IN THE COURT OF APPEALS OF THE
STATE OF OREGON

Kimberly J. Jacobsen SHERERTZ,
individually,
Plaintiff,
and
Kimberly J. Jacobsen SHERERTZ,
as guardian *ad litem* for
William Cole Sherertz, a minor child;
Kimberly J. Jacobsen Sherertz, as the Personal
Representative of the Estate of William W. Sherertz;
Kimberly J. Jacobsen Sherertz, as Trustee of the
William W. Sherertz Testamentary Trusts,
Plaintiffs-Appellants,
v.
BROWNSTEIN, RASK, SWEENEY,
KERR, GRIM, DESYLVIA & HAY, LLP,
dba Brownstein Rask,
Defendant-Respondent,
and
Kirkham E. HAY,
individually,
Defendant.

Multnomah County Circuit Court
130100793; A158820

John A. Wittmayer, Judge.

Argued and submitted October 25, 2016.

Corey Tolliver argued the cause for appellants. With him on the opening brief were Bonnie Richardson and Folawn Alterman & Richardson LLP. With them on the reply brief was Zachariah H. Allen.

Peter R. Mersereau argued the cause for respondent. With him on the brief were Thomas W. McPherson, Blake H. Fry, and Mersereau Shannon LLP.

Before DeHoog, Presiding Judge, and Hadlock, Chief Judge, and James, Judge.*

JAMES, J.

Reversed and remanded.

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* Hadlock, C. J., *vice* Flynn, J. pro tempore; James, J., *vice* Sercombe, S. J.

JAMES, J.

Plaintiffs appeal from both a general judgment and a supplemental judgment in this action for legal malpractice involving allegations that defendant law firm was negligent in preparing an estate plan. Following a jury trial and verdict, the court entered a general judgment that both dismissed plaintiffs' claims against defendant and awarded monetary damages on defendant's counterclaim. The supplemental judgment awarded defendant costs and disbursements as a prevailing party. On appeal, plaintiffs raise three assignments of error. We reject without discussion plaintiffs' second and third assignments of error and write only to address their first. There, they assert that the trial court erred in giving defendant's special requested jury instruction, which read:

> "Attorneys are not negligent merely because they do not achieve the result desired by the client. An attorney does not guarantee a good result by undertaking to perform a service."

Plaintiffs argue that the trial court erred in giving the instruction because it was reasonably likely to confuse or mislead the jury. We agree, and conclude that in the context of this case, the risk of prejudice was significant. Accordingly, we reverse the general judgment and remand. As a result of that disposition, the supplemental judgment is also reversed and remanded. ORS 20.220(3)(a).

Plaintiff Kimberly Sherertz brought suit against defendant law firm in her capacity (1) as guardian *ad litem* for Cole Sherertz (her child with the decedent); (2) as personal representative of the decedent's estate; (3) as trustee of the decedent's testamentary trusts; and (4) on her own behalf. Plaintiffs alleged that defendant was professionally negligent in multiple respects, including "[f]ailing to prepare an estate plan that fulfilled [the decedent's] intent[ions]" to, among other things, preserve ownership over all of the decedent's Barrett Business Services, Inc. (BBSI) stock and to provide the estate with liquidity to pay the estate taxes.

The crux of the case was how the decedent had intended to dispose of his stock and how he intended to pay

the taxes on his estate. According to plaintiffs, defendant law firm had proposed and promised to create an irrevocable life insurance trust (ILIT)[1] to pay the estate taxes. Further, according to plaintiffs, the plan to use the proceeds of the ILIT to pay taxes was essential to realizing the decedent's intentions to pass his entire BBSI stock to his son, Cole, thereby retaining controlling interest in the company within the family. Ultimately, however, the ILIT was unable to pay the estate taxes, which resulted in a sale of significant portions of stock to cover the nearly $10 million owed.

In response, the defense contended that the law firm drafted estate planning documents in accord with the decedent's wishes. Defendant disputed that the ILIT was intended to cover estate taxes. Rather, according to defendant, the intent of the ILIT was to equally divide the proceeds amongst the decedent's four children. According to defendant, plaintiffs' claims that the ILIT was intended to cover taxes would have deprived the other children of their share, and ran counter to the decedent's wishes.

For claims of instructional error, we review a trial court's decision to give a particular instruction primarily to determine whether the instruction, when read together with the other instructions given, completely and accurately stated the law applicable to the case and, if not, whether any error in giving the instruction was prejudicial to the party opposing the instruction. *Wallach v. Allstate Ins. Co.*, 344 Or 314, 318-22, 180 P3d 19 (2008); *State v. Woodman*, 341 Or 105, 118, 138 P3d 1 (2006).

Before turning to the jury instruction at issue, it is helpful to discuss the nature of this case. An action for legal malpractice is not significantly distinct from an ordinary negligence action. "It is simply a variety of negligence in which a special relationship gives rise to a particular duty that goes beyond the ordinary duty to avoid a foreseeable risk of harm." *Watson v. Meltzer*, 247 Or App 558, 565,

[1] An ILIT is an estate planning tool that acts as both the owner and beneficiary of one or more life insurance policies. Upon the death of the insured, the trustee invests the insurance proceeds and administers the trust for one or more beneficiaries.

270 P3d 289 (2011), *rev den*, 352 Or 266 (2012). As such, a claim for legal malpractice carries with it the elements of (1) duty, (2) breach, (3) harm measurable in damages, and (4) a causal connection between the breach of duty and the harm. *Id*.

Legal malpractice in the context of estate planning, where the plaintiff is not the client, however, presents unique challenges. Ordinarily, a defendant is not liable for negligently causing a stranger's purely economic loss without injuring his person or property. *See Hale v. Groce*, 304 Or 281, 284, 744 P2d 1289 (1987); *see also Ore-Ida Foods v. Indian Head*, 290 Or 909, 627 P2d 469 (1981) (denying employer's claim against third person who negligently caused employer to become liable for workers' compensation benefits); *see also Snow v. West*, 250 Or 114, 440 P2d 864 (1968) (denying employer's claim against third person for loss of services of employee).

To escape that general rule, a plaintiff must establish a duty to the nonclient. "It does not suffice that the harm is a foreseeable consequence of negligent conduct that may make one liable to someone else, for instance to a client. Some source of a duty outside the common law of negligence is required." *Hale*, 304 Or at 284.

In *Hale*, "the court found that duty in the law of contracts. It reasoned that the plaintiff in that case was 'a classic intended third-party beneficiary' of the attorney's promise to his client to include the plaintiff in his will." *Lord v. Parisi*, 172 Or App 271, 276, 19 P3d 358, *rev den*, 332 Or 250 (2001). "Because under third-party analysis the contract creates a 'duty' not only to the promisee, the client, but also to the intended beneficiary, negligent nonperformance may give rise to a negligence action as well." *Hale*, 304 Or at 286. Thus, *Hale* concluded "that the plaintiff could pursue a negligence claim against the attorney not because the harm was foreseeable but because the court could identify a duty that the attorney owed the plaintiff apart from the foreseeability of the harm." *Lord*, 172 Or App at 277; *see Onita Pacific Corp. v. Trustees of Bronson*, 315 Or 149, 159, 159 n 7, 843 P2d 890 (1992) (explaining *Hale*).

In a third-party legal malpractice claim, such as here, the plaintiff establishes that duty by showing "that the attorney actually made an express or implied promise to the testator *** under circumstances that indicate that the testator intend[ed] to give the plaintiff the benefit of the promised performance." *Frakes v. Nay*, 254 Or App 236, 267, 295 P3d 94 (2012), *rev den*, 353 Or 747 (2013).

The nature, and specificity, of the promise is important:

> "Standing alone, an attorney's promise to the testator to use the skill and care customary among lawyers in the relevant community is not a promise to obtain *a particular result* for the plaintiff's benefit that will support a third-party negligence claim for financial loss."

Id. at 267 (emphasis added).

Therefore, under *Hale* and our subsequent cases, the facts surrounding a lawyer's alleged promised result to a client become the central point of inquiry. "The lawyer's promise must be more specific than a general obligation to use his or her best professional efforts with the skill and care customary among lawyers in the relevant community; the lawyer must have agreed to accomplish specific results or objectives for the client." *Deberry v. Summers*, 255 Or App 152, 159, 296 P3d 610 (2013).

We turn now to the jury instruction given here. A jury instruction must be both complete and accurate. *Estate of Michelle Schwarz v. Philip Morris Inc.*, 348 Or 442, 454, 235 P3d 668, *adh'd to as modified on recons*, 349 Or 521, 246 P3d 479 (2010). As the Supreme Court has explained:

> "The parties to any jury case are entitled to have the jury instructed in the law which governs the case in plain, clear, simple language. The objective of the mold, framework and language of [jury] instructions should be to enlighten and to acquaint the jury with the applicable law. Everything which is reasonably capable of confusing or misleading the jury should be avoided. Instructions which mislead or confuse are ground for a reversal or a new trial."

Williams et al. v. Portland Gen. Elec., 195 Or 597, 610, 247 P2d 494 (1952).

At trial, defendant requested a special jury instruction based on Uniform Civil Jury Instruction (UCJI) 44.03.

Defendant sought to modify that instruction, sometimes used in medical malpractice cases, to fit the context of legal malpractice. The uniform instruction reads as follows:

> "Physicians are not negligent merely because their efforts were unsuccessful. A physician does not guarantee a good result by undertaking to perform a service."

UCJI 44.03.

The instruction is derived principally from two cases, *Crewse v. Munroe*, 224 Or 174, 177, 355 P2d 637 (1960) and *Hotelling v. Walther*, 169 Or 559, 562, 130 P2d 944 (1942).[2] As the Oregon Supreme Court noted, "a physician is not a warrantor of a cure." *Crewse*, 224 Or at 177. The "good result" in the instruction is a "cure," and the unsuccessful efforts equate to the success or failure in the ultimate rehabilitation of the patient to health.

The instruction given in this case, however, is materially different. Here, as noted, the instruction read:

> "Attorneys are not negligent merely because they do not achieve the result desired by the client. An attorney does not guarantee a good result by undertaking to perform a service."

The use of the phrase "the result" in the first sentence is significant. *Hotelling* and *Crewse* do not support the proposition that a physician, as a matter of law, can never guarantee *some* result. For example, if a patient sees a physician to have her appendix removed, one expected "result" is the removal of an appendix, not an amputation of a foot.

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[2] An instruction's inclusion as a uniform instruction lends it no special credence or presumed accuracy. *State v. Lopez-Minjarez*, 350 Or 576, 583-84, 260 P3d 439 (2011). Neither *Hotelling* nor *Crewse* concern the proper instruction of a jury. Jury instructions drawn from short snippets of opinions pose challenges. As the Oregon Supreme Court has cautioned:

> "A trial judge is not a mere automaton whose function is limited to reciting the words approved by statute or by the Supreme Court. On the contrary, it is not advisable in charging the jury to use the exact words of an appellate court opinion in stating the law in similar cases. *** The judge must preside over the trial. His office calls for the exercise of an informed intellect."

Ireland v. Mitchell, 226 Or 286, 294, 359 P2d 894 (1961); *see also Amfac Foods v. Int'l Systems*, 294 Or 94, 99 n 3, 654 P2d 1092 (1982) (noting that appellate opinions are often "written with no view" that they will be turned into instructions).

That same distinction applies, with arguably even more force, in the context of legal malpractice. There are many instances where a client may engage the services of an attorney for a very discrete task. Perhaps a client wants an attorney to file a tort claim notice on her behalf. Or perhaps a client retains an attorney to file a redemption in a judicial foreclosure action. Both of those are discrete actions with critical filing deadlines. Whatever the ultimate success of the legal action, one "result" desired by a client in those instances is that the critical document will be timely filed.

Now, in each of the examples given above, the failure to timely file a document is not, on its own, determinative of negligence. But, a client's communication of an expected result—for example, filing a document—and a lawyer's agreement to deliver that result can certainly be relevant to the determination of duty. And, likewise, a lawyer's failure to achieve that result—for example, by not filing on time—is certainly a critical fact to be considered in assessing breach of that duty in a claim for legal malpractice.

With that legal framework in mind, we conclude that it was error to instruct the jury in accord with defendant's special requested instruction in this case. While the instruction was technically true that "[a]ttorneys are not negligent *merely* because they do not achieve the result desired by the client" the instruction carried with it a significant risk of confusing the jury as to the importance of "the result" promised by defendant law firm in determining duty and breach (emphasis added). As discussed previously, to establish a claim of negligence in this context, the plaintiffs could only establish duty by showing that a specific result had been "promise[ed] to the testator *** under circumstances that indicate[d] that the testator intend[ed] to give the plaintiff the benefit of the promised performance." *Frakes*, 254 Or App at 267. When the instruction then tells the jury that "[a]ttorneys are not negligent merely because they do not achieve the result desired by the client," it hopelessly confuses what is at issue.[3]

[3] Our decision in this case thus turns on the fact that the alleged negligence relates to an alleged promise to achieve a particular, discrete result. Accordingly, this case does not require us to address—and we express no opinion about—whether a court could properly give the instruction in a legal malpractice case in

The instruction added no clarity to the jury's understanding of the law; rather, it muddied the waters. "Everything which is reasonably capable of confusing or misleading the jury should be avoided." *Williams*, 195 Or at 610; *see also Holger v. Irish*, 316 Or 402, 415, 851 P2d 1122 (1993) (holding that the trial court erred by delivering an instruction that "was correct in the abstract" but "did nothing to inform the jury about the issues that it was to decide").

The instruction in this case played a similar role to the instruction in *Rogers v. Meridian Park Hospital*, 307 Or 612, 619, 772 P2d 929 (1989). There, the Supreme Court held that the error-of-judgment instruction, while drawn from prior cases, obscured facts and skewed the jury decision-making to avoid liability, and, as such, it was error to give it. *Id.* As the court noted, the instruction, while "based on language concerning the exercise of 'judgment' by doctors found in opinions of this court and the Court of Appeals" nevertheless confused the jury and incorrectly stated the factual inquiry. *Rogers*, 307 Or at 620. The same can be said for the instruction in this case.

Having concluded that the trial court erred in instructing the jury, the question remains whether that error requires reversal. Under ORS 19.415(2), we are empowered to reverse on account of the error only if the error is one "substantially affecting" a plaintiffs' rights. The question for us is "whether—in an important or essential manner—the error had a detrimental influence on a party's rights." *Purdy v. Deere and Company*, 355 Or 204, 226, 324 P3d 455 (2014). We review the record to assess the likelihood that the error permitted the jury to reach an incorrect result. *Id.* at 228-29. If there is "little likelihood" that an error affected the verdict, we may not reverse; if there is "some" likelihood or a "significant" likelihood that the error influenced the jury's verdict, we must reverse. *Id.* at 226. "In the context of instructional error, that standard will generally be met if, 'when the instructions are considered as a whole in light of the evidence and the parties' theory of the case at trial[,]

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which the specifications of negligence relate to something other than a failure to deliver an allegedly promised result.

there is some likelihood that the jury reached a legally erroneous result.'" *Dosanjh v. Namaste Indian Restaurant, LLC*, 272 Or App 87, 92, 353 P3d 1243 (2015) (quoting *Purdy*, 355 Or at 232).

Here, as we explained above, whether the defendant law firm had promised a particular result in creating the estate plan was the central point of argument. Indeed, in closing, defense counsel argued:

> "Thank you. Counsel, Your Honor, ladies and gentlemen, when you return to the jury room, I'm going to ask you to ask yourselves one question, and that is this: Have you seen any evidence that Bill Sherertz would have taken the [irrevocable life insurance trust] ILIT shares away from the three daughters or reduce them *** ?
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> "The plaintiffs' entire case rests on the assumption that in 2004, Bill Sherertz would have wanted to amend or change the existing ILIT that was already there since 2001 to take the girls out of their 2.5 million shares in the ILIT.
>
> "There is no evidence, and Plaintiffs' entire case rests on that premise. And if you agree, this case is over. You don't need to do another thing in this case.
>
> "*****
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> "At the end of the day, the documents prepared by [the attorney] fully reflected his client's intent. He did what his client asked him to do."

However, the jury instruction told the jury that defendant was not negligent *merely* for failing to achieve the desired result, when, in fact, whether that desired result had been expressed—and disregarded—by defendant formed the central question in the case related to duty and breach. As defense counsel stated in closing, it was the "one question" the jury should focus upon, and "[p]laintiffs' entire case" rested on that issue.

We cannot, therefore, conclude that there is not "some likelihood" that the error affected the verdict. As such, reversal is required.

Reversed and remanded.