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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

2009 AUG -3 PM 3:54 *E*

NO. 62954-9-I

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

TUYEN D. NGUYEN and MAI T. VAN,

Appellants,

vs.

LISA F. MOORE,

Respondent.

BRIEF OF RESPONDENT

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ORIGINAL

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I. ASSIGNMENTS OF ERROR

Assignments of Error

Defendant-Respondent Lisa F. Moore (“Respondent” or “Moore”) assigns no error to the trial court’s decisions.

Issues Pertaining to Assignments of Error

Respondent disagrees with Appellants’ Assignments of Error and Issues Pertaining to Assignments of Error. The issues are more properly stated as follows:

Whether the trial court properly denied Appellant counsel’s post-trial motion for additional attorney fees and expenses, of \$212,170.91, where

1. Appellants were already made whole through their receipt of settlement monies and the jury award at trial;
2. The claim was never pleaded, raised, or joined before or during trial, and never reserved for a later court determination;
3. The claim lacks any recognized basis at law or in equity;
4. The claim is precluded by the doctrine of merger, and even if it were not, it would fail nevertheless, because Appellants were not the prevailing party in the underlying case.

Whether the trial court properly deducted from the jury's award the settlement monies of \$25,000 Appellants had received in the underlying case, where

1. Before and during trial, Appellants' counsel asserted that the deduction was proper and raised no objection to it until after trial; and
2. The source of the settlement monies was the original tortfeasors, thereby precluding application of the "collateral source rule."

II. STATEMENT OF THE CASE

See Agreed Report of Proceedings and Clerk's Papers.

III. SUMMARY OF ARGUMENT

The trial court properly denied the motion filed by Appellants' attorney seeking recovery of his fees for prosecuting contract claims within the context of his clients' claims for legal malpractice. It would appear that counsel filed that motion less for Appellants' benefit than for his own.

The aim of that motion was obviously not to reimburse Appellants for any legal fees or expenses they had ever actually incurred. Appellants themselves had already been made whole. They had received settlement monies from the defendants in the underlying action and from all of the

codefendants before trial in the malpractice action. At trial, they received the costs of repairing the construction defects that were the subject of the underlying action and nearly all of the fees they had paid to Respondent during her representation. It may be presumed, then, that the sole aim of Appellants' post-trial motion was to reimburse their counsel for his own fees, incurred on a contingency-fee basis, in an amount for which he never actually billed Appellants and which Appellants never actually paid.

The motion was ill-conceived on several other grounds, too. It lacked the support of any legal authority, statutory or decisional. The issues presented were never pleaded, raised, or joined by the parties before or during trial, and were never reserved for the trial court's determination. The stated basis of the motion was a contract document — a real estate purchase and sale agreement — that had merged upon settlement of the underlying case and that was, therefore, without legal existence and legal effect long before the malpractice case was filed. Even if that contract had not been extinguished by merger, because Respondent was not a party to it she could not be held liable under its attorney fee provision. The trial court had little choice but to deny the motion.

The trial court also properly overruled counsel's objection to deduction from the jury's award of monies that Appellants had received in settlement of the underlying case. This was an objection that was not

taken before or during trial, and was never reserved for the trial court's determination. In raising this objection for the first time post-trial, Appellants' counsel contradicted his previously stated position, which was that all settlement proceeds should indeed be deducted from the jury's award. In reasoning that Appellants had received the subject settlement proceeds from the original tortfeasor in the underlying case, and therefore that the "collateral source rule" did not apply, the court's deduction of the settlement proceeds from the jury's award was proper. Overruling Appellant counsel's objection was consistent not only with counsel's own position through but also with the case authorities.

This Court should therefore affirm the trial court's orders respecting (1) additional attorneys' fees and expenses, and (2) deduction of settlement monies from the jury award.

IV. ARGUMENT

A. The trial court's denial of Appellants' request for additional attorney fees was proper.

The trial court had several separately adequate grounds on which to deny Appellants' request for additional fees and expenses.

1. Although Appellants were made whole by the jury's award at trial, their counsel seeks recovery of additional fees Appellants never paid.

Appellants received pre-trial settlement monies totaling \$90,000. They received \$25,000 from the Singh defendants in the underlying case.

ARP 15. They received \$65,000 from the attorney codefendants in the malpractice case. ARP 9; CP 61. Appellants then received a jury award totaling \$131,621.51. CP 1052–62. They were awarded \$90,900 for repair costs. *Id.* They were also awarded \$40,721.51 for the return of attorney fees and miscellaneous expenses paid to Respondent. *Id.* Together, the settlement monies and trial award total \$221,621.51.

The jury considered evidence that Appellants had paid to all of the defendant attorneys a total of \$65,506.48, comprising fees and litigation expenses. ARP 10. Of this amount, \$47,086.51 was attributable to Respondent, and the remainder, \$13,289.09, to the codefendants, and the remainder to replacement counsel retained to settle the underlying case.

Of the fees and costs paid to Respondent, the jury awarded the return of \$40,721.51, or roughly 86 percent of the total. ARP 14; CP 1055. Presumably, the jury found that the remaining amount, \$6,365, had been legitimately earned. The jury expressly declined to award the return any of the fees incurred by Appellants' replacement counsel to negotiate settlement of the underlying case. CP 1058.

With respect to compensation for lost repair costs, the jury apportioned 40 percent liability to the codefendants and 60 percent to Respondent. ARP 14; CP 1062. Respondent's apportioned share was \$54,540. Codefendants' apportioned share, had they proceeded to trial,

would have been \$36,360. Assuming a 100-percent return of codefendants' attorney fees and costs, of \$13,289.09, their total liability for damages at trial would have been \$49,649.09. At a settlement cost of \$65,000, codefendants overpaid Appellants by \$15,350.91, an amount best characterized as a windfall.

It is clear that **all** of the attorney fees and costs incurred in the underlying case were pleaded and presented to the jury in the malpractice action. All of those fees and costs were then carefully considered during the jury's deliberations, as reflected in the Special Verdict Form. CP 1052–62. Thus, any **additional** award of attorney fees pursued by Appellants could hardly be characterized as “recovery.” Any such award would be a windfall — double “recovery” for Appellants or, more accurately, their counsel, because there is no evidence on the record showing that Appellants themselves ever incurred, much less paid or will be bound to pay, the **\$212,170.91** their counsel sought in his post-trial motion and now seeks on this appeal. CP 1283–93. Appellants' counsel was retained to prosecute the malpractice action on a contingency-fee basis. ARP 9.

2. **Recovery of Appellant counsel's own fees was never pleaded, raised, or joined as an issue before or during trial, and never reserved for the court's later determination.**

In attempting to support their argument for additional fees and expenses, Appellants imply that a determination of the attorney fee provision contained in a contract document in evidence in the underlying case was reserved for future determination by the court in the malpractice action. ARP 12. **It was not.** *Id.*

Prior to their post-trial motion, Appellants never submitted anything to the trial judge or jury — by pleading, expert testimony, memorandum, oral argument, or otherwise — asserting a right to attorney fees and expenses incurred in prosecuting the malpractice action. ARP 10. The trial court, having never been asked, therefore never addressed such an assertion. This was consistent with the prayer for relief contained in Appellants' malpractice complaint, which pleaded a claim for attorney fees only with respect to those paid to the attorney defendants in the underlying action:

1. For an award for the full amount of their damages to be proved at trial, including but not limited to, the costs to repair their home (less the money received by way of settlement) **and the attorney fees and costs paid to the Defendants.**

CP 1104. Appellants never changed their position. Appellants briefed Respondent and the trial court on that very position at trial as follows,

under the heading “Damages,” addressing the “attorney fees and costs incurred in the underlying action, including”:

| | |
|--------------------|---|
| \$13,289.09 | to the Cascade Law Group and its attorneys, Robert Clegg and Simon Stocker; |
| \$47,086.51 | to Lisa Moor d/b/a/ the Moore Law Office; |
| <u>\$8,707.00</u> | to Richard J. Moore |
| \$69,082.60 | |

In addition, during the course of their representation by Lisa Moore and the former Defendant Cascade lawyers, the Nguyens paid an additional **\$5,130.88** to third parties for other services related to the underlying litigation.

ARP 10. On that basis, the entire issue of Appellants’ entitlement to attorney fees was submitted to the jury. ARP 10–2.

Appellants’ counsel nevertheless asked the court to usurp or supersede the jury’s charge with respect to the determination of fees he himself had incurred in trying contract-related claims within the malpractice case. On post-trial motion, he purported to segregate out the time he had spent prosecuting the contract claims from the time spent prosecuting the negligence claims. CP 1290–1, 1153–80. But that exercise does nothing to advance his request for reimbursement of additional fees, particularly when those fees were never incurred by Appellants themselves.

As trial approached, Appellants' expert attorney Richard Moore opined that Appellants had no viable causes of action based, *inter alia*, on alleged breaches of the underlying contract, the Real Estate Purchase and Sale Agreement ("REPSA"). CP 1332-3. He admitted that in his opinion "I thought [Appellants] were going to lose on every theory, which is why I recommended they settle the case." CP 1333. But shortly before trial, he revised his opinion to include causes of action for breaches of an oral contract or promissory estoppel or both, along with an allegation of a REPSA breach that Respondent had already included in the complaint she filed while she was Appellants' counsel. ARP 9; CP 1335. At all events, Mr. Moore never opined during deposition or at trial that on the basis of any of his revised theories Appellants were ever entitled to an award of attorney fees. In fact, Mr. Moore never offered **any** opinions concerning Appellants' entitlement to any attorney fees, much less the additional fees that Appellants' counsel eventually sought on post-trial motion. Appellants' request for additional attorney fees relating the underlying contract were, and remain, unsupported by expert evidence.

Telling, Appellant has presented no orders, pleadings, motions, memoranda, minute entries, or proceeding transcripts to support his current contention that this claim was ever advanced at any time before the jury's verdict was rendered. As a result, Appellants' version of the trial

court's pre-trial ruling on the issue of additional attorney fees is at odds with, among other things, the court's later denial of all of Appellants' post-trial motions. ARP 14.

The court ruled pre-trial that whereas the liability for the **return**, or disgorgement, of attorneys' fees would be left to the jury, the court would reserve discretion only to determine the **reasonableness** of the amount to be returned or disgorged. APR 12. It was for that very reason that the trial court then **rejected** Respondent's proposed jury instruction premised on RPC 1.5 (Fees), but **accepted** proposed jury Instruction No. 23, which stated, in part:

If you find that Ms. Moore was negligent and proximately caused damages to the plaintiffs you may award attorney fees and costs incurred in the underlying action against the Singhs, **after** Lisa Moore became involved in the case as an element of damage.

ARP 11–2 [emphasis added]. Nothing in Instruction No. 23 or any other instruction reserved a right to additional recovery for attorney fees incurred at any point by Appellants in their malpractice action. ARP 10. Moreover, in the Special Verdict Form the jury was asked to determine the total amount of attorney fees for which Respondent was liable, and the question expressly offered several bases for such an award.

Question No. 5: Are Tuyen D. Nuyen and Mai T. Van entitled to recover the \$47,086.51 they paid to Lisa Moore d/b/a the Moore Law Office, for legal services and costs in their lawsuit against Singh?

CP 1055 [emphasis added]. The \$47,086.51 in attorney fees Appellants requested in Question No. 5 was the **largest** amount of attorney fees they ever requested in the case; in other words, it represents the very limit of such relief they sought from Respondent.

But the jury deliberately denied Appellants' request for the full amount. The jury answered "No" to Question No. 5, and awarded the return of attorney fees from defendant Moore in the amount of \$40,721.51. *Id.* The jury declined to award the return of any other attorney fees, including fees paid to the attorney codefendants on any basis alleged in Appellants' complaint or explained in the Jury Instructions. CP 1055–8. Tellingly, the jury expressly declined to award the return any of the fees incurred by Richard Moore for negotiating a \$25,000 settlement and a consent judgment of dismissal of the underlying claims. CP 1058.

Thus, the jury was never asked to consider awarding as damages any attorney fees that Appellants incurred in the malpractice action. ARP 10. The court was likewise never asked. That was a correct position at law, for there is no statutory, legal, or equitable basis for such an award, whether requested at trial, post-trial, or on appeal.

3. Appellants' request for fees and expenses beyond those awarded by the jury lacks a legal basis.

In general, Washington follows the so-called "American rule," requiring each part to bear his or her own attorney fees. The prevailing party, however, may be entitled to recover a reasonable attorney fee if the parties have so agreed by contract, or if a special statute so provides, or if the fee can be awarded on a recognized basis of equity. *City of Seattle v. McCready*, 131 Wn.2d 266, 931 P.2d 156 (1997) (attorney fees denied for lack of recognized basis for award); *Dempere v. Nelson*, 76 Wn. App. 403, 886 P.2d 219 (1994) (a claim for attorney's fees must be authorized by statute, contractual terms, or equitable principles).

Other than reference to paragraph q. of the REPSA, which will be dealt with below, Appellants cite no other legal basis for their proposition that they are entitled to an extra **\$212,170.91**, being, \$196,377.79 in attorney fees and \$15,793.12 in expenses allegedly incurred in prosecuting certain elements of their malpractice case through trial. CP 1291–3. But the REPSA cannot be revived as a legal document with legal effect, so as to permit a fee or cost award based on its provisions. Even if could be revived for that limited purpose, a much more fundamental flaw plagues Appellants' request: Respondent was never a party to the REPSA at issue in the underlying case, and Appellants attempt to extend the REPSA attorney fee provision into the malpractice action is not supported by any

statutory or case authority. Appellants citations to RCW 4.84.330, and *Singleton v. Frost*, 108 Wn.2d 723, 742 P.2d 1224 (1987) are inapt and wholly unavailing.

- a. **Respondent is not a party to the REPSA, and is therefore not liable on its attorney fee provision.**

RCW 4.84.330 governs actions “on a contract,” a phrase that, even given a liberal interpretation, extends only to the executing parties and other parties as may be expressly referenced in the attorney fee provision. “The phrase ‘in any action on a contract’ in this statute encompasses any action in which it is alleged that a person is liable on a contract.” *Herzog Aluminum, Inc. v. General Am. Window Corp.*, 39 Wn. App. 188, 197, 692 P.2d 867 (1984). Unless the attorney fee provision otherwise expressly provides, the purview of RCW 4.84.330 extends **only** to the parties signing the contract at issue. *Mutual Security Financing v. Unite*, 68 Wn. App. 636, 847 P.2d 4 (1993); *cf.*, *Yuan v. Chow*, 96 Wn. App. 909, 982 P.2d 647 (1999).

Paragraph q. of the REPSA names only the Buyer and Seller as parties entitled to attorney fees and costs in the event either prevailed in a suit against the other.

- q. **Attorneys’ Fees.** If **Buyer or Seller** institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorney fees and expenses.

ARP 2; CP 114 [emphasis added]. Respondent was neither the Buyer nor Seller referenced in the attorney fee provision. Respondent was not even involved in the REPSA transaction, much less as an executing party. She was assigned no rights under it, and accordingly, assumed **no liabilities**.

Nor was the malpractice action Appellants brought against her premised upon the REPSA. That action was premised on alleged negligence with respect to Respondent's handling of litigation arising from the REPSA. At no time, therefore, was Respondent herself ever "liable on" the REPSA. Respondent herself may have been liable on the retainer agreement she had executed with Appellants, but never on the REPSA, *per se*. *Cf.* CP 126–8. And it is solely the REPSA on which Appellants base their claim for "recovery" of additional fees and costs. ARP 14. Nothing in the evidence record suggests that the parties to the REPSA contemplated such an extension, and Appellants have not cited any case authorities suggesting that such an extension would be consistent with Washington law, the "American rule," or sound public policy.

In the absence of **any recognized basis for liability**, the trial court was correct in denying Appellants' request. If this Court agrees, it may deny Appellants' appeal and need not consider the remaining arguments. If, however, this Court disagrees, holding that the scope of the attorney fee provision of the REPSA in the underlying action does extend to

Respondent in the malpractice action, it is Respondent's position that the fee provision was rendered inoperative at law, extinguished by the doctrine of merger.

4. The doctrine of merger extinguished the contractual basis for Appellants' post-trial claim for additional attorney fees.

Attorney Richard Moore represented Appellants in settling the underlying case. On December 7, 2006, he relayed their acceptance of an offer from the defendants Singh to settle all the outstanding claims for a payment of \$25,000. CP 1315. On February 9, 2006, the parties' filed a Certificate of Settlement Without Dismissal, pursuant to KCLR 41(e)(3), pending formalization of the settlement agreement in accordance with CR 2A and enforcement thereof. CP 1317-8. Counsel certified their belief that "the **final** dismissal of this action will be appropriate as of April 15, 2007." CP 1318 [emphasis added]. The parties formalized their agreement on December 12, 2006, and defendants Singh made the required payment in full on March 21, 2007. CP 1323. The parties filed a Stipulation for and Order of Dismissal the next day. ARP 8; CP 1325-6. Upon the court's review of the Stipulation presented by the parties, the court issued the following Order: "ORDERED that **all claims** asserted by the parties herein be and are hereby **dismissed with prejudice** and **without costs.**" ARP 8; CP 1326 [emphasis added]. Neither the

Stipulation nor the Order contained any reference to a prevailing party or an award of attorney fees.

a. The Order of Dismissal is a valid final judgment.

“An action in the superior court may be dismissed by the court and a **judgment** of nonsuit rendered in the following cases . . . (2) Upon the motion of either party, upon the written consent of the other.” RCW 4.56.120 [emphasis added]. A judgment of dismissal based upon stipulation of the parties settling the subject matter of the action and agreeing to dismissal, bars any subsequent action for the same cause. *Godfrey v. Dept. of Labor and Industries*, 198 Wn. 71, 86 P.2d 1110 (1939). Dismissal of an action is treated as final judgment, for purposes of *res judicata* and collateral estoppel. *In re Metcalf*, 92 Wn. App. 165, 963 P.2d 911 (1998). A final order or judgment settled and entered by agreement or consent of the parties is no less effective as a bar or “estoppel” than is one which is rendered on contest and trial unless the judgment has been obtained through fraud or mistake. *LeBire v. Dept. of Labor and Industries*, 14 Wn.2d 407, 128 P.2d 308 (1942).

Without question, the Order of Dismissal Appellants negotiated and obtained in the underlying case is a valid, final judgment.

b. The REPSA merged into the Order of Dismissal, precluding use of the REPSA's terms as a basis for subsequent claims.

“A ‘judgment’ is the determination or sentence of the law, pronounced by a competent judge or court, as a result of an action or proceeding instituted in such court, affirming that, upon matters submitted for its decision, **a legal duty or liability no longer exists.** *In re Clark*, 24 Wn.2d 105,163 P.2d 577 (1945) [emphasis added]. When a judgment has been rendered, **all rights of the litigants are merged in it.** *Fisher v. Schwabacher Hardware Co.*, 106 Wn. 257, 186 P. 649 (1920) [emphasis added]. A valid final judgment for payment of money extinguishes the original claim and creates a new cause of action **on the judgment.** *Caine & Weiner v. Barker*, 42 Wn. App. 835, 713 P.2d 1133 (1986) [emphasis added]. Where the underlying claim was premised on a contract that included an attorney fee provision, in at least one case that specific contractual right was held to have been extinguished by the issuance of a valid final judgment. *Woodcraft Const. Inc. v. Hamilton*, 56 Wn. App. 885, 786 P.2d 307; *reconsideration denied* (1990).

Woodcraft involved a promissory note upon which a foreign judgment was entered. The note contained an attorney fee provision not unlike paragraph q. of the REPSA. In a separate action to enforce the judgment, the court cited the doctrine of merger and held that “the

attorney fee provision of the note merged into the judgment and ceased to exist.” *Id.* at 889. Reliance on the attorney fee provision would be *res judicata*. The plaintiff was therefore not permitted to rely on its terms in seeking attorney fees in any separate action.

Appellants’ rights to pursue the defendants Singh for payment of additional attorney fees were extinguished upon issuance of the Order of Dismissal. Appellants’ rights to rely on the attorney fee provision of the REPSA in pursuing Respondent in a subsequent separate action were likewise extinguished.

Appellants have long been without any existing legal basis on which to seek reimbursement of attorney fees over and above those already awarded by the jury in this case. Appellants’ motion for attorney fees incurred in the malpractice action is without merit at law, and the trial court’s denial should be affirmed.

5. Appellants were not the prevailing party, as otherwise required by the REPSA attorney-fee provision.

Even assuming *arguendo* that the REPSA had not been merged, paragraph q. could not be construed in Appellants’ favor. Appellants were not the “prevailing party” in the underlying action, and on joint motion the court in the underlying case dismissed Appellants’ action “with prejudice

and without costs,” thereby precluding any further award of attorney fees and expenses.

The dismissal of an action “with prejudice” is a final judgment on the merits of the controversy. *Banchero v. City Council of City of Seattle*, 2 Wn. App. 519, 468 P.2d 724, *review denied* (1970). Dismissal “with prejudice” properly follows adjudication of the merits of litigation in favor of the defendant. *Parker v. Theubet*, 1 Wn. App. 285, 461 P.2d 9 (1969). In cases where the court orders that each party bear its own costs, no prevailing party is found. *See for e.g., Ennis v. Ring*, 56 Wn.2d 465, 341 P.2d 885 (1959).

Paragraph q. of the REPSA makes clear that only “the prevailing party” is entitled to reasonable attorney fees. CP 114. The Stipulation the parties presented to the court did **not** reference the REPSA or request that the court find that Appellants were the prevailing parties for the purpose of paragraph q. CP 1325-6. It was on the basis of the Stipulation that the court rendered its judgment, and stated as much in the recital:

THIS MATTER, having come on for consideration **upon the stipulation of the parties**, and the court being advised that the case has been settle and that the parties jointly request dismissal, now, therefore, it is hereby . . .

CP 1325 [emphasis added]. The recitals in a judgment are entitled to great weight. *Case v. City of Bellingham*, 31 Wn.2d 374, 197 P.2d 105 (1948).

The Order of Dismissal dismissed all of Appellants' claims, with prejudice. ARP 8; CP 1325-6. It is plain on the face of the Order that Appellants were **not** the prevailing party, and arguably under *Parker* it was the defendants Singh who are to be construed as the prevailing parties. Be that as it may, in the absence of any Stipulation or finding that Appellants were the prevailing parties, no costs or attorney fees were ever awarded to them.

B. The trial court's deduction of settlement monies from the jury's award was proper.

The **first time** Appellants ever objected to deduction of the settlement proceeds they received from the defendants Singh in the underlying case from the jury award in the malpractice case was in their post-trial motion. ARP 15. Not only did that objection contradict Appellants' position through trial, but it also lacked merit at law, and was therefore correctly overruled by the trial court. *Id.* The "collateral source rule" has no application to the relevant facts. Any entered Judgment in the malpractice action must reflect Appellants' receipt of \$25,000 in settlement of the underlying case.

1. Appellants' objection to deduction of monies received in settlement of the underlying case contradicted their stated position through trial.

As with Appellants' surprising motion for additional attorney fees, at no time before or during trial did Appellants ever signal any objection

to reducing a potential jury award by the amount they had been paid to settle the underlying case. To have done so would have flatly contradicted Appellants' stated position, a position they reasserted time and time again.

From the outset Appellants conceded that the \$25,000 they had received from the defendants Singh was to be deducted from any jury award for repair costs and expenses. They asserted as much in their prayer for relief:

WHEREFORE having fully set forth their causes of action against the Defendants, the Plaintiffs pray for judgment against the Defendants, jointly and severally, and requests the following relief:

1. For an award for the full amount of their damages in an amount to be determined at trial, including but not limited to, the costs to repair their home (**less the money received by way of settlement**) and the attorney fees and costs paid to the Defendants.

ARP 9; CP 1104 [emphasis added]. They reasserted their position to the court just before trial, in their Motion in Limine:

Any discussion about the settlement of the plaintiffs' claims with Amrik Singh, the Cascade Law Group, Robert Clegg, or Simon Stoker, are not relevant or material to any of the issues still pending before the Court, and would only confuse, distract and mislead the jury. **The Court should instruct the jury about the fact of theses settlement, and that any settlement amounts, if any, that the plaintiffs may have received will be deducted from any award the jury may make in this case,** and that accordingly, if the jury deems an award appropriate in this case their award should be for the full amount of any damages to which they may conclude the plaintiffs are entitled.

ARP 10–11; CP 113 [emphasis added]. And again in Plaintiffs’ Trial

Brief:

While it is appropriate for the Court to instruct the jury the Plaintiffs have settled their claims with [defendants Singh and codefendant attorney], the jury should also be instructed that they are not to be concerned with the terms of those settlement, but that **any amounts paid to Plaintiffs by way of those settlements will be deducted from any award they might make in this case.**

CP 61–2. Appellants reasserted it in their Proposed Jury Instructions, unnumbered, on damages issues:

Finally, as I instructed you previously, you are not to concern yourself with the fact that the Nguyens have settled their claims with Amrik Singh, the Cascade Law Group, P.L.L.C. and Simon Stoker. **Those settlement amounts shall be deducted from any award you may make in this case.** Accordingly, your award, if any, should be in the full amount of damages you find the Nguyens would have recovered in their underlying lawsuit against Amrik Singh, but for the negligence of Lisa Moore, the Cascade Law Group, P.L.L.C. and Simon Stoker.

ARP 11; CP 43 [emphasis added]. Adopting the rightness of Appellants’ position, the trial court so instructed the jury, in Instruction No. 23:

Finally, as I instructed you previously, you are not to concern yourself with the fact that the Tuyen Nguyen and Mai Van have settled their claims with Amrik Singh, the Cascade Law Group, P.L.L.C. and Simon Stoker. **The court will take those settlements into consideration into entering any judgment based on any award you may make in this case.** Accordingly, your award, if any, should be in the full amount of damages you find the Nguyens would have recovered in their underlying lawsuit against Amrik Singh, after Lisa Moore became involved in this

case, but for the negligence of Lisa Moore, the Cascade Law Group, P.L.L.C., Robert Clegg and Simon Stoker.

ARP 11–12; CP 1149 [emphasis added]. In light of Appellants’ unequivocal position on this point through trial, Appellants should be precluded from raising it as an issue post-trial.

2. The “collateral source rule” does not apply to the settlement monies in issue, because the source of those monies were the tortfeasors in the underlying case.

The collateral source rule is a rule of evidence, not of law or equity, applied solely to prevent a wrongdoer from receiving a benefit from payments made by a source “**wholly independent** of the tortfeasor.” *Wash. Ins. Guar. Ass’n v. Mullins*, 62 W. App. 878, 886, 816 P.2d 61 (1991) [emphasis added].

The rule comes from tort principles as a means of insuring that a fact finder will not reduce a defendant’s liability because the claimant received money from other sources, **such as insurance carriers.**

Mazon v. Krafchick, 158 Wn.2d 440, 452, 86 P.3d 210 (2004) [emphasis added]. In Washington, application of the rule has been limited to payments made by insurance carriers, once they are found to be factually and morally independent of the wrongdoing at issue. For this reason, Appellants are unable to cite any cases other than those involving payments made by insurance carriers. This is not such a case.

The defendants Singh in the underlying case were not an insurance carrier or similar entity. They were the very defendants who Appellants had sued for the costs of repairing construction defects caused by their negligence and contract breach. CP 405–12. At trial in the legal malpractice case against Respondent, the jury was asked to quantify the damages caused by wrongdoing on the part of the defendants Singh, central to which were those costs of repairing Appellants’ home. CP 1059. In the context of the legal malpractice case, Respondent became responsible for her portion of the jury’s award for repair costs because, in legal malpractice theory, she had “stepped into the shoes” of the Singh defendants. In this way, defendants Moore and Singh were both factually and morally bound to Appellants, and the jury in the legal malpractice action was left to determine, *inter alia*, the costs of repair as the proper measure of damages. They did, in accordance with Jury Instruction No. 23:

Finally, as I instructed you previously, you are not to concern yourself with the fact that the Tuyen Nguyen and Mai Van have settled their claims with Amrik Singh, the Cascade Law Group, P.L.L.C. and Simon Stoker. **The court will take those settlements into consideration into entering any judgment based on any award you may make in this case.** Accordingly, your award, if any, should be in the **full amount of damages** you find the Nguyens would have recovered in their underlying lawsuit against Amrik Singh, after Lisa Moore became involved in this

case, but for the negligence of Lisa Moore, the Cascade Law Group, P.L.L.C., Robert Clegg and Simon Stoker.

CP 1149 [emphasis added].

Appellants bore the burden of showing application of the collateral source rule to the settlement proceeds they received in their underlying case against the Singh defendants. They were, and remain, unable to discharge this burden. The Singh defendants were anything but “wholly independent’ of the tortfeasor” Respondent. The defendants Singh were the central, originating tortfeasors whose legal liability was attributed to Respondent by reason of the malpractice claim premised upon it. The collateral source rule has no application whatsoever on these case facts.

Other jurisdictions provide numerous examples where legal malpractice awards have been reduced by the settlement amount of the underlying case. In one example, a jury verdict against the Virginia attorney, who had erred in searching title, was reduced by the settlement received by the client from the grantors of the property. *Katzenberger v. Bryan*, 206 Va. 78, 141 S.E.2d 671 (1965). In another example, a Wisconsin attorney, sued for failing to perfect a client’s insurable interest in property, was given credit for the amount the client received for compromising its claim against its insurers. *Gustavson v. O’Brien*, 87 Wis.2d 193, 274 N.W.2d 627 (1979). In still another example, a Florida

attorney, who had failed to sue a defendant, was liable only for \$500 of a \$2,500 legal malpractice verdict, because the client had settled for \$2,000 against the other tortfeasor in the underlying case. *Kay v. Bricker*, 485 So2d 486 (Fla. App. 1986).

In this case, Appellants acknowledged in their original complaint that the jury's award for "the costs to repair their home," now known to be \$90,900, should be reduced by "the money received by way of settlement," being \$25,000, to arrive at \$65,900.00. ARP 9; CP 1104. This was the amount subject to the jury's liability apportionment among the defendants at trial, of which Respondent was to bear the 60 percent share. After deduction of the settlement proceeds and reduction by the percentage of codefendants' fault, the award against Respondent was \$39,540, to which the appropriate legal fees and costs were then added.

V. CONCLUSION

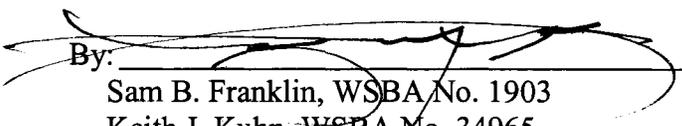
Appellants have recovered everything to which they are legally and equitably entitled. The additional amount sought, in the amount of \$212,170.91, is only fictional "recovery," asserted in the absence of a viable contractual term or other cognizable legal premise. Being neither buyer nor seller, nor either's agent for the purpose of the land transaction at issue in the underlying case, Respondent was never liable on the REPSA, and the subject attorney fee provision therefore does not apply to

Appellants' claims in the malpractice action. Respondent respectfully requests that trial court's denial of additional recovery be affirmed.

Respondent also respectfully requests affirmance of the trial court's deduction from the jury's award of the \$25,000 in settlement monies previously received by Appellants. That deduction was entirely consistent with the case authorities and Appellants' stated position through trial.

RESPECTFULLY SUBMITTED this 3rd day of August, 2009.

LEE SMART, P.S., INC.

By: 

Sam B. Franklin, WSBA No. 1903
Keith J. Kuhn, WSBA No. 34965
Of Attorneys for Respondent

CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on August 3, 2009, I caused service of the foregoing on each and every attorney of record herein:

VIA LEGAL MESSENGER

Mr. C. Nelson Berry, III
Law Offices of C. Nelson Berry, Inc.
1708 Bellevue Avenue
Seattle, WA 98122

DATED this 3rd day of August, 2009 at Seattle, Washington.



Rondi Susort, Legal Assistant

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