IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WILLIAM M. EDLEMAN and KATHIE A. EDLEMAN, husband and wife, and the marital community comprised thereof, Respondents, v. BRIAN PAUL RUSSELL and JANE DOE RUSSELL, his wife, and the marital community comprised thereof; and BRIAN P. RUSSELL, attorney at law, PLLC, a Washington professional limited liability company, f/k/a/ BRIAN P. RUSSELL, ATTORNEY AT LAW, P.S., a Washington professional services corporation, Appellants.	NO. 65668-6-I DIVISION ONE UNPUBLISHED OPINION FILED: April 30, 2012

Lau, J. — Brian Russell appeals the jury's verdict in favor of William and Kathie Edleman in this attorney malpractice action. Russell challenges several jury instructions and various evidentiary rulings. Because he establishes no reversible error, we affirm the judgment on the jury's verdict. And because the trial court properly

refused to give an erroneous damages instruction and properly declined to order Russell to disgorge fees, the Edlemans' cross appeal lacks merit.

FACTS

The facts in this attorney malpractice case against Brian Russell are reported in Green v. Normandy Park, 137 Wn. App. 665, 151 P.3d 1038 (2007). We repeat only facts necessary to address the Edlemans' malpractice claims against Russell. In November 2000, the Edlemans purchased a house in the neighborhood known as the Riviera Section of the City of Normandy Park. The Edlemans planned to demolish the existing house and construct a new house. Neighborhood covenants contained setbacks that restricted the new construction and required community club (Club) approval. The Edlemans retained Russell to assist them with this process. The Edlemans initially corresponded with the Club to seek its approval. They later began building their house and garage without Club approval or full compliance with the setback requirements.

Russell filed two lawsuits on the Edlemans' behalf challenging the Club board's composition and the Club's authority to enforce the covenants.[1] The trial court granted the Club's summary judgment motion in favor of its authority to enforce the covenants. The trial court also ruled that the Edlemans abandoned their board composition claim because they neither raised it in opposition to the Club's summary judgment motion nor in support of their own summary judgment motion. Green, 137 Wn. App. at 667. After

[1] The second lawsuit also named several neighbors as defendants and asserted that their homes violated the covenants. Several neighbors filed a third lawsuit against the Edlemans to enforce the covenants. The trial court consolidated the three lawsuits.

a bench trial, the court announced its oral ruling and entered a judgment in the Club's favor supported by extensive written findings of fact and conclusions of law. It found that the Edlemans violated the covenants because (1) they failed to obtain Club approval prior to construction and (2) the house and garage were constructed outside the covenants' setback areas. The trial court entered a permanent injunction that (1) directed the Edlemans to demolish the home and the detached garage and (2) enjoined the Edlemans from building on their property without first obtaining Club approval.

The Edlemans retained new counsel for their appeal. We reversed the trial court's ruling that the internal setbacks prevented the Edlemans from building across their two lots. Green, 137 Wn. App. at 689-92. We affirmed the remaining rulings that (1) the Edlemans abandoned their board composition claim, (2) the Club acted reasonably and in good faith in disapproving the Edlemans' construction plans, and (3) the Club had authority to enforce the outer setbacks and require the Edlemans to obtain board approval for their plans. Green, 137 Wn. App. at 692-700. We remanded the case to the trial court for proceedings consistent with our opinion to address the appropriate remedy. Green, 137 Wn. App. at 700-01.

The Edlemans then settled their dispute with the Club. The written settlement agreement required the Edlemans to scale back their garage, preserved the house as built, and pay the Club's attorney fees.

The Edlemans sued Russell for legal malpractice. The Edlemans' three expert witnesses testified at trial that Russell breached the standard of care when he failed to

(1) adequately advise the Edlemans about the risks of construction or keep them informed, (2) "go through the process" to secure Club approval before filing suit, and (3) properly prepare for and represent the Edlemans at trial. Russell testified and denied these allegations. His expert witness testified that Russell's legal representation met the standard of care and employed a common trial strategy. A jury found Russell negligent and awarded $999,000 in damages, which included attorney fees paid to successor appellate counsel, attorney fees paid to the Club as part of the settlement, and costs related to the new garage. Russell appeals. The Edlemans cross appeal on damages.

ANALYSIS

Jury Instructions

A. Health Care Informed Consent Instruction

Russell argues for the first time on appeal that the court's instruction 13, premised on the health care informed consent law, allowed the jury to impermissibly find Russell liable without finding he breached the standard of care. Instruction 13 states,

> A lawyer has a duty to inform a client of all material facts, including risks and alternatives, which a reasonably prudent client would need to make an informed decision on whether to consent to or reject a proposed course of action. A material fact is one to which a reasonably prudent person in a position of a client would attach significant (sic) in deciding whether or not to follow the proposed course of action.
>
> A lawyer's duty to properly advise and counsel the lawyer's client in accordance with the applicable standard of care cannot be delegated to another person or entity.

Russell claims this instruction held him to an erroneous duty to advise the Edlemans of

all "material facts, including risks and alternatives," expected of a "reasonably prudent client," which gave "undue weight to [the] Edlemans' expert testimony that this duty could not be delegated, and was owed irrespective of what Edleman already knew or learned from third parties." Appellant's Br. at 25. Russell also argues that ordinary negligence principles—not health care informed consent principles—govern an attorney's standard of care,

The Edlemans respond that instruction 13 properly states the law by imposing a mandatory duty on the attorney to obtain a client's informed consent under Rule of Professional Conduct 1.4(b). The Edlemans also argue that both parties' experts testified about this mandatory duty.

We consider a claimed error in a jury instruction only if the specific issue was timely raised to the trial court by a specific adequate exception to that instruction. See Van Hout v. Celotex Corp., 121 Wn.2d 697, 702, 853 P.2d 908 (1993). CR 51(f) provides,

> Before instructing the jury, the court shall supply counsel with copies of its proposed instructions which shall be numbered. Counsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction. The objector shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made.

(Emphasis added.) "'The trial court must have been sufficiently apprised of any alleged error to have been afforded an opportunity to correct the matter if that was necessary.'" Van Hout, 121 Wn.2d at 703 (quoting Estate of Ryder v. Kelly Springfield Tire Co., 91 Wn.2d 111, 114, 587 P.2d 160 (1978)). "The purpose of CR 51(f) is to assure that the

trial court is sufficiently apprised of any alleged error in the instructions so that the court is afforded an opportunity to correct any mistakes before they are made and thus avoid the inefficiencies of a new trial." Goehle v. Fred Hutchinson Cancer Research Ctr., 100 Wn. App. 609, 615, 1 P.3d 579 (2000). "'The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection.'" Walker v. State, 121 Wn.2d 214, 217, 848 P.2d 721 (1993) (quoting Crossen v. Skagit County, 100 Wn.2d 355, 358, 669 P.2d 1244 (1983)). Vague or general objections are not sufficient. Moore v. Mayfair Tavern, Inc., 75 Wn.2d 401, 407-08, 451 P.2d 669 (1969).

Russell failed to preserve his objection on the ground he now asserts as required under CR 51(f) and our case authority. Riblet v. Ideal Cement Co., 57 Wn.2d 619, 358 P.2d 975 (1961) (additional reasons advanced on appeal as to why appellants believed instruction was incorrect could not be considered where they were not within scope of exceptions taken in trial court). Russell's objection to instruction 13 stated:

> Defendant excepts to the Court's giving instruction No. 13. Instruction No. 13—I will not read it into the record, basically has been the subject of expert testimony. It may be discussed by the experts in regard to their opinions on the standard of care. We believe it is, to some degree, a comment on the evidence and an inappropriate jury instruction . . . .

RP (June 11, 2010) at 164 (emphasis added).

Because Russell failed to object below to instruction 13 premised on claims raised for the first time on appeal, we decline to review his challenge to this

[2] To show he sufficiently objected to this instruction, Russell asserts in a footnote

instruction.[2] And an exception to a proposed jury instruction that stated, "[I]t's not a correct statement of the law," was not sufficient to comply with the rule providing that exceptions to an instruction shall be sufficiently specific to apprise the court of the points of law or questions of fact in dispute. Lunz v. Neuman, 48 Wn.2d 26, 290 P.2d 697 (1955). Russell's objection on grounds that instruction 13 is "an inappropriate instruction" lacks sufficient specificity to merit review. RP (June 11, 2010) at 164.

Russell also argues instruction 13 improperly commented on the evidence. An impermissible comment is one that conveys to the jury a judge's personal attitudes towards the case's merits. Hamilton v. Dep't of Labor & Indus., 111 Wn.2d 569, 571, 761 P.2d 618 (1988). We conclude that a fair reading of instruction 13 conveys no personal attitude or opinion by the trial court on the case's merit.[3] It constitutes no improper comment on the evidence.

B. Proposed Instructions 13, 14, 15 and 16

Russell also assigns error to the court's failure to give his proposed instructions.

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that he "argued that his liability for legal malpractice must be based on a breach of the standard of care in his motion for summary judgment, trial brief, and in his post-trial motion." Appellant's Br. at 25 (citations omitted). This was insufficient. See, e.g., Goodman v. Boeing Co., 75 Wn. App. 60, 75, 877 P.2d 703 (1994) (one sentence in trial brief to the effect that discriminatory intent is required in order to prevail on claim of reasonable accommodation discrimination insufficient where party proposed no alternative instruction). Also, "[p]lacing an argument of this nature in a footnote is, 'at best, ambiguous or equivocal as to whether the issue is truly intended to be part of the appeal.'" St. Joseph Gen. Hosp. v. Dep't of Revenue, 158 Wn. App. 450, 473, 242 P.3d 897 (2010) (quoting State v. Johnson, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993)).

[3] We note that neither party proposed instruction 13 and its language is nearly identical to Washington pattern instruction 105.04, the medical health care informed consent instruction.

These challenges fail for the reasons discussed below.

Proposed instruction D13 states:

> A lawyer is not a guarantor of a successful outcome in the representation. In a situation involving the exercise of professional judgment, a lawyer is not required to employ the same means or select the same options as would other competent lawyers in the many situations in which competent lawyers reasonably exercise professional judgment in different ways.
>
> The duty of competence also does not require "average" performance, which would imply that the less skillful part of the profession would automatically be committing malpractice. The duty is one of reasonableness in the circumstances.

Proposed instruction D14 states:

> The standard of care to be exercised and the scope of the attorney's duty to the client are determined at the time the services are rendered rather than at the time of trial.
>
> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counseI's perspective at the time.

Proposed instruction D15 states:

> An attorney employed to provide professional services does not ensure a satisfactory result with regard to the transaction or services rendered, nor is the attorney responsible for any unsatisfactory results of his rendering of professional services unless his own lack of professional knowledge, care, skill or diligence is the proximate cause of such result.
>
> The fact that a client may experience an unsatisfactory result is not in and of itself evidence that the professional services rendered were done negligently or that the attorney failed to exercise the requisite degree of knowledge, care, skill and diligence.
>
> In general, mere errors in judgment or in trial tactics do not subject an attorney to liability for legal malpractice.
>
> An attorney is not liable for an error of judgment made in good faith, so long as the decision was made with consideration of the issues involved and with adequate investigation.

"'[A] specific instruction need not be given when a more general instruction adequately explains the law and enables the parties to argue their theories of the case.'" State v. Brown, 132 Wn.2d 529, 605, 940 P.2d 546 (1997); see also Havens v. C&D Plastics, Inc., 124 Wn.2d 158, 165, 876 P.2d 435 (1994). We review the adequacy of jury instructions de novo as a question of law. Hall v. Sacred Heart Med. Ctr., 100 Wn. App. 53, 61, 995 P.2d 621 (2000). "[A] trial court's decision whether to give a particular instruction to the jury is a matter that we review only for abuse of discretion." Anfinson v. FedEx Ground Package Sys., Inc., 159 Wn. App. 35, 44, 244 P.3d 32 (2010).

> The number and specific language of jury instructions is a matter within the trial court's discretion. Instructions are sufficient which permit a party to argue that party's theory of the case, are not misleading, and when read as a whole properly inform the trier of fact on the applicable law. If these requirements are met, it is not error to refuse to give a detailed augmenting instruction. Similarly, "[i]t is not error to refuse to give a cumulative instruction or one collateral to or repetitious of instructions already given."

Havens, 124 Wn.2d at 165-66 (alteration in original) (citations omitted). Our review of the record and instructions as a whole demonstrates no trial court error in refusing to give Russell's proposed instructions. The court's instructions when read as a whole (1) permitted each party to argue their theory of the case, (2) did not mislead the jury, and (3) accurately stated applicable law.

Russell also assigns error to the court's failure to give proposed instruction 16. This instruction explained standards associated with the enforcement of neighborhood covenants.[4] We decline to address this alleged error because Russell's argument on

[4] We note that this instruction also impermissibly comments on the evidence, is

this point is neither adequately briefed nor analyzed. He devotes two sentences in a footnote within a section containing his evidentiary challenges to this issue. Appellant's Br. at 39 n.7. Because a party abandons assignments of error unsupported by argument, Russell has abandoned this claim. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (assignments of error unsupported by reference to the record or argument will not be considered on appeal); Palmer v. Jensen, 81 Wn. App. 148, 153, 913 P.2d 413 (1996) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration").

Admission of Evidence

Russell challenges various evidentiary rulings by the trial court.[5] These claims fail for the reasons discussed below.

"We review evidentiary rulings for an abuse of discretion." Cole v. Harveyland, LLC, 163 Wn. App. 199, 213, 258 P.3d 70 (2011). A trial court abuses its discretion when the ruling is manifestly unreasonable or based upon untenable grounds or reasons. Salas v. Hi–Tech Erectors, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010).

"General principles of causation are no different in a legal malpractice case than in an ordinary negligence case. To recover, the plaintiff must demonstrate that he or

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argumentative, and overemphasizes Russell's theories. For example, the proposed instruction declares that the issues in the case involve "allegedly arbitrary and capricious way that the local homeowners association had enforced [neighborhood covenants]." Appellant's Br. at Appendix E.

[5] Our review is hampered by Russell's conclusory arguments. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." Palmer, 81 Wn. App. at 153.

she would have achieved a better result had the attorney not been negligent." Versuslaw, Inc. v. Stoel Rives, LLP, 127 Wn. App. 309, 328, 111 P.3d 866 (2005). Expert testimony that focuses on "why the judge made his or her decision and what he or she would have done under different circumstances" is improper. 4 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 34.21, at 1208 (2008). "Such use of expert testimony usurps the jury's prerogative to decide the ultimate facts." 4 Mallen, et al. supra, at 1208 (referring to expert testimony by the judge from the prior proceeding); see also Brust v. Newton, 70 Wn. App. 286, 293, 852 P.2d 1092 (1993) ("[T]he purpose of the 'trial within a trial' that occurs in a legal malpractice action is not to recreate what a particular judge or factfinder would have done. Rather, the jury's task is to determine what a reasonable judge or factfinder would have done, i.e., what the result should have been.").

In a legal malpractice case, the court may admit the transcript from the "case within a case." See Walker v. Bangs, 92 Wn.2d 854, 862, 601 P.2d 1279 (1979). Such proceedings are not offered for the truth of the matter asserted, but rather to demonstrate "what evidence was produced in court." Walker, 92 Wn.2d at 861. Washington courts also generally admit otherwise inadmissible evidence to show the basis of an expert's opinion. Allen v. Asbestos Corp., Ltd., 138 Wn. App. 564, 579, 157 P.3d 406 (2007).

Russell argues:

Using verbatim portions of Judge Middaugh's findings and conclusions[6] in the

[6] The briefs are unclear on whether Russell's reference to "findings and conclusions" means the oral ruling or the written findings and conclusions. If the latter,

> prior action, [the court] allowed the Edlemans' experts to speculate about Judge Middaugh's subjective view of the underlying case, and that she would have adhered to her ruling requiring destruction of the Edlemans' home even after the Court of Appeals reversed her injunction.

Appellant's Br. at 35. For this claim Russell cites no relevant portions of the record. RAP 10.3(6); Cowiche Canyon, 118 Wn.2d at 809 (assignments of error unsupported by reference to the record or argument will not be considered on appeal). We decline to review this claimed error.

Russell argues the trial court allowed the Edlemans' experts "to speculate that Judge Middaugh ruled against the Edlemans because of 'unreasoning' hostility towards Russell, erroneously focusing on what Judge Middaugh, rather than a hypothetical reasonable fact-finder, would have done." Appellant's Br. at 37. Review of Russell's citations to the record fail to support this claim. For example, he relies on report of proceedings (June 7, 2010) at 16-23. But the record there shows that Russell's trial counsel agreed to allow the Edlemans' expert to testify from the trial transcripts about Russell's trial conduct, how this conduct breached the standard of care, and the conduct's impact on the ultimate decision. The record shows that the trial court instructed the Edlemans' expert witness: "[I]it would be best if you identified instances in the transcript and then testified about your opinion as to how that impacted the ultimate result." RP (June 7, 2010) at 15-16. The Edlemans' trial counsel then asked the expert witness:

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the court excluded as an exhibit the written findings and conclusions. Russell agreed that expert witnesses may appropriately discuss the trial court's findings and conclusions on the question of proximate cause and damages. See infra pp. 17-18.

> Mr. Eglick, let me tell you where I'm at; I'm sure her honor will tell me if I'm incorrect. Using the Court's oral decision, Judge Middaugh's oral decision of September 10th, 2004, using the Judge Middaugh's findings and conclusions of December, 2004, and you can feel free to paraphrase them, you can't quote from them, can you tell this jury, please, based on your opinion, how the negligence of the defendant Russell, what he did or didn't do below the standard of care came through in to what the judge found in her oral decision, findings and conclusions, please.

RP (June 7, 2010) at 16-17.

Eglick's response to this and related questions are transcribed in report of proceedings (June 7, 2010) at 17-23. Notably, Russell's trial counsel failed to object to this testimony. Likewise, Russell points to report of proceedings (June 7, 2010) at 66-69 to support his claim. Our review of the record shows that the Edlemans' counsel asked Eglick whether Russell's lack of trial preparation "had a negative effect on the fact finder, Judge Middaugh, do you have such an opinion, yes or no?" Russell's counsel responded, "Objection, same basis, plus I think this is rank speculation on his part."

RP (June 7, 2010) at 66. What counsel meant by "same basis" is unclear from our review of the record. The trial court overruled the "same basis" and "speculation" objections. Eglick testified the lack of preparation affected the decision making as reflected in the trial transcript that was admitted without objection.

Russell also relies on report of proceedings (June 7, 2010) at 68-69 to support his claim. There, Eglick testified that Judge Middaugh responded, "[T]oo bad" when Russell mistakenly told the court a picture of the Edlemans' landscape was an exhibit when it was not. Eglick testified that the judge's "too bad" remark in context meant

Russell "blew it." RP (June 7, 2010) at 68. Russell's counsel belatedly moved to strike this testimony on "speculation" and "hyperbole" grounds after Eglick testified on this topic for nearly two pages. The court overruled the objection and orally instructed the jury to "disregard Mr. Eglick's characterization of what's going on in Judge Middaugh's mind when she said, 'Too bad.' That's for you to decide when you look at the transcript." RP (June 7, 2010) at 69. Absent evidence to the contrary, juries are presumed to follow the trial court's instructions. State v. Foster, 135 Wn.2d 441, 472, 957 P.2d 712 (1998). Russell points to no evidence that members of the jury disregarded this directive.

Russell next relies on report of proceedings (June 7, 2010) at 72-75 to support his claim. There, Eglick testified that Russell's decision to sue the Edlemans' neighbors (the Fawcetts and Cooks) constituted negligence because no good faith basis existed for the lawsuit. He described the lawsuit as "legal bullying" based on the Fawcetts' and Cooks' opposition to the Edlemans' construction plans. Russell's counsel objected when the Edlemans' counsel asked how this tactic affected Judge Middaugh's ultimate decision. He objected based on speculation and impermissibly calling on the witness to quote from the trial court's written findings and conclusions and oral ruling. The court overruled the objections and orally instructed the jury

> to take evidence concerning what Judge Middaugh said not as proof of the truth of what she said, but simply as a basis for Mr. Eglick's opinion as to how Mr. Russell's conduct of the trial allegedly negatively impacted the Edlemans in the decision that was made by the trial judge against them.

RP (June 7, 2010) at 74. The record shows that Eglick provided no testimony that

quoted from the written findings and conclusions or oral ruling transcript. In sum, Russell's citations to the record do not support his claim. In addition, the record Russell cites does not establish that the experts provided speculative opinions. The experts relied on thirteen volumes of the trial court report of proceedings including the summary judgment proceedings and other documents which were all admitted without objection.

Russell also claims the experts "speculated what Judge Middaugh would have done on remand." Appellant's Br. at 38. Our review of Russell's record citations does not support this claim. These citations show no expert testimony about "what Judge Middaugh would have done on remand."[7]

Russell also claims trial court error "by allowing the jury to hear verbatim portions of Judge Middaugh's oral decision . . . ." Appellant's Br. at 38. He acknowledges, "While the trial court excluded Judge Middaugh's [written] findings as a trial exhibit, it initially admitted her oral decision as an exhibit in its entirety. The trial court then reconsidered its decision several days later, after the oral decision had been repeatedly read and displayed to the jury." RP (June 3, 2010) at 38 n.6 (citations omitted). This record citation fails to support his claim.

It is true the trial court's initial ruling admitted exhibit 103, the transcript of the court's oral ruling, and allowed the Edlemans' expert witness, J. Richard Aramburu, to read and publish portions of it to the jury. But the trial court ruled on reconsideration

[7] The testimony shows Judge Middaugh had discretionary authority to apply or not equitable principles.

that Russell (1) never moved in limine to exclude exhibit 103 despite his contrary argument, (2) belatedly disclosed controlling and persuasive case authority, and (3) incurred no prejudice because the oral limiting instruction to the jury cautioned that Judge Middaugh's findings are not binding and the jury must independently determine the evidence presented at trial.[8] Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 136, 875 P.2d 621 (1994) (we presume the jury follows the court's instructions). The trial court reasoned:

> [T]he defendants motions in limine did not directly address Judge Middaugh's oral decision, nor did the defendants proposed order on the motions in limine address that. . . . The defendant did not cite any legal authority in terms of case law other than the Paradise Orchards case in support of its motion in limine to bar admission of the trial court's findings of fact and conclusions of law. It wasn't until this week, which is a week after I ruled, that the Court of Appeals decisions and the written findings and conclusions of law would not be admitted as exhibits, but that Judge Middaugh's oral decision, which is Exhibit 103, would be admitted as part of the transcript of the proceedings below pursuant to the Walker versus Bangs case, that defense counsel brought a motion for a mistrial again a week later, and in doing so, first brought to my attention the case of In Re Detention of [Pouncy, 168 Wn.2d 382, 229 P.3d 678 (2010)], a March 2010 case, which was decided two months before trial in this case, and essentially affirmed the ruling of the Division I Court of Appeals decision which came out two years earlier.
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> The precedent from California in the form of the case of Wiley v. San Diego, 58 Cal. App. 4th 434, 68 Cal. Rptr.2d 193 (1997], a 1997 case, was not brought to my attention until yesterday. . . .
>
> My point is this entire recitation is things may have gone a little differently if [Pouncy] had been cited to me at the time the motions in limine were argued, rather than a week later. In light of the [Pouncy] case and the other legal precedents that have been brought to my attention in the last few days, I

[8] For example, the court instructed the jury in part: "Mr. Russell is not bound by those findings of fact because even though he was representing the Edleman[s], he was not a party. So you can make your own independent determinations about any facts that the trial court in the underlying case found and you are not bound by those determinations of fact. However, there will be some evidence submitted to you about what some of those findings of fact were." RP (May 26, 2010) at 136. The court repeated similar instructions later in the trial.

> indicated that I would reconsider my earlier decision about the admissibility of Judge Middaugh's oral ruling. . . .
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> . . . . Re-reading the Paradise Orchards case in light of the [Pouncy] case and the California case, the Wiley case, which frankly seems the most on point of any of the cases here, I am persuaded that under the legal precedent that requires the jury in this case to retry the merits of the underlying case in order to make an independent determination of what a reasonable judge would have done absent the alleged malpractice, that admission of Judge Middaugh's oral decision would not be appropriate[] since the jury may be hard-pressed to second guess her articulated conclusions involving the exercise of judgment or discretion, or the expression of opinion, which the Supreme Court in [Pouncy] said should not be admissible evidence. I also do not believe, in light of the precedent that I am now aware of, that it is necessary for the jury to read or have read to them Judge Middaugh's rulings. I'm confident that plaintiffs can prove their case concerning what the results were at trial and how those results were proximately caused by Mr. Russell's alleged malpractice through expert testimony concerning what the standard of care required, what the actual results were in terms of their impact on the Edlemans, and also how or why a reasonably prudent judge would have ruled differently if Mr. Russell had met the standard of care in the opinion of the plaintiff's experts.

RP (June 3, 2010) at 2-9 (emphasis added).

As to Russell's mistrial motion premised on the alleged erroneous admission of the oral ruling, the court explained:

> I still stand by my earlier ruling that a mistrial is not warranted in this case. The jury has been instructed and we can instruct them again, if you would like, that Judge Middaugh's findings are not binding on them and that they must exercise[] their own independent judgment as to the evidence that was presented in the underlying trial. I also re-checked my notes, and as I mentioned earlier, when I ruled on the motion for a mistrial, the portion of Judge Middaugh's oral ruling that was actually read or shown to the jury was actually quite limited. . . . Given the curative instruction that was given to the jury, I can't fairly conclude that this limited exposure to Judge Middaugh's oral decision is so overwhelming or unfairly prejudicial that it warrants a mistrial, however, I have reconsidered my earlier decision to admit Exhibit 103, and I'm not going to admit Exhibit 103.

RP (June 3, 2010) at 9-11 (emphasis added).

Russell's counsel also acknowledged the relevance of the written findings and

conclusions. During arguments over motions in limine, the trial court granted Russell's motion to exclude admission of the actual written findings and conclusions. He acknowledged that the findings and conclusions were relevant and the proper subject for expert testimony,

"The majority of the things in the findings and conclusions can probably be discussed, but it is true that this specific motion in limine deals specifically with the written findings and conclusions." RP (May 20, 2010) at 107.

> The whole evidence of the trial within a trial is going to be put before [the jury], a number of issues in regard to what she considered can be discussed. We are not saying that the jury can't hear these things, but to see them all put together in a document where the Court has come to a conclusion, without necessarily having all the facts before it, and certainly expressing its own opinion as to what should happen, is going to -- and I have said it before, I will say it again, it robs the jury of its ability to hear all the facts, to weigh them, and to come to its own conclusion. It is highly prejudicial, and there is no need for it. There is no need for it because the evidence is going to come in orally, through testimony, through opinion. But to have this all put in a document and laid out with a judge's opinion for them to follow is highly prejudicial, it is wrong, and it steals the fact finding function of the jury.

RP (May 20, 2010) at 112 (emphasis added).

> Now, the Court said that the jury -- the jury can hear expert testimony which would be directed towards proximate cause and damage issues, I think that's appropriate, [the findings and conclusions] can be utilized in that fashion, but I don't think it is appropriate to submit to the jury incomplete or truncated findings of fact or conclusions of law because it is going to lead to all kinds of speculation because they are going to have to be redacted. 'Conclusions of law' don't mean much unless you have them attached to a finding -- well, I guess they do, finding of fact, but I think it is going to be very confusing to a jury. I think it is a better -- a matter that is addressed by expert testimony by both plaintiffs and defendants as to what the effect, or consequences, or meaning of those conclusions of law are in each instance. Rather than going in as either as a partial exhibit or as a redacted exhibit, which is simply going to be very confusing.

RP (May 24, 2010) at 14-15 (emphasis added).

We conclude that under the circumstances here, the trial court's admission of the challenged evidence was reasonable and based on tenable grounds. None of Russell's record citations, when read in context, supports his evidentiary claims. He also fails to demonstrate that the jury relied on the challenged evidence for an improper purpose given the court's oral limiting instructions, which the jury is presumed to follow.

For the reason discussed above, we decline to address Russell's related challenge to the court's denial of his mistrial motion premised on these claimed evidence errors. In addition, Russell devoted one sentence in his opening brief on the mistrial motion error. He discussed no standard of review and cited no case authority. State v. Logan, 102 Wn. App. 907, 911 n.1,10 P.3d 504 (2000) ("'Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.'") (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)); RAP 10.3(a)(6).

Russell also argues the court erred by admitting testimony about the "abandoned" claim from the "case within a case." We disagree. In the "case within a case," the trial court held that the Edlemans abandoned their claim that the Club board was improperly composed. In the malpractice case, the trial court granted Russell's motion for partial summary judgment on this issue, reasoning that because individuals in the Normandy Park community could independently enforce the setbacks, any abandonment proximately caused no damage to the Edlemans. The court admitted

expert testimony on the abandoned claim to show that Russell failed to confer with his clients before abandoning this claim and failed to understand the effect of abandoning this claim on the upcoming trial. Because this evidence was relevant to the breach of duty element—Russell failed to keep his clients informed and to prepare sufficiently for trial—Russell demonstrates no abuse of discretion.[9]

Russell also assigns error to evidentiary rulings admitting "speculative" testimony about his trial tactics while representing the Edlemans. But Russell makes no argument about this assignment of error in his brief. Cowiche Canyon, 118 Wn.2d at 809 (assignments of error unsupported by reference to the record or argument will not be considered on appeal). Russell has abandoned this claim.

Damages

A. Error of Law

Russell argues, "The jury was allowed to find Russell responsible for damages caused by Judge Middaugh's error of law,[10] and not by any malpractice."[11] Appellant's

[9] We also conclude Russell demonstrates no error in the court's refusal to give proposed instruction D31. Although this instruction is not part of our record, Russell claims the court should have instructed the jury "that the Edlemans' 'abandoned due process claim has been dismissed.'" Appellant's Br. at 48. Russell speculates that the failure to give the instruction caused the jury to consider this claim even though it "caused no damages." He points to no evidence in the record to support this claim.

[10] We described this error in Green, "The trial court erred by concluding that the Edlemans were required to meet the covenants' setback requirements regulating the area along the boundary between their two adjoining lots." Green, 137 Wn. App. at 692.

[11] Although Russell assigns error to the order denying summary judgment, Russell's argument and objection below make clear that he challenges jury instruction 15, which permitted the jury to consider these items as damage. Accordingly, we

Br. at 40 (formatting and boldface omitted). These "error of law" damages include the Edlemans' attorney fees on appeal and the settlement that included the Club's attorney fees. The Edlemans counter that Russell's failure to warn them not to build caused these damages.

"'The measure of damages for legal malpractice is the amount of loss actually sustained as a proximate result of the attorney's conduct.'" Bishop v. Jefferson Title Co., Inc. 107 Wn. App. 833, 848, 28 P.3d 802, 810-11 (2001) (quoting Matson v. Weidenkopf, 101 Wn. App. 472, 484, 3 P.3d 805 (2000)). This is generally a question of fact. See Brust, 70 Wn. App. at 293 (quoting 3 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 27.10, at 659 (3d ed. 1989) (courts agree that the determination of the extent of the injury is for the trier of fact, and there appear to be no reported decisions treating the extent of damage as an issue of law)). The client may recover reasonable attorney fees and litigation expenses to avoid, minimize, or reduce the damages caused by the lawyer's misconduct. 3 Mallen et al., supra, § 21.10, at 31-32.

Jury instruction 15 provides:

> It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.
>
> If your verdict is for the plaintiffs, then you must determine the amount of money that will reasonably and fairly compensate the plaintiffs for such damages as you find were proximately caused by the negligence of the defendant, apart from any consideration of contributory negligence or express assumption of risk.

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review this assignment of error as a challenge to the jury instruction. Goehle, 100 Wn. App. at 614 ("The appellate court will review the merits of the appeal where the nature of the challenge is perfectly clear and the challenged ruling is set forth in the appellate brief.").

> If you find for the plaintiffs, you should consider the following elements of damages:
>
> - The amount of monies that you find were reasonably expended by the plaintiffs for successor counsel and/or to mitigate their damages through settlement;
> - The cost of redesign, demolition or reconstruction reasonably incurred;
> - The diminution in value to plaintiffs' property, if any.
>
> The burden of proving damages rests upon the plaintiffs. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.
>
> Your award must be based upon evidence, and not upon speculation, guess, or conjecture.

(Emphasis added.)

Russell relies primarily on Paradise Orchards General Partnership v. Fearing, 122 Wn. App. 507, 94 P.3d 372 (2004). There, attorney Fearing drafted documents for orchard seller Paradise. When the deal fell through, Paradise sought specific performance, but the trial court ruled its contract allowed no specific performance. Paradise filed no appeal. In a later malpractice action against Fearing, we held that the trial court in the "case within a case" erred and that the contract allowed specific performance. Paradise gave up an opportunity to challenge that erroneous ruling and could therefore prove no causation in its malpractice claim. Paradise Orchards, 122 Wn. App. at 520.

Paradise Orchards does not control. That case held as a matter of law the attorney breached no standard of care nor committed any act that proximately caused damage to the client. Here, ample evidence supports the jury's determination that Russell breached the standard of care. Whether the breach caused the damages suffered by the Edlemans presented a factual question. It is true that damages caused

solely by judicial error and not legal malpractice would not be recoverable. See Paradise Orchards, 122 Wn. App at 520. But there may be more than one proximate cause, and a third party's concurring negligence does not necessarily break the causal chain from the original negligence to the final damages. Estate of Shinaul M. v. Dep't of Soc. & Health Servs., 96 Wn. App. 765, 770, 980 P.2d 800 (1999). Russell's "error of law" claim fails.

B. ABC Rule

Russell also argues that under the "ABC rule," the Edlemans were not entitled to appellate counsel's attorney fees or the Club's attorney fees paid to settle the underlying dispute. Russell claims that the Edlemans' own conduct contributed to their litigation with the Club, regardless of whether that conduct constituted fault under Washington law. Russell also argues that because the Club and the Edlemans' neighbors were not strangers to Russell's conduct in representing the Edlemans, the Edlemans cannot recover subsequent attorney fees. The Edlemans counter that they were entitled to recover these attorney fees to mitigate the damage Russell caused.

"[A]ttorney fees are not available as costs or damages absent a contract, statute, or recognized ground in equity." City of Seattle v. McCready, 131 Wn.2d 266, 275, 931 P.2d 156 (1997). There exists a critical distinction between fees recoverable as costs and those recoverable as damages. See Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC, 139 Wn. App. 743, 757-62, 162 P.3d 1153 (2007). One recognized ground in equity is equitable indemnity, also referred to as "consequential damages" or the "ABC rule." Barnett v. Buchan Baking Co., 108 Wn.2d 405, 408, 738 P.2d 1056 (1987);

George v. Farmers Ins. Co. of Wash., 106 Wn. App. 430, 445, 23 P.3d 552 (2001). Attorney fees as consequential damages require three elements:

> (1) a wrongful act or omission by A [Russell] toward B [the Edlemans]; (2) such act or omission exposes or involves B [the Edlemans] in litigation with C [the Club]; and (3) C [the Club] was not connected with the initial transaction or event, viz., the wrongful act or omission of A [Russell] toward B [the Edlemans].

Manning v. Loidhamer, 13 Wn. App. 766, 769, 538 P.2d 136 (1975). "[A] party may not recover attorney fees or costs of litigation under the theory of equitable indemnity if, in addition to the wrongful act or omission of A [Russell], there are other reasons why B [the Edlemans] became involved in litigation with C [the Club]." Jain v. J.P. Morgan Sec., Inc., 142 Wn. App. 574, 587, 177 P.3d 117 (2008). Whether this rule authorizes attorney fees is a legal question we review de novo. See Tradewell Group, Inc. v. Mavis, 71 Wn. App. 120, 126-27, 857 P.2d 1053 (1993). We also review whether the evidence supports all three elements. See Tradewell Group, 71 Wn. App. at 126-27.

Russell relies primarily on Jain to argue that the ABC rule "prevents a plaintiff [the Edlemans] in a legal malpractice suit from recovering the attorney's fees incurred in litigation with a third party where the plaintiff is at least partially responsible for undertaking that litigation." Appellant's Br. at 43. There, we held federal security laws prohibited the Jains from pursuing indemnity claims against their brokerage and law firms for violations of federal securities law. Jain, 142 Wn. App. at 585-87. We also reasoned the Jains failed to satisfy the ABC rule, because they "were not blameless in the transactions giving rise to their liability." Jain, 142 Wn. App. at 587.

Jain is factually and legally distinguishable. Jain was decided primarily on the

basis of a federal statute barring indemnity. No such statute exists here. Unlike the Jains, who participated in the wrongful conduct at issue, the special verdict form shows the jury specifically found no negligence by the Edlemans. Russell argues that even absent negligence by the Edlemans, their actions still contributed to further litigation. But the jury was entitled to find that Russell's conduct, not the Edlemans' conduct, caused the subsequent litigation.

Russell also fails to show the Club's connection to his wrongful conduct. In Flint v. Hart, 82 Wn. App. 209, 917 P.2d 590 (1996), an attorney failed to retain a funeral home seller's perfected security interest, resulting in an unsecured bankruptcy claim when the buyer defaulted. The attorney's negligence involved the seller in litigation with the buyer. We reasoned that attorney fees could be awarded as damages in the malpractice action because the attorney's wrongful conduct involved the seller in litigation with others. In that case, the buyers were not connected to "the wrongful act or omission of [the law firm] toward [the client]." Flint, 82 Wn. App. at 224. Here, the wrongful act that triggered this litigation was not the dispute in the "case within a case" between the Club and the Edlemans, but Russell's negligent representation of the Edlemans. The Club was not connected with Russell's negligent legal representation. Because the Edlemans satisfy the ABC rule's three elements,[12] we conclude the court properly instructed the jury on damages.

Russell also contends he should not have to pay the Club's attorney fees as part

[12] When attorney fees are awarded as damages rather than costs of suit, the measure of these damages is a jury question. Jacob's Meadow, 139 Wn. App. at 751.

of the Edlemans' settlement with the Club. The Edlemans counter that such fees constituted an attempt to mitigate damages.

In Flint, the seller settled its claim with the buyer at a reduced amount because the claim was unsecured. The jury awarded this reduced amount as damages in the subsequent malpractice action. We held that the exercise of business judgment in settling the claim did not bar Flint's claim against his attorney. Flint, 82 Wn. App. at 223. We reasoned, "The plaintiff has an obligation to mitigate damages. The reasonableness of his or her conduct in doing so is a question for the jury." Flint, 82 Wn. App. at 220-21 (citation omitted). Our Supreme Court affirmed Flint's reasoning on the independent business judgment rule[13] in City of Seattle v. Blume, 134 Wn.2d 243, 260, 947 P.2d 223 (1997), holding that "'the independent business judgment rule' can no longer serve as a bar to the proximate cause element of a legal claim." The court reasoned that the independent judgment rule discourages settlement and serves as a shield for wrongdoing. Blume, 134 Wn.2d at 259-60.

Here, ample evidence supported the Edlemans' claim that the settlement was reasonable and necessary to mitigate the damages flowing from Russell's malpractice. After Green, the Edlemans still faced the possibility that the trial court would order them to demolish the house. The jury was entitled to find that the settlement avoided such a possibility at a reasonable cost. Versuslaw, 127 Wn. App. at 327-28 (jury question in

[13] Earlier cases had held that "when a plaintiff by the exercise of independent business judgment elects not to pursue available legal remedies, the wrongful act of the defendant is not the proximate cause of the plaintiff's damages." Horn v. Moberg, 68 Wn. App. 551, 558, 844 P.2d 452 (1993).

legal malpractice case whether settlement was disadvantageous and what impact this had on damages). We conclude the trial court properly instructed the jury on the recoverable damages.

Cross Appeal

The Edlemans contend that the court erred in refusing a proposed instruction that would have allowed them to recover attorney fees they paid to Russell. They argue in the alternative that the trial court erroneously denied a posttrial motion to disgorge those fees. Russell responds that the proposed instruction misstates the law and such fees are not generally recoverable in a legal malpractice action.

Washington courts have recognized that an attorney's breach of a fiduciary duty to a client may result in disgorgement of the attorney's fees. See Eriks v. Denver, 118 Wn.2d 451, 462, 824 P.2d 1207 (1992). "[T]the trial court has discretion in deciding what impact, if any, lawyer misconduct will have on a claim for attorney's fees." Kelly v. Foster, 62 Wn. App. 150, 156, 813 P.2d 598 (1991).

The Edlemans claim the court erred by not giving their proposed jury instruction 21 because they are entitled to recover attorney fees paid to Russell as consequential damages. The proposed instruction states:

> It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.
>
> If your verdict is for the plaintiffs, then you must determine the amount of money that will reasonably and fairly compensate the plaintiffs for such damages as you find were proximately caused by the negligence of the defendant.
>
> If you find for the plaintiffs, your verdict must include the following undisputed items:
>
> (1) The amount of monies paid by plaintiffs to the defendant Russell for those services that you find fell below the standard of care and were negligent;

> 2) The amount of monies that you find were paid by the plaintiffs to appellate counsel;
>
> (3) The amount of monies that you find were reasonably necessary to settle the underlying litigation if you find that that settlement was reasonable;
>
> (4) The diminution in value to plaintiffs' property.
>
> The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.
>
> Your award must be based upon evidence and not upon speculation, guess, or conjecture.

(Emphasis added.) We need not address the Edlemans' argument that the court should have submitted this issue to the jury. The proposed instruction misstates the law because it instructs the jury that the "verdict must include the following undisputed items." (Emphasis added.) The instruction included successor counsel's fees, the diminution of the Edlemans' property, amounts "reasonably necessary to settle the underlying litigation," and fees paid to Russell for "services that you find fell below the standard of care." Since it instructed the jury that it "must" award damages that were disputed, the instruction misstated the law. "It is not error to refuse to give an instruction containing a misstatement of the law." Havens, 124 Wn.2d at 167.

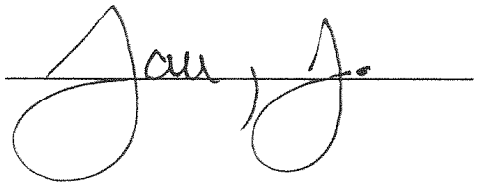
We are also unpersuaded by the Edlemans' alternative contention that the court should have ordered these attorney fees disgorged. The cases they cite approving disgorgement involve a breach of fiduciary duty.[14] The Edlemans alleged no breach of

[14] Shoemake ex rel. Guardian v. Ferrer, 168 Wn.2d 193, 225 P.3d 990 (2010) is not on point. The case involves a hypothetical contingency fee, no actual disgorgement, and a breach of fiduciary duty in addition to malpractice. Jacob's Meadow is not a legal malpractice case. And Flint deals with consequential damages under the ABC rule, not fee disgorgement. The Restatement of the Law Governing Lawyers, relied on by both parties, appears in accord with Washington law. It states, "A lawyer engaging in a clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter. Considerations

fiduciary claim against Russell. Even if we assume the court had discretion to order disgorgement of Russell's fees, the record shows it properly exercised that discretion. The court reasoned that due to the jury's verdict awarding successor attorney fees and settlement costs, "[p]laintiffs thus were made whole. Allowing them additionally to recover the fees they paid to defendant Russell would result in a windfall to the plaintiffs." The court properly refused the Edlemans' proposed jury instruction and properly exercised its discretion in denying disgorgement of Russell's fees.

CONCLUSION

Because neither party demonstrates reversible error, we affirm the judgment on the jury's verdict.



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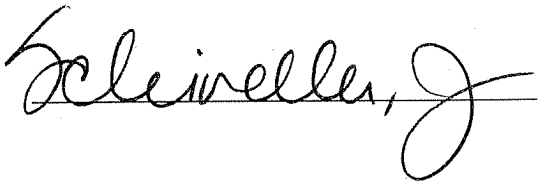

relevant to the question of forfeiture include the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies." Restatement (Third) of the Law Governing Lawyers § 37, at 270 (1998). A separate restatement section relied on by the Edlemans refers to other consequential damages, not disgorgement of the negligent attorney's fees.