No. 94132-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 74744-4



---

CONNIE POTTER,
trustee of the Amended and Restated Fredrick O. Paulsell, Jr.
Living Trust dated December 22, 2002,

Petitioner,

v.

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

Respondents.



---

# PETITION FOR REVIEW

---

Robert B. Gould, WSBA #4353
LAW OFFICES OF ROBERT B. GOULD
4100 194th Street SW, Suite 215
Lynwood, Washington 98036
Telephone: (206) 633-4442

Benjamin Gould, WSBA #44093
Ian S. Birk, WSBA #31431
KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
Telephone: (206) 623-1900

Attorneys for Petitioner

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Washington Cases**

**Other Cases**



**Rules**



**State Statutes**



**Other Authorities**

## INTRODUCTION

When a wrongdoer's act embroils its victim in litigation with a third party, Washington's so-called "ABC Rule" limits when the victim can recover the expense of that litigation by suing the wrongdoer in a follow-on lawsuit. Under that Rule, the victim can recover fees and costs spent in litigation with the third party only if the third party was not "connected with" the wrongdoer's wrongful act. This "connection" element has been applied broadly, so that if the third party has any factual connection to the relationship between the wrongdoer and the victim, the victim cannot recover litigation expenses. *See LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 117, 124–25, 330 P.3d 190 (2014).

This malpractice case arises from Defendant Joseph Gaffney's simultaneous representation of two clients with conflicting interests. Gaffney negligently took one client's side against the other, thereby embroiling the two clients in litigation with each other. The question here is whether the ABC Rule should continue to limit the wronged client from recovering the expenses of that litigation. This Court has suggested that it would be open to modifying the ABC Rule as it applies to legal malpractice. *See id.* at 126. The Court should do so, as there is no justification for applying the rule as a bar to recovery on these facts. Under RAP 13.4(b)(1) and (4), this Court should grant review.

## IDENTITY OF PETITIONER

Petitioner is Connie Potter, a Plaintiff below. Potter is the successor-in-interest to former co-Plaintiff and co-trustee Susan Paulsell, who due to her death is no longer a party. *See* Mot. to Substitute Parties Under RAP 3.2, Jan. 17, 2017.

## CITATION TO COURT OF APPEALS DECISION

The Court of Appeals' decision, filed December 19, 2016, is attached as Appendix A to this Petition. The Court of Appeals' January 12, 2017 denial of a motion for publication and reconsideration is attached as Appendix B.

## ISSUE PRESENTED FOR REVIEW

Where an attorney represents two persons with conflicting interests without a conflict waiver, and where the attorney's negligence proximately causes litigation between the two clients but not involving the attorney, can one of the clients, through a separate legal-malpractice action, recover any of the expenses incurred in that earlier litigation?

## STATEMENT OF FACTS AND PROCEDURE

### I. Facts

#### *A. Susan Paulsell and Fred Paulsell III retain Defendant Gaffney.*

Frederick Paulsell, Jr. ("Fred Jr.") died unexpectedly. He was survived by his widow, Susan Paulsell ("Susan"), along with Frederick

Paulsell III ("Fred III"), Fred Jr.'s son by a previous marriage, among other children. There were questions about the validity and scope of the simple will that Fred Jr. executed shortly before his death—a will that left all his possessions to Susan and nothing to Fred III. *See* CP 79, ¶ 6. Gaffney agreed to represent both Susan and Fred III. CP 456 at 14:7–16; CP 457 at 15:4–7. Gaffney never requested or received a conflict waiver despite Susan's and Fred III's divergent interests. *See* CP 251, ¶¶ 15–16.

***B. Gaffney drafts a Trust agreement.***

Gaffney drafted and recommended that Susan enter into a trust agreement ("Trust"), which she did. Fred III and Susan were named co-trustees. CP 108, § 2.4. The Trust provided that distributions of both income and principal would be made to Susan to allow her to continue in her "accustomed manner of living." CP 107, § 2.2. It also provided that any assets remaining at Susan's death would be distributed to Susan's and Fred Jr.'s children, including Fred III. CP 107, § 2.3.

***C. Gaffney's Trust accounting leads to litigation.***

In 2008, about six years after the Trust was created, Fred III and Susan jointly asked Gaffney to prepare an accounting of the Trust's receipts and disbursements. CP 41, ¶ 2.11. Gaffney's accounting claimed that Susan—still a client—owed the Trust *over $3 million*. CP 255.

But the accounting was flawed. It not only failed to account for

over $1.8 million that Susan had paid into the Trust, CP 279, but also overlooked the very language that Gaffney himself had drafted. The Trust agreement provided that Susan was entitled to payments from the Trust that would be "sufficient to provide for [Susan's] support in her accustomed manner of living," such payments being made "in the trustee's absolute discretion." CP 107, § 2.2. Gaffney's accounting, however, assumed that there was an unstated limitation in the Trust agreement providing that the residuary beneficiaries—Susan's and Fred Jr.'s children—would receive something after Susan's death. CP 361–62.

Gaffney's advice forced Susan to hire another attorney, who concluded that the accounting was negligent and that Susan owed the Trust nothing. CP 250, ¶¶ 9, 11. Meanwhile, Fred III, in his capacity as co-trustee and relying on Gaffney's accounting, had frozen the Trust's assets and prohibited Susan from taking any disbursements. *See* CP 810 (accounting led to Fred III's suspension of distributions to Susan).

To resolve this dispute, Susan and the Trust had to file a declaratory-judgment action against Fred III in Oregon (the "Multnomah County action"). CP 250, ¶¶ 10–11. Gaffney continued to press a position directly adverse to Susan, maintaining that she owed the Trust a significant sum of money. He even drafted and signed a declaration on behalf of Fred III in the litigation. CP 438, ¶ 17.

### *D. The court presiding over the Trust litigation rejects Gaffney's accounting.*

The court in the Multnomah County action rejected Gaffney's position. It found that Susan "owe[d] the trust nothing," because she had no duty to manage the Trust assets to provide for herself for her entire life, let alone a duty to manage the assets so that Fred III and the other children would receive anything after her death. CP 807, 809, 811.

The court also removed Fred III as co-trustee. CP 811. In his place, the court appointed Plaintiff Connie Potter, a professional fiduciary, to be Susan's co-trustee. CP 242–43, ¶ 1.

During the litigation, the Multnomah County court also expressed its disappointment in Gaffney, lamenting the "bad supervision, with respect to the legal profession," that both parties had received. CP 534. If they had received "a better plan and some direction," the court said, "I don't think you would be here." CP 534.

After its judgment, the court awarded attorney fees and costs. It noted that "Susan consistently made reasonable overtures to attempt a less costly resolution," and it recognized her "consistent efforts to minimize continued litigation." CP 801–02. The court therefore directed the Trust to reimburse all of Susan's litigation expenses, deeming them "reasonable in all respects." CP 802. It directed Fred III to reimburse the Trust for a

portion of Susan's expenses. CP 802. And it directed the Trust to reimburse Fred III for payments he had made to a firm that had performed an accounting to which the both Fred III and Susan had agreed. CP 244, 802. The Trust remains depleted by all of these expenditures.

## II. Procedural history

Plaintiff's operative complaint asserts claims for legal malpractice and breach of fiduciary duty against Defendants. CP 33–34, ¶ 3.0–4.3. It seeks all damages proximately caused by Defendants' negligence, including attorney fees and costs incurred in the Multnomah County action. CP 34, ¶ 3.1; CP 35.

Defendants sought summary judgment, arguing that under Washington's ABC Rule, Plaintiff could not recover the litigation expenses incurred in the Multnomah County action against Fred III, even if Defendants' negligence proximately caused Plaintiff to incur those fees. In response, Plaintiff argued that the ABC Rule should not continue to limit clients from recovering attorney fees incurred in another litigation proximately caused by their attorney's negligence. CP 230–32.

At the summary judgment hearing, the trial court "wonder[ed] whether . . . the ABC Rule has morphed into something that was not intended." RP 10:13–15. It was troubled by the ABC Rule's requirement that, in order for Plaintiff to recover, Fred III must have no factual

connection with the wrong that Gaffney committed against Plaintiff. "I understand that is the law," the court said, "but I can't understand *why* it's the law." RP 30:2–4 (emphasis added). Nevertheless, the court concluded that the ABC Rule prevented Plaintiff from recovering past litigation expenses, RP 34–35, and granted Defendants summary judgment.

Plaintiffs filed a notice of appeal with this Court, which transferred the case to the Court of Appeals. That court reversed the dismissal of Plaintiff's breach-of-fiduciary-duty claim, but affirmed the dismissal of Plaintiff's legal-malpractice claim, ruling that under the ABC Rule, Plaintiff did not suffer "legally compensable damages." App. A at 13. The court denied a motion to publish and for partial reconsideration. App. B.

## ARGUMENT

### I. It conflicts with *Shoemake ex rel. Guardian v. Ferrer* to allow a negligent attorney to embroil two of his clients in litigation with each other, and then to escape liability for the expenses of that litigation.

This case presents the Court with an opportunity to reconcile two doctrines that, in their present forms, are logically irreconcilable. Under one doctrine, compensatory damages may account for the attorney fees that a culpable attorney has caused his client to pay in an earlier lawsuit against a third person. Under the current scope of the ABC Rule, however, clients may not recover these attorney fees as damages if—indeed *especially* if—that lawsuit was against another client of that same

attorney. Review is warranted to resolve this conflict in precedent. RAP 13.4(b)(1).

Here, the Court of Appeals held that Plaintiff was not entitled to litigation expenses incurred in the Multnomah County action because the American Rule barred the recovery of attorney fees as costs or damages. App. A at 11. The ABC Rule was "an exception to the American Rule," *id.*, but the ABC Rule did not allow Plaintiff to recover attorney fees incurred in the Multnomah County action, *id.* at 11–12, because Fred III, the opposing litigant in that action, was factually connected with Gaffney's negligence, as he was also Gaffney's client.

To reach this conclusion, the Court of Appeals relied on *LK Operating*, which applied the ABC Rule to legal malpractice. There, a lawyer, Powers ("A"), violated his duties by entering into a joint venture agreement with a client, Fair ("B"), and another client, LKO ("C"). LKO later sued Fair. The Court stated that the ABC Rule barred an award of attorney fees to Fair as consequential damages because the other client, LKO, was factually connected to Powers' wrongful action as Fair's fellow client and joint venturer. 181 Wn.2d at 124. And, in the course of coming to this conclusion, the Court noted in passing that "Washington State courts follow the 'American Rule"—thus suggesting, although not stating explicitly, that to the extent the ABC Rule limited the recovery of attorney

fees as damages in legal malpractice cases, it was simply an application of the American Rule. *Id.* at 123.

This statement was dictum, since the foundations of the ABC Rule were not at issue in *LK Operating*. Indeed, as this Court noted, the parties had proceeded on the assumption that the ABC Rule applied to legal malpractice actions, and the plaintiffs themselves had argued to the trial court that the ABC Rule applied. *See id.* ("[Plaintiffs] asserted only one basis on which [their] damages were compensable—the ABC Rule."); *see also id.* at 126 (noting the plaintiffs' request to "craft a new or modified equitable rule . . . in legal malpractice actions," but declining to reach the issue because it was raised for the first time on appeal).

Still, this dictum was one that the Court of Appeals repeated and applied here. App. A at 11. And the dictum is correct only if the American Rule bars the recovery of attorney fees as consequential damages simply because they *are* attorney fees—even if the fees sought were incurred not in the present suit, but in an earlier suit against a different party, and as a direct result of the present defendant's negligence. At least in legal malpractice, this assumption about the American Rule is incorrect, given the reasoning of *Shoemake ex rel. Guardian v. Ferrer*, 168 Wn.2d 193, 225 P.3d 990 (2010).

*Shoemake* indicates that the American Rule provides no barrier to

awarding attorney fees incurred outside the legal malpractice action itself if the need to pay those fees flowed proximately from attorney negligence. In *Shoemake*, the defendant attorney's negligence had prevented his clients from entering into a settlement. The attorney argued that any award to his clients should equal the settlement the clients should have received, minus the fee he would have received if he had not been negligent. This Court rejected that argument. It declined to deduct the negligent attorney's contingent fee from the injured clients' damages because the clients had to pay another attorney to do what the negligent attorney had failed to do. *Id.* at 201. In calculating the clients' damages, *Shoemake* intended to compensate them for the fees they had to pay a second attorney.

Thus, in its reasoning, *Shoemake* refused to exclude the second attorney's fees from the clients' damages—and there is no economic or logical difference between refusing to exclude the expenses of a separate litigation from damages and including those expenses in damages. Here, like the plaintiffs in *Shoemake*, Plaintiff asks that her damages include the expenses incurred, in a separate litigation, to correct Defendant Gaffney's negligent work. Denying Plaintiff those damages—a remedy that will make Plaintiff whole—conflicts with the reasoning of *Shoemake*.

After all, if *Shoemake* had applied the ABC Rule, it would have reached a different result. In *Shoemake*, the injured clients paid a second

attorney to pursue a claim against the very insurance company whose settlement offer the negligent attorney had earlier failed to communicate to the clients. *Id.* at 196. Because the insurance company was thus "inextricably linked to the attorney['s] wrongful conduct," the ABC Rule would have forbidden the clients to be compensated for their second attorney's fees. *LK Operating*, 181 Wn.2d at 124–25 (citation and internal quotation marks omitted). Yet *Shoemake*'s reasoning took those fees into account in determining the correct measure of damages.

Indeed, *Shoemake*'s express language conflicts with the result that the Court of Appeals reached here. *Shoemake* flatly rejected the argument that the American Rule could bar recovery for attorney fees incurred outside the legal malpractice action itself, so long as they were the foreseeable consequences of attorney negligence. On this point, this Court favorably quoted the Court of Appeals decision that it was affirming:

> Crediting the negligent attorney with fees through a mechanistic application of the "American rule" fails to account for the fact that both the negligent attorney's fees and the fees of replacement counsel are being incurred for the same service.

168 Wn.2d at 200–01 (quoting *Shoemake v. Ferrer*, 143 Wn. App. 819, 829, 182 P.3d 992 (2008)). This language speaks directly to this case, where Susan and Fred III sought advice from Gaffney, who then negligently took the side of Fred III to the disadvantage of Susan. This left

Susan with no option other than to retain new counsel to correct Gaffney's erroneous conclusion—including, as proved necessary, through litigation.

Most fundamentally, denying recovery of attorney fees that were incurred because of an attorney's negligence defeats the purpose of a legal malpractice action: allowing the client to be made whole if injured by legal negligence. In *Shoemake*, the make-whole principle in *Shoemake* required accounting for the Shomakes' need to hire a second attorney to correct the first attorney's negligence. The same principle guided the Court's decision in *Schmidt v. Coogan*, which allowed emotional damages for legal malpractice where foreseeable because the "measure of damages is the amount of loss actually sustained as a proximate result of the attorney's conduct." 181 Wn.2d 661, 670, 335 P.3d 424 (2014) (citation and internal quotation marks omitted). Likewise, here, Plaintiff cannot be made whole if she is denied the fees paid to repair Gaffney's negligence.

The Court should grant this petition to address the conflict between *Shoemake* and the current contours of the ABC Rule.

## II. It raises an issue of substantial public interest to allow negligent attorneys to escape liability for one of the most predictable consequences of attorney negligence: the litigation that is necessary to correct that negligence.

As Plaintiff will explain below, the ABC Rule has perverse consequences in the legal-malpractice context, and has the effect of

carving out a special exception for negligent attorneys. If a common-law rule is to have such harmful consequences, it at least deserves an explanation. But the ABC Rule, and particularly its "connection" requirement, has never received a reasoned justification. This Court now has the opportunity to examine, for the first time, whether the ABC Rule's current contours should mark the limit to compensable damages in legal-malpractice actions. Review is warranted under RAP 13.4(b)(4).

### *A. The ABC Rule's perverse consequences—and its creation of a loophole for negligent attorneys—raise an issue of substantial public interest.*

When A wrongs B, embroiling B in litigation with C, the ABC Rule requires B to show that C was not "connected with" the original wrong. This "connection" requirement requires B to show that C did not have any factual connection to the relationship between A and B. *See LK Operating, LLC*, 181 Wn.2d at 124–25. This requirement has a perverse effect: the more harm an attorney does, the more likely the attorney is to escape liability.

To see why, suppose that an attorney's negligence embroils a client in litigation with a completely unrelated third person. In that event, the ABC Rule's connection requirement would allow recovery. Now contrast that case with this one, where an attorney's negligence embroiled two jointly represented clients in litigation with each other. In the first

case, the attorney has wronged only one client. Here, Defendant Gaffney wronged two clients. And here, the connection requirement bars recovery precisely *because* he wronged two clients—because the other client was factually connected with the original negligent advice as one of its recipients. This result makes no sense at all. Recovery for injury is all the more important when negligence has harmed more than one person.

Moreover, if Gaffney were another kind of professional, the rule would not bar recovery for similar expenses. If a botched operation forces a patient to seek out corrective health care, the patient can recover the cost of that corrective care from the physician who botched the first operation. *Bauer v. White*, 95 Wn. App. 663, 669, 976 P.2d 664 (1999). For Washingtonians injured by a negligent attorney, however, the ABC Rule drastically limits recovery simply because a second *attorney* must perform the corrective care. Thus, the result of the ABC Rule is to create a special exception for negligent attorneys. The exception is all the more objectionable because attorney negligence is especially likely to embroil a client in litigation. *See* 3 Ronald E. Mallen, *Legal Malpractice* § 21:18 (2017) (recognizing that clients often incur further attorney fees in trying to "avoid, minimize or reduce" damage proximately caused by lawyer negligence).

The public interest in correcting the ABC Rule's perverse effects,

and in closing the loophole it creates for negligent attorneys, becomes even more substantial in light of this Court's constitutional role. Supervision of the legal profession "is within the sole province of the judiciary." *Hagan & Van Camp, P.S. v. Kassler Escrow, Inc.*, 96 Wn.2d 443, 453, 635 P.2d 730 (1981). That supervisory duty makes review of this case all the more warranted under RAP 13.4(b)(4).

### *B. The ABC Rule has never received a reasoned justification.*

The posture of *LK Operating* meant that this Court was called upon only to apply, and not to justify, the ABC Rule. *LK Operating*, 181 Wn.2d at 126. But there's a strange thing about the ABC Rule: No Washington court has *ever* given a justification for it. And, as Plaintiff will explain, the Rule as presently formulated seems unjustifiable in this context. The Court should grant review to reexamine it.

#### *1. The assumption that the American Rule supports the ABC Rule has never been examined.*

The American Rule bars a prevailing party in an action from recovering from the losing party the attorney fees that the prevailing party incurred in ***that*** action. Thus, if Plaintiff were asking Defendants to reimburse her for the attorney fees she were paying in this legal-malpractice action, the American Rule would squarely apply.

Dictum from *LK Operating*, however, appeared to assume that the full form of the American Rule also applies *whenever* a party is seeking

attorney fees as damages, even where a party is seeking the fees it paid in an earlier action against a different party. 181 Wn.2d at 123; *see supra* pp. 8–9. This assumption merits reexamination, for more than one reason.[1]

For one thing, Washington has a long history of allowing recovery of attorney fees as consequential damages when they were incurred in an earlier action against a different party. In *Thomas v. Gaertner*, the Court of Appeals held that the ABC Rule does not govern when a claimant is seeking, as damages, the attorney fees it had to pay the other party's attorneys in separate litigation. 56 Wn. App. 635, 638, 784 P.2d 575 (1990). And it held that the American Rule—"the general rule relating to recovery of attorney fees"—did not bar the recovery of the attorney fees the claimant was seeking, noting that "a different rule applies" to "fees and expenses incurred in a previous suit." *Id.* at 640 (quoting Charles T. McCormick, *Handbook on the Law of Damages* § 66, at 246 (1935)). Even earlier, this Court long held "that when the natural and proximate consequences of a wrongful act by defendant involve plaintiff in litigation with others, there may, as a general rule, be a recovery of damages for the

---

[1] The Court of Appeals stated in passing that Plaintiff had "concede[d] that many of its claimed damages are not available under the ABC Rule *and the American Rule*." App. A at 12 (emphasis added). To be clear, Plaintiff made no such concession about the American Rule. *See, e.g.*, Br. of Appellants at 20 ("The American Rule says nothing, then, about the situation presented here . . . ."); *id.* at 22 ("[T]he American Rule does not bar recovery in a case like this."); *see also* Reply Br. at 1, 5.

reasonable expenses incurred in the litigation, including compensation for attorney's fees." *Wells v. Aetna Ins. Co.*, 60 Wn.2d 880, 882, 376 P.2d 644 (1962) (citing *Longview Sch. Dist. No. 112 v. Stubbs Elec. Co.*, 160 Wash. 465, 295 P. 186 (1931); *Murphy v. Fid. Abstract & Title Co.*, 114 Wash. 77, 194 P. 591 (1921); *Curtley v. Sec. Sav. Soc'y*, 46 Wash. 50, 89 P. 180 (1907)). These cases would have been decided on different grounds if the American Rule flatly barred the recovery of attorney's fees as such.

Nor do the purposes of the American Rule squarely apply to a legal malpractice case in which an injured client is seeking attorney fees expended against a different party in an earlier action. One of the principal justifications for the American Rule is that, "since litigation is at best uncertain[,] one should not be penalized for merely defending or prosecuting a lawsuit." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967); *see also Blue Sky Advocates v. State*, 107 Wn.2d 112, 123, 727 P.2d 644 (1986) (Dore, J., dissenting) (echoing this concern). That justification has no purchase here. Plaintiff seeks expenses incurred in separate litigation, not in this litigation, so recovery of those expenses does not penalize Defendants merely for defending themselves in this lawsuit. Where one of the principal reasons for the American Rule does not apply, it makes little sense for the full American Rule to apply.

2. *The ABC Rule's "connection" requirement has never been given a justification.*

As noted, Washington long followed a general rule that attorney fees were recoverable as consequential damages when they were incurred because of another party's negligence. But the formulation of the ABC Rule applied in *LK Operating* holds that when A wrongs B, embroiling B in litigation with C, recovery of fees as damages requires B to show that C was not "connected with" the original wrong. This "connection" requirement requires B to show that C did not have any factual connection to the relationship between A and B. *See LK Operating, LLC*, 181 Wn.2d at 124–25. Washington courts, however, have never supplied a justification for this "connection" requirement. The requirement, it appears, was first articulated in *Armstrong Construction Co. v. Thomson*, 64 Wn.2d 191, 390 P.2d 976 (1964), a contract case, and then restated in its current form by *Manning v. Loidhamer*, 13 Wn. App. 766, 538 P.2d 136 (1975), a case arising from a car crash. But neither of these cases, nor any case since, has explained why the connection requirement exists in the first place. *See* RP 35:1–3. For this reason alone, the requirement is worth reconsidering, at least in the legal-malpractice context, where negligence is especially likely to cause the client to incur new attorney fees.

The ABC Rule's connection requirement might make more sense

if it were more limited. It would make more sense, for example, if the ABC Rule simply required that the opposing party in the earlier litigation not be the same person from whom the claimant is seeking damages in the current case. Such a rule would prevent a second suit against the same party merely to recover the expenses incurred in the first suit. *See Lovell v. House of the Good Shepherd*, 14 Wash. 211, 44 P. 253 (1896). That rule would also be consistent with decades of law from this Court. *See, e.g., Wells*, 60 Wn.2d at 882; *see also Choukas v. Severyns*, 3 Wn.2d 71, 83–84, 99 P.2d 942 (1940) (this Court's precedents recognized liability for fees incurred in litigation with "a party other than the one whose original wrongful act caused the litigation in which the attorney's fees had been paid"). Alternatively, the connection requirement might be more understandable if it simply required that the opposing party in the earlier litigation not be a participant in the tort that proximately caused that litigation. That kind of rule would prevent a plaintiff from suing one joint tortfeasor for damages, and then filing a separate suit for fees against another joint tortfeasor.[2]

---

[2] It is not even clear that these hypothetical rules would actually be required to prevent either situation from occurring. The prohibition against claim splitting, *see, e.g., Landry v. Luscher*, 95 Wash. App. 779, 976 P.2d 1274 (1999), already prevents litigants from filing a follow-on action to collect expenses incurred in an earlier action against the same party. This prohibition would also bar a follow-on action against a second joint tortfeasor, since an injured party's claim against joint tortfeasors is considered an "indivisible claim." RCW 4.22.040(1).

But the current form of the ABC Rule's connection requirement extends far beyond merely requiring the litigant in the earlier action not to be identical or not to be participant in the original wrong. Instead, it broadly requires the litigant in the earlier action not to have had any factual connection to the relationship between the party now seeking attorney fees as damages and the party against whom those damages are sought. *LK Operating*, 181 Wn.2d at 124–25. This broad requirement makes little sense. It should be either justified or jettisoned.

## CONCLUSION

The decision below conflicts with *Shoemake*, raises an issue of fundamental importance for legal malpractice, and perpetuates a harmful rule that has never received a justification. Review is warranted.

RESPECTFULLY SUBMITTED this 10th of February, 2017.

KELLER ROHRBACK L.L.P.

By _____
Benjamin Gould, WSBA #44093
Ian S. Birk, WSBA #31431

LAW OFFICES OF
ROBERT B. GOULD

By _____
For Robert B. Gould, WSBA #4353

Attorneys for Petitioner

## CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on February 10, 2017, I caused a true and correct copy of the foregoing PETITION FOR REVIEW to be served on the following via email, pursuant to RAP 18.5(a) and CR 5(b)(7):

Bradley S. Keller
Keith David Petrak
BYRNES KELLER CROMWELL, LLP
1000 Second Avenue, 38th Floor
Seattle, WA 98104
bkeller@byrneskeller.com
kpetrak@byrneskeller.com
kwolf@byrneskeller.com

Paul J. Lawrence
Matthew J. Segal
Taki V. Flevaris
PACIFICA LAW GROUP LLP
1191 Second Avenue, Suite 2000
Seattle, WA 98101
Paul.Lawrence@pacificalawgroup.com
Matthew.Segal@pacificalawgroup.com
Taki.Flevaris@pacificalawgroup.com
Dawn.Taylor@pacificalawgroup.com

Cathy Hopkins, Legal Assistant

# APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | |
|---|---|
| SUSAN B. PAULSELL, a single woman in her individual capacity,<br><br>Plaintiff,<br><br>CONNIE POTTER and SUSAN PAULSELL, Trustees of the Amended and Restated Frederick O. Paulsell, Jr. Living Trust dated December 22, 2002,<br><br>Appellants,<br><br>v.<br><br>JOSEPH MICHAEL GAFFNEY and JANE DOE GAFFNEY, his wife, and DORSEY & WHITNEY, LLP, a Minnesota Limited Liability Partnership,<br><br>Respondents. | No. 74744-4-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION<br><br>FILED: December 19, 2016 |

TRICKEY, A.C.J. — A trust, through its co-trustees, Connie Potter and Susan Paulsell, appeals the dismissal on summary judgment of its claims for legal malpractice and breach of fiduciary duty against attorney Joseph Gaffney and his law firm, Dorsey & Whitney, LLP. Gaffney successfully sought summary judgment on the basis that all the damages the trust sought were unrecoverable attorney fees under the American Rule. Because the trust did not raise a genuine issue of material fact that some of the damages sought fell outside the rule, we affirm the trial court's grant of summary judgment on the legal malpractice claim.

But, because genuine issues of material fact remain whether the trust is entitled to disgorgement of the attorney fees it paid to Gaffney, we reverse the trial court's dismissal of the trust's breach of fiduciary duty claim.

FACTS

Attorney Joseph Gaffney is a member of the law firm Dorsey & Whitney, LLP, who works in the firm's Seattle office. Gaffney provided estate planning services to Frederick O. Paulsell Jr. (Fred Jr.)[1] in the 1980s and 1990s, including setting up a trust for Fred Jr. in 1987. Gaffney prepared an amended living trust for Fred Jr. in 1997.

Fred Jr. married Susan B. Paulsell in 1998. Susan had four children from a previous marriage. Fred Jr. also had children from a previous marriage, including his son Frederick O. Paulsell III (Fred III).

Fred Jr. wrote a new will without the assistance of counsel in April 2002. Fred Jr. died in October 2002. The will left all of Fred Jr.'s material possessions to Susan, and on Susan's death, to be "passed on to both her natural children and [his] natural children in equal proportions" and named Susan and Fred III as co-trustees of his estate.[2]

After Fred Jr's death, Fred III and Susan sought legal advice from Gaffney. Gaffney asserts he advised them as co-personal representatives of Fred Jr.'s estate and not in their individual capacities. Gaffney believed that the new will created uncertainty about which of Fred Jr.'s assets were trust assets and which were estate assets and would not allow Susan to take advantage of the federal estate tax's marital deduction. Gaffney prepared a binding non-judicial dispute resolution agreement to address any conflicts between the trusts and the will, and

[1] Because many of the parties share the last name Paulsell, we refer to them by their first names. We intend no disrespect.
[2] Clerk's Papers (CP) at 100.

to ensure that Susan could take advantage of the marital deduction. All of the beneficiaries, including Susan and Fred III, signed that agreement.

The agreement created a new trust, the "Amended and Restated Frederick O. Paulsell, Jr. Living Trust" (the Trust).[3] The new Trust named Susan and Fred III as co-trustees. The Trust directed the trustees to pay all income from the trust to Susan and, if the income was not sufficient to provide for Susan's "support in her accustomed manner of living," to distribute "such sums of principal" as the trustees deemed advisable.[4] On Susan's death, the remaining trust assets, not consumed by estate taxes, would be shared equally by Susan's and Fred Jr.'s children.

Over the next five years, Gaffney provided some advice about the Trust's administration and performed "various services" for the Trust, including drafting a distribution agreement. But neither he nor his firm handled the day-to-day administration of the Trust.

Conflict arose between Susan and Fred III when he objected to her spending habits and the fact that she was distributing trust assets to her biological children but not to him and his biological siblings. In 2008, in an effort to resolve their disputes, Susan and Fred III asked Gaffney and another Dorsey & Whitney employee to help them prepare an accounting and reconciliation. They completed the reconciliation in March 2009. The reconciliation stated that Susan owed the trust over $3 million. The Trust paid Dorsey & Whitney $73,407.35 for its

[3] CP at 80, 147-53.
[4] CP at 149.

"accounting and other trust work."[5]

Afraid that she would have to reimburse the Trust the money, Susan sought independent legal advice in the spring of 2009. In September 2009, Fred III froze the Trust's accounts. Shortly after, Susan, in her capacity as trustee, distributee, and beneficiary of the Trust, filed a declaratory judgment in Multnomah County Circuit Court, Oregon, where she resided, against Fred III as co-trustee and against all the contingent beneficiaries of the Trust. She sought a declaration that the primary purpose of the Trust was to support her in her accustomed manner of living during her lifetime.

In November 2009, Susan and Fred III hired the firm Beagle Burke & Associates to perform a new accounting. In April 2010, the court appointed Jeffrey Thede as an interim co-trustee. The Trust paid Thede nearly $50,000.

Susan ultimately prevailed at trial. The Oregon court ordered Fred III to pay approximately $500,000 of Susan's attorney fees. But the court ordered the Trust to pay attorney fees for Susan's children in the amount of $57,701.09, Fred Jr.'s children in the amount of $47,037.34, and Fred III in the amount of $160,000. The Trust itself paid over $200,000 in attorney fees for its own representation.

The Oregon court removed Fred III as a co-trustee and appointed Connie Potter, a professional trustee. As of January 2015, the Trust had paid $22,900 in other trustees' fees. Those fees are continuing.

---

[5] CP at 243. Neither party has directed our attention to anything in the record that segregates the fees paid for the accounting work from other attorney fees paid to Dorsey & Whitney. The approximately $70,000 also includes legal work Dorsey & Whitney undertook to sell some of the Trust's property on Whidbey Island, Washington. The Trust has not alleged any breach of fiduciary duties in that sale.

In March 2012, the Trust, with Susan and Potter acting as co-trustees, sued Gaffney, his wife, and Dorsey & Whitney for legal malpractice and breach of fiduciary duties. The amended complaint claimed damages for all the attorney fees the Trust had paid as a result of the Oregon litigation, as well as all the professional trustees' fees, accounting fees, and attorney fees paid to Dorsey & Whitney.

In January 2015, Gaffney moved for summary judgment, arguing primarily that the only damages the Trust sought were litigation expenses and, therefore, not available under the American Rule. The Trust noted that Gaffney's motion for summary judgment did not address that it sought disgorgement of the attorney fees it had paid to Dorsey & Whitney. It provided declarations from Potter and Susan's trial attorney, opining that the parties would not have become involved in the Oregon litigation without Gaffney's negligent accounting and reconciliation. The trial court granted Gaffney's motion.

The Trust sought direct review in the Supreme Court. The Supreme Court transferred the case to this court.

## ANALYSIS

### Summary Judgment

The Trust argues that the trial court erred by granting Gaffney's motion for summary judgment on both its legal malpractice and breach of fiduciary duty claims. Because Gaffney is not entitled to judgment as a matter of law on some of the Trust's claims, we reverse in part.

The trial court grants summary judgment to a party when there is no genuine

issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). "'A material fact is one that affects the outcome of the litigation.'" Elcon Const., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 164, 273 P.3d 965 (2012) (quoting Owen v. Burlington N. Santa Fe R.R., 153 Wn.2d 780, 789, 108 P.3d 1220 (2005)).

We review summary judgment orders de novo, and view "all facts and reasonable inferences in the light most favorable to the nonmoving party." Elcon Const., 174 Wn.2d at 164. We address the breach of fiduciary duty and legal malpractice claims in turn.

*Fiduciary Duty*

The Trust argues that the trial court erred by dismissing its breach of fiduciary duty cause of action. Gaffney argues that the Trust cannot raise this issue on appeal because it did not raise it below. Ordinarily, this court does not review arguments raised for the first time on appeal. RAP 2.5(a). But the Trust did raise its breach of fiduciary duty claim below. The Trust alleged in its amended complaint that Gaffney breached his fiduciary duties. It listed that breach as a separate cause of action. It also pointed out, in its response to Gaffney's motion for summary judgment, that breach of a fiduciary duty gives rise to a separate claim for disgorgement. In that response, the Trust relied on Eriks v. Denver, the same case it relies on in this appeal. 118 Wn.2d 451, 462-63, 824 P.2d 1207 (1992).

Gaffney points out that the Trust did not cite specific Rules of Professional Conduct (RPC) until its brief before this court. But he cites to no authority requiring the Trust to do so to survive summary judgment. The Trust's complaint and citation

to Eriks was enough to preserve this issue for appeal.

Gaffney also argues that the Trust has abandoned its claims because it failed to mention them in its statement of grounds for direct review. RAP 4.2(c)(2) requires the party seeking direct review to include a "statement of each issue the party intends to present for review" in its statement. But, under RAP 12.1, this court bases its decisions on matters raised in the parties' briefs. The Trust adequately briefed this issue.

A plaintiff may use an attorney's violations of the RPCs as evidence in a claim that an attorney breached a fiduciary duty. Behnke v. Ahrens, 172 Wn. App. 281, 297, 294 P.3d 729 (2012). Disgorgement of fees is an appropriate remedy for a breach of fiduciary duties. Eriks, 118 Wn.2d at 463. An order to disgorge attorney fees does not require a showing of causation or damages by the complaining party. Behnke, 172 Wn. App. at 298.

An attorney has a concurrent conflict of interest when "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." RPC 1.7(a)(2). The attorney may represent these clients only if "each affected client gives informed consent, confirmed in writing." RPC 1.7(b)(4). An attorney must also act "with reasonable diligence and promptness in representing a client." RPC 1.3.

Gaffney contends that the Trust cannot bring a claim of breach of fiduciary duty related to his representation in 2002 because he owed no duty to the Trust in 2002. Specifically, he argues that the Trust is alleging that he violated his duties to Susan in 2002, who is not a party to this lawsuit in her individual capacity. But,

in its amended complaint, the Trust alleged that Gaffney represented all of the Trust beneficiaries when they formed the Trust, despite the conflicts of interest between the heirs and potential beneficiaries. The Trust responded to Gaffney's motion for summary judgment with declarations from an expert that Gaffney should have advised Susan and Fred III to retain independent legal counsel at the outset of the representation.

And, as Gaffney set out in his motion for summary judgment, Fred Jr.'s will named "Susan and Fred III as joint 'trustees' of his estate."[6] "In that role, Susan and Fred III hired Dorsey [& Whitney] to advise them about the administration of Fred Jr.'s estate."[7] Moreover, the Trust paid the attorney fees for that representation. Accordingly, there is at least a genuine issue of material fact whether Gaffney represented Susan as a trustee in 2002.

Gaffney also argues that the Trust's claim for disgorgement relating to the 2002 representation is time barred. The Trust brought this action in 2012, more than three years after 2002. The Trust argues that Gaffney's representation was continuous. We conclude there are genuine issues of fact on this question as well.

The statute of limitations for a breach of fiduciary duty claim is three years. RCW 4.16.080(3); Hudson v. Condon, 101 Wn. App. 866, 872-73, 6 P.3d 615 (2000). The statute of limitations begins to run when the client discovers "or in the exercise of reasonable diligence should have discovered" all the facts necessary to support each element of its cause of action. Janicki Logging & Const. Co., Inc. v. Scwabe, Williamson, & Wyatt, P.C., 109 Wn. App. 655, 659-60, 37 P.3d 309

[6] CP at 50.
[7] CP at 50.

(2001). If the same attorney has continuously represented the client, in the same matter, the statute of limitations does not begin to run until the end of the representation. Janicki, 109 Wn. App. at 663-64. One factor in determining whether the attorney has continued to work on the same matter is whether the attorney could "have remedied [the] error or mitigated the damage it caused." Cawdrey v. Handson Baker Ludlow Drumheller, P.S., 129 Wn. App. 810, 820, 120 P.3d 605 (2005). Whether the representation was continuous is often a question of fact. Hipple v. McFadden, 161 Wn. App. 550, 558, 561, 255 P.3d 730 (2011).

In 2002, Gaffney created the current version of the Trust, allegedly while breaching his fiduciary duties. He advised Susan and Fred III on how to "distribute the Estate and Trust assets" as late as 2005, including specific advice on how much of the Trust principal the Trust should distribute to Susan.[8] He advised that, if Susan's distributions exceeded a certain amount, the parties, including him, "should review the facts and circumstances to determine whether Susan should repay the trust for any living expense distributions."[9]

In 2008, when concerns about Susan's trust management and spending arose, Gaffney stepped in to help Susan and Fred III sort them out. Gaffney opened a new billing matter number for his work in 2008 and 2009. Even with the new billing matter number, a reasonable person could conclude that Gaffney's work in creating the Trust was sufficiently related to his advice in how to manage the Trust and that it would be the same matter. There are genuine issues of fact over whether Gaffney's representation was continuous.

---

[8] CP at 80-82.
[9] CP at 82.

The Trust has also provided enough evidence to raise a genuine dispute of a material fact over whether Gaffney's 2008 and 2009 representation violated his fiduciary duties to the Trust. Through a declaration from Susan's attorney in the Oregon litigation, the Trust offered evidence that Gaffney had a conflict of interest in 2008 and 2009 because he represented Fred III and Susan during the accounting and reconciliation, and that Gaffney's preparation of the reconciliation negligently stated that Susan owed the Trust over $3 million. Gaffney does not dispute that the Trust paid the firm for its work on the reconciliation and accounting. The trial court erred by granting Gaffney's summary judgment on the disgorgement claims.

Legal Malpractice

The Trust alleges the trial court erred by dismissing its claim for legal malpractice. Gaffney argues that the Trust's malpractice claim fails because the only damages the Trust seeks are not compensable under Washington law.

To sustain a claim for legal malpractice, the plaintiff must prove:

> (1) The existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client;
> (2) an act or omission by the attorney in breach of the duty of care;
> (3) damage to the client; and
> (4) proximate causation between the attorney's breach of the duty and the damage incurred.

Hizey v. Carpenter, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992). Gaffney appears to accept that there are at least genuine issues of material fact for the first two elements. Thus, our discussion focuses on damages.

In our state's version of the American Rule, parties are responsible for their "own litigation expenses." Colorado Structures, Inc. v. Ins. Co. of the W., 161

Wn.2d 577, 621, 167 P.3d 1125 (2007) (Alexander, C.J., concurrence/dissent). Thus, parties usually cannot recover attorney fees as "*costs or damages.*" City of Seattle v. McCready, 131 Wn.2d 266, 275, 931 P.2d 156 (1997).

But a party may seek attorney fees when authorized by a "contract, statute, or recognized ground of equity." Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc., 168 Wn. App. 86, 97, 285 P.3d 70 (2012). One recognized ground of equity is equitable indemnification, commonly called the ABC Rule. Newport Yacht, 168 Wn. App. at 104 n.11. In LK Operating, LLC v. Collection Group, LLC, the Washington State Supreme Court recognized the ABC Rule as an exception to the American Rule in legal malpractice cases. 181 Wn.2d 117, 123-24, 330 P.3d 190 (2014).

The ABC Rule applies when an attorney (A), represents a client (B), and as a result of A's malpractice, B becomes involved in separate litigation with a third party (C). If B sues A for malpractice, B can claim as consequential damages the attorney fees B incurred in the litigation with C, but only if C was not connected to the original representation. LK Operating, 181 Wn.2d at 123.

In addition, in order for B to recover from A under this rule, A's actions must be the sole cause of the litigation between B and C.[10] Blueberry Place Homeowners Ass'n v. Northward Homes, Inc., 126 Wn. App. 352, 358-59, 110 P.3d 1145 (2005). "[E]ven if it is possible to apportion attorneys' fees related to a

[10] Below, Gaffney argued that the Trust was estopped from asserting that Gaffney was the proximate cause of the Oregon litigation. On appeal, Gaffney clarifies that his position is that the Trust is estopped from claiming that his representation was the "sole" cause of the Oregon litigation. Because the Trust does not argue, even on appeal, that Gaffney's alleged misconduct was the sole cause, we do not address whether the Trust would be estopped from doing so.

particular claim, where there are additional reasons why the party seeking fees was sued, fees are not available under the theory of equitable indemnity." Blueberry Place, 126 Wn. App. at 361.

The Trust concedes that many of its claimed damages are not available under the ABC Rule and the American Rule.[11] But the Trust asks this court to reconsider the Supreme Court's holding in LK Operating. This court cannot reconsider a Supreme Court decision because Washington State Supreme Court decisions are binding on this court. Godefroy v. Reilly, 146 Wash. 257, 259, 262 P. 639 (1928).

Gaffney claims that all of the Trust's claimed damages are litigation expenses and are, therefore, subject to the American Rule. The Trust argues that, even assuming the American Rule and the ABC Rule apply, it can still recover some damages from Gaffney. The Trust contends that over $260,000 in third-party attorney fees,[12] the professional trustees' fees, and the accounting fees it paid are outside the rule. Relying on RAP 9.12, Gaffney argues that the Trust cannot make this argument on appeal because it failed to do so at the trial court level.

When reviewing orders granting summary judgment, this court will review "only evidence and issues called to the attention of the trial court." RAP 9.12; see, e.g., Silverhawk, LLC v. KeyBank Nat'l Ass'n, 165 Wn. App. 258, 265-66, 268 P.3d

[11] As stated in its introduction, "The ABC Rule, however, appears to bar recovery of a large portion of these litigation expenses." Br. of Appellant at 2. This concession is consistent with the Trust's request to have the Supreme Court revisit its holding in LK Operating.
[12] The Multnomah County Superior Court ordered the Trust to reimburse the attorney fees incurred by Susan's children and Fred Jr's children, including Fred III's.

958 (2011) (declining to consider contract analysis not presented to trial court); 1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp., 101 Wn. App. 923, 932, 6 P.3d 74 (2000) (declining to consider argument that one party fell outside of statute's protection because it did not raise it to the trial court).

Gaffney moved for summary judgment on all of the Trust's claims, arguing that the Trust sought only attorney fees and expenses, which were not available under the ABC Rule exception to the American Rule.[13] In its response, the Trust mentioned several times that "the majority of [its] claimed damages [were] not attorney fees or costs that [it] incurred in the Multnomah County litigation," but it never articulated any basis for distinguishing between the attorney fees it incurred and attorney fees for which it had to reimburse third parties.[14] We decline to consider this distinction because the Trust did not argue it to the trial court.

Similarly, on appeal, the Trust claims that Gaffney's negligently prepared accounting and reconciliation created the need for a new accounting by Beagle Burke & Associates, and that the new accounting was not a "mere product of litigation."[15] But, again, the Trust did not raise this distinction to the trial court. We decline to consider it for the first time on appeal.

Because we conclude that the Trust did not raise a genuine issue of material fact whether it suffered legally compensable damages, we do not reach the issue of proximate cause.

---

[13] Gaffney included all of the categories of damages in his motion.
[14] CP at 225.
[15] Br. of Appellant at 43.

We affirm in part and reverse in part, and remand to the trial court for further proceedings consistent with this opinion.

Trickey, ACJ

WE CONCUR:

Cox, J.

Becker, J.

# APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | |
|---|---|
| SUSAN B. PAULSELL, a single woman in her individual capacity,<br><br>Plaintiff,<br><br>CONNIE POTTER and SUSAN PAULSELL, Trustees of the Amended and Restated Frederick O. Paulsell, Jr. Living Trust dated December 22, 2002,<br><br>Appellants,<br>v.<br><br>JOSEPH MICHAEL GAFFNEY and JANE DOE GAFFNEY, his wife, and DORSEY & WHITNEY, LLP, a Minnesota Limited Liability Partnership,<br><br>Respondents. | No. 74744-4-I<br><br>ORDER DENYING MOTION TO PUBLISH AND FOR PARTIAL RECONSIDERATION AND JOINDER |

The appellants, Connie Potter and Susan Paulsell, have filed a motion to publish and for partial reconsideration. A joinder to the motion to publish has been filed by attorneys Andrew Benjamin, Gloria James, and Robert Wayne. The court has taken the matters under consideration and has determined that the motion to publish and for partial reconsideration and joinder should be denied.

Now, therefore, it is hereby

ORDERED that the motion to publish and for partial reconsideration and the joinder should be denied, and the unpublished opinion filed December 19, 2016, shall remain unpublished.

Done this 12th day of January, 2017.

FOR THE COURT:

ACJ