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October 7, 2016

WSBA Amicus Committee
c/o Committee Chair
1325 4th Ave, Ste. 600
Seattle, WA 98101-2539

SENT BY EMAIL ONLY
WSBA: questions@wsba.org
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Re: Requesting appearance of WSBA as amicus curiae in *Arden v. Forsberg & Umlauf, P.S.*, Supreme Court No. 93207-7

Dear Amicus Committee:

On behalf of Roff and Bobbi Arden, petitioners in *Arden v. Forsberg & Umlauf, P.S.*, Supreme Court No. 93207-7, we request WSBA appear as amicus curiae.

The Supreme Court granted Ardens' petition for review on September 28. Supplemental briefs of the parties are due November 28. Oral argument will be scheduled in the Winter Term, as early as January 12, 2017.

Summary of the Case and Issues Presented
Forsberg & Umlauf attorneys, Hayes and Gibson, were appointed by the Hartford to defend Ardens, under a reservation of rights. The attorneys failed to disclose their existing relationships with Hartford—including an attorney-client relationship as coverage counsel—and the potential conflicts of interest that could arise. The attorneys failed to keep Ardens informed of all developments and information related to settlement. The attorneys followed the Hartford's settlement instructions to reject offers and make counteroffers without consulting with Ardens or obtaining Ardens' approval. The attorneys did not advise Ardens, or allow Ardens time to consult with personal counsel, regarding their options in the face of Hartford's refusal to settle.

Ardens sued Forsberg, Hayes, and Gibson for malpractice and breach of fiduciary duties. The trial court dismissed Ardens' claims on summary judgment. The Court of Appeals affirmed in a decision that entirely undermined the protections provided to insured clients by *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986). Ardens' petition for review identified the following issues that should be of interest to WSBA:

1. Under *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986), insurance-appointed defense counsel must fully disclose

potential conflicts of interest and resolve them in favor of the insured client. Forsberg had a potential "materially limited" conflict due to its long-standing relationships as coverage counsel and panel counsel for Hartford, but never disclosed these relationships to Ardens. Did Forsberg breach its fiduciary duties to Ardens by failing to disclose or resolve this conflict of interest?

2. Under *Tank*, defense counsel must keep the insured client fully apprised of all activity involving settlement, to enable the client to make informed decisions regarding settlement. Forsberg failed to consult with Ardens regarding their options in response to Hartford's settlement decisions. Forsberg carried out Hartford's instructions without giving Ardens an opportunity to react. Did Forsberg breach its fiduciary duties to Ardens?

Reasons for Granting the Amicus Request

The issues identified above should be of substantial interest to the WSBA. The Court will be required to illuminate the contours of the duties owed by attorneys to their clients. The duties outlined in *Tank* are the natural application of the RPCs to the context of insurance-appointed counsel defending under a reservation of rights—particularly, Rules 1.2 (client control of settlement), 1.4 (consultation with client), 1.7 (conflicts of interest and informed consent), 1.8 (allowing third-party payment of the lawyer's fee only if there is no interference with the lawyer's judgment or the attorney-client relationship), and 5.4 (same). The decision of the Court of Appeals gives attorneys license to evade these duties, to the detriment of their clients. At its heart, this case is about the **integrity of the bar** and the **effectiveness of the legal system** for clients being represented by insurance-appointed defense counsel. WSBA could bring a valuable perspective that would be helpful to the Court in resolving these issues.

Significant Related Cases

Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 715 P.2d 1133 (1986) (establishing ethical standards for insurance-appointed defense counsel and explaining counsel's duties to the insured client)

Oral Argument

Ardens do not currently anticipate giving oral argument time to amicus. However, if WSBA takes a position sufficiently aligned with Ardens, we would be willing to consider a request to share oral argument time.

We would welcome the appearance of WSBA as amicus curiae in this case.

Respectfully,

Kevin Hochhalter

No. 46991-0-II

Court of Appeals, Div. II, of the State of Washington

Roff Arden and **Bobbi Arden,**

Appellants,

v.

Forsberg Umlauf, P.S., et al.,

Respondents.

Brief of Appellants

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1. Introduction

Forsberg & Umlauf attorneys John Hayes and William "Chris" Gibson were appointed by Hartford, Ardens' insurer, to defend Ardens under a reservation of rights. Forsberg had a long-standing attorney-client and business relationship with Hartford, but did not advise Ardens of that relationship. Forsberg's conflict of interest, which should have disqualified it from representing Ardens, caused Forsberg to breach its fiduciary duties of undeviating loyalty to Ardens. Forsberg failed to advise Ardens of potential and actual conflicts of interest, failed to confer with Ardens regarding settlement decisions, and ultimately placed the interests of Hartford above the interests of Ardens.

Ardens sued Forsberg for legal malpractice and breach of fiduciary duties. The trial court erroneously dismissed both claims on summary judgment. Ardens' evidence set forth specific facts supporting the elements of their claims. The undisputed facts show that Forsberg breached its fiduciary duties under the RPCs and under *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986), entitling Ardens to disgorgement of all fees and costs received by Forsberg in connection with the representation. This Court should reverse the trial court's erroneous orders.

Ardens ask this Court to also recognize that insurance-assigned defense counsel stands in the position of a trustee over the insurance defense asset, which it must manage for the sole benefit of the insured client. Breach of trust entitles the client to additional equitable remedies.

2. Assignments of Error

1. The trial court erred in granting Defendants' motion for summary judgment on Ardens' legal malpractice claims where there were material issues of fact as to proximate cause and the availability of emotional distress damages.

2. The trial court erred in denying Ardens' motion for reconsideration of the first summary judgment order.

3. The trial court erred in granting Defendants' motion for summary judgment on Ardens' breach of fiduciary duty claims where Ardens' evidence set forth specific facts supporting each of the elements of their claims.

4. The trial court erred in denying Arden's motion for partial summary judgment of liability for breach of fiduciary duty where the undisputed evidence established Forsberg's breach of fiduciary duties.

Issues related to assignments of error

Whether insurance-appointed defense counsel stands in the position of a trustee over the insured's asset of insurance defense (assignments of error 3 and 4).

Whether Forsberg breached its fiduciary duties as attorneys and trustees by failing to advise Ardens of potential or actual conflicts of interest and failing to resolve those conflicts in favor of Ardens (assignments of error 3 and 4).

Whether Defendants breached their fiduciary duties as attorneys and trustees by placing the interests of Hartford above the interests of Ardens (assignments of error 3 and 4).

Whether there were material issues of fact on the element of proximate cause in Ardens' legal malpractice claim, precluding summary judgment dismissal (assignments of error 1 and 2).

Whether there were material issues of fact regarding the availability of emotional distress damages under *Schmidt v. Coogan*, 181 Wn.2d 661, 335 P.3d 424 (2014) (assignments of error 1 and 2).

3. Statement of the Case

3.1 Forsberg was appointed by Hartford to defend Ardens in *Duffy v. Arden*.

Roff and Bobbi Arden were sued by Anne and Wade Duffy for negligent or intentional property damage and emotional distress. CP 855, 904. Ardens tendered defense of the case to their insurer, Property and Casualty Insurance Company of Hartford. CP 856, 904. Hartford initially refused to defend. CP 904. Ardens hired attorney Jon E. Cushman, who pressured Hartford to accept the tender of defense. CP 855-56.

Hartford eventually accepted, appointing attorneys John P. Hayes and William C. "Chris" Gibson of the firm Forsberg & Umlauf, P.S. to defend Ardens. CP 130; 445-46. Hartford informed Forsberg & Umlauf that the defense would be under a reservation of rights. *See* CP 208, 318, 320. Although the reservation of rights letter was not issued until months later,

Hayes and Gibson recognized from the outset that a coverage dispute was likely to arise between Ardens and Hartford. CP 169, 208.

Hartford was a long-standing client of Forsberg & Umlauf in coverage disputes. Four partners, including Hayes, regularly represented Hartford as coverage counsel. CP 203-04. Neither Hayes nor Gibson ever informed Ardens of this pre-existing attorney-client relationship with Ardens' insurer. CP 227, 229, 430. Neither Hayes nor Gibson ever informed Ardens of any potential conflict of interest that may have arisen from Forsberg & Umlauf's relationship with and duties to Hartford. CP 430. Had Ardens known of the relationship, they would not have accepted Forsberg & Umlauf as defense counsel. CP 227, 229.

Gibson met with Ardens and Cushman within a few weeks of being appointed. CP 483-84; 546. During that meeting, Gibson explained to Ardens that his duties were solely to Ardens as clients. CP 173. Gibson told Ardens that he would attempt to get Hartford to pay the full amount of any liability, despite the reservation of rights. CP 173. Cushman would remain involved in the case as personal counsel and to prosecute Ardens' counterclaims. CP 166.

Ardens explained to Gibson the circumstances surrounding Duffys' claims. Duffys alleged that Roff Arden negligently or maliciously shot and killed two of Duffys' dogs. CP 445. Duffys lived over 200 yards away from Ardens in a rural area in Mason County. CP 536. Duffys habitually allowed their dogs to roam free. CP 536. On multiple occasions, Duffys' dogs came onto the Arden property and threatened and chased Ardens. CP 536-37.

Roff Arden suffers from post-traumatic stress disorder (PTSD) as a result of physical and mental abuse as a child. CP 573. He was re-traumatized in 2010 by a painful, unexpected eye procedure. CP 572-73. His PTSD manifests as acute anxiety attacks or bouts of depression, difficulty trusting others, and an intense fight-or-flight response. CP 574, 586. Arden also suffers from a fear of dogs as the result of a previous dog attack. CP 589-90.

Arden had explained his mental condition to Anne Duffy in 2009. CP 538, 540. Two of Duffys' dogs startled Arden while he was working with caustic chemicals outside his studio. CP 540, 599. Arden warned Anne Duffy that the dogs could not be around the studio. CP 540, 599. Nevertheless, Duffys continued to allow their dogs to wander free and to menace Ardens on Ardens' property. *See* CP 538-39, 599. Arden admitted to Gibson that he shot Duffys' yellow lab in the midst of a PTSD-induced fight-or-flight response when two of Duffys' dogs chased Ardens halfway down their driveway. CP 585-86. A police report claimed that Arden admitted to having shot another dog 15 months earlier, but Arden maintained he did not. CP 585. The report, which Gibson reviewed, recommended felony criminal charges against Roff Arden. CP 484, 491.

Coming out of the meeting with Gibson, Ardens understood that Gibson would evaluate Hartford's exposure in the case and then get back in touch with Ardens. CP 546. Gibson had informed Ardens that it was his "practice," generally, to try to get the insurer to pay the full amount even in a reservation-of-rights case. CP 173. Neither Gibson nor Hayes ever contacted Ardens to discuss a specific litigation or settlement strategy. CP 574, 582.

3.2 Forsberg followed Hartford's settlement instructions despite opposition from Ardens.

On January 18, 2013, one month after this initial meeting, Duffys' attorney, Adam Karp, sent Gibson and Cushman a settlement demand for $55,000, which was set to expire on January 28. CP 255. After consulting with Ardens, Cushman informed Gibson that Ardens wanted to accept the offer so long as Hartford paid the settlement. CP 256, 617. Through Cushman, Ardens instructed Gibson to communicate their position to Hartford as a demand that Hartford fund the settlement. CP 256. Hayes claims he did so by phone, CP 214, but the written evidence shows only that when Gibson notified Hartford of the Duffys' offer, he blandly asked, "Please get back to me and Mr. Cushman very soon as to whether Hartford will fund a response to the offer accepting it." CP 328. Cushman immediately followed with an email to Hartford demanding that Hartford fund the settlement. CP 329. Gibson admits he did not communicate Ardens' demand to Hartford. CP 188.

Hayes suggested that Gibson ask Karp for an extension of the deadline, to give Hayes and Gibson time to receive Duffys' interrogatory responses and evaluate the damage claims. CP 189-90. Neither Hayes nor Gibson consulted with Ardens or Cushman regarding the extension. CP 189, 208. Hayes only informed Cushman after the extension had already been requested. CP 331. Cushman immediately expressed displeasure, asking if Hartford was refusing Ardens' demand to fund the settlement. CP 332. Hartford responded that it needed further information to evaluate the case

before funding a settlement. CP 333. Cushman pressured Hartford to fund the settlement or to defend without any reservation of rights. CP 336, 344. Karp extended the deadline on the offer to March 4 at 5 p.m. CP 341.

After receiving Duffys' discovery responses, Hayes and Gibson prepared a case analysis for Hartford. CP 253. They recommended attempting to settle the case at up to $35,000. CP 468-69. Cushman reviewed the report before it was sent to Hartford, recommending insertion of "negligence" throughout when describing Duffys' claims. CP 474. Although Cushman expressed confidence in being able to get the case settled at $35,000, he had previously noted that his review was "solely from a coverage perspective, not from case valuation perspective." CP 475.

On March 4 at 6:29pm, Hartford notified Cushman that it was letting the Duffys' settlement offer expire. CP 262. The next morning, Hayes notified Cushman that Hartford had given him settlement authority up to $35,000 and that he was going to start with a counteroffer of $18,000. CP 263. Eight minutes later, Gibson sent an email to Karp referencing a voice message he had already left at Karp's office that morning regarding "a settlement offer from the Ardens funded by Hartford." CP 878. Neither Hayes nor Gibson had consulted with Ardens or sought their approval of the counteroffer. CP 183, 210.

Karp responded to the $18,000 counteroffer on March 10, stating, "My clients reject the counteroffer as wholly inadequate and extend no new offer." CP 719. Cushman contacted Karp and convinced him to make a "last best offer" on behalf of Duffys. CP 760. Karp contacted Cushman and

Gibson on March 12 with an offer at $40,000, set to expire March 14 at 5 p.m., noting, "I have no more room to move." CP 882. Cushman, on behalf of Ardens, again demanded that Hartford fund the settlement. CP 883.

On March 14 at 10:47 a.m., Hartford notified Cushman and Hayes that it would not fund the settlement at $40,000 and that it intended to make a counteroffer at $25,000. CP 767. Cushman objected, warning Hartford and Hayes that their proposed course was bad faith. CP 770. By 11:34 a.m., Hayes had made Hartford's counteroffer. CP 267. Neither Hayes nor Gibson had consulted with Ardens or sought their approval before making the counteroffer. CP 198, 219. Neither Hayes nor Gibson had invited Ardens to contribute toward bridging the $5,000 gap between Hartford's funding and the Duffy's offer. CP 574-75.

Duffys rejected the $25,000 counteroffer and refused to negotiate further. CP 890. Karp later notified Hayes and Gibson that Duffys would not participate in any further negotiation unless Ardens offered over $55,000. CP 221. On March 19, Roff Arden learned that felony charges had been filed against him. *See* CP 798-99, 892.

Throughout the failed settlement process, Ardens felt that they were not being properly represented. CP 228. Ardens felt Gibson was not keeping them informed of developments. CP 655. Ardens felt Hayes and Gibson never explained any plan or strategy behind their settlement decisions. CP 574. Ardens felt Hayes and Gibson responded to and obeyed Hartford but never responded to Ardens. CP 582. Ardens felt Hayes and Gibson

ignored Roff Arden's mental infirmities and potential criminal jeopardy. CP 574, 582. Ardens felt Hayes and Gibson represented Hartford, not Ardens. CP 574.

Despite Ardens' desire for a quick settlement in hopes of avoiding criminal charges and minimizing the mental health impacts of the litigation, *see* CP 857, Hayes and Gibson followed Hartford's deliberate, low-ball strategy for settlement, *see* CP 111, 143, 152, 219. Despite Gibson's understanding that the insured client has the right to participate in settlement negotiations in a reservation-of-rights defense, CP 171-72, Gibson never involved Ardens in any settlement-related decisions, CP 865. Despite Hayes' understanding that he owed a duty of undivided loyalty to Ardens, CP 208, Hayes obediently carried out Hartford's instructions over Ardens' objections, CP 219.

Ardens sued Hartford for bad faith, later adding claims of legal malpractice and breach of fiduciary duties against Forsberg & Umlauf, Hayes, and Gibson. RP 19; Supp. RP 2. A global mediation was held, at which Ardens, Duffys, and Hartford settled the claims between them for $75,000 paid by Hartford to Duffys. RP 19. Only Ardens' claims against Forsberg & Umlauf, Hayes, and Gibson remained. RP 19.

3.3 The trial court dismissed Ardens' claims on summary judgment.

After a contentious discovery process, the parties made cross-motions for summary judgment on the legal malpractice claims. Defendants argued that Ardens could not produce evidence to support any of the

elements of duty, breach, proximate cause, or injury and damages. CP 825. Ardens' motion, which also served as their response to Defendants' motion, sought partial summary judgment of liability for legal malpractice. CP 396, 415. Ardens argued that Defendants committed malpractice by failing to communicate with and advise Ardens, failing to follow Ardens' direction, and placing the interests of Hartford above Ardens' interests. CP 404.

The trial court denied Ardens' motion and granted Defendants' motion, dismissing Ardens' legal malpractice claim but leaving Ardens' breach of fiduciary duty claim for later determination. CP 249-50; Supp. RP 2-3, 6.[1] The court held that it was clear that there was an attorney-client relationship between Ardens and Defendants giving rise to duties owed by Defendants to Ardens. Supp. RP 3-4. The court held that there were disputes of fact as to whether Ardens and Hartford's positions were in conflict and whether Defendants' conduct breached their duties to Ardens. *Id.* at 4. Nevertheless, the court held that any breach did not cause Roff Arden to be charged with a crime and that attorney fees and emotional distress damages were not recoverable in a legal malpractice claim. *Id.* at 5-6.

Ardens made a motion for reconsideration, arguing that there were material issues of fact as to causation of the criminal charges and the

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[1] The verbatim report of proceedings was supplemented by order of the commissioner on motion of the parties to include the October 1, 2014, oral ruling of the trial court. The supplemental transcript is referred to herein as "Supp. RP," while the originally filed report of proceedings is referred to as "RP."

availability of emotional distress damages. CP 78. The trial court denied the motion. RP 94; CP 19-20.

The parties made a second set of cross-motions for summary judgment to address the breach of fiduciary duty claim. Ardens argued that Defendants had breached their duty of loyalty to Ardens "by taking on a representation from which they were disqualified by conflicts of interest; failing to communicate with Ardens; failing to keep Ardens apprised of all activity involving settlement; failing to consider Ardens' mental helath condition and criminal jeopardy; and placing the interests of the insurer above the interests of Ardens, their clients." CP 236-37. Ardens argued that the fiduciary relationship between insurance defense counsel and the insured client is impressed with a trust, entitling Ardens to equitable remedies such as disgorgement of fees for Defendants' breach of trust. CP 241-43.

Defendants argued that there was no conflict of interest and therefore no breach of fiduciary duty. CP 89. Defendants argued that Ardens could not establish proximate cause of any injury and that Ardens were not entitled to disgorgement or other remedies. CP 93, 96.

The trial court denied Ardens' motion and dismissed the remainder of Ardens' claims. RP 94. The court ruled that there was no disqualifying conflict of interest in Defendants taking on the representation, and therefore no breach of fiduciary duty. RP 84-85. The court commented that Ardens' trust theory was "interesting and somewhat compelling," but the court did not find it supported by precedent. RP 94. The decision disposed of all of Ardens' claims. CP 24. Ardens appealed. CP 5.

4. Summary of Argument

The trial court erred in denying Ardens' motion for partial summary judgment on Forsberg's liability for breach of fiduciary duties and in dismissing Ardens' claims. Part 5.2 outlines the fiduciary duties Forsberg owed to Ardens as clients: the ordinary duties owed by an attorney to a client, enhanced duties under *Tank*, and the duties of a trustee over the insurance defense asset. Part 5.3 demonstrates that Forsberg breached those duties by failing to disclose and resolve conflicts of interest in favor of Ardens and by placing the interests of Hartford above the interests of Ardens, the insured clients. Part 5.4 explains how the remedy of disgorgement of fees for breach of fiduciary duties and other equitable remedies for breach of trust naturally follow.

Ardens presented sufficient evidence to the trial court to establish Forsberg's duties and breach. This Court should reverse the trial court's second summary judgment order, grant summary judgment in favor of Ardens on the issues of duty and breach, and remand to the trial court for a determination of damages.

The trial court also erred in granting summary judgment dismissal of Ardens' legal malpractice claim. Part 5.5 demonstrates that there were material issues of fact precluding summary judgment on the legal malpractice claim. This Court should reverse the trial court's first summary judgment order and remand for further proceedings.

5. Argument

5.1 Summary judgment rulings are reviewed *de novo.*

This Court reviews summary judgment orders *de novo. Schmitt v. Langenour*, 162 Wn. App. 397, 404, 256 P.3d 1235 (2011). The Court engages in the same inquiry as the trial court. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 832, 100 P.3d 791 (2004). Summary judgment is only proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). In determining the existence of an issue of material fact, the court views all facts and inferences in favor of the nonmoving party. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009). "[A] court must deny summary judgment when a party raises a material factual dispute." *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485-86, 78 P.3d 1274 (2003).

5.2 Forsberg owed fiduciary duties of undeviating loyalty to Ardens.

It is undisputed that Hayes, Gibson, and Forsberg & Umlauf (collectively, "Forsberg") had an attorney-client relationship with Ardens. Forsberg was assigned to represent Ardens in the *Duffy* matter under a reservation of rights. By virtue of the appointment as insurance defense counsel under a reservation of rights, Forsberg owed some specific, fiduciary duties to Ardens. First, Forsberg owed the ordinary fiduciary duties of any attorney to a client. Second, Forsberg owed enhanced *Tank* duties because of Hartford's reservation of rights. Third, Forsberg owed duties of a trustee over Ardens' insurance defense asset.

5.2.1 Forsberg owed Ardens the fiduciary duties ordinarily owed by an attorney to a client.

"[T]he attorney-client relationship is a fiduciary one as a matter of law and thus the attorney owes the highest duty to the client." *Versuslaw Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 333, 111 P.3d 866 (2005). An attorney's fiduciary duties are outlined in the Rules of Professional Conduct. *See Cotton v. Kronenberg*, 111 Wn. App. 258, 265-66, 44 P.3d 878 (2002) (holding the RPCs may be considered in determining whether an attorney breached fiduciary duties). An attorney owes undeviating loyalty to a client.

The client of insurance-appointed defense counsel is the **insured defendant,** not the insurance company. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 388, 715 P.2d 1133 (1986). An insurance company has only a "quasi-fiduciary" duty: to never put its own interests ahead of the interests of its insured. *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 405, 229 P.3d 693 (2010). However, **counsel** appointed by an insurer is a **true fiduciary,** owing "undeviating fidelity" solely to the **insured client—"No exceptions can be tolerated."** *Tank*, 105 Wn.2d at 388 (quoting *Van Dyke v. White*, 55 Wn.2d 601, 613, 349 P.2d 430 (1960)) (emphasis added).

Insurance defense counsel cannot allow the interests of the insurance company to influence his or her professional judgment under any circumstances. *Tank*, 105 Wn.2d at 388; *see* RPC 1.8(f)[2]; RPC 5.4(c)[3]. Defense

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[2] RPC 1.8(f) allows third-party payment of the lawyer's fee for representing a client only if "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship."

counsel must consider all interests of the insured client, including interests that are secondary to the goal of defending the claim. William T. Barker, et al., *Insurer Litigation Guidelines: Ethical Issues for Insurer-Selected and Independent Defense Counsel*, ABA Section of Litigation 2012 Insurance Coverage Litigation Committee CLE Seminar, March 1-3, 2012, at p. 5.[4] The insured client should never have cause to question who defense counsel actually represents. Thomas V. Harris, *Washington Insurance Law*, § 17.05 (3d ed. 2010).

The Rules of Professional Conduct provide that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." RPC 1.7(a).

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[3] RPC 5.4(c) provides: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

[4] available at http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012_inscle_materials/23_1_guidelines.authcheckdam.pdf (accessed May 7, 2015). This multi-state source speaks largely in terms of the majority rule that defense counsel represents both the insured and the insurer as joint clients. However, the principles apply with even greater force to Washington's minority rule, in which the insured is defense counsel's **only** client. "A conflict that would preclude joint representation would also preclude, absent informed consent by the policyholder, acceptance of insurer direction by counsel. And if counsel had a regular ongoing relationship with the insurer, the lawyer's personal interest in pleasing the insurer could create a conflict in the same way that a legal duty of loyalty would." Barker, et al., *Ethical Issues*, at 3-4.

Rule 1.7 requires a lawyer to withdraw or obtain informed consent not only when there is an actual conflict, but any time there is **potential** conflict. *In re Disciplinary Proceeding Against Marshall*, 160 Wn.2d 317, 336-37, 157 P.3d 859 (2007). A potential conflict exists when a lawyer foreseeably might be tempted to favor an interest of the lawyer or of a non-client at the expense of an interest of the client; an actual conflict ripens when a lawyer must choose a course of action and the question is whose interest will be sacrificed. *See* William T. Barker & Charles Silver, *Professional Responsibilities of Insurance Defense Counsel*, § 12.02 (2014).

A direct conflict exists when the manner of handling the defense could affect the determination of coverage or otherwise benefit the insurer at the policyholder's expense. Barker, et al., *Ethical Issues*, at 6. For example, where a claim alleges in the alternative that the policyholder's conduct was either negligent (covered) or intentional (generally not covered), the insurer might request a defense that would increase the likelihood of a finding of intent. *Id.* at 8, 9. This is one of the conflicts "inherent" in a reservation of rights defense. *See Tank*, 105 Wn.2d at 387.

A conflict can arise when the insured client has collateral interests that lead to a desire for a defense or settlement strategy different from the favored strategy of the insurer (which is generally to minimize the total cost of the claim). Barker & Silver, *Professional Responsibilities*, § 12.01. For example, a desire to avoid criminal jeopardy arising from the facts of the case would be one such collateral interest. *Id.* Any indication that the policyholder may

have divergent interests from those of the company requires defense counsel to consult with the policyholder to identify and address any conflict. *Id.*

A conflict also arises when instructions from the insurer are contrary to the expressed desires of the insured client. Defense counsel's duty of loyalty does not permit him or her to disregard instructions from the insured client. *See* RPC 1.2(a); RPC 1.4(a)(2). Even where the insurer has the right to control the defense,[5] counsel must obtain the client's prior approval regarding settlement decisions. Barker, et al., *Ethical Issues*, at 13-15.

When any of these conflicts arise, potential or actual, it is defense counsel's duty to consult with the insured client to seek a resolution and informed consent or to withdraw. *See* RPC 1.7, Comments [2]-[4].

5.2.2 Forsberg owed enhanced duties under *Tank* because the defense was under a reservation of rights.

When insurance defense is undertaken under a reservation of rights, both insurers and defense counsel have **enhanced obligations** due to the potential conflicts of interest inherent in that type of defense. *Tank*, 105 Wn.2d at 387. Defense under a reservation of rights is "fraught with potential conflicts." *Nat'l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 879, 297 P.3d 688 (2013). Because of these potential conflicts, the insured client is put at risk that insurance-assigned defense counsel's advice might be affected by counsel's loyalty to the insurer or personal interest in cultivating the insurer's favor. Barker, et al., *Ethical Issues*, at 3. To fulfill the duty of loyalty,

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[5] Note, however, that in a reservation of rights defense it is the insured client who is entitled to control settlement. Harris, *Washington Insurance Law*, § 17.07

defense counsel "must be vigilant in identifying any potential conflicts of interest" and must resolve them in favor of the insured client. Harris, *Washington Insurance Law*, § 17.05.

Defense counsel retained by an insurer to defend the insured under a reservation of rights must meet distinct criteria.

> Rules of Professional Conduct 5.4(c) prohibits a lawyer, employed by a party to represent a third party, from allowing the employer to influence his or her professional judgment. In a reservation of rights defense, RPC 5.4(c) demands that counsel understand that he or she represents only the insured, not the company. As stated by the court in *Van Dyke v. White*, 55 Wn.2d 601, 613, 349 P.2d 430 (1960), "[t]he standards of the legal profession require undeviating fidelity of the lawyer to his client. No exceptions can be tolerated."

Tank, 105 Wn.2d at 388.

In addition to absolute loyalty to the insured client, defense counsel owes a three-part duty of "full and ongoing disclosure to the insured:"

1. "potential conflicts of interest between insurer and insured must be fully disclosed and resolved in favor of the insured;"
2. "all information relevant to the insured's defense … must be communicated to the insured;" and
3. "all offers of settlement must be disclosed to the insured as those offers are presented. … [T]he insured must be fully apprised of all activity involving settlement."

Tank, 105 Wn.2d at 388-89. This duty of communication is not well understood by all defense counsel but may be one of counsel's most important duties, particularly from the standpoint of the insured client. Barker, et al., *Ethical Issues*, at 12.

When a potential conflict is identified, defense counsel's duty of "full and ongoing disclosure" requires in-depth consultation with the insured client, which should include the following:

- Explain the nature of the potential conflict.
- Identify defense counsel's obligation to the insurer[6] to defend in a manner that will minimize the loss.
- Identify defense counsel's duty to the policyholder not to act in disregard of the policyholder's express desires.
- Explain that the representation can continue as long as the potential conflict is not likely to ripen into an actual conflict.
- Explain the costs and benefits to the policyholder of waiving the potential conflict.
- Explain that a time may come when defense counsel's responsibilities to the insurer and the policyholder will actually conflict. When this happens the policyholder will have to decide whether to protect the identified interest or to compromise that interest and permit counsel to proceed as desired by the insurer.
- Explain that defense counsel will respect the policyholder's decision, but may withdraw if the policyholder refuses to consent to the insurer's desired course of action.
- Explain, as applicable, that the policyholder's decision involves questions on which defense counsel cannot advise the policyholder (such as coverage) but concerning which the policyholder may obtain advice from independent counsel retained and paid for by the policyholder.

Barker & Silver, *Professional Responsibilities*, § 12.03.

When the insured client disagrees with a course of action directed by the insurer, defense counsel must first confer with the insurer's representative

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[6] Although defense counsel owes no duties of loyalty to the insurer, counsel does have contractual obligations and may have a personal interest in pleasing the insurer.

and explain how the insurer's proposed course of action places the insured client's interests at risk. Barker, et al., *Ethical Issues*, at 19. If the insurer does not withdraw or modify its instruction, defense counsel must consult with the insured client, as above, to seek informed consent to proceed according to the insurer's instruction. *Id.* at 20. If the insured client does not consent, defense counsel must withdraw. *Id.* at 21.

5.2.3 Forsberg owed the fiduciary duties of a trustee over Ardens' asset of insurance defense.

In addition to the ordinary fiduciary duties of any attorney to his or her client and the enhanced duties of insurance-assigned defense counsel under a reservation of rights, defense counsel owes the insured client the duties of a trustee managing a valuable asset for the benefit of the client.

When a person purchases a liability insurance policy, they purchase two valuable insurance assets: defense and indemnity. *See Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 54, 164 P.3d 454 (2007) ("The duty to defend is a valuable service paid for by the insured and one of the principal benefits of the liability insurance policy."); CP 106, 107 (Forsberg's expert Jeffrey Tilden described the insurance policy as consisting of these two, valuable "assets"). When the insured is sued and the insurer carries out its duty to defend, defense counsel assigned in accordance with the policy becomes a trustee over the insurance defense asset. Defense counsel's fees and costs of the defense are paid out of that asset, which is managed on the basis of defense counsel's independent, professional judgment. Defense counsel's fiduciary duties, outlined above, require him or her to manage the insurance defense

asset for the sole benefit of the insured. This relationship has all of the essential elements of a trust.

A trust is "a fiduciary relationship in which one person holds a property interest, subject to an equitable obligation to keep or use that interest for the benefit of another." Bogert, George G., et al., *The Law of Trusts and Trustees*, § 1 (3d ed. 2007); *see also* Restatement 2d of Trusts, § 2. Here, the trust property is the insurance defense asset. The trustee who holds and manages that property is insurance-assigned defense counsel. Defense counsel is under an obligation to use the property solely for the benefit of the insured client. Defense counsel owes fiduciary duties to the insured client, including duties of care and undeviating loyalty in managing the defense. The parties create the trust by way of the insurance policy and the acceptance by the insured client of representation by assigned counsel. All of the essential elements of a trust relationship are present.

Even if an insurance policy is not expressly intended to create a formal trust, this result is appropriate. It is a resulting trust, which exists by implication, "based on the idea that the law should presume or infer or create a trust if parties put themselves into a certain situation." Bogert, *Trusts and Trustees*, § 452. Here, the parties—the insurer, the insured, and insurer-assigned defense counsel—have structured a relationship that bears all of the characteristics of a trust. This Court should hold that the fiduciary relationship between insurance-assigned defense counsel and the insured client is impressed with a trust, in which insurance defense counsel becomes

a trustee over the insurance defense asset, which counsel must manage for the sole benefit of the insured.

Because the relationship is a trust, defense counsel owes the insured client the duties of a trustee and is subject to the remedies imposed for breach of trust duties. The most fundamental duty of a trustee is that of loyalty: the trustee must display "complete loyalty to the interests of the beneficiary and must exclude all selfish interest and all consideration of the interests of third persons." Bogert, *Trusts and Trustees*, § 543. The trustee may not take a position in which his personal interest or the interest of a third party is or becomes adverse to the interest of the beneficiary. *Id.* A trustee with a conflict of interest must eliminate the conflicting interest or resign as trustee. *Id.* A trustee also has a duty to deal with the beneficiary with "utmost frankness and fair play," including "full disclosure and high regard for the interest of the [beneficiary]." *Id.*, § 544.

The trustee's duty of loyalty is so important that, when crafting an equitable remedy for breach of trust, actual financial damage to the beneficiary is immaterial; rather, the court seeks to render the disloyalty of the trustee "so prejudicial to him that he and all other trustees will be induced to avoid disloyal transactions in the future." Bogert, *Trusts and Trustees*, §§ 543, 543(V).

These duties are familiar. As discussed above, an attorney owes undeviating loyalty to his or her client. Insurance-assigned defense counsel owes an additional, enhanced duty of loyalty, including "full and ongoing disclosure" of information related to the defense. The duties of a trustee are

similar. Formally recognizing that the parties to an insurance defense arrangement have created a trust relationship would not significantly change defense counsel's duties to the insured client, which already require the utmost fidelity to the client's interests. Defense counsel's status as a trustee over the insurance defense asset is the natural result of the relationship the parties have voluntarily created.

This Court should hold that insurance-assigned defense counsel stands in the position of a trustee managing the insurance defense asset for the benefit of the insured client. Because Forsberg breach its duties—its ordinary fiduciary duties, its enhanced *Tank* duties, and trust duties—the trial court erred in denying Ardens' motion and dismissing Ardens' claims. This Court should reverse.

5.3 Forsberg breached its duty of loyalty to Ardens.

As set forth above, Forsberg, as insurance-assigned defense counsel under a reservation of rights, owed Ardens specific, enhanced duties. Forsberg breached those duties by taking on the representation without ever advising Ardens or seeking Ardens' informed consent for actual and potential conflicts of interest in the representation. Forsberg also breached its duties by placing the interests of Hartford above the interests of Ardens. These breaches also constitute breaches of Forsberg's duties as trustee over the insurance defense asset. The trial court should have granted Ardens' motion for partial summary judgment of liability for Forsberg's breach of fiduciary duties.

5.3.1 Forsberg failed to advise Ardens and seek Ardens' informed consent for actual and potential conflicts of interest in the representation.

Under *Tank*, Forsberg had heightened duties, including a duty to fully disclose not only actual, concurrent conflicts of interest but potential conflicts of interest as well, and to resolve those conflicts in favor of Ardens. Forsberg breached that duty by taking on the representation of Ardens under a reservation of rights without advising Ardens of potential conflicts of interest that were readily foreseeable from the outset. Forsberg further breached its duties by failing to advise Ardens of potential conflicts arising from Ardens' interest in swift resolution. Finally, Forsberg breached its duties by failing to advise Ardens or seek Ardens' informed consent when Ardens' settlement instructions conflicted with instructions from Hartford.

Whether an attorney's conduct violates ethical rules, thereby breaching fiduciary duties, is a question of law that can appropriately be determined on summary judgment. *Hizey v. Carpenter*, 119 Wn.2d 251, 264, 830 P.2d 646 (1992) (citing *Eriks v. Denver*, 118 Wn.2d 451, 457-58, 824 P.2d 1207 (1992)).

5.3.1.1 Potential conflicts relating to coverage and to Forsberg's long-standing relationship with Hartford.

Forsberg initially breached its fiduciary duties by taking on the representation without advising Ardens of potential conflicts of interest arising from the reservation of rights defense and from Forsberg's long-standing relationship with Hartford and without seeking informed consent to waive the conflicts (if they could be waived at all). Defense counsel must

consider conflicts before accepting the defense assignment. Barker, et al., *Ethical Issues*, at 3. Potential conflicts that may arise from coverage issues under a reservation of rights or from an existing relationship between the insurer and defense counsel are easily foreseeable from the outset. Forsberg should have recognized these potential conflicts and advised Ardens. Forsberg did not.

Hartford informed Forsberg immediately upon appointment that Hartford intended to defend under a reservation of rights. *See* CP 208, 318, 320. Hayes and Gibson recognized from the outset that a coverage dispute was likely to arise between Ardens and Hartford. CP 169, 208. Forsberg should have recognized the risk that at some point during the litigation, Forsberg would have to choose between Ardens' interest in a finding of negligence (covered) and Hartford's likely interest in a finding of malicious intent (not covered). Forsberg should have informed Ardens of this potential conflict.

Another potential conflict arose from Forsberg's long-standing relationship with Hartford. Hayes was Forsberg's "go-to" attorney in the Seattle area. CP 120. The vast majority of Gibson's practice is insurance defense work assigned by Hartford. CP 165. Forsberg regularly serves as coverage counsel for Hartford. CP 203-04.

When an ongoing relationship exists between defense counsel and the insurer, "the lawyer's personal interest in pleasing the insurer could create a conflict in the same way that a legal duty of loyalty would." Barker, et al., *Ethical Issues*, at 3-4. The comments to RPC 1.7 describe precisely this type of

conflict: "[T]he client on whose behalf the adverse representation is undertaken [Ardens] reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client [Hartford], i.e., that the representation [of Ardens] may be materially limited by the lawyer's interest in retaining the current client [Hartford]." RPC 1.7, Comment [6]. Alternatively, there is a conflict if there is "significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client." RPC 1.7, Comment [13].

"Insurers should not retain their own panel counsel to defend an insured when that attorney is also representing the insurer as a current client. Such a dual representation violates RPC 1.7." Harris, *Washington Insurance Law*, § 11.02. At the very least, "counsel with a regular relationship with the insurer, should disclose that fact." Barker, et al., *Ethical Issues*, at 12. Forsberg was duty-bound to inform Ardens of this potential conflict at the outset of the representation.

Given the high likelihood that these potential conflicts would ripen into actual conflicts, Forsberg should never have accepted the assignment as defense counsel for Ardens. *See* CP 422. Forsberg's *Tank* duties required Forsberg to fully disclose these conflicts and their likely ramifications and to resolve the conflicts in favor of Ardens. Knowing that Ardens' interests were likely to become directly adverse to Hartford, Forsberg's existing client, the conflict was not consentable. *See* RPC 1.7; CP 422. The only way to resolve

the conflict in favor of Ardens would have been to decline the representation. *See* RPC 1.7, Comment [3].

Obviously, Forsberg did not decline. Rather, Forsberg took on the representation without ever informing Ardens of either of these potential conflicts. Forsberg never informed Ardens of its long-standing relationship with Hartford. CP 227, 229, 430. Forsberg did not inform Ardens of any potential conflict arising from Hartford's coverage position, but simply told Ardens that Forsberg would not give any coverage advice to Ardens or Hartford. CP 901. Forsberg neither sought nor obtained Ardens' informed consent to waive either of these conflicts. Forsberg's failure to fully disclose and resolve conflicts of interest in favor of Ardens was a breach of Forsberg's fiduciary duties.

5.3.1.2 Potential conflicts arising from Ardens' secondary interests in swift resolution of the litigation.

Forsberg continued to breach its fiduciary duties in the same manner as the representation continued. During Gibson's initial investigation, he learned that the county prosecutor was considering filing felony charges against Roff Arden arising from the same facts as the *Duffy* matter. CP 484. At Gibson's initial meeting with Ardens, he learned that Roff Arden suffered from depression and PTSD. CP 179, 586. Arden's mental health condition and potential criminal jeopardy created a strong, secondary interest in obtaining a swift resolution to the *Duffy* litigation. *See* CP 857. Gibson should have recognized that Ardens' interest in swift resolution would likely conflict with Hartford's deliberate, low-ball negotiation strategy.

Forsberg has argued that it did not need to consider Ardens' secondary interests because, it argued, those interests were outside the scope of the representation. *E.g.,* CP 523. However, a limited scope of representation does not limit the range of interests which defense counsel must bear in mind. Barker, et al., *Ethical Issues*, at 5. "A lawyer must respect all interests a client has, including primary interests that relate to the agreed goal of a representation and secondary interests that do not." *Id.* "The point for counsel to remember is that any indication that the policyholder may have divergent interest from those of the company must be explored. At a minimum, any such divergence calls for consultation with the policyholder. Any conflict must be identified and addressed." Barker & Silver, *Professional Responsibilities*, § 12.01. Ardens' immediate insistence that the first settlement offer be accepted should have been a signal to Forsberg of Ardens' divergent interest. Forsberg failed to communicate with Ardens sufficiently to identify and address the potential conflict. In failing to even recognize Ardens' strongly held secondary interest, Forsberg breached its duty of loyalty to Ardens.

5.3.1.3 Actual conflict between Ardens' settlement instructions and settlement instructions from Hartford.

The potential conflict of interest arising from Ardens' interest in swift resolution of the litigation ripened into an actual conflict when Ardens' settlement instructions conflicted with instructions Forsberg received from Hartford. Ardens consistently insisted that Duffys' settlement demands be accepted with funding from Hartford. Hartford refused to fund the demands

and instructed Forsberg to allow the offers to expire and then make low-ball counteroffers. Hartford's instructions conflicted with Ardens' instructions. Forsberg could not follow both. Forsberg could not follow Hartford's instructions without sacrificing Ardens' interests. What was originally only a potential conflict had ripened into an actual conflict.

When instructions from the insurer conflict with the expressed desires of the insured client, RPC 1.2 and RPC 1.4 require consultation with the client before defense counsel may take action. Defense counsel's duty of undeviating loyalty to the insured client does not allow counsel to disregard the client's instructions. *See* RPC 1.4, Comment [2].

> [A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter.

RPC 1.2(a). When a client and lawyer disagree about the means to be used to accomplish the client's objectives, the lawyer should consult with the client to seek a mutually acceptable resolution to the disagreement. RPC 1.2, Comment [2]; RPC 1.4(a)(2). The lawyer must explain the matter to the extent reasonably necessary to permit the client to make an informed decisions. RPC 1.4(b). Except in exigent circumstances (such as during a trial), the lawyer must consult with the client prior to taking action. RPC 1.4, Comment [3]. If, after consultation, the lawyer and client still disagree and

the client has not given consent to the lawyer's proposed course of action, the lawyer should withdraw. RPC 1.2, Comment [2].

These rules envision the lawyer as the source of the proposed course of action with which the client disagrees. However, the rules apply equally when the proposed course of action originates from the insurer, if defense counsel intends to follow it. It is the client's divergent interests and the lawyer's duty of loyalty to the client that require consultation and resolution prior to taking any action.

Because defense counsel owes undeviating loyalty to the client, counsel's first attempt at resolution should be with the insurer. *See* Barker, et al., *Ethical Issues*, at 19. If defense counsel can convince the insurer to change its desired course of action, counsel will have succeeded in fully protecting the client's interests, in keeping with counsel's duty of loyalty. If the insurer persists, defense counsel still cannot follow the insurer's instructions without first obtaining informed consent from the client. *See Id.* at 20. This requires full consultation in keeping with RPC 1.4. If the client refuses to consent to the insurer's proposed course of action, defense counsel cannot proceed and has no choice but to withdraw.[7] *See* Barker, et al., *Ethical Issues*, at 21.

Forsberg did not consult with Ardens when it was faced with conflicting instructions. After Forsberg obtained an extension of the

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[7] In this situation, defense counsel's duty of undeviating loyalty to the client does not permit counsel to follow the insurer's instructions without the informed consent of the client. On the other hand, defense counsel's obligations to the insurer likely would not permit counsel to follow the client's instructions without being discharged by the insurer. The only viable choice is to withdraw.

deadline, the Duffys' first settlement demand of $55,000 was set to expire on March 4 at 5 p.m. *E.g.,* CP 457. At 8:49 a.m. on March 5 (after the offer had already expired), Forsberg notified Ardens, through Cushman, that Hartford chose not to fund the $55,000 demand and that a counteroffer would be made at $18,000. CP 263. The counteroffer was proposed by Hartford. CP 141. Within eight minutes of the 8:49 a.m. email to Cushman, Gibson had already left a voice message and email with Karp attempting to communicate the counteroffer. CP 878. Forsberg never sought an opportunity to consult with Ardens or obtain their informed consent regarding Hartford's settlement decision and instructions, which were contrary to Ardens' repeatedly expressed desire for immediate settlement. *See* CP 183, 575-76.

Ardens demanded acceptance of Duffy's second settlement demand of $40,000. CP 883. On March 14 at 10:47 a.m., Hartford notified Cushman and Hayes of its contrary instruction to reject and counter at $25,000, alternatively inviting Ardens to contribute to settlement. CP 767. Forsberg made no attempt to consult with Ardens or obtain Ardens' informed consent regarding Hartford's instructions or invitation to contribute. *See* CP 142, 198, 219, 579. Within 47 minutes of Hartford's email, Hayes had communicated the rejection and counteroffer to Karp. CP 267.

Forsberg made no attempt to reach out to Ardens. Forsberg did not contact Ardens directly for a consultation. Forsberg did not ask Cushman to consult with Ardens, to explain the situation to Ardens, or to ask Ardens for their consent to the Hartford's proposed courses of action. Forsberg did not

even allow Cushman the time to independently consult with Ardens to help them react to the developing situations. Forsberg breached its duty to fully disclose and resolve these conflicts in favor of Ardens.

Forsberg had a duty to fully disclose any potential or actual conflict of interest to Ardens and resolve those conflicts in favor of Ardens. Forsberg failed to consult with Ardens regarding potential conflicts arising from Forsberg's long-standing relationship with Hartford, from the reservation of rights defense, and from Ardens' interest in swift resolution of the case. Forsberg never sought consent from Ardens to waive any of these conflicts. Forsberg should have declined the assignment due to the seriousness of these potential conflicts. Having taken the representation, Forsberg failed to consult with Ardens regarding the actual conflict between Ardens' expressed desire for swift settlement and contrary instructions Forsberg received from Hartford. Forsberg breached its fiduciary duties of undeviating loyalty to Ardens, the insured client.

5.3.2 Forsberg placed the interests of Hartford above the interests of Ardens.

Not only did Forsberg fail to disclose and resolve the conflicts, but Forsberg favored the interests of Hartford, an adverse client, over the interests of Ardens, the clients Forsberg should have been representing with undeviating loyalty. Forsberg should have been assisting Ardens to understand Hartford's position relative to settlement and making sure that Ardens had the knowledge and opportunity necessary to appropriately react to the developing situation.

> "The company's decision to reject a within-limits demand requires special treatment [by defense counsel]. This is so whether a rejection is carried out by an affirmative act or by a failure to respond favorably before a deadline expires. A defense lawyer should **immediately** communicate a company's decision to a policyholder. If a deadline is approaching without any decision to accept the demand, **the policyholder must be warned.**
> …
> If the company decides to reject the demand, that should be communicated to the policyholder **before any communication with the claimant,** to give the policyholder a chance to act before the demand is rejected."

Barker & Silver, *Professional Responsibilities*, § 12.05 (emphasis added).

Rather than consulting with Ardens to help them understand and appropriately react to settlement developments, Forsberg blithely and obediently marched to Hartford's drum, following Hartford's every command with exactness and speed. *See, e.g.,* CP 143, 152. Forsberg did not warn Ardens of Hartford's decisions until minutes before Forsberg communicated the unauthorized counteroffers to Karp. Forsberg made no attempt to consult with Ardens prior to taking action. Forsberg gave Ardens no time or opportunity to react or to protect their own interests. Forsberg's actions demonstrate an utter disregard for the interests of Ardens, the insured client to whom Forsberg owed a duty of undeviating loyalty. Instead, Forsberg gave its loyalty to Hartford, ignoring Ardens' desires and following Hartford's instructions without a second thought. Forsberg betrayed Ardens' trust and egregiously breached its fiduciary duties to Ardens by placing the interests of Hartford above the interests of Ardens.

5.3.3 Forsberg's breach of duties also constitutes breach of trust.

As outlined in Part 5.2.3, above, a trustee's duties are similar to the duties of insurance-assigned defense counsel under a reservation of rights. A trustee has duties of absolute loyalty and full disclosure to the beneficiary. A trustee with a potential or actual conflict of interest must either eliminate the conflicting interest or resign as trustee. Bogert, *Trusts and Trustees*, § 543. Forsberg had potential and actual conflicts of interest, yet Forsberg did not disclose or eliminate those conflicts. Forsberg did not resign its position of trust. Instead, Forsberg attempted to serve two masters, which a trustee is absolutely forbidden to do. *See Id.* Forsberg breached its duties as trustee over the insurance defense asset and should be subject to the broad, equitable powers of the court to craft a remedy that both makes Ardens whole and prevents Forsberg from benefitting from its breach of trust.

The undisputed evidence demonstrates that Forsberg breached its duties to Ardens. This court should reverse the trial court's second summary judgment order, grant partial summary judgment in favor of Ardens on the issue of Forsberg's liability for breach of fiduciary duties, and remand to the trial court for a determination of damages.

5.4 Ardens are entitled to broad equitable remedies for Forsberg's breach.

When a lawyer breaches fiduciary duties to a client, the client may be entitled to recover the lawyer's fees from the representation without any further showing of causation or damages. *Eriks v. Denver*, 118 Wn.2d 451,

462-63, 824 P.2d 1207 (1992). When a trustee breaches fiduciary duties, the court has broad equitable powers to craft a remedy to make plaintiffs whole and to prevent the trustee from benefitting from the breach of trust. *Gillespie v. Seattle-First Nat'l Bank*, 70 Wn. App. 150, 173, 855 P.2d 680 (1993); Restatement 2d of Trusts, § 205. Forsberg should be compelled to (1) disgorge all fees and costs paid to it by Hartford; (2) reimburse Ardens for attorney fees that they would not have incurred but for Forsberg's breach of trust; and (3) compensate Ardens for emotional distress caused by Forsberg's breach of trust.

5.4.1 Ardens are entitled to disgorgement of all fees paid to Forsberg for the representation.

Forsberg was disqualified from taking on the representation of Ardens. Forsberg breached its fiduciary duties by accepting the assignment without recognizing, disclosing, and resolving the conflict. Forsberg could not adequately and faithfully represent Ardens, as demonstrated by Forsberg's conduct after accepting the representation. When an actual conflict finally ripened, Forsberg ignored Ardens' interests and gave its full loyalty to Hartford. Forsberg was unjustly enriched by collecting fees and costs from Ardens' insurance defense asset when Forsberg utterly failed to faithfully represent Ardens. Disgorgement of those fees and costs to Ardens is the natural remedy for Forsberg's breach of fiduciary duties.

Disgorgement of fees is a reasonable and well-recognized way to deter breach of ethical or fiduciary duties. *Eriks*, 118 Wn.2d at 463. In *Eriks*, the defendant, Denver, was an attorney who represented the promoters of

an investment advertised as a tax shelter. *Id.* at 454. The promoters set up a fund that would pay Denver to represent any investors in IRS audits or tax court cases arising from the tax shelter. *Id.* Denver knew, before taking on the representation of any of the investors, that the investors would potentially have civil claims against the promoters, who were also his clients. *Id.* at 455. Denver never advised his investor clients of these potential conflicts of interest and proceeded to represent the investors. *Id.* After the conflicts ripened, the investors sued Denver, and the trial court found that Denver's failure to disclose the conflict was a breach of his fiduciary duties to the investors. *Id.* The trial court ordered Denver to disgorge all fees collected from representing the investors. *Id.* at 455-56.

The Washington Supreme Court affirmed the trial court judgment. *Eriks*, 118 Wn.2d at 463. In doing so, the court relied in part on the U.S. Supreme Court's opinion in *Woods v. City Nat'l Bank & Trust Co.*, 312 U.S. 262, 85 L. Ed. 820, 61 S. Ct. 493 (1941):

> Where [an attorney] … was serving more than one master or was subject to conflicting interests, **he should be denied compensation.** It is no answer to say that fraud or unfairness were not shown to have resulted…
>
> A fiduciary who represents [multiple parties] … may not perfect his claim to compensation by insisting that, although he had conflicting interests, he served his several masters equally well.

Eriks, 118 Wn.2d at 462 (quoting *Woods*, 312 U.S. at 268-69) (alterations in *Eriks*, emphasis added). The court further explained that the remedy of disgorgement follows directly from the finding of breach of fiduciary

duties—no showing of causation or actual damages was necessary. *Eriks*, 118 Wn.2d at 462.

Similarly, in *Behnke v. Ahrens*, 172 Wn. App. 281, 294 P.3d 729 (2012), the court awarded the plaintiffs all fees received for representing them, plus prejudgment interest, *Id.* at 289, even though half of those fees were paid to the defendant attorney by a third party on the plaintiffs' behalf, *Id.* at 286. Even though a jury found that plaintiffs' only actual damages were the attorney fees plaintiffs paid, *Id.* at 287, the court found that the defendant attorney had violated the RPCs and that disgorgement of **all** fees was the proper remedy, *Id.* at 298.

Here, as in *Eriks* and *Behnke*, Forsberg took upon itself a representation from which it was disqualified by conflicts of interest because of its pre-existing duties to and relationship with Hartford, whose interests would foreseeably become directly adverse to Ardens. By taking on the representation, Forsberg, like Denver and Ahrens, breached its fiduciary duties to its new client, Ardens. Disgorgement of all fees and costs received by Forsberg is the natural remedy.

5.4.2 Ardens are entitled to emotional distress damages.

In the recent Washington Supreme Court decision in *Schmidt v. Coogan*, 181 Wn.2d 661, 335 P.3d 424 (2014), the court held that emotional distress damages are recoverable in a legal malpractice case "when significant emotional distress is foreseeable from the sensitive and personal nature of representation or when the attorney's conduct is particularly egregious." *Id.*,

at 671. The court supported this holding on common law principles applicable to emotional distress damages in other contexts. The court noted that the nature of the parties' relationship is relevant to whether an award of emotional distress damages is proper. *Id.*, at 672-73. Where the relationship is such that a person standing in the defendant's shoes could foresee that its breach is likely to cause emotional distress, such damages are proper. *See Id.* The same rule should apply in cases of breach of an attorney's fiduciary duties.

As expounded above, the parties' relationship here was that of a trust. Forsberg owed the highest fiduciary duties to Ardens. Forsberg knew of Ardens' existing mental condition and of the possibility of criminal jeopardy that Arden faced. Forsberg could have reasonably foreseen that a breach of trust would be likely to cause Ardens to suffer emotional distress. *See* CP 223-24. This is precisely the kind of relationship that should give rise to an award of emotional distress damages. *See Schmidt*, 181 Wn.2d at 673 ("Thus, emotional-distress damages are ordinarily not recoverable when a lawyer's misconduct causes the client to lose profits from a commercial transaction, but are ordinarily recoverable when misconduct causes a client's imprisonment."); *Id.*, at 687 (Stephens, J., dissenting) ("These situations reveal a common thread justifying the imposition of liability for emotional distress: a special relationship based on trust. When such a special relationship exists, … 'a reasonable person standing in the defendant's shoes would easily foresee that its breach is likely to cause significant emotional distress. It will support emotional distress damages without proof of physical impact or

objective symptomatology.'" (quoting *Price v. State*, 114 Wn. App. 65, 73, 57 P.3d 639 (2002)).

Alternatively, emotional distress damages should be considered as part of an equitable remedy for breach of trust. Remedies for breach of trust seek to both prevent unjust enrichment of the trustee and to make the beneficiary whole. Ardens cannot be made whole unless they are able to recover for their emotional distress resulting from Forsberg's breach of trust.

Where Ardens have presented evidence of both a sensitive representation and egregious conduct by Forsberg, this Court, or the trial court on remand, should award Ardens' emotional distress damages caused by Forsberg's breach of fiduciary duties.

5.4.3 Ardens are entitled to attorney fees incurred as a result of Forsberg's breach of trust, including fees incurred in this malpractice litigation.

In addition to the remedies of disgorgement of fees and costs and recovery of emotional distress damages, Forsberg is subject to the court's broad, equitable powers to craft a remedy to both make Ardens whole and prevent Forsberg from benefiting from its breach of trust. In order for Ardens to be made whole, they must be reimbursed for attorney fees that they were compelled to incur as a result of Forsberg's breach of trust. As a result of Forsberg's breaches, Ardens had to incur fees for personal counsel to represent their interests in the *Duffy* matter free from any conflicts, as well as in this matter seeking redress for Forsberg's breach. As a result of

Forsberg's breaches, Roff Arden was charged with a felony and had to incur fees for criminal defense counsel. *See, e.g.,* CP 418, 424-25.

Where litigation is necessitated by the inexcusable conduct of a trustee, the trustee is liable to pay those expenses. *Allard v. Pac. Nat'l Bank*, 99 Wn.2d 394, 408, 663 P.2d 104 (1983). Such an award of attorney fees caused by a breach of trust is within a trial court's discretion as a part of making the plaintiff whole from the defendant's breach. *Allard v. First Interstate Bank, N.A.*, 112 Wn.2d 145, 151-52, 768 P.2d 998 (1989). The award can include fees incurred throughout the litigation for breach of trust, including all fees at trial and on appeal. *Id.* Breach of trust is thus a recognized ground in equity for an award of attorney fees. This Court, or the trial court on remand, should award Ardens all of their fees incurred in the *Duffy* matter, in this case, and in the criminal case.

The trial court erred in denying Ardens' motion for partial summary judgment on Forsberg's liability for breach of fiduciary duties and in dismissing Ardens' claims. As demonstrated above, Forsberg owed Ardens the highest fiduciary duties—the ordinary duties owed by an attorney to a client, enhanced duties under *Tank*, and the duties of a trustee over the insurance defense asset. Forsberg breached those duties by failing to disclose and resolve conflicts of interest in favor of Ardens and by placing the interests of Hartford above the interests of Ardens, the insured clients. The remedies of disgorgement for breach of fiduciary duties and other equitable remedies for breach of trust naturally follow.

Ardens presented sufficient evidence to the trial court to establish Forsberg's duties and breach. At the very least, Ardens' evidence was sufficient to raise a material issue of fact to preclude summary judgment dismissal of Ardens' claims. This Court should grant summary judgment in favor of Ardens on these issues and remand to the trial court for a determination of damages.

5.5 The trial court erred in dismissing Ardens' legal malpractice claim where there were material issues of fact precluding summary judgment.

The trial court correctly held that there was a clear attorney-client relationship between Ardens and Forsberg giving rise to a duty of care owed by Forsberg to Ardens. Supp. RP 3-4. The trial court correctly held that there were disputes of fact as to whether Forsberg's conduct breached its duties to Ardens. *Id.* at 4. However, the trial court erred by failing to recognize material issues of fact precluding summary judgment on the issues of damages and proximate cause.

5.5.1 There were material issues of fact regarding the availability of emotional distress damages under *Schmidt v. Coogan*.

Emotional distress damages are recoverable in a legal malpractice case (1) when emotional distress is foreseeable from the nature of the representation or (2) when the attorney's conduct is particularly egregious. Ardens have presented evidence in support of both alternatives. *Schmidt*, 181 Wn.2d at 671.

Emotional distress was foreseeable from the nature of the representation here. The parties' relationship here was that of a trust. Forsberg owed the highest fiduciary duties to Ardens. Forsberg knew of Ardens' existing mental condition and of the possibility of criminal jeopardy that Arden faced. *E.g.,* CP 179, 484. Ardens demonstrated their interest in swift resolution of the *Duffy* matter by insisting on immediate settlement. *E.g.,* CP 865. Forsberg knew that it was representing frail clients. Forsberg also knew that it was acting under a reservation of rights and that the defense was fraught with potential conflicts of interest. Forsberg should have known that it needed to tread lightly and make sure it lived up to its duties of loyalty. Given the circumstances, Forsberg could have reasonably foreseen that a breach of trust would be likely to cause Ardens to suffer emotional distress. *See* CP 223-24, 857.

Defendants' conduct was also particularly egregious. As demonstrated above, Forsberg took on a representation from which it was disqualified by conflicts of interest. Forsberg failed to advise Ardens of any potential or actual conflicts of interest. Forsberg failed to resolve the conflicts in favor of Ardens. Forsberg failed to communicate information relevant to the defense to Ardens. Forsberg failed to keep Ardens apprised of all activity involving settlement. Forsberg ignored Ardens' expressed desires regarding settlement and instead followed instructions from Hartford without giving Ardens any opportunity to understand or react to those instructions before Forsberg carried them out.

Because a reasonable fact-finder could conclude from the evidence that Ardens' emotional distress was compensable, the trial court should have denied summary judgment dismissal. The issue should have gone to trial.

5.5.2 There were material issues of fact as to whether Forsberg's malpractice was a proximate cause of Roff Arden being charged with a felony.

Ardens presented evidence that, had Defendants settled the Duffy matter sooner, Roff Arden would not have been charged with a crime. Ardens presented opinion testimony of three qualified experts that the prosecutor's office most likely would not have charged Roff Arden with a felony if the *Duffy* matter settled before the charging decision was made. *See* CP 417-18, 424-25, 924-25. Duffys had been lobbying the prosecutor's office to bring felony charges against Roff Arden. CP 279-84. However, as soon as Duffys notified the prosecutor's office of the settlement, Arden was sent to "friendship diversion" and the charges were dropped. CP 270, 272. Forsberg was aware of the prosecutor's pending decision, CP 484, but decided it had no duty to consider Ardens' interest in avoiding charges, CP 170. Viewing the evidence and reasonable inferences in a light favorable to Ardens, a reasonable fact-finder could conclude that, had the matter settled earlier, as repeatedly urged by Ardens, Roff Arden would not have been charged with a felony. This creates a material issue of fact as to damages and causation, precluding summary judgment dismissal of Ardens' claim. This Court should reverse the trial court's first summary judgment order, reinstate Ardens' legal malpractice claim, and remand for further proceedings.

5.6 Ardens request an award of attorney fees on appeal.

Where litigation is necessitated by the inexcusable conduct of a trustee, the trustee is liable to pay those expenses. *Allard v. Pac. Nat'l Bank*, 99 Wn.2d 394, 408, 663 P.2d 104 (1983). Such an award of attorney fees caused by a breach of trust is within a trial court's discretion as a part of making the plaintiff whole from the defendant's breach. *Allard v. First Interstate Bank, N.A.*, 112 Wn.2d 145, 151-52, 768 P.2d 998 (1989). The award can include fees incurred throughout the litigation for breach of trust, including all fees at trial and on appeal. *Id.* Breach of trust is thus a recognized ground in equity for an award of attorney fees. If Ardens prevail on appeal, this Court should direct the trial court to determine the amount of fees and expenses to be awarded for the appeal.

6. Conclusion

The undisputed facts demonstrate that Forsberg breached its fiduciary duties to Ardens. The trial court erred in denying Ardens' motion for partial summary judgment and dismissing Ardens' claims. The trial court also erred in granting Forsberg's motion for summary judgment on Ardens' legal malpractice claim when there were material issues of fact as to the issues of breach, proximate cause, and damages. This Court should reverse the trial court's summary judgment orders, grant partial summary judgment to Ardens on Forsberg's liability for breach of fiduciary duties, and remand to the trial court for further proceedings.

Respectfully submitted this 11th day of May, 2015.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellants

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on May 11, 2015 I caused the original of the foregoing document, and a copy thereof, to be served by the method indicated below, and addressed to each of the following:

Court of Appeals Division II 950 Broadway, #300 Tacoma, WA 998402	____ U.S. Mail, Postage Prepaid ____ Legal Messenger _____ Overnight Mail _____ Facsimile _XX_ Electronic Mail
Sam B. Franklin Pamela J. DeVet Lee Smart P.S., Inc. 1800 One Convention Place 701 Pike Street Seattle, WA 98101-3929 sbf@leesmart.com pdj@leesmart.com jaj@leesmart.com mvs@leesmart.com	____ U.S. Mail, Postage Prepaid _____ Legal Messenger _____ Overnight Mail _____ Facsimile _XX_ Electronic Mail

DATED this 11h day of May, 2015.

/s/ Rhonda Davidson
Rhonda Davidson, Legal Assistant

NO. 46991-0-II

COURT OF APPEALS STATE OF WASHINGTON
DIVISION II

ROFF ARDEN and BOBBI ARDEN, adult husband and wife,

Appellants.

v.

FORSBERG & UMLAUF, P.S., a Washington State professional services corporation; JOHN HAYES and "JANE DOE" HAYES, adult Washington State residents including any marital community; WILLIAM "CHRIS" GIBSON and "JANE DOE" GIBSON, adult Washington State residents including any marital community; and DOE DEFENDANTS I through V,

Respondents.

BRIEF OF RESPONDENTS

Sam B. Franklin, WSBA No. 1903
Pamela J. DeVet, WSBA No. 32882
Of Attorneys for Respondents Forsberg & Umlauf, P.S., Hayes and Gibson

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I. INTRODUCTION

Almost exactly a year after Roff Arden shot and killed his neighbors' puppy, the Ardens' insurer retained the law firm of Forsberg & Umlauf, P.S., and attorneys John Hayes and Chris Gibson (collectively "Attorneys" herein), to defend the Ardens in the neighbors' civil suit. Attorneys represented the Ardens for five months, during which time they developed a settlement plan, approved by the Ardens and accepted by the insurer, and engaged in settlement negotiations. When Mr. Arden was charged with criminal animal cruelty, and the insurer failed to fund settlement at the amounts proposed, the Ardens blamed Attorneys and sued them for legal malpractice. Attorneys argued in the trial court that (a) the duty owed the Ardens did not include either the duty to force the insurer to fund settlement or the duty to prevent the prosecutor from charging Mr. Arden with a crime; (b) Attorneys did not breach any of the duties a lawyer owes a client; (c) Attorneys' conduct was not the proximate cause of harm to the Ardens; and (d) the Ardens were not entitled to the damages they sought. The trial court ruled as a matter of law that no alleged violation of duty had caused the exposure to criminal charges and that the Ardens could not recover emotional distress damages or attorneys' fees. The trial court correctly dismissed all claims on summary judgment, and the rulings below should be affirmed.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Attorneys assign no error to the trial court's decisions. Attorneys contend that the Ardens misstate the single issue that this appeal raises and that the issue is more properly stated as follows:

Whether the trial court correctly dismissed claims of negligence and breach of fiduciary duty, where the ex-clients failed to raise a genuine issue of material fact as to multiple essential elements of their causes of action and failed to assign error to the trial court's denial of their first motion for partial summary judgment.

III. STATEMENT OF THE CASE

A. After Roff Arden shot his neighbor's puppy, the neighbor initiated the civil case of *Duffy v. Arden*.

Roff and Bobbi Arden live on a five-acre parcel in Shelton, Washington, where dogs frequently visit the "far edges" of their property. CP 589, (197:12-15).[1] Mr. Arden did not like for dogs to come within 10 yards of his house. CP 589 (197:5-12). Dogs belonging to neighbors Wade and Anne Duffy reportedly came onto the Arden property only three times in the years from February 2005, when the Ardens moved in, to December 2011. CP 537-38 (16:14-17:2); CP 599. Nevertheless, Mr. Arden believed the Duffys failed to "control" their dogs. CP 538

[1] Because the record contains many deposition transcripts reproduced in a four-to-a-page format, Attorneys include page and line citations where appropriate.

(20:9-12); CP 541 (30:17-31:16 ("They're adults. I'm an adult. They already knew they had a problem"), 32:2-3 ("[I]t isn't up to me to tell them. It's up to them to control their dogs").

In late November 2011, when the Ardens drove their garbage and recycling down to the road, they saw the Duffys' black lab beside the street. CP 586 (pp 183:7-16; 185:4); CP 599. The next week, Mr. Arden armed himself before he took out the trash. CP 499. The black lab and the Duffys' new 13-week-old yellow lab puppy were on the street. CP 499. After unloading the trash, the Ardens got back in the truck, where they were safe, and the dogs began to follow the truck. CP 499; CP 744 (11:2-10). When they were still about 175 feet from their house, Mr. Arden stopped the truck, got out, yelled at the dogs to go home, then shot the puppy when it did not immediately leave. CP 499-500, CP 585 (179:22-180:2, 181:4-17); CP 586 (186:10-17).

The Mason County Sheriff's Department investigated. CP 488-94. It referred the investigation to the Mason County Prosecutor's Office, asking the prosecutor to review Animal Cruelty charges. CP 491. The deputy reported Mr. Arden admitted to shooting another of the Duffys' dogs some 15 months before. CP 490. Although Mr. Arden admits he shot the puppy in December 2011, he denies he shot the other dog or admitted that to the deputy. CP 585 (182:2-7). However, he stipulated

that the facts in the investigative reports are sufficient for a trier of fact to find him guilty of the charge of Animal Cruelty. CP 591 (203:12-16).

The Duffys contacted the prosecutor frequently about the status of the criminal case. CP 439-40. In May 2012, they threatened the Ardens with a civil lawsuit. CP 611. When the parties could not reach a pre-suit settlement, the Duffys sued in Mason County Superior Court. CP 536 (10:11-12). Mr. Arden blames the Duffys for his shooting their puppy. *Id.* (12:5-8). The Ardens thought the Duffys should be liable to them, CP 539 (21:16-18), and counterclaimed against the Duffys for emotional distress and filing a frivolous action. CP 537 (14:14-20, 15:3-14).

B. The Ardens' insurer, Hartford, initially denied its duty to defend but belatedly accepted the tender of defense.

The Ardens tendered the claim to their insurer, Hartford. CP 542 (33:14-25). Hartford interviewed Mr. Arden about the matter. CP 125 (37:19-20). Hartford knew that the police were investigating Mr Arden. CP 125 (38, ll. 3-9). Hartford misread the complaint as alleging **only** intentional conduct by Mr. Arden, CP 315, CP 317, and ignored negligence allegations against Mr. Arden and separate negligence allegations against Mrs. Arden. CP 147-48. Hartford denied the tender in June 2012. CP 128 (51:16-18); CP 148 (131:21-23); CP 542 (33:22-23).

In or around October 2012, the Ardens retained attorney Jon

Cushman of Cushman Law Offices to replace their previous defense counsel, to prosecute their counterclaim, and to address coverage issues. CP 539 (24:14-23); CP 587-88 (190:23-191:17). Mr. Cushman analyzed the case and believed Hartford had breached its duty to defend. CP 756. Mr. Cushman re-tendered the claim to Hartford. CP 316; CP 756.

In November 2012 Hartford accepted the tender of defense. CP 601. Mr. Cushman immediately advised his clients:

> Good news. [Hartford] has agreed to appoint defense counsel. [¶]
>
> The Hartford is appointing defense, but they are issuing a reservation of rights letter, which means they continue to dispute coverage. They can't do this as they failed to defend and are now on the hook for coverage by estoppel, which means they can't try to jump out.

CP 601. In fact, Hartford did not issue a reservation of rights letter at that time. CP 119 (16:21-25).

C. Hartford appointed Attorneys to defend *Duffy v. Arden.*

1. Attorneys represented only the Ardens.

Hartford retained Attorneys to defend the Ardens. CP 542 (33:24-25); *see also* CP 119 (16:10-12); CP 139 (60:18-20); CP 483. Mr. Cushman told Hartford he was "ok with panel defending." CP 320. Hartford and Attorneys understood Attorneys represented only the Ardens in *Duffy v. Arden*, not Hartford. CP 144 (113:15-16); CP 155 (158:2-5); CP 166 (21:10-11); CP 167 (26:16-19, 27:5-6). Attorneys and Hartford

understood Mr. Cushman was the Ardens' personal counsel and had full authority to speak for them. CP 134 (76:6-8); CP 166 (22:3-4, 22:13-14); CP 205 (15:12-24). *See also* CP 515. Mr. Cushman told Attorneys the Ardens' coverage position was that Hartford had acted in bad faith and was liable to the Ardens for full indemnity, and that the Ardens would not pay out of pocket for settlement. CP 447; CP 526.

2. Attorneys were not coverage counsel.

Attorneys made it clear to the Ardens they were not representing either the Ardens or Hartford as to coverage. CP 365; CP 506. They did not advise Hartford regarding coverage. CP 157 (165:11-16). Hartford relied on the Attorneys regarding Washington law on the Ardens' liability, not on coverage. CP 127 (45:3-11). Nor did the Ardens expect Attorneys to advise them as to coverage matters, because they expected Mr. Cushman to give them that advice. CP 544 (43:9-16). Indeed, the standard of care in Washington for defense counsel is not to press coverage issues with, and obtain a more favorable reaction from, the insurer. CP 105 (10:8-13). That is the role of personal counsel. CP 105 (10: 13-14); CP 111 (37:11-13); CP 112 (38:22-23).

Forsberg & Umlauf has done coverage work for Hartford. CP 204 (9:13-20). However, the record contains no evidence that it represented Hartford in a coverage matter at the same time it represented the Ardens.

CP 165 (18:17-20:1); CP 203-04 (8:8-10:12). Attorney John Hayes had periodically represented Hartford in coverage matters, but this was not the focus of his practice. CP 203 (8:8-9). Rather, almost all of his work is as appointed defense counsel, and only about 30-35 percent of that appointed by Hartford. CP 204 (9:21-10:4). Mr. Hayes does not always have a coverage case in his portfolio. CP 203 (8:15-19). Likewise, defending Hartford's insureds made up a large portion of attorney Chris Gibson's practice. CP 165 (19:23-20:1). The Ardens do not dispute that the decades-long practice of hundreds of reasonable, careful, and prudent attorneys across Washington has been to represent insurers in coverage and to simultaneously defend that insurer's policyholders in other matters. CP 365.

D. Attorneys immediately began evaluating the defense.

Attorneys immediately began their investigation into the facts and law, including reviewing the police report of the puppy-shooting incident. CP 190 (118:1-8); CP 484; CP 519-20. Within a week or two after Hartford retained them, they sent the Ardens a letter describing the scope of representation and other preliminary issues. CP 167 (25:14-21); CP 505-07; CP 514. By mid-December 2012, the Ardens knew Mr. Cushman and Mr. Gibson were in contact to discuss choice of an arbitrator for mandatory arbitration, to associate Attorneys as co-counsel

of record, and to schedule a client meeting. CP 545 (46:6-18; 48:8-49:14).

E. The Ardens and their defense counsel met and decided on a plan to settle the case with Hartford money.

The Ardens met with Mr. Gibson in late December 2012. CP 545 (47:6-8); CP 546 (51:23-24); CP 484. During the meeting, Mr. Gibson and the Ardens discussed the whole case, including the Ardens' version of the facts. CP 546 (51:10-22). Although he had not seen a reservation of rights letter yet, Mr. Gibson told the Ardens at their initial meeting that he expected there would probably be a coverage dispute in the case based on the allegations of intentional acts:

> I had a conversation with the clients in my initial meeting with them about there are – there could be a coverage dispute between you and the insurance company, and my role as your defense counsel in a *Tank* case: I am not going to give the insurance company anything that could defeat coverage.

CP 169 (35:1-36:24). *Accord* CP 182 (82:18-25); CP 207-08 (24:23-25:14) (Hartford told Hayes there would be a reservation letter; he presumed it was timely sent). Mr. Gibson also explained to them the tripartite relationship in an insurance-appointed defense situation. CP 173 (51:19-52:5). He specifically told the Ardens his goal was for Hartford to pay full indemnity even if it reserved its rights. CP 173 (52:5-10); 183 (92:15-20). The Ardens understood the defense plan: Attorneys would evaluate the case and liability exposure and contact them with that report.

CP 546 (51:25-52:12). Going forward, the Ardens endorsed the settlement position reflected by each settlement offer. CP 110 (33:1-15).

F. Attorneys continued to evaluate the case.

Attorneys served discovery on the Duffys in early January 2013. CP 485. They researched jury verdicts and sought an expert to evaluate the value of the dogs. CP 215 (53:15-17).

1. Attorneys considered Mr. Arden's condition.

Although Mr. Arden had represented that he had Post-Traumatic Stress Disorder (PTSD) and depression, he did not exhibit symptoms of PTSD during the initial meeting or later. CP 485. *See also* CP 216 (57:12-58:1); CP 175 (59:2-9); CP 179 (75:23-76:6). Nevertheless, Attorneys considered Mr. Arden's mental condition in their case evaluation. CP 175-76 (58-62). Attorneys believed his condition could affect either the Ardens' potential justification defense (which was part of Attorneys' defense) or their counterclaim (which Mr. Cushman would pursue). CP 175 (59:22-61:7). Attorneys sought Mr. Arden's medical records to substantiate Mr. Arden's defense. CP 175 (60:20-21); CP 216 (57:17-21). However, Attorneys did not observe that Mr. Arden was "emotionally fragile" during their representation. CP 175 (59:17-22).

2. Attorneys considered possible criminal charges.

In their case evaluation, Attorneys considered Mr. Arden's

possible criminal liability. CP 170 (38-42); CP 174-75; CP 177, CP 194-95; CP 210 (34:6-36:12); CP 213 (47:8-13); CP 484. In November 2012, Attorneys had reviewed the sheriff's report and learned the sheriff's deputy had referred the case to the prosecutor almost a year before. CP 210 (34:6-9); CP 484. They reviewed their clients' previous discovery responses and analyzed whether Mr. Arden had already waived his Fifth Amendment right against self-incrimination. CP 170 (40:15-22). They understood Mr. Arden might have to decide whether to invoke the Fifth Amendment. CP 170 (38-40); CP 220 (75:15-76:3). They did nothing in the civil proceeding that would further expose Mr. Arden to criminal liability, CP 170 (38-39); CP 174 (55:13-18); and had no obligation to extract Mr. Arden from exposure to criminal charges. CP 106 (16:12-18).

G. The Duffys demanded $55,000 in settlement without providing proof of their claimed damages.

The Duffys had reported to the police the dogs were worth $4,500. CP 609. On January 18, 2013, before their discovery responses were due, the Duffys demanded $55,000 to settle. CP 547-48 (56:18-57:21); CP 255. The Ardens did not think the case was worth that much; indeed, Mr. Arden testified, "I didn't think the case was worth a dime." CP 550 (67:9-14). *Accord* CP 551 (71:23-72:3) ("Everybody thought [the demand] was pretty high"). The deadline to respond to the demand was

January 28, 2013, also before the Duffys' discovery responses were due. CP 611. The demand did not include an offer to ask the prosecutor not to charge Mr. Arden. CP 611. Although Mr. Cushman himself received the demand, CP 255, Attorneys sent it to the Ardens and Mr. Cushman very shortly after receiving it. CP 548 (57:1-21); CP 611. The Duffys' counsel sent a follow-up email moments later, which says:

> I meant to add what was implied – all counterclaims by the Ardens are dismissed with prejudice as well. Please note this in the offer.

CP 617. The Ardens received both messages that same day. CP 548 (59:11-17); CP 549 (61:24-62:1); CP 617. Mr. Cushman told Attorneys the Ardens would accept the offer "**provided the carrier pay** this settlement." CP 256 (emphasis added). Mr. Hayes called Hartford to report the Ardens demanded Hartford pay $55,000. CP 214 (52:9-17).

When Attorneys first received the Duffys' $55,000 demand, they had only limited information, because the Duffys had not yet answered discovery. CP 621, CP 328. They informed Hartford, Cushman, and the Ardens that they did "not evaluate damages at this time at or near $55,000." CP 621. Mr. Cushman immediately wrote directly to Hartford conveying the Ardens' conditional acceptance:

> Let me be perfectly clear. Ardens want to accept this offer **provided it is paid by the carrier**. Ardens **demand the Hartford fund this settlement** and relieve them of all

> exposure to liability. They are willing to forsake their counterclaim as part of the deal.

CP 329 (emphasis added).

The Ardens' acceptance of the demand was **always** subject to Hartford funding it. *E.g.*, CP 621; CP 663. The Ardens expected the money for settlement to come solely from Hartford. CP 591 (205:3-7). The Ardens wanted Hartford to "pon[y] up the cash." CP 556 (90:5-7).

H. Hartford refused to fund the $55,000 demand without supporting evidence.

Under the Ardens' policy, Hartford retained the right to determine whether to settle a case with, and for what amount of, Hartford's funds; Hartford believed neither the Ardens nor the Attorneys had the right to make these decisions. CP 159 (173:24-174:8). *See also* 520. Hartford would not accept the $55,000 demand, even when Mr. Cushman insisted Hartford fund it, because Hartford viewed it as inflated and overvalued. CP 155 (158:20-25; 159:3-5). Hartford made it clear on January 22, 2013, that it would not fund the $55,000 demand without the Duffys' discovery responses. CP 624. The Ardens admit the case did not settle that day because Hartford refused to fund the demand. CP 576 (143:22-25).

Attorneys reasonably believed they had no basis at that time to recommend settlement at $55,000. CP 367; CP 518. Mr. Hayes decided to request an extension of the deadline to respond to settlement in order to

obtain answers to discovery. CP 208 (28:9-16); CP 215 (53:13-15). He knew it was in the Ardens' best interest to develop better damages information with the Duffys' discovery. CP 216 (57:9-11). With additional evidence of damages, he would have a basis to recommend a higher number to Hartford. CP 215 (53:22-54:2). An extension would also give the Ardens' personal counsel time to persuade Hartford to fund the $55,000 settlement. CP 366. Attorneys timely told Mr. Cushman they were seeking the extension. *Compare* CP 330, CP 346 (10:25 a.m. request for extension) *with* CP 331 (11:10 a.m. notice to Cushman) *and* CP 332 (11:12 a.m. response); CP 518. *See also* CP 155 (160:4-9); CP 189 (113:24-114:3); CP 190 (120:20-22); CP 624. Mr. Cushman and the Ardens knew about and did not object to the request for a deadline extension before the Duffys had responded to it. CP 551 (71:6-9); CP 552 (75:6-22); CP 624; CP 634. *See also* CP 155 (160:14-22).

The Duffys agreed to a deadline extension of two weeks following service of their answers to discovery. CP 338; 341; CP 628; CP 631. The new deadline was forecast to be March 4, 2013. CP 631; CP 638. The Ardens and Mr. Cushman knew the Duffys agreed to an extension minutes after the agreement was reached. *Compare* CP 341 (3:42 agreement) *with* CP 342 (4:00 notice to Cushman) *and* CP 344 (4:07 response); CP 518. The Duffys memorialized the agreement, reiterating that the offer

pertained to only the civil case, not the criminal case, and that the counterclaim would have to be dismissed with prejudice. CP 638. When Mr. Arden inquired about this message, Mr. Cushman advised him, "The state owns the right to prosecute crimes. This is not something Duffy controls." CP 651. *Accord*, CP 554 (84:8-13 ("[Mr. Cushman] was advising me that [the Duffys] didn't have any influence over the district attorney."). The Ardens understood: Mr. Arden told his counsel, "I realize the county has control over criminal charges." CP 663. The record does not show Mr. Cushman used this time to give Hartford legal and factual bases to fund a $55,000 settlement. CP 366. Nonetheless, on February 5, the Ardens again demanded Hartford fund the $55,000 settlement on those terms. CP 673.

In the midst of this activity, Hartford belatedly drafted and sent a reservation-of-rights letter without Attorneys' knowledge. CP 135-36 (80:17-81:19); CP 215 (56:6-9); CP 216 (59:15-17; 60:6-7). The record does not reflect whether Attorneys learned of or saw this letter.

I. The Ardens approved the plan to attempt to settle with Hartford funds up to $35,000.

After receiving discovery responses, Attorneys properly analyzed them and prepared a case report for the Ardens and their insurer. CP 516; CP 695-710. Attorneys undertook an independent, reasoned analysis,

advocating settlement up to $35,000, which they believed was at the very high point of the recoverable damages spectrum. CP 447; CP 520; CP 706-07; *see also* CP 156 (162:4-6). After reviewing the draft and making comments as to the language on February 25, Mr. Cushman approved the case valuation on behalf of the Ardens, stating, "I bet you can settle the case for the $35,000 you estimate in value." CP 693. Mr. Cushman recognized this number was within the reasonable range to address the Ardens' exposure. CP 762 (62:10-11).

The Ardens also received and read the litigation report. CP 561 (109:10-13); CP 747 (18:9-12). Mr. Cushman told the Ardens he had approved the $35,000 case valuation in the litigation report. CP 560 (108:17-21). Mr. Arden "figured they would get it done probably at 35." CP 562 (113:17). Mr. Cushman and the Ardens approved the strategy to settle with Hartford's money up to $35,000. CP 516. Neither asked Hartford to fund the $55,000 offer after the report. CP 516-17. Attorneys had the Ardens' authority to settle the case in the $35,000 range. CP 517.

J. Hartford agreed to fund settlement up to $35,000.

Attorneys made all Mr. Cushman's suggested changes to the report and sent it to Hartford eight days before the response deadline. CP 447. Hartford accepted the Attorneys' judgment and agreed the case was worth up to $35,000. CP 156 (162: 7-10); CP 520; CP 522. Therefore, it

decided not to fund the settlement demand of $55,000. CP 140 (99:13-23); CP 156 (162:15-21). The deadline expired March 5, 2013. CP 444. On March 4, Hartford told Mr. Cushman it would let the deadline expire without funding the demand, but would extend a $18,000 counteroffer. CP 716; CP 141 (102:6-11); CP 876 (same-day response). When Attorneys told Mr. Cushman the same thing the next day, he did not object, CP 518-19; CP 714, but instead replied, "I hope you succeed. I will stay out of the loop. Keep me posted on all offers and responses." CP 714. It was not until after Attorneys received Mr. Cushman's approval that they made the $18,000 counteroffer on March 5, 2013. CP 517; CP 720-21. The Ardens knew Attorneys were making this counteroffer, thought this would start negotiations, and hoped the matter would settle at $35,000. CP 561-62 (112:25-113:3, 113:12-22).

K. The Duffys next demanded $40,000 to settle the lawsuit.

On March 10, 2013, the Duffys rejected the $18,000 counteroffer and declined to make a new offer. CP 719. Attorneys timely forwarded the communication to their clients. CP 519; CP 880. Although he said he would stay out of the loop, Mr. Cushman contacted the Duffys' counsel directly to ask for a new offer. CP 760 (48:14-22). The Duffys demanded $40,000 on March 12, 2013, to expire at 5:00 p.m. on March 14, 2013. CP 760 (48:23-24); CP 882. The Duffys were still willingly engaged in

settlement negotiations. *See* CP 440. *See also* CP 142 (106:25-107:1); CP 143 (110: 15-19). Mr. Cushman asked that John Hayes "get into the act" with the insurer. CP 184 (95:9-11). Mr. Hayes then spoke to Hartford, pointing out that a mere $5,000 more than the $35,000 recommended settlement value would end the case. CP 158 (170:15-171:5); CP 212-13 (44:19-458); CP 448.

Hartford rejected the new $40,000 demand because Hartford believed it still exceeded the full settlement value of the case. CP 142 (106: 17-23); CP 156 (162:22-163:6); CP 158 (171:6-8). Hartford informed Mr. Cushman it planned to reject the $40,000 offer and counter with $25,000. CP 730. *See also* CP 156 (163:18-23). Although Mr. Cushman castigated Hartford for not funding the $40,000 demand, neither he nor the Ardens instructed Attorneys not to make a $25,000 counteroffer. CP 156 (164:2-7); CP 448; CP 578 (154:22-23); CP 579 (156:1-10); CP 770. Nor did Mr. Cushman ask for any time to discuss with the Ardens the possibility of contributing their own money to the settlement. CP 156 (164:8-11); CP 448; CP 517; CP 770.

Although the Duffys said they had no more room to move, they had said the same before and had come down; it was reasonable to ask them to consider another move. CP 522. However, when Attorneys extended the counteroffer, the Duffys rejected it. CP 890-91. The Ardens

admit the reason the case did not settle on March 14, 2013 is that the insurer did not fund the $40,000 demand. CP 579 (156:11-13).

The Ardens, directly or through Mr. Cushman, authorized every offer Attorneys made to the Duffys, and consented to the negotiation strategy that Attorneys followed. CP 110 (32:16-25); CP 111 (34:14-20).

L. The prosecutor decided to criminally charge Mr. Arden at least eleven days before the Duffys' $40,000 demand.

On March 1, 2013, the Mason County Prosecutor filed a motion for an order determining probable cause to charge Mr. Arden with Animal Cruelty in the First Degree. CP 794-97. *See also* CP 802-03 (probable cause order). The prosecutor then filed the Information. CP 798-99. The Ardens speculated that because *Duffy v. Arden* had not settled before March 1, the prosecutor decided to charge Mr. Arden with a crime. CP 583 (171:6-14); CP 892. However, the prosecutor himself submitted evidence that conclusively shows that his decision to charge Mr. Arden had nothing to do with the settlement negotiations in the civil action:

> I am an attorney with the Mason County Prosecutor's Office. I was assigned the file involving Roff Arden, and I made the decision to criminally charge Mr. Arden. I was unaware that the Duffys were pursuing a civil case against Mr. Arden prior to making my decision to charge Mr. Arden.

CP 441. This evidence remains undisputed.

M. The Ardens sued Hartford for bad faith.

The Ardens blamed Hartford for the criminal prosecution. CP 583 (171:6-14). Therefore, they sued Hartford for bad faith and breach of contract, among other things. *See* CP 326. Mr. Hayes forwarded the complaint to Hartford in order to nudge them to approve settlement, but he did not discuss the bad faith case with Hartford. CP 220-21 (74:25-75:5, 77:15-79:3); CP 368. In April 2013, the Ardens added John Hayes and Forsberg & Umlauf as defendants in the action. *See* CP 899. They alleged Attorneys caused them to lose the opportunity to settle before criminal charges were filed, resulting in legal fees and costs, financial hardship, and emotional distress. CP 735-36.

The parties to this action and to *Duffy v. Arden* mediated in August 2013. CP 432. All claims were settled except the Ardens' claims against Attorneys, with Hartford funding the *Duffy* settlement and obtaining dismissal of the bad faith claim. *Id.* Also in August, Mr. Arden received a "friendship diversion" in lieu of trial in the criminal case. *Id.*; CP 442.

N. The Ardens' legal malpractice claim was dismissed on summary judgment.

The parties filed cross-motions for summary judgment, which were heard before Judge Amber Finlay on September 26, 2014. CP 8-11. Judge Finlay also considered Attorneys' motion to strike considerable

portions of the Ardens' proffered evidence. CP 9.[2] Attorneys' expert, Jeff Tilden, opined that Attorneys satisfied the standard of care with respect to all the issues the Ardens alleged. CP 364; CP 514; CP 112 (38, ll. 19-20) ("I don't believe they mishandled the file in any way here"). However, the trial court stated at oral argument that a genuine issue of material fact arose as to the single allegation that Attorneys violated the standard of care by asking for an extension of time to respond to the $55,000 settlement demand on January 22, 2013 without seeking the clients' permission first. VRP 4:16-25. The judge found no other issue of fact on breach, and she did not rule as a matter of law that Attorneys violated the standard of care. *See id.*

As to the other elements, the trial court specifically ruled as a matter of law (a) no causal connection existed between any alleged violation of duty and the exposure to criminal charges, and (b) no support existed for the recovery of either emotional distress damages or attorneys' fees. CP 11. Judge Finlay denied the Ardens' motion for partial summary judgment and granted Attorneys' motion, dismissing the legal malpractice claim with prejudice. CP 10-11. Mr. Cushman's statements in his declaration dated August 6, 2014 were stricken and were not considered in

[2] The Ardens did not designate this motion to strike, or Attorneys summary judgment reply, in its designation of clerk's papers. Therefore, pursuant to RAP 9.6(a), Attorneys have supplemented the designation of clerk's papers.

the summary judgment rulings. CP 11. The trial court also later denied the Ardens' motion for reconsideration. CP 19-20.

O. The Ardens' breach of fiduciary duty claim was dismissed on summary judgment.

The trial court permitted the Ardens to file a second amended complaint alleging breach of fiduciary duty and adding Chris Gibson as a defendant on September 17, 2014. VRP 2:16. The parties filed cross-motions for summary judgment, heard November 17, 2014. VRP 53. The trial court denied the Ardens' motion for partial summary judgment and granted defendants' motion, dismissing the Ardens' case. CP 24.

IV. SUMMARY OF ARGUMENT

In dismissing the Ardens' claims on summary judgment, and denying reconsideration, the trial court did not err. The rulings below should be affirmed.

A lawyer retained to defend an insured person has no obligation to advocate coverage issues between insured and insurer. Nor is that lawyer a trustee of the funds used for defense and indemnity. Likewise, a lawyer retained to defend a client in a civil suit is not required to prevent the prosecutor from charging the client with a crime. Therefore, dismissal can be affirmed on the element of duty.

Breach is determined as a matter of law – always when breach of fiduciary duty is at issue, and when reasonable minds could reach but one

conclusion when duty of care is at issue. The Ardens have alleged a concurrent conflict of interest and multiple violations of duties of lawyers – none of which is supported by the record. They presented no evidence that Attorneys' judgment decisions were outside the range of those that a reasonable and prudent lawyer would make in this jurisdiction. On the other hand, there is ample evidence to support a determination, as a matter of law, that Attorneys did not breach their duty of care or fiduciary duty to the Ardens. Dismissal can be affirmed on the element of breach.

This court can determine as a matter of law that no legal causation exists. Being charged with a crime is not a compensable injury, and tort law is not designed to permit a plaintiff to foist the consequences of his own bad acts onto another. The record also supports a ruling as a matter of law that Attorneys' conduct was not the cause in fact of the Ardens' claimed harm. The evidence is undisputed that Mr. Arden was charged with a crime because he committed the acts at issue, and the case did not settle during Attorneys' representation because Hartford would not fund the demands. The Ardens failed to produce any evidence that they would have fared better in *Duffy v. Arden* but for Attorneys' claimed negligence. This court can affirm dismissal on the element of proximate cause.

Finally, as a matter of law, the Ardens are not entitled to the damages they seek or to disgorgement. The summary judgment rulings

may be affirmed on the element of damages, and dismissal should stand.

V. ARGUMENT

A. The trial court properly dismissed the Ardens' claims on summary judgment.

Summary judgment is proper where the record before the court shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The defendant is entitled to summary judgment if (1) the defendant shows the absence of evidence to support the plaintiff's case; and (2) the plaintiff fails to come forward with evidence creating a genuine issue of material fact on an essential element of the plaintiff's case. *Clark Cty. Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, 180 Wn. App. 689, 699, 324 P.3d 743 (2014). Review of a summary judgment ruling is de novo. *Id.* at 698. On the other hand, whether to award attorneys' fees and disgorgement of fees is left entirely to the sound discretion of the trial court. *Eriks v. Denver*, 118 Wn. 2d 451, 465, 824 P.2d 1207 (1992); *Cotton v. Kronenberg*, 111 Wn. App. 258, 275, 44 P.3d 878 (2002); *Kelly v. Foster*, 62 Wn. App. 150, 156, 813 P.2d 598 (1991). When reviewing a ruling on summary judgment, this court does not consider issues the appellant did not raise below, RAP 9.12, but can affirm the trial court's ruling for any reason supported by the record. RAP 2.5(a); *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 305, 151 P.3d 201, 207 (2006), *as amended* (2007).

A plaintiff alleging a breach of fiduciary duty "must prove (1) existence of a duty owed, (2) breach of that duty, (3) resulting injury, and (4) that the claimed breach proximately caused the injury." *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn.App. 412, 433-34, 40 P.3d 1206 (2002). Similarly, a plaintiff alleging legal malpractice must prove duty, breach, causation, and damages. *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992). On summary judgment, if the party with the burden of proof at trial fails to come forward with evidence to support any one element, the claim must be dismissed. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). *See also LK Operating, LLC v. Collection Grp., LLC*, 181 Wn. 2d 117, 126, 330 P.3d 190, 195 (2014) (summary judgment dismissal of entire legal malpractice claim affirmed where plaintiff could not show compensable damages); *Clark Cty. Fire Dist. No. 5*, 180 Wn. App. at 699 (summary judgment affirmed as to multiple allegations of breach of the attorney duty of care). Because both causes of action require proof of duty, breach, causation, and damages, arguments on each element are addressed together here.

Like the trial court, the Court of Appeals considers only admissible evidence in reviewing summary judgment. CR 56(e); *Lynn*, 136 Wn. App. at 306. A party cannot rely on inadmissible hearsay in response to a

summary judgment motion. *Lynn*, 136 Wn. App. at 309. Nor can a party rely on speculation to show material factual issues; instead, the nonmoving party must "set forth specific facts that sufficiently ... disclose that a genuine issue as to material fact exists." CR 56(e); *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

B. This court may affirm summary judgment dismissal of the legal malpractice claim as to the duty of care, which is a question of law for the court.

Under *Hizey*, a legal malpractice plaintiff must prove the existence of an attorney-client relationship giving rise to a duty of care. 119 Wn. 2d at 260. Although the Ardens did not move for summary judgment on the question of duty of care, Attorneys did. Attorneys acknowledge an attorney-client relationship existed from November 2012 to April 2013. However, according to the law and this record, the scope of Attorneys' representation did not include advocating the Ardens' coverage position against Hartford or preventing Mr. Arden from being charged.

"The essence of an attorney-client relationship is whether the attorneys' advice or assistance is sought and received on legal matters." *Bohn v. Cody*, 119 Wn. 2d 357, 363, 832 P.2d 71 (1992). *See also* RPC 1.2(c). The record is clear that the Ardens did not seek or receive advice from Attorneys regarding insurance coverage or criminal charges. They knew Attorneys were retained to defend them in *Duffy v. Arden*, and

that Mr. Cushman would represent them as to other matters. They also knew Attorneys could not control the prosecutor's actions.

The existence of an attorney-client relationship "turns largely on the client's subjective belief that it exists," but that belief must be "reasonably formed based on the attending circumstances, including the attorneys' words or actions." *Bohn*, 119 Wn. 2d at 363. Here, the Ardens did **not** believe Attorneys represented them as to coverage or criminal matters. Because the record shows the Ardens' reasonable subjective belief that Attorneys did not represent them as to coverage or criminal matters, the Attorneys' duty of care did not extend to advocating coverage issues against Hartford, and it did not extend to preventing Mr. Arden from being charged with a crime. This court may affirm dismissal of the legal malpractice claim on the element of duty. RAP 2.5(a).

C. An attorney appointed to defend an insured client is not a trustee subject to a trustee's duties and remedies.

The Ardens endorse a novel theory that insurance-assigned defense counsel is the trustee of the "defense asset." They cite no authority for the proposition, and trust law certainly does not fit in this context:

> Express trusts are [t]hose trusts which are created by contract of the parties and intentionally. ... An express trust is one created by the act of the parties; and, **where a person has, or accepts, possession of money, promissory notes, or other personal property with the express or implied understanding that he is not to hold it as his**

> **own absolute property, but to hold and apply it for certain specified purposes**, an express trust exists.

Hartford Fire Ins. Co. v. Columbia State Bank, 183 Wn. App. 599, 334 P.3d 87 (2014) (emphasis added, citations omitted) (no trust where writing did not require general contractor to hold payments for benefit of subcontractors). *Accord*, Restatement (Second) of Trusts § 29 (1959) ("The owner of property can create a trust of the property by transferring it to another person in trust although there is no consideration other than the transfer of the property"). "A claim seeking damages against an attorney for breach of fiduciary duty is legal, not equitable." *Behnke v. Ahrens*, 172 Wn. App. 281, 296, 294 P.3d 729 (2012).

No express trust existed here. The Ardens produce no proof of a contract or intent to act as trustee. The Hartford policy obligated it to defend, but not to create a trust. Attorneys did not hold or manage any asset of the Ardens. No one believed or understood Hartford sent Attorneys money belonging to the Ardens. Hartford paid Attorneys for the Ardens' defense for services rendered; Hartford transferred the payments as Attorneys' absolute property. The Ardens' arguments based on "breach of trust" case law do not withstand scrutiny.

D. Summary judgment of dismissal of both claims may be affirmed on the element of breach.

As set forth above, the causes of action urged here both require a

showing of breach. In the trial court, the parties moved for summary judgment on the issue of breach. The Ardens did not assign error to the trial court's denial of their motion on breach of the standard of care, and that decision need not be reviewed. RAP 10.3(g).

An attorney has a duty to exercise "the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer" in Washington. *Hizey*, 119 Wn. 2d at 261. Under the attorney judgment rule, "an attorney cannot be liable for making an allegedly erroneous decision involving honest, good faith judgment if (1) that decision was within the range of reasonable alternatives from the perspective of a reasonable, careful, and prudent attorney in Washington; and (2) in making that judgment decision, the attorney exercised reasonable care." *Clark Cty. Fire Dist. No. 5*, 180 Wn. App. At 704. To avoid summary judgment, the plaintiff must (a) show with expert testimony the attorney's exercise of judgment was not within the range of reasonable choices from the perspective of a reasonable, careful, and prudent attorney in Washington; or (b) show the attorney was negligent in arriving at that decision. *Id.* at 706. The trial court may determine whether an attorney violated the duty of care on summary judgment where reasonable minds could not differ. *Id.* at 705, 712-15.

An attorney also has a fiduciary duty to his client. *Kelly*, 62 Wn.

App. at 155. The Rules of Professional conduct may be considered to determine whether an attorney is in breach. *Cotton*, 111 Wn. App. at 266. *See also Tank v. State Farm Fire and Cas. Co.*, 105 Wn. 2d 381, 388-89, 715 P.2d 1133 (1986). The question of whether an attorney has breached his fiduciary duty is a question of law. *Eriks*, 118 Wn. 2d at 457-58.

Because the Ardens allege that certain conduct breached the standard of care or the fiduciary duty, or both, Attorneys address the allegations together below. This court may affirm dismissal on the basis that, as a matter of law, Attorneys did not violate **any** duty to the Ardens.

1. Treatises and seminar materials are not authority and were not part of the record below.

The Ardens are required to present "citations to legal authority" in support of their arguments. RAP 10.3(a)(6). In their opening brief, the Ardens allege many of Attorneys' acts are breaches of their fiduciary duty, but they cite no legal authority to support their position. They rely instead upon treatises and continuing education materials by William T. Barker and Charles Silver, who are not listed as attorneys licensed in the State of Washington. This is not the "legal authority" contemplated by RAP 10.3(a)(6), and the court need not consider it. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P.2d 549 (1992).

For two additional reasons, this court should disregard these

statements. First, on review of a summary judgment order, this court considers only "evidence and issues called to the attention of the trial court." RAP 9.12. None of these materials were before the trial court. Second, "[w]hen a trial court is presented with a question of law, the court may properly disregard expert affidavits that contain conclusions of law." *Eriks*, 118 Wn. 2d at 458. *Accord Cotton*, 111 Wn. App. at 267 (properly excluding legal conclusions in a John Strait declaration). These sources are not sworn testimony, and they contain multiple conclusions of law about violations of fiduciary duty. As such, they are better viewed as unsworn, conclusory testimony by undisclosed experts– and disregarded.

2. Attorneys did not violate any duty in accepting the representation.

The Ardens allege Attorneys could not accept the representation without disclosing conflicts of interest and obtaining informed consent under RPC 1.7. However, the record shows as a matter of law that Attorneys did not violate the conflict rules because a "concurrent conflict of interest" never arose. "A concurrent conflict of interest exists if ... there is significant risk that the representation of [a] client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interst of the lawyer." RPC 1.7(a)(2).

The Ardens first allege Attorneys were required to disclose that

Hartford was Attorneys' client under RPC 1.7(a)(2). However, the record contains no evidence that Hartford was a current client when Attorneys began representing the Ardens. The absence of evidence alone defeats this claim of breach. Further, although the Ardens cite Mr. Hayes as testifying that Attorneys "regularly serve[ ] as coverage counsel for the Hartford," App. Br. at 25, that was not his testimony. CP 203-04. The Ardens also do not contend that Attorneys represented Hartford as to coverage as against the Ardens or on a similar coverage issue in any other case.

Next, the Ardens allege Attorneys violated a duty by failing to disclose potential conflicts between Hartford and the Ardens, as *Tank* requires. However, the undisputed evidence is that Mr. Gibson discussed this very issue at his first meeting with them. CP 169. Moreover, the Ardens had personal counsel handling an **existing** coverage dispute before Attorneys were retained. They knew about their conflict with Hartford.

Finally, the Ardens allege Attorneys failed to disclose their business relationship with Hartford, including acting as panel counsel, in violation of RPC 1.7(a)(2). They improperly raise this issue for the first time on appeal. When reviewing summary judgment orders, this court does not consider issues not called to the attention of the trial court. RAP 9.12. RAP 2.5(a) (appellate court need not consider arguments raised for the first time on appeal), *LK Operating*, 181 Wn. 2d at 126

(same). The Ardens did not ask either attorney about this in depositions, so the record is silent about whether they made the disclosure at issue. The record does reveal that Mr. Cushman, who undisputedly spoke with the Ardens' full authority, knew and approved Hartford's plan to retain panel counsel. CP 320. He told the Ardens that Hartford was appointing defense counsel. CP 601. The Ardens most likely knew the relationship existed. As the issue was not raised below, Attorneys had no opportunity to obtain evidence to rebut it. The court should not consider it.

Furthermore, as a matter of law no concurrent conflict of interest existed, because there is no evidence of a "significant risk" that representation of the Ardens would be "materially limited" by Attorneys' responsibilities to Hartford or a personal interest of any of the Attorneys, a showing required under RPC 1.7(a)(2). Instead, there was significant proof that Attorneys' conduct – far from being "materially limited" – in fact met the standard of care in every way. CP 362-69; CP 508-26.

3. Attorneys did not violate any duty throughout the representation.

The Ardens allege many errors of attorney judgment in the course of the litigation. However, they did not produce expert testimony that Attorneys' acts fell outside the reasonable alternatives for lawyers complying with the standard of care. For that reason alone, summary

judgment on the issue of breach of the standard of care would have been proper. *Clark Cty. Fire Dist. No. 5*, 180 Wn. App. At 706.

Further, the record demonstrates there was no breach. The Ardens allege Attorneys allowed Hartford to influence their professional judgment. Specifically, they allege Attorneys failed to consider the Ardens' "interest" in swift resolution of the case and ignored their instructions in settlement negotiations and obeyed Hartford instead. The record simply does not bear this out.

The record establishes that Attorneys attempted to resolve the *Duffy* case swiftly, and there is no evidence they slowed it down. The case was already six months old when Hartford retained Attorneys, and they got to work right away, developing the defense and obtaining evidence. They met with the clients and established an objective to complete their evaluation of exposure and move toward settlement with Hartford dollars, even with a possible reservation of rights pending. They never deviated from that objective. *See* RPC 1.2(a). They considered both Mr. Arden's criminal issues and his health condition as they developed the defense. They served discovery on the Duffys. They kept the Ardens and Mr. Cushman apprised of what was happening, including sending them all communications regarding settlement.

When the $55,000 demand came in, the objective did not change:

the Ardens wanted to settle the case with Hartford's money. Attorneys told Hartford the Ardens wanted to settle at that amount **if** Hartford would pay. However, Attorneys could not force Hartford to approve a swift resolution. Even the Ardens' experienced coverage counsel did not do that, although he held the unique position of being able to settle at that number, then pursue Hartford for bad faith if they would not fund it. CP 367.

When it became clear Hartford would not fund settlement before discovery responses were due, Attorneys sought an extension of the deadline to respond to the $55,000 demand. The Ardens claim they were not consulted, but they knew soon after Attorneys asked for the extension, and they never objected. They knew soon after the Duffys agreed to the extension, and they never objected. Asking for an extension without express permission was not a breach of a lawyer's duty. *See* RPC 1.4(b), (c) (duty to consult with and keep client reasonably informed about status); CP 112 (38:4-15). In fact, it was the best choice given Hartford's refusal to fund. It gave the Ardens' defense and coverage counsel time to find bases for urging settlement at a higher number.

When the Ardens approved Attorneys' case valuation of $35,000, the case objective did not change. The instruction was still, "Try to settle with Hartford money." In fact, the Ardens, through Mr. Cushman, knew

before Attorneys that Hartford accepted the $35,000 valuation, that it was going to let the $55,000 demand expire, and that it was going to recommend starting with a $18,000 counteroffer. CP 876. They did not suggest any other course, and they did not object. When Attorneys conveyed the same message, Mr. Cushman responded, "I hope you succeed," and "Keep me posted on **all** offers and responses." CP 714 (emphasis added). He knew, of course, multiple exchanges within the $35,000 authority were likely. Again, when Hartford refused to fund the second demand of $40,000, Attorneys conveyed the plan to counter with $25,000 to Mr. Cushman, and they were still following the clients' instruction to try and settle the case with Hartford's money. Client and lawyer did not disagree, even though the Ardens were frustrated with Hartford's refusal to "pony up" more cash than either the Ardens or their personal counsel agreed the case was worth.

Breach of fiduciary duty is a question of law for the court. Breach of the standard of care may be determined as a matter of law when reasonable minds could not differ. Attorneys did not breach any duty to the Ardens, and this court can affirm the trial court's summary judgment ruling on the basis of breach. RAP 2.5(a).

4. Attorneys are not liable for Hartford's conduct.

The Ardens paint a bleak picture of Hartford's conduct in this

matter as well, hoping to color Attorneys by association. CP 526. Attorneys are, at most, independent contractors retained by Hartford. *See Tank*, 105 Wn. 2d at 390; *Evans v. Steinberg*, 40 Wn. App. 585, 588, 699 P.2d 797 (1985). Hartford's conduct is not attributable to Attorneys, and they cannot be liable for breach based on Hartford's acts or omissions.

E. This court may affirm summary judgment dismissal of both claims based on lack of legal causation.

The Ardens allege Attorneys' conduct caused Mr. Arden to be charged with a crime. They did not move for summary judgment on proximate cause, but Attorneys did. Proximate cause requires proof of two elements: cause-in-fact and legal causation. *Neilson v. Eisenhower & Carlson*, 100 Wn. App. 584, 591, 999 P.2d 42 (2000); *Micro Enhancement*, 110 Wn.App. at 433-34. "Legal causation rests on policy considerations determining how far the consequences of a defendant's own act should extend. It involves the question of whether liability should attach as a matter of law, even if the proof establishes cause in fact." *Neilson*, 100 Wn. App. at 591. This court should affirm summary judgment on the basis of legal causation. RAP 2.5(a).

This court may determine as a matter of law that, even if Attorneys erred, as a matter of law they are not liable for Mr. Arden being charged. Mr. Arden should not be permitted to benefit from his own bad acts

(shooting a neighbor's pet) by making his civil defense counsel pay for the consequences of them. Cases addressing malpractice of a criminal defense attorney are instructive. In Washington, as in the majority of jurisdictions, a criminal defendant suing his attorney for malpractice must prove by a preponderance of the evidence that he was actually innocent of the underlying criminal charges in order to maintain a malpractice action. *Ang v. Martin*, 154 Wn.2d 477, 486, 114 P.3d 637 (2005). Unless a criminal defendant shows his innocence, his illegal conduct is the cause of injuries flowing from criminal acts, and he *cannot* establish causation in a civil malpractice action. *Falkner v. Foshaug*, 108 Wn. App. 113, 118, 120, 29 P.3d 771 (2001). The rule prevents a defendant from benefiting from his own bad acts. *Ang*, 154 Wn.2d at 485.

Here, Mr. Arden admitted to shooting his neighbor's pet. He cannot prove by a preponderance of the evidence that he was actually innocent of the underlying criminal charges. In fact, he admitted the evidence was sufficient to convict him. His conduct is the cause of being charged with animal cruelty and being sued by the Duffys, and he alone should bear full responsibility for the consequences of shooting the dog. Even if Attorneys' later conduct had been negligent, Mr. Arden's greater culpability supplants it. The reasoning of this line of cases applies with equal or greater force to defeat proximate cause where, as here, civil

counsel has absolutely no control over the prosecutorial decisions or the criminal defense attorney's strategy in the criminal action – and should not be liable for the criminal consequences of his client's actions.

F. This court may affirm summary judgment of dismissal of both claims based on lack of cause in fact.

Cause in fact exists if the act complained of more likely than not caused the subsequent injury, and that the outcome would have been more favorable but for the alleged negligent conduct. *Clark Cty. Fire Dist. No. 5*, 180 Wn. App. at 707. This court may decide cause in fact if reasonable minds could not differ. *Id.* To avoid summary judgment on causation, the Ardens must produce evidence that a breach, including an error in judgment, did in fact affect the outcome. *Id.*; *Paradise Orchards Gen. P'ship v. Fearing*, 122 Wn. App. 507, 514, 94 P.3d 372 (2004).

1. This court should affirm dismissal of the malpractice claim because the undisputed evidence establishes lack of cause in fact.

The trial court properly held that Attorneys' alleged breaches of the duty of care did not cause Mr. Arden to be charged with a crime. The Ardens hypothesized that because the civil case did not settle before March 1, 2013, the prosecutor decided to charge Mr. Arden with a crime for shooting the Duffys' puppy. However, when the prosecutor decided to charge Mr. Arden, he undisputedly did not know the Duffys were suing the Ardens. His decision, therefore, could not have been influenced by the

state of the civil action. Moreover, the Duffys undisputedly planned to pursue the criminal charges even if their civil case settled in early 2013, and the Ardens and their counsel asked Hartford to fund settlement even knowing the Duffys wanted to try and influence the prosecutor to file charges.

Importantly, none of Attorneys' conduct **after** the prosecutor made his decision to charge Mr. Arden could have caused him to make that decision. There is no evidence to support proximate cause between **any** alleged negligence on or after March 1, 2013 and the criminal charge.

The Ardens submitted speculative statements that the status of a civil action might **in theory** have an impact on the prosecutor's decision to charge. However, the prosecutor's testimony that it **in fact** did not remains undisputed. Moreover, the Ardens' proffered testimony was inadmissible. It was inadmissible under ER 602 because the witnesses had no personal knowledge about the prosecutor's decision. Testimony about the Duffys' interactions with the prosecutor was inadmissible under ER 602 and ER 802 because none of the witnesses, Strophy, Whitehead, or Strait, established he had any personal knowledge of the hearsay proffered. The trial court may not consider such evidence in response to summary judgment. CR 56(e). Further, summary judgment is appropriate where proof of factual causation requires inferences that are remote or

unreasonable. *Lynn*, 136 Wn. App. at 310. The record fully supports the trial court's determination that no causal connection existed between Attorneys' alleged negligence and exposure to criminal charges. This court should affirm that decision.

2. The record reveals no causal link between Attorneys' conduct and the failure to settle.

The Ardens failed to meet their summary judgment burden on the broader question of causation: whether they would have fared better absent Attorneys' claimed negligence. As the Ardens conceded below and again on appeal, their "instruction" to settle in January through March 2013 was always conditioned on Hartford's funding the settlement:

> Ardens consistently insisted that Duffys' settlement demands be accepted **with funding from Hartford**.

App. Br. at 28 (emphasis added). However, the Ardens also concede Hartford was absolutely unwilling to fund the $55,000 settlement demand or the $40,000 settlement demand. *Id.* The Ardens admit the *Duffy* case did not settle precisely because of Hartford's refusal to pay either amount. Hartford maintained its position even though Hartford knew the Ardens "insisted" it accept and fund the demands, and even in the face of Mr. Cushman's threats to sue Hartford for bad faith. Although the Ardens say Attorneys ignored their instructions and obeyed Hartford's, they are incorrect. Attorneys obeyed the Ardens' instruction, which was always,

"Settle if you can do so with Hartford's money only." Attorneys could not accept the Duffys' demands without Hartford's agreement to finance the deal: **that** would be disobeying the Ardens' instruction.

In response to summary judgment, the Ardens failed to present any evidence that **any** conduct of Attorneys more likely than not caused a later injury, or that the outcome would have been more favorable but for Attorneys' alleged negligence. Without such evidence, summary judgment based on proximate cause was correct and should be affirmed.

3. The record reveals no causal connection between alleged breach of fiduciary duty and harm.

The Ardens presented no evidence that Attorneys' alleged breach of fiduciary duty caused them any harm. The Ardens' outcome in *Duffy v. Arden* would not have been any more favorable had Attorneys explained more fully its representation of Hartford as to unrelated coverage actions. Attorneys represented the Ardens for approximately five months, and during that time, (a) Attorneys used their independent judgment to develop a defense plan, settlement strategy, and case valuation; (b) Attorneys properly communicated with their clients regarding the case, specifically the settlement communications; and (c) Attorneys recognized the Ardens were its clients, not Hartford, and acted accordingly.

None of Attorneys' conduct, including asking for a deadline

extension, caused Hartford to be able to improve its coverage position. Hartford denied, and probably wrongfully denied, the tender of defense in June 2012. Hartford was required to compare the complaint against the Ardens' to the terms of their policy (the "eight corners" rule) to determine coverage, and there is "a significant burden on the insurer to determine if there are any facts in the pleadings that could give rise to a duty to defend." *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 53-54, 164 P.3d 454 (2007). If the policy conceivably covered any allegations, Hartford was required to defend the case. *Id.* at 53. It could have, but did not, defend under a reservation of rights as of June 2012. *See id.* at 54. Hartford ignored both (a) negligence allegations against Mr. Arden, incorrectly viewing the complaint as alleging only intentional misconduct, and (b) separate negligence allegations against Mrs. Arden. Either of these triggered the defense duty, but Hartford initially denied it. Unreasonable failure to defend is bad faith. *E.g.*, *Woo*, 161 Wn.2d at 68-69; *Griffin v. Allstate*, 108 Wn. App. 133, 146-47, 29 P.3d 777 (2001).

When Hartford agreed to defend about five months after it had denied the defense, the previous conduct estopped it from asserting coverage defenses. *Truck Ins. Exch. V. Vanport Homes, Inc.*, 147 Wn.2d 751, 759, 58 P.3d 276 (2001) (insurer that in bad faith refuses or fails to defend is estopped from denying coverage); *Kirk v. Mt. Airy Ins. Co.*, 134

Wn.2d 558, 563, 951 P.2d 1124 (1998) (same). Mr. Cushman recognized this legal proposition. He believed the Ardens were entitled to coverage by estoppel, and that Hartford could no longer effectively reserve its rights. Then Hartford failed to send a reservation of rights letter when accepting the tender in November 2012. Thus Hartford gave the Ardens a further basis for coverage: Hartford appeared to be defending without reservation of rights.

Because Hartford was already subject to coverage by estoppel for its bad faith denial of the tender in June 2012, sending a reservation of rights on January 30, 2013 would have no legal benefit to Hartford. Instead, its belated attempt to reserve rights, after defending without reservation for several months and following the initial denial of the case, gave the Ardens even more support for a bad faith claim. *See Safeco v. Butler*, 118 Wn.2d 383, 392, 823 P.2d 499 (1992); *Transamerica Ins. Group v. Chubb*, 16 Wn. App. 247, 554 P.2d 1080 (1976) (control of defense for 10 months before issuing reservation of rights). That is, sending the letter several months after accepting the tender actually **improved** the Ardens' coverage position against Hartford.

G. This court should affirm summary judgment of dismissal of both claims for failure to prove damages.

Attorneys moved for summary judgment on the element of

damages, although the Ardens did not. The measure of damages is the amount of loss actually sustained as a proximate result of the attorneys' allegedly negligent conduct. *Schmidt v. Coogan*, 181 Wn. 2d 661, 670, 335 P.3d 424 (2014). Where a legal malpractice plaintiff fails to show compensable damages, it cannot meet a necessary element of the relevant cause of action, and summary judgment for the defendant is appropriate. *LK Operating*, 181 Wn. 2d at 126. Moreover, being charged with a crime is not a compensable injury in a malpractice action. *See Falkner*, 108 Wn. App. at 119 (no compensable injury unless innocent person is wrongly convicted). The Ardens failed to support their claims for damages, and Attorneys ask that the trial court's ruling be affirmed.

1. The Ardens' claim for emotional distress was properly dismissed on summary judgment.

The Washington Supreme Court recently adopted a rule permitting recovery of emotional distress in limited types of legal malpractice cases:

> [T]he plaintiff in a legal malpractice case may recover emotional distress damages when significant emotional distress is foreseeable from the sensitive or personal nature of representation or when the attorney's conduct is particularly egregious. However, simple malpractice resulting in pecuniary loss that causes emotional upset does not support emotional distress damages.

Schmidt v. Coogan, 181 Wn. 2d at 671. In that case, plaintiff had retained counsel to pursue her slip-and-fall claim, and he negligently named the wrong defendant when filing the action. The Court held the subject matter

and pecuniary loss of the attorney-client relationship were not sensitive enough to meet the test. *Id.* at 671, 674. The lawyer's conduct was not "particularly egregious." *Id.* at 671. The Court affirmed the trial court's decision not to award emotional distress damages. *Id.* at 674-75.

In this case, there is no evidence that the nature of Attorneys' representation of the Ardens was "sensitive" or "personal." Attorneys were retained to defend civil claims involving destruction of a neighbor's pet. The scope of the representation is defined by Attorneys' letter and the Ardens' admissions in depositions that they understood that scope. Mr. Arden had admitted to the sheriff he had shot his neighbors' dog. He had been subject to criminal prosecution for almost a year already before Attorneys were appointed to defend him and his wife in the civil case. He had published his claimed PTSD to his neighbors already. Attorneys and the Ardens had no special relationship beyond attorney-client.

There is also no evidence Attorneys' conduct was "particularly egregious." Indeed, an experienced expert has opined that all of their conduct met the standard of care in Washington and was within the range of reasonable options for an attorney in the circumstances. CP 362-69; CP 508-27. The Ardens have alleged that Attorneys failed to get the case settled early, but in reality, Hartford refused to fund the amounts the Duffys demanded. While the Ardens may have been frustrated by their

insurer's decision, this is not the sort of "significant emotional distress" that would be foreseeable from Attorneys' alleged negligence.

Instead, this is a case of alleged emotional upset stemming not from Attorneys' supposed breaches, but from the course of litigation. A plaintiff generally cannot recover for litigation-induced emotional distress. *Lincor Contractors, Ltd. v. Hyskell*, 39 Wn. App. 317, 324, 692 P.2d 903 (1984), *rev. denied* 103 Wn.2d 1036 (1985) (expenses of litigation not recoverable beyond stated exceptions). *See also Knussman v. State of Maryland*, 272 F.3d 625, 642 (4th Cir. 2001) (plaintiffs' evidence was insufficient to justify an award of $375,000 in emotional distress damages; "litigation-induced emotional distress is never a compensable element of damages"); *Stoleson v. U.S.*, 708 F.2d 1217, 1223 (7th Cir. 1983) ("It would be strange if stress induced by litigation could be attributed in law to the tortfeasor"). The Ardens were involved in the litigation, and affected by its stressors, for months before Attorneys were retained – or did anything that the Ardens now claim was tortious.

2. The Ardens' claim for attorneys' fees was properly dismissed on summary judgment.

The Ardens argue that as a result of Attorneys' conduct, they were forced to incur fees in *Duffy v. Arden*, in *State v. Arden*, and in this case. They disregard settled Washington law holding a plaintiff may not recover

attorneys' fees in an action for legal malpractice or for breach of fiduciary duty, absent a contract, statute, or recognized equitable ground. *Schmidt*, 181 Wn. 2d at 679; *Shoemake v. Ferrer*, 143 Wn. App. 819, 831, 182 P.3d 992 (2008). Actions for breach of either fiduciary duty or duty of care are legal actions, not equitable actions, *Benke*, 172 Wn. App. at 296, so the Ardens' trust theory is not a recognized equitable ground.

Without referring to it, the Ardens invoke the ABC Rule, or equitable indemnity, which provides an equitable basis for recovery of attorneys fees when acts of a defendant ("A") exposes or involves plaintiff ("B") in litigation with a third party ("C"). *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 258, 110 P.3d 1145 (2005). The ABC Rule requires a showing of, among other things, "an exceptionally close causal nexus" "greater than in an ordinary tort action" between A's wrongful conduct and B's exposure to litigation. *Woodley v. Benson & McLaughlin*, 79 Wn. App. 242, 247-48, 901 P.2d 1070 (1995) (no recovery where predominant cause of legal expenses was B's tortious conduct). That is, A's conduct must be the **sole cause**:

> **[B] may not recover attorney fees or cost of litigation under the theory of equitable indemnity if, in addition to the wrongful act or omission of A, there are other reasons why B became involved in litigation with C.** [T]he critical inquiry is whether, apart from A's actions, B's own conduct caused it to be exposed or involved in litigation with C."

Jain v. J.P. Morgan Sec., Inc., 142 Wn. App. 574, 587, 177 P.3d 117, *review denied*, 164 Wn.2d 1022, 196 P.3d 135 (2008) (emphasis added), *cert. denied*, 556 U.S. 1105, 129 S.Ct. 1584, 173 L.Ed.2d 676 (2009). *Accord, Blueberry Place*, 126 Wn. App. at 359; *Lyzanchuk v. Yakima Ranches Owners Ass'n, Phase II, Inc.*, 73 Wn. App. 1, 10-11, 866 P.2d 695 (1994). Even the trust-law case the Ardens rely on requires this close causal nexus. *Allard v. Pac. Nat. Bank*, 99 Wn. 2d 394, 408, 663 P.2d 104, 112 (1983) ("Where litigation is **necessitated** by the inexcusable conduct of the trustee, however, the trustee individually must pay those expenses.").

Attorneys' conduct did not necessitate litigation with third parties. Mr. Arden's killing the neighbor's puppy was the principal reason he was embroiled in litigation with both the Duffys and the State. Further, the Duffys sued the Ardens long before Attorneys were even part of the case, and the prosecutor knew nothing about the civil action when he decided to charge Mr. Arden. Additionally, Hartford's refusal to fund the settlement led to litigation with Hartford, not Attorneys' conduct. In any event, Attorneys conduct is not the sole cause of the Ardens' involvement in litigation, and it cannot form a basis for recovery under this theory. The Ardens also provide no grounds on which to recover Mr. Cushman's fees in the instant action as a departure from established precedent. The trial

court did not abuse its discretion when it ruled the Ardens had not supported their claim for attorneys' fees. CP 250.

3. The Ardens' claim for disgorgement was properly dismissed on summary judgment.

A client whose attorney has represented clients in a conflict situation may be entitled to disgorgement of attorney fees. *See Eriks*, 118 Wn.2d at 462–63. A plaintiff seeking disgorgement need not show proximate cause and damages. *Id.* at 462. However, this relief is not available in every case:

> [W]hile attorney misconduct can be so egregious as to constitute a complete defense to a claim for fees, **not every act of misconduct will justify such a serious penalty**.

Kelly, 62 Wn. App. at 156 (emphasis added). Instead, it should only be applied where the claimed attorney misconduct is so egregious as to constitute a complete defense to a claim for fees. *Id.* at 157. The trial court has discretion to award or deny disgorgement. *Id.* at 156. In *Kelly*, the Court of Appeals affirmed the trial court's decision not to award disgorgement of the attorney fees paid by a nonclient. *Id.* at 157.

Here, the Ardens are not entitled to disgorgement. First, Attorneys' conduct is not the sort of egregious conduct contemplated in disgorgement cases. Additionally, as in *Kelly*, the party seeking disgorgement did not pay the fees. CR 17(a) provides, "Every action shall be prosecuted in the name of the real party in interest." Under this rule,

"the real party in interest is the person who, if successful, will be entitled to the fruits of the action." *Northwest Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 716, 899 P.2d 6 (1995). Even if the Ardens could be successful in their request for an order requiring defendants to disgorge the money, they would not be entitled to the fruits of the action. Hartford undisputedly paid Attorneys. The Ardens paid nothing. They are not the real parties in interest. The trial court, in denying the Ardens' bid for disgorgement, did not abuse its discretion.

VI. CONCLUSION

The trial court's decision to deny both of the Ardens' motions for partial summary judgment on breach, and their motion for reconsideration of the first order on summary judgment, should be affirmed. In response to the Ardens' motions, Attorneys produced significant evidence to rebut the Ardens' factual contentions regarding breach of the duty of care and breach of fiduciary duty. Therefore, the Ardens could not establish breach as a matter of law as the moving party.

Additionally, the trial court's decision to grant both of the Attorneys' motions for summary judgment should be affirmed on one or more grounds, each of which is fully supported by the record. For these reasons, Attorneys ask that the Court of Appeals affirm all of the trial court's rulings on appeal.

Respectfully submitted this 9th day of June, 2015.

LEE SMART, P.S., INC.

By: _____
Sam B. Franklin, WSBA No. 1903
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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on June 9, 2015, I caused service of the foregoing pleading on each and every attorney of record herein:

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No. 46991-0-II

Court of Appeals, Div. II, of the State of Washington

Roff Arden and **Bobbi Arden,**

Appellants,

v.

Forsberg Umlauf, P.S., et al.,

Respondents.

Reply Brief of Appellants

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1. Introduction

Ardens' brief argued that the undisputed facts show that Forsberg breached its fiduciary duties under the RPCs and under *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986), entitling Ardens to disgorgement of all fees and costs received by Forsberg in connection with the representation. Ardens also argued that insurance-assigned defense counsel stands in the position of a trustee over the insurance defense asset, which it must manage for the sole benefit of the insured client, and that breach of that trust entitles the client to additional equitable remedies.

Forsberg's response brief does not meaningfully engage these arguments. Instead, Forsberg asks the Court to ignore Ardens' arguments and affirm dismissal on alternative grounds—primarily, lack of evidence. However, Forsberg's arguments require the Court to turn a blind eye to undisputed evidence in the record that supports the elements of Ardens' claims. From the undisputed evidence, this Court can determine Forsberg's liability for breach of fiduciary duty as a matter of law. This Court should reverse summary judgment dismissal, grant Ardens' motion for partial summary judgment of liability for breach of fiduciary duty, and remand for further proceedings.

2. Clarification of Facts

Forsberg relies on the opinion testimony of its standard of care expert, Jeffrey Tilden, to make factual claims that have no reasonable basis in the actual, underlying evidence of the case.

Forsberg claims that Ardens do not dispute Tilden's opinion "that the decades-long practice of hundreds of reasonable, careful, and prudent attorneys across Washington has been to represent insurers in coverage and to simultaneously defend that insurer's policyholders in other matters." Brief of Respondents at 7 (citing CP 365). Tilden provides no foundation for this hyperbole. In fact, in his own practice, he studiously avoids such representation by only representing policyholders. CP 103-04. More importantly, Ardens **do** dispute Tilden's opinion, through the opinion of John Strait. Strait testified that such representation, far from being reasonable, careful, and prudent, creates an unwaivable conflict of interest. CP 422. Ultimately, whether such representation creates a conflict of interest is a question of law for the Court, not a question of expert opinion.

Relying on Tilden's opinion testimony, Forsberg claims that Ardens consented to Forsberg's negotiation strategy and authorized every counteroffer. Brief of Respondents at 9 (citing CP 110), 15 (citing CP 516-17), 18 (citing CP 110-11). Tilden's story cannot be reconciled with the underlying facts.

Ardens never consented to Forsberg's negotiation strategy. Coming out of their one meeting with Gibson, Ardens were not aware of **any** negotiation strategy:

> Q. And did you feel like there was a game plan going out?
> A. [by Roff Arden] Mr. Cushman – Mr. Gibson told us that he would – he was going to put together a … he assumed at this time that we were going to arbitration and that he was going to put together a … I don't know what you'd call it … a list

> or a … an evaluation of what he thought The Hartford's exposure would be in arbitration, and then from that point then they'd [Forsberg] be contacting us.

CP 546. Neither Gibson nor Hayes ever contacted Ardens to discuss a specific litigation or settlement strategy:

> A. [by Roff Arden] … All the offers and counteroffers that went on where they weren't – they didn't follow our instructions, they didn't communicate any, any plan or strategy to us. And it didn't seem to me like they were representing us at all.
> …
> A. … They did not act like my attorneys in that they didn't communicate to me what they were going to do. The only time they did was after the fact. They didn't communicate any strategy to me or anything else.
> …
> A. … they would never respond to my settlement offer – you know, to our settlement demands, not even as much as to say, "Here's our plan."

CP 574, 582. Gibson and Hayes never involved Ardens in any settlement-related decisions, CP 865.

Ardens never authorized any of the counteroffers. When the $55,000 settlement demand came in from Duffys, Ardens immediately informed Gibson of their desire to accept the $55,000 offer, so long as Hartford paid the settlement. CP 256. Ardens repeated their instruction to settle at $55,000 multiple times. CP 329, 344, 642, 673, 683. After reviewing Forsberg's litigation report to Hartford, Cushman expressed confidence in Forsberg's ability to get the case settled at $35,000 if litigation continued, but again repeated Ardens' demand to settle immediately if Hartford would not remove its reservation of rights:

> Arden has demanded that the case be settled within the limits to avoid his exposure to the uninsured claims. However, he i[s] OK with going forward to defend, as you guys are prepared to beat this claim, provided the carrier remove the ROR. … Short of that the carrier should settle.

CP 474.

The $55,000 offer was set to expire on March 4.[1] The morning of March 5, Hayes notified Cushman that he was going to extend a counteroffer of $18,000:

> Hartford is going to let the offer expire but has given us settlement authority up to our recommended $35K value. We are going to start with an $18k offer. Will keep you advised.

CP 263. Hayes did not ask for Ardens' consent; he told them about a decision that had already been made without their participation. Neither Hayes nor Gibson consulted with Ardens or sought their approval.

> Q. Did you or did you not get the client's authority to let that offer expire?
> A. [by Chris Gibson] Me, personally, I did not get the client's authority.

CP 183.

> Q. … Nobody from your office communicated that negotiation strategy to me or my client and got our consent to proceed that way?

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[1] Forsberg asserts the deadline was March 5, citing after-the-fact testimony of its own, favorable witness. Brief of Respondents at 16 (citing RP 444). However, the contemporaneous evidence indicates that Forsberg believed—and represented to Ardens—that the deadline was March 4. *E.g.,* CP 457 (the Phase Litigation Report, which states that the offer "is set to expire two weeks after the defendants received the plaintiff's discovery responses. Those responses were received on February 18, 2013. Thus, the offer will expire on close of business March 4, 2013.").

…

A. [By John Hayes] I don't recall talking to your clients about that, no.
Q. Okay. And Gibson says he didn't. So, if you didn't and –
A. If it wasn't one or the other of us, maybe we didn't.

CP 210.

After being notified of Forsberg's unilateral decision to follow Hartford's settlement instructions, and believing the offer had already expired by its own terms, Cushman responded to Hayes and Gibson, "I hope you succeed." CP 477, 295 ("The offer had already expired fifteen hours earlier. What else was there to say but 'good luck'."). Cushman's resigned response cannot reasonably be interpreted as communicating Ardens' consent to the counteroffer. The only reasonable conclusion is that Forsberg did not ask for consent and Ardens did not give it.

Likewise, Ardens never authorized the second counteroffer. When the second settlement demand of $40,000 came in, Ardens immediately instructed Forsberg to settle with Hartford funds. CP 883. Hartford notified Cushman and Hayes that it would not fund the settlement at $40,000 and instructed Forsberg to let the offer expire, then make a counteroffer at $25,000. CP 767. Cushman objected, warning Hartford and Hayes that their proposed course was bad faith and indicating that Ardens might exercise their right to settle. CP 770. Not 25 minutes later, Hayes rejected the $40,000 offer and made Hartford's counteroffer. CP 267. Neither Hayes nor Gibson had consulted with Ardens or sought their approval before making the counteroffer.

Q. … Do you know of any consent that you, or Mr. Hayes, or anybody else at Forsberg & Umlauf got to make that counteroffer from Arden?
A. [by Chris Gibson] I didn't know of any consent that I got and I can only speak for myself.

CP 198.

Q. So, this is you are making this response to Karp at the direction of Ronda Wein, aren't you?
A. [by John Hayes] Correct.
Q. Okay. Not at the direction of Ardens?
A. No. This was Hartford's direction.

CP 219. The only reasonable conclusion is that Forsberg did not seek Ardens' consent and Ardens did not give it. Ardens consistently opposed the settlement instructions Forsberg received from Hartford, but Forsberg never consulted with Ardens about the conflict. Forsberg's assertion that Ardens consented to the negotiation strategy and authorized the counteroffers has no reasonable basis in the facts of the case.

3. Argument

Ardens' appeal relates to two separate claims: a claim for breach of fiduciary duties (duty of loyalty) and a claim for legal malpractice (breach of the duty of care). Ardens' opening brief presented these claims separately because each requires a different analysis. Forsberg's responding brief conflates the two claims, incorrectly implying that the same analysis applies to both. This reply brief will continue to treat the claims separately and will address Forsberg's opposition arguments in the appropriate places.

Part 3.1 will address Ardens' breach of fiduciary duty claim. This Court can determine from the undisputed evidence that Forsberg owed fiduciary duties to Ardens under the Rules of Professional Conduct, under *Tank*, and as trustees over the insurance defense asset (Part 3.1.1). This Court can determine that Forsberg breached those duties by failing to consult with Ardens regarding potential and actual conflicts of interest and by placing the interests of Hartford above the interests of Ardens (Part 3.1.2). Finally, this Court can determine that Ardens are entitled to disgorgement of Forsberg's fees and other equitable remedies (Part 3.1.3). This Court should reverse the trial court's second summary judgment order, grant summary judgment in favor of Ardens on the breach of fiduciary duty claim, and remand for a determination of appropriate remedies.

Part 3.2 will address Ardens' legal malpractice claim. Ardens presented sufficient evidence to support each of the elements of this claim: duty (Part 3.2.1), breach (Part 3.2.2), causation (Part 3.2.3), and damages (Part 3.2.4). This Court should reverse summary judgment dismissal of the legal malpractice claim and remand for further proceedings.

3.1 Forsberg breached its fiduciary duties of undeviating loyalty to Ardens.

3.1.1 Forsberg owed fiduciary duties to Ardens under the RPCs, under *Tank*, and as trustees over the insurance defense asset.

Ardens' Brief described the fiduciary duties owed to the insured client by insurance defense counsel appointed under a reservation of rights:

the ordinary fiduciary duties of any attorney to a client; enhanced duties under *Tank* because of the reservation of rights; and duties of a trustee over the insurance defense asset. Ardens supported these duties with citations to the Rules of Professional Conduct, *Tank*, and multiple secondary sources consistent with *Tank* and the RPCs.

Forsberg argues that the secondary sources cited by Ardens to illustrate the duties outlined in the RPCs and *Tank* are not "legal authority." Brief of Respondents at 29-30. This argument is based on an unreasonably restrictive understanding of the term "legal authority." Forsberg would have the Court disregard any citation that is not a published opinion of a Washington appellate court.

Black's Law Dictionary defines "authority" as "A legal writing taken as definitive or decisive." Black's Law Dictionary 55 (3d pocket ed. 2006). The definition includes "secondary authority," which is "Authority that explains the law but does not itself establish it, such as a treatise, annotation, or law-review article." *Id.* at 56. Secondary authority is also "persuasive authority," defined as "Authority that carries some weight but is not binding on a court." The treatises cited by Ardens are the type of secondary sources that are commonly accepted and considered by Washington Courts as persuasive authority. *E.g., Del Rosario v. Del Rosario*, 116 Wn. App. 886, 898, 68 P.3d 1130 (2003) ("Viewing these Washington cases in conjunction with the secondary sources and cases from other jurisdictions, the rule that emerges is …"). There is no reason to disregard Ardens' secondary sources.

Forsberg argues that the secondary sources should be disregarded as expert opinion testimony stating conclusions of law. Brief of Respondents at 30. Forsberg faults Ardens for not presenting this "evidence" to the trial court. *Id.* This argument again betrays a misunderstanding of the concept of persuasive authority. Persuasive legal authority is not evidence. It is not expert opinion testimony. Ardens were not required to present the secondary sources to the trial court. Forsberg's proposed rule would defeat the purpose of appellate briefing to bring the legal issues more sharply into focus so that errors that were not perceived in the trial court can be corrected.

It is of note that Forsberg does not argue that the secondary sources are wrong. Indeed, the authorities cited by Ardens are all consistent with the Rules of Professional Conduct and the enhanced duties under *Tank*. The secondary sources aptly illustrate the practical application of those duties to the real-life context of insurance defense work. This Court should not only consider the principles and illustrations set forth in those sources, but also adopt them as legal duties of insurance-appointed defense counsel.

As set forth in Ardens' opening brief, an attorney owes undeviating loyalty to a client. The client of insurance-appointed defense counsel is the insured defendant. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 388, 715 P.2d 1133 (1986). Defense counsel has enhanced duties of "full and ongoing disclosure to the insured," under *Tank*, including full disclosure of potential conflicts of interest, all information relevant to the defense, and all activity involving settlement. *Tank*, 105 Wn.2d at 388-89. The insured client

should never have cause to question who defense counsel actually represents. Thomas V. Harris, *Washington Insurance Law*, § 17.05 (3d ed. 2010).

Defense counsel must obtain the client's prior approval regarding any settlement decisions. William T. Barker, et al., *Insurer Litigation Guidelines: Ethical Issues for Insurer-Selected and Independent Defense Counsel*, ABA Section of Litigation 2012 Insurance Coverage Litigation Committee CLE Seminar, March 1-3, 2012, at 13-15. The duty of loyalty does not permit defense counsel to disregard instructions from the insured client. *See* RPC 1.2(a) ("a lawyer shall abide by a client's decision whether to settle a matter"); RPC 1.4(a)(2) ("A lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished"). When the client disagrees with counsel's (or the insurer's) settlement position, it is counsel's duty to consult with the insured client to seek a resolution of the disagreement and to obtain the client's informed consent. *See* RPC 1.7, Comments [2]-[4] ("Resolution of a conflict of interest problem under this Rule requires the lawyer to … consult with the clients affected … and obtain their informed consent").

In addition to the ordinary fiduciary duties of any attorney to his or her client and the enhanced duties of insurance-assigned defense counsel under a reservation of rights, defense counsel owes the insured client the duties of a trustee managing a valuable asset for the benefit of the client.

Forsberg argues that trust law does not apply to the insurance context because the insurance policy does not expressly create a trust. Brief of Respondents at 26-27. This argument misses the point. Ardens do not

argue that an insurance policy creates an express trust. Rather, Ardens point out that when an insured is sued and the insurer carries out its duty to defend, a relationship is created between the insurer, insured, and defense counsel, which has all of the essential elements of a trust. In such situations, courts recognize what is called a "resulting trust." A *resulting trust* exists by implication, "based on the idea that the law should presume or infer or create a trust if parties put themselves into a certain situation." Bogert, George G., et al., *The Law of Trusts and Trustees*, § 452 (3d ed. 2007). It does not matter that the parties did not expressly create a trust, if their relationship is such that a trust should be implied.

Forsberg does not challenge Ardens' description of the relationship and do not argue that such a relationship should not create a resulting trust. When an insurer assigns defense counsel, the insurer sets its reserves, designating a specific amount of money for expenses of the insured's defense. *See* CP 320-21. Defense counsel must then manage its billable time and other expenses to use that insurance defense asset to provide the best defense for the benefit of the insured client. In doing so, defense counsel must use its own professional judgment and maintain undeviating loyalty to the insured client. This relationship bears all of the indicia of a trust. This Court should recognize it as such and hold that insurance-assigned defense counsel stands in the position of a trustee, subject to the duties of a trustee and the equitable remedies available for breach of those duties.

Because Forsberg breached its duties—its ordinary fiduciary duties, its enhanced *Tank* duties, and trust duties—the trial court erred in denying

Ardens' second motion for summary judgment and dismissing Ardens' breach of fiduciary duty claims. This Court should reverse.

3.1.2 Forsberg breached its fiduciary duties.

As set forth above, Forsberg, as insurance-assigned defense counsel under a reservation of rights, owed Ardens specific, enhanced duties. Forsberg breached those duties by taking on the representation without ever advising Ardens or seeking Ardens' informed consent for actual and potential conflicts of interest in the representation. Forsberg also breached its duties by placing the interests of Hartford above the interests of Ardens. These breaches also constitute breaches of Forsberg's duties as trustee over the insurance defense asset. The trial court should have granted Ardens' motion for partial summary judgment of liability for Forsberg's breach of fiduciary duties.

Forsberg argues that there was no conflict of interest at the time it accepted the representation. Brief of Respondents at 30-32. Forsberg's argument betrays a misunderstanding of conflicts of interest. Rule of Professional Conduct 1.7 requires a lawyer to withdraw or obtain informed consent not only when there is an actual, direct conflict, but any time there is **potential** conflict. *In re Disciplinary Proceeding Against Marshall*, 160 Wn.2d 317, 336-37, 157 P.3d 859 (2007). A potential conflict exists when a lawyer foreseeably might be tempted to favor an interest of the lawyer or of a non-client at the expense of an interest of the client; an actual conflict ripens when a lawyer must choose a course of action and the question is whose

interest will be sacrificed. *See* William T. Barker & Charles Silver, *Professional Responsibilities of Insurance Defense Counsel*, § 12.02 (2014).

It is clear from the record that Hartford was a long-term firm client of Forsberg & Umlauf.

> Q. Have you ever represented the Hartford in coverage?
> A. [by John Hayes] Yes.
> Q. When was the most recent time you've represented the Hartford in coverage?
> A. Oh, a few months ago I got a case in for them.
> …
> Q. … Did the Hartford bring work to Bradbury Bliss Reardon [former name of Forsberg & Umlauf in 1991 (*see* CP 202-03)] when you were there?
> A. You know, I think they did, but I didn't do it, and I didn't have any personal experience with it, but I think that's correct.
> …
> Q. Is the Hartford your client?
> A. It's the firm's client. … I share the Hartford with some other partners.

CP 203-04. Hayes was Forsberg's "go-to" attorney in the Seattle area. CP 120. The vast majority of Gibson's practice is insurance defense work assigned by Hartford. CP 165.

Forsberg never informed Ardens of their existing relationship with Hartford or of the conflict that could result:

> When The Hartford appointed John Hayes and William "Chris" Gibson as my counsel, neither of them informed me they represented The Hartford for decades as coverage counsel. Neither attorney revealed to me that they had any relationship with The Hartford. I never would have agreed to allow either of them to be my attorney if I had known.

CP 227 (Declaration of Roff Arden).[2]

That such a relationship creates a potential conflict is specifically called out in the comments to the RPCs. For example, there is a conflict if there is "significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee." RPC 1.7, Comment [13]. The lawyer's personal interest in pleasing the insurer creates a conflict in the same way that a legal duty of loyalty would. Barker, et al., *Ethical Issues*, at 3-4.

This potential conflict ripens into an actual conflict any time that the interests or instructions of the insured client conflict with those of the insurer. Defense counsel is then faced with the dilemma of whose interests to pursue and whose to sacrifice. Counsel's duty of loyalty to the insured client conflicts with counsel's obligations or interests toward the insurer. Counsel must either withdraw or, through consultation, convince either the insurer or the insured client to consent to compromise its own interests and permit counsel to proceed as desired by the other. That Forsberg fails to recognize this conflict of interest, even after it had ripened into an actual conflict, is particularly troubling.

Forsberg argues that it fulfilled its duty to disclose conflicts when Gibson informed Ardens in their initial meeting that there might be a

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[2] Forsberg argues that Ardens raise this issue for the first time on appeal. Brief of Respondents at 31-32. This Declaration of Roff Arden, submitted in support of Ardens' second motion for summary judgment, squarely addresses the issue. Forsberg did not offer any evidence to dispute Roff Arden's testimony that Forsberg failed to disclose the relationship.

coverage dispute between Ardens and Hartford. Brief of Respondents at 31. However, Forsberg's duty required much more. Forsberg was required to disclose to Ardens that such a coverage dispute would place **Forsberg** in a conflicted position. Forsberg had a duty to disclose that, at some point in the defense, Forsberg might have to choose between a defense strategy that would favor covered claims and one that would favor uncovered claims. Hartford might pressure Forsberg to favor uncovered claims, while Forsberg's duty to Ardens would require Forsberg to favor covered claims. If Hartford ever did instruct Forsberg to engage in a strategy that would favor uncovered claims, Ardens would have to decide whether to consent to allow Forsberg to follow Hartford's instructions. Forsberg never made such a disclosure.

Forsberg argues that it did not breach its duty because it claims to have followed Ardens' settlement instructions. Brief of Respondents at 33-35. Forsberg can only support this argument by ignoring the clear import of Ardens' repeated demands: "We need this case to settle." CP 642; CP 673 ("Ardens want this case settled on these terms."). When Hartford refused to fund the settlement and instructed a counteroffer, Forsberg was placed in a conflicted position: Forsberg could not follow one instruction without violating the other. Forsberg was duty-bound to consult with Ardens to find out how Ardens would like to respond. In order to remain loyal to Ardens, Forsberg had only two options: either convince Hartford to fund the settlement or convince Ardens to consent to the counteroffer. Instead, Forsberg ignored its client and followed Hartford's instructions:

Q. The Ardens never told you to engage in that strategy, did they?
[objection]
A. [by John Hayes] They don't have to tell me.
Q. They don't have to tell you?
A. No.
Q. Okay.
A. What they told me was to get it settled at fifty-five and Hartford pay it. That was rejected.
Q. But –
A. Now we're back to a clean slate and Hartford says, "By the way, we don't agree with the fifty, fifty-five, make this offer." So, we made the offer.

CP 214. Forsberg did not explain the situation to Ardens. Forsberg did not consult with Ardens regarding their options. Forsberg did not ask Ardens to consent to Hartford's plan of letting the offer expire and making a counteroffer. Forsberg did not even give Ardens time or opportunity to react to the developing situation. Hartford instructed, and Forsberg followed, without a single thought for the interests of Ardens, the insured client. Forsberg betrayed Ardens' trust and egregiously breached its fiduciary duties to Ardens by placing the interests of Hartford above the interests of Ardens.

The undisputed evidence demonstrates that Forsberg breached its duties to Ardens. This court should reverse the trial court's second summary judgment order, grant partial summary judgment in favor of Ardens on the issue of Forsberg's liability for breach of fiduciary duties, and remand to the trial court for a determination of damages.

3.1.3 Ardens are entitled to disgorgement of Forsberg's fees and other equitable remedies for breach of trust.

Forsberg argues that Ardens cannot demonstrate a causal link between Forsberg's' breach of fiduciary duty and Ardens' damages. Brief of Respondents at 41-43. However, Forsberg later concedes that a showing of proximate cause and damages is not required. *Id.* at 49. Forsberg's concession is correct. When a lawyer breaches fiduciary duties to a client, the client may be entitled to recover the lawyer's fees from the representation without any further showing of causation or damages. *Eriks v. Denver*, 118 Wn.2d 451, 462-63, 824 P.2d 1207 (1992). When a trustee breaches fiduciary duties, the court has broad equitable powers to craft a remedy to make plaintiffs whole and to prevent the trustee from benefitting from the breach of trust. *Gillespie v. Seattle-First Nat'l Bank*, 70 Wn. App. 150, 173, 855 P.2d 680 (1993); Restatement 2d of Trusts, § 205.

Forsberg argues that its conduct was not egregious enough to warrant disgorgement of fees. Brief of Respondents at 49. Throughout the representation, Forsberg ignored Ardens' instructions, failed to consult with Ardens regarding settlement, failed to advise Ardens of their options, and did nothing more than process the claim on behalf of Hartford. Ardens' insurance defense asset was being wasted to pay for attorneys who were not representing Ardens' interests in any meaningful way. Forsberg's breach of fiduciary duties was egregious and would be a complete defense to a claim for fees. Ardens are entitled to disgorgement of all fees paid to Forsberg for the representation.

Forsberg argues that Ardens are not the proper party to receive any disgorged fees because Ardens did not pay the fees. Brief of Respondents at 49-50. This is incorrect. In *Behnke v. Ahrens*, 172 Wn. App. 281, 294 P.3d 729 (2012), the court awarded the plaintiffs all fees received for representing them, plus prejudgment interest, *Id.* at 289, even though half of those fees were originally paid to the defendant attorney by a third party on the plaintiffs' behalf, *Id.* at 286. Even though a jury found that plaintiffs' only actual damages were the attorney fees plaintiffs paid, *Id.* at 287, the court found that the defendant attorney had violated the RPCs and that disgorgement of **all** fees was the proper remedy, *Id.* at 298. This case should be no different.

Additionally, Forsberg's fees were all derived from Ardens' insurance defense asset, which Ardens had purchased through their insurance premiums. Even though Hartford issued the checks, it only did so on behalf of Ardens. Furthermore, disgorgement is a remedy for Forsberg's breach of duties to Ardens, not to Hartford. Ardens, not Hartford, have been injured by Forsberg's' misconduct. Ardens, not Hartford, are the real party in interest. Ardens are entitled to disgorgement of all fees and costs paid to Forsberg for the representation.

Because Forsberg breached its duties as trustee of the insurance defense asset, Forsberg is subject to the court's broad, equitable powers to craft a remedy to both make Ardens whole and prevent Forsberg from benefiting from its breach of trust. In order for Ardens to be made whole, they must be reimbursed for attorney fees that they were compelled to incur

as a result of Forsberg's breach of trust. As a result of Forsberg's breaches, Ardens had to incur fees for personal counsel to represent their interests in the *Duffy* matter free from any conflicts, as well as in this matter seeking redress for Forsberg's breach. As a result of Forsberg's breaches, Roff Arden was charged with a felony and had to incur fees for criminal defense counsel. *See, e.g.,* CP 418, 424-25.

Forsberg argues that Ardens are not entitled to recover attorney fees incurred in *Duffy v. Arden*, *State v. Arden*, or this case because there is no recognized equitable ground for such an award. Brief of Respondents at 46-47. While courts have previously held that attorney fees are not awardable in an action for an attorney's breach of fiduciary duties, those cases did not involve claims against insurance defense counsel or for breach of trust. *E.g., Behnke v. Ahrens*, 172 Wn. App. 281, 294 P.3d 729 (2012). If this Court determines that Forsberg was a trustee over Ardens' insurance defense asset and that Forsberg breached its trust duties, this court has broad equitable discretion to determine a remedy. Breach of trust is a recognized equitable ground for an award of attorney fees. *Allard v. First Interstate Bank, N.A.*, 112 Wn.2d 145, 151-52, 768 P.2d 998 (1989). The award can include fees incurred throughout the litigation for breach of trust, including all fees at trial and on appeal. *Id.* This Court, or the trial court on remand, should award Ardens all of their fees incurred in the *Duffy* matter, in this case, and in the criminal case.

Forsberg argues that even under a breach of trust theory, Ardens are not entitled to recover attorney fees because Forsberg claims to not be at

fault for any of Ardens' litigation costs. Brief of Respondents at 48. Where litigation is necessitated by the inexcusable conduct of a trustee, the trustee is liable to pay those expenses. *Allard v. Pac. Nat'l Bank*, 99 Wn.2d 394, 408, 663 P.2d 104 (1983) (citing *Wolff v. Calla*, 288 F. Supp. 891, 894 (E.D. Pa. 1968)). A court should hold a trustee liable for fees when his conduct has been "of a gross or inexcusable nature." *Wolff v. Calla*, 288 F. Supp. at 894.

Forsberg's breach of its duties to Ardens was inexcusable. Forsberg entirely ignored its duty of loyalty to Ardens, disregarded Ardens' repeatedly expressed interests, failed to disclose conflicts and material information regarding the representation, and placed its own interests and the interests of Hartford above those of Ardens, the trust beneficiaries. An award of litigation expenses necessitated by Forsberg's breach is proper.

As a result of Forsberg's breaches, Ardens had to incur fees for personal counsel to represent their interests in the *Duffy* matter free from any conflicts, as well as in this matter seeking redress for Forsberg's breach. As a result of Forsberg's breaches, Roff Arden was charged with a felony and had to incur fees for criminal defense counsel. *See, e.g.,* CP 418, 424-25. Ardens have presented sufficient evidence to preclude summary judgment dismissal of this element of damages. This court should remand to the trial court to determine, in the first instance, an appropriate equitable remedy for Forsberg's breach of trust.

Forsberg argues that Ardens are not entitled to emotional distress damages. Those arguments are addressed in Part 3.2.4, below. The trial court should also have the opportunity to determine in the first instance whether

emotional distress damages are proper as part of an equitable remedy for breach of trust.

Ardens presented sufficient evidence to the trial court to establish Forsberg's duties and breach. At the very least, Ardens' evidence was sufficient to raise a material issue of fact to preclude summary judgment dismissal of Ardens' claims. This Court should reverse the trial court's decision on the second summary judgment motions, grant partial summary judgment in favor of Ardens on the issues of duty and breach, and remand to the trial court for a determination of damages.

3.2 Ardens presented sufficient evidence to support the elements of Ardens' malpractice claim, precluding summary judgment dismissal.

The trial court correctly determined that Forsberg owed a duty of care to Ardens and that there were disputes of material fact as to Forsberg's' breach. Ardens' brief presented evidence to support the elements of damages and proximate cause. Forsberg now argues, as alternative grounds for affirming dismissal, that Ardens cannot establish any of the elements of the malpractice claim. There is sufficient evidence in the record to support each of the elements.

3.2.1 Forsberg owed a duty of care as Ardens' defense counsel.

Forsberg argues that it had no duty of care regarding coverage issues or criminal charges because its scope of representation was limited to the defense of *Duffy v. Arden*. Brief of Respondent at 25-26. However, a limited

scope of representation does not limit the range of interests which defense counsel must bear in mind. Barker, et al., *Ethical Issues*, at 5. "A lawyer must respect all interests a client has, including primary interests that relate to the agreed goal of a representation and secondary interests that do not." *Id.* John Strait testified that Forsberg's duty of care included consideration of Ardens' mental health condition and exposure to criminal liability in crafting their defense strategy. CP 423-24. Forsberg was hired to represent **Ardens'** interests in the defense, not Hartford's. In crafting and carrying out a defense strategy, Forsberg had a duty to consider **all** of Ardens' interests, not just those that agreed with Hartford's interests.

3.2.2 Forsberg breached the duty of care.

Forsberg argues that Ardens presented no evidence that Forsberg's judgment decisions were outside the range of those that a reasonable and prudent lawyer would make. Brief of Respondents at 22, 32-33. This is not true. John Strait testified,

> It is my opinion that John Hayes and Chris Gibson **failed to exercise reasonable judgment** in choosing to follow a negotiation strategy dictated by The Hartford and not approved by, the Ardens; by letting settlement offers expire, without the Ardens' knowledge or consent; and by making counteroffers without the Ardens' knowledge or consent. **These actions were not within the range of choices a reasonable, careful, and prudent attorney in Washington would adopt.** My opinion in this regard is not simply a disagreement by me on whether John Hayes, Chris Gibson, and Forsberg & Umlauf selected the "best" choice in how they handled this matter with the Ardens. **It is my opinion the choices they made were not within the range of**

acceptable choices a reasonable attorney performing to the standard of care would make.

CP 421 (emphasis added). Ardens presented sufficient evidence for a reasonable fact finder to conclude that Forsberg breached its duty of care. Summary judgment dismissal was improper.

3.2.3 Forsberg's breach caused damage to Ardens.

Forsberg argues that Ardens cannot demonstrate that Forsberg's breaches were a cause-in-fact of Roff Arden being charged with a felony. Brief of Respondents at 38-40. Ardens presented sufficient evidence to survive summary judgment on this issue.

In any malpractice case, the plaintiff must prove cause-in-fact by showing what would more likely than not have happened if the defendants had not breached their duty of care. Forsberg's evidence showed what happened as a result of their breach: the prosecutor had no knowledge of the civil case and did not consider it. CP 441. Ardens' evidence, on the other hand, showed what would have happened absent a breach: the prosecutor would have been informed of the settlement, would have considered it as a part of the charging decision, and likely would have reduced the charges, placed Roff Arden in a diversion program, or not have charged him at all. *See* CP 417-18, 424-25, 924-25.[3] This evidence meets Ardens' burden of production on the issue of cause-in-fact. Summary judgment was improper.

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[3] Forsberg argues that some of this evidence is inadmissible. However, Forsberg did not object in the trial court to the testimony of Tim Whitehead (CP 417-18) or John Strait (CP 424-25) on this issue. *See* CP 957-58 (Forsberg's motion to strike). Forsberg has waived any objections by failing to make them below. *Bonneville v. Pierce*

Forsberg argues that Ardens cannot demonstrate legal cause because a criminal defendant cannot prevail in a malpractice action without demonstrating his actual innocence. Brief of Respondents at 36-38. However, this is not a malpractice case against a **criminal** defense attorney whose negligence resulted in a guilty verdict. Ardens' claim is that Forsberg's negligence resulted in Roff Arden being **charged** with a felony. As actual guilt is not required for charges to be brought, so actual innocence is not required to show that the charges were a result of Forsberg's negligence.

Forsberg argues that it cannot be responsible for the criminal charges when it has no control over the charging decision. Forsberg did have the opportunity to **influence** the charging decision, however. As demonstrated by Ardens' evidence, swift settlement could have caused the prosecutor not to charge Roff Arden. Principles of legal cause do not bar Ardens' malpractice claim.

3.2.4 Ardens are entitled to emotional distress damages.

Forsberg argues that Ardens' emotional distress is not recoverable because it stemmed only from the ordinary stress of litigation. Brief of Respondents at 46. However, Forsberg does not—indeed, cannot—point to any evidence in the record that indicates that Ardens' emotional distress was caused by the course of litigation rather than by Forsberg's' own conduct. Roff Arden testified his distress was caused by Forsberg's' conduct:

Cnty., 148 Wn. App. 500, 509, 202 P.3d 309 (2008) Mr. Strophy's qualified expert opinion testimony (CP 924-25) was not excluded by the trial court. CP 250.

Q. Okay. In this lawsuit where you're suing Forsberg & Umlauf are you claiming damages related to PTSD?
A. [by Roff Arden] Yes.
Q. And tell me about that.
A. Their actions, or inactions, basically resulted in my being re-traumatized.
Q. How is that?
A. … All the offers and counteroffers that went on where they weren't – they didn't follow our instructions, they didn't communicate any, any plan or strategy to us. And it didn't seem to me like they were representing us at all.

The basic nut with PTSD is, you can't trust somebody. Now, I have to place my trust in attorneys provided to me by the insurance company. We were told they were my attorneys: "They're your attorneys."

Okay. And they weren't acting like my attorneys. And when the specter of criminal prosecution was raised and they did nothing, that was a re-traumatization.

CP 574. Summary judgment was improper.

4. Conclusion

The trial court erred in denying Ardens' second motion for partial summary judgment and dismissing Ardens' breach of fiduciary duty claims. The trial court also erred in granting Forsberg's motion for summary judgment on Ardens' legal malpractice claim where there were disputed issues of material fact. This Court should reverse the trial court's summary judgment orders, grant partial summary judgment to Ardens on Forsberg's liability for breach of fiduciary duties, and remand to the trial court for further proceedings.

Respectfully submitted this 23rd day of July, 2015.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellants

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on July 23, 2015 I caused the original of the foregoing document, and a copy thereof, to be served by the method indicated below, and addressed to each of the following:

Court of Appeals Division II 950 Broadway, #300 Tacoma, WA 998402	____ U.S. Mail, Postage Prepaid ____ Legal Messenger _____ Overnight Mail _____ Facsimile _XX_ Electronic Mail
Sam B. Franklin Pamela J. DeVet Lee Smart P.S., Inc. 1800 One Convention Place 701 Pike Street Seattle, WA 98101-3929 sbf@leesmart.com pdj@leesmart.com jaj@leesmart.com mvs@leesmart.com	____ U.S. Mail, Postage Prepaid _____ Legal Messenger _____ Overnight Mail _____ Facsimile _XX_ Electronic Mail

DATED this 23rd day of July, 2015.

/s/ Rhonda Davidson
Rhonda Davidson, Legal Assistant
Cushman Law Offices, P.S.
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Arden v. Forsberg & Umlauf

Court of Appeals of Washington, Division Two

January 22, 2016, Oral Argument; May 3, 2016, Filed

No. 46991-0-II

Reporter
193 Wn. App. 731; 373 P.3d 320; 2016 Wash. App. LEXIS 944

ROFF ARDEN ET AL., *Appellants*, v. FORSBERG & UMLAUF PS ET AL., *Respondents*.

Subsequent History: Review granted by Arden v. Forsberg Umlauf, PS, 2016 Wash. LEXIS 1047 (Wash., Sept. 28, 2016)

Prior History: **[***1]** Appeal from Mason County Superior Court. Docket No: 13-2-00175-0. Judge signing: Honorable Amber L Finlay. Judgment or order under review. Date filed: 12/15/2014.

Arden v. Prop. & Cas. Ins. Co., 2013 U.S. Dist. LEXIS 94957 (W.D. Wash., July 8, 2013)

Case Summary

Overview
HOLDINGS: [1]-Attorneys retained by the insurer to defend the insureds under a reservation of rights did not breach their fiduciary duty of loyalty to the insureds by virtue of their long-standing relationship with the insurer that included representing the insurer in coverage cases because there was no violation of the conflict of interest rules of Wash. R. Prof. Conduct 1.7, Wash. R. Prof. Conduct 5.4(c), or Wash. R. Prof. Conduct 1.8(f)(2); [2]-The attorneys were not required to disclose to the insureds their relationship with the insurer; [3]-The attorneys did not violate their fiduciary duty of loyalty to the insureds by not attempting to persuade the insurer to fund a settlement demand as requested by the insureds because such a duty would be inconsistent with an attorney's role in a reservation of rights defense.

Outcome
The trial court's grant of summary judgment in favor of the attorneys was affirmed on both the breach of the fiduciary duty of loyalty and legal negligence claims.

Counsel: *Jon E. Cushman* and *Kevin Hochhalter* (of *Cushman Law Offices*), for appellants.

Sam B. Franklin and *Pamela J. DeVet* (of *Lee Smart PS*), for respondents.

Judges: Authored by Bradley A. Maxa. Concurring: Lisa Sutton, Rich Melnick.

Opinion by: Bradley A. Maxa

Opinion

[*736] [323]**

¶1 MAXA, A.C.J. — Roff and Bobbi Arden appeal the trial court's summary judgment order dismissing their claims against Forsberg & Umlauf PS, and attorneys John Hayes and William "Chris" Gibson (collectively Forsberg) for breach of fiduciary duties and legal malpractice. Property and Casualty Insurance Company of Hartford (Hartford), the Ardens' homeowners' insurance company, retained Forsberg to defend a lawsuit filed against the Ardens. Hartford provided the defense under a reservation of its rights to deny coverage for any judgment entered against the Ardens.

¶2 First, the Ardens argue that Forsberg breached its fiduciary duty of loyalty to them by defending them in a reservation of rights context while also representing **[***2]** Hartford in other cases. We hold as a matter of law that Forsberg's representation of the Ardens while it also represented Hartford did not create a conflict of interest and that Forsberg had no obligation to notify the Ardens that they represented Hartford in other cases. We also hold that there **[*737]** is no evidence that Forsberg breached its duty of disclosure regarding the potential conflicts of interest between Hartford and the Ardens.
[324]**

¶3 Second, the Ardens argue that Forsberg breached its fiduciary duty of loyalty to them during settlement negotiations. We hold that (1) as a matter of law, Forsberg had no duty to the Ardens to persuade Hartford to accept the claimants' initial settlement offer; (2) there is no evidence that Forsberg breached a fiduciary duty regarding the Ardens‘ interest in a swift resolution of the lawsuit; (3) a question of fact exists as to whether Forsberg breached its duty to consult with the Ardens before rejecting settlement demands, but there is no evidence that any breach injured the Ardens; and (4) even if Forsberg had a duty to consult with the Ardens before making settlement offers, there is no evidence that Forsberg breached any such duty regarding its first **[***3]** settlement offer and that the breach of any duty for the second settlement offer injured the Ardens.

¶4 Third, the Ardens argue that Forsberg was negligent in requesting an extension of the start of settlement negotiations when they had an interest in a prompt settlement. We hold that there is no evidence that Forsberg was negligent regarding its judgment decision to extend the start of settlement negotiations.

¶5 Accordingly, we affirm the trial court's grant of summary judgment in favor of Forsberg on both breach of the fiduciary duty of loyalty and legal negligence and the denial of the Ardens' summary judgment motions.

FACTS

¶6 The Ardens and Wade and Anne Duffy were neighbors in Shelton. In December 2011, Roff Arden shot and killed the Duffys' puppy. He claimed that the shooting occurred after the puppy and another dog chased him and Bobbi down their driveway. The Mason County Sheriff's Office investigated, and referred the investigation to the prosecutor's office to pursue animal cruelty charges.

[*738] *Lawsuit and Tender of Defense to Hartford*

¶7 The Duffys filed suit against the Ardens in May 2012 after settlement negotiations broke down. The lawsuit apparently alleged that the Ardens were liable for **[***4]** (1) willful conversion of the dog, (2) malicious injury, (3) intentional or reckless infliction of emotional distress, and (4) gross negligence and willful or reckless property damage.[1] The Ardens requested insurance coverage for the lawsuit from Hartford under the liability portion of their homeowners' insurance policy. Hartford initially refused to defend the lawsuit based on an intentional act exclusion in its policy.

¶8 In October 2012, the Ardens retained new personal counsel, Jon Cushman. Cushman demanded that Hartford defend and indemnify the Ardens against the Duffy lawsuit because the complaint contained some negligence allegations. Hartford agreed to defend the Ardens. Hartford informed Cushman that it intended to defend under a reservation of its rights to deny coverage for any judgment, and Cushman stated that he was “ok” with Hartford's panel counsel[2] defending the case. Clerk's Papers (CP) at 320. Cushman informed the Ardens that Hartford had agreed to defend but under a reservation of rights, and that he would continue to provide coverage advice to Arden and to monitor the defense. However, Hartford did not send the Ardens **[***5]** a letter reserving its rights to deny coverage until January 30, 2013.

Forsberg Representation

¶9 Hartford retained Forsberg to represent the Ardens, and Forsberg assigned attorneys Hayes and Gibson to the case. Hartford was one of Forsberg's clients, and Hayes was **[*739]** one of the firm's partners who regularly worked on Hartford cases. Approximately 30 to 35 percent of Hayes's practice involved defending Hartford's insureds. He also had represented Hartford in coverage matters. A substantial part of Gibson's practice involved defending Hartford's insureds.

¶10 On November 27, 2012, Forsberg sent a letter to the Ardens informing them that Hartford had retained Forsberg to defend **[**325]** the Duffy lawsuit. The letter stated that Forsberg's representation was limited to defending the Ardens in the lawsuit and that Forsberg would not provide any insurance coverage advice to either Hartford or the Ardens. The letter also stated, “Unless instructed otherwise, we will assume that any settlement authority or instructions we receive from the Hartford to settle are given with your consent and will

[1] Neither party included a copy of the Duffys' complaint in the appellate record.

[2] “Panel counsel” generally refers to an attorney who is regularly retained by a particular insurer.

proceed accordingly." **[***6]** CP at 427. The letter did not inform the Ardens that Forsberg regularly defended Hartford's insureds and had also represented Hartford in coverage matters.

¶11 Gibson met with the Ardens in December. At the meeting, Gibson explained that he expected Hartford to issue a reservation of rights letter and that there could be a coverage dispute. He further explained that Forsberg's only role was as the Ardens' defense attorneys. He told the Ardens that his goal was for Hartford to pay full indemnity for the lawsuit despite any reservation of rights.

Settlement Negotiations

¶12 Forsberg served discovery requests on the Duffys in early January 2013. On January 18, the Duffys made a settlement demand of $55,000 to both Cushman and Forsberg. The deadline to respond to the demand was January 28. Cushman immediately sent an email to Forsberg stating that the Ardens would accept the offer provided that Hartford pay the settlement. On January 22, Cushman also sent Forsberg and Hartford an email stating that the Ardens wanted to accept the offer provided that Hartford would pay and demanding that Hartford fund the settlement.
[*740]

¶13 Hartford was not willing to settle the case for $55,000 at that time because it did not have **[***7]** discovery responses that would have provided documentation regarding the claimed damages and information about case value. Forsberg emailed Cushman that it had requested an extension of time to respond to the settlement demand until after the Duffys had responded to discovery requests. Hartford sent a similar email to Cushman. Forsberg later emailed Cushman and informed him that the Duffys had agreed to extend the time for responding to their settlement demand until two weeks after they answered discovery. The new projected settlement deadline was March 4. Cushman did not object to the extension at that time.

¶14 After receiving the Duffys' discovery responses, Forsberg prepared a detailed litigation report and case evaluation and provided a draft to Cushman for review before sending it to Hartford. Forsberg recommended that Hartford attempt to settle the case for up to $35,000. Cushman sent Forsberg an email with several substantive changes, and concluded, "I bet you can settle the case for the $35,000 you estimate in value." CP at 693. Cushman did not tell Forsberg that he thought the value was too low or that he should recommend a higher settlement value to Hartford.

¶15 On March 4, Hartford informed **[***8]** Cushman that it planned to allow the deadline for the $55,000 demand to expire and then continue negotiations. On March 5, Forsberg informed Cushman by email that Hartford had given Forsberg settlement authority up to $35,000, and that they were going to start with an $18,000 offer. Cushman responded, "I hope you succeed. I will stay out of the loop. Keep me posted by copy on all offers and responses." CP at 714. Cushman also told the Ardens that Hartford was going to start with an $18,000 offer. Neither Cushman nor the Ardens objected to this offer. Roff Arden expected that the **[*741]** parties would negotiate back and forth and probably get the case settled for $35,000.

¶16 Forsberg conveyed an $18,000 settlement offer to the Duffys later on March 5. The Duffys initially rejected the counteroffer without extending a new offer. However, on March 12 Cushman contacted the Duffys' attorney directly and asked him to move to a midpoint. The attorney responded with an email to Forsberg and Cushman offering to settle for $40,000 if accepted by the end of the day on March 14. On March 14, Hartford informed Cushman that it would be allowing the $40,000 demand to expire and would make a counteroffer of $25,000. **[***9]** An hour after Hartford's email to Cushman, Forsberg communicated the $25,000 offer to the Duffys' attorney. Cushman did not object **[**326]** to this offer at the time, but he later argued that Hartford was acting in bad faith by not accepting the $40,000 demand.

¶17 Later on March 14, the Duffys' attorney sent an email to Forsberg and Cushman rejecting the $25,000 offer and stating that no new offers would be made. At that point, negotiations stopped.

Criminal Charges

¶18 On March 13, the Mason County Prosecuting Attorney charged Arden with one count of first degree animal cruelty with a firearm enhancement. The prosecutor was unaware of the Duffys' lawsuit until after he filed the information.

Lawsuit Against Hartford and Forsberg

¶19 On March 15, the Ardens filed a lawsuit against Hartford alleging that Hartford had acted in bad faith in handling their claim. The Ardens then amended their complaint to add Forsberg and Hayes as defendants and alleged that Forsberg had committed legal malpractice. The Ardens later filed a second amended complaint adding Gibson as a defendant and asserting a claim that Forsberg and its attorneys had breached their fiduciary duties.
[*742]

¶20 The Ardens, Hartford, Forsberg, and the Duffys **[***10]** participated in mediation in August 2013. Hartford funded a settlement of the Duffys' lawsuit against the Ardens, the Duffys agreed to recommend to the prosecutor that criminal charges not be pursued, and the Ardens dismissed their claim against Hartford. The only matter not settled was the Ardens' claims against Forsberg, Hayes, and Gibson.

Summary Judgment

¶21 Both the Ardens and Forsberg filed multiple summary judgment motions regarding the Ardens' breach of fiduciary duty and legal negligence claims. The trial court granted summary judgment in favor of Forsberg on all the Ardens' claims. The trial court denied the Ardens' summary judgment motions. The Ardens appeal the trial court's summary judgment orders.

ANALYSIS

A. STANDARD OF REVIEW

¶22 We review a trial court's order granting summary judgment de novo. *Lyons v. U.S. Bank Nat'l Ass'n*, 181 Wn.2d 775, 783, 336 P.3d 1142 (2014). We review the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013).

¶23 Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome **[***11]** of the litigation." *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011). If reasonable minds can reach only one conclusion on an issue of fact, that issue may be determined on summary judgment. *Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 649, 336 P.3d 1112 (2014), *cert. denied*, 135 S. Ct. 1904 (2015).
[*743]

¶24 The moving party bears the initial burden of showing that there is no genuine issue of material fact. *Lee v. Metro Parks Tacoma*, 183 Wn. App. 961, 964, 335 P.3d 1014 (2014). A moving defendant can meet this burden by showing that there is an absence of evidence to support the plaintiff's case. *Id.* The burden then shifts to the plaintiff to come forward with sufficient evidence to establish the existence of each element of the plaintiff's case. *Id.* If the plaintiff does not submit such evidence, summary judgment is appropriate. *Id.*

B. ATTORNEY'S FIDUCIARY DUTIES – RESERVATION OF RIGHTS DEFENSE

1. General Principles

[1] ¶25 An attorney owes fiduciary duties to his or her client. *VersusLaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 333, 111 P.3d 866 (2005). Breach of a fiduciary duty imposes liability in tort. *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 433, 40 P.3d 1206 **[**327]** (2002). The plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that fiduciary duty, (3) resulting injury, and (4) that the breach of duty proximately caused the injury. *Id.* at 433-34.

[2, 3] ¶26 The Rules of Professional Conduct (RPC) generally outline an attorney's fiduciary duties. *See Eriks v. Denver*, 118 Wn.2d 451, 457, 824 P.2d 1207 (1992); *Cotton v. Kronenberg*, 111 Wn. App. 258, 265-66, 44 P.3d 878 (2002). Whether a fiduciary duty exists under the RPCs and whether an attorney has breached a fiduciary **[***12]** duty are questions of law. *See Eriks*, 118 Wn.2d at 457-58.

2. Duty of Loyalty Under the RPCs

[4] ¶27 The Ardens allege that Forsberg breached its fiduciary duty of loyalty to them. The RPCs contain two rules addressing the duty of loyalty that potentially apply when an insurer retains an attorney to defend its

insured. First, RPC 1.7 provides:

> **[*744]** (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

RPC 1.7(b) states that if a concurrent conflict of interest exists, a lawyer may represent a client if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client" and "each affected client gives informed consent, confirmed in writing." RPC 1.7(b)(1), (4).

¶28 Second, RPC 5.4(c) states:

> A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render **[***13]** legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

See also RPC 1.8(f) ("A lawyer shall not accept compensation for representing a client from one other than the client unless: … (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship.").

3. Defense Attorney Duties under *Tank*

[5] ¶29 In *Tank v. State Farm Fire & Casualty Co.*, the Supreme Court adopted specific criteria regarding the fiduciary duty of loyalty for insurer-retained attorneys defending insureds when the insurer is providing a defense under a reservation of rights to deny coverage. 105 Wn.2d 381, 388, 715 P.2d 1133 (1986). First, the court emphasized that a defense attorney owes a duty of loyalty to the insured/client, not to the insurer, consistent with RPC 5.4(c). *Id.*

> **[*745]** In a reservation of rights defense, RPC 5.4(c) demands that counsel understand that he or she represents only the *insured*, not the company. … "[T]he standards of the legal profession require undeviating fidelity of the lawyer to his client. No exceptions can be tolerated."

Id. (second alteration in original) (quoting *Van Dyke v. White*, 55 Wn.2d 601, 613, 349 P.2d 430 (1960)).

¶30 Second, a defense attorney owes a "duty of full and ongoing disclosure to the insured." *Tank*, 105 Wn.2d at 388. This duty includes three aspects: **[***14]** (1) "potential conflicts of interest between insurer and insured must be fully disclosed and resolved in favor of the insured," and the dictates of RPC 1.7 must be strictly followed; (2) "all information relevant to the insured's defense, including a realistic and periodic assessment of the insured's chances to win or lose the pending lawsuit, must be communicated to the insured"; and (3) "*all* offers of settlement must be disclosed to the insured as those offers are presented" and "the insured must be fully apprised of all activity involving settlement, whether the settlement offers or rejections come from the injured party or the insurance company." *Id.* at 388-89.[3]

[328]** C. Defense Attorney's Relationship with Insurer

¶31 The Ardens argue that Forsberg breached its fiduciary duty of loyalty to them by representing them in the Duffy lawsuit despite its long-standing **[***15]** relationship with Hartford that included representing Hartford in coverage cases. The Ardens claim that this relationship created a conflict of interest for Forsberg as a matter of law because Hartford was defending under a reservation of rights to deny coverage. We disagree.

[*746] 1. Expert Disagreement

¶32 Whether Forsberg's representation of Hartford in coverage cases precludes Forsberg from defending Hartford's insured in a reservation of rights case is a question of first impression in Washington. The parties submitted expert declarations that disagreed on this issue. The Ardens' expert was John Straight, a Seattle

[3] The Ardens also argue that the right to a defense is a valuable asset, and that defense counsel becomes a "trustee" over the insurance defense asset and owes the insured the duties of a trustee. However, they cite no authority to support this novel argument. We decline to hold that Forsberg somehow became a trustee by undertaking a reservation of rights defense.

University law professor, who stated that Forsberg's representation of Hartford in coverage cases and its longtime attorney-client relationship with Hartford created a nonwaivable conflict of interest. Forsberg's expert was Jeffery Tilden, an experienced insurance coverage attorney, who stated that it is a reasonable, common practice for attorneys to represent an insurer in coverage matters and also represent that insurer's insureds in other matters.

¶33 Because the breach of a fiduciary duty is a question of law, the trial court – and an appellate court on review – are free to disregard **[***16]** expert opinions regarding whether an attorney has breached a fiduciary duty. *Eriks*, 118 Wn.2d at 458. Therefore, we are not bound by either opinion. *Id.* Instead, we acknowledge that there is a difference of opinion among experts on this issue.

¶34 Thomas Harris, a Washington insurance law commentator, stated in the third edition of his treatise that an insurer violates RPC 1.7 when it retains an attorney who represents the insurer as a current client to also represent its insured. THOMAS V. HARRIS, WASHINGTON INSURANCE LAW §11.02, at 11-3 to 11-4 (3d ed. 2010). However, in his 2015 cumulative supplement Harris deleted this statement, instead noting the difference of opinions on this issue. HARRIS, §11.02, at 27-28 (Supp. 2015).[4] In the supplement, Harris does not support either position.
[*747]

[6] ¶35 To resolve the legal issue of whether Forsberg's representation of Hartford precluded Forsberg from representing the Ardens in a reservation of right context, we analyze **[***17]** RPC 1.7 and the *Tank* guidelines. We conclude that an attorney who represents an insurer in coverage cases is not automatically prohibited from representing that insurer's insured when the insurer reserves its right to deny coverage.

2. Conflict of Interest Under RPC 1.7

¶36 The Ardens argue that an attorney who represents an insurer has a conflict of interest under RPC 1.7 when representing that insurer's insured in a reservation of rights case. RPC 1.7(a) states that a concurrent conflict of interest exists only if (1) the representation of one client will be directly adverse to another client, or (2) there is a significant risk that the representation of one client will be materially limited by the attorney's responsibility to another client. Neither situation exists here.

¶37 First, Hartford's interests were not directly adverse to the Ardens' interests with regard to Forsberg's defense of the Duffy lawsuit. Hartford and the Ardens did have adverse interests with regard to coverage issues, but Forsberg made it clear that it did not represent either Hartford or the Ardens on those issues. Hartford's interests and the Ardens' interests were aligned on the defense **[**329]** aspect of the claim. Both were interested in winning the case **[***18]** or settling it.

¶38 Second, as long as the defense attorney follows the criteria outlined in *Tank*, there is not a significant risk that the attorney's representation of the insured will be materially limited by the attorney's representation of the insurer in other cases. A defense attorney handling a reservation of rights case knows that, under *Tank*, he or she represents only the insured, not the insurer, and owes a duty of loyalty to the insured that has no exceptions. *Tank*, 105 Wn.2d at 388. Because the *Tank* criteria form the foundation of any **[*748]** reservation of rights defense, a conflict of interest does not automatically arise under RPC 1.7(a)(2) in that context.[5]

3. *Tank* Rule

¶39 The Ardens advocate the adoption of a rule requiring an insurer defending under reservation of rights to retain an "independent" **[***19]** defense attorney who has no connection at all to that insurer. The California Court of Appeals adopted a similar rule shortly before our Supreme Court decided *Tank*. *See San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y,*

[4] The Ardens cite to William T. Barker & Charles Silver, *Professional Responsibilities of Insurance Defense Counsel* (2014) and materials Barker prepared for an American Bar Association seminar. Because these materials do not specifically address Washington law, we do not find them persuasive.

[5] Our holding applies only to the argument that a conflict of interest *automatically* exists when an attorney defending under a reservation of rights also represents an insurer. A defense attorney still is subject to liability for breach of fiduciary duty under RPC 1.7(a)(2) if the facts actually show that the attorney's representation of the insured will be materially limited by the attorney's responsibilities to or relationship with the insurer.

Inc., 162 Cal. App. 3d 358, 208 Cal. Rptr. 494 (1984). In *Cumis*, the California court reasoned that an attorney retained to undertake a reservation of rights defense would represent both the insurer and the insured and therefore would have an irreconcilable conflict of interest. *Id.* at 499-506. As a result, the court held that in the absence of the insured's express consent to representation by an attorney connected to the insurer, an insurer defending under a reservation of rights must pay the reasonable cost of hiring independent counsel to defend the insured. *Id.* at 506.

¶40 In *Tank*, the Supreme Court implicitly rejected the *Cumis* rule. Instead of requiring insurers to retain independent counsel for a reservation of rights defense, the court emphasized that (1) insurers owed an enhanced obligation of fairness to insureds in the reservation of rights context, and (2) defense attorneys were required to follow specific criteria that centered on the recognition that only the insured was the attorney's client. *Tank*, 105 Wn.2d at 383, 387-88. In essence, the court ruled that, as long as defense attorneys satisfy the specific *Tank* **[***20]** criteria, an insurer-retained attorney does not violate his or her duty of loyalty to an insured.
[*749]

¶41 This court addressed whether an attorney defending a reservation of rights case was required to be independent of the insurer in *Johnson v. Continental Casualty Co.*, 57 Wn. App. 359, 788 P.2d 598 (1990). In *Johnson*, the insured argued that "when an insurer defends under a reservation of rights, a conflict of interest automatically arises requiring that the insurer pay for independent counsel chosen by the insured." *Id.* at 361. The court noted that the insured was relying on the *Cumis* case. *Id.* at 361 n.2.

¶42 This court expressly rejected the insured's argument that a conflict of interest between the insurer and the insured automatically arises when the insurer is defending under a reservation of rights. Citing *Tank*'s imposition of enhanced obligations of fairness on the insurer, the court stated that "no actual conflict of interest necessarily exists in a reservation of rights defense." *Id.* at 361. The court summarily rejected the insured's assertion that the insurer's refusal to provide coverage for certain claims "'creates a conflict of interest for the attorney selected by the [insurer] to defend against the above referenced claims.'" *Id.* at 362. The court concluded:

> In Washington, there is simply no presumption, **[***21]** as Johnson urges, that a reservation of rights situation creates an automatic conflict of interest. Therefore, the insurer has no obligation *before the fact* to **[**330]** pay for its insured's independently hired counsel.

Id. at 363.

¶43 Consistent with *Tank* and *Johnson*, Hartford's retention of Forsberg to defend the Ardens under a reservation of rights did not create a conflict of interest even though Forsberg represented Hartford in other cases. Accordingly, we hold as a matter of law that Forsberg did not **[*750]** breach its fiduciary duty of loyalty by undertaking the reservation of rights defense of the Ardens.[6]

D. Defense Attorney's Disclosure Requirements

[7] ¶44 The Ardens argue that Forsberg breached its fiduciary duty **[***22]** of loyalty by failing to give them notice of its long-standing relationship with Hartford and of potential conflicts of interest arising from Hartford's reservation of rights. We disagree.

1. Disclosure of Attorney's Relationship with Insurer

¶45 The Ardens claim that Forsberg had a duty to inform them of its relationship with Hartford. Under RAP 1.7(b)(4), if a concurrent conflict of interest exists the attorney must obtain informed consent for continued representation, which necessarily would require disclosure of the conflict of interest. However, as discussed above, an attorney's undertaking of a reservation of rights defense even when the attorney represents the insurer in other cases does not automatically create a conflict of interest under RPC 1.7(a). Therefore, Forsberg had no obligation under

[6] Our holding does not insulate defense attorneys from liability for breach of duty of loyalty. The Supreme Court in *Tank* suggested that if an attorney defending a reservation of rights case failed to comply with the specific criteria outlined in that case, that attorney would be subject to liability. 105 Wn.2d at 387-88. This court made the same observation in *Johnson*. 57 Wn. App. at 363. We hold only that a defense attorney's relationship with the insurer does not *automatically* prohibit that attorney from undertaking a reservation of rights defense.

RPC 1.7 to disclose to the Ardens its relationship with Hartford.[7]

¶46 Further, nothing in *Tank* requires a defense attorney to disclose his or her relationship with the insurer to the insured. As discussed below, *Tank* requires a defense attorney **[*751]** to follow the dictates of RPC 1.7, disclosing any conflict of interest between the insured and the insurer defending under a reservation of rights. 105 Wn.2d at 388. But neither RPC 1.7 nor *Tank* impose a requirement that a defense attorney disclose its relationship with that insurer.

¶47 The better practice for attorneys handling a reservation of rights defense may be to inform their clients if they have a long-standing relationship with the insurer and represent the insurer in other cases. But we hold that, as a matter of law, Forsberg had no fiduciary duty to provide such notice to the Ardens.

2. Disclosure of Reservation of Rights Process

[8] ¶48 One requirement for attorneys handling a reservation of rights defense is that "potential conflicts of interest between insurer and insured must be fully disclosed and resolved in favor of the insured." *Tank*, 105 Wn.2d at 388. Further, the attorney generally must explain the reservation of rights process; i.e., that the insurer could refuse to indemnify the insured even though it was providing a defense **[***24]** and that the attorney represents only the insured and not the insurer.

¶49 Forsberg's initial representation letter did not completely fulfill Forsberg's duty of disclosure under *Tank*. The letter explained that Forsberg was not representing either Hartford or the Ardens with regard to coverage but it did not explain the ramifications of the reservation of rights defense.[8] **[**331]** However, Gibson testified that he met with the Ardens in December and discussed the relationship between Hartford, Forsberg and the Ardens.

> In the meeting that I had with them early in the case I explained [the insurer/attorney/insured relationship] as best I could knowing that they're not sophisticated, but I had to allay **[*752]** I think some presumed concerns that almost all of my clients have in insurance defense situations. They want to know who I'm working for and they want to know who's [sic] interest I'm protecting, and I explain the relationship and how in a [*Tank*] case my duties are solely to you. … I specifically said that, that my practice is to try to get the insurance company to pay everything and have you not pay a penny out of your pocket, even in a reservation of rights case.

CP at 17.

¶50 The record shows that Gibson discussed with the Ardens the parameters and scope of Forsberg's defense of them under a reservation of rights. Nothing in the record indicates that Gibson failed to explain the reservation of rights process to them. Further, the Ardens had personal counsel who was engaged in the reservation of rights process and who presumably provided the Ardens with information and legal advice about that process. Therefore, we hold that there is no evidence that Forsberg breached its duty of disclosure under *Tank* regarding the potential conflicts of interest between Hartford and the Ardens.

E. Defense Attorney's Duties in Settlement Negotiations

¶51 The Ardens argue that Forsberg breached its fiduciary duty of loyalty to them by placing Hartford's interests above theirs and by failing to consult with them before rejecting the Duffys' settlement demands and making counteroffers. We hold that summary judgment was proper **[***26]** on these claims.

1. Insured's Involvement in Settlement

[9] ¶52 Most automobile and homeowners' insurance policies provide the insurer with control over settlement. But in the reservation of rights context, there are two

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[7] The Ardens cite *In re Disciplinary Proceeding Against Marshall*, in which the Supreme Court suggested that consultation and consent is required under RPC 1.7(b) any time a *potential* conflict of interest exists. 160 Wn.2d 317, 336, 157 P.3d 859 (2007). However, in *Marshall* the attorney represented multiple plaintiffs in the same discrimination lawsuit. *Id.* at 324. Under *Tank* the law is clear that Forsberg's only client **[***23]** in the Duffy lawsuit was the Ardens. 105 Wn.2d at 388.

[8] At the time Forsberg sent the November **[***25]** 27, 2012 letter, Hartford had not yet issued a reservation of rights letter to the Ardens. Forsberg's failure to address reservation of rights issues in the retention letter may be more excusable than if a reservation of rights letter already had been issued.

exceptions to the insurer's right to control settlement. First, the Supreme Court in *Tank* recognized that the insured has the right to decide whether to settle a lawsuit defended under a reservation of rights. 105 Wn.2d at 389. Although **[*753]** unstated, the court clearly was referring to the situation where the insured agrees to pay the settlement amount. *See id.* (stating that "[i]n a reservation of rights defense, it is the insured who may pay any judgment or settlement"). Therefore, if the insurer defends under a reservation of rights, the insured under certain circumstances has the ability to settle the case at his or her own expense without defeating coverage even when the insurer does not consent. *See Mut. of Enumclaw Ins. Co. v. T&G Constr., Inc.*, 165 Wn.2d 255, 268-69, 199 P.3d 376 (2008).

¶53 Second, under certain circumstances the insured can enter into an agreement with the plaintiff to execute a stipulated judgment. This type of agreement usually involves an assignment of the insured's bad faith claims against the insurer in exchange for the claimant's covenant not to execute on the **[***27]** judgment against the insured. *See, e.g., Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 764-65, 287 P.3d 551 (2012).

2. Persuading Hartford to Accept Settlement

¶54 The Ardens suggest that Forsberg breached its fiduciary duty of loyalty to them by not attempting to persuade Hartford to fund the $55,000 settlement demand as the Ardens requested. We disagree.

[10] ¶55 First, a defense attorney clearly has an obligation to communicate an insured's request to settle to the insurer. *Tank*, 105 Wn.2d at 388-89. But the Ardens provide no authority to support **[**332]** imposing a duty on the defense attorney to attempt to *persuade* the insurer to settle the case. Such a duty would be inconsistent with the defense attorney's role in a reservation of rights defense. When coverage is disputed, an insurer's decision to settle necessarily involves an evaluation of the strength of its coverage defenses. Imposing a duty on defense counsel to attempt to persuade an insurer to settle would require that attorney either to argue the insured's position on coverage or advise the insurer on coverage issues, both of which would give rise to actual conflicts of interest. **[*754]**

[11] ¶56 Second, when as here the insured has personal counsel who is actively involved in the case, there is no reason for defense counsel to become involved in persuading **[***28]** the insurer to settle. Personal counsel is in the best position to advocate for settlement with the insurer. Cushman did so here, telling Hartford, "Let me be perfectly clear. Arden's [sic] want to accept this offer provided it is paid by carrier. Arden's [sic] demand the Hartford fund this settlement and relieve them [of] all exposure to liability." CP at 258. Later, Cushman vigorously argued that Hartford was acting in bad faith by not settling the case for $40,000.

¶57 We decline to impose a fiduciary duty on Forsberg to attempt to persuade Hartford to settle for an amount the Ardens demanded. The defense attorney's duty is to give a fair evaluation of the liability and damages aspects of the case without regard to any coverage issues. *See Tank*, 105 Wn.2d at 388-89. Forsberg met that duty here.

3. Conflict of Interest Regarding Quick Settlement

¶58 The Ardens argue that Forsberg breached its fiduciary duty of loyalty to them because it failed to recognize the conflict between their interest in swiftly resolving the case and Hartford's deliberate negotiation strategy. We disagree because there is no evidence that there was such a conflict.

¶59 The Ardens assert that they were interested in a quick settlement of the Duffy lawsuit **[***29]** because of the pending decision on criminal charges and Roff Arden's problems with depression and posttraumatic stress disorder (PTSD). The Ardens claim that Hartford's settlement strategy was inconsistent with this interest. But there is no evidence that Hartford disagreed with seeking a quick settlement or attempted to slow down settlement discussions. Hartford did let the $55,000 demand expire, but then made a counteroffer the next day, March 5. When the Duffys lowered their demand to $40,000 on March 12, Hartford responded with another offer two days later. Negotiations **[*755]** then broke down. The speed of these negotiations – multiple offers and counteroffers in less than 10 days – showed that Hartford, like the Ardens, was interested in a prompt resolution.

¶60 The start of negotiations was delayed approximately two months because Forsberg and Hartford were waiting for the Duffys' discovery responses, which were

needed to evaluate the claim. However, as discussed below, Forsberg's request for an extension of time to respond to the $55,000 settlement demand was a reasonable judgment decision designed to further the Ardens' interest in having Hartford fund any settlement.

¶61 We hold that there **[***30]** is no evidence that Forsberg breached any fiduciary duty relating to the Ardens' interest in a quick settlement of the Duffy lawsuit.

4. Conferring with the Ardens Regarding Settlement Offers

¶62 As stated above, *Tank* requires defense counsel to keep the insured fully apprised of all activity involving settlement, including all settlement offers or rejections of offers from either the injured party or the insurer. 105 Wn.2d at 388-89. Here, there is no question that Forsberg informed the Ardens – through Cushman – of all settlement developments. However, the Ardens argue that Forsberg breached its fiduciary duty of loyalty because it did not consult with them before rejecting Duffys' settlement demands or making counteroffers. We hold that summary judgment was proper on these issues.

[333]** a. Rejecting Demands

[12, 13] ¶63 As noted above, when the insurer defends under a reservation of rights the insured has the ability, under certain circumstances, to settle the case without the insurer's involvement or consent. This means that when the claimant makes a settlement demand, defense counsel must consult with the insured before that demand is **[*756]** rejected or allowed to expire. *See Tank*, 105 Wn.2d at 388-89. Otherwise, it may be difficult for the insured to exercise **[***31]** its settlement rights.

¶64 Here, Forsberg did not expressly consult with the Ardens or Cushman before rejecting the Duffys' two settlement demands. Forsberg notified Cushman that it would reject the demands, but Forsberg never inquired whether the Ardens were interested in settling the case without Hartford's involvement. On the other hand, Forsberg's initial representation letter had stated, "Unless instructed otherwise, we will assume that any settlement authority or instructions we receive from The Hartford to settle the claims against you in this lawsuit are given with your consent and will proceed accordingly." CP at 427. And the Ardens had clearly stated that they were interested in settlement only if Hartford funded any settlement agreement. This competing evidence arguably created a question of fact as to whether Forsberg breached its duty to consult with the Ardens.

¶65 However, an attorney can be liable for a breach of fiduciary duty only if the breach caused some injury. *See Micro Enhancement*, 110 Wn. App. at 433-34. Here, there is no question of fact regarding whether this potential breach of duty injured the Ardens. There is no evidence in the record suggesting that if Forsberg had consulted with the Ardens, they would have been **[***32]** willing to fund the settlement themselves or otherwise negotiate a separate settlement with the Duffys. The only evidence is that the Ardens and Cushman were adamant that Hartford must fund any settlement. Therefore, as a matter of law Forsberg cannot be liable for its failure to confer with the Ardens before rejecting the settlement demands.

b. Making Counteroffers

¶66 The Ardens argue that Forsberg was required to consult with them before making counteroffers. They claim that Forsberg breached its fiduciary duty of loyalty to them **[*757]** by carrying out Hartford's instructions regarding settlement offers without considering their interests. We assume without deciding that Forsberg had a duty to consult with the Ardens regarding settlement strategy. However, we hold that the trial court correctly granted summary judgment in favor of Forsberg because the evidence shows that Forsberg did not breach any such duty regarding the $18,000 offer and that any breach regarding the $25,000 offer did not injure the Ardens.

¶67 The evidence is undisputed that Forsberg did consult with Cushman before making the $18,000 counteroffer. After Hartford gave Forsberg authority to settle for $35,000, Forsberg informed **[***33]** Cushman before communicating any offer to the Duffys that it was starting with an $18,000 offer. This consultation gave Cushman the opportunity to provide input on this decision. Cushman did not object to or disagree with Forsberg's approach. In fact, he told Forsberg that he hoped Forsberg would succeed and that he would stay out of the loop on settlement negotiations. Cushman

also told the Ardens about the offer, and rather than objecting Roff Arden noted that this offer was just the starting point and expected the parties to negotiate back and forth. Therefore, there is no genuine issue of fact that Forsberg consulted with the Ardens before making the $18,000 offer.

¶68 For the $25,000 counteroffer, Forsberg gave Cushman some advance notice before making the offer an hour later. Cushman did not respond, so there was no actual discussion about the new counteroffer. But again, Cushman did not disagree with or object to this offer even after the offer was made. Cushman's objection was not to the amount of the $25,000 counteroffer, but with Hartford's refusal to accept the $40,000 demand. **[**334]**

¶69 Even if Forsberg breached some duty to consult with the Ardens regarding settlement strategy, there is **[***34]** no evidence that that this breach injured the Ardens. The evidence shows that Hartford was not willing to pay more than **[*758]** $35,000 to settle the case and that the Duffys' were not willing to settle for any amount less than $40,000. As a result, even if Forsberg had consulted with the Ardens and had devised a different settlement strategy – or simply immediately offered $35,000 – there is no indication in the record that the case would have settled.

¶70 We hold that Forsberg was entitled to summary judgment on the alleged breach of its fiduciary duty of loyalty regarding the failure to consult with the Ardens before rejecting settlement demands and making counteroffers.

F. LEGAL NEGLIGENCE – SETTLEMENT NEGOTIATIONS

¶71 The Ardens argue that Forsberg was negligent in not attempting to settle the Duffy lawsuit quickly in order to minimize Roff Arden's potential exposure to criminal charges and to avoid exacerbating his depression and PTSD. We hold that there is no evidence that Forsberg was negligent in making a judgment decision on extending the time for settlement negotiations.

1. Legal Principles

[14-17] ¶72 To establish a claim of legal negligence, the plaintiff must prove four elements:

> (1) The existence of **[***35]** 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.

Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey PC, 180 Wn. App. 689, 700-01, 324 P.3d 743 (quoting *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992)), *review denied*, 181 Wn.2d 1008 (2014). An attorney satisfies the duty of care if he or she exercises "'the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in **[*759]** the practice of law' in the state of Washington." *Clark County Fire*, 180 Wn. App. at 701 (quoting *Hizey*, 119 Wn.2d at 261).

¶73 Under the attorney judgment rule,

> an attorney cannot be liable for making an allegedly erroneous decision involving honest, good faith judgment if (1) that decision was within the range of reasonable alternatives from the perspective of a reasonable, careful, and prudent attorney in Washington; and (2) in making that judgment decision the attorney exercised reasonable care.

Clark County Fire, 180 Wn. App. at 704. "Merely providing an expert opinion that the judgment decision was erroneous or that the attorney should have made a different decision is not enough; the expert must do more than simply disagree with the attorney's decision." *Id.* at 706. **[***36]**

2. Extending the Time for Settlement

[18, 19] ¶74 The Ardens argue that they had an interest in a quick settlement of the Duffy lawsuit because of the pending decision on criminal charges and Roff Arden's depression and PTSD and that Forsberg committed legal malpractice by disregarding this interest. The Ardens appear to be referring to Forsberg's decision to obtain an extension of time to respond to the Duffys' initial $55,000 settlement demand when the Ardens had demanded that Hartford immediately agree to settle for

that amount. We disagree.[9]

¶75 We assume, without deciding, that an attorney representing an insured in a reservation of rights case has an obligation to consider the insured's "personal" interests, **[**335]** even though they may not directly affect the merits of the **[*760]** case. Under *Tank*, only the insured is the defense attorney's client, and a defense attorney arguably cannot disregard his or her client's interests. **[***37]** However, a client may have many, sometimes competing, interests that the attorney must consider in the exercise of his or her professional judgment in defending the case. Under the attorney judgment rule, the question is whether an attorney's particular judgment decision is within the range of reasonable alternatives or whether the attorney was negligent during the decision-making process. *Clark County Fire*, 180 Wn. App. at 704.

¶76 Here, the Ardens had an interest in the prompt settlement of the case. However, they were not willing to settle unless Hartford funded the settlement. Therefore, the Ardens' predominant interest was having Hartford fund any settlement. When the Duffys made a settlement demand before providing their discovery responses, the Ardens' two interests conflicted. Without discovery responses, Hartford did not have enough information to evaluate the settlement demand. Therefore, without an extension of time there was no possibility that Hartford would agree to fund the $55,000 settlement demand.

¶77 The evidence shows that Forsberg made a judgment decision about the best way to obtain a settlement of the Duffy lawsuit with Hartford funding that settlement. Forsberg determined that the best strategy was to obtain **[***38]** an extension of time for responding to the Duffys' settlement demand until after Hartford had enough information to determine the settlement value of the claim. The Ardens presented no evidence that this decision was outside the range of reasonable alternatives from the perspective of a reasonable, careful, and prudent attorney in Washington or that Forsberg somehow failed to exercise reasonable care in making that judgment decision. Accordingly, we hold that there is no evidence that Forsberg was negligent in delaying the beginning of settlement negotiations.

[*761] CONCLUSION

¶78 We affirm the trial court's grant of summary judgment in favor of Forsberg on both breach of the fiduciary duty of loyalty and legal negligence and the trial court's denial of the Ardens' summary judgment motions.

MELNICK and SUTTON, JJ., concur.

References

Thomas V. Harris, Washington Insurance Law (3d ed.)

Washington Rules of Court Annotated (LexisNexis ed.)

[9] The trial court ruled that these circumstances created a question of fact regarding breach of duty, but that any breach caused no recoverable damages. Because our review is de novo, we are not bound by the trial court's ruling on breach of duty. And we can affirm on any basis presented in the pleadings and record. *Wash. State Commc'n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 206-07, 293 P.3d 413 (2013).

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Supreme Court No.
Court of Appeals No. 46991-0-II

Supreme Court of the State of Washington

Roff Arden and **Bobbi Arden,**

Petitioners,

v.

Forsberg Umlauf, P.S., et al.,

Respondents.

Petition for Review

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1. Identity of Petitioners

Roff and Bobbi Arden, Plaintiffs in the trial court and Appellants in the Court of Appeals, ask this Court to accept review of the Court of Appeals decision terminating review, specified below.

2. Court of Appeals Decision

Arden v. Forsberg & Umlauf, P.S., No. 46991-0-II (May 3, 2016).

A copy of the decision is included in the Appendix at pages 1-27.

3. Issues Presented for Review

1. Under *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986), insurance-appointed defense counsel must fully disclose potential conflicts of interest and resolve them in favor of the insured client. Forsberg had a potential "materially limited" conflict due to its long-standing relationships as coverage counsel and panel counsel for Hartford, but never disclosed these relationships to Ardens. Did Forsberg breach its fiduciary duties to Ardens by failing to disclose or resolve this conflict of interest?

2. Under *Tank*, defense counsel must keep the insured client fully apprised of all activity involving settlement, to enable the client to make informed decisions regarding settlement. Forsberg failed to consult with Ardens regarding their options in response to Hartford's settlement decisions. Forsberg carried out Hartford's instructions without giving Ardens an opportunity to react. Did Forsberg breach its fiduciary duties to Ardens?

3. Disgorgement of fees is a common remedy for breach of an attorney's duty of loyalty. Forsberg breached its duty of loyalty to Ardens. Are Ardens entitled to disgorgement of all fees received by Forsberg for the representation?

4. When a trustee breaches its duty of loyalty, the court has broad equitable powers to craft a deterrent remedy. The relationship between insurer, insured, and defense counsel bears all of the characteristics of a trust, with defense counsel as trustee over the insurance defense asset. Does Forsberg's breach amount to a breach of trust?

5. Under the "attorney judgment rule" adopted by the Court of Appeals in *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey PC*, 180 Wn. App. 689, 324 P.3d 743 (2014), a legal negligence claim must be supported by expert testimony that the defendant's actions were outside the range of reasonable alternatives from the perspective of a reasonable, careful, and prudent attorney in Washington. Ardens' expert witness provided such testimony. Is the "attorney judgment rule" the law in Washington and did the expert testimony raise a genuine issue of material fact?

4. Statement of the Case

Forsberg & Umlauf and attorneys John Hayes and William "Chris" Gibson ("Forsberg") were appointed by Hartford, Ardens' insurer, to defend Ardens under a reservation of rights. Throughout the representation, Forsberg failed to advise Ardens of potential and actual conflicts of interest and failed to consult with Ardens regarding their options in response to

Hartford's settlement decisions. Instead, Forsberg carried out Hartford's instructions without giving Ardens any opportunity to react.

Ardens sued Forsberg for legal malpractice and breach of fiduciary duties. The undisputed facts show that Forsberg breached its fiduciary duties under the RPCs and under *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986). Ardens' expert testified that Forsberg's actions also breached the standard of care. The trial court dismissed Ardens' claims on summary judgment. The Court of Appeals affirmed.

4.1 Forsberg was appointed by Hartford to defend Ardens in *Duffy v. Arden*.

Roff and Bobbi Arden were sued by Anne and Wade Duffy. CP 855, 904. Ardens tendered defense of the case to their insurer, Property and Casualty Insurance Company of Hartford. CP 856, 904. Hartford initially refused to defend, but accepted after being threatened with coverage litigation. CP 315-21, 856. Hartford appointed attorneys John P. Hayes and William C. "Chris" Gibson of the firm Forsberg & Umlauf, P.S. to defend Ardens. CP 130; 445-46. Hartford informed Forsberg that the defense would be under a reservation of rights. *See* CP 208, 318, 320.

Hartford was a long-standing client of Forsberg. Four partners, including Hayes, regularly represented Hartford as coverage counsel. CP 203-04. Forsberg was also Hartford's "go-to" defense firm in the Seattle area. *See* CP 120, 165. Neither Hayes nor Gibson ever informed Ardens of this pre-existing relationship or any potential conflict of interest that may have arisen from it. CP 227, 229, 430. Had Ardens known of the

relationship, they would not have accepted Forsberg as defense counsel. CP 227, 229.

Gibson met with Ardens and their coverage counsel, Jon Cushman, within a few weeks of being appointed. CP 483-84; 546. During that meeting, Ardens explained to Gibson the circumstances surrounding Duffys' claims. Duffys alleged that Roff Arden negligently or maliciously shot and killed two of Duffys' dogs. CP 445. Duffys had habitually allowed their dogs to roam free. CP 536. On multiple occasions, Duffys' dogs had come onto the Arden property and threatened and chased Ardens. CP 536-37.

Roff Arden suffers from post-traumatic stress disorder (PTSD) as a result of physical and mental abuse as a child and was re-traumatized in 2010. CP 572-73. His PTSD manifests as acute anxiety attacks or bouts of depression, difficulty trusting others, and an intense fight-or-flight response. CP 574, 586. Arden also suffers from a fear of dogs as the result of a previous dog attack. CP 589-90. Arden admitted to Gibson that he shot Duffys' yellow lab in the midst of a PTSD-induced fight-or-flight response when two of Duffys' dogs chased Ardens halfway down their driveway. CP 585-86. Gibson was aware that the sheriff's office had requested the prosecutor consider charging Roff Arden with felony animal cruelty. CP 484, 491.

Coming out of the meeting with Gibson, Ardens were unaware of any particular defense or settlement plan. CP 546. Gibson only told Ardens he would be evaluating Hartford's exposure. *Id.* Neither Gibson nor Hayes ever contacted Ardens to discuss strategy. CP 574, 582.

4.2 Forsberg followed Hartford's settlement instructions despite opposition from Ardens.

Duffys demanded $55,000 to settle the case. CP 255. After consulting with Ardens, Cushman informed Gibson that Ardens wanted to accept the offer and demanded that Hartford fund the settlement. CP 256, 617. Hartford refused, wanting more information to evaluate the case. CP 333. Forsberg sought an extension in time on the settlement offer, and during that extension, Hartford drafted and sent Arden a reservation of rights letter, which it had failed to do three months earlier. CP 135-36, 330.

After receiving discovery responses from Duffys, Hayes and Gibson prepared a case analysis for Hartford. CP 253. They recommended attempting to settle the case at up to $35,000. CP 468-69. After close of business on the day Duffys' offer expired, Hartford notified Cushman that it was letting the offer expire. CP 262. The next morning, Hayes notified Cushman that Hartford had given him settlement authority up to $35,000 and that he was going to start with a counteroffer of $18,000. CP 263. Within eight minutes, Gibson had already attempted to communicate the counteroffer to Duffys. CP 878. Neither Hayes nor Gibson had consulted with Ardens regarding letting the Duffys' offer expire or making the counteroffer. CP 183, 210.

Duffys promptly rejected the counteroffer. CP 719. Within days, Duffys extended a new offer at $40,000. CP 882. Cushman, on behalf of Ardens, again demanded that Hartford fund the settlement. CP 883.

The day the offer was to expire, Hartford notified Cushman and Hayes that it would not fund the settlement at $40,000 and that it intended to make a counteroffer at $25,000. CP 767. Cushman objected, warning Hartford and Hayes that their proposed course was bad faith. CP 770. About 45 minutes after receiving Hartford's instruction, Hayes made the counteroffer. CP 267. Neither Hayes nor Gibson had consulted with Ardens or sought their approval before making the counteroffer. CP 198, 219.

Duffys rejected the $25,000 counteroffer and refused to negotiate further. CP 890. On March 19, Roff Arden learned that felony charges had been filed against him. *See* CP 798-99, 892. Despite Forsberg's knowledge that such charges were possible, Gibson testified he had no duty to consider Arden's exposure to criminal jeopardy:

> Q. Do you think that you as their lawyer have any duty to craft your defense strategy toward minimizing their criminal exposure?
> [Objection]
> A. [by Chris Gibson] I don't think I have that duty, to be honest with you.
> Q. Okay. All right. So, if one strategy might increase their exposure to criminal jeopardy and another strategy might reduce their exposure to criminal jeopardy, you do not believe you have a duty to craft the strategy that reduces their exposure to criminal jeopardy?
> [Objection]
> A. I think my clients have a responsibility to themselves to get a criminal defense attorney involved…

CP 170.

Despite Ardens' desire for a quick settlement in hopes of avoiding criminal charges and minimizing the mental health impacts of the litigation,

see CP 857, Hayes and Gibson followed Hartford's deliberate, low-ball strategy for settlement, *see* CP 111, 143, 152, 219. Despite Gibson's stated understanding that the insured client has the right to participate in settlement negotiations in a reservation-of-rights defense, CP 171-72, Gibson never involved Ardens in any settlement-related decisions, CP 865. Despite Hayes' stated understanding that he owed a duty of undivided loyalty to Ardens, CP 208, Hayes obediently carried out Hartford's instructions over Ardens' objections, CP 219.

4.3 The trial court dismissed Ardens' claims on summary judgment.

Ardens sued Hartford for bad faith, later adding claims against Forsberg & Umlauf, Hayes, and Gibson for legal malpractice and breach of fiduciary duties. RP 19; Supp. RP 2. Hartford and Duffys settled, leaving only Ardens' claims against Forsberg & Umlauf, Hayes, and Gibson. RP 19.

After a contentious discovery process, the parties made cross-motions for summary judgment on the legal malpractice claims. The trial court granted Forsberg's motion, dismissing Ardens' legal malpractice claim but leaving Ardens' breach of fiduciary duty claim for later determination. CP 249-50; Supp. RP 2-3, 6.[1] The court held that, despite disputes of fact regarding breach of duty, Ardens failed to prove causation and that attorney

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[1] The verbatim report of proceedings was supplemented by order of the commissioner on motion of the parties to include the October 1, 2014, oral ruling of the trial court. The supplemental transcript is referred to herein as "Supp. RP," while the originally filed report of proceedings is referred to as "RP."

fees and emotional distress damages were not recoverable in a legal malpractice claim. Supp. RP 4-6.

The parties made a second set of cross-motions for summary judgment to address the breach of fiduciary duty claim. Ardens argued that Forsberg had breached its duty of loyalty to Ardens "by taking on a representation from which they were disqualified by conflicts of interest; failing to communicate with Ardens; failing to keep Ardens apprised of all activity involving settlement; failing to consider Ardens' mental health condition and criminal jeopardy; and placing the interests of the insurer above the interests of Ardens, their clients." CP 236-37. Ardens argued that the relationship between insurance defense counsel and the insured client is impressed with a trust, entitling Ardens to equitable remedies for breach of trust. CP 241-43. Forsberg argued that there was no conflict of interest and therefore no breach of fiduciary duty. CP 89.

The trial court denied Ardens' motion and dismissed the remainder of Ardens' claims. RP 94. The court ruled that there was no disqualifying conflict of interest and therefore no breach of fiduciary duty. RP 84-85. The court commented that Ardens' trust theory was "interesting and somewhat compelling," but the court did not find it supported by precedent. RP 94. The decision disposed of all of Ardens' claims. CP 24. Ardens appealed. CP 5.

4.4 The Court of Appeals Affirmed Dismissal

On appeal, Ardens described in detail the duties owed by Forsberg under the RPCs, under *Tank*, and as trustees over the insurance defense asset. Br. of App. at 14-23. Ardens emphasized the in-depth consultation required to satisfy defense counsel's duty of "full and ongoing disclosure" of actual and potential conflicts of interest, including disagreements between the insurer and the insured client regarding settlement decisions. Br. of App. at 19-20. Ardens argued that Forsberg breached its fiduciary duties by 1) failing to advise Ardens or seek Ardens' informed consent for conflicts of interest arising from Forsberg's long-standing attorney-client and business relationships with Hartford (Br. of App. at 24-27); 2) failing to consult with Ardens regarding the actual conflict between Hartford's instructions and Ardens' expressed interests (Br. of App. at 27-32); and 3) following Hartford's instructions without giving Ardens an opportunity to act before Duffys' demands were rejected (Br. of App. at 32-33).

Ardens argued that they were entitled to broad equitable remedies for Forsberg's breach, including disgorgement of fees (Br. of App. at 35-37), emotional distress damages (Br. of App. at 37-39), and other remedies to make Ardens whole and prevent Forsberg from benefitting from its breach of trust (Br. of App. at 39-41). Ardens argued that material issues of fact precluded summary judgment dismissal of their legal malpractice claim. Br. of App. at 41-43.

The Court of Appeals affirmed dismissal of Ardens' claims. App. 2. The court briefly outlined defense counsel's duties under the RPCs and

under *Tank*, but declined to address Ardens' trust argument. App. 9-11. Addressing the issue of conflicts arising from Forsberg's relationship with Hartford as a question of first impression, the court dismissed the opinions of the parties' experts and of esteemed commentators. App. 11-12. The court reasoned, "as long as the defense attorney follows the criteria outlined in *Tank*, … a conflict of interest does not **automatically** arise." App. 13 (emphasis added). The court ignored the existence of potential conflicts, reasoning that such would only arise in cases of multiple representation. App. 16. The court also reasoned that because Forsberg had explained to Ardens "the parameters and scope of Forsberg's defense of them under a reservation of rights," it had satisfied its duty of full and ongoing disclosure of actual and potential conflicts of interest under *Tank* without disclosing the relationship between Forsberg and Hartford. App. 17-18.

The court noted that in a reservation of rights case, the insured client has the right to settle a case without the insurer's consent, either by putting up the client's own money or by entering into a stipulated judgment with a covenant not to execute against the insured. App. 18-19. The court acknowledged that "This means that when the claimant makes a settlement demand, defense counsel must consult with the insured before that demand is rejected or allowed to expire. Otherwise, it may be difficult for the insured to exercise its settlement rights." App. 22. Nevertheless, the court held that Forsberg could not be liable for failing to consult with Ardens regarding settlement, reasoning that Ardens had not shown that "they would have been willing to fund the settlement themselves or otherwise negotiate a separate

settlement with the Duffys." App. 22; *but see* CP 574-75 (Arden would have been willing to contribute his own money at the time of the $40,000 offer).

On the Ardens' legal negligence claim, the court relied on the "attorney judgment rule" it had created in *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey PC*, 180 Wn. App. 689, 324 P.3d 743 (2014). Misreading the record, the court held that Ardens had failed to present evidence that Forsbergs' actions were "outside the range of reasonable alternatives from the perspective of a reasonable, careful, and prudent attorney in Washington." *Compare* App. 27 *with* CP 421-22 (Prof. Strait provided the required testimony).

Ardens seek review.

5. Argument

A petition for review should be accepted when the decision of the Court of Appeals is in conflict with a decision of this Court or when the case involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(1) and (4).

The decision of the Court of Appeals conflicts with, and entirely undermines, this Court's decision in *Tank v. State Farm Fire & Cas. Co.,* 105 Wn.2d 381, 715 P.2d 1133 (1986). Where *Tank* protected the insured client's right to be represented by a loyal and persuasive advocate, the decision of the Court of Appeals allows defense counsel to act as little more than a claims adjuster, blithely following the direction of the insurer, without a thought for the interests of the client, so long as the matter eventually

settles on the insurer's dime. It leaves insureds, like Ardens, effectively unrepresented, without an advocate for their interests in the defense. While purporting to rely on *Tank*, the decision of the Court of Appeals turns *Tank* on its head. The disastrous effect of the decision is an issue of substantial public interest that should be addressed and corrected by this Court. This Court should accept review and reverse the decisions of the trial court and the Court of Appeals, clarifying the duties of insurance defense counsel and the remedies available when those duties are breached.

5.1 The decision of the Court of Appeals conflicts with this Court's decision in *Tank*.

5.1.1 *Tank* protected the right of the insured client to be represented by a loyal advocate.

In *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986), this Court made it clear that insurance-appointed defense counsel has only one client—the insured defendant—to whom counsel owes undeviating loyalty. *Id.* at 388. Defense counsel also owes enhanced duties of "full and ongoing disclosure to the insured [client]," including full disclosure of 1) potential conflicts of interest, 2) all information relevant to the defense, and 3) all activity involving settlement. *Id.* at 388-89. In addition to disclosing, defense counsel must resolve all conflicts in favor of the insured client. *Id.* The dictates of RPC 1.7 must be strictly followed, including the requirement of informed consent. *Id.* at 388. Defense counsel cannot allow the insurer to influence counsel's professional judgment. *Id.*; RPC 5.4(c).

The policy established in *Tank* was intended to ensure that insurance-appointed defense counsel under a reservation of rights would represent their insured clients in the same manner, to the same standards of care and loyalty, as would an attorney hired directly by the insured client. *See Tank*, 105 Wn.2d at 387 ("A reservation of rights agreement is not a license for an insurer to conduct the defense of an action in a manner other than [the manner in which] it would normally be required to defend."). Anything less would be bad faith or breach of duty, for which the insurer or defense counsel could be liable. *Id.* at 387-88.

Because a reservation of rights defense is "fraught with potential conflicts," *Nat'l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 879, 297 P.3d 688 (2013) (citing *Tank*), this Court required "full and ongoing disclosure" of all actual or potential conflicts, in order to give the insured client the opportunity to understand the conflicts and decide whether to give informed consent to waive the conflicts. *See Tank*, 105 Wn.2d at 387-88. In disclosing and resolving conflicts, defense counsel must explain to the client the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of the client and discuss the client's options and alternatives. RPC 1.0A(e) and Comment [6]; RPC 1.7 Comment [18].

Under *Tank*, the insured client has the right to be represented by a loyal advocate for the client's interests. Like any other attorney, insurance-appointed defense counsel must consider **all** interests of the insured client, including interests that are secondary to the goal of defending the claim. William T. Barker, et al., *Insurer Litigation Guidelines: Ethical Issues for Insurer-*

Selected and Independent Defense Counsel, ABA Section of Litigation 2012 Insurance Coverage Litigation Committee CLE Seminar, March 1-3, 2012, at p. 5.[2] The insured client should never have cause to question who defense counsel actually represents. Thomas V. Harris, *Washington Insurance Law*, § 17.05 (3d ed. 2010).

5.1.2 The decision of the Court of Appeals gives license to defense counsel to favor the interests of the insurance company.

The decision of the Court of Appeals in this case, in direct conflict with this Court's decision in *Tank*, gives defense counsel license to conceal conflicts of interest and to ignore the desires, rights, and interests of the insured client, in favor of doing the bidding of the insurance company. Although the Court of Appeals purports to rely on *Tank*, the result it reaches is in direct conflict with this Court's decision.

The Court of Appeals held that Forsberg had no duty to disclose its long-standing attorney-client and business relationships with Hartford, the insurer. Yet, it is precisely this relationship that gives rise to some of the potential conflicts of interest inherent in a reservation of rights defense. When an ongoing relationship exists between defense counsel and the insurer, "the lawyer's personal interest in pleasing the insurer could create a conflict in the same way that a legal duty of loyalty would." Barker, et al.,

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[2] available at http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012_inscle_materials/23_1_guidelines.authcheckdam.pdf (accessed May 31, 2016).

Ethical Issues, at 3-4. There is significant risk that any time the interests of the insured client and the insurance company diverge, representation of the insured client will be materially limited by defense counsel's interest in maintaining its business relationship with the insurance company. The risk was even greater in this case, where Hartford was also a **client** of Forsberg in coverage matters and coverage of the Ardens' case was contested. Under *Tank*, defense counsel is obligated to fully disclose this potential conflict and explain to the client the reasonably foreseeable ways that the conflict could have an adverse impact.

Nevertheless, the Court of Appeals reasoned, "as long as the defense attorney follows the criteria outlined in *Tank*, … a conflict of interest does not automatically arise." App. 13. But this reasoning assumes its own conclusion: assuming defense counsel follows *Tank*, there is no conflict of interest to disclose, therefore Forsberg followed *Tank* when it did not disclose conflicts. This reasoning betrays a misunderstanding of *Tank*. Defense counsel cannot follow the criteria outlined in *Tank* unless defense counsel fully discloses actual and potential conflicts and resolves them in favor of the insured client.

Tank does not make conflicts go away; *Tank* requires disclosure of conflicts so they can be appropriately resolved in favor of the insured client through informed consent. The decision of the Court of Appeals instead allows defense counsel to say to themselves, "I know who my client is, therefore there is no risk of a conflict and nothing to disclose." *Tank* does not allow such thinking; *Tank* recognizes that potential conflicts exist even

when defense counsel knows who the client is. *Tank* requires full and ongoing disclosure.

The decision of the Court of Appeals entirely ignored the existence of **potential** conflicts, reasoning that such would only arise in cases of multiple representation. App. 16. But potential conflicts exist whenever it is foreseeable that a lawyer might be tempted, at some future point, to favor an interest of the lawyer or of a non-client at the expense of an interest of the client; an actual conflict ripens at the point of decision: when a lawyer must choose a course of action and the question is whose interest will be sacrificed. *See* William T. Barker & Charles Silver, *Professional Responsibilities of Insurance Defense Counsel*, § 12.02 (2014). *Tank* does not allow defense counsel to ignore potential conflicts; *Tank* expressly requires full disclosure and resolution in favor of the insured client. *Tank*, 105 Wn.2d at 388 ("potential conflicts of interest between insurer and insured must be fully disclosed and resolved in favor of the insured.").

The Court of Appeals also reasoned that because Forsberg had explained to Ardens "the parameters and scope of Forsberg's defense of them under a reservation of rights," it had satisfied its duty of full and ongoing disclosure of actual and potential conflicts of interest under *Tank* without disclosing the relationship between Forsberg and Hartford. App. 17-18. The Court of Appeals interpreted defense counsel's duty as simply "explain[ing] the reservation of rights process; i.e., that the insurer could refuse to indemnify the insured even though it was providing a defense

and that the attorney represents only the insured and not the insurer." App. 17. This interpretation is in conflict with this Court's decision in *Tank*.

In *Tank*, this Court recognized that there are potential conflicts of interest inherent in a reservation of rights defense. This Court required that those conflicts be fully disclosed and resolved through informed consent. While the basic explanation described by the Court of Appeals is surely required, it is not sufficient to satisfy defense counsel's duties under *Tank*. Telling the client that the insurer could refuse to indemnify and that the attorney represents only the client does nothing to explain the foreseeable ways in which the attorney might be tempted to favor the insurer's interests. The decision of the Court of Appeals would allow defense counsel to explain the "process" and be done; *Tank* requires full disclosure.

The decision of the Court of Appeals in this case conflicts with this Court's decision in *Tank*. This Court should accept review and clarify the duties of insurance defense counsel and the remedies available when those duties are breached.

5.2 The defense bar's failure to understand and live up to its duties to insured clients is an issue of substantial public interest.

"The business of insurance is one affected by the public interest, requiring that all persons … preserv[e] inviolate the integrity of insurance." RCW 48.01.030. Countless defendants are represented in Washington's courts by insurance-appointed defense counsel under reservations of rights. It is of paramount importance that the insurance defense bar understands

and lives up to its duties to insured clients. *See Tank*, 105 Wn.2d at 388 ("No exceptions can be tolerated.").

Sadly, this case illustrates that the defense bar does not understand or live up to its duties. For example, in deposition, Hayes was unable to recognize his duty to consult with Ardens regarding settlement activity or his duty to obtain Ardens' consent when Hartford's instructions conflicted with Ardens':

> Q. The Ardens never told you to engage in that strategy, did they?
> [Objection]
> A. [by John Hayes] They don't have to tell me.
> Q. They don't have to tell you?
> A. No.
> Q. Okay.
> A. What they told me was to get it settled at fifty-five and Hartford pay it. That was rejected.
> Q. But –
> A. Now we're back to a clean slate and Hartford says, "By the way, we don't agree with the fifty, fifty-five, make this offer." So, we made the offer.

CP 214.

When Hartford refused to fund the settlement at $55,000, Forsberg was duty-bound to inform Ardens of Hartford's decision, advise Ardens of their options, and seek their consent to go forward with Hartford's plan or some other plan. Instead, Forsberg simply followed Hartford's instructions, without even allowing Ardens time to react to the developing situation. Forsberg's failure to make any meaningful attempt to consult with Ardens regarding Hartford's settlement position or the counteroffers they made

demonstrates a callous disregard for Forsberg's duties to its insured client. *See* CP 183, 198, 210, 219.

Commentators and practitioners have recognized this problem in the defense bar. Barker, ordinarily friendly to the defense bar, has observed that the duty to fully inform the insured client is not well understood by all defense counsel even though it is one of counsel's most important duties. Barker, et al., *Ethical Issues*, at 12. Forsberg's expert witness, Jeffrey Tilden, demonstrating this misunderstanding, testified to his belief that defense counsel satisfies their duty to consult with the client about settlement activity by merely "generally informing the client of the goal of settlement," noting, **"Many assigned defense counsel do less."** CP 516. He also testified, "Hundreds of attorneys across the state do both coverage work and appointed defense work for the same insurers." CP 365. The problem is widespread, and now the Court of Appeals has published its approval.

The decision of the Court of Appeals allows defense counsel to play to the power, please the insurance companies that hire them, and leave their insured clients effectively unrepresented. That decision, coupled with the defense bar's failure to recognize and live up to its professional duties to insured clients, creates an issue of substantial public interest that should be addressed and corrected by this Court. This Court should accept review to clarify the duties of appointed insurance defense counsel.

6. Conclusion

The decision of the Court of Appeals conflicts with this Court's decision in *Tank*. The result of the decision is to leave defense counsel free to ignore conflicts of interest and serve the interests of insurance companies at the expense of their insured clients. The defense bar needs a reminder of its duties to insured clients. This Court should accept review and reverse the decisions of the trial court and the Court of Appeals, clarifying the duties of insurance defense counsel and the remedies available when those duties are breached.

Respectfully submitted this 2nd day of October, 2016.

/s/ Kevin Hochhalter
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7. Appendix

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on June 2, 2016 I caused the original of the foregoing document, and a copy thereof, to be served by the method indicated below, and addressed to each of the following:

Court of Appeals Division II 950 Broadway, #300 Tacoma, WA 998402	____ U.S. Mail, Postage Prepaid ____ Legal Messenger _____ Overnight Mail _____ Facsimile _XX_ Electronic Mail
Supreme Court Temple of Justice 415 – 12th Avenue SW Olympia, WA 98501-2314	____ U.S. Mail, Postage Prepaid _XX_ Legal Messenger _____ Overnight Mail _____ Facsimile _____ Electronic Mail
Sam B. Franklin Pamela J. DeVet Lee Smart P.S., Inc. 1800 One Convention Place 701 Pike Street Seattle, WA 98101-3929 sbf@leesmart.com pdj@leesmart.com jaj@leesmart.com mvs@leesmart.com	____ U.S. Mail, Postage Prepaid _____ Legal Messenger _____ Overnight Mail _____ Facsimile _XX_ Electronic Mail

DATED this 2nd day of June, 2016.

/s/ Rhonda Davidson
Rhonda Davidson, Legal Assistant

No. 93207-7

SUPREME COURT OF THE
STATE OF WASHINGTON

ROFF ARDEN and BOBBI ARDEN, husband and wife,

Petitioners,

vs.

FORSBERG & UMLAUF, P.S., a Washington State professional services corporation; JOHN HAYES and "JANE DOE" HAYES, adult Washington State residents including any marital community; WILLIAM "CHRIS" GIBSON and "JANE DOE" GIBSON, adult Washington State residents including any marital community; and DOE DEFENDANTS I through V,

Respondents.

ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

This case arises out of Roff Arden's shooting and killing of a puppy owned by his neighbors, the Duffys. The Ardens sought liability insurance coverage for this intentional act from their homeowners insurer, Hartford, that defended them under a reservation of rights. The Ardens retained separate counsel who represented them in connection with coverage. Hartford appointed the well-respected law firm of Forsberg & Umlauf, P.S., and attorneys John Hayes and Chris Gibson ("Attorneys"), to defend the Ardens in the Duffys' civil suit arising from the puppy's death, and paid Attorneys' fees. The Ardens' coverage counsel acquiesced in this appointment. Attorneys developed a settlement plan approved by the Ardens and their coverage counsel, and accepted by Hartford as well. Attorneys engaged in settlement negotiations with the Duffys. When the Mason County Prosecutor charged Arden with criminal animal cruelty, a choice beyond the ability of Attorneys to control in the civil case, and Hartford failed to fund settlement at the amounts the Duffys demanded, the Ardens blamed Attorneys and sued them for breach of fiduciary duty and for professional negligence.

The trial court ruled as a matter of law that (1) Attorneys breached no duty, including alleged duties to force Hartford to fund a settlement or to prevent the Mason County Prosecutor from charging Arden, (2) the

Ardens could not demonstrate proximate cause, and (3) the Ardens could not recover emotional distress damages or attorney fees, and dismissed the Ardens' complaint.[1] In a thoughtful, well-reasoned opinion, the Court of Appeals affirmed the trial court's decision.[2]

The Ardens now seek review of that decision by this Court. Their petition is defective in that it fails to substantively address the issues it putatively raises, thereby waiving them. On the single issue it does address, the petition is long on anti-defense bar rhetoric and short on any legal analysis under RAP 13.4(b) as to why this Court should grant review. This Court should deny review.

B. STATEMENT OF THE CASE

The Court of Appeals opinion sets out the facts in a fair, detailed fashion. Op. at 3-8. Attorneys concur in that statement of facts, but believe that the Ardens' petition misstates key, often undisputed, facts requiring attention to those facts in this answer.

First, it is undisputed that Arden shot the Duffys' 13-week-old lab puppy in December 2011. CP 499-500, 585. Roff Arden also allegedly

[1] In resisting Attorneys' motion for summary judgment, the Ardens *egregiously* misrepresented the record to the trial court, forcing Attorneys to file a motion to strike such false evidence and to seek sanctions. CP 941-59. Attorneys reserve the right to raise this issue, not addressed by the Court of Appeals in its opinion, should this Court grant review. *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 725, 845 P.2d 987 (1993).

[2] Commissioner Pierce denied a motion to transfer this case from Division II to this Court in Cause No. 92116-4.

reported to a Mason County deputy sheriff in the course of the Sheriff's Office's investigation that he shot another of his neighbors' dogs 15 months before. CP 490. Arden subsequently stipulated that the facts in the Mason County Sheriff's investigation report were sufficient for a trier of fact to find him guilty of animal cruelty. CP 591. Those facts included the prior shooting of the Duffys' dog. *Id.*

Second, the Ardens retained attorney Jon Cushman to represent them Hartford initially denied coverage. CP 539, 587-88.[3] Cushman re-tendered the case to Hartford and it agreed to defend the Ardens under a reservation of rights. CP 119, 601. Cushman accepted Attorneys' appointment to represent his clients in the Duffys' lawsuit. CP 320, 601. Thereafter, Cushman remained actively involved in representing the Ardens on coverage, he was also involved in their defense and the settlement negotiations between the Duffys and Attorneys. He had authority to speak for them. CP 134, 166. He agreed to the settlement plan developed by Attorneys and the Ardens, including their case evaluation and objective to have Hartford pay for any settlement. CP 173, 183, 693. In fact, he insisted that Hartford, not the Ardens, would pay any settlement in full. CP 447, 526.

[3] Hartford failed to note initially that the Duffys' civil complaint against the Ardens pleaded negligence counts, claims clearly covered by the Hartford policy. CP 147-48, 315, 317.

On settlement, Cushman was aware of the Duffys' initial demand of $55,000, CP 255, 329, 548, 611, and insisted that Hartford pay it in full. CP 329. He knew Attorneys sought an extension to respond to the demand until the Duffys answered pending discovery. CP 144, 189-90, 330-32, 346, 518, 551-52, 624, 634. Cushman knew and told the Ardens a civil settlement could not affect the Prosecutor's criminal charging decision. CP 554, 638, 651. In fact, Cushman insisted Hartford settle the case when the Duffys clearly stated settlement would not impact the criminal matter. CP 673-74.

Attorneys made clear to the Ardens that they represented them, not Hartford. CP 365, 506. They gave no advice to Hartford about coverage, CP 157, nor did they give the Ardens coverage advice, as Cushman did. CP 544. While Attorneys had represented Hartford on coverage issues in the past, CP 204, nothing in the record indicates that Attorneys represented Hartford on any coverage matter at the same time they represented the Ardens, CP 165, 203-04, nor did the Ardens document the claim in their petition at 3 that Attorneys "regularly" represented Hartford on coverage matters. *See* CP 203-04. Attorneys had served as defense counsel appointed by Hartford in other matters, CP 165, 204.

C. ARGUMENT WHY REVIEW SHOULD BE DENIED

The Ardens' procedurally defective petition for review makes it very difficult for Attorneys to adequately respond to the "issues" the Ardens are actually raising in this Court, or for this Court to properly process their petition.

The Ardens suggest that they intend to address five issues in their petition for review, pet. at 1-2, but then they actually only argue one of those issues pertaining to the alleged conflict of interest of Attorneys. They fail to articulate precisely why review of the Court of Appeals' careful opinion on that issue is merited under the specific criteria of RAP 13.4(b).

Not only did the Ardens have an obligation to articulate the issues they believe this Court should address under RAP 13.4(c)(5), they then had an obligation to provide a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b), with argument." RAP 13.4(c)(7).[4] This they failed to do as

[4] By failing to comply with RAP 13.4(c)(7), the Ardens have waived those issues because they have not legitimately "raised" them within the meaning of RAP 13.7(b) on this Court's scope of review. Clearly, the failure to set out an issue in the statement of issues, required under RAP 13.4(c)(5), means a party has not "raised" an issue, and the issue may not be raised for the first time in subsequent supplemental briefing. *State v. Korum*, 157 Wn.2d 614, 623-25, 141 P.3d 13 (2006) (The petitioner there also failed to present argument on the issue in its petition as required by RAP 13.4(c)(7). 157 Wn.2d at 624.). It is no different if a party mentions an issue but then fails to address as is required by RAP 13.4(c)(7); it must be disregarded. *In re Detention*

to their issues involving (1) the attorney judgment rule, (2) the notion that defense counsel is the trustee of "the insurance defense asset," or (3) fee disgorgement.

The Court of Appeals opinion does not merit review by this Court. RAP 13.4(b). It is fully consistent with precedents of the Court of Appeals and this Court. RAP 13.4(b)(1-2).[5] Nor is it a case of substantial public importance as the Attorneys adhered faithfully this Court's teachings in *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986), and the rule the Ardens seemingly propose to supplant *Tank* for insurance defense counsel is ill-conceived and unworkable. RAP 13.4(b)(4). Simply put, Attorneys did not breach any fiduciary duty to the Ardens or commit professional negligence, and the trial court and Court of Appeals appropriately agreed.

(1) The Court of Appeals Correctly Discerned that Attorneys Adhered to This Court's Decision in *Tank*

The central focus of the Ardens' petition is upon their unfounded allegation that Attorneys somehow violated the *Tank* court's directions. Pet. at 11-17. In *Tank*, this Court was very specific as to the obligations of defense counsel appointed by an insurer to represent an insured where the

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of A.S., 138 Wn.2d 898, 922 n.10, 982 P.2d 1156 (1999) (in the absence of argument on an issue in a petition for review, Court will not consider the argument).

[5] Indeed, the Ardens discuss only three cases in their petition.

insurer is defending under a reservation of rights (as well as the obligations of the insurer to the insureds). The *Tank* court made it crystal clear that an insurer must retain "competent defense counsel" for the insured. *Id.* at 388. That counsel must clearly understand that the insured is the client. *Id.* The *Tank* court then articulated the specific obligations of defense counsel:

> … defense counsel retained by insurers to defend insureds under a reservation of rights must meet distinct criteria as well. First, it is evident that such attorneys owe a duty of loyalty to their clients. Rules of Professional Conduct 5.4(c) prohibits a lawyer, employed by a party to represent a third party, from allowing the employer to influence his or her professional judgment. In a reservation-of-rights defense, RPC 5.4(c) demands that counsel understand that he or she represents only the *insured*, not the company. As stated by the court in *Van Dyke v. White*, 55 Wash.2d 601, 613, 349 P.2d 430 (1960), "[t]he standards of the legal profession require undeviating fidelity of the lawyer to his client. No exceptions can be tolerated."
>
> Second, defense counsel owes a duty of full and ongoing disclosure to the insured. This duty of disclosure has three aspects. First, potential conflicts of interest between insurer and insured must be fully disclosed and resolved in favor of the insured. The dictates of RPC 1.7, which address conflicts of interest such as this, must be strictly followed. Second, all information relevant to the insured's defense, including a realistic and periodic assessment of the insured's chances to win or lose the pending lawsuit, must be communicated to the insured. Finally, *all* offers of settlement must be disclosed to the insured as those offers are presented. In a reservation-of-rights defense, it is the insured who may pay any judgment or settlement. Therefore, it is the insured who must make the ultimate choice regarding settlement. In order to make an informed

> decision in this regard, the insured must be fully apprised of all activity involving settlement, whether the settlement offers or rejections come from the injured party or the insurance company.

Id. at 388-89. *See generally*, Thomas V. Harris, *Wash. Insurance Law* (3d ed.) § 17.05.

The record here clearly discloses Attorneys told the Ardens both by letter and in a face-to-face meeting that their duty was to defend the Ardens. Op. at 4-5.[6] Attorneys were not involved in any coverage controversy between Hartford and the Ardens. *Id*.

Having followed *Tank*'s admonition that defense counsel should avoid any possibility of having the insurer influence defense counsel conduct of the insured's defense, the Court of Appeals properly concluded Attorneys had no duty to persuade Hartford to settle the case, particularly where the Ardens had their own coverage counsel, Jon Cushman, whose job it was to try to persuade Hartford. Op. at 19-20.

The Ardens allege Attorneys violated a duty by failing to disclose potential conflicts between Hartford and the Ardens, as *Tank* requires. However, the undisputed evidence is that Gibson discussed this very issue at his first meeting with them. CP 169. Moreover, in Jon Cushman, the Ardens had a personal attorney handling an existing coverage dispute

[6] The court indicated that a combination of the statements in the initial letter and Gibson's communications during a subsequent meeting with the Ardens satisfied Attorneys' disclosure obligations under *Tank*. Op. at 17-18.

before — and after — Attorneys were retained. Cushman knew, CP 320, and the Ardens are charged with knowing, CP 601, that Hartford appointed Attorneys to represent them in accordance with their policy and paid Attorneys for their services.

Moreover, Attorneys apprised the Ardens, directly or through Cushman, of the settlement negotiations with the Duffys. Op. at 5-6, 21. Cushman was fully aware of counteroffers to the Duffys' demands. Op. at 23-24. Thus, the Ardens' assertions that they were unaware of a defense plan, pet. at 4, and that they never had involvement in settlement decisions, pet. at 6, are simply false.

The only aspect of Attorneys' involvement in settlement in which the Court of Appeals questioned Attorneys' conduct was with regard to consulting with the Ardens before rejecting the Duffys' settlement demand. Op. at 22. But the court also concluded that the Ardens were not harmed by this conduct because the Ardens were only interested in settlement if Hartford paid the settlement *in its entirety*. *Id.*

The Court of Appeals provided a clear, careful articulation of the principles this Court established in *Tank.* Op. at 9-11. It noted the added ethical dimension to defense counsel's obligation to insureds like the Ardens when it discussed the implications of RPC 5.4(c) and RPC

1.8(f)(2) that apply when a third party is paying for the services of counsel in representing clients. Op. at 10. Review is not merited. RAP 13.4(b).

(2) The Court of Appeals Correctly Concluded that Attorneys Had No RPC 1.7 Conflict of Interest

Tank requires not only that appointed defense counsel meet this Court's specific protocol for the appropriate representation of an insured in a reservation of rights situation, the appointed counsel must also avoid specific conflicts of interest under RPC 1.7. 105 Wn.2d at 388. Here, Attorneys had no conflict of interest under that rule.

Just as the Ardens' petition does not actually provide argument to this Court on their putative issues involving defense counsel as a "trustee," fee disgorgement, or the attorney judgment rule in professional negligence cases, it appears that the Ardens believe there is a conflict of interest issue in this case, because they employ the language of RPC 1.7, pet. at 1 (issue 1), but they then offer *no argument* in the petition on how the Court of Appeals decision *in any way* contradicted the teachings of this Court on RPC 1.7 or contradicted precedential decisions of the Court of Appeals.

The Ardens seemingly contend for a position on defense counsel's relationship with an insured that *far exceeds* the express parameters of *Tank*. They imply that insurer-appointed defense counsel *automatically* have a conflict of interest with insureds if they have ever represented an

insurer in a coverage dispute or have been appointed by an insurer. Pet. at 12-17.[7] Such a position undermines *Tank* and other Washington authority.

The Court of Appeals addressed the issue of conflict of interest with care in its opinion at 13-14, rejecting an apparent argument offered by the Ardens that an insurer in a reservation of rights case is automatically "conflicted" and must invariably appoint as the insured's defense counsel an attorney who has never previously represented the insurer in coverage matters or has never been appointed by an insurer to represent other insureds. Op. at 14-15. As the Court of Appeals noted, the Ardens' initial premise is wrong. *Tank* specifically stands for the proposition that while defense under a reservation of rights creates only a "potential" for a conflict of interest, an actual conflict of interest can be

[7] The Ardens supported this extreme position with the declaration of Professor John Strait who concluded that any representation by Attorneys of Hartford on coverage matters, regardless of how different the time or subject of such coverage matters might be, constituted so great a conflict that the Ardens could not have waived it. CP 422. Jeffrey Tilden, an expert with considerable experience as defense counsel and personal counsel for policyholders, stated:

> In essence, Professor Strait's opinion is that an attorney cannot both represent an insurer as to coverage in some matters and simultaneously defend that insurer's policyholders in other matters. This is plainly not the standard of care in this state. The practice of reasonable, careful, and prudent attorneys across Washington is to do just this. Hundreds of attorneys across the state do both coverage work and appointed defense work for the same insurers on a daily basis and have for the entire 33 years of my career. I have never heard anyone suggest this was improper until the declaration filed here.

CP 365.

avoided if this Court's directions set forth to defense counsel are met. 105 Wn.2d at 387. Op. at 14-15.[8]

Like the Supreme Court, the Court of Appeals has long rejected the proposition that there is an "automatic" conflict of interest when an insurer defends an insured under a reservation of rights. *Johnson v. Continental Cas. Co.*, 57 Wn. App. 359, 361, 788 P.2d 598 (1990) ("In Washington, there is simply no presumption that a reservation of rights situation creates an automatic conflict of interest."). An insurer has no obligation to pay for its insured's retention of separate, personal counsel so long as the insurer and its appointed defense counsel adhere to the *Tank* protocol. *Id*. at 362-63. As noted in Thomas V. Harris, *Wash. Insurance Law* (3d ed.) at 17-18, "The decision in *Johnson* is entirely appropriate."

An automatic conflict rule is obviously *highly impractical*, and will deprive insurers of the ability to appoint the most qualified, experienced defense counsel to represent insureds, something highly desirable from the *insureds' standpoint*.[9]

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[8] The Court of Appeals specifically noted, however, that defense counsel are not insulated from liability for breach of their fiduciary duty to a client if they failed to adhere to the *Tank* protocol. Op. at 15 n.6.

[9] The Ardens neglect to discuss just how far they propose their interpretation of RPC 1.7 should go. Will a single representation of an insurer in a coverage dispute 10 years ago, invariably disqualify that firm from appointment to represent an insured? Will 5% of a firm's work that involves defense appointment to represent insureds mandate disqualification? Will appointment by State Farm to defend its insureds at some point disqualify a firm from representing Hartford insureds? Such a broad sweep to RPC

The record shows as a matter of law that Attorneys did not violate the conflict rules because a "concurrent conflict of interest" never arose. RPC 1.7(a)(2).[10] As a matter of law, no concurrent conflict of interest existed, because the Ardens presented no evidence of a "significant risk" that representation of the Ardens would be "materially limited" by Attorneys' responsibilities to Hartford or a personal interest of any of the Attorneys, a showing required under RPC 1.7(a)(2). The Ardens presented no evidence that Hartford was a current client when Attorneys began representing the Ardens. The Ardens also do not contend that Attorneys represented Hartford as to the Ardens' coverage or on a similar coverage issue in any other case.

Instead, there was significant proof that Attorneys' conduct – far from being "materially limited" – in fact met the standard of care in every way. CP 362-69, 508-26.

Finally, with regard to the one instance in which a specific conflict of interest was alleged by the Ardens – an alleged failure on Attorneys'

1.7(a) certainly has implications for the construction of CJC 2.11(A)(6) as well. An absolute rule, if that is what the Ardens are contending should apply in the RPC 1.7(a) context, must be rejected.

[10] "A concurrent conflict of interest exists if ... there is significant risk that the representation of [a] client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer." RPC 1.7(a)(2). *See generally*, *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 48, 84, 331 P.3d 1147 (2014) where this Court held that an attorney's representation of a trust set up for his children and the principal of a debt collection firm was directly adverse under RPC 1.7(a)(1).

part to "quickly" settle the Duffys' lawsuit, the Court of Appeals patiently explained that there was no breach of duty by Attorneys because the Ardens failed to document any alleged conflict. Op. at 20-21.[11]

If it is the Ardens' position that they are entitled to an "independent counsel" in which they select counsel to represent them in defense of a tort claim like that of the Duffys, and insurers like Hartford must simply pay for such representation, that position is unsupported in Washington. (Again, left undiscussed is the question of whether such counsel would be invariably barred from representing them if concurrently, or in the past, such counsel had represented Hartford on a coverage matter or had been appointed to defend a Hartford insured). This Court implicitly rejected such a notion in *Tank*, as the Court of Appeals observed. Op. at 14. This approach to representation of insureds has been modified by statute in the state in which it originated. *Dynamic Concepts, Inc. v. Truck Ins. Exchange*, 71 Cal. Rptr. 2d 882 (Cal. App. 1998).[12]

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[11] Indeed, the Ardens do not argue this issue in their petition, and mention an alleged desire for such a quick settlement only in passing. The facts also belie the argument in any event. Attorneys were appointed to represent the Ardens by Hartford on November 19. Gibson met with them 5 weeks later. Attorneys served discovery on the Duffys shortly after that. CP 621. The full duration of Attorneys' representation of the Ardens was about 5 months.

[12] The idea of independent counsel originated in California in *San Diego Federal Credit Union v. Cumis Ins. Society, Inc.*, 208 Cal. Rptr. 494 (Cal. App. 1984). The California Legislature substantially modified the principle in Cal. Civil Code § 2860. In *Dynamic Concepts*, applying that code section, the court held that an insurer's defense under a reservation of rights did not create a per se conflict of interest requiring

Moreover, Washington law is unambiguous after *Tank* that defense counsel owe a duty to the insureds they represent, not to the insurer that pays them. In the malpractice context, this Court has specifically held that insurance defense counsel have *no duty* to the carrier that selects them and pays for the representation of the insured. In *Stewart Title Guaranty Co. v. Sterling Savings Bank*, 178 Wn.2d 561, 567-68, 311 P.3d 1 (2013), this Court specifically held there is no duty (directly or indirectly under *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994)), allowing an insurance carrier to sue insurance defense counsel for professional negligence. In so holding, this Court found to do so would conflict with *Tank* and violate RPC 5.4(c). The Ardens' position is implicitly based upon a proposition that insurance defense counsel have independent duties to the carrier, a proposition rejected in *Stewart Title*. The role and

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appointment of independent counsel. As noted in Douglas R. Richmond, *Independent Counsel in Insurance*, 48 San Diego L. Rev. 857, 859 (2011), the "majority, and clearly better position" is that not every reservation of rights creates an automatic entitlement to independent counsel in states that allow for such a role. Moreover, that role itself is fraught with practical problems:

> For example, what qualifies a lawyer or law firm to serve as independent counsel? Who selects independent counsel? How or on what basis should independent counsel be compensated? Must independent counsel accept the same financial and administrative constraints that insurers impose on their regular counsel? What is the relationship between the insurer and independent counsel? What duties do independent counsel owe and to whom do they owe them? There is little authority to guide courts and lawyers analyzing these issues, and only a few states regulate independent counsel in any fashion.

Id. at 860.

obligations of insurance defense counsel are those enunciated in *Tank*, which were met in this case. This Court should reject the Ardens' attempt to undercut established precedent with no articulated reason to do so.

Finally, the Ardens' attempt to smear all defense counsel as invariably failing to live up to their ethical and *Tank*-related obligations merits a response. Pet. at 17-19. The Ardens offer no real evidence or authority that this is a pressing problem in Washington. Without any basis, the Ardens cast aspersions on the men and women appointed to represent insureds who generally perform excellent, highly professional, and ethical services on behalf of insureds they are appointed to represent. This Court should not simply accept such an unsupported, broad brush assertion by the Ardens. RAP 13.4(b)(4).

Simply put, the Ardens offer no real argument as to how Attorneys violated RPC 1.7(a). This Court should not be required to construct an argument when the party has failed to make such an argument on its own behalf. Review of this putative issue is not merited under RAP 13.4(b).

(3) Contingent Issues As to Why the Court of Appeals Decision Is Correct

As noted *supra*, the Ardens have waived the other issues mentioned in passing in their petition[13] such as the attorney judgment rule,[14] the establishment of a trust,[15] and disgorgement.[16]

Moreover, there are additional reasons why the Ardens failed to establish claims for professional negligence or breach of fiduciary duty against Attorneys. To the extent that the Ardens contend Attorneys bore some duty to them with regard to Rolf Arden's criminal prosecution, a point disputed below by Jeffrey Tilden, CP 523,[17] the Ardens are

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[13] Attorneys reserve the right to raise these issues in any supplemental brief should the Court deem them appropriately preserved for review. *Lewis River Golf*, *supra*.

[14] The Ardens contend that the attorney judgment rule should never apply in Washington in connection with the breach of duty elements of a professional negligence or fiduciary duty claim. Pet. at 2, 11. However, they offer no argument in their petition on that theory, *waiving* it for the reasons cited *supra*. The Court of Appeals' analysis of the issue, however, is entirely supported on the facts and the law in any event. Op. at 22-27. *See generally*, br. of resp'ts at 28.

[15] The Ardens endorse a novel theory that appointed defense counsel is the trustee of the "defense asset." Pet. at 2. Ultimately, the Ardens have *no authority* for their novel proposition; trust law certainly does not fit in this context. *See* br. of resp'ts at 26-27.

[16] The Ardens also contend they are entitled to "disgorgement" of fees paid to Attorneys, *even though they never paid them*. Pet. at 2. While a client whose attorney has breached a fiduciary duty to the client may be entitled to disgorgement of attorney fees in certain egregious situations, this relief is not available in every case. *Kelly v. Foster*, 62 Wn. App. 150, 156, 813 P.2d 598, *review denied*, 118 Wn.2d 1001 (1991). Instead, it should only be applied where the claimed attorney misconduct is so egregious as to constitute a complete defense to a claim for fees. *Id.* at 157. *See generally*, br. of resp'ts at 49-50.

[17] Tilden opined that Attorneys met the standard of care as to their treatment of Rolf Arden's criminal case situation in any event. CP 369.

effectively requesting that Attorneys take on the responsibilities of criminal defense lawyers. As such, they are immune from professional negligence liability unless Arden was actually innocent. *Ang v. Martin*, 154 Wn.2d 477, 114 P.3d 637 (2005); *Piris v. Kitching*, ___ Wn.2d ___, __ P.3d __, 2016 WL 3748969 (2016). Because Arden was admittedly guilty of killing the Duffy's puppy, as noted *supra*, Attorneys are immune from liability. They reserve the right to raise this issue. *Lewis River Golf, supra*.

The Ardens cannot establish either harm[18] or proximate cause[19] or in connection with their claims, and Attorneys reserve the right to raise these issues should the Court grant review. *Lewis River Golf, supra*.

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[18] The Court of Appeals did not address the Ardens' alleged harm, but the Ardens failed to establish the requisite harm element of their claims. *See generally*, br. of resp'ts at 43-50. The Ardens argued below that as a result of Attorneys' conduct, they were forced to incur fees in *Duffy v. Arden*, in *State v. Arden*, and in this case. Br. of Appellants at 39-41. In doing so, they disregard settled Washington law that a plaintiff may not recover attorney fees in an action for legal malpractice or for breach of fiduciary duty, absent a contract, statute, or recognized equitable ground. *Schmidt v. Coogan*, 181 Wn.2d 661, 679, 335 P.3d 424 (2014); *Benke v. Ahrens*, 172 Wn. App. 281, 296, 294 P.3d 729 (2012), *review denied*, 177 Wn.2d 1003 (2013); *Shoemake v. Ferrer*, 143 Wn. App. 819, 831, 182 P.3d 992 (2008). The Ardens also could not recover fees under equitable indemnity for recovery of attorney fees. *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 358, 110 P.3d 1145 (2005).

Finally, the Ardens could not recover damages for their alleged emotional distress. *Schmidt*, 181 Wn.2d at 679.

[19] The Ardens failed to establish the requisite proximate cause for either their professional negligence or breach of fiduciary duty theory as to Attorneys' alleged failure to timely settle. *See generally*, br. of resp'ts at 38-43. Clearly, the Ardens wanted Hartford to pay and gave it and Attorneys latitude to negotiate a settlement; the Ardens always conditioned settlement on Hartford's funding it, as they admitted. Br. of Appellants at 28. The Court of Appeals correctly concluded any issues regarding the

D. CONCLUSION

The Ardens' petition for review is procedurally defective, making the response to that petition and its processing a matter of needless guesswork for Attorneys and this Court. The Ardens mention issues, but do not argue them, thereby waiving them. On the issue they do argue, they fail to address the criteria in RAP 13.4(b) governing review.

The trial court's summary judgment decisions were correct, and the Court of Appeals correctly affirmed those decisions based on *Tank* and RPC 1.7 in its thoughtful opinion. Because the Ardens fail to demonstrate how the Court of Appeals opinion falls within any of the criteria in RAP 13.4(b), this Court should deny review.

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settlement process did not harm the Ardens, given that desire to have Hartford pay any settlement. Op. at 21-24.

Similarly, nothing Attorneys did in settlement had anything to do with criminal charges against Roff Arden. Simply put, Roff Arden admitted to shooting his neighbor's pet. He admitted the evidence was sufficient to convict him. CP 591. His conduct was the cause of being charged with animal cruelty and being sued by the Duffys. When the Prosecutor decided to charge Arden, he undisputedly did not know the Duffys were suing the Ardens. CP 441. His decision, therefore, was not (and could not have been) influenced by the status of the civil action. Moreover, the Duffys undisputedly planned to pursue the criminal charges even if their civil case settled. The Ardens and their counsel asked Hartford to fund the settlement even knowing the Duffys wanted to try and influence the prosecutor to file charges. CP 673-74. The Court of Appeals correctly discerned that the Ardens again failed to establish causation. Op. at 24-27.

DATED this 15th day of July, 2016.

Respectfully submitted,

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THE SUPREME COURT OF WASHINGTON

ROFF and BOBBI ARDEN, Petitioners, v. FORSBERG UMLAUF, PS, et al., Respondents.	)	No. 93207-7 **ORDER** C/A No. 46991-0-II

Department I of the Court, composed of Chief Justice Madsen and Justices Johnson, Fairhurst, Wiggins, and Gordon McCloud, considered at its September 27, 2016, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is granted. Any party may serve and file a supplemental brief within 30 days of the date of this order, see RAP 13.7(d).

DATED at Olympia, Washington, this 28th day of September, 2016.

For the Court

Madsen, C.J.
CHIEF JUSTICE

2446.002.cc:cliente

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September 29, 2016

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Re: Supreme Court No. 93207-7 - Roff and Bobbi Arden v. Forsberg Umlauf, PS, et al.
Court of Appeals No. 46991-0-II

Counsel:

The following notation ruling was entered on September 29, 2016, by the Supreme Court Clerk in the above referenced case:

MOTION FOR EXTENSION OF TIME TO FILE RESPONDENTS' SUPPLEMENTAL BRIEF

"Motion granted as to both parties. Any supplemental brief for this case should be served and filed by November 28, 2016."

Sincerely,

Susan L. Carlson
Supreme Court Clerk

SLC:bw

Tank v. State Farm Fire & Casualty Co.

Supreme Court of Washington

March 20, 1986

Nos. 50933-6, 50994-8

Reporter
105 Wn.2d 381; 715 P.2d 1133; 1986 Wash. LEXIS 1078

James D. Tank, Respondent, v. State Farm Fire and Casualty Company, Petitioner, Melvin F. Walker, Respondent. Pamela G. Johnson, Appellant, v. Public Employees Mutual Insurance Company, Respondent

Case Summary

Procedural Posture
Respondents, insured and adversary, brought an action against petitioner first insurer, and appellant accident victim brought an action against respondent second insurer, claiming breach of the duty of good faith. The trial courts dismissed the actions. The Washington Court of Appeals reversed as to the insured. The court consolidated the appeals of the adversary, the accident victim, and the insurers.

Overview
The insured assaulted the adversary. The first insurer defended the insured in the adversary's action under a reservation of rights. The accident victim was injured by an insured of the second insurer. The insured contended on appeal that the first insurer's reservation of rights had caused it to defend him less vigorously, and the adversary and the accident victim argued that the insurers were negligent per se or were guilty of deceptive practices. The court held that the duty of good faith of an insurance company defending under a reservation of rights included an enhanced obligation of fairness toward its insured. Potential conflicts between the interests of the insurer and the insured, inherent in a reservation of rights defense, underlay the insurer's enhanced obligation. The court concluded that there was insufficient evidence to support the finding that a question of fact existed on the first insurer's breach of the duty of good faith. As an action for breach of good faith against an insurer was limited to the insured, third party claimants could not sue an insurance company directly for alleged breach of duty of good faith under a liability policy.

Outcome
The court affirmed the trial court's grant of summary judgment to the first insurer, thereby reversing the judgment of the court of appeals for the insured. The court upheld the court of appeals' judgment affirming the dismissal of the adversary's claim, and affirmed the trial court's dismissal of the accident victim's action.

Counsel: *Mullin,* **[***4]** *Etter & Cronin, P.S.,* by *Mr. Timothy P. Cronin,* Spokane, Washington, and *Reed, McClure, Moceri, Thonn & Moriarty,* by *Mr. William R. Hickman* and *Ms. Karen Southworth Weaver,* Seattle, Washington, for petitioner.

Gould, Russo, Eitreim & Barrett, by *Mr. Robert B. Gould* and *Mr. Douglas K. Barrett,* Seattle, Washington, for appellant.

Mr. Clinton J. Henderson, Attorney at Law, Clarkston, Washington, for respondents Tank and Walker.

Keolker & Swerk, by *Mr. Robert A. Keolker,* Seattle, Washington, for respondent Public Employees Mutual Insurance Co.

Mr. Bryan P. Harnetiaux, Attorney at Law, on behalf of Washington Trial Lawyers Association, Spokane, Washington, amicus curiae for respondent Tank.

Bertha B. Fitzer on behalf of Washington Association of Defense Counsel, amicus curiae for the insurers.

Judges: En Banc. Brachtenbach, J. Dolliver, C.J., and Utter, Pearson, Andersen, Callow, and Durham, JJ., concur. Dore and Goodloe, JJ., dissent in part by separate opinion.

Opinion by: BRACHTENBACH

Opinion

[*383] **[**1135]** These two cases were consolidated. Both present the issue whether a third party claimant may sue an insurer directly for **[***5]** breach of the insurer's duty of good faith. To fully address that question, the portion of Tank v. State Farm Fire and Casualty Company which involves Walker, the third party claimant, is consolidated with Johnson v. Public Employees Mutual Insurance Company and analyzed in part II.

That portion of Tank v. State Farm Fire & Casualty Company which involves an insured's claims against his insurer for breach of duty of good faith is addressed in part I.

I

The case involving Tank presents the question, broadly stated, of the nature of an insurance company's duty of good faith toward its insured when the company defends under a reservation of rights, and whether State Farm Fire and Casualty Company (State Farm) breached that duty. We hold that the duty of good faith of an insurance company defending under a reservation of rights includes an enhanced obligation of fairness toward its insured. Potential conflicts between the interests of insurer and insured, inherent in a reservation of rights defense, underlie this enhanced obligation. In this case, however, there is insufficient evidence on the record to support the finding that a question of fact exists regarding whether State Farm **[***6]** breached its duty of good faith. Thus, we affirm the trial court grant of summary judgment to State Farm and reverse the Court of Appeals. *See Tank v. State Farm Fire & Cas. Co.*, 38 Wn. App. 438, 686 P.2d 1127 (1984).

[*384] The incident giving rise to this dispute occurred in April 1980, when Tank assaulted Walker in a supermarket parking lot in Clarkston, Washington. Walker sued Tank, alleging intentional tort. When Tank contacted State Farm, his insurer, the company advised Tank that if his acts were intentional, there was a specific policy provision excluding coverage.

Tank then retained his own attorney, who tendered to State Farm the defense of the Walker suit. After investigation of the incident, State Farm accepted the defense upon a specific clearly stated reservation of the right to contest coverage. State Farm then retained counsel to represent the insurer's interests and retained separate counsel to represent Tank.

The attorney hired by State Farm for Tank maintained contact with the insured, the insured's personal attorney, and the insurer, providing a written evaluation of the case to all parties prior to trial. Defense counsel's opinion was that it **[***7]** was a case of liability, that mutual combat was not a defense, and that self-defense was a slim but possible defense. Counsel also informed all parties that settlement in the $ 3,000 to $ 5,000 range had been rejected by Tank's personal lawyer. Although it is not entirely clear from the record, the insured apparently was financially unable to contribute to a settlement. It is also unclear whether State Farm would have contributed estimated defense costs to a settlement. In any event, no settlement was reached, and the case was tried to the court.

The court found Tank liable to Walker for $ 16,118.67 in damages and $ 305.40 in costs. This judgment was based on a finding that Tank had committed an intentional tort. Tank has not contested this finding. Moreover, he concedes that the finding that he committed an intentional tort absolves State Farm of any duty to pay.

State Farm refused to pay the judgment. Tank then sued State Farm for breach of duty of good faith. His complaint alleged that State Farm failed to make reasonable efforts to settle the Walker claim and that State Farm subordinated **[*385]** Tank's interests to its own interests by structuring a defense which **[***8]** would absolve State Farm of liability under Tank's insurance policy. State Farm moved for summary judgment of dismissal, which the trial court granted. Tank appealed to the Court of Appeals, which reversed as to Tank. State Farm now petitions for review of that reversal.

[1136]** The real issue in this case is: what does an insurer's duty of good faith entail when the insurer defends under a reservation of rights? In addressing this issue, we focus on (1) the evolution of the duty of good faith imposed on insurers in this state, (2) the nature of this duty in a reservation of rights context, and (3) application of the good faith duty in a reservation of rights context to the facts of this case.

Webster's Third New International Dictionary 978 (1976) defines "good faith" as "a state of mind indicating honesty and lawfulness of purpose". This definition of good faith as applied to the insurance industry would require that an insurer deal with its insured in a state of mind indicating honesty and lawfulness of purpose.

[1] The duty to act in good faith or liability for acting in bad faith generally refers to the same obligation. *Tyler v. Grange Ins. Ass'n,* 3 Wn. App. **[***9]** 167, 173, 473 P.2d 193 (1970). Indeed, we have used those terms interchangeably. *See Murray v. Mossman,* 56 Wn.2d 909, 355 P.2d 985 (1960). However, regardless of whether a good faith duty in the realm of insurance is cast in the affirmative or the negative, the source of the duty is the same. That source is the fiduciary relationship existing between the insurer and insured. Such a relationship exists not only as a result of the contract between insurer and insured, but because of the high stakes involved for both parties to an insurance contract and the elevated level of trust underlying insureds' dependence on their insurers. This fiduciary relationship, as the basis of an insurer's duty of good faith, implies more than the "honesty and lawfulness of purpose" which comprises a standard definition of good faith. It implies "a broad obligation of fair dealing", *Tyler,* at 173, and a responsibility to give "equal consideration" to the insured's **[*386]** interests. *Tyler,* at 177. Thus, an insurance company's duty of good faith rises to an even higher level than that of honesty and lawfulness of purpose toward its policyholders: an insurer must deal fairly with an **[***10]** insured, giving equal consideration *in all matters* to the insured's interests.

The duty of good faith has been imposed on the insurance industry in this state by a long line of judicial decisions. *See, e.g., Burnham v. Commercial Cas. Ins. Co.,* 10 Wn.2d 624, 117 P.2d 644 (1941); *Evans v. Continental Cas. Co.,* 40 Wn.2d 614, 245 P.2d 470 (1952); *Van Dyke v. White,* 55 Wn.2d 601, 349 P.2d 430 (1960); *Murray v. Mossman,* 56 Wn.2d 909, 355 P.2d 985 (1960); *Waite v. Aetna Cas. & Sur. Co.,* 77 Wn.2d 850, 467 P.2d 847 (1970); *Hamilton v. State Farm Ins. Co.,* 83 Wn.2d 787, 523 P.2d 193 (1974); *Levy v. North Am. Co. for Life & Health Ins.,* 90 Wn.2d 846, 586 P.2d 845 (1978); *Tyler v. Grange Ins. Ass'n,* 3 Wn. App. 167, 473 P.2d 193 (1970); *Weber v. Biddle,* 4 Wn. App. 519, 483 P.2d 155 (1971); *Briscoe v. Travelers Indem. Co.,* 18 Wn. App. 662, 571 P.2d 226 (1977); *Rice v. Life Ins. Co.,* 25 Wn. App. 479, 609 P.2d 1387 (1980); *Gould v. Mutual Life Ins. Co.,* 37 Wn. App. 756, 683 P.2d 207 (1984).

Not only have the courts imposed on insurers a duty of good faith, the Legislature has imposed it as well. RCW 48.01.030 provides, in relevant part: **[***11]**

> The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters.

In addition, the Insurance Commissioner, pursuant to legislative authority under RCW 48.30.010, has promulgated regulations defining specific acts and practices which constitute a breach of an insurer's duty of good faith. *See* Washington Administrative Code 284-30-300 *et seq.*

The imposition of an insurer's duty of good faith by both the courts and the Legislature of this state has resulted in lawsuits alleging breach of that duty in both nondefense and defense settings. In a nondefense context, allegations of **[*387]** breach have arisen from the company's wrongful refusal to pay a claim. (*See, e.g., Levy v. North Am. Co. for Life & Health Ins., supra; Rice v. Life Ins. Co., supra; Gould v.* **[**1137]** *Mutual Life Ins. Co., supra*.) In a defense context, actions for breach of an insurer's duty of good faith have involved a wrongful refusal to defend (*see, e.g., Waite v. Aetna Cas. & Sur. Co., supra; Briscoe v. Travelers Indem. Co., supra*), or failure **[***12]** to settle a lawsuit within policy limits (*see, e.g., Burnham v. Commercial Cas. Ins. Co., supra; Evans v. Continental Cas. Co., supra; Murray v. Mossman, supra; Hamilton v. State Farm Ins. Co., supra; Tyler v. Grange Ins. Ass'n, supra*). While the above "defense context" opinions all dealt with a nonreservation of rights defense, at least two decisions have addressed breach of duty of good faith in the conduct of a reservation of rights defense: *Van Dyke v. White, supra,* and *Weber v. Biddle, supra*. Both *Van Dyke* and *Weber* made it clear that an insurer owes the same duty of good faith to its insured, regardless of the type of defense it has undertaken. The Court of Appeals in *Weber,* at 524, specifically found no distinction between the two types of defenses:

> A reservation of rights agreement is not a license for an insurer to conduct the defense of an action in a manner other than [the manner in which] it would normally be required to defend. The basic obligations of the insurer to the insured remain in effect.

The "basic obligations" referred to in *Weber* amount to a duty of good faith. We have stated that the duty of good faith of an insurer **[***13]** requires fair dealing and equal consideration for the insured's interests. Thus, under *Weber*, the same standard of fair dealing and equal consideration is unquestionably applicable to a reservation of rights defense. We find, however, that the potential conflicts of interest between insurer and insured inherent in this type of defense mandate an even higher standard: an insurance company must fulfill an enhanced obligation to its insured as part of its duty of good faith. Failure to satisfy this enhanced obligation may result in liability of the company, **[*388]** or retained defense counsel, or both.

[2] This enhanced obligation is fulfilled by meeting specific criteria. First, the company must thoroughly investigate the cause of the insured's accident and the nature and severity of the plaintiff's injuries. Second, it must retain competent defense counsel for the insured. Both retained defense counsel and the insurer must understand that only the *insured* is the client. Third, the company has the responsibility for fully informing the insured not only of the reservation of rights defense itself, but of *all* developments relevant to his policy coverage and the progress **[***14]** of his lawsuit. Information regarding progress of the lawsuit includes disclosure of all settlement offers made by the company. Finally, an insurance company must refrain from engaging in any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk.

[3] In addition to the above specific criteria to be met by the company, defense counsel retained by insurers to defend insureds under a reservation of rights must meet distinct criteria as well. First, it is evident that such attorneys owe a duty of loyalty to their clients. Rules of Professional Conduct 5.4(c) prohibits a lawyer, employed by a party to represent a third party, from allowing the employer to influence his or her professional judgment. In a reservation of rights defense, RPC 5.4(c) demands that counsel understand that he or she represents only the *insured*, not the company. As stated by the court in *Van Dyke v. White*, 55 Wn.2d 601, 613, 349 P.2d 430 (1960), "[t]he standards of the legal profession require undeviating fidelity of the lawyer to his client. No exceptions can be tolerated."

Second, defense counsel owes a duty of full and ongoing **[***15]** disclosure to the insured. This duty of disclosure has three aspects. First, potential conflicts of interest between insurer and insured must be fully disclosed and resolved in favor of the insured. The dictates of RPC 1.7, which address conflicts of interest such as this, must be strictly followed. Second, **[*389]** all information **[**1138]** relevant to the insured's defense, including a realistic and periodic assessment of the insured's chances to win or lose the pending lawsuit, must be communicated to the insured. Finally, *all* offers of settlement must be disclosed to the insured as those offers are presented. In a reservation of rights defense, it is the insured who may pay any judgment or settlement. Therefore, it is the insured who must make the ultimate choice regarding settlement. In order to make an informed decision in this regard, the insured must be fully apprised of all activity involving settlement, whether the settlement offers or rejections come from the injured party or the insurance company.

Based on the foregoing criteria, we find no question of fact in the instant case regarding an alleged breach of duty of good faith by State Farm. In considering **[***16]** the materials which were utilized by the trial court in granting summary judgment to State Farm, it is clear that the company fully investigated the incident involving its insured and the plaintiff. In addition, there were no allegations in Tank's complaint that State Farm neglected to hire competent defense counsel or failed to understand that defense counsel should represent only Tank. In fact, the record is clear that the company retained counsel to represent the company's interests and then hired separate counsel for Tank. Furthermore, State Farm fully informed Tank of all developments regarding policy coverage and the progress of the insured's lawsuit. Finally, there is no evidence on the record to suggest that the company engaged in actions which demonstrated greater concern for its own interests than for the interests of its insured. As to Tank's allegations that State Farm had a duty to settle his lawsuit, we have stated that it is the insured

who must decide whether to settle a lawsuit defended under a reservation of rights. To aid in this decision, the insured must be fully informed of all settlement activity. There is no evidence on the record to suggest Tank was **[***17]** not fully informed.

[4] Notwithstanding that Tank's complaint alleged **[*390]** breach of a good faith duty by State Farm, the insured's real concern appears to be that retained defense counsel provided an improper defense. However, Tank never specifically alleged any breach of duty by retained defense counsel, relying instead on the deposition of that attorney to show that the defense was conducted in a manner contrary to the insured's interests. We, however, cannot consider that deposition in reaching our decision. We are limited here to a review of the propriety of the trial court's grant of State Farm's motion for summary judgment and the Court of Appeals reversal of that grant. Because we are asked to consider only a summary judgment dismissal, we may take into account only those materials upon which the trial court relied in making its ruling. The trial court, in the summary judgment order, specifically recited the materials upon which it relied. Those materials did not include the deposition of defense counsel, and with good cause. The deposition had been taken the day before the summary judgment hearing. It had not then been transcribed. While there was reference to **[***18]** it in argument, the record is clear that it was not considered. Indeed, it was not even filed with the court until a month *after* the summary judgment order was signed. Thus, we are precluded from considering the deposition. Moreover, the Court of Appeals erred in relying on this deposition.

Even assuming the existence of attorney misconduct, which we do not, we must disregard it. Because we must disregard the actions of defense counsel in this case, we are unable to enter into any discussion of an insurer's vicarious and direct liability and/or defense counsel's liability as an independent contractor for breach of defense counsel's duties as an attorney.

In holding that insurers defending under a reservation of rights have an enhanced obligation to insureds, and in enumerating specific criteria which comprise that enhanced obligation, we do not propose to discourage reservation of rights defenses. **[**1139]** We recognize that such a defense usually provides a valuable service to the insured. However, if the **[*391]** outcome of the trial would determine whether coverage exists, and an attorney hired by the insurer conducts a defense while in close communication with **[***19]** the insurer, the defense itself should be closely scrutinized. This is especially true where, as here, the judgment resulted in no liability to the insurance company.

We also recognize that insurers, when faced with defending under a reservation of rights, are not without alternatives. They may sue for a declaratory judgment before they undertake a defense, to determine their liability. *See, e.g., American Employer's Ins. Co. v. Crawford,* 87 N.M. 375, 533 P.2d 1203 (1975). The company may also instruct an insured to pay for his own defense, reimbursing him for defense costs if the final judgment establishes the company's liability. *See, e.g., Waite v. Aetna Cas. & Sur. Co.,* 77 Wn.2d 850, 467 P.2d 847 (1970). In any event, the company must always give equal consideration in all matters to the well being of its insured. "Good conscience and fair dealing [require] that the company pursue a course that [is] not advantageous to itself while disadvantageous to its policyholder; . . ." *Van Dyke v. White,* 55 Wn.2d 601, 611, 349 P.2d 430 (1960) (quoting *Perkoski v. Wilson,* 371 Pa. 553, 557, 92 A.2d 189 (1952)).

II

Walker, the injured in *Tank v. State Farm Fire* **[***20]** *& Cas. Co.,* 38 Wn. App. 438, 686 P.2d 1127 (1984), and Johnson, the injured in Johnson v. Public Employees Mutual Insurance Company (PEMCO), both sued insurance companies as third party claimants. Their appeals thus raise a single issue: may a third party claimant who was injured by the insured bring a cause of action against the insurer? We hold that third party claimants may not sue an insurance company directly for alleged breach of duty of good faith under a liability policy. Before proceeding to an analysis, we set forth the facts of these cases separately.

Walker was injured by Tank in a traffic oriented altercation. He sued Tank and recovered a judgment of approximately **[*392]** $ 16,000, based on Tank's intentional tort. State Farm, Tank's insurer, refused to pay the judgment, and Tank was apparently unable to pay it. Tank subsequently sued State Farm for breach of duty of good faith (issue 1). Walker joined as a plaintiff-in-intervention, alleging that State Farm breached its duty of good faith to him.

The trial court dismissed Walker's complaint upon State Farm's motion for summary judgment. The Court of Appeals affirmed, holding that an action for breach of **[***21]** good faith against an insurer is limited to the insured. *See Tank v. State Farm Fire & Cas. Co., supra*. By our holding today we affirm both the trial court and the Court of Appeals.

Johnson was injured in a minor automobile accident by Carol Prets, who was PEMCO's insured. Johnson apparently sustained injury to her shoulder, neck, and lower back; however, PEMCO questioned whether Johnson's condition was caused by the subject collision or caused or contributed to by an earlier accident. Prets nonetheless stipulated to entry of an order of liability, and the issue of damages was reserved for trial. In the meantime, Johnson's condition required medication, physical therapy, and visits to a physician. PEMCO refused to advance any expenses for this treatment. Moreover, Johnson alleged that PEMCO had made no effort either to obtain an independent medical examination or to settle the Johnson versus Prets claim. Ultimately, Johnson sued PEMCO for bad faith in failure to settle a claim. Upon PEMCO's motion for summary judgment, the trial court granted dismissal. The court found that third parties had no direct right of action in this context against insurance companies. We affirm **[***22]** the trial court.

In their respective lawsuits against State Farm and PEMCO, both Walker and Johnson alleged negligence per se and violations of the Consumer Protection Act (CPA), RCW 19.86. Petitioners cannot prevail **[**1140]** against the insurance companies under either theory.

The statutory violations alleged by petitioners as the basis for their negligence per se actions are bottomed on **[*393]** RCW 48.30.010. This statute, discussed in part I, generally prohibits unfair or deceptive acts or practices in the business of insurance. It further authorizes the Insurance Commissioner to promulgate regulations which define and prohibit specific unfair acts or practices.

Pursuant to authority under RCW 48.30.010, the Insurance Commissioner developed comprehensive unfair practice regulations which became effective on September 1, 1978. These rules are found in WAC 284-30-300 through -600. They generally set forth certain minimum standards which, if violated with such frequency as to indicate a general business practice, will be deemed to constitute unfair claims settlement practices.

[5] Nothing in the language of these regulations specifically gives third party claimants the **[***23]** right to enforce the rules. Moreover, we are not persuaded that it was the intent of the Insurance Commissioner in drafting these regulations to create a cause of action in third party claimants. The enforcement of these rules on behalf of third parties should be the province of the Insurance Commissioner, not individual third party claimants.

In ruling that a third party claimant has no right of action against an insurance company for breach of duty of good faith, we are not unmindful that a handful of other jurisdictions recognize such a cause of action. *See, e.g., Royal Globe Ins. Co. v. Superior Court*, 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979). We do not, however, choose to follow those few.

One Court of Appeals decision, *Green v. Holm*, 28 Wn. App. 135, 622 P.2d 869 (1981), would appear to be contrary to our ruling. In *Green*, the court denied recovery against the insurance company to a third party claimant who was injured by an insured. In reaching this result, the court was forced to recognize the third party claimant's cause of action. However, the court did not make a determination whether a first party *or* third party claimant could sue **[***24]** to enforce WAC 284-30-300 *et seq*. The language of the opinion states clearly that the court was merely "[a]ssuming **[*394]** without deciding that a private cause of action may be based upon a violation of WAC 284-30-330". *Green*, at 139. An assumption that a third party claimant has such a cause of action, after our holding today, would not be valid.

In addition to allegations of negligence based on RCW 48.30.010 and WAC 284-30-300 *et seq.*, petitioners alleged per se violations of the CPA. It is established that insureds may bring a private action against their insurers for breach of duty of good faith under the CPA. *Salois v. Mutual of Omaha Ins. Co.*, 90 Wn.2d 355, 581 P.2d 1349 (1978); *Levy v. North Am. Co. for Life & Health Ins.*, 90 Wn.2d 846, 586 P.2d 845 (1978); *Rice v. Life Ins. Co. of North Am.*, 25 Wn. App. 479, 609 P.2d 1387 (1980); *Green v. Holm, supra*. It is also established

that breach of an insurer's duty of good faith constitutes a per se CPA violation. *Salois v. Mutual of Omaha Ins. Co., supra; Levy v. North Am. Co. for Life & Health Ins., supra*. However, *only an insured* may bring a *per se* action. *Transamerica Title* **[***25]** *Ins. Co. v. Johnson,* 103 Wn.2d 409, 418, 693 P.2d 697 (1985). Thus, under *Transamerica,* Walker and Johnson cannot prevail under per se CPA theories.

Our decision in *Transamerica,* in addition to limiting per se CPA actions in this context to insureds, suggests in dicta that *non* per se actions may be maintainable by third parties. *Transamerica,* at 418. However, in this case neither Walker nor Johnson alleged non per se CPA violations or made any showing of the damage-inducement-repetition elements of a non per se theory. *See Anhold v. Daniels,* 94 Wn.2d 40, 46, 614 P.2d 184 (1980). Thus, we need not decide if petitioners could have maintained a non per se CPA action.

[1141]** Our holding today is in apparent conflict with a recent Court of Appeals decision in *Gould v. Mutual Life Ins. Co.,* 37 Wn. App. 756, 683 P.2d 207 (1984). But the result in *Gould* can be explained. The *Gould* court held that a widow, as third party beneficiary under her husband's life insurance policy, could bring a CPA action against the insurer for wrongful refusal to pay a claim. The court found **[*395]** that the widow was an intended beneficiary under the insurance **[***26]** contract. As such, she was owed a direct contractual obligation by the insurance company and could sue to enforce the obligation. In contrast, Walker and Johnson were not "intended beneficiaries" of the liability policies between the insureds and insurers, and were owed no direct contractual obligation by State Farm and PEMCO. Thus, there is no direct obligation which Walker and Johnson may sue to enforce.

In foreclosing the right of third party claimants to sue insurers for breach of their statutory duty of good faith, we are persuaded that the public as a whole would not benefit from allowing such suits. The goal of the insurance regulations is a well regulated insurance industry. To this end, the Insurance Commissioner, not a third party claimant, should have the primary enforcement right.

Concur by: DORE (In Part)

Dissent by: DORE (In Part)

Dissent

Dore, J. (concurring in part, dissenting in part)

I concur in the disposition of the third party claimant actions. I dissent to the majority's dismissal of the insured's action for breach of the enhanced duty of good faith by the insurer.

The majority opinion holds that an insurer has an enhanced obligation of good faith in conducting a **[***27]** reservation of rights defense. This enhanced obligation is fulfilled by (1) a thorough investigation of the cause of the insured's accident and the nature and severity of the plaintiff's injuries; (2) retaining competent defense counsel for the insured with the understanding that *only the insured is the client*; (3) fully informing the insured of all developments relevant to policy coverage and progress of the lawsuit, including disclosure of all settlement offers made by the insurer; and (4) refraining from engaging in any action which would demonstrate a greater concern of the insurer's monetary interest than for the insured's financial risk.

[*396] The majority has set forth the correct legal standard to be applied to determine whether the insurer has fulfilled its obligation of good faith in a reservation of rights defense. The determination itself, however, should normally be left to the trier of fact. The question thus is whether the insured presents an issue of material fact upon which reasonable minds could disagree.

The majority finds the evidence insufficient to support a finding that a question of fact exists regarding whether State Farm breached any of these **[***28]** obligations to James Tank. I disagree. Viewing the evidence in a light most favorable to Tank, as we are required to do, I find questions of fact exist concerning these obligations of good faith.

In Tank's affidavit he states that he was (1) not advised of the amount of his potential liability exposure, (2) not advised of possible avenues of settlement, including what amount the plaintiff would consider, and that State Farm was willing to contribute $ 5,000 to an eventual settlement, and (3) not informed that his counsel considered State Farm a *coclient* and supplied all information concerning the lawsuit to the insurer. Clerk's Papers, at 169-70.

Contrary to the findings of the majority, consideration of the Tank affidavit alone raises questions of fact regarding (1) the insurer's understanding that retained defense counsel should represent only Tank, (2) whether the insurer informed Tank of all developments regarding the progress of the insured's lawsuit, (3) whether the insurer engaged in actions which demonstrated greater concern for its own interests than **[**1142]** for the interests of insured and (4) whether State Farm failed to disclose settlement offers.

Failure **[***29]** to disclose the offer of $ 5,000 as a contribution toward settlement prevented the insured from potentially avoiding the $ 16,000 judgment. The majority concedes that the record is unclear as to whether the insured had the financial ability to take advantage of this offer of contribution. Evidence resolving this question should be developed at trial.

The majority appears to have further erred in rejecting **[*397]** any consideration of the deposition of retained defense counsel. Although this deposition was not formally filed with the trial court until after the summary judgment was entered, the contents of the deposition were argued before the trial judge in the hearing on the motion for summary judgment and the trial judge specifically stated that he would consider the contents of the deposition assuming that counsel correctly stated its contents. Report of Proceedings, at 5-11. The argument made in summary judgment hearing and supported by the deposition of retained defense counsel was that counsel represented *both* State Farm and the insured in the lawsuit and counsel was required by his contract with State Farm to keep the insurer apprised of the status of the case **[***30]** and his evaluation. The deposition supports the allegations that the insurer demonstrated greater concern for its financial interests than for the insured's financial risk. The deposition also supports the allegations that State Farm failed to communicate to Tank the offer of a $ 5,000 contribution toward a settlement.

I would hold that there are unresolved factual issues regarding State Farm's violation of its duty to exercise good faith in its defense under reservation of rights, and whether Tank was damaged by his inability to take advantage of the potential for settlement. I would remand for trial.
