NO. 09-2-03892-2

COA# 42864-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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 APPELLANT

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1. The trial court erred when it found that "[t]here is no genuine issue of material fact in dispute that Plaintiff American Alternative Insurance Corporation lacks standing to bring this lawsuit." Clerk's Papers (CP) at 698.

2. The trial court erred when it ordered that "[t]he Plaintiffs motion to strike the Defendants' affirmative defense that Plaintiff American Alternative Insurance Corporation lacks standing to bring this lawsuit is DENIED." CP at 698.

3. The trial court erred when it ordered that "[t]he Defendants' affirmative defense that Plaintiff American Alternative Insurance Corporation lacks standing to bring this lawsuit is GRANTED." CP at 698.

4. The trial court erred when it ordered that "[w]ith regard to the claims of Plaintiff American Alternative Insurance Corporation, judgment shall be entered in favor of the Defendants." CP at 698.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under CR 56(c) and applicable Washington law, did the trial court err as a matter of law when it ruled that American Alternative Insurance Corporation lacks standing to bring a legal malpractice claim

against Bullivant Houser Bailey, P.C., and Richard G. Matson, who were retained and paid by American Alternative Insurance Corporation to defend its insured, Plaintiff Clark County Fire District No. 5? (Assignments of Error 1, 2, 3, and 4).

2. Under CR 56(c) and applicable Washington law, did the trial court err as a matter of law when it granted the affirmative defense of Bullivant Houser Bailey, P.C., and Richard G. Matson that American Alternative Insurance Corporation lacks standing to bring its legal malpractice claim? (Assignment of Error 3).

3. Under CR 56(c) and applicable Washington law, did the trial court err as a matter of law when, with respect to American Alternative Insurance Corporation's claims, it entered judgment in favor of Bullivant Houser Bailey, P.C., and Richard G. Matson? (Assignment of Error 4).

STATEMENT OF THE CASE

I. SUBSTANTIVE FACTS

In 2005, American Alternative Insurance Corporation ("AAIC"), through Glatfelter Claims Management, Inc. ("GCM"),[1] retained Bullivant Houser Bailey, P.C. ("BHB"), and its attorney Richard G. Matson ("Matson") to defend Clark County Fire District No. 5 ("the Fire District")

[1] GCM is a third-party administrator for Munich Reinsurance America, which wholly owns AAIC, an insurance provider. CP at 4-5, 19-20.

and Martin P. James ("James") against a lawsuit brought by Sue Collins, Helen Hayden, Valerie Larwick, and Kristy Mason. CP at 4, 24-27; *see also Collins v. Clark County Fire District No. 5*, 155 Wn. App. 48, 62-63, 231 P.3d 1211 (2010). Significantly, AAIC assumed this defense without a reservation of rights. CP at 61.

In their lawsuit, the plaintiffs raised many claims against the Fire District and James, including: outrage; negligent supervision; negligent retention; negligent infliction of emotional distress; and violations of the Washington Law Against Discrimination (WLAD) under chapter 49.60 RCW. *Collins*, 155 Wn. App. at 63.

Matson was purported to be experienced at trying sexual harassment cases in both state and federal courts. CP at 114-17. In reality, however, Matson cannot recall ever handling a case with an exposure over $500,000.00. CP at 126. He had never tried a sexual harassment case in his career. CP at 78. He had never defended a sexual harassment case with multiple plaintiffs. CP at 79. In fact, Matson admitted that he had tried only one other employment case before *Collins*. CP at 114.

During the time of Matson's representation, BHB held itself out as being a team of experienced attorneys; yet as a firm, only about 3% of BHB's cases were made up of employment litigation. CP at 157-58. And

more importantly, the Vancouver, Washington office of BHB, of which Matson was the shareholder-in-charge, had been handling fewer and fewer cases of employment litigation: 1.2% in 2003; 1.0% in 2004; 0.7% in 2005; 0.6% in 2006; and 0.8% in 2007. CP at 152-60, 218-22.

Unfortunately, in defending the underlying plaintiffs' claims, the conduct of BHB and Matson fell far below the standard of care to which attorneys must comply. CP at 194, 198-99, 202-05, 209-10, 211-15, 300-01. Other than Matson, no other attorney – including associates, shareholders, and of counsel – at the Vancouver, Washington office of BHB practiced in the particular field of employment practices liability. CP at 161, 162-63. All other BHB attorneys who practiced in the field of employment practices liability practiced out of other BHB offices throughout the northwest. CP at 161.

Despite his lack of experience in handling cases of this nature, Matson did not consult with others at BHB who were more experienced. CP at 131. Matson did no research to determine what effect multiple plaintiffs claiming sexual harassment could have on the underlying case. CP at 81. And the associate attorney initially assigned to the case by Matson and BHB had no experience in handling sexual harassment claims, either. CP at 183-85. He was a bankruptcy attorney. CP at 181-82.

Early in the case, Matson was on notice that the plaintiffs' allegations were serious and that there was the potential for a multi-million dollar verdict. CP at 84-86, 96-97, 101-02. Despite this information, Matson somehow assumed that a jury would find James's conduct simply to be "lighthearted and banter." CP at 97. As a result, Matson filed no offers of judgment, no motions to bifurcate, and no other dispositive motions. CP at 79-80, 87, 89-90.

Matson admitted that "the big issue" with the plaintiffs' case was damages. CP at 140. Nevertheless, Matson took no steps to determine the likely measure of damages for the four plaintiffs. And he eschewed any review of potentially relevant jury verdicts, claiming they are "often not very helpful in trying to analyze what's going to happen in your case." CP at 105-06, 143-44.

Most egregiously, Matson did not engage in any substantive efforts to settle the case until mediation – almost *two years* after being retained in the underlying case and less than *two months* before the initial trial date. CP at 50, 68-69. Matson's failure in this regard is particularly egregious in light of the pleas from GCM's insurance adjustor to move the case into mediation.[2] CP at 195.

[2] In late 2006 and early 2007, GCM's insurance adjustor sought the help of Ohio attorney Katherine Hart Smith to review several issues related to

Matson never completed an evaluation regarding the value of the plaintiffs' claims until just weeks before the mediation. CP at 50, 57. And when Matson finally completed this evaluation, he woefully underestimated the value of the case. His opinion that $370,000.00 was a fair and reasonable sum for purposes of settling the plaintiffs' multi-million dollar claims was not supported by any research or analysis. CP at 68, 106-07 504-10.

Matson admitted that, between him and the insurer, he was in the best position to determine the value of these types of cases and to determine liability and damages exposure in these types of cases in the Vancouver, Washington market. CP at 112. He also testified that AAIC, the Fire District, and James were entitled to reasonably rely upon him in making decisions about settlement. CP at 141-42.

Accordingly, relying on Matson's evaluation and advice, AAIC, through its third-party administrator GCM, brought $400,000.00 in settlement authority for a mediation in the underlying case. CP at 49. But by the time of the mediation, the plaintiffs substantially increased their settlement demands to more than *$8 million.* CP at 51. GCM's

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the underlying case. CP at 236-37, 241. Hart Smith is an employment law attorney who sometimes handles claims assigned to her by GCM, and who occasionally consults with GCM in regard to cases being handled by local counsel. CP at 228-29, 230-31, 232-34.

representative repeatedly asked Matson why the parties' evaluations of the underlying case were so different. CP at 52-53. Matson could not provide any answer, except to say that his evaluation of the plaintiffs' claims was correct. CP at 54-56, 59, 69-71. When the mediation in the underlying case failed, AAIC, the Fire District, and James reluctantly, and unfortunately, headed to trial. CP at 58, 68.[3]

During the trial of the underlying case,[4] Matson proceeded on a defense strategy premised on a fundamentally erroneous understanding of the law. Matson placed heavy emphasis on blaming plaintiff Collins for the hostile work environment on the basis that she participated in the inappropriate banter with James. CP at 96-97, 211-12. But Matson's defense strategy actually served to bolster the other three plaintiffs' hostile work environment claims.[5] CP at 211-12.

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[3] GCM's representative recalled, "When I sat at mediation and my counsel tells me there's no way these numbers are wrong, they're barking up the wrong tree, they're totally unrealistic, I'm in a position where I have to go to trial and that's when I said we'd go to trial." CP at 58.

[4] At the urging of GCM's representative, Hart Smith agreed to assist Matson in trying the case. CP at 242-44. Hart Smith was admitted *pro hac vice*; she arrived in Vancouver, Washington, shortly before the trial. CP at 235, 240. She was not present during the entire trial due to previous commitments. CP at 107. But Matson was present during the entire trial, during which he served as lead trial counsel. CP at 186-87.

[5] As the trial court noted in its Memorandum of Decision:

After a lengthy trial, the plaintiffs' attorney in the underlying case ended his closing argument by requesting $1 million in non-economic damages for each plaintiff. *Collins*, 155 Wn. App. at 72-73. The plaintiffs' attorney argued in closing:

> *The amount that's being sought will not in any way reduce fire services, hurt the department. It's not going to do anything that will hurt services in any way, or raise taxes, do any of the bogeys that might be mentioned. It will not happen. We know that.*
>
> *What you need to do, please, is put a value on their suffering that other departments will look up and say, "We can't do that."* Put a value on what they have experienced and compensate them to a level that says, "If you do this serious consequences flow, and we compensate people as they are injured." *And in so doing, help let the commissioners know the answer to the question they felt had to go to you all to be decided. And in so doing, also let HR departments know that there's a better structure, there's a better way to do this.*
>
> HR departments don't exist for the protection of the City. HR departments don't exist for the protection of the company. *Let them know that they have to be up there with a viable means for somebody who's experiencing harassment to step forward and bring it forth in a safe way.*

> It is clear that [Sue Collins's] outrageous behavior at the employment site was totally inappropriate and should have been corrected by her supervisor Marty James. James had a clear duty and responsibility as director of the Training Center to prevent any such actions from taking place. It is clear from some of the jury's findings that not only did he permit it to occur, but he helped promote some of the specific activities in question.

CP at 282.

> And an award of $1 million [to each of the four women] ... is the best way you can do that.

Collins, 155 Wn. App. at 72-73. Matson did not object to this, or any other, portion of the closing argument by the plaintiffs' attorney. *Collins*, 155 Wn. App. at 73.

After its deliberations, the jury returned a verdict in favor of the plaintiffs, awarding substantial judgments to each of them. *Collins*, 155 Wn. App. at 73-74. The jury's award to the plaintiffs totaled more than $3.5 million, or *almost 10 times more* than what Matson had evaluated the case for settlement purposes. *Collins*, 155 Wn. App. at 73-74; CP at 276-87. [6] In response, the Fire District and James filed post-trial motions for: (1) a new trial or remittitur under CR 59(a); (2) judgment as a matter of law under CR 50(b); and (3) a new trial or remittitur under RCW 4.76.030. *Collins*, 155 Wn. App. at 74. With the exception of reducing the jury's award to Larwick, the trial court denied their motions. *Collins*, 155 Wn. App. at 74-75; CP at 276-87. Nevertheless, even after the remittitur reduction, the award to the plaintiffs in the underlying case was more than $3.1 million, or *almost nine times more* than what Matson had evaluated the case for settlement purposes. *Collins*, 155 Wn. App. at 73-74, 76-80; CP at 276-87.

[6] The trial court also awarded the plaintiffs' attorney $752,854.21 in attorney fees and costs. CP at 287.

The Fire District and James appealed the trial court's denial of their post-trial motion for a new trial under CR 59(a) and partial denial of their post-trial motion for a remittitur under RCW 4.76.030. *Collins*, 155 Wn. App. at 80-81. Larwick appealed the trial court's remittitur reduction of the jury's award to her. *Collins*, 155 Wn. App. at 81. And both Collins and Larwick appealed the trial court's award of attorney fees and costs. *Collins*, 155 Wn. App. at 81.

Ultimately, this court affirmed the trial court's denial of the post-trial motions for a new trial under CR 59(a) and partial denial of the post-trial motions for remittitur under RCW 4.76.030. *Collins*, 155 Wn. App. at 81-87, 93-97, 105. This court reversed the trial court's remittitur reduction of the jury's award to Larwick, *Collins*, 155 Wn. App. at 87-93, and affirmed the trial court's award of attorney fees and costs. *Collins*, 155 Wn. App. at 98-104, 105. Finally, this court awarded attorney fees and costs on appeal to Collins and Larwick.[7] *Collins*, 155 Wn. App. at 104-05.

In sum, the supplemental judgment following appeal, for which AAIC indemnified the Fire District, totaled more than $4.8 million (not including interest of 7.007%). CP at 289-93.

[7] The attorney fees and costs on appeal totaled $116,650.69. CP at 291.

II. PROCEDURAL FACTS

After two failed mediations, the Fire District and AAIC filed and served their complaint against BHB and Matson for professional negligence in August 2009. CP at 295-302. In their complaint, the Fire District and AAIC alleged that BHB and Matson breached their duty of care to act as reasonable and prudent legal practitioners in Washington state. CP at 300-01. The Fire District and AAIC further alleged that, as a direct and proximate result of BHB's and Matson's negligence, they suffered financial damages, including additional attorney fees and costs for post-trial motions, mediations, and appellate matters. CP at 301.

In response, BHB and Matson filed and served their answer. CP at 304-11. Among other things therein, BHB and Matson asserted the following defenses. CP at 309-10. First, they asserted that AAIC lacks standing to bring the lawsuit. CP at 310. Second, they asserted an affirmative defense of "contributory negligence." CP at 310. Third, they asserted that Matson is shielded from claims arising from his improper conduct based on "judgmental immunity." CP at 310.

The Fire District and AAIC filed a summary judgment motion, arguing that the trial court should summarily dismiss the above-referenced affirmative defenses. CP at 313-43. Among other things, the Fire District and AAIC argued that, under *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71

(1992), and *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994), BHB and Matson owed a duty to AAIC in the underlying case. CP at 327-33. Thus, the Fire District and AAIC argued that AAIC, as the most financially injured party, had standing to bring the present lawsuit. CP at 333. BHB and Matson filed a response, and argued for summary judgment in their favor. CP at 346-96.[8]

Initially, the trial court agreed with the Fire District and AAIC that AAIC had standing to bring the present lawsuit. Report of Proceedings (RP) at 8. Then the trial court indicated that it was not going to rule on the motion. RP at 8-9. Finally, the trial court agreed with BHB and Matson that AAIC has no standing to bring the present lawsuit, reasoning that AAIC was not their client. RP at 16-19.

Thereafter, the trial court entered its order, which dismissed AAIC from the present lawsuit. CP at 695-99. The trial court certified its order under CR 54(b) to facilitate an immediate appeal of the issues presented before it for summary judgment. CP at 696-98; RP at 21-22. AAIC now appeals. CP at 700-06.

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[8] The parties and the trial court agreed to continue the motions to strike the affirmative defenses of contributory negligence and judgmental immunity. CP at 698-99.

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING AAIC FROM THE PRESENT LAWSUIT FOR LACK OF STANDING

In denying the summary judgment motion brought by the Fire District and AAIC, the trial court stated, "Under Washington law, [an attorney's] duty is to his client.... His *only* duty is to his client." RP at 16 (emphasis added).[9] But this absolute statement is contrary to our Supreme Court's precedent and is an error of law. *See, e.g., Trask v. Butler*, 123 Wn.2d 835, 842-43, 872 P.2d 1080 (1994); *Stangland v. Brock*, 109 Wn.2d 675, 680-81, 747 P.2d 464 (1987); *see also In re Guardianship of Karan*, 110 Wn. App. 76, 81, 38 P.3d 396 (2002) ("[A]n attorney may owe a nonclient a duty even in the absence of this privity."). For the reasons stated herein, this court should: (1) reverse the trial court's order dismissing AAIC from the present lawsuit; (2) conclude that Matson and BHB owed a duty to AAIC, which creates standing for AAIC to sue for legal malpractice; and (3) remand for trial on the remaining elements of negligence.

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[9] Inexplicably, the trial court also stated, "That's what I'm going with in terms of the duty of attorneys to clients, OK? I'm not overruling *Trask*. I'm not doing anything more. I'm just letting it hang out there." RP at 19.

A. Standard of Review

On an appeal from summary judgment, this court engages in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860-61, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)); *see* CR 56(c). Here, the facts underlying the relationship between AAIC, the Fire District, BHB, and Matson are not in dispute. Simply put, the question on appeal before this court is whether BHB and Matson owed a duty to AAIC, which creates standing for AAIC to sue for legal malpractice. "And that is a question of law to be decided by [this court]." *Karan*, 110 Wn. App. at 81; *see also Trask*, 123 Wn.2d at 842-43; *Bohn v. Cody*, 119 Wn.2d 357, 362, 832 P.2d 71 (1992) ("An appellate court reviews de novo a trial court's summary judgment decision.").

B. More than 25 Years Ago, Our Supreme Court Recognized that an Attorney May Owe a Duty to a Third-Party Beneficiary

Despite sharp doctrinal differences in recognizing attorney-client relationships, the vast majority of courts across the United States recognize the existence of a duty beyond the confines of those in privity to the attorney-client contract. 1 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice, §7:8 (2011 ed.); *see One Nat'l Bank v. Antonellis*, 80 F.3d 606 (1st Cir. 1996); *In re Raymond Prof'l Group, Inc.*, 400 B.R.

624 (Bankr. N.D. Ill. 2009); *Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 200 Ariz. 146, 24 P.3d 593 (Ariz. 2001); *Jackson v. Ivory*, 353 Ark. 847, 120 S.W.3d 587 (Ark. 2003); *Chang v. Lederman*, 172 Cal. App. 4th (Cal. Ct. App. 2009); *Needham v. Hamilton*, 459 A.2d 1060 (D.C. 1983); *Greenberg v. Mahoney Adams & Criser, P.A.*, 614 So. 2d 604 (Fla. Dist. Ct. App), *review denied*, 624 So.2d 267 (Fla. 1993); *Young v. Williams*, 285 Ga. App. 208, 645 S.E.2d 624 (Ga. Ct. App. 2007); *Blair v. Ing*, 95 Haw. 247, 21 P.3d 452 (Haw. 2001); *Harrigfeld v. Hancock*, 140 Idaho 134, 90 P.3d 452 (2001); *Beckom v. Quigley*, 824 N.E.2d 420 (Ind. Ct. App. 2005); *Estate of Leonard ex rel. Palmer v. Swift*, 656 N.W.2d 132 (Iowa 2003); *Johnson v. Wiegers*, 30 Kan. App. 2d 672, 46 P.3d 563 (Kan. Ct. App. 2002); *Noble v. Bruce*, 349 Md. 730, 709 A.2d 1264 (Md. 1998); *Beaty v. Hertzberg & Golden, P.C.*, 456 Mich. 247, 571 N.W.2d 716 (Mich. 1997); *McIntosh County Bank v. Dorsey & Whitney, L.L.P.*, 745 N.W.2d 538 (Minn. 2008); *Mark Twain Kansas City Bank v. Jackson, Brouillette, Phol & Kirley, P.C.*, 912 S.W.2d 536 (Mo. Ct. App. 1997); *Redies v. Attorneys Liab. Prot. Soc.*, 335 Mont. 233, 150 P.3d 930 (Mont. 2007); *Perez v. Stern*, 279 Neb. 187, 777 N.W.2d 545 (Neb. 2010); *MacMillan v. Scheffy*, 147 N.H. 362, 787 A.2d 867 (N.H. 2001); *Davin, L.L.C. v. Daham*, 329 N.J. Super. 54, 746 A.2d 1034 (N.J. Super. Ct. App. Div. 2000); *Leyba v. Whitley*, 120 N.M. 768, 907 P.2d 172 (N.M. 1995);

Leary v. N.C. Forest Products, Inc., 157 N.C. App. 396, 580 S.E.2d 1 (N.C. Ct. App.), *aff'd*, 357 N.C. 567, 597 S.E.2d 673 (N.C. 2003); *Leak-Gilbert v. Fahle*, 55 P.3d 1054 (Okla. 2002); *Roberts v. Fearey*, 162 Or. App. 546, 986 P.2d 690 (Or. 1990); *Guy v. Liederbach*, 501 Pa. 47, 459 A.2d 744 (Pa. 1983); *Credit Union Cent. Falls v. Groff*, 966 A.2d 1262 (R.I. 2009); *Oxendine v. Overturf*, 973 P.2d 417 (Utah 1999); *Trask*, 123 Wn.2d 835; *Calvert v. Scharf*, 217 W. Va. 684, 619 S.E.2d 197 (W. Va. 2005); *Auric v. Continental Cas. Co.*, 111 Wis. 2d 507, 331 N.W.2d 325 (Wis. 1983); *In re Estate of Drwenski*, 83 P.3d 457 (Wyo. 2004); *see also Chem-Age Indus., Inc. v. Glover*, 652 N.W.2d 756 (S.D. 2002).

Similarly, more than 25 years ago, our Supreme Court first announced that under certain circumstances an attorney owes a duty beyond the confines of those in privity to the attorney-client contract. *Bowman v. John Doe*, 104 Wn.2d 181, 186-88, 704 P.2d 140 (1985). Our Supreme Court explained that two theories provided the basis for expanded liability: (1) an attorney may be held liable for negligence to third party beneficiaries of an attorney-client contract and (2) an attorney may be held liable for negligence under a multi-factor balancing test developed in California. *Bohn*, 119 Wn.2d at 365 ("Under certain circumstances, an attorney may be held liable for malpractice to a party

the attorney never represented."); *Stangland*, 109 Wn.2d at 680-81; *Bowman*, 104 Wn.2d at 187-88.

In order to "eliminate any confusion to trial courts," our Supreme Court subsequently combined the two tests into a "modified multi-factor balancing test." *Trask*, 123 Wn.2d at 842-43. Thus, the modified multi-factor balancing test consists of the following elements:

(1) the extent to which the transaction was intended to benefit the plaintiff;

(2) the foreseeability of harm to the plaintiff;

(3) the degree of certainty that the plaintiff suffered injury[10];

(4) the closeness of the connection between the defendant's conduct and the injury;

(5) the policy of preventing future harm; and

(6) the extent to which the profession would be unduly burdened by a finding of liability.

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[10] Division One of the Court of Appeals has noted that this element usually is not part of determining whether a duty exists. *Estate of Treadwell ex rel. Neil v. Wright*, 115 Wn. App. 238, 247 n.2, 61 P.3d 1214, *review denied*, 149 Wn.2d 1035 (2003). Nevertheless, "[t]he *Trask* test seems to compile the elements of a malpractice claim by a nonclient duty, foreseeability, injury in fact, causation, deterrence/prevention and burden balancing, and label them a test for duty." *Estate of Treadwell*, 115 Wn. App. at 247 n.2.

Trask, 123 Wn.2d at 842-43; *see also Hetzel v. Parks*, 93 Wn. App. 929, 935-36, 971 P.2d 115 (1999) ("[P]rivity of contract is no longer a prerequisite for suit against an attorney for malpractice.").

To date, no reported Washington case has specifically addressed whether an attorney assigned to represent an insured owes a duty to the insurer. "But there is no bright-line rule; nor should there be." *Karan*, 110 Wn. App. at 83; *see also Estate of Treadwell ex rel. Neil v. Wright*, 115 Wn. App. 238, 247, 61 P.3d 1214, *review denied*, 149 Wn.2d 1035 (2003). "The lesson of *Trask* is that each case must be evaluated on its own facts." *Karan*, 110 Wn. App. at 83.

C. BHB AND MATSON OWED A DUTY TO AAIC AS A THIRD-PARTY BENEFICIARY

In evaluating the facts of this case under the modified multi-factor balancing test of *Trask*, well-established principles of Washington law, the law of other jurisdictions, and public policy all compel the legal conclusion that BHB and Matson owed an independent duty to AAIC as a known and intended third-party beneficiary.

1. AAIC Was an Intended Beneficiary of the Services of BHB and Matson

The threshold question under the modified multi-factor balancing test of *Trask* is simply whether the services of BHB and Matson were intended to benefit AAIC. *See Trask*, 123 Wn.2d at 843; *Karan*, 110 Wn.

App. at 82. Here, AAIC owed a duty to defend, a duty to pay, and a duty of good faith to its insured. *See Am. Best Foods, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404, 229 P.3d 693 (2010) (the duty to defend and the duty to pay are distinct obligations); *Tank v. State Farm & Cas. Co.*, 105 Wn.2d 381, 386-87, 715 P.2d 1133 (1986) (the duty to defend, once undertaken, must meet good-faith requirements established by the judiciary and the legislature). AAIC employed the services of BHB and Matson on behalf of its insured. CP at 4, 24-27. And as described below, there can be no question that the services of BHB and Matson were intended to benefit AAIC in fulfilling its duties to its insured.

To begin, it is important to note that AAIC unconditionally – and without any reservation of rights – accepted the defense of the underlying plaintiffs' claims.[11] CP at 61. By doing so, AAIC legally bound itself to provide a full and unconditional defense, to pay the costs of the defense, and to pay any judgment or settlement up to the policy's limit. *See*

[11] Insurers have four options when presented with a claim: (1) the insurer can provide unconditional coverage; (2) the insurer, following appropriate investigation, can decide that coverage does not apply and deny the claim; (3) the insurer, in appropriate cases, can institute a declaratory action and let the courts decide the coverage question; and (4) the insurer can conduct a reservation of rights defense. Matthew L. Sweeney, *Tank v. State Farm: Conducting a Reservation of Rights Defense in Washington*, 11 U. PUGET SOUND L. REV. 139, 141 (1987).

THOMAS V. HARRIS, WASHINGTON INSURANCE LAW, § 15.01, at 15-1 (3d ed. 2010 ("Once it has unconditionally accepted a tender of defense, an insurer cannot claim either (1) that there are any coverage exclusions or limitations, or (2) that subsequent factual proof has taken the claim outside the policy coverage.").

Thus, both the insured *and* the insurer shared a common interest in securing quality representation to protect their interests. *See, e.g., Paradigm Ins. Co.*, 24 P.3d at 601; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 51 cmt. g (2000) ("A lawyer designated by an insurer to defend an insured owes a duty of care to the insurer with respect to matters as to which the interests of the insurer and insured are not in conflict, whether or not the insurer is held to be a co-client of the lawyer."). In all respects, AAIC was "dependent upon" the services of BHB and Matson to protect its interests. *See, e.g., Paradigm Ins. Co.*, 24 P.3d at 601. And as a result of this dependency, AAIC was more than just an incidental beneficiary of the services of BHB and Matson. *Contra Leipham v. Adams*, 77 Wn. App. 827, 832-34, 894 P.2d 576, *review denied*, 127 Wn.2d 1022 (1995).

Here, BHB and Matson intentionally engaged in an unmistakable relationship with AAIC. *See, e.g., Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 307-08, 45 P.3d 1068 (2002) (attorney acted with intent to influence

decisions, developed a trusting relationship, and impacted the claim and settlement options). This relationship included direct communications to and from AAIC's third-party administrator, GCM. CP at 52-55, 58-60, 61, 68-71, 512-15, 540. BHB and Matson periodically informed GCM about the progress of defending the underlying case. CP at 479-502, 504-10, 512-15, 540. Additionally, BHB and Matson knowingly counseled GCM on the merit and value of the underlying case,[12] even seeking settlement authority from the insurer in an attempt to mediate the underlying case.[13] CP at 49, 112, 504-10, 512-15.

In turn, AAIC relied on BHB and Matson to zealously represent the Fire District and James, so as to honor and effectuate AAIC's contractual agreement to provide an unconditional defense. *See Tank* at 386-87, 715 P.2d 1133 (1986); *Scottsdale Ins. Co. v. Int'l Protective Agency, Inc.*, 105 Wn. App. 244, 248-49, 19 P.3d 1058 (2001) (discussing an insurer's duty to defend); *see also, e.g., Paradigm*, 24 P.3d at 601.

Furthermore, AAIC relied on BHB and Matson to defend the underlying plaintiffs' claims of liability and to minimize the damages

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[12] Matson even admitted that the Fire District, James, *and* AAIC were entitled to reasonably rely on him in making decisions about settlement. CP at 141-42.

[13] These activities are exactly the kind of activities that attorneys and their clients regularly undertake.

AAIC had to pay. *See* HARRIS, WASHINGTON INSURANCE LAW, § 18.01, at 18-1 ("An insurer must indemnify its insured for any judgment which imposes an obligation upon the insured to pay damages for a covered event."); *W. Nat'l Assurance Co. v. Hecker*, 43 Wn. App. 816, 820-21, 719 P.2d 954 (1986); *Safeco Ins. Co. of Am. v. McGrath*, 42 Wn. App. 58, 61, 708 P.2d 657 (1985), *review denied*, 105 Wn.2d 1004 (1986); *see also, e.g., Paradigm*, 24 P.3d at 601.

Clearly, therefore, the services of BHB and Matson were intended to benefit AAIC. *See, e.g, Paradigm*, 24 P.3d at 601 ("the lawyer's duties to the insured are often discharged for the full or partial benefit of the nonclient"); *see also Hetzel*, 93 Wn. App. at 937 ("We do not read *Trask* as holding that a duty to a nonclient can arise only as an offshoot of an established client relationship."). And AAIC passes the threshold inquiry under *Trask*.

2. The Harm to AAIC Was Foreseeable

Given that the services of BHB and Matson were intended to benefit AAIC, the harm to AAIC from the negligence of BHB and Matson was entirely foreseeable. After all, BHB and Matson knew or should have known that AAIC unconditionally accepted the defense of the underlying plaintiffs' claims, including the duty to pay. CP at 61, 128-30. BHB and Matson knew very early in the underlying case that the plaintiffs were

seeking a multi-million dollar award. CP at 101-02. Matson admitted that "the big issue" in the underlying case was damages. CP at 140. Moreover, AAIC justifiably relied on the services of BHB and Matson to defend the underlying plaintiffs' claims of liability and to minimize the damages AAIC had to pay. CP at 4-5, 49, 54-56, 59, 69-71, 112, 114-17, 141-42, 157-58, 174, 504-10.

In other words, it was foreseeable that a negligent discharge of the services of BHB and Matson would leave AAIC vulnerable to the kind of losses it in fact incurred. *See, e.g., Jones*, 146 Wn.2d at 307; *Karan*, 110 Wn. App. at 85; *Paradigm*, 24 P.3d at 601 ("there was a foreseeable risk of harm to a foreseeable non-client whose protection depended on the actor's conduct") (quotations and citation omitted).[14]

3. There Is a High Degree of Certainty that AAIC Suffered a Multi-Million Dollar Injury

After the negligence of BHB and Matson left no option but to try the underlying case, CP at 58, 68, the jury returned a verdict of more than $3.5 million in favor of the plaintiffs. *Collins*, 155 Wn. App. at 73-74; CP at 276-87. Because the underlying plaintiffs prevailed on facts that fell within the policy coverage, AAIC was under a duty to indemnify its

[14] Moreover, "[l]iability is not predicated upon the ability to foresee the exact manner in which the injury may be sustained." *King v. City of Seattle*, 84 Wn.2d 239, 248, 525 P.2d 228 (1974).

insured. *See Hecker*, 43 Wn. App. at 820-21; *McGrath*, 42 Wn. App. at 61. Moreover, because AAIC had unconditionally accepted the defense of the underlying plaintiffs' claims, including the duty to pay, AAIC was under a duty to "indemnify its insured for *any* judgment which impose[d] an obligation upon the insured to pay damages for a covered event." HARRIS, WASHINGTON INSURANCE LAW, § 18.01, at 18-1 (emphasis added). Thus, in discharging its duty of indemnification, AAIC incurred a multi-million dollar injury.

And while BHB and Matson may argue that AAIC's injury is "almost incapable of certainty," CP at 369, the requirement to prove damages with reasonable certainty is concerned with the *proof* of damages, rather than the *amount* of damages. *See Reefer Queen Co. v. Marine Constr. & Design Co.*, 73 Wn.2d 774, 781, 440 P.2d 448 (1968) ("the wrongdoer is not free of liability because of difficulty in establishing the dollar amount of damages"); *Puget Sound Power & Light Co. v. Strong*, 59 Wn. App. 430, 440, 798 P.2d 1162 (1990) (Reed, J., dissenting), *rev'd on other grounds*, 117 Wn.2d 400, 816 P.2d 716 (1991); *V.C. Edwards Contracting Co., Inc. v. Port of Tacoma*, 7 Wn. App. 883, 888, 503 P.2d 1133 (1972) ("uncertainty as to the precise amount of damage is not fatal"), *aff'd*, 83 Wn.2d 7, 514 P.2d 1381 (1973).

Here, the evidence in the record by way of the pleadings and the declarations not only alleges damages, (CP at 6, 9-10), but also permits the reasonable inference that AAIC incurred a multi-million dollar injury above and beyond either: (1) the $370,000.00 for which BHB and Matson negligently valued the underlying case for settlement or (2) the $741,000.00 for which BHB and Matson negligently valued the underlying case for purposes of trial. CP at 58, 68, 70-71, 93, 112, 141-42, 276-87, 289-93.[15]

Under the circumstances of this case, AAIC should not be denied recovery simply because the amount of damages has yet to be exactly ascertained or apportioned. *See Barnard v. Compugraphic Corp.*, 35 Wn. App. 414, 417, 667 P.2d 117 (1983); *Alpine Indus., Inc. v. Gohl*, 30 Wn. App. 750, 755, 637 P.2d 998 (1981), *review denied*, 97 Wn.2d 1013 (1982).[16] To the extent further evidence of damages is required at trial, the parties should have an opportunity to develop further evidence by additional discovery on remand. Thus, for the purposes of the modified multi-factor balancing test of *Trask,* AAIC has shown, to a high degree of certainty, that it suffered a multi-million dollar injury.

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[15] *See, e.g., VersusLaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 327-28, 111 P.3d 866 (2005), *review denied*, 156 Wn.2d 1008 (2006).

[16] There is no authority to support the proposition that at the summary judgment stage a plaintiff must specify the *amount* of damages.

4. There is a Direct and Unmistakable Connection Between the Negligence of BHB and Matson and the Injury to AAIC

As previously discussed, BHB and Matson intentionally engaged in an unmistakable relationship with AAIC, which included communication to and from AAIC's third-party administrator, GCM. CP at 52-55, 58-60, 61, 68-71, 479-502, 504-10, 512-15, 540. BHB and Matson held themselves out as being competent to defend and try sexual harassment cases. CP at 112, 114-17, 141-42. And to its detriment, AAIC justifiably relied on BHB and Matson to exhibit reasonable care in defending the underlying plaintiffs' claims of liability and in minimizing the damages AAIC had to pay. *See Hecker*, 43 Wn. App. at 820-21; *McGrath*, 42 Wn. App. at 61.[17] Therefore, common sense and policy considerations dictate that the connection between the negligent services of BHB and Matson and the injury to AAIC is direct and substantial enough to impose liability.

Among other things, BHB and Matson periodically informed GCM about the progress of defending the underlying case. CP at 479-502, 504-10, 512-15, 540. BHB and Matson knowingly counseled GCM on the

[17] Incredibly, Matson testified that he was not sure whether the insurer was relying on him to give sound legal advice. CP at 135.

merit and value of the underlying case. CP at 49, 112, 504-10, 512-15.[18] And Matson specifically admitted during his deposition that AAIC, the Fire District, and James were entitled to reasonably rely on his services. CP at 141-42.

Likewise, GCM's representative testified during her deposition that GCM and AAIC relied on Matson's evaluation of the merit and value of the underlying case. CP at 53-56, 58-59, 68, 70-71. In particular, she stated, "[Matson] is the person who practices in Washington. He knows the values of this case. I'm paying him to tell me what is this case worth." CP at 68. She continued, "I have to believe him because that's his state, his territory, his expertise, not mine. I pay him to tell me this information." CP at 71. In fact, by the end of the underlying case, BHB and Matson had directly billed AAIC approximately $500,000.00 for their services. CP at 92.

But for all of AAIC's money, it would not have changed the fact that Matson had never tried a sexual harassment case in his career. CP at 78. It would not have changed the fact that Matson had never defended a

[18] *Cf. Gorski v. Smith*, 812 A.2d 683, 703 (Pa. Super. Ct. 2003) ("A client who retains an attorney to perform legal services has a justifiable expectation that the attorney will exhibit reasonable care in the performance of those services, since that is the attorney's sacred obligation to the client."), *appeal denied*, 579 Pa. 692, 856 A.2d 834 (Pa. 2004).

sexual harassment case with multiple plaintiffs. CP at 79. Furthermore, it would not have changed the fact that Matson had tried only one other employment case before the underlying case. CP at 114.[19]

While experience need not be the handmaiden of competence,[20] Matson nevertheless did not consult or associate with others at BHB who were more experienced than he was in defending and trying sexual harassment cases. CP at 131. Matson made no inquiry into, and no analysis of, what effect multiple plaintiffs claiming sexual harassment could have on the underlying case. CP at 81. Plus, with no BHB policy regarding staffing of cases, (CP at 166-69), Matson inexplicably assigned an associate, who had no experience in handling sexual harassment claims, to the underlying case. CP at 183-85.

Matson admitted that "the big issue" in the underlying case was damages, not liability.[21] CP at 140. In fact, from the very beginning of the underlying case, Matson believed that the overall liability was unfavorable for the Fire District and James. CP at 136. Yet Matson did

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[19] And it would not have changed the fact that, as a firm, only about 3% of BHB's cases were made up of employment litigation. CP at 157-58.

[20] *See, e.g.,* Rules of Professional Conduct (RPC) 1.1 and the comments thereto.

[21] He knew or should have known of the potential for a multi-million dollar verdict. CP at 84-86, 96-97, 101-02.

not provide an evaluation to AAIC, the Fire District, or James regarding the value of the plaintiffs' claims until just weeks before the mediation – almost *two years* after being retained in the underlying case and less than *two months* before the initial trial date. CP at 50, 68-69.

This evaluation was arbitrary, and devoid of any research or analysis. CP at 68, 106-07, 504-10. Matson took no steps to determine the likely measure of damages for the four plaintiffs. CP at 99, 105, 143-44. He filed no dispositive motions whatsoever. CP at 87. Moreover, he proceeded with a defense strategy premised on a fundamentally erroneous understanding of the law, which even the trial court acknowledged in its Memorandum of Decision. CP at 96-97, 211-12, 282.[22]

Thus, despite being in the best position to determine the liability and damage exposure in a case such as the underlying one, (CP at 112), and knowing that AAIC, the Fire District, and James were relying on his services, (CP at 141-42), Matson failed in his paramount duty to exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in Washington. *See generally Cook, Flanagan & Berst v. Clausing*, 73 Wn.2d 393, 395-

[22] In addition, Matson failed to object to a series of improper comments during the plaintiffs' closing argument, thereby failing to preserve these claims of error for appeal. *See Collins*, 155 Wn. App. at 72-73, 93-97.

96, 438 P.2d 865 (1968). And based on the privity and reliance between the parties, there is no question that the negligent advice and services of BHB and Matson – in defending the underlying plaintiffs' claims of liability and in minimizing the damages AAIC had to pay – are directly connected to AAIC's multi-million dollar injury.[23]

5. Permitting a Negligent Attorney To Escape Liability Would Not Further the Policy of Preventing Future Harm

In denying the summary judgment motion brought by the Fire District and AAIC, the trial court stated, "I'm going with the basic concept that an attorney's duty is to his client, not the client's insurance company. Okay? Does that make it easy?" RP at 19. While this concept "make[s] it easy" by immunizing the attorney's malpractice in this case, permitting a negligent attorney to escape liability would do little – if anything – to further the policy of preventing future harm. *See State & County Mut. Fire Ins. Co. v. Young*, 490 F.Supp.2d 741, 747 (N.D. W. Va. 2007). This unjust result is not only bad policy, but also unnecessary. *See Paradigm*, 24 P.3d at 599.

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[23] To the extent further evidence of proximate causation is required at trial, the parties should have an opportunity to develop further evidence by additional discovery on remand. *See, e.g,. Karan*, 110 Wn. App at 85 ("If established, the connection between the alleged conduct and the injury is direct."); *Hetzel*, 93 Wn. App. at 934, 939-41 (reversing judgment of dismissal, concluding: (1) that the defendant attorney owed the plaintiff a duty as a third-party beneficiary and (2) that the plaintiff may be able to prove that the attorney's breach of that duty proximately caused his loss).

Here, in assuming the defense of the underlying case with no reservation of rights, AAIC retained BHB and Matson. CP at 4, 24-27, 61. During the pendency of the underlying case, BHB and Matson communicated directly with GCM's representative, discussing the investigation of the plaintiffs' claims, matters of legal strategy, affirmative defenses, and the progress of defending the underlying case. CP at 52-55, 58-60, 61, 68-71, 479-502, 504-10, 512-15, 540. Matson deliberately provided GCM's representative with "[his] liability evaluation, [his] damages evaluation and [his] recommended settlement range for each of the plaintiffs' cases." CP at 504-10. And to its detriment, AAIC justifiably relied on the advice and counsel of BHB and Matson in making decisions about the merit and value of the underlying case. CP at 4-5, 49, 54-56, 59, 69-71, 112, 114-17, 141-42, 157-58, 174, 504-10.

Yet under the trial court's analysis, if AAIC was not a client, then BHB and Matson simply owed no duty whatsoever to the insurer that hired them, assigned the case to them, paid their fees, and paid the judgment resulting from their negligence. As the Supreme Court of Arizona astutely noted:

> There are many problems with that result: if that lawyer's negligence damages the insurer only, the negligent lawyer fortuitously escapes liability. Or if the lawyer's negligence injures both insurer and insured in a case in which the

> insured is the only client but refuses to proceed against the lawyer, the insurer is helpless and has no remedy.

Paradigm, 24 P.3d at 599. Similarly, if the lawyer's negligence injures both insurer and insured in a case in which the insured is the only client but cannot proceed against the lawyer, the insurer is helpless and has no remedy. *Cf. Paradigm*, 24 P.3d at 599.[24] Clearly, these and other scenarios reveal "the inadequacy of predicating the analysis of malpractice liability solely on the lack of an attorney-client relationship between the insurer and defense counsel." *See Atlanta Int'l Ins. Co. v. Bell*, 438 Mich. 512, 475 N.W.2d 294, 297 (Mich. 1991).

Because of this inadequacy, nearly all jurisdictions in the United States permit some form of legal malpractice action by an insurer against the firm it retains to defend an insured. *Gen. Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP*, 357 F.Supp.2d 951, 956-57 (E.D. Va. 2005). The Eastern District Court of Virginia succinctly explained the "obvious" public policy reasons for permitting such actions:

> Among other things, permitting an insurer to bring an action against the attorney it retains can "promote[ ] enforcement of [the attorney's] obligations to the insured," RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 51 cmt. g (2000), because "both insurer and insured often

[24] Public policy is best served by routing out negligent lawyers; otherwise, lawyers may convince inexperienced clients to accept substandard legal services.

> share a common interest in developing and presenting a strong defense to a claim [...]." *Paradigm*, 24 P.3d at 598. Because the insurer, rather than the insured, is typically required to satisfy a judgment resulting from the firm's negligence, the insured rarely has any incentive to bring a claim for malpractice against the retained attorney. *See Bell*, 475 N.W.2d at 297. *The failure to permit a cause of action by the insurer, therefore, serves the interests of no one except the attorney who committed the malpractice. See id.* at 298. Permitting the insurer to sue the attorney, moreover, comports more readily with the understanding among both attorneys and insurers that "the lawyer's services are ordinarily intended to benefit both the insurer and the insured when their interests coincide." *Paradigm*, 24 P.3d at 602.

Gen. Sec. Ins. Co., 357 F.Supp.2d at 957. (first and second alteration in original) (emphasis added); *see also State & County Mut. Fire Ins. Co.*, 490 F.Supp.2d 745-47.

Consistent with the above reasoning, BHB and Matson should not be permitted to escape liability simply because of the lack of direct attorney-client relationship with AAIC.[25] In fact, "the attorney-client relationship, the interests of the client, the interest[s] of the insurer, and ultimately the public, which would otherwise absorb the costs of the

[25] Should this court affirm the trial court's ruling, "defense counsel's immunity from suit by the insurer would place the loss for the attorney's misconduct on the insurer." *Atlanta Int'l Ins. Co.*, 475 N.W.2d at 298. But this result is at odds with the guiding principle of tort law that an injured party should be made as whole as possible through pecuniary compensation. *See Shoemake v. Ferrer*, 168 Wn.2d 193, 198, 225 P.3d 990 (2010).

malpractice, all benefit from exposure to suit." *See Atlanta Int'l Ins. Co.*, 475 N.W.2d at 299. And AAIC should be accorded an independent right[26] to assert a legal malpractice claim against BHB and Matson arising out of their negligent advice and services. Otherwise, without it, the trial court's ruling would impair the policy of preventing such future harm. *See, e.g., Atlanta Int'l Ins. Co.*, 475 N.W.2d at 298 ("The only winner produced by an analysis precluding liability would be the malpracticing attorney.").

6. The Profession Would Not Be Unduly Burdened by a Finding of Liability

Finally, under the modified multi-factor balancing test, one must consider the extent to which the profession would be unduly burdened by a finding of liability. *Trask*, 123 Wn.2d at 843. In evaluating this issue, our Supreme Court observed:

> The policy considerations against finding a duty to a nonclient are strongest where doing so would detract from the attorney's ethical obligations to a client. This occurs where a duty to a nonclient creates a risk of divided loyalties because of a conflicting interest or of a breach of confidence.

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[26] Under the modified multi-factor balancing test, the duty owed by an attorney to a third party is not necessarily derivative of the duty owed by the attorney to his client. *See Hetzel*, 93 Wn. App. at 937 ("We do not read *Trask* as holding that a duty to a nonclient can arise only as an offshoot of an established client relationship."). In fact, the duty sounding in tort runs directly from the alleged tortfeasor to the injured party. *Hetzel*, 93 Wn. App. at 937.

Trask, 123 Wn.2d at 844. But those concerns are not present here, especially given that AAIC assumed the defense of the underlying case with no reservation of rights.

Admittedly, "[t]here can be no doubt that actual conflicts between insured and insurer are quite common and that the potential for conflict is present in every case." *Paradigm*, 24 P.3d at 597; *see* Rules of Professional Conduct (RPC) 1.7 and comment 8 thereto ("[A] conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests."); *see also* RPC 1.8(f) and comment 11 thereto; RPC 5.4(c) and comments thereto.

Nevertheless, the interests of the insured and the insurer frequently coincide. *Paradigm*, 24 P.3d at 598; *see also Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322 (9th Cir. 1995); *Atlanta Int'l Ins. Co.*, 475 N.W.2d at 298 ("The best interests of both insurer and insured converge in expectations of competent representation."). "Thus, by serving the insured's interests the lawyer can also serve the insurer's, and if no question arises regarding the existence and adequacy of coverage, the potential for conflict may never become substantial." *Paradigm*, 24 P.3d at 598, 601.

Contrary to the mere supposition, opinions, and unsupported assertions[27] of BHB and Matson, (CP at 364-66, 371), the underlying case was not the type of case where an attorney faced a conflict of interest between the rights of the insured and the rights of the insurer. *See, e.g., Home Indem. Co.*, 43 F.3d at 1330. Moreover, taking into account only those materials on which the trial court relied in making its rulings, *Tank*, 105 Wn.2d at 390, BHB and Matson cannot point to any evidence of a supposed conflict of interest with: billing; the direction of the defense; competing interests; or coverage issues.[28]

And their "parade of horribles" argument that an insurer might deny coverage, thereby giving rise to a potential conflict of interest, is simply a red herring. AAIC never raised or reserved any coverage issue. CP at 61. In fact, AAIC could not do so; as previously noted, "[o]nce it has unconditionally accepted a tender of defense, an insurer cannot claim

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[27] Mere supposition, opinion, or unsupported assertions of fact are insufficient for purposes of summary judgment. *See Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988); *Johnson v. Cont'l Cas. Co.*, 57 Wn. App. 359, 362-63, 788 P.2d 598 (1990).

[28] As RPC 1.7(a) and comment 8 thereto make clear, "The mere possibility of subsequent harm does not itself require disclosure and consent." Where there is no direct adverseness, "[t]he critical questions are *the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment* ...." RPC 1.7(a) and comment 8 thereto (emphasis added). Matson and BHB did not even attempt to answer these questions before the trial court.

either (1) that there are any coverage exclusions or limitations, or (2) that subsequent factual proof has taken the claim outside the policy coverage." HARRIS, WASHINGTON INSURANCE LAW, § 15.01, at 15-1.

Simply put, the underlying case did not involve a reservation of rights or other conflict situation. *See, e.g., Home Indem. Co.*, 43 F.3d at 1330.[29] The interests of the insured and the insurer throughout the underlying case were exactly the same – to limit their exposure to damages. "It was in the interest of both the insured and the insurer to settle within the policy limits." *See, e.g., Home Indem. Co.*, 43 F.3d at 1330. Thus, there is no question that AAIC, the Fire District, and James *together* wished to successfully defend and, if that was not possible, then minimize damages. *See, e.g., Home Indem. Co.*, 43 F.3d at 1330.

In circumstances such as the underlying case, where there is no reservation of rights and no conflicts of interest, the obligation to protect the interests of the insured *and* the insurer does not put attorneys in an ethical bind. A successful defense is the common goal of all and is consonant with the interests of all parties. *See Atlanta Int'l Ins. Co.*, 475 N.W.2d at 298. The existing rules of professional conduct already provide

[29] Even assuming arguendo that the underlying case involved a reservation of rights situation, there still would be no presumption of an automatic conflict of interest. *See Johnson*, 57 Wn. App. at 363.

for sufficient protection. Therefore, the profession will not be *unduly* burdened by a finding of liability.

D. BHB AND MATSON SHOULD BE HELD TO THE STANDARD OF CARE OF A REASONABLY PRUDENT LAWYER IN THE STATE OF WASHINGTON

Under well-established principles of Washington law, the law of other jurisdictions, and public policy, BHB and Matson owed a duty to AAIC as a third-party beneficiary. Once such a duty is owed, "the law will give it recognition and effect only as it is defined by a particular standard of conduct." *Stangland*, 109 Wn.2d at 681. In Washington, the standard of care to which a lawyer is held in performing professional services is that "degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction." *Hizey v. Carpenter*, 119 Wn.2d 251, 261, 830 P.2d 646 (1992); *Hansen v. Wightman*, 14 Wn. App. 78, 90, 538 P.2d 1238 (1975) (it is a statewide standard of care). As such, BHB and Matson should be accountable to AAIC under this standard of care.[30]

II. CONCLUSION

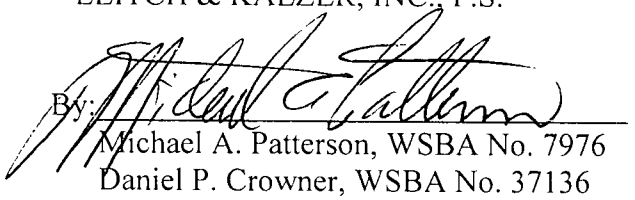
For the reasons set out above, it is clear that a negligent attorney should not be allowed to escape liability based solely on the lack of a

[30] The remaining elements of a legal malpractice claim are the same as for any other negligence action. *Karan*, 110 Wn. App. at 87. Questions of breach, proximate cause, or damages will be questions of fact on remand. *See, e.g., Karan*, 110 Wn. App. at 87.

direct attorney-client relationship between the insurer and defense counsel. Because AAIC is a third-party beneficiary, the trial court erred as a matter of law in dismissing AAIC from the present lawsuit. Thus, AAIC has standing to enforce its attorneys' obligations of competent representation. As such, this court should: (1) reverse the trial court's order dismissing AAIC from the present case; (2) conclude as a matter of law that Matson and BHB owed a duty to AAIC, which creates standing for AAIC to sue for legal malpractice; and (3) remand the case for trial on the remaining elements of negligence.

RESPECTFULLY SUBMITTED this 30th day of March 2012.

PATTERSON BUCHANAN FOBES
LEITCH & KALZER, INC., P.S.



By: _____
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CERTIFICATE OF SERVICE

I, Jennifer N. Culbertson, hereby certify that on the date below I caused the foregoing to be served upon the Court of Appeals ***via ABC Legal Messenger*** and each and every attorney of record as noted below:

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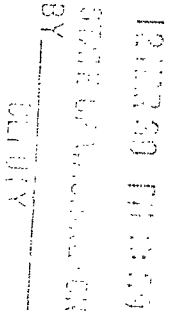

I certify under penalty of perjury under the laws of the State of Washington that the above is correct and true.

Executed in Seattle, Washington, on March 30, 2012.

Jennifer N. Culbertson
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