

FILED
JUN 30 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 287904

COURT OF APPEALS STATE OF WASHINGTON
DIVISION III

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

Appellants.

v.

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

Respondents/Cross Appellants.

OPENING BRIEF OF RESPONDENTS/CROSS-APPELLANTS

Joel E. Wright, WSBA No. 8625
William L. Cameron, WSBA No. 5108
Attorneys for Respondents/
Cross-Appellants

LEE SMART, P.S., INC.
1800 One Convention Place
701 Pike Street
Seattle, WA 98101-3929
(206) 624-7990

FILED
JUN 30 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

NO. 287904

COURT OF APPEALS STATE OF WASHINGTON
DIVISION III

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

Appellants.

v.

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

Respondents/Cross Appellants.

OPENING BRIEF OF RESPONDENTS/CROSS-APPELLANTS

Joel E. Wright, WSBA No. 8625
William L. Cameron, WSBA No. 5108
Attorneys for Respondents/
Cross-Appellants

LEE SMART, P.S., INC.
1800 One Convention Place
701 Pike Street
Seattle, WA 98101-3929
(206) 624-7990

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. ASSIGNMENT OF ERROR	2
III. STATEMENT OF THE CASE	3
A. Crane Bergdahl represented the Aldersons in the dissolution of Triple A Farms.....	3
B. Judge VanderSchoor ordered that Triple A be sold to the highest bidder.	4
C. The Aldersons sued Bergdahl for legal malpractice but changed their allegations against him only after their depositions..	7
D. Judge Acey granted summary judgment to Bergdahl.....	8
IV. SUMMARY OF ARGUMENT.....	9
V. ARGUMENT.....	10
A. The Aldersons concede that no issues of fact exist that would contradict Bergdahl’s undisputed testimony.	10
B. Judge Acey erred in denying Bergdahl’s motion to exclude the testimony of the Aldersons’ experts.	12
C. Bergdahl did not commit malpractice.	13
1. The Aldersons’ claim of duty is based on the infallibility of hindsight.	13
2. Attorney Bergdahl did not misinterpret Judge VanderSchoor’s oral ruling.	14
3. Attorney Bergdahl did not inappropriately fail to argue his case to Judge VanderSchoor.....	15
D. Attorney Bergdahl properly and adequately represented the Aldersons.	15
1. Legal causation	15
2. Attorney Bergdahl met the standard of care.	17
3. The Aldersons claims are based on speculation.	18
E. It was the Aldersons who made a decision that bars their recovery.	20

F. Attorney Bergdahl’s conduct on this matter is immune from liability.....	22
G. Attorney Bergdahl did not commit an ethical violation in encouraging and assisting Tiegs to bid on Triple Farms.....	26
1. Opposing Peterson’s right of first refusal was for the benefit of the Aldersons.....	26
2. Bergdahl did not represent Tiegs.....	27
3. John Strait’s opinion is a legal conclusion that is contrary to Washington law.....	29
VI. CONCLUSION	33

TABLE OF AUTHORITIES

Washington Cases

<i>Bush v. O’Connor</i> , 58 Wash. App. 138, 791 P.2d 915 (1990)	14, 23
<i>Daugert v. Pappas</i> , 104 Wn.2d 254, 258-59, 704 P.2d 600 (1985)	23
<i>Equitable Shipyards v. State of Washington</i> , 93 Wn.2d 465, 611 P.2d 396 (1980).....	29
<i>Eriks v. Denver</i> , 118 Wn.2d 451, 824 P.2d 1207 (1992).....	31, 32
<i>Geer v. Tonnon</i> , 137 Wn. App. 838, 155 P.3d 163 (2007), <i>review denied</i> , 162 Wn.2d 1018 (2008).....	18
<i>Guillen v. Pierce County</i> , 127 Wn. App. 278, 110 P.3d 1184 (2005).....	15
<i>Halvorsen v. Ferguson</i> , 46 Wn. App. 708, 713, 735 P.2d 675 (1987)	16, 23, 24
<i>In re Botimer</i> , 166 Wn.2d 759, 214 P.3d 133 (2009)	30
<i>Lake v. Woodcreek Homeowners Ass’n</i> , 168 Wn.2d 694, 229 P.3d 791 (2010).....	10
<i>McKee v. Am. Home Prods. Corp.</i> , 113 Wn.2d 701, 782 P.2d 1045 (1989)	13
<i>Nielson v. Eisenhower & Carlson</i> , 100 Wn. App. 584, 999 P.2d 42 (2000)	19, 20
<i>Paradise Orchards v. Fearing</i> , 122 Wn. App. 507, 94 P.3d 372 (2004) ..	20
<i>Sacotte Const., Inc., v. Natl. Fire & Marine Ins. Co.</i> , 143 Wn. App. 410, 177 P.3d 1147 (2008)	30
<i>Singly v. Warren</i> , 18 Wash. 434, 51 Pac. 1066 (1898).....	28
<i>South Tacoma Way LLC v. Washington</i> , No. 82212-3 (Wash. Supreme Ct. June 24, 2010).....	29
<i>Southwest Wash. Ch. National Electrical Contractors’ Assn. v. Pierce County</i> , 100 Wn. 2d 109, 667 P.2d 1092 (1982)	29
<i>Taliesen Corp. v. Razore Land Co.</i> , 135 Wn. App. 106, 144 P.3d 1185 (2006).....	11
<i>Washburn v. Beatt Equipment Co.</i> , 120 Wn.2d 246, 840 P.2d 860 (1992)	20

Other Cases

<i>In re Conduct of Wyllie</i> , 331 Or. 606, 615, 19 P.3d 338 (2001).....	30
<i>In re Tom’s Foods Inc.</i> , 341 B.R. 82 (B.M.D.Ga. 2006).....	29, 31
<i>Simko v. Blake</i> , 201 Mich. App. 191, 506 N.W.2d 258 (1993) <i>aff’d</i> 448 Mich. 648, 532 N.W.2d 842	20, 22, 23
<i>Viner v. Sweet</i> , 30 Cal. 4th 1232, 70 P.3d 1046, 135 Cal. Rptr. 2d 629 (2003).....	25

Woodruff v. Tomlin, 616 F.2d 924 (6th Cir. 1980).....20

Other Authorities

Bauman, *Damages For Legal Malpractice: An Appraisal of the Crumbling
Dike and Threatening Flood*, 61 TEMP. L. REV. 1127 (1988)25
R. Mallen & J. Smith, 2 *Legal Malpractice* §19.1622
R. Mallen & J. Smith, 4 *Legal Malpractice* § 30.3919

I. INTRODUCTION

Robert and Joanne Alderson, husband and wife, hired attorney Crane Bergdahl to assist them with the dissolution of Triple A Farms, a partnership owned by Robert Alderson, his brother Jack, and Jack's son Scott. Initially, Franklin County Superior Court Judge Vic L. VanderSchoor¹ determined a percentage of ownership for each of the three groups and ordered the property sold. He also determined that a five-acre parcel containing "Grandma Jessie's house" belonged to Robert Alderson individually. Jack and Scott submitted a bid to purchase Triple A for \$4,818,291 based on an appraisal by Jack Fredrickson. They subtracted the value of Grandma Jessie's house from the appraisal to arrive at their bid. Meanwhile, Bergdahl began making inquiries to see if he could obtain higher bids. He sent out bid packages, including one to Frank Tiegs, one of his regular clients. Bidding progressed under court supervision, and Tiegs ultimately submitted the high bid of \$7,200,000.

During the bidding, Mark Peterson, the farm's tenant, claimed that he had a right of first refusal, and a second trial was held on that issue, with Judge VanderSchoor determining Peterson did have a right of first refusal. Following the trial, there were numerous issues that remained to be resolved, but before the sale closed, Judge VanderSchoor altered his

¹ This brief will refer to the judges by name to avoid confusion.

opinion on the sale of Grandma Jessie's house and ordered that it be sold with the balance of the farm.

The Aldersons claim that Bergdahl was negligent by allowing the court to sell Grandma Jessie's house. They also claim that by soliciting bids from Tiegs to raise the sale price from \$4,900,000 to \$7,200,000, Bergdahl had a conflict of interest and that Bergdahl was really representing Tiegs's interest and not theirs. They now claim that challenging Peterson's right of first refusal was really in Tiegs's, not their, interest.

Bergdahl contends that all of his conduct met the standard of care of a reasonably prudent attorney, and the cause of the loss of Grandma Jessie's house was an erroneous ruling by Judge VanderSchoor that the Aldersons did not appeal. Any potential conflict of interest was completely known to the Aldersons, and the solicitation of a bid from Tiegs was clearly to the Aldersons' benefit, increasing the sale price of the property by millions of dollars.

II. ASSIGNMENT OF ERROR

Assignment of Error

The trial court erred in not excluding the opinions of the Aldersons' experts, Richard C. Robinson and John A. Strait.

Issue Pertaining to Assignments of Error

In opposition to Bergdahl's motion for summary judgment, the Aldersons submitted two declarations by previously undisclosed experts. Bergdahl had propounded interrogatories requesting the identity of all experts and the substance of any expert's testimony, but the Aldersons had disclosed neither their experts nor their opinions. Did the trial court abuse its discretion in denying Bergdahl's motion to exclude the declarations of Strait and Robinson?

Plaintiffs' Assignments of Error

Attorney Bergdahl assigns no error to Judge Acey's decision, order or judgment. The Aldersons claim Bergdahl did not properly understand Judge VanderShoor's decision on Grandma Jessie's house and did not properly present arguments to him on that issue. They now claim that Bergdahl represented Frank Tiegs and his interests instead of theirs. As we will discuss below, these errors are the product of hindsight and not the proximate cause of any of the Aldersons' putative damages.

III. STATEMENT OF THE CASE

A. Crane Bergdahl represented the Aldersons in the dissolution of Triple A Farms.

Triple A Farms was formed by Jack and Robert Alderson, their wives, and Jack's son, Scott. They stopped actively farming at the end of the calendar year 1996, and Mark Peterson, originally as manager, then as

tenant, farmed the land. CP 241-242 The Aldersons did not get along, and Robert and Joanne Alderson hired Crane Bergdahl to represent them in the dissolution of the partnership. Early in the litigation, Judge Vic VanderSchoor, the Franklin County judge who was assigned to the case, ordered the sale of the property and an appraisal. Jack Fredrickson prepared the appraisal, which valued the farm at \$4,900,000. Judge VanderSchoor determined that Jack Alderson owned 40 percent of the farm, Scott Alderson owned 10 percent, and Robert Alderson owned 50 percent. Judge VanderSchoor also determined that the house where the Aldersons' mother had lived, "Grandma Jessie's house," had been deeded to Robert and was not part of Triple A Farms. CP 242-43

B. Judge VanderSchoor ordered that Triple A be sold to the highest bidder.

On November 15, 2005, Jack and Scott prepared a bid of \$4,818,291. They arrived at this figure by subtracting the value of Grandma Jessie's house, \$81,409, from Fredrickson's \$4,900,000. CP 243-44 Robert and Joanne Alderson and Bergdahl began making inquiries in the farming community to see if they could obtain higher bids than the one proposed by Jack and Scott. Bergdahl prepared bid packages for at least two commercial agricultural real estate firms in Pasco. As he did with other prospective bidders, Bergdahl prepared a bid from a form in his office. He attached a copy of the legal description used by Fran Forgette in

preparing Jack and Scott's bid and gave it to Frank Tiegs who was his landlord and a long time client. CP 244 The bid was so lopsided on Robert and Joanne's behalf that Judge VanderSchoor made Bergdahl alter it. CP 245 Tiegs ultimately submitted the high bid of \$7,200,000 on March 27, 2006. *Id.*, CP 553-561 The Aldersons had full knowledge of Bergdahl's business relationship with Tiegs and had no problem with submitting the proposal on their behalf. They were enthusiastic supporters of Tiegs' bidding. CP 244 In the meantime, however, Mark Peterson, the tenant, sued to enforce a claimed right of first refusal. CP 245 During the bidding process, the Aldersons believed that Peterson was a silent partner in Jack and Scott's bid and did not wish Peterson to become a purchaser, because he would be absolutely unreasonable to deal with. CP 245-46

After Judge VanderSchoor determined that Peterson's first right of refusal was valid, Peterson exercised his option on August 4, 2006. Ken Miller, Peterson's attorney, ordered a title report that included the legal description that all of the bidders had used, and that had been provided by Fran Forgette. On reviewing the report, Bergdahl discovered that the preliminary commitment included Grandma Jessie's house. He wrote to the title company on November 7, 2006, and requested that the report be revised to delete it. CP 246-47 Miller and Bergdahl negotiated a number of issues during the next month until November 28, 2006, when Miller told Bergdahl that Peterson was not going to concede on post-closing

occupancy and a lane for ingress and egress the Aldersons were claiming to Grandma Jessie's house. On November 30, 2006, Robert and Joanne Alderson sent Bergdahl an e-mail telling him that if they did not get a pre-closing agreement on the encroachment of Peterson's farming operation and the easement; they would take their chances in court. CP 250, 697 Bergdahl then talked to Miller on the telephone, who told him that Grandma Jessie's house was included as part of the legal description in Tiegs's \$7,200,000 bid, and, because Robert and Joanne had caused so much difficulty, Peterson told him that he wanted to go after Grandma Jessie's house. CP 250 While Miller acknowledged in the telephone conversation that Peterson knew Grandma Jessie's house was not part of the farm, he nonetheless wanted to pursue it. *Id.* At a hearing on January 10, 2007, Judge VanderSchoor ruled:

I don't think anything that I order is going to be accepted by any of the parties. I don't mean the attorneys but their clients. Maybe not. Mr Peterson it may be unfair to say that. Be that as it may, I am trying to be as fair to everybody involved. Grandma Jesse's house will be dealt with the way the sale document indicates. I did say earlier that I thought that was Bob and Joanne's property. If that wasn't consistently treated in the sale then that's the way it goes. I'm sorry I don't know what I can do

CP 725 After the court's ruling, the Aldersons agreed it was better to conclude the sale and take their net recovery from closing of approximately \$3,200,000, rather than continue to fight over Grandma Jessie's house and possibly lose a closing date. CP 251-52 Therefore, they

determined not to appeal the court's ruling and place the sale at risk. CP 252

C. The Aldersons sued Bergdahl for legal malpractice but changed their allegations against him only after their depositions.

The Aldersons originally claimed that they were suing Bergdahl only over the loss of Grandma Jessie's house. CP 58-59, 215 They claim he failed to properly investigate the accurate legal description of Triple A, improperly argued their case to Judge VanderSchoor and misinterpreted his decision. CP 238-39 The Aldersons agreed that Judge VanderSchoor was in error, CP 813, and they identified no damages except the loss of Grandma Jessie's house. CP 1069, 1083-84. After their depositions, they decided that Bergdahl had really represented Tiegs, not them in the bidding process. CP 237-39

During discovery in this case, Bergdahl had made routine requests for the plaintiffs to identify the experts the Aldersons might call as witnesses. CP 8-9 When Aldersons' counsel announced that he had consulted with an expert to justify an amendment to the complaint, CP 23, Bergdahl's counsel asked him to supplement his discovery. CP 12 He did not. CP 5-6 The Aldersons did not disclose any experts until they submitted untimely declarations less than 11 days before the summary judgment hearing. CP 1091-1137; RP 11-12.

Bergdahl claims that he properly and adequately represented the Aldersons' interests, that they were fully aware of his relationship with Tiegs, and that he did not ever represent any interest other than the Aldersons' interest. CP 946 The Aldersons' evidence in opposition to this is the conclusion of John Strait that Tiegs interests directly conflicted with those of the Aldersons and this created a "non-waivable conflict of interest." CP 1102-03.

D. Judge Acey granted summary judgment to Bergdahl

Judge William D. Acey of the Hells Canyon Judicial District heard Bergdahl's motion for summary judgment on January 6, 2010. He ruled that he had read the expert opinions and could not take them out of his head, but that they were clearly served untimely. RP 12 "They should be properly excluded, but I won't because we're -- for reasons I'll make clear later. Ah -- ah, it shouldn't be an issue as far as my decision." *Id.* As to the merits of the Aldersons' claim he found, "[N]o reasonable minds can differ that [Judge VanderSchoor] just flipped and did a 180," and "a lawyer has no legal or ethical obligation to a client to have such a good crystal ball as to be able to stop, thwart, change an erroneous judicial, ruling." RP 29-30 He signed an order of summary judgment that day and a judgment later that month. CP 1195-96, 1199-1201

IV. SUMMARY OF ARGUMENT

Judge Acey correctly summed up Bergdahl's argument that he did not mishandle the closing of the sale of Triple A Farms by waiting until he had received a title report to verify the legal descript for the sale documents:

I agree with Defense Counsel that a lawyer has no legal or ethical obligation to a client to have such a good crystal ball as to be able to stop, thwart, change an erroneous judicial, ah, ruling. And it was erroneous. I do so find as a matter of law. I like your quote. "Lawyers are not expected to draft documents that are judge proof."

RP 30 The Aldersons' entire argument is premised on the inability of Bergdahl to anticipate a judicial decision, which they admit was in error. This is not a breach of the standard of care for an attorney.

While the Aldersons now fault Bergdahl for soliciting bids for Triple A from his longtime client Frank Tiegs, they were happy enough to accept the additional \$2,300,000 it helped add to the sale price, and they were fully aware of Bergdahl's business and legal relationship with Tiegs. The solicitation was for their benefit. After having filed this action and analyzed the issues for months, they now think they should be reimbursed for much of their litigation costs, because they now view it as having benefitted Tiegs even though they testified otherwise at their depositions.

V. ARGUMENT

A. **The Aldersons concede that no issues of fact exist that would contradict Bergdahl's undisputed testimony.**

Our Statement of the Case is from Crane Bergdahl's declaration. Neither in their presentation to Judge Acey nor in their opening brief do the Aldersons point to any error or inaccuracy in his recitation of the facts. CP 1159 Bergdahl's facts were presented to the Columbia County Superior Court as admitted and should be accepted by this court as such. This court reviews Judge Acey's decision *de novo*. *Lake v. Woodcreek Homeowners Ass'n*, 168 Wn.2d 694, 229 P.3d 791 (2010). The only critical finding in a summary judgment is the absence of a material issue of fact, and the Aldersons neither assign error to that finding nor analyze it in their brief.

Without directly challenging a material fact, the Aldersons' Statement of the Case implies wrongdoing by innuendo. It is far from being a "fair statement of the facts ... without argument" as required by RAP 10.3(a)(5). For example, the Aldersons use the word "admit" rather than "said" 11 times. Their entire Statement of the Case, from the last line of page 6 of the brief to first line of page 12 concerning Bergdahl's encouraging Tieg to submit a bid, is a mischaracterization of the undisputed record. While the Aldersons now suggest that defending against Peterson's right of first refusal or contesting the easement,

personal property, and other issues were Bergdahl's idea, Robert's deposition testimony and the e-mail of November 30 2006, leave little doubt that this bickering was the Aldersons' idea. CP 215-21, 697 For the purpose of the summary judgment motion and this appeal, the Aldersons could have called into question any statement Bergdahl made in his declaration, but they pointed to none. Judge Acey made only one finding of fact – there was no material issue of fact. CP 1196 The Aldersons do not challenge that essential finding, and it should be a verity on appeal. *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 144 P.3d 1185 (2006).

The Aldersons incorrectly claim “Mr. Tiegs and Mr Bergdahl share office space and a common conference room.” App. Brief at 6. The truth is that, as Bergdahl testified, Tiegs was “my landlord and we’re in the same building I can open my conference room and Mr. Tiegs can join us.” CP 943 The Aldersons misleadingly allege, “Mr. Bergdahl then drafted and submitted a number of successive bids on behalf of Mr. Tiegs.” App. Brief at 9 The truth is different.

- Q. Okay. You made — I’ll back up.
There were a number of offers that were made on behalf Frank Tiegs, correct?
- A. Yes.
- Q. And did you draft the documents with respect to the Tiegs offers?
- A. No.
- Q. Who did?
- A. Mr. Tiegs did.

CP 942 While Bergdahl admittedly assisted Tiegs in the preparation of his bid, it was with the encouragement of his clients and their full knowledge. CP 244-45 These issues were not explored in the Aldersons' depositions, because the issue of Bergdahl's encouraging Tiegs to bid on the property was not part of the suit at that time. Nonetheless, the Aldersons did not choose to file declarations in any way contradicting Bergdahl's straightforward testimony that he did not represent Tiegs. Tiegs hired Joseph VanLeuven as his counsel. CP 244

The Aldersons' Statement of Case from the end of page 13 is nothing but a claim that Attorney Bergdahl and Judge Acey erred and that Robinson has the correct answers. The Statement is neither fair nor without argument. This Court should ignore the Aldersons' Statement of the Case.

B. Judge Acey erred in denying Bergdahl's motion to exclude the testimony of the Aldersons' experts.

Judge Acey reasoned that he had already read the opinions of the experts at the time of hearing, and even he acknowledged that he should exclude them, stating: "They should be properly excluded, but I won't because we're — for reasons I'll make clear later. Ah — ah, it shouldn't be an issue as far as my decision." RP 12 Judge Acey gave the opinions no consideration.

Nonetheless, experts who are not disclosed in violation of the rules of discovery should not be permitted to testify, and the trial court should not consider their declarations for any purpose. The competency of an expert to testify is to be judged by the trial court, and its determination will not be set aside in the absence of a showing of abuse of discretion. *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989). While Judge Acey's reluctance to unring the bell is understandable, this court should not consider Strait and Robinson's declarations under any circumstances.

C. Bergdahl did not commit malpractice.

1. The Aldersons' claim of duty is based on the infallibility of hindsight.

Attorney Bergdahl reviewed and corrected the legal description of the property when he was preparing the final sale documents and dealing with the exceptions in the preliminary title report. CP 245-46 To establish a violation of the standard of care of a reasonably prudent attorney, the Aldersons must show that a competent attorney closing a farm sale would have examined the detailed legal descriptions in every bid submitted rather than following a preliminary title report. Robinson apparently never closed a real estate transaction. CP 1091-95. Other than anticipating an error by Judge VanderSchoor, there was no reason to perform this task for each of the bids, and no attorney is charged with the

duty to anticipate a decision by a court. *Bush v. O'Connor*, 58 Wash. App. 138, 791 P.2d 915 (1990). For that matter, when the bids were submitted, Peterson was not an issue, because he did not raise his right of first refusal until the bidding was well underway. CP 245 No real estate expert has suggested that Bergdahl's timing of the inspection of the legal descriptions was in error. If it was, then so was that of Fran Forgette and Terry Miller.

2. Attorney Bergdahl did not misinterpret Judge VanderSchoor's oral ruling.

The Aldersons claim that Bergdahl misinterpreted Judge VanderSchoor's ruling on January 10, 2007. While his decision appears clear enough, CP 964, there were several attorneys present, including Fran Forgette. It is clear from this exchange between Forgette and VanderSchoor a few months later that all present understood the ruling:

MR. FORGETTE: One comment on grandma's house. I know the Court's ruling back in October '05. Later the Court will remember during the — the legal description that ended up in the earnest money agreement when it was sold to Mark Peterson and included grandma's house. Since it was in the legal description, it sold with the rest of the property to those buyers. That was the ultimate disposition of that house.

THE COURT: I remember that. It wasn't because the house was in the partnership it was because that's the way it was drafted and that's the way it went.

CP 1175 The assertion that everyone in the court room did not understand what the judge was saying is meritless.

3. Attorney Bergdahl did not inappropriately fail to argue his case to Judge VanderSchoor

The Aldersons claim that by signing off on the order that attorney Miller presented to Judge VanderSchoor for signature following the January 10, 2007, hearing, Bergdahl “acquiesced in an interpretation of the Court’s ruling which is not supported by the transcript.” CP 1093 In *Guillen v. Pierce County*, 127 Wn. App. 278, 110 P.3d 1184 (2005), the plaintiffs took two voluntary nonsuits, so the trial court dismissed a third complaint under CR 41(a)(4). The plaintiffs tried to argue that, because the County had approved the dismissals as to form, the dismissals were stipulations and thus not subject to the two-dismissal rule. “By agreeing ‘as to form’ of the orders, the County simply acknowledged that it agreed to the structure of the plaintiffs’ unilateral motions for voluntary nonsuit under CR 41(a)(1)(B).” *Guillen*, 127 Wn. App. at 287. Here, Attorney Bergdahl signed the order “Approved as to form” only, and in so doing, he did not acquiesce in anything. CP 770-73

D. Attorney Bergdahl properly and adequately represented the Aldersons.

1. Legal causation

This case is as much about the parties to the underlying transaction as anything else. Consider Robert Alderson’s deposition:

Q. Well, I think the court was ordering the sale, so the Judge was going to ultimately decide who bought [Triple A]. But, I mean, is there some reason other

than personal vindictiveness that you didn't want to sell it to Mr. Peterson?

- A. Well, I don't know if you call it vindictive — vindictiveness or not, but I didn't — if I had a choice I wouldn't have sold it to Mr. Peterson... .
- Q. Is there some other reason, other than you didn't like Mr. Peterson for not selling it to him?
- A. It would be numerous reasons why I did not like Mr. Peterson and why I didn't want to sell it to him.
- Q. Now is your time to tell me.

CP 829-30 Legal causation is at issue in this case for two reasons. First, the Aldersons must prove that Bergdahl was the proximate cause of any damage. Liability for legal malpractice requires proof of four elements: (1) the existence of an attorney-client relationship giving rise to a duty of care on the part of the lawyer; (2) an act or omission breaching that duty; (3) damage to the client; and (4) the breach of duty must have been a proximate cause of the damages to the client. *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992). Second, as a matter of policy, the relitigation of an attorney's good faith tactical decisions should not be allowed because it would have a chilling effect on the attorney-client relationship, would substantially expand the sheer number of legal malpractice claims, and would impose an impossible burden on litigation attorneys. *Halvorsen v. Ferguson*, 46 Wn. App. 708, 713, 735 P.2d 675 (1987). Judge VanderSchoor's decision was incorrect under any analysis that one wishes to place on the facts or the law. The Aldersons agree that he was wrong and no logical reason exists for Bergdahl to have prepared a

greater analysis and presentation than he made other than hindsight. *See D.3., infra.*

2. Attorney Bergdahl met the standard of care.

The Aldersons argue Bergdahl admitted he violated the standard of care. App. Br. at 21. Bergdahl did no such thing:

Q. What's your understanding in terms of the difference between a mistake and a breach of the standard of care, a mistake a lawyer makes which is a breach of the standard of care?

A. Well, lawyers make mistakes all the time. And that doesn't necessarily mean that when I — if I make a mistake, that I've breached the standard of care, that I've committed malpractice, which I believe those are synonymous terms.

Q. Okay.

A. And I relied on my previous reviews of the legal descriptions and my previous reviews of the title policies and my review of the documents that came in that I thought had been well drafted by Mr. Forgette's office and I didn't make an independent study on it. And that was the mistake. And I'm not sure that I was required to do that.

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

A. Yes.

Q. Okay.

A. And I did. But I've done enough real estate work to know that looking at real estate descriptions doesn't necessarily help you in determining where that legal description is when you're talking about a large legal description that's metes and bounds and degrees and all of that good sort of stuff, as to be able to determine looking at that description exactly where physically it fits. That's a difficult task

CP 945 No one, expert or otherwise, has suggested the timing and detail of Bergdahl's review of the legal descriptions was substandard. In

determining whether an attorney breached this duty of care in a legal malpractice action, expert testimony is often required. *Geer v. Tonnon*, 137 Wn. App. 838, 850, 155 P.3d 163 (2007), *review denied*, 162 Wn.2d 1018 (2008). The Aldersons offered no expert testimony to establish the timing of Bergdahl's inspection of the legal fell below that standard, and Judge Acey was well acquainted with that standard of care. RP 25-28 In hindsight it may well have been a mistake, but certainly not below any established standard of care. Once a preliminary commitment for title insurance was prepared by the title company, Bergdahl recognized the error of including Grandma Jessie's home, brought it to the attention of Peterson's attorney, Miller, who then had the wrong preliminary commitment cancelled. CP 247 The title company issued a new correct preliminary commitment upon which all parties relied as they proceeded toward closing. *Id.* It never included Grandma Jessie's house until Judge VanderSchoor made his ruling January 10, 2007. CP 764

3. The Aldersons claims are based on speculation.

With the benefit of hindsight, the Aldersons claim a variety of tactical decisions should have been made differently. Any unhappy party to a trial — and at least one party always will be — may argue the same. But an attorney cannot guarantee the outcome of litigation. The Aldersons never appealed. One may not forego an appeal that would succeed and then sue the attorney over that decision. *Nielson v. Eisenhower &*

Carlson, 100 Wn. App. 584, 999 P.2d 42 (2000). As the Aldersons agree, Judge VanderSchoor was wrong, and they would have prevailed on appeal. They might also have lost the sale of \$7,200,000. The question then is: What if anything would have changed Judge VanderSchoor's mind? No party or expert can answer that question with certainty. Selling Grandma Jessie's house settled the question of the easement and made the issue of removing the Aldersons and their property an easy call, because they would no longer be in a position to vex Peterson and consequently return to court. From the pragmatic position of a judge who was running out of patience with obstreperous litigants, he settled a dispute. If he erred legally, he nonetheless completely and finally settled a dispute that was more than four years old. It cannot be said that anything any attorney would have done could have changed Judge VanderSchoor's decision. It is not possible to conjure an opinion that some line of reasoning would have persuaded him to rule other than he did.

The absence of liability for tactical decisions is "extremely appropriate and necessary to protect the attorney engaged in the conduct of a trial, who must continuously select between alternatives, few of which are necessarily wrong or right." R. Mallen & J. Smith, 4 *Legal Malpractice* § 30.39 at 560-61. The decision to use an expert witness, the selection of evidence, and the manner and extent of witness impeachment are protected judgmental decisions. *Simko v. Blake*, 201 Mich. App. 191,

506 N.W.2d 258 (1993) *aff'd* 448 Mich. 648, 532 N.W.2d 842 (tactical decision to call certain witnesses); *Woodruff v. Tomlin*, 616 F.2d 924 (6th Cir. 1980) *cert. denied* 449 U.S. 888, 101 S.Ct. 246, 66 L.Ed.2d 114 (1980) (witness impeachment).

Had Fran Forgette's legal description accurately described Triple A Farms and had Ken Miller just asked the judge to reconsider his original decision about the ownership of Grandma Jessie's house, Judge VanderSchoor might well have made the same decision. Interlocutory decisions are always subject to amendment any time prior to a final judgment. *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 840 P.2d 860 (1992). We can only speculate what Judge VanderSchoor might have done, but whichever way he decided, either the Aldersons or Peterson could have appealed his decision. The remedy is appeal, not a lawsuit against the attorney. *Nelson, supra*.

E. It was the Aldersons who made a decision that bars their recovery.

After deciding that Grandma Jessie's house would be part of the sale of Triple A to Mark Peterson, the Aldersons could accept the sale as approved by the court, or they could seek appellate review. *Paradise Orchards v. Fearing*, 122 Wn. App. 507, 94 P.3d 372 (2004), is a case remarkably similar to this one. The trial judges were the same; the underlying events involved the sale of agricultural property that did not go

as planned; John Strait gave a totally ignored opinion; CP 1109, and the results should be exactly the same. As did the Aldersons, Paradise lost an interlocutory ruling regarding contract terms that forced Paradise to settle on disadvantageous terms with the buyer. Paradise then sued its former attorney George Fearing, who had drafted the contract. While Paradise was bound by the previous case, because it did not appeal the adverse ruling and chose to settle instead, Judge Acey and this court ruled as a matter of law the interlocutory ruling was erroneous and dismissed the action against the attorney. Like attorney Fearing, attorney Bergdahl had no control over the erroneous ruling, or for that matter, his clients' desire to take their chances in court. The only difference between *Paradise Orchards* and this case is that unlike the plaintiffs in *Paradise Orchards*, the Aldersons agree that the trial court was incorrect, and we need not revisit the issue. As did Paradise Orchards, the Aldersons decided to accept an adverse ruling. They took the benefits of a lucrative sale instead. Just as George Fearing's conduct toward Paradise Orchards was not the proximate cause of loss, Crane Bergdahl's conduct is not the proximate cause of the Aldersons' loss. Their loss was the product of their desire to have their day in court on minor issues and then being faced with the unpleasant choice of appealing and possibility losing a valuable sale.

F. Attorney Bergdahl's conduct on this matter is immune from liability.

The issues here are beyond the scope of retrial.

The vast body of litigation, concerning the meaning or validity of documents or legal products, demonstrates a willingness for persons to litigate issues of interpretation. Invariably, one party's legal position will be found to be incorrect. Hindsight will show how the other party's lawyer could have drafted, advised or acted differently to reduce the risk of an unfounded claim. On a causation analysis, each successful litigant could sue his or her lawyer for the cost of litigation and the unsuccessful litigants could claim that their lawyers were negligent in recommending the litigation. With the benefit of hindsight, an expert witnesses [sic] could be found to opine that the [sic] each lawyer was negligent.

R. Mallen & J. Smith, 2 *Legal Malpractice* §19.16. An illustration of this principle can be found in *Simko v. Blake, supra*. Blake represented Simko in a criminal action, where Simko was convicted of possession with intent to deliver more than 650 grams of cocaine and possession of a firearm during the commission of a felony. Blake called only Simko to testify in his own defense. Simko was convicted, but the conviction was eventually reversed for lack of sufficient evidence. The Michigan Court of Appeals affirmed the trial court's order dismissing Simko's legal-malpractice claim against Blake, because the attorney did not have a duty to do more than what was legally adequate to vindicate fully Simko's interests.

There is no motion that can be filed, no amount of research in preparation, no level of skill, nor degree of perfection that could anticipate every error or completely shield a client from the occasional aberrant ruling of a fallible judge

or an intransigent jury. To impose a duty on attorneys to do more than that which is legally adequate to fully vindicate a client's rights would require our legal system, already overburdened, to digest unnecessarily inordinate quantities of additional motions and evidence that, in most cases, will prove to be superfluous. And, because no amount of work can guarantee a favorable result, attorneys would never know when the work they do is sufficiently more than adequate to be enough to protect not only their clients from error, but themselves from liability.

Id., 506 N.W.2d at 259-60. Simko spent two years in prison waiting for the appellate courts to overturn his conviction. His malpractice counsel presented the same arguments the Aldersons and their experts offer, but like Blake, Bergdahl did not owe any duty "to protect [the Aldersons] from judge and jury." *Id.* At 260.

Washington has adopted this rule in legal malpractice cases. Claims of professional negligence usually involve mixed questions of law and fact. *Halvorsen v. Ferguson, supra*. A determination of whether an attorney erred regarding a legal matter is a question of law for the judge. *Id.* at 713. Similarly, when determining proximate cause requires legal analysis, the judge is in a much better position than a jury to make that determination. *Id.*; *Daugert v. Pappas*, 104 Wn.2d 254, 258-59, 704 P.2d 600 (1985).

"In general, mere errors in judgment or in trial tactics do not subject an attorney to liability for legal malpractice." *Halvorsen*, 46 Wn. App. at 717. This is particularly true when the error involves an uncertain,

unsettled, or debatable proposition of law. *Id.* As a matter of law, an expert's statement that she would have conducted litigation differently does not constitute a basis for a legal malpractice claim. *Id.* at 718. As long as an attorney conducts reasonable research to ascertain relevant legal principals and makes an informed judgment, he or she is immune from judgmental liability. *Id.*

Robinson's opinion is illustrative of this impermissible post hoc analysis. He opined, "Mr. Bergdahl's breach caused damages to the plaintiffs since they ultimately lost the property based upon his breach of his duty to them to protect their interests." CP 1094 The only reason anyone has given that Bergdahl should have double checked Fran Forgette's work is that Peterson used it to persuade Judge VanderSchoor to remove the Aldersons from the property. No other reason appears in the pleadings or Robinson's declaration. That decision was legally incorrect, and Bergdahl had no duty to protect against it.

In the context of a business transaction, Robinson's opinion expresses the frustration of any party when things do not go as they hoped.

When a business transaction goes awry, a natural target of the disappointed principals is the attorney who arranged or advised the deal. Clients predictably attempt to shift some part of the loss and disappointment of a deal that goes sour onto the shoulders of persons who were responsible for the underlying legal work.

Bauman, *Damages For Legal Malpractice: An Appraisal of the Crumbling Dike and Threatening Flood*, 61 TEMP. L. REV. 1127 (1988). In *Viner v. Sweet*, 30 Cal. 4th 1232, 70 P.3d 1046, 135 Cal. Rptr. 2d 629 (2003), a California case arising out of the sale of a recording business, Mr. and Mrs. Viner brought a malpractice action against their lawyer, alleging seven counts of malpractice over his representation with respect to a business sale. The jury found the defendant liable on all seven claims of malpractice of more than \$13,000,000.00. The California Supreme Court reversed the jury verdict. The plaintiffs were required to prove that a more favorable result would have been obtained but for the alleged negligence. “[T]he plaintiff must establish that but for the alleged negligence of the defendant attorney, the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred. The purpose of this requirement, which has been in use for more than 120 years, is to safeguard against speculative and conjectural claims. It serves the essential purpose of ensuring that damages awarded for the attorney’s malpractice actually have been caused by the malpractice” *Id.*, 70 P.3d 1052 (citation omitted). Peterson could well have persuaded Judge VanderSchoor to change his mind about the ownership of Grandma Jessie’s house. The court might have denied the easement, allowed the encroachments, and ordered the Aldersons to vacate immediately. The problem with this is we do not know and cannot know

what Peterson or Judge VanderSchoor would have done under the circumstances. There is no way to know for what the property would have sold if Bergdahl had not asked Tiegs to bid on it. The Aldersons received a package deal when this case was finished. Now they would like to go back and unravel small pieces with which they find fault. The law does not permit them to renegotiate parts of their contract for the sale of Triple A Farms on a theory of malpractice.

G. Attorney Bergdahl did not commit an ethical violation in encouraging and assisting Tiegs to bid on Triple Farms.

1. Opposing Peterson's right of first refusal was for the benefit of the Aldersons.

The Aldersons connect the expenses of defending against Peterson's right of first refusal with Tiegs's having been a regular client of Bergdahl's. John Strait, the Aldersons' expert makes no such connection. Aside from the Aldersons' admitted dislike of Peterson, CP 219-21, Peterson would have had to bid an additional \$25,000 to be in the running had he not prevailed. (This assumes the court would have allowed him to bid had he lost his action to enforce his right of first refusal.) Aside from personal animosity, the Aldersons had good reason to make Peterson a bidder if they could. The Aldersons do not raise any factual issue in this regard.

Joanne Alderson's declaration, like her experts', was not timely filed. CP 1138-43 Nonetheless, during the Peterson litigation it developed that the only reason the Aldersons did not sign was that lease was a disagreement as to their son's interest in Triple A. They were estopped to deny the lease. CP 543-50 While it is not necessary to retry the merits of the Peterson case here, the animosity between the Aldersons and Peterson justified the litigation, and the Aldersons do not claim that Bergdahl pushed them into it.

2. Bergdahl did not represent Tiegs.

Bergdahl repeatedly testified that he did not represent Tiegs, that Tiegs had his own attorney for the purpose of the bidding on Triple A Farms, and that whatever he did for Tiegs was to benefit the Aldersons. CP 244-45

Q. Did you in the writing to the Aldersons, the writing that you think may exist in your correspondence with respect to your relationship with Mr. Tiegs, discuss the issue, the conflict of interest or potential conflict of interest with respect to —

A. No.

Q. — Mr. Tiegs and the Aldersons?

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

CP 947 This testimony is clear. While Strait urges a different conclusion, the facts do not show any dual representation. Asked a very similar question, the Iowa Bar Association issued the following ethics opinion:

Question 2: “Can a law firm represent an issuer as bond counsel in an issuer debt financing involving the competitive sale of bonds where the low bidder for the bonds (an underwriter) is represented in other matters or transactions by a member of the firm? Is the answer any different if there is no simultaneous representation, but the firm nonetheless regularly represents the underwriter in other financing transactions?”

Answer: The differing interests present in question one, above, do not exist in your second question concerning a competitive sale of bonds. Acceptance of a bid, as you point out, creates a contract between the issuer and the bidder. Therefore, it is the opinion of the board that it would not be improper for an Iowa law firm to represent an issuer as bond counsel in an issuer debt financing involving the competitive sale of bonds where the low bidder for the bonds (an underwriter) is represented in other matters or transactions by a member of the firm, providing DR 2-105(D) is complied with.

This also would be true if there were no simultaneous representation, but the firm nonetheless regularly represents the underwriter in other financing transactions.

Iowa, Formal and Informal Opinions, 95-20, February 22, 1996.

It is the settled policy of the law to encourage public bidding at judicial sales. *Singly v. Warren*, 18 Wash. 434, 51 Pac. 1066 (1898). The same principles that underlie bidding public works — procuring the best price for the public and providing a fair forum for the bidders — underlies all bidding situations. *Equitable Shipyards v. State of Washington*, 93

Wn.2d 465, 611 P.2d 396 (1980). Bidding removes fraud, collusion, and any favoritism from the process. *South Tacoma Way LLC v. Washington*, No. 82212-3 (Wash. Supreme Ct. June 24, 2010); *Southwest Wash. Ch. National Electrical Contractors' Assn. v. Pierce County*, 100 Wn. 2d 109, 667 P.2d 1092 (1982). The bidding under court supervision where the court is the actual seller of Triple A Farms, pushed the bidding higher, so that it was impossible for Bergdahl's participation in the process to have worked a detriment on the Aldersons. Similar arguments were raised in an attempt to deny debtor's counsel its fees in *In re Tom's Foods Inc.*, 341 B.R. 82 (B.M.D.Ga. 2006). The court noted that through the debtor's counsel, the initial bid for the equity in the company had been increased from \$20,000,000 to \$40,000,000, "The Court notes the efforts of Greenberg Traurig in marketing Debtor's assets, organizing the auction, and working with potential bidders." *Id.*, 341 B.R. at 89. Much as Bergdahl did, the debtor's attorneys assisted potential bidders with their applications, because the more bidders, the more likely a large return on the sale. There is no evidence of a conflict of interest or adverse representation.

3. John Strait's opinion is a legal conclusion that is contrary to Washington law.

Strait's conclusion that "Mr. Bergdahl had a non-waivable conflict of interest" is a concept that no Washington court has ever accepted. The

Court of Appeals rejected it in *Sacotte Const., Inc., v. Natl. Fire & Marine Ins. Co.*, 143 Wn. App. 410, 177 P.3d 1147 (2008). What Strait seems to be trying to say is that there was an “actual conflict of interest” or “concurrent conflict of interest.”

An “actual conflict of interest” exists when the lawyer “has a duty to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client.” DR 5-105(A)(1). A “likely conflict of interest” exists in all other situations “in which the objective personal, business or property interests of the clients are adverse.” DR 5-105(A)(2). DR 5-105(F) permits representation of multiple current clients “when such representation would not result in an actual conflict and when each client consents to the multiple representation after full disclosure.” Only likely conflicts may be waived after full disclosure; actual conflicts are not waivable. Full disclosure requires the lawyer to explain to the client the potential adverse impact of the multiple representation, advise the client to seek independent legal advice about whether consent should be given, and contemporaneously to confirm the disclosure in writing. DR 10-101(B).

In re Conduct of Wyllie, 331 Or. 606, 615, 19 P.3d 338 (2001); *see also In re Botimer*, 166 Wn.2d 759, 214 P.3d 133 (2009). Strait’s conclusion that the dual representation created “a potential benefit to Tieg and a potential detriment to the Aldersons” brings the alleged conflict into the waivable category. CP 1103 As we have seen there is no evidence Bergdahl attempted to obtain a lower sale price for the Aldersons and in the bidding context of this sale, he could not have done so. This was a sale ordered and conducted by Judge Vic VanderSchoor. He was the seller, not the

Aldersons who were beneficiaries of that sale. A conflict as to the Aldersons was not really possible, and the parallels with the bankruptcy described in *Tom's Food, supra*, is the proper paradigm.

In *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992), on which the Aldersons rely, Cliff Johnston, Percy Goodwin, and others began selling investments in master sound recordings as tax shelters. When the IRS challenged the scheme, the promoters formed the Master Recording Trust Fund to provide joint legal defense of the investors and promoters in the anticipated audits and tax court cases. They hired attorney William Denver to represent those who contributed to the MRTF. Denver shared an office and support staff with the promoters. The promoters solicited contributions to MRTF from investors, and eventually more than 240 investors contributed approximately \$400 each to the MRTF. Denver knew that the IRS was, as a matter of policy, automatically rejecting all tax credits and deductions based on investments in master sound recordings, that every investor would be audited and believed that the credits and deductions would be disallowed, and that no tax credit or deduction had been allowed after an IRS audit. Denver knew that his investor clients potentially could have civil claims against his promoter clients, and discussed his potential conflicts of interest with his promoter clients, but not with his investor clients. The trial court ordered that Denver disgorge his fees from his investor clients. Our Supreme

Court held that the question of whether an attorney's conduct violates the relevant Rules of Professional Conduct is a question of law... . [T]he court may properly disregard expert affidavits that contain conclusions of law." *Id.* at 457-58.

The present facts do not resemble those in *Eriks*. More importantly, even if Bergdahl were in some way representing both their interests, "[a]n attorney may represent multiple clients with potentially conflicting interests where (1) it is obvious the attorney can adequately represent each client; and (2) each client consents to the multiple representation after full disclosure of the potential conflict." *Eriks*, 118 Wn.2d at 461. The Aldersons have never asserted that they were ignorant of the long-standing relationship between Bergdahl and Tiegs or their collective roles in the court supervised bidding.

There was never multiple representation, a conflict of interest, or any lack of disclosure. Contrary to Strait's conclusions, Bergdahl committed no ethical violation.

VI. CONCLUSION

Judge Acey correctly dismissed the Aldersons' complaint against Crane Bergdahl. This court should sustain the trial court's decision in its entirety.

RESPECTFULLY SUBMITTED this 29th day of June 2010.

LEE SMART, P.S., INC.

By 
Joel E. Wright, WSBA No. 8625
William L. Cameron, WSBA No. 5108
Of Attorneys for Respondents

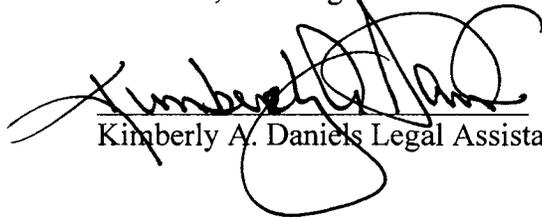
CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on June 29, 2010, I caused service of the foregoing on each and every attorney of record herein:

VIA LEGAL MESSENGER

Jeffrey Thomas Parker
2110 N Pacific St Ste 100
Seattle, WA 98103-9181

DATED this 29th day of June at Seattle, Washington.



Kimberly A. Daniels Legal Assistant