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STATE OF WASHINGTON

NO. _____

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

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

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

Respondents,

vs.

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

Petitioners.

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

PETITION FOR REVIEW

**REED McCLURE
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I. IDENTITY OF PETITIONER

Defendant/Petitioner R. Douglas Ferrer seeks review of the Division I decisions identified *infra*.

II. COURT OF APPEALS DECISION

The decisions which should be reviewed are *Shoemake v. Ferrer*, ___ Wn. App. ___, 182 P.3d 992 (2008), the April published decision of the Court of Appeals, Division I, and that court's May 8, 2008 Order Denying Ferrer's Motion for Reconsideration. Copies of the Court of Appeals decision and Order Denying Motion for Reconsideration are set forth in the Appendices A and B.

III. OVERVIEW OF CASE

A contingent-fee attorney negligently failed to secure an uninsured motorist insurance (UM) recovery for his client. Nine and one-half years later, the client became aware of the negligence and sued her former attorney for malpractice. The attorney admitted negligence, and admitted his former client was entitled to recover as damages the net sum she should have received from her UM policy, plus prejudgment interest on that amount. The trial court agreed.

Plaintiff/former client appealed, and Division I reversed, holding that in addition to the admitted damages and prejudgment interest on that sum, the former client is also entitled to recover the contingent fee the

defendant attorney would have earned and received on a successful recovery, and prejudgment interest on that amount.

IV. ISSUES PRESENTED FOR REVIEW

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

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

C. Does the award of the contingent fee to plaintiff constitute a windfall recovery in excess of the amount of loss actually sustained by plaintiff?

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

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

V. STATEMENT OF THE CASE

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

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

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

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

This malpractice action was commenced in January, 2006. (CP 1-6). Pursuant to the agreement of plaintiffs' current counsel (CP 239),

Ferrer's defense counsel contacted the Shoemakes' insurer to reopen the Shoemakes' UM claim, and obtained payment to plaintiffs, in April 2006, of the \$100,000 UM limits previously offered. (CP 236). Ferrer did not obtain or request any fee on this recovery. (CP 12).

Defendant admitted liability for legal negligence, and also admitted damages in the amount of \$52,088. (CP 256-58). The admitted damages consisted of the UM policy limits of \$100,000, less the 40 percent contingent fee defendant would have collected had he concluded the case, and less a subrogation interest against plaintiffs' recovery held by a medical insurer in the amount of \$7,912. (CP 11-12). Defendant also agreed that plaintiffs were entitled to prejudgment interest on the undisputed damages amount of \$52,088. (CP 219, 225-26).

The parties filed cross-motions for summary judgment. (CP 40-59, 219-27). Judge Charles Mertel ruled that plaintiffs were entitled to recover \$60,000 (the policy limits less the contingent fee) together with prejudgment interest on that amount. (CP 269-72). The trial court did not deduct the medical subrogation claim of \$7,912, apparently concluding it was not a valid deduction from the damages.

Following a dispute with plaintiffs over the effect of Judge Mertel's order, defendant filed a motion for clarification of the award (CP 304-06, 415-20). That motion resulted in an order ruling that judgment to

be entered against defendant would be in the amount of \$60,000 plus prejudgment interest on that sum, in the amount of \$70,511.59, for a total of \$130,511.58, less the \$100,000 UM policy limits which had already been paid, yielding a net judgment of \$30,511.58. (CP 339-40). The trial court also awarded attorney fees and costs to plaintiffs in the amount of \$16,137.82. (CP 269-72, 379-80).

Plaintiffs appealed from the resulting judgment. (CP 381-96) Defendant cross-appealed from the award of attorney fees. (CP 401-12). Division I ruled that plaintiffs could recover not only their actual loss from defendant's negligence, and interest on that loss, but should also recover as damages money they could not have obtained in the underlying action, in the form of their expected transactional costs in that action (defendant's uncollected contingent fee), plus interest on that fee. The panel reached this result by reasoning that plaintiffs' damages should be the gross recovery in the underlying action, including the fee defendant would have been entitled to if the underlying claim had been successful. The rationale for this ruling was that plaintiffs incurred fees of a second attorney to sue the first attorney (defendant) and should be compensated for these fees in the damages award. *Shoemake v. Ferrer*, ___ Wn. App. ___, 182 P.3d. 992 (2008).

VI. ARGUMENT

RAP 13.4(b) provides this Court will grant a petition for review only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- ...
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

As will be discussed below, all three criteria are present here.

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

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

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

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

to recover a greater amount is contrary to the Court of Appeals' own prior decisions.

B. WASHINGTON LAW DOES NOT PERMIT PUNITIVE DAMAGES.

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

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

Dempere, 76 Wn. App. at 410.

Despite this Court's long-standing prohibition against punitive damages, the Court of Appeals' ruling here grants plaintiffs a recovery greater than full compensation of their loss. The Court of Appeals' acceptance of plaintiffs' arguments for damages in excess of full compensation can only be viewed as a type of punitive damages applicable only to negligent lawyers.

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

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

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

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

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

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

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

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

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

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

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

The contingent fee portion of the principal amount was not withheld from plaintiffs as the result of defendant's actions, and in fact, was not withheld at all. Thus, there is no basis in law to award plaintiffs prejudgment interest on the fee portion of the damages award. The Court of Appeal's awarding of that prejudgment interest directly contravenes this Court's precedent, as well as Division I's own precedent.

In this case, an award of prejudgment interest on the contingent fee portion of the principal award comprises a significant part of the overall damage recovery, increasing the overall award by \$47,007.73. As the \$40,000 fee portion of the principal was not withheld, or lost by plaintiffs, the interest on that amount can only be rationalized as a punishment of defendant, contrary to the long-standing rule against punitive damages in Washington. *Spokane Truck & Dray Co. v. Hoefler*, 2 Wash. 45, 25 P. 1072 (1891); *Dempere v. Nelson*, 76 Wn. App. 403, 410, 886 P.2d 219 (1994), *rev. denied*, 126 Wn.2d 1015 (1995).

D. INCLUDING THE CONTINGENT FEE AS DAMAGES VIOLATES THE AMERICAN RULE GOVERNING ATTORNEYS' FEES.

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

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

Public Utility District No. 1 v. Kottsick, 86 Wn.2d 388, 389, 545 P.2d 1 (1976). *See also, ASARCO v. Air Quality Coalition*, 92 Wn.2d 685, 715, 601 P.2d 501 (1979); *Dempere v. Nelson*, 76 Wn. App. 403, 406, 886 P.2d 219 (1994), *rev. denied*, 126 Wn.2d 1015 (1995); *Kelly v. Foster*, 62 Wn. App. 150, 813 P.2d 598, *rev. denied*, 118 Wn.2d 1001 (1991).

Here, there is no contract or statute authorizing an award of attorney fees in litigation between the parties. Even the Court of Appeals in this case held there is no recognized ground in equity for awarding attorney fees to plaintiffs here. (Opinion at 2)

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

The Court of Appeals further justifies its decision with the argument that as damages in attorney malpractice actions are intended to make the injured client whole, failure to allow the injured client to recover, in the malpractice case, the contingent fee the negligent lawyer would have obtained in the underlying case means the client will not achieve a complete recovery. The Court states: "Reducing a successful malpractice plaintiff's damages by the amount that the attorney would have earned had the attorney not been negligent necessarily fails to put the injured plaintiff in the position he or she would have occupied in the absence of negligence. (Opinion at 11) The transparent difficulty with that reasoning is that it can be applied to every case in which the American Rule precludes a recovery of attorney fees. For this reason alone, this Court should accept review pursuant to RAP 13.4(b)(4) in order to consider this sea change in the law governing recovery of attorney fees.

The fact that the necessity of paying an attorney to recover the compensatory damages suffered due to a tort or breach of contract must leave the victim with less than a "full" recovery has not dissuaded this Court from following the American Rule as applied in *State ex rel. Macri*,

8 Wn.2d 93. The Court of Appeals' attempt to dodge this Court's precedent must not be permitted to stand.

E. THIS PETITION PRESENTS ISSUES OF SUBSTANTIAL PUBLIC IMPORTANCE THAT THIS COURT SHOULD REVIEW.

The question of consideration of attorneys' fees in the calculation of damages in an attorney malpractice action is quite obviously an issue of importance to the legal profession, and to members of the public who engage attorneys to provide legal services. This issue presents a case of first impression in Washington. As noted in the Court of Appeals opinion, the authorities elsewhere are split. (Opinion at 7) The legal profession and public should receive from this Court a clarification of the treatment of legal fees in the underlying case in determining damages in a legal malpractice claim.

Moreover, the implications of this issue extend well beyond legal malpractice claims. In any damages case, a proper calculation deducts the injured party's transactional costs for achieving the end result that has been stymied by the tort or breach of contract. For example, a typical measure of damages for breach of contract is lost anticipated profits, a measure which necessarily contemplates deducting the injured party's expenses from the revenue to be obtained by contractual performance.

This Court, in *Platts v. Arney*, 50 Wn.2d 42, 309 P.2d 372 (1957), identifies the principle:

The plaintiff is not, however, entitled to more than he would have received had the contract been performed. If the defendant, by his breach, relieves the plaintiff of duties under the contract which would have required him to spend money, an amount equal to such expenditures must be deducted from his recovery.

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

Further, in most cases, the injured party's transactional costs of achieving a recovery (in the form of attorney fees) is also not recoverable. *State ex rel. Macri*, 8 Wn.2d at 101. The Court of Appeals has in this case adopted a line of reasoning that turns the above traditional approach to legal damages on its head. There is no principled rationale for limiting application of this new damages approach to legal malpractice cases. After all, the Court's argument that the "measure of damages for legal malpractice is the amount of loss actually sustained" (from *Matson v. Weidenkopf*, 101 Wn. App. at 484) means that one must ignore transactional costs in determining that loss, can be applied across the board. The potential mischief resulting from allowing the Court of Appeals decision to stand should not be allowed to take root.

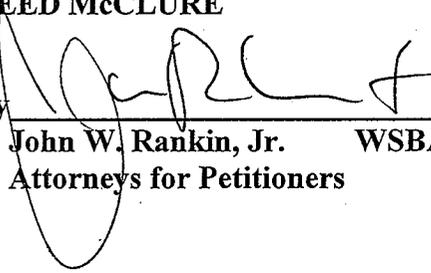
VII. CONCLUSION

The Court of Appeals decision in this case creates a special category of punitive damages for attorneys, contrary to long-standing policy announced by this Court prohibiting punitive damages generally in Washington. The decision also turns damages law on its head, and contravenes this Court's precedent regarding the purpose of prejudgment interest. This petition satisfies the criteria of RAP 13.4(b). This Court should accept review and reverse the decision of the Court of Appeals.

DATED this 9th day of June, 2008.

REED McCLURE

By



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plaintiffs, we hold that the trial court erred when it calculated the Shoemakes' damage award. Because we also hold that there was no recognized basis in law or equity for the trial court to award the Shoemakes attorney fees in their malpractice action, we reverse that award as well.

I

The parties essentially agree on the facts. The Shoemakes hired Ferrer to represent them after Andrea Shoemake was seriously injured in a head-on collision between her car and the car of a drunk driver, Joseph Hernandez. The collision occurred on April 9, 1992. Ferrer and the Shoemakes entered into a contingent fee arrangement, agreeing that Ferrer would receive a fee equal to 40 percent of any damages that the Shoemakes recovered.

Ferrer prepared a complaint against Hernandez and attempted to serve him with process. Ferrer did not file the complaint in the superior court until April 7, 1995, however, just two days before the statute of limitation on the Shoemakes' claims expired. Ferrer failed to file the required confirmation of joinder pleading, resulting in that court dismissing the complaint on March 6, 1996. Recognizing that the statute of limitation on the Shoemakes' claims had run, Ferrer appeared before the court and urged it to reinstate the complaint, which it did. The court scheduled trial on the case for March 10, 1997. But Ferrer neither appeared for trial nor notified the Shoemakes that a trial date had been set. He apparently chose this course because, in the intervening years between the service of the complaint and the trial date, Hernandez had

completed his jail sentence for drunk driving, had left the state, and could not be located. The trial court again dismissed the Shoemakes' complaint.

Ferrer never told the Shoemakes of these events. Instead, for years he told them that their case was backlogged in the court and that he would inform them as soon as anything happened. Each of the 10 to 15 times that Andrea Shoemake called to ask him about her case's status, Ferrer told her that the court was too busy to examine her claims.

In 2005, Andrea Shoemake called the court clerk's office herself. When she did, she learned that her complaint had been dismissed in 1997. She confronted Ferrer with this fact. He told her he had never received notice of the dismissal. He told her that he would seek to have the Shoemakes' case reinstated. Instead, he did nothing.

Unhappy with this turn of events, the Shoemakes hired a new attorney, Robert Gould, to replace Ferrer and to sue him for malpractice. As with Ferrer, the Shoemakes agreed to pay Gould a contingent fee. Through Gould, they learned that their insurer, State Farm, had offered to pay the \$100,000 limit of the Shoemakes' uninsured motorist policy in June of 1995. Ferrer had taken no action on the insurance payment because he "was unsure of the legal ramifications of accepting that payment." Clerk's Papers (CP) at 168. On behalf of the Shoemakes, Gould recovered the still-available payment from State Farm. He then filed a lawsuit on the Shoemakes' behalf against Ferrer, asserting claims for malpractice and breach of fiduciary duty, and seeking delay damages in the

form of interest on the \$100,000 payment for the more than 10 years that the Shoemakes were forced to wait before receiving it.

Ferrer admitted liability in his amended answer to the Shoemakes' complaint, but only admitted \$52,088 in damages. This amount represented the \$100,000 State Farm policy limit, less Ferrer's 40 percent contingent fee, and less a subrogation interest against the Shoemakes' recovery arising out of an unpaid healthcare bill.

The parties filed cross-motions for summary judgment on the issue of damages.¹ The main issue presented by the motions was whether the Shoemakes' damage award against Ferrer should be reduced by the amount of Ferrer's contingent fee.² The trial court entered an order that set damages, and which also awarded the Shoemakes attorney fees in their malpractice action, apparently on the basis of their fiduciary duty claim:

Judgment for the Plaintiff is entered in the amount of \$60,000.00, together with prejudgment interest as delayed damages on the \$100,000 State Farm UIM Policy 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. . . . 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.

CP at 271.

¹ The Shoemakes' motion also sought a determination of liability on both the negligence and breach of fiduciary duty claims against Ferrer. Ferrer, having already admitted liability, did not challenge these aspects of the motion.

² The statute of limitations on the subrogation claim had expired. Thus, the trial court did not allow that proposed reduction of the Shoemakes' damage award.

The parties were unable to agree on the meaning of this order, and Ferrer moved the court to clarify it. Ferrer maintained that the order awarded interest on the amount of the insurance payment, less the contingent fee he would have recovered had he not been negligent, less the full \$100,000 payment ultimately made to the Shoemakes by State Farm, for a total award of \$30,511.58 plus attorney fees. The Shoemakes maintained that the correct damage calculation was prejudgment interest on the entire \$100,000 insurance payment with no deduction of Ferrer's fees, or \$117,519.31. The trial court accepted Ferrer's characterization and ruled accordingly, finding that the proper damage award was "\$130,511.58 plus attorney fees, less the \$100,000 State Farm payment previously made, for a net of \$30,511.58." CP at 339-40. Thus, stated numerically, the court awarded: \$60,000 (the principal award of \$100,000 minus Ferrer's 40 percent contingent fee) + \$70,511.58 (prejudgment interest on the \$60,000) - \$100,000 (the payment made by State Farm to the Shoemakes) = \$30,511.58 (the final damage award). The trial court also awarded the Shoemakes \$14,893.37 in attorney fees.

Both parties appeal.

II

The first issue presented is whether a negligent attorney is entitled to have the damages awarded to a successful malpractice plaintiff reduced by the amount stated in the negligent attorney's contingent fee contract. Ferrer urges us to affirm the trial court's reduction of the Shoemakes' damage award by the amount of his proposed contingent fee, contending that not crediting a negligent

attorney's fees against the plaintiff's damages creates a windfall for the plaintiff and subjects negligent attorneys to a unique punitive damages theory.

Conversely, the Shoemakes contend that the trial court erred by deducting Ferrer's hypothetical contingent fee from the base sum upon which it calculated their interest damages. According to the Shoemakes, deducting attorney fees from a legal malpractice award necessarily fails to fully compensate the successful plaintiff because such plaintiffs must invariably hire another attorney and pay additional legal fees in order to be made whole.

The trial court's decision on this question was one based entirely on the interpretation and application of the law, rather than as a trier-of-fact. As such, we review the trial court's order de novo. VersusLaw, Inc. v. Stoel Rives, L.L.P., 127 Wn. App. 309, 319, 111 P.3d 866 (2005). Likewise, we review de novo trial court decisions addressing the proper components of a damage award. Kobza v. Tripp, 105 Wn. App. 90, 94-95, 18 P.3d 621 (2001).

No Washington case decides this issue. Moreover, there is distinct and explicit disagreement both among scholarly sources and among cases from other jurisdictions as to which is the better rule. With that said, the better-reasoned cases recognize that the policy underlying both negligence and breach of contract damage awards—to attempt to restore injured parties to the position they would have been in but for the wrongful conduct of the defendant—favors adopting the more modern rule of not reducing legal malpractice damage awards by an amount equal to the negligent attorney's proposed fee. We thus conclude

that the trial court erred by deducting an amount equal to Ferrer's proposed fee from the Shoemakes' damage award.

The general rule is that the "measure of damages for legal malpractice is the amount of loss actually sustained as a proximate result of the attorney's conduct." Matson v. Weidenkopf, 101 Wn. App. 472, 484, 3 P.3d 805 (2000).

The aim of any legal malpractice damage award must thus be to place successful plaintiffs, as nearly as possible, in the position they would have occupied had their attorneys capably and honestly represented them.

Both the leading cases from other jurisdictions and respected academic sources are in sharp disagreement about how to achieve this goal with respect to the proposed fees of negligent attorneys, however. One side of the debate is characterized by the leading treatise on the subject. It is dismissive of cases that fail to reduce malpractice awards by the negligent attorney's fees, arguing that those cases disregard the standard "American rule" that parties should be responsible for paying their own attorneys in litigation:

The rationale in trading off the client's legal fees in the malpractice action for the defendant's fees in the underlying action essentially allows a party to recover attorneys' fees in a negligence action. . . . In a legal malpractice case, however, the issue is the client's measure of damages. If the client would have had to pay the defendant or any other attorneys' fees to receive full performance, the value of proper performance, which sets the initial measure of damages, should be reduced by that amount, particularly where the lawyer has rendered services.

3 RONALD E. MALLEN & JEFFERY M. SMITH, LEGAL MALPRACTICE § 21.18, at 69 (2008) (footnotes omitted). This rationale reiterates the historical view of the issue, which refuses to accept as a valid consideration that the successful legal

malpractice plaintiff inevitably must hire a second attorney to secure the recovery that the negligent attorney, by definition, failed to achieve.

The case most widely cited for this rationale is Moores v. Greenberg, 834 F.2d 1105 (1st Cir. Mass. 1987). According to the Moores court, “the assertion that the fees originally to be paid should not be deducted from a malpractice award because the client will then pay twice for the ‘same’ services assumes what it sets out to determine: that plaintiff is entitled to recover the attorneys’ fees.” Moores, 834 F.2d at 1111. The Moores court reasoned that this is directly contrary to “the general rule in the United States . . . that each suitor bears his own lawyering costs.” Moores, 834 F.2d at 1111. Accord Sitton v. Clements, 385 F.2d 869 (6th Cir. Tenn. 1967) (overruled by Foster v. Duggin, 695 S.W.2d 526 (Tenn. 1985)); McGlone v. Lacey, 288 F. Supp. 662 (D.S.D. 1968); Childs v. Comstock, 69 A.D. 160, 74 N.Y.S. 643 (N.Y. App. 1902) (overruled by Campagnola v. Mulholland, Minion & Roe, 148 A.D.2d 155, 543 N.Y.S.2d 516 (N.Y. App. 1989)); Horn v. Wooster, 165 P.3d 69 (Wyo. 2007).

As indicated by the overruling of the earlier precedents cited in Moores, more modern cases have rejected this “American rule” reasoning as inevitably allowing the successful plaintiff less than full recovery. The current Restatement of the law on the subject articulates the rationale for the modern majority rule that negligent attorneys are not entitled to be credited with fees that they failed to earn due to their malpractice:

When it is shown that a plaintiff would have prevailed in the former civil action but for the lawyer’s legal fault, it might be thought that—applying strict causation principles—the damages to be recovered in the legal-malpractice action should be reduced by the fee due

the lawyer in the former matter. . . . 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.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 cmt. c (2000).³ The Restatement thus rejects the Moore approach based on cases that conclude that the strict application of the "American rule" to legal malpractice actions creates a structural inequity against plaintiffs who successfully sue negligent lawyers. See, e.g., Carbone v. Tierney, 151 N.H. 521, 534, 864 A.2d 308 (2004) ("We disagree that reducing the verdict by the amount of the contingency fee puts the plaintiff in the same position that he or she would have been in if the defendant had performed competently in the underlying action."). Accord Duncan v. Lord, 409 F. Supp. 687, 691-692 (E.D. Pa. 1976) ("[d]educting a hypothetical contingent fee fails to compensate plaintiff fully for her loss"); Kane, Kane & Kritzer, Inc. v. Altagen, 107 Cal. App. 3d 36, 43-44, 165 Cal. Rptr. 534 (1980) ("deduction of a hypothetical contingent fee does not fully compensate the plaintiff"); McCafferty v. Musat, 817 P.2d 1039, 1045 (Colo. Ct. App. 1990) (credit "places on plaintiff's shoulders the necessity of paying twice for the same service"); Christy v. Saliterman, 288 Minn. 144, 174, 179 N.W.2d 288 (1970) (rejecting Sitton, 385 F.2d 869); DiStefano v. Greenstone, 357 N.J. Super. 352, 354, 815 A.2d 496 (2003) (applying to contingent fee rule of Saffer v. Willoughby,

³ Section 53 of the Restatement, which comment c addresses, provides: "A lawyer is liable under § 48 or § 49 only if the lawyer's breach of a duty of care or breach of fiduciary duty was a legal cause of injury, as determined under generally applicable principles of causation and damages."

143 N.J. 256, 670 A.2d 527 (1996), that deducting attorney fees from award does not fully compensate plaintiff).

Other cases have rejected crediting negligent attorneys with their fees for various other reasons. See, e.g., Campagnola v. Mulholland, Minion & Roe, 76 N.Y.2d 38, 555 N.E.2d 611, 556 N.Y.S.2d 239 (1990) (New York public policy bars crediting fees); Foster, 695 S.W.2d at 527 (replacement attorney's fees "are in the nature of incidental damages"). Still other cases have attempted to strike a middle ground by only allowing a quantum meruit reduction of the award for those services performed by the negligent attorney that directly benefited the client. See, e.g., Schultheis v. Franke, 658 N.E.2d 932 (Ind. Ct. App. 1995). Accord Samuel J. Cohen, The Deduction of Contingent Attorneys' Fees Owed to the Negligent Attorney from Legal Malpractice Damages Awards: The New Modern Rule, 24 TORT & INS. L.J. 751 (1989) (urging quantum meruit approach). This approach has been convincingly criticized, however, for creating difficult and arbitrary factual questions about precisely which of the negligent attorney's actions actually helped the plaintiff and to what extent they did so. See Carbone, 151 N.H. at 535 ("it would be difficult for a jury to assign a value to the services provided by the first lawyer, particularly where there is considerable disagreement about whether those services benefited the client in any meaningful way").⁴

⁴ The parties also extensively debate the meaning of our state's decisions regarding fee forfeiture. See, e.g., Eriks v. Denver, 118 Wn.2d 451, 824 P.2d 1207 (1992). Those cases are inapplicable. Ferrer has received no fee that can be disgorged. The question before us is, rather, the appropriate measure of the Shoemakes' damages.

Because Washington cases are unambiguous that legal malpractice damages should fully compensate plaintiffs injured by attorney malpractice, we hold that the modern majority rule adopted by the Restatement is the best rule for Washington. Reducing a successful malpractice plaintiff's damages by the amount that the attorney would have earned had the attorney not been negligent necessarily fails to put the injured plaintiff in the position he or she would have occupied in the absence of negligence. In virtually every case, the injured plaintiff will be required to hire a second attorney to prosecute the malpractice action against the negligent attorney and will be required to pay that second attorney. Crediting the negligent attorney with fees through a mechanistic application of the "American rule" fails to account for the fact that both the negligent attorney's fees and the fees of replacement counsel are being incurred for the same service. The replacement attorney is required to prove precisely what the negligent lawyer failed to prove—that the plaintiff is entitled to recover on the underlying claim. That this must be done through the vehicle of a malpractice action does not change the fact that the plaintiff's damages are limited to a single recovery on that underlying claim. By definition, reducing that 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.

Applying the Restatement rule also removes any confusion about the Shoemakes' damage award in relation to the insurance payment that, through replacement counsel's efforts, they eventually received. Once again, stated numerically, the Restatement rule simply provides the Shoemakes with:

\$100,000 (the principal award of \$100,000) + \$117,519.31 (prejudgment interest on the delayed \$100,000 principal payment) - \$100,000 (the payment made by State Farm to the Shoemakes) = \$117,519.31 (the final damage award). In other words, the Shoemakes are simply entitled to the foregone interest on their insurance payment. This result is not particularly surprising—the trial court itself defined the Shoemakes' proper measure of damages as prejudgment interest on the principal payment. The primary reason that the actual award did not reflect this definition was because the trial court decided to reduce that principal amount by an amount equal to Ferrer's hypothetical contingent fee. The trial court erred by so deciding.

III

The next issue presented is whether the trial court abused its discretion by awarding the Shoemakes attorney fees in this malpractice action based on their breach of fiduciary duty claims. Because breach of fiduciary duty by a lawyer is not a recognized equitable ground upon which to award attorney fees under Washington law, the trial court erred in so doing. Thus, this award must be vacated.

Attorney fee awards are reviewed for abuse of discretion. Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 335, 858 P.2d 1054 (1993). A trial court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law. Fisons, 122 Wn.2d at 339.

Attorney fees may only be awarded if authorized by contract, statute, or a recognized ground in equity. Flint v. Hart, 82 Wn. App. 209, 223-24, 917 P.2d

590 (1996). Flint held that “[a]n equitable ground exists ‘when the natural and proximate consequences of a wrongful act by defendant involve plaintiff in litigation with others.’” Flint, 82 Wn. App. at 224 (quoting Armstrong Constr. Co. v. Thomson, 64 Wn.2d 191, 196, 390 P.2d 976 (1964)). According to the Shoemakes, this means that, because Ferrer’s negligent conduct required them to bring suit against him in order to recover interest on the insurance payment he failed to obtain, they are entitled to attorney fees for their malpractice action. Contrary to the Shoemakes’ contention, however, Flint does not stand for the proposition that attorney fees are routinely recoverable in legal malpractice actions as mitigation damages. Attorney fees are properly considered as mitigation damages only where a defendant’s conduct results in the plaintiff being involved in litigation with a *third party*—not simply when an attorney’s negligence draws a lawsuit from the plaintiff. Cf. Jacob’s Meadow Owners Ass’n v. Plateau 44 II, LLC, 139 Wn. App. 743, 758, 162 P.3d 1153 (2007) (attorney fees incurred in a *separate* proceeding recoverable as consequential damages; citing Flint, 82 Wn. App. at 223-24).

Attorney fees are also not recoverable simply because Ferrer breached his fiduciary duties to the Shoemakes. Contrary to the Shoemakes’ present contention, breach of fiduciary duty in the legal malpractice context is not a recognized equitable basis for an award of attorney fees. The Shoemakes rely on Hsu Ying Li v. Tang, 87 Wn.2d 796, 799-801, 557 P.2d 342 (1976), for the proposition that a trial court has the inherent power to award attorney fees when a fiduciary’s breach amounts to “constructive fraud,” and that because Ferrer

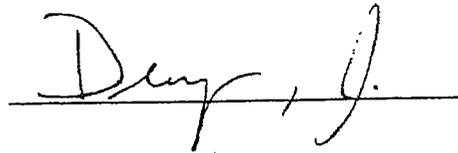
repeatedly lied to the Shoemakes about their case, his conduct was “constructive fraud” justifying an award of attorney fees. But the Shoemakes misread Hsu Ying Li. In fact, the court in Hsu Ying Li applied a well-established equitable basis for the award of attorney fees: the prosecution of a successful action to preserve a common fund. See Hsu Ying Li, 87 Wn.2d at 799. See also ASARCO, Inc. v. Air Quality Coal., 92 Wn.2d 685, 716, 601 P.2d 501 (1979) (“[t]he actual award [in Hsu Ying Li] stemmed from the prevailing party’s having preserved partnership assets, i.e., an identifiable fund”).

While the Shoemakes fail to provide any authority holding that a breach of fiduciary duty by an attorney is a recognized equitable basis for an award of attorney fees in a subsequent legal malpractice action, Ferrer provides clear authority to the contrary. In Perez v. Pappas, 98 Wn.2d 835, 845, 659 P.2d 475 (1983), the Supreme Court held that plaintiffs were not entitled to an award of attorney fees based on their attorney’s breach of his duties as their fiduciary. Similarly, in Kelly v. Foster, 62 Wn. App. 150, 154, 813 P.2d 598 (1991), we held that a legal malpractice action, regardless of whether it was based upon a lawyer’s breach of fiduciary duty, is an action “to recover damages, . . . a traditional legal remedy.” “Washington courts have not recognized the ordinary legal malpractice action as one in which attorney’s fees can be recovered as part of the cost of litigation.” Kelly, 62 Wn. App. at 155. See also Dempere v. Nelson, 76 Wn. App. 403, 410, 886 P.2d 219 (1994) (“bad faith in the underlying tortious conduct is not a recognized equitable ground for awards of attorney fees in Washington”).

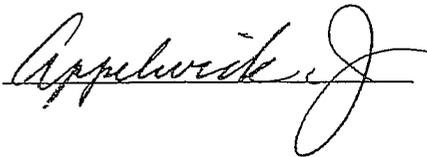
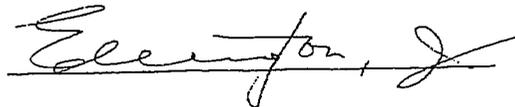
Notwithstanding the trial court's characterization of its attorney fee award as "sanctions," the basis for its attorney fee award was that Ferrer breached his fiduciary duty to the Shoemakes in pursuing their personal injury claims; there was no allegation of bad faith in the conduct of this malpractice suit itself. Accordingly, the trial court premised the attorney fee award on the legally erroneous assumption that an attorney's breach of his fiduciary duties to his clients provides a recognized equitable basis for an award of attorney fees in a subsequent malpractice action against the attorney. Thus, the trial court abused its discretion in awarding attorney fees to the Shoemakes.

Having concluded that the trial court's attorney fee award was improper, we need not consider whether the award was adequate. Similarly, because there was no basis to award attorney fees below, there is no basis to award attorney fees on appeal.

Reversed.

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WE CONCUR:

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ANDREA SHOEMAKE, by and through)
a guardian ad litem to be appointed, and)
KEITH SHOEMAKE, and their marital)
community,)
Appellants,)
v.)
R. DOUGLAS P. FERRER and JANE)
DOE FERRER, husband and wife,)
Respondents.)

DIVISION ONE
No. 60158-0-1

ORDER DENYING MOTION
FOR RECONSIDERATION

The respondent, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 8th day of May, 2008.

FOR THE COURT:

Dugan, A.C.J.
Judge

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