No. 312038

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

Rose Townsend Trust for Donald Townsend, et al.
Plaintiff/Appellant,

vs.

Scott R. Smith,
Defendant/Respondent.

REPLY BRIEF OF APPELLANT

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On behalf of Appellant
Rose Townsend Trust for Donald
Townsend, et al.

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I. SUMMARY OF REPLY

The Brief of Respondent fails to adequately address the central point of this Appeal--the trial court's error in dismissing two legal negligence claims against two separate attorneys when at least one claim *had to survive*.

In particular, the trial court held in April 2011 that (1) because the Townsend Trust's attorney, Scott Smith, knew or should have known of a cause of action against Attorney Joseph Delay and that (2) Mr. Smith had a duty to inform the Client of this cause of action, (3) the statute of limitations for any claims against Mr. Delay commenced and ran during Mr. Smith's representation of Townsend Trust, and therefore, (4) any claims against Mr. Delay should be dismissed.

The trial court did not require expert testimony in April 2011 to determine that Mr. Smith was aware of the existence of a legal malpractice cause of action against Mr. Delay. In light of that ruling, expert testimony was not required in the ongoing legal negligence action against Mr. Smith for his failure to advise Townsend Trust of the action against Mr. Delay. To the extent that the court needed further education or testimony about the standard of care for a bench trial, Townsend Trust had listed Attorney Scott Smith (and his expert witnesses) as witnesses for trial. (CP 307).

If Mr. Smith did not know (or should not have known) of a cause of action against Mr. Delay, then he should have argued that to the trial court in April 2011. He did not file any opposing declarations or memoranda to Mr. Delay's motion to dismiss in April 2011. Mr. Smith now belatedly argues that the trial court was *wrong* in its April 2011 decision: "First, the argument assumes that Judge Eitzen's summary judgment ruling in favor of Delay, Curran was legally correct. It was not." [Brief of Respondent, page 18]. However, neither Mr. Smith nor Townsend Trust appealed or sought discretionary review of the trial court's April 2011 decision, so it became the "law of the case."

By contrast to Mr. Smith's belated action, Townsend Trust acted timely when information became available to it about Mr. Smith's prior knowledge about Mr. Delay's negligence. After learning at Mr. Smith's deposition on July 25, 2010 that in the Fall of 2005, Mr. Smith privately considered Mr. Delay to have created a poorly drafted document that would cause problems for the Townsend Trust, Townsend Trust filed the Second Amended Complaint, alleging that the indivisible harm to Townsend Trust from the successive actions of the two attorneys was the loss of the collectible state court judgment worth $83,183.37, plus interest. (CP 51-100). In paragraph 5.2 of Plaintiff's Second Amended Complaint,

Plaintiff alleged joint liability of Mr. Delay and Mr. Smith for the loss of the judgment:

> 5.2 As a proximate result of Defendants' [plural] negligence and/or breach of contractual obligations, Plaintiff Townsend Trust lost the benefit of collecting monies from the Johnston State Judgment in the amount of $83,183.37, plus interest at 12%, commencing on January 22, 1998.

(CP 67, bracket language added).

In short, Mr. Smith clearly knew of a legal negligence remedy against Mr. Delay in the Fall of 2005 related to the loss of the State Court Judgment, and the trial court's ruling in April 2011 has no other logical conclusion.

Mr. Smith's Brief of Respondent attempts to cloud the issue of this Appeal by discussing some of the other admittedly complicated parts of his representation of the Townsend Trust in the later federal bankruptcy matter pertaining to two unrelated federal bankruptcy judgments. Well after he knew in the Fall of 2005 that the Townsend Trust had a legal remedy against Mr. Delay pertaining to the lost State Court Judgment, Mr. Smith attempted to establish priority for those two unrecorded federal bankruptcy judgments. Mr. Smith had been the Townsend Trust's attorney for nearly 20 years, and Mr. Smith had earlier given wrong advice to the Townsend Trust about whether or not those two federal bankruptcy

judgments needed to be recorded with the County Auditor in order to have lien priority in relation to other debtors' claims against a homestead property. (CP 53) (CP 654-656) Mr. Smith apparently believed that "local custom" (i.e., he believed most local attorneys did not think that recording was necessary) trumped the express language of RCW 6.13.090, which states as follows:

> A judgment against the owner of a homestead shall become a lien on the value of the homestead property in excess of the homestead exemption **from the time the judgment creditor records the judgment with the recording officer of the county where the property is located.**

Earlier in Mr. Smith's legal career, this statute did not have this recording requirement, and that may provide some insight as to his error.

At the earlier summary judgment hearing, Mr. Delay argued that Mr. Smith unilaterally chose to forgo the legal malpractice claim against Mr. Delay and instead filed an adversary complaint to establish that the two federal bankruptcy judgments did not have to be recorded in order to have priority:

> **Scott Smith was aware of the issues and risks relative to the 2005 Assignment of Judgment in December of 2005 or January of 2006. Scott Smith determined than rather than pursue a potential legal malpractice claim against Defendant Delay, Curran, Thompson, Pontarolo & Walker, P.S., or advise the Rose Townsend Trust that a legal malpractice claim could be pursued, the different course of**

> **filing a Complaint for Lien Priority was instead instituted and followed by Mr. Smith in behalf of the Rose Townsend Trust. As a result, a potential legal malpractice claim existed in January of 2006, and the three year statute of limitations to bring a legal malpractice claim against Delay, Curran, Thompson, Pontarolo & Walker, P.S. ran in January of 2009.**

(CP 226-227 bold added).

As argued previously, the Townsend Trust itself was not aware that Mr. Smith considered Mr. Delay to have been negligent and the Townsend Trust was not aware that a legal malpractice action existed against Mr. Delay. Co-trustee Robert Moe stated as follows in his April 12, 2011 Declaration:

> I have never been informed by Scott Smith (or anyone at his law firm) that he thought that the July 2005 "Assignment of Judgment" document was poorly written, or that the waiver in the Assignment of Judgment could have negative legal consequences, or that the Townsend Trust had a potential claim against Joe Delay or his law firm.

(CP 194).

While Mr. Smith was successful at the federal District Court level (to Judge Suko, as noted by Mr. Smith in his Brief of Respondent), his advice was proven to be wrong by the Ninth Circuit Court of Appeals. That errant advice regarding the federal judgments, and the subsequent massive legal fees incurred by the Townsend Trust relating to that issue, *was and is separate* from the more straightforward issue about his

knowledge in the Fall of 2005 of a cause of action against Mr. Delay pertaining to the loss of the state court Judgment.

This Court should review the trial court's decision on a de novo basis, because the standard of care is a legal question. The trial court's dismissal should be reversed, and this matter should be remanded for a bench trial.

II. REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Respondent Scott R. Smith documents his involvement as the Townsend Trust's counsel with regard to collection of judgments. However, Mr. Smith had been the Townsend Trust's long term general counsel for nearly two decades, and Mr. Smith's firm had done many various legal matters, including obtaining the valuable 1998 Johnson State Court Judgment worth $83,183.37. (CP 36, 83-87). Mr. Smith's involvement before and after the Townsend Trust's fateful procurement of two unrecorded federal bankruptcy judgments was an unfortunate black mark in an otherwise very successful representation of the Townsend Trust.

The underlying case is not as complicated as portrayed by Respondent Smith in his Statement of the Case. In short, there were four judgments, two that were from a single Washington State court matter, and two obtained from a federal bankruptcy matter. The two state court judgments were obtained by Mr. Smith's firm in 1998, with one judgment being recorded with the Spokane County Auditor (and referred to in the pleadings as the "Johnston State Court Judgment.") (CP 36, 83-87) The other state court judgment was relatively small, and was never recorded. The two federal bankruptcy judgments were procured by the Trust in July 2005. As Mr. Smith acknowledged at his deposition, at all times, the clear intent was for the Townsend Trust to have four judgments against Daryl Johnston. The problem was that the two federal bankruptcy judgments were never recorded with the Spokane County Auditor, and were therefore effectively worthless (contrary to Mr. Smith's advice).

Attorney Joseph Delay created the July 21, 2005 "Assignment of Judgment" document that unintentionally served to destroy the Townsend Trust's ability to collect on the valuable, recorded, Johnston State Court Judgment. The fatal language derived from the phrase, "in consideration of the Assignee waiving its Creditor's Claim filed in the above-entitled estate, does hereby assign, transfer and convey over unto the Rose

Townsend Trust the judgment entered in the above-entitled cause." (CP 42-43, 49-50) At that time, the Creditor's Claim (created by Mr. Smith in the federal bankruptcy matter) included the two State Court Judgments. The Ninth Circuit interpreted this language to mean that in exchange for the Townsend Trust waiving its right to collect on the valuable, recorded Johnston State Court Judgment, the Townsend Trust was given the two, unrecorded, federal bankruptcy judgments. Well before his initial success with Judge Suko, Mr. Smith knew in the Fall of 2005 (when he says he reviewed the July 21, 2005 "Assignment of Judgment") that the language was "sloppy" and would create problems for the Trust. Mr. Smith knew that the intent was to add, not trade, judgments. (CP 656).

As Mr. Smith feared, that inartfully drafted document is what unintentionally caused the Townsend Trust to lose the right to collect on the valuable $83,183.37 Judgment. (CP 97-101, 192-193).

On June 2, 2010, the Townsend Trust filed suit in Spokane County Superior Court against Attorney Scott R. Smith, alleging negligence related to the loss of the Johnston State Court judgment worth $83,183.37, plus interest. (CP 1-50). (Townsend Trust had served Mr. Smith with the original complaint in March 2010). At the time of the filing of the Complaint, it was unclear who had drafted the July 21, 2005 document or

provided input into the drafting of that document. [Mr. Smith had not filed an Answer until March 5, 2012, so it was unclear to Townsend Trust what his position would be].

However, at Mr. Smith's June 25, 2010 deposition, he asserted that he had not created or contributed to the July 21, 2005 "Assignment of Judgment," but when he first reviewed the document, he testified that he had private concerns about the implications of the "very poorly drafted" legal document that Mr. Delay had prepared for the benefit of Townsend Trust in July 2005. (CP 117-120, 224, 225, 848).

Therefore, on November 10, 2010, Townsend Trust filed the Second Amended Complaint to add attorney Joseph Delay as a Defendant. (CP 51-101). In paragraph 5.2 of Plaintiff's Second Amended Complaint, Plaintiff alleged joint liability of Mr. Delay and Mr. Smith for the loss of that judgment:

> 5.3 As a proximate result of Defendants' [plural] negligence and/or breach of contractual obligations, Plaintiff Townsend Trust lost the benefit of collecting monies from the Johnston State Judgment in the amount of $83,183.37, plus interest at 12%, commencing on January 22, 1998.

(CP 67, bracket language added).

At pages 4-5 of the Brief of Respondent, Mr. Smith refers to sections 3.3 through 3.7 of Plaintiff's Second Amended Complaint (before

Mr. Delay was added to the suit), wherein Townsend Trust alleges that Mr. Smith gave false advice about the necessity of recording the federal bankruptcy judgments to have lien priority, and also that Mr. Smith did act properly with regard to the waiver of the recorded Johnson State Court Judgment:

> 3.5 Mr. Smith should have known that a waiver of the creditor's claim in the Johnston bankruptcy proceeding would render the Johnston state court judgment unenforceable.

Townsend Trust also alleged that Mr. Smith should have modified the creditor's claim to clarify the misleading language, because Mr. Smith was acting as the bankruptcy counsel for the Townsend Trust. (CP 66).

Plaintiff also alleged that Mr. Smith was negligent with respect to other parts of the document that Mr. Delay created. In particular, Plaintiff alleged that Mr. Smith advised the Townsend Trust that the federal bankruptcy judgments (for which Mr. Delay was creating an Assignment of Judgment document in July 2005) did not need to be recorded with the County Auditor in order to have lien priority. (CP 66) Plaintiff alleged that this advice was contrary to RCW 6.13.090, which expressly states as follows:

> A judgment against the owner of a homestead shall become a lien on the value of the homestead property in excess of the homestead exemption **from the time the judgment creditor**

> **records the judgment with the recording officer of the county where the property is located.**

The Ninth Circuit Court of Appeals held that Mr. Smith's arguments about that statute (he argued that the judgment did not need to recorded) were incorrect. (CP 46-50).

On March 25, 2011, Mr. Delay filed a Motion for Summary Judgment, alleging that the statute of limitations had run for any claims against him during Scott Smith's representation of the Townsend Trust. (CP 109-133) Mr. Delay argued that Mr. Smith was aware of the cause of action, and therefore the statute of limitations began to run when Mr. Smith first had concerns about the legal document created by Mr. Delay. (CP 115, 223-225). The entire thrust of Mr. Delay's argument was that Mr. Smith was aware of the potential legal malpractice claim by December 2005 or January 2006, and that knowledge was imputed to his client, Townsend Trust:

> Defendant Delay, Curran, Thompson, Pontarolo & Walker P.S.'s Motion for Summary Judgment of Dismissal is based on the fact that **Rose Townsend Trust was aware of a potential legal malpractice claim against Delay, Curran, Thompson, Pontarolo & Walker P.S., in December or 2005 or January of 2006.** The rule in Washington State is that the **knowledge of an attorney is the knowledge of a client**. Regardless of this knowledge of a potential legal malpractice claim, Rose Townsend Trust did not file a cause of action against Defendant Delay, Curran, Thompson, Pontarolo & Walker P.S. until November 10, 2010.

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The **attorney of record for the Rose Townsend Trust in 2005 was Scott R. Smith.** At his deposition on June 25, 2010, **Mr. Smith testified that he was aware of the July 2005 Assignment of Judgment**. In this regard, **Mr. Smith testified that he knew in December of 2005 or January of 2006 about the Assignment of Judgment,** and that he thereafter took no action with regard to that 2005 Assignment of Judgment as part of a Complaint for Lien Priority that was thereafter filed in U.S. Bankruptcy Court.

Q. When did you first obtain a copy of that July 2005 Assignment of Judgment signed by Jack Reeves.?

A. I believe it was late 2005.....

***

Q. **When you saw that language in that assignment, did you believe that the Townsend Trust had waived their right to collect in the 1998 Judgment?**

A. **I thought that the document was very poorly drafted...**

***

A. **...What I believe is that it was sloppy language and drafting by the parties involved.**

Q. **Joe Delay and Jack Reeves.**

A. **Correct.....**

(CP 115, 222-223, bold added).

Mr. Delay further noted that Mr. Smith did not dispute Mr. Delay's version of the facts or the legal implications:

Defendant Delay, Currant, Thompson, Pontarolo & Walker, P.S. established that **attorney Scott Smith reviewed the July 2005 Assignment of Judgment for the Rose**

> **Townsend Trust in December 2005 or January of 2006. This is undisputed by any party to this action....**
>
> **Scott Smith, in fact, was the attorney for the Rose Townsend Trust. Scott Smith's knowledge is therefore imputed to that of his clients.** As held by the Supreme Court of the State of Washington, '**The attorney's knowledge is deemed to be the client's knowledge, when the attorney acts on his behalf.**" *Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978)...The holding of *Haller* is referenced as "the **general rule in Washington that knowledge of an attorney is knowledge of his or her client...**
>
> In this case, **Scott Smith, attorney for the Rose Townsend Trust, was aware of issues and risks with the 2005 Assignment of Judgment in December 2005 or January of 2006....**
>
> **Scott Smith was aware of the issues and risks relative to the 2005 Assignment of Judgment in December of 2005 or January of 2006. Scott Smith determined than rather than pursue a potential legal malpractice claim against Defendant Delay, Curran, Thompson, Pontarolo & Walker, P.S., or advise the Rose Townsend Trust that a legal malpractice claim could be pursued, the different course of filing a Complaint for Lien Priority was instead instituted and followed by Mr. Smith in behalf of the Rose Townsend Trust. As a result, a potential legal malpractice claim existed in January of 2006, and the three year statute of limitations to bring a legal malpractice claim against Delay, Curran, Thompson, Pontarolo & Walker, P.S. ran in January of 2009.**

(CP 226-227 bold added).

In response to that Motion, Townsend Trust submitted testimony from the Trustees indicating they were never informed by Mr. Smith about his concerns about the legal document, nor were they ever advised by Mr. Smith of any cause of action against Mr. Delay. (CP 194).

Attorney Scott Smith did not resist Mr. Delay's motion for summary judgment, and he did not file any opposing declarations to the above testimony.

III. REPLY TO ARGUMENT

A. THE COURT ERRED IN RULING THAT AN EXPERT WAS ABSOLUTELY REQUIRED IN THIS PARTICULAR LEGAL NEGLIGENCE ACTION.

The trial court erred in ruling in a pre-bench-trial motion in limine hearing that an expert was absolutely required in this legal negligence action.

Contrary to Respondent's argument, Appellant's citation to CJS Attorney and Client, Section 330, remains appropriate. Especially for a bench trial, a judge can determine the appropriate standard of care for an attorney in a legal negligence action:

> Whether expert testimony is necessary to establish that an attorney's conduct fell below the standard of care is a legal question that the court must determine by examining the particular malpractice issues that the case presents. A failure to produce such testimony can be [not "is"] fatal to a plaintiff's case. In an action for legal malpractice, exert testimony means testimony of lawyers. The reasons for requiring expert evidence of negligence and causation of damages in attorney malpractice cases is that the factors involved ordinarily are not within the lay persons composing the jury.

CJS, *Attorney and Client*, Section 330, page 368 (bracket and underscoring added). A judge is not a lay person or a jury. Because the standard of care is a legal question, the trial court's dismissal is reviewable by this court on a de novo standard.

Here, Townsend Trust listed Attorney Scott Smith as a witness, so the trial court would have had testimony from an attorney. Of course, Townsend Trust had hoped to educate the judge further about the claims against Mr. Smith via a Trial Brief, Opening Statement, witnesses (including Mr. Smith including himself and his attorney experts, Nancy Isserlis and John Munding), documentary evidence presented at trial (and Townsend Trust had filed the "Notice of Intent to Offer Documents Pursuant to ER 904" pleading that listed 23 exhibits to be presented at trial), and a Closing Argument. Mr. Smith's counsel would have presented opposing arguments, of course, and the Judge would have had sufficient information to fully determine the requisite standard of care, especially in light of her earlier decision regarding Mr. Delay.

Townsend Trust recognizes that if the bench trial had proceeded, Townsend Trust may not have met its burden of persuasion. In other words, at trial, the Judge may have nevertheless ruled that Townsend Trust did not meet its burden to persuade the Judge of its claims. That is different, however, from an absolute pre-trial requirement that the plaintiff

have the burden of producing its own attorney as an expert. The trial court erred is dismissing the case before trial.

Contrary to Mr. Smith's argument, the Washington Supreme Court has stated that expert testimony is not always required to establish a prima facie case of legal malpractice:

> A few courts have held that expert testimony on the standard of care is *mandatory*. *See, eg. Dorf v. Relles*, 355 F.2d 488 (7th Cir. 1966); *Walters v. Hastings*, 84 N.M. 101, 500 P.2d 186 (1972); *Baker v. Beal*, 225 N.W. 2d 106 (Iowa 1975). The **general rule is to permit but not require expert testimony**. See Admissibility And Necessity of Expert Evidence As To Standards of Practice and Negligence in Malpractice Action Against Attorneys, Annot, 17 A.L.R. 3d 1442 (1968).[1]

Walker v. Bangs, 92 Wash.2d 854, 858, 601 P.2d 1279 (1979) (bold added),

Contrary to Mr. Smith's arguments, the courts in *Brust v. Newton*, 70 Wash.2d 286, 862 P.2d 1092 (1993), and *Daugert v. Pappas*, 104 Wash.2d 254, 704 P.2d 600 (1985) emphasize the Judge's expertise and ability to determine the standard of care (with jury trials being involved in those cases).

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[1] The *Walker* case involved a jury, and the Supreme Court overturned the trial court's order rejecting an out-of-state attorney's expert opinion, saying that an expert opinion in that case was "both proper and necessary in this instance." *Id.*, 92 Wash.2d at 858.

Next, contrary to Mr. Smith's arguments, the entire bases for experts being allowed to testify—Evidence Rule 702-- expressly discusses experts as being helpful, but not mandatory:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, **may** testify thereto in the form of an opinion or otherwise.

ER 702 (bold added).

Mr. Smith acknowledges that in "legally straightforward," "obvious" or "non-complex" matters (such as the failure to object to clearly admissible testimony), an expert is not required in a legal negligence action.

In the present case, the trial court dismissed Mr. Delay, because it was apparently obvious to the Judge at the April 29, 2011 hearing that Mr. Smith considered Mr. Delay to be negligent:

> THE COURT: And **Mr. Smith** says, "Gee, **I think this assignment of judgment was poorly drafted and could cause trouble for the estate." And he's thinking this or saying this, but he doesn't tell [Trustee] Riley , right?**
>
> MR. HUNTER: Right.
>
> THE COURT: **So isn't Riley's recourse against Mr. Smith and not Delay? And I'm not -- I'm obviously making no findings as to any culpability on the part of Smith, but why bring Delay into it? Smith is the one who arguably had the knowledge and didn't do anything.**

MR. HUNTER: **We think it's both is why we brought them both in and we thought that Mr. Delay essentially created the problem in the first place that—**

***

We think they [Delay and Smith] are both responsible. They are both negligent is our theory to the extent that a jury[2] would apportion fault between the two or say, no at some point it was fully Mr. Smith's fault and that any—in fact, that's part of the argument is there was superseding cause. But for the meantime, we have alleged fault, duty fault, all the elements on both.

***

THE COURT: What about Mr. Hunter's argument that the knowledge of the attorney—**let's assume hypothetically that I accept that Smith saw the problem, knew the problem; didn't do anything about** it. Let's assume that. Mr. Hunter says it doesn't matter. You say it does matter that the knowledge of the attorney is imputed to the client.

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MR. THORNER: …."the attorney's knowledge is deemed to be the client's knowledge when the attorney acts on his client's behalf."

And so what we have here, Your Honor is a very clear situation. If **Mr. Smith at that time that he reviewed this document in the fall of 2005 was clearly acting, it's undisputed, as the attorney for the Rose Townsend Trust, his testimony is from his deposition that he had major concerns concerning the language in the assignment**. That knowledge is clear under the authority of the Washington State Supreme Court in this case,

[2] Plaintiff's Counsel misspoke. Neither party to this action has ever requested a jury in this matter.

which has been cited repeatedly in other cases, as we pointed out, that an **attorney acting in the course of his employment or activity as the attorney for a client who has knowledge of something, that knowledge regardless of whether it's communicated to the client starts the running of the statute of limitations.**

THE COURT: But 2005, **when Mr. Smith realizes there is a problem who could have** -- apparently no one foresaw this was waiving a substantial right. Things were going along well through the appellate courts.

MR. HUNTER: I agree. But who is in the best position, **which is why we have a claim against Mr. Smith, as well. We have alleged negligence on his part.**
CP 708-70-9, 711, bold added. April 29, 2011 Hearing, entire Summary Judgment Transcript at CP 711-730).

The Trial court stated further at the same hearing:
THE COURT: That's important. It's not just this was poorly drafted, it's poorly drafted and this might be a problem for the estate, affect the estate's right.

(CP 718)

Respondent Smith attempts to portray the underlying case as complex. However, in dismissing Mr. Delay, the trial court did not concern itself with the "complexity" of the federal bankruptcy matters, and it properly focused on the loss of the Johnston State Court Judgment. The trial court dismissed Mr. Delay (without any expert testimony) on the express basis that Mr. Smith (and not the Townsend Trust itself) knew or should have known of a cause of action against Mr. Delay and allowed a statute

Mr. Smith never disputed the fact that he failed to advise Townsend Trust that it had a potential legal negligence claim against Joseph Delay.

It is Townsend Trust's position that the standard of care was set by the trial court in April 2011 when it held that the statute of limitations began to run for any claims against Attorney Joseph Delay when Mr. Smith knew or should have known that the Townsend Trust had a potential cause of action against Mr. Delay. At trial, Mr. Smith may attempt to explain why he did not think he had deviated from the standard of care, his explanation must square against the Court's ruling in April 2011 that Mr. Smith knew or should have known of the potential legal negligence action. A duty to advise the client of the potential legal

negligence cause of action is a direct implication of that standard of care imposed upon Mr. Smith at the time he knew or should have known of the potential cause of action.

B. THE TOWNSEND TRUST'S COMPLAINT AND THE APRIL 29, 2011 COURT ORDER CLEARLY PUT MR. SMITH ON NOTICE OF A NEGLIGENCE CLAIM RELATING TO THE LOSS OF THE JOHNSTON STATE COURT JUDGMENT.

As Mr. Smith acknowledges at page 15 of the Brief of Respondent, "[P]leadings are primarily intended to give notice to the Court and the opponent of the general nature of the case asserted." *Northwest Line Constructors v. Snohomish County Public Utility District No. 1*, 104 Wn. App 843, 848, 17 P.3d 151 (2001), quoting *Lewis v. Bell*, 45 Wn. App, 192, 197, 724 P.2d 425 (1986). Here, the Court itself and Townsend Trust put Mr. Smith on notice, having said at the April 2011 hearing:

> THE COURT: **So isn't Riley's recourse against Mr. Smith and not Delay? And I'm not -- I'm obviously making no findings as to any culpability on the part of Smith, but why bring Delay into it? Smith is the one who arguably had the knowledge and didn't do anything.**
>
> THE COURT: But 2005, **when Mr. Smith realizes there is a problem who could have** -- apparently no one foresaw this was waiving a substantial right. Things were going along well through the appellate courts.

> MR. HUNTER: I agree. But who is in the best position, **which is why we have a claim against Mr. Smith, as well. We have alleged negligence on his part.**
> CP 708-70-9, 711, bold added. April 29, 2011 Hearing, entire Summary Judgment Transcript at CP 711-730).

Townsend Trust did not seek to amend the Second Amended Complaint after the April 29, 2011 hearing. It was Plaintiff's belief that an amendment was not necessary, as the Court's ruling made it clear that a statute of limitations had commenced and run during Mr. Smith's representation (of which Mr. Smith was aware and Townsend Trust was not). (CP 837, 845-847). Townsend Trust filed a motion in limine to clarify the earlier court's ruling. Plaintiff expected there to be other issues for trial, which was why Plaintiff did not consider the motions in limine to be dispositive of the entire case against Mr. Smith.

C. CONTRARY TO MR. SMITH'S ARGUMENT, THE TOWNSEND TRUST DID NOT SEEK TO ADD ANOTHER CAUSE OF ACTION.

Contrary to Mr. Smith's argument at page 16 of its Brief, the Townsend Trust was not seeking to add another cause of action to the complaint. The Townsend Trust had alleged negligence against Mr. Smith relating to the loss of the Johnston State Court Judgment. At

best, if Townsend Trust had amended its complaint, Townsend Trust would have merely added a few more lines of facts to the negligence cause of action in the multiple page complaint.

To date, Mr. Smith had not even argued that he would be prejudiced by an Amendment.

Plaintiff alleged that the loss of the 1998 State Court Judgment was the same element of damage against both Mr. Smith and Mr. Delay for which they were jointly liable. Plaintiff alleged in paragraph 5.2 of the Second Amended Complaint that both Mr. Smith and Mr. Delay were responsible for the loss of the 1998 Judgment, valued at $83,183.37, plus 12% interest. Plaintiff was not seeking the same element of damage twice—it was one indivisible harm. Plaintiff's counsel made crystal clear to Defendant's counsel by February 24, 2012 that Plaintiff was alleging negligence for Mr. Smith's failure to advise the Townsend Trust of the potential negligence claim against Mr. Delay.

Plaintiff argued to the trial court that the remedy was to allow Plaintiff to Amend the Complaint, similar to allowing the Plaintiff to Amend the Complaint at trial to conform to the proof presented at trial. Defendant cannot demonstrate prejudice, as Defendant has been aware well before trial of that particular aspect of the negligence claim (and the new trial date not yet been set). There is one set of facts surrounding

Plaintiff's negligence claim, namely, the loss of the 1998 State Court Judgment.

D. CONTRARY TO MR. SMITH'S ARGUMENT, SCOTT SMITH HAD A DUTY TO ADVISE TOWNSEND TRUST OF THE CAUSE OF ACTION AGAINST MR. DELAY AS A MATTER OF LAW.

The Court properly held in April 2011 that Scott Smith had a duty to advise Townsend Trust that it had a negligence claim against Mr. Delay. Mr. Smith had been the general counsel for the Townsend for over 20 years, and the Trustees for Townsend Trust relied on his advice.

Mr. Smith was directly involved with all issues surrounding the four judgments, well before the July 2005 Assignment of Judgment was drafted by Mr. Delay. (CP 38, 161-181) The Assignment was then sent to Mr. Smith's office within a week, and his firm reviewed documents to collect on the four judgments. Mr. Smith testified that he did not personally review the Assignment of Judgment until later in the Fall of 2005. However, he clearly testified that he knew that the Assignment of Judgment would cause problems with for the Trust. He was the bankruptcy attorney who had prepared the "Creditor's Claim" for the Trust and received all notices electronically about the "Assignment of Judgment" and the disbursements. (CP 159,196. 201). If anyone was

familiar with the legal issues concerning the Townsend Trust, it was Scott Smith.

The trial court held in April 2011 that Mr. Smith's knowledge of the cause of action against Mr. Delay was imputed to the client, despite the Townsend Trust having no knowledge of the cause of action.

The only clear remedy for the Townsend Trust for the loss of the Johnston State Court judgment was a legal negligence action against the attorney who drafted the document. Townsend Trust alleged that Mr. Smith could have taken steps to ameliorate the harm of the July 2005 Assignment of Judgment, which he did not do so. Townsend Trust also alleged that had he given proper advice about the two federal bankruptcy judgments (i.e., that they were worthless because they had never been recorded), the Townsend Trust trustee would never have met with Joseph Delay in an attempt to obtain the two federal bankruptcy judgments. If he had not met with Mr. Delay, the "Assignment of Judgment" document would never have been created, and the Townsend Trust would not have lost that valuable State Court Judgment, which had been recorded.

IV. CONCLUSION

For the reasons expressed above, this case should be remanded for trial.

Respectfully submitted this 2nd day of May, 2013.

AMOS R. HUNTER, P.S.

AMOS R. HUNTER,
WSBA #20846
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

Amos Hunter, certifies as follows:

I am a citizen of the United States of America, over the age of 18 years, and competent to be a witness herein.

That on the 2nd day of May, 2013, I caused to be served a copy of the foregoing Reply Brief of Appellant to the following by the method indicated below:

Christopher Kerley
James King
Markus W. Louvier
Evans, Craven & Lackie
818 W. Riverside
Suite 200
Spokane, WA 99201

[X] Via hand delivery

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

May 2, 2013, Spokane, WA

AMOS HUNTER