COA #42864-4

No. 09-2-03892-2

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

AMERICAN ALTERNATIVE INSURANCE CORPORATION,

Appellant,

CLARK COUNTY FIRE DISTRICT NO. 5

Plaintiff,

v.

BULLIVANT HOUSER BAILEY, P.C., and RICHARD G. MATSON

Respondents,

BRIEF OF RESPONDENTS

Ray P. Cox, WSBA # 16250
Richard R. Roland, WSBA # 18588
Of Attorneys for Respondents
Bullivant Houser Bailey, P.C. and
Richard G. Matson

FORSBERG & UMLAUF, P.S.
901 Fifth Avenue, Suite 1400
Seattle, Washington 98164
Telephone: (206) 689-8500

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

A. THE PARTIES 3

B. THE DEFENSE ASSIGNMENT 4

C. PROCEDURAL BACKGROUND 4

ARGUMENT 6

A. THE TRIAL COURT RULING DISMISSING AAIC'S LEGAL MALPRACTICE CLAIMS FOR LACK OF STANDING WAS CORRECT 6

1. STANDARD OF REVIEW 7

B. CURRENT WASHINGTON LAW SUPPORTS THE TRIAL COURT RULING THAT THERE IS NO LEGAL DUTY IMPOSED ON AN ASSIGNED INSURANCE DEFENSE COUNSEL TO A NON-CLIENT, THIRD-PARTY INSURANCE CARRIER 8

C. AUTHORITY IN OTHER JURISDICTIONS SUPPORTS THE CURRENT STATE OF WASHINGTON LAW THAT AN INSURANCE DEFENSE COUNSEL OWES NO SEPARATE DUTY OF REPRESENTATION TO ITS ASSIGNING INSURANCE CARRIER 11

D. THE NON-WASHINGTON AUTHORITY CITED BY APPELLANT DOES NOT APPLY TO THE SPECIFIC FACTS AND CIRCUMSTANCES OF THIS ACTION 14

E. THE TRASK V. BUTLER "MODIFIED MULTI-FACTOR BALANCING TEST" ESTABLISHES NO DUTY ON THE PART OF ASSIGNED DEFENSE COUNSEL TO A LIABILITY CARRIER 16

1. PUBLIC POLICY IMPACT OF IMPOSITION OF A DUTY OF CARE FROM AN INSURANCE DEFENSE COUNSEL TO THE ASSIGNING INSURANCE CARRIER 17

2. Imposing A Separate Duty By An Insurance Defense Counsel To Its Client's Insurer Will Inherently Create Impermissible Potential Conflicts Of Interest And Promote Divided Loyalties On The Part Of The Attorney 18

3. Imposing The Additional Duty May compromise or Negate The Insured's Attorney-Client Privilege With Its Insurance Defense Attorney 21

4. Refraining From Imposition Of A Duty To A Non-Client Insurance Carrier Is Consistent With Policy Considerations Favoring Availability of Recourse Against The Lawyer For Negligence 22

F. Application Of The Trask Multi-part Analysis Determines That AAIC Has No Legal Standing As A Non-Client Third-Party To The Defendants, For A Claim Of Legal Malpractice Based On The Defendants' Actions In Representing Their Actual Clients, AAIC's Insureds 25

1. The Attorney-Client Relationship Between Defendants And Their Clients, AAIC's Insureds, Does Not Directly Benefit AAIC 25

2. Even Where A Non-Client Third-Party Receives Some Benefit From The Attorney-Client Transaction, No Duty To That Party Arises Where A Benefit Is "Incidental", As Is The Case Her 30

G. The Absence Of A Reservation Of Rights Negates Any Adversarial Relationship Between AAIC And The Defendants' Clients, Its Insureds, Does Not Insulate The Tri-Partite Relationship From Potential Conflicts Which Promote The Existence Of Adversarial Interests 31

H. AAIC Is No More Than An "Incidental Beneficiary" To The Services Defendants

PROVIDED TO THEIR CLIENTS, AAIC'S INSUREDS, AND AS SUCH, TRASK DOES NOT IMPOSE A SEPARATE LEGAL DUTY ON THE DEFENDANTS TO AAIC 37

1. THERE IS NO FORESEEABLE "HARM" TO THE NON-CLIENT THIRD-PARTY INSURER BY NOT IMPOSING A DUTY ON THE INSURANCE DEFENSE LAWYER IN FAVOR OF THE INSURER 38

2. IN VIEW OF AAIC'S PRE-EXISTING INDEMNITY OBLIGATION TO ITS INSUREDS, THERE IS NO CERTAINTY WHATSOEVER THAT THE INSURER SUFFERED ANY ACTIONABLE INJURY 40

3. ANY CONNECTION BETWEEN THE DEFENDANTS' CONDUCT AND THE ALLEGED "INJURY" IS ENTIRELY DERIVATIVE FROM THE DEFENDANTS' SEPARATE OBLIGATIONS PERFORMED FOR ITS CLIENTS 42

4. IMPOSING A NEW DUTY ON INSURANCE DEFENSE ATTORNEYS WILL NOT FURTHER A POLICY OF PREVENTING FUTURE HARM 42

5. IMPOSING A SEPARATE DUTY ON A DEFENSE ATTORNEY IN FAVOR OF THE INSURER WILL UNDULY BURDEN THE LEGAL PROFESSION IN FUNDAMENTAL, CRITICAL AREAS OF REPRESENTATION 44

CONCLUSION 47

TABLE OF AUTHORITIES

WASHINGTON CASES

Bohn v. Cody, 119 Wn.2d 357, 832 P.2d 71 (1992) 8, 28, 44
Bowman v. John Doe Two, 104 Wn.2d 181, 704 P.2d 140 (1985) 10
Burris v. General Insurance Company of America, 16 Wn. App. 73, 553 P.2d 125 (1976) 7
Cannon, Inc. v. Federal Insurance Co., 82 Wn. App 480, 918 P.2d 937 (1996) 26
Estate of Treadwell ex rel. Neil v. Wright, 115 Wn. App. 238, 61 P.3d 1214 (2003) 23, 40
Harrington v. Pailthorp, 67 Wn. App. 901, 841 P.2d 1258 (1992) 10
Hayden v. Mutual of Enumclaw Ins. Co., 141 Wn.2d 55, 1 P.3d 1167 (2000) 37
Hetzel v. Parks, 93 Wn. App. 929, 971 P.2d 115 (1999) 19
Higgins v. Stafford, 123 Wn.2d 160, 866 P.3d 31 (1994) 7
In re Disciplinary Proceeding Against Marshall, 160 Wn.2d 317, 157 P.3d 859 (2007) 33
In re Disciplinary Proceeding Against McKean, 148 Wn.2d 849, 64 P.3d 1226 (2003) 32
In re Disciplinary Proceeding Against Schafer, 149 Wn.2d 148, 66 P.3d 1036 (2003) 46
In re Guardianship of Karan, 110 Wn. App. 76, 38 P.3d 396 (2002) 23
Johnson v. Continental Cas. Co., 57 Wn. App. 359, 788 P.2d 598 (1990) 20
Jones v. Allstate Ins. Co., 146 Wn.2d 291, 45 P.3d 1068 (2002) 19, 48
Kim v. O'Sullivan, 133 Wn. App. 557, 137 P.3d 61 (2006) 20
Leipham v. Adams, 77 Wn. App. 827, 894 P.2d 576 (1995) 10, 25
Marshall v. Bally's PacWest, Inc., 94 Wn. App. 372, 972 P.2d 475 (1999) 8
McKasson v. State, 55 Wn. App. 18, 776 P.2d 971 (1989) 10
Meneely v. S.R. Smith, Inc., 101 Wn. App. 845, 5 P.3d 49 (2000) 26
Morgan v. Roller, 58 Wn. App. 728, 794 P.2d 1313 (1990) 11
R.A. Hanson Co., Inc. v. Aetna Cas. & Sur. Co., 15 Wn. App. 608, 550 P.2d 701 (1976) 33

Spokane Airports v. RMA, Inc., 149 Wn. App. 930, 206 P.3d 364 (2009), *review denied,* 167 Wn.2d 1017, 224 P.3d 773 (2010) 7
Stangland v. Brock, 109 Wn.2d 675, 747 P.2d 464 (1987) 8
Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 715 P.2d 1133 (1986) 8, 20, 43
Transamerica Ins. Group v. Chubb & Son, Inc., 16 Wn. App. 247, 554 P.2d 1080 (1977) 33
Trask v. Butler, 123 Wn.2d 835, 872 P.2d 1080 (1994) ..... passim
Van Dyke v. White, 55 Wn.2d 601, 349 P.2d 430 (1960) 8, 20, 40
Washington Rules of Professional Conduct 1.8 35
Water's Edge Homeowners Ass'n v. Water's Edge Associates, 216 P.3d 1110 (2009) 20

FEDERAL CASES

Cont'l Cas. Co. v. Pullman, Comley, Bradley & Reeves, 929 F.2d 103 (2nd Cir. (Conn.) 1991) 12
National Savings Bank v. Ward, 100 U.S. 195, 25 L. Ed. 621 (1880) 8, 45
Wood v. Georgia, 450 U.S. 261, 101 S. Ct. 1097 (U.S.Ga., 1981) 21

OTHER JURISDICTIONS

Atlanta Intern. Ins. Co. v. Bell, 438 Mich. 512, 475 N.W.2d 295 (1991) 13
Baystone Equities, Inc. v. Handel-Harbour, 27 A.D.3d 231, 809 N.Y.S.2d 904 (2006) 11
Bogard v. Employers Cas. Co., 164 Cal. App. 3d 602, 210 Cal. Rptr. 578 (1985) 13
Bradt v. West, 892 S.W.2d 56 (Tex. App.-Houston [1st Dist.] 1994, writ denied) 12
D'Amico v. First Union Natl. Bank, 285 A.D.2d 166, 728 N.Y.S.2d 146 (2001), *lv. denied,* 99 N.Y.2d 501, 752 N.Y.S.2d 588, 782 N.E.2d 566 (2002) 11
Federal Ins. Co. v. North American Specialty Ins. Co., 47 A.D.3d 52, 847 N.Y.S.2d 7 (N.Y.A.D. 1 Dept., 2007) 11
First Am. Carriers, Inc. v. Kroger Co., 302 Ark. 86, 787 S.W.2d 669 (1990) 12, 13
Higgins v. Karp, 239 Conn. 802, 687 A.2d 539 (1997) 13
In re Rules of Prof'l Conduct, 299 Mont. 321, 2 P.3d 806 (2000) 13

Jackson v. Trapier, 42 Misc.2d 139, 247 N.Y.S.2d 315 (1964) 12
Lavanant v. General Acc. Ins. Co., 164 A.D.2d 73, 561 N.Y.S.2d 164 (1990), *affd.* 79 N.Y.2d 623, 584 N.Y.S.2d 744, 595 N.E.2d 819 (1992) 11
Mich. Millers Mut. Ins. Co. v. Bronson Plating Co., 197 Mich. App. 482, 496 N.W.2d 373 (1992) 12
Miller v. Shugart, 316 N.W.2d 729 (Minn. 1982) 13
Mutual Serv. Cas. Ins. Co. v. Luetmer, 474 N.W.2d 365 (Minn. App. 1991) 13
Paradigm Ins. Co. v. Langerman Law Offices, P.A., 200 Ariz. 146, 24 P.3d 593 (Ariz., 2001) 30
Perkoski v. Wilson, 371 Pa. 553, 92 A.2d 189 (1952) 40
Petrowski v. Norwich Free Academy, 2 Conn. App. 551, 481 A.2d 1096 (1984) 12
Point Pleasant Canoe Rental, Inc. v. Tinicum Township, 110 F.R.D. 166 (E.D.Pa. 1986) 12
Safeway Managing General Agency, Inc. v. Clark & Gamble, 985 S.W.2d 166 (Tex. App.–San Antonio, 1998) 11
State Farm Mutual Auto. Ins. Co. v. Traver, 980 S.W.2d 625 (1998) 12
Strait v. Kennedy, 103 Wn. App. 626, 13 P.3d 671 (2000) 17, 26, 30, 47

RULES

ABA Model Code of Professional Responsibility EC-5-23 (1980) 21
APR 5 46
Minn. R. Prof. Conduct 5.4(c) 14
Minnesota Code of Professional Responsibility, DR 5-107(B) (1980) 14
Washington Rules of Professional Conduct 1.6 46
Washington Rules of Professional Conduct 1.7 ..... 22, 27, 32, 36
Washington Rules of Professional Conduct 5.4(c) 14, 20
Washington Rules of Professional Conduct, *Preamble, A Lawyer's Responsibilities,* §17 46

OTHER AUTHORITIES

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Bauman, John H., *A Sense of Duty: Regulation of Lawyer Responsibility to Third Parties by the Tort System,* 37 S. Tex. L. Rev. 995 (1996) 45
Harris, Thomas, WASHINGTON INSURANCE LAW (3d ed.) 36
Restatement of the Law Governing Lawyers (Third), Section 51 29

STATEMENT OF THE CASE

On review of the lengthy factual recitation by plaintiffs, defendants find no material issues with the assertions relating to the procedural aspects concerning the parties or claims addressing in the underlying litigation.

Appellants do note and contest Appellant's continual allegation, presented as "fact" in the "Substantive Facts", and as presumptive fact throughout the argument that the defendants/appellants "were negligent", or that the defendants have "breached the standard of care", or "caused damages" to the plaintiffs. First, it must be noted that this in an appeal of a limited issue presented from the trial court prior to the occurrence or conclusion of trial. There have been no findings of fact and no judgments entered in the trial court proceedings of this case other than the dismissal of the plaintiff insurance company's complaint for legal malpractice against these defendants, which is the subject of this appeal. There are no established "facts" which conclude that these defendants are in fact liable to either the Appellant or to the remaining plaintiffs in the trial court.

Further, there is ample evidence in the record before this Court which is directly contrary to the plaintiffs unfounded assertions of the existence of defendant's liability for legal malpractice.

It is defendants' position, as supported by evidence in the record, that defendant Richard Matson in fact:

Met the standard of care in his representation of the Clark County Fire District No. 5 and Marty James (CP 412);

Mr. Matson properly evaluated the underlying case, including the potential settlement value in that without limitation he:

Evaluated and/or interviewed the prospective list of witnesses (CP 414, 419 – 442);

Analyzed the underlying plaintiffs' discovery responses (CP 443 – 444);

Mr. Matson prepared detailed brief for pre-trial mediation and trial (CP 479 – 502, 448 – 474);

Mr. Matson prepared and presented his clients detailed evaluations of potential damages (415 - 416, 504 –510);

Mr. Matson properly discussed the case and analysis with his clients (CP 416 – 417);

Mr. Matson properly evaluated the potential quantum of plaintiffs' attorneys fees (CP 417);

Mr. Matson properly conducted settlement negotiations on behalf of his clients. (CP 419 – 421).

Accordingly, the "facts" presented in the record on this appeal can justifiably be argued to prove that the defendants did not breach the standard of care, did not breach any duty, did not proximately cause any "damage" either to its clients, AAIC's insureds, and certainly not to AAIC.

An additional fact that bears noting here is that while AAIC claims that the defendants here owe it a separate legal duty beyond the duty that defendants indisputably owed to its actual clients, the Clark County Fire District No. 5 and Mr. James, during the underlying action, AAIC employed a

separate counsel, Katherine Hart-Smith, (CP 421) who was retained by AAIC's agent Glatfetler (CP 5, ¶ 10) to act as an additional "co-counsel" for the defendants. Hart-Smith had worked as a "consultant" for Glatfelter in several prior cases. (CP 231-235). Six months prior to the underlying trial she reported to AAIC's agent Glatfelter that on her review of the case she agreed with defendant Richard Matson that the underlying trial would result in "an all or nothing verdict". Ms Hart-Smith reported to the insurer that "if the jury believes the plaintiffs, I expect a multi-million dollar verdict" (CP 532).

These facts are relevant to the arguments below.

A. THE PARTIES

Plaintiff and Appellant is American Alternative Assurance Corporation, a Delaware corporation. CP 4. (hereinafter "AAIC," "plaintiff" or "appellant"). AAIC was a liability insurer for Clark County Fire District No. 5.

Defendants and Respondents are Bullivant Houser Bailey, P.C., a Washington professional service corporation, and Richard G. Matson, a shareholder of the Bullivant firm (hereinafter "defendants," "attorney defendants" or "respondents").

AAIC has no standing to bring a legal malpractice suit against the defense counsel that was assigned to represent its own insured. Its dismissal from this litigation is required.

B. THE DEFENSE ASSIGNMENT

American Alternative Insurance Corporation is a liability insurer who issued a contract of insurance and agreed to provide insurance to Fire District No. 5. As the District's Liability Insurer, AAIC agreed to indemnify the Fire District for all losses.

Under its contract of insurance with Clark County Fire District No. 5, AAIC was requested to defend and indemnify Clark County Fire District No. 5 against claims by third party former Fire District employees based on allegations of employment discrimination and other related claims. CP 4. The only clients that defendants represented in the underlying action were the Fire District and Mr. James.

C. PROCEDURAL BACKGROUND

This is in effect an Interlocutory Appeal brought from the Clark County Superior Court.

This case was initially filed in Clark County Superior Court in August 2009. CP 295-302. The complaint asserts claims for professional negligence. CP 300-301.

Defendants Bullivant Houser Bailey and Richard Matson filed an Answer responding to the complaint. CP 304-311. Noting that one of the plaintiffs, AAIC, was the liability insurer of its clients, and recognizing that Washington law does not impose a legal duty on insurance defense attorneys to the insurer who assigns them to represent and defend the insurer's insureds

defendants alleged an affirmative defense of lack of standing in their Answer. CP 310.

In September 2011, plaintiffs filed a motion for partial summary judgment requesting in part, that the trial court dismiss the defendants' affirmative defense of AAIC's lack of standing. CP 327.

Defendants thereafter filed a Response including a request for summary judgment dismissal of AAIC's claims based on a lack of standing. CP 346.

Oral Argument was heard in Clark County Superior Court in October 14, 2011. The Trial Court entered an order dismissing the claims of AAIC against the defendants on the ground that AAIC has no legal standing as the insurance carrier of Clark County Fire District No. 5 to bring claims for legal malpractice against the defendants. CP 695-699.

The order of the trial court was certified under CR 54(b), and AAIC has filed this Appeal prior to the commencement or conclusion of trial in the Superior Court.

The case in the trial court of Clark County continues forward on the claims for legal malpractice brought against the defendants by their client in the underlying action Clark County Fire District No. 5.

ARGUMENT

A. THE TRIAL COURT RULING DISMISSING AAIC'S LEGAL MALPRACTICE CLAIMS FOR LACK OF STANDING WAS CORRECT.

The Trial Court was correct in granting the underlying defendants'/respondents' Motion for Summary Judgment and in dismissing the claims alleged for legal malpractice there by plaintiff/petitioner insurance carrier American Alternative Insurance Corporation against defendant attorneys Bullivant Houser Bailey, P.C. and Richard G. Matson (hereinafter "defendants"). Based on its legal responsibility under its contract of insurance with its insureds, the underlying defendants Clark County Fire District No. 5 and Marty James, AAIC assigned the defendant attorneys to represent and defend the separate interests of those insureds against claims alleging employment discrimination and other causes of action in the underlying action.

As an insurer, AAIC did not have any attorney-client relationship with the defendant attorneys. Mr. Matson did not represent AAIC as its counsel in the underlying matter and had no attorney-client relationship with AAIC; nor did his firm, Bullivant Houser Bailey, P.C. ("BHB").

Lacking any attorney-client or any representational relationship with AAIC, under existing Washington law, the attorney defendants had no legal duty of representation to AAIC. Concomitantly, as a matter of law, AAIC

has no legal right or legal standing under Washington law to bring claims for legal malpractice against either Mr. Matson or BHB.

Under current Washington law, a liability insurer such as AAIC has no legal standing as a non-client third party to bring a suit for legal malpractice against a defense attorney it has assigned to represent the separate interests of the insurance carrier's insured, based on actions of the assigned defense attorney performed on behalf of the attorney's actual client, the insured.

The correct decision of the Trial Court should be affirmed.

1. STANDARD OF REVIEW.

The purpose of summary judgment is "to do away with useless trials and issues which cannot be factually supported, or, if factually supported, could not, as a matter of law lead to a result favorable to a non-moving party." *Burris v. General Insurance Company of America*, 16 Wn. App. 73, 553 P.2d 125 (1976). In reviewing an order granting summary judgment, the Court of Appeals engages in the same inquiry as the trial court. *Higgins v. Stafford*, 123 Wn.2d 160, 168, 866 P.3d 31 (1994). Whether a party has standing to sue is a question of law that will be reviewed *de novo*. *Spokane Airports v. RMA, Inc.,* 149 Wn. App. 930, 939, 206 P.3d 364 (2009), *review denied,* 167 Wn.2d 1017, 224 P.3d 773 (2010).

"The nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain." *Marshall v. Bally's PacWest, Inc.*, 94 Wn. App. 372, 377, 972 P.2d 475 (1999).

B. CURRENT WASHINGTON LAW SUPPORTS THE TRIAL COURT RULING THAT THERE IS NO LEGAL DUTY IMPOSED ON AN ASSIGNED INSURANCE DEFENSE COUNSEL TO A NON-CLIENT, THIRD-PARTY INSURANCE CARRIER.

It is well established that "the general rule is that the obligation of the attorney is to his client, and not to a third party . . ." *National Savings Bank v. Ward,* 100 U.S. 195, 200, 25 L. Ed. 621 (1880). "The standards of the legal profession require undeviating fidelity of the lawyer to his client. No exceptions can be tolerated." *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 388, 715 P.2d 1133, 1137 (1986) (citing *Van Dyke v. White,* 55 Wn.2d 601, 613, 349 P.2d 430 (1960).

Traditionally, the only person who could bring a lawsuit for attorney malpractice was an attorney's client. *Bohn v. Cody*, 119 Wn.2d 357, 364-65, 832 P.2d 71 (1992); *Stangland v. Brock*, 109 Wn.2d 675, 747 P.2d 464 (1987); 2 R. Mallen & J. Smith, Legal Malpractice § 26.4 (3d ed. 1989).

Almost 20 years ago, the Washington Supreme Court articulated specific rules which defined the limited circumstances in which a non-client third-party to a separately-existing attorney-client relationship could show that the attorney owed the third-party a separate legal duty and thus, gain

standing to bring a legal malpractice claim against the attorney. *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994).

Since 1994, over 60 Washington Cases which have either applied or discussed the *Trask v. Butler* rule. As AAIC correctly notes in its own brief on appeal, over that same period, the Washington Courts have never ruled in favor of any insurer that an attorney assigned by an insurance company to represent and defend the separate interests of the insurance company's insured, has a separate legal duty to the insurance company based on that representation. *Appellant's Opening Brief*, p. 18.

This Court need look no further than Plaintiffs' own standard of care expert regarding the legal standing of AAIC to prosecute this action. In his specific report and testimony addressing the issue of whether AAIC has standing, plaintiffs' expert clearly conceded:

> Washington jurisprudence has not directly addressed whether the relationship between the insurer and counsel assigned to represent the insured creates a duty of care owed to the insurer by counsel so as to confer standing on the insurer to sue assigned counsel for malpractice during the course of the insured's defense.

CP at 595.

The Trial Court below agreed with the existing state of Washington law and dismissed AAIC's legal malpractice claims in this case that are alleged against the defendant attorneys, for lack of standing. CP at 695-699. Plaintiffs' argument on this appeal is effectively that this Court should singly

ignore the legal and practical realities of the adversarial nature of the insurance carrier-insured relationship, and unwisely impose a separate and inherently conflicted additional duty of representation in favor of the insurer upon a defense counsel representing an insured, essentially requiring counsel to simultaneously serve as counsel for both the insurer and its insured.

As a general matter, Washington courts have been reluctant to "extend professional malpractice protection to third parties" in legal malpractice actions . *McKasson v. State,* 55 Wn. App. 18, 28, 776 P.2d 971 (1989) (broker's attorney not liable for failing to inform investors that broker was engaged in unauthorized practice of law); see *Trask,* 123 Wn.2d at 845, 872 P.2d 1080 (attorney hired by the personal representative of an estate did not owe a duty of care to the estate or to the estate beneficiaries); *Bowman v. John Doe Two,* 104 Wn.2d 181, 188-89, 704 P.2d 140 (1985) (attorney did not owe a duty to his client's adversary, the mother, where attorney was hired by child in child's petition for alternative residential placement away from his mother); *Leipham v. Adams,* 77 Wn. App. 827, 832-34, 894 P.2d 576 (1995) (where attorney gave decedent limited representation and did not lead decedent to believe that he was undertaking general estate planning, attorney did not owe a duty to estate beneficiaries for failing to advise decedent to file a disclaimer of joint tenancy interest); *Harrington v. Pailthorp,* 67 Wn. App. 901, 905-10, 841 P.2d 1258 (1992) (no duty was owed by attorney to plaintiff where attorney represented plaintiff's former wife in custody modification

proceeding); *see also Morgan v. Roller,* 58 Wn. App. 728, 732-33, 794 P.2d 1313 (1990) (attorney did not have a duty to disclose his views of his client's disability to the beneficiaries of his client's testamentary plan).

C. AUTHORITY IN OTHER JURISDICTIONS SUPPORTS THE CURRENT STATE OF WASHINGTON LAW THAT AN INSURANCE DEFENSE COUNSEL OWES NO SEPARATE DUTY OF REPRESENTATION TO ITS ASSIGNING INSURANCE CARRIER.

Several jurisdictions specifically hold that there is no duty by assigned defense counsel to the insurer allowing the insurer to make a claim against the lawyer for legal malpractice. *See, e.g., Federal Ins. Co. v. North American Specialty Ins. Co.*, 47 A.D.3d 52, 59, 847 N.Y.S.2d 7, 12 (N.Y.A.D. 1 Dept., 2007).

> 'New York courts impose a strict privity requirement to claims of legal malpractice; an attorney is not liable to a third party for negligence in performing services on behalf of his client' (*Lavanant v. General Acc. Ins. Co.,* 164 A.D.2d 73, 81, 561 N.Y.S.2d 164 [1990], *affd.* 79 N.Y.2d 623, 584 N.Y.S.2d 744, 595 N.E.2d 819 [1992]; *see also D'Amico v. First Union Natl. Bank,* 285 A.D.2d 166, 172, 728 N.Y.S.2d 146 [2001], *lv. denied,* 99 N.Y.2d 501, 752 N.Y.S.2d 588, 782 N.E.2d 566 [2002]). Thus, absent an attorney-client relationship, a cause of action for legal malpractice cannot be stated (*Baystone Equities, Inc. v. Handel-Harbour,* 27 A.D.3d 231, 809 N.Y.S.2d 904 [2006]; *Linden v. Moskowitz,* 294 A.D.2d 114, 115, 743 N.Y.S.2d 65 [2002], *lv. denied,* 99 N.Y.2d 505, 755 N.Y.S.2d 712, 785 N.E.2d 734 [2003]).

See also Safeway Managing General Agency, Inc. v. Clark & Gamble, 985 S.W.2d 166, 168 (Tex. App.–San Antonio, 1998).

> In Texas, the law is well settled that no attorney-client relationship exists between an insurance carrier and the

> attorney it hires to defend one of the carrier's insureds. *Bradt v. West,* 892 S.W.2d 56, 77 (Tex. App.-Houston [1st Dist.] 1994, writ denied); *cf. State Farm Mutual Auto. Ins. Co. v. Traver,* 980 S.W.2d 625, 627–28 (1998) (noting the attorney owes unqualified loyalty to the insured).

Courts in many jurisdictions have simply concluded that the insured is the sole client of defense counsel retained by an insurer. *See, e.g., Cont'l Cas. Co. v. Pullman, Comley, Bradley & Reeves*, 929 F.2d 103, 108 (2nd Cir. (Conn.) 1991) (holding that in an insurance context, attorney owes allegiance to insured, not to insurer who retained him); *First Am. Carriers, Inc. v. Kroger Co.*, 302 Ark. 86, 787 S.W.2d 669, 671 (1990) (holding that when insurer retains lawyer to defend insured, insured is lawyer's client); *Mich. Millers Mut. Ins. Co. v. Bronson Plating Co.*, 197 Mich. App. 482, 496 N.W.2d 373, 378 (1992) (holding that no attorney-client relationship exists between insurer and attorney representing insured; attorney's sole duty and loyalty is to insured); *Jackson v. Trapier*, 42 Misc.2d 139, 247 N.Y.S.2d 315, 316 (1964) (concluding that insured and not insurer is client of defense attorney, even if insurer chose and paid for counsel); *Point Pleasant Canoe Rental, Inc. v. Tinicum Township*, 110 F.R.D. 166, 170 (E.D.Pa. 1986) (holding that when insurer retains attorney to defend insured, insured is attorney's client); *Petrowski v. Norwich Free Academy,* 2 Conn. App. 551, 563, 481 A.2d 1096, 1104 (1984) ("under Connecticut law, '[t]he test of the attorney-client relationship is not who pays the bills, but to whom allegiance is owed.' ").

Defense counsel in some jurisdictions are prohibited from even forming an attorney-client relationship with the insurer. *See, e.g., First Am. Carriers, Inc. v. Kroger Co.*, 302 Ark. 86, 787 S.W.2d 669, 671 (1990); *Higgins v. Karp*, 239 Conn. 802, 687 A.2d 539, 543 (1997); *Atlanta Intern. Ins. Co. v. Bell*, 438 Mich. 512, 475 N.W.2d 295, 296 (1991); *In re Rules of Prof'l Conduct*, 299 Mont. 321, 2 P.3d 806, 814 (2000) (relying on Montana Rules of Professional Conduct to hold that insured is sole client of defense counsel).

Case law in many other jurisdictions recognizes the inherent potential conflicts that arise between the insured and the insurer when the insurer retains defense attorneys. *See, e.g., Mutual Serv. Cas. Ins. Co. v. Luetmer*, 474 N.W.2d 365, 368 (Minn. App. 1991) (*citing Bogard v. Employers Cas. Co.*, 164 Cal. App. 3d 602, 210 Cal. Rptr. 578, 582 (1985)) (counsel selected by insurer may have compelling interest in protecting rights of insurer rather than rights of insured because of counsel's closer ties with insurer).

Virtually all courts outside of Washington hold that attorneys hired by an insurance company to defend their insureds' interests on underlying claims "owe their allegiance to their clients, the insureds, to best represent their interests." *Miller v. Shugart*, 316 N.W.2d 729, 733 (Minn. 1982) (emphasis added).

In *Miller v. Shugart,* the Minnesota Supreme Court addressed a number of inherent potential conflicts between an insurer and its insured

involving "cooperation" and "settlement" and relied on a provision of the Minnesota Code of Professional Responsibility which precludes attorneys from allowing someone who employs counsel for another from interfering with legal representation of the client:

> [The insurer] cannot complain that the lawyers it hired to represent the insureds were not working in the best interests of [the insurer]. 'A lawyer shall not permit a person who recommends, employs or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.'

Citing, Minnesota Code of Professional Responsibility, DR 5-107(B) (1980), now embodied in Minn. R. Prof. Conduct 5.4(c).

Washington attorneys are governed by Rules of Professional Conduct which contain the identical prohibition as the Minnesota rules. *See*, Washington Rules of Professional Conduct 5.4(5)(c).

D. THE NON-WASHINGTON AUTHORITY CITED BY APPELLANT DOES NOT APPLY TO THE SPECIFIC FACTS AND CIRCUMSTANCES OF THIS ACTION.

AAIC initially seeks to validate its argument by offering a string-citation implying the existence of favorable legal authorities from outside Washington. *Appellant's Opening Brief*, pp. 14-16. On examination and analysis, these "authorities" are effectively of no moment to the specific issue here as to whether an insurance defense counsel owes a separate duty to the insurance carrier who assigned it to defend the carrier's insured, counsel's actual client. These cases merely represent a collection of instances where

courts outside of Washington have discussed various scenarios where the parties have litigated an issue of whether an attorney may owe a duty to a third party other than its specific client.

Separately or taken together, these "authorities" presented by the Appellant from jurisdictions other than Washington provide little, if any, guidance to resolution of the issues here. Most do not discuss the "multifactor test" for determining the existence of a duty to a non-client and hence would not even be characterized as persuasive authority for Washington courts. Additionally, the vast majority of the cases involve issues where the dispute over a lawyer's duty of representation to non-client third-parties involved either Probate or Guardianship proceedings and had no relation to the circumstances of the tri-partite relationship between insurer, insured and assigned defense counsel.

Of the 33 cases cited by the Appellant, only one case addresses the issue of an insurance defense attorney's possible duty to his or her assigning non-client insurance carrier.[1]

In sum, the out-of-state authority noted by AAIC in support of its request that this Court alter the *status quo* of Washington law which limits the duty that Washington attorneys owe to non-client third-parties, is no more

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[1] *Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 200 Ariz. 146, 149, 24 P.3d 593, 596 (Ariz., 2001). The *Paradigm* court ruled on the issue of an insurance defense counsel's duty to its client's insured utilizing a test stated under the Restatement of the Law Governing Attorneys (Third), which is markedly different than the *Trask v. Butler* test used by Washington courts, and questioned by Ronald Mallen, a leading legal malpractice authority. See, *infra* at 29-30.

persuasive than the authority of other jurisdictions which uphold the view that an insurance defense counsel cannot hold an independent duty for malpractice to its client's insurance carrier.

E. THE TRASK V. BUTLER "MODIFIED MULTI-FACTOR BALANCING TEST" ESTABLISHES NO DUTY ON THE PART OF ASSIGNED DEFENSE COUNSEL TO A LIABILITY CARRIER.

In *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994), Washington established a multifactor balancing test to determine the limited circumstances where an attorney may owe a legal duty to a third-party who is not the attorney's actual client. Applied here, the *Trask* test establishes the lack of an insurer's standing to bring a claim for legal malpractice against defense counsel it had assigned to defend the separate interests of the carrier's insured(s).

The *Trask* multifactor test encompasses the following elements (the referenced "plaintiff" being the liability carrier):

a. The extent to which the transaction was *intended to benefit* the plaintiff;

b. The foreseeability of harm to the plaintiff;

c. The degree of certainty that the plaintiff suffered injury;

d. The closeness of the connection between the defendant's conduct and the injury;

e. The policy of preventing future harm; and,

f. The extent to which the profession would be unduly burdened by a finding of liability.

Trask, 123 Wn.2d at 843 (emphasis added).

1. PUBLIC POLICY IMPACT OF IMPOSITION OF A DUTY OF CARE FROM AN INSURANCE DEFENSE COUNSEL TO THE ASSIGNING INSURANCE CARRIER.

In creating its test, the *Trask* court also realized the consequential nature of extending, even to the limited extent of its new rule, the scope of an attorney's duty to persons other than the attorney's actual client. Addressing that concern, the court required that before any independent duty to a non-client might be imposed on an attorney, a court must also examine the public policy impact and implications of creating such a duty in the circumstances. *Trask,* 123 Wn.2d at 844.

Although AAIC asserts that the Court must look only to the specific facts of this matter in determining the issue at hand, the particular, finite circumstances of the tri-partite insurer-insured-defense counsel relationship which so clearly impact the public policy affecting the practice of law and the rights of attorneys' clients, demand a consistent result.

"[W]e conclude that the determination of whether a transaction was intended to benefit a non-client plaintiff is more than merely factual; it has public policy ramifications akin to those accompanying inquiries into legal causation." *Strait v. Kennedy*, 103 Wn. App. 626, 636, 13 P.3d 671 (2000).

2. IMPOSING A SEPARATE DUTY BY AN INSURANCE DEFENSE COUNSEL TO ITS CLIENT'S INSURER WILL INHERENTLY CREATE IMPERMISSIBLE POTENTIAL CONFLICTS OF INTEREST AND PROMOTE DIVIDED LOYALTIES ON THE PART OF THE ATTORNEY.

The *Trask* analysis is significantly premised on the specific conclusion that public policy does not favor finding a duty by an attorney to a non-client third-party where doing so will place the attorney in a position of potential conflict of interest involving his obligations to his actual client and any imposed duty to a non-client third party.

The *Trask* court accurately observed that "the policy considerations against finding a duty to a non-client are the strongest where doing so would detract from the attorney's ethical obligations to the client." [citing 1 R. Mallen & J. Smith, LEGAL MALPRACTICE (3d ed. 1989) §7.11]. This occurs where a duty to a non-client creates a risk of divided loyalties because of a conflicting interest or of a breach of confidence. [citing 1 R. Mallen & J. Smith, LEGAL MALPRACTICE (3d ed. 1989) §7.11]." Trask v. Butler, 123 Wn.2d at 844.

The fact that the insurer-insured-defense counsel "tri-partite relationship" may exist in a given circumstance, in no way itself creates any direct attorney-client relationship between assigned defense counsel and carrier which gives the insurer legal standing to subsequently sue the defense counsel for legal malpractice based on the actions taken by the attorney in representing its actual direct client, the insured.

Viewing the issue in a more global, policy-oriented sense, it is clear even to the Appellant that the inherent tensions which exist in the "tri-partite relationship" between an insurance carrier, its insured, and an attorney assigned by the carrier to represent and defend its insured in satisfaction of the insurer's separate contractual obligation to its insured, create "in every case", a "significant risk that a lawyers' ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as the result of the lawyer's other responsibilities to its insured necessarily fail the test". *Appellant's Opening Brief*, p. 35. The Court should thus consider the global policy aspects of this relationship rather than addressing these issues in the context of a single selected set of facts.

"[P]olicy considerations militating against finding a duty are strongest where such a duty would detract from the attorney's obligations to his or her client by creating a risk of divided loyalties because of conflicts of interest or breaches of confidence. [*citing Trask v. Butler*] at 844, 872 P.2d 1080. The *Trask* court noted that "in no instance has a court found liability to a third-party adversary." *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 318-319, 45 P.3d 1068 (2002).

"Policy considerations weigh against finding a duty to a non-client if it will detract from an attorney's duties to an actual client, for example, by creating a risk of divided loyalty or breach of confidence." *Hetzel v. Parks*, 93 Wn. App. 929, 939, 971 P.2d 115 (1999) (emphasis added).

In *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 387 - 89, 715 P.2d 1133 (1986), the court set forth the distinct duties owed to the insured by retained defense counsel. In doing so the court recognized that the responsibilities of attorneys and insurers are distinct, and referred to the former as "defense counsel's duties as an attorney." *Tank*, 105 Wn.2d at 390, 715 P.2d 1133 (emphasis added). *Kim v. O'Sullivan*, 133 Wn. App. 557, 565-566, 137 P.3d 61 (2006).

The assigned defense counsel owes its entire duty to the insured. "[I]nsurance appointed counsel has a duty to the insured that cannot be subordinated to the insurer's interests." *Water's Edge Homeowners Ass'n v. Water's Edge Associates*, 216 P.3d 1110, 1121-1122 (2009).

Initially, "this obligation stems from an attorney's obligation under RPC 5.4(c) not to "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." *Johnson v. Continental Cas. Co.*, 57 Wn. App. 359, 362, 788 P.2d 598, 600 (1990). "[I]t is evident that such attorneys owe a duty of loyalty to their clients. Rule 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.... 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."

Citing the then-current ABA Model Code of Professional Responsibility, the United States Supreme Court noted many years ago the basis of possible conflicts confronting attorneys who are representing one client and being paid by another party:

> A person or organization that pays or furnishes lawyers to represent other possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his individual client. *Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client....* Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom."

Wood v. Georgia, 450 U.S. 261, 271, 101 S. Ct. 1097, 1103 (U.S.Ga., 1981), *citing* ABA Model Code of Professional Responsibility EC-5-23 (1980) (emphasis added). *See also*, RCP 5.4(c).

3. IMPOSING THE ADDITIONAL DUTY MAY COMPROMISE OR NEGATE THE INSURED'S ATTORNEY-CLIENT PRIVILEGE WITH ITS INSURANCE DEFENSE ATTORNEY.

Another significant impediment to the existence of separate legal duties to the attorney's actual client and to the client's insurance carrier is the fact that where an attorney owes representational duties to multiple clients in

"common representation," "the prevailing rule is that, as between commonly represented client, the [attorney-client] privilege does not attach". RPC 1.7, comment 30.

Accordingly, whether or not the interests of the insurance carrier and its insured could fortuitously intersect under some limited circumstances, the virtual universal existence of a potential for a conflict of their interests proscribed by the Rules of Professional Conduct to exist would preclude, on a public policy ground, imposition, in any instance of a duty on the part of an assigned insurance defense counsel to the assigning insurance defense counsel based on the performance of the attorney's representation for its actual client, the insured.

4. Refraining From Imposition Of A Duty To A Non-Client Insurance Carrier Is Consistent With Policy Considerations Favoring Availability Of Recourse Against The Lawyer For Negligence.

A third policy consideration weighing against imposition of a separate representation duty on insurance defense counsel as to the insurance carrier discussed in *Trask* and its progeny, is whether in not in the absence of finding such a duty, the primary beneficiary of the attorney-client relationship for whom the service was directly performed, has recourse against the attorney for negligent acts.

The *Trask* court found that creating a duty in favor of the non-client estate beneficiary there, to allow a cause of action for legal malpractice

against the estate personal representative's lawyer was not necessary, in part, because the attorney's client, the personal representative, had the right to recourse against that attorney. *Trask,* 123 Wn.2d at 843-44, 872 P.2d 1080.

In *Estate of Treadwell ex rel. Neil v. Wright*, 115 Wn. App. 238, 244-245, 61 P.3d 1214 (2003), the court noted the same issue. In *Treadwell*, the court found a duty on the part of an attorney in a guardianship proceeding to the non-client ward where the lawyer's direct client was the guardian. The court imposed a duty on the lawyer in favor of the non-client on the principal ground that in that case, if the guardian was precluded from recourse against the attorney, the ward was left without "a meaningful remedy". *See also, In re Guardianship of Karan,* 110 Wn. App. 76, 85, 38 P.3d 396 (2002).

In this case, as in all cases involving questions of the attorney's duties connected with the inherently adversarial and potentially conflict-ridden "tri-partite" relationship between an insurance carrier, its insured and the attorney assigned to defend the insured as his client, the attorneys' actual client, the insured, will always have potential recourse and access to a remedy for legal malpractice against the attorney for any breach of the lawyer's duty in performing services for that client.

This circumstance is fully demonstrated in this case by the fact that even though the trial court has dismissed the legal malpractice claims against non-client insurance carrier AAIC based on a lack of standing, the trial case continues forward in Superior Court on claims of legal malpractice alleged

against the defendant attorneys by their actual clients, Fire District No. 5 and Marty James. Whether or not AAIC is allowed here to proceed with a malpractice claim based on the defendants' performance of services for its clients in the underlying case, the insureds who are the direct beneficiaries of the attorneys' services in this case have definitive recourse and a potential remedy for any proven breach of the standard of care found by a trier-of-fact to be applicable to the defendant attorneys.

In the situation of the insurance defense tri-partite relationship, the public policy favoring remedies against alleged wrongdoers is upheld by universal existence of the actual client's right of recourse against the insurance defense attorney for legal malpractice.

Thus, the policy analysis required by *Trask*, confirms that separate representational duty to the insurance carrier imposed on insurance defense counsel in the tri-partite relationship, would be inconsistent with the protection of the insurance defense counsel's direct client, the insured. Such a duty would lead to issues of conflict of interest on the part of the counsel rising in many aspects from the inherent adversarial nature of the contractually based insurer-insured relationship. It would as well, significantly impact the confidentiality of attorney-client communications. At the same time, imposing such a duty would have no effect on the already existing avenues of recourse and remedy available to the insured client, to redress any negligent conduct of its attorney in the conduct of its defense.

F. APPLICATION OF THE *TRASK* MULTI-PART ANALYSIS DETERMINES THAT AAIC HAS NO LEGAL STANDING AS A NON-CLIENT THIRD-PARTY TO THE DEFENDANTS, FOR A CLAIM OF LEGAL MALPRACTICE BASED ON THE DEFENDANTS' ACTIONS IN REPRESENTING THEIR ACTUAL CLIENTS, AAIC'S INSUREDS.

1. THE ATTORNEY-CLIENT RELATIONSHIP BETWEEN DEFENDANTS AND THEIR CLIENTS, AAIC'S INSUREDS, DOES NOT DIRECTLY BENEFIT AAIC.

The first of the six *Trask* factors is the most significant and represents the threshold inquiry; if the attorney's representation was not specifically intended to benefit the non-clients, or if any "benefit" derived by the non-client was merely "incidental" in nature, the non-client has no legal standing to sue the attorney for malpractice based on his representation of actual client. *Leipham v. Adams,* 77 Wn. App. 827, 832, 894 P.2d 576 (1995) (citing *Trask,* at 842-43). No further inquiry is required unless an intent to benefit the non-client is proven to exist. *Trask*, 123 Wn.2d at 843.

AAIC asserts that actions taken by the defendants in "direct communications" informing AAIC "about the progress of the case" or discussing "the merit and value of the underlying case", as well as discussing "settlement authority" with AAIC (*Appellant's Opening Brief,* p. 21) were benefits of the defendants' relation with its actual client, *direct to AAIC.* In reality, any such interaction between the defense attorney and the insurance carrier were entirely ancillary to the defendants' obligations to their actual clients, the Fire District and Mr. James, and thus nothing more than "incidental benefits" to AAIC.

Defendants' actual clients were AAIC's insureds, not AAIC. AAIC owed separate and contractual obligations and duties to its insured under the contract of insurance, inherently adversarial to the insurer. To the extent that defendants furnished information to the insurer during the course of representing their clients, the Fire District and Mr. James, it was furnished for the benefit of the client in furtherance of its clients' obligation of cooperation owed under the policy. An insured is bound to cooperate with a carrier and not prejudice the carrier's ability to prepare and present liability and coverage defenses. *Cannon, Inc. v. Federal Insurance Co.*, 82 Wn. App 480, 485-486, 918 P.2d 937 (1996).

The *Trask* court noted that "the beneficiary test does not apply in the adversarial context," *Trask*, 123 Wn.2d at 844. Circumstances giving rise to what would be an "adversarial" relationship between the defense counsel and the insurance carrier are inherent. From this, we conclude that the determination of whether a transaction was intended to benefit a non-client plaintiff is more than merely factual; it has public policy ramifications akin to those accompanying inquiries into legal causation. *See, Meneely v. S.R. Smith, Inc.*, 101 Wn. App. 845, 863, 5 P.3d 49, 58 (2000). "Issues of duty and legal causation are intertwined." *Strait v. Kennedy*, 103 Wn. App. 626, 636, 13 P.3d 671 (2000).

All communications by defense counsel with its clients' insurer are subject to limits and confidentiality restrictions because of the inherently

adversarial nature of the relationship between the attorney's client and the insurer. Imposing a duty on the attorney in favor of its clients' insurance carrier jeopardizes this confidentiality. *Cf.* RPC 1.7, comment 30. This fact alone indicates that any such contact between the insurer and the defense counsel can be considered no more than "incidental at most."

In the end, a salient point that risks becoming lost in the details of the briefing in this matter is that the sole reason for the establishment of any relationship between the defendants and AAIC was to protect and defend AAIC's insureds, the Fire District and Mr. James. The attorney-client relationship between the defendants here was seminally established for the sole benefit of the Fire District and Mr. James, not for the benefit AAIC. AAIC's involvement in the defendants' representation rose because of AAIC's separate contractual obligation to the Fire District and Mr. James embodied in the insurance contract.

Ronald Mallen has observed that "[o]ften, the attorney's retention will benefit another. The inquiry, however, usually is whether the plaintiff was *the* person *intended* to be benefited by the legal services.... Thus, the inquiry is whether both the attorney and the client intended the plaintiff to be the beneficiary of legal services. The fact that the transaction benefited the [non-client third party] is not determinative. 1 R. Mallen, J. Smith, LEGAL MALPRACTICE (2010 ed.) §7:8, p. 941-942 (emphasis original).

AAIC's subjective view of their interaction with the defendants in the defendants' role as counsel for AAIC's insureds is not by any means dispositive. In analyzing the nature of the interaction between a defense counsel and the insure, the purported plaintiffs' subjective view of the attorney's obligations is only one of a number of elements considered. "Moreover, the client's subjective belief does not control "unless it is reasonably formed based on the attending circumstances, including the attorney's words or actions." *Bohn v. Cody,* 119 Wn.2d 357, 363, 832 P.2d 71 (1992)."

Notwithstanding any alleged subjective assumptions by AAIC now concerning the nature of its relationship with defense counsel in the past, in this case there is no evidence whatsoever that the defendants expressly agreed to assume any legal representational duty to the insurer which was connected to his distinct and separate affirmative duty to his actual client, the Fire District. There is no evidence in the record of such intent. AAIC was definitively aware that the defendants did not represent it, but rather represented its insureds. AAIC also was fully aware that existing Washington law does not recognize a representational duty on the part of the defendants to it based on the simple existence of the tri-partite relationship.

The defendants' actual clients, the Fire District and Marty James, not AAIC, were the intended beneficiary of the attorney-client relationship.

AAIC's citation to Section 51 of the Restatement of the Law Governing Lawyers (Third) to support its analysis is not persuasive in the context of the Washington *Trask v. Butler* analysis. Section 51 of the Restatement of Law Governing Lawyers provides an abbreviated balancing test not that is not consistent with the test of *Trask v. Butler*, to determine when an attorney has a "duty to use care" to a non-client when the attorney knows that "the client intends as one of the primary objectives of the representation that the lawyers' services benefit the non-client." 1 R. Mallen, J. Smith, LEGAL MALPRACTICE (2010 ed.), §7:8, p. 935.

Restatement of the Law Governing Lawyers (Third), Section 51 states:

> [A] lawyer owes a duty of care ... to a nonclient when and to the extent that:
>
> (a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient;
>
> (b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and
>
> (c) the absence of such a duty would make enforcement of those obligations to the client unlikely.

Of course, first, *Trask*, and not the Restatement, is controlling authority in Washington. Further, as Ronald Mallen notes, the Restatement's approach under Section 51 is "questionable." The " 'primary objectives' inquiry is not the same as the judicially developed intended-beneficiary standard [articulated

by *Trask*].... The Restatement does not look to the primary purpose, but only for one of several primary purposes." 1 R. Mallen, J. Smith, LEGAL MALPRACTICE (2010 ed.), §7:8, p. 935.

Application of Restatement Section 51 test to determine the existence of an insurance defense counsel's duty to the non-client insurer is not adequate to protect the attorney's obligations to its client under Washington law. Cases which utilize the Restatement's standard do not comport with Washington's *Trask* test. *Cf. Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 200 Ariz. 146, 149, 24 P.3d 593, 596 (2001).

2. EVEN WHERE A NON-CLIENT THIRD-PARTY RECEIVES SOME BENEFIT FROM THE ATTORNEY-CLIENT TRANSACTION, NO DUTY TO THAT PARTY ARISES WHERE A BENEFIT IS "INCIDENTAL", AS IS THE CASE HERE.

"An "intended beneficiary" of the transaction under *Trask* means just that, that the transaction must have been intended to benefit the plaintiff; it is not enough that the plaintiff may be an " 'incidental' beneficiary of the transaction." *Strait v. Kennedy,* 103 Wn. App. 626, 631, 13 P.3d 671 (2000) (emphasis added).

The insurance carrier's interests with respect to its obligation of indemnity to its insureds the Fire District and Mr. James were fixed by its separate insurance contract with the District. Any "benefit" to AAIC of defendants' services performed for its actual clients connected with AAIC's independent and adverse indemnity obligation to its insured, was no more

than "incidental" to the carrier's contractual obligation to the insureds. As such, technically under *Trask*, no further analysis is even required and no separate duty of the defense attorney to the insurer should be imposed.

G. THE ABSENCE OF A RESERVATION OF RIGHTS NEGATES ANY ADVERSARIAL RELATIONSHIP BETWEEN AAIC AND THE DEFENDANTS' CLIENTS, ITS INSUREDS, DOES NOT INSULATE THE TRI-PARTITE RELATIONSHIP FROM POTENTIAL CONFLICTS WHICH PROMOTE THE EXISTENCE OF ADVERSARIAL INTERESTS.

In claiming the "benefit" of defendants' representation of the insureds, AAIC relies on an argument that because it may have not issued a "reservation of rights" to its insureds the Fire District and Mr. James, any possible dichotomy of interest between AAIC and its insureds were thereby abrogated, and thus, all potential conflicts of interest of the defendant attorneys based on such divergent interests between the insurer and the respondent attorney's actual clients, were negated.

If AAIC did not "reserve its rights" on policy "coverage" issues, by no means does that guarantee that the insurance carrier's interests granted by its contract of insurance with the Fire District and Mr. James were fully aligned with the insured. Nor does the lack of a "reservation of rights" by the carrier assure that the representation by the assigned defense counsel who is defending the insured as its client would be conflict-free if an additional, separate duty of representation to the carrier were imposed on the defendants.

The limited evidence of the purported absence of a "reservation of rights" exists in a single reference in the underlying record found in deposition testimony. CP 61. That testimony, given its best inference to the AAIC as the non-moving party below, merely states that the carrier did not dispute "coverage" of the claims made against the insureds in the underlying case.

"Coverage" is not the only source of potential dispute between the carrier and its insured.

AAIC's contention is that the potential for conflict is lacking because, in general, the interests of the insurer and the insured are "common." AAIC essentially presents the false argument that only when the coverage is in dispute, is there any real conflict between an insurer and its insured.

These arguments are disposed of first, by stressing that even potential conflicts of interest affecting an attorney, and the mere appearance of impropriety raised by such potential conflicts of interest are just as egregious as any actual or real conflict. RPC 1.7 "allows for a lawyer to represent a client when a potential conflict of interest exists only if the lawyer "reasonably believes the representation will not be adversely affected" *and* "the client consents in writing after consultation and a full disclosure of the material facts...." *In re Disciplinary Proceeding Against McKean,* 148 Wn.2d 849, 867, 64 P.3d 1226 (2003). RPC Rule 1.7 " requires full disclosure of *potential* conflicts and written consent of the client where multiple

representation *may* materially affect the client's case." *In re Disciplinary Proceeding Against Marshall*, 160 Wn.2d 317, 338, 157 P.3d 859 (2007).

This Court should not be requested to put on the blinders that Appellant apparently has in place. It is intuitive to even a casual observer that the situation where an insurance defense attorney would have a separate representational duty to the insurer based on its performance of its duties in representing its actual client the insured, is rife with potential conflicts.

Even though a carrier has initially accepted the defense of a claim against its insured, there is at least some period of time in which the carrier is still entitled to issue a reservation of rights letter to the insured, instantly creating a situation that is indisputably incompatible with the defense lawyer holding a duty of representation to both its client the insured, and the insurer. Although a 10-month delay in issuing a reservation of rights letter to the insured questioning coverage of the underlying claims will bar issuance of a delayed "reservations of rights" letter, *Transamerica Ins. Group v. Chubb & Son, Inc.*, 16 Wn. App. 247, 252, 554 P.2d 1080 (1977), lesser periods would be accepted by the courts. *R.A. Hanson Co., Inc. v. Aetna Cas. & Sur. Co,* 15 Wn. App. 608, 610, 550 P.2d 701 (1976).

The fact that an insurer might refrain from issuance of a "reservation of rights" to contest issues of policy coverage at any point in time in a given case by no means alleviates the potential for conflict between the insurance carrier and its insured which precludes a lawyer for either one to represent

both. Even if not initially apparent at the time that a defense assignment is accepted, a conflict situation even over the insured's rights to coverage can subsequently arise where in representing the insured client, the assigned defense counsel discovers new or previously unknown evidence, which would clearly establish that one or all of the claims being defended under the insurer's policy are not entitled to coverage. In such a situation, the attorneys' seminal duty would be to their actual client, the insured, and at some level, counsel would be required to perform some act that would be inherently prejudicial to the insurance company.

As the Appellant notes, an insurer has available an array of options in dealing with its insured. *Appellants' Opening Brief*, p. 19, n. 11. None of those options are definitively foreclosed by initially accepting the insureds' defense with no "reservation of rights". Each of these options presents potential tensions between the insurer and its insured. Imposing an additional separate duty of representation on the defense counsel to the insurer would only give rise to impermissible conflicts.

Numerous circumstances can be envisioned in the tri-partite relationship where potential or actual conflicts of interest could arise for the insurance defense attorney even where an insurer has not "reserved its rights" under its contract of insurance with the attorney's client. These would include but are not necessarily limited to (1) representation of the insured which becomes more complex than anticipated, resulting in financial hardship

for the attorney; (2) policy and/or coverage defenses discovered by either the carrier or the attorney and insured while the attorney represents the insured; (3) disagreement between the insured and the insurer with regard to settlement negotiations. While the insured and the insurer may share some "common" interests, the two parties are subject to complete divergence at any time.

Further, inherent in all of these potential conflicts is a concern of the insured client that the entity paying the attorney, the insurer, and not the one to whom the attorney is obligated to defend, the insured, is at least administratively controlling the legal representation.

The Washington Rules of Professional Conduct point to the inherent potential conflict to an attorney representing a client such as CCFD No. 5 where a third party such as the client's insurer AAIC is paying the lawyers' fee bill. "[T]hird party payors frequently have interests that differ from those of the client, including interests in minimizing the amount spent on representation..." Washington Rules of Professional Conduct 1.8, comment 11.

Another area of potential conflict which is virtually impossible to negate simply because the carrier has accepted the defense of its insured without any "reservation of rights," is when a claimant offers to settle with the defense counsel's client, the insured, within the indemnity limits of the

insurance policy. Washington's preeminent insurance expert, Thomas Harris, described the situation:

> When a claimant offers to settle within the insured's policy limit, an insurer's natural inclination would be to consider it own interest first. If the duty to pay only included the duty to indemnify, the insurer would face no risk beyond its policy limits. Allowing an insurer to interpret its contractual duty to pay in such a narrow fashion "would be akin to asking the cat to guard the canary."
>
> An insurer is obligated to give the interests of its insured "equal consideration" It must recognize that it has a potential conflict with its insured any offer to settle within the policy limit."

Harris, Thomas, WASHINGTON INSURANCE LAW (3d ed.), p. 18-3.

Such circumstances literally meet the definition of a "conflict of interest" as described in the Washington Rules of Professional Conduct. RPC 1.7, comment 8.

If the assigned defense counsel owed both the insured client and the insurer separate representational duties as envisioned by plaintiffs mistaken analysis of the *Trask v. Butler* scenario, potential irresolvable conflicts or inconsistent competing interests continue to be numerous and glaring.

Plaintiffs' efforts to isolate their argument to the alleged "facts" of this specific case, and denigrating what even they term as a set of possible "horribles" which are inherent in virtually every instance of the Tripartite Relationship completely ignores the reality of those issues of tension and

conflict that are inherent in the insurance carrier-insured-assigned defense counsel relationship.

H. AAIC Is No More Than An "Incidental Beneficiary" To The Services Defendants Provided To Their Clients, AAIC's Insureds, And As Such, Trask Does Not Impose A Separate Legal Duty On The Defendants To AAIC.

Clearly, the defendants' legal services performed in representation of the Fire District were not specifically intended to directly benefit the District's liability insurer AAIC. The defendant attorneys could not act on behalf of the insurance carrier independent from their actual clients, the insureds. Any "benefit" derived by AAIC from the defendants' representation of their actual client the Fire District, was incidental to AAIC at best.

As AAIC itself notes, AAIC owed a separate contractual duty to the Fire District to indemnify it for any settlements or judgments against it (CP 19), notwithstanding what any settlement valuation, or what judgment amount was imposed. Although an insurer can often categorically determine that an alleged loss, if proven, will be covered, the duty to pay does not arise unless nd until the injured party ultimately prevails on facts which fall within the policy coverage. "The duty to indemnify hinges on the insured's actual liability to the claimant and actual coverage under the policy." *Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wn.2d 55, 64, 1 P.3d 1167 (2000).

AAIC's malpractice claim here erroneously assumes that it was legally entitled to a "benefit" of some "minimized", discounted value of its

indemnity obligation to the Fire District due to the actions of the defendants in performance of their actual representation of their true client, the Fire District. Allowing an insurer to bring a malpractice claim against an assigned defense counsel because the carrier believes that a judgment or settlement for which it was independently contractually responsible to its insured is nothing more than a back door to avoid its own contractual obligations.

Under its insurance contract with its insureds AAIC was responsible to the Fire District for any amount assessed against the District in settlement or by judgment at least up to the full value of AAIC's policy limits. Given this pre-existing contractual requirement that AAIC fully indemnify the Fire District and Mr. James to the policy limits, if by some "better" lawyering on the part of the defendants a different verdict or a settlement might have resulted, it would not have resulted in any change of AAIC's duty to reimburse its' insured for such amounts.

1. THERE IS NO FORESEEABLE "HARM" TO THE NON-CLIENT THIRD-PARTY INSURER BY NOT IMPOSING A DUTY ON THE INSURANCE DEFENSE LAWYER IN FAVOR OF THE INSURER.

This factor of the *Trask* test analysis is effectively legally impossible for this Appellant/"plaintiff" to meet. This proceeding is an which is going forward prior to any trial of this case in the Superior Court. Despite AAIC's gratuitous assertions that the defendants breached a standard of care in the underlying action, there has been no such determination. There has been no

determination that the defendants proximately caused any damage to any party based on their actions in the underlying case. There has been no determination by any trier of fact that any "harm" at all has in fact occurred to AAIC. Given that Washington law does not recognize a duty by defense counsel to the insurer, defendants did not owe a duty to AAIC, and thus, it was not "foreseeable" that any "harm" to AAIC could occur based on defendants' representation of its own client.

The "harm" to the insurer alleged by the AAIC here is apparently the fact that in satisfaction of its pre-existing contractual indemnity obligation to its insured, the carrier was required to pay a greater sum than it now thinks it should have. In the absence of any determination of law or fact finding liability or damages against the defendants in the trial court, and in the context of this existing and separate contractual indemnity obligation to its insured, AAIC cannot claim that it has been "harmed".

AAIC admits its unconditional obligation to indemnify the defendants' clients, AAIC's insured, for "any judgment." AAIC satisfied this contractual obligation to its insured by paying the underlying judgment, which was within policy limits, that is, within the scope of its anticipated contractual obligation.

The insurer 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)). Satisfying a judgment entered against its insured is seminal to the carrier's obligation of good faith and it cannot complain that it was required to do so.

The fact that the carrier ultimately was required to pay a larger amount, at or below the limits of the policy is collected premiums for from its insured, does not make it a "loss" that was not foreseeable".

2. In View Of AAIC's Pre-existing Indemnity Obligation To Its Insureds, There Is No Certainty Whatsoever That The Insurer Suffered Any Actionable Injury.

As the plaintiffs note (*Appellants' Opening Brief*, p 17, n. 10). Washington courts following *Trask* question whether this element is even appropriate to discuss in the absence of the showing of an uncontroverted loss. *See, Estate of Treadwell* 115 Wn. App. at 247 n. 2.

With respect to this case, there is no "certainty" whatsoever that the conduct of these defendant caused any injury to any plaintiff. First, it should be noted that this is an Interlocutory Appeal. There has been no judgment entered in this case except for the dismissal of AAIC's claims for malpractice due to a lack of legal standing.

In the legal sense, in the absence of any finding of fact, or any judgment by the trial court holding that the defendants in this case are in fact

liable for malpractice, there is no certainty that any injury even occurred. In a factual sense, the record in the trial court is replete with evidence offered by the defendants that contradict the allegations of the plaintiffs that any breach of a duty by the defendants or that any malpractice occurred. To the extent that the plaintiffs assert that the record below may include "evidence" of some "damage", this is overwhelmingly refuted in the Declarations and attached exhibits of the defendants' experts, Judge Robert Ladley (CP 398-408) and Bruce Rubin (CP 409-523).

Plaintiffs' argument on this point, that the issue revolves around the legal "certainty" or "speculation" of a specific quantum of damage is misdirected. Here, there has been no finding of the defendants' breach of the standard of care, or that any such alleged breach was a proximate cause of any damage whatsoever to plaintiffs. There is no certainty that any action by the defendants caused any injury to AAIC or any other party.

Further, in virtually every case where a carrier would claim that it had suffered injury that was allegedly caused by actions of an appointed defense counsel performed while representing a carrier's insured, the existence, and indeed, any quantification of such purported injury would be almost incapable of certainty. All financial impact to the insurer would rise entirely from the carrier's separate and independent obligation to indemnify its insured, based on the insured's conduct.

3. Any Connection Between The Defendants' Conduct And The Alleged "Injury" Is Entirely Derivative From The Defendants' Separate Obligations Performed For Its Clients.

Any purported injury incurred by an insurance carrier due to alleged legal malpractice of the assigned defense counsel in representing the insured, is distant from, and must be derivative to, an injury proven in a separate proceeding, found to have been the responsibility of the client. Any "injuries" sustained by a liability carrier rising from the "tripartite relationship" must fundamentally rise from its separate contractual indemnity relationship with its insured, not from its relationship with defense counsel.

4. Imposing A New Duty On Insurance Defense Attorneys Will Not Further A Policy Of Preventing Future Harm.

The analysis advanced by AAIC in its opening brief on this factor of the Trask test defective. The "harm" which AAIC comes to the Court and complains of is not that a "negligent attorney will "escape liability" for purportedly "negligent" acts. The supposed "harm" that this Appellant complains of, is that an insurance carrier, obligated by a pre-existing insurance contract to indemnify settlements or judgments entered against that insurance carrier's insured might be actually required to pay the amount of the agreed contractual policy limits, when after the fact, it unilaterally concludes that it .

The fundamental policies of law relating to the "tripartite" relationship between liability carrier, insured, and assigned defense counsel are longstanding and clearly establish that counsel's legal obligations run only to its specific client, the insured, not to the insured's carrier. The insurance defense attorney "must exercise complete *independent professional judgment* on behalf of its client the carrier's insured, not on behalf of the insurer itself." *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 391, 715 P.2d 1133 (1986) (emphasis added).

A new policy that would impose duties upon an assigned defense counsel which rise from a new view that counsel has obligations of legal representation not only its client, the carrier's insured, but also to the insured's insurer, would inherently create impermissible situations where the defense counsel would find itself in conflict, to the absolute detriment of its true client to whom the attorney owes undivided loyalty, the carrier's insured.

The idea that an attorney who may have been "negligent" in the performance of his or her legal duties to their client, the insured, will necessarily "escape liability" relating to actions taken by counsel in performing its services to its client, if the insurance carrier is not allowed the separate right to pursue perceived harm caused to the insured/client, is fallacious. Whether or not the insurer ever has a right to sue the assigned defense counsel for any alleged defect in his representation of his own client, that client has the unfettered right to sue the attorney and hold him or her

accountable for legal malpractice, based on the glaring fact that the insured is the action client of the attorney.

It is more foreseeable that future harm will result from allowing insurance carriers a separate right to sue assigned defense attorneys for actions taken in defending their separate clients who are insured by such carriers. Finding a duty on the part of the attorney to the insurer necessarily presupposes that the attorney, already fully subject to the direction of his actual client, will be separately and actually also subordinate to the demands and direction of the carrier, resulting at a minimum, in an inherent potential conflict of interest to the detriment of the insured/client, in every single case.

5. Imposing A Separate Duty On A Defense Attorney In Favor Of The Insurer Will Unduly Burden The Legal Profession In Fundamental, Critical Areas Of Representation.

"Balanced against the importance of providing a remedy to those harmed by attorneys is the recognition that imposing liability could place an undue burden on practicing attorneys. Attorneys have a duty of zealously representing their clients within the bounds of the law. When their clients have opposing interests with third parties, attorneys are supposed to represent their clients' interests over the interests of others." *Bohn v. Cody* 119 Wn.2d 357, 367, 832 P.2d 71 (1992) (emphasis added).

Imposing a new legal duty on insurance defense counsel in favor of insurance carriers who assign those counsel to defend the separate interests of

the carriers' insureds against third-party claims, would also create significant additional burdens, at least on that portion of the legal community.

There are several reasons courts are or should be reluctant to relax the rule of privity so as to extend a duty to a non-client third party in attorney malpractice cases. First, and perhaps most critical, the rule preserves an attorney's duty of loyalty to, and effective advocacy for the client.

Second, adding responsibilities to non-clients creates the danger of conflicting duties. John H. Bauman, *A Sense of Duty: Regulation of Lawyer Responsibility to Third Parties by the Tort System,* 37 S Tex L Rev 995, 1006 (1996).

Third, once the privity rule is relaxed, the number of persons a lawyer might be accountable to could be limitless. *Nat'l Savings Bank v. Ward,* 100 U.S. [10 Otto] 195, 198, 25 L.Ed. 621, 624 (1879). An attorney should know in advance who is being represented and for what purpose. The attorney should also be able to personally control the specific scope of the representation and the risks to be accepted. Where an attorney has an automatic and preexisting duty at the inception of the assigned defense to the insurance carrier as well as to his client, the carrier's insured he will never have any control of the scope of the adverse nature of the carriers' relationship with its insured.

Fourth, a relaxation of the strict privity rule of representation would clearly imperil attorney-client confidentiality. "The attorney-client privilege

is pivotal in the orderly administration of the legal system, which is the cornerstone of a just society. The reasoning is tripartite: to maintain the adversarial system, parties must utilize lawyers to resolve disputes; lawyers must know all the relevant facts to advocate effectively; and clients will not confide in lawyers and provide them with the necessary information unless the client knows what he says will remain confidential." *In re Disciplinary Proceeding Against Schafer,* 149 Wn.2d 148, 160-161, 66 P.3d 1036 (2003); *see* APR 5 (Oath of Attorney, ¶ 6); RPC 1.6 (Attorney's Duty To Respect Client's Confidence); Washington Rules of Professional Conduct, *Preamble, A Lawyer's Responsibilities,* §17.

Once the attorney is liable not only to the client, but to the client's insurer even where no current "reservation of rights" with respect to "coverage" exists, what is confidential and what is not?

Imposing liability in favor of nonclients, generally speaking, threatens all these interests. In threatening the interests of the attorney, the interests of potential clients may also be compromised; they might not be able to obtain legal services as easily in situations where potential third party liability exists. Before abandoning privity, the courts need a good reason for thinking that the private arrangements are inadequate.

As Washington law clearly recognizes, the best interests of an insured client being represented by assigned defense counsel will virtually always be, in some fashion, contrary to the insurer's interests or wishes. The duty of

counsel to exert his best ethical efforts on his client's behalf is inconsistent with any duty he might owe to the insurer." *See, Strait v. Kennedy*, 103 Wn. App. 626, 637, 13 P.3d 671 (2000).

Logic also indicates that allowing both the insured and the insurer to make a claim against the defense attorney creates a situation enhancing the impermissible situation of a double recovery.

CONCLUSION

Given these circumstances, and for all the reasons described above, if a carrier were allowed to retain the right to make a claim of legal malpractice against its assigned defense counsel, such a situation would have an obvious and unacceptable chilling effect on members of the insurance defense bar.

In evaluating this issue, the court in *Trask* observed, "The policy considerations against finding a duty to a non-client are the strongest where doing so would detract from the attorney's ethical obligations to a client. This occurs where a duty to a non-client creates a risk of divided loyalties because of a conflicting interest or of a breach of confidence." *Trask* at 844, 872 P.2d 1080 [emphasis added]. It is difficult to conceive of a situation where imposing a duty on a lawyer to a third-party would detract more from an attorney's ethical obligations to his or her client than in a situation where that third-party is the client's insurance company, the client's "adversary" in its contract of insurance.

Proper analysis and application of the *Trask v. Butler* test clearly establishes that an attorney assigned by an insurer to represent and defend one of the insurer's insureds from a claim actually or potentially covered by the insurance policy between the insurer and the insured, has no legal duty of representation to the insurer as a "non-client".

The courts do not view *Trask* as a universal panacea to plaintiffs who may have a tangential with an attorney in a certain circumstance to claim malpractice. "[G]enerally a duty is not owed to a third party adversary. As explained, and it bears repeating, [the Washington Supreme] court noted in *Trask* that policy considerations generally disfavor finding a duty to a nonclient where an adversarial relationship exists because finding a duty may detract from an attorney's obligation to his or her own client." *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 319-320, 45 P.3d 1068 (2002).

Creating a new legal duty in the tri-partite relationship on the insurance defense counsel in favor of the insurance carrier is not warranted by considerations of public policy, or by the application in this action of the multi-factor test of *Trask v. Butler*.

This Court should affirm the judgment properly decided and entered in the trial court below.

RESPECTFULLY SUBMITTED, this 30th day of April, 2012.

FORSBERG & UMLAUF, P.S.

Ray P. Cox, WSBA #
Richard R. Roland, WSBA # 18588
Attorneys for Defendants
Bullivant Houser Bailey, P.C. and
Richard G. Matson

CERTIFICATE OF SERVICE

I, Jean M. Young, hereby certify that on the date below I caused the foregoing to be served upon the Court of Appeals via Email @, and each and every attorney of record as noted below:

Via ABC Legal Messenger

Michael A. Patterson
Daniel P. Crowner
Patterson Buchanan Fobes Leitch
& Kalzer, Inc. P.S.
2112 Third Avenue, Suite 500
Seattle, Washington 98121
Email: map@pattersonbuchanan.com
Email: dpc@pattersonbuchanan.com
Attorneys for Appellant

I certify under penalty of perjury under the laws of the State of Washington that above is true and correct.

Executed at Seattle, Washington, on April 30, 2012.

Jean M. Young

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