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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.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

For the second time in two years, Petitioner Connie Potter (the "Trustee") seeks Supreme Court review of a straightforward ruling that parties to litigation in Washington bear their own attorney fees absent a recognized exception to the longstanding "American Rule" prohibiting fee awards. For decades, Washington courts have applied the American Rule and the narrow exception, including in legal malpractice cases. In this case, based on allegations of underlying malpractice, a well-funded trust sought reimbursement for fees incurred between beneficiaries who have been found to have neglected their duties as co-trustees, sued one another, and engaged in protracted litigation. The American Rule prohibits the fee award sought here and the equitable indemnity exception does not apply. Both the trial court and the Court of Appeals properly declined to expand the rule's narrow "equitable indemnity" exception.

As in her previous petition to this Court, the Trustee spends the bulk of her Petition for Review arguing that this Court should expand the equitable indemnity exception to the American Rule in the attorney malpractice context. But these long-standing doctrines are reasonable and appropriate, especially in this case. The Court of Appeals' decision neither presents an issue of substantial public interest nor conflicts with a decision of this Court. The Petition should be denied. *See* RAP 13.4(b).

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II. IDENTITY OF RESPONDENTS

Respondents are Joseph Gaffney, Jane Doe Gaffney, and Dorsey & Whitney LLP (collectively, "Dorsey"), Defendants below.

III. COUNTERSTATEMENT OF ISSUES

1. Whether the Trustee has raised an issue of substantial public interest sufficient to warrant this Court's review, when the well-settled American Rule serves important interests and the limited exceptions to that rule are properly construed narrowly.

2. Whether the Trustee has established that the Court of Appeals' decision conflicts with any authority of this Court when, as recently as 2014, this Court confirmed the scope of equitable indemnity, including as applied to legal malpractice.

IV. ISSUE PRESENTED FOR CROSS-REVIEW

Although the Petition should be denied, if this Court accepts review, Dorsey raises the following issue per RAP 13.4(d): Whether the Court of Appeals erred in remanding the Trustee's breach of fiduciary duty claim when, among other things, such claim was filed in 2012 regarding conduct that occurred in 2002.

V. COUNTERSTATEMENT OF THE CASE

A. Factual background.

Investment banker and venture capitalist Frederick Paulsell Jr. ("Fred Jr.") married Susan Paulsell ("Susan") in 1998. CP 79, ¶ 4. Previously, Fred Jr. had established a revocable trust for the benefit of his children by a prior marriage (the "Paulsell children"). CP 78-79, ¶ 3. In 2002, Fred Jr. executed a one-page will without involving Dorsey, leaving all "material possessions" to Susan and directing that upon her death they should pass equally to the Paulsell children and Susan's four children by a prior marriage (the "Hebenstreit children"). CP 79, ¶ 5. The will named Susan and one of the Paulsell children, Frederick Paulsell III ("Fred III"), as joint "trustees." *Id.* The same year, Fred Jr. died. CP 29, ¶ 1.3.

As co-personal representatives, Susan and Fred III asked Dorsey to advise them with respect to Fred Jr.'s estate. CP 79-80. Dorsey advised them to enter a Binding Non-judicial Dispute Resolution Agreement (the "Agreement") to resolve several issues potentially arising from the 2002 will. *Id.* With input from Susan and Fred III, Dorsey drafted an Agreement creating an Amended and Restated Trust (the "Trust"), which Fred III and Susan agreed reflected Fred Jr.'s expressed intent. *Id.*

The Agreement named Susan sole beneficiary for her lifetime and allowed her to use Trust assets to maintain the lifestyle she enjoyed while

married to Fred Jr. CP 106-07. This included, for example, ownership of five houses and membership in nine country clubs. CP 584, 588. Upon her death, any residual was to pass to the children. CP 107. Susan and Fred III were designated co-trustees. CP 108.

Dorsey did not handle day-to-day administration of Fred Jr.'s estate or the Trust, was not involved in the accounting of the Trust, and received no Trust account statements or other accounting records. CP 81, ¶ 9. Dorsey's work related to the establishment of the Trust (in 2002) was complete by May 2007, when Dorsey sent the final invoice in that matter (for incidental services). CP 196-98.

In September 2008, Fred III—concerned by Susan's spending and his own lack of knowledge—contacted Dorsey. CP 83, ¶ 12, 200, 205. Susan and Fred III then engaged Dorsey to prepare an accounting and reconciliation. CP 203, 208-09. Dorsey opened this new matter on October 7, 2008. CP 83, ¶ 12, 203. Despite requests from Dorsey, Susan provided incomplete information, and Dorsey was unable to account for nearly $3 million in Trust funds. CP 84, ¶ 14, 810.

In September 2009, Fred III unilaterally froze the Trust's assets. CP 250, ¶ 10. Susan then filed a declaratory judgment action in Oregon (the "Oregon litigation"). *Id.*, ¶ 11. An interim trustee was appointed, and a professional fiduciary firm was hired to prepare a full audit. CP 641-42.

Despite locating much of the missing $3 million, the audit did not end the litigation between Susan and Fred III, who continued to dispute Susan's spending, commingling of funds, and alleged gifts of more than $1 million exclusively to Susan's own children. *See* CP 667-75, 678-94.

The Oregon litigation, to which Dorsey was not a party, was resolved by bench trial. CP 381, 804. The court found Susan failed to act "as a careful fiduciary", kept incomplete records, and was partly to blame for Dorsey's incomplete accounting. CP 803, 805, 809. Susan neglected her duties as co-trustee notwithstanding the fact she was a financial advisor. CP 579-80. The court ultimately decided Susan would be limited to a monthly Trust distribution of no more than $47,000. CP 805, 809-11.

The Oregon court likewise found Fred III had abdicated his duties and replaced him as co-trustee. CP 805. The court characterized his performance as "lacking in even the basics necessary to fulfill his duties as trustee," stating among other things that he "ignored his duty of loyalty to the beneficiary of the trust", "neither requested nor authored any yearly summaries regarding the income and expenditures of the trust until 2008", and "inflated this dispute from something that could have been resolved with a joint accounting to a fully litigated dispute costing approximately one sixth the value of the trust." CP 801, 802, 805, 809. Professional fiduciary Connie Potter was designated as Fred III's replacement. CP 1.

B. Proceedings below.

In March 2012, Susan and Ms. Potter (the "Co-Trustees") filed the present action against Dorsey. CP 1-8. Alleging legal malpractice and breach of fiduciary duty, the Co-Trustees sought to recover attorney fees and related litigation expenses incurred by Susan, Fred III, and others in the Oregon litigation (fees that were reimbursed by the Trust), in addition to disgorgement of fees paid to Dorsey. CP 33-35, 243-44.

Dorsey moved for summary judgment on multiple grounds, arguing the American Rule bars any award of litigation expenses, that Washington's narrow equitable indemnity exception or "ABC Rule" does not apply here, that the Co-Trustees failed to bring their claims within the applicable limitations period, and that the Co-Trustees failed to identify how claimed damages were caused by any specific claim. CP 59-72, 546-52. After a hearing on the motion, *see* VRP (Feb. 6, 2015), the trial court granted Dorsey summary judgment and dismissed all claims. CP 555-56.

The Co-Trustees requested direct review, arguing this Court should expand the equitable indemnity exception to the American Rule. This Court denied that request and transferred the case to the Court of Appeals.

In an unpublished decision filed on December 19, 2016, the Court of Appeals affirmed in part and reversed in part. *Paulsell v. Gaffney*, No. 74744–4–I, 2016 WL 7470061 (Wash. Ct. App. Dec. 19, 2016). The

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Court of Appeals affirmed dismissal of the Co-Trustees' claim for legal malpractice under the American Rule. *Id.* at *5-6. It rejected arguments based on recoupment and segregation of fees because the issues were not argued below. *Id.* at *6. But it reinstated the Co-Trustees' breach of fiduciary duty claim seeking disgorgement of unspecified Dorsey fees, considering it a genuine dispute whether Dorsey's 2002-2007 and 2008-2009 representations were continuous. *Id.* at *3-4.

Susan died in May 2016, leaving Ms. Potter as sole trustee.

VI. ARGUMENT

The Trustee raises two grounds for review: first, that the petition involves an issue of substantial public interest; and second, that the Court of Appeals' decision is in conflict with a decision of this Court. *See* RAP 13.4(b)(1), (4); Pet. at 1. Review is not warranted under either ground.

A. The Scope of Washington's Equitable Indemnity Exception Is Well-Settled and Does Not Present an Issue of Public Interest.

The Trustee devotes the majority of her Petition to requesting that this Court overturn well-settled law under RAP 13.4(b)(4)'s "substantial public interest" prong. As it did once already, this Court should decline the Trustee's invitation. As shown below, the American Rule and narrow equitable indemnity exception have been applied consistently for decades in this State in furtherance of numerous compelling purposes.

1. The American Rule and the narrow equitable indemnity exception are well-established and appropriate.

In Washington, the longstanding American Rule broadly precludes awarding litigation expenses as costs or damages. Under the rule, any "litigation expenses"—including attorney fees in particular—"are not recoverable absent specific statutory authority, contractual provision, or recognized grounds in equity." *Wagner v. Foote*, 128 Wn.2d 408, 416, 908 P.2d 884 (1996). Washington has followed this rule "[s]ince pioneer days." *Armstrong Constr. Co. v. Thomson*, 64 Wn.2d 191, 195, 390 P.2d 976 (1964); *see Baker Botts L.L.P. v. Asarco LLC*, 135 S. Ct. 2158, 2164, 192 L. Ed. 2d 208 (2015) (noting American Rule is a "bedrock principle").

The American Rule serves numerous compelling purposes, including but not limited to avoiding "the time, expense, and difficulties of proof inherent in litigating . . . attorney's fees," *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718, 87 S. Ct. 1404, 18 L. Ed. 2d 475 (1967); leaving each party to decide how much to spend on its own legal representation, *see Oelrichs v. Spain*, 82 U.S. 211, 231, 21 L. Ed. 43 (1872); preventing the "danger of abuse" when third parties are expected to pay for attorney fees, *id.*; and deferring to the legislature's judgment regarding which particular circumstances warrant fee-shifting, *see Blue Sky Advocates v. State*, 107 Wn.2d 112, 121-22, 727 P.2d 644 (1986).

The American Rule is subject to discrete exceptions for awarding "attorney fees as *damages*." *City of Seattle v. McCready*, 131 Wn.2d 266, 275, 931 P.2d 156 (1997) (emphasis in original); *see, e.g.*, *Rorvig v. Douglas*, 123 Wn.2d 854, 861-62, 873 P.2d 492 (1994) (fees recoverable as special damages for malicious prosecution and wrongful attachment). One such exception allows recovery based on a "wrongful action . . . subjecting a party to litigation" with a "third person," *McCready*, 131 Wn.2d at 275, also known as a claim for "equitable indemnity," *Brock v. Tarrant*, 57 Wn. App. 562, 571, 789 P.2d 112 (1990).[1] As with all exceptions to the American Rule, equitable indemnity "must be narrowly construed" so it does not "swallow the rule." *Interlake Sporting Ass'n, Inc. v. Wash. State Boundary Rev. Bd.*, 158 Wn.2d 545, 561, 146 P.3d 904 (2006).

Under Washington law, three separate elements must be met for the equitable indemnity exception to apply. *See, e.g.*, *Haner v. Quincy Farm Chems., Inc.*, 97 Wn.2d 753, 758, 649 P.2d 828 (1982). First, the defendant must have committed a "wrongful act or omission . . . toward" the plaintiff (breach); second, the act must have "expose[d] or involve[d]" plaintiff in litigation with a third party (causation); and finally, the third

[1] This exception is also known as the "ABC Rule," among other names. *Lyzanchuk v. Yakima Ranches Owners Ass'n*, 73 Wn. App. 1, 10, 866 P.2d 695 (1994).

party must not have been "connected with the initial transaction or event" involving defendant's wrongful act (independence). *Id.*

Consistent with the narrow construction of exceptions to the American Rule in Washington, the second element has consistently been understood to require *sole* causation. In other words, defendant's wrongful act must have been the sole proximate cause of the third-party litigation. *See, e.g., Tradewell Grp., Inc. v. Mavis*, 71 Wn. App. 120, 127-28, 857 P.2d 1053 (1993). This narrows the scope of the exception and in part enforces the fundamental principle that a party invoking equity must have "clean hands." *J. L. Cooper & Co. v. Anchor Secs. Co.*, 9 Wn.2d 45, 71-72, 113 P.2d 845 (1941). This element has been applied consistently in Washington for many years and is not challenged by the Trustee here.[2]

The third element, independence, further narrows the exception by requiring the third party to have been disconnected from the events giving rise to defendant's alleged liability. *See, e.g., Armstrong*, 64 Wn.2d at 195-96. This straightforward limitation serves many purposes, including preventing circumvention of the American Rule in cases involving intersecting tortfeasors (e.g., A and B harm C; C sues A for damages and then B for fees); avoiding circumvention and fee inflation in cases involving interconnected parties with cross-claims (e.g., A, B, and C all

[2] *See, e.g., Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 359-61, 110 P.3d 1145 (2005); *Tradewell*, 71 Wn. App. at 127-28 (citing cases).

are parties to a contentious contract; A and B aggressively litigate their cross-claims and then sue C for all fees incurred); and, more broadly, avoiding the complication and expense of litigating these and other issues to determine fee liability among numerous interrelated parties. This element also has been applied consistently for decades.[3]

2. The equitable indemnity exception should not be expanded in the context of legal malpractice or other tort cases.

The Trustee claims this Court should revisit the above-discussed settled law on the American Rule, particularly the scope of the equitable indemnity exception's independence element. The Trustee urges that this element be either scrapped altogether or substantially expanded in cases involving legal malpractice. The Court should decline this request.

At the outset, the Trustee's request for expansion of equitable indemnity runs contrary to the general principle that exceptions to the American Rule are to be construed narrowly. *See Interlake*, 158 Wn.2d at 561; *Vincent v. Parkland Light & Power Co.*, 5 Wn. App. 684, 686, 491 P.2d 692 (1971) (noting equitable indemnity is a "narrow exception").

Moreover, the request to expand equitable indemnity for legal malpractice is especially groundless. Pet. at 1, 12-18. Legal malpractice is no more likely than other forms of malpractice to result in third-party

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[3] *See, e.g.*, *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 117, 123-25, 330 P.3d 190 (2014); *N. Pac. Plywood, Inc. v. Access Road Builders, Inc.*, 29 Wn. App. 228, 235-37, 628 P.2d 482 (1981); *Armstrong*, 64 Wn.2d at 195-96.

litigation. As this Court recently observed, it "would be anomalous to award attorney fees in [the legal malpractice] context but not in other tort cases." *Schmidt v. Coogan*, 181 Wn.2d 661, 678, 335 P.3d 424 (2014).

The Trustee is wrong when she asserts that the equitable indemnity exception creates a "loophole" for negligent attorneys as opposed to other types of professionals. *See* Pet. at 14-15. To the contrary, the American Rule and its exceptions apply the same regardless of the type of professional involved. *Compare Kelly v. Foster*, 62 Wn. App. 150, 153-55, 813 P.2d 598 (1991) (holding attorney's client was not entitled to fee award in addition to damages for malpractice), *with Burns v. McClinton*, 135 Wn. App. 285, 291-92, 306, 308-11, 143 P.3d 630 (2006) (reversing fee award against accountant but upholding compensation award for overcharges). As this Court observed in *Schmidt*, it would be unwarranted to treat cases involving legal malpractice differently.

The Trustee fails to appreciate that litigation simply is not a type of "corrective" measure that normally qualifies as a compensable form of damages, whether in the context of legal malpractice or otherwise. Just as the costs of corrective medical care might be compensable, the costs of hiring a second attorney to correct or rewrite a faulty legal document might be recoverable. Under the American Rule, however, the costs of hiring an attorney to *litigate* disputes resulting from alleged professional

malpractice—medical, legal, or otherwise—are appropriately treated differently. Such costs are not recoverable unless equitable indemnity or some other recognized exception applies.

The Trustee argues that one of the justifications for the American Rule is to avoid penalizing a party "'for merely defending or prosecuting a lawsuit,'" asserting that this particular rationale does not apply here. Pet. at 17 (quoting *Fleishmann*, 386 U.S. at 718). But the Trustee overlooks the several other important purposes of the rule that do apply here, including the need to avoid complex and protracted fees litigation, especially in cases involving interconnected parties with cross-claims.

Similarly, the Trustee's claim that no court has "justified" the equitable indemnity exception's independence element ignores how this Court has applied the independence element: regularly, consistently, recently, and in the shadow of the American Rule, which has repeatedly been explained. This Court has amply justified the rule.

The Trustee also argues that the independence element creates "perverse consequences" by benefiting attorneys who harm two clients as opposed to one. Pet. at 13-14. But in cases involving two clients, the element actually hinges on whether both clients were involved at the outset and then litigated a related dispute between them, thus implicating concerns over fee litigation that the American Rule is designed to address.

This distinction is applicable here. Both Susan and Fred III were involved with Dorsey's work, were found to have failed to act properly, and engaged in protracted litigation. They could seek damages resulting from breach of trustee obligations, but their litigation fees are different.

The Trustee next contends the American Rule should be limited to fee requests in the same litigation. Pet. at 15-17. But the American Rule is a longstanding check against the many problems related to awarding fees, including fees from a separate litigation sought as damages. *LK Operating*, 181 Wn.2d at 120, 125 (noting rule covers "fees incurred in a separate litigation"); *McCready*, 131 Wn.2d at 275 (noting "attorney fees are not available as *costs or damages*" (emphasis in original)); *Lovell v. House of the Good Shepherd*, 14 Wash. 211, 214-15, 44 P. 253 (1896) (noting fees "cannot be recovered in a separate action"). If the American Rule applied only to same-suit fees, there would be no need for equitable indemnity in the first place. As already explained, that exception is well-established and narrowly defined to serve important purposes.

The Court of Appeals' recent decision in *Maytown Sand & Gravel LLC v. Thurston Cnty.*, No. 46895-6-II, 2017 WL 1231784 (Wash. Ct. App. Apr. 4, 2017), submitted as a supplemental authority, does not change the analysis. *Maytown* holds fees may be awarded when an "intentional tort" requires "legal action" and the resulting fees are sought

in a "subsequent proceeding." *Id.* at *14. The case involved a request for fees incurred in administrative proceedings against a county that had wrongfully interfered with the plaintiff's development application. *See id.* at *1-5. The court acknowledged "established" exceptions to the American Rule for malicious prosecution, wrongful attachment, and insurance bad faith, and then added an exception for intentional torts. The case did not involve malpractice, negligent torts, third party litigation, or equitable indemnity, the claims at issue here. It simply has no relevance.[4]

The Trustee next argues that the American Rule should not apply when a party has been ordered to pay a separate party's fees and then seeks recoupment, citing *Thomas v. Gaertner*, 56 Wn. App. 635, 638, 784 P.2d 575 (1990). *See* Pet. at 16. As the Court of Appeals held, this issue was never timely raised in this case. *Paulsell*, 2016 WL 7470061 at *6. Thus, the issue cannot be raised in this appeal. RAP 2.5(a); *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978). In any event, the fees

[4] For the same reason, *Maytown* does not conflict with the Court of Appeals decision in this case. *See* RAP 13.4(b)(2). In addition to being inapposite, however, the decision is unsupported and erroneous on the merits. For one thing, it relies on precedents that do not support its holding. *See Pleas v. City of Seattle*, 112 Wn.2d 794, 799, 809-10, 774 P.2d 1158 (1989) (merely noting trial court awarded fees as damages before remanding entire award for further proceedings); *Rorvig*, 123 Wn.2d at 861-62 (recognizing exception for slander of title). The decision also conflicts with prior precedent. *See Dempere v. Nelson*, 76 Wn. App. 403, 410, 886 P.2d 219 (1994) (noting that awarding fees for intentional torts would be inconsistent with American Rule and Washington's rejection of punitive damages). Finally, the decision conflicts with the directive that exceptions to the American Rule are construed narrowly.

sought here were incurred by individuals involved with the trust, not by a separate party. Thus, *Thomas* does not apply.[5]

Finally, the Trustee's request for expansion of equitable indemnity ignores the important role of the Legislature in this context. The narrow and restrained application of historical exceptions to the American Rule reflects a respect for legislative judgments in this area and acknowledges that legislatures over time have filled any perceived gaps regarding fee-shifting. *See Blue Sky*, 107 Wn.2d at 121 (holding it is for the Legislature and "not the judiciary" to "fashion exceptions to the 'American Rule'").

3. <u>The facts of this case further weigh against revisiting the equitable indemnity exception</u>.

Even if narrowing the equitable indemnity exception's independence element were of substantial public interest, this would not be the case to do so, for three reasons. First, this case lies at the heart of the exception rather than the margins. Susan and Fred III were more than incidentally connected. Their overlapping interests existed before Dorsey became involved, as Dorsey documented in its initial engagement letter. CP 160-61. Both engaged in substantial interactions with one another, sometimes separately, sometimes with Dorsey, and both were found to have contributed to and inflated the expenses in the Oregon litigation.

[5] The Co-Trustees also attempted for the first time on appeal to distinguish between litigation expenses and accounting fees. The Court of Appeals properly declined to consider this argument. *Paulsell*, 2016 WL 7470061, at *6.

Second, as the Trustee admits, the independence element makes the most sense when "the [third] party in the earlier litigation" was "a participant in the [alleged] tort that proximately caused that litigation." Pet. at 19. And that is what happened here—both Susan and Fred III were active participants in Dorsey's work and were found to have proximately caused and inflated the Oregon litigation. Susan even failed to provide Dorsey with complete information for its accounting. CP 803, 805, 809.

Third, as noted, the Trustee must also show sole causation for the equitable indemnity exception to apply. The Trustee does not object to or even address the sole causation element. Nor did the Co-Trustees argue that Dorsey's malpractice was the sole cause of the Oregon litigation. Indeed, the Oregon trial court found that both Susan and Fred III bore significant responsibility for the litigation and resulting expense. *See* CP 800-12. Because the Trustee cannot show sole causation, she could not recover *even if* the independence element were narrowed.

B. The Trustee Has Not Established Any Conflict Between the Court of Appeals' Decision and This Court's Precedent.

The Court of Appeals' decision is consistent with well-settled authority limiting recovery of attorney fees as costs or damages in litigation unless certain narrow exceptions apply. This Court has never

called into question the validity of the American Rule or the equitable indemnity exception. Review is not warranted under RAP 13.4(b)(1).

In attempting to demonstrate conflict, the Trustee relies primarily on this Court's decision in *Shoemake ex rel. Guardian v. Ferrer*, 168 Wn.2d 193, 198, 225 P.3d 990 (2010). *Shoemake* does not even address equitable indemnity, let alone create a conflict with the Court of Appeals' decision here. *Shoemake* merely addressed the calculation of malpractice damages from a delayed settlement. The Court refused to deduct the negligent attorney's hypothetical contingent fee from a compensatory damages award. *Id.* at 201. No litigation expenses were awarded and the American Rule did not apply. In fact, the Court explicitly stated it was *not* addressing whether fees could be recovered as damages. *Id.* at 200 n.2.

Further undermining the Trustee's conflict argument, the Trustee acknowledges that the Court of Appeals "relied on *LK Operating*, which applied the ABC Rule to legal malpractice." Pet. at 8. In *LK Operating*, this Court confirmed the scope of equitable indemnity and the independence element. The Court applied these doctrines, as a matter of course, to a tort claim for legal malpractice. *See* 181 Wn.2d at 125-26. The Court rejected one party's argument for a "new or modified" approach because the argument was "raised for the first time on appeal." *Id.* at 126. Nothing in the opinion invited re-visitation of that issue.

The Trustee complains that refusal to award fees fails to make the client whole. Pet. at 12. But this 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*, 76 Wn. App. at 410 (rejecting argument that "make whole" standard supported fee awards for all intentional torts). The American Rule and the "make whole" standard do not conflict and have always coexisted—under the American Rule, fees are different.

The Trustee ignores that Washington law already provides an avenue for awarding attorney fees in legal malpractice cases when equity so requires: 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). Here, the requirements for equitable indemnity simply have not been met.

VII. CROSS PETITION

If the Court accepts the Trustee's Petition, it should also grant cross-review to address whether the Trustee's breach of fiduciary duty claim was properly dismissed by the trial court, in part because it is untimely as a matter of law. The limitations period for such a claim is three years. *See* RCW 4.16.080(3); *Huff v. Roach*, 125 Wn. App. 724,

729, 106 P.3d 268 (2005). Here, the Co-Trustees filed their complaint in 2012, but argued for disgorgement based solely on Dorsey's 2002 work establishing the Trust. *See* Br. of Apps. at 40-42. That work was complete by May 2007 at the latest. CP 196-98. The request for an accounting in 2008 was distinct from all prior work, and was billed and paid separately. The breach of fiduciary duty claim is thus untimely.

The Court of Appeals' finding that the "continuous representation" doctrine might apply was not supported. Given the two distinct phases of Dorsey's work, application of the doctrine would conflict with prior precedent. *See, e.g.*, *Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.*, 129 Wn. App. 810, 819-20, 120 P.3d 605 (2005) (doctrine did not apply to real estate work completed in 1999 and separate estate planning work undertaken in 2000). To the extent review is granted, the Court should also review this issue. RAP 13.4(b)(2).

VIII. CONCLUSION

The Trustee has failed to satisfy any ground for review. The American Rule and equitable indemnity exception are well-established, warranted, and consistent with this Court's precedent. If the Court grants review, it should then also review Dorsey's cross-petition, so that the Court may ultimately grant Dorsey the full relief to which it is entitled.

RESPECTFULLY SUBMITTED this 12th day of April, 2017.

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