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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. _____

(Court of Appeals 483751-1-II)

TORI KRUGER-WILLIS,

Appellant,

v.

HEATHER HOFFENBURG and JOHN DOE HOFFENBURG,

Respondent.

RESPONSE TO PETITION FOR REVIEW

LOCKNER, CROWLEY & KAY, INC., P.S.
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I. FACTS AND PROCEDURAL HISTORY

On March 28, 2017, Division II of the Court of Appeals issued its third decision in the case of Tori Kruger-Willis v. Heather Hoffenburg. Please note that Defendant was incorrectly identified as "Hoffenburg" at the trial court level, but her name has been corrected to "Hofferbert" in the appellate record. The central issue in this case is whether counsel retained by an insurance company has "authority to act" on behalf of the insured in circumstances in which counsel is unable to establish regular and reliable communication with his or her client. The Appellant, Tori Kruger-Willis, called upon Division II of the Court of Appeals to address this issue, citing to RCW 2.44.030 and RPC 1.2(f) and urging the Court to find that defense counsel does not have "authority to act" under those circumstances and should be required to withdraw from representation immediately. Insofar as this theory of "authority to act" poses significant questions regarding the insurance company's concomitant "duty to defend," the Appellant has attempted to bifurcate these issues, treating them as though the relationship between the two is not one of interdependence.

As the Court of Appeals acknowledged, the Appellant envisions a scenario in which "the insurer and defense counsel would not even be able to file a notice of appearance and would be forced to allow a default judgment to be entered against the insured." *See Appendix D, Page D8,*

Paragraph II. Confronted with the Court's rejection of her reasoning, the Appellant proposed an alternative scenario in which defense counsel would be permitted to appear on behalf of the insured, subject to a reservation of rights by the carrier. *See Appendix E, Page E14, Paragraph II.* The Appellant further noted that the carrier could file an action for declaratory judgment, permitting the insurer to withdraw both defense and indemnification from its insured under these circumstances. *Id.* Unacknowledged in the Appellant's Petition for Review is the simple fact that this "compromise" proposal would still require defense counsel to appear on behalf of the insured, conduct that she has maintained would violate RCW 2.44.030 and RPC 1.2(f). Appellant postulates that the law imposes an absolute bar to retained defense counsel appearing on behalf of an insured where communication is limited or non-existent, but argues that such an appearance would be permissible, provided the insurer is simultaneously working to strip coverage from the insured for non-cooperation. If this Court is looking for logical consistency to Appellant's arguments, there is none to be found.

The procedural history of this case begins more than nine years ago, with a motor vehicle accident that occurred on February 1, 2008. Respondent Heather Hofferbert struck a parked car owned by Appellant Tori Kruger-Willis. Because the Hofferbert vehicle was insured by

GEICO General Insurance Company, the repairs to the Kruger-Willis vehicle were paid pursuant to the GEICO policy. Notwithstanding the completion of repairs, Ms. Kruger-Willis asserted a claim for "diminution of value," alleging a reduction in the resale value of her vehicle as the result of its involvement in a collision. GEICO rejected that claim, and Ms. Kruger-Willis commenced litigation against Heather Hofferbert in Mason County Superior Court. In response, GEICO retained Morgan J. Wais to represent Ms. Hofferbert. Throughout the course of litigation, Mr. Wais was unable to establish contact with Ms. Hofferbert. Nonetheless, at trial Mr. Wais obtained a defense verdict on behalf of his client. The jury found for Ms. Hofferbert, awarding no damages to Ms. Kruger-Willis.

Prior to trial, Ms. Kruger-Willis invoked the fee-shifting provisions of RCW 4.84.250 in order to recover attorneys' fees should she be the prevailing party. Because she was the prevailing party, Heather Hofferbert was entitled to recover attorney's fees pursuant to the statute, and judgment was entered against Tori Kruger-Willis in the amount of $11,490.00. In response, Appellant filed the first of three appeals before Division II.

Tori Kruger-Willis' first appeal alleged that the trial court had erred in awarding fees and costs to Heather Hofferbert. Specifically, Ms. Kruger-Willis argued that defense counsel had been representing the

interests of GEICO General Insurance Company rather than those of its insured, Heather Hofferbert. This argument was rejected, with the Court of Appeals remanding the case to the trial court for further action. Upon remand, Ms. Kruger-Willis filed a motion at the trial court level, alleging that defense counsel did not have the "authority to act" on behalf of Ms. Hofferbert. Ms. Kruger-Willis demanded retroactive disqualification of counsel and vacation of the jury verdict based upon the allegation that defense counsel had acted in violation of RCW 2.44.030 and RPC 1.2(f). Contemporaneous to this request, Alana K. Bullis, counsel for Appellant, filed grievances with the Washington State Bar Association, alleging violations of RCW 2.44.030 and RPC 1.2(f) by Morgan Wais, the attorney retained by GEICO to handle the case at the trial court level, and Paul Crowley, the attorney retained by GEICO to handle appellate proceedings. Those grievances are still pending, because Ms. Bullis has asked the Washington State Bar Association to keep them open until there is a final resolution of her client's appeals.

Pursuant to RCW 2.44.030, Ms. Kruger-Willis demanded that defense counsel "produce or prove the authority under which he or she appear[ed]." The Appellant further demanded that the trial court "stay all proceedings by him or her on behalf of the party for whom he or she assume[d] to appear" until such time as counsel's "authority to act" on

behalf of Heather Hofferbert had been proven to the trial court's satisfaction. *See RCW 2.44.030.* Defense counsel relied upon the statutes, case law and contractual provisions which Division II cited in support of its ultimate decision in this case. The trial court concurred with defense counsel, but failed to issue findings of fact and conclusions of law, rendering its decision defective procedurally.

In response, Appellant filed the second of three appeals. Kruger-Willis objected to the trial court's finding that defense counsel had "authority to act," basing that appeal upon the absence of formal findings of fact and conclusions of law supporting the order. While the parties briefed the substantive issues, the Court of Appeals decided the case based upon the procedural question, finding that the trial court had erred. The issue was remanded to the trial court with instructions to issue findings of fact and conclusions of law.

On remand, the trial court issued a decision that met the requirements set forth by the Court of Appeals, finding that defense counsel had "authority to act" on behalf of Heather Hofferbert and setting forth the facts and law that led to that conclusion. Ms. Kruger-Willis responded with a third appeal, attacking the trial court's determination regarding "authority to act". On March 28, 2017 the Court of Appeals issued its decision, affirming the trial court. Ms. Kruger-Willis filed a

motion for reconsideration, which was rejected. She now petitions the Washington State Supreme Court for review, alleging that the Court of Appeals has erred by finding that retained defense counsel had "authority to act" on behalf of Respondent Heather Hofferbert.

Appellant alleges that Division II has overturned existing precedent governing the formation of an attorney-client relationship. The Appellant further alleges that Division II has tacitly overturned the *Tank* decision, which set forth the parameters of the tripartite relationship between insurer, insured and defense counsel. Neither of these claims has merit. Division II decided this case based upon the clear language of RCW 2.44.030 and in a manner that is entirely consistent with well-established case law regarding the insurer's "duty to defend."

II. ARGUMENT

1. There Is No Conflict With Existing Precedent

Appellant contends that Division II's decision conflicts with a string of cases governing the relationship between the insurer, the insured and defense counsel retained by the carrier. Per Appellant, the Court of Appeals has found "authority to act" on the part of defense counsel in violation of RCW 2.44.030 insofar as no attorney-client relationship has been formed, and such a relationship must exist before counsel can act on behalf of his or her client. As outlined above, Appellant's arguments have

shifted over the course of this litigation, but there remains one constant: an unshakeable determination that the insured be stripped of defense and indemnification. So vehement is Appellant regarding this issue that she has argued, without irony, that she would prefer to see the insurance company file a declaratory action to withdraw coverage rather than see defense counsel act on behalf of an uncooperative insured. Missing from this argument is any acknowledgement of the fact that the legal theory advanced by Appellant would not merely strip countless individuals of the protections for which they contracted with their insurers, but that by stripping those individuals of defense and indemnification, the Court would also be denying compensation to countless claimants who might not have any other source of recovery. The common thread running through Appellant's briefing is the proposition that it is defense counsel's obligation to take actions that would jeopardize coverage for the insured. By proposing that counsel be forced to withdraw in situations in which contact cannot be established with the insured, Appellant is proposing that this Court put defense counsel in the position of having to take actions that will lead, ineluctably, to withdrawal of coverage by the insurance carrier. That this argument is couched in terms of what is required by the Rules of Professional Conduct is painfully ironic.

On one hand, Ms. Kruger-Willis contends that no attorney-client relationship exists and that counsel cannot, therefore, appear on behalf of the insured. As the Court of Appeals has acknowledged, this theory would leave the insured vulnerable to entry of default and subsequent default judgment, insofar as counsel could not appear to prevent either from occurring. Because insurance policies condition coverage on the cooperation of the insured, any default judgment entered against the insured as a result of counsel being forced to withdraw would necessarily result in denial of coverage and indemnification. *Staples v. Allstate Insurance Company*, 176 Wn.2d 404, 295 P.3d 201 (2013). If the insured does not cooperate with defense counsel, resulting in the entry of a default judgment, it is self-evident that the carrier's ability to defend the claim has been materially compromised. Under those circumstances, a denial of coverage would be permitted under Washington State Law. *Id.* Because the insurer would have been prejudiced in its ability to defend the claim, the carrier would be within its rights to deny indemnification. *Oregon Auto Ins. Co. v. Salzberg,* 85 Wn.2d 372, 375-6, 535 P.2d 816 (1975). Accordingly, Appellant would have this Court believe that her preferred scenario is one in which defense counsel is unable to appear on behalf of defendant, and plaintiff has no insurance proceeds from which to collect any judgment.

In the alternative, and in response to the obvious problems with her first proposal, Appellant offers another theory as to the appropriate course of action for defense counsel confronted with a situation in which the insured does not respond to correspondence or other attempts to communicate. Per Ms. Kruger-Willis, the "best practice" for retained defense counsel would be to inform the carrier of the insured's non-cooperation, thereby spurring the carrier to defend the case under a reservation of rights. *See Petition for Review at 19.* Appellant further recommends that the carrier "seek a declaratory judgment that it has no duty to defend" so that the insurer can void the duties of defense and indemnification, leaving the insured to fend for himself or herself. *See Petition for Review at 19-20.* Again, Appellant would have this Court believe that the Rules of Professional Conduct require that defense counsel inform the carrier of the insured's lack of cooperation with the understanding, and indeed the intent, that coverage would be jeopardized by such a report. The logic of compelling defense counsel to undermine his or her client's interest runs counter to every decision that this Court has ever issued.

As the Court noted in *Tank*, defense counsel must resolve any "potential conflicts of interest between the insurer and insured...in favor of the insured." *Tank v. State Farm Fire & Casualty Company*, 105,

Wn.2d 381, 388, 715 P.2d 1133 (1986). In a scenario in which the insured is non-cooperative, such a conflict clearly exists. The insurer has the right, to the extent that it is prejudiced by that non-cooperation, to deny coverage. The insured, however, would be prejudiced by such a denial, leaving him or her exposed to a judgment but without any right to indemnification by the insurer. *Tank* makes it absolutely clear that this conflict must be resolved in favor of the insured, not the insurer. Accordingly, Appellant's suggestion that defense counsel must inform the carrier of the insured's non-cooperation and set the stage for denial of coverage is preposterous. Moreover, while trumpeting RPC 1.2(f), Appellant simply ignores the provisions of RPC 1.6(a), which provides that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." *RPC 1.6(a).* Defense counsel cannot, and should not, be required to disclose to the insurer that the insured has been non-communicative and/or non-cooperative. The consequences of such a disclosure are uniformly negative and adverse to the interests of the insured. No reasonable defense attorney would view such a disclosure to be in his or her client's interests, nor would any reasonable court view such a disclosure to be mandated by any statute, rule or case law. RPC 1.8(b) similarly makes the folly of Appellant's argument clear insofar as it states that "[a] lawyer

shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent." *RPC 1.8(b).* Disclosure of the sort that Appellant contemplates would clearly violate the Rules of Professional Conduct.

Rule of Professional Conduct (RPC) 1.2(f) states that:

> A lawyer shall not purport to act as a lawyer for any person or organization if the lawyer knows or reasonably should know that the lawyer is acting without the authority of that person or organization, unless the lawyer is authorized or required to so act by law or a court order.

In its March 28, 2017 decision, Division II of the Court of Appeals held that the "duty to defend," as enshrined in the contract of insurance and further mandated by statute and precedential law in the State of Washington, obligates the carrier to retain counsel to represent the insured. The Court further held that while the "duty to defend" explicitly requires retention of defense counsel for the insured, it also implicitly authorizes action by counsel retained to provide that defense. The Court did not rely solely upon the implications of the "duty to defend" to find such authority, however. The Court also found that authority within RPC 1.2(f), the same Rule of Professional Conduct that Appellant cites in opposition to such a holding. Per the Court of Appeals, RPC 1.2(f) expressly authorizes representation, with or without the prior establishment of an attorney-client relationship, where counsel is "authorized or required to so act by

law..." *RPC 1.2(f).* The Court of Appeals held that defense counsel would be so authorized under contract law, with the authorization being necessary and essential to fulfillment of the carrier's "duty to defend." As the Court observed, "[u]nder Kruger-Willis' position, if the insurer or defense counsel could not contact the insured to obtain express authority to represent him or her, the insurer and defense counsel would not even be able to file a notice of appearance and would be forced to allow a default judgment to be entered against the insured." *See Appendix D, Page D8, Paragraph II.* Without an accompanying "authority to act," the "duty to defend" would be meaningless.

Appellant contends that the Court of Appeals' March 28, 2017 decision fundamentally altered the legal standards governing the attorney-client relationship. Specifically, Appellant complains that the Court "abolished the requirement for the formation of an attorney-client relationship" entirely, permitting retained defense counsel to appear on behalf of a client with whom no prior relationship existed. *See Petition for Review at 1.* This allegation is unsupported by the record, and by the clear and unambiguous resolution of these issues based upon existing legal precedent. The Court of Appeals held that "authority to act" could be found in the insurance contract that afforded coverage to Ms. Hofferbert as well as under RPC 1.2(f). Where Appellant disagrees with that

interpretation of the rule, she simply ignores it. It is undeniable, however, that RPC 1.2(f) does authorize action by counsel when "so required to act by law..." *RPC 1.2(f).* The rule does not differentiate between statute, contract or case law, thereby suggesting the intent to permit as broad an interpretation as possible. This makes sense insofar as the public policy goal is to expand opportunities for representation of parties rather than limit them. Unless Appellant is prepared to have this Court define the term "law" as excluding the contractual provisions, there is no reason to conclude that the Court of Appeals erred in finding that defense counsel had the "authority to act" as required by the law.

III. CONCLUSION

This case has been before the Court of Appeals on three occasions. The Court of Appeals has consistently ruled against Appellant on each and every one of the substantive issues raised in this Petition for Review. There is conflict with existing precedent and there is no issue of substantial public interest.

RAP 12(c) states that a motion for reconsideration:

> should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised.

Appellant's briefing merely reiterates the same positions and

theories that have been rejected on three prior occasions. Respondent is entitled to finality. Accordingly, Respondent requests that this Court deny Appellant's Motion for Reconsideration.

RESPECTFULLY SUBMITTED this 15th day of May, 2017.

LOCKNER, CROWLEY & KAY, INC., P.S.

By: _____
Paul L. Crowley, WSBA #31235
Attorney for Respondent

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CERTIFICATE OF SERVICE

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Certificate of Service

I, Elizabeth Shelton-Stevens, certify that on May 15, 2017 I sent for delivery a true and correct copy of the Response to Petition for Review, drafted by Paul L. Crowley, by e-mail to Appellant's counsel Bullis, and by way of Greyhound Legal Messenger to be served on the following party:

Counsel for Appellant
Alana Kimberly Bullis
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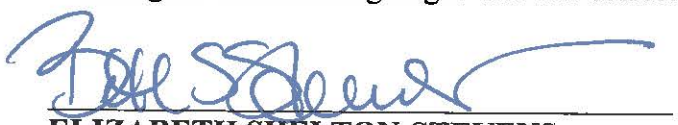
Dupont, WA 98327-7743

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



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