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No. 65668-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Respondents/Cross-Appellants.

v.

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

Appellants/Cross-Respondents.

REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS
– CROSS APPEAL

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COURT OF APPEALS
DIVISION I
CLERK OF COURT

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I. INTRODUCTION.

Russell, in his Response, not only mischaracterizes the holding in *Shoemake v. Ferrer*, 168 Wn.2d 193, 225 P.3d 990 (2010), but also the **Restatement (Third) Law Governing Lawyers**. Russell incorrectly argues that the failure of the trial court to allow the trier of fact to consider Russell's hourly fees paid results in a windfall to the Edlemans. The opposite is true.

The jury understood the inherent inequity in Russell being able to keep his fees for services negligently performed. The inquiries by the jury as a matter of mathematics and logic can only be regarding Russell's attorney's fees. The trial court by its statement to the jury not only commented on the evidence, but failed in refusing plaintiffs' damage instruction to follow the guiding principle of tort law to make the injured party whole.

II. REPLY TO RUSSELL.

A. **The Hourly Fees Paid By The Edlemans To Russell As A Legal Item Of Damage Present A Question Of Law For Both The Trial Court And This Court.**

Russell argues (Russell Br., pp. 31-36) that the amount of attorney's fees paid by the Edlemans in fact are not "an element of damages in a malpractice case alleging litigation negligence". Russell is wrong for a variety of reasons and mischaracterizes the case as "litigation

negligence”.

This argument ignores the fact that Russell’s negligence started from the beginning of his representation and that initial negligence in refusing to cooperate with the Normandy Park Community Club inexorably led to the underlying trial and its appeal.

Contrary to Russell’s argument that hourly legal fees paid for negligent services is not a proper legal element of damage is to be found in

Shoemake. In *Shoemake*, the Court stated:

Generally, the appropriate measure of damages for a given cause of action is a question of law, reviewed de novo.

Shoemake, supra, at ¶9, citing *Womack v. Von Rardon*, 133 Wn.App. 254, 263, 135 P.3d 542 (2006) (citing *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 843, 726 P.2d 8 (1986)).

B. This Court Has Given Guidance To Attorney’s Fees As Damages In *Jacob’s Meadow Owners Association v. Plateau 44 II, LLC*, 139 Wn.App. 743, 162 P.3d 1153 (2007).

As discussed in the Edleman’ opening brief, *Flint v. Hart*, 82 Wn.App. 209, 917 P.2d 590 (1996) speaks to the issue of attorney’s fees as damages. (Edleman Br. of Resp., pp.31-35).

This Court in *Jacob’s Meadow*, (¶33), relying in part on *Flint* has

addressed the same issue of attorney's fees as a damage item:

When the natural and proximate consequences of a wrongful act by defendant involve plaintiff in litigation with others, there may, as a general rule, be a *recovery of damages* for the reasonable expense incurred in the litigation, *including compensation for attorneys' fees*.

Jacob's Meadow, supra, ¶35.

This Court, in Footnote 6 in *Jacob's Meadow* observed that such an approach “. . . is the approach of the majority of courts in other jurisdictions.” In the case at bar, the jury found that Russell's approach and strategy was flawed from the very beginning in refusing to cooperate with the Community Club. (Ex. 8) (CP 287). It is the “natural and proximate consequence[s]” of such an approach that led to the Edlemans being involved in litigation with others. Not only does *Flint v. Hart* belie Russell's position, but *Jacob's Meadow Owners Association* from this Court additionally belies his position.

C. Plaintiffs' Proposed Instruction On Damages Is A Correct Statement Of The Law (WPI 30.01.01; WPI 30.02.01 (Modified))

Russell misleadingly states to this Court that plaintiffs' proposed instruction directed the jury to award damages that were in fact disputed. (Russell Br., pp.38-40).

Plaintiffs' proposed Instruction No. 21 (CP 967) on damages was taken directly from Washington Pattern Instruction Nos. 30.01.01 and 30.02.01 (modified). It correctly states the law when it prefaces the instruction with the following words:

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.

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; . . . [Emphasis added.]

The amount of monies in fact paid by Edlemans to Russell after the admission of his billings were never disputed by Russell. (6/11 RP 54-58; 110). This instruction properly left it to the finder of fact, the jury, to determine the amount of monies paid by the Edlemans to Russell that were for services that fell below the standard of care. That is not the directed verdict that Russell tries to argue to this Court.

In light of the principle purpose of our tort law to make injured parties whole, this was and is a correct statement of the law, and is congruous and not in any way incongruous with *Shoemake*.

D. Russell Misconstrues *Shoemake* – *Shoemake* Being The Contingency Side Of Attorney’s Fees As Damages.

Russell argues that Edlemans misread *Shoemake*. Any fair reading of *Shoemake* shows that the primary issue before the Supreme Court in *Shoemake* was whether or not Ferrer, the negligent attorney, could get a credit for his “hypothetical” contingency fee. The Supreme Court quoted from the Court of Appeals as follows:

Crediting the negligent attorney with fees through a mechanistic application of the “American rule” fails to account for the fact that both the negligent attorney’s fees and the fees of replacement counsel are being incurred for the same service. The replacement attorney is required to prove precisely what the negligent attorney failed to prove – that the plaintiff is entitled to recover on the underlying claim.

Shoemake, ¶14, quoting from *Shoemake*, 143 Wn.App. 819, at 829, 182 P.3d 992 (2008).

Russell also misconstrues *Shoemake* and tries to make it simply a breach of fiduciary duty case (Russell Br., pp. 33-34). Again, this ignores

the similarity of *Shoemake* and the case at bar:

But this argument ignores the totality of his **negligent conduct** in representing the Shoemakes, which resulted in the dismissal of their complaint against the driver . . . But this argument disregards the conceptual similarity between fee disputes and legal malpractice cases involving **tortious conduct** by a lawyer. It should make no difference whether the lawsuit arises when the lawyer sues for fees and the client defends on the basis of legal malpractice **or when the client brings an action for legal malpractice in the first instance.** [Emphasis added.]

Shoemake, supra, ¶18.

Based upon bedrock principles of tort law and proximate cause absolutely applicable to a legal malpractice case, but for Russell's negligence, the Edlemans would not have incurred a substantial portion of the \$160,000 actually incurred and paid to Russell for Russell's negligent services.

To analogize, hypothetically if a negligent surgeon would amputate the wrong leg and the surgeon's fees were inadvertently paid by the insurance carrier, would there be any reasonable basis for holding that the surgeon should be allowed to keep the fee? It follows that as the jury intuitively understood to allow Russell to keep those fees results in a windfall to Russell – and a significant monetary damage to the Edlemans.

E. Contrary To The Argument Of Russell, The Restatement (Third) Of Law Governing Lawyers Would Allow The Hourly Fees To Be Considered As Damages.

Russell misstates the **Restatement** saying that a plaintiff in a legal malpractice action may recover attorney's fees paid to the negligent lawyer only ". . . upon entry of a finding that the lawyer has engaged in a serious breach of fiduciary duty." (Russell Br., p.31). In Comment (c) to §37 of the **Restatement**, in addressing the duty to the client owed by the lawyer, the **Restatement** states:

The source of the duty can be civil or criminal law, including, for example, the requirements of an applicable lawyer code or the law of malpractice.

Additionally, as earlier cited in Edleman's brief, Comment (f) to §53 of the **Restatement**, Attorneys Fees As Damages, specifically recognizes that the American Rule:

. . . 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.

The authors of the **Restatement** are simply pointing to Hornbook law on proximate cause and stating that damages flowing as a direct and

proximate result of a defendant lawyer's negligence are and should be recoverable. It was those very damages that the Edlemans were prevented as a matter of law from attempting to recover.

F. Jury Trial On Remand.

Russell states to this Court as follows:

Even if this court holds that the fees paid to Russell are recoverable, contrary to the trial court's finding that the Edlemans were made whole by an award of almost \$1 million and in the absence of a claim for breach of fiduciary duty, the court would be required to remand for a new trial, rather than dissect the undifferentiated general verdict to direct an appellate additur.

(Russell's Br., p.45.)

This Court in *Jacob's Meadow* gives support for Russell's position in this regard. In *Jacob's Meadow*, this Court stated:

As an element of damages, the measure of the recovery of attorney fees pursuant to the indemnification provision must be determined by the trier of fact. When trial is to a jury, therefore, the measure of such damages is a jury question . . . Consistent with these principles, courts in other jurisdictions have held that, when attorney fees are recoverable as an element of damages, the measure of such attorney fees must be determined by the jury.

Jacob's Meadow, supra, ¶¶37, 39.

Should this Court rule as the Edlemans seek that the damage item

of fees actually paid to Russell for services negligently provided is a proper damage item, it is conceded by the Edlemans to be a question for the finder of fact, i.e. the jury. The Edlemans then acknowledge that a “mini trial” should therefore on remand be held on the sole issue of the amount of attorney’s fees paid by the Edlemans to Russell that were for services negligently performed. In this regard, the jury in the “mini trial” could be and should be instructed as to the finding of the predecessor jury, and leaving to the follow-on jury that sole and discrete issue.

III. CONCLUSION

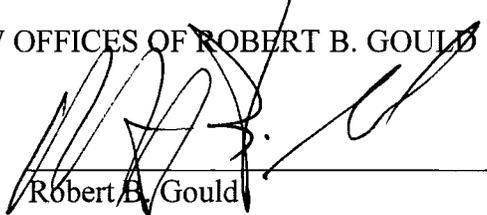
As *Shoemake* makes clear, the paramount duty of our tort law system is to endeavor to make an injured party financially whole. The jury in this case to its credit intuitively saw that in light of the totality of the evidence that they heard, that the amount of attorney’s fees actually paid to Russell by the Edlemans should be considered by the jury as a damage item. Contrary to the position of Russell, to not allow this as a damage item creates an absolute windfall to a tort feisor and an uncompensated damage to the injured client. This Court should not allow a mechanistic incantation of the American Rule to override the paramount duty of making the Edlemans whole.

DATED this 29 day of June, 2011.

Respectfully submitted:

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comprised thereof