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SUPREME COURT
OF THE STATE OF WASHINGTON

THE COLLECTION GROUP, LLC,
a Washington Limited Liability Company,
and BRIAN FAIR and SHIRLEY FAIR, husband and wife,
and the marital community composed thereof,

Appellants,
v.

LESLIE ALAN POWERS and PATRICIA POWERS,
husband and wife, and KEITH THERRIEN and
MARSHA THERRIEN, husband and wife,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR CHELAN COUNTY
THE HONORABLE THEODORE SMALL

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

Legal malpractice is a tort; “once an attorney-client relationship is established, the elements for legal malpractice are the same as for negligence.” *Hizey v. Carpenter*, 119 Wn.2d 251, 261, 830 P.2d 646 (1992), describing *Bowman v. John Doe*, 104 Wn.2d 181, 185, 704 P.2d 140 (1985). “To establish a claim for legal malpractice, a plaintiff must prove the following elements: (1) The existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred.” *Hizey*, 119 Wn. 2d at 260-61.

Here, for purposes of summary judgment the trial court had to presume that the attorneys' breach of duty had proximately caused plaintiffs' damages. It nonetheless dismissed this action on the grounds that 1) the damages alleged to have been caused by the attorneys' malpractice were the hundreds of thousands of dollars of fees plaintiffs incurred in another (“the contract”) action and 2) the attorneys were not the *sole* cause of that litigation 3) with LKO, the company that sued the plaintiffs, which the trial court concluded

was not a “stranger” to the transaction because the attorneys managed LKO as an estate planning device and on behalf of their adult children.

None of these three facts is a reason to deny a client a remedy for his attorneys’ professional negligence. In ruling as a matter of law that the fees plaintiffs incurred in the contract action could not be recovered as consequential damages in this malpractice action, the trial court misapplied the “ABC rule,” which provides an *additional* equitable basis for an award of attorney fees as damages where, unlike here, the defendant has “no prior duty” to the party seeking fees. This equitable indemnity doctrine was never intended to be an absolute *defense* to an award of fees as consequential damages for professional malpractice. Yet that was how it was misused here. This Court should reverse the trial court’s dismissal of this professional negligence action and reject application of the “ABC rule” as a bar to a tort plaintiff’s recovery of fees incurred in underlying litigation as consequential damages proximately caused by an attorney’s malpractice.

II. REPLY TO RESTATEMENT OF FACTS

On appeal from a summary judgment dismissing a tort claim, the appellate court takes all facts in a light most favorable to the plaintiff. *Afoa v. Port of Seattle*, 176 Wn.2d 460, 466, 296 P.3d 800 (2013). Respondents' statement of the case, which contrary to RAP 9.12 admittedly (Response Br. 4 n.3) relies upon "facts" outside the summary judgment record, tells a fairy tale that has been rejected *on the facts* in the courts below. Without identifying every misstatement (and there are many) of the facts, considered both in a light most favorable to plaintiffs and as found below, appellants simply point out that the restatement of facts is noteworthy only for respondents' continuing self-absolution from any responsibility for their professional misconduct. For instance:

The attorneys deny a client relationship with Fair by accusing their legal assistant of the unauthorized practice of law. (Response Br. 4-5: "In January 2004, Brian Fair contacted Diane Sires, a legal assistant Powers & Therrien, P.S., and asked her to assist him in incorporating a Nevada corporation. . . . Sires did

so.”)¹ *But see Bullard v. Bailey*, 91 Wn. App. 750, 757, 959 P.2d 1122 (1998) (attorney “who held [nonattorney] out to be his paralegal on at least one occasion” was liable for malpractice for nonattorney’s conduct when nonattorney “engaged in the unlawful practice of law on a regular basis” with attorney’s knowledge), *rev. denied*, 137 Wn.2d 1014 (1999).

As the trial court found after trial (CP 61), attorney *Powers* accepted his client Fair’s proposition to engage in a joint venture – not that “LKO accepted the offer without negotiation or alteration, and neither party asked for or signed any written agreement.” (Response Br. 5) Fair in fact asked the attorneys to “prepare legal doc for this JV (if needed)” in October 2004 (CP 110,133), and to “formalize” their arrangement “however you wish” in February 2005. (CP 112, 155) The attorneys having utterly failed to memorialize this business enterprise with and for their clients Fair and TCG, in April 2007 Fair asked them to do so again, proposing

¹ The cited reference for this proposition (the trial court’s March 31, 2009, memorandum decision) actually reads: “Shortly before Brian Fair formed TCG, he hired the law firm of Powers & Therrien, P.S. to form, renew and ultimately close a Nevada corporation known as BF Trading. Powers & Therrien, P.S. drafted BF Trading’s articles of incorporation . . .”. (CP 35)

ownership interests in TCG that reflected 26 months of capital contributions and work building the business. (CP 113, 157-58)

The attorneys' response was to have LKO, the company they managed as an estate planning device and for their adult children's benefit, sue the Fairs and TCG. In a masterfully Nixonian use of the passive voice, respondents claim that "Fair caused that litigation to commence" and "caused litigation to be commenced" (Response Br. 10, 1) because he "ignited the dispute" by writing a letter to his attorneys seeking a written agreement to memorialize their joint venture. The attorneys now escalate this "dispute," complaining (even though they claim to have no pecuniary interest in the company) that Fair "diverted business away from TCG" (Response Br. 1, 6)² by giving *Powers and Therrien* a "private invitation" to

² Respondents repeat this assertion in the argument section of their brief, claiming that "Fair neglects to mention the other conduct that spawned litigation, his diversion of TCG business into another entity in an effort to render worthless LKO's 50% share of TCG, and keep all of the profit from TCG for himself. Appendix E at 4." (Response Br. 17) There is no "Appendix E" to the Response Brief, and there is no support for this "diversion" claim, which respondents make for the first time in their Response Brief.

purchase additional debt portfolios “researched and recommended by TCG,” for which TCG would be paid a fee. (CP 684-85)³

Finally, the attorneys seek to evade the consequences of their professional negligence by blaming the victim of their misconduct – simultaneously complaining both that the Fairs were claiming “100% of losses [from TCG] against their tax obligations” (Response Br. 6, 27) and that Fair received “a \$700,00 windfall” (Response Br. 1, 11, 27) when the trial court rescinded the joint venture and ordered TCG to return to respondents’ family corporation LKO the capital contributions Powers and Therrien had invested on behalf of LKO, plus interest.

Both these claims find no support in the summary judgment record, in any other portion of this malpractice case record, or in the record of the contract action. The basis for the claim of a

³ The attorneys drafted the legal documents incorporating OPM I, LLC, the entity through which they now claim TCG “business opportunities” were diverted. (CP 63-64) OPM is not owned by Fair, but by a number of investors – some of whom the attorneys recruited. (See CP 689, 691) The OPM Operating Agreement, drafted by Powers in early 2007 to govern TCG’s relationship with the investors (CP 693), contains this cryptic first (and only) reference to the attorneys’ conflict of interest:

Counsel who has prepared this Agreement and formed the Company has represented the Manager [TCG] and certain of the Members and continues to do so. Members of Counsel’s family have an interest in the Manager and through it the Company.

(CP 64)

\$700,000 “windfall” is Fair’s April 21, 2007, letter to Powers and Therrien, imploring them once again to “consider formalizing our ownership in The Collection Group, LLC,” “[b]efore we jump into bed together on the potential building deal” that Powers, Therrien and Fair were discussing at the time. (CP 157) After acknowledging the “sweat equity” put into TCG, Fair continued: “I think the value of the company is around \$1.5M. I base this on one public company (PRA), whose outstanding share value was 3 times greater than book equity.” (CP 157) The attorneys divide this “estimate” in half to “calculate” Fair’s “windfall.”

The reality of TCG’s economic condition was, and is, quite different. Through 2006, TCG had never shown a profit. (CP 390, 397, 406) As of June 2007, TCG had collected \$1,134,482 on debt purchased for \$988,200 (CP 682), and owed \$275,000 on a \$300,000 credit line on which the Fairs alone were personally liable. (CP 113) With Fair and TCG at a significant financial disadvantage, this is when the attorneys retained counsel who, claiming a conflict of interest by the firm Fair had been forced to retain to attempt to resolve the ownership of TCG, threatened “expensive” litigation and suggested that Fair “communicate directly with Les Powers and need not retain an attorney nor go

through my office,” “to resolve this dispute by discussion between businessmen.” (CP 160-61)

Even when the parties’ professional relationship was falling apart because of their misconduct, the attorneys thus utterly failed to recognize and address the conflicts *they* had created by their breach of professional duties and the standard of care. As a consequence of their negligence, TCG and the Fairs have now spent six years and hundreds of thousands of dollars⁴ defending litigation commenced by the family company Powers and Therrien control.

This Court should rely on the facts set out in the opening brief. It must reject the attorneys’ rewriting of the past to assert as “alternative” grounds to affirm that there was no attorney-client relationship, that they violated no ethical rules, or that Fair’s “unclean hands” or “windfall” prevent plaintiffs from pursuing a claim for damages for professional negligence. There was expert evidence presented on summary judgment that an attorney-client relationship existed, and that the attorneys breached the standard of care. (CP 106-07) For purposes of the issue in this appeal – whether the trial court erred in dismissing plaintiffs’ malpractice

⁴ As of May 2011, TCG had incurred \$404,941 and the Fairs \$79,810 in fees defending the contract action commenced by LKO, the family company Powers and Therrien managed and controlled. (CP 455)

action on the grounds that, as a matter of law, the attorneys could not be liable for their professional negligence and misconduct because the damages sought were fees incurred in the contract action -- breach of the duty and standard of care must be presumed.

III. REPLY ARGUMENT IN SUPPORT OF APPEAL

The trial court erred in relying on the equitable indemnity doctrine/"ABC rule" to dismiss this legal malpractice action, and in concluding that because "[a]s a matter of law, plaintiffs cannot show the alleged malpractice of defendants was the sole reason they were involved in the . . . [contract] action," and that "as a matter of law, LKO was connected to the original agreement," "equitable indemnification is not available to the plaintiffs." (CP 908) The "ABC rule" is not a *defense* to an action for breach of an attorney's duty of care -- a tort action for damages that would otherwise be subject to standard notions of comparative fault. Equitable indemnity instead is an *affirmative* basis upon which a court may award attorney fees as damages -- an *additional equitable exception* to the "American rule" that presumes each side will bear its own fees. This Court should hold that a jury in a legal malpractice action may award as damages attorney fees incurred in litigation caused by an attorney's breach of the standard of care.

A. Fees Incurred Because Of An Attorney's Malpractice Are Recoverable As Consequential Damages.

In legal malpractice cases, as in other tort cases, the tortfeasor is liable for those damages that are "the natural and proximate consequence" of the breach of a duty of care. *See* cases cited at Opening Br. 10-11. "Had the plaintiff been forced to hire an accountant to repair the damage caused by the defendant's conduct, she would undoubtedly have been entitled to recover the accountant's fee as an ordinary element of damages. There is no basis in logic for denying recovery of the same type of loss merely because the plaintiff required an attorney instead of an accountant to correct the situation caused by the defendant's neglect." *Sorenson v. Fio Rito*, 90 Ill. App. 3d 368, 372, 413 N.E.2d 47 (1980). This Court should confirm that legal fees incurred by a

client as a result of his attorney's malpractice are recoverable as consequential damages.⁵

Fair and TCG do not seek a "fee award" in *this* malpractice action. Nor are Fair and TCG proposing a "*per se* attorney fee award in RPC 1.7 and 1.8 cases," as the attorneys claim. (Response Br. 24) Fair and TCG instead seek as *damages* those fees incurred in the contract action that the attorneys caused LKO, the limited liability company they created and managed on behalf of their children, to bring against Fair and TCG.

The attorneys especially misplace their reliance on *Shoemake ex rel. Guardian v. Ferrer*, 168 Wn.2d 193, 225 P.3d 990 (2010) (Response Br. 23), *affirming* 143 Wn. App. 819, 182 P.3d 992 (2008). All *Shoemake* does is confirm this Court's commitment to measuring damages in legal malpractice actions in a

⁵ In addition to *Sorenson* and the out-of-state cases illustrating this rule cited at Opening Br. 17-18, the following cases are representative: *Sindell v. Gibson, Dunn & Crutcher*, 54 Cal. App. 4th 1457, 1470, 63 Cal. Rptr. 2d 594 (1997); *De Pantosa Saenz v. Rigau & Rigau, P.A.*, 549 So.2d 682, 685 (Fla. Dist. Ct. App. 1989), *rev. denied*, 560 So.2d 234 (1990); *Ramp v. St. Paul Fire & Marine Ins. Co.*, 263 La. 774, 790, 269 So. 2d 239, 245 (1972); *Shimer v. Foley, Hoag & Eliot LLP*, 59 Mass. App. Ct. 302, 314, 795 N.E.2d 599, 608 (2003); *Hill v. Okay Const. Co., Inc.*, 312 Minn. 324, 347, 252 N.W.2d 107, 121 (1977); *First Nat. Bank of Clovis v. Diane, Inc.*, 102 N.M. 548, 555, 698 P.2d 5, 12 (Ct. App. 1985); *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d 438, 443, 867 N.E.2d 385 (2007); *John Kohl & Co. P.C. v. Dearborn & Ewing*, 977 S.W.2d 528, 534 (Tenn. 1998); *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 122 (Tex. 2009).

manner that both makes the client/tort victim whole (as in any negligence action).—168 Wn.2d at 198 ¶ 10.⁶ This Court’s denial of review of the reversal of an award of fees in the malpractice action itself has no significance – and not just because the denial of review is never considered “precedential.”

Fair and TCG do not seek their attorneys fees incurred in *this* malpractice action, but the attorney fees incurred in the contract action, as consequential damages caused by the attorneys’ malpractice. Equitable indemnity and the “ABC rule” are not a legal impediment to their damage claim, and the trial court erred in ruling on summary judgment that it was.

B. The “ABC Rule” Is Not An Absolute Defense To A Malpractice Claim.

This Court has never held that the “ABC rule” precludes a jury from awarding as damages a client’s fees incurred in litigation caused by attorney malpractice. As respondent attorneys concede, this Court “did not originate the ‘ABC’ formulation of the rule.”

⁶ In *Shoemake*, this Court affirmed the portion of Division One’s decision awarding prejudgment interest on the client’s damages, which were premised on forfeiture of a hypothetical contingent fee on a settlement lost through the attorney’s malpractice. This Court did not grant review of Division One’s holding in the same opinion that the attorney’s breach of fiduciary duty “was not a recognized equitable basis for an award of attorney fees in a subsequent malpractice action.” *Shoemake v. Ferrer*, 143 Wn. App. 819, 832 ¶ 26, 182 P.3d 992 (2008).

Instead, “the Court of Appeals extrapolated it from a long line of this Court’s decisions in equitable indemnity attorney fee cases dating back to 1907.” (Response Br. 13 n.12, citing *Manning v. Loidhamer*, 13 Wn. App. 766, 538 P.2d 136, rev. denied, 86 Wn.2d 1001 (1975).)⁷ As Division One in *Manning* recognized in its “extrapolation” of the “ABC rule” from five decisions of this Court between 1907 and 1962 (each of which allowed an award of fees as damages), 13 Wn. App. at 770-71, the equitable indemnity doctrine can provide an *additional* basis for recovery of fees as damages even though there was “no prior duty” between the party seeking fees and the party from whom fees are sought. *Manning*, 13 Wn. App. at 772.

In *Manning*, the Court of Appeals rejected the State’s claim for reimbursement of the expenses of litigating a tort claim against its co-defendants, the owners and drivers of vehicles involved in an

⁷ *Blueberry Place Homeowners Ass’n v. Northward Homes, Inc.*, 126 Wn. App. 352, 359 ¶ 11, 110 P.3d 1145 (2005) (bracketed additions omitted), quoting *Manning v. Loidhamer*, 13 Wn. App. 766, 769, 538 P.2d 136 (1975), most recently recites the “ABC rule:”

The elements of equitable indemnity are:

- (1) a wrongful act or omission by A toward B;
- (2) such act or omission exposes or involves B in litigation with C; and
- (3) C was not connected with the initial transaction or event, the wrongful act or omission of A toward B.

automobile accident in which the plaintiffs claimed negligent highway design by the State. The vehicle owners and drivers obviously had “no prior duty” to the State, and recovery of fees under an equitable indemnity theory was not justified because “[a]ll defendants, including the State, were participants in the events which gave rise to the litigation.” *Manning*, 13 Wn. App. at 772.

Division Two next rejected a claim for fees under the equitable indemnity theory 10 years later, in a dispute between a real property seller and a subsequent purchaser over the proceeds of fire insurance on the building. *Dauphin v. Smith*, 42 Wn. App. 491, 494, 498, 713 P.2d 116 (1986). Once again, there was “no prior duty” between the parties in *Dauphin* that would justify an award of fees as damages.

The intermediate appellate courts have authorized claims for fees using the “ABC rule” in several cases decided since *Manning*.⁸ The Court of Appeals cases that on the other hand deny an award of fees as damages under the “ABC rule” do so because there was no “prior duty” – such as the duty of an attorney to his clients in this

⁸ See, e.g., in addition to the cases discussed in the text, *Brock v. Tarrant*, 57 Wn. App. 562, 789 P.2d 112, rev. denied, 115 Wn.2d 1016 (1990); *North Pacific Plywood, Inc. v. Access Road Builders, Inc.*, 29 Wn. App. 228, 628 P.2d 482, rev. denied, 96 Wn.2d 1002 (1981).

case – owed to the party who sought fees that would give rise to a tort or contract action for breach of that duty and an award of damages proximately caused by the breach.⁹

In *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 857 P.2d 1053 (1993) (Response Br. 14-16), for instance, Division One rejected a landlord's claim for fees against a prospective tenant on the grounds that its misrepresentation of the status of its negotiations with a current tenant for purchase of a grocery store in the landlord's property had been the cause of litigation among the parties. An award of fees *in that action* was not justified when the litigation was based not only on the prospective tenant's misrepresentation but on the landlord's current lease with the

⁹ See, e.g., in addition to the cases discussed in the text, *Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc.*, 168 Wn. App. 86, 285 P.3d 70 (real property purchaser could not rely on equitable indemnity to obtain an award from vendor of attorney fees that would not be recoverable under the parties' negotiated contractual indemnity provision), *rev. denied*, 175 Wn.2d 1015 (2012); *Stevens v. Security Pacific Mortg. Corp.*, 53 Wn. App. 507, 523-24, 587-88 ¶¶ 38-41, 768 P.2d 1007, *rev. denied*, 112 Wn.2d 1023 (1989); *Western Community Bank v. Helmer*, 48 Wn. App. 694, 699-701, 740 P.2d 359 (1987) (both Response Br. 14). In *Jain v. J.P. Morgan Sec., Inc.*, 142 Wn. App. 574, 177 P.3d 117, *rev. denied*, 164 Wn.2d 1022 (2008), *cert. denied*, 129 S.Ct. 1584 (2009), the Court of Appeals cited the "ABC rule" to prohibit the Jains from pursuing claims for fees and amounts paid in settlement of securities litigation against their law firms, Perkins Coie and Wilson Sonsini Goodrich & Rosati, but federal security laws independently barred any claim for indemnity, equitable or otherwise. 142 Wn. App. at 582 ¶ 18-19, 586 ¶ 36.

current tenant. The prospective tenant had no duty to the landlord that would support an award of fees.

Similarly, equitable indemnity did not provide a basis for a claim of fees incurred in defending homeowners' claims of faulty workmanship where the contract between a contractor and subcontractor did not include a fee provision in *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 356 ¶ 3, 110 P.3d 1145 (2005) (Response Br. 16). The party seeking fees had been sued on an "independent and separate" claim by the homeowners, and could not recover the fees incurred in defending that action. *Blueberry Place*, 128 Wn. App. at 361 ¶ 17.

Here, however, TCG and Fair had no "independent and separate" duty to LKO. Instead, the misconduct of their attorneys Powers and Therrien – substituting LKO, which they managed on behalf of their adult children, as "partners" in the TCG endeavor, without proper notification or documentation with their clients Fair and TCG – pre-dated and was independent of any involvement of LKO in TCG. In other words, to use the language of equitable indemnity and the "ABC rule," the attorneys' wrongful acts toward their clients involved them in litigation with a third party to that conduct, LKO.

Illustrating how the “ABC rule” can be misapplied in legal malpractice cases, the attorneys argue (and the trial court agreed: CP 908) that Fair and TCG cannot recover the fees incurred in defense of the litigation commenced by LKO because LKO was not “connected” to the dispute over ownership in TCG. However, where, as here, a client relies on counsel for assistance in an underlying transaction, the fact that the attorney’s negligence results in litigation with the other party to the transaction makes the client’s fees incurred in that litigation more, not less, foreseeable. Here, the attorneys created and controlled LKO for estate planning purposes on behalf of their adult children. LKO’s claimed ownership of TCG was at the heart of the attorneys’ misconduct, and their family corporation LKO was inextricably linked to the attorneys’ wrongful conduct toward their clients Fair and TCG. The attorneys cannot defend their actions by arguing that the family corporation *they injected* into the business venture was not a “stranger” to their misconduct.

The Court of Appeals in *Flint v. Hart*, 82 Wn. App. 209, 917 P.2d 590 (1996) (Opening Br. 12-13, Response Br. 19) properly recognized the limitations of the “ABC rule” as a defense to the recovery of attorney fees as damages in legal malpractice actions.

To the extent the rule provides any guidance at all in this sort of case, it is the “wrongful act or omission by [the attorney] toward [the client]” – that is, the alleged breach of a professional duty of care giving rise to a claim for malpractice – that authorizes the recovery of attorney fees as damages. *Flint*, 82 Wn. App. at 224. The involvement of the client or of a third party in the transaction that gives rise to the client’s claim of malpractice is not an absolute defense to liability for damages merely because one consequence of the attorney’s malpractice is that the client incurs fees in litigation caused by the attorney’s negligence.

The trial court also wrongly accepted as an absolute defense to liability the attorneys’ claim that they could not as a matter of law be liable for the fees their clients Fair and TCG incurred in the contract action as a consequence of their malpractice because “plaintiffs cannot show the alleged malpractice of defendants was the sole reason they were involved in the [contract] action.” (CP 908) But in legal malpractice actions, as in all tort actions, a plaintiff’s comparative fault can only reduce the defendant attorney’s liability, and does not eliminate it completely. See *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 552, 55 P.3d 619 (2002). The plaintiffs’ comparative responsibility, or “independent

judgment,” was for a jury, not a reason for the trial court to dismiss the malpractice claim outright as a matter of law. *Bullard v. Bailey*, 91 Wn. App. 750, 756, 959 P.2d 1122 (1998); see also *City of Seattle v. Blume*, 134 Wn.2d 243, 259-60, 947 P.2d 223 (1997) (rejecting “independent business judgment” as an absolute defense).

In any event, TCG was blameless in the dispute, as respondents concede. (Response Br. 6: “[N]one of LKO’s claims alleged that TCG had committed wrongdoing.”, 27) Further, Fair could not be considered at “fault” for sending a letter to his attorneys in April 2007 suggesting that ownership in TCG reflect the 26 months of capital contributions and “sweat equity” that had been put into building the business.

As the trial court found after trial (CP 61), Fair had offered the attorneys an interest in TCG in exchange for capital contributions *and* legal services. See RCW 25.15.190 (contribution of limited liability company member may be made in “services rendered, or . . . obligation . . . to perform services”). As the trial court also recognized, “it was not wrongful for Mr. Fair to attempt to renegotiate the agreement he previously entered into with Mr. Powers.” (CP 907) Fair was entirely justified in questioning the terms of the parties’ business transaction based on current

circumstances where, as here, that transaction also constituted a fee arrangement between attorney and client. *See Holmes v. Loveless*, 122 Wn. App. 470, 484, 94 P.3d 338 (2004) (“agreements between attorneys and clients are different from ordinary business contracts . . . [and] subject to continuous review . . .”); *Cotton v. Kronenberg*, 111 Wn. App. 258, 272, 44 P.3d 878 (2002), *rev. denied*, 148 Wn.2d 1011 (2003) (“[A] fee agreement that may seem fair to the client at the time the agreement is signed must be reevaluated . . . when subsequent events alter the circumstances of the relationship. For example, [when] a client offers an attorney an interest in a fledgling company in exchange for legal representation . . .”).

Use of the equitable indemnity doctrine and the “ABC rule” to analyze the viability of a claim for fees as damages for attorney malpractice needlessly (and with increasing confusion in the lower courts) requires dissecting the relevant “wrongful conduct,” whether the party instigating litigation for which fees are sought is a “stranger” to the parties’ attorney-client relationship, and the client’s claimed culpability for the underlying litigation. All of this is contrary to the tort law governing malpractice. A doctrine that was intended to *expand* the circumstances in which fees could be awarded has instead become an absolute *defense* to an award of

fees as consequential damages in claims for attorney malpractice. The Court should eliminate this confusion by recognizing that equitable indemnity provides an additional basis for fees, not a defense to tort liability, and holding that the “ABC rule” is not an absolute defense to award of fees as damages in a professional negligence action.

IV. RESPONSE TO “CROSS-APPEAL”

Violation of an ethical rule may also be malpractice, but breach of the duty of care is a separate issue. *Hizey v. Carpenter*, 119 Wn.2d 251, 263-67, 830 P.2d 646 (1992); *Hetzel v. Parks*, 93 Wn. App. 929, 934-35, 971 P.2d 115 (1999). As they clearly conceded below and in this Court, the issue whether the attorneys’ RPC violations were also malpractice was not before the trial court. (See CP 204, Defendants Powers’ and Therriens’ Motion for Summary Judgment Re Lack of Compensable Damages: “Whether there was any negligence is hotly disputed.”; see also Response Br.

10 n.11: "The trial court's finding of an RPC violation was not germane to its summary judgment ruling on damages.")¹⁰

The attorneys' violation of the Rules of Professional Conduct is also not before this Court in this malpractice action, which (contrary to the attorneys' claims at Response Brief 3 n.2, 10, 29) has not been "consolidated" with the contract action. Nor (contrary to the attorneys' claims at Response Br. 2, 3 n.2, 19, 24, 28), do Fair and TCG "rely on" the attorneys' RPC violations, "extensively" or otherwise, in their opening brief in this appeal. The *only* mention of RPC 1.7 or RPC 1.8 in the opening brief is in the procedural history of the actions, recited at 7-9. (*See* Opening Br. iv (Table of Authorities))

"Only an aggrieved party may seek review." RAP 3.1. Respondent attorneys were not aggrieved by any decision of the trial court in dismissing this malpractice action, and their cross-appeal is improper. RAP 5.1(d). The parties have fully briefed the issue of the attorneys' RPC violations in the companion contract

¹⁰ Particularly unpersuasive is respondents' argument that this Court's jurisdiction over attorney discipline somehow immunizes them from tort liability, or requires a higher burden of proof of professional negligence. (Response Br. 42-43) Were that the case, no legal malpractice action could proceed while an attorney was subject to discipline for conduct that both violated the standard of care and the Rules of Professional Conduct.

action. The issue is not in this case, and the attorneys' "cross-appeal" is a transparent effort to improperly set up an opportunity for additional briefing in the contract action. This Court should dismiss and disregard the cross-appeal and strike and disregard any cross-reply directed to the merits of the issue whether the attorneys violated RPC 1.7 or 1.8.

V. CONCLUSION

Legal fees a client incurs as a result of his attorney's malpractice are recoverable as consequential damages. The "ABC rule" is not an absolute defense to a malpractice claim. For the reasons set out in this and the opening brief, this Court should reverse the trial court's order dismissing this malpractice action and remand for trial on the damages proximately caused by the attorneys' breach of their duties to their clients TCG and Fair.

Dated this 21st day of August, 2013.

SMITH GOODFRIEND, P.S.

By: 

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 21, 2013, I arranged for service of the foregoing Reply Brief of Appellants, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 21st day of August, 2013.



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Attached for filing in pdf format is the Reply Brief of Appellants, in *The Collection Group, LLC v. Powers and Therrien*, Cause No. 88846-9. The attorney filing this document is Catherine W. Smith, WSBA No. 9542, email address cate@washingtonappeals.com.

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