No. 94132-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CONNIE POTTER,
Petitioner,

v.

JOSEPH MICHAEL GAFFNEY and JANE DOE GAFFNEY, his wife, and DORSEY & WHITNEY LLP, a Minnesota Limited Liability Partnership,
Respondents.

RESPONDENTS' ANSWER TO MEMORANDUM OF AMICI CURIAE BRIAN J. WAID AND ROBERT J. WAYNE

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I. INTRODUCTION

Amici curiae Brian J. Waid and Robert J. Wayne (collectively, "Amici") do not dispute that the well settled and narrow equitable indemnity exception to the American Rule does not apply in this case. Instead, Amici argue that the equitable indemnity exception should be modified or abolished in attorney malpractice cases. Specifically, Amici argue that (1) the exception conflicts with Washington tort law's mitigation of damages doctrine, and (2) the exception's sole causation element conflicts with Washington law on proximate causation. Neither argument is properly before the Court, however. Neither of the parties at any level of court has raised or argued that the equitable indemnity exception conflicts with mitigation principles. Moreover, Petitioner Connie Potter (the "Trustee") has not raised the scope of the sole causation element in her Petition for Review. Arguments raised only by amici curiae should not be considered. *See* RAP 12.1(a); RAP 13.7(b); *Coburn v. Seda*, 101 Wn.2d 270, 279, 677 P.2d 173 (1984); *Wash. State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n*, 91 Wn.2d 48, 59-60, 586 P.2d 870 (1978).

Regardless, contrary to Amici's arguments, the American Rule and narrow equitable indemnity exception have coexisted with other general tort doctrines for decades. The record in this case, briefs submitted in this

Court and the Court of Appeals, and established Washington precedent demonstrate the important reasons for preserving all elements of the exception. For all of these reasons, the Court should decline Amici's invitation to disrupt longstanding precedent precluding attorney fees as damages.

II. STATEMENT OF THE CASE

Dorsey incorporates by reference the Counterstatement of the Case set forth in its Answer to Petition for Review ("Answer") filed with this Court on April 12, 2017.

III. ARGUMENT IN RESPONSE TO AMICI

The Trustee's Petition asks this Court to reconsider in attorney malpractice cases Washington's longstanding rule providing that parties to litigation in Washington bear their own attorney fees absent a recognized exception to the "American Rule" prohibiting fee awards. In support, Amici—legal malpractice practitioners who "often represent clients harmed by negligent representation," Br. of Amici at 1—make two arguments under RAP 13.4(b)(4)'s "substantial public interest" prong. First, Amici claim that the equitable indemnity exception is inconsistent with the duty to mitigate damages. Br. of Amici at 2-5. Second, Amici claim that the equitable indemnity exception's sole causation element

conflicts with "normal rules of proximate cause" and finds no support in this Court's precedent. *Id.* at 6-8.

Amici are wrong on both counts. As Dorsey explained in its Answer, the American Rule and narrow equitable indemnity exception have been applied consistently for decades in this State in furtherance of numerous compelling purposes. Moreover, these doctrines have always coexisted with other elements of Washington tort law—including mitigation of damages and proximate causation. Amici raise no issue of substantial public interest warranting review. This Court should reject Amici's attempt to benefit their own area of practice at the expense of the fundamental policies at the heart of the American Rule.

A. Tort Law's Mitigation of Damages Doctrine Has Not Been Raised on Appeal and Is Consistent with the Equitable Indemnity Exception.

Amici attempt to create a conflict between the American Rule's equitable indemnity exception and Washington tort law's expectation that plaintiffs mitigate damages, claiming that the "[equitable indemnity exception], at least in its current form, cannot coexist with normal mitigation rules." Br. of Amici at 5. As noted, this argument has never been raised by the parties and should be disregarded for that reason alone. Regardless, the argument fails for several reasons.

Initially, Amici cite no relevant authority supporting their novel theory that litigation expenses should be recoverable so long as they are incurred as a form of mitigation. Amici rely on cases and secondary sources discussing mitigation only in the most general terms. Amici's cited authorities do not hold or even suggest that litigation expenses may be awarded as damages under a mitigation theory. This is not surprising, as such a holding would conflict with decades of established authority precluding recovery of litigation expenses—including attorney fees—"absent specific statutory authority, contractual provision, or recognized grounds in equity." *Wagner v. Foote*, 128 Wn.2d 408, 416, 908 P.2d 884 (1996); *see also* Answer at 8-11; *Armstrong Constr. Co. v. Thomson*, 64 Wn.2d 191, 195, 390 P.2d 976 (1964).

Amici's argument also ignores "the policy of the law to discourage rather than encourage litigation." *U.S. Fidelity & Guar. Co. v. Hollenshead*, 51 Wash. 326, 330, 98 P. 749 (1909); *see also, e.g.*, *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 673-74, 15 P.3d 115 (2000) (adopting rule "supported by Washington's strong public policy of encouraging settlements" and rejecting alternative rule that "would encourage litigation" (internal marks omitted)). Consistent with this policy, the American Rule itself is designed to avoid "the time, expense, and difficulties of proof inherent in litigating . . . attorney's fees"

and the resulting "substantial burdens for judicial administration." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718, 87 S. Ct. 1404, 18 L. Ed. 2d 475 (1967). Amici's proposed mitigation rule would encourage protracted litigation over fees in cases where it is least appropriate.

Moreover, Amici's proposed broad expansion of the grounds for recovering fees violates the general principle that exceptions to the American Rule are to be construed narrowly. *See Interlake Sporting Ass'n, Inc. v. Wash. State Boundary Rev. Bd.*, 158 Wn.2d 545, 561, 146 P.3d 904 (2006).

Amici ignore that Washington law already provides an avenue for awarding litigation expenses in legal malpractice cases when appropriate: the equitable indemnity exception. *See Flint v. Hart*, 82 Wn. App. 209, 224, 917 P.2d 590 (1996) (fees awarded in legal malpractice case because equitable indemnity elements were satisfied). Under that well established exception, legal malpractice plaintiffs are allowed to recover third party litigation expenses, but only if the third party and the plaintiff were not entangled in the events surrounding the defendant's allegedly wrongful act and the defendant's allegedly wrongful act was the sole cause of the fees incurred. Amici do not dispute that these requirements simply have not been met here, nor do they set forth any reason for abandoning the careful

balance struck by the American Rule and equitable indemnity exception for awarding fees as damages.

In reality, the equitable indemnity exception has long coexisted with normal mitigation rules in the same manner in which it has coexisted with the "make whole" standard of damages. *See* Answer at 19. Indeed, Amici's argument that fees should be awarded to compensate for mitigation is in essence a "make whole" argument that is "nothing more than a restatement of one of the oft-repeated criticisms of the American Rule," which courts have consistently rejected. *Summit Valley Indus., Inc. v. Local 112*, 456 U.S. 717, 725, 102 S. Ct. 2112, 72 L. Ed. 2d 511 (1982) (internal marks omitted); *Dempere v. Nelson*, 76 Wn. App. 403, 410, 886 P.2d 219 (1994) (noting American Rule applies notwithstanding goal of making "the injured party as whole as possible").

The facts of this case further weigh against revisiting the American Rule and equitable indemnity exception in relation to Washington's mitigation doctrine. Here, Susan and Fred III's litigation did not *mitigate* any alleged malpractice by Dorsey. Rather, the court in the Oregon litigation found that both Susan and Fred III contributed to the significant additional expenses incurred. CP 801-03, 805, 809. Indeed, the Oregon court specifically found that the dispute "could have been resolved with a joint accounting" but instead, due to Susan and Fred III's conduct, was

"inflated . . . to a fully litigated dispute costing approximately one sixth the value of the trust." CP 801. If anything, mitigation would require a joint accounting rather than protracted litigation.

Finally, Amici's claim that litigation expenses incurred to mitigate damages should always be recoverable is a matter for the Legislature, not the courts. The "allowance of attorney fees . . . creates a substantive right" and is thus legislative in nature. *E.g.*, *Penn. Life Ins. Co. v. Emp't Sec. Dep't*, 97 Wn.2d 412, 414, 645 P.2d 693 (1982). The Legislature has adopted many statutes to govern awards of litigation expenses. *See* 14A KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 37:13 (2d ed. 2009) (citing statutes). This includes a statute addressing medical, as opposed to legal, malpractice cases. *See* RCW 7.70.070. In light of the Legislature's occupation of this area of the law, and the longstanding and historical nature of the equitable exceptions to the American Rule, this Court has held that going forward, it is for the Legislature and "not the judiciary" to "fashion exceptions to the 'American Rule'" on litigation expenses. *Blue Sky Advocates v. State*, 107 Wn.2d 112, 121, 727 P.2d 644 (1986); *see also Penn. Life*, 97 Wn.2d at 417 (noting party seeking equitable award of fees must qualify under a "doctrine heretofore recognized").

In sum, this case involves a run-of-the-mill dispute in which the parties must bear their own litigation expenses. It does not fall within any of the narrow categories of cases in which such expenses may be recovered as damages. Amici's novel and unsupported mitigation theory does not merit review of the well settled American Rule and equitable indemnity exception under RAP 13.4(b)(4).

B. The Sole Causation Element Has Not Been Raised on Appeal and Is Consistent With Equitable Principles.

Amici also contend that the equitable indemnity exception's sole causation element conflicts with general rules of proximate cause. This issue is not properly before this Court because the Trustee chose not to argue this issue in her Petition. Regardless, Amici's arguments lack merit.

In general, this Court reviews only the issues raised by the parties. *See* RAP 13.7(b) (providing that "the Supreme Court will review only the questions raised in the . . . petition for review and the answer"). The Trustee's Petition raised the issue whether the equitable indemnity exception should be modified based only on the argument that the independence element should be narrowed or abandoned in legal malpractice cases. The Petition did not call into question the sole causation element. In doing so, the Trustee established "precisely which claims and issues" she has "brought before the court for appellate review."

Clark Cnty. v. W. Wash. Growth Mgmt. Hrgs. Rev. Bd., 177 Wn.2d 136, 144-45, 298 P.3d 704 (2013).

In response to the Trustee's arguments, Dorsey proceeded in its Answer to address whether this Court should review the merits of the equitable indemnity exception's independence element. Dorsey noted that the sole causation element "is not challenged by the Trustee here" and proceeded accordingly, treating the independence element as the sole issue raised on appeal. Answer at 10, 17. In these circumstances, the validity of the sole causation element is not before the Court. *See Clark Cnty.*, 177 Wn.2d at 143-45.

Accordingly, the Court should disregard Amici's collateral colloquy over the merits of the sole causation element. This Court has emphasized numerous times that it "will not address arguments raised only by amicus." *E.g.*, *City of Seattle v. Evans*, 184 Wn.2d 856, 861 n.5, 366 P.3d 906 (2015) (internal quotations omitted); *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003) (same). The Court reviews only issues properly raised in the Petition for Review. *See* RAP 13.7(b); *State v. Murdock*, 91 Wn.2d 336, 339, 588 P.2d 1143 (1979) ("Appellant did not raise this issue in his petition for review [] and we are thus precluded from considering it. . . . [W]e review only those questions which are raised in the petition.").

Even if the Court considers Amici's arguments regarding the merits of the equitable indemnity exception's sole causation element, Amici fail to establish an issue of substantial public interest warranting review. The sole causation element is well established and consistent with applicable legal principles.

As Dorsey has explained, plaintiffs seeking to recover third party litigation expenses under the equitable indemnity exception must show (among other things) that the defendant's wrongful act was the sole proximate cause of the third party litigation. *See* Answer at 10 (citing cases). In response, Amici first contend that the sole causation element should be reviewed because no case from this Court has "adopted" it. Br. of Amici at 6. But Amici ignore that Washington courts have consistently applied the sole causation element for decades, and this Court has denied review in several such cases. *See Jain v. J.P. Morgan Sec., Inc.*, 142 Wn. App. 574, 587, 177 P.3d 117 (2008) ("[W]e have consistently held that 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, there are other reasons why B became involved in litigation with C."), *review denied*, 164 Wn.2d 1022, 196 P.3d 135 (2008); *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 86, 106, 285 P.3d 70 (2012) (noting sole causation requirement is part of

"well-established Washington law"), *review denied*, 175 Wn.2d 1015, 287 P.3d 10 (2012).

In one case, this Court denied review after the Court of Appeals correctly explained that the exception requires a showing of, among other things, "an *exceptionally close causal nexus* between Party B's exposure to litigation and the wrongful act or omission by Party A." *Woodley v. Benson & McLaughlin, P.S.*, 79 Wn. App. 242, 247-48, 901 P.2d 1070 (1995) (emphasis added), *review denied*, 128 Wn.2d 1021, 913 P.2d 816 (1996). The Court of Appeals further explained:

> The required causal showing is greater than in an ordinary tort action. If Party A's conduct is not the *only cause* of Party B's involvement in the litigation, and *particularly if Party B's own conduct contributed to Party B's exposure in the litigation*, an [equitable indemnity claim] will not lie.

Id. at 248 (emphases added). Given this significant precedent and lack of any conflict within the Court of Appeals, this Court should again decline to review the Court of Appeals' consistent and correct application of the sole causation element.

Ignoring this expansive and consistent precedent, Amici suggest that this Court has "employed the normal proximate-causation standard" in equitable indemnity cases, citing *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 117, 330 P.3d 190 (2014) and *Armstrong*. But neither case adopted a normal proximate causation standard or rejected a sole

causation standard. In fact, both denied fee recovery based on the independence element, not the sole causation element. *See LK Operating*, 181 Wn.2d at 124-25; *Armstrong*, 64 Wn.2d at 196.

Amici also question whether the element is consistent with Washington tort law on causation. Amici overlook that the equitable indemnity exception is, as its name indicates, an "*equitable* rule." *LK Operating*, 181 Wn.2d at 123 (emphasis added). Washington law is well settled with respect to equitable relief. Under the "clean hands" doctrine, a court may not grant equitable relief to a party that is at fault in the transaction at issue. *Kramarevcky v. Dep't of Social & Health Serv.*, 122 Wn.2d 738, 743 n. 1, 863 P.2d 535 (1993). More generally, a court applying equitable principles will not "balance the equities between the parties when they are both in the wrong, nor give the complainant relief against his own vice and folly." *J.L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wn.2d 45, 72, 113 P.2d 845 (1941).

The sole causation element comports with the above principles governing equitable relief. By requiring that legal malpractice be the sole cause of the litigation between the plaintiff and a third party, the equitable indemnity exception enforces the fundamental principle that a party invoking equity must have "clean hands." Thus, the element does not "depart[] radically" from Washington law as Amici claim. Br. of Amici at

6. To the contrary, requiring sole causation is entirely consistent with Washington law governing equitable remedies.

Nor does the sole causation element conflict with Washington tort law governing causation. Amici cite cases and authorities discussing proximate causation in general terms, but those sources do not hold or indicate that third party litigation expenses should be recoverable or treated like other forms of damages. The rules on causation in general are irrelevant to whether litigation expenses in particular are recoverable as damages.

For similar reasons, the sole causation element does not conflict with RCW 4.22.070. That statute directs the jury to apportion liability among all at-fault entities and provides that each such entity is liable for its "proportionate share of the claimant's total damages." RCW 4.22.070(1). It says nothing about whether attorney fees incurred in third party litigation should be considered part of the plaintiff's total damages in the first place. Only the American Rule and its narrow exceptions answer that question.

In sum, the sole causation element is well established and consistent with applicable legal principles. Amici have not demonstrated an issue of substantial public interest warranting this Court's review.

IV. CONCLUSION

The American Rule and narrow equitable indemnity exception are well established, serve important purposes, and are consistent with other elements of Washington tort law. Amici's arguments to the contrary are not properly before this Court and should be disregarded for that reason alone. Regardless, contrary to Amici's arguments, these longstanding doctrines do not conflict—and, in fact, have long coexisted—with the general duty to mitigate damages and the usual tort rules of proximate cause. Amici have not demonstrated any basis for this Court to reconsider or modify the American Rule and equitable indemnity exception in the legal malpractice context. For the reasons stated above and in its previously filed Answer, Dorsey respectfully requests that the Court deny the Petition.

RESPECTFULLY SUBMITTED this 3rd day of May, 2017.

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