

NO. 81812-6

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

SUPPLEMENTAL BRIEF OF PETITIONERS

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I. NATURE OF CASE

The Court of Appeals has in this case created a new class of attorney-defendants subject to punitive damages and attorney fee awards unique in Washington law, in contravention of time-honored legal principles. This new special rule of damages, if allowed to stand, will have repercussions far beyond the arena of legal malpractice.

A contingent-fee attorney negligently failed to secure an uninsured motorist insurance (UM) recovery for his client. In this malpractice suit, the attorney admitted negligence, and admitted his former client was entitled to recover as damages the net sum she should have received from her UM policy, plus prejudgment interest on that amount.

Division I held that in addition to the admitted damages and prejudgment interest on that sum, the former client is also entitled to recover, as damages, the contingent fee the defendant attorney would have earned and received on a successful recovery, plus prejudgment interest on that amount.

II. ISSUES PRESENTED

A. Does the award of the defendant attorney's anticipated but unrecovered contingent fee to plaintiff constitute a windfall recovery in excess of the amount of loss actually sustained by plaintiff?

B. Does the award of the contingent fee to plaintiff as damages, in order to compensate for the former client's attorney fees in the subsequent malpractice case, violate long-standing Washington law prohibiting recovery of attorney fees except in limited defined circumstances?

C. Does the award of the defendant attorney's contingent fee amount to the plaintiff/former client constitute a special form of punitive damages in contravention of long-standing public policy in Washington?

D. Does the award of prejudgment interest on a sum the plaintiff would not and could not have recovered in the underlying action violate the rationale for awards of prejudgment interest in Washington?

E. Does the award of prejudgment interest on the contingent fee portion (never collected by defendant attorney or withheld from plaintiff) of the damages constitute punitive damages in contravention of long-standing public policy in Washington?

III. STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS.

Plaintiff Andrea Shoemake was injured in 1992 in an automobile accident caused by an uninsured, intoxicated driver. (CP 9-10). Plaintiff and her husband carried automobile insurance, including UM coverage of \$100,000. (CP 11).

Plaintiffs retained defendant Ferrer to represent them following the accident. The parties executed an agreement providing for a 40% contingent fee on any recovery. (CP 9, 10, 12, 14-18).

Ferrer made an appropriate claim under the Shoemakes' UM insurance, and provided the insurer with the necessary information to support the claims for liability of the uninsured motorist and for Ms. Shoemake's injuries and damages. (CP 11). Through these efforts, Ferrer obtained a settlement offer from the insurer on June 19, 1995, for the \$100,000 limits of the Shoemakes' UM policy. (CP 11).

Ferrer failed to advise his clients of their insurer's settlement offer, and failed to conclude the settlement on behalf of his clients. (CP 12).

B. STATEMENT OF PROCEDURE.

This malpractice action was commenced in January 2006. (CP 1-6). Pursuant to the agreement of plaintiffs' current counsel (CP 239), Ferrer's defense counsel contacted the Shoemakes' insurer to reopen the Shoemakes' UM claim, and obtained payment to plaintiffs, in April 2006, of the \$100,000 UM limits previously offered. (CP 236). Ferrer did not obtain or request any fee on this recovery. (CP 12).

Defendant admitted liability for legal negligence, and also admitted damages in the amount of \$52,088. (CP 256-58). The admitted damages consisted of the UM policy limits of \$100,000, less the 40

percent contingent fee defendant would have collected had he concluded the case, and less a subrogation interest against plaintiffs' recovery held by a medical insurer in the amount of \$7,912. (CP 11-12). Defendant also agreed that plaintiffs were entitled to prejudgment interest on the undisputed damages amount of \$52,088. (CP 219, 225-26).

The parties filed cross-motions for summary judgment. (CP 40-59, 219-27). Judge Charles Mertel ruled that plaintiffs were entitled to recover \$60,000 (the policy limits less the contingent fee) together with prejudgment interest on that amount. (CP 269-72).

Following a dispute with plaintiffs over the effect of Judge Mertel's order, defendant filed a motion for clarification of the award (CP 304-06, 415-20). That motion resulted in an order ruling that judgment to be entered against defendant would be in the amount of \$60,000 plus prejudgment interest on that sum, in the amount of \$70,511.59, for a total of \$130,511.58, less the \$100,000 UM policy limits which had already been paid, yielding a net judgment of \$30,511.58. (CP 339-40).

Plaintiffs appealed from the resulting judgment. (CP 381-96) Division I ruled that plaintiffs could recover not only their actual loss from defendant's negligence, and interest on that loss, but should also recover as damages money they could not have obtained in the underlying action, in the form of their expected transactional costs (defendant's uncollected

contingent fee), plus prejudgment interest on that fee. The rationale for this ruling was that plaintiffs incurred fees of a second attorney to sue the first attorney (defendant) and should be compensated for these fees in the damages award. *Shoemake v. Ferrer*, 143 Wn. App. 819, 182 P.3d 992 (2008), *rev. granted*, ___ Wn.2d. ___ (2008).

Defendant moved for reconsideration of that portion of the Court of Appeals' decision allowing plaintiffs to recover prejudgment interest on the defendants' uncollected contingent fee. The motion for reconsideration was denied. (Petition for Review, Appendix B).

IV. ARGUMENT

A. DAMAGES IN LEGAL MALPRACTICE ACTIONS ARE THE ACTUAL LOSS TO THE INJURED CLIENT.

Damages allowable in legal negligence cases are governed by the same principles as other tort claims. The rule is that the plaintiff/victim is awarded damages to place him or her in as good a position as if the wrong had not occurred. *Tilly v. Doe*, 49 Wn. App. 727, 731-32, 746 P.2d 323 (1987), *rev. denied*, 110 Wn.2d 1022 (1988). In Washington, the "measure of damages for legal malpractice is the **amount of loss actually sustained** as a proximate result of the attorney's conduct." *Matson v. Weidenkopf*, 101 Wn. App. 472, 484, 3 P.3d 805 (2000) (emphasis added); *Tilly v. Doe*, 49 Wn. App. at 732; *Martin v. Northwest Wash. Legal Services*, 43 Wn. App. 405, 412, 717 P.2d 779 (1986).

Matson repeats well settled Washington law that former clients are not entitled to receive a windfall as a result of their attorney's negligence. In *Matson*, the court considered whether the collectibility of the underlying judgment not obtained because of the negligence should be a factor in determining damages in the legal malpractice case. The court concluded that collectibility had to be considered in assessing damages to prevent the plaintiff from receiving a windfall in the malpractice action. The court reasoned as follows: “[I]t would be inequitable for the plaintiff to be able to obtain a judgment, against the attorney, which is greater than the judgment that the plaintiff would have collected from the third party.” *Matson*, 101 Wn. App. at 484 (emphasis added), quoting from *Kituskie v. Corbman*, 452 Pa. Super. 467, 682 A.2d 378, 382 (1996), *aff'd*, 552 Pa. 275, 714 A.2d 1027 (1998). See also *Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S.*, 112 Wn. App. 677, 685, 50 P.3d 306 (2002).

In *Lavigne*, Division III considered the issue of damages in an attorney malpractice case where collectibility of the underlying judgment was in question, noting that the majority of jurisdictions consider proof of collectibility to be a part of the malpractice plaintiff's burden of proof. In its discussion, the court referred to the reasoning of another court:

As one of these courts reasoned, “In a malpractice action, a plaintiff’s ‘actual injury’ is measured by the amount of money she would have actually *collected* had her attorney not been negligent.” *Klump v. Duffus*, 71 F.3d 1368, 1374 (7th Cir. 1995) [emphasis in original]. Hypothetical damages beyond what the plaintiff would have genuinely collected from the judgment debtor “are not a legitimate portion of her ‘actual injury;’ awarding her those damages would result in a windfall.” *Klump*, 71 F.3d at 1374.

Lavigne, 112 Wn. App. at 685-86. There is no rational distinction between defining a plaintiff’s “actual injury” as money that would be collectible from the ultimate judgment debtor and that which the plaintiff would have received in the suit net of transactional costs. Nonetheless, the Court of Appeals wrongly treats these facts as if they were distinguishable.

In this case, the actual loss suffered by the plaintiffs as the result of defendant’s negligence was \$60,000. That is the amount they would have recovered in 1995 from their UM insurer, net of the transactional costs, i.e., the agreed-upon contingent fee, had the negligence not occurred. Thus, \$60,000 represents the damages recoverable in the malpractice case under Washington law. The ruling of Division I that plaintiffs are entitled to recover a greater amount is contrary to Washington law.

B. THE COURT OF APPEALS HAS CHOSEN THE WRONG RULE FOR THIS CASE.

Division I, in its decision, recognizes there is “sharp disagreement” among other courts and academicians as to the proper analysis for determining damages in a malpractice case involving a contingent fee

attorney. *Shoemake*, 143 Wn. App. at 825. As the Court of Appeals discusses, there are two diametrically opposed approaches, plus a “middle road” rule, which have been adopted by courts of other jurisdictions that have been faced with this issue. Unfortunately, Division I has made the wrong choice in its decision, picking the approach which cannot be squared with existing law in several respects.

The question of treatment of the putative contingent fee in an attorney malpractice action was considered in depth by the Wyoming Court in *Horn v. Wooster*, 165 P.3d 69 (Wyo. 2007), including an analysis of the cases from other jurisdictions which had ruled on the issue. The Wyoming court concluded that its existing law of damages required that the malpractice plaintiff’s recovery be confined to the plaintiff’s actual loss, in other words:

... an aggrieved client should be entitled to recover from the negligent attorney the amount he would have expected to recoup if his underlying action had been successful. It would, therefore, be appropriate to deduct the attorney’s contingency fee from the amount the jury determines the underlying judgment would have been because the client’s ultimate recovery in the underlying action would have been reduced by that expense.

Horn, 165 P.3d at 74.

It is apparent in *Horn* that Wyoming legal malpractice damages

law is the same as Washington's. This Court, like the Wyoming Court, thus should analyze this issue in terms of the actual loss to the client:

Concentrating on the question of what the client lost as a result of the attorney's negligence requires the deduction of all expenses which the client would have incurred in order to successfully prosecute his claim, including the attorney's fee expense. This rationale focuses on compensating the client rather than punishing the negligent attorney.

We, therefore, reject a general rule that a client may recover more than he lost simply because the defendant was an attorney who was negligent in performance of his duties. Instead, the well-accepted principles for calculation of damages in both contract and tort cases should be applied and the plaintiff should receive an award that would place him in the same position he would have enjoyed had the negligence not occurred.

Horn, 165 P.3d at 75 (footnote omitted).

The *Horn* Court discussed the apparent reasoning of the courts which allow the malpractice plaintiff to recover the contingent fee amount as well as the client's actual loss:

By refusing to deduct the contingent fee from the malpractice award simply because the attorney was negligent, the courts appear to be punishing the attorney for his negligence rather than compensating the client for his loss. See, *Moore*, 834 F.2d at 1110-11. Indeed, some courts seem apologetic because a member of their profession acted negligently and appear to want to avoid any possible inference that they did not deal severely enough with the negligent acts of one of their own. See, e.g., *Campagnola*, 556 N.Y.S.2d 239, 555 N.E.2d at 614; *McCafferty*, 817 P.2d at 1045.

Horn, 165 P.3d at 74.

Reaching the same result as *Horn* (and relied upon by the *Horn* Court) was the First Circuit in *Moore v. Greenberg*, 834 F.2d 1105 (1st Cir. 1987). Both Courts addressed one of the stated rationales of those courts permitting recovery of the contingent fee amount (and repeated by Division I and plaintiffs here), that disallowing recovery of the contingent fee by the client would force her to pay attorney fees twice to collect one recovery. Both Courts rejected that argument, pointing out that the American rule regarding payment of attorney fees puts the burden of such fees on the respective litigants. Thus, in the absence of a contract or statute allowing recovery of fees, payment of fees is simply a cost of achieving recovery for a wrong, whether from an attorney or any other tortfeasor. This Court should recognize the legal fallacies inherent in the approach adopted by the Court of Appeals, and should instead embrace the rule exemplified by the *Horn* and *Moore* cases

C. INCLUDING THE CONTINGENT FEE AS DAMAGES VIOLATES THE AMERICAN RULE GOVERNING ATTORNEY FEES.

The Court of Appeals justifies its decision on the ground that because the client injured by her attorney's negligence must pay an attorney to recover the loss, she should receive from the negligent lawyer more than she would have obtained in the underlying action in order to pay her second attorney.

The Court of Appeals further argues that as damages in attorney malpractice actions are intended to make the injured client whole, failure to allow the injured client to recover, in the malpractice case, the contingent fee the negligent lawyer would have obtained in the underlying case means the client will not achieve a complete recovery. The Court states: "Reducing a successful malpractice plaintiff's damages by the amount that the attorney would have earned had the attorney not been negligent necessarily fails to put the injured plaintiff in the position he or she would have occupied in the absence of negligence." *Shoemaker v. Ferrer*, 143 Wn. App at 829.

This argument is a perversion of the Court of Appeals' own reasoning in *Matson v. Weidenkopf*, 101 Wn. App. 472, apparently intended to disguise an end run around the long-standing rule in this and every other jurisdiction in the United States that:

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, *rev. denied*, 118 Wn.2d 1001 (1991).

This principle, universally known as the “American rule,” was recognized by the Court of Appeals itself as applicable in this case to preclude plaintiffs’ claims for a direct award of attorney fees. *Shoemaker v. Ferrer*, 143 Wn. App. at 830-832. Yet, by justifying its decision to award defendant’s uncollected contingent fee to plaintiffs as damages under its “make whole” rationale, Division I undermines the very American rule it claims to honor, and in effect purports to overrule this Court’s precedent precluding recovery of attorney fees where there is no statute, contract or recognized ground in equity supporting such a recovery.

In analyzing this identical issue, the Wyoming Supreme Court in *Horn v. Wooster*, 165 P.3d 69 (Wyo. 2007) stated:

In our view, refusing a deduction for the contingent fee on the basis that the second fee cancels out the first, or allowing an award as consequential or incidental damages of the malpractice, is inconsistent with the American rule. We see no reason for creating an exception to the American rule when legal malpractice is involved, and, in fact, believe such an exception would undermine the rule because in any litigation it could be argued the plaintiff is harmed because of the need to pay attorney’s fees to pursue his or her legal rights.

Horn, 165 P.3d at 75.

The transparent difficulty with Division I's reasoning, as pointed out in *Horn*, is that it can be applied to every case in which the American rule precludes a recovery of attorney fees. The fact that the necessity of paying an attorney to recover the compensatory damages suffered due to a tort or breach of contract must leave the victim with less than a "full" recovery has not dissuaded this Court from following the American rule as applied in *State ex rel. Macri*, 8 Wn.2d 93. The Court of Appeals' attempt to dodge this Court's precedent must not be permitted.

D. LEGAL DAMAGES DO NOT INCLUDE TRANSACTIONAL COSTS.

The implications of Division I's reasoning extend well beyond legal malpractice claims, and potentially well beyond attorney fee award claims. In any damages case, a proper calculation deducts the injured party's transactional costs for achieving the end result that has been stymied by the tort or breach of contract. For example, a typical measure of damages for breach of contract is lost anticipated profits, a measure which necessarily contemplates deducting the injured party's expenses from the revenue to be obtained by contractual performance. This Court, in *Platts v. Arney*, 50 Wn.2d 42, 309 P.2d 372 (1957), identifies the principle:

The plaintiff is not, however, entitled to more than he would have received had the contract been performed. If the defendant, by his breach, relieves the plaintiff of duties

under the contract which would have required him to spend money, an amount equal to such expenditures must be deducted from his recovery.

Platts, 50 Wn.2d at 46. See also *Longenecker v. Brommer*, 59 Wn.2d 552, 558, 368 P.2d 900 (1962); *Lincor Contractors v. Hyskell*, 39 Wn. App. 317, 320-21, 692 P.2d 903 (1984), *rev. denied*, 103 Wn.2d 1036 (1985).

The Wyoming Court in *Horn v. Wooster*, 165 P.3d 69, discussing the opinion in *Moore v. Greenberg*, 834 F.2d 1105 (1st Cir. 1987), noted that the *Moore* Court could “identify no legal reason to deny an attorney a deduction from the award against him for appropriate expenses, including the legal fees which would have been owed by the client, when similar deductions would be available to defendants in other cases.” 165 P.3d at 74 (emphasis added).

In most damages cases, the injured party’s transactional costs of achieving a recovery (in the form of attorney fees) are also not recoverable. *State ex rel. Macri*, 8 Wn.2d at 101. The Court of Appeals has in this case adopted a line of reasoning that turns the traditional approach to legal damages on its head. There is no principled rationale for limiting application of Division I’s new damages approach to legal malpractice cases. After all, if the court’s argument that the “measure of damages for legal malpractice is the amount of loss actually sustained” (from *Matson v. Weidenkopf*, 101 Wn. App. at 484) truly means, as

Division I holds, that one must ignore transactional costs in determining the loss, that rationale can be applied across the board to rewrite damages law generally, not to mention the American rule of litigation costs. The potential mischief resulting from this decision should be carefully considered by this Court.

E. WASHINGTON LAW DOES NOT PERMIT PUNITIVE DAMAGES.

Punitive damages are contrary to long-established policy in this state, and are not recoverable. *Barr v. Interbay Citizen's Bank*, 96 Wn.2d 692, 699, 635 P.2d 441, 649 P.2d 827 (1981). Division I briefly recited the history of this policy in *Dempere v. Nelson*, 76 Wn. App. 403, 886 P.2d 219 (1994), *rev. denied*, 126 Wn.2d 1015 (1995):

... Washington does not recognize punitive damages. *Barr v. Interbay Citizen's Bank*, 96 Wn.2d 692, 699, 635 P.2d 441, 649 P.2d 827 (1981). This has been settled Washington law since the rationale underlying punitive damages was first rejected over 100 years ago. In *Spokane Truck & Dray Co. v. Hoefler*, 2 Wash. 45, 51-52, 25 P. 1072 (1891) our Supreme Court considered and rejected the argument that civil actions should not only compensate the injured party but also punish the offender.

Dempere, 76 Wn. App. at 410.

Despite this Court's long-standing prohibition against punitive damages, the Court of Appeals' ruling here grants plaintiffs a recovery greater than full compensation of their loss. The Court of Appeals' acceptance of plaintiffs' arguments for damages in excess of full

compensation can only be viewed as a type of punitive damages applicable only to negligent lawyers.

In considering the question of plaintiff's recovery in a legal malpractice case where the defendant attorney had a contingent fee agreement with the plaintiff client, the First Circuit Court of Appeals reasoned in *Moore v. Greenberg*, 834 F.2d 1105 (1st Cir. 1987):

Restricting the client's recovery in a ... malpractice action to the realizable net proceeds from his earlier case does not allow a culpable attorney to "collect" anything. More importantly, **the argument to the contrary overlooks that the fundamental purpose of such damages is to compensate a plaintiff, not punish a defendant.**

Moore, 834 F.2d at 1111 (emphasis added). The reasoning in *Moore* is in accord with Washington's historic position on punitive damages, and should lead to reversal of the Court of Appeals.

Similarly, while also considering the very issue presented here, the Supreme Court of Wyoming stated: "While we do not believe that attorneys should be treated more favorably than any other class of negligent defendants, we think they are entitled to equal treatment." *Horn v. Wooster*, 165 P.3d 69, 74 (Wyo. 2007). The *Horn* court went on to hold, like the *Moore* court, that an award in excess of full compensation amounted to an improper special type of punitive damages for attorney malpractice cases.

The trial court in this case properly awarded plaintiffs their compensatory damages, and refused to adopt plaintiffs' disguised punitive damages theory. This Court should reinstate that result as proper under Washington law.

F. THE AWARD OF INTEREST ON THE CONTINGENT FEE IS PUNITIVE.

The Court of Appeals' confused reasoning goes beyond merely awarding plaintiffs "full compensation" for their loss, and leads to mandating a punitive recovery against plaintiffs' former lawyer in the form of prejudgment interest on the contingent fee portion of the award. Unlike the net portion of the principal amount (\$60,000) in the underlying case, the contingent fee portion (\$40,000) was not withheld from plaintiffs. Had the underlying suit been handled properly, plaintiffs would not ever have seen the contingent fee portion of the principal recovery.

The purpose of prejudgment interest is to compensate for the time value of money that has been withheld by defendant. *Hansen v. Rothaus*, 107 Wn.2d 468, 473, 730 P.2d 662 (1986); *Matson v. Weidenkopf*, 101 Wn. App. 472, 485, 3 P.3d 805 (2000). This Court in *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998) further explains the rationale for prejudgment interest:

The touchstone for an award of prejudgment interest is that a party must have the "use value" of the money improperly.

Hansen v. Rothaus, 107 Wn.2d 468, 473, 730 P.2d 662 (1986). In effect, an award of prejudgment interest compels a party that wrongfully holds money to disgorge the benefit.

Mahler, 135 Wn.2d at 429-30.

The contingent fee portion of the principal amount was not withheld from plaintiffs as the result of defendant's actions, and in fact, was not withheld at all. The plaintiffs were never going to see that \$40,000 in 1995. Plaintiffs did not lose the use of that money. Thus, there is no basis in law to award plaintiffs prejudgment interest on the fee portion of the damages award, money they would not have been entitled to receive. *Bloor v. Fritz*, 143 Wn. App. 718, 741, 180 P.3d 805 (2008). The Court of Appeal's awarding of that prejudgment interest directly contravenes this Court's precedent, as well as Division I's own precedent.

In this case, an award of prejudgment interest on the contingent fee portion of the principal award comprises a significant part of the overall damage recovery, increasing the overall award by \$47,007.73. As the \$40,000 fee portion of the principal was not withheld, or lost by plaintiffs, the interest on that amount can only be rationalized as a punishment of defendant, contrary to the long-standing rule against punitive damages in Washington. *Spokane Truck & Dray Co. v. Hoefler*, 2 Wash. 45, 25 P.

1072 (1891); *Dempere v. Nelson*, 76 Wn. App. 403, 410, 886 P.2d 219 (1994), *rev. denied*, 126 Wn.2d 1015 (1995).

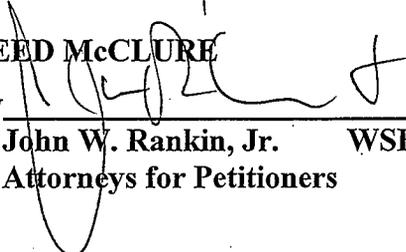
It is indeed ironic that although Division I argues that a “mechanistic application of the American rule” (*Shoemake*, 143 Wn. App. at 829) should not govern its decision on awarding the unrecovered contingent fee as damages, it has invoked a similarly mechanistic approach to prejudgment interest to lead it to impose punitive damages on defendant here.

V. CONCLUSION

Mandating, as Division I has, that plaintiffs in a legal malpractice case should recover more money in damages than their actual loss resulting from the defendant’s negligence violates Washington’s traditional law of damages, Washington’s application of the American rule of litigation costs, and Washington’s policy against punitive damages. This sea change to long-standing Washington law is ill-considered and should be rejected by this Court.

DATED this 16th day of January, 2009.

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