

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOANNE ALDERSON and ROBERT)	No. 28790-4-III
ALDERSON, individually and as the)	
marital community composed thereof,)	
)	
Appellants,)	
)	
v.)	Division Three
)	
R. CRANE BERGDAHL and JANE)	
DOE BERGDAHL, individually and the)	
marital community composed thereof,)	
)	
Respondents and)	
Cross-Appellants.)	UNPUBLISHED OPINION

Korsmo, J. — The trial court granted summary judgment in favor of attorney Crane Bergdahl. His former clients appeal, arguing that they have stated a cause of action for legal malpractice relating to the sale of their farm. We disagree and affirm.

FACTS

This action has its genesis in a former family farm in Franklin County. Triple A Farms was owned by a partnership involving Robert Alderson, his brother Jack Alderson, and Jack Alderson's son, Scott. The property was farmed by longtime tenant Mark Peterson. Friction developed in the partnership, resulting in litigation. The marital community of Robert and Joanne Alderson (Aldersons) retained attorney R. Crane Bergdahl to represent their interests.

Contentious litigation began in 2002. There were numerous disputes about a particular segment of the Triple A Farms known as the Grandma Jessie Property. The trial court, the Honorable Vic VanderSchoor, ultimately ruled that the Grandma Jessie Property was the personal property of Robert Alderson and was not part of Triple A Farms. Judge VanderSchoor ruled in 2005 that the Triple A Farms property should be sold. A court-ordered appraisal had set the value of the entire property at \$4,900,000. The court also determined that 50 percent of the proceeds would go to Robert Alderson, 40 percent to Jack Alderson, and 10 percent to Scott Alderson.

Counsel for Jack and Scott Alderson prepared a bid for the property in the sum of \$4,818,591, representing the appraisal less the value of the Grandma Jessie Property. The bid proposal attached an 18-page legal description of the property. Clerk's Papers

(CP) 423-440. The legal description included the Grandma Jessie Property.

Bergdahl assisted his clients in soliciting other bids for the property in order to maximize their proceeds. He sent bid solicitations that contained the same legal description used by Jack and Scott Alderson to several potential bidders. One of the people he solicited was Frank Tiegs, who owned extensive farming operations in the region. Tiegs also was Bergdahl's biggest client. Bergdahl rented office space in a building owned by Tiegs; the two shared the building's conference room.

Tiegs decided to bid on the property. His initial bid of \$6,146,548 was submitted to the court by Bergdahl; it included side agreements relating to Robert Alderson's access to the Grandma Jessie Property. The court directed that the side agreements be deleted and a revised bid was filed. Mark Peterson, who had farmed the property since 1996, claimed a right of first refusal to purchase the property under his lease. He filed suit to enforce his right to purchase the property.

Robert Alderson did not want to sell the property to Peterson. There was personal antagonism between Peterson and Robert and Joanne Alderson. Robert Alderson believed Peterson would be difficult to deal with in the future. Robert therefore directed Bergdahl to contest the claimed right of first refusal.

Peterson's suit went to trial July 5-6, 2006; Bergdahl represented the Aldersons in

that contest. CP 539-540. Bergdahl also sent Tiegs a letter indicating his belief that the Aldersons would prevail on the issue. However, Judge VanderSchoor ruled that Peterson did have a valid right of first refusal. CP 540-541.

Tiegs retained his own counsel no later than April 5, 2006, to respond to issues raised by counsel for Jack and Scott Alderson about his bids. CP 975. Despite having his own counsel, Tiegs continued to submit increased bids on several occasions using bid documents provided by Bergdahl. Jack and Scott Peterson submitted a bid of \$7,125,000. Tiegs then submitted a final bid for \$7,200,000, using his own form. His final bid document did not attach any legal description, although it made reference to unattached lists. The final bid did list the tax identification numbers associated with the parcels, but did not include the Grandma Jessie Property's identification number.

Mr. Peterson matched Mr. Tiegs' final bid of \$7,200,000. Mr. Peterson and the Aldersons began negotiating various aspects of the sale, including easements to the Grandma Jessie Property. During this time, Bergdahl discovered that the title report included the Grandma Jessie Property in its description; he asked the title company to delete it. Meanwhile, negotiations became acrimonious and ultimately broke down. Although he knew that the Grandma Jessie Property was not included in the sale, Mr. Peterson and his counsel sought to include it, presumably to foreclose the need to deal

with the Aldersons in the future.

The matter once again returned to Judge VanderSchoor. After hearing arguments whether the Grandma Jessie Property was to be included in the sale or not, Judge VanderSchoor ruled that the sale would go forward in accordance with the sale documents. He signed an order that included the property in the sale of Triple A Farms.

The Aldersons did not appeal the ruling. They later asserted that they did not do so because Bergdahl advised them they could not win. Bergdahl claims it was because the Aldersons needed the money and did not want to jeopardize the sale going through.

The Aldersons subsequently sued Bergdahl for legal malpractice. Their initial claim was negligence based on the inclusion of the Grandma Jessie Property in the sale of Triple A Farms to Peterson. They subsequently were allowed to amend the complaint to expand the negligence claim and also to assert that Bergdahl acted under a conflict of interest by representing both them and Tiegs.

Extensive discovery ensued. The matter proceeded to a summary judgment proceeding before the Honorable William Acey. Bergdahl moved to strike declarations from two experts that he claimed had not been timely identified. Judge Acey denied that motion, but did grant Bergdahl's motion for summary judgment and dismissed the action.

The Aldersons timely appealed to this court. Bergdahl cross-appealed from the

denial of his motion to strike the two declarations.¹

ANALYSIS

The parties address the two malpractice theories separately; so will we. Well settled standards govern this review.

This court reviews a summary judgment *de novo*; the inquiry is the same as the trial court's inquiry. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). We view the facts, and all reasonable inferences to be drawn from them, in the light most favorable to the nonmoving party. *Id.* If there is no genuine issue of material fact, summary judgment will be granted if the moving party is entitled to judgment as a matter of law. *Id.*; *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000).

The elements of a legal malpractice action are: (1) an attorney-client relationship which gives rise to a duty of care, (2) an act or omission by the attorney in breach of that duty, (3) damage to the client, and (4) proximate causation between the breach of duty and the damage incurred. *Hizey v. Carpenter*, 119 Wn.2d 251, 260-261, 830 P.2d 646 (1992). A legal malpractice trial effectively requires a trial within a trial. The jury must decide if the underlying cause of action would have resulted in a favorable verdict for the client; only then is the suit against the attorney viable. *Daugert v. Pappas*, 104 Wn.2d

¹ In light of our disposition of the Aldersons' appeal, we do not address the cross appeal.

254, 258, 704 P.2d 600 (1985).

Negligence Action. The Aldersons contend that Bergdahl was negligent in two specific regards concerning the Grandma Jessie Property—he erroneously included that land in the original property descriptions and he erroneously interpreted Judge VanderSchoor’s ruling on Peterson’s motion to include that land in the sale. While we question the factual bases² for these arguments, we need not address them because the fourth element of the legal malpractice standard is not satisfied.

The fourth element requires that there be a proximate link between the attorney’s error and the client’s injury. *Hizey*, 119 Wn.2d at 260-261. That link does not exist here because of Judge VanderSchoor’s ruling on Peterson’s motion to include the Grandma Jessie Property in the sale of the Triple A Farms. Judge VanderSchoor was reminded of his previous ruling giving that property to Robert Alderson, but nonetheless chose to include that land along with the Triple A Farms sale. Assuming, as we must for purposes of a summary judgment proceeding, that the attorney’s error led to this issue arising, it was still the judge’s ultimate ruling to reverse his previous position and include the Grandma Jessie Property in the sale that led to the Aldersons losing that property. The

² The final bid did not contain the erroneous land description and did not include the tax parcel identification for the Grandma Jessie Property, making the claim that the earlier error caused the sale a dubious one. We also do not believe that Judge VanderSchoor’s ruling on Peterson’s motion can be interpreted other than as the parties did. *See* Judge Acey’s discussion of the topic at Report of Proceedings (RP) 29.

judge's ruling was the proximate cause of their loss. That ruling broke the causal link between the attorney's error and the client's loss.

This court reached a similar result in *Paradise Orchards General Partnership v. Fearing*, 122 Wn. App. 507, 94 P.3d 372 (2004), *review denied*, 153 Wn.2d 1027 (2005). There the attorney representing a seller had drafted the sales agreement, including a remedies clause. When the sale fell through, litigation resulted and the trial judge interpreted the clause as limiting the remedies available to the seller. The seller then settled with the buyer on less favorable terms than desired and sued its attorney for malpractice. *Id.* at 511-513. The trial court³ ruled that the first judge had erred in the interpretation of the remedies clause and found no legal malpractice. *Id.* at 513. This court agreed that the client's remedy was to challenge the judge's ruling rather than sue the attorney. *Id.* at 515, 520. The judgment in favor of the attorney was affirmed. *Id.* at 520.

As in *Fearing*, the remedy for the erroneous⁴ inclusion of the Grandma Jessie

³ As in this case, the *Fearing* malpractice case was heard by the Honorable William Acey.

⁴ The original Grandma Jessie Property ruling had led to failed negotiations and additional litigation related to access easements, rent, and farming encroachment. As Judge Acey opined, it did seem likely that Judge VanderSchoor reversed his position in order to end the litigation and conclude the sale. RP 29-30.

Property in the sale was to appeal the ruling. The Aldersons did not do so.⁵ An attorney malpractice action is not an insurance policy against judicial error. An aggrieved party must challenge an erroneous ruling by appeal rather than sue counsel for the judge's error.⁶

The judge's ruling broke the chain between the attorney's error and the client's loss. It was the cause of the complained of injury. The negligence action was properly dismissed.

Conflict of Interest. The Aldersons also argue that Bergdahl acted under a conflict of interest, representing both their interests and Tiegs'. They have not presented a sufficient factual basis for a jury to find that an attorney-client relationship existed between Bergdahl and Tiegs with respect to the farm sale.

Preliminarily, however, we note that their legal theory in the trial court was unclear. A section of their amended complaint was titled "Violations of Ethical Standards of Professional Conduct." CP 239. But violations of ethical rules in and of themselves do not give rise to a cause of action. *Barrett v. Freise*, 119 Wn. App. 823, 842, 82 P.3d 1179 (2003) (citing *Hizey*, 119 Wn.2d at 265). These violations may result

⁵ In this action, we assume that the failure to appeal was because of the reason stated by the Aldersons—that Bergdahl had advised they would not win. The Aldersons have not alleged that Bergdahl was negligent in giving them that advice.

⁶ A malpractice action may be filed if the attorney's error prevents a successful appeal.

in a breach of a fiduciary duty. *Barrett*, 119 Wn. App. at 841-843. The remedy in such a case is disgorgement of fees paid. *Eriks v. Denver*, 118 Wn.2d 451, 462, 824 P.2d 1207 (1992). This remedy is available even in the absence of proof of damages. *Id.*

Presumably, the Aldersons were asserting a breach of fiduciary duty, since one of the remedies they requested was a disgorgement of fees paid to Mr. Bergdahl. *See* CP 240.

On appeal, the argument is clearer—the Aldersons argue that Bergdahl was representing both them and Tiegs. They rely upon RPC 1.7, which provides:

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

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

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

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

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

(2) the representation is not prohibited by law;

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

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

The Aldersons have not presented sufficient evidence to support their claim that

Bergdahl was representing Tiegs at the same time he was representing them. Normally the question of whether an attorney-client relationship exists is a factual one to be decided at trial. *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). However, as with other factual questions, this assignment of duties will not defeat a summary judgment motion if the facts are not sufficient to show an attorney-client relationship existed. *Id.* at 364. That is the situation here.

The existence of an attorney-client relationship depends upon several factors:

The essence of the attorney/client relationship is whether the attorney's advice or assistance is sought and received on legal matters. The relationship need not be formalized in a written contract, but rather may be implied from the parties' conduct. Whether a fee is paid is not dispositive. The existence of the relationship "turns largely on the client's subjective belief that it exists." The client's subjective belief, however, does not control the issue unless it is reasonably formed based on the attending circumstances, including the attorney's words or actions.

Id. at 363 (citations omitted).

The Aldersons have presented no evidence that Tiegs subjectively believed that Bergdahl was representing him in the farm sale.⁷ Instead, they point to several of Bergdahl's actions which they claim demonstrate he was actively representing Tiegs. Specifically, they rely on the fact that Bergdahl (1) filed Tiegs' initial bids with the court, (2) fought to have the first refusal clause invalidated, and (3) moved to confirm Tiegs'

⁷ Bergdahl consistently stated that he was only representing the Aldersons. Meanwhile, Tiegs hired his own counsel two months before the bidding ended. CP 975.

final bid as the high bid. None of these actions show that Bergdahl represented Tiegs.

Bergdahl's assistance with filing the bids benefitted the Aldersons. It was in their interest to have higher bids filed with the court. There is no evidence that Bergdahl would not have assisted additional bidders other than those his clients opposed. Tiegs decided how much to bid on each occasion and signed the bid forms that Bergdahl filed. Having successfully solicited additional bidders for the Aldersons, the action of filing the bids he received does not demonstrate that Bergdahl was representing the other bidders, let alone doing so in conflict with the interests of the Aldersons.

The Aldersons next argue that Bergdahl represented Tiegs when he contested Peterson's claim that he had a right of first refusal. This argument misconstrues the record. Peterson sued Triple A Farms and the individual partners; he filed a separate action independent of the partnership dissolution action. CP 539. It was up to the Aldersons to decide whether they wanted to contest the action.⁸ They did because they did not want Peterson to purchase the property. It appears that they correctly concluded they would not be able to successfully work with Peterson should he purchase the farm.

Nonetheless, the Aldersons strenuously claim that because removal of the clause would benefit Tiegs more than it would benefit them, Bergdahl was actually representing

⁸ The Aldersons did not allege that Bergdahl gave them bad advice in deciding how to defend the Peterson suit and it was not part of their negligence claim.

Tiegs. Their argument misses the point that Bergdahl's representation of them was the result of their decision to contest the Peterson suit. The fact that they did not want Peterson to purchase the farm coincided with Tiegs' (and any other bidders') interest in removing the first refusal right, but the fact that they had the same interest simply does not show an attorney-client relationship existed between Bergdahl and Tiegs.

Removing the first refusal right also would not necessarily have been detrimental to the Aldersons' financial interests. Peterson was interested in purchasing the farm. The loss of the opportunity to simply match the high bid would have required him to actively enter the bidding process, a fact that could only increase the sale price. Peterson would now have to bid in increments in order to obtain the farm. Having an additional active bidder rather than a mystery figure who might or might not try to match a bid, could only work to increase the ultimate sale price.

For all of these reasons, this argument does not establish that Bergdahl was representing Tiegs.

Finally, the fact that Bergdahl moved to confirm the high bid did not mean that he was representing Tiegs. Once the bidding period ended, Tiegs' \$7,200,000 bid was the winner. At that point the court needed to confirm the high bid and then wait to see if Peterson matched it or not. Confirming the apparent high bid was yet another action

taken to benefit the Aldersons even though Tiegs may have obtained some small cost savings from not having to present his own order. The sale had been ordered to resolve the failed partnership. Confirmation of the sale was the next step toward ending that litigation and providing the proceeds to the former partners. It needed to be done by someone.

None of the noted actions showed that Bergdahl was representing Tiegs. Each of the now challenged actions showed that Bergdahl was acting for the benefit of the Aldersons. The fact that Tiegs may also have benefited resulted from the fact that his interests were parallel to those of the Aldersons. That interest parallelism did not equate with legal representation of both parties. The other partners also benefited financially from Bergdahl's actions in finding a bidder who drove the sale price up \$2,400,000. That did not mean that they were also represented by Bergdahl.⁹

The Aldersons have demonstrated that Tiegs and others benefited from Bergdahl's actions. That fact is not sufficient to establish that Bergdahl was representing Tiegs (or any others). There was no conflict of interest because there was no representation of multiple clients with conflicting interests. The trial court correctly dismissed the conflict of interest claim at summary judgment.

⁹ The same could be said from the county and local governments that undoubtedly benefited from the increase in the valuation of the property. Were they, too, clients of Bergdahl?

No. 28790-4-III
Alderson v. Bergdahl

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Kulik, C.J.

Brown, J.