No. 96759-8

SUPREME COURT OF THE STATE OF WASHINGTON

BADGLEY MULLINS TURNER, PLLC, a Washington Professional Limited Liability Company f/n/a BADGLEY MULLINS LAW GROUP, PLLC, and DUNCAN C. TURNER,

Petitioners,

v.

LESLIE BLAKEY SPENCER, an individual, and TAMMY S. BLAKEY, an individual,

Respondents.

BMT AND TURNER'S ANSWER TO PETITION FOR REVIEW

Christopher W. Nicoll, WSBA No. 20771
Noah S. Jaffe, WSBA No. 43454
Nicoll Black & Feig PLLC
1325 Fourth Avenue, Suite 1650
Seattle, WA 98101
Telephone: (206) 838-7555
Facsimile: (206) 838-7515
Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

RULES

WASHINGTON STATUTES

I. INTRODUCTION

The parties are in apparent agreement that the malpractice trial that unfolded at the trial court was replete with reversible error. This case is unusual, insofar as both parties now simultaneously seek review of the Court of Appeals decision, which simply affirmed all aspects of the trial court's rulings in the malpractice trial below. But the two petitions for review are not created equal. Leslie and Tammy simply fail to specify how or why their petition satisfies the criteria for review under RAP 13.4(b), save one sweeping, unsupported and summary allegation in their conclusion that *each* of the four criteria has somehow been met. Leslie and Tammy's petition is without merit, particularly in the absence of any asserted bases, or even meaningful argument that review is merited under RAP 13.4(b).

Badgley Mullins Turner, PLLC ("BMT") and Duncan Turner's petition, by contrast, focuses predominantly and directly on the trial court's concerning decision to submit an unpublished appellate opinion as evidence to the jury, in direct contravention of clear law established in this Court's opinion in *In re Det. Of Pouncy*, 168 Wn.2d 382, 229 P.3d 678 (2010).[1] This Court should deny Leslie and Tammy's petition and reject their alleged bases for review, and should grant BMT and Turner's petition.

---

[1] In the event that review is granted on BMT and Turner's petition and the issues raised therein are deemed to constitute reversible error, all of the issues raised in Leslie and Tammy's petition would be obviated and moot.

II. COUNTERSTATEMENT OF THE CASE

BMT and Turner adopt by reference the Statement of the Case from their briefing to the Court of Appeals as well as from their parallel petition for review to this Court.

Additionally, it bears pointing out that Leslie and Tammy's statement of the case frequently strays from a fact-based and citation-supported recitation, into argument, speculation, mischaracterization, or even invective.

For example, their petition bewilderingly asserts, without support, that Turner committed an "*intentional* breach of the applicable standard of care" and thereby committed "*intentional* misconduct." Leslie and Tammy's Petition, 6-7 (emphasis in original). Yet the Court of Appeals easily rejected this characterization when Leslie and Tammy made it below, as "lack[ing] any merit." *Spencer v. Badgley Mullins Turner, PLLC*, No. 76835-2-I, 2018 Wash. App. LEXIS 2552, at *33, fn. 13 (Wn. App. Div. 1 Nov. 13, 2018) (hereafter, the "Opinion"). The Court of Appeals noted, most obviously, that Leslie and Tammy's original malpractice claim did not even allege intentional tort, but simply alleged negligence. *Id*. And the Court of Appeals affirmed—as supported by substantial evidence—the trial court's findings that: "Mr. Turner made a judgment decision about the best way to handle the Paul Neir declaration in light of the very limited time available in which to act, unanswered questions, and tax liabilities[;] [and] that Mr. Turner's judgment was within the range of reasonable alternatives, and not negligent, and thus,

there was no breach of fiduciary duty by defendants." Opinion at *42-43. Their contention now that Turner and BMT committed *intentional* misconduct, despite the Court of Appeals' rejection of that very characterization, and despite omitting such allegations from their complaint, is misleading and wrong.

Leslie and Tammy's statement of the case also flatly accuses Turner of lying, based on his deposition testimony—some three years after the events in question—where he stated that he could not remember whether he had prepared a declaration for Paul Neir and/or submitted it to the court, and that he (erroneously) believed he had filed the declaration with the trial court. Leslie and Tammy's Petition, 4-5. In fact, while Turner stopped short of filing the Neir declaration, he had sent it to opposing counsel, who did not raise any objection to its inclusion at the hearing or to reliance on Neir's funds as part of the effort to match. And evidence of Neir's funds was presented to the court through Leslie's own declaration and as part of an Exhibit summarizing the relevant assets, all of which the court considered as part of its ruling. CP 115, 122, 147, 256. Indeed, the Court of Appeals explicitly concluded that "there is substantial evidence supporting the finding that Judge Yu did not exclude the statement in Leslie's declaration regarding Neir's funds." Opinion, at *38. Leslie and Tammy's characterization of Turner as having *lied* is needlessly inflammatory and unsupported by the record.

In other instances, Leslie and Tammy's statement of the case contains errors that are less incendiary and more casual, but nonetheless

equally misleading. For example, they state that "Turner *knew* that Leslie needed to use her fiancé Paul Neir's [accounts] to prove her actual ability to match the Manson offer." Leslie and Tammy's Petition, at 2 (emphasis added). In actuality, Turner did not—and could not possibly—know exactly what would be required to persuade a reasonable judge of the match, though the evidence plainly reflects his belief and his hope that a match could be proved even without Neir's funds. CP 147, 256; *see, also,* Opinion, at *5-6. But more than this, the Court of Appeals explicitly determined that evidence of Neir's assets was, in fact, unnecessary, and that Leslie and Tammy—and therefore, Turner—had actually presented enough evidence to prove a match even *without* Neir's funds. Opinion at *18. Turner couldn't have known that the Neir declaration was necessary to support a match, when the Court of Appeals reached the opposite conclusion. Leslie and Tammy's characterization is misleading and incorrect.

This Court should rely on the facts as the Court of Appeals and BMT and Turner have presented them, rather than on the misleading and one-sided summary that Leslie and Tammy have presented in their petition.

III. ARGUMENT WHY REVIEW OF LESLIE AND TAMMY'S PETITION SHOULD NOT BE ACCEPTED

A. Leslie and Tammy's petition fails to raise any argument for review under the criteria set forth in RAP 13.4(b)(1), (3) or (4).

Under RAP 13.4(b), a petition for review will be accepted only under the following circumstances:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Leslie and Tammy's petition cites to this rule only once in passing, in their conclusion section, stating broadly without support or argument that "each of the considerations set forth in RAP 13.4" apply. Leslie and Tammy's Petition, 18. In actuality, the remainder of their petition is largely unconcerned with the criteria governing this Court's acceptance of review, opting instead to simply reargue the merits of the issues they raised and failed to prevail on before the Court of Appeals.

RAP 13.4(c)(7) requires that parties make a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b), with argument." This Court should deny Leslie and Tammy's petition for review, on the basis that it fails to comply with that requirement of RAP 13.4(c). *See State v. Korum*, 157 Wn.2d 614, 623-25, 141 P.3d 13 (2006) (where this Court declined to consider issues not properly raised as required under RAP 13.4(c)(5)).

Even if the Court does attempt to match Leslie and Tammy's arguments with the four criteria under RAP 13.4(b), despite their own

petition's failure to do so, it is apparent that none of their arguments or alleged errors fit under three of the four bases. In other words, Leslie and Tammy's petition simply contains no argument that the Court of Appeals' decision: poses a significant question of law under the Constitution (13.4(b)(3)); involves an issue of substantial public interest (13.4(b)(4)); or that the decision is in conflict with a decision of this Court (13.4(b)(1)). Indeed, the only argument in their petition which appears to satisfy any of the RAP 13.4(b) criteria is their assertion that the "Court of Appeals' ruling is in direct conflict with *Gunn v. Riely*, 185 Wn. App. 517, 529, 344 P.3d 1225 (2015)[.]" Leslie and Tammy's Petition, at 9. That assertion is part of Leslie and Tammy's first issue presented for review, and their broader argument that the jury's award should not have been reduced for contributory negligence, because that affirmative defense was allegedly waived by Turner and BMT. Leslie and Tammy's Petition, at 7-8.

B. The Court of Appeals' Opinion does not conflict with *Gunn v. Riely* or any other appellate decisions addressing waiver of defenses.

Leslie and Tammy point to *Gunn* for its general proposition that "affirmative defenses [like contributory negligence] are waived unless they are pleaded or tried with the parties' express or implied consent. A defendant may also waive an affirmative defense 'if the defendant's assertion of the defense is inconsistent with the defendant's previous behavior.'" *Gunn*, 185 Wn. App. at 529 (citations omitted); see also, CR 8(c) (requiring parties to plead the affirmative defense of contributory

negligence). Here, BMT and Turner did not plead contributory negligence as an affirmative defense in their answer, and first gave notice of their intent to present this defense in the proposed jury instructions, submitted one week before trial. Opinion, at *33.

Leslie and Tammy's argument that the Opinion in this case is in conflict with *Gunn*, however, is incorrect and belied by the exception that the *Gunn* decision itself explicitly set forth: that even if such a defense is not pleaded, it may be tried with the parties' express or implied consent. 185 Wn. App. at 529. In this case, the Court of Appeals cited to and relied upon this very exception: "Our Supreme Court has recognized, however, that the [pleading] requirement is not absolute." Opinion, at *33 (citing *Mahoney v. Tingley*, 85 Wn.2d 95, 100, 529 P.2d 1068 (1975); *Henderson v. Tyrrell*, 80 Wn. App. 592, 624, 910 P.2d 522 (1996)). The Court of Appeals went on: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." *Id*. (citing CR 15(c) and *Bernsen v. Big Bend Elec. Coop., Inc.*, 68 Wn. App. 427, 433-34, 842 P.2d 1047 (1993)).

Here, the Court of Appeals correctly noted that Turner and BMT had effectively raised the argument as early as summary judgment, when they contended, as an alternative argument, that "Leslie and Tammy had caused their own loss because of decisions they made to rely on loans to fund the purchase." See Opinion, at *34. The Court of Appeals also noted that Turner had "argued below that whether the sisters had delayed

unreasonably in seeking cash for the deal had implicitly been tried by both parties." *Id*. Accordingly, the Court of Appeals agreed that Leslie and Tammy were prepared to address, and did address, the question of contributory negligence at trial; and the issue was therefore tried with the consent of the parties. *Id*. The decision that Leslie and Tammy protest—to allow BMT and Turner to assert the defense of contributory negligence—was within the broad discretion of the trial court, *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 433, 40 P.3d 1206 (2002), and the Court of Appeals was persuaded that it was not unreasonable or untenable. Opinion, at *34.

Contrary to Leslie and Tammy's assertion, the Court of Appeals' decision in this case does not conflict with *Gunn*, but instead actually applies the very analysis and exception that *Gunn* explicitly noted. *See, also, Mahoney v. Tingley*, 85 Wn.2d 95, 100 (where this Court allowed a defendant to assert an unpleaded affirmative defense: "To conclude that defendants are precluded from relying upon [a defense] would be to impose a rigid and technical formality upon pleadings which is both unnecessary and contrary to the policy underlying CR 8(c)."). The trial court properly allowed Turner and BMT to assert the defense of contributory negligence, and the Court of Appeals' affirmance on that issue does not create any conflict with preceding published Court of Appeals opinions. Review is not merited. RAP 13.4(b)(2).

C. The remainder of Leslie and Tammy's petition does not fit under any of the RAP 13.4(b) criteria, and therefore need not be considered.

The remainder of Leslie and Tammy's petition should be disregarded, as it does not raise any additional arguments as to why their petition satisfies the relevant criteria under RAP 13.4(b). But even if the Court was inclined to consider those arguments, they are without merit. For example, Leslie and Tammy strangely renew their argument that their malpractice award should not have been reduced for contributory negligence, based on their assertion that BMT and Turner are guilty of an *intentional tort*. Leslie and Tammy's Petition, at 10-12. There is no indication or rationale for why this argument contributes to their broader assertion that review is necessary or appropriate in this case. But, as was addressed *supra*, the Court of Appeals easily rejected this argument below, finding it meritless on the basis that Leslie and Tammy's own complaint alleged negligence but not intentional tort. The persistence of this argument appears to reflect a continuing and fundamental misapprehension of the distinction between an intentional act versus an intentional tort. As in the argument below that the Court of Appeals considered and rejected, Leslie and Tammy cite to the law that an intentional *tortfeasor* is not entitled to benefit from reduction of an award based on the plaintiff's contributory fault. Leslie and Tammy's Petition, at 11; RCW 4.22.015; *Tegman v. Accident & Med. Investigations, Inc.*, 150 Wn.2d 102, 109, 75 P.3d 497 (2003). But while they are correct that Turner made an intentional *act* in deciding not to file the Neir declaration,

that does not convert him into an intentional *tortfeasor* who is thereby barred from asserting the defense of contributory negligence.

Leslie and Tammy's petition next reasserts their argument from below that the defense of the "attorney judgment rule" should not have been applicable to their claim for breach of fiduciary duty based on alleged RPC violations. Leslie and Tammy's Petition, 12-14. The Court of Appeals noted that this question of "whether or when the attorney judgment rule may be invoked as a defense to an alleged RPC violation" is an open and unresolved one in Washington. Opinion, at *39-40. But the Court of Appeals found this question to be moot, and that "any error in applying the attorney judgment rule is harmless because the evidence does not demonstrate any breach of the duty of loyalty or the conflict of interest rules by Turner." *Id*. This argument does not support their petition for review or reflect any conflict in Washington law, as it did not form the basis for the Court of Appeals' decision.

Lastly, Leslie and Tammy argue that Turner breached the RPCs and therefore his fiduciary duties, and BMT should now be required to disgorge fees. Leslie and Tammy's Petition, at 15-18. They invoke this Court's constitutional power to regulate the practice of law, and ask that this "Court should not turn a blind eye to Turner's intentional misconduct like the courts below." Leslie and Tammy's Petition, at 18. But their argument here again simply fails to address or meet any of the criteria for review under RAP 13.4(b). The Court of Appeals' opinion considered each of the alleged RPC violations in turn, and concluded that "Turner did

not violate any of the RPCs invoked by Leslie and Tammy." Opinion, at *40-48. And while Leslie and Tammy plainly disagree with the Opinion—even characterizing the Court of Appeals' reasoning as "absurd" in one instance (Leslie and Tammy's Petition, at 16, fn. 30)—disagreeing with an opinion is simply not one of the enumerated bases for further review before this Court.

IV. CONCLUSION

The Court of Appeals' decision is indeed problematic and merits review for the reasons set forth in BMT and Turner's parallel petition for review. But Leslie and Tammy's petition, by contrast, fails to meet any of the criteria for review set forth in RAP 13.4(b). The Court of Appeals' opinion was in accord with existing precedent, regarding Leslie and Tammy's arguments on contributory negligence and the breach of fiduciary duty claim. Moreover, in the event this Court is persuaded to grant BMT and Turner's petition and reverse and remand the trial court's ultimate determination of negligence, that would moot and obviate the need to address all of Leslie and Tammy's issues presented for review. The malpractice trial that unfolded was deeply flawed and problematic. This Court should deny review of Leslie and Tammy's petition, and grant BMT and Turner's petition.

Respectfully submitted this 19th day of February, 2019.

NICOLL BLACK & FEIG

By: */s/ Christopher W. Nicoll*
Christopher W. Nicoll, WSBA No. 20771
Noah S. Jaffe, WSBA No. 43454
Attorneys for Appellants/
Cross-Respondents Badgley Mullins Turner and
Duncan C. Turner

CERTIFICATE OF SERVICE

I certify that on the 19th day of February, 2019, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below**:**

Attorney for Respondents/ Cross-Appellants: C. Nelson Berry III Berry & Beckett, PLLP 1708 Bellevue Avenue Seattle, WA 98122-2017 Main (206) 441-5444 Fax (206) 838-6346 E-mail cnberryiii@seanet.com	☐ VIA MESSENGER ☐ VIA FACSIMILE ☐ VIA U.S. MAIL ☒ VIA CM/ECF

I declare under penalty of perjury that the foregoing is true and correct, and that this certificate was executed on February 19, 2019 at Seattle, Washington.

Katherine Smith Jacobs

NICOLL BLACK & FEIG

February 19, 2019 - 4:22 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96759-8
Appellate Court Case Title:	Leslie Spencer & Tammy S. Blakey v. Badgley Mullins Turner, PLLC, et al.
Superior Court Case Number:	15-2-02296-2

The following documents have been uploaded:

- 967598_Answer_Reply_20190219161637SC500158_3096.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was BMT and Turner - Answer to Petition for Review.PDF

A copy of the uploaded files will be sent to:

- cnberryiii@seanet.com
- ksmith@nicollblack.com
- njaffe@nicollblack.com

Comments:

Sender Name: Kaye Jacobs - Email: ksmith@nicollblack.com
Filing on Behalf of: Christopher Weldon Nicoll - Email: cnicoll@nicollblack.com (Alternate Email:)

Address:
1325 Fourth Avenue
Suite 1650
Seattle, WA, 98101
Phone: (206) 838-7555

Note: The Filing Id is 20190219161637SC500158