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No. 60158-0-1

**COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON**

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

*Appellants/Cross-Respondents,*

v.

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

*Respondent/Cross-Appellant*

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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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**OPENING BRIEF OF APPELLANTS**

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ORIGINAL

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## I. INTRODUCTION

Plaintiffs/appellants/cross-respondents Keith and Andrea Shoemake appeal the lower court summary judgment order concerning the proper measure of damages and attorney fees recoverable on legal malpractice and breach of fiduciary duty claims by clients against their former attorneys. The issue concerning the proper measure of Mr. and Mrs. Shoemake's damages, in particular, represents a significant, recurring issue that frequently arises in the context of legal malpractice litigation.

Mr. and Mrs. Shoemake retained attorney Ferrer on a contingent fee basis, to represent them concerning Mrs. Shoemake's severe and disabling injuries that resulted from a motor vehicle collision. The Shoemakes' claims against the uninsured, at-fault driver were uncollectible. The only recoverable sum consisted of the Shoemake's \$100,000 UIM policy with State Farm.

State Farm offered its \$100,000 UIM policy limit in 1995. Due to his incompetence, Ferrer could not decide whether his clients should accept State Farm's UIM policy limit offer. He chose instead to repeatedly lie to the Shoemakes over the course of approximately the next 10 years, falsely blaming the lengthy delays in resolution of their case on the court system. The Shoemakes eventually retained replacement counsel who recovered State Farm's \$100,000 UIM policy limit in April 2006.

Mr. and Mrs. Shoemake sued Ferrer for both legal malpractice and breach of fiduciary duty. On summary judgment, the lower court held that Ferrer committed legal malpractice *and* breached his fiduciary duties to Mr. and Mrs. Shoemake. The lower court further held that the Shoemakes' damages consisted of delay damages on the unpaid \$100,000 State Farm UIM policy limit during the period between State Farm's offer and its recovery. Neither appeal disputes these lower court conclusions.

Calculation of the Shoemakes' delay damages depends on whether Washington allows attorneys to receive credit against their former clients' recovery for legal malpractice and/or breach of fiduciary duty based upon the attorney's hypothetical, contingent fee. If the measure of the clients' damages does not allow for such a credit, the Shoemakes' delay damages consist of legal interest on \$100,000 during the period of delay; if the measure of such damages does allow for such a credit, then the Shoemakes' delay damages should consist of legal interest on \$60,000. No Washington case has addressed the specific issue of whether attorneys should receive credit against their clients' malpractice and/or breach of fiduciary duty recoveries for such hypothetical fees, and a split exists in the jurisprudence from other jurisdictions. In this particular case, the lower court gave Ferrer credit for his *full 40%* contingent fee. Mr. and Mrs. Shoemake maintain that Ferrer should *not* receive *any* such credit.

The lower court went even further, however, calculating the Shoemakes' delay damages as "the amount of \$130,511.58 plus attorney fees, less the \$100,000 State Farm payment previously made, for a net of \$30,511.58..." CP 339-40. The \$130,511.58 amount used by the lower court consisted of \$60,000 plus interest on \$60,000. CP 325 (Calculation no.2). This meant that the lower court gave Ferrer credit for a 40% hypothetical contingent fee *both before and after calculating interest due to delay in payment*. Mr. and Mrs. Shoemake thus appeal this lower court decision because it in effect grants Ferrer a windfall, double recovery.

The lower court also awarded Mr. and Mrs. Shoemake reasonable attorney fees for proceedings in this case. The Shoemakes appeal two parts of the lower court attorney fee award in their favor. First, the lower court reduced its lodestar calculation, reasoning that it "should exclude time spent on Plaintiff's [sic] unsuccessful damage theories and claims." CP 376 ¶¶1.6-1.7, 2.2. The Shoemakes maintain that losing part of a motion does not constitute an "unsuccessful claim" for purposes of calculating the lodestar. Mr. and Mrs. Shoemake also appeal the lower court denial of their request for a modest 1.5 multiplier, particularly in light of Ferrer's assertions that establish a high risk of no recovery. Mr. and Mrs. Shoemake also request attorney fees in this appeal, pursuant to RAP 18.1.

## **II. ASSIGNMENTS OF ERROR**

1. The lower court held that the defendant/attorney Mr. R. Douglas P. Ferrer, committed malpractice and breached his fiduciary duties to his clients, Mr. and Mrs. Shoemake, but nevertheless allowed Ferrer credit for a hypothetical contingent fee against the Shoemakes' subsequent recovery through replacement counsel. Should a Washington attorney receive credit against his/her former clients' recovery for the attorney's breach of fiduciary duty and/or legal malpractice, for the hypothetical contingent fee the attorney would have received but for his/her incompetence?

### **Issues Pertaining to this Assignment of Error:**

- a. Did Ferrer's breaches of fiduciary duty forfeit his claim to a hypothetical, contingent fee from his clients, the Shoemakes?
- b. Did Ferrer's legal malpractice forfeit his claim to a hypothetical, contingent fee from his clients, the Shoemakes?

2. Did the lower court further abuse its discretion when it effectively awarded Ferrer double credit for the hypothetical contingent fee he claimed?

3. Did Findings of Fact 1.6 and 1.7, together with Conclusion of Law 2.2, apply an erroneous legal standard when it reduced the lodestar calculation for "unsuccessful claims"?

**Issues Pertaining to this Assignment of Error:**

- a. Considering that the Shoemakes prevailed on both their legal malpractice and breach of fiduciary duty causes of action against Ferrer, partially prevailed relative to the proper damage formula, and obtained an order awarding them attorney fees, did the lower court apply an erroneous legal standard when it reduced the Shoemakes' attorney fees because they did not prevail on *every* remedy theory?
- b. If this Court modifies the lower court damage analysis should the Court also reverse the lower court's reduction of the lodestar calculation for "unsuccessful claims"?

4. Considering that the Shoemakes' counsel undertook representation in this legal malpractice/breach of fiduciary duty matter pursuant to a contingent fee agreement and Ferrer admits he is both uninsured and unable to pay the Shoemakes' judgment, did lower court Finding of Fact 1.12 and Conclusion of Law 2.3 apply an erroneous legal standard in denying the Shoemakes a 1.5 contingent risk multiplier?

5. Should this Court award Mr. and Mrs. Shoemake attorney fees on this appeal, pursuant to RAP 18.1?

**III. STATEMENT OF THE CASE**

**A. Facts re: The Shoemakes' Underlying Tort Case**

The parties generally agree on the underlying facts. Andrea Shoemake was severely injured in a motor vehicle collision on April 9, 1992. CP 60-89, 108-114. The vehicle driven by Joseph Hernandez crossed over the centerline of the highway, sideswiped a second vehicle,

and struck Mrs. Shoemake's car head on. CP 72. Hernandez had also been drinking. CP 73. Ferrer admits that Hernandez's negligence was the sole cause of the collision. CP 4 ¶5; CP 7 ¶1.

The parties further agreed that Mrs. Shoemake had suffered severe injuries. CP 9-10 ¶¶2-3. Ferrer acknowledged that Mrs. Shoemake's injuries "were very serious" and included closed head injuries that "would likely create disabilities for her for the rest of her life." CP 172 (28:10-13). Ferrer understood that Mrs. Shoemake had suffered a traumatic brain injury, a severe knee injury, and that she would suffer "ongoing mental deficits" as a result of the collision. CP 176-77 (32:9-33:9). Ferrer estimated Mrs. Shoemake's special damages alone at "\$150,000." CP 174 (30:6-9).

Mr. and Mrs. Shoemake retained Ferrer to represent them on a contingent fee basis concerning their claims arising out of the April 9, 1992 collision. CP 4 ¶9; CP 8 ¶2(C); CP 180-81 (38:15-39:18). Ferrer apparently prepared the complaint and summons, dated December 11, 1992. CP 118-23. Ferrer purported to have personally served Mr. Hernandez with process on July 15, 1994. CP 216-18. Ferrer did not formally file Mr. and Mrs. Shoemake's complaint until April 7, 1995, just two days prior to the expiration of the statute of limitations. CP 118-23. Ferrer, however, also did not file the requisite confirmation of joinder and

the court dismissed the complaint on March 6, 1996. CP 124-26, 130-39. Even Ferrer recognized that the statute of limitations had expired in 1995, when he failed to effectuate proper service on Hernandez. CP 204 (65:4-10). (Pursuant to CR 3(a) and RCW 4.16.170, the purported service on Hernandez was ineffective and did not toll the statute of limitations). The court nevertheless reinstated Mr. and Mrs. Shoemake's complaint, via an ex parte order dated March 15, 1996. CP 142. Mr. and Mrs. Shoemake's case was eventually scheduled to commence trial on March 10, 1997. CP 146-48. Ferrer did not appear for trial on March 10, 1997, and also did not make any arrangements for Mr. and Mrs. Shoemake to appear for trial on that date. CP 199-200 (60:16-61:2). The Court again dismissed the Shoemakes' complaint, this time with prejudice. CP 150.

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 admits 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 the status of her case, but that he repeatedly

lied to her about its status. CP 200-04 (61:21-63:10, 64:23-65:3). Ferrer concedes 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).

State Farm provided UIM insurance for Mr. and Mrs. Shoemake. By June 19, 1995, State Farm had offered to pay its \$100,000 policy limits to Mr. and Mrs. Shoemake. CP 215; See further, CP 167-68 (23:16-24:2). Ferrer conceded that his representation of Mr. and Mrs. Shoemake "was deficient in not accepting an offered payment of \$100,000 from State Farm on behalf of the Shoemakes." CP 166-67 (22:16-23:6). Ferrer explained that "I was unsure of the legal ramifications of accepting that payment...and I should have determined what the legal consequences of accepting the payment were and advised them and I did not do that." CP 167-68 (24:10-25:1).

Mr. and Mrs. Shoemake retained Robert Gould to replace Ferrer, in 2005, pursuant to a contingent fee agreement. CP 60-61 ¶3. Gould recovered State Farm's \$100,000 UIM policy limits on April 28, 2006, subject to Gould's contingent fee agreement. *Id.*

**B. Lower Court Proceedings**

*1. The Parties' Pleadings and Summary Judgment Motions.*

Keith and Andrea Shoemake sued Ferrer for legal malpractice and breach of fiduciary duty, on January 6, 2006. CP 1-6 and ¶13. Ferrer denied liability. CP 7-8. On January 12, 2007, Mr. and Mrs. Shoemake filed a motion for summary judgment on liability and the calculation of damages. CP 40-59. They argued, *inter alia*, that Ferrer's malpractice and breach of fiduciary duty preclude Ferrer from receiving credit against Mr. and Mrs. Shoemake's damages based upon his contingent fee contract. *Id.*

When the Shoemakes moved for summary judgment, Ferrer moved to amend his Answer to admit liability on Mr. and Mrs. Shoemake's legal malpractice claim. CP 12 ¶16, 257 ¶2(E). Ferrer, however, continued to *deny* that he had breached his fiduciary duties to Mr. and Mrs. Shoemake. CP 258 ¶14 (denying Complaint ¶13 [CP 5]). Ferrer also filed a cross-motion for summary judgment, in which he "concede[d] that plaintiffs are entitled to prejudgment interest," as damages for the defendants' legal malpractice that caused State Farm to delay its delivery of its \$100,000 UIM policy limits. CP 244, 254-55. Ferrer nevertheless argued that he should also receive credit against the Shoemakes' recovery based upon

certain subrogation claims. CP 244, 251-2.<sup>1</sup> Ferrer further argued that the lower court should calculate the Shoemakes' damages as "the net difference between the \$52,088<sup>2</sup> they would have realized in settlement of the UM case, plus prejudgment interest on that amount, less the \$100,000 they have received from the UM settlement." CP 255.

**2. *The Trial Court Summary Judgment and Related Rulings***

The lower court granted the Shoemakes' motion for summary judgment on liability, holding, as a matter of law [CP 270-71]:

- A. Defendant R. Douglas Ferrer violated RPC 1.4 and 8.4, and breached his fiduciary duty to plaintiffs Andrea Shoemake and Keith Shoemake, and the marital community comprised thereof, when he did not promptly inform them that their case had been dismissed with prejudice and repeatedly lied to them about the status of their case;
- B. Defendant R. Douglas Ferrer breached the standard of care applicable to Washington attorneys in the same or similar circumstances, during the course of his representation of plaintiffs Andrea Shoemake and Keith Shoemake, when he:
  - (i) allowed the statute of limitations to expire on their claims;
  - (ii) failed to appear for trial in their case and/or make arrangements for plaintiffs to appear for trial;
  - (iii) failed to determine, and advise Mr. and Mrs. Shoemake whether they should accept State Farm's 1995 offer of its

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<sup>1</sup> The Shoemakes' Response explained why such a credit would be inappropriate. CP 231-33. The lower court implicitly agreed with the Shoemakes because it did not allow Ferrer such a credit.

<sup>2</sup> \$52,088 represents the \$100,000 State Farm UIM policy less Ferrer's claimed 40% hypothetical contingent fee, and also less \$7,912 based on Ferrer's subrogation claim argument. See n. 1, *supra*.

\$100,000 in UIM policy limits; and (iv) repeatedly lied to Mr. and Mrs. Shoemake concerning the status of their complaint.

Concerning the amount of the Shoemakes' recovery, the lower court held as follows [CP 271]:

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

The Court, in effect, adopted most of the Shoemakes' theories concerning remedies, rejected Ferrer's argument for a credit against the Shoemakes' recovery based on subrogation claims, but nevertheless allowed Ferrer credit for his \$40,000 hypothetical, contingent fee. *Id.*

Ferrer filed a motion for clarification concerning the lower court damage formula, which the Shoemakes contested. CP 304-07, 328-33. The lower court thereupon calculated the Shoemakes' damages as "the amount of \$130,511.58 plus attorney fees, less the \$100,000 State Farm

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<sup>3</sup> \$60,000 represents the net amount of the \$100,000 State Farm UIM policy *after* deduction of Ferrer's hypothetical 40% contingent fee. CP 93 ¶4.

payment previously made, for a net of \$30,511.58 + Attorney fees.” CP 338-40. (The Shoemakes maintain that the lower court damage calculation effectively granted Ferrer a *double* credit for his hypothetical fee. See discussion, *infra*, pp.16-19).

On the Shoemakes’ separate application [CP 273], the lower court fixed the amount of the Shoemakes’ attorney fees award at \$14,893.37. CP 342, 379-80. Consistent with the lower court’s award of attorney fees “to prosecute this proceeding” [CP 271], specifically segregated out their time incurred in recovering the UIM proceeds from State Farm. CP 280 ¶5. The lower court arrived at the \$14,893.37 amount by: (1) rejecting the Shoemakes’ request for a 1.5 lodestar multiplier [CP 277, 273 ¶12], reasoning that “Counsel was not at significant risk of obtaining little or no recovery upon which to base their contingent fee” [CP 377-78 ¶¶1.12, 2.3]; and (2) excluding 65% of the time incurred by the Shoemakes’ counsel relative to the summary judgment motions from the lodestar calculation by reasoning that it “should exclude time spent on Plaintiff’s [sic] unsuccessful damage theories and claims.” [CP 376 ¶¶1.6-1.7, 2.2. Concerning the Shoemakes’ request for a contingent risk multiplier, Ferrer acknowledged that the Shoemakes’ face a risk of non-recovery [CP 318]:

In actual fact, the only risk faced in this case by Plaintiffs was not whether they could obtain a substantial judgment, **but whether Defendant can pay that judgment.** As the Court is

aware from a comment by Plaintiff's counsel during oral argument of the cross-motions for summary judgment, **Defendant is not covered by insurance for this claim. Any judgment will be paid out of his pocket.** Rendering a punitive lodestar fee enhancement will only make that **payment more difficult and less likely.** (Emphasis added).

Mr. and Mrs. Shoemake appeal the lower court damage and attorney fee awards as insufficient. CP 381-96. Ferrer has cross-appealed. Ferrer has not posted supersedeas and has not obtained a stay of the judgment against him. ER 201(f). This Opening Brief addresses the issues raised by the Shoemakes' appeal.

#### IV. SUMMARY OF ARGUMENT

Washington courts should not reward lawyer malpractice and violation of attorneys' fiduciary duties (the "punctilio of an honor most sensitive") to their clients. The lower court violated this fundamental principle when it awarded Mr. and Mrs. Shoemake delay damages (correctly) but calculated those damages by crediting Mr. Ferrer credit with a full, hypothetical, contingent fee despite his malpractice and breaches of fiduciary duty. As a practical matter, the lower court required the clients to pay *two* contingent attorney fees, *i.e.* one to Mr. Ferrer and the other to replacement counsel retained to mitigate their damages. An attorney who commits legal malpractice and breaches his/her fiduciary duties to the attorney's client should not receive *any* credit against the

client's recovery, as a matter of law. The lower court compounded its error by giving Ferrer a double credit for the hypothetical, contingent fee, thus further reducing the Shoemakes' delay damages.

The lower court also correctly awarded Mr. and Mrs. Shoemake attorney fees, but incorrectly calculated the award of attorney fees in two ways. First, the lower court incorrectly reduced the lodestar calculation for 65% of counsel's hours spent on the parties' summary judgment motions, even though plaintiffs generally prevailed on those motions and the case generally, *and* the loss of part of a motion does not constitute an "unsuccessful claim" that justifies segregation of attorney time for purposes of calculating the lodestar. Second, the lower court denied the Shoemakes' request for a modest 1.5 contingent risk multiplier based on its erroneous conclusion that the Shoemakes' counsel do not face a risk of non-recovery in this case, despite the fact that Ferrer himself established that he is uninsured and unable to pay the Shoemakes' judgment.

Mr. and Mrs. Shoemake also seek attorney fees on appeal, pursuant to RAP 18.1.

## V. ARGUMENT

### A. **The Trial Court Correctly Awarded Interest as Delay Damages, but Applied a Legally and Mathematically Erroneous Formula to Calculate those Damages.**

1. *The Trial Court Correctly Awarded Interest as Delay Damages.*

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). When, as here, the tortfeasor's victim sustains a loss of the use of property (*i.e.*, the State Farm UIM proceeds), interest constitutes an appropriate measure of delay damages. *Restatement (Second) of the Law of Torts*, §913 (ALI 1979). Accord, *Matson v. Weidenkopf*, 101 Wn. App. 472, 485-86, 3 P.3d 805 (2000).

The lower court thus correctly awarded Mr. and Mrs. Shoemake delay damages in the form of interest on the State Farm UIM policy proceeds, but then applied a legally erroneous formula to determine the amount of those delay damages.

2. *The Court Reviews Lower Court Damage Components De Novo.*

This Court reviews summary judgment orders *de novo*. *E.g., VersusLaw, supra*, 127 Wn. App. at 319. The Court also reviews *de novo*

the lower court decision concerning which components to include in the measure of damages. *Kobza v. Tripp*, 105 Wn. App. 90, 94-95, 18 P.3d 621 (2001). See further, *Martin v. Northwest Legal Services*, 43 Wn. App. 405, 412, 717 P.2d 779 (1986)(legal malpractice action involving damage formula related to division of pension benefits); *Flint, supra*, 82 Wn. App. at 214-223 (re: application of “collectibility” and “independent business judgment rule” to damage calculations in legal malpractice actions). The Court thus reviews the lower court damage formula *de novo*.

3. ***The Lower Court Erred when it Rewarded Ferrer’s Malpractice and Breach of Fiduciary Duty by Awarding him a Higher Contingent Fee than he could have Recovered if he had been Discharged Without Cause.***

Delay damages, *without* credit for Ferrer’s hypothetical contingent fee, total \$117,519.31 (*i.e.*, \$100,000 principal + \$117,519.31 interest on \$100,000 (6/19/95 to 4/18/06) – \$100,000 UIM proceeds. CP 320 ¶3, 323. Mr. and Mrs. Shoemake maintain that this calculation represents the correct calculation of delay damages in this particular case. See discussion, *infra*, pp. 19-32. Even if the Court allowed Ferrer credit for a 40% hypothetical contingent fee, the Shoemakes’ delay damages should total \$70,511.58. CP 325 (Calculation no. 1).

The lower court nevertheless credited Ferrer with a 40% contingent fee *twice, i.e.*, calculating the delay damages as \$60,000 +

\$70,511.58 interest on \$60,000, before deducting the full UIM policy proceeds of \$100,000. CP 325 (Calculation no. 2); CP 339-40. The lower court delay damage formula resulted in a total damage award to Mr. and Mrs. Shoemake of only \$30,511.58: *Id.* The lower court apparently reasoned that: (1) it should calculate delay damages based *only* on the \$60,000 that Mr. and Mrs. Shoemake would have received if Ferrer had accepted State Farm's offer in 1995 and deducted a 40% contingent fee at that time; *and* (2) Ferrer should then receive a full \$100,000 credit against the resulting delay damage calculation because (the Court reasoned) Ferrer would have recovered a \$40,000 fee out of State Farm's \$100,000 payment. The lower court thus achieved the dubious distinction of actually *rewarding* Ferrer's malpractice and breach of fiduciary duty, by awarding him more than he could have recovered if the Shoemakes had terminated his services without cause.

Four fundamental flaws exist in the lower court analysis. First, Ferrer's malpractice and breach of fiduciary duty forced Mr. and Mrs. Shoemake to retain replacement counsel to whom they also paid a contingent fee. The Shoemakes' mitigation expenses, consisting of replacement counsel's contingent fee and expenses, thus offset Ferrer's claim to a credit for his hypothetical contingent fee. *Flint, supra*, 82 Wn. App. at 223-24. Second, and in that same context, Washington generally

limits an attorney's contingent fee to *quantum meruit*, in those circumstances in which the client discharges the attorney - *even without good 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>4</sup> The lower court thus erred as a matter of law when it credited Ferrer with his *full* 40% contingent fee; indeed, the lower court *rewarded* Ferrer by granting him a *higher* contingent fee than he could have recovered if he had simply been discharged *without cause*.

Washington also, generally, does not allow double recovery of a party's compensatory damages. *E.g., Weyerhaeuser v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 672, 15 P.3d 115 (2000). Both technically and practically, Ferrer's claim to credit for a contingent fee represents his claim for compensatory damages in *quantum meruit* arising out of Mr. and Mrs. Shoemake's termination of his contingent fee services prior to recovery. *E.g., Taylor v. Shigaki, supra*, 84 Wn. App. at 723, 728. See discussion, *supra*, p. 17. Thus, even if the Court allows Ferrer's recovery of a hypothetical contingent fee, the Court should not reward him with a *double credit* for his claimed fee, just as he could not have obtained a

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<sup>4</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 discussion, *infra*, pp. 21-25. See further, 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.

double fee recovery if the Shoemakes had successfully settled the case without the assistance of replacement counsel. The lower court nevertheless calculated delay damages by first deducting Ferrer's 40% contingent fee, and then crediting Ferrer with a second contingent fee by deducting a full \$100,000 (rather than \$60,000) from the resultant delay damage calculation. Even if the Court were to allow Ferrer credit for a hypothetical contingent fee, it should apply that credit either before calculating delay damages, or after, *but not both as it in fact did*.

Finally, the lower court should not have allowed Ferrer *any* credit for a contingent fee under these circumstances, because an attorney who commits legal malpractice and/or breaches the attorney's fundamental fiduciary duties to the client thereby forfeits *any* claim to a contingent fee out of the clients' recovery, as discussed next.

**B. Ferrer's Breaches of Fiduciary Duty and Legal Malpractice Forfeited his Claim to Credit for a Hypothetical Contingent Attorney Fee.**

*1. Standard of Review.*

A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *E.g., Wash. State Phys. Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). This standard requires the trial court to make decisions "founded upon principle and reason." *Cogle v. Snow*, 56 Wn. App. 499, 505, 784 P.2d 554

(1990). A trial court necessarily abuses its discretion when it applies an incorrect legal standard. *Fisons, supra*, 122 Wn.2d at 339. The lower court thus abused its discretion here when it concluded, as a matter of law, that *neither* Ferrer's malpractice nor his breaches of fiduciary duty, or the combination of the two, forfeited Ferrer's claim to a hypothetical contingent fee.

***2. Washington has not Decided Whether an Attorney should Receive Credit for a Hypothetical Contingent Fee Against a Client's Legal Malpractice Damages; the Court should Adopt the Reasoning of the Restatement and the Majority of Other Jurisdictions which Deny the Negligent Attorney such a Credit.***

Foundational to the fee forfeiture issue, the lower court held that Ferrer committed legal malpractice "when he: (i) allowed the statute of limitations to expire on their claims; (ii) failed to appear for trial in their case and/or make arrangements for plaintiffs to appear for trial; (iii) failed to determine, and advise Mr. and Mrs. Shoemake whether they should accept State Farm's 1995 offer of its \$100,000 in UIM policy limits; and (iv) repeatedly lied to Mr. and Mrs. Shoemake concerning the status of their complaint." CP 270-71.

To establish a claim for legal malpractice, the client must prove the existence of an attorney-client relationship, an act or omission in breach of the attorney's duty of care, damage, and proximate cause. *Hizey v.*

*Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992). Missing the statute of limitations is a “classic example” of attorney negligence that any layperson can understand, as is Ferrer’s numerous lies to his clients. *James V. Mazuca and Associates v. Schumann*, 82 S.W.3d 90, 97 (Tex. App. 2002) (surveying cases from numerous jurisdictions). Accord, e.g., *Giron v. Koltavy*, 124 P.3d 821, 825 (Colo. App. 2005); *Valentine v. Watters*, 896 So.2d 385, 394 (Ala. 2004); *Allyn v. McDonald*, 112 Nev. 68, 910 P.2d 263, 266 (Nev. 1996); *Little v. Matthewson*, 114 N.C. App. 562, 442 S.E.2d 567, 571 (N.C. App. 1994).

The lower court thus correctly concluded that Ferrer committed malpractice. Although Ferrer ultimately conceded his malpractice on summary judgment, the nature of his malpractice and the fact that it *caused* Mr. and Mrs. Shoemake’s delay damages bears significantly on whether Ferrer should receive credit for a contingent fee against their recovery of those very same delay damages.

Washington courts, however, have not addressed the specific issue of whether an attorney, who has committed legal malpractice while representing the client pursuant to a contingent fee contract, may nevertheless receive credit for the hypothetical contingent fee the attorney might otherwise have recovered had he/she performed competently. In the specific context of legal malpractice, *Kane, Kane & Kritzer, Inc. v.*

*Altgen*, 107 Cal. App.3d 36, 42-44, 165 Cal. Rptr. 534 (1980) defines the issue as follows:

The more challenging issue concerns the court's reduction of the \$1,355.31 award by the amount appellant normally would have paid respondent as attorney's fees if the collection had been competently handled.<sup>5</sup> Appellant claims an attorney should not be compensated for his own negligence. . . If the attorney's fee is not deducted from the award, he claims appellant is indirectly recovering attorney's fees in violation of the section. [Footnotes omitted].

Both parties agree that there is no California decisional law directly in point and our research was similarly unrewarding. What the research *did* disclose was two diametrically opposed points of view in other jurisdictions. The cases supporting the deduction do so strictly on a measure of damage theory; namely, that the client is entitled only to what he would have recovered had the attorney properly handled the collection. [Citations omitted].

The more recent cases disagree with this approach on the ground that deduction of a hypothetical contingent fee does not fully compensate the plaintiff for the loss as it is cancelled out by the attorney's fees plaintiff incurred in the malpractice action. . . .

We believe the more modern cases...reach a more desirable result. The older cases that permit the deduction do so under the rationale that the client is entitled only to what would have been recovered had the attorney performed competently....This logic, however, is somewhat self-destructing because the attorney has not handled the matter competently. We agree with the court's conclusion on this issue, in *Andrews v. Cain, supra*, 406 N.Y.S.2d 168, 169, where it stated: "**Crediting the defendant with a fee he has failed to earn not only rewards his wrongdoing, but places on plaintiffs' shoulders the necessity of paying twice for the same service.**" [Emphasis added; citations omitted].

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<sup>5</sup> In *Kane, Kane & Kritzer, supra*, the law firm charged a 25% contingent fee.

Accord, e.g., *Carbone v. Tierney*, 151 N.H. 521, 864 A.2d 308, 319-20 (2004)(barring the defendant attorney from receiving credit to reflect the contingency fee puts plaintiff “in the same position he would have been in if the defendant had performed competently in the underlying action”); *Saffer v. Willoughby*, 143 N.J. 256, 670 A.2d 527 (N.J. 1996), cited with approval, *Distefano v. Greenstone*, 815 A.2d 496, 499-500 (N.J. App. 2003); *Campagnola v. Mulholland, Minion & Roe*, 76 N.Y.2d 38, 555 N.E.2d 611, 556 N.Y.S.2d 239, 240-243 (1990)(defendant attorney not entitled to credit for 1/3<sup>rd</sup> contingent fee on \$100,000 UIM policy not recovered, “for reasons of public policy”); *McCafferty v. Musat*, 817 P.2d 1039, 1045 (Colo. App. 1990); 1 *Restatement (Third) of the Law Governing Lawyers*, §53, cmte. c, p. 391 (ALI 2000)[“Yet if the net amount were all the plaintiff could recover in the malpractice action, the defendant lawyer would in effect be credited with a fee that the lawyer never earned, and the plaintiff would have to pay two lawyers (the defendant lawyer and the plaintiff’s lawyer in the malpractice action) to recover one judgment.”]. The approach of *Flint v. Hart*, *supra*, 82 Wn. App. at 223-24, in considering recovery of the costs of litigation incurred in mitigating the damages caused by a former attorney’s legal malpractice as part of the clients’ legal malpractice damages, effectively achieves the

same result because it would result in an offset of replacement counsel's contingent fee against the negligent attorney's claim of a contingent fee.

*Schultheis v. Franke*, 658 N.E.2d 932, 939-41 (Ind. App. 1996), in contrast, adopted a self-described "middle-road approach" which allows the defendant attorney to receive *quantum meruit* credit against the malpractice award, but "only for legal services which actually benefited the client." *Schultheis* thus *presumed* that replacement counsel's responsibilities would be limited to "prov[ing] only those portions of the underlying case that were not already completed by the negligent attorney." *Id.* Such a presumption hardly seems appropriate here, considering that Ferrer delayed completion of the UIM-related legal work for approximately ten (10) years, thus causing Mr. and Mrs. Shoemakes' delay damages. See further, *In re: Discipline of Cohen*, 149 Wn.2d 323, 337, 67 P.3d 1086 (2003)(*ethically improper* for a Washington attorney to charge clients fees for an appeal caused by attorney's misconduct). The lower court also rejected *Schultheis'* analysis, considering that it awarded Ferrer his full 40% contingency rather than *quantum meruit*.

*Moore v. Greenberg*, 834 F.2d 1105 (1<sup>st</sup> Cir. 1987), predicting Maine law, remains as the *only* relatively recent case that *arguably* supports the lower court's legal conclusion. In *Moore*, the defendant attorney's malpractice consisted of failing to communicate a settlement

offer during trial. In those circumstances, the court allowed credit for the attorney's contingent fee because the settlement offer was "presumably in direct response to Greenberg's labors on his client's behalf." *Id.*, at 1113. *Moore's*, however, explicitly disclaimed any decision of the precise issue presented here, explaining (*Id.*, at 1109 n. 7):

Particularly, we note that **plaintiff offered no proof as to his fee arrangement with successor counsel** (the lawyers who essayed on his behalf to bring Greenberg [defendant/attorney in malpractice action] to account). **We leave for another day the question of the admissibility of such evidence if proffered.** [Bold added].

Subsequent case law and the *Restatement* uniformly reject *Moore's*, because it does *not* place the client back into the same position the client would have been but for the attorney's negligence. See discussion, *supra*, pp.21-23, *citing*, *Carbone*, *supra*, 864 A.2d at 308 (expressly rejecting *Moore's*); *McCafferty v. Musat*, *supra*, 817 P.2d at 1045 (expressly rejecting *Moore's*); *Saffer v. Willoughby*, *supra*, 670 A.2d 527 (expressly rejecting *Moore's*); 1 *Restatement (Third) of the Law Governing Lawyers*, §53, cmt. c, pp. 391-2 (ALI 2000).

Consistent with the rationale of *Flint*, *supra*, concerning the client's recovery of mitigation expenses, this Court should adopt the better-reasoned analysis of the more recent jurisprudence, as well as the *Restatement*, and hold that Ferrer's malpractice of Mr. and Mrs. Shoemaker

forfeited any claim that he would otherwise have had to a contingent fee out of their recovery in the underlying tort lawsuit. The Court can reach the same conclusion based upon Ferrer's breaches of fiduciary duty, which are discussed next.

**3. *Fee Forfeiture Represents the Appropriate Remedy for a Washington Attorney's Breach of the Attorney's Fiduciary Duties to the Client.***

The lower court held that Ferrer breached his fiduciary duties to Mr. and Mrs. Shoemake "when he did not promptly inform them that their case had been dismissed with prejudice and repeatedly lied to them about the status of their case." CP 270-71 ¶A.

Foundational to the fee forfeiture issue, Washington attorneys undertake the duties of a fiduciary to the client when they accept representation, bound to act with utmost fairness and good faith toward the client in all matters. *E.g., Perez v. Pappas*, 98 Wn.2d 895, 840-41, 659 P.2d 475 (1983) (attorney owes highest duty to the client); *VersusLaw supra*, 127 Wn. App. at 309, 333 ("highest duty"); *In re Beakley*, 6 Wn.2d 410, 423, 107 P.2d 1097 (1940) ("one of the strongest fiduciary relationships known to the law"); *Bovy v. Graham, Cohen & Wampold*, 17 Wn. App. 567, 570, 564 P.2d 1175 (1977) ("the punctilio of an honor the most sensitive"); *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wn.2d 784, 798 n. 2, 16 P.3d 574 (2001) (Talmadge, J., concurring) "the law

creates a special status for fiduciaries, imposing duties of loyalty, care, and full disclosure upon them”).

As a result, the fiduciary may *not* remain silent when the fiduciary becomes aware of material facts affecting the fiduciary relations, but instead has an *affirmative duty* to make prompt and full disclosure to the beneficiary because “[t]he concealment of a fact which one is bound to disclose is an indirect representation that such fact does not exist, and constitutes fraud.” *Oates v. Taylor*, 31 Wn.2d 898, 903, 199 P.2d 924 (1948) (emphasis added), quoting, 37 C.J.S. 244, *Fraud* §16a. Accord, *Burien Motors v. Balch*, 9 Wn. App. 573, 577-8, 513 P.2d 582 (1973)[equating attorney’s duty with fiduciary’s duty under *Restatement (Second) of Trusts* §170(2)].

The fiduciary’s duty of prompt disclosure extends to facts “which are, or *may be*, material...and which *might* affect the principal’s rights and interests or influence his actions.” *Mersky v. Multiple Listing Bureau*, 73 Wn.2d 225, 229, 437 P.2d 897 (1968) (emphasis added) (real estate broker/fiduciary must “timely reveal” close ties to subagent). A “material fact’ is a fact ‘to which a reasonable [person] would attach importance in determining his [or her] choice of action in the transaction in question.”” *Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 115, 86 P.3d 1175 (2004), quoting, *Aspelund v. Olerich*, 56 Wn. App. 477, 481-2, 784 P.2d

179 (1990) (“material fact” under Securities Act of Washington, RCW 21.20.010(2)); *Morris v. Int’l Yogurt Co.*, 107 Wn.2d 314, 322-3, 729 P.2d 33 (1986) (“material fact” under FIPA, RCW 19.100.170(2)). See further, *United States v. Bennett*, 57 F. Supp. 670, 678 (E.D. Wash. 1944) (when fiduciary engages in self-dealing on the beneficiary’s account, “the fiduciary relation is under a duty not only to disclose the fact that he is dealing on his own account but also to disclose all other facts which are material to the transaction”).

Mallen & Smith, in their seminal treatise *Legal Malpractice*, describe the attorney’s fiduciary obligations as “twofold: (1) confidentiality; and (2) undivided loyalty.” 2 Mallen & Smith, *Legal Malpractice*, §14.2, p. 584 (2007 ed.). Concerning the attorney’s duty of “undivided loyalty,” Mallen & Smith, *supra*, explain (§14.22, pp. 716-17):

A corollary of the fiduciary obligations of undivided loyalty and confidentiality is *the attorney’s responsibility to promptly advise the client of any important information that may impinge on those obligations*. This means that *there must be complete disclosure of all information that may bear on the quality of the attorney’s representation*. The disclosure must include not only all material facts but also should include an explanation of their legal significance. . .

The duty of disclosure does not exist in the abstract but relates to the particular circumstances. There are two basic requirements. First, the attorney must disclose any fact that may limit his or her ability to comply with the fiduciary obligations. Therefore, there must be disclosure of any personal interest of the attorney, any adverse interest of a prior client, or a conflicting interest of another

present client. Second, the client must be informed of any acts or events concerning the subject matter of the retention for which the client has a right to exercise discretion or control. (Emphasis added; footnotes omitted).

The attorney's duty of disclosure is therefore consistent with the duty of fiduciaries, generally, "to inform the beneficiaries **fully of all facts which would aid them in protecting their interests.**" *Esmieu v. Schrag*, *supra*, 88 Wn.2d 490 (emphasis added), *quoted with approval*, *Van Noy*, *supra*, 142 Wn.2d at 792.

In general, a Washington attorney breaches the 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). Washington attorneys, for example, 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) (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, supra* 149 Wn.2d 323 at 336-7 (attorney subject to discipline for *two month* delay in notification of dismissal). These conclusions are consistent with the duties of all fiduciaries to fully disclose material facts to the beneficiary. See discussion, *supra*, p. 26-27.

By his own admission, Ferrer *repeatedly lied* to Mr. and Mrs. Shoemake about the status of their case, and never did tell them that the case had been dismissed and forever lost. Ferrer instead strung the Shoemakes along for nearly ten (10) years to protect himself against what he obviously knew was his own malpractice. His conduct violated RPC 1.4 and 8.4 and breached his fiduciary duties to Mr. and Mrs. Shoemake.

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. Accord, *Mersky, supra*, 73 Wn.2d 225 at 231 (“no consequence...that the [breach of fiduciary duty]...did not result in injury to the principal”); *Marriage of Petrie*, 105 Wn. App. 268, 276, 19 P.3d 443 (2001) (breach of fiduciary duty even though trustee showed “net benefit” to beneficiaries); *Huber v. Taylor*, 469 F.3d 67, 76-8 (3<sup>rd</sup> Cir. 2006) (“[w]hen only fee forfeiture is at issue, actual harm need not be proven because ‘[i]t is the agent’s disloyalty, not any resulting harm, that violates the fiduciary relationship and thus impairs the basis for compensation.’”), quoting, *Burrow v. Arce*, 997 S.W.2d 229, 238 (Tex. 1999); 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”).

**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). Accord, *Mersky, supra*, 73 Wn.2d at 232-3; *Kane v. Klos*, 50 Wn.2d 778, 789, 314 P.2d 672 (1957); 1 *Restatement (Third) of the Law Governing Lawyers*, §37, cmt. e, p. 274 (“forfeiture extends to all fees”).

Washington does *not* require knowing and intentional breach of the attorney’s fiduciary duties as a prerequisite to fee forfeiture. See, *e.g.*, *Eriks, supra*, 118 Wn.2d at 462; *Mersky, supra*, 73 Wn.2d at 231. Nevertheless, in the elegant formulation of *Kane v. Kos, supra*, at 789, “[p]ublic policy forbids compromise with a **swindler**. The **fiduciary** who engages in such conduct **forfeits all right to compensation**.” Accord, *Kelly v. Foster*, 62 Wn. App. 150, 157, 815 P.2d 598 (1991) (“*fraudulent acts or gross misconduct* in violation of a statute or against public policy” warrant fee reduction or forfeiture).

Ferrer’s knowing and intentional breaches of his fiduciary duties by repeatedly lying to Mr. and Mrs. Shoemake easily satisfy any appropriate legal standard warranting complete fee forfeiture. The lower court thus erred when it awarded Ferrer full credit for his hypothetical contingent fee.

**C. The Lower Court Relied upon Untenable Grounds when it Reduced the Shoemakes’ Attorney Fee Lodestar Calculation for “Unsuccessful Claims” and Denied them a 1.5 Contingent Risk Multiplier.**

**1. The Basis for the Lower Court Attorney Fee Award.**

The lower court awarded Mr. and Mrs. Shoemake reasonable attorney fees “to prosecute this proceeding.” CP 271. Washington trial courts have the discretion to award attorney fees when a fiduciary’s conduct constituting the breach is “tantamount to constructive fraud.” *Li v. Tang*, 87 Wn.2d 796, 799-901, 557 P.2d 342 (1976) (court has the inherent power to award fees); *Green v. McAllister*, 103 Wn. App. 452, 468-69, 14 P.3d 795 (2000). See further, *Perez v. Pappas*, *supra*, 98 Wn.2d at 845 (denying fees based in part on the nature of the breach of fiduciary duty and because the parties had entered into an accord and satisfaction); *Kelly v. Foster*, *supra*, 62 Wn. App. at 153-55 (denying attorney fees because “[t]his is a legal malpractice action where there is a remedy at law and no equitable relief is requested or granted”). In this particular case, the lower court decided to award Mr. and Mrs. Shoemake attorney fees, as was within its discretion, “for [Ferrer’s] deceit, misrepresentation and breach of fiduciary duty.” CP 271.

## 2. *Standard of Review.*

This Court reviews lower court fee awards, including calculation of the lodestar, for an abuse of discretion. *E.g.*, *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 335, 858 P.2d 1054 (1993); *Boeing v. Sierracin Corp.*, 108 Wn.2d 33, 65, 738 P.2d 665 (1987); *Pham v. City of Seattle*, 159 Wn.2d 527 ¶16, 151 P.3d 976 (2007). The abuse of discretion

standard also applies to award of a multiplier. *E.g., Fisons, supra*, 122 Wn.2d at 336 (affirming 1.5 multiplier); *Mayer v. Sto Industries, Inc.*, 123 Wn. App. 443, 460-1, 98 P.3d 116 (2004), *aff'd in part and rev'd in part on other grounds*, 156 Wn.2d 677, 132 P.3d 1151 (2006). A lower court abuses its discretion when its decision rests on “untenable grounds,” *i.e.*, when the lower court applies an erroneous legal standard. See discussion, *supra*, p. 19.

3. ***The Lower Court Applied an Erroneous Legal Standard when it Reduced the Lodestar for “Unsuccessful Claims.”***<sup>6</sup>

Here, the lower court excluded part of the time incurred by Mr. and Mrs. Shoemakes’ counsel “on Plaintiff’s unsuccessful damage theories and claims.” CP 370 ¶¶1.6, 2.2. The lower court thus applied an erroneous legal analysis because Mr. and Mrs. Shoemake prevailed on both of their causes of action and there were *no* “unsuccessful claims” within the meaning of Washington law.

Determination of a reasonable attorney fee begins with calculation of the lodestar. *Bowers v. TransAmerica Title Insurance*, 100 Wn.2d 581, 597 (1983); *Physicians Ins. Exch. v. Fisons, supra*, at 334-335. The first step in calculating the lodestar requires determination of “the number of

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<sup>6</sup> If the Court adopts Mr. and Mrs. Shoemakes’ position concerning calculation of damages, then the Court should also reverse the lower court’s reduction of the lodestar because the Shoemakes will have prevailed on the “unsuccessful claim.”

hours reasonably expended in the litigation.” *Bowers, supra*, 100 Wn.2d at 597. The court then “must limit the lodestar to hours reasonably expended, and should discount hours spent on *unsuccessful claims*, duplicated effort, or otherwise unproductive time.” *Id.* (emphasis added).

However, losing *part* of a motion concerning *part* of plaintiffs’ requested relief does *not* constitute an “unsuccessful claim” that justifies reduction in the lodestar calculation. *Martinez v. City of Tacoma*, 81 Wn. App. 228, 242-43, 914 P.2d 86 (1996), *cited with approval by, Pham, supra*, 159 Wn.2d at 538; thus explains:

The Supreme Court<sup>7</sup> held that where a plaintiff brought “distinctly different claims for relief that are based on different facts and legal theories,” counsel’s work on unsuccessful claims cannot be deemed to have been expended on successful claims. **But where the plaintiff’s claims involve a common core of facts and related legal theories, “a plaintiff who has won substantial relief should not have his attorney’s fee reduced simply because the district court did not adopt each contention raised.”** Finally “where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.”

We do not read *Hensley* as supporting the City’s theory that Martinez achieved “only limited success” in this case. Martinez and his wife brought an action for damages suffered by the unlawful actions of the City. **Martinez prevailed on this, his only claim. The amount of damages does not erase the fact that Martinez won “substantial relief.”** [Emphasis added; citations and footnotes omitted].

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<sup>7</sup> The Court in *Martinez* here refers to the United States Supreme Court decision in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed.2d 40 (1983).

The plaintiffs in *Martinez v. City of Tacoma*, *supra*, initially sought \$4,000,000 *but* recovered a principal judgment in the amount of only \$8,000. *Id.*, 81 Wn. App. at 231.

Consistent with the rationale of *Martinez*, the mere fact that Mr. and Mrs. Shoemake did *not* prevail on every contention raised, but instead lost *part* of a motion concerning the amount of their requested remedies, does *not* constitute an “unsuccessful claim” for purposes of calculating the lodestar. Moreover, Mr. and Mrs. Shoemakes’ complaint alleged causes of action for legal malpractice and breach of fiduciary duty. CP 1-6. Ferrer answered the complaint and *denied* liability. CP 7-8. Mr. and Mrs. Shoemake moved for summary judgment on both causes of action, covering both liability and remedies. CP 40-59. The vast majority of their supporting evidence and argument on summary judgment was needed *only* for purposes of establishing liability. CP 60-217. Ferrer conceded liability on *only* the legal malpractice cause of action, *only after* Mr. and Mrs. Shoemake filed their motion for summary judgment. CP 12, ¶16, 257 ¶2(E). Even then, however, Ferrer denied the Shoemakes’ fiduciary duty cause of action. CP 258, ¶14. Ferrer also filed his own cross-motion for summary judgment in which he argued, *inter alia*, that he should also receive credit for certain medical subrogation claims. CP 221-222, 225-226, 257 ¶2(E). Mr. and Mrs. Shoemake generally limited their response

to Ferrer's motion to this new "subrogation" argument advanced by Ferrer. CP 231-233.

The lower court *granted* Mr. and Mrs. Shoemake's motion for summary judgment on both their legal malpractice *and* breach of fiduciary duty causes of action. CP 270-71. As in *Martinez*, Mr. and Mrs. Shoemake thus prevailed on all of the causes of action asserted. The lower court also awarded Mr. and Mrs. Shoemake damages, as well as reasonable attorney fees for Ferrer's breach of fiduciary duty. CP 271. The lower court also *rejected* Ferrer's summary judgment motion that sought credit (within the calculation of delay damages) for medical subrogation claims, but otherwise accepted Ferrer's proposed formula for calculating delay damages. CP 221, 223, 225-26, 257 ¶2(F), 271.

**Mr. and Mrs. Shoemake thus prevailed on all of their claims arising out of a common core of facts and related legal theories.** As a result, there were no "unsuccessful claims" within the meaning of *Martinez, supra*, 81 Wn. App. at 242-43, as approved by the Washington Supreme Court in *Pham, supra*, 159 Wn.2d at 538. The lower court thus erred when it reduced the lodestar calculation for "unsuccessful claims."

4. *The Lower Court also Abused its Discretion when it Refused to Award the Shoemakes a 1.5 Contingent Risk Multiplier.*

The final step in setting the amount of attorney fees involves adjustment of the lodestar up or down based upon the contingent nature of success or risk involved or, in exceptional circumstances, based on the quality of work. *E.g., Fisons, supra*, 122 Wn.2d at 334-6 (approving a 1.5 multiplier). Here, Mr. and Mrs. Shoemake requested a modest 1.5 multiplier, based specifically on their attorney's contingent risk in pursuing *this case* against their uninsured, former attorney Ferrer, so many years after Mrs. Shoemake's injury. CP 279-80 ¶3, 283 ¶12, 277-78.

Washington specifically allows adjustment to the lodestar amount to compensate attorneys for the contingent risk that the litigation would be unsuccessful and that no fee would be obtained. *Pham v. Seattle City Light, supra*, 159 Wn.2d 527 at 541-42;<sup>8</sup> *Bowers, supra*, 100 Wn.2d at 598-601 (1.5 multiplier); *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 343, 54 P.3d 665 (2002) (approving 1.5 multiplier based on "risk" without trial). Multipliers of 3 to 4 are common. See, *Viscaino v.*

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<sup>8</sup> Mr. and Mrs. Shoemake furthermore suggest that a contingent fee multiplier is especially appropriate in cases in which a client seeks to enforce fundamental standards of the Rules of Professional Conduct governing the attorney-client relationship against the client's former attorney. See, *Pham, supra*, 159 Wn.2d at 542 ("possibility of a multiplier works to encourage civil rights attorneys to accept difficult cases"). See further, *Eriks v. Denver, supra*, 118 Wn.2d at 461 ("Today, we reaffirm this court's commitment to interpreting attorney discipline rules for the benefit of the public").

*Microsoft Corp.*, 142 F. Supp.2d 1299, 1306 (W.D. Wash. 2001), *aff'd*, 290 F.3d 1043 (9<sup>th</sup> Cir. 2002) (applying Washington law and approving 3.64 multiplier).

The *source* of the contingent risk “should not impact the determination of whether a contingency multiplier should be applied.” *Pham, supra*, 159 Wn.2d at 543. A trial court thus abuses its discretion, as a matter of law, if it considers an improper factor when evaluating the propriety of a contingency adjustment. *Id.* The Supreme Court, for example, reversed this Court’s decision in *Pham* because the trial court had *denied* a contingent fee multiplier based on consideration of an improper factor.

Ferrer himself confirms that Mr. and Mrs. Shoemake, and their counsel, do indeed face a very real and substantial “source” of contingent risk [CP 370]:

“[T]he only risk faced in this case by Plaintiffs was not whether they could *obtain a substantial judgment, but whether Defendant can pay that judgment.* As the court is aware from a comment by Plaintiff’s counsel during oral argument of the cross-motions for summary judgment, *Defendant is not covered by insurance for this claim.* Any judgment will be paid out of his pocket. Rendering a punitive lodestar fee enhancement *will only make that payment more difficult and less likely.* [Emphasis added].

As in *Pham*, the simple fact that Ferrer himself is the “source” of the Shoemakes’ contingent risk must *not* impact the decision of whether to

award a contingent fee multiplier. Conversely, the lower court mistakenly reasoned that “Counsel was not at significant risk of obtaining little or no recovery upon which to base their contingent fee” CP 377-78 ¶¶1.12, 2.3. **No evidence** whatsoever supports the lower court conclusion, which Ferrer’s lack of insurance and inability to pay the judgment shows was in error.<sup>9</sup>

The lower court therefore erred when it denied Mr. and Mrs. Shoemake a contingent fee multiplier based upon its conclusion that “[c]ounsel was not at significant risk of obtaining little or no recovery upon which to base their contingent fee.” This Court should therefore reverse the lower court denial of the Shoemakes’ request for a 1.5 contingent risk multiplier.

**D. Mr. and Mrs. Shoemake should Recover Attorney Fees for this Appeal, Pursuant to RAP 18.1.**

RAP 18.1 requires a party seeking fees to devote a separate section of its brief to the fee request. The lower court, in its discretion, awarded Mr. and Mrs. Shoemake reasonable attorney fees for Ferrer’s “deceit, misrepresentation, and breach of fiduciary duty.” CP 271. See discussion, *supra*, pp. 32-33 (which the Shoemakes incorporate by this reference). Mr. and Mrs. Shoemake pursued this appeal to correct the lower court’s

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<sup>9</sup> Consistent with Ferrer’s plea of penury, he has not sought a stay of the underlying judgment. This Court may take judicial notice of that fact. ER 201(F).

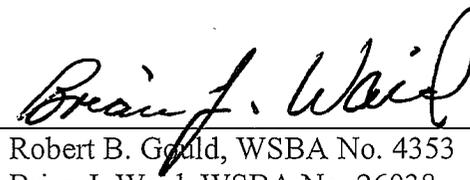
inadequate remedy for Ferrer's malpractice and breach of fiduciary duty. This Court should, therefore, exercise its discretion for the same reasons and award Mr. and Mrs. Shoemake their reasonable attorney fees for this appeal.

### CONCLUSION

Mr. and Mrs. Keith Shoemake therefore request that the Court reverse the lower court's damage calculation and direct that judgment be entered in their favor in the principal amount of \$117,591.31, plus interest, costs and reasonable attorney fees. CP 320 ¶3, 323. Mr. and Mrs. Shoemake further request that the Court reverse the lower court's reduction of their attorney fee award for "unsuccessful claims" and the lower court's denial of their request for a 1.5 contingent risk multiplier.

DATED this 20th day of August, 2007.

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



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DECLARATION OF SERVICE

On August 20th, 2007, I caused to be delivered via legal messenger a true and accurate copy of the attached document, to the following:

John Rankin, Esq.  
REED MCCLURE  
Two Union Square  
601 Union Street, Suite 1500  
Seattle, WA 98101-1363  
*Attorney for Respondents R. Douglas P. Ferrer  
and Jane Doe Ferrer*

The original of this document was also sent via legal messenger to be filed in the Court of Appeals.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



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Charolette F. Mace, Paralegal  
LAW OFFICES OF ROBERT B. GOULD

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STATE OF WASHINGTON  
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**APPENDIX A  
STATUTES AND RULES**

**RPC 1.4 - COMMUNICATION**

(a) A lawyer shall;

(1) promptly inform the client of any decision of circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

**Comment**

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

**Communicating with Client**

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly

inform the client of its substance unless that client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations - depending on both the importance of the action under consideration and the feasibility of consulting with the client - this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

#### Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give

informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

#### Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

#### **RPC 1.5 (E) – FEES**

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client. Upon the request of the client in any matter, the lawyer shall communicate to the client in writing the basis or rate of the fee.

#### **RPC 8.4 – MISCONDUCT**

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;
- (g) commit a discriminatory act prohibited by state law on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status, where the act of discrimination is committed in connection with the lawyer's professional activities. In addition, it is professional misconduct to commit a discriminatory act on the basis of sexual orientation if such an act would violate this Rule when committed on the basis of sex, race, age, creed, religion, color, national origin, disability, or marital status. This Rule shall not limit the ability of a lawyer to accept, decline, or withdraw from the representation of a client in accordance with Rule 1.16;
- (h) in representing a client, engage in conduct that is prejudicial to the administration of justice toward judges, other parties and/or their counsel, witnesses and/or their counsel, jurors, or court personnel or officers, that a reasonable person would interpret as manifesting prejudice or bias on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status. This Rule does not restrict a lawyer from representing a client by advancing material factual or legal issues or arguments.
- (i) commit any act involving moral turpitude, or corruption, or any unjustified act of assault or other act which reflects disregard for the rule of law, whether the same be committed in the course of his or her conduct as a lawyer, or otherwise, and whether the same constitutes a felony or misdemeanor or not; and if the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding shall not be a condition precedent to disciplinary action, nor shall acquittal or dismissal thereof preclude the commencement of a disciplinary proceeding;

(j) willfully disobey or violate a court order directing him or her to do or cease doing an act which he or she ought in good faith to do or forbear;

(k) violate his or her oath as an attorney;

(l) violate a duty or sanction imposed by or under the Rules for Enforcement of Lawyer Conduct in connection with a disciplinary matter; including, but not limited to, the duties catalogued at ELC 1.5;

(m) violate the Code of Judicial Conduct; or

(n) engage in conduct demonstrating unfitness to practice law.

#### Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] [Reserved.]

[3] [Washington revision] Legitimate advocacy respecting the factors set forth in paragraph (h) does not violate paragraphs (d) or (h). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.