

**FILED**  
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CLERK OF SUPREME COURT  
STATE OF WASHINGTON

NO. \_\_\_\_\_

(Formerly Court of Appeals No. 60158-0-1)

**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

**ANDREA SHOEMAKE, by and through Julie Schisel, Guardian ad Litem, and  
KEITH SHOEMAKE, and their marital community,**

**Respondents,**

**vs.**

**R. DOUGLAS P. FERRER and JANE DOE FERRER, husband and wife,**

**Petitioners.**

**APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Charles W. Mertel, Judge**

**REPLY TO ANSWER TO PETITION FOR REVIEW**

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## I. OVERVIEW OF REPLY

Respondents/plaintiffs ask this Court conditionally to review the claim, rejected by the Court of Appeals, that petitioner's breach of fiduciary duty requires forfeiture or disgorgement of his attorney fee. They contend the Court should review the issue as an "alternative ground" for affirming the Court of Appeals' decision. The truth is, as recognized by the Court of Appeals, there was no attorney fee claimed or collected by petitioner here. Thus, there is nothing to forfeit or disgorge. Respondents' "issue" is specious on the facts of the case, and is nothing other than a convoluted attempt to justify a punitive award, equal to the fee he did not earn, against petitioner for his admitted negligence.

Similarly, respondents seek to have this Court establish a new rule that a breach of fiduciary duty constitutes a recognized equitable ground for awarding attorney fees to successful plaintiffs. Respondents do not admit they seek a change in the well-established existing equitable grounds. However, a careful reading of the caselaw demonstrates the only way to reach the requested result is to create a new rule. Respondents' claim that existing law supports their contention is untrue, and is based upon a complete distortion of the caselaw they cite.

**II. RESPONSE TO RESPONDENTS'  
STATEMENT OF ISSUES PRESENTED FOR  
CROSS-REVIEW**

1. Do arguments about disgorgement or forfeiture of fees for breach of fiduciary duty have any relevance to a legal malpractice case where no fees were claimed or received by the defendant attorney?
2. Do claims for “disgorgement” or “forfeiture” of a fee never received or claimed amount to anything other than a smokescreen for the imposition of punishment on the negligent attorney?
3. Does a finding of breach of fiduciary duty in an attorney malpractice action entitle plaintiff to an award of attorney fees?

**III. ARGUMENT WHY CROSS-REVIEW  
SHOULD BE DENIED**

**A. PLAINTIFFS/RESPONDENTS SEEK AN ADVISORY OPINION.**

Respondents ask this Court to review an issue concerning defendant’s “hypothetical contingent fee.” (Answer to Petition, pg. 14). That admission as to the “hypothetical” nature of the request underscores the fatal flaw in respondents’ entire discussion of fee disgorgement or forfeiture theory and caselaw. The simple fact is that here, no fee was paid, nor was any claimed by defendant/petitioner. (CP 12, 221). As the Court of Appeals correctly noted, at 143 Wn. App. 828 n.4, “Those cases [re: fee forfeiture] are inapplicable. Ferrer has received no fee that can be

disgorged. The question before us is, rather, the appropriate measure of the Shoemakes' damages."

Respondents suggest this Court should review this issue, as "no Washington decision has ever established the legal standard to guide those [fee forfeiture] decisions." (Answer to petition, pg. 14). As there was no fee to forfeit here, respondents are in fact requesting this Court to establish legal standards which are inapplicable to this case. In other words, they ask this Court to issue an advisory opinion. This the Court will not do. *Walker v. Munro*, 124 Wn.2d 402, 414, 879 P.2d 920 (1994). Respondents' arguments here must await a proper case.

**B. AS THERE WAS NO FEE TO FORFEIT, RESPONDENTS SEEK TO PUNISH PETITIONER.**

Respondents' request for cross-review of their rejected claim that fee forfeiture principles apply to this case is simply disingenuous. This case is not about either forfeiture or collection or disgorgement of petitioner/defendant's attorney fee. This case is really about the measure of damages allowed in Washington law. Respondents' characterization otherwise is simply an effort to "spin" the case into something it is not.

The fee forfeiture cases cited by respondents are completely inapposite here, and serve only to create a misleading impression of the real issues in this case. The plain fact of the matter here is that the

petitioner/defendant has received no fees to disgorge or forfeit, and is making no claim for fees which the court can deny.

To respond to respondents' legal argument on this issue, it is instructive to start with the observation of Division I in *Kelly v. Foster*, 62 Wn. App. 150, 813 P.2d 598, *rev. denied*, 118 Wn.2d 1001 (1991) that claims of legal negligence and breach of fiduciary duty by an attorney are often coextensive:

. . . both Kelly and Foster treated the case as an action for legal malpractice. Like many such cases, the basis of liability was a claimed breach of fiduciary duty . . . . A review of the Rules of Professional Conduct will suggest that most cases of proven legal malpractice will involve a breach of one or more fiduciary duties.

62 Wn. App. at 154, 155. *See also Hizey v. Carpenter*, 119 Wn.2d 251, 265, 830 P.2d 646 (1992); *Stoll v. Superior Court*, 9 Cal. App. 4<sup>th</sup> 1362, 12 Cal. Rptr. 2d 354 (1992).

The *Kelly* court's observation points up that with the exception of fee denial or disgorgement in cases involving disputes over the attorney's fees, the law does not provide for separate civil remedies for legal malpractice and breach of fiduciary duty by an attorney. To the extent that a breach of fiduciary duty gives rise to the four elements of malpractice, including a resultant loss to the client, the remedy is in the law of damages for negligence. *Kelly v. Foster*, 62 Wn. App. 150. Where the breach of

fiduciary duty does not cause identifiable loss to the client, the remedy is a public one, with the Bar Association, rather than a private remedy. *Hizey v. Carpenter*, 119 Wn.2d at 259.

Here, the loss suffered by the plaintiffs is compensated by damages for legal malpractice, plus prejudgment interest for the delay in plaintiffs' receipt of the money. There is no separate private civil remedy for breach of fiduciary duty, and there was in fact no loss caused by that breach, except for time delay, which is compensated in the law as part of the damages for the negligence, through prejudgment interest.

Respondents cite a number of cases for the proposition that a breach of fiduciary duty can lead to a denial of attorney fees, *Dailey v. Testone*, 72 Wn.2d 662, 435 P.2d 24 (1967), or disgorgement of fees; *Perez v. Pappas*, 98 Wn.2d 835, 659 P.2d 475 (1983). But even where a breach of fiduciary duty is established, the cases do not mandate a forfeiture of fees:

It is apparent that while attorney misconduct can be so egregious as to constitute a complete defense to a claim for fees, not every act of misconduct will justify such a serious penalty. It is implicit in the *Ross* opinion [*Ross v. Scannell*, 97 Wn.2d 598, 647 P.2d 1004 (1982)] that the trial court has discretion in deciding what impact, if any, lawyer misconduct will have on a claim for attorney's fees.

*Kelly*, 62 Wn. App. at 156.

The real point of the respondents' argument centered around the breach of fiduciary duty/fee forfeiture cases is the notion that petitioner should be punished for the breach of fiduciary duty over and above the respondents' actual loss. The respondents' suggested punishment is payment by petitioner of damages in the amount of the dollar value of a fee he never received, under the guise of forfeiture or disgorgement of that fee.

Respondents stretch the law with this argument. None of the cases respondents cite punish an attorney who breaches a fiduciary duty with monetary damages, apart from denial of fees, and/or damages for legal malpractice. None of the cases cited by respondents award damages for breach of fiduciary duty, separate from the damages for legal negligence. *See Kelly v. Foster*, 62 Wn. App. 150. Respondents have identified no support in the law for their scheme to create punitive damages for legal negligence under the guise of "forfeiture" of a fee never claimed or received. Respondents' arguments in this regard simply seek the proverbial punitive "pound of flesh."

Such punishment in the context of civil litigation has long been contrary to public policy in Washington. *Spokane Truck & Dray Co. v. Hoefler*, 2 Wash. 45, 25 P. 1072 (1891). Respondents' arguments otherwise should not be reviewed now.

**C. NO LEGAL BASIS EXISTS FOR AN AWARD OF ATTORNEY FEES TO RESPONDENTS.**

It has long been the law in Washington that attorney fees may be awarded only in limited circumstances:

In the absence of a contract, statute, or recognized ground of equity, a court will not award attorney fees as part of the cost of litigation. *State ex rel. Macri v. Bremerton*, 8 Wn.2d 93, 113-14, 111 P.2d 612 (1941).

*Public Utility District No. 1 v. Kottsick*, 86 Wn.2d 388, 389, 545 P.2d 1 (1976). See also, *ASARCO v. Air Quality Coalition*, 92 Wn.2d 685, 715, 601 P.2d 501 (1979); *Dempere v. Nelson*, 76 Wn. App. 403, 406, 886 P.2d 219 (1994), *rev. denied*, 126 Wn.2d 1015 (1995); *Kelly v. Foster*, 62 Wn. App. 150, 813 P.2d 598 (1991).

Respondents contend that one of the recognized grounds of equity triggering an award of attorney fees permits such an award in the event of “bad faith” conduct in the events leading up to the litigation, in other words, in the underlying transaction. Respondents are wrong.

Division I in *Dempere* rejected the notion that bad faith conduct in the underlying action or transaction constituted an equitable ground for imposition of attorney fees, as unsupported by actual case law. After analysis of the history of this supposed equitable exception to the no-attorney-fee rule, the court held:

The rationale which would support an award of attorney fees for intentional wrongdoing is the need to deter and

punish bad faith misconduct. This is essentially the rationale behind punitive damages. *See Glass v. Burkett* [64 Ill. App. 3d 676, 381 N.E.2d 821 (1978)]. However, Washington does not recognize punitive damages . . . .

Our research has not discovered any other coherent rationale which would support awards of attorney fees for bad faith or intentional torts in a state (like Washington) which adopts the American rule but rejects punitive damages. Consequently, we hold that bad faith in the underlying tortious conduct is not a recognized equitable ground for awards of attorney fees in Washington.

*Dempere*, 76 Wn. App. at 410.

Respondents' claim that underlying bad faith conduct has been established as a ground for awarding attorney fees, subsequent to the *Dempere* decision, plays fast and loose with the facts and reasoning of the cases they cite. *In re Pearsall-Stipek*, 136 Wn.2d 255, 961 P.2d 343 (1998) considered two petitions to force a recall election of the Pierce County auditor. The question in that case which is relevant here was whether the auditor could be awarded attorney fees for defending the frivolous litigation if the suit was brought in bad faith. This Court concluded that while the facts suggested the suit was commenced in bad faith, no finding to that effect had been made by the trial court, so the Court concluded fees could not be awarded.

Nothing in *Pearsall-Stipek* so much as suggests that the Court's dicta could be applied to situations like this, where the alleged "bad faith" is not in the litigation, but in the events that gave rise to the suit. In fact,

in *Pearsall-Stipek II (In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 10 P.3d 1034 (2000)), the Court noted in discussing this aspect of its earlier decision: “Bad faith in this context refers to ‘intentionally frivolous recall petitions brought for the purpose of harassment.’” 141 Wn.2d at 783. That defines bad faith litigation conduct, not bad faith in the underlying acts.

Similarly, the other cases cited by respondents for the supposition that bad faith conduct provides an equitable ground for awarding attorney fees discuss the issue as related to the litigation itself, as opposed to the events out of which the litigation arose. See *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 982 P.2d 131 (1999) (bad faith institution of litigation), *rev. denied*, 140 Wn.2d 1010 (2000); and *Blueberry Place Homeowners Ass’n v. Northward Homes, Inc.*, 126 Wn. App. 352, 110 P.3d 1145 (2005) (bad faith conduct in the litigation). In fact, in both cases, despite the courts’ discussion of the supposed litigation bad faith ground for an award of fees, the court reversed an award of fees.

Respondents’ contention that *Rogerson Hiller Corp.* recognized that *Pearsall-Stipek* “rejected *Dempere’s* analysis” (Answer to Petition, pg. 16) is a serious exaggeration of what the court actually said, and is completely wrong as to the context in which the term “bad faith” was used, both in *Dempere* and in this case. Again, *Pearsall-Stipek* and

*Rogerson Hiller Corp.* related to bad faith litigation conduct. *Dempere* and this case concern alleged misconduct prior to the suit. None of the cases respondents cite invalidate (or even address) the *Dempere* court's analysis showing that awarding attorney fees for bad faith in the underlying conduct is contrary to Washington law, and in fact amounts to imposition of punitive damages.

Respondents cite to *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 557 P.2d 342 (1976) as authority for the award of attorney fees in breach of fiduciary duty cases. (Answer to Petition, pg. 17). However, the case does not actually stand for that proposition. As this Court discussed in *Perez v. Pappas*, 98 Wn.2d 835, 659 P.2d 475 (1983), considering the claim before it that a breach of fiduciary duty renders the defendant liable for attorney fees:

We disagree with appellants' interpretation of this language [quotation from *Hsu Ying Li* said to support the claim that breach of fiduciary duty allows an award of attorneys' fees]. As stated in *Asarco Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 716, 601 P.2d 501 (1979), the "actual award [in *Hsu Ying Li*] stemmed from the prevailing party's having preserved partnership assets, *i.e.*, an identifiable fund." No similar considerations are present in the instant action.

*Perez*, 98 Wn.2d at 845. Nothing in *Pearsall-Stipek*, *Rogerson Hiller Corp.*, or *Blueberry Place Homeowners Ass'n.* affects or changes the conclusion of this Court in *Perez*, or of Division I in *Dempere*.

Respondents' ruminations about "constructive fraud" are even farther afield from the issue involved in their request for cross-review. Whether bad faith was held equivalent to constructive fraud in the context of cases which did not involve awarding attorneys' fee as a result of the underlying conduct is immaterial to the question of whether either breach of fiduciary duty or legal malpractice constitutes a recognized equitable ground of equity for awarding attorney fees. Respondents have cited no applicable authority for the proposition that either act is such a recognized equitable ground.

By the same token, nothing in *McGreevy v. Oregon Mutual Ins. Co.*, 128 Wn.2d 26, 904 P.2d 731 (1995) helps respondents here. That case actually had nothing to do with the *sui generis* realm of insurance bad faith, despite the dicta cited by respondents. Rather, *McGreevy* simply upheld the unique rule of *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991) allowing attorney fees to insureds who successfully litigate insurance coverage issues with their insurance carriers. There is nothing in the rationale of either *Olympic Steamship* or *McGreevy* which provides support for respondents' contention that a trial court has discretion to award attorney fees in an attorney malpractice/breach of fiduciary duty case.

Respondents cannot avoid the holdings of *Perez v. Pappas*, 98 Wn.2d 835, 659 P.2d 475 (1983) and *Kelly v. Foster*, 62 Wn. App. 150, 813 P.2d 598, *rev. denied*, 118 Wn.2d 1001 (1991) to the effect that proof of a breach of fiduciary duty by an attorney does not entitle the successful plaintiff to an award of attorney fees. There simply is no authority for plaintiffs' argument that the trial courts have discretion to award fees in a breach of fiduciary duty case, absent one of the recognized equitable grounds established in Washington law. None of those grounds apply to this case.

As Division I observed in *Kelly* at 62 Wn. App. 155, "most cases of proven legal malpractice will involve a breach of one or more fiduciary duties." The end result of respondents' argument for cross-review of this issue, if adopted, would be a rule that attorney fees are awardable to successful claimants in most legal malpractice cases. Respondents have identified no cogent rationale, much less authority, for such a sea change in the law of legal malpractice or the American Rule of attorney fees. The request for cross-review of the award of attorneys' fees should be denied.

#### IV. CONCLUSION

There are no attorney fees claimed or paid in this case to forfeit or disgorge. Respondents' claim that the legal theories applicable to cases involving actual fees can somehow be morphed into application where there are no fees defies imagination. Respondents' contention does not constitute an alternative ground for affirming the Court of Appeals, as they claim, but a perversion of the concept of "fees," making nothing into something translatable to damages against defendant. Respondents seek punishment, pure and simple.

There is no legal basis in this case to support an award of attorney fees to respondents. The finding of a breach of fiduciary duty by petitioner is not a "recognized ground of equity" which gives rise to an award of attorney fees in the resulting litigation. Respondents' efforts in misreading the caselaw notwithstanding, a serious analysis of the existing law concerning "bad faith" conduct demonstrates this exception to the American Rule of attorney fees applies only to bad faith conduct in the litigation, not alleged bad faith or breach of fiduciary duty in the underlying act that gave rise to the litigation. Respondents' shell game here cannot, in the end, hide the fact they are asking the Court to create a new "equitable ground" to support an award of attorneys' fees.

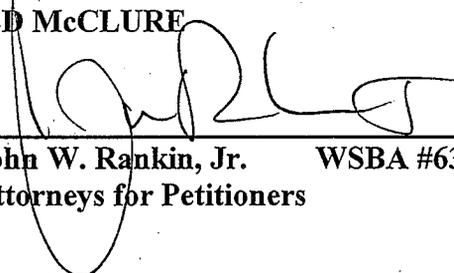
The request for cross-review, as to both issues raised, does not meet the requirements of RAP 13.4, and does not otherwise merit review.

The request should be denied.

DATED this 8<sup>th</sup> day of July, 2008.

REED McCLURE

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