COA #42864-4
NO. 09-2-03892-2

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.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING AMERICAN ALTERNATIVE INSURANCE CORPORATION FROM THE PRESENT LAWSUIT FOR LACK OF STANDING

A. THE TRIAL COURT'S ORDER IS INCONSISTENT WITH THE GUIDING PRINCIPLES OF WASHINGTON LAW AND INEQUITABLY REWARDS THE MALPRACTICING ATTORNEY

"The cornerstone of tort law is the assurance of full compensation to the injured party." *Seattle First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 236, 588 P.2d 1308 (1978). "Simply stated, a plaintiff is entitled to that sum of money that will place him in as good a position as he would have been but for the defendant's tortious act." *Shoemake v. Ferrer*, 168 Wn.2d 193, 198, 225 P.3d 990 (2010) (quotations and citations omitted).

But were this court to affirm the trial court's ruling, and agree with the arguments of Bullivant Houser Bailey, P.C. ("BHB") and Richard G. Matson ("Matson"), this court would have to brush aside this guiding principle. And this court would have to brush aside the facts in this case, which clearly establish that BHB and Matson owed an independent duty to American Alternative Insurance Corporation ("AAIC") under the modified multi-factor balancing test of *Trask v. Butler*, 123 Wn.2d 835, 842-43, 872 P.2d 1080 (1994).

Significantly, this result would permit BHB and Matson to escape liability for their injuries to AAIC. It would serve the interests of no one, except BHB and Matson, who committed the malpractice. *See, e.g, Atlanta Int'l Ins. Co. v. Bell*, 438 Mich. 512, 475 N.W.2d 294, 298 (Mich. 1991). And with an eye to the future, it would create a class of special, protected defense attorneys who could commit malpractice with impunity. This result simply cannot stand; thus, the trial court erred as a matter of law in dismissing AAIC from the present lawsuit.

B. THE TRIAL COURT'S ORDER IS CONTRARY TO THE CURRENT STATE OF WASHINGTON LAW

While BHB and Matson rely on case law from over a hundred years ago, *see National Savings Bank v. Ward*, 100 U.S. 195, 25 L. Ed. 621 (1880), they cannot dispute that modern case law has relaxed the privity requirements for legal malpractice. *See, e.g., Morgan v. Roller*, 58 Wn. App. 728, 731, 794 P.2d 1313 (1990).

In fact, since deciding *Van Dyke v. White*, 55 Wn.2d 601, 613, 349 P.2d 430 (1960), and *Tank v. State Farm Fire & Casualty Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986), our Supreme Court clearly has announced that "[u]nder certain circumstances, an attorney may be held liable for malpractice to a party the attorney *never represented*." *Bohn v. Cody*, 119 Wn.2d 357, 365, 832 P.2d 71 (1992) (emphasis added); *see also Trask*,

123 Wn.2d at 842-44.[1] Together, these rulings, not simply the trial court's ruling, are the existing state of Washington law.[2]

C. UNDER THE LAW AND THE FACTS OF THIS CASE, BHB AND MATSON INTENDED THEIR SERVICES TO BENEFIT AAIC

In an effort to insulate themselves from liability, BHB and Matson erroneously argue that under *Trask* a duty to a third-party beneficiary can arise only as an offshoot of an established client relationship. (Br. of Resp't at 27-30, 42). BHB and Matson even assert that "there is no evidence whatsoever that the defendants expressly agreed[3] to assume any legal representational duty to the insurer *which was connected* to [their] distinct and separate affirmative duty to [their] actual client, the Fire

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[1] Apparently, BHB and Matson are taking the position before this court that our Supreme Court erred in relaxing the rule of privity as a prerequisite for legal malpractice claims. (Br. of Resp't at 44-46). But once our Supreme Court has decided an issue of state law, that interpretation is binding on all lower courts until our Supreme Court overrules it. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (1996); *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d. 569, 571, 761 P.2d 618 (1988).

[2] Despite their unequivocal proclamation that Washington courts have "ruled" otherwise, BHB and Matson cite no authority for this argument. (Br. of Resp't at 9). This court does not need to consider arguments for which a party has not cited authority. *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.3d 232 (2004), *review denied*, 155 Wn.2d 1015 (2005).

[3] Whether BHB and Matson "expressly agreed" to any attorney-client relationship in this case is simply irrelevant. "The relationship need not be formalized in a written contract, but rather may be implied from the parties' conduct." *Bohn*, 119 Wn.2d at 363.

District." (Br. of Resp't at 28) (emphasis added). But BHB and Matson ignore the rejection of such an argument in *Hetzel v. Parks*, 93 Wn. App. 929, 936-37, 971 P.2d (1999).

In *Hetzel*, a defendant attorney argued that the plaintiff could not be a third-party beneficiary because he had no connection with any of the attorney's actual clients. *Hetzel*, 93 Wn. App. at 936-37. But Division One of this court disagreed, stating:

> We do not read *Trask* as holding that a duty to a nonclient can arise only as an offshoot of an established client relationship. This might be true if the *Trask* court had arrived at its relaxation of the privity requirement solely through an analysis based on the "more traditional" contract-based third party beneficiary concept. *But Trask's multi-factor test for relaxing the privity requirement is an evolution of negligence law.* According to the California Supreme Court, in which the multi-factor test originated, its use renders the third-party beneficiary theory "conceptually superfluous." *Because a duty sounding in tort runs directly from the alleged tortfeasor to the injured party, it is not fatal to [the plaintiff's] claim that he does not claim to be a third party beneficiary of a transaction involving the attorney and another party.*

Hetzel, 93 Wn. App. at 937 (footnotes omitted) (emphasis added); *see also Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 307, 45 P.3d 1068 (2002) (finding a claims adjuster engaged in the unauthorized practice of law owed a duty to unrepresented third parties).[4]

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[4] Significantly, our Supreme Court stated, "[The plaintiffs] were *at least one* of the intended beneficiaries of the transaction to which [the claims

Thus, the threshold question simply is whether the services of BHB and Matson were intended to benefit AAIC as the insurer of Clark County Fire District No. 5 ("the Fire District") and Martin P. James ("James"). *See Strait v. Kennedy*, 103 Wn. App. 626, 13 P.3d 671 (2000). While BHB and Matson insist that their relationship with AAIC was "ancillary" and "incidental," (Br. of Resp't at 25, 37), they do not support their argument with any briefing or legal authority beyond this bald proposition.[5]

In light of the facts of this case, (Clerk's Papers (CP) at 49, 52-55, 58-60, 61, 68-71, 112, 479-502, 504-10, 512-15, 540), BHB and Matson simply cannot deny that they: (1) intentionally developed a trusting relationship with AAIC; (2) intentionally influenced AAIC's decisions in providing a defense; and (3) knew or should have known that their services could benefit AAIC in minimizing the amount of money it would expend. If similar facts are sufficient for our Supreme Court to find that a

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adjuster's] advice pertained." *Jones*, 146 Wn.2d at 307 (emphasis added). *Contra* 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE, § 7:8 (2012 ed.).

[5] Mere supposition, opinion, or unsupported assertions of fact are insufficient for purposes of summary judgment. *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. Furthermore, this court does not need to consider arguments that are not developed and for which a party has not cited authority. *Bercier*, 127 Wn. App. at 824.

claims adjuster, who is engaged in the unauthorized practice of law, intended to benefit unrepresented third parties, *Jones*, 146 Wn.2d at 307, then the facts here are sufficient to find that BHB and Matson intended to benefit AAIC.

D. UNDER THE LAW AND THE FACTS OF THIS CASE, THE HARM TO AAIC FROM THE NEGLIGENCE OF BHB AND MATSON WAS ENTIRELY FORESEEABLE

Without any supporting argument or citation to legal authority, BHB and Matson argue that, because they allegedly did not owe a duty to AAIC, "it was not 'foreseeable' that any 'harm' to AAIC could occur based on the defendants' representation of its own client." (Br. of Resp't at 39).[6] This argument is specious.

First, this argument ignores the fundamental underpinnings of the multi-factor balancing test, i.e., "[u]nder certain circumstances, an attorney may be held liable for malpractice to a party *the attorney never represented*."[7] *Bohn*, 119 Wn.2d at 365 (emphasis added); *see also Jones*, 146 Wn.2d at 307 (finding a claims adjuster engaged in the unauthorized practice of law owed a duty to unrepresented third parties; *Hetzel*, 93 Wn.

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[6] If anything, it appears that BHB and Matson are conceding that genuine issues of material fact exist regarding the foreseeability of harm, such that summary judgment was improper. *See* CR 56(c).

[7] Lest attorneys have unlimited duties, (Br. of Resp't at 45), our Supreme Court has clarified that this statement applies only to third-party beneficiaries. *See Jones*, 146 Wn.2d at 306 n.17.

App. at 939 (finding attorney owed a duty to protect the plaintiff's funds on deposit in the attorney's trust fund account, as if the plaintiff had been his own client). Second, this argument ignores that "*Trask's* multi-factor test for relaxing the privity requirements is an evolution of negligence law." *Hetzel*, 93 Wn. App. at 937. Thus, the duty sounding in tort (not contract) runs directly from BHB and Matson to AAIC. *See Hetzel*, 93 Wn. App. at 937. Finally, this argument ignores the facts of this case, as BHB and Matson knew that AAIC was relying on their services 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.

E. UNDER THE LAW AND THE FACTS OF THIS CASE, THERE IS A HIGH DEGREE OF CERTAINTY THAT AAIC SUFFERED A MULTI-MILLION DOLLAR INJURY

In an incoherent argument that strains credulity, BHB and Matson argue that this court should excuse and immunize their negligence because AAIC had a contractual duty to pay a judgment or settlement up to the policy's limit.[8] (Br. of Resp't at 37-41). Without any citation to

[8] Ironically, the crux of this argument is that BHB and Matson are somehow third-party beneficiaries of the insurance contract between AAIC and the Fire District.

authority,[9] they assert that, as long as an insurer pays within the policy limits, an attorney's negligence can never cause harm to an insurer. (Br. of Resp't at 37-38). They even go so far as to assert that "the existence, and indeed, any quantification of such purported injury would be almost incapable of certainty." (Br. of Resp't at 41).[10] But their "back door" argument to avoid liability for their negligence is simply misplaced.

At this stage of the case, in determining whether an attorney owes a duty to a third-party beneficiary under the modified multi-factor balancing test of *Trask*, the inquiry is focused simply on "*the degree of certainty* that the plaintiff suffered injury." *Trask*, 123 Wn2d at 845 (emphasis added).[11] While BHB and Matson suggest (in no uncertain terms) that AAIC suffered no injury, (Br. of Resp't at 38-40), even they admit that no judge or jury has yet to make this finding of fact. (Br. of Resp't at 38-41). And absent a general citation to over 100 pages of

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[9] This court does not need to consider arguments that are not developed and for which a party has not cited authority. *Bercier*, 127 Wn. App. at 824.

[10] If anything, this argument supports AAIC's argument, *infra*, that a direct cause of action in this case would be an empty remedy.

[11] In *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), Division One of this court actually stated, "This element is certainly an element of a negligence claim, but usually not part of a duty determination."

clerk's papers,[12] (Br. of Resp't at 41), BHB and Matson make no attempt at disputing the facts of this case, which show that AAIC, to a high degree of certainty, has suffered a multi-million dollar injury. CP at 58, 68, 70-71, 93, 112, 141-42, 276-87, 289-93.

Furthermore, in *VersusLaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 111 P.3d 866 (2005), *review denied*, 156 Wn.2d 1008 (2006), Division One of this court already rejected the kind of argument that BHB and Matson seek to advance. In *VersusLaw*, the defendant law firm tried to excuse its malpractice by relying on a limitation of liability clause contained in a contract between its client and a third-party. *VersusLaw*, 127 Wn. App. at 324-25. But Division One of this court concluded that this provision applied only between the client and the third-party under the contract. *VersusLaw*, 127 Wn. App. at 324-25. Significantly, the contract did not limit the scope of damages recoverable from the defendant law firm. *VersusLaw*, 127 Wn. App. at 325. As in *VersusLaw*, this court also

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[12] This court does not need to consider arguments unsupported by specific references to relevant parts of the record. RAP 10.3(a)(6), (b); *In re Estate of Lint*, 135 Wn.2d 518, 531-32, 957 P.2d 755 (1998) ("If we were to ignore the rule ... we would be assuming an obligation to comb the record with a view toward constructing arguments for counsel.... This we will not and should not do."). Interestingly, this citation is one of only two citations to the clerk's papers in over 40 pages of argument from BHB and Matson.

should hold that the contract between AAIC and the Fire District does not *per se* limit the scope of damages recoverable from BHB and Matson.

Most importantly, though, this court should not be tempted to characterize AAIC's injury as speculative just because of an alleged difficulty in liquidating the claim. *See* 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE, § 21:3 (2012 ed.). "Often, no one can say precisely what the plaintiff lost or should have lost, but difficulty or imprecision in calculating damages does not exculpate an attorney." 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE, § 21:3 (2012 ed.); *see also Better Homes, Inc. v. Rogers*, 195 F. Supp. 93, 96 (N.D. W. Va. 1961) (attorneys should not be free of an obligation to respond in damages for breach of the ordinary standards of due care, simply because the damages are difficult of ascertainment).

In many cases, damages can be estimated. *See, e.g., McClung v. Smith*, 870 F. Supp. 1384, 1391 (E.D. Va. 1994) ("although the client is not required to prove the exact amount of incurred damages, she is required to show facts and circumstances from which the trier of fact can make a reasonably certain estimate of those damages"), *aff'd in part,* 89 F.3d 829 (4th Cir. 1996); *Benard v. Walkup*, 272 Cal. App. 2d 595, 606, 77 Cal. Rptr. 544 (Cal. Ct. App. 1969) ("the applicable rule is that which states that one whose wrongful conduct has rendered difficult the

ascertainment of damages cannot complain because the court must make an estimate of damages rather than an actual computation"). In many other cases, damages can be resolved through the "case within a case" methodology. *See, e.g., Daugert v. Pappas*, 104 Wn.2d 254, 258, 704 P.2d 600 (1985); *Schmidt v. Coogan*, 135 Wn. App. 605, 145 P.3d 1216 (2006), *rev'd on other grounds*, 162 Wn.2d 488, 173 P.3d 273 (2007).

Otherwise, attorneys could avoid liability merely because the damages are difficult to measure. 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE, § 21:3 (2012 ed.); *see London v. Weitzman*, 884 S.W.2d 674, 677-78, (Mo. Ct. App. 1994).[13] And then, "[t]he beneficiaries would be those attorneys whose errors were the greatest and whose conduct succeeded in complicating the issue of measuring the client's injury." 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE, § 21:3 (2012 ed.). For these reasons, the "back door" argument that "the existence, and indeed, any quantification of such purported injury would be almost incapable of certainty," (Br. of Resp't at 41), must fail.

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[13] Such a result is contrary to the existing law. *See Barnard v. Compugraphic Corp.*, 35 Wn. App. 414, 417, 667 P.2d 117 (1983); *Alpine Industries, Inc. v. Gohl*, 30 Wn. App. 750, 755, 637 P.2d 998 (1981), *review denied*, 97 Wn.2d 1013 (1982); *Wilson v. Brand S Corp.*, 27 Wn. App. 743, 745 (1980) ("Damages are not precluded because they fail to fit some precise formula."), *review denied*, 95 Wn.2d 1010 (1981).

F. UNDER THE LAW AND THE FACTS OF THIS CASE, THE PROFESSION WOULD NOT BE UNDULY BURDENED BY A FINDING OF LIABILITY

In yet another attempt to deflect this court's attention away from the facts of this case, *contra In re Guardianship of Karan*, 110 Wn. App. 76, 83, 38 P.3d 396 (2002), BHB and Matson argue that the relationship between the insurer and the insured is inherently adversarial and conflict ridden,[14] such that BHB and Matson could owe no duty to AAIC. (Br. of Resp't at 18-21, 23-24, 26-27, 31-36).

But as this court has held, there is no presumption, even when an insurer is defending under a reservation of rights, that the relationship between the insurer and the insured creates an automatic conflict of interest. *See Johnson v. Cont'l Cas. Co.*, 57 Wn. App. 359, 361-63, 788 P.2d 598 (1990); *see also Tank*, 105 Wn.2d at 383.

Moreover, BHB and Matson fail to appreciate the fundamental difference between a "possible" conflict of interest and a "potential" conflict of interest. "The mere possibility of subsequent harm does not itself require disclosure and consent." *See* Rules of Prof'l Conduct (RPC) 1.7 and comment 8 thereto; *see also* former Model Rules of Prof'l

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[14] While BHB and Matson bandy about the terms "adversary" and "adversarial" to describe the relationship between AAIC and the Fire District (Br. of Resp't at 10, 23, 24, 47, and 48), they fail to support their argument with any citation to the facts or authority. As such, this court does not need to consider this argument. *Bercier*, 127 Wn. App. at 824.

Conduct 1.7 (2001) and comment 4 thereto ("A possible conflict of interest does not itself preclude the representation."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 121 cmt. c(iii) (2000) ("The standard requires more than a mere possibility of adverse effect.").[15]

Despite the hyperbole of BHB and Matson, (Br. of Resp't at 33-37), most insurers and insureds, like AAIC, the Fire District, and James in this case, share a common interest in developing and presenting a strong defense to a claim that they believe to be unfounded as to liability, damages, or both. *Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 200 Ariz. 146, 24 P.3d 593, 598 (Ariz. 2001); *see generally Am. Mut. Liab. Ins. Co. v. Superior Court*, 38 Cal. App. 3d 579, 113 Cal. Rptr. 561, 571 (Cal. Ct. App. 1974) ("Both the insured and the carrier have a common interest in defeating or settling the third party's claim."); *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151, (Ind. 1999) ("a vast number of claims have been and presumably will be handled with no significant issue between the insurer and the policyholder"); *In re Allstate Ins. Co.*, 722 S.W.2d 947, 952 (Mo. 1987) ("When coverage is admitted and

[15] "Typically, there is no conflict or risk of adversity to the insured where there is no coverage issue." 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE, § 30:7 (2012 ed.).

adequate[,] the interests of the insurer and the insured are congruent. Both are interested in disposing of the case on the best possible terms.").[16]

The American Bar Association has recognized that "a community of interest exists between the company and the insured growing out of the contract of insurance with respect to any action brought by a third person against the insured within the policy limitations. The company and the insured are virtually one in their common interest." ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 282 (1950) (considering the ethical implications of lawyers serving as insurance staff counsel); *see also* ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 03-430 (2003) (revisiting the issue in the context of today's model rules). Even Ronald Mallen has observed that "[d]ual representation by defense counsel usually is harmonious and beneficial to both the insurer and the insured since they typically share the same goals during the pendency of

[16] The undeveloped argument of BHB and Matson that comment 30 to RPC 1.7 would preclude a duty owed to AAIC, (Br. of Resp't at 22, 27), is simply a non sequitur. Comment 30 to RPC 1.7 provides no basis for prohibiting a duty owed to AAIC. This argument also ignores RPC 1.6(a), which already permits disclosures of confidences and secrets, whether authorized by the client or impliedly authorized "in order to carry out the representation."

the litigation." 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE, § 30:16 (2012 ed.).[17]

Nevertheless, BHB and Matson summarily conclude that RPC 1.8(f) and 5.4(c) prohibit an attorney from owing a duty to an insurer under these circumstances. (Br. of Resp't at 14, 20-21, 35). But their argument is an excuse, rather than a true reason . Under RPC 1.8(f) and 5.4(c), the concern is that an insurer, which is paying for the attorney's services, will interfere with or override the attorney's independent professional judgment in representing the insured's interests. *See, e.g.*, ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 01-421 (2001).

Typically, this concern arises with regard to an insurer's litigation management guidelines, which sometimes seek to restrict the number of depositions an attorney can take or to preclude the attorney from performing legal research without prior approval. *See, e.g., Dynamic Concepts, Inc. v. Truck Ins. Exch.*, 61 Cal. App. 4th 999, 71 Cal. Rptr. 2d

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[17] BHB and Matson try to "bootstrap" a conflict of interest in this case with an altered quotation about an insurer's duty to settle within policy limits. (Br. of Resp't at 36). They ignore that our Supreme Court has preemptively dealt with this issue by holding that the standard of care for both an insurer and defense counsel is to evaluate the settlement as if the insured's policy had no limit. *Hamilton v. State Farm Ins. Co.*, 83 Wn.2d 787, 790, 523 P.2d 193 (1974); *see* THOMAS V. HARRIS, WASHINGTON INSURANCE LAW, § 19.02, at 19-3 (3d ed. 2010). In addition, BHB and Matson fail to cite to any facts showing that AAIC did not meet this standard of care.

882, 889 n.9 (Cal. Ct. App. 1998). But what if the insurer allows the attorney "full rein" to exercise his professional judgment? Then the interests of the insured will be adequately safeguarded. *See Finley v. Home Ins. Co.*, 90 Haw. 25, 975 P.2d 1145, 1154 (Haw. 1998). In fact, the American Bar Association has recognized, "In most cases, *undivided loyalty to the insured* thus would be fully consistent with undivided loyalty to the insurance company and its directives without regard to whether both insured and insurer are clients of the lawyer." ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 01-421 (2001) (emphasis added).

Despite the "parade of horribles" argument that an attorney's duty to an insured would become subordinated to an insurer's interest, (Br. of Resp't at 20-21, 35), BHB and Matson must concede that in this case it did not occur. AAIC allowed BHB and Matson "full rein" to exercise their professional judgment, consistent with RPC 1.8(f) and 5.4(c). For instance, Matson did not recall AAIC ever denying him the authority to retain an expert or precluding him from certain discovery tools. CP at 134-35. As far as Matson knew, AAIC was not questioning the bills or the type of work he was doing. CP at 140. Matson even admitted, "I had the authority to recommend strategy to my client and also to the insurance

company." CP at 134.[18] Absent any evidence to the contrary, there simply is no support for the blanket rule proposed by BHB and Matson that an attorney owing a duty to the insurer under these circumstances *will* slant his representation to the detriment of the insured.

Consistent with this reasoning, several jurisdictions even go so far as to hold that both the insurer and the insured are an attorney's clients, allowing either one to make a claim against the attorney for legal malpractice. *See Mitchum v. Hudgens*, 533 So.2d 194, 198 (Ala. 1988) ("When an insurance company retains an attorney to defend an action against an insured, the attorney represents the insured as well as the insurance company in furthering the interest of each."); *Unigard Ins. Group v. O'Flaherty & Belgum*, 38 Cal. App. 4th 1229, 45 Cal. Rptr. 2d 565, 569 (Cal. Ct. App. 1995) (where the insurer hires an attorney to defend its insured and does not raise or reserve any coverage disputes, and where there is no conflict of interest that would preclude an attorney from representing both parties, the attorney has a dual attorney-client relationship with both the insurer and the insured); *Gray v. Commercial Union Ins. Co.*, 191 N.J. Super. 590, 468 A.2d 721, 725 (N.J. Ct. App.

[18] Even more telling, BHB and Matson cannot cite to any facts in this case showing that a breach of confidentiality under RPC 1.6 or a conflict of interest under RPC 1.7 ever materialized in this case.

1983) ("There is no dispute that as a fundamental proposition a defense lawyer is counsel to both the insurer and the insured."); *see also* Oregon State Bar Formal Ethics Op. No. 2005-30 ("Simultaneous representation in insurance defense cases is generally permissible: a conflict that falls within Oregon RPC 1.7 generally will not exist because the clients have common interest in defeating the claim.").

While BHB and Matson take issue with the cases cited by AAIC,[19] (Br. of Resp't at 14-16), this court should not assume that the cases cited by BHB and Matson are "authorities," either. For instance, New York and Texas law provide little, if any, guidance to the resolution of the issues here. Unlike Washington,[20] neither New York nor Texas has relaxed the privity requirements for legal malpractice. *See, e.g., Fed. Ins. Co. v. N. Am. Specialty Ins. Co.*, 47 A.D.3d 52, 847 N.Y.S.2d 7, 12 (N.Y. App. Div. 2007); *Barcelo v. Elliott*, 923 S.W.2d 575, 578-79 (Tex. 1996) ("We believe the greater good is served by preserving a bright-line privity rule which denies a cause of action to *all beneficiaries* whom the attorney did not represent.") (Emphasis added).

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[19] BHB and Matson fault AAIC for the choice of its authorities, (Br. of Resp't at 15), but "[o]ne way to measure the strength of the privity rule is to examine those decisions concerning claims by a would-be beneficiary of a will." 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE, § 7:7 (2012 ed.).

[20] *See Morgan*, 58 Wn. App. at 731.

Although Michigan holds that no attorney-client relationship exists between an insurer and defense counsel, the Michigan Supreme Court nevertheless has cautioned, "[Y]et to hold that a mere commercial relationship exists would work obfuscation and injustice." *Atlanta Int'l Ins. Co.*, 475 N.W.2d at 297. And although Montana similarly holds that no attorney-client relationship exists between an insurer and defense counsel, the Montana Supreme Court similarly has cautioned, "Nor, finally, should our holding be taken to signal that defense counsel cannot be held accountable for their work." *In re Rules of Prof'l Conduct*, 299 Mont. 321, 2 P.3d 806, 814 (Mont. 2000). Finally, Minnesota, which BHB and Matson emphasize has adopted a rule of professional conduct "*identical*" to Washington's RPC 5.4(c), (Br. of Resp't at 13-14), actually holds that "in the absence of a conflict of interest between the insured and the insurer, the insurer can become a co-client of defense counsel" after consultation and the insured's express consent. *Pine Island Farmers Coop v. Erstad & Riemer, P.A.*, 649 N.W.2d 444, 452 (Minn. 2002).

Thus, 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. [21]

G. UNDER THE LAW AND THE FACTS OF THIS CASE, A DIRECT CAUSE OF ACTION WOULD BE AN EMPTY REMEDY

Finally, ignoring the mandate that "the lesson of *Trask* is that each case must be evaluated on its own facts," *Karan*, 110 Wn. App. at 83, BHB and Matson baldly argue[22] that "in all cases involving questions of the attorney's duties ... the insured[] will always have potential recourse and access to a remedy for legal malpractice." (Br. of Resp't at 23). BHB and Matson even argue that "[t]his circumstance is fully demonstrated in this case." (Br. of Resp't at 23-24). But the logic of this argument is inherently flawed.

As Division One of this court has noted, referring to legal malpractice claims, "the burden is on the plaintiff to show that damages are collectible." *Kim v. O'Sullivan*, 133 Wn. App. 557, 564, 137 P.3d 61

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[21] Certainly, this court can expect that prudent attorneys in circumstances such as the underlying case will consult with the insured (explaining the implications of the representation, the advantages involved, and the risks involved) and thereafter obtain the insured's informed consent. *See, e.g.*, RPC 1.0(b), (e); 1.2(c); 1.6(a); 1.7(b); and 1.8(f). No new or additional burdens under the rules of professional conduct will be unduly imposed on attorneys.

[22] This court does not need to consider arguments that are not developed and for which a party has not cited authority. *Bercier*, 127 Wn. App. at 824.

(2006), *review denied*, 159 Wn.2d 1018 (2007); *see also Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S.*, 112 Wn. App. 677, 684-87, 50 P.3d 306 (2002); *Matson v. Weidenkopf*, 101 Wn. App. 472, 484, 3 P.3d 805 (2000). The policy basis for this approach is to ensure that damage awards accurately reflect actual losses and avoid windfalls. *Kim*, 133 Wn. App. at 564; *cf. Lavigne*, 112 Wn. App. at 687; *Matson*, 101 Wn. App. at 484.[23]

Here, BHB and Matson acknowledge throughout their brief that AAIC owed a duty to defend and a duty to pay to its insureds. (Br. of Resp't at 37-41). They concede, as they must, that "AAIC was responsible to the Fire District for any amount assessed against the [Fire] District in settlement or by judgment at least up to the full value of AAIC's policy limits." (Br. of Resp't at 38). And they concede, as they must, that AAIC alone actually paid the underlying judgment. (Br. of Resp't at 39).[24]

Given these facts, it is extremely unlikely that a court would permit either the Fire District or James to show that certain damages incurred in this case – e.g., the costs of the defense and the underlying multi-million

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[23] The purpose of tort damages is to place the plaintiff in the condition he would have been in had the wrong not occurred. *Tilly v. Doe*, 49 Wn. App. 727, 731-32, 746 P.2d 323 (1987), *review denied*, 110 Wn.2d 1022.

[24] AAIC also paid approximately $500,000.00 to BHB and Matson for their services. CP at 92.

dollar judgment – are "collectible" by them. *See, e.g., Kim*, 133 Wn. App. at 564-65. After all, a court likely would find that awarding damages measured by a judgment that neither the Fire District nor James paid would give them "an unjustified windfall." *See, e.g., Kim*, 133 Wn. App. at 564-65.[25] Thus, contrary to what BHB and Matson presume, (Br. of Resp't at 23-24, 43), a direct cause of action simply would be an empty remedy. *See generally Stangland v. Brock*, 109 Wn.2d 675, 681, 747 P.2d 464 (1987) (if third-party beneficiaries could not recover for an attorney's negligence, then no one could); *Trask*, 123 Wn.2d at 843-44.

H. UNDER THE LAW AND THE FACTS OF THIS CASE, AN ATTORNEY'S IMMUNITY FROM NEGLIGENCE WOULD NOT FURTHER THE POLICY OF PREVENTING FUTURE HARM

Therefore, were this court to affirm the trial court's ruling, "[t]he only winner produced by an analysis precluding liability would be the malpracticing attorney." *See Atlanta Int'l Ins Co.*, 475 N.W.2d at 298.

[25] Of course, AAIC could show that these damages – e.g., the costs of the defense and the underlying multi-million dollar judgment – are "collectible" by it. Unfortunately, other than situations involving adversaries in an underlying case, our Supreme Court has not addressed the question of whether legal malpractice claims can be assigned or equitably subrogated to another party. *Kommavongsa v. Haskell*, 149 Wn.2d 288, 311, 67 P.3d 1068 (2003). But a number of states (including Indiana, whose law regarding assignment of legal malpractice claims our Supreme Court found to be "generally persuasive," *Kommavongsa*, 149 Wn.2d at 309) have held that subrogation amounts to an assignment, which is impermissible for a legal malpractice claim. *Querrey & Harrow, Ltd. v. Transcon. Ins. Co.*, 861 N.E.2d 719, (Ind. Ct. App. 2007), *aff'd*, 885 N.E.2d 1235 (Ind. 2008).

"Defense counsel's immunity from suit by the insurer would place the loss for the attorney's misconduct on the insurer." *See Atlanta Int'l Ins. Co.*, 475 N.W.2d at 298. Far from any "double recovery," (Br. of Resp't at 47), AAIC would have no recovery and the Fire District very likely would have an empty recovery – or even worse, no recovery.[26]

Yet BHB and Matson would receive a multi-million dollar windfall from liability, merely because AAIC paid the judgment (and paid for their services). Such a result should not arise simply because the Fire District had the foresight to contract with AAIC for insurance coverage. *See, e.g., Am. Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480, 485 (Tex. 1992). It is inequitable and utterly contrary to the guiding principles of Washington law. *See Seattle First Nat'l Bank*, 91 Wn.2d at 236 ("The cornerstone of tort law is the assurance of full compensation to the injured party.").

This court should not affirm the trial court's ruling, thereby creating a class of special, protected defense attorneys who could commit malpractice with impunity. Rather, "the attorney-client relationship, the

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[26] It is not hard to imagine BHB and Matson subsequently moving to dismiss the Fire District's legal malpractice claim on the basis that the damages incurred in this case – e.g., the costs of the defense and the underlying multi-million dollar judgment – are not "collectible" by it. If not AAIC, the Fire District, or James, then who could hold BHB and Matson accountable for their malpractice?

interests of the client, the interest[s] of the insurer, and ultimately the public, which would otherwise absorb the costs of the malpractice, all benefit from exposure to suit." *See Atlanta Int'l Ins. Co.*, 475 N.W.2d at 299. "The social costs of legal malpractice [are] best borne by the malpracticing attorneys." *See Nat'l Union Ins. Co. v. Dowd & Dowd, P.C.*, 2 F. Supp. 2d 1013, 1024 (N.D. Ill. 1998). And negligent lawyers, such as BHB and Matson, should be routed out, not immunized from the consequences of their malpractice.

II. CONCLUSION

For the reasons set forth above, the trial court erred as a matter of law in dismissing AAIC from the present lawsuit, thereby immunizing BHB and Matson from the consequences of their malpractice. Under the law and the facts of this case, AAIC has standing to enforce its attorneys' obligations of competent representation. Therefore, 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 May, 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:

Via ABC Legal Messenger

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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 May 30th, 2012.

Jennifer N. Culbertson
Legal Assistant to Daniel P. Crowner