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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.

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Other Cases

Other Authorities

ARGUMENT IN REPLY

I. The American Rule does not apply where a party is seeking expenses it incurred in separate litigation against a third party.

The facts of this case would justify a jury in inferring that Defendant attorney Gaffney wrongfully determined that his client, Plaintiff Susan Paulsell, owed the Trust millions of dollars, Br. of Appellants 8, and then testified against her and in favor of her adversary to that effect, *id*. at 9. The natural—arguably the inevitable—result was that she would have to pay attorneys to correct Gaffney's erroneous advice. If she establishes that Gaffney's advice was negligent, then "[t]he guiding principle of tort law" requires her to be made "as whole as possible." *Shoemake ex rel. Guardian v. Ferrer*, 168 Wn.2d 193, 198, 225 P.3d 990 (2010) (citation and internal quotation marks omitted).

Rather than deal with the conflict between this guiding principle and the ABC Rule, Defendants simply argue that the American Rule bars recovery here. None of Defendants' cases support this argument. At most, Defendants' cases establish that if Susan sued Fred III a second time and sought the expenses she had incurred against him in the Multnomah County litigation, she could not recover them. Here, however, Plaintiffs are not seeking expenses from any party to the Multnomah litigation. For while Defendants proximately caused that litigation to occur, they were not parties to it.

A. Defendants fail to address the conflict between the ABC Rule and the reasoning of Shoemake.

Under the reasoning of *Shoemake*, Plaintiffs should be allowed to recover their earlier attorney fees as damages. There, the Court 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. 168 Wn.2d at 201. In calculating the clients' damages, *Shoemake* intended to compensate the injured clients 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. Like the plaintiffs in *Shoemake*, Plaintiffs here ask that their damages include the expenses they incurred, in a separate litigation, to cover the cost of correcting their first attorney's negligent work.

Shoemake flatly rejected the argument that the American Rule could bar recovery for the foreseeable consequences of attorney negligence. It favorably quoted the Court of Appeals:

> 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.

Id. at 200–01 (quoting *Shoemake v. Ferrer*, 143 Wn. App. 819, 829, 182 P.3d 992 (2008)). This 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 combat Gaffney's erroneous conclusion—including, as proved necessary, through litigation.

The ABC Rule's current formulation as applied by the trial court conflicts with the reasoning of *Shoemake*. The ABC Rule bars recovery of the attorney fees that Susan incurred to fix Gaffney's error because she incurred them in litigation with Fred III, who was "connected with" the "initial transaction or event." *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 117, 123, 330 P.3d 190 (2014) (citation and internal quotation marks omitted). *Shoemake*, however, took those corrective attorney fees into account in calculating damages. *Shoemake* shows that, at least in legal malpractice cases, the Court should jettison the ABC Rule's expansively vague "connected with" standard. The Court should return to the traditional rule under which fees were recoverable as consequential damages if they were "incurred in an action" with "a party other than the one whose original wrongful act caused the litigation." *Choukas v. Severyns*, 3 Wn.2d 71, 84, 99 P.2d 942 (1940). That standard is met here.

B. Defendants' misunderstanding of the American Rule finds no support in this Court's precedent.

To support their overbroad understanding of the American Rule, Defendants rely on *Lovell v. House of the Good Shepherd*, 14 Wash. 211, 44 P. 253 (1896), but distort its holding. There, the plaintiffs were seeking to recover fees from the very party against whom they had incurred those fees. The *Lovell* Court stated that it would not "allow a party who successfully brings an action for the recovery of a legal right to bring a subsequent action to recover the expenses incident to the first case." *Id.* at 214. This statement appears to be based on the prohibition against claim splitting, and not on the American Rule.[1] But whatever its basis, *Lovell* holds at most that plaintiffs cannot simply use a second lawsuit to recover fees from the *same party* that they sued or were sued by in the first suit. That holding does not apply here, since Plaintiffs are not seeking recovery of their expenses from any party to the Multnomah litigation.

Defendants also put misplaced reliance on *LK Operating*. That decision's brief allusion to the American Rule, *see* 181 Wn.2d at 123,

[1] This, in turn, shows that Defendants are wrong to assert that the American Rule cannot be confined to same-suit fees because "any litigant . . . could always file separate actions to circumvent the American Rule." Br. of Resp'ts 14. As *Lovell* shows, the prohibition against claim-splitting *already* prevents litigants from filing a follow-on suit to collect expenses incurred in an earlier action against the same party. *Cf. Sprague v. Adams*, 139 Wash. 510, 515, 247 P. 960 (1926); *Landry v. Luscher*, 95 Wash. App. 779, 782–83, 976 P.2d 1274 (1999).

did not specify the relationship between the American Rule and the ABC Rule. In any event, the allusion was pure dictum. It was not necessary to decide the case, because the foundations of the ABC Rule were not at issue. The parties had proceeded on the assumption that the ABC Rule applied. Indeed, 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."). Thus, the case was decided on the express assumption that the ABC Rule should apply to legal malpractice actions. *Id.* at 126. That is precisely the assumption that Plaintiffs now ask the Court to reconsider.

As additional support, Defendants note that, under this Court's decisions, the American Rule prohibits the recovery of attorney fees as either costs or damages. Br. of Resp'ts 13 (citing *City of Seattle v. McCready*, 131 Wn.2d 266, 273–75, 931 P.2d 156 (1997)). That observation is true but irrelevant. The American Rule, *when it applies*, prohibits the recovery of attorney fees as damages. Here, however, the American Rule does not apply, because Plaintiffs are seeking fees they incurred in separate litigation against a different party.

If this Court's precedents on the American Rule really held what Defendants claim they do, it seems unlikely that a unanimous Ninth Circuit panel, aided by briefing from some of the most distinguished

attorneys in the nation, would have issued *Microsoft Corp. v. Motorola, Inc.*, which held that the American Rule in Washington applies only to "same-suit fees." 795 F.3d 1024, 1049 (9th Cir. 2015). Defendants try to distinguish *Microsoft* on a number of unavailing grounds. Br. of Resp'ts 16–17. They say it involved a contract claim, but that is irrelevant, since the contract there had no provision for attorney fees. *Microsoft*, 795 F.3d at 1049. Defendants cite a federal statute that allows attorney fees in patent suits—but the court noted that Microsoft had "identified no statutory basis for fees." *Id.* Defendants also note that the court supported its ruling with analogies from other legal contexts, but that hurts their argument. The Ninth Circuit found analogies in cases where a wrong is especially likely to lead to litigation, or where litigation expenses are a fair measure of a victim's injury. *See id.* at 1050–51. Both of those conditions are true in a legal malpractice case like this one: Gaffney's negligence was especially likely to lead to collateral litigation to clear up his error, and the necessity for that litigation *was* the injury he caused.

Defendants hint that *Microsoft* may have gotten Washington law wrong. But Defendants ignore the Washington case law that directly supports the Ninth Circuit's decision. *Thomas v. Gaertner* drew precisely the same distinction between same-suit fees and "attorney fees in a previous action," and held that the American Rule applies to the former

but not the latter. 56 Wn. App. 635, 640, 784 P.2d 575 (1990). In any event, Defendants' quarrel with *Microsoft* provides another reason for the Court to grant direct review of this action and clarify Washington law.

II. As Defendants concede, the policies behind the American Rule do not squarely apply here, where Plaintiffs ask a negligent attorney to compensate them for expenses they incurred in separate litigation against a third party.

One of the main policies "[i]n support of the American Rule" is that "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). Defendants concede that this policy does not apply here. Br. of Resp'ts 12. Because Plaintiffs seek expenses incurred in *separate* litigation, not in this litigation, recovery of those expenses does not penalize Defendants merely for defending themselves in this lawsuit.

Because the rationale for the American Rule does not squarely apply here, the full form of the American Rule should not apply either. To put it in Defendants' words, this case presents circumstances in which "the reasons for the American Rule have the least force," and "the equities favoring" an award of fees "are at their greatest." *Id.* at 33. Thus, even if the ABC Rule *did* flow from the American Rule (which it does not), precedent, logic, and equity weigh against applying the ABC Rule to clients whom a negligent attorney has embroiled in separate litigation with

a third party. These considerations are strengthened by the shaky foundations of the ABC Rule's "disconnection" requirement, which makes little sense in *any* tort case, let alone this one.

Precedent already weighs against applying the ABC Rule to legal malpractice. 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. 168 Wn.2d 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. *See supra* pp. 2–3.

Besides precedent, considerations of reason and equity also favor recovery. Two considerations bear particular mention. *See also* Br. of Appellants 29–31. First, an attorney's error about a legal matter is especially likely to embroil a client in litigation. *See* 3 RONALD E. MALLEN WITH ALLISON MARTIN RHODES, LEGAL MALPRACTICE § 21:12 (2015) (noting that collateral litigation is a "frequent result" of negligent legal advice). In many cases—for example, when the injured client has prevailed in the prior litigation—the expenses incurred in that litigation

may be nearly the only damages. *Id.* Thus, legal malpractice is akin to other contexts where Washington has allowed the recovery of litigation expenses as damages because those expenses *are* the harm the defendant has caused. *See Microsoft*, 795 F.3d at 1050–51.

Second, excluding Plaintiffs' Multnomah County litigation expenses treats Gaffney differently from other negligent professionals. Br. of Appellants 15–16. The clients of those professionals, after all, may recover the cost of hiring another professional to correct the negligent professional's mistakes. *Id.* at 16.

Defendants claim, however, that plaintiffs in *any* professional malpractice suit may not recover a second professional's expenses, so long as those expenses are incurred as part of litigation. Br. of Resp'ts 30. But the case they cite, *Fiorito v. Goerig*, 27 Wn.2d 615, 179 P.2d 316 (1947), does not stand for that proposition. *Fiorito* did not allow the recovery of accountant fees, but it was not an accountant malpractice lawsuit. It was a suit amongst joint venturers in construction.

Defendants also cite *Kelly v. Foster*, 62 Wn. App. 150, 153–55, 813 P.2d 598 (1991) and *Burns v. McClinton*, 135 Wn. App. 285, 291–92, 143 P.3d 630 (2006), to argue that "[r]egardless of the type of professional, . . . successful plaintiffs do not recover their attorney fees." Br. of Resp'ts 29. But the fees in *Kelly* and *Burns* were same-suit fees—

fees incurred in the professional malpractice action itself.[2] Plaintiffs do not argue that prevailing parties are entitled to attorney fees incurred in a professional malpractice action itself, and are not asking to recover those fees here.

The shaky foundations of the ABC Rule's "disconnection requirement" provide an independent reason not to apply that requirement to legal malpractice. As Plaintiffs have noted, the Rule arose in the contract context, and makes sense only there. *See* Br. of Appellants 24–26 (discussing *Armstrong Constr. Co. v. Thomson*, 64 Wn.2d 191, 390 P.2d 976 (1964)). While Defendants insist that *Armstrong* concerned both tort and contract damages, they do not deny that the former economic-loss rule confined the *Armstrong* plaintiffs to contract damages. Br. of Resp'ts 35. Because *Armstrong*'s facts dealt solely with damages available under a contract rather than damages available to tort victims, its holding is necessarily limited to those facts. *See In re Estate of Burns*, 131 Wn.2d 104, 113, 928 P.2d 1094 (1997) ("general statements" are limited to "the facts and issues of that particular case").

Defendants restate the same policy arguments to try to support the

[2] This is also true of *Schmidt v. Coogan* (cited by Br. of Resp'ts 28–29), which denied same-suit fees only. *See* 181 Wn.2d 661, 679, 335 P.3d 424 (2014) ("[T]he winning party in a malpractice action ordinarily cannot recover its attorney fees and other expenses *in the malpractice action itself* . . . ." (emphasis added, citation omitted)).

ABC Rule's disconnection requirement. Br. of Resp'ts 32–33. They again insist that the disconnection requirement prevents a plaintiff from suing one joint tortfeasor for damages, and then filing a separate suit for fees against another joint tortfeasor. Even if Defendants were right, this would not justify the scope of the ABC Rule's disconnection requirement, since that requirement extends far beyond joint tortfeasors and encompasses anyone with a factual connection to the initial wrong. This case illustrates that point: Fred III and Defendant Gaffney were not joint tortfeasors, but the current form of the ABC Rule would still bar recovery here. At any rate, Defendants' concern about serial lawsuits is misplaced. As Plaintiffs have pointed out, the law considers a claim against joint tortfeasors to be indivisible, which has consequences far beyond actions for contribution. Because the claim is indivisible, the second suit for fees is the same suit as the first—which means that the American Rule prevents an award of fees in that second suit. Res judicata also comes into play, with its prohibition against claim-splitting barring a second suit as well. Br. of Appellants 33.

Next, Defendants argue that the ABC Rule's disconnection requirement prevents recovery whenever the litigation that the tortfeasor has caused involves cross-claims. Br. of Resp'ts 32. Even if this argument correctly described the ABC Rule, it is not clear what it would prove. If Defendants' argument is meant to show that the ABC Rule prevents a

tortfeasor from being held responsible for complex litigation that he has proximately caused, that is a strike *against* the Rule. *See* Br. of Appellants 30–31. The more harm a tortfeasor has caused, the greater the need to hold him responsible. If, by contrast, the argument is meant to show that the ABC Rule prevents litigants from shifting inflated fees to someone else, that argument is deeply misguided. The mitigation-of-damages doctrine and proximate-cause rules already prevent tortfeasors from bearing another's inflated fees. *Id.* at 34.

Defendants attempt to respond to this point by suggesting that the ABC Rule's disconnection requirement cuts down on *any* litigation over fees. As Plaintiffs have pointed out, that concern cannot be enough to justify the disconnection requirement. *Id.* at 34–35.

Defendants suggest, however, that fee litigation may be especially "protracted" and the equities "less favorable" where the parties in the underlying litigation are "interrelated." Br. of Resp'ts 33. Defendants provide no reasoning to support this conclusory assertion, and—as Plaintiffs have observed—precedent, logic, and equity all decisively favor recovery here. *See supra* pp. 7–10; Br. of Appellants 29–31.

III. Precedent from other jurisdictions supports the recovery of litigation expenses in these circumstances.

In light of the American Rule's dubious applicability to fees

incurred in separate litigation and the strong considerations favoring recovery here, all jurisdictions to squarely address the issue have allowed injured clients to recover litigation expenses that a negligent attorney has proximately caused. Defendants do not really argue otherwise. Instead, their appeal to case law from other jurisdictions mischaracterizes that case law and dwells on irrelevancies.

Defendants cite out-of-state case law for four propositions. First, they argue that other states have held that the American Rule applies even when fees were incurred in earlier litigation. Br. of Resp'ts 15–16. In part, this claim is just wrong. The highest courts of Maryland and Texas have explicitly stated that the American Rule does not apply when fees were incurred in separate litigation.[3] More importantly, Defendants do not mention that several of the jurisdictions they cite allow the recovery of attorney fees incurred in earlier litigation without any of the restrictions of the ABC Rule.[4] Whether this is phrased as an exception to the American

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[3] *Collier v. MD-Individual Practice Ass'n, Inc.*, 607 A.2d 537, 542 (Md. 1992) (distinguishing between the American Rule and a separate rule that allows recovery of attorney fees incurred in "collateral litigation"); *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 121 (Tex. 2009) ("The situation before us does not involve the American Rule that prevails in Texas. NDR does not seek to recover attorney's fees for prosecuting its malpractice suit against Akin Gump. It seeks damages measured by the economic harm it suffered from Akin Gump's breach of its duty of care in prosecuting the Panda suit.")

[4] *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 128 Cal. Rptr. 901, 906–07 (Ct. App. 1976); *Noell v. City of Carrollton*, 431 S.W.3d 682, 715–16 (Tex. App. 2014); *S. Sanpitch Co. v. Pack*, 765 P.2d 1279, 1282 (Utah Ct. App. 1988).

Rule or otherwise, these jurisdictions have held that the American Rule presents no bar to recovery of attorney fees in cases such as this.

Second, Defendants wrongly say that Utah allows litigants to recover fees from earlier litigation only in contract actions and not in tort. Br. of Resp'ts 27–28. In Utah, "when the natural consequence of *one's negligence* is another's involvement in a dispute with a third party, attorney fees reasonably incurred in resolving the dispute are recoverable from the negligent party as an element of damages." *S. Sanpitch Co. v. Pack*, 765 P.2d 1279, 1282 (Utah Ct. App. 1988) (emphasis added). Defendants cite *McQueen v. Jordan Pines Townhomes Owners Ass'n*, but that case merely holds that attorney fees from earlier litigation are recoverable only when there was no intervening break in the chain of causation. 298 P.3d 666, 675 (Utah Ct. App. 2013).

Third, Defendants maintain that Kansas and Vermont have adopted the ABC Rule's disconnection requirement. This claim is also wrong. To the contrary, the supreme courts of both states have allowed the recovery of attorney fees where Washington's ABC Rule would forbid it. In *Hawkinson v. Bennett*, 962 P.2d 445 (Kan. 1998), a franchisee sued another franchisee for causing the first franchisee to have to litigate against the franchisor. The plaintiff franchisee sought the attorney fees it incurred in the earlier litigation. Even though all three parties were

interrelated and the franchisor was connected with the defendant's wrong, *see id.* at 452–53, the Kansas Supreme Court allowed the recovery of attorney fees, *see id.* at 456. Likewise, in *Bourne v. Lajoie*, 540 A.2d 359 (Vt. 1987), an attorney negligently prepared a deed conveying his client's real estate to a third party. This negligence embroiled the client in a deed-reformation action with that third party. Even though that third party was inextricably linked with the negligence, the Vermont Supreme Court held that the client could recover "the fees and expenses she incurred in bringing the reformation action." *Id.* at 364; *see also id.* at 364 n.3.

Fourth and last, Defendants say that one jurisdiction, Arkansas, has flatly banned the recovery of fees from earlier litigation, and that four more have made recovery available only in extraordinary circumstances or where the plaintiff is totally faultless. Br. of Resp'ts 27–28. This last claim is wrong as it concerns Arizona and Utah. Arizona does not require defendants to have acted egregiously before awarding fees incurred in earlier litigation against a different party.[5] Nor does Utah require the plaintiff to be faultless; it simply requires the defendant's wrong to have

[5] *See Collins v. First Fin. Servs., Inc.*, 815 P.2d 411, 413–15 (Ariz. Ct. App. 1991) (allowing the plaintiffs to recover fees incurred in a separate action against a third party because the fees were incurred as a proximate result of the defendant's tort, and articulating no requirement of egregious conduct). The case Defendants cite, *Taylor v. Southern Pacific Transportation Co.*, 637 P.2d 726, 733 (Ariz. 1981) concerned an award of sanctions, not an award of attorney fees incurred in an earlier action.

proximately caused the earlier litigation. *McQueen*, 298 P.3d at 675. More fundamentally, none of the cases Defendants cite has squarely confronted the question here: whether an injured client who incurs expenses in an earlier litigation because of an attorney's negligence may recover those expenses as damages in a legal malpractice action. As Plaintiffs have pointed out, no court to squarely confront that question has agreed with the position that Defendants ask the Court to adopt. Br. of Appellants 31; *see also* 3 MALLEN, *supra*, § 21:18 (citing cases).

IV. Defendants' request for a novel "sole-cause" requirement should be rejected because it has no basis in this Court's precedents and conflicts with normal tort-law principles.

Defendants argue that the ABC Rule bars recovery for another reason: the Rule supposedly requires an injured plaintiff to show that the defendant was the "sole cause" of the earlier litigation for which the plaintiff seeks compensation. Br. of Resp'ts 22.

Defendants cite no case from this Court that has ever applied a sole-cause standard as part of the ABC Rule. To the contrary, this Court has applied the normal causation standard.[6] Defendants are thus left to cite a Court of Appeals case, *Tradewell Group, Inc. v. Mavis*, 71 Wn. App.

[6] *See LK Operating*, 181 Wn.2d at 123 ("such act or omission exposes or involves B . . . in litigation with C" (citation and internal quotation marks omitted)); *Armstrong*, 64 Wn.2d at 196 (damages available where litigation was "the natural and proximate consequence[] of a wrongful act" (citation omitted)).

120, 127–28, 857 P.2d 1053 (1993) (cited by Br. of Resp'ts 22). But *Tradewell* and the two cases it cited for its sole-cause standard involved contracts and were not pure tort cases. As Plaintiffs have noted, the ABC Rule first arose—and may make sense—in contract actions, and that is where the Court of Appeals' sole-cause standard should also stay. Br. of Appellants 25–26. More importantly, *Tradewell* does not bind this Court, so Defendants' reliance on it is misplaced. *See LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 92, 331 P.3d 1147 (2014) ("We do not need to address, analyze, approve of, or disapprove of *In re Corporate Dissolution of Ocean Shores Park, Inc. Ocean Shores* is a Court of Appeals opinion not binding on this court . . . ." (citation omitted)).[7]

Defendants' plea for a sole-cause standard also shows how far Defendants would like to depart from normal tort law. It is a basic rule of tort law that the proximate-cause standard is met where the defendant's negligence is "*a* cause" of the injury complained of, as "[t]here may be more than one proximate cause of an [injury]." 6 WASHINGTON PRACTICE, WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 15.01.01 (emphasis added); *see also, e.g.*, *Doyle v. Nor-West Pac. Co.*, 23 Wn. App. 1, 6, 594 P.2d 938 (1979). Nor do injured parties need to show that they were

[7] Defendants now clarify that their estoppel argument is based entirely on the premise that the ABC Rule has a sole-cause requirement. Br. of Resp'ts 24. Because the Rule lacks a sole-cause requirement, Defendants' estoppel argument must fail.

completely blameless, since "innocence is not a precondition to asserting a tort claim" in a comparative-fault jurisdiction such as Washington. *Stout v. Warren*, 176 Wn.2d 263, 279, 290 P.3d 972 (2012). Concurring causes or comparative fault may reduce recovery, but they do not bar it wholly.

Defendants claim, however, that because the ABC Rule is an equitable exception, equity's clean-hands doctrine requires the plaintiff to be totally free from fault. Br. of Resp'ts 23. But the clean-hands doctrine requires a high level of culpability before barring recovery: "deceit, false representations, or dishonest behavior," or some other form of bad faith. *J.L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wn.2d 45, 75, 113 P.2d 845 (1941). Defendants do not accuse Plaintiffs of this kind of culpability, nor could they. *See* CP 709 ("Nothing about the evidence in this case . . . indicates that Susan was intentionally deceptive or . . . hid[] the income or distributions."). The clean-hands doctrine also requires that the plaintiff have practiced "[f]raud or inequity" against the *defendant*, and not some other person. *McKelvie v. Hackney*, 58 Wn.2d 23, 32, 360 P.2d 746 (1961). Here, Defendants point to no way in which Susan wronged Gaffney. The clean-hands doctrine does not bar recovery here.

V. Allowing Plaintiffs to recover damages is consistent with this Court's judicial role.

Defendants argue that the ABC Rule should not be modified

because only the Legislature may create exceptions to the American Rule. Br. of Resp'ts 30–31, 36–37. But Defendants incorrectly assume that the American Rule applies here at all. It does not apply here.

Defendants also forget that the ABC Rule is itself a creature of the Court's common-law powers. *See Armstrong*, 64 Wn.2d at 195–96. As such, this Court can modify it. Because "[t]he common law is free standing," the Court does not surrender its own inherent power to modify the common law "absent clear legislative intent." *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 283, 358 P.3d 1139 (2015). The Legislature has never spoken to the ABC Rule in legislation, so the Court remains free to modify it. *See Senear v. Daily Journal-Am.*, 97 Wn.2d 148, 152, 641 P.2d 1180 (1982) ("Where a case is not governed by statute law, . . . it is an appropriate occasion for this court to apply the common law to determine the outcome of the case.").[8]

[8] To argue that this Court may not modify the ABC Rule, Defendants rely on inapposite precedents. In one case, the Court declined to award attorney fees to an employer who had successfully challenged an award of unemployment benefits. *Pa. Life Ins. Co. v. Emp't Sec. Dep't*, 97 Wn.2d 412, 645 P.2d 693 (1982) (cited by Br. of Resp'ts 30–31). The Court rejected the employer's reliance on a statute, *id.* at 414, and held that no other basis for attorney fees existed because rights and remedies under the unemployment compensation act were "founded upon statute, not upon the common law." *Id.* at 415. Plaintiffs, by contrast, pursue a common-law claim and ask the Court to modify a common-law doctrine. In *Blue Sky Advocates v. State*, the Court rejected the private-attorney-general doctrine, declining to strike out on its own without any basis in precedent or traditional equitable doctrines. 107 Wn.2d 112, 121–22, 727 P.2d 644 (1986) (cited by Br. of Resp'ts 31). Here, Plaintiffs simply ask the Court to apply precedents such as *Shoemake* and to modify a traditional equitable doctrine.

Counterintuitively, Defendants argue that the Legislature has endorsed the ABC Rule by not addressing it. Br. of Resp'ts 31, 37. But no precedent holds that legislative *inaction* may place a common-law rule beyond the Court's power to change. Precedent instead holds that the Court has the power to modify the common law if, as here, the Legislature has not enshrined it in legislation. *See Senear*, 97 Wn.2d at 152.

VI. Susan Paulsell's conduct in the Multnomah County litigation was measured and responsible.

Defendants try to shift the blame by accusing Susan of wrongdoing in the Multnomah County litigation. They accuse her of "improper and overly litigious conduct" and "aggressive[]" litigation. Br. of Resp'ts 1, 32. These accusations lack any basis in the record. The Multnomah court found that "Susan consistently made reasonable overtures to attempt a less costly resolution . . . . Her consistent efforts to minimize continued litigation were precisely in line with . . . her duties as a trustee . . . ." CP 801–02. Her "fees and costs" were "reasonable in all respects." *Id.* at 802. Moreover, by successfully seeking reimbursement from Fred III in that litigation, CP 802–03, she mitigated damages—thus benefiting Gaffney.

VII. Because Gaffney breached his ethical duties, Plaintiffs may seek disgorgement of his fees.

Even if the ABC Rule barred Plaintiffs from recovering other

damages, they may still recover the fees paid to Gaffney. Contrary to what Defendants argue, Plaintiffs are not raising this disgorgement claim for the first time on appeal. Their amended complaint alleged that Defendants had violated the rules against conflicts of interest, CP 34, ¶¶ 4.0–4.2, and requested disgorgement as a remedy, CP 35. Plaintiffs also addressed disgorgement in their summary-judgment response. First, they accurately stated that Defendants had not included disgorgement in their motion. Second, they explicitly argued that disgorgement fell outside the ABC Rule and was justified by Defendants' "breach of ethical duties." CP 234 (quoting *Eriks v. Denver*, 118 Wn.2d 451, 462–63, 824 P.2d 1207 (1992)). Because "the issue [was] advanced below and the trial court ha[d] an opportunity to consider and rule on relevant authority," Plaintiffs have preserved the disgorgement issue. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 291, 840 P.2d 860 (1992).

Defendants next argue that Plaintiffs have waived disgorgement on appeal. Br. of Resp'ts 40. This argument also lacks merit. They cite no precedent holding that a Plaintiff waives an argument by failing to include it in a fifteen-page Statement of Grounds for Direct Review. Recent cases, moreover, show that it is the *briefs* on appeal, not the Statement of

Grounds, that are intended to present the issues for appellate review.[9]

The disgorgement claim is also timely, because Gaffney continuously represented Susan on one matter from 2002 to 2009. The work that Gaffney did before the 2008 reconciliation cannot be meaningfully separated from the reconciliation itself. Gaffney advised Susan and Fred III on the amount of Trust assets Susan could use for her "general living expenses." CP 169. He opined on trust administration. CP 169. Most telling of all, he told Susan and Fred III that "a reconciliation will have to occur" and that it might be "possible . . . that Susan should repay the trust for any over-distribution of living expenses." CP 169. The reconciliation that Gaffney performed in 2008 was part of the same work that Gaffney had been performing since he created the Trust in 2002. While he may have "opened a new matter number," Br. of Resp'ts 42, that cannot be dispositive, since it would allow canny attorneys to easily avoid the continuous-representation rule.

Finally, Defendants argue that Plaintiffs, as Trustees, lack standing to seek disgorgement. But the record shows that even in 2002—when

[9] For example, in *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 327 P.3d 614 (2014), the appellant's Statement of Grounds included no reference to the trial court's exclusion of certain evidence. *See* Statement of Grounds, *Wilkinson*, 180 Wn.2d 241 (No. 86870-1), 2012 WL 6827447. Appellant's opening brief presented that issue for review, however, *see* Br. of Appellant, *Wilkinson*, 180 Wn.2d 241 (No. 86870-1), 2012 WL 6827439, and this Court ruled on it, *see Wilkinson*, 180 Wn.2d at 259.

Gaffney was representing Susan after her husband's death—Gaffney's fees were paid out of Trust assets. Gaffney noted in a November 18, 2002 letter that his fees would be "deductible on the Federal Estate Tax Return or the estate's income tax return"—indicating that his fees would be paid out of estate assets. CP 318. And the estate *was* the Trust: the Trust Agreement provided that all estate assets would be included in the Trust, CP 105, effective from the date of Fred Jr.'s death, *see* CP 148 (Trust is dated October 22, 2002). Thus, Gaffney's fees were paid out of the Trust. And because his fees were paid out of the Trust, it is Plaintiffs as Trustees that have standing to seek disgorgement of those fees. *See, e.g., Eichner v. Cahill*, 11 Wn.2d 108, 110, 118 P.2d 419 (1941).

VIII. Plaintiffs may recover other litigation expenses.

Plaintiffs seek the fees and costs that the Trust paid to the children and to Fred III in the Multnomah County litigation. Br. of Appellants 43–44. They also seek the accounting fees they paid. *Id.* at 43.

Defendants maintain that the American Rule prohibits the recovery of the fees and costs paid to the children and to Fred III, citing *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 728 P.2d 597 (1986). But as the Court of Appeals later pointed out in *Thomas v. Gaertner*, 56 Wn. App. 635, 638, 784 P.2d 575 (1990), *Interlake Porsche* merely holds that the ABC Rule is *irrelevant* when a plaintiff seeks the fees and

costs it was forced to pay another party in separate litigation. In *Thomas*, the Court of Appeals held that nothing—neither the ABC Rule nor the American Rule—precluded recovery of the fees and costs that a wronged plaintiff was required to pay a third party in earlier litigation. *See id.* at 640–41. Plaintiffs may pursue Defendants for the fees and costs the Trust was required to pay other parties to the Multnomah County litigation.

Defendants also assert that Plaintiffs may not recover the cost of the new accounting that Gaffney's misfeasance necessitated. For this proposition, they rely on *Wagner v. Foote*, 128 Wn.2d 408, 416–17, 908 P.2d 884 (1996), but that case was about same-suit accounting fees.

IX. It is Defendants' burden to apportion damages, not Plaintiffs'.

Defendants argue that Plaintiffs' claims should be dismissed because they failed to "segregate" damages. This argument misstates the law. If Defendants want to apportion damages to Fred III—a third party—then it is their burden to do so. *Cox v. Spangler*, 141 Wn.2d 431, 442–44, 5 P.3d 1265 (2000). If Defendants want to reduce their amount of liability by attributing a degree of fault to Susan herself, that too is their burden. *Godfrey v. State*, 84 Wn.2d 959, 965, 530 P.2d 630 (1975).[10] Furthermore,

[10] To counter these uncontroversial propositions, Defendants rely on inapposite case law. *See* Br. of Resp'ts 46–48. *Wappenstein v. Schrepel*, 19 Wn.2d 371, 374, 142 P.2d 897 (1943), simply involved a failure of proof, since the plaintiff had submitted no evidence showing that the accident with the defendant had caused certain of her medical

recovery is permitted when the fact of damages can be shown even if the amount of damages may be difficult to measure. *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 717, 845 P.2d 987 (1993).

In the only example they give of Plaintiffs' supposed failure to segregate, Defendants say that Plaintiffs seek the fees Gaffney collected for a non-negligent house sale. Br. of Resp'ts 48. But Plaintiffs seek those fees not in their negligence claim, but in their claim for disgorgement.

CONCLUSION

The Court has suggested that it would be open to reconsidering whether the ABC Rule should apply to legal malpractice. *LK Operating*, 181 Wn.2d at 126. The Court should now rein in a doctrine that has created a conflict within the reasoning of this Court's precedents. The Court should resolve that conflict by giving Plaintiffs an opportunity to prove that Gaffney's legal negligence proximately caused their damages, including the legal expenses they incurred in the Multnomah litigation. The trial court should be reversed and Plaintiffs' claims remanded for trial.

RESPECTFULLY SUBMITTED this 7th of December, 2015.

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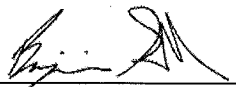
conditions. *Hufford v. Cicovich*, 47 Wn.2d 905, 909–10, 290 P.2d 709 (1955), involved a similar failure to proof. Here, by contrast, Plaintiffs have submitted plenty of evidence that Gaffney's negligence led proximately to the litigation. Br. of Appellants 36–39. *Scott v. Rainbow Ambulance Service, Inc.*, 75 Wn.2d 494, 452 P.2d 220 (1969) required damages segregation because it involved two different accidents—one caused by the plaintiff—whereas any fault by Susan is intimately tied up in Gaffney's negligent 2008 reconciliation, which led to the Multnomah County litigation. Finally, *Maas v. Perkins*, 42 Wn.2d 38, 253 P.2d 427 (1953) has been superseded by *Cox*, 141 Wn.2d at 442–44.

KELLER ROHRBACK L.L.P.

By 

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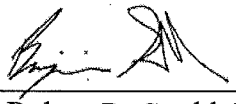
By 

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CERTIFICATE OF SERVICE

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

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