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No. 89178-8

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE DOCTORS COMPANY, a California Interinsurance Exchange,

Appellant,

v.

BENNETT BIGELOW & LEEDOM, P.S., a Washington professional services corporation; AMY THOMPSON FORBIS and JOHN DOE FORBIS, her husband, and the marital community comprised thereof; and JENNIFER LYNN MOORE and JOHN DOE MOORE, her husband, and the marital community comprised thereof,

Respondents.

REPLY BRIEF

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INTRODUCTION

As it did below, TDC here raised three theories of legal duty:

> (1) a direct duty based on the erroneous legal advice that BBL gave to TDC;
>
> (2) a direct duty based on the RESTATEMENT (THIRD) OF THE LAW OF THE LAW GOVERNING LAWYERS, § 51, not only due to BBL's erroneous conflicts advice, but also due to its misrepresentation of a conflict, and to its failures to fulfill its ethical responsibilities of competence, diligence, and honesty in all matters; and
>
> (3) third-party beneficiary status.

Under the egregious facts of this case, this Court must find a duty. Otherwise, it will create a safe harbor for legal malpractice where, as here, an insurer fully protects its insureds from harm.

BBL's response is remarkably inaccurate. BBL misstates the facts in the light most favorable to it. It misstates the law. BBL even misstates TDC's arguments – and then criticizes TDC for making those misstated arguments!

The crucial issue here is whether – in the name of protecting Washington insureds – this Court will condone serious and troubling violations of its own ethical rules that would have egregiously harmed these insureds had TDC not stepped up to protect them. This Court should exercise its plenary authority over attorney misconduct in Washington to find actionable duties running from BBL to TDC.

REPLY RE STATEMENT OF THE CASE

Although BBL acknowledges the summary judgment standard requiring this Court to view the facts in the light most favorable to TDC, its Statement of the Case does the opposite. Under CR 56, this Court must disregard BBL's many factual allegations inconsistent with TDC's evidence. The Court certainly cannot take the facts in the light most favorable to BBL, as its briefing does.

A few examples should suffice. First, BBL completely ignores the following key facts:

> TDC asked BBL whether it could represent all three defendants, and relied on BBL's advice that it could. BA 5.
>
> BBL never sought or obtained a written waiver of the apparent conflict of interest, violating RPC 1.7. *Id.*
>
> BBL failed to disclose – and even misrepresented – Dr. Manning's refusal to support Dr. Nudelman. BA 6.

These facts – which are well supported by the record – demonstrate that BBL undertook duties to TDC and breached those duties. If TDC cannot sue BBL for its egregious breaches, no one can.

Second, BBL claims that Nancy Nucci's supervisor, Tony Luttrell, "voiced no impediment to retaining one law firm to represent all three" defendants. BR 4. BBL fails to mention what Luttrell actually said to Nucci: ask BBL about conflicts. CP 1851. TDC relied on BBL's legal advice. *Id.* BBL did not raise any conflict issue

until late September 2010. CP 455-56. In the interim, it lied to TDC about the actual conflict between its clients. BA 6.

Third, BBL falsely (and laboriously) accuses TDC of failing to "timely pursue settlement." BR 6-11. BBL again ignores that TDC could not pursue settlement without its insureds' consent because its policy lacks a "hammer clause." BA 9 n.3. From early in the case, Nucci had discussions with Dr. Nudelman about the risks, but he would not consent. CP 443, 447-48, 454-55. No one from BBL directly asked TDC to get his consent from 2008 until September 2010. CP 456-57. Dr. Nudelman did not give his consent until October 2010. CP 457. TDC settled in early November 2010. CP 221-28. Dr. Moore never consented. CP 457-58. As soon as it could, TDC timely and successfully pursued settlement.

Finally, BBL falsely asserts that TDC settled "the insureds' bad faith claims against it" when it settled the ***Gabarra*** matter. BR 16-17. That is patently absurd. TDC was not a party to ***Gabarra***, and its payment was obviously made on behalf of its insureds to settle the plaintiffs' claims against them. CP 227-28. TDC was never sued for bad faith, never admitted bad faith, never acted in bad faith, and never paid for bad faith. CP 522-23, 1951-54. BBL's unjustified hyperbole improperly risks misleading this Court.

REPLY ARGUMENT

A. BBL gave TDC legal advice, so it owed TDC a duty.

TDC first explained that BBL gave TDC legal advice – that it could properly represent all three defendants and that Dr. Manning supported both doctors – on which TDC relied. BA 10-14. BBL's advice was false, and BBL breached RPC 1.7 (conflict of interest, current clients). *Id.* Its breach directly and proximately caused TDC to pay $7 million in excess of its policy limits to protect its insureds. *Id.* If TDC cannot sue BBL for its negligence, no one can: TDC protected its insureds from suffering any harm by taking the bullet itself. *Id.* BBL thus owed a direct duty to TDC, permitting TDC's direct malpractice claim.

BBL brings several arguments in response: (1) TDC did not raise this argument below; (2) ***Bohn*** and ***Tank***; (3) ***Trask*** and ***Stewart Title***. BR 21-39.[1] The first point is not accurate, while the rest are irrelevant. BBL brings no substantive, relevant response. The Court should reverse and remand for trial.

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[1] Citing ***Bohn v. Cody***, 119 Wn.2d 357, 832 P.2d 71 (1992); ***Tank v. State Farm Fire & Cas. Ins. Co.***, 105 Wn.2d 381, 715 P.2d 1133 (1986); ***Trask v. Butler***, 123 Wn.2d 835, 872 P.2d 1080 (1994); ***Stewart Title Guar. Co. v. Sterling Sav. Bank***, 178 Wn.2d 561, 311 P.3d 1 (2013).

On preservation, TDC first framed the legal issue for the trial court as follows (CP 87):

> Under Washington law, does insurance defense counsel owe a legal duty to the insurance carrier hiring them; paying them; and bearing the financial brunt and results of their negligence?

To answer this duty question, TDC raised three primary arguments:

1. The ***Bohn/Trask*** multifactor balancing test for third-party beneficiary status in the insurance contract (CP 88-90);

2. RESTATEMENT (THIRD) § 51 (CP 92); and

3. A direct duty under Washington's law governing the tripartite insurance-defense relationship (CP 93-94).

Under the third argument, TDC relied on RCW 48.01.030, the public interest provision of Washington's insurance statutes (CP 93):

> The business of insurance is one affected by the public interest, requiring that **all** persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, **and their representatives** rests the duty of preserving inviolate the integrity of insurance. [Emphasis added.]

TDC also quoted a commentator on the importance of recognizing potential conflicts and disclosing actual conflicts to the insurer:

> An attorney must endeavor to both **anticipate possible** and recognize actual conflicts of interest. . . . A defense attorney who continues the representation of an insured after securing an insured's consent, **should also take steps to disclose the nature and the scope of any conflicts of interest to the insurer as well**. [Emphasis added.]

CP 94. TDC also quoted this on the stated issue (*id.*):

> The attorney occupies a fiduciary relationship to the insured, **as well as to the insurance company**. [Emphasis added.]

Consistent with this analysis, in subsequent pleadings TDC supported its direct-duty argument with very recent authority, ***Ace Am. Ins. Co. v. Sandberg***, 900 F. Supp. 2d 887 (S.D. Ill. 2012). CP 393-94. Specifically, TDC argued that ***Ace*** "concluded that the plaintiff insurance companies had a direct legal malpractice claim against the [insurance-defense counsel] defendants." CP 394. And indeed, ***Ace*** unequivocally holds that such a direct malpractice claim will lie due to the fiduciary relationship between the insurer and its hired defense counsel:

> [I]t is beyond doubt that Illinois law allows a direct malpractice claim by a primary insurer against the attorney retained by the primary insurer. "In Illinois, it has long been recognized that **an attorney retained by a primary insurer to represent its insured has a fiduciary duty to *two clients***: (1) the insured and (2) the primary insurer. . . . Consequently, **either the insured or the primary insurer can sue the retained attorney for legal malpractice**."

900 F. Supp. 2d at 902 (emphases altered) (citing ***National Union Ins. Co. v. Dowd & Dowd***, 2 F. Supp. 2d 1013, 1017 (N.D. Ill. 1998); *see also* ***Maryland Cas. Co. v. Peppers***, 64 Ill. 2d 187, 355 N.E.2d 24, 30-31 (Ill. 1976)).

In sum, it is inaccurate to say that TDC never raised or argued BBL's direct duty to TDC. It is true, of course, that this was not the focus of TDC's arguments, simply because TDC had to focus primarily on ***Trask***. But TDC did raise the direct-duty argument.

On the substance of this argument, BBL first claims that TDC cannot meet ***Bohn*** because either (a) Luttrell and Nucci had no subjective belief that BBL was TDC's lawyer, or (b) any such subjective belief would not be objectively reasonable. BR 23-27. But contrary to BBL's unsupported assertion at BR 24, it is not mere "rhetoric" to say that TDC solicited and relied upon BBL's legal advice; rather, it is undisputed testimony from Mr. Luttrell that must be taken in the light most favorable to TDC:

> Nancy [Nucci] approached me as to whether or not there was a conflict on the part of [BBL in] representing all three of our insureds . . . . My response to Nancy was that we needed to let [BBL] *tell us* if there was a conflict.
>
> When [BBL] expressed willingness and ability to represent all three, we understandably relied on their legal expertise in this situation.

CP 1851. And while it is true that Luttrell and Nucci said they did not subjectively believe that BBL was TDC's attorney (albeit while answering a different question) their erroneous legal opinions hardly contradict Luttrell's unequivocal assertion that he, on behalf of TDC,

sought and relied upon BBL's legal advice regarding conflicts of interest. This is sufficient to establish an attorney-client relationship.

Indeed, it is the essence of the attorney-client relationship:

> The essence of the attorney/client relationship is whether the attorney's advice or assistance is sought and received on legal matters. *See* 1 R. Mallen & J. Smith § 11.2 n.18; 7 Am. Jur. 2d *Attorneys at Law* § 118 (1980).

Bohn, 119 Wn.2d at 363. Nor does ***Bohn*** *require* a subjective belief. There, the alleged client had expressly disclaimed any attorney-client relationship, yet the Court still analyzed the objective reasonableness of the relationship. *Id.* at 363-64. Nothing in ***Bohn*** supports BBL's assertions that TDC's representatives' mistaken subjective beliefs are independently dispositive on this issue.[2]

Nor are its assertions supported by BBL's overstatement regarding ***Sherman v. State***, 128 Wn.2d 164, 189, 905 P.2d 355 (1995). BR 25 ("Where the purported client does not even believe that he or she is entering into an attorney-client relationship, none

---

[2] Troublingly, BBL says that "TDC misrepresents [***Bohn***'s] holding in arguing that here, 'as in *Bohn* . . . BBL and TDC had an attorney-client relationship.' (App. Br. 12)." BR 25 (ellipses in BR). ***BBL uses deceptive ellipses to misrepresent TDC's argument.*** TDC actually argued: "As in ***Bohn***, once BBL undertook 'to tell part of the story,' it had a duty to take 'reasonable steps to tell the whole story, not just the self-serving portions of it.' 119 Wn.2 at 367. BBL and TDC had an attorney-client relationship on this issue." BA 12. TDC did not misrepresent ***Bohn***, but BBL does misrepresent TDC's argument to this Court.

exists as a matter of law"). Like ***Bohn***, ***Sherman*** notes that there is no evidence of the alleged client's subjective belief, but then goes on to conclude that any such belief would be objectively unreasonable. 128 Wn.2d at 189. No case holds that the mere lack of a subjective belief is dispositive as a matter of law.

Rather, the focus must be on objective reasonableness where, as here, there is clear evidence of a request for and reliance upon legal advice. To challenge this ***Bohn*** element, BBL relies on ***Tank***. BR 26-27. In the consolidated ***Tank*** cases, tortfeasor Tank claimed that his insurer breached its duty of good faith in defending him under a reservation of rights, while plaintiff Johnson claimed that the insurer of the tortfeasor who injured her acted in bad faith in failing to settle with her. 105 Wn.2d at 384, 392. This Court held that Tank's insurer met its enhanced duty of good faith in defending under a reservation of rights and that, as a third party, Johnson could not sue her tortfeasor's insurer for bad faith. *Id.* at 389, 392.

Tank is easily distinguished. TDC undertook its insureds' defense with no reservation of rights. And TDC is not a third-party attempting to sue a tortfeasor's insurer. ***Tank*** does not apply here.

Nonetheless, BBL argues that ***Tank*** requires insurers to retain insurance defense counsel who will treat the insured as their *only*

client "as one of the 'basic obligations' of the carrier to the insured in *all* cases." BR 26. BBL flatly misstates ***Tank***. This Court actually said that the "basic obligations" applicable in all insurance defense cases "amount to a duty of good faith," which requires "fair dealing and equal consideration for the insured's interests." 105 Wn.2d at 387. In other words, "the same standard of fair dealing and equal consideration is unquestionably applicable to a reservation of rights defense" as to a non-reservation defense. *Id.*

Only after restating those "basic obligations" applicable to all insurance-defense cases did the Court go on to impose an enhanced duty applicable solely in reservation-of-rights-defense cases (*id.*):

> We find, however, that the potential conflicts of interest between insurer and insured inherent in this type of [reservation-of-rights] defense mandate an even higher standard: an insurance company must fulfill an enhanced obligation to its insured as part of its duty of good faith. Failure to satisfy this enhanced obligation may result in liability of the company, or retained defense counsel, or both.

And it is only under this enhanced duty that the Court imposed the sole representation requirement (*id.* at 388):

> This enhanced obligation is fulfilled by meeting specific criteria. . . . Second, [the insurer] must retain competent defense counsel for the insured. Both retained defense counsel and the insurer must understand that only the *insured* is the client.

BBL is simply wrong to claim that this sole-representation requirement is a "basic obligation" of the tripartite insurance-defense relationship. It applies only in reservation of rights cases. *Id.* at 387-88. ***Tank*** has no application here.

BBL also talks about ***Stewart Title*** and ***Trask*** here, but those cases address other theories. They are discussed *infra*. This Court should hold that TDC may sue BBL for malpractice.

B. This Court should adopt the RESTATEMENT (THIRD) § 51 approach in this limited arena.

TDC also asked this Court to join the majority of states in recognizing a direct duty running from insurance defense counsel to the insurer in non-reservation of rights cases, and to do so under the three-part test stated in the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51. BA 15-22. The § 51 test is more precisely calibrated to the tripartite insurance-defense relationship than ***Trask*** or ***Stewart Title***. *Id.* And TDC meets this test because

> (1) BBL undeniably knew that one of the primary objectives of the representation was that its services would also benefit TDC – indeed, its services were expressly intended to fulfill TDC's contractual duties to its insureds;
>
> (2) TDC demanded only that BBL properly represent the insureds/clients, without reservation, so no conflict of interest existed; and

> (3) if TDC cannot sue BBL, no one can, where TDC protected its insureds from suffering the harms caused by BBL's malpractice. *Id.*

The Court should adopt § 51 in this limited arena.

BBL does not directly respond to these points. Instead, it mischaracterizes TDC's arguments, and then argues against its own mischaracterizations. BR 36-39. For instance, BBL claims this:

> As TDC acknowledges, the *Stewart Title* Court expressly "reject[ed] that analysis," adhered to *Trask*, despite acknowledging that "other jurisdictions have come to a different conclusion" by allowing a liability carrier to sue retained defense counsel for legal malpractice. 178 Wn2d at 567 & n.2.

BR 37 (no cite to TDC brief in original). But TDC actually said this:

> As discussed infra, it is unclear whether the Court actually rejected the . . . § 51 analysis in ***Stewart Title***.

BA 15 n.4. TDC also said this:

> Of course, this Court very recently rejected a different analysis. *See* ***Stewart Title***, 178 Wn.2d at 567 n.2. . . . [which included] a "*see also*" cite to § 51, but did not expressly address § 51.

BA 17. And this:

> In sum, this Court should – to the extent necessary – recalibrate ***Stewart Title*** in light of the egregious facts presented here.

BA 22. None of this "acknowledges" that ***Stewart Title*** "expressly" rejected § 51, which it did not do.

Indeed, BBL falsely asserts that ***Stewart Title*** "expressly rejected the very standard that TDC now urges this Court to adopt." BR 37. The "*see also*" cite to § 51 in ***Stewart Title***'s n.2 refers to this statement: "that an insurer's and insured's interests happen to align in some respects . . . does not by itself show that the attorney or client *intended* the insurer to benefit from the attorney's representation of the insured." 178 Wn.2d at 567, text at n.2. ***Stewart Title*** never expressly rejected § 51, which (as BBL admits at BR 37) was raised for the first time in supplemental briefing. It was not properly before this Court, where (unlike here) it was not raised in the trial court. And ***Stewart Title***'s holdings are unequivocal:

> We hold that an alignment of interests is insufficient to support a duty to of care to a nonclient. We further hold that a contractual duty to inform is insufficient to support a duty of care to a nonclient. Putting both of them together does not cure the insufficiency.

178 Wn.2d at 569. ***Stewart Title*** (addressed *infra* with ***Trask***) says nothing dispositive about § 51.

BBL also falsely argues that TDC is "really" asking this Court to overrule ***Trask*** and ***Stewart Title***. Since neither case addressed § 51, and neither addressed a case like this in which the interests of

insured and insurer are perfectly aligned,[3] and neither addressed the ultimate fact that denying a duty here creates a safe harbor for negligent insurance-defense counsel, there is no need for TDC to seek their overruling. Just because the two factors mentioned in ***Stewart Title*** were not sufficient there does not mean that this case – with its much more egregious malpractice – is not sufficient.

Finally on this point, BBL falsely asserts that "TDC steadfastly refused to negotiate or attempt settlement, its insureds had retained personal counsel to pursue bad faith claims and it had devised a strategy to throw two of its insureds to the wolves in an attempt to save itself $2 million under its other insured's policy." BR 38-39 (no citations in original). BBL offers no cites because this is a total fabrication.[4] As explained *supra*, TDC could not negotiate a settlement absent its insureds' consent, which was not forthcoming until shortly before TDC successfully negotiated a settlement. BA 9 n.3; CP 221-28, 457-58. Dr. Moore steadfastly refused to settle, so her $2 million policy was never in play. CP 457-58, 492, 534-35.

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[3] ***Stewart Title*** pointedly notes a conflict of interest between insurer and insured regarding settlement in that case. 178 Wn.2d at 567. No such conflict – of any sort – arose here.

[4] Even if BBL had cites, the facts taken in light most favorable to TDC contradict BBL's false allegations.

TDC hired independent counsel for its insureds, of course, when BBL's malpractice came to light shortly before trial. BA 7-8, 9.

And there is absolutely no evidence of any "plan to throw two of its insureds to the wolves" – whatever that means. Rather, Dr. Manning believed Dr. Nudelman's conduct was indefensible – a fact BBL withheld and even lied to TDC about for months (BA 6, citing CP 526, 1156-57, 1163, 1165, 1758, 1784-85) – so he was finally forced to agree to settle. CP 532-37. Dr. Moore would not agree, so her policy was inaccessible. No schemes (or wolves) were involved.

C. Alternatively, TDC is a third-party beneficiary under *Trask* and *Stewart Title*.

In the alternative, TDC argued that it is a third-party beneficiary under the six-factor test in ***Trask*** and ***Stewart Title***:

(1) The tripartite relationship is intended to benefit both TDC and insureds to the fullest possible extent by fulfilling TDC's contractual duty to its insureds;

(2) financial harm to TDC was easily foreseeable;

(3) TDC certainly suffered that harm;

(4) BBL's malpractice directly caused that harm;

(5) a strong public policy exist against creating a safe harbor for malpractice; and

(6) the profession is not unduly burdened by requiring BBL to properly represent the insureds and avoid conflicts of interest.

BA 22-27. In light of BBL's serious malpractice, a duty must exist.

This is particularly true in light of the many RPC violations implicated here. *Id.* Specifically,

> RPC 1.1 (duty of competent representation);
>
> RPC 1.3 (duty to act with reasonable diligence);
>
> RPC 1.7 (nondelegable duty to identify and disclose conflicts);
>
> RPC 2.3 (lawyer evaluations for benefit of third party); and
>
> RPC 4.1 ("a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person").

Taking the facts in the light most favorable to TDC, BBL violated each of these mandatory ethics rules, while TDC rightfully relied on BBL to comply with them. This Court should reverse and remand for trial.

The RPC 4.1 violation is perhaps the most troubling in this third-party context. When BBL misrepresented Dr. Manning's opinion to TDC, it violated this rule – wholly intended to protect non-client members of the public with whom lawyers interact – as a matter of law. *See, e.g.*, ***Eriks v. Denver***, 118 Wn.2d 451, 457, 824 P.2d 1207 (1992) (whether attorney's conduct violates the RPCs is a question of law). The trial court's refusal to find a duty here essentially eviscerates RPC 4.1 – if TDC cannot sue BBL for this violation, no one can. *See, e.g.*, CP 390-91, 1806.

BBL falsely argues that this Court "has recently and emphatically rejected TDC's argument that a liability carrier is a third party beneficiary of the attorney-client relationship between retained counsel and the insured-client." BR 27 (citing ***Stewart Title***). Aside from the obvious fact that TDC's arguments were not raised in ***Stewart Title***, that opinion repeatedly emphasizes that Stewart Title did not present sufficient evidence to meet the ***Trask*** test, not that no carrier could ever meet the test:

> The alignment of interests is insufficient to find a duty running from Witherspoon to Stewart Title for purposes of a malpractice claim.
>
> The fact that an insurer's and insured's interests happen to align in some respects . . . does not **by itself** show that the attorney or client *intended* the insurer to benefit from the attorney's representation of the insured.
>
> We conclude that Witherspoon's duty to inform Stewart Title **is insufficient** to establish a further duty of care . . .
>
> We hold that an alignment of interests **is insufficient** to support a duty of care to a nonclient. We further hold that a contractual duty to inform **is insufficient** to support a duty of care to a nonclient. Putting both of them together does not cure the insufficiency.

Stewart Title, 178 Wn.2d at 567-69 (bold added). ***Stewart Title*** is very clear that the two factors Stewart Title raised – alignment of interests and contractual duty to report – were, by themselves,

insufficient to establish a duty. By contrast, as noted above, here we have not only those two factors, but all six ***Trask*** factors. BA 22-27.

Moreover, Stewart Title merely raised an argument that insurance-defense counsel failed to assert a viable defense. 178 Wn.2d at 563. But here, BBL did far worse (*see* BA 5-9):

> BBL failed to recognize and disclose potential conflicts;
>
> BBL failed to obtain a written conflicts waiver;
>
> BBL failed to disclose an actual conflict when it arose;
>
> BBL lied to TDC about the actual conflict;
>
> BBL failed to comply with the case schedule; and
>
> BBL thereby placed TDC in an untenable litigation position.

Stewart Title simply did not confront the sort of egregious malpractice alleged in this case. The strong policies against creating a safe harbor for malpractice, and in favor of ensuring just compensation for those injured by such malpractice, strongly support finding a duty under the facts of this case.

Hoping to avoid liability for its egregious malpractice, BBL argues the facts in the light most favorable to it on each of the ***Trask*** factors. BR 29-36. It would serve no useful purpose to again walk through these arguments, as BBL's allegations are simply irrelevant

on summary judgment. Taking the facts in the proper light – most favorably to TDC – this Court should reverse and remand for trial.[5]

D. TDC is not seeking contribution.

As it did below, BBL again raises an extremely strained and irrelevant argument about the Tort Reform Act and contribution. BR 39-42. As TDC did below, it again states that it is not seeking contribution. CP 2068-70. Nor could TDC seek contribution, as it was not a "joint tortfeasor" with BBL. *Id.* Since the settlement did not "extinguish" BBL's liability, but rather expressly preserved TDC's right to sue BBL for malpractice, RCW 4.22.040 does not apply. *Id.* As explained in the facts above, TDC did not pay anything to "settle" any alleged bad-faith claim. BBL's argument is meritless.

E. BBL's "delta" argument is irrelevant.

As it did below, BBL again argues that TDC saved money on lawyers by hiring only BBL, rather than three separate firms for its three insureds, so there is no "delta" to recover for fees paid to successor counsel. CP 1985-86. TDC did not dispute this irrelevant assertion below, and does not do so here. CP 2054-72. But it is plainly far from true that TDC *saved* any money by hiring BBL.

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[5] BBL tangentially mentions ***Clark Cy. Fire Dist. No. 5 v. Bullivant Houser Bailey, P.C.***, No. 42864-4-II (April 24, 2014), from which a Petition for Review was recently filed in this Court. This Court should take both cases.

CONCLUSION

This Court should reverse and remand for trial. Whether the Court finds (1) a direct attorney-client relationship due to the negligent legal advice regarding conflicts that BBL gave to TDC under an Illinois/***Ace*** analysis; or (2) a direct-duty relationship due to BBL's fiduciary relationship with TDC under a § 51 analysis; or (3) a third-party beneficiary relationship due to BBL's misrepresentations to TDC under a ***Trask*** analysis; the egregious malpractice alleged here should not be shielded from a trial. Both the conflicts of interest and dishonesty RPC violations are plainly actionable, but only if TDC is permitted to bring them forward. This Court – which has plenary responsibility for attorney misconduct in Washington – should decline to give safe harbor to such practices.

RESPECTFULLY SUBMITTED this 28 day of May, 2014.

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REPLY BRIEF

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