No. 91411-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Plaintiffs-Appellants,

v.

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

Defendants-Respondents.

BRIEF OF APPELLANTS

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INTRODUCTION

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. If a CPA botches a tax return and the taxpayer is forced to hire a second CPA to prepare a correct return, the taxpayer can recover the cost of hiring the second CPA from the first CPA.

Things are quite different, however, for Washingtonians who are injured by a negligent attorney. If an attorney's negligence precipitates a client into litigation, it is only in limited circumstances that the client can recover the expense of hiring a second attorney for that litigation. This anomaly is created by the "ABC Rule," a doctrine—apparently original to Washington—that first arose in contract cases and has been extended to torts such as legal malpractice.

The ABC Rule applies when one person ("A") wrongs another ("B"), and the wrong then embroils the injured person in litigation with someone else ("C"). In those circumstances, the ABC Rule provides that B can recover from A the attorney fees that B incurred in litigation with C only if C was not "connected with" the original wrong—even if the original wrong proximately caused the litigation. *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 359,

110 P.3d 1145 (2005). This "connection" element does not mean simply that C was actively involved in the wrong that A perpetrated against B. Under the ABC Rule, "connected with" has taken on a far broader meaning: it has come to refer to C's having any factual connection to the relationship between A and B. *See LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 117, 124–25, 330 P.3d 190 (2014). If C has any such connection, B cannot recover the attorney fees it incurred due to A's wrong.

Here, Defendant Joseph Gaffney gave his two clients—one of whom was Plaintiff Susan Paulsell—negligent legal advice about a Trust of which the clients were co-trustees. Within a matter of a few months, this advice caused litigation between the two co-trustees on the very subject to which Gaffney's negligent advice pertained. Susan Paulsell was forced to hire other attorneys to clean up the mess Gaffney had made. Gaffney then prolonged the litigation by refusing to back away from his negligent advice. This litigation cost hundreds of thousands of dollars in attorney fees and other expenses.

The ABC Rule, however, appears to bar the recovery of a large portion of these litigation expenses. If—in the jargon of the ABC Rule—Gaffney is A, Susan Paulsell is B, and her co-trustee is C, that co-trustee was "connected with" the negligent legal advice that Gaffney provided,

because he was one of the recipients of that advice. *See LK Operating*, 181 Wn.2d at 124. Because of that factual connection, the ABC Rule forbids recovery of the fees Susan Paulsell paid her attorneys in the litigation that Gaffney's negligence caused.

As Plaintiffs will explain, there is no principled reason for this Rule. It conflicts with basic tort principles of proximate cause and make-whole damages. It shields negligent attorneys from the kind of damages that other negligent professionals must pay. It cannot be justified by relying on the American Rule concerning attorney fees. It should be confined to the contractual context where it first arose. At the very least, it should not apply to legal malpractice cases. Indeed, Washington alone applies this Rule to legal malpractice.

Just last year, in *LK Operating*, this Court suggested that it would be open to reconsidering the ABC Rule's application to legal malpractice. *See* 181 Wn.2d at 126. This case presents the Court with an opportunity to reconsider the Rule. The Court should limit this harmful Rule, which conflicts with basic legal principles and lacks any rational justification.

ASSIGNMENT OF ERROR

I. Assignment of error

1. The trial court erred in granting summary judgment in favor of Defendants in its order dated February 6, 2015.

II. Issues pertaining to the assignment of error

1. Washington's ABC Rule applies when one person ("A") wrongs another ("B"), and the wrong then embroils the wronged person in litigation with a third party ("C"). In those circumstances, the ABC Rule holds, the wronged person can recover from the wrongdoer the attorney fees it incurred in litigation with a third party only if the third party was "not connected with" the original wrong—even if the original wrong proximately caused the litigation. Here, Defendant Gaffney's negligent legal advice embroiled Plaintiff Susan Paulsell in litigation against Fred Paulsell III. The trial court reluctantly concluded that the ABC Rule prevented Plaintiffs from recovering from Gaffney any of the expenses incurred in litigation against Fred III, because Fred III, as a fellow client of Gaffney, was connected with the original negligence. Should this Court reconsider the ABC Rule insofar as it bars victims of legal malpractice from recovering damages proximately caused by an attorney's negligence?

2. Even if this Court decides not to reconsider the ABC Rule, did the trial court err in concluding that the ABC Rule wholly bars Plaintiffs from recovering any damages?

STATEMENT OF THE CASE

I. Factual background

A. After Susan is left a widow, Susan and her co-trustee Fred III go to Gaffney for legal advice.

Successful venture capitalist Frederick Paulsell, Jr. ("Fred Jr.") died unexpectedly in October 2002, leaving Plaintiff Susan Paulsell ("Susan") a widow. Clerk's Papers ("CP") 29, ¶ 1.3; CP 40, ¶ 1.3. Earlier that year, Fred Jr. had himself prepared a four-paragraph will leaving "all [his] material possessions" to Susan. CP 304. The will also directed that,

after Susan's death, the estate would pass equally to Fred Jr.'s children by a previous marriage and Susan's children by a previous marriage. CP 304. The co-personal representatives of Fred Jr.'s estate were Susan and Frederick Paulsell III ("Fred III"), Fred Jr.'s son by a previous marriage. CP 304. Susan and Fred III went to Defendant Joseph Gaffney, a partner in Defendant Dorsey & Whitney's Seattle office, for legal advice on Fred Jr.'s will. *See* CP 79, ¶ 6. Gaffney jointly represented both Susan and Fred III. *See* CP 79, ¶ 6; CP 456 at 14:7–16; CP 457 at 15:4–7.

B. Gaffney drafts—and recommends that Susan and Fred III enter into—a binding Trust agreement allowing Susan to live "in her accustomed manner."

In November 2002, Gaffney drafted a binding trust agreement under which Fred III and Susan agreed that Fred Jr. had intended to leave all assets in trust to Susan for her lifetime, with any assets remaining at her death to be distributed equally among the children. CP 79–80, ¶ 6. The agreement—signed by Fred III, Susan, and all the children—created a trust for the property bequeathed by Fred Jr. (the "Trust"). Fred III and Susan were named the co-trustees of the Trust. 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 Trust assets

remaining at Susan's death would be distributed in equal shares to all the children, including Fred III. CP 107, § 2.3.

Even though Fred Jr.'s will provided that "[m]y wife, Susan Paulsell, is to inherit all my material possessions," CP 304, Gaffney told Susan that "Fred's simple will as written does not contain the proper disposition pattern to defer all death tax until your death." CP 316. And Gaffney advised Susan that to qualify for the marital deduction under the federal estate tax, she needed to sign a Trust agreement that would supersede the will. CP 316. Susan, still grieving for her husband's untimely death, had no reason to doubt this advice, and believed that the agreement was necessary "in order for the estate to avoid significant death taxes." CP 248, ¶ 3; CP 251, ¶ 13. After Gaffney gave Susan this advice, however, an associate at Dorsey & Whitney informed Gaffney that Susan would qualify for the marital tax deduction without the need for the Trust agreement. CP 320. Gaffney did not disclose the results of this research to Susan. CP 251, ¶ 16.

Without Gaffney's advice, Susan would not have entered into the Trust agreement—and without the Trust, the litigation between Susan and Fred III would not have ensued.

C. Gaffney's Trust accounting leads to litigation between Susan and Fred III.

In 2008, about six years after the Trust was created, Fred III and Susan, as co-trustees, jointly asked Gaffney to prepare an accounting of the Trust's receipts and disbursements. CP 41, ¶ 2.11. Gaffney's accounting concluded that Susan owed the Trust over $3 million. CP 255.

Gaffney's accounting suffered from two major errors. First, it failed to account for over $1.8 million that Susan had paid into the Trust. CP 279. Second, it overlooked the Washington law of trusts and the very Trust 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 Susan had abused her discretion in withdrawing funds from the Trust, CP 268, and that "she needed to significantly curtail" her spending, CP 249, ¶ 7. Gaffney believed that there was an implicit 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 also disapproved of Susan's spending, believing it was excessive

"in a general way," although he has admitted that he "didn't know the actual expenditures" she was making. CP 373–74 at 176:21–22, 177:1.

Gaffney's advice forced Susan to hire another lawyer. After Gaffney told Susan that she owed the Trust more than $3 million, Susan sought the advice of John Folawn, a Portland, Oregon trusts and estates lawyer. CP 248, ¶ 3. In July 2009, Folawn met with Gaffney in Seattle to discuss Gaffney's Trust accounting. CP 249, ¶ 7. In that meeting, Folawn has testified, Gaffney was "mainly concerned that his fee bill had not been paid," and remained "adamant" that Susan owed the Trust $3 million and that she "needed to significantly curtail spending." CP 249, ¶ 7. Shortly thereafter, Folawn told Gaffney he had a conflict of interest and needed to withdraw. CP 249, ¶ 8. Gaffney did not withdraw, and Dorsey & Whitney continued to bill the Trust for his services. CP 404–12.

In September 2009, after examining voluminous Trust documents, Folawn concluded that Gaffney had negligently prepared the accounting—and that under Washington law Susan owed the Trust nothing, as she had an unqualified right to be supported in her "accustomed manner of living." CP 250, ¶¶ 9, 11. Meanwhile, Fred III, relying on Gaffney's accounting, had unilaterally frozen the Trust's assets and prohibited Susan from taking any disbursements. *See* CP 810 (Gaffney's accounting led to Fred III's suspension of distributions to Susan).

To resolve this dispute, Susan and the Trust were forced to file a declaratory judgment action against Fred III in Multnomah County, Oregon. CP 250, ¶¶ 10–11. This declaratory judgment action effectively asked the Multnomah County court to rule that Gaffney's legal advice had been incorrect, and that Susan was entitled to Trust payments sufficient to support her in "her accustomed manner of living." CP 293–94.

Despite being informed about the errors in his accounting, Gaffney continued to press his position that Susan owed the Trust a significant sum of money. A few months after the declaratory judgment action was filed, Gaffney drafted and signed a declaration on behalf of Fred III that was submitted as evidence in the litigation, to be used against Susan. Gaffney testified, in support of Fred III's position and against Susan's, that "it seemed reasonable that Susan would have to reimburse a significant amount to the Trust." CP 438, ¶ 17.

D. The court presiding over the Trust litigation rejects Gaffney's position, criticizes his work, and rules that Susan owes the Trust nothing.

After a bench trial, the Multnomah County court presiding over the declaratory judgment action issued a final judgment in July 2011. The court rejected Gaffney's position, finding that Susan "owes the trust nothing," because the Trust was intended to maintain the "accustomed manner of living" she had enjoyed in the years before Fred Jr.'s death. CP

807, 811. Susan, the court also found, 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 809. The court removed Fred III as co-trustee. CP 811.

In the course of the litigation, the Multnomah County court also expressed its disappointment in Gaffney, noting that his failures had led to the litigation between Susan and Fred III:

> I'm sorry to Ms. Paulsell and to Mr. Paulsell that you didn't get better lawyering for the proceedings years ago in this case, because I actually think that there's been remarkably bad supervision, remarkably bad supervision, with respect to the legal profession in 2002, 2003, 2004, and 2005, because *I don't think you would be here if you had a better—a better plan and some direction back then.*

CP 534 (emphasis added).

After its judgment, the court entered a postjudgment order on attorney fees and costs in October 2012. The court directed the Trust to reimburse all of Susan's litigation expenses. It directed Fred III, in turn, to reimburse the Trust for a portion of Susan's expenses. And it directed the Trust to reimburse Fred III for payments he had made to the accounting firm of Beagle Burke, which 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. Proceedings below

After the Multnomah County court's decision, Susan and her new co-trustee Connie Potter—a professional fiduciary—filed this action against Gaffney and his firm, Dorsey & Whitney. They assert claims for legal malpractice and breach of fiduciary duty. CP 33–34, ¶¶ 3.0–4.3. They seek an award of 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 moved for summary judgment, arguing mainly that the suit was barred by the ABC Rule. According to Defendants, Plaintiffs cannot recover the attorney fees incurred in litigation with Fred III, even if Defendants' negligence proximately caused those fees. Or, to put it in the language of the ABC Rule, when A (here, Defendants) commits legal malpractice against B (Susan), which then proximately causes B to incur attorney fees against C (Fred III), B can only recover those fees from A if C was not connected with the legal malpractice. Defendants argue that because Gaffney represented both Fred III and Susan at the time he committed his negligence, Fred III was connected with the legal malpractice. Hence, they argue, Plaintiffs cannot recover from Gaffney.

In response, Plaintiffs questioned whether the ABC Rule should continue to apply to legal malpractice actions that ask that attorney fees

incurred in another action be awarded as consequential damages. *See* CP 230–32. They noted that last year, in *LK Operating LLC v. Collection Group LLC*, 181 Wn.2d 117, 126, 330 P.3d 190 (2014), this Court had raised that very issue. Because the plaintiffs in LK Operating had not properly preserved that issue, however, the Court did not reach it. *Id.*

At the summary judgment hearing, the trial court appeared troubled by the ABC Rule. It "wonder[ed] whether . . . the ABC Rule has morphed into something that was not intended." Report of Proceedings ("RP") 10:13–15. It was particularly troubled by the ABC Rule's requirement that, in order for B to recover, C must have no connection to the wrong that A committed against B. "I understand that is the law," the trial court commented, "but I can't understand *why* it's the law." RP 30:2–4 (emphasis added). Nevertheless, the court concluded that it was bound by the ABC Rule, which compelled summary judgment in Defendants' favor. RP 34–35. The court granted Defendants summary judgment of dismissal and Plaintiffs filed a timely notice of appeal to this Court.

STANDARD OF REVIEW

"Appellate review of summary judgment determinations, including those made in the context of the ABC Rule, is de novo." *LK Operating*, 181 Wn.2d at 123. In reviewing a summary judgment order, this Court engages in the same inquiry as the trial court, considering the evidence in

the light most favorable to Plaintiffs and drawing all reasonable inference in their favor. *Miller v. Jacoby*, 145 Wn.2d 65, 71, 33 P.3d 68 (2001). A motion for summary judgment should be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 71–72. There is no genuine issue of material fact "only if, from all the evidence, reasonable persons could reach but one conclusion." *Id.* at 72 (citation and internal quotation marks omitted).

ARGUMENT

A valid claim for legal malpractice has four required elements: (1) an attorney-client relationship giving rise to a duty of care; (2) a breach of that duty; (3) damage to the client; and (4) proximate causation between the breach and the damage. *Hizey v. Carpenter*, 119 Wn.2d 251, 260–61, 830 P.2d 646 (1992). As this case comes to the Court, Defendants have not contested the first and second elements. Instead, they argue mainly that Plaintiffs have failed to prove the third element: damages. Under the ABC Rule, they say, Plaintiffs have no compensable damages.

In what follows, Plaintiffs first explain why the Court should reconsider the ABC Rule as it applies to legal malpractice claims. The ABC Rule should not be used to bar victims of legal malpractice from recovering damages that an attorney's negligence has proximately caused, even if those damages take the form of attorney fees incurred in a separate

litigation. And because Gaffney's negligence proximately caused Plaintiffs to incur attorney fees in a separate lawsuit, those fees should be compensable.

Plaintiffs then explain why, even if the ABC Rule is held to apply here, that Rule does not wholly bar their claims. Plaintiffs seek several kinds of damages that do not fall within the ABC Rule's prohibitions.

Finally, Plaintiffs turn to the two other arguments that Defendants raised below—estoppel and the statute of limitations—and show why those arguments are meritless.

I. The ABC Rule should not be used to bar Plaintiffs from recovering damages that Gaffney's negligence has proximately caused.

The ABC Rule provides that attorney fees incurred in litigation are compensable as consequential damages only if three elements are satisfied: (1) a wrong committed by A against B; (2) the wrong exposes or involves B in litigation with C; and (3) C "was not connected with the initial transaction or event . . . , viz., the wrongful act or omission of A toward B." *LK Operating*, 181 Wn.2d at 123 (citation and internal quotation marks omitted). Here, C's "connection" refers not to shared culpability in B's wrong against A, but to a factual connection of some kind with that wrong. *See id.* at 124. As explained below, the ABC Rule has no justification and should no longer be applied to legal malpractice.

A. The ABC Rule conflicts with normal principles of proximate causation, thereby carving out a special exception for negligent attorneys.

This Court has long held that injured clients are entitled to recover all damages proximately caused by an attorney's negligence. *See, e.g.*, *Hizey*, 119 Wn.2d at 260–61; *Bowman v. Doe*, 104 Wn.2d 181, 186, 704 P.2d 140 (1985). It reaffirmed this rule last year in *Schmidt v. Coogan*, 181 Wn.2d 661, 665, 335 P.3d 424 (2014). Indeed, the lead opinion in *Schmidt*—applying traditional tort standards—held that damages for emotional distress are available if they are a foreseeable result of an attorney's conduct. *See id.* at 672–74 (opinion of Wiggins, J.).

The ABC Rule, however, creates an exception to the usual rule that an injured client is entitled to foreseeable, proximately caused damages. Here, ample evidence establishes that the fees Plaintiffs incurred in the Multnomah County litigation flowed proximately from Gaffney's negligence. *See* CP 250–51, ¶¶ 11, 14; CP 244, ¶ 4; *see also infra* pp. 36–39. But because Fred III—the other litigant in the Multnomah County case—had some factual connection to Gaffney's negligent accounting, Plaintiffs are barred from recovery under the ABC Rule.

The ABC Rule thus carves out a special exception for attorneys from the rules that apply to other negligent professionals. Here, Susan was forced to hire new attorneys to contest, via litigation, the negligent legal

advice that Gaffney had provided. If the ABC Rule applies to Susan, however, Plaintiffs cannot recover the fees she paid those new attorneys, even though those fees were necessary to correct Gaffney's mistakes. Contrast this result with the rules that apply to other negligent professionals, who must pay their clients for the costs incurred in fixing the professionals' mistakes. Washington courts recognize, for example, that when a physician negligently leaves a foreign object in a patient's body, "the physician's negligence is the unequivocal proximate cause of some damage, including the additional surgical procedure" needed to remove the object. *Bauer v. White*, 95 Wn. App. 663, 669, 976 P.2d 664 (citation and internal quotation marks omitted). That damage is therefore compensable. *See id.* After all, "where malpractice results in an injury for which a physician is liable, the risk created includes that of additional medical treatment." *Lindquist v. Dengel*, 92 Wn.2d 257, 262, 595 P.2d 934 (1979). Similarly, when an accountant's negligence forces a client to go to another accountant, the expense of the second accountant is chargeable to the first. *See Sorenson v. Fio Rito*, 413 N.E.2d 47, 52 (Ill. App. Ct. 1980). "There is no basis in logic" for making attorneys an exception to this rule. *Id.*

B. The ABC Rule conflicts with the rule that damages should make the injured party whole.

The "guiding principle in tort law" is "to make the injured party as whole as possible through pecuniary compensation." *Schmidt*, 181 Wn.2d at 668 (citation and internal quotation marks omitted). This principle applies fully to those whom negligent attorneys have injured. *Shoemake ex rel. Guardian v. Ferrer*, 168 Wn.2d 193, 198, 225 P.3d 990 (2010).

This Court has recognized that attorney fees incurred "as a result of [an attorney's] negligence" must be taken into account to make an injured client whole. *Id.* at 201. In *Shoemake*, the 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. He contended that allowing the clients to keep this fee would give them a windfall. This Court rejected this argument because the attorney's preferred measure of damages did not leave his injured clients whole. The negligent attorney's preferred measure of damages, the Court stated, did not take into account the attorney fees the plaintiffs had to incur due to his negligence:

> The Shoemakes had to expend fees on a second lawyer in order to finish the job the first lawyer neglected to do. . . . Because the plaintiffs incurred fees in hiring a second attorney, [the Court's] approach compensates the plaintiffs

> for losses actually incurred as a result of [the attorney's] negligence. The award is compensatory and remedial . . . .

Id.

The ABC Rule conflicts with *Shoemake*. *Shoemake* recognizes that courts should take into account further attorney fees paid as a proximate result of an attorney's negligence. The ABC Rule, however, prevents Plaintiffs from recovering attorney fees paid as a proximate result of Gaffney's negligence.

Defendants have argued that *Shoemake* does not conflict with the ABC Rule. *Shoemake*, they say, "assumed that the clients would not recoup the second lawyer's fees as consequential damages." Answer to Statement of Grounds for Direct Review ("Answer to Statement") 10. At most, *Shoemake* assumed only that the clients *would* not recoup those fees as a matter of fact, not that they *could* not as a matter of law. In *Shoemake*, the injured clients chose not to seek compensation for the fee they paid the second attorney to pursue the settlement that the first attorney had neglected. The clients sought only "damages in the form of interest on the $100,000 payment" they would have received if the first attorney had not been negligent. *Shoemake ex rel. Guardian v. Ferrer*, 143 Wn. App. 819,

822, 182 P.3d 992 (2008), *aff'd*, 168 Wn.2d 193.[1] *Shoemake* therefore did not address whether the clients could have received direct compensation for the fees they paid the second attorney to do the job the first attorney neglected. Perhaps more fundamentally, Defendants overlook *Shoemake*'s larger point: In calculating legal-malpractice damages, courts must account for attorney fees that clients incur due to legal malpractice. In *Shoemake*, the clients were not seeking to directly recover the fees they paid to correct the negligent lawyer's error, so those fees were taken into account in another way. But *Shoemake* nowhere suggests that those fees cannot be taken into account directly.

C. The ABC Rule cannot be justified by relying on the American Rule.

Defendants say that the ABC Rule is just an application of the "American Rule," under which each party to a lawsuit bears "its own attorney fees and costs." *Cosmopolitan Eng'g Grp., Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 296, 149 P.3d 666 (2006); *see* Answer to Statement 5–6. Defendants misunderstand the American Rule, however. It does not provide that attorney fees, simply because they are attorney fees, are not recoverable as damages. Rather, the American Rule provides

[1] The Shoemakes unsuccessfully sought fees incurred in the malpractice proceeding itself—but they did not seek compensation for the fees they had paid their second lawyer to pursue the settlement that the negligent lawyer had neglected. *See Shoemake*, 143 Wn. App. at 823, 830–31.

that—absent a contract, a statute, or a recognized ground in equity—the prevailing party may not recover from the losing party the fees that it incurred in pursuing or defending the litigation in which it prevailed. The American Rule does not bar a party from recovering those fees in a *different* litigation from a *different* party who proximately caused the first litigation.

The proper scope of the American Rule is made clear by one of its principal justifications: "[S]ince 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). The American Rule, in other words, prevents the losing party to a lawsuit from having to pay the fees the prevailing party incurred in that lawsuit, because the losing party should not be punished merely for defending or prosecuting the lawsuit. So while the Rule allows compensation for the plaintiff's injury itself, it forbids incremental compensation for the cost of redressing that injury in court.

The American Rule says nothing, then, about the situation presented here, where Plaintiffs have incurred fees in an *earlier* lawsuit that Defendants caused but to which Defendants were not parties. In a case

like this, that earlier lawsuit *is* the injury. Forcing Defendants to pay fees incurred in that earlier lawsuit does not punish them for prosecuting or defending this present malpractice lawsuit. Rather, it is purely compensation for injury—i.e., compensation for the earlier lawsuit. Plaintiffs must still bear the cost of redressing that injury, since they must still bear the cost of this follow-on suit. *See Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 760, 162 P.3d 1153 (2007) (distinguishing between fees that "represent damages flowing from the [other party's] actions" and fees that constitute "costs incurred by [the plaintiff] as a result of maintaining its subsequent action" against the defendant). This result does not offend the American Rule.

The Ninth Circuit, applying Washington law, has recently come to this very conclusion about the limits of the American Rule. In *Microsoft Corp. v. Motorola, Inc.*, — F.3d —, 2015 WL 4568613 (9th Cir. July 30, 2015), Microsoft claimed that Motorola's filing of a separate lawsuit breached a contract between them. A jury agreed, and it awarded Microsoft damages to compensate it for the attorney fees it had incurred in that separate lawsuit. Motorola argued that this award violated the American Rule. The Ninth Circuit disagreed, holding that the American Rule barred only an award of "same-suit fees"—fees incurred in the same

litigation in which the fees are sought. *Id.* at *20. Motorola's argument, the court said, ignored

> a critical factor in determining the propriety of attorneys' fees in the damages award in this case. The fees at issue here were incurred not in the current breach of contract action but in defending against the injunctive action found to have breached the [contractual] agreement. *The fees sought are thus distinct from the same-suit fees generally banned by the American rule.* As losses independent of the current litigation and triggered by the contract-breaching conduct, they are best characterized as recoverable consequential contract damages . . . .

Id. (emphasis added). The Ninth Circuit recognized that the American Rule does not bar compensation for attorney fees simply because they are attorney fees. Instead, it bars compensation for attorney fees incurred in pursuing the same litigation in which a party is seeking compensation for the fees—i.e., "same-suit fees."

There is another reason that the American Rule does not bar recovery in a case like this. The American Rule prohibits the prevailing party from shifting its attorney fees to the losing party. The Rule is not implicated, however, if a client is allowed to recover fees that it incurred in litigation caused by an attorney's misconduct—for those fees may be recoverable even when the client is *not* the prevailing party in that litigation. *See Shammas v. Focarino*, 784 F.3d 219, 223–24 (4th Cir. 2015) (the American Rule was not implicated by a statute requiring a

trademark applicant to pay litigation expenses regardless of whether the applicant won or lost the case). Suppose, for example, that a lawyer, A, represents both parties to a contract, B and C, and tells them different things about what the contract means. B and C's conflicting understandings eventually give rise to a lawsuit, which B loses. A's misconduct caused the litigation, so under normal proximate-cause principles B could recover its attorney fees from A even though B lost the suit in which it incurred them.

In sum, as many other jurisdictions have concluded, it is simply false to claim that the American Rule forbids compensation for attorney fees incurred in a different litigation.[2]

D. The ABC Rule should be confined to the context where it first arose: contract cases in which a party is seeking same-suit fees.

While the current form of the ABC Rule cannot be justified by reference to the American Rule, the ABC Rule did *originate* in cases

[2] *See, e.g.*, *Baker v. Dorfman*, 239 F.3d 415, 426–27 (2d Cir. 2000) (applying New York law); *Shen v. Leo A. Daly Co.*, 222 F.3d 472, 479 (8th Cir. 2000) (applying Nebraska law); *Ex parte Burnham, Klinefelter, Halsey, Jones & Cater, P.C.*, 674 So. 2d 1287, 1290 (Ala. 1995); *Prentice v. N. Am. Title Guar. Corp.*, 381 P.2d 645, 647 (Cal. 1963); *Rocky Mountain Festivals, Inc. v. Parsons Corp.*, 242 P.3d 1067, 1071–72 (Colo. 2010); *Sorenson v. Fio Rito*, 413 N.E.2d 47, 51–52 (Ill. App. Ct. 1980); *Turner v. Zip Motors, Inc.*, 65 N.W.2d 427, 431–33 (Iowa 1954); *First Nat'l Bank of Clovis v. Diane, Inc.*, 698 P.2d 5, 12 (N.M. Ct. App. 1985); *S & D Mech. Contractors, Inc. v. Enting Water Conditioning Sys., Inc.*, 593 N.E.2d 354, 363 (Ohio Ct. App. 1991); *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 121 (Tex. 2009); *Hiss v. Friedberg*, 112 S.E.2d 871, 876–77 (Va. 1960).

where a party was seeking "same-suit" fees. *Microsoft*, 2015 WL 4568613, at *20. What is more, what eventually became the ABC Rule originated in a contract case, and was only later extended to torts. The Rule should be limited to its original context—the only context where the Rule makes sense. The ABC Rule should apply only if a party is seeking same-suit fees under a purely contractual cause of action.

The ABC Rule's origins lie principally in two cases: *Armstrong Construction Co. v. Thomson*, 64 Wn.2d 191, 390 P.2d 976 (1964), and *Manning v. Loidhamer*, 13 Wn. App. 766, 538 P.2d 136 (1975). Both of those cases involved what the Ninth Circuit in *Microsoft* called "same-suit fees"—that is, in both cases, parties had incurred fees in the same litigation in which they were seeking those fees. *See Armstrong*, 64 Wn.2d at 194 (describing the litigation's procedural history); *Manning*, 13 Wn. App. at 767 (same). Only in later cases was the ABC Rule applied to fees incurred in another, earlier action. *See LK Operating*, 181 Wn.2d at 121.

Just as importantly, *Armstrong* was a contract case, not a tort case. Landowners had entered into a three-party construction contract with an architect and a builder. The architect designed a house that did not comply with minimum setback requirements—which, in turn, led to litigation between the landowner and the builder. The builder joined the architect as a third-party defendant, and the landowners sought to recover from the

architect the attorney fees they had incurred in litigation against the builder. This Court, noting that "[s]ince pioneer days in this jurisdiction, attorney's fees have been left to the agreement of the parties," held that attorney fees are recoverable when the litigation "is brought or defended by third persons—that is, persons not privy to the contract, agreement or events through which the litigation arises." *Armstrong*, 64 Wn.2d at 195–96. But because "both the builder and the architect were privy to the construction contract," the builder could not be considered a third person, and fees were not recoverable. *Id.* at 196.

Armstrong did not state the ABC Rule in its current form. Instead, it seems to have laid down a rule of privity: a "third person" under *Armstrong* is simply a person who is not in privity with the other two parties. In the contractual context, this rule makes a great deal of sense. If A, B, and C all have a contractual arrangement with each other, that contract can provide for the award of fees if litigation ensues. If the contract does not provide for the award of fees, then awarding fees as a matter of equity, without accounting for what the contract did or did not provide, would interfere with private parties' freedom of contract. *See, e.g.*, *In re Estate of Bachmeier*, 147 Wn.2d 60, 68, 52 P.3d 22 (2002) ("Generally, courts function to enforce contracts as drafted by the parties and not to change the obligations of the contract the parties saw fit to

make."). Indeed, the *Armstrong* Court seems to have had these contractual concerns explicitly in mind, since it began its discussion by noting that "[s]ince pioneer days," attorney fees in Washington "have been left to the agreement of the parties." *Armstrong*, 64 Wn.2d at 195. The reasoning and rule of *Armstrong* suggest, then, that the Court was mostly concerned with contractual relationships, and was not thinking about the tort context.[3]

In 1974, however, the Court of Appeals in *Manning* first articulated the ABC Rule in its current form and applied it to torts. *See Manning*, 13 Wn. App. at 769. *Manning* recognized that it was extending *Armstrong* into a new context. *See id.* at 773 ("*Armstrong* involved a contract but the principle also applies to tort actions.").

Manning arose from an automobile crash. The plaintiffs brought both a claim of negligent highway design against the State and a simple claim of negligence against the other driver and his employer. At trial, the State was exonerated and the other defendants found liable. The State then asked that its co-defendants, United Transfer and Donald Kainz, be

[3] *Armstrong* suggested that its holding applied to both contract and tort claims. *See* 64 Wn.2d at 195 (asking whether architect was liable for attorney fees caused by "the architect's oversight, negligence, or breach of contract"). At the time, however, a landowner's claims for negligence or breach of contract against an architect were essentially coextensive under Washington law. The former "economic loss rule" would have barred the landowners in *Armstrong* from recovering anything more under a tort claim than they could have under their contract claim. *See Donatelli v. D.R. Strong Consulting Eng'rs, Inc.*, 179 Wn.2d 84, 95, 312 P.3d 620 (2013) (noting the limits that the former economic loss rule placed on recovery against a design professional).

ordered to pay the attorney fees the State had incurred in the litigation. Division One denied fees. It first noted that "no prior duty existed between United or Kainz to the State of Washington, nor did United or Kainz commit a wrong against the State." *Id.* at 772. It went on to say that the State was not owed attorney fees because "[a]ll defendants, including the State, were participants in the events which gave rise to the litigation." *Id.*

In *Manning*, the co-defendants' actions may have embroiled the State in litigation, but those actions did not breach any duty *to the State*. That fact by itself would have been sufficient to deny attorney fees, since without a duty and a breach thereof, there can be no compensable wrong. *See Transamerica Title Ins. Co. v. Johnson*, 103 Wn.2d 409, 413, 693 P.2d 697 (1985) (tort actions cannot be founded on a breach of duty owed to somebody else). The *Manning* court's other ground for denying fees—its extension of *Armstrong* into the tort context—was quite unnecessary. And the correctness of the *Manning*'s result on the facts of that case may have led the court into language whose consequences it did not fully envision.

In any event, *Manning* should not have extended *Armstrong* to torts. The *Manning* court itself advanced no reasoned justification for the ABC Rule's requirement that C not be "connected with" A's wrong against B. And one of *Manning*'s key authorities actually cuts against that requirement. Quoting *American Jurisprudence* at length, *Manning* said

that the "general rule" allowing for recovery of attorney fees as damages requires that "the dispute" be "with a third party—*not with the defendant*." *Manning*, 13 Wn. App. at 772 (emphasis added) (quoting 22 AM. JUR. 2D *Damages* § 166 (1965)). Thus, the general rule in other states requires only that C not be the same party as A.[4] There is no additional requirement that C not be "connected with" the wrong that A committed against B.[5] So *Manning* ignored the very general rule on which it purported to rely.

Notably, in the years since *Manning*, this Court has applied *Manning*'s ABC Rule only to cases involving contracts, rather than to breaches of an independently existing tort duty.[6] *See Barnett v. Buchan Baking Co.*, 108 Wn.2d 405, 738 P.2d 1056 (1987); *Haner v. Quincy Farm Chems., Inc.*, 97 Wn.2d 753, 694 P.2d 828 (1982). The contractual context is where the ABC Rule first arose, and where it should stay. The

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[4] This is the rule that *Choukas v. Severyns*, 3 Wn.2d 71, 99 P.2d 942 (1940) applied. There, a real estate owner had successfully brought a quiet-title action against judgment creditors and the sheriff who sought to enforce that judgment against the real estate. Then, in a second action, the real estate owner sued the sheriff for fees incurred in the earlier quiet-title action. The Court held that these fees could not be recovered because the first action was against "the sheriff himself." *Id.* at 82. *Manning* represented a departure from this earlier case law.

[5] *See, e.g.*, *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 128 Cal. Rptr. 901, 907 (Ct. App. 1976); *Dalo v. Kivitz*, 596 A.2d 35, 38 (D.C. 1991); *Rocky Mountain Festivals*, 242 P.3d at 1071; *Uyemura v. Wick*, 551 P.2d 171, 176 (Haw. 1976); *Hawkinson v. Bennett*, 962 P.2d 445, 454–57 (Kan. 1998); *Tetherow v. Wolfe*, 392 N.W.2d 374, 379 (Neb. 1986); *In re Estate of Lash*, 776 A.2d 765, 769 (N.J. 2001); *Pullman Standard, Inc. v. Abex Corp.*, 693 S.W.2d 336, 340 (Tenn. 1985); *Sundown, Inc. v. Pearson Real Estate Co.*, 8 P.3d 324, 333 (Wyo. 2000).

[6] The exception, of course, is *LK Operating*, which was decided under the express assumption that the ABC Rule applies to legal malpractice. *LK Operating*, 181 Wn.2d at 126.

Rule should apply only if A, B, and C were bound by a contract and A did not owe B an independent duty under tort law.

E. Even if the ABC Rule applies outside the contractual context, it should not apply to legal malpractice.

Even if the Court declines to limit the ABC Rule to contracts, the Rule should no longer apply to legal malpractice. This is true for four reasons.

First, as Plaintiffs have already noted, the ABC Rule gives negligent attorneys a special exception from the rules that apply to other negligent professionals. *See supra* pp. 15–16. Exempting attorneys from the rules that apply to other professionals can only undermine confidence in the legal system. Consistently with the Court's responsibility to regulate the bar for the protection of the public, *see Short v. Demopolis*, 103 Wn.2d 52, 62, 691 P.2d 163 (1984), this exemption should not be allowed to continue.

Second, the ABC Rule creates an anomaly even within the legal-malpractice context, because it treats attorney fees incurred in litigation differently from other kinds of attorney fees. The ABC Rule applies only when an attorney's negligence proximately caused a client to incur further attorney fees in litigation. *See Manning*, 13 Wn. App. at 769. Nothing in the Rule, however, precludes an award of attorney fees as damages when

those fees were *not* incurred in litigation—if, for example, they were incurred in hiring a second attorney to redraft a negligently drafted contract, or to perfect an unperfected security interest. It is anomalous to allow injured clients to recover transactional attorney fees but not litigation fees.

Third, the ABC Rule creates perverse consequences when it is applied to legal malpractice. To see why, contrast this case with *Flint v. Hart*, 82 Wn. App. 209, 917 P.2d 590 (1986), where a law firm failed to retain a security interest in the asset that a client sold to a third party. That failure involved the client in litigation with the third-party purchaser. Because the purchaser was held to be "not connected with" the law firm's malpractice, the client was allowed to pursue the law firm for the attorney fees incurred in litigation with the purchaser.[7] *Id.* at 224. In *Flint*, the law firm had only injured one client. Yet, in a situation like this one, where an

[7] Some of the language in *LK Operating* is arguably at odds with the result of *Flint*. In *LK Operating*, a lawyer, Powers, violated his duties by entering into a joint venture agreement with a client, Fair, and another client, LKO. Under the ABC Rule, Powers was A, Fair was B, and LKO was C. The Court stated that the ABC Rule barred an award of fees as consequential damages because, "[i]f the wrongful action was Powers entering the joint venture agreement without complying with former RPC 1.8(a), LKO was connected to that action as a participant in the joint venture agreement." *LK Operating*, 181 Wn.2d at 124. This language seems to suggest that if an attorney provides services to a client with respect to a deal, and that attorney's breach of duty embroils a client in litigation with a counterparty to that deal, then the counterparty is "connected with" the attorney's wrongdoing merely by being a counterparty. In *Flint*, a client was embroiled in litigation with a counterparty, but the Court of Appeals held that the ABC Rule permitted an award of fees as damages. *LK Operating*, however, did not disapprove *Flint*. The unresolved tension between *LK Operating* and *Flint* provides another reason for the Court to review this appeal directly. *See* RAP 4.2(a)(3).

attorney's negligence has embroiled *two* clients into litigation with each other, the ABC Rule precludes recovery. And it precludes recovery *precisely because* the attorney harmed two clients rather than just one. This result makes no sense at all. Recovery for injury is all the more important when negligence has harmed more than one person.

Fourth and last, the expansion of the ABC Rule to legal malpractice leaves Washington alone in the United States. As far as Plaintiffs have been able to determine, all other jurisdictions to address the issue allow wronged clients to recover attorney fees as consequential damages, without the limitations of the ABC Rule. *See* 3 RONALD E. MALLEN WITH MARTIN RHODES, LEGAL MALPRACTICE § 21:18 (2015). The only court that has gone the other way is the Seventh Circuit, which purported to apply Illinois law, *see Garris v. Schwartz*, 551 F.2d 156 (7th Cir. 1977)—only to see the Illinois courts reject its decision soon thereafter, *see Sorenson*, 413 N.E.2d at 52–53.

Defendants are wrong to claim that Washington is not alone in applying the ABC Rule to legal malpractice. To support this claim, Defendants have cited three cases. *See* Answer to Statement 13. In two of the cases they have cited, A breached an agreement with B, and A's breach then embroiled B in litigation with other parties to the very agreement that A breached. *See Wright v. Bhd. Bank & Trust Co.*, 782

P.2d 70, 75–76 (Kan. Ct. App. 1989); *Albright v. Fish*, 422 A.2d 250, 254–55 (Vt. 1980). These cases involved breaches of agreement to which A, B, and C were all parties—not breaches of an independent tort duty such as an attorney's duty of care toward a client. *See supra* pp. 25–29 (arguing that the ABC Rule should be retained in the contractual context). Defendants have also cited *Sindell v. Gibson, Dunn & Crutcher*, 63 Cal. Rptr. 2d 594 (Ct. App. 1997). This citation is puzzling. *Sindell* allowed a client to seek compensation for litigation expenses from an attorney, and did not adopt the ABC Rule. *Id.* at 602–03. To the contrary, California has allowed plaintiffs to recover damages from an attorney even where that would be prohibited by Washington's ABC Rule. *See Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 128 Cal. Rptr. 901, 906–07 (Ct. App. 1976) (where lawyers' negligent misrepresentations about their client embroiled the plaintiff in litigation with that client, the plaintiff could recover litigation expenses from the lawyers).

F. Defendants fail to justify the ABC Rule on other policy grounds.

Defendants have sought to justify the ABC Rule on policy grounds. For an injured party to recover fees as consequential damages, the ABC Rule requires that the third party against whom the injured party incurred those fees be factually disconnected from the wrong that the

injured party suffered. Defendants offer three justifications for this "disconnection" requirement. No Washington court has ever offered any of these justifications; Defendants' arguments are all *post hoc* rationalizations. More importantly, none of their arguments makes sense.

First, Defendants argue that the disconnection requirement makes sense "in cases involving joint tortfeasors," where A and B jointly harm C. Answer to Statement 8. The ABC Rule, say Defendants, ensures that C cannot sue A for damages and then sue B for fees. An injured party's claim against joint tortfeasors, however, is an "indivisible claim." RCW 4.22.040(1). Thus, in Defendants' hypothetical case, the American Rule would already bar C from recovering, from B, the fees that C incurred in litigating against A. That is because the claim on which C incurred attorney fees is the *same claim* on which—and therefore, in the eyes of the law, the same action in which—C now sues B. *See Microsoft*, 2015 WL 4568613, at *20 (recognizing that the American Rule forbids an award of "same-suit fees"). For the same reason, the rule against claim-splitting would also prevent these successive suits. *See Restatement (Second) of Judgments* §§ 18, 24 (1982). So Defendants' concern about follow-on fee litigation against joint tortfeasors is unfounded in more than one way.

Second, Defendants maintain that the ABC Rule's disconnection requirement avoids "circumvention and fee inflation" in contract cases

with interrelated parties and cross-claims. Answer to Statement 8. They give an example: Suppose that A, B, and C are all parties to a contract, and that A and B "aggressively litigate their cross-claims and then sue C for all fees incurred." *Id.* There are several problems with this hypothetical. Most fundamentally, it has nothing to do with this case, where Plaintiffs are asking the Court to modify the ABC Rule only as it relates to legal malpractice. What is more, there is good reason to retain the ABC Rule in contract cases—for if the parties' contract does not provide for attorney fees, there is no reason for a court to award them. *See supra* pp. 15–16. Nor can concerns about fee inflation justify the ABC Rule, at least as the Rule applies to legal malpractice. For if an attorney's negligence embroils a client in litigation, the client may recover only those fees that were *reasonably* incurred. Under the mitigation-of-damages doctrine, a party cannot recover for damages it could have avoided by reasonable efforts. *See, e.g.*, *Young v. Whidbey Island Bd. of Realtors*, 96 Wn.2d 729, 732, 638 P.2d 1235 (1982).[8] Proximate cause—on which Plaintiffs bear the burden of proof—also precludes recovery for inflated or unnecessary fees.

Finally, Defendants say that the ABC Rule prevents "the complication and expense of litigating" attorney-fee issues. Answer to

[8] *See also TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc.*, 134 Wn. App. 819, 826, 142 P.3d 209 (2006) (suggesting that mitigation of damages typically presents a jury question).

Statement 8. This concern cannot be enough to sustain the ABC Rule. If it were, Washington courts, at least in the absence of a contract or statute, would *never* allow parties to recover attorney fees. That is not the law. *See, e.g.*, *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 784, 275 P.3d 339 (summarizing noncontractual and nonstatutory grounds for award of fees).

In sum, two of Defendants' justifications for the ABC Rule collapse under scrutiny. And the third justification is not enough on its own to support the ABC Rule.

G. Stare decisis does not favor retaining the ABC Rule.

Because, as shown above, the ABC Rule is "incorrect and harmful," it should no longer be applied to legal malpractice claims. *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). Two factors make limiting the ABC Rule particularly appropriate.

First, "stare decisis protects reliance interests," *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 278, 208 P.3d 1092 (2009), and reliance interests in the ABC Rule's application to legal malpractice are unusually weak. It is not as if the Court has applied the ABC Rule to legal malpractice in a long and unbroken string of precedents. Instead, the first time this Court had *ever* applied the ABC Rule to legal malpractice was just last year in *LK Operating*. And it did so simply because the

appellants had failed to preserve any argument that the ABC Rule should be limited. *See LK Operating*, 181 Wn.2d at 126. The reliance interests in that decision, then, are at their nadir. *See State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997) (overruling *State v. Lucky*, 128 Wn.2d 727, 912 P.2d 483 (1996), issued a year earlier).

Second, stare decisis is strongest when it applies to a longstanding interpretation of a statute. *See City of Federal Way v. Koenig*, 167 Wn.2d 341, 351–52, 217 P.3d 1172 (2009) (Korsmo, J., concurring); *see also Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004). The reason for this "is clear. . . . Once a court has construed a statute, the legislative branch is free to clarify its intent by altering the statute if it sees fit. If it does not do so, then we presume the legislature is satisfied with the interpretation." *Koenig*, 167 Wn.2d at 352 (Korsmo, J., concurring) (citation omitted). The ABC Rule is not a statute. It is a judicially created rule that arose in contract law and was extended into torts. The judiciary possesses the power to alter it. It should exercise that power.

II. Gaffney's negligence proximately caused Plaintiffs to incur attorney fees.

If the Court modifies the ABC Rule so that it does not bar Plaintiffs from seeking all damages proximately incurred as a result of Gaffney's negligence, the only question that remains is whether the

attorney fees incurred in the prior litigation flowed proximately from Gaffney's negligence. That is an easy question to answer: Plaintiffs have at least raised a triable issue of fact on proximate cause. The evidence on proximate cause comes from four main sources: from the Multnomah County court, from the attorney whom Susan hired to remedy Gaffney's negligence, from Susan's new co-trustee, and even from Gaffney himself.

The Multnomah County court stated more than once that Gaffney's negligence led proximately to the litigation before it. At a hearing, it stated that if Fred III and Susan had received competent advice on the Trust, the litigation would not have occurred: "I don't think you would be here if you had a better—a better plan and some direction back then." CP 534. Then, in its written judgment, the court stated that Fred's freezing of Trust assets—the event that immediately preceded the litigation—would not have happened without Gaffney's faulty accounting. Fred's action, it said, was "based upon the ill will generated by this faulty reconciliation." CP 810. Most fundamentally, the court believed that the misunderstandings caused by Gaffney's faulty interpretation of his own Trust agreement was what caused the litigation. *See* CP 808.

The testimony of John Folawn—one of the attorneys who represented Susan in the Multnomah County litigation—also supports proximate cause. Folawn has testified that Gaffney, in the months leading

up to the litigation, "was adamant that Susan needed to pay to the trust the millions of dollars stated in the reconciliation" and that "she needed to significantly curtail spending," CP 249, ¶ 7—precisely the position that Fred III took in litigation and the Multnomah County court rejected. *See* CP 681–85. Folawn concluded that Gaffney "had taken Fred III's side in contravention of . . . Washington trust law." CP 249, ¶ 8. Folawn's testimony suggests that the positions Fred III took before and during litigation came directly from Gaffney. Without Gaffney's negligence, Fred III would not have taken those positions.

Plaintiff Connie Potter, a professional fiduciary and a co-trustee of the Trust, has similarly testified that Gaffney's litigation proximately caused the Multnomah County litigation. That litigation, she has averred, "arose from the flawed and wrong Trust accounting done by the defendants." CP 244. If the accounting had been done correctly, the litigation would not have occurred. CP 244.

Even if one disregards all of this evidence and believes that Gaffney did not cause the litigation, Gaffney's own words would still show that he unnecessarily *prolonged* the litigation by clinging to his own negligence. In December 2009—about three months into litigation that would last well into 2012—Gaffney submitted a declaration to the Multnomah County court. Far from retreating from his negligent

accounting, he embraced it, stating that "it seemed reasonable that Susan would have to reimburse a significant amount to the Trust." CP 438, ¶ 17. If Gaffney had retreated from his negligent accounting and unsupported interpretation of the Trust, Fred III would have had nothing to stand on. Without the support he received from Gaffney, it seems extraordinarily unlikely that Fred III would have continued to litigate the matter.

III. Even if the ABC Rule applies to Plaintiffs' claims, it does not bar all of the relief they seek.

Even if the Court declines to modify the ABC Rule as it applies to legal malpractice actions, that Rule does not bar all of the damages that Plaintiffs seek. This is true in three ways. First, Plaintiffs ask that Defendants, because of their breach of ethical duties, be ordered to disgorge their own fees. This remedy does not fall inside the ABC Rule's ambit. Second, Plaintiffs ask that Defendants reimburse them for non-attorney-fee items. This remedy, too, is not barred by the ABC Rule. Third, the ABC Rule bars a plaintiff from recovering for its own attorney fees. It does not forbid recovery to a plaintiff who was forced to reimburse the fees of *others*. The ABC Rule, therefore, does not prevent Plaintiffs from seeking damages for the reimbursement of others' fees.

A. Because Gaffney breached his ethical duties to Susan, Susan may seek disgorgement of his fees.

This Court has recognized that when attorneys breach their ethical duties, the courts may order them to disgorge their fees. *Eriks v. Denver*, 118 Wn.2d 451, 462–63, 824 P.2d 1207 (1992). Because Gaffney breached his ethical duties to Susan, she may ask the trial court to order Gaffney to give back the fees he charged.

Gaffney violated RPC 1.7, which prohibits a lawyer from representing a client "if the representation involves a concurrent conflict of interest." A concurrent conflict of interest exists, if, among other things, there is a significant risk that a lawyer's representation of one client will be materially limited by his responsibilities to another. RPC 1.7(a)(2).

Gaffney's representation of both Susan and Fred III constituted a concurrent conflict of interest, because Gaffney's responsibilities to Fred III materially limited his representation of Susan's interests. In 1987, Fred Jr. had created a living trust in which he placed certain property for the sole benefit of Fred III and Fred III's siblings. *See* CP 91–98. The simple will that Fred Jr. executed in 2002, however, stated that Susan " is to inherit *all* my material possessions[,] including all properties, stocks, furnishings, cars, etc." CP 100 (emphasis added). Questions about whether the 2002 will was valid, and about its scope, created a conflict of interest

between Fred III and Susan. *See* CP 251, ¶ 15. If the will was valid and superseded the living trust, Fred III would be eliminated as a primary beneficiary of Fred Jr.'s estate. If, on the other hand, the will was not valid or did not supersede the living trust, Susan's assets would be diminished.

Gaffney did not disclose this conflict of interest to either Fred III or Susan before drafting the new Trust agreement in 2002. Indeed, before Susan signed the Trust agreement, an associate of Gaffney's had opined that Fred Jr.'s will was valid—a fact that Gaffney did not disclose to Susan. CP 251, ¶¶ 15–16. The closest Gaffney ever came to disclosing the conflict of interest came in an elliptical paragraph that he buried in a nine-page letter addressed to Susan and Fred III. That paragraph did not concern the Trust agreement itself, let alone the entire representation of Susan and Fred III—instead, it stated only that the question of repaying Fred Jr.'s creditors from the estate might pose "something of a conflict of interest issue," but that the conflict was not "insurmountable." CP 313. Plaintiffs' expert witness has testified that Gaffney failed to properly disclose the conflict of interest. CP 251, ¶ 16.

Gaffney also violated his ethical duty to investigate and then disclose relevant law and facts to Susan. *See* RPC 1.4(a)(3), (b) (duty to keep client "reasonably informed about the status of the matter," and to "explain a matter to the extent reasonably necessary to permit the client to

make informed decisions"); *Burien Motors, Inc. v. Balch*, 9 Wn. App. 573, 577, 513 P.2d 582 (1973) (attorney has a duty to investigate the applicable law and facts and "disclose the results to his clients"). Before Susan signed the Trust agreement Gaffney drafted, Gaffney had advised her that the agreement was necessary to qualify for the federal estate tax's marital deduction. CP 248, ¶ 3. Gaffney also believed that there might be questions about the validity of Fred Jr.'s will. *See* CP 308. By December 2002, though, Gaffney had learned that (1) Fred Jr.'s will was valid, and thus the Trust agreement was not necessary to bypass possible questions about its validity; and (2) Fred Jr.'s bequest to Susan would qualify for the marital tax deduction without the need for the Trust agreement. CP 308, 320. Gaffney told Susan none of this. By failing to tell Susan, Plaintiffs' expert has testified, Gaffney breached his duty of disclosure. CP 251, ¶ 16.

As Gaffney breached his ethical duties to Susan, he is subject to fee disgorgement. *See* 6 WASHINGTON PRACTICE, WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 107.10 cmt. (6th ed. 2013) ("A client whose attorney has breached a fiduciary duty may be entitled to disgorgement of attorney fees, even in the absence of proof of proximate cause and damages."). At the very least, therefore, the trial court erred by dismissing Plaintiffs' claims in their entirety.

B. Because the need for a new accounting flowed directly from Gaffney's negligence, Plaintiffs may recover the cost of that accounting.

After the Multnomah County litigation began, both sides agreed that a new accounting was appropriate, and jointly retained the accounting firm Beagle Burke to perform that accounting. *See* CP 719, 783. The Trust bore the cost of retaining Beagle Burke. CP 244. These fees resulted from Susan and Fred III's agreement to conduct a new accounting. They were not the mere product of litigation. They therefore do not fall within the ABC Rule. And because the need to perform a new accounting resulted directly from Gaffney's negligent accounting, the trial court should have allowed Plaintiffs to seek reimbursement of the accounting fees from Gaffney.

C. The ABC Rule allows Plaintiffs to recover the fees and costs that the Trust paid to the children and to Fred III.

The American Rule—the Rule of which the ABC Rule is supposedly an extension—provides that a party to a litigation must normally bear "*its own* attorney fees and costs." *Cosmopolitan Eng'g*, 159 Wn.2d at 296 (emphasis added). Here, however, the Multnomah County court ordered the Trust to cover fees and costs incurred by Fred Jr.'s children, by Susan's children, and even certain fees and costs incurred by Fred III. CP 243. As a mere matter of logic, therefore, the ABC Rule

cannot prevent Plaintiffs for recovering for these reimbursements, because they were not Plaintiffs' own attorneys' fees and costs.

Armstrong, for example, involved a tripartite contract among a construction company, architect, and the landowners. The construction company foreclosed a lien against landowners and was awarded $250 in attorney fees. *Armstrong*, 64 Wn.2d at 194. The injured landowners sought to recover from the architects both that $250 and the attorneys' fees they had paid their own attorneys in that foreclosure action. The trial court had awarded them the $250 only. While *Armstrong* did not allow them to recover their own attorney fees, it did not suggest that the trial court's $250 award was erroneous. Quite the opposite, in fact: In reaching its result, the court thought it "should make it clear" that the trial court had awarded the homeowners $250 for the fees they had to pay the construction company. *Id.* at 195. *Armstrong* indicates that the ABC Rule does not cover attorney fees paid to another party in the earlier litigation.[9]

[9]While *Barnett v. Buchan Baking Co.*, 108 Wn.2d 405, 738 P.2d 1056 (1987)'s discussion of the ABC Rule does not explicitly distinguish between an award of a party's own attorney fees and an award to reimburse a party for having to pay another party's attorney fees, the distinction between those two different kinds of awards was not raised in that case. Because that distinction was not raised or argued, *Barnett* does not control. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994); *see also Kucera v. State, Dep't of Transp.*, 140 Wn.2d 200, 220, 995 P.2d 63 (2000); *In re Elec. Lightwave, Inc.*, 123 Wn.2d 530, 541, 869 P.2d 1045 (1994).

IV. Estoppel does not bar Plaintiffs' claims.

Before the trial court, Defendants insisted that collateral and judicial estoppel barred Plaintiffs claims. They do not.

Defendants say that collateral estoppel precludes Plaintiffs from asserting that Defendants proximately caused them to incur litigation expenses. CP 67–68. For this argument to succeed, Defendants must prove four things: (1) the proximate-cause issue was actually raised and decided in the Multnomah County action, and is identical to the issue presented here; (2) the earlier action resulted in a final judgment on the merits; (3) Plaintiffs were parties, or in privity with parties, in the earlier action; and (4) precluding relitigation of the issue will not work an injustice against Plaintiffs. *Clark v. Baines*, 150 Wn.2d 905, 913, 84 P.3d 245 (2004).

Defendants cannot satisfy the first element of issue preclusion because the issues actually raised and decided in the Multnomah County action were different. The issue here is whether—under Washington's law of legal malpractice and fiduciary duty—Defendants proximately caused the Plaintiffs' damages. The issues raised and decided by the Multnomah County court were which parties should bear the litigation expenses under Or. Rev. Stat. § 130.815, and how much of those expenses they should bear. In deciding that question, the Multnomah County court had what it called "a tremendous amount of discretion." CP 800, ¶ 2. That

extraordinarily vague legal standard did not make it necessary for the court to decide whether Defendants proximately caused Plaintiffs to incur litigation expenses. *See, e.g.*, *Brownfield v. City of Yakima*, 178 Wn. App. 850, 872, 316 P.3d 520 (2014) (collateral estoppel does not apply when legal standards are different). Nor, for that matter, did the Multnomah County court hint that Defendants did *not* proximately cause Plaintiffs to incur litigation expenses. *See* CP 800–03. Indeed, the Multnomah County court explicitly stated that it would *not* decide "legal malpractice issues presented by some of the events and documents in evidence in this case"—issues that necessarily include the issue of proximate causation. CP 808 n.1. Because proximate cause was not actually raised and necessarily decided, collateral estoppel does not apply here. *See, e.g.*, *Seattle-First Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 228, 588 P.2d 725 (1978).

Defendants also say that judicial estoppel bars Plaintiffs' assertions of proximate cause because, in the Multnomah County action, Susan argued that Fred III was responsible for the litigation. Judicial estoppel is designed to prevent parties from taking a position in one proceeding and then taking a directly conflicting position in another proceeding. Courts consider three factors in deciding whether to apply judicial estoppel: (1) whether a party's later position is "clearly inconsistent" with its earlier

position; (2) whether accepting an inconsistent position in the later proceeding "would create the perception that either the first or the second court was misled"; and (3) whether accepting the inconsistent position would confer an unfair advantage on the asserting party or impose an unfair detriment on the other party. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538–39, 160 P.3d 13 (2007) (citations and internal quotation marks omitted).

Susan has not taken clearly inconsistent positions in the two actions. In the Multnomah County action, Susan never claimed that Fred III alone caused the litigation. Indeed, she stated unequivocally that the "lawsuit started because Gaffney's 'reconciliation' negligently concluded Susan owed the Trust over $3 million." CP 761 (quoting an earlier filing in the case). To say that Fred III was involved in bringing about the litigation as a concurring cause is not to say that Defendants did not proximately cause the litigation. *See State v. Jacobsen*, 74 Wn.2d 36, 37–38, 442 P.2d 629 (1968).

A finding of proximate cause in this action, moreover, would not create the perception that any court was misled. As explained above, the Multnomah County court did not find, and did not have to find, either Fred III alone was responsible for the litigation, or that Defendants did *not* proximately cause the litigation. A finding of proximate cause here,

therefore, will create no perception that the Multnomah County court was misled. Defendants' invocation of judicial estoppel lacks merit.

V. The statute of limitations does not bar Plaintiffs' claims.

Defendants have also argued that Plaintiffs' claims are time-barred insofar as they seek relief for Gaffney's actions in 2002.[10] The relevant statute of limitations here is three years, *see Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 659, 37 P.3d 309 (2001); *Meryhew v. Gillingham*, 77 Wn. App. 752, 755–56, 893 P.2d 692 (1995), but it was tolled under the continuous-representation rule. That rule tolls the statute of limitations until an attorney stops representing a client in the same matter in which he committed malpractice. *Janicki*, 109 Wn. App. at 661. Here, Gaffney was told in July 2009 to withdraw from representing Susan, CP 249, ¶ 8, although he continued to bill her through October 2009, CP 406. Because this action was filed in March 2012, it is timely. CP 1.

Defendants, however, claim that because Gaffney represented Susan in two different matters, the continuous-representation rule is not satisfied. The first matter, they say, involved Fred Jr.'s estate, while the second matter involved the Trust created in 2002. CP 72.

[10] Defendants do not argue that the statute of limitations bars Plaintiffs' claims insofar as they seek relief for Gaffney's other actions. CP 551.

This artificial distinction between the estate and the Trust should be rejected. Gaffney drafted the Trust agreement as part of the services he provided to Susan in the aftermath of Fred Jr.'s death. The agreement represented itself as carrying out Fred Jr.'s testamentary intent: "the parties believe that the Decedent intended to leave all of his assets . . . in trust for Susan B. Paulsell for her lifetime, with all assets remaining at her death to be distributed in equal shares among [the children]." CP 105, ¶ 5. Gaffney also advised Susan that the agreement was necessary to qualify for the marital tax deduction. CP 164. Gaffney's work on the Trust was just an extension of his work on Fred Jr.'s estate.

Washington case law suggests that Gaffney's work on the Trust and his work on the estate are one matter, not two matters. In *Burns v. McClinton*, 135 Wn. App. 285, 298, 143 P.3d 630 (2006), the Court of Appeals cited *Ackerman v. Price Waterhouse*, 683 N.Y.S.2d 179 (App. Div. 1998) to explain what "one matter" means under the continuous-representation rule. In *Ackerman*, "the client alleged that an accounting firm had repeatedly used an improper accounting method." *Burns*, 135 Wn. App. at 298. The IRS audited the client, and "the firm agreed to serve the client through the audit process," the result of which was unfavorable. *Id. Ackerman* treated the use of the accounting method *and* the involvement in the audit as one continuous representation. *See Ackerman*,

683 N.Y.S.2d at 197. The audit was a natural extension of the accounting services that the firm had provided, so the continuous-representation rule was satisfied. The same is true here, because Gaffney's work on the Trust was a natural extension of his work on the estate.

At the very least, whether Gaffney represented Susan in one matter or two presents a fact question that cannot be decided on summary judgment. *See Hipple v. McFadden*, 161 Wn. App. 550, 558, 255 P.3d 730 ("As there is no bright-line rule for determining when representation ends, particular circumstances most often present an issue of fact.").

CONCLUSION

The judgment of the trial court should be reversed and Plaintiffs' claims remanded for trial.

RESPECTFULLY SUBMITTED this 7th of August, 2015.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on August 7, 2015, I caused a true and correct copy of the foregoing APPELLANTS' OPENING BRIEF to be served on the following via email, pursuant to RAP 18.5(a) and CR 5(b)(7):

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