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DIVISION I
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NO. 60158-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

81812-6

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

Appellants/Cross-Respondents,

vs.

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

Respondents/Cross-Appellants.

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

REPLY BRIEF OF CROSS-APPELLANTS/RESPONDENTS

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**I. SUMMARY OF CROSS-APPELLANTS'
REPLY**

Though plaintiffs quibble with defendant's characterization of the issue presented by this cross-appeal, and attempt to sidetrack the argument by discussion of irrelevant authorities and legal issues, nowhere in their response do they identify any Washington authority supporting the trial court's decision to award attorney fees in this legal malpractice and breach of fiduciary duty case. Plaintiffs' efforts to dance around the issue in the end only serve to highlight the simple truth that there is no statute or recognized ground of equity authorizing an award of attorney fees in this case.

Plaintiffs continue their disingenuous approach to the entire case (i.e., the contention that the case is about forfeiture or disgorgement of a fee, when it is really about damages allowed in Washington law) in this cross-appeal by arguing a contractual claim never briefed or presented to the court below – that the collection provision of the agreement between the parties somehow supports a prevailing party fee award. Simply put, this case is not about either forfeiture or collection of defendant's attorney fees. That characterization is plaintiffs' effort to "spin" the case into something it is not. The case is not about a suit by defendant to collect a fee. Thus, even if plaintiffs' latecomer argument about the "two-way"

effect of RCW 4.84.330 had been properly raised, it is irrelevant. The claims in this case arise from defendant's negligence, not out of the collection provision in the parties' agreement, which is the only portion of the agreement allowing fees to a prevailing party.

II. ARGUMENT

A. NO RECOGNIZED GROUND OF EQUITY EXISTS TO SUPPORT THE FEE AWARD.

Plaintiffs agree (App. Reply Br. 25) this court in *Dempere v. Nelson*, 76 Wn. App. 403, 886 P.2d 219 (1994), *rev. denied*, 126 Wn.2d 1015 (1995) identified four recognized equitable grounds in Washington supporting awards of attorney fees: Bad faith conduct of the losing party, preservation of a common fund, protection of constitutional principle, and private attorney general actions. *Dempere*, 76 Wn. App. at 407. However, plaintiffs choose to ignore the court's discussion in the case demonstrating that the supposed bad faith ground is a myth, never actually adopted in Washington law, and further that the supposed "ground" amounts to nothing more than a type of punitive damages, long prohibited in Washington.

Plaintiffs' claim that bad faith conduct has been established as a ground for awarding attorney fees, subsequent to the *Dempere* decision, plays fast and loose with the facts and reasoning of the cases plaintiffs cite. *In re Pearsall-Stipek*, 136 Wn.2d 255, 961 P.2d 343 (1998)

considered two petitions to force a recall election of the Pierce County auditor. The question in that case which is relevant here was whether the auditor could be awarded attorney fees for defending the frivolous litigation if it was brought in bad faith. The court concluded that while the facts suggested the suit was commenced in bad faith, no finding to that effect had been made by the trial court, so the court concluded fees could not be awarded. Nothing in *Pearsall-Stipek* so much as suggests that the court's dicta could be applied to situations like this, where the alleged "bad faith" is not in the litigation, but in the events that gave rise to the suit. In fact, the court said in *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 10 P.3d 1034 (2000), discussing this aspect of its earlier decision: "Bad faith in this context refers to 'intentionally frivolous recall petitions brought for the purpose of harassment.'" 141 Wn.2d at 783.

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

courts' discussion of the supposed litigation bad faith ground for an award of fees, the court reversed the award of fees in both cases.

Plaintiffs' contention that *Rogerson Hiller Corp.* recognized that *Pearsall-Stipek* "rejected *Dempere's* analysis" (App. Reply Br. 26) is a serious exaggeration of what the court actually said, and is completely wrong as to the context in which the term "bad faith" was used in *Dempere* and is used in this case. Again, *Pearsall-Stipek* and *Rogerson Hiller Corp.* related to bad faith litigation conduct. *Dempere* and this case concern alleged misconduct prior to the suit. None of the cases plaintiffs cite invalidate (or even address) the *Dempere* court's analysis showing that awarding attorney fees for bad faith in the underlying conduct is contrary to Washington law.

Plaintiffs' ruminations about "constructive fraud" are even further removed from the issue involved in this cross-appeal. Whether bad faith was equivalent to constructive fraud in the context of the will contest in *In re Estate of Mumby*, 97 Wn. App. 385, 982 P.2d 1219 (1999), (where there was no issue of awarding attorney fees), is immaterial to whether either breach of fiduciary duty or legal malpractice constitutes a recognized equitable ground of equity for awarding attorney fees.

By the same token, nothing in *McGreevy v. Oregon Mutual Ins. Co.*, 128 Wn.2d 26, 904 P.2d 731 (1995) helps plaintiffs here. That case

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

Plaintiffs acknowledge the holdings of *Perez v. Pappas*, 98 Wn.2d 835, 659 P.2d 475 (1983) and *Kelly v. Foster*, 62 Wn. App. 150, 813 P.2d 598, *rev. denied*, 118 Wn.2d 1001 (1991) to the effect that proof of a breach of fiduciary duty by an attorney does not entitle the successful plaintiff to an award of attorney fees. Plaintiffs then contend that those cases, despite their holdings, would allow such an award in the discretion of the trial court. However, plaintiffs do not cite a case in which such an award was made and upheld, because they cannot. There simply is no authority for plaintiffs' argument that the trial courts have discretion to award fees in a breach of fiduciary duty case, absent one of the recognized equitable grounds established in Washington law.

As this court observed in *Kelly* at 62 Wn. App. 155, “most cases of proven legal malpractice will involve a breach of one or more fiduciary duties.” The end result of plaintiffs’ argument in this cross-appeal, if adopted, would be a rule that attorney fees are awardable to successful claimants in most legal malpractice cases. Plaintiffs have identified no cogent rationale, much less authority, for such a sea change in the law of legal malpractice or the American Rule of attorney fees.

B. PLAINTIFFS HAVE NO CLAIM FOR ATTORNEY FEES IN THE CROSS-APPEAL.

The argument that plaintiffs are entitled to recover additional attorney fees for opposing this cross-appeal, under RAP 18.1, in the event they prevail on the cross-appeal, is unavailing. Plaintiffs cite only to a federal case interpreting the Equal Access to Justice Act, 28 U.S.C. § 2412 (and improperly attribute the source of the quotation in that case). Plaintiffs cite no Washington authority for their proposition, and it should be rejected.

C. THE CONTRACT CLAIM WAS NOT RAISED IN THE TRIAL COURT.

For the first time, in their Cross-Respondents’ Response brief, plaintiffs contend that defendant should be liable for plaintiffs’ attorney fees as prevailing parties under the agreement between the parties, as augmented by RCW 4.84.330. This claim was never presented to the trial court. The contract section plaintiffs rely upon provides for attorney fees

to defendant in the event a collection action is necessary to obtain fees due under the agreement. The trial court did not rule upon whether the prevailing party fee language in that provision applied to this malpractice suit.

While the contingent fee agreement was made an exhibit to defendant's declaration in support of his motion for summary judgment (CP 9-18), it was presented to demonstrate the amount of the agreed contingent fee. As discussed in the respondent's brief (Resp. Br. 14), defendant has not made a claim for fees in this case, despite the plaintiffs' efforts to characterize defendant's damages position that way. Thus, the collection section of the agreement was not considered, and did not need to be considered, by the trial court in reaching its decision on the cross-motions for summary judgment.

In *Sorrell v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 38 P.3d 1024, *rev. denied*, 147 Wn.2d 1016 (2002), respondent argued on appeal an alternative ground to support the ruling of the trial court which had not been presented below. This court refused to consider the argument, stating: "Where the trial court had no opportunity to address the issue, we decline to consider it." 110 Wn. App. at 299. *See also Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. at 362-63.

Similarly, in *State v. Larson*, 88 Wn. App. 849, 946 P.2d 1212 (1997), the State argued, for the first time on appeal, an alternative ground for upholding the legality of a search. The court refused to consider the argument, noting: “We will not affirm on the basis of a theory argued for the first time on appeal.” 88 Wn. App. at 852.

Plaintiffs’ attempt to inject the contractual argument now to support the award of attorney fees should be rejected as too little, too late.

D. THE CONTRACT DOES NOT SUPPORT AN ATTORNEY FEE AWARD FOR THIS CLAIM.

Defendant agrees that RCW 4.84.330 applies to make prevailing party fee award agreements bilateral, regardless of their language. However, the statute does not otherwise expand the scope of a contractual fee agreement to make it apply to disputes not contemplated in the contract.

Here, section 12 of the parties’ Agreement for Legal Services Contingent Fee Agreement provides, in relevant part:

If suit is commenced to collect amounts due Attorneys, Clients hereby submit to the jurisdiction of King County courts and agrees [sic] that the venue of this action shall be King County. In the event of any such suit, Clients promise and agree to pay, in addition to all other sums determined due from Clients to Attorneys, such reasonable Attorneys’ fees and expenses incurred by Attorneys in such action

(CP 17) This is the only place in which the agreement speaks of an award of fees (other than the fee agreed for the legal services contemplated in the agreement). In other words, the agreement does not have any provision granting an award of fees in the event of a dispute arising out of the agreement generally. The fee agreement applies only to collection efforts.

The general rule concerning the scope of prevailing party attorney fee provisions is stated by the Court in *Seattle First Nat. Bank v. Washington Insurance Guaranty Ass'n*, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991): “Under Washington law, for purposes of a contractual attorneys’ fee provision, an action is on a contract if the action arose out of the contract and if the contract is central to the dispute.” Here, the action commenced by plaintiffs cannot be said to have arisen out of the Agreement for Legal Services. The terms of the agreement have nothing to do with the malpractice or breach of fiduciary duty claims. Those are in fact tort claims, arising by operation of law independent of the agreement. Thus, the contract is not “central to the dispute.” Further, the only portion of the contract to which the fee provision applies by its terms has no connection to the dispute, as it concerns only efforts to collect unpaid fees. This action does not arise out of the collection provision of the Agreement.

The concept that a contractual fee agreement will be limited to disputes arising out of that portion of the contract to which the fee agreement applies was recognized in *Hindquarter Corp. v. Property Development Corp.*, 95 Wn.2d 809, 631 P.2d 923 (1981), where the Court reversed a portion of an attorney fee award to a landlord who had successfully resisted the lessee's declaratory action to force a lease renewal, stating: "The terms of the lease authorized attorney's fees only for curing defaults, and the award of fees should reflect only those services rendered toward that end." 95 Wn.2d at 815. That case mandates that if the contractual fee provision was to be considered here, the court would have to determine what actions the agreement authorized attorney fees for, and only allow fees accordingly. *See also CPL, L.L.C. v. Conley*, 110 Wn. App. 786, 40 P.3d 679 (2002) (dispute arose out of "earnout agreement" which contained no attorney fee provision, rather than preceding purchase agreements which did); *Keyes v. Bollinger*, 27 Wn. App. 755, 621 P.2d 168 (1980) (dispute arose out of home builder/seller's construction defects rather than earnest money agreement under which house purchased, and which contained attorney fee provision).

Plaintiff's fanciful arguments notwithstanding, this case is not about defendant's efforts to collect the fee agreed to in the Agreement. The attorney fee provision relates only to collection efforts, which are not

involved in this case. Thus, neither the prevailing party attorney fees clause nor RCW 4.84.330 provide any basis for the trial court's award of attorney fees here.

III. CONCLUSION

In their efforts to justify the trial court's award of attorney fees, plaintiffs' rhetoric has wandered far afield from the original claim that a breach of fiduciary duty by an attorney supports a fee award in favor of the client. These meanderings have proven fruitless in their intended goal of identifying authority or even a legal rationale for awarding attorney fees in what is a simple legal negligence case. The supposed "bad faith" equitable ground for awarding fees, to the extent it may exist at all, applies only to bad faith in the litigation itself. Otherwise, as this court recognized in *Dempere*, an award of attorney fees as a sanction for the conduct leading to the litigation is nothing more than a form of punitive damages, and cannot be countenanced in Washington.

The last minute attempt to support the fee award under the contract and RCW 4.84.330 avails the plaintiffs nothing, as the issue was never raised in the cross-motions for summary judgment at the trial court level and thus should not be considered here. More importantly, the dispute in this case is about legal malpractice, not about a fee collection claim, and

the attorney fee provision of the Agreement for Legal Services is thus not triggered.

DATED this 19th day of November, 2007.

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