HONORABLE KIMBERLEY PROCHNAU

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

BARCELINO CONTINENTAL CORP, a California corporation, Plaintiff, vs. G. MICHAEL ZENO, JR. and JANE DOE ZENO, husband and wife; ZENO, DRAKE & HIVELY, P.S., a Washington professional corporation, Defendants.	NO. 09-2-18900-5 SEA COURT'S INSTRUCTIONS TO THE JURY

Dated: 1/20, 2011

Judge Kimberley Prochnau

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of

the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In

the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

INSTRUCTION NO. 8

Plaintiff Barcelino Continental Corp claims that defendants G. Michael Zeno Jr., an agent of Zeno, Drake & Hively, PLLC was negligent in his representation of Barcelino in an underlying lawsuit entitled Bellevue Square Managers, Inc. v. Barcelino Continental Corp. The underlying case concerned a commercial lease dispute between Barcelino, as tenant, and its landlord Bellevue Square in which Bellevue Square filed suit seeking to enjoin Barcelino from advertising and conducting a sale on the leased premises.

Barcelino contends that Zeno was negligent in defending against Bellevue Square's action by failing to advocate defenses of merit. Further, Barcelino contends that Zeno negligently conceived and prosecuted counter and third-party suits in reaction to Bellevue Square's suit and otherwise failed to take action which would have efficiently ended the litigation. Barcelino claims that it suffered damages in the form of attorney fees incurred in the underlying action because of Zeno's negligence and therefore should be able to recover them in the instant suit.

Zeno denies Barcelino's claims and has asserted affirmative defenses including that: Barcelino's damages, if any, were caused by Barcelino's contributory negligence; that Barcelino failed to reasonably mitigate its damages; that Barcelino's claims are banned by equitable estoppel; and finally Zeno denies the nature and extent of Barcelino's claimed damages.

INSTRUCTION NO. 3

The foregoing is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed; and you are to consider only those matters that are established by the evidence. These claims have been outlines solely to aid you in understanding the issues.

Plaintiff Barcelino has the burden of proof on its claims and defendants have the burden of proof on their affirmative defenses.

INSTRUCTION NO. 4

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case [bearing on the question], that the proposition on which that party has the burden of proof is more probably true than not true.

INSTRUCTION NO. 5

The law treats all parties equally whether they are corporations, partnerships or individuals. This means that corporations, partnerships and individuals are to be treated in the same fair and unprejudiced manner.

INSTRUCTION NO. 6

Defendant G. Michael Zeno, Jr. was the agent of defendant Zeno, Drake & Hively, P.S., a professional corporation, and, therefore, any act or omission of the agent Zeno was the act or omission of the defendant Zeno, Drake & Hively, P.S.

INSTRUCTION NO. 7

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 8

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION NO. 9

To establish legal malpractice, the plaintiff has the burden of proving:

(1) The existence of an attorney-client relationship.

(2) A duty on the part of the attorney.

(3) The failure of the attorney to perform the duty; and,

(4) That the attorney's failure to perform the duty was negligent and a proximate cause of the client's damages.

INSTRUCTION NO. 10

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

INSTRUCTION NO. 11

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstance.

INSTRUCTION NO. 12

The duty or standard of care owed by an attorney to his client is to exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in Washington State.

INSTRUCTION NO. 13

Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed.

INSTRUCTION NO. 14

If you find that more than one entity was negligent, you must determine what percentage of the total negligence is attributable to each entity that proximately caused damages incurred by the plaintiff. The court will provide you with a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

Entities to which you may attribute a percentage of negligence include the defendant(s) and the plaintiff.

INSTRUCTION NO. 15

A cause of an event or injury is a proximate cause if it is related to the event or injury in two ways: (1) the cause produced the event or injury in a direct sequence unbroken by any new, independent cause, and (2) the event or injury would not have happened in the absence of the cause.

There may be more than one proximate cause of an event or injury.

INSTRUCTION NO. 16

To establish the element of proximate causation in an attorney malpractice action, the former client must demonstrate that it would have achieved a better result in the underlying case had the attorney not been negligent.

INSTRUCTION NO. 17

An attorney employed to provide professional services to a client 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.

An attorney is not liable for mere errors of judgment if he acts in good faith and in an honest belief that his acts and advice are well founded and in the best interest of his client so long as he does not act negligently.

INSTRUCTION NO. 18

You are instructed that the causal relationship between the alleged negligence of defendants and the injury to the plaintiff must be established by evidence that is beyond speculation and conjecture.

The evidence must be more than the alleged act of defendants "might have," "may," "could have'" or "possibly did" cause the injury complained of.

The evidence must rise to the degree of proof that but for the alleged malpractice the resulting injury would not have occurred.

INSTRUCTION NO. 19

To establish equitable estoppel it must be shown that (1) the conduct, acts, or statements by the party to be stopped are inconsistent with a claim afterward asserted by that party; (2) the party asserting estoppel took action in reasonable reliance upon that conduct; and (3) the party asserting estoppel would suffer injury if the party to be stopped were allowed to contradict his prior conducts.

INSTRUCTION NO. 20

A party who alleges equitable estoppel has the burden of proving it by clear, cogent, and convincing evidence. However, this burden of proof is applicable only to the proof of equitable estoppel. All other allegations of the respective parties must be proved by a preponderance of the evidence as that term is more fully defined in other instructions.

When it is said that a proposition must be proved by clear, cogent, and convincing evidence it means that the proposition must be proved by evidence that carries greater weight and is more convincing than a preponderance of evidence. However, it does not mean that the proposition must be proved by evidence that is convincing beyond a reasonable doubt.

INSTRUCTION NO. 21

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 plaintiff, then you must first determine the amount of money required to reasonably and fairly compensate the plaintiff for the total amount of such damages as you find were proximately caused by the negligence of the defendant, apart from any consideration of contributory negligence.

The burden of proving damages rests with the plaintiff and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence. You must be governed by your own judgment, by the evidence in the case, and by these instructions, and not upon speculation, guess, or conjecture.

If you find for the plaintiff, Barcelino Continental Corp., you should consider the following past economic damages elements: attorneys' fees incurred or paid in the underlying matter of *Bellevue Square Managers, Inc. v. Barcelino Continental Corp.*, due to the Zeno defendants' negligence. You should not consider as damages any claim for "lost profits."

INSTRUCTION NO. 22

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to answer any question on the special verdict form, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that you have reached a verdict. The bailiff will bring you back into court where your verdict will be announced.