

FILED

JUN 01 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 287904

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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ROBERT ALDERSON AND JOANNE ALDERSON, individually and as  
the marital community composed thereof,

Appellants,

v.

R. CRANE BERGDAHL AND JANE DOE BERGDAHL, individually  
and the marital community comprised thereof,

Respondents.

---

BRIEF OF APPELLANT

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Jeffery T. Parker  
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Attorney for Appellants

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206.632-7510

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## PRELIMINARY STATEMENT

The matter at bar concerns a legal malpractice case asserted by Robert and Joanne Alderson against their former attorney, Crane Bergdahl, for negligently representing Appellants in litigation related to a certain parcel of realty known as the “Grandma Jesse” property, and for claims arising out of Mr. Bergdahl’s conflict of interest in his representation of the Aldersons in the sale of their realty interests on the seller side, while at the same time, Mr. Bergdahl represented his most important client, Frank Tiegs, in furtherance of Tiegs’ effort to purchase the same realty on the buyer side of the transaction.

The issues pertaining to the Grandma Jesse property arose out of a larger farm dissolution action between Robert Alderson, appellant herein, and his brother Jack Alderson. Jack and Robert had farmed a rather large tract of land in Franklin County for a number of years prior to the commencement of the farm litigation in 2002.

In 1998, Jesse Alderson, the mother of Robert and Jack Alderson executed a quit claim deed, deeding the property known as the Grandma Jesse House to Robert. During the course of the underlying farm litigation, Judge Vanderschoor ruled that the Grandma Jesse Property was Robert Alderson’s separate property and not farm property.

Thereafter, Judge Vanderschoor, entered an order that the farm partnership property be sold. Judge Vanderschoor devised a bidding system where interested parties could bid on the farm property.

In response to Judge Vanderschoor's order, Mr. Bergdahl told his most important client, Frank Tiegs, that the Alderson farm was up for bid. Mr. Tiegs, who is a very prominent grower in the southeast region of Washington state, indicated his interest in bidding on the property. (Mr. Tiegs has been Mr. Bergdahl's largest client since the early 1970's. Mr. Tiegs and Mr. Bergdahl share office space and a common conference room). Mr. Bergdahl then drafted the offers on behalf of Mr. Tiegs and submitted them pursuant to the bid scheme devised by Judge Vanderschoor.

In drafting and submitting bids on behalf Tiegs, Mr. Bergdahl negligently included the legal description of the Grandma Jesse property.

On January 10, 2007, a hearing was held in the underlying farm litigation, in part to determine the rights of Aldersons to the Grandma Jesse property. Judge Vanderschoor indicated that the disposition of the Grandma Jesse property would be dealt with the "sale document" indicates.

Mr. Bergdahl assumed that the trial court had ignored the argument he made and concluded that the Aldersons had lost the Grandma Jesse property. Mr. Bergdahl asserts that Judge Vanderschoor ruled against the

Aldersons because the Grandma Jesse legal description had been erroneously included in the original bid documents Mr. Bergdahl drafted on behalf of his other client, Frank Tiegs.

The Aldersons have alleged and supported with competent evidence the fact that Mr. Bergdahl was negligent by failing to incorrectly interpret the trial court's ruling with regard to the disposition of the Grandma Jesse property; or that he was negligent by including the legal description of the Grandma Jesse property in bid documents he prepared while representing both the Aldersons and Tiegs, when he had a non-waivable conflict of interest.

On January 6, 2010, the trial court in this matter granted Mr. Bergdahl's summary judgment motion, finding as a matter of law that Judge Vanderschoor specifically intended to deprive the Aldersons of their interest in the Grandma Jesse property.

**A. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO.**

1. The trial court erred as a matter of law when it granted defendants' summary judgment motion by finding that the underlying trial judge specifically intended to deprive the Alderson's of their property interest in the Grandma Jesse realty.

2. The trial court committed reversible error by entering an

order dismissing plaintiffs' claims on summary judgment, when Mr. Bergdahl was negligent in misinterpreting the underlying trial court's oral ruling; and where Mr. Bergdahl breached the standard of care by failing to review the legal descriptions he submitted on behalf of his other client, Frank Tiegs, which erroneously contained the legal description for the Grandma Jesse property

2. The trial court erred when it ruled as a matter of law that plaintiffs' claims arising out of Mr. Bergdahl's conflict of interest should be dismissed as a matter of law when it is unrefuted that Mr. Bergdahl prepared bid offers on behalf of his other client, Frank Tiegs, LLC, to purchase the Aldersons interest in the farm property, and where the bids submitted by Mr. Bergdahl on behalf of Tiegs contained the legal description of the Grandma Jesse realty, which the court had previously ruled was not part of the farm property, but rather was the separate property of Robert Alderson.

**B. STATEMENT OF THE CASE**

1. Factual Background

Mr. Bergdahl represented the Aldersons with respect to a 5 acre parcel of real estate located in Franklin County known as the "Grandma Jesse Property." (CP 930; P 8; Lines 14-17).

The Grandma Jesse property was located next to realty owned by

Triple A Farms. Triple A Farms was a farm partnership in which appellant Robert Alderson and his brother Jack Alderson held ownership interests. (CP 1139; Lines 1-4).

The brothers had farmed a rather large tract of land in Franklin County for a number of years. Unfortunately, by 2002, the relationship the brothers had enjoyed for a number of years deteriorated to the point where litigation was instituted in Franklin County to dissolve the farming venture under Franklin County Cause No. 02-2-50685-5. (CP 229-230).

Respondent, attorney Crane Bergdahl, represented Robert and Joanne Alderson in the Triple A Farms litigation. (CP 930; P. 6, Lines 17 - 25; P. 7 Lines 1-5).

An issue arose in the Triple A Farms litigation, whereby Jack Alderson claimed that the Grandma Jesse property was a farm asset. The Grandma Jesse property had been owned by Jesse Alderson, Robert and Jack's mother. In 1998, Jesse Alderson quit claimed her interest in the Grandma Jesse property to Robert Alderson. (CP 954).

On October 5, 2005, a hearing was held before Judge Vic Vanderschoor to, in part, ascertain the ownership rights in the Grandma Jesse parcel. Bob and Joanne Alderson were represented by attorney Bergdahl at this hearing. Judge Vanderschoor ruled that the Grandma Jesse

property was not Triple A Farms property, but rather was the separate property of Robert Alderson. (CP 932; Lines 1-6).

At a separate hearing Judge Vandershoor ruled that the Triple A Farms realty was to be sold as part of the farm partnership dissolution action. Judge Vandershoor implemented a bidding system, whereby entities interested in purchasing the farm property were to submit written bids. Other interested purchasers would then have five days to respond. Successive bidding was to be in increments at least \$25,000.00 over the last submitted bid. (CP 932; P. 13; Lines 15-21).

After Judge Vandershoor entered the order detailing the Triple A Farm property bid procedure, attorney Bergdahl notified his most important client, Frank Tiegs, that the Alderson farm was up for sale and inquired as to whether Tiegs would be interested in bidding on the Alderson farm. Tiegs indicated that he would be interested. (CP 947; P. 74; Lines 20-24).

Tiegs and Mr. Bergdahl have had a continuous attorney-client relationship dating back to the early 1970s. Mr. Bergdahl admits that Mr. Tiegs has been his largest and most important client since that time. Mr. Tiegs and Mr. Bergdahl share office space and a common conference room. (CP 943; P 57; Lines 5-8)

Once Tiegs indicated his interest in bidding on the Alderson

property, Mr. Bergdahl drafted the Tiegs bid. This initial written bid dated December 13, 2005, was submitted by Mr. Bergdahl on behalf of Tiegs. (CP 942; P. 56; Lines 24-25; CP 943; P 57; Lines 1-9).

This initial Tiegs' bid, drafted by Mr. Bergdahl, contained comprehensive legal descriptions for the parcels Tiegs desired to purchase. Mr. Bergdahl received these legal descriptions from Attorney Fran Forgette, who was representing Jack Alderson the adversary in the underlying farm dissolution matter:

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**2 Q. Now, Mr. Tiegs is a client of yours in other matters during**

**3 this time, correct?**

4 A. Yes, he is.

**5 Q. In fact, he's a pretty important clients of yours, correct?**

6 A. Yes.

**7 Q. Is he your largest client?**

8 A. Overall, yes. Not maybe at any one particular time, but when

9 I look at 40 years of legal history, Mr. Tiegs is my biggest

10 client.

**11 Q. And he's supplying a legal description that potentially**

**12 affects the legal rights of the Aldersons?**

13 A. Correct.

14 **Q. Correct. And you assume that Mr. Tiegs' legal description**  
15 **was correct and did not include Grandma Jessie's house?**

16 A. No. I knew that *Mr. Tiegs' legal description was the exact*

17 *legal description I had received from the office of*

18 *Mr. Forgette*. I didn't assume anything. I knew that it was. (emphasis  
added)

19 Q. So you knew it included Grandma Jessie's house?

20 A. No. I just knew it was the same description. I knew it was

21 Exhibit A, Pages 1 to 10, Exhibit B, Pages, I think, 1

22 through 8.

23 **Q. And you knew that there was an earlier issue.**

24 **Well, you knew there was an issue in December of '05**

25 **with respect to Grandma Jessie's house that included**

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1 **erroneously an -- an offer?**

2 A. In someone else's offer, right.

3 **Q. Okay. So --**

4 A. It didn't click anything with me.

5 **Q. Should it have clicked something with you?**

6 A. Yeah. It should have.

7 **Q. Do you think you made a mistake in --**

8 A. Yeah. I made a mistake in not checking it out.

(CP 946: Page 69: Lines 14-25; Page 70, Lines 1-6).

The legal description contained in the December 13, 2005 initial Tiegs' bid drafted by Mr. Bergdahl, erroneously included the legal description for the Grandma Jesse property, despite the court's prior October 5, 2005 order that the Grandma Jesse property was Robert Alderson's separate property, and not farm property. (Id.). Mr. Bergdahl was also made aware of this error by another bidder on the farm property, Walker Plow, back in December 2005, yet he didn't correct the problem before he commenced bidding on the property on behalf of his important client, Tiegs (CP 943; Page 59-60).

Mr. Bergdahl then drafted and submitted a number of successive bids on behalf of Tiegs to purchase the realty at issue. The successive bids are dated: January 5, 2006; February 9, 2006; February 23, 2006; March 9, 2006; March 16, 2006, with the final Tiegs' bid being submitted on March 27, 2006. (CP 987-991).

All of the Tiegs bid, except the final March 27, 2006 bid contained legal descriptions which included the Grandma Jesse property. The final March 27, 2006 Tiegs' bid appears to have been submitted directly by Mr.

Tiegs, as Mr. Bergdahl was out of town. Mr. Tiegs didn't attach any legal description to the March 27, 2006 bid. CP 931; P. 12; Lines 19-25; CP 932; P. 13; Lines 1-14).

Mr. Bergdahl admits that he failed to review the legal descriptions included in the initial Tiegs' bids he drafted and submitted on behalf of Tiegs. Mr. Bergdahl admits that had he "dug deep enough" he would have determined that the Grandma Jesse property was erroneously included in the legal descriptions of the bid he submitted on behalf of Tiegs. (CP 945: P. 67; Lines 6 -16)

Mr. Bergdahl admits that it was a mistake for him not to review the legal descriptions in the initial Tiegs bids he drafted and submitted on behalf of his other client, Tiegs. Mr. Bergdahl testified as follows:

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**15 Q. Did you review the legal description of the bids that were**

**16 submitted by Mr. Tiegs?**

17 A. I don't believe I did. Other than knowing that that was it,

18 the same legal description that I had received from Jack and

19 Scott and Mr. Forgette.

**20 Q. Did you know that the legal description that you received**

**21 from Jack and Scott and Mr. Forgette included Grandma**

22 **Jessie's house?**

23 A. No, I didn't.

24 **Q. Now, if you had checked the legal description on the bids**

25 **submitted by Mr. Tiegs and checked it in a reasonably prudent**

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1 **fashion, do you have an opinion as to whether or not you**

2 **would have been able to discover that Grandma Jessie's was**

3 **included in the legal description attached to the bids**

4 **submitted by Frank Tiegs?**

5 A. Maybe I would have been able to.

6 **Q. You're competent enough I assume, and it may sound like a**

7 **silly question, but I'm trying to figure out when you say**

8 **"maybe," Mr. Bergdahl, it seems to me that you would been**

9 **able to determine had you looked carefully enough that**

10 **Grandma Jessie's house was in the bid submitted by Mr. Tiegs,**

11 **but you never looked?**

12 A. I -- if I had dug deep enough, I would have been able to

13 determine that.

14 **Q. Do you think it was a mistake for you not to dig deep enough**

15 **to determine --**

16 A. Yes. I do think it was.

(CP 945; Page 66; Lines 15 – 25; Page 67; Lines 1-16).

In February 2006, Mark Peterson, a tenant farmer on the Triple A Farms property filed suit against Triple A Farms and Jack, Robert and Joanne Alderson. Mr. Peterson sought enforcement of a right of first refusal to purchase the Triple A Farms property, ostensibly set forth in written ground farm leases executed in 1997 and a 2000 to which he was a party. (CP 932; P. 14).

Mr. Bergdahl defended Robert and Joanne Alderson in the Peterson litigation. Mr Bergdahl advised the Aldersons that they should resist Peterson's efforts, and that they had a strong chance of winning. The Alderson's heeded Mr. Bergdahl's advice and defended the Peterson litigation. (CP 1138-1144).

The trial in the Peterson litigation was held in July 2006 before Judge Vanderschoor. Judge Vanderschoor ruled that Peterson held a valid right of first refusal. He further ruled that Robert and Joanne Alderson were liable for Peterson's attorneys' fees. (CP 932: P 15; Lines 15).

Judge Vanderschoor also ruled that Mark Peterson had 30 days to execute his right of first refusal and meet the latest March 27, 2006 Tiegs bid in the sum of \$7.2 Million. (Id.)

On August 4, 2006, Peterson filed his right of first refusal within the 30 day time frame. Thereafter Tiegs dropped out of the bidding. (CP 932; P 15; Lines 14 -25).

Throughout the remainder of 2006, the parties continued to bicker about a number of issues. By late 2006, it became apparent that Peterson was asserting an ownership right to the Grandma Jesse property by virtue of his execution of his right of first refusal. (CP 942; Page 55).

A hearing was held on January 10, 2007, before Judge Vanderschoor to ascertain the ownership status of the Grandma Jesse Property. (CP 933)

A central tenant of Mr. Bergdahl's argument at that hearing was that the March 27, 2006 Tiegs' bid did not contain a legal description or parcel number identifying the Grandma Jesse property as being included in the proposed bid. (CP 936). The March 27, 2006 Tiegs' bid referenced legal descriptions attached as Exhibit A and B, which did contain the Grandma Jesse legal description in the previous Tiegs' bids, however no such exhibits containing any legal descriptions were attached to the final March 27, 2006 Tiegs' bid, nor was the Grandma Jesse parcel number included in the listing of the parcel numbers identifying the Triple A Farms property on the March 27, 2006 Tiegs' bid. (Id.)

Judge Vanderschoor ruled as follows:

I don't think anything I order is going to be accepted by the parties. I don't mean the attorneys but their clients. Mr. Peterson it may be unfair to say that. Be that as it may, I am trying to be fair to everybody involved. Grandma Jesse's house will be dealt with the way the **sale document** indicates. I did say earlier that was Bob and Joanne's property. **If that wasn't treated consistently in the sale then that's the way it goes.** (Emphasis added). (CP 979). According to Mr. Bergdahl's sworn deposition testimony, the sale

document that Judge Vanderschoor referenced was the March 27, 2006 Tieg's bid (CP 934; P. 34; Lines 7 - 11) which does not include any legal description, parcel number, or in any other manner, identify the Grandma Jesse property as being part of the sale. (Id.)

Mr. Bergdahl simply, erroneously, assumed that he had lost the motion, despite Judge Vanderschoor's clear ruling that the Grandma Jesse property "will be dealt with the way the sale document indicates." It is undisputed that the sale document Judge Vanderschoor referenced in his order was the March 27, 2006 Tieg's bid. It is further undisputed that this document didn't include the Grandma Jesse parcel.

Shortly after the hearing, Mr. Bergdahl met with the Aldersons and advised them not to appeal this decision because it was his belief that they wouldn't win. (CP 1141; Lines 17-23).

On January 16, 2006, Mr. Bergdahl voluntarily signed an order prepared by Ken Miller, Peterson's attorney, which states in relevant part

as follows:

It is further ORDERED, ADJUDGE AND DECREED, that the parcel of property commonly referred to as Grandma Jessie's house, and the related estate related to such, shall be included in the Triple A Farms purchase/sale at the existing price.

(CP 984)

The property proceeded to close on January 22, 2007 and the Grandma Jesse house was transferred to Peterson. Mr. Bergdahl oversaw the execution of the closing documents and advised the Aldersons to sign. (CP 1141-1142).

Mr. Bergdahl's opinion as to why he assumed Judge Vanderschoor ruled that the Grandma Jesse property be awarded to Peterson was because the earlier Tiegs' bids which he prepared and submitted on behalf of Tiegs, erroneously included the legal descriptions for the Grandma Jesse property:

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**4 Q. Do you think that -- you know, Judge VanderSchoor's ruling**  
**5 had anything to do with the legal description included in the**  
**6 earlier Tiegs offers?**

**7 A. Absolutely it did. That's the only basis he could make that**  
**8 ruling. There is no other basis, other than to say the legal**

9 description on all of the other Tiegs bids included Grandma  
10 Jessie's house. There's no reason to think that the legal  
11 description that supposedly is attached to this bid wasn't  
12 the same. (CP 942: P. 56; Lines 7-15).

As set forth above, Mr. Bergdahl admits that he didn't check the legal descriptions on the earlier bids he submitted on behalf of Tiegs and he admits it was a "mistake" for him not to do so. (CP 945).

Furthermore, Mr. Bergdahl admits that the standard of care required him to look at the legal descriptions: (CP 945: P 68; Lines 11-13).

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11 **Q. But you would agree that a standard of care would require**  
12 **that you look at the legal descriptions?**

13 A. Yes.

2. Procedural Background.

Respondents filed a summary judgment motion which was granted by Judge William Acey after a hearing held on January 6, 2010.

The gravamen of Mr. Bergdahl's argument on summary judgment was that the Judge Vanderschoor made an erroneous ruling when he ruled that the Grandma Jesse property should be awarded to Peterson. Bergdahl further asserted that since the Aldersons didn't appeal this ruling, that any

claim of legal malpractice they may have had against Mr. Bergdahl has been waived. (CP 860-880).

The trial court justified granting the summary judgment order on the finding that Judge Vanderschoor was guilty of purposefully making a legal mistake in issuing his January 10, 2007 ruling dispossessing the Aldersons of their property interest in the Grandma Jesse realty and awarding the same to Peterson. (VRP P. 30).

The trial court found that it was clear that Judge Vanderschoor had done a "180" in issuing his order of January 10, 2007, where he ruled that the Grandma Jesse property would be dealt with the way the sale document indicates. The trial court found that reasonable minds could not differ on this conclusion. (RVP P. 29).

The trial court went through its prior experience as a lawyer in Georgia and stated that he was of the opinion that a lawyer in Mr. Bergdahl's position didn't have a duty to review legal descriptions in order to comply with the standard of care in the state of Washington. The trial court stated: "How could a lawyer compete with a title company who's doing documents for free? You can't - - you can't compete with free and make a little profit" (RVP P. 27)

It's hard to know where the trial court came up with this

conclusion. Mr. Bergdahl admits the standard of care required him to do review the legal descriptions with regard to the Grandma Jesse property; Mr. Bergdahl admits he made a mistake in not doing so when he submitted bids which erroneously included the Grandma Jesse property in bids he made on behalf of his other client, Tiegs, and Mr. Bergdahl clearly admits that had he not erroneously included the Grandma Jesse property in the initial bids he drafted, the Alderson's would have retained their legal rights to the Grandma Jesse property.

Plaintiff's expert, Mr. Robinson also sets forth that same opinion. There wasn't any countervailing opinion submitted by Mr. Bergdahl, nor any authority to support the proposition that Mr. Bergdahl didn't have a duty, pursuant to the standard of care to review the legal descriptions on the bids Mr. Bergdahl prepared for Mr. Tiegs to purchase the interests of his other clients on the opposite end of the transaction (the Aldersons). (CP 1091-1095).

In any event, it's improper on a summary judgment motion for a judge to establish a standard of care sua sponte, when the defendant himself admits to a breach of the standard of care and the same is supported by plaintiffs' expert witness.

The trial court did not address any of the conflict of interest claims

set forth by appellants in issuing his oral ruling, so it is unknown as to why these claims were summarily dismissed. (VRP 1-34).

C. ARGUMENT.

1. Law and Summary Judgment

Under CR 56(c), the moving party bears the burden of demonstrating there is no genuine dispute as to any material fact. *Green v. A.P.C.*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998). "A material fact is one upon which the outcome of the litigation depends, in whole or in part." *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980). Only when reasonable minds could reach but one conclusion on the evidence should the court grant summary judgment. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003); *Morris v. McNicol*, 83 Wn.2d 491, 494-95, 519 P.2d 7 (1974). In conducting this inquiry, the court must view all facts and reasonable inferences in the light most favorable to the nonmoving party. *City of Lakewood v. Pierce County*, 144 Wn.2d 118, 125, 30 P.3d 446 (2001). Where different competing inferences may be drawn from the evidence, the issue must be resolved by the trier of fact. *Hudesman v. Foley*, 73 Wn.2d 880, 889, 441 P.2d 532 (1968); *Kuyper v. State Dept. of Wildlife*, 79 Wn. App. 732, 739, 904 P.2d 793 (1995).

2. The law concerning the elements of a legal malpractice

claim.

A legal malpractice claim requires proof of four elements by a preponderance of the evidence: (1) The existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred. *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992).

A. *Duty*

There is no question with regard to the existence of an attorney client relationship. Mr. Bergdahl admits he represented the Alderson with regard to the Grandma Jessie property, as well as the *Alderson v. Alderson* farm dissolution action and the *Peterson v. Alderson* litigation.

Defendants did not raise the absence of a duty in their motion.

B. *Breach of the Standard of Care*

In a legal malpractice case, the plaintiff is generally required to submit expert testimony establishing a breach of the standard of care. *Geer v. Tonnon*, 137, Wn.App, 838, 844 (2007).

Plaintiffs' expert Richard Robinson has analyzed the facts of this matter and opined that Mr. Bergdahl breached the standard of care by

failing to correctly interpret the court's ruling with regard to the disposition of the Grandma Jesse Property. See generally Declaration of Richard Robinson (CP 1091-1095).

In the alternative, Mr. Robinson is of the opinion that Mr. Bergdahl breached the standard of care in failing to review the legal descriptions of the earlier Tiegs' bids which erroneously included the legal description of the Grandma Jesse property. (Id.).

Mr. Bergdahl testified that the Judge Vanderschoor awarded the Grandma Jesse property to Peterson because the earlier Tiegs bids erroneously included the legal description of the Grandma Jesse property. Mr. Bergdahl admits that he made a mistake in not checking the legal descriptions when he drafted and submitted the earlier bids on behalf of his other client, Tiegs. Instead, Mr. Bergdahl relied upon opposing counsel to supply a legal description incorporated into the bids he prepared and submitted on behalf of Tiegs, without ever bother to check the same; an act Mr. Bergdahl admits was a "mistake."

Mr. Bergdahl admits that the standard of care required him to check the legal descriptions he used in preparing the bids on behalf of Mr. Tiegs. Mr. Bergdahl admits that he would have discovered that the Grandma Jesse property was included in the Tiegs' bids he prepared, had

he “dug deep enough.” He further admits it was a mistake not for him to do so.

As set forth by Mr. Robinson, and Mr. Bergdahl, Mr. Bergdahl’s failure to check the legal descriptions on the Tiegs’ bids is a breach of the standard of care.

C. *Causation*

General principles of causation are no different in a legal malpractice action than in an ordinary negligence case. *Sherry v. Diercks*, 29 Wn. App. 433, 437, 628 P.2d 1336 (1981). To recover, the plaintiff must demonstrate that he or she would have achieved a better result had the attorney not been negligent. *Id.* at 438, 628 P.2d 1336. Proximate cause consists of two elements: cause in fact and legal causation. *City of Seattle v. Blume*, 134 Wn.2d 243, 251, 947 P.2d 223 (1997). “Cause in fact refers to the ‘but for’ consequences of an act, that is, the immediate connection between an act and an injury.” *Blume*, 134 Wn.2d at 251-2, 947 P.2d 223. The “but for” test requires a party to establish that the act or omission complained of probably caused the subsequent injury. *Nielson v. Eisenhower & Carlson*, 100 Wn. App. 584, 591, 999 P.2d 42 (2000). Legal causation rests on considerations of policy determining how far a party’s responsibility should extend. *Blume*, 134 Wn.2d at 252, 947 P.2d

223. It involves the question of whether liability should attach as a matter of law, even if the proof establishes cause in fact. *Id.* Proximate cause may be determined as a matter of law only when reasonable minds could reach but one conclusion. *Kim v. Budget Rent A Car Systems, Inc.*, 143 Wn.2d 190, 203-04, 15 P.3d 1283 (2001).

Whether sufficient evidence supports proximate cause represents an issue of “factual proximate cause rather than legal proximate cause.” *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn. 2d. 229, 314 (1993). The courts may therefore determine proximate cause (including in a transactional legal malpractice case involving estate planning as a matter of law) “only when the facts are undisputed and inferences there from are plain and incapable of reasonable doubt or difference of opinion.” *Daugert v. Pappas*, 104 Wash. 2d 254, 257-8 (1985) (“The trier of fact decides whether the client would have fared better but for such mishandling.”) As a result, proximate cause almost always represents an issue for the jury to decide. *Physicians Ins. Exch.* 122 Wn. 2d at 314.

Washington courts have established that the fact finder must determine what the plaintiff would have done but for the defendant’s negligence, the plaintiff establishes proximate cause through inferences drawn by the fact finder. *Daugert v. Pappas*, supra 104 Wn. 2d at 257-8;

*Bishop v. Jefferson Title Co.*, 107 Wn. App. 833, 848-9 (2001); *Hetzl v. Parks*, 93 Wn. App. 929, 939-41 (1999).

In *Brust v. Newton*, 70 Wn. App. 286, 290-94 (1993) the court held “it is for the trier of fact to decide whether the client would have fared better but for the attorney’s mishandling of his case. It is also for the trier of fact to decide the extent to which that is true.” This premise is especially true whereas here, on summary judgment, all reasonable inferences must be drawn in favor of the non-moving party. e.g., *Young v. Key Pharmaceuticals*, 112 Wn. 2d 216, 226 (1989).

The inferences with regard to causation in this matter overwhelmingly favor the Aldersons. Had Mr. Bergdahl simply correctly interpreted Judge Vanderschoors’ ruling that the “sale document” – March 27, 2006 Tiegs’ bid - controlled, the Aldersons would not have lost the Grandma Jesse property because this document did not include, nor did it contain any reference to the Grandma Jesse property. The language of Judge Vanderschoor’s oral decision, coupled with the undisputed fact that the sale document did not include the Grandma Jesse property, gives rise to only one reasonable inference; that being that Mr. Bergdahl won the argument he made to Judge Vanderschoor at the January 10, 2007 hearing and erroneously assumed he had lost. He then advised the Aldersons not

sign over the rights and no appeal the matter.

The trial court, in his oral decision granting summary judgment, stated that reasonable minds couldn't differ and it was clear, as a matter of law, that Judge Vanderschoor intentionally made a legal mistake in awarding the Grandma Jesse property to Mr. Peterson.

The trial court's finding in this regard is violative of the central tenant governing the granting of a summary judgment order, namely that all inferences are to be viewed in favor of the non-moving party.

In this matter, there is more than the requisite reasonable inference present to support the position that Mr. Bergdahl's negligence in failing to correctly interpret Judge Vanderschoor's order, or in failing to review the legal descriptions on the documents he submitted on behalf of Mr. Tiegs which erroneously included the Grandma Jesse legal description, were, alternatively, the cause of the Alderson's dispossession of their rights in the Grandma Jesse property.

Even if one were to ignore the inference that Mr. Bergdahl misinterpreted Judge Vanderschoor's January 10, 2007 oral ruling, Mr. Bergdahl is still negligent, because Judge Vanderschoor's award of the property to Peterson could only then have been reasonably based upon Mr. Bergdahl's erroneous inclusion of the Grandma Jesse property in the early

Tiegs bids. Mr. Bergdahl admits the same.

It only logically follows that if Mr. Bergdahl hadn't made a "mistake" in not determining that the early Tiegs bids, drafted by Mr. Bergdahl and submitted by him, contained the legal description for the Grandma Jesse property, then Peterson would not have been awarded the property.

The trial court has simply ignored the only two logical and plausible inferences supported by evidence, both of which point to Mr. Bergdahl negligence, and instead based his summary judgment ruling upon his unsupported conclusion that Judge Vanderschoor purposefully meant to dispossess the Aldersons of their rights in the Grandma Jesse property.

There simply is no evidence, nor any inference, reasonable or otherwise, to support the finding, as a matter of law, that Judge Vanderschoor intended to deprive Bob and Joanne Alderson of the Grandma Jesse realty and instead illegally award it to Peterson, thereby absolving Mr. Bergdahl of responsibility.

Where reasonable inferences giving rise to relevant questions of fact exist, it is improper to grant summary judgment.

D. Conflict of Interest - Ethical Violations

Whether an attorney's conduct violates the RPC is a question of law. *Eriks v. Denver*, 118 Wn.2d 451, 457-58, 824 P.2d 1207 (1992). The RPC should be construed broadly to protect the public from attorney misconduct. *Eriks*, 118 Wn.2d at 459. If a lawyer accepts dual representation and the clients' interests thereafter come into actual conflict, the lawyer must withdraw. *Eriks*, 118 Wn.2d at 459. To protect clients from the hardship and expense of obtaining new counsel in this situation, "[a]n attorney must discuss all potential conflicts of interest of which he or she is aware prior to undertaking the multiple representation." *Eriks*, 118 Wn.2d at 461. The attorney should resolve all doubts against undertaking a dual representation. *Eriks*, 118 Wn.2d at 460.

Here, it is uncontested that Mr. Bergdahl had a longstanding attorney-client relationship with Tiegs. Mr. Bergdahl admits that he had an attorney-client relationship in which he was representing Mr. Tiegs on other matters during the entirety of the time he represented the Aldersons. Furthermore, Mr. Bergdahl admits to drafting and submitting the Tiegs' bids on behalf of Mr. Tiegs.

After the March 27, 2006 Tiegs' bid was submitted to the court, Mr. Bergdahl made a motion in May 2006 to have Mr. Tiegs confirmed as the high bidder. (CP 944: Page 61) Mr. Bergdahl also regularly kept

Mr. Tiegs apprised of the events concerning the Mark Peterson right of first refusal litigation. (CP 993 – 997).

On January 26, 2006, Mr. Bergdahl wrote to Mr. Tiegs and provided him with an extensive legal analysis concerning the defense of the Peterson first right of refusal. In this five-page letter, Mr. Bergdahl also attaches and provides to Mr. Tiegs all the Alderson “documents contained in my files and records.” (CP 993 – 997).

The Aldersons submitted the declaration of John Strait in response to defendants’ motion for summary judgment. Professor Strait opined that Mr. Bergdahl did have an attorney-client relationship with Tiegs concerning Tiegs efforts to purchase the Triple A Farm property. (CP 1096 – 1137).

Professor Strait also set forth his opinion that Mr. Bergdahl had a non-waivable conflict of interest. It is clear that Mr. Bergdahl was representing both the Aldersons and Tiegs on opposite sides of the same transaction where each client had interests diametrically opposed to the other. (CP 1096 – 1137).

Tiegs’ interest was to minimize the amount of money that he paid for the Triple A Farms property, and to get as much land as he could for the money he bid.

In contrast, the Aldersons had an interest in maximizing the price paid for the Farm property, and in retaining ownership of the Grandma Jesse parcel. The interests of the Aldersons and Mr. Tiegs were directly adverse.

One of the major impediments to Mr. Tiegs' interest in paying the lowest price possible for the Farm property was Mr. Peterson's right of first refusal. In fact, it was Mr. Peterson's right of first refusal which ultimately prevented Mr. Tiegs' March 27, 2006 \$ 7.2 million bid from succeeding.

Respondents could argue that Peterson could have participated in the bidding structure that Judge Vanderschoor implemented which is certainly true. However, under his rights of first refusal, Peterson wasn't subject to bidding in escalating \$25,000.00 increments. Peterson would merely have to match the highest and best bid.

The validity of the Peterson right of first refusal would have the effect of encouraging Tiegs to submit a larger bid for the property to avoid having his bid matched by Peterson under the first right of refusal.

There was great value and benefit to Tiegs to have Peterson's right of first refusal deemed invalid.

What is clear is that Mr. Bergdahl advised the Aldersons to resist

Peterson's right of first refusal. However, the entity who really stood the most to gain from the defeat of Peterson's right of first refusal was Tiegs, not the Aldersons. Yet the Alderson's incurred all of the cost of defending the Peterson lawsuit and were found liable for Peterson's attorneys' fees because they followed Mr. Bergdahl's advice and resisted Peterson's assertion of his rights of first refusal.

Mr. Bergdahl went so far as to charge the Alderson's for a motion Mr. Bergdahl made on behalf of Mr. Tiegs, in May 2006, during the pendency of the Peterson litigation, to have Mr. Tiegs declared the high bidder and owner of the property.

This case is on point with the seminal decision in *Eriks v. Denver*, 118 Wn.2d 451 (1992). In *Eriks*, Attorney Denver represented both the investors the promoters in a tax shelter scheme. The IRS began challenging the tax deductions and the promoters hired Denver to represent investors. Prior to undertaking representation of the investors, Denver knew that the IRS was, as a matter of policy rejecting the tax credits claimed through the scheme. Denver knew that his investor clients would have potential claims against the promoters yet continued to represent the investors. The court in interpreting the CPR, the predecessor to the RPCs stated as follows:

The ethical considerations (hereafter EC) illustrate the problems inherent in such representation. If a lawyer accepted such employment and the interest did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients. CPR EC 5-15. That is exactly what happened in this case. After the IRS denied several investor client's deductions those clients asked Denver whether they had any legal recourse against the promoters. Denver's response was;

I made it quite clear that they should obtain independent counsel if they wish to pursue any actions against other parties in this matter and I did not advise them as to possible recourse against the persons who sold them their master recordings.

Thus the evil the rules were designed to prevent actually came about in this case. Denver could not advise his clients as to an appropriate course of action. His inability to properly advise his clients violated Denver's duty of loyalty to those clients. Model Rules of Professional Conduct Rule 1.7 comment, at 73 (1984).

*Eriks* at 459 – 460.

The same "evil" existed in this matter. RPC 1.7 provides as follows:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the

lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

Pursuant to RPC 1.7, Mr. Bergdahl could not undertake the representation of both the Aldersons and Mr. Tiegs because their interests were directly adverse to each other. Mr. Tiegs had an interest in minimizing the price he paid for the Triple A Farms property and in getting as much land as possible, while the Aldersons had the adverse interest to maximize the price paid for the Farm property and retain their interest in the Grandma Jesse House.

Under RPC 1.7(b) the lawyer may undertake dual representation if there is a concurrent conflict of interest but only where the lawyer

reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client. In this instance Mr. Bergdahl could not have reasonably believed that he would be able to provide competent and diligent representation to each affected client, given the directly adverse interests of the Aldersons and Tiegs. (See Declaration of John Strait).

Furthermore PC 1.7(b)(4) requires each affected client give informed consent, confirmed in writing (following authorization from the other client to make any required disclosures.)

RPC 1.0(e) defines informed consent as follows:  
Informed consent denotes the agreement by a person to a proposed course of conduct after the lawyer has communicate adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Mr. Bergdahl did not obtain informed consent in writing from the Aldersons:

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17 **Q. Did you in that writing disclose that he was, in writing, a**

18 **client of yours, that Frank Tiegs was a client of yours?**

19 A. I'm sure that I did. I'm sure that in my writing somewhere

20 that it indicates that he's a client of mine.

21 They had no -- you're asking about in writing and I

22 can't point to it right now, but I would say yes, I probably  
23 did.

24 **Q. And that document would be somewhere if it exists, correct,**  
25 **you would have that document?**

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1 A. It would be in my correspondence.

2 **Q. Did you in the writing to the Aldersons, the writing that you**  
3 **think may exist in your correspondence with respect to your**  
4 **relationship with Mr. Tiegs, discuss the issue, the conflict**  
5 **of interest or potential conflict of interest with respect**  
6 **to --**

7 A. No.

8 **Q. -- Mr. Tiegs and the Aldersons?**

9 A. No. I made it really clear to Mr. Tiegs and to the Aldersons  
10 that I did not represent Mr. Tiegs in this transaction.

11 **Q. Did you do that in writing?**

12 A. I can't tell you.

(CP 947)

In *Eriks*, at 460 the court noted even when an attorney is justified  
in accepting multiple representation of clients with differing interests, it is

nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and obtain other counsel if he so desires. Denver provided that opportunity to his promoter clients but denied it to his investor clients. In so doing Denver violated his duty to explain any circumstances that might cause a client to doubt Denver's loyalty. Therefore as a matter of law Denver violated the CPR.

The remedy for an attorney who violates the Rules of Professional Conduct in undertaking representation which results in a conflict of interest is disgorgement of fees. The court in *Eriks*, at 462-463, stated:

The trial court specifically relied on *Woods v. City Nat'l Bank & Trust Co.*, 312 U.S. 262, 85 L. Ed. 820, 61 S. Ct. 493 (1941) and *Silbiger v. Prudence Bonds Corp.*, 180 F.2d 917 (2d Cir. 1950), cert. denied, 340 U.S. 831, 95 L. Ed. 610, 71 S. Ct. 37 (1950) in ordering disgorgement. In *Woods* a unanimous Court noted:

Where [an attorney] . . . was serving more than one master or was subject to conflicting interests, he should be denied compensation. It is no answer to say that fraud or unfairness were not shown to have resulted. . . .

. . . A fiduciary who represents [multiple parties] . . . may not perfect his claim to compensation by insisting that, although he had conflicting interests, he served his several masters equally well . . . Only strict adherence to these equitable principles can keep the standard of conduct for fiduciaries "at a level higher than that trodden by the crowd." See Mr. Justice Cardozo in *Meinhard v. Salmon*, 249 N. Y. 458, 464; 164 N. E. 545 [(1928)].

Woods, 312 U.S. at 268-69. The general principle that a breach of ethical duties may result in denial or disgorgement of fees is well recognized. S. Gillers & N. Dorsen,

Regulation of Lawyers: Problems of Law and Ethics 265 (2d ed. 1989); *Ross v. Scannell*, 97 Wn.2d 598, 610, 647 P.2d 1004 (1982) ("[p]rofessional misconduct may be grounds for denying an attorney his fees").

It is impossible to know on what basis Judge Acey dismissed the Aldersons' claims arising out of the conflict of interest issues because he didn't articulate any reason, or address these claims in issuing his oral ruling at the summary judgment hearing.

There is ample evidence in the record that these claims are viable as a matter of law and they shouldn't have been summarily dismissed.

E. Defendants' assertion that the Alderson's recovery is barred because they failed to appeal Judge Vanderschoor's ruling with regard to the Grandma Jesse property is irrelevant given the facts of this matter.

Defendants cited *Paradise Orchards v. Fearing*, 122 Wn. App. 507 (2004) for the proposition that the Aldersons were required to appeal Judge Vanderschoor's order and by not doing so they waived any claim of legal malpractice against Mr. Bergdahl.

The trial court did refer to the *Paradise Orchards* case in issuing his oral ruling on summary judgment and stated that he found it applicable. The theory that the Alderson's were required to appeal Judge

Vanderschoor's ruling, based on the holding in *Paradise Orchards*, is flawed for two reasons: 1) Mr. Bergdahl advised the Alderson's not to appeal because it was his opinion that they would lose (CP 1141); and 2) it was Mr. Bergdahl's negligence, not Judge Vanderschoor's ruling which resulted in the Aldersons being disposed of the Grandma Jesse property. Any appeal would have been useless given those facts.

In *Paradise Orchards*, following the entry of adverse order, Paradise chose to settle rather than appeal. Paradise then filed a legal malpractice action against attorney Fearing. The court found that the judge in the underlying case committed an error and dismissed the malpractice claim against the attorney defendant.

In order for the *Paradise Orchards* holding to be applicable in this case, it must be Judge Vanderschoor, and not Mr. Bergdahl, who committed the error. The facts of this case show that Mr. Bergdahl misinterpreted Judge Vanderschoor's ruling. There simply wasn't any justiciable issue the Alderson's could have appealed because Judge Vanderschoor ruled that the Grandma Jesse property was to go to the Aldersons. The error here was Mr. Bergdahl's misinterpretation of the Judge Vanderschoor's ruling.

In the alternative, according to Mr. Bergdahl's theory, Judge

Vanderschoor awarded the property to Mr. Peterson because the early Tiegs' bids erroneously contained a legal description of the Grandma Jessie parcel. If such is the case, the fault lies not with the judge, but with Mr. Bergdahl for breaching the standard of care in not reviewing the legal descriptions to determine their accuracy.

Furthermore, as set forth in Joanne Alderson's declaration and deposition testimony, Mr. Bergdahl advised the Aldersons not to appeal because he didn't feel they would win. The Alderson's merely followed the advice of their attorney and declined to pursue an appeal. (CP 1138-1134).

#### E. CONCLUSION.

This matter should not have been dismissed on summary judgment. It is clear that the Aldersons had an ownership interest in the Grandma Jesse property. This fact is established by Judge Vanderschoor's October 5, 2005 ruling, together with the existence of the 1998 quit claim, deeding the property to Bob Alderson as his separate property.

Its also clear that that the Aldersons were dispossessed of their interest in the Grandma Jesse realty. There are only two logical and reasonable inferences as to why the Alderson's were disposed of their property rights, the first is that Mr. Bergdahl misinterpreted Judge Vanderschoor's ruling on the disposition of the property. The second is that

Mr. Bergdahl erroneously included the legal description of the Grandma Jesse property in the bids he prepared on behalf of his other client, Frank Tiegs.

A review of the transcript of the January 10, 2007 hearing shows that Judge Vanderschoor ordered that the Grandma Jesse property be awarded the way the "sale document" indicates. This order was precisely the result that Mr. Bergdahl argued for at that hearing. It is undisputed that the sale document Judge Vanderschoor referenced was the March 27, 2006 Tiegs bid. It is also undisputed that the March 27, 2006 Tiegs' bid contained no reference to the Grandma Jesse parcel as being included in the proposed bid, which Mr. Peterson later accepted when he filed the same with the court August 4, 2006 along with his notice of exercise of his right of first refusal.

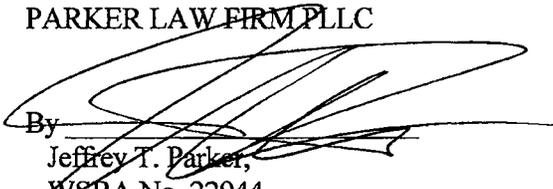
In the alternative, the only other rational basis Judge Vanderschoor could have had for awarding the property to Mr. Peterson was Mr. Bergdahl's erroneous inclusion of the Grandma Jesse property in the earlier bids he prepared on behalf of his other client, Frank Tiegs. Mr. Bergdahl acknowledges it was a breach of the standard of care for him not to review these legal descriptions. Mr. Robinson, plaintiffs' expert, has rendered the same opinion.

Furthermore, the fact that Mr. Bergdahl was representing Tiegs and the Aldersons on the opposite side of the same transaction gives rise to a non-waivable conflict of interest. These claims are viable and should not have been dismissed on summary judgment.

DATED this 31<sup>st</sup> day of May, 2010.

Respectfully submitted,

PARKER LAW FIRM PLLC

By 

Jeffrey T. Parker,  
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**CERTIFICATE OF SERVICE**

Pursuant to the laws of the State of Washington, the undersigned certifies under penalty of perjury of the laws of the State of Washington that a true and correct copy of the foregoing *Appellant's Brief* was sent for service via legal messenger, this 1st day of June, 2010 to:

*Attorneys for Respondent R. Crane Bergdahl*

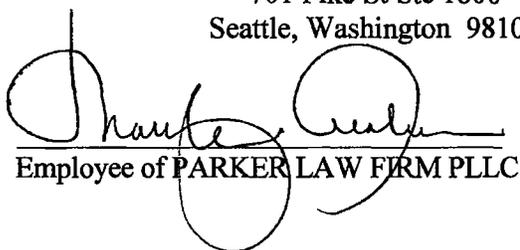
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