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71832-1

No. 71832-1-I

**COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON**

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Byong Jik Choi and In Sook Choi, husband and wife, and the marital  
community comprised thereof

*Appellants,*

v.

CHRISTOPHER D. ADAMS and MEGAN E. ADAMS, husband and  
wife, and the marital community comprised thereof, and ADAMS &  
DUNCAN, INC., P.S., a Washington Professional Services Corporation,

*Respondents.*

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**BRIEF OF APPELLANT**

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2014 SEP 11 11:14 AM  
COURT OF APPEALS  
DIVISION I  
CLERK OF COURT  
JENNIFER L. HARRIS

ORIGINAL

## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR.....	4
1. Where, as in the present case, an attorney undertakes to represent a client, the attorney has duties to the Ostensible Client even if the Ostensible Client has been misrepresented to the attorney.....	4
a. Issues Pertaining to the Assignment of Error No. 1	4
i. When an attorney undertakes representation of a client, does it make any difference as to the lawyer's legal duty that the attorney's representation is based on a fraudulent misrepresentation by a person other than the Ostensible Client?.....	4
ii. When a lawyer represents a client without meeting the client or verifying the client's identity, does the lawyer's legal duties to that client change in any respect?.....	4
iii. When a lawyer's objective manifestations and representations to third parties manifest the lawyer's belief of representing the client, does that create as a matter of law legal duties on behalf of the lawyer to that client?.....	4
2. Where, as here, the lawyer makes representations on behalf of a client to a third party, which are false, and those misrepresentations result in litigation by the third party against the client, can the lawyer escape liability and responsibility to the client?.....	4

3.	Based upon the facts before this Court, viewed in a light most favorable to the clients, has a duty been created and are there genuine issues of material fact precluding summary judgment?.....	5
III.	STATEMENT OF THE CASE.....	5
A.	Factual Background.....	5
B.	Procedural Background.....	7
IV.	ARGUMENT.....	8
A.	Adams Created An Attorney-Client Relationship With The Chois and <i>Trask v. Butler</i> , 123 Wn.2d 835, 872 P.2d 1080 (1994) Is Not Applicable.....	8
B.	Creation Of The Attorney-Client Relationship.....	9
C.	Reasonableness Of The Chois Belief – Irrelevant.....	9
D.	Once Adams Created The Attorney-Client Relationship Our Concepts Of Legal Malpractice – Negligence – Standard Of Care Are Automatically Implicated.....	10
V.	CONCLUSION.....	10

**TABLE OF AUTHORITIES**

<b>Washington Cases</b>	<b><u>Page(s)</u></b>
<i>Trask v. Butler</i> , 123 Wn.2d 835, 872 P.2d 1080 (1994).....	8, 9, Footnote 1
<i>Bohn v. Cody</i> , 119 Wn.2d 357, 832 P.2d 71 (1992).....	9
<i>Hizey v. Carpenter</i> , 119 Wn.2d 251, 830 P.2d 646 (1992).....	10
 <b>State Rules</b>	
RCW 19.86.....	3, 7

APPENDIX..... A-1

Appendix A: Verbatim Report of Proceedings  
Transcript: Motions for Summary  
Judgment before Hon. Regina  
Cahan, March 28, 2014.

## **I. INTRODUCTION**

Numerous duties and obligations are created as a matter of law when a lawyer undertakes the representation of a client. Christopher Adams, a lawyer, (hereinafter “Adams”), in his youth and zeal for new business, negligently undertook the representation of clients and in that representation negligently performed services on their behalf.

The uniqueness of this matter has its genesis in Adams undertaking the actual objective representation of “Ostensible Clients”, e.g. the Plaintiffs Byong Jik Choi and In Sook Choi (hereinafter “Ostensible Client” or “the Chois”).

This botched representation began with Adams’ negligence in being fooled by the Ostensible Client’s son, Ron Choi. Ron Choi, fraudulently and without the knowledge of the Ostensible Client, misrepresented himself on the phone and by e-mails to Adams as Ron Choi being the Ostensible Client; e.g. Ron Choi at all times fraudulently told Adams that he, Ron Choi, was “the Chois”. Adams never physically met either Ron Choi or the Ostensible Clients.

In the course of Adams’ representation, which was unknown to the Ostensible Client, Adams affirmatively and negligently misrepresented himself as counsel for the Ostensible Client to third parties. As a direct

result of Adams' negligence and negligent misrepresentations on behalf of the Ostensible Clients, hard-money lenders, to whom Adams made the misrepresentations, loaned money secured by the Chois' property and the bulk of the money was taken by Ron Choi. Resulting from this debacle, the hard-money lenders have sued the Chois.

Adams seeks to escape liability in the face of his actual representation of the Ostensible Clients by taking the position that he was representing an imposter, and therefore has no liability to the Chois! It was Adams' lack of due diligence; Adams' negligence; Adams' negligent misrepresentations to the hard-money lenders all for and on behalf of the Ostensible Client that has lead inexorably to the Ostensible Client being sued by the hard-money lenders. The Chois had absolutely no contact or knowledge with either Adams or the hard-money lenders. Adams alleges in the face of these facts that he had no duty to the Ostensible Client, which is simply wrong and oxymoronic.

Where, as here, Adams dealt on behalf of Ostensible Clients, his duties as an attorney flow directly from that relationship for the benefit of the Ostensible Client, even though the relationship was unknown to the Ostensible Clients. Adams' representations on behalf of the Ostensible Clients and Adams' objective manifestations show that he was "representing" the Ostensible Clients.

The trial court, without giving reasons, but perhaps confused in oral argument by the court's inquiry on Adams' subjective intent (*See* Verbatim Report of Proceedings Transcript, pp.9-10) (*See* App. A) and misunderstanding the duty that Adams in fact had (*See* Verbatim Report of Proceedings Transcript, pp.12-13) (*See* App. A) dismissed the Ostensible Client's claims for legal malpractice and violation of the Washington State Consumer Protection Act (RCW 19.86) on summary judgment. Ironically, the same court that dismissed the Ostensible Client's claims for legal practice and violation of the Washington State Consumer Protection Act (RCW 19.86) against Adams, denied Adams' motion to be dismissed from the hard-money lenders' claims, based on his opinion letters to the hard-money lenders.

Accordingly, at the time of filing this brief, the posture of this case is that the Ostensible Clients have no claim against Adams, even though Adams' negligence have placed the Ostensible Clients in the gun sights of litigation with the hard-money lenders. Yet, the hard-money lenders, to whom Adams misrepresented, can pursue claims against Adams **and** the Ostensible Client, the Chois.

As there are genuine issues of material fact and the trial court was wrong as a matter of law, this injustice should be addressed by this Court and remanded to the King County Superior Court for trial.

## **II. ASSIGNMENTS OF ERROR**

1. Where, as in the present case, an attorney undertakes to represent a client, the attorney has duties to the Ostensible Client even if the Ostensible Client has been misrepresented to the attorney.

a. Issues Pertaining to the Assignment of Error No. 1

i. When an attorney undertakes representation of a client, does it make any difference as to the lawyer's legal duty that the attorney's representation is based on a fraudulent misrepresentation by a person other than the Ostensible Client?

ii. When a lawyer represents a client without meeting the client or verifying the client's identity, does the lawyer's legal duties to that client change in any respect?

iii. When a lawyer's objective manifestations and representations to third parties manifest the lawyer's belief of representing the client, does that create as a matter of law legal duties on behalf of the lawyer to that client?

2. Where, as here, the lawyer makes representations on behalf of a client to a third party, which are false, and those misrepresentations result in litigation by the third party against the client, can the lawyer escape liability and responsibility to the client?

3. Based upon the facts before this Court, viewed in a light most favorable to the clients, has a duty been created and are there genuine issues of material fact precluding summary judgment?

### **III. STATEMENT OF THE CASE**

#### **A. Factual Background**

Byong Jik Choi and In Sook Choi, plaintiff appellants (hereinafter “Ostensible Clients”), are Korean immigrants with limited English language abilities (CP 216-217). Defendant Christopher D. Adams (hereinafter “Adams”) is a young lawyer, WSBA No. 37269 (CP 134, 149), and a principal of the Defendant Adams & Duncan, Inc., P.S., Washington Professional Service Corporation law firm (CP 134, 149).

The Ostensible Clients were referred to Adams by an Everett, Washington colleague of Adams (CP 135, 150, 161, 352). Ron Choi had all of the contact with Adams, which was made by phone and e-mail – never in person. (CP 135, 162, 353). Ron Choi is a law school graduate, who falsely represented to his parents that he was working in a Kirkland law firm (CP 214-215, 218-219). Because of his background, the Ostensible Clients delegated a great deal of financial authority in handling Ostensible Clients’ commercial real estate to Ron Choi (CP 215-219, 228).

Unbeknownst to the Ostensible Clients, Ron Choi was forging papers and stealing from his parents (CP 137, 152, 163, 221-224, 229-

234). Ron Choi contacted hard-money lenders to raise money as the Ponzi scheme he was running with his parents' money was coming to an end (CP 133-140). The hard-money lenders were willing to loan money based upon Ron Choi's continuing false representations that Ron Choi's parents, the Ostensible Clients, were the borrowers together with the Ostensible Clients' free and clear commercial real estate (CP 133-140, CP 230). As part of Ron Choi's fraudulent scheme he placed his parents' free and clear (CP 230) Everett, Washington commercial property as collateral for the hard-money loan (CP 44, 61-67, 106). The hard-money lenders desired an opinion letter from the Ostensible Clients' attorney (CP 135, 150, 162).

In a series of contacts, either by phone or e-mail, Ron called upon Adams to perform this condition precedent to obtaining the hard-money loan (CP 135-136, 150-151, 162-163). Adams was negligent in the intake of the client (*See* Declaration of John Strait, dated March 14, 2014, pp. 10-12, §IV(C), ¶1-3) (CP 357-359), as well as his negligent misrepresentation to the hard-money lenders (*See* Declaration of John Strait, dated March 14, 2014, pp. 10, §IV(B), ¶4) (CP 357); (*See* Declaration of John Strait, dated March 14, 2014, pp. 12-13, §IV(D), ¶1, through §IV(E), ¶3) (CP 359-360); (CP 135-137); and (*See* Declaration of Christopher Adams, dated February 26, 2014, pp. 3, ¶6-7, Exhibits B and C) (CP 173, 184-189).

The hard-money lenders made the loan and took a deed of trust against the Ostensible Clients' commercial property – resulting from Ron Choi's forging of their names on the deed of trust (CP 44, 61-67, 106). Ron Choi has fled to Vancouver, Canada (CP 164, 211-212).

**B. Procedural Background**

The hard-money lenders earlier commenced a lawsuit against First American Title, who issued the title insurance on this transaction, and later amended the lawsuit adding the Ostensible Client as defendants on October 16, 2012 (CP 41-54) – King County Cause No. 12-2-17128-9. Ostensible Clients filed their Complaint for Legal Malpractice and Violation of the Washington State Consumer Protection Act (RCW 19.86), dated October 2, 2013, against Adams and his firm in Snohomish County, Washington (CP 148-155). Venue was based upon Adams' residence and the jurisdiction where the tort was committed (CP 148-155).

The Chois action against Adams was transferred from the Snohomish County Superior Court to the King County Superior Court (CP 4-6). The hard-money lenders' lawsuit against the Ostensible Client and the Chois Snohomish County legal malpractice action against Adams were consolidated under the King County Cause No. 12-2-17128-9 (CP 472-473).

Adams moved for summary judgment of dismissal against both the Ostensible Clients and the hard-money lenders (CP 160-170). Oral argument before Judge Regina Cahan was held on March 28, 2014 (*See* Verbatim Report of Proceedings Transcript, p.1 (*See* App. A)).

Judge Cahan dismissed the Chois claims against Adams (CP 442-444) and denied Adams' motion for summary judgment of dismissal against the hard-money lenders (CP 439-441). This appeal, on behalf of the Chois, followed (CP 463-471).

#### IV. ARGUMENT

##### A. **Adams Created An Attorney-Client Relationship With The Chois And *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994) Is Not Applicable**

It cannot be disputed that Adams, by his objective manifestations, believed and represented that his clients were the Chois. *Trask, supra*, states: "Thus, under the modified multi-factor balancing test, the threshold question is whether the plaintiff is an intended beneficiary of the transaction to which the advice pertained. While the answer to the threshold question does not totally resolve the issue, no further inquiry need be made unless such an intent exists." *Trask*, pp. 843. The Chois ask rhetorically, why possibly does one need to rely upon *Trask* when under the facts and posture of this case Adams objectively believed and objectively represented and manifested that he in truth and in fact represented the Chois?

Even assuming, *arguendo*, in the most opaque reading of the facts, resulting from this unique situation, that there was no **actual** attorney-client relationship between Adams and the Chois then *Trask, supra*, by its very “definition” would have application. It would apply as it is beyond dispute that Adams clearly and unequivocally intended to “benefit” his believed actual clients, the Chois.<sup>1</sup>

### **B. Creation Of The Attorney-Client Relationship**

Any reasonable review of what Adams in fact did is compelling evidence that Adams believed there was an attorney-client relationship between he and the Chois. While the Chois believe there is no genuine issue of material fact as to the actual existence of an attorney-client relationship, based on Adams’ actions, our case law holds that at worst that would create a genuine issue of material fact. *Bohn v. Cody*, 119 Wn.2d 357, 363-64, 832 P.2d 71 (1992).

### **C. Reasonableness Of The Chois Belief - Irrelevant**

The parties agree that the Ostensible Clients, the Chois, could not and did not know of Adams’ actions. Accordingly, Washington jurisprudence on a clients’ subjective belief of the existence of an attorney-client relationship has no application in the case at bar. *Bohn, supra*, pp. 364.

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<sup>1</sup>“...a nonclient plaintiff must prove...(1) the existence of an attorney-client relationship which gives rise to a duty of care to the plaintiff,...” *Trask, supra*, p. 839.

**D. Once Adams Created The Attorney-Client Relationship  
Our Concepts Of Legal Malpractice – Negligence –  
Standard Of Care Are Automatically Implicated**

As this Court is well aware, the elements of legal malpractice start with duty; go to breach of duty; then proximate cause; and damages flowing from that proximate cause. *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992).

It is by Adams' own affirmative actions in his belief that he was representing in truth and in fact the Chois; his affirmative representations to third parties that he was representing the Chois; and his billing the Chois [through Ron Choi] that trigger his duty of care to the Chois. It would simply be hypocritical to say that while Adams owed a duty to third parties, the hard-money lenders, he owes no duty to what he believed to be his clients. It was error under the unique facts of this case for the trial court to dismiss.

**V. CONCLUSION**

The Chois acknowledge the factual uniqueness of this case. Their research has been unable to find any appellate court decision with similar facts.

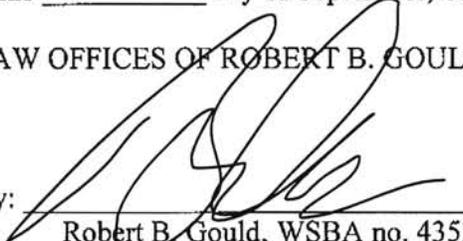
However, Adams' own actions in purporting to represent the Chois trigger and implicate Washington's longstanding jurisprudence on legal malpractice. It was Adams himself who created the attorney-client

relationship, albeit based on the fraud of Ron Choi. The creation of that attorney-client relationship brings into being Adams' obligation and duties as a Washington attorney to his Ostensible Clients.

This Court should overturn the improvident grant of summary judgment of dismissal and mandate the return of this case to be decided on the merits by the trier of fact.

DATED this 10th day of September, 2014.

LAW OFFICES OF ROBERT B. GOULD

By: 

for #27861  
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**DECLARATION OF SERVICE**

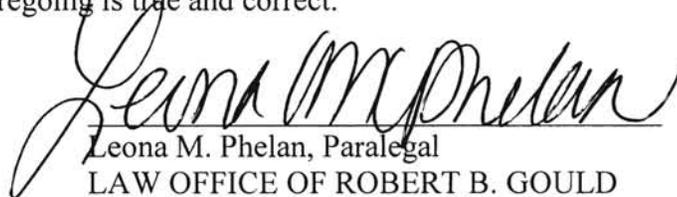
On September 11<sup>th</sup>, 2014, I caused to be delivered via ABC

Legal Messenger a true and accurate copy of the attached document, to the following:

Jeffrey Kestle, Esq.  
John Hayes, Esq.  
Forsberg & Umlauf, P.S.  
901 Fifth Avenue, Suite 1400  
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*Attorney for Respondents*

The original of this document was also sent via legal messenger to be filed in the Court of Appeals.

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

  
\_\_\_\_\_  
Leona M. Phelan, Paralegal  
LAW OFFICE OF ROBERT B. GOULD

## **Index To Appendix**

Appendix A: Verbatim Report of Proceedings Transcript:  
Motions for Summary Judgment before  
Hon. Regina Cahan, March 28, 2014.

Ordal, et al.  
v.  
Choi, et al.

\* \* \* \* \*

Motions for Summary Judgment  
before Hon. Regina Cahan  
March 28, 2014

\* \* \* \* \*

Transcribed by:  
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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

ROBERT E. ORDAL, TRUSTEE OF  
THE ROBERT E. ORDAL, PLLC  
PROFIT-SHARING PLAN; JOHN  
ORDAL, TRUSTEE OF THE  
PULMONARY CONSULTANTS, P.C.  
401(K) PROFIT-SHARING PLAN  
TRUST; BRAD DECKER AND LAURA  
DECKER, husband and wife;  
JOY M. ORDAL, a single woman;  
DAVID ORDAL, a married man  
as his separate estate;  
STUART WALKER, a married man  
as his separate estate;  
VIKING RETIREMENT ASSETS,  
CUSTODIAN FBO KIT WRIGHT IRA  
#004293; and RSH GRANT, INC.,  
a Washington corporation,

Plaintiffs,

vs.

BYONG JIK CHOI and IN SOOK  
CHOI, husband and wife;  
CHRISTOPHER D. ADAMS and  
MEGAN E. ADAMS, husband and  
wife; ADAMS & DUNCAN, P.S.,  
a Washington professional  
services corporation,

Defendants.

BYONG JIK CHOI and IN SOOK  
CHOI, husband and wife,

Third-Party Plaintiffs,

vs.

CHRISTOPHER D. ADAMS and  
MEGAN E. ADAMS, husband and  
wife, and ADAMS & DUNCAN, P.S.,

No. 12-2-17128-9 SEA

MOTIONS FOR SUMMARY  
JUDGMENT

HON. REGINA CAHAN  
March 28, 2014

(Continued on next page)

1 )  
 2 a Washington professional )  
 3 services corporation, )  
 4 )  
 5 Third Party Defendants. )  
 6 )

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7 MOTIONS FOR SUMMARY JUDGMENT  
 8 VERBATIM REPORT OF PROCEEDINGS

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9 HELD BEFORE: HONORABLE REGINA CAHAN

10 HELD ON: March 28, 2014  
 11 11:01 a.m. to 11:54 a.m.

12 HELD AT: King County Courthouse  
 13 516 Third Avenue, Room E-733  
 14 Seattle, Washington

15 Transcribed by: Jeanne M. Gersten, RMR, CCR  
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I N D E X

PAGES

Introduction of matter and participants . . .	4 - 5
Argument by Mr. Kestle . . . . .	5 - 11
Argument by Mr. Gould . . . . .	11 - 18
Argument by Mr. Kestle . . . . .	18 - 27
Argument by Mr. Peterson . . . . .	27 - 41
Reply argument by Mr. Kestle . . . . .	42 - 43
Ruling by the Court . . . . .	43 - 47

1 March 28, 2014, Seattle, Washington:

2 PROCEEDINGS: 11:01 a.m.

3 THE COURT: Summary judgments filed by  
4 defendant Adams, one against Choi, and one to dismiss out  
5 Ordal.

6 How would you like to proceed? First of all, why  
7 don't you all state your names for the record.

8 MR. KESTLE: Your Honor, Jeff Kestle for  
9 the Adams defendants.

10 MR. GOULD: May it please the Court,  
11 Robert Gould, counsel for third-party plaintiffs Choi.

12 MR. PETERSON: Your Honor, Tom Peterson on  
13 behalf of the plaintiffs, the Ordal plaintiffs.

14 THE COURT: Okay. And I have read  
15 everything, so -- And I went back to the record to just  
16 see. There's been a lot of summary judgments.

17 I tried to bring myself up to speed because I  
18 frankly never liked it when cases were assigned to  
19 different judges all the time. That kind of annoyed me  
20 when I was a lawyer, so -- not that I'm not a lawyer, but,  
21 you know, when I was practicing. So I tried to make the  
22 transition somewhat seamless, but I couldn't just go  
23 listen to all of the oral arguments. There was just too  
24 many of them. But I did read everything, and I'm pretty  
25 up to speed, I think.

1           So how would you like to proceed? We have two  
2 different motions, so obviously you're starting, but --

3           MR. KESTLE: Sure.

4           THE COURT: How do you want to proceed?

5           MR. KESTLE: Bob, do you want to go first?

6           MR. GOULD: Your call.

7           MR. KESTLE: Why don't we do the one  
8 involving the Choi --

9           THE COURT: Okay.

10          MR. KESTLE: -- defendants.

11          And Your Honor, may I argue from up --

12          THE COURT: Actually, just stay right there  
13 is perfect, --

14          MR. KESTLE: Okay.

15          THE COURT: -- if you're comfortable.

16          MR. KESTLE: All righty. Your Honor, --

17          THE COURT: Wherever you're more  
18 comfortable is fine with me, but --

19          MR. KESTLE: I'm going to come up.

20          THE COURT: Okay.

21          MR. KESTLE: So again, good morning,  
22 Your Honor.

23          THE COURT: All right.

24          MR. KESTLE: My name is Jeff Kestle. I  
25 represent the Adams defendants in this case.

1           So for this first motion, we have a motion to  
2       dismiss the claims of Byong Jik Choi and In Sook Choi  
3       against the Adams defendants. The Adams defendants are  
4       Chris Adams, who is the attorney involved in the  
5       transactions that are at issue here, his law firm, Adams  
6       and Duncan, and his wife.

7                       THE COURT: Right.

8                       MR. KESTLE: So the facts -- and I'll  
9       probably just do one recitation of the facts for both, for  
10      both arguments because --

11                      THE COURT: That's fine. I mean, I'm  
12      pretty -- I've read everything. I'm pretty familiar with  
13      the facts, but --

14                      MR. KESTLE: Okay. Well, --

15                      THE COURT: -- but you can certainly go  
16      through them, if you'd like.

17                      MR. KESTLE: In that event, why don't we  
18      just skip right to the argument.

19                      So for the Choi plaintiffs they have two claims  
20      against the Adams defendants. They have a claim for legal  
21      malpractice, and they have a claim for violation of the  
22      Washington Consumer Protection Act.

23                      THE COURT: Can I just interrupt you right  
24      there and ask a question?

25                      MR. KESTLE: Yes.

1 THE COURT: In the response the --  
2 Mr. Gould was talking all about medical -- about  
3 negligent misrepresentation, I'm sorry, --

4 MR. KESTLE: Yes.

5 THE COURT: -- and not legal malpractice.  
6 So I was kind of --

7 MR. KESTLE: Well, and I think the argument  
8 that he was making there is not a -- The Chois have not  
9 asserted a claim of negligent misrepresentation. I  
10 believe what Mr. Gould was arguing was that because --  
11 because Chris Adams misrepresented something, that has led  
12 them to be -- the Chois to become involved in the  
13 litigation, and therefore there is some duty on the part  
14 of Adams toward the Chois.

15 THE COURT: All right.

16 MR. KESTLE: That's how I understood the  
17 argument.

18 THE COURT: Okay.

19 MR. KESTLE: So in order to prevail --  
20 First let's talk about the legal malpractice claim. So to  
21 prevail on the legal malpractice cause of action you have  
22 to show, like any negligence action, duty, breach,  
23 causation, damages. Whether there is a duty is a question  
24 of law.

25 The Chois don't claim that they had a direct

1 attorney-client relationship with Adams. Therefore, under  
2 the Trask v. Butler case, a 1994 Washington Supreme Court  
3 case, the Court must employ or analyze a multifactor test  
4 to determine whether or not there's a duty to a non-party  
5 or non-client third party.

6 THE COURT: Right.

7 MR. KESTLE: And the only thing that we're  
8 arguing today is about this threshold issue, which is was  
9 the plaintiff or were the Chois an intended -- Were they  
10 intended beneficiaries of the attorney-client relationship  
11 between Adams and Ron Choi, their son?

12 THE COURT: Right. Was there a duty.

13 MR. KESTLE: Was there a duty.

14 THE COURT: Right.

15 MR. KESTLE: And were they beneficiaries of  
16 that relationship.

17 And our argument -- I think it's a pretty simple  
18 argument -- is the client is Ron Choi. The Choi  
19 plaintiffs have not alleged that Ron Choi intended to  
20 benefit them by the transaction. He basically lied to his  
21 attorney, got a loan that he shouldn't have got, stole  
22 money, and then fled to Canada. They're not making a  
23 claim that he intended to benefit them.

24 So then the next question --

25 THE COURT: But -- Wait. Who is not making

1 the claim that he intended --

2 MR. KESTLE: I'm sorry. The Choi -- The  
3 Choi plaintiffs are not alleging that Ron Choi, their son,  
4 intended to benefit them by the transaction.

5 THE COURT: Right.

6 MR. KESTLE: So then the question is did  
7 Chris Adams intend to benefit the Chois? Well, he didn't  
8 know they existed. So as an initial matter, I don't think  
9 you can owe a duty under Trask to a party you don't know  
10 exists.

11 THE COURT: Well, their argument is he  
12 thought they existed. He thought it was them. I mean,  
13 that's -- that's, I think, essentially Mr. Gould's  
14 argument, that your client thought he was dealing with the  
15 Chois; and so because of his negligence of not  
16 investigating who he was dealing with, because he thought  
17 he was dealing with them, you know, is that --

18 MR. KESTLE: It -- Yes.

19 THE COURT: -- it essentially?

20 MR. KESTLE: That's the argument, but -- So  
21 Chris Adams believed he was dealing with a person, --

22 THE COURT: Right.

23 MR. KESTLE: -- Ron Choi.

24 THE COURT: Right.

25 MR. KESTLE: He believed that Ron Choi's

1 name was Byong Jik Choi. He did not know and did not  
2 intend to benefit any third party. He didn't know that  
3 Choi had parents. The transaction wasn't intended to  
4 benefit the parents.

5 Ron Choi chose to use the name of his father. "This  
6 is my name," but that doesn't mean that Chris Adams  
7 intended to benefit a third party, Ron Choi's parents. So  
8 that's our argument.

9 And so under that argument neither party intended to  
10 benefit the parents. Therefore, there was no duty, and  
11 the legal malpractice claim should be dismissed.

12 THE COURT: Understood.

13 MR. KESTLE: Okay. For the CPA claim the  
14 allegation is that Chris Adams overbilled for his work, --

15 THE COURT: Right.

16 MR. KESTLE: -- his work for Ron Choi. He  
17 billed Ron Choi. Ron Choi paid him. The --

18 THE COURT: Where's the damage?

19 MR. KESTLE: The Choi plaintiffs argue,  
20 "Well, the damage is we're being sued," but the lawsuit  
21 between the Ordal plaintiffs and the Choi plaintiffs has  
22 nothing to do with how much --

23 THE COURT: Right. So where's the damage  
24 as a result of the billing?

25 MR. KESTLE: -- Chris Adams billed. The

App. A-11

Ordal, et al. v. Choi, et al.

1 expenses in defending this suit are not damages that flow  
2 from Chris Adams overbilling for his work.

3 THE COURT: Right.

4 MR. KESTLE: And so therefore, no damages,  
5 and the claims should be dismissed.

6 THE COURT: I understand. Thank you.

7 MR. KESTLE: Thank you.

8 THE COURT: Mr. Gould.

9 MR. GOULD: Your Honor, Robert Gould. I am  
10 pleased to represent the third party plaintiff, Choi.

11 There is a saying, I believe emanating from the  
12 Old Testament. I could be mistaken. Nothing --

13 THE COURT: The Chutzpah analysis?

14 MR. GOULD: I'm sorry?

15 THE COURT: The Chutzpah analysis; right?

16 MR. GOULD: No, Your Honor. Quote,  
17 "Nothing new under the sun," unquote. Well, this comes  
18 awfully close, and perhaps we're in a solar orbit if it's  
19 nothing new under the sun.

20 I welcome at any time any questions that the Court  
21 might have.

22 It is ironic that able counsel can get up before you  
23 and say to you that there wasn't a, quote -- and I put  
24 quotes around it -- "an attorney-client relationship"  
25 between his client and my clients. That's precisely who

1 the defendant Adams thought he was dealing with.

2 We are here under CR 56. You have in front of  
3 you -- you've said you've read everything, and I'm sure  
4 you have -- the declaration of John Strait. There is no  
5 countervailing expert testimony; but it is clear, and the  
6 Rules of Professional Conduct dictate this to us.

7 THE COURT: But John Strait's declaration  
8 doesn't talk about the duty.

9 MR. GOULD: It does.

10 THE COURT: It talks -- Well, it talks  
11 about the duty of a lawyer to investigate and figure out  
12 who his client is, and it talks about all the reasons why  
13 frankly, the lawyer arguably did something wrong; but it  
14 doesn't discuss, it seems to me, that -- and maybe you can  
15 point me to it. Maybe I missed it, but I don't think so.  
16 It doesn't discuss if the lawyer here --

17 Well, really, who determines the attorney-client  
18 relationship? It's really the client determines  
19 subjectively when he thinks there's a relationship, and  
20 that certainly wasn't your clients.

21 MR. GOULD: When, in the words of the case  
22 law it is, quote, "reasonable in regards to the attendant  
23 circumstances," unquote. I believe that to be a quote,  
24 Your Honor. I think we are perhaps passing like ships in  
25 the night. Mr. Strait alludes to the Rules of

1 Professional Conduct with regard to his opinions, which  
2 bolster his opinions.

3 As we have cited to you, Your Honor, the Rules of  
4 Professional Conduct are to be determined by this Court  
5 and all other courts in the state of Washington as a  
6 matter of law. Your Honor, and let me take an example.

7 You asked earlier on about negligent  
8 misrepresentation. Lawyers cannot misrepresent, RPC 8.4,  
9 I believe, and there is no question that the defendant  
10 Adams misrepresented. It's absolutely beyond dispute.

11 THE COURT: But that goes to damage, and --

12 MR. GOULD: It goes to duty.

13 THE COURT: -- it doesn't --

14 I don't see how that goes to duty. I guess, you  
15 know, the footnote in the -- in the Adams reply kind of  
16 hit me, which is exactly what I was thinking, which is  
17 most of your brief goes to damage, not to whether a duty  
18 exists.

19 MR. GOULD: Your Honor, may I speak?

20 THE COURT: Or it goes to the breach, I  
21 guess. Go ahead.

22 MR. GOULD: May I speak to that?

23 THE COURT: Of course.

24 MR. GOULD: Your Honor talks in terms of  
25 the existence of the attorney-client relationship, --

1 THE COURT: Right.

2 MR. GOULD: -- which depends in part upon  
3 the subjective intent of the client, but that's only one  
4 aspect of it.

5 How possibly can the defendants in this case, or the  
6 Court, say that there was not a, quote, "ostensible  
7 attorney-client relationship" between the defendant Adams  
8 and who he thought my clients were? That is the unique  
9 characteristic of this.

10 The undisputable fact is that he thought he was  
11 having an attorney-client relationship with my clients --  
12 sui generis, unique, nothing new under the sun, close to  
13 that, but that's the facts of this case. And it follows  
14 as the night follows the day, duties follow from that and  
15 flow from that, and that is exactly what Professor Strait  
16 has said. That is exactly what Eriks v. Denver teaches  
17 us.

18 And Mr. Strait has laid out the predicates and the  
19 foundation for his understandable opinion, which is  
20 ultimately a matter of law for the Court, --

21 THE COURT: I agree.

22 MR. GOULD: -- as to whether or not there  
23 is a duty.

24 And I ask rhetorically -- and I mean this  
25 respectfully, Your Honor -- how possibly, in light of the

1 ostensible attorney-client relationship between Adams and  
2 my client, could this Court not find a duty? It follows  
3 inexorably.

4 THE COURT: I'll tell you, I've read this a  
5 couple of times because it's unique, of course, the facts.  
6 And your heart says of course there must be a duty. And  
7 my -- Upon first read I'm thinking even if there's not --  
8 it's not the way you'd first see it, you go oh, there must  
9 be a duty because these folks are out. They're damaged.  
10 There must have been some relationship that a lawyer  
11 thought that's what they were dealing with.

12 And then when you read it again the second time, you  
13 think, you know, I'm not sure legally -- I'm to follow the  
14 law -- as much as my heart wants to find a duty, I'm not  
15 sure the brain can. The lawyer is dealing with X. X  
16 misrepresents who he is. But your clients, A and B, never  
17 had a relationship with the lawyer.

18 MR. GOULD: May I speak to that?

19 THE COURT: Of course.

20 MR. GOULD: What you're missing is the  
21 establishment of the ostensible attorney-client  
22 relationship creates as a matter of law duties. The facts  
23 are not in dispute. He thought he was having an  
24 attorney-client relationship with my clients. That's not  
25 disputed.

1 THE COURT: But it's not what the lawyer  
2 thinks. It's what the client thinks, isn't it?

3 MR. GOULD: It is not. There isn't an --  
4 It is undisputed that there is an establishment, an  
5 existing attorney-client relationship. Rhetorically, how  
6 the dickens can he bill ostensibly my client? How can he  
7 send out opinion letters addressed by the Rules of  
8 Professional Conduct without thinking that there was an  
9 attorney-client relationship? It follows inexorably if  
10 there is an attorney-client relationship, there are  
11 duties.

12 THE COURT: Okay.

13 MR. GOULD: Do you have any questions on  
14 the Consumer Protection Act?

15 THE COURT: Yes. How can the damages that  
16 flow from the allegation of double billing be everything  
17 here if it was paid? I don't see that in there.

18 MR. GOULD: Because RCW 19.86, which  
19 mandates the liberal construction of a Consumer Protection  
20 Act, you do not have, as we've cited to you in our brief,  
21 privity. There does not have to be privity. Rather,  
22 there has to be damage from the alleged unfair and  
23 deceptive acts or practices. Short & Cressman v.  
24 Demopolis, "Unfair or deceptive acts or practices in the  
25 entrepreneurial aspects of the practice of law" --

1 If you'll just bear with me one second.

2 THE COURT: I'm not interrupting you.

3 MR. GOULD: -- "the way an attorney  
4 obtains, retains, bills and discharges clients." That's  
5 awfully close to a quote of Short & Cressman v. Demopolis.  
6 We have that here under a CR 56 standard.

7 He did engage for purposes of this motion in double  
8 billing. What damages? The Consumer Protection Act, just  
9 as the Washington State Jurisprudence on Legal  
10 Malpractice, requires there to be a nexus, a proximate  
11 cause between the unfair and deceptive acts or practice  
12 and the damage.

13 The damages happen to be similar, if not identical  
14 in both causes of action, but it supports both causes of  
15 action. Because of his greed, because of his failure to  
16 identify the client, because of his negligent  
17 misrepresentations, because of his legal malpractice, we  
18 have been involved in litigation with the plaintiffs. It  
19 has cost my client over \$80,000. That's the nexus.

20 THE COURT: I can see the argument that  
21 because of his misrepresentation and malpractice you get  
22 all this, but because of double billing you get all this?

23 MR. GOULD: Because it's a question of fact  
24 for the Trier of Fact. What are the damages proximately  
25 caused? That's not, with all due respect, a legal issue

1 for the Court, rather has there been a sufficiency of the  
2 evidence to allow that question, what are those damages to  
3 go before the Finder of Fact?

4 Do you have any other questions that I might attempt  
5 to answer?

6 THE COURT: I do not. Thank you.

7 MR. GOULD: I thank you for your attention.

8 THE COURT: Thank you.

9 Any reply?

10 MR. KESTLE: I have nothing further, Your  
11 Honor.

12 THE COURT: Okay. Let's move on to the  
13 other one.

14 MR. KESTLE: Okay. Your Honor, so this is  
15 the --

16 THE COURT: Ordals.

17 MR. KESTLE: -- the motion to dismiss the  
18 Ordal plaintiffs' claims. The Ordal plaintiffs have two  
19 claims. One is negligent misrepresentation. The second  
20 is legal malpractice.

21 Both parties agree for -- Let's talk about  
22 negligent misrepresentation first. Both parties agree  
23 that Washington state has adopted the Restatement (Second)  
24 of Torts §552, the negligent misrepresentation. Both  
25 parties agree on in the Haberman decision it laid out

1 three circumstances in which a party can be liable for  
2 negligent misrepresentation.

3 Both parties agree that those three circumstances --

4 THE COURT: Right.

5 MR. KESTLE: -- are what we're looking at.

6 And those three circumstances are in this case either the  
7 Adams had knowledge of the Ordal plaintiffs' reliance on  
8 his letter, that Adams sought to influence a group with  
9 his letter, and the Ordal plaintiffs happened to be a  
10 member of that group; or that Adams had special reason to  
11 know that some member of the limited group -- well, would  
12 rely on it, and the Ordal plaintiffs happen to be members  
13 of some limited group that would rely on this letter. So  
14 those are the three circumstances.

15 And the key in all of these is what did Adams know  
16 and intend when he wrote the letter? That's the key for  
17 all three of these. So the first is did Adams have  
18 knowledge of the Ordal plaintiffs' reliance on his letter?  
19 Well, this kind of goes back to the argument I just made  
20 for the other motion. He didn't know they existed. So  
21 no, he didn't --

22 THE COURT: Yes, except if you read that  
23 case -- and counsel puts it -- cites more of the quotes in  
24 his brief -- you don't have to know the specifics of who  
25 you're writing it to. What's your intent? Your intent

1 certainly is to have that letter be relied on.

2 MR. KESTLE: Agree. I think --

3 THE COURT: By an institution or someone  
4 like this.

5 MR. KESTLE: Okay. And I think, however,  
6 that in this case, for this particular factor, did he have  
7 knowledge of the specific injured party's reliance? So  
8 for this one factor, no. He wrote a letter to Greenway  
9 Lenders, LLC. He didn't know the Ordal plaintiffs  
10 existed. He did not have specific knowledge or knowledge  
11 of the specific parties' reliance on his letter. So he  
12 sends out the letter. He doesn't know they're relying on  
13 it. He didn't learn that they relied on it until all this  
14 came up when Ron Choi's fraud was discovered.

15 The second circumstance is did Adams seek to  
16 influence a group, and were the Ordal plaintiffs a member  
17 of that group? And again, this goes to the key is what  
18 did Adams know and intend when he wrote the letter? He  
19 wrote the letter. He sent it to Greenway Lenders, LLC.  
20 That's the only communication he had with Greenway Lenders  
21 outside of his discussions with Ron Choi.

22 Nobody from Greenway Lenders contacted him and said,  
23 "Hey, we're going to sell participation interests." Ron  
24 Choi didn't tell them, "Hey, these guys are going to sell  
25 participation interests." So there's a group that's going

1 to be -- You know, Greenway is going to get the letter and  
2 use it later --

3 THE COURT: Sure.

4 MR. KESTLE: -- for somebody else.

5 Adams did not seek to influence a group. He sought  
6 to influence an LLC, which is a distinct legal entity.  
7 Greenway Lenders was, in fact, an LLC at the time, so the  
8 second circumstance is in play here.

9 Third, did Adams have special reason to know that  
10 some member of the limited group would rely on the  
11 information? And the Ordal plaintiffs came back in their  
12 response brief and said that, "Hey, this guy works in real  
13 estate; therefore, he had to know that, you know, either  
14 this was likely or this could have been," or something  
15 like that.

16 Chris Adams had been practicing for five years, in  
17 the declaration and reply.

18 THE COURT: Right, I saw that. Do you  
19 think that's a question of fact, of whether that's  
20 reasonable to think that someone who has been in real  
21 estate five years should know that?

22 MR. KESTLE: I don't think it's a question  
23 of fact, given what Chris Adams has said on the record. He  
24 didn't know that this was something that hard money  
25 lenders do.

1 THE COURT: I guess whether he should have  
2 known. I mean --

3 MR. KESTLE: What would --

4 THE COURT: -- yeah, he doesn't say he  
5 knew. He says in the declaration he didn't.

6 MR. KESTLE: So --

7 THE COURT: But do you think this is a  
8 question of fact that he should have known that, that this  
9 is a typical thing on hard lending money?

10 MR. KESTLE: We have in the record somebody  
11 who has been doing this for 35 years that says this is  
12 what happens sometimes in these transactions.

13 I mean, given the fact that Chris Adams said he had  
14 no idea this happens, I don't think it's a question of  
15 fact at all. Should he have known based on what? What is  
16 that based on, because some lawyer who has practiced 35  
17 years knows that it happens? I just don't think there's a  
18 question of fact on that issue at all.

19 The only evidence before you is that Chris Adams  
20 didn't know. He's a young attorney who hadn't been  
21 involved in transactions like this, and he simply didn't  
22 know. So he didn't have reason, special -- And the  
23 language is, "Did he have special reason to know?" And to  
24 me that means is there something about his involvement  
25 with Ron Choi or with Greenway Lenders that gave him

1 special reason to know that something like this was going  
2 to happen, that Greenway Lenders was going to turn around,  
3 securitize the mortgage, sell it off to other people? Did  
4 he have special reason to know?

5 There's no evidence in the record that he had  
6 special reason to know that that was going to happen, so I  
7 don't think that first circumstance is met in this case,  
8 either. So that's it for negligent misrepresentation.

9 THE COURT: And what about their argument  
10 that they're really the real parties of interest? I mean,  
11 they were involved before the loan went out, and --

12 MR. KESTLE: They're different legal  
13 entities. They entered into contracts with Greenway  
14 Lenders, each of them, to buy a piece of the loan.  
15 Chris Adams had no idea about this. I mean, they're  
16 parties to a different transaction than the one that  
17 Chris Adams thought that he was writing the letter for, a  
18 loan from Greenway Lenders to Ron Choi.

19 So I mean, they certainly have a right to bring this  
20 suit, but I don't think under the three circumstances  
21 outlined in Haberman that they don't -- They don't meet  
22 any of those factors, so -- But I don't think that  
23 argument gets them anywhere.

24 THE COURT: Okay. Thank you.

25 MR. KESTLE: Oh, and then there's the legal

1 malpractice --

2 THE COURT: No. Yeah, I understand.

3 MR. KESTLE: -- cause of action. And  
4 again, it's the same.

5 THE COURT: Trask.

6 MR. KESTLE: We do the Trask analysis  
7 again.

8 So again, did Ron Choi intend to benefit these  
9 people? We don't know that Ron Choi even knew that they  
10 existed. The same with Chris Adams, he definitely didn't  
11 know that they existed. You can't owe a duty under a  
12 legal malpractice theory to a party you don't even know  
13 exists.

14 Chris Adams didn't intend to benefit the Ordal  
15 plaintiffs. Ron Choi didn't, either, and that claim  
16 should be dismissed.

17 THE COURT: Let me ask you, this kind of  
18 fits to both of the claims on legal malpractice. If you  
19 look at Trask -- And I know it's not one of the factors,  
20 but they also in the case talk about -- I'm trying to  
21 think how exactly they phrase it -- but if the  
22 beneficiaries could not recover from the attorney's  
23 alleged negligence, no one could. And they go into this  
24 analysis essentially of does the party have a different  
25 cause of action that they could bring?

1           And that's really what this whole little section of  
2 four goes into. It's seeming to say -- Even though I  
3 appreciate it's not in their factors, but it's seeming to  
4 say can they get relief in another way, or do they need  
5 legal malpractice?

6           MR. KESTLE: Was that quote from -- that's  
7 --

8           THE COURT: It's right in Trask.

9           MR. KESTLE: That's from Trask.

10          THE COURT: Yeah, it's right from Trask.

11          MR. KESTLE: Trask is where the estate  
12 beneficiaries are -- Well, and I'm sorry. Is that the  
13 portion where the Court is actually quoting from a  
14 different case?

15          THE COURT: It's right after the multi-  
16 factor analysis; and then yeah, they're talking about  
17 Stangland; but then it goes into, "In finding a duty to  
18 the beneficiaries under the multifactor balancing test, we  
19 recognize, quote, 'If the beneficiaries could not recovery  
20 from the attorney's alleged negligence, no one could.'"   
21 That's from Stangland.

22          MR. KESTLE: Right.

23          THE COURT: But then it talks about the  
24 rationale --

25          MR. KESTLE: And Stangland predates that.

1 THE COURT: -- in the case.

2 MR. KESTLE: Stangland was using the old  
3 multifactor balancing test.

4 THE COURT: Right. But it seems to argue  
5 that somehow that -- and I appreciate, as I say, it's not  
6 in the factors, but it seems to argue somehow that a Court  
7 should be looking at whether they have a different cause  
8 of action or not. And I was just curious what you thought  
9 of that.

10 MR. KESTLE: Well, I don't think that's the  
11 case. I mean, I think Trask plays out here's the test the  
12 courts are supposed to use to determine whether an  
13 attorney owes a duty to a non-client third party.

14 If they have a separate cause of action, neither of  
15 the parties in this case have argued one that -- Well, --

16 THE COURT: Well, we know here they would.  
17 I mean, --

18 MR. KESTLE: They've done CPA and negligent  
19 misrepresentation.

20 THE COURT: Right.

21 MR. KESTLE: But for legal malpractice you  
22 follow the Trask factors.

23 THE COURT: Well, I know. It just -- It  
24 goes into explaining why it has those factors, and it goes  
25 into that one reasoning. And then it goes into the

1 second, which is essentially would a third party have a  
2 conflict of interest. And I mean, it's kind of explaining  
3 what the policies are of the factors.

4 MR. KESTLE: Right. And that --

5 THE COURT: Anyway.

6 MR. KESTLE: I think it goes beyond just  
7 looking at that first factor, and all they're arguing is  
8 have you satisfied the threshold inquiry in this case.

9 THE COURT: Right. Okay. I understand  
10 your argument. Thank you.

11 MR. PETERSON: May it please the Court,  
12 Tom Peterson on behalf of the Ordal plaintiffs.

13 THE COURT: Good morning.

14 MR. PETERSON: Adams provided a false  
15 letter for the purpose of inducing a lender to loan money  
16 to the Chois. The Ordals are the lenders. They did loan  
17 money to the Chois, and they were injured.

18 Plaintiff -- or counsel starts out the brief with  
19 the statement that the Ordal plaintiffs have no standing  
20 to bring this lawsuit, so let me talk about standing just  
21 for a minute. First of all, the plaintiffs are the real  
22 parties in interest. From the day that Adams wrote the  
23 letter -- in fact, before the date he wrote the letter,  
24 the Ordal plaintiffs were lined up to be the lenders in  
25 this loan. That was on October 3rd the first contact was

1 made.

2 On October 6 the letter was written. That was the  
3 day that John Hoss sent the email to Ordal stating, you  
4 know, "We're gathering the documents together. We'll send  
5 them to you," and then about two weeks later sent all the  
6 documents, including the letter. And ultimately they  
7 funded the loan before they paid --

8 THE COURT: I understand the facts, but  
9 legally they're different entities, are they not?

10 MR. PETERSON: They are different entities,  
11 so -- But the question for standing -- and we can talk  
12 about that issue again with respect to malpractice and  
13 with respect to negligent misrepresentation, but however  
14 you want to do it --

15 But as far as standing is concerned, the issue, the  
16 focus is who is the real party in interest? Who has  
17 actually been injured? And the entity doesn't matter in  
18 that context as far as standing is concerned. And under  
19 CR 17A the action shall be prosecuted in the name of the  
20 real party --

21 THE COURT: Right.

22 MR. PETERSON: -- in interest who was  
23 injured.

24 THE COURT: Right.

25 MR. PETERSON: And so if the argument is

1 and the stated argument is that, "No, no. We wrote a  
2 letter to Greenway. If anybody has got a claim here, it's  
3 Greenway, not Ordal," well, then that's a clear case that  
4 arises under 17A in which they would provide an objection.  
5 Greenway would be brought in as a party, and I'm sure  
6 Ordal could sue Greenway. Greenway could then sue Adams  
7 and so on.

8 But we don't think that that is what 17A is  
9 requiring in this case. Initially we think Ordal is the  
10 plaintiff with standing; and because they are the ones  
11 that made the loan, they were the ones that relied on the  
12 letter, made the loan and lost the money.

13 But if -- if it was the case that Greenway was to be  
14 brought in, then under 17A the case isn't dismissed.  
15 Rather, they have the opportunity to make an objection.  
16 We have an opportunity to state why we're the real party  
17 in interest. If not, then the opportunity to bring in  
18 real parties in interest to continue to prosecute the  
19 case. So the solution is not to dismiss the claim under  
20 17A.

21 Standing is a little bit different. There the focus  
22 is on the existence of an injury, and that's the  
23 dispositive factor. And again, here clearly the parties  
24 that were injured are the lenders, the Ordals, the  
25 plaintiffs that were injured by Adams' negligence.

1           Furthermore, again, along with the argument of  
2 standing, they are -- to the extent that the question is  
3 well, Greenway actually was the person that communicated.  
4 Ordal is, if nothing else, the successor in interest to  
5 all of Greenway's rights, and for that matter they are an  
6 assignee of the loan and the deed of trust. They can be  
7 an assignee of a malpractice claim as well, and that is an  
8 analysis that a Court will look at to determine whether  
9 standing is present.

10           Now, regarding the specific claims, negligent  
11 misrepresentation. I know the Court has looked at the  
12 Restatement, but in order to make it really easy --

13           THE COURT: Thank you.

14           MR. PETERSON: -- I have a copy of it for  
15 you.

16           THE COURT: Thank you.

17           MR. PETERSON: So the Restatement has been  
18 adopted in Washington, and a number of cases state so.  
19 One is ESCA v. KPMG. And the standards are outlined here  
20 in bold on the handout that I've given to you.

21           And what we're focusing on today are the exceptions.  
22 I mean, there's no question that this is a person in the  
23 course of business provided --

24           THE COURT: Sure.

25           MR. PETERSON: You know, to be compensated

1 for, provided the erroneous information and so on and so  
2 forth. The question is whether there is an exception  
3 under A or B.

4 And so A focuses on whether the person is one of a  
5 limited group of persons for whose benefit and guidance he  
6 intends to supply the information or knows that he is the  
7 recipient to supply it. And what the comments state on  
8 page four make it very clear that the maker should not --  
9 does not need to have any particular person in mind or  
10 even a probable recipient of the information.

11 In other words, it is not required that the person  
12 who is to become the plaintiff be identified or known to  
13 the defendant as an individual when the information is  
14 supplied.

15 MR. KESTLE: I'm sorry, which comment was  
16 that?

17 MR. PETERSON: That was comment to  
18 Subsection 2. It's H.

19 MR. KESTLE: Thank you.

20 THE COURT: So the last paragraph, I think,  
21 on four; right? Or the second, the middle?

22 MR. PETERSON: Page 4. Actually, I was  
23 reading the second paragraph under H.

24 Under this section, as in the case of fraudulent  
25 misrepresentation, it goes on to say, "In other words, it

1 is not required that the person who is to become the  
2 plaintiff be identified or known to the defendant as an  
3 individual when the information is supplied. It is enough  
4 that the maker of the representation intends to reach and  
5 influence either a particular person or persons known to  
6 him, or a group or class of persons distinct from a much  
7 larger class who might reasonably be expected sooner or  
8 later to have access to the information."

9 And so what that means is that what is the class  
10 that this is intended to provide, and that class is the  
11 lender. Who is the lender here?

12 The facts of this case are clear, and counsel has  
13 made it clear in his own argument and brief, is that  
14 Adams, he didn't know Greenway from Adam, no pun intended.  
15 He had no -- He had no contact with them. He didn't -- He  
16 knew they were a hard money lender. I don't know why he  
17 knew that, but he didn't rely on their specific rules or  
18 regulations or procedures or status in the community or  
19 anything. Greenway was nothing more than a name, a name  
20 on a letter.

21 Who he intended to influence was the lender, and  
22 that lender could have been Olympic. It could have been  
23 Greenway. It could have been Seafirst. He was  
24 influencing the lender. Well, as it so happens, the  
25 lender that he was seeking to influence here from day one

1 was Robert Ordal and the other plaintiffs.

2 It goes on to say in the next paragraph, I believe  
3 the second sentence, "In many situations the identity of  
4 the person for whose guidance the information is supplied  
5 is of no moment to the person who supplies it, although  
6 the number and character of the persons to be reached and  
7 influenced and the nature and extent of the transaction  
8 for which guidance is furnished may be vitally important."

9 And I will acknowledge that it is vitally important  
10 to Adams that this letter go to a lender. So what this  
11 concern is about something being disseminated beyond the  
12 party to whom it's intended are situations like, you know,  
13 this lender ends up in, you know, another loan file some  
14 day, or maybe it's given to --

15 THE COURT: Right. Or it bundles and it  
16 keeps moving on; right?

17 MR. PETERSON: I think that's even --  
18 Potentially there's liability there, but even beyond that  
19 let's assume that it end up in the hands of a real estate  
20 agent; and the real estate agent is now using this letter  
21 to establish a connection between Adams and Choi, or  
22 something like that. Or it ends up in some relative's  
23 hands. I mean, obviously, you know, a letter like this  
24 happens in the case of title insurance policies. They get  
25 disseminated, and people who look at them and rely upon

1 them for what the state of title is, even though they're  
2 not the insured.

3 You know, so information, I could see an appraisal  
4 getting disseminated way beyond the bank that the  
5 appraisal is provided to or the party that is buying it.  
6 And so it ends up, you know, a couple years later in the  
7 hands of some other potential buyer, and so there is a  
8 policy reason for cutting it off at some point.

9 Well, certainly the actual lender, particularly when  
10 the person writing the letter hasn't a clue, anything more  
11 except for a name on a letter. Certainly the actual  
12 lender is the person who is intended to be the beneficiary  
13 of the estate. Now, the case law bears this out.

14 Oh, I should say the other -- the other requirement  
15 is B, and that is -- I think that's informative here  
16 because the second requirement is that it must be through  
17 reliance upon it in a transaction that he intends the  
18 information to influence or knows the recipient so intends  
19 or in a substantially similar transaction.

20 And so I think this is important because certainly  
21 clearly Adams knew this letter was intended for a loan  
22 transaction. It was intended to induce a lender to loan  
23 money to the Chois, so he understood this transaction.  
24 And indeed, this letter was provided to the very lender  
25 who loaned the money to the Chois. So both are very

1 applicable.

2 And there's just one more comment, and this is  
3 comment J, the very -- second to the last sentence that I  
4 think is informative on this point. And the question --

5 THE COURT: Wait. I'm sorry. What page  
6 are you on?

7 MR. PETERSON: Excuse me. Page six under  
8 comment J.

9 THE COURT: Got it.

10 MR. PETERSON: The second to the last  
11 sentence before the illustration, "And the question  
12 becomes one of whether the departure from the contemplated  
13 transaction is so major and so significant that it cannot  
14 be regarded as essentially the same transaction."

15 So is it significant that Ordal loaned the money  
16 rather than Greenway? No. Certainly not as to Adams,  
17 because Adams didn't have a clue who Greenway was. It was  
18 a lender. It could have been any lender. And indeed he  
19 provided that loan to the lender -- or that letter to the  
20 lender who would be making the loan in order to induce  
21 that lender to make the loan, and that's exactly what  
22 happened. So the requirements of the Restatement are  
23 there.

24 Now, in Haberman, which counsel has talked about,  
25 you know, he talked about the standard and is trying to

1 cram it into the ones in Haberman; but there's important  
2 language in Haberman that the Court needs to focus on, and  
3 that is Haberman says, "It is not necessary that the  
4 plaintiff be identified or known to the defendant."

5 So counsel focuses on Greenway. The letter says  
6 Greenway. By the way, the letter says Greenway  
7 representative.

8 THE COURT: Yeah, I saw that.

9 MR. PETERSON: And I think that's  
10 significant because it's just kind of this, "Hey, somebody  
11 over there at Greenway, you're going to read this letter."  
12 And it wouldn't matter to -- He doesn't know who that  
13 person is. It could be anybody. In fact, it was read by  
14 someone. It was relied upon by someone. That someone  
15 happened to be Bob Ordal.

16 The Court says, "It is enough that the maker  
17 intended to influence a group or class of persons," and my  
18 contention is that he did. He intended to induce a  
19 lender -- the lender -- in this transaction, and he indeed  
20 did that.

21 So again, Adams had no particular knowledge about  
22 Greenway. It was just a name. He intended to influence  
23 the actual lender, and in that case -- in this case -- it  
24 was Choi -- I mean it was Ordal. And again, the lender  
25 from the inception. This isn't a case where it was sold

1 downstream years later or months later or even a day  
2 later. The loan came from Choi ab initio -- or I mean,  
3 excuse me, from Ordal, ab initio.

4 THE COURT: I was following you. Don't  
5 worry.

6 MR. PETERSON: Thank you.

7 Another case that's important is the Schaaf v.  
8 Highfield case. This is the one where the appraiser  
9 provides an appraisal to the bank. The client of the  
10 appraiser was the lender, but the buyer of the property  
11 relied upon -- and the Court held that privity is no  
12 defense. It's a similar situation.

13 In that case there is a good discussion about policy  
14 and issues, why there is that limitation, which I talked  
15 about a little bit earlier, and that is the indeterminate  
16 liability.

17 THE COURT: Right.

18 MR. PETERSON: But here the Court held that  
19 the buyer is the most proximal person there could possibly  
20 be in this appraisal/lender situation, and I offer to the  
21 Court what could -- I think there is something more  
22 proximal, and that is where there's a purported lender  
23 versus the actual lender, a name -- and again, a faceless,  
24 named entity, versus the actual party who really did loan  
25 the money. I would venture to say that's even more

1 proximal than the fact pattern in Schaaf v. Highfield.

2 And then the ESCA v. KPMG case I think is  
3 informative as well. This case involved two reports.  
4 There was a draft report provided by the auditor, and then  
5 there was a final report provided by the auditor. And in  
6 that case the jury -- and the Court affirmed -- the  
7 liability of KPMG, the accountants, to Seafirst Bank, on  
8 the final audit based on negligent misrepresentation. And  
9 they don't go into a lot of discussion about that, but the  
10 question about whether Seafirst, who was not the recipient  
11 of the final report -- KPMG -- I mean ESCA was the client  
12 who received the report. That was understood for the  
13 final report.

14 And so what is distinguishing, which is a fact that  
15 doesn't apply here, is that in the draft report the Court  
16 held that Seafirst did not have a claim under the  
17 negligent misrepresentation law because KPMG clearly  
18 intended that to be a draft report, intended it to be for  
19 the purposes of KPMG -- or ESCA only. That was, you know,  
20 labeled a draft report. It was for discussion purposes.  
21 The circumstances were such that the clear intent is that  
22 it was not a report that would be disseminated beyond the  
23 customer here.

24 And so I think this Court really -- or that case  
25 really focuses on the bright line. The bright line is

1 whether Adams intended this to be truly just for Greenway  
2 or whether this was a letter that he intended to supply to  
3 Greenway in the sense of it being a name for a lender.

4 THE COURT: I understand your argument.  
5 Let's -- Let's move on to the -- just because of time --  
6 to legal malpractice.

7 MR. PETERSON: All right. So under  
8 Trask v. Butler there are five elements, and I think we  
9 can agree that four of them aren't being argued here  
10 today; that they're conceding two, three, four and five.

11 So the one issue is whether it was intended to  
12 benefit the plaintiff, and what counsel focuses too  
13 heavily on is the part of that sentence, "The plaintiff,"  
14 versus -- and specifically very narrowly focusing on who  
15 is the plaintiff, and I don't think that the intention in  
16 Trask v. Butler is that narrow.

17 I think first of all, the focus is on intent to  
18 benefit someone other than the client. I think that is  
19 what is the focus of that sentence. In other words, the  
20 attorney has a client relationship. Obviously, the whole  
21 point of the question --

22 THE COURT: Right, it's the third party.

23 MR. PETERSON: It's the third party.

24 THE COURT: Sure.

25 MR. PETERSON: So it was intended to

1 benefit the third party, and I think the important part of  
2 the analysis is really was the intent to benefit the third  
3 party versus the intent to benefit the client. Not was it  
4 intended to benefit this specific person versus that  
5 specific person versus that specific person. The  
6 distinction is the third party versus the client. That's  
7 the important distinction here.

8           And here Greenway obviously was the intended  
9 beneficiary. Greenway was the intended beneficiary  
10 because the letter is addressed to Greenway. So vis-a-vis  
11 the client, I don't think there could be any argument that  
12 this is a classic Trask v. Butler situation where Adams  
13 was asked to write a letter to influence some third party  
14 to make a decision.

15           I don't believe, though, and I think counsel places  
16 way too much emphasis on the fact that the letter was  
17 addressed to a Greenway representative versus -- and  
18 whether that is a significant factor that distinguishes it  
19 from and makes this case distinguishable from Trask.

20           Adams, the intent clearly was to benefit the lender,  
21 whoever that might be, and cause that lender to loan money  
22 to the Chois. Ordal was the lender. As I say, Greenway  
23 was just a name. There was no particular significance in  
24 providing the lender -- the letter to Greenway or to  
25 Ordal. There was no history with Greenway. There was

1 no -- It was just a name on a letter.

2 And the point is that it wasn't the client. It was  
3 to influence that lender, and indeed they did. On the  
4 basis of that letter Ordal relied upon it, read it,  
5 determined A) that there was a business purpose of the  
6 loan; B) that oh, great, these people have sat down and  
7 met with a lawyer. So I can be confident that these are  
8 real people that really exist. They're, you know,  
9 sitting, meeting with their lawyer, reviewing documents,  
10 and indeed that was a -- A very high level of confidence  
11 was given to Mr. Ordal and taken by Mr. Ordal in making  
12 this analysis.

13 And that's kind of a jury question, and perhaps a  
14 jury question will come out; but I believe that when the  
15 facts are fully presented in court, that's what it will be  
16 is that there was a clear reliance by the Ordal plaintiffs  
17 on this letter in order to make this loan. It was a key  
18 factor in making this loan.

19 And so for this reason there is a duty under  
20 Trask v. Butler to this third party, the true lender, the  
21 real lender in fact, and this false letter caused direct  
22 and substantial injury to the plaintiffs. So for these  
23 reasons we ask the Court to deny both motions for summary  
24 judgment on both claims. Thank you.

25 THE COURT: Thank you. Reply.

App. A-42

Ordal, et al. v. Choi, et al.

1 MR. KESTLE: Okay. So -- Excuse me. On  
2 negligent misrepresentation, if you try to fit these facts  
3 into the Haberman, those three factors, they don't fit,  
4 and that's all recognized. There is no --

5 THE COURT: Well, they do if you look at  
6 them as the true lender or the party in fact. I mean,  
7 that's essentially what it boils down to, really, isn't  
8 it?

9 MR. KESTLE: Okay, but this -- But the  
10 lender, the true lender is a party that entered into  
11 separate contractual relationships with the party to whom  
12 Adams sent the letter. Who knows what was contained in  
13 the promotional materials from Greenway Lenders to the  
14 others. They say that the letter was in there, and they  
15 relied on it. This is a separate transaction.

16 And under the Restatement the key is was Adams --  
17 It's what Adams knew and intended. Was he manifestly  
18 aware that his letter was going to be used in promotional  
19 materials for some participation interest to third  
20 parties? He didn't. So this idea that they are the  
21 alter-ego or somehow they're the lenders and they're the  
22 ones that Adams meant to influence or knew that he was  
23 going to influence, it just doesn't fit. So that's the  
24 argument there.

25 On the legal malpractice argument, even if you get

1 past -- even if you get past the fact that -- Well, even  
2 if you accept this argument that they're really the true  
3 lender and therefore Adams meant to benefit them, I think  
4 Greenway or the Ordal plaintiffs, the most that they could  
5 qualify as is incidental beneficiaries to Adams'  
6 relationship with Ron Choi.

7 Just like the estate beneficiaries in Trask and the  
8 plaintiffs in the Stewart Title case, Adams didn't -- The  
9 sole purpose wasn't to benefit another party. It was to  
10 help his client get a loan. So at most they're incidental  
11 beneficiaries, and under Trask there is no duty.

12 Thank you.

13 THE COURT: All right. Thank you very  
14 much.

15 All right. We are here today on two different  
16 summary judgments. I'm going to take Ordal first, just --

17 Well, I'll tell you right now I'm actually going to  
18 reserve on Choi, and I want to think about it over the  
19 weekend. I had some preliminary thoughts when I came out  
20 here, but you've made me reflect. So I just want to look  
21 at it a little bit, and I will, hopefully the beginning of  
22 next week.

23 Okay. On Ordal I am ready to rule. We are here.  
24 There is a summary judgment. As I said, I read all the  
25 documents. With respect to the misrepresentation -- Well,

1 I am denying summary judgment on both.

2 With respect to the misrepresentation claims, I do  
3 think that the Haberman factors and frankly the  
4 Restatement factors are met. I think if you look at them  
5 as the lenders, there's no way not to have these factors  
6 met. I think it really fits down to who was the Adams --  
7 what was his intent in writing the letter? And it's to  
8 influence the lender, and that's who the Ordals were.

9 And so with respect to the Haberman factors, when  
10 you say the plaintiff is a member of the group the  
11 defendants sought to influence, I think that's easily met,  
12 and it's the same for the Restatements. The person or  
13 limited persons for whom benefit and guidance he intends  
14 to supply the information. I think that's the lenders.  
15 And through reliance upon it, the transaction will be. So  
16 in any respect, I think those factors are met, and I am  
17 denying the summary judgment.

18 As I say on the Choi case, I just need to think  
19 about it a little. I'm -- I'm -- I can share with you I'm  
20 having a little issues with the fact that I appreciate  
21 that's who he in essence thought he was dealing with, but  
22 really he thought he was dealing with Ron, who said he is  
23 A and B. But I understand the arguments. I just need  
24 to -- I just need to think about them a little and see how  
25 it all plays out.

1 All right.

2 MR. GOULD: May I address the Court?

3 THE COURT: Sure. Of course.

4 MR. GOULD: Your Honor, I have provided to  
5 all counsel a copy of our proposed order denying. May I  
6 approach the bench --

7 THE COURT: Yes.

8 MR. GOULD: -- and provide you with an  
9 original and courtesy copy --

10 THE COURT: Yes, I appreciate that.

11 MR. GOULD: -- of our proposed order.

12 Thank you, Your Honor.

13 THE COURT: I appreciate that.

14 And do you have one as well?

15 MR. KESTLE: I have one that is updated  
16 with --

17 THE COURT: Perfect.

18 MR. KESTLE: -- everything that has been  
19 filed.

20 THE COURT: Perfect. And I'll keep both of  
21 these. And as I said, I will --

22 MR. KESTLE: Oh, sorry.

23 THE COURT: -- try to just look at this  
24 over the weekend and rule by Monday. But I will certainly  
25 rule somewhere along the line next week. If it happens

1 Monday, I can't 100 percent say that, but it will happen  
2 by the end of the week. Thank you.

3 MR. KESTLE: Thank you.

4 THE COURT: And then do you have an order  
5 on Ordal?

6 (Inaudible comment.)

7 I have to say, because it's completely different  
8 issues, but when I went back to the ECR to look at what  
9 happened in this case, the summary judgments on the  
10 insurance company, I mean, you had all kinds of issues in  
11 this case.

12 MR. KESTLE: We're new.

13 THE COURT: It's interesting. Huh?

14 MR. KESTLE: We're new to this one.

15 THE COURT: Oh, I don't know who is all  
16 who, to be honest, but there's been a lot going on here.  
17 What's your trial date?

18 MR. KESTLE: Oh, there was just a motion.

19 MR. GOULD: It's in early October,  
20 Your Honor. We've lodged a motion for a continuance,  
21 which was lodged and noted for yesterday without oral  
22 argument.

23 THE COURT: Oh, okay. It hasn't -- I don't  
24 think it's crossed my desk yet. I'll -- I'll get it.

25 Was there an objection?

1 MR. GOULD: No, there was no objection,  
2 Your Honor.

3 THE COURT: Okay. All right. I'll look at  
4 it. I didn't even know. I had no idea.

5 Okay. I signed the order. Thank you. Have a great  
6 weekend, everybody.

7 MR. KESTLE: Thank you. Your Honor.

8 MR. PETERSON: Thank you, Your Honor.

9 END OF PROCEEDINGS: 11:54 a.m.

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C E R T I F I C A T E

STATE OF WASHINGTON )  
 ) SS  
County of King )

I, the undersigned Washington Certified Court Reporter, pursuant to RCW 5.28.010 authorized to administer oaths and affirmations in and for the State of Washington, do hereby certify:

That the annexed and foregoing proceedings were transcribed to the best of my ability from a digital tape provided to me at the request of the Law Office of Robert B. Gould. I was not present at the proceedings held on March 28, 2014.

I further certify that I am not a relative or an employee or attorney or counsel of any of the parties to said action, or a relative or employee of any such attorney or counsel, and that I am not financially interested in the said action or the outcome thereof.

I further certify that the foregoing proceedings, as transcribed, is a full, true and correct transcript of the testimony, including questions and answers and all objections, motions and exceptions of counsel made and taken at the time of the foregoing examination and was prepared pursuant to Washington Administrative Code 308-14-135, the transcript preparation format guideline, to the best of my ability as a transcriptionist.

IN WITNESS WHEREOF, I have hereunto set my hand this 17th day of June, 2014.

*Jeanne M. Gersten*

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