front of them Russell’s bills (Ex. 1) intuitively and with a common sense of justice and innate fairness could see the appropriateness of Edlemans’ recovering the attorney’s fees that they paid for services negligently performed.

The Edlemans submit that the trial court’s response to the jury is inappropriate, misleading and prejudicial. It is correct as part of our

juridical system that “The amount of damages is for you [the jury] to determine, . . . “. The Court is also correct that the amount of damages for the jury to determine is in fact “based upon the evidence”. Part and parcel of that evidence that was in front of the jury is the \$159,938.23 of attorney’s fees charged by Russell to the plaintiffs, which the plaintiffs paid. (Ex. 1) (5/25 RP 31-32; 6/1 RP 88; 6/11 RP 110).

The Court, however, errs when it arbitrarily says “. . . your award may not exceed \$1,099,000.” The Court’s direction to the jury interferes with the constitutional role of the jury as the sole and exclusive fact finder and is contrary to the constitutional prohibition of a trial judge commenting upon the evidence. Constitution of Washington, Art. 4, § 16<sup>5</sup>. “An instruction improperly comments on the evidence if the instruction resolves a disputed issue of fact that should have been left to the jury.” *State v. Eaker*, 113 Wn.App. 111, 118, 53 P.3d 37 (2002), *rev. denied*, 149 Wn.2d 1003 (2003).

This instruction to the jury, later coupled with the Court’s denial to require disgorgement on equitable grounds, frustrates and defeats the primary purpose of our tort justice system to make plaintiffs whole.

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<sup>5</sup> Charging Juries. Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

**C. The Restatement Of The Law Governing Lawyers (Third) Supports The Edleman's Position.**

Further support for the Edlemans' position re: attorney's fees paid to Russell as damages can also be found in the most recent **Restatement of the Law Governing Lawyers Third**. In Official Comment (f) to § 53 (1998), Causation and Damages, it is stated:

The rule barring recovery of fees does not prevent a successful legal-malpractice plaintiff from recovering as damages additional legal expenses reasonably incurred **outside the malpractice action itself** as a result of a lawyer's misconduct. For example, if a lawyer's negligent title search causes a client to buy land with an unclear title and as a result to incur legal expenses defending the title against a challenger, the client may recover those expenses from the negligent lawyer. [Emphasis added.]

Here, using a proximate cause damage analysis, the negligent advice of Russell himself caused his clients the Edlemans to incur significant legal expense of \$159,938.23 with Russell himself. With the evidence in front of it as to Russell's total billings, it is up to the jury based upon proper instructions such as that plaintiffs' proposed in their proposed Instruction No. 21 (CP 967) (App. E), for the jury to determine the nexus between Russell's negligence and the clients incurring attorney's fees directly with Russell for his negligent advice.

It is not sound policy nor reasoning to appropriately prevent a

contingency lawyer who malpractices to be able to take a “credit” against the damages he has caused the client and to harbor and shield a negligent attorney from such a result who bills on an hourly basis. The end result is truly a distinction without a difference. Such a result is also totally contrary to the fundamental tort principle as recognized yet again by the Supreme Court in *Shoemaker* of making the client whole.

**D. The Trial Court Failed To Exercise Its Broad Equitable Powers To Examine Russell’s Billings And Disgorge His Fees.**

The issue of disgorgement of fees, albeit for an attorney acting unethically in the course of providing those services, was addressed by the Supreme Court 29 years ago in *Ross v. Scannell*, 97 Wn.2d 598, 647 P.2d 1004 (1982).

In *Ross*, Scannell charged that his attorney Ross collected an illegal and excessive fee; acquired a proprietary interest in the client’s cause of action; and had conflicts of interest. The Court on remand directed the trial court “. . . to consider the charges of unethical conduct in relation to several principles enunciated by this court in determining the amount of fees due Ross. Professional misconduct may be grounds for denying an attorney his fees. Citing *Yount v. Zarbell*, 17 Wn.2d 278, 135 P.2d 309 (1943).” *Ross*,

*supra*, p.610.

A similar result was obtained in *Eriks v. Denver, supra*. *Eriks* was a case brought against an attorney under the Consumer Protection Act (RCW 19.86) who had conflicts of interest in representing the promoters of a tax shelter and then the investors in the same tax shelter when those investors were audited by the Internal Revenue Service. The trial court “. . . ordered Denver to disgorge all fees paid in conjunction with representing the class members, plus prejudgment interest.” *Eriks, supra*, p.455. The Court went on to say “The general principle that a breach of ethical duties may result in denial or disgorgement of fees is well recognized.” *Eriks, supra*, p.462.

The Edlemans are not leveling charges of “professional misconduct” against Russell. However, the line between professional misconduct and negligence is not that bright and sharp, e.g. RPC 1.1.<sup>6</sup> From the point of view of the injured client, the result is the same, i.e. monetary damage incurred.

**E. Disgorgement Should Be An Available Remedy Here.**

The Edlemans acknowledge that there is no appellate case on this direct and precise issue of attorney’s fees as an item of damage to a

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<sup>6</sup> Competence. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation

negligent attorney paid on an hourly basis. Having said that, however, the logic and *ratio decidendi* of *Shoemake* is inextricably wound up with the proper determination of this issue and cannot be distinguished as it results in the damage actually experienced by the client. The Edlemans have been damaged and the tort feisor Russell has been financially rewarded.

Accordingly, this Court should take the opportunity to address this injustice and hold that in a legal malpractice proceeding, where the client has paid the negligent attorney on an hourly fee basis, the finder of fact may consider as an item of damage the amount of attorney's fees and costs paid by the client for services that were negligently performed and which fell beneath the minimum standard of care. This is absolutely consistent and harmonious with the principles of our justice system and comes much closer to making the clients whole. Such a decision by this Court will appropriately guide judges and practitioners in future cases.

## VI. CONCLUSION

This Court should remand the issue of failure to make the Edlemans whole vis-à-vis attorney's fees and costs paid to Russell. Upon remand, the trial court should be directed to determine in light of the entirety of the trial before the Court to determine the amount of attorney's

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reasonably necessary for the representation.<sup>47</sup>

fees which were charged and paid for by way of negligent services.

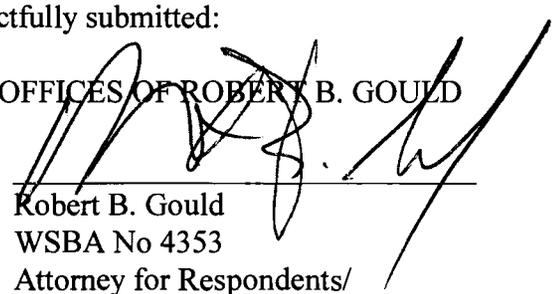
Interest should be allowed on those liquidated sums.

DATED this 4<sup>th</sup> day of April, 2011.

Respectfully submitted:

LAW OFFICES OF ROBERT B. GOULD

By:

  
Robert B. Gould

WSBA No 4353

Attorney for Respondents/

Cross-Appellants William M. Edleman

and Kathie A. Edleman, husband and

wife, and the marital community

comprised thereof

### **Index To Appendices**

- Appendix A: Trial Exhibit No. 8, Letter From Russell  
to the Edlemans dated 11/7/03
- Appendix B: Special Verdict Form dated 6/14/10
- Appendix C: Inquiry From The Jury And The Court' Response  
(10:53 a.m.)
- Appendix D: Inquiry From The Jury And The Court's Response  
(11:48 a.m.)
- Appendix E: Court's Instructions To The Jury

*BRIAN P. RUSSELL*  
*Attorney at Law, Inc., P.S.*  
140 S.W. 153<sup>rd</sup> St.  
Seattle, WA 98166

November 7, 2003

Phone: 206-244-3200 Fax: 206-248-2023

Mr. and Mrs. Bill Edleman

BY FAX: 206-315-0553

Re: Normandy Park Covenants

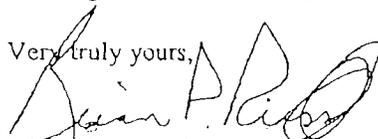
Dear Bill and Kathy:

I have reviewed the Normandy Park, Riviera Section, letter and Green letters that you sent to me and have further reviewed the Normandy Park covenants. I have also contacted Ms. AnnMarie Petrich, attorney for Mr. and Mrs. Green, regarding the Greens' objection to your project. Clearly, the Greens are on record as not having any objection or conflict with your proposed building project as evidenced by their two letters both dated December 16, 2002. This was confirmed by the letter I received from Ms. Seidler. I believe we should not give too strict an interpretation of the Club's June 13, 2003 letter. The letter refers to the written concerns of your neighbors including your immediate neighbors to the north, east and south, but also refers to these neighbors as having all honored and complied with the covenants. We certainly know that all of your neighbors have not complied with the covenants and specifically the plans now approved for the Greens is evidence that they are not complying with the covenant set backs.

In reviewing the covenants, there is a specific section relating to building plans. Sections 23 of the covenants states that no single family residence shall be erected on any lot unless and until plans and specifications together with a block plan indicating location have been submitted and approved in writing by the Seattle-Tacoma Land Company. These plans must be prepared by a licensed architect. I think we discussed before our strategy related to the covenants. We can't on the one hand state that the covenants are unenforceable, yet on the other hand seek compliance and approval of our plans in accordance with the covenants. Certainly, the June 13, 2003 letter by the Club acknowledges your building plans filed with the City of Normandy Park. If you think that we should submit plans for approval, I believe this certainly undermines our position that the covenants are unenforceable but we could submit the plans as an ER 408 settlement negotiation. Any negotiations between parties to the lawsuits in an attempt to settle are not admissible at trial. This would not bind us to the position that plans must be submitted to the Club, but it also could not be used by us at trial to show that we attempted compliance. Although, I believe they have copies of our plans which were filed with the City of Normandy Park, you may wish to submit another set of plans to the Club under an offer of settlement so it would not be admissible at trial.

Please give me a call when you have a chance so that we can discuss these issues.

Very truly yours,

  
BRIAN P. RUSSELL

JUDGE ANDREA DARVAS

FILED  
KING COUNTY, WASHINGTON

JUN 14 2010

SUPERIOR COURT CLERK  
BY DONNALEE PICKREL  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

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

Plaintiffs,

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,

Defendants.

NO. 08-2-17668-1 KNT

SPECIAL VERDICT FORM

We, the jury, answer the questions submitted by the Court as follows:

QUESTION 1: Was the defendant Brian Paul Russell negligent in his representation of the  
plaintiffs?

ANSWER: Yes (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to Question 1, sign this verdict and do not answer  
any further questions. If you answered "yes" to Question 1, answer Question 2.)

QUESTION 2: Was the negligence by the defendant a proximate cause of injury or damage to the plaintiffs?

ANSWER: yes (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to Question 2, sign this verdict and do not answer any further questions. If you answered "yes" to Question 2, answer Question 3.)

QUESTION 3: What is the total amount of the plaintiffs' damages?

ANSWER: \$ 999,000.00

(INSTRUCTION: Please answer Question 4.)

QUESTION 4: Was there negligence by the plaintiffs that was a proximate cause of the injury or damage to the plaintiffs?

ANSWER: No (Write "yes" or "no")

(INSTRUCTION: Please answer Question 5.)

QUESTION 5: Did the plaintiffs voluntarily assume a specific risk of damages or harm?

ANSWER: No (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to both Question 4 and Question 5, sign this verdict form and do not answer any further questions. If you answered "yes" to either Question 4 or Question 5, please answer Question 6.)

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QUESTION 6: Assume that 100% represents the total combined conduct of the parties (negligence and/or assumption of risk) which contributed to the plaintiffs' damages. What percentage of the plaintiffs' damages is attributable to the plaintiffs' contributory negligence and/or to plaintiffs' assumption of risk?

ANSWER: \_\_\_\_\_ %.

*(INSTRUCTION: Sign this verdict form and notify the bailiff.)*

DATED this 14 day of June, 2010.

  
\_\_\_\_\_  
Presiding Juror

FILED  
KING COUNTY, WASHINGTON

JUN 14 2010

SUPERIOR COURT CLERK  
BY DONNALEE PICKREL  
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON  
COUNTY OF KING

EDLEMAN et ux, et al

Plaintiff

Cause No. 08-2-17668-1 KNT

vs.

INQUIRY FROM THE JURY AND THE  
COURT'S RESPONSE  
(JYN)

RUSSELL

Defendant

JURY INQUIRY: *Can we add money amount ?  
Another words can we add  
"others" fee's*

*Julene Maggall*  
FOREMAN

*6/14/10 10:53*  
DATE AND TIME SUBMITTED

ORIGINAL

DATE / TIME RECEIVED BY THE COURT: *6/14/10 10:54*

\*\*\*\*DO NOT DESTROY- LEAVE IN JURY ROOM\*\*\*\*

COURT'S RESPONSE: (AFTER AFFORDING ALL COUNSEL/PARTIES OPPORTUNITY TO BE HEARD):

*Please clarify the question. The Court does not understand the question & therefore cannot provide an answer.*

  
JUDGE ANDREA DARVAS

DATE AND TIME RETURNED TO JURY: 6/14/10 @ 11:05

App. C-2

FILED  
KING COUNTY WASHINGTON

JUN 14 2010

SUPERIOR COURT CLERK  
BY DONNALEE PICKREL  
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON  
COUNTY OF KING

EDLEMAN et ux, et al

Plaintiff

Cause No. 08-2-17668-1 KNT

vs.

INQUIRY FROM THE JURY AND THE  
COURT'S RESPONSE  
(JYN)

RUSSELL

Defendant

JURY INQUIRY: *Regarding Question 3*

*Can we add to the amount of damages  
or are we required to put 1,099,000 or  
less?*

*John Maguire*  
PRESIDING JUROR

*6-14-10 11:46*  
DATE AND TIME SUBMITTED

ORIGINAL

DATE / TIME RECEIVED BY THE COURT:

*6-14-10*

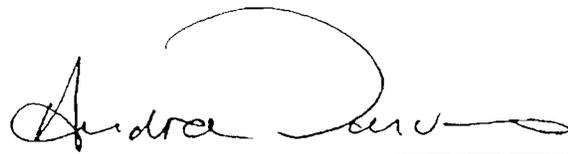
*11:48 am*

\*\*\*DO NOT DESTROY- LEAVE IN JURY ROOM\*\*\*

Inquiry From the Jury and Court's Response, Page 1 of 2 SC Form JO-117 (7/00)

COURT'S RESPONSE: (AFTER AFFORDING ALL COUNSEL/PARTIES OPPORTUNITY TO BE HEARD):

The amount of damages is for you to determine, based upon the evidence & the jury instructions. However, your ~~is~~ award may not exceed \$1,099,000.



JUDGE ANDREA DARVAS

DATE AND TIME RETURNED TO JURY: 6/14/10 @ 12:05

\*\*\*\*DO NOT DESTROY- LEAVE IN JURY ROOM\*\*\*\*

FILED  
KING COUNTY, WASHINGTON

JUN 14 2010

SUPERIOR COURT CLERK  
BY DONNALEE PICKREL  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

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

Plaintiffs,

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,

Defendants.

NO. 08-2-17668-1 KNT

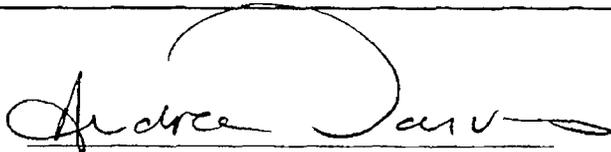
COURT'S INSTRUCTIONS  
TO THE JURY

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COURT'S INSTRUCTIONS TO THE JURY

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Dated: June 11, 2010

  
Judge Andrea Darvas

ORIGINAL

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

The order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

You are the sole judges of the credibility of the witnesses. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's

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testimony, you may consider these things: the opportunity of the witness to observe or know the things that the witness has testified about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

The comments of the lawyers during this trial are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

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You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. However, you should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

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INSTRUCTION NO. 2

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

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INSTRUCTION NO. 3

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts. You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

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INSTRUCTION NO. 4

The fact that a witness has talked with a party, lawyer, or party's representative does not, of itself, reflect adversely on the testimony of the witness. A party, lawyer, or representative of a party has a right to interview a witness to learn what testimony the witness will give.

INSTRUCTION NO. 5

(1) The plaintiffs claim that the defendant was negligent in one or more of the following respects:

(a) In failing to provide to them competent representation as it relates to the advice, counseling and handling of plaintiffs' disputes with the Riviera Section of the Normandy Park Community Club.

(b) In failing to meet the standard of care of a reasonable attorney acting in the same or similar circumstances.

(c) In failing to possess and exercise the legal knowledge and skill reasonably necessary in the representation of plaintiffs.

(d) By failing to explain to the plaintiffs the applicable law sufficiently such that the plaintiffs would be able to make informed decisions regarding the representation.

The plaintiffs claim that one or more of these actions and inactions on the part of defendant Russell was a proximate cause of injuries and damages to the plaintiffs. The defendants deny these claims.

(2) In addition, the defendants claim as affirmative defenses, and the plaintiffs deny, the following affirmative defenses:

(a) That the plaintiffs' damages were caused by or contributed to the negligent acts or omissions of the plaintiffs.

(b) That the plaintiffs expressly assumed a specific risk of damages or harm.

(c) That the plaintiffs failed to exercise ordinary care to avoid or to minimize their damages.

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(3) The defendants further deny the nature and extent of plaintiffs' claimed injuries and damages.

The foregoing is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed unless admitted by the opposing party; and you are to consider only those matters that are admitted or established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

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INSTRUCTION NO. 6

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

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INSTRUCTION NO. 7

Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed.

If you find contributory negligence, you must determine the degree of negligence, expressed as a percentage, attributable to the person(s) claiming injury or damage. The court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

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INSTRUCTION NO. 8

The plaintiffs have the burden of proving each of the following propositions:

First, that there existed an attorney-client relationship between the plaintiffs and the defendant;

Second, that the defendant acted, or failed to act, in one of the ways claimed by the plaintiffs and that in so acting or failing to act, the defendant was negligent;

Third, that the plaintiffs would have had a better result in the underlying action if the defendant had not been negligent;

Fourth, that the plaintiffs incurred injuries or damages; and

Fifth, that the negligence of the defendant was a proximate cause of the injuries or damages to the plaintiffs.

The defendant has the burden of proving both of the following propositions:

First, that the plaintiffs acted, or failed to act, in one of the ways claimed by the defendant, and that in so acting or failing to act, the plaintiffs were negligent;

Second, that the negligence of the plaintiffs was a proximate cause of the plaintiffs' own injuries or damages and was therefore contributory negligence.

INSTRUCTION NO. 9

With regard to his affirmative defense that the plaintiffs expressly assumed a specific risk of harm or damages, the defendant has the burden of proving each of the following propositions:

First, that the plaintiffs had knowledge of the specific risk leading to the harm or damages;

Second, that the plaintiffs understood the nature of this risk; and

Third, that the plaintiffs voluntarily consented to encounter the risk by agreeing in advance to relieve the defendant of the duty of care owed to the plaintiffs in relation to the risk.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then using 100% of the total combined conduct of the parties (negligence and assumption of risk) which contributed to the plaintiffs' damages, you must reduce the total damages that you find to have been sustained by the plaintiffs, by the percentage of that conduct attributable to the risk expressly assumed by the plaintiffs. The court will furnish you with a special verdict form for this purpose.

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INSTRUCTION NO. 10

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression “if you find” is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

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INSTRUCTION NO. 11

A cause of an injury or event is a proximate cause if it is related to the injury or event in two ways: (1) the cause produced the injury or event in a direct sequence unbroken by any superseding cause, and (2) the injury or event would not have happened in the absence of the cause.

There may be more than one proximate cause of an injury or event.

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INSTRUCTION NO. 12

A lawyer owes to the lawyer's client a duty to possess and exercise the degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer practicing law in the state of Washington. Failure to exercise such skill, care and knowledge constitutes a breach of the standard of care and is negligence.

The degree of care actually practiced by members of the legal profession is evidence of what is reasonably prudent. However, this evidence alone is not conclusive on the issue and should be considered by you along with any other evidence bearing on the question.

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INSTRUCTION NO. 13

A lawyer has a duty to inform a client of all material facts, including risks and alternatives, which a reasonably prudent client would need to make an informed decision on whether to consent to or reject a proposed course of action. A material fact is one to which a reasonably prudent person in a position of a client would attach significant in deciding whether or not to follow the proposed course of action.

A lawyer's duty to properly advise and counsel the lawyer's client in accordance with the applicable standard of care cannot be delegated to another person or entity.

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INSTRUCTION NO. 14

If you find that the defendant was negligent but that the sole proximate cause of the plaintiffs' damages was a later independent intervening cause that the defendant, in the exercise of ordinary care, could not reasonably have anticipated, then the defendant's original negligence is superseded by the intervening cause and is not a proximate cause of the injury. If however, in the exercise of ordinary care, the defendant should reasonably have anticipated the intervening cause, it does not supersede defendant's original negligence and defendant's negligence is a proximate cause.

INSTRUCTION NO. 15

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

*If your verdict is for the plaintiffs, then you 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, apart from any consideration of contributory negligence or express assumption of the risk.*

*If you find for the plaintiffs, you should consider the following elements of damages:*

- The amount of monies that you find were reasonably expended by the plaintiffs for successor counsel and/or to mitigate their damages through settlement;
- The cost of redesign, demolition or reconstruction reasonably incurred;
- The diminution in value to plaintiffs' property, if any.

The burden of proving damages rests upon the plaintiffs. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence, and not upon speculation, guess, or conjecture.

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INSTRUCTION NO. 16

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding.

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The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to answer any question on the special verdict form, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that you have reached a verdict. The bailiff will bring you back into court where your verdict will be announced.

SSD

No. 65668-6-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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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.

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ERRATA RE: BRIEF OF  
RESPONDENTS/CROSS-APPELLANTS

---

Law Offices of Robert B. Gould  
Robert B. Gould, WSBA No. 4353  
2110 N. Pacific Street, Suite 100  
Seattle, WA 98103-9181  
(206) 633-4442  
Attorney for Respondents/Cross-Appellants

Page 10, ¶12, Lines 2-4 of Respondents/Cross-Appellants William M. Edleman and Kathie A. Edleman's Brief should read "... (1) the amounts paid on appeal and remand to Messrs. Eglick and Talmadge totaling \$388,000.00 (Ex. No. 110) (CP 1039) (6/1 RP 107); ...".

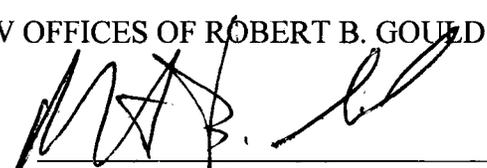
It is respectfully requested that the Court should disregard the reference to Ex. No. 109 as that exhibit was not admitted into evidence in the underlying trial.

DATED this 5<sup>th</sup> day of April, 2011.

Respectfully submitted:

LAW OFFICES OF ROBERT B. GOULD

By:



Robert B. Gould  
WSBA No 4353  
Attorney for Respondents/  
Cross-Appellants William M. Edleman  
and Kathie A. Edleman, husband and  
wife, and the marital community  
comprised thereof