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## 2001 Survey of Rhode Island Law: Cases: Legal Malpractice

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**Legal Malpractice.** *Richmond Square Capital Corp. v. Mittleman*, 773 A.2d 882 (R.I. 2001). An attorney and his law firm committed legal malpractice by failing to notify lender about unpaid-tax encumbrances on mortgaged property used to secure a loan, and this subsequently damaged the lender because it was forced to pay back-taxes in order to maintain its collateral and priority as a first position lender. Furthermore, any evidence of a settlement between the lender and a guarantor over the loan default was inadmissible to disprove damages regarding the legal malpractice claim.

#### FACTS AND TRAVEL

Richard Mittleman (Mittleman or defendants) and the law firm of Cameron and Mittleman (defendants) appealed from a damages judgment after a jury found them liable to their client, lender Richmond Square Capital Corporation (Richmond Square or plaintiffs), for legal malpractice.<sup>1</sup> The plaintiffs retained the defendants for representation in connection with a loan to be made to Parking Corporation of America (Parking), and to be secured by mortgages on several pieces of real estate including the Shepard Building.<sup>2</sup> The alleged malpractice occurred when Mittleman assured the president of Richmond Square, Harold Schein (Schein), that Richmond Square would have a first position mortgage on the Shepard Building property.<sup>3</sup> At this point Schein believed that the Shepard Building was free and clear of all encumbrances because he would not have made the loan if he knew there were outstanding taxes due and owing on the property.<sup>4</sup> As a small business investment corporation, Richmond Square had certain lending limits which were exceeded by adding the amount of unpaid taxes to the loan extended to Parking.<sup>5</sup>

Shortly after the property's closing, Parking failed to make required loan payments, and in December 1990, the plaintiffs received notice of a tax sale on the Shepard building.<sup>6</sup> "Schein

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1. See *Richmond Square Capital Corp. v. Mittleman*, 773 A.2d 882, 883 (R.I. 2001).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 884.

testified that he was shocked to receive such notice because he thought all the taxes [had been] paid by the previous owner.<sup>7</sup> To avoid public auction, Richmond Square paid the 1989 back-taxes and in February 1991 instituted a foreclosure on the Shepard building property, subsequently selling it.<sup>8</sup> During the foreclosure proceedings, Richmond Square entered into a settlement with David Golden (Golden), the president of Parking, concerning the loan guaranty.<sup>9</sup> In exchange for releasing Golden from his guaranty, he agreed not to contest the foreclosure, gave Richmond Square several properties, and paid \$40,000.<sup>10</sup>

On December 17, 1993, Richmond Square filed a legal malpractice action.<sup>11</sup> Initially, the action was dismissed pursuant to the statute of limitations, but the Rhode Island Supreme Court reversed, holding that there was a question of material fact as to when Richmond Square discovered the tax liens.<sup>12</sup> If the plaintiffs did not discover the validity of the tax liens until on or after December 17, 1990, their claim was timely.<sup>13</sup> The jury found that Richmond Square did not learn of the tax liens until December 17, 1990 at the earliest and, therefore, rendered a verdict of \$127,182.16 in its favor.<sup>14</sup>

#### ANALYSIS AND HOLDING

On appeal, the defendants contended that Richmond Square failed to prove its actual damages.<sup>15</sup> The defendants also asserted that the trial justice erred in excluding evidence concerning the settlement between Richmond Square and Golden that, if admitted, would have reduced or negated Richmond Square's damages arising from the legal malpractice.<sup>16</sup> The defendants argued that the settlement documents would have helped the jury analyze the value of the consideration given by Golden to determine if this amount was more or less than Golden's initial obligations under

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7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 885.

15. *Id.*

16. *Id.*

the loan.<sup>17</sup> Ultimately, the defendants asserted that without these documents in evidence the jury was not in a position to determine whether Richmond Square suffered any damages.<sup>18</sup> In addition, defendants argued that Richmond Square was reimbursed for any damages through the settlement agreement with Golden, and that, in spite of the back-taxes payment and the expenses of foreclosure, Richmond Square profited from the settlement.<sup>19</sup>

The plaintiffs asserted that the settlement documents were irrelevant because they were speculative, did not have probative value, and were too far removed from the loan transaction at issue.<sup>20</sup> Furthermore, Richmond Square argued that it suffered a front-end cost (\$79,493.34) by having to pay the taxes on the Shepard property in December of 1990.<sup>21</sup>

The Rhode Island Supreme Court affirmed the judgment and held that there was no abuse of discretion on behalf of the trial judge.<sup>22</sup> In this malpractice action, the plaintiffs have the burden of proving that the defendants were the "but for" cause of plaintiff's damages incurred in paying the back taxes.<sup>23</sup> Here the court held that reasonable persons could conclude that Richmond Square suffered damages when it incurred an unforeseen expense in paying the back taxes, and that Mittleman was negligent in failing to discover these taxes before the closing date.<sup>24</sup> The court further pointed out that regardless of the loan's fate, Richmond Square was forced to pay back-taxes to maintain its collateral for the loan to Parking.<sup>25</sup>

Regarding mitigation, the court held that the trial judge did not abuse his discretion by refusing to admit the settlement documents.<sup>26</sup> First, the settlement documents did not indicate that the properties and other consideration covered the back taxes that were owed.<sup>27</sup> Furthermore even if the documents were specific as

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17. *Id.*

18. *Id.*

19. *Id.* at 886.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 886-87.

25. *Id.* at 887.

26. *Id.*

27. *Id.*

to the back taxes, they were inadmissible because the value of the settlement would not have reduced the damages the plaintiffs incurred in paying back taxes.<sup>28</sup> This was an expense that the plaintiffs had to pay regardless of the fate of the loan or any subsequent settlement.<sup>29</sup> Finally, the settlement documents did not contain specific values of the properties, thus, introduction into evidence would have caused the jury to speculate impermissibly.<sup>30</sup>

Overall, the trial judge could not have reduced the jury's award because the evidence in the record did not specifically indicate that the value of the settlement with Golden exceeded the amount of the unpaid loan and covered or reduced the back-tax payments.<sup>31</sup> Moreover, evidence of appraisals or other documents concerning the settlement properties' value would be barred by the collateral source doctrine.<sup>32</sup>

#### CONCLUSION

The defendants' failure to discover and notify the plaintiffs of the existence of back-taxes on the Shepard Building was legal malpractice and the proximate cause of the front-end expense incurred by Richmond Square. There was no abuse of discretion in precluding the admission of the settlement documents that were speculative and non-probative.

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28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 888.

32. *Id.* The collateral source doctrine "mandates that evidence of payments made to an injured party from sources independent of the tort-feasor are inadmissible and shall not diminish the tort-feasor's liability to the plaintiff." *Id.* at 887 (quoting *Gelsomino v. Mendonca*, 723 A.2d 300, 301 (R.I. 1999)).