

81812-6

X

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2008 JUN 25 P 3:52

BY RONALD R. CARPENTER

CLERK

No. \_\_\_\_\_

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

**Court of Appeals No. 60158-0-1**

**FILED**  
JUL 14 2008

CLERK OF SUPREME COURT  
STATE OF WASHINGTON

ANDREA SHOEMAKE, by and through JULIE SCHISEL, Guardian ad  
Litem; and KEITH SHOEMAKE, and their marital community,

*Respondents / Cross-Petitioners*

v.

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

*Petitioners / Cross-Respondents.*

**ANSWER TO PETITION FOR REVIEW, RAP 13.4(d)**

Robert B. Gould, WSBA #4353  
Brian J. Waid, WSBA #26038  
The Law Offices of Robert B. Gould  
2110 North Pacific Street, Suite 100  
Seattle, WA 98103-9181  
(206) 633-4442  
Fax (206) 633-4443

*Attorneys for Respondents / Cross-Petitioners*

ORIGINAL

## TABLE OF CONTENTS

	<u>PAGE</u>
<b>A. IDENTITY OF RESPONDENTS</b>	<b>1</b>
<b>B. DECISION BY THE COURT OF APPEALS</b>	<b>2</b>
<b>C. RESPONSE TO PETITIONER'S STATEMENT OF ISSUES</b>	<b>2</b>
1. Forfeiture of a negligent professional's fees does not constitute punitive damages; fee forfeiture instead represents a traditional remedy that is consistent with Washington law governing mitigation expenses and <i>quantum meruit</i> .	2
2. Having admittedly lied to and deceived his clients for many years, Mr. Ferrer may not rely on equity.	2
3. Refusing to allow a negligent and discharged attorney credit against the client's legal malpractice recovery, for a hypothetical contingent fee, does not constitute an award of attorney fees to the attorney's former client.	3
4. Ferrer did not raise the prejudgment interest issue, designated in his Petition for Review Issue E (p. 3), in the lower courts.	3
<b>D. ISSUES PRESENTED FOR CROSS-REVIEW</b>	<b>3</b>
5. Does a Washington attorney, who lies to and deceives his/her client, thereby breach the attorney's fiduciary duty of undivided loyalty and forfeit any credit for the attorney's hypothetical contingent fee to reduce the client's subsequent recovery of damages for malpractice?	3
6. May Washington courts remedy a fiduciary's pre-litigation bad faith conduct toward the beneficiary through an award of reasonable attorney fees?	3

<b>E.</b>	<b>FACTS RELEVANT TO ANSWER</b>	<b>3</b>
<b>F.</b>	<b>ARGUMENT WHY REVIEW SHOULD BE DENIED</b>	<b>4</b>
1.	The Petition does not meet RAP 13.4 Standards for Review.	4
2.	The Court of Appeals Correctly Decided this Issue Consistent with Washington Law.	7
3.	Fee Forfeitures do not Constitute “Punitive Damages”	9
<b>G.</b>	<b>ARGUMENT WHY THE COURT SHOULD GRANT CROSS-REVIEW</b>	<b>10</b>
1.	If the Court Review Ferrer’s Petition, the Court Should Also Grant Cross-Review so that It may Consider the Full Array of Remedies Available to Mr. and Mrs. Shoemake.	10
2.	Fee Forfeiture Represents the Proper Remedy for Ferrer’s Breaches of Fiduciary Duty.	12
3.	Washington Courts have Discretion to Award Reasonable Attorney Fees for a Fiduciary’s Pre-Litigation Bad Faith Conduct toward the Beneficiary.	15
<b>H.</b>	<b>CONCLUSION</b>	<b>18</b>

**APPENDIX A:**

**Order Granting Plaintiffs’ Motion for Partial Summary Judgment and Denying Defendants’ Motion for Summary Judgment**

## TABLE OF AUTHORITIES

### Washington State Cases

<u>CASE</u>	<u>PAGE</u>
<i>Belli v. Shaw</i> , 98 Wn.2d 569, 657 P.2d 315 (1983)	6
<i>Blueberry Place Homeowners Ass'n. v. Northward Homes, Inc.</i> , 126 Wn. App. 352, 110 P.3d 1145 (2005)	16
<i>In re: Impoundment of Chevrolet Truck</i> , 148 Wn.2d 145, 60 P.3d 53 (2002)	16
<i>In re: Discipline of Cohen</i> , 149 Wn.2d 323, 67 P.3d 1086 (2003)	13
<i>Cotton v. Kronenberg</i> , 111 Wn. App. 258, 44 P.3d 878 (2002)	9, 13, 14
<i>In re: Discipline of Dann</i> , 136 Wn.2d 67, 960 P.2d 416 (1998)	12, 13
<i>Dempere v. Nelson</i> , 76 Wn. App. 403, 886 P.2d 219 (1994)	15, 16
<i>Eriks v. Denver</i> , 118 Wn.2d 459, 824 P.2d 1207 (1992)	9, 12, 13, 14
<i>Flint v. Hart</i> , 82 Wn. App. 209, 917 P.2d 590 (1996)	8
<i>Green v. McAllister</i> , 103 Wn. App. 452, 14 P.3d 795 (2000)	17
<i>Hyde v. Wellpinit Sch. Dist.</i> , 32 Wn. App. 465, 648 P.2d 892 (1982)	9
<i>Kubista v. Romaine</i> , 14 Wn. App. 58, 538 P.2d 812 (1975), <i>aff'd</i> , 87 Wn.2d 62, 549 P.2d 491 (1976)	9
<i>Estate of Larson</i> , 103 Wn.2d 517, 694 P.2d 1051 (1985)	5
<i>Li v. Tang</i> , 87 Wn.2d 796, 557 P.2d 342 (1976)	17

<i>Matson v. Weidenkopf</i> , 101 Wn. App. 472, 3 P.3d 805 (2000)	7
<i>McGreevy v. Oregon Mut. Ins. Co.</i> , 128 Wn.2d 26, 904 P.2d 731 (1995)	16
<i>Mersky v. Multiple Listing Bureau</i> , 73 Wn.2d 225, 437 P.2d 897 (1968)	9
<i>Miotke v. Spokane</i> , 101 Wn.2d 307, 678 P.2d 803 (1984)	15
<i>In re: Discipline of Orton</i> , 97 Wn.2d 243, 643 P.2d 448 (1982)	13
<i>In re: Pearsall-Stipek</i> , 136 Wn.2d 255, 961 P.2d 343 (1998), as amended, 141 Wn.2d 756, 10 P.3d 1034 (2000)	16
<i>Marriage of Petrie</i> , 105 Wn. App. 268, 19 P.3d 443 (2001)	9
<i>In re: Discipline of Poole</i> , 156 Wn.2d 196, 125 P.3d 954 (2006)	12
<i>Rogerson Hiller Corp. v. Port of Port Angeles</i> , 96 Wn. App. 918, 982 P.2d 131 (1999)	16
<i>Ross v. Scannell</i> , 97 Wn.2d 598, 647 P.2d 1004 (1982)	13
<i>Shoemake v. Ferrer</i> , 143 Wn. App. 819, 182 P.3d 992 (2008)	1, 2, 3, 7, 8, 12, 15
<i>Spokane Truck &amp; Dray Co. v. Hoefer</i> , 2 Wash. 45, 25 P. 1072 (1891)	9
<i>Taylor v. Shigaki</i> , 84 Wn. App. 723, 930 P.2d 340 (1997)	6
<i>Thompson v. Huston</i> , 17 Wn.2d 457, 135 p.2d 834 (1943)	17
<i>Tilly v. Doe</i> , 49 Wn. App. 727, 746 P.2d 323 (1987)	8
<i>Valley/50<sup>th</sup> Ave., LLC v. Stewart</i> , 159 Wn.2d 736, 153 P.3d 186 (2007)	5

### Court Rules & Statutes

RAP 13.4	4
RPC 1.5	5
RPC 1.5(e)	6
RPC 8.4(b)	13
RAP 13.4((b)(4).	14, 18
RAP 13.4(b)(1)	18
RAP 13.4(b)(2)	18
RAP 18.1	18

### Foreign Authorities

<i>Huber v. Taylor</i> , 469 F.3d 67 (3 <sup>rd</sup> Cir. 2006)	10
<i>Moores v. Greenberg</i> , 834 F.2d 1105 (1 <sup>st</sup> Cir. 1987)	9
<i>Woods v. City National Bank &amp; Trust Co.</i> , 312 U.S. 262, 61 S. Ct. 493, 85 L. Ed.820 (1941)	14

### Other Authorities

WSBA Formal Ethics Opinion no. 158	5
WSBA Formal Ethics Opinion no. 181	5
<i>Restatement (Third) of the Law Governing Lawyers</i> (ALI 2000)	6, 7, 9, 10, 17
W. Gregory, <i>The Fiduciary Duty of Care: A Perversion of Words</i> , 38 Akron L.R. 181, 192 (2005)	17
3 Mallen & Smith, <i>Legal Malpractice</i> , §20.6 (2007 ed.)	9

**A. IDENTITY OF RESPONDENTS**

Respondents Andrea and Keith Shoemake, husband and wife, ask the Court to deny the Petition for Review filed by R. Douglas P. Ferrer. However, if the Court grants review of Mr. Ferrer's petition, Mr. and Mrs. Shoemake ask the Court to also review of the issues set forth in Section D of this Answer. Due to the brain injuries Mrs. Shoemake sustained in the underlying motor vehicle collision, the Guardian Ad Litem appointed to protect her, Julie Schisel, joins in this Answer on behalf of Mrs. Shoemake.

**B. DECISION BY THE COURT OF APPEALS**

Explaining that “[n]o Washington case decides this issue,” the Court of Appeals adopted “the more modern rule of not reducing legal malpractice damage awards by an amount equal to the negligent attorney’s proposed fee.” *Shoemake v. Ferrer*, 143 Wn. App. 819, 182 P.3d 992 ¶13 (2008). The Court reasoned that “Washington cases are unambiguous that legal malpractice damages should fully compensate plaintiffs injured by attorney malpractice” and “[b]y definition, reducing that [legal malpractice] recovery by two sets of attorney’s fees leaves the plaintiff in a worse position than the client would have been in, absent the malpractice.” *Id.* ¶19.

The Court did not reach Mr. and Mrs. Shoemake's alternative argument that Ferrer's breaches of fiduciary duty also forfeited his hypothetical contingent fee. Mr. and Mrs. Shoemake raised and fully briefed this issue in both the trial and appellate courts below. See, Appellants' Op. Br., pp. 26-32 and Appellants' Reply Br., pp. 2-15.

The Court of Appeals also reversed the trial court's award of reasonable attorney fees to Mr. and Mrs. Shoemake "for [Ferrer's] deceit, misrepresentation and breach of fiduciary duty." CP 271. The Court of Appeals reasoned that, because "there was no allegation of bad faith *in the conduct of this malpractice suit itself*," the Washington courts may *not* award attorney fees as a remedy for a fiduciary's pre-litigation bad faith toward his/her beneficiary. *Shoemake, supra*, at ¶¶21-27 (emphasis added).

### **C. RESPONSE TO PETITIONER'S STATEMENT OF ISSUES**

1. Forfeiture of a negligent professional's fees does not constitute punitive damages; fee forfeiture instead represents a traditional remedy that is consistent with Washington law governing mitigation expenses and *quantum meruit*.

2. Having admittedly lied to and deceived his clients for many years, Mr. Ferrer may not rely on equity.

3. Refusing to allow a negligent and discharged attorney credit against the client's legal malpractice recovery, for a hypothetical contingent fee, does not constitute an award of attorney fees to the attorney's former client.

4. Ferrer did not raise the prejudgment interest issue, designated in his Petition for Review Issue E (p. 3), in the lower courts.

**D. ISSUES PRESENTED FOR CROSS-REVIEW**

5. Does a Washington attorney, who lies to and deceives his/her client, thereby breach the attorney's fiduciary duty of undivided loyalty and forfeit any credit for the attorney's hypothetical contingent fee to reduce the client's subsequent recovery of damages for malpractice?

6. May Washington courts remedy a fiduciary's pre-litigation bad faith conduct toward the beneficiary through an award of reasonable attorney fees?

**E. FACTS RELEVANT TO ANSWER**

The Court of Appeals accurately states the facts pertinent to its decision. *Shoemake, supra*, 182 P.3d at ¶¶2-10. Mr. Ferrer's Petition for Review (pp. 3-6), however, omits those facts which supported the trial court holding that Mr. Ferrer also breached his fiduciary duties toward Mr. and Mrs. Shoemake.

More specifically, Mr. Ferrer admitted that he did not tell Mr. and Mrs. Shoemake that their case had been dismissed. CP 200 (61:16-25). Instead, for the next several years, until September 2005, Mr. Ferrer admitted that he *repeatedly lied* to Mr. and Mrs. Shoemake, telling them “that the case was in a judge’s backlog and was pending and had not been resolved” and that their case “was on hold and that I would let them know when I heard anything to the contrary.” CP 170-71, 200-02, 210 (26:24-27:23, 61:21-63:10, 71:3-12). Ferrer estimated that Mrs. Shoemake called him “[p]robably 10 to 15 times,” inquiring about her case, but that he repeatedly lied to her about its status. CP 200-04 (61:21-63:10, 64:23-65:3). Ferrer conceded that Mrs. Shoemake confronted him in September 2005 (after she learned from the Court’s Clerk that her complaint had been dismissed in 1997) and that he *lied* to her *again*, telling her that he had never received notice of the dismissal. CP 204-05 (65:11-66:6). He nevertheless promised to file a motion to have the case re-instated, but did not do so. CP 155, 210-11 (71:18-72:12).

**F. ARGUMENT WHY REVIEW SHOULD BE DENIED**

**1. The Petition does not meet RAP 13.4 Standards for Review.**

Mr. Ferrer concedes that his Petition “presents a case of first impression in Washington.” Pet. for Review, p. 14. He therefore also

concedes, at least implicitly, that he cannot meet the first three considerations governing acceptance of review under RAP 13.4(b). Mr. Ferrer nevertheless argues that he raises an issue of substantial public interest under RAP 13.4(b) because: “[t]he legal profession and public should receive from this Court clarification of the treatment of legal fees...in determining damages in a legal malpractice claim” and “the implications of this issue extend well beyond legal malpractice claims.” Pet., p. 14.

The practice of law, however, is a profession and unlike most businesses. Attorneys owe the duties of a fiduciary toward their clients, including relative to their fees, and the attorney’s fees must be “reasonable” regardless of the attorney’s specific fee agreement. See, e.g., RPC 1.5; *Estate of Larson*, 103 Wn.2d 517, 531, 694 P.2d 1051 (1985). Strict limitations thus apply to the attorney-client relationship, which usually do not apply in other business settings. See, e.g., *Valley/50<sup>th</sup> Ave., LLC v. Stewart*, 159 Wn.2d 736, 743-48, 153P.3d 186 (2007); WSBA Formal Ethics Opinion nos. 158 and 181 (interest; client’s access to files). In that context, the breach of contract damages recoverable by a discharged Washington attorney are (usually) limited to *quantum meruit* for services rendered prior to discharge, even if the client breaches the contract by discharging the attorney prior to completion of the

representation *and without cause*. RPC 1.5(e); *Belli v. Shaw*, 98 Wn.2d 569, 576-77, 657 P.2d 315 (1983); *Taylor v. Shigaki*, 84 Wn. App. 723, 728, 930 P.2d 340 (1997).<sup>1</sup> Legal malpractice cases also generate other unique damage issues, beyond the unique issue of credit for a hypothetical contingent fee presented here. *E.g.*, *Taylor v. Shigaki*, 84 Wn. App. 723, 728, 930 P.2d 340 (1997) (“collectability”).

Therefore, the rules governing damages in legal malpractice cases do *not* apply universally to damage issues in breach of contract and tort cases generally. Therefore, whether Mr. Ferrer should receive credit against Mr. and Mrs. Shoemake’s legal malpractice damage award, for his full, hypothetical, 40% contingent fee, presents a narrow issue, peculiar to legal malpractice cases, and an issue of first impression in Washington. This narrow issue thus does *not* warrant this Court’s review.

The Court should also deny review for the following reasons: (1) the Court of Appeals decided this issue correctly, consistent with well-established Washington law, and; (2) alternative theories provide the same, or similar, result reached by the Court of Appeals. Mr. and Mrs.

---

<sup>1</sup> Washington courts have not addressed the distinct issue of whether contingent fee attorneys may recover a fee in *quantum meruit* if discharged *with good cause*. See, 1 *Restatement (Third) of the Law Governing Lawyers*, §40(2) and cmt. (b), (c), pp. 289-94 (ALI 2000). Mr. and Mrs. Shoemake obviously had very good “cause” to discharge Ferrer prior to recovery.

Shoemake raise these latter, alternative theories, by way of cross-review. See discussion, *infra*, pp. 10-18.

**2. The Court of Appeals Correctly Decided this Issue Consistent with Washington Law.**

The Court of Appeals adopted the rule suggested in the *Restatement (Third) of the Law Governing Lawyers*, §53, cmt. c (ALI 2000) because Mr. Ferrer's approach "creates a structural inequity against plaintiffs who successfully sue negligent lawyers." *Shoemake, supra*, at ¶17. The Court correctly reasoned that Washington cases are unambiguous that legal malpractice damages should fully compensate plaintiffs injured by attorney malpractice" and "[b]y definition, reducing that [legal malpractice] recovery by two sets of attorney's fees leaves the plaintiff in a worse position than the client would have been in, absent the malpractice. *Id.* ¶19.<sup>2</sup>

Mr. Ferrer nevertheless complains that the Court's "reasoning is a 'stealth' reversal of this Court's precedent precluding recovery of attorney fees where there is no contract, statute, or recognized ground in equity supporting such recovery." *Pet.*, pp. 12-13. However, the Court of

---

<sup>2</sup> The Court of Appeals' reasoning is, therefore, entirely consistent with *Matson v. Weidenkopf*, 101 Wn. App. 472, 3 P.3d 805 (2000), quoted by Ferrer [*Pet.*, p. 6]. The *Matson* Court also explained that "[i]t would be *inequitable* for the plaintiff to obtain a judgment, against the attorney, which is greater than the judgment that the plaintiff would have collected from the third party." *Id.*, 101 Wn. App. at 484. Mr. Ferrer cannot rely on "equity" in this case, considering his undisputed breaches of fiduciary duty.

Appeals' analysis fully comports with existing Washington law because damages recoverable by clients against their former attorneys for legal malpractice generally include what the client would have recovered but for the attorney's malpractice, as well as the litigation expenses (including attorney fees) incurred by the client in attempts to mitigate damages caused by the malpractice. *E.g., VersusLaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 328-29, 111 P.3d 866 (2005); *Flint v. Hart*, 82 Wn. App. 209, 223-24, 917 P.2d 590 (1996); *Tilly v. Doe*, 49 Wn. App. 727, 732, 746 P.2d 323 (1987). The Court of Appeals' analysis is also consistent with Washington law which limits a discharged attorney to recovery in *quantum meruit*, even when discharged without cause. See discussion, *supra*, pp. 5-6 and n.1.<sup>3</sup>

The Court of Appeals thus correctly recognized that the clients would not be made whole if Mr. Ferrer received credit for his 40% contingent fee, because the clients had incurred the costs of replacement counsel to mitigate the damages his malpractice had caused. *Shoemake*,

---

<sup>3</sup> Mr. Ferrer also complains that “[t]he award of interest on the contingent fee is punitive.” Pet., p. 10. In the lower courts, however, Mr. Ferrer *agreed* that prejudgment interest represented the proper measure of delay damages. App. Op. Br., pp. 14-15; CP 244, 254-55. The issue here, in contrast, is whether Mr. Ferrer should receive credit against those delays damages for his hypothetical contingent fee.

*supra*, at ¶¶6, 20.<sup>4</sup> The Court's conclusion is entirely consistent with Washington case law.

### 3. Fee Forfeitures do not Constitute "Punitive Damages"

The reasoning of the Court of Appeals, as well as settled Washington law governing recovery of mitigation expenses, thus refutes Mr. Ferrer's charge that the Court of Appeals awarded "punitive damages." Petition, pp. 8-10.<sup>5</sup> Moreover, Washington courts have also consistently upheld the validity of fee forfeitures against fiduciaries without regard to causation or damage. See, e.g., *Eriks v. Denver*, 118 Wn.2d 459, 457, 824 P.2d 1207 (1992); *Mersky v. Multiple Listing Bureau*, 73 Wn.2d 225, 437 P.2d 897 (1968); *Cotton v. Kronenberg*, 111 Wn. App. 258, 44 P.3d 878 (2002); *Marriage of Petrie*, 105 Wn. App. 268,

---

<sup>4</sup> Washington allows an injured victim to recover, as damages, the victim's reasonable mitigation expenses incurred as a result of the tortfeasor's actions. E.g., *Hyde v. Wellpinit Sch. Dist.*, 32 Wn. App. 465, 469, 648 P.2d 892 (1982); *Kubista v. Romaine*, 14 Wn. App. 58, 64, 538 P.2d 812 (1975), *aff'd*, 87 Wn.2d 62, 549 P.2d 491 (1976). Accord, 3 Mallen & Smith, *Legal Malpractice*, §20.6, pp. 20-21 (2007 ed.) ("The client's injury may be the expense of retaining another attorney. Such damages can result from an attempt to avoid or minimize the consequences of the former attorney's negligence."); 1 *Restatement (Third) of the Law Governing Lawyers*, *supra*, §53, cmt. f, p. 393 ("The rule barring recovery of fees does not prevent a successful legal-malpractice plaintiff from recovering as damages additional legal expenses reasonably incurred outside the malpractice action itself as a result of a lawyer's misconduct [including malpractice]"). The contingent fee of replacement counsel, considered as mitigation expenses, thus offsets Ferrer's hypothetical 40% contingent fee - an issue that *Moore v. Greenberg*, 834 F.2d 1105, 1109 n. 7 (1<sup>st</sup> Cir. 1987) recognized but left "for another day."

<sup>5</sup> Washington prohibits punitive damages on public policy grounds. *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 50-56, 25 P. 1072 (1891). Washington authorizes fee forfeitures on public policy grounds. *Eriks v. Denver*, 118 Wn.2d 451, 463, 824 P.2d 1207 (1992). No conflict exists between the two policies that support each result.

276, 19 P.3d 443 (2001) (breach of fiduciary duty even though trustee showed “net benefit” to beneficiaries). Accord, *Huber v. Taylor*, 469 F.3d 67, 76-8 (3<sup>rd</sup> Cir. 2006); 1 *Restatement (Third) of the Law Governing Lawyers*, §37, cmte. b, p. 272 (ALI 2000)(“Forfeiture is also a deterrent...The damage that misconduct causes is often difficult to assess”).

Indeed, in the Court of Appeals, Ferrer *conceded* that “fee denial or disgorgement in cases involving disputes over the attorney’s fees” constitutes an “exception” that distinguishes breach of fiduciary duty and legal malpractice claims. Resp. Br., p. 23. In short, denying fees to a wayward professional does *not* constitute punitive damages.

Thus, regardless of how the Court characterizes the client’s remedy, as a “make whole” rule, recovery of “mitigation expenses,” or “fee forfeiture”, each of those theories arrives at the same result achieved by the Court of Appeals.

**G. ARGUMENT WHY THE COURT SHOULD GRANT CROSS-REVIEW**

- 1. If the Court Review Ferrer’s Petition, the Court Should Also Grant Cross-Review so that It may Consider the Full Array of Remedies Available to Mr. and Mrs. Shoemake.**

Mr. and Mrs. Shoemake request cross-review of two issues related to the same measure of remedies issue raised by the Petition for Review.

If the Court reviews Mr. Ferrer's Petition, it should also grant cross-review to determine whether: (1) the attorney's breaches of fiduciary duty, based on dishonesty and misrepresentation, forfeited his claim to credit for a contingent fee, and; (2) whether a fiduciaries bad faith pre-litigation conduct toward his/her beneficiaries authorizes Washington trial courts to award attorney fees to the beneficiaries as a remedy. The Court should grant review of these issues, if it reviews Ferrer's Petition because they involve remedies available to Mr. and Mrs. Shoemake to replace the remedy awarded by the Court of Appeals, and represent an alternative basis to affirm. The Court of Appeals did *not* reach and decide the breach of fiduciary duty issue, even though Mr. and Mrs. Shoemake had raised and fully briefed it in both the trial court and the Court of Appeals. See, App. Op. Br., pp. 19-31; App. Reply Br., pp. 3-12. Cross-review would thus obviate the potential for remand of this issue for decision by the Court of Appeals in the first instance. See, RAP 13.7(b).

Similarly, the trial court awarded Mr. and Mrs. Shoemake reasonable attorney fees for Mr. Ferrer's Shoemake "for [Ferrer's] deceit, misrepresentation and breach of fiduciary duty." Appendix A [CP 271]. However, the Court of Appeals reversed, reasoning that because "there was no allegation of bad faith *in the conduct of this malpractice suit itself*," the Washington courts may *not* award attorney fees as a remedy for

a fiduciary's pre-litigation bad faith toward his/her beneficiary. *Shoemake, supra*, at ¶¶21-27 (emphasis added). If this Court were to review Mr. Ferrer's Petition, the Court should consider this attorney fee issue as well, so that the Court may have the full array of potential remedies available to it when it decides the proper remedy for Mr. Ferrer's malpractice and breaches of fiduciary duty.<sup>6</sup>

The substantive issues supporting cross-review are briefly described next.

**2. Fee Forfeiture Represents the Proper Remedy for Ferrer's Breaches of Fiduciary Duty.**

In general, a Washington attorney breaches his/her fiduciary duty if the attorney violates the Rules of Professional Conduct governing the attorney-client relationship. *Eriks v. Denver*, 118 Wn.2d 457, 824 P.2d 1207 (1992). For example, Washington attorneys may not lie to their clients. RPC 8.4(c) (lawyer may not engage in "conduct involving dishonesty, fraud, deceit or misrepresentation"). See, e.g., *In re: Discipline of Dann*, 136 Wn.2d 67, 77-80, 960 P.2d 416 (1998); *In re: Discipline of Poole*, 156 Wn.2d 196, 210-14, 125 P.3d 954 (2006)

---

<sup>6</sup> Mr. and Mrs. Shoemake appealed the amount of the trial court fee award. Appellant's Op. Br., pp. 32-40. The Court did not reach this issue because it reversed the award of attorney fees and denied fees as a matter of law. If the Court grants review of the attorney fee issue, the Court should also take up all issues concerning the proper fee determination. RAP 13.7(b).

(violation of RPC 8.4(b) involves determination of “whether the attorney lied”); *In re: Discipline of Orton*, 97 Wn.2d 243, 244-5, 643 P.2d 448 (1982) (attorney breached ethics rules when he misrepresented that a guardian ad litem had been appointed). As the Supreme Court stated in *Dann*, “[l]ying to clients is an assault upon the most fundamental tenets of attorney-client relations.” *Dann, supra*, 136 Wn.2d at 80 (emphasis added). A Washington attorney thus breaches the attorney’s fiduciary duty to the client if the attorney lies or misrepresents matters to a client, including by failing to disclose material information to the client.

An attorney also breaches his/her fiduciary duties to keep the client informed, as required by RPC 1.4(b), if the attorney delays notifying the clients that their case has been dismissed. *In re: Discipline of Cohen*, 149 Wn.2d 323, 336-7, 67 P.3d 1086 (2003) (attorney subject to discipline for *two month* delay in notification of dismissal).

When an attorney has violated the Rules of Professional Conduct and his/her fiduciary duties to the client, as occurred here, “[d]isgorgement of fees is a reasonable way to ‘discipline specific breaches of professional responsibility, and to deter future misconduct of a similar type.’” *Eriks, supra*, 118 Wn.2d at 463. Accord, *Ross v. Scannell*, 97 Wn.2d 598, 610, 647 P.2d 1004 (1982); *Cotton v. Kronenberg*, 111 Wn.App. 250, 275, 44 P.3d 878 (2002). The client need not show damage or causation to justify

fee disgorgement. *Eriks, supra*, 118 Wn.2d at 462. See discussion, *supra*, pp. 9-10. Complete disgorgement normally represents the appropriate remedy. *Eriks, supra*, 118 Wn.2d at 462, quoting, *Woods v. City National Bank & Trust Co.*, 312 U.S. 262, 268-69, 61 S. Ct. 493, 85 L. Ed.820 (1941); *Cotton, supra*, 111 Wn. App. at 258 (refusing to award *quantum meruit* fees).

Although the Washington appellate courts have frequently affirmed fee forfeitures of professionals and fiduciaries, no Washington decision has ever established the legal standard to guide those decisions.<sup>7</sup> This issue therefore also warrants review under RAP 13.4((b)(4). Thus, if the Court reviews Mr. Ferrer's petition, it should also review the issue of whether Mr. Ferrer's breaches of fiduciary duty forfeited his claimed credit, against his former clients' malpractice damages, for the hypothetical contingent fee.

---

<sup>7</sup> The Washington Supreme Court in *Eriks* agreed that "[i]t is no answer to say that fraud or unfairness were not shown to have resulted." *Eriks, supra*, 118 Wn.2d at 462, quoting *Woods v. City Nat'l's Bank & Trust Co.*, 312 U.S. 262, 268-9, 85 L. Ed. 820, 61 S. Ct. 493 (1941). Accord, *Mersky v. MLS Bureau*, 73 Wn.2d 225, 231, 437 P.2d 897 (1968)("It is of no consequence, in this regard, that the broker may be able to show that the breach of his duty of full disclosure and undivided loyalty did not involve intentional or deliberate fraud, or did not result in injury to the principal or did not materially affect the principal's ultimate decision in the transaction." [emphasis added]).

**3. Washington Courts have Discretion to Award Reasonable Attorney Fees for a Fiduciary's Pre-Litigation Bad Faith Conduct toward the Beneficiary.**

The trial court awarded reasonable attorney fees to Mr. and Mrs. Shoemake to remedy “for [Ferrer’s] deceit, misrepresentation and breach of fiduciary duty.” CP 271. The Court of Appeals reasoned that, because “there was no allegation of bad faith *in the conduct of this malpractice suit itself*,” the Washington courts may *not* award attorney fees as a remedy for a fiduciary’s pre-litigation bad faith toward his/her beneficiary. *Shoemake, supra*, at ¶¶21-27 (emphasis added).

Washington trial courts, however, may also award reasonable attorney fees to litigants for an opposing party’s pre-litigation bad faith. Washington recognizes at least four equitable bases upon which a litigant may recover attorney fees from their opponent, including *bad faith conduct of the losing party*, preservation of a common fund, protection of constitutional principles, and private attorney general actions. *Dempere v. Nelson*, 76 Wn. App. 403, 407, 886 P.2d 219 (1994) and *Miotke v. Spokane*, 101 Wn.2d 307, 338, 678 P.2d 803 (1984). *Dempere*, denigrated attorney fees awarded on the basis of bad faith as “a sort of ‘urban legend,’” and held that “[b]ad faith in the underlying tortious conduct is not a recognized equitable ground for awards of attorney fees in Washington.” Subsequent to *Dempere*, however, this Court, and both

Division I and Division 2, have recognized that equity does indeed authorize an award of attorney fees on the basis of bad faith. *E.g., In re: Pearsall-Stipek*, 136 Wn.2d 255, 266-67 and n. 6, 961 P.2d 343 (1998) (“our inherent equitable powers authorize the award of attorney fees in cases of bad faith”), *as amended*, 141 Wn.2d 756, 783, 10 P.3d 1034 (2000); *Blueberry Place Homeowners Ass’n. v. Northward Homes, Inc.*, 126 Wn. App. 352, 362 n. 9, 110 P.3d 1145 (2005); *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 927-29 and n. 2, 982 P.2d 131 (1999) (recognizing that *Pearsall-Stipek* rejected *Dempere’s* analysis). See further, *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 37, 904 P.2d 731 (1995) (insured recovers attorney fees for insurer’s bad faith, in part because the “insurer acts in contravention to its enhanced fiduciary obligations”).

In this equitable context, bad faith includes “actual or *constructive fraud*” or a ‘neglect or refusal to fulfill some duty...not prompted by an honest mistake as to one’s rights or duties, but by some interested or sinister motive.’” *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 37, 904 P.2d 731 (1995) (emphasis added), *cited with approval*, *In re: Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 160 n. 13, 60 P.3d 53 (2002) (“bad faith, as such refers to conduct involving ill will, fraud, or frivolousness”). Accord, *Pearsall-Stipek, supra*, 141 Wn.2d at 783. It is

no coincidence that an attorney's breach of fiduciary duty is also characterized as a "constructive fraud." See 1 *Restatement (Third) of the Law Governing Lawyers*, §49, cmt. a, p. 348; W. Gregory, *The Fiduciary Duty of Care: A Perversion of Words*, 38 Akron L.R. 181, 192 (2005). *Green v. McAllister*, 103 Wn. App. 452, 467-68, 14 P.3d 795 (2000) thus defines "constructive fraud" as follows:

Constructive Fraud. Conduct that is not actually fraudulent but has all the actual consequences and legal effects of actual fraud is constructive fraud. Breach of a legal or equitable duty, *irrespective or moral guilt*, is "fraudulent because of its tendency to deceive others or violate confidence." [Emphasis in original].

Accord, *Thompson v. Huston*, 17 Wn.2d 457, 461, 135 P.2d 834 (1943) ("Untrue statements amount to constructive fraud, even though made in good faith"); *Li v. Tang*, 87 Wn.2d 796, 799-801, 557 P.2d 342 (1976) (court has the inherent power to award fees when the fiduciary's breach is "tantamount to constructive fraud").

The lower court awarded attorney fees to Mr. and Mrs. Shoemake because Ferrer "repeatedly lied" to Mr. and Mrs. Shoemake and was guilty of "deceit, misrepresentation, and breach of fiduciary duty." CP 270-71. Ferrer's lying or "dissembling" (by whatever name), constitutes "constructive fraud," as a matter of Washington law. Constructive fraud constitutes bad faith, and bad faith through constructive fraud *allows* the courts to award reasonable attorney fees based on their inherent authority.

Accordingly, *if* the Court grants review of Mr. Ferrer's Petition, it should also grant cross-review to decide whether the Washington courts may remedy a fiduciary's pre-litigation bad faith through an award of reasonable attorney fees. RAP 13.4(b)(1)(2) and (4).

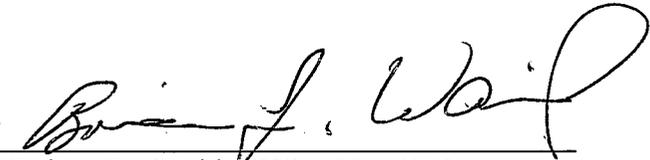
#### **H. CONCLUSION**

The Court should deny Mr. Ferrer's Petition for Review. Nevertheless, *if* the Court grants review of Mr. Ferrer's Petition, the Court should then also grant review of Mr. and Mrs. Shoemake's cross-petition, so that the Court may ultimately grant Mr. and Mrs. Shoemake the full remedy to which they are entitled as a matter of law. Mr. and Mrs. Shoemake specifically do *not* request cross-review unless the Court grants review of Mr. Ferrer's petition, so that this case may be concluded as quickly as possible.

If the Court grants cross-review, the Court should also award Mr. and Mrs. Shoemake their reasonable attorney fees, in both this Court and the Court of Appeals. RAP 18.1. Mr. and Mrs. Shoemake raised this issue in the Court of Appeals, thus preserving it for appeal in this Court.

DATED this 24<sup>th</sup> day of June, 2008.

By: \_\_\_\_\_



Robert B. Gould, WSBA No. 4353  
Brian J. Waid, WSBA No. 26038  
LAW OFFICES OF ROBERT B. GOULD  
2110 N Pacific Street #100  
Seattle, WA 98103  
(206) 633-4442  
*Attorneys for Respondents/Cross-Petitioners*



# **APPENDIX A**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

ANDREA SHOEMAKE, by and through a  
guardian ad litem to be appointed, and  
KEITH SHOEMAKE, and their marital  
community.,

Plaintiff,

v.

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

Defendant.

NO. 06-2-01446-4 SEA

**ORDER GRANTING PLAINTIFFS'  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT AND DENYING  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

THIS MATTER has come before the Court, with oral argument, before the undersigned  
Judge of the above-entitled Court on Plaintiffs' Motion for Partial Summary Judgment and  
Defendants' Motion for Summary Judgment.

Plaintiffs' were represented by their attorney, Robert B. Gould, of the Law Offices of  
Robert B. Gould. Defendants were represented by their attorney, John Rankin, of Reed  
McClure.

The Court, having reviewed the file and pleadings herein, including:

ORDER GRANTING MOTION FOR PARTIAL  
SUMMARY JUDGMENT AND DENYING  
DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT

Court 269  
2/17/07

1 I. Plaintiffs' Pleadings:

- 2 1. Plaintiffs' Motion for Partial Summary Judgment;
- 3 2. Declaration of Robert B. Gould;
- 4 3. Index of Foreign Authorities;
- 5 4. Plaintiffs' Response to Defendants' Motion for Summary Judgment;
- 6 5. Plaintiffs' Reply in Support of Plaintiffs' Motion for Partial Summary
- 7 Judgment;
- 8

9 II. Defendants' Pleadings:

- 10 1. Defendants' Motion for Summary Judgment;
- 11 2. Declaration of R. Douglas P. Ferrer in Support of Defendants' Motion for
- 12 Summary Judgment;
- 13 3. Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment;
- 14 4. Declaration of John W. Rankin, Jr. in Opposition to Plaintiffs' Motion for
- 15 Partial Summary Judgment.
- 16

17 The Court having heard the argument of counsel, and being fully advised in the

18 premises, IT IS THEREFORE,

19 ORDERED that Plaintiffs' Motion for Partial Summary Judgment is hereby

20 GRANTED and Defendants' motion for Summary Judgment is DENIED, the Court having

21 determined as a matter of law, that:

22

- 23 A. Defendant R. Douglas P. Ferrer violated RPC 1.4 and 8.4, and breached his
- 24 fiduciary duty to plaintiffs Andrea Shoemake and Keith Shoemake, and the
- 25 marital community comprised thereof, when he did not promptly inform

1                   them that their case had been dismissed with prejudice and repeatedly lied to  
2                   them about the status of their case;

3                   B.           Defendant R. Douglas P. Ferrer breached the standard of care applicable to  
4                   Washington attorneys in the same or similar circumstances, during the  
5                   course of his representation of plaintiffs' Andrea Shoemake and Keith  
6                   Shoemake, when he: (i) allowed the statute of limitations to expire on their  
7                   claims; (ii) failed to appear for trial in their case and/or make arrangements  
8                   for plaintiffs' to appear for trial; (iii) failed to determine, and advise Mr. and  
9                   Mrs. Shoemake whether they should accept State Farm's 1995 offer of its  
10                  \$100,000 UIM policy limits; and (iv) repeatedly lied to Mr. and Mrs.  
11                  Shoemake concerning the status of their complaint.

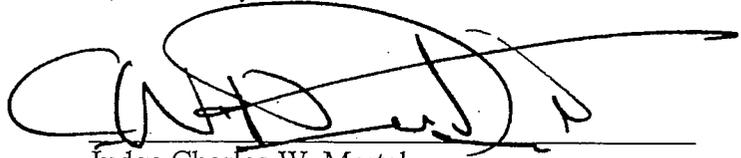
12  
13  
14                  NOW, THEREFORE, IT IS FURTHER ORDERED:

15                  Judgment for the Plaintiff is entered in the amount of \$60,000.00, together with  
16                  prejudgment interest as delayed damages on the \$100,000 State Farm UIM Policy proceeds  
17                  that would have been paid on June 19, 1995, but for defendants' malpractice and breach of  
18                  fiduciary duty, until April 18, 2006, which represents the date on which State Farm paid its  
19                  \$100,000 UIM policy limits. See, Gould Decl. ¶3. Sanctions against Defendant are also  
20                  appropriate for his deceit, misrepresentation, and breach of fiduciary duty. Plaintiff is  
21                  therefore awarded reasonable attorney fees and costs incurred to Mr. Gould's office to  
22                  prosecute this proceeding. Additionally, Plaintiff will recover from Defendant; reasonable  
23                  attorney fees and costs, the exact amounts of which will be determined by subsequent order of  
24                  the Court based upon Plaintiff's attorney, Robert B. Gould.

25  
ORDER GRANTING MOTION FOR PARTIAL  
SUMMARY JUDGMENT AND DENYING  
DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT

*CLW*  
- 11/07 271

1  
2 DATED this 15<sup>th</sup> day of February, 2007.

3  
4 

5 Judge Charles W. Mertel  
6 King County Superior Court

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ORDER GRANTING MOTION FOR PARTIAL  
SUMMARY JUDGMENT AND DENYING  
DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT