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No. 89178-8

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.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE DEAN S. LUM

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Anticipating by several months the Supreme Court's decision in *Stewart Title Guar. Co. v. Sterling Sav. Bank*, 178 Wn.2d 561, 311 P.3d 1 (2013), the trial court held that the law firm retained by a liability insurance carrier to defend its insureds owed its undivided duty of care and loyalty to the insured/clients, and not to the insurance carrier paying the firm's fees. The trial court correctly applied the multifactor test of *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994), holding that only the insured clients were intended beneficiaries of counsel's services, and that to impose a tort duty of care in favor of the non-client liability carrier would burden the legal profession by exacerbating conflicts of interest and undermining the bedrock principle of undivided loyalty that the Court has so rigorously enforced since *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986).

This Court should affirm dismissal of the appellant The Doctor's Company's ("TDC") legal malpractice action against counsel retained for its insureds, respondents the firm of Bennett, Bigelow & Leedom ("BBL") and its lawyers Amy Forbis and Jennifer Moore.

II. RESTATEMENT OF ISSUES RELATED TO ASSIGNMENTS OF ERROR

The trial court dismissed not only The Doctors Company's tort claim for legal malpractice, but also dismissed its claims for breach of implied contract, breach of fiduciary duty, violation of the Consumer Protection Act and to recover the fees paid to successor counsel. (CP 2470-72) Those decisions are unchallenged on appeal. (§ IV.A, *infra*) The issues related to appellant's assignments of error are limited to:

1. May a liability insurance carrier, whose representative expressly stated that defense counsel's only client was its insureds, assert in a legal malpractice action that the carrier was a "client" of the law firm it retained to defend its insureds?

2. May a carrier sue retained defense counsel, who, under *Tank v. State Farm*, owes an undivided duty of loyalty only to the insured-client, for alleged legal malpractice in defense counsel's representation of the insured-client?

3. Can and should this Court overrule *Trask v. Butler*, *Mazon v. Krafchick*, and *Stewart Title Ins. Co. v. Sterling Savings Bank* to adopt a more liberal standard that allows a non-client to sue another party's lawyer for legal malpractice?

III. RESTATEMENT OF THE CASE

A. Restatement of Facts.

1. TDC retained BBL to defend its insureds – two physicians and their employer-clinic – after they were sued for medical negligence.

The Doctors Company, which sells liability insurance to medical professionals, insured Drs. Heather Moore and Mitchell Nudelman and their employer, the Bellegrove OB/GYN Clinic. (CP 230) Drs. Nudelman and Moore each paid approximately $100,000 annually for $2 million in coverage with TDC, supplemented by the Clinic's $1 million *respondeat superior* coverage, for total coverage of $5 million. (CP 788, 1459, 1479)

After going into labor, Jean Gabarra, Dr. Moore's patient, was admitted to Overlake Hospital & Medical Center on November 3, 2006. (CP 230) Dr. Moore oversaw the initial stage of labor until her shift ended, when Dr. Nudelman took over. (CP 230) Early on the morning of November 4, he asked Dr. Moore to return to the hospital and assist with a C-section. (CP 230) Julie Gabarra was born shortly after 5 a.m., having suffered oxygen deficiency that left her severely disabled. (CP 230)

The Gabarras, represented by Joel Cunningham and the Luvera law firm, gave Drs. Nudelman, Moore and the Clinic notice

of intent to sue on September 18, 2008, and the insureds tendered the claim to their liability carrier TDC. (CP 4, 230) After reviewing the claim, TDC's claims representative Nancy Nucci believed that Dr. Nudelman was the "primary defendant." (CP 608) Under TDC's defense manual, where even a potential conflict is identified, the matter must be brought to the attention of TDC's Regional Vice President (CP 140) Ms. Nucci raised the possibility of a conflict with her immediate supervisor, TDC's Regional Vice President Tony Luttrell, who voiced no impediment to retaining one law firm to represent all three of its insureds. (CP 608, 610, 1851)

Ms. Nucci informed Dr. Nudelman by phone that she intended to appoint one defense attorney to jointly represent him, Dr. Moore and the Clinic, and that she would further discuss the risks and benefits of joint representation when they met in person. (CP 611) As Ms. Nucci recorded the conversation:

> Explained evaluation process and settlement versus defense of the case. We also discussed the possibility of a conflict between himself and Moore. Told him we would talk about this in greater detail at our initial meeting.

(CP 133)

Ms. Nucci selected BBL to defend all three of TDC's insureds on September 26. (CP 230) TDC's engagement letter to retained

counsel states that TDC is engaging the attorney to "represent the interests of" the insured. (CP 811) Ms. Nucci's supervisor, Mr. Luttrell, acknowledged that TDC hired BBL to represent its insureds, *not* TDC:

> Q. You understood, at the time that you were contacting Bennett & Bigelow, that you were hiring them to represent your insureds, correct?
>
> A. Yes.
>
> Q. You understood, at the time you were hiring them, that their clients would be your insureds, right?
>
> A. That's always been made clear to me, yes.
>
> Q. And that's important, isn't it, that the lawyers be representing the insureds, not The Doctors Company, right?
>
> A. Yes.

(CP 697-98)

Ms. Nucci set up two meetings at which she and BBL lawyers Amy Forbis and Jennifer Moore met separately with Dr. Moore and Dr. Nudelman in October 2008. (CP 463) Ms. Nucci warned Ms. Forbis in advance that Dr. Nudelman, who had supervised what appeared to be an unusually prolonged second stage of labor, "is the primary defendant and is quite nervous and will need a lot of TLC." (CP 231, 237)

At these meetings, Ms. Nucci and Ms. Forbis questioned the doctors about the events, not only to explore their defenses, but to assess possible conflicting interests. (CP 136, 230, 610-12) Both Ms. Nucci and Ms. Forbis informed the doctors about ramifications of joint representation, including the fact that information shared by one could be shared with the other, and that if they were not comfortable with joint representation, TDC would provide them with separate counsel. (CP 230-31, 610-12) Ms. Nucci was satisfied at the conclusion of the initial meetings that she had thoroughly discussed the ramifications of joint representation with her insureds and agreed with Ms. Forbis that there was no impediment to BB&L's joint representation of the Clinic and its two physicians, Drs. Moore and Nudelman. (CP 611, 628-29, 1117) The doctors agreed to joint representation. (CP 231, 610-12)

2. TDC failed to timely pursue settlement, exposing its insureds to a judgment in excess of liability limits.

BBL promptly retained a board certified OB/GYN recommended by Ms. Nucci, Dr. Thomas Garite. (CP 231) In November 2008, Dr. Garite reported to Ms. Forbis that the case was "totally indefensible," (CP 241), an opinion reflected in TDC's internal evaluation conducted the previous month. (CP 789 ("the

case does not appear defensible.")) Nonetheless, TDC failed to pursue settlement, prompting the Gabarras, in March 2009, to sue Dr. Nudelman, Dr. Moore, and the Clinic, as well as Overlake Hospital and Children's Hospital. (CP 231)

Defense counsel deposed the Gabarras in August 2009. (CP 231) They proved to be extremely sympathetic plaintiffs with a significant damages claim. (CP 231, 664-65) The BBL lawyers and Overlake's counsel then met with the claims adjusters, including Ms. Nucci. (CP 639) All agreed with Ms. Nucci's assessment that the case presented "significant liability issues," particularly with respect to Dr. Nudelman. (CP 639) According to Overlake counsel Jack Rosendahl, the case was "the worst damaged infant case that we had ever seen," with damages that could exceed $20 million, (CP 665), and should be "settled as soon as possible." (CP 666) Mr. Rosendahl told Ms. Nucci that the $5 million in coverage available to TDC's three insureds "was just totally inadequate for the damages in the case." (CP 666) Ms. Nucci agreed. (CP 642) Nonetheless, TDC did not authorize the BBL lawyers to make an offer or to solicit an offer from plaintiffs' counsel. (CP 231)

By January 2010, BBL lawyers Forbis and Moore were speaking frequently with Dr. Nudelman, who proved to be the

"nervous" client that Ms. Nucci had forewarned. (CP 231, 237) He frequently "waffled." (CP 630) Ms. Forbis repeatedly discussed with Dr. Nudelman the main problems identified by plaintiffs and defense consulting expert Dr. Garite, particularly the fact that Ms. Gabarra's second stage labor was unnecessarily prolonged. (CP 231) Ms. Forbis reported those conversations to Ms. Nucci. (CP 231) For instance, in a January 29, 2010 email, Ms. Forbis told Ms. Nucci that after meeting with Dr. Nudelman for two hours, he still did "not understand criticism of second stage," that he is "nervous about a dep," and wanted the defense to "retain additional experts." (CP 244)

In February 2010, Ms. Nucci received reports from two additional OB/GYNs retained by TDC as internal consultants. (CP 231) Dr. Phillip Goldstein stated that "[t]he standard of care was breached by the failure to deliver the infant by about 4 AM." (CP 249) Dr. John Scanlon reported to Ms. Nucci that the failure to intubate the lifeless infant "for 5 minutes after birth suggests incompetence." (CP 253-54) Yet TDC still did not authorize BBL to pursue settlement. (CP 231-32)

Instead, Ms. Nucci decided that BBL should move for summary judgment on behalf of Dr. Moore, which, if successful,

would have reduced the amount of TDC's available coverage from $5 million to $3 million in a case where *all* of TDC's insureds faced significant excess exposure. (CP 638, 805) Ms. Nucci encouraged Dr. Moore to believe that she would be dismissed, even though Ms. Forbis had told Ms. Nucci that the Gabarras would likely get an expert and that summary judgment would be denied. (CP 630-31)

In May 2010, BBL sought a continuance of the August 2010 trial in light of scheduling conflicts and substantial uncompleted discovery, including a total of 40 new experts that were only recently disclosed by both sides. (CP 257-58) The court set a new trial date of November 15, 2010, and issued an amended scheduling order requiring the completion of discovery by September 27, 2010. (CP 262)

In July 2010, the Gabarras' counsel Joel Cunningham for the first time expressed interest to Ms. Forbis in settlement, suggesting a September mediation. (CP 265) Ms. Forbis forwarded his email to Ms. Nucci, who did not respond. (CP 232, 265) Several weeks later, on August 3, 2010, Mr. Cunningham reiterated his offer to mediate. (CP 273) Ms. Forbis again conveyed that interest to Ms. Nucci. (CP 270) Ms. Nucci directed Ms. Forbis to "indicate we are willing to consider attending mediation but I cannot guarantee

contribution" and that a mediation in early September was, in any event, out of the question. (CP 270) On August 5, Ms. Forbis' paralegal told Mr. Cunningham's paralegal that "[w]e cannot commit to a mediation in early September." (CP 273)

TDC's recalcitrance frustrated not only the Gabarras' lawyer Cunningham, but also Overlake Hospital's defense counsel Rosendahl. (CP 669) Ms. Forbis authorized Mr. Rosendahl to speak directly with Ms. Nucci. (CP 669) Mr. Rosendahl urged Ms. Nucci to mediate, reminding her of their assessment of liability and damages several months earlier in fall 2009. (CP 669) Ms. Nucci told him that TDC's home office had a process to complete, and that it was "out of her hands." (CP 669)

As Ms. Forbis had predicted, the Gabarras obtained an expert, Dr. Richard Sweet, who stated that Dr. Moore should have taken over Ms. Gabarra's care from Dr. Nudelman earlier, after Dr. Nudelman called Dr. Moore to report on her labor on the night of Ms. Gabarra's admission. (CP 357-58) In light to this expert testimony, BBL did not file the summary judgment motion and informed Dr. Moore on September 6, 2010 that she would not be dismissed from the case. (CP 631, 795, 806)

Mr. Rosendahl had believed that the proposal for an early September mediation was the best chance for a settlement. (CP 671) So had plaintiffs' counsel. Thus, on September 22, Mr. Cunningham's partner Paul Luvera, told Mr. Rosendahl that any "reasonable chance of settlement" had passed "more than a month back when we were trying to schedule [mediation], but Amy's client wouldn't agree to do it." (CP 671, 738-39) Ms. Nucci, in a meeting with her supervisor Mr. Luttrell and TDC regional vice president James Dorigan, discussed the fact that TDC's failure to settle the case exposed the company to a bad faith claim by its insureds. (CP 196, 637-38) Mr. Rosendahl later stated that TDC's refusal to mediate put TDC "deep into bad faith." (CP 741)

3. Before counsel could execute a stipulation to extend the discovery cutoff by one month, TDC replaced BBL with three new law firms.

In light of plaintiffs' expert's reliance on the phone call between Drs. Nudelman and Moore, Ms. Forbis and Ms. Nucci discussed with Dr. Moore exactly what Dr. Nudelman had reported to her on the night of November 3, 2006. (CP 794-97) At a strategy meeting on September 23, Ms. Nucci and her supervisor Mr. Luttrell also discussed the challenging liability case they faced in defending Dr. Nudelman's care. With summary judgment no

longer a viable means of limiting TDC's exposure to $3 million, they next discussed having Dr. Nudelman and the Clinic settle; Dr. Nudelman would then "fall on his sword" at trial, so that TDC would not have to pay on Dr. Moore's $2 million policy. (CP 636-37, 703-05) Ms. Nucci and Mr. Dorigan acknowledged that this new strategy would create conflicts both for TDC and for counsel jointly representing its insureds. (CP 636-37, 703-05)

Ms. Nucci then called BBL lawyer Bruce Megard and asked him whether if Dr. Moore and Dr. Nudelman had differing views about their phone call regarding Ms. Gabarra's labor, a conflict would require separate counsel and, if so, whether retaining new counsel would continue the trial date. (CP 360) While TDC's strategy had been to delay settlement negotiations, Ms. Nucci and TDC Vice President Dorrigan knew that the Gabarras had been pressing for an early resolution and would oppose a continuance. (CP 270)

On September 27, Ms. Forbis told Ms. Nucci that she did not know if bringing in a new attorney for Dr. Moore alone would result in a trial continuance. (CP 792) That same day, Dr. Moore left Ms. Nucci a voice mail expressing frustration that she remained a party to the action. (CP 627, 1480, 1848) She conveyed to Ms. Nucci the

advice of an attorney-relative, who suggested that Dr. Moore ask for separate defense counsel. (CP 627, 1480, 1848) Ms. Nucci relayed Dr. Moore's message to the BBL lawyers, who told her they would look into the situation. (CP 792, 799)

The next morning, September 28, Mr. Megard called Portland ethics lawyer Peter Jarvis, who advised him that if there was "finger pointing between the two" clients, BBL could not represent them both, but could represent one with the insureds' informed consent. (CP 715, 1257) Mr. Jarvis and Mr. Megard exchanged drafts of a letter providing for the insureds' consent to BBL's continued representation of Dr. Nudelman. (CP 370-74) Dr. Moore testified that she would have consented. (CP 1480-81)

BBL never got the chance to ask. In a meeting that same day, TDC's Nucci, Dorigan and Luttrell, again considered Dr. Nudelman and the Clinic "throwing in [the] towel" to protect Dr. Moore's $2 million in coverage. (CP 196) Recognizing that TDC faced potential liability to its insureds for bad faith if it did not settle, Mr. Luttrell summarized TDC's strategy: "Don't open up limits." (CP 196-97) Without confirming whether there was or was not in fact a conflict between its insureds or whether they would waive it to allow BBL to continue as counsel for Dr. Nudelman, and without even consulting

with its insureds, TDC decided to replace BBL with three new attorneys. (CP 157, 161, 633, 702, 706-07, 1480) In a call later that day about whether BBL would continue representing Dr. Nudelman, Ms. Nucci directed BBL to withdraw as counsel for all three of its insureds. (CP 633) Surprised, Ms. Forbis told Ms. Nucci that she believed BBL could stay on for at least one of TDC's insureds. (CP 633) Ms. Nucci responded, "That decision has been made for you." (CP 233, 376, 633)

4. The Gabarras' counsel believed TDC orchestrated the substitution of defense counsel in order to obtain a trial continuance and moved to exclude undisclosed defense experts.

The consequences of TDC's decision to replace BBL at this critical juncture were swift and severe. The Gabarras' counsel Mr. Cunningham had cordial relations with defense counsel Forbis and Rosendahl. (CP 666-67, 675-76) On September 24, 2010, Mr. Cunnigham signed a stipulation agreeing to extend the discovery cutoff to October 26, because of difficulties scheduling the Gabarras' experts. (CP 232-33, 282-83, 293-96, 343) He sent the stipulation to defense counsel for signature, but it had not yet been signed when TDC fired BBL on September 28, 2010. (CP 232-33, 347-50) Mr. Rosendahl promptly sent the Cunnigham stipulation

to successor counsel on October 1, in order to let them know they needed to get moving on the case. (CP 680)

On October 5, upon learning that new counsel would seek a continuance, Mr. Cunningham's spirit of cooperation came to an abrupt halt. (CP 752) Not surprisingly, he viewed BBL's withdrawal as a subterfuge by TDC to get a continuance. (CP 681-82) Mr. Cunnigham withdrew the stipulation and informed all defense counsel that he would not only oppose a continuance, but would also seek to exclude all defense expert opinions not disclosed prior to the existing discovery deadline of September 27. (CP 782) Had BBL not been discharged or had successor counsel not requested a trial continuance, Mr. Cunningham would have kept the agreement to extend the discovery cutoff to October 26, and conclude defense expert depositions after September 27, without the threat of sanctions. (CP 678, 681-82, 693, 753)

In opposing the new counsel's motion for a continuance on October 13th, the Gabarras claimed that TDC's insureds had a bad faith claim against TDC that expanded coverage beyond the $5 million in combined limits. (CP 174-79) That day, Ms. Nucci retained Dan Mullin as outside counsel for TDC, in order to "Start creating our record." (CP 201) Mr. Mullin hired legal experts to

advise TDC on various "legal/ethical questions," noting evidence "that suggest[s] The Doctors Company did not properly supervise management of the defendants' defense." (CP 204)

On October 27, the Gabarras increased the pressure on TDC, moving to exclude defense expert opinions not disclosed in advance of the September 27 discovery cutoff. (CP 181-89) On the next day, October 28, Judge Bradshaw denied the insureds' motions to continue the trial date. (CP 520) Emboldened by this ruling, on October 29 the Gabarras proposed that the Bellegrove Clinic stipulate that it was vicariously liable for the actions of Drs. Nudelman and Moore, and that TDC increase Bellegrove's policy limits to $10 million, in return for which Drs. Nudelman and Moore would be nonsuited. (CP 191)

5. TDC settled the Gabarra litigation for $10.15 million and settled its insureds bad faith claims while attempting to preserve its claim against BBL.

The insureds' personal lawyers accused TDC of bad faith and demanded that TDC accept the Gabarras' proposal. (CP 193-94) On November 1, Mr. Mullin advised TDC that it could face liability for bad faith based upon its failure to adequately monitor the defense, and that TDC's liability would be based on its own conduct, and not BBL's.

(CP 208-09)

Judge Bradshaw heard argument on the motion to exclude defense experts on November 5, and took the matter under advisement. (CP 1692-1730) Before he ruled, Overlake agreed to settle with the Gabarras for $9.85 million. (CP 1696) In the face of the insureds' demands that it accept the Gabarra proposal, TDC then reached conditional agreements with its three insureds who agreed to release their bad faith claims, if TDC settled the *Gabarra* litigation "with adequate protection for" both the insureds and TDC. (CP 221-26) Those settlements expressly excluded any release of BBL. TDC then settled the *Gabarra* litigation – and thus confirmed its settlement of the insureds' bad faith claims against it – for an aggregate payment of $10,150,000. (CP 227-28)

B. Procedural History

1. The trial court dismissed TDC's claims against BBL for legal malpractice, breach of fiduciary duty and violation of the Consumer Protection Act.

TDC sued BBL and its attorneys Amy Forbis and Jennifer Moore in King County Superior Court alleging legal malpractice, breach of implied contract, breach of fiduciary duty and violations

of the Consumer Protection Act. (CP 1-14) The case was assigned to the Honorable Dean Lum ("the trial court").

TDC did not contend that it was BBL's client, but argued only that it was a third party beneficiary of the attorney-client relationship between BBL and its insureds. (CP 1039) The trial court dismissed TDC's claims for legal malpractice and for breach of fiduciary duty on summary judgment, holding after considering the factors identified by the Supreme Court in *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994), that there was no genuine issue of material fact and that "Defendants did not owe a duty of care" to TDC as a matter of law. (CP 1961) The trial court held that imposing a tort duty in favor of the non-client carrier would undermine principles of good faith established by *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986), and would burden defense counsel with conflicting loyalties:

> [T]he Court finds that defendants owed no duty to plaintiff TDC under *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994). . . . Importantly, . . . no Washington appellate court has ever extended such a duty from retained insurance defense counsel to the third party insurer either as a matter of law or as applied to a particular set of facts.
>
> . . .
>
> [T]he potential conflicts outline[d] in *Tank* and its progeny have long been recognized in this state, and

> imposing such a new duty on insurance defense counsel would be hugely burdensome. Indeed, there was a huge level conflict between the clients and the plaintiff/insurance company in this case, and imposing a new duty would conflict with insurance defense counsel's paramount duty to his or her client, be burdensome to counsel and would ultimately draw insurance defense counsel into coverage disputes between the insurer and the insured.

(CP 1957, 1960, App. A)

In a subsequent order, the trial court dismissed TDC's remaining implied contract and CPA claims, and held that TDC could not recover the fees paid to successor counsel because it could not show that those fees exceeded what it would have paid if it had retained separate law firms earlier in the case. (CP 2377-79)

IV. ARGUMENT

A. Scope and Standard of Review: This Court's review is limited to the trial court's dismissal of TDC's legal malpractice claim because BBL did not owe TDC a duty of care, which is a legal issue.

The trial court dismissed all four of TDC's claims, but TDC challenges only the dismissal of its legal malpractice claim. This Court's review is limited to the dismissal of TDC's legal malpractice claim on the ground that BBL did not owe TDC a duty of care as a third party beneficiary of BBL's attorney-client relationship with

Drs. Nudelman, Moore and their clinic. TDC conceded below that it was not a "client" of BBL. (§ IV.B.1, *infra*)

TDC has not assigned error to the dismissal of its claims for breach of an implied contract or violation of the Consumer Protection Act and has not argued those issues in its brief. They are therefore waived. *See Behnke v. Ahrens*, 172 Wn. App. 281, 298, ¶ 44, 294 P.3d 729 (2012), *rev. denied*, 177 Wn.2d 1003 (2013). Nor has TDC argued that the trial court erred in dismissing its claim for breach of a fiduciary duty. That issue is also waived. *Hall v. Feigenbaum*, ___ Wn. App. ___, ¶ 9, 319 P.3d 61, 64 (2014) ("We deem an issue not briefed to be waived.")

TDC correctly identifies the standard of review as de novo, but erroneously argues that the question of duty "necessarily involves questions of fact." (App. Br. 10, quoting *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992)) To the contrary, under *Trask*, 123 Wn.2d at 841, the Court balances six factors to determine whether to impose a duty in tort as a matter of law and policy. *See Snyder v. Med. Serv. Corp. of Eastern Washington*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001) ("The existence of a duty is a question of law and depends on mixed considerations of 'logic, common

sense, justice, policy, and precedent."), quoting *Hartley v. State,* 103 Wn.2d 768, 779, 698 P.2d 77 (1985).

Here, the trial court considered undisputed evidence in holding that the law firm retained by a liability carrier to represent its insured owed no duty of care in tort to the carrier. Its ruling was correct. This Court should affirm.

B. As a matter of law, the BBL lawyers owed a duty of care to their clients, and not to TDC, the liability carrier that paid BBL to represent TDC's insureds.

BBL had an attorney-client relationship with its clients, Drs. Nudelman, Moore and their Clinic, and not with the clients' liability carrier TDC. Because the firm owed no duty to TDC, a non-client, TDC has no claim for legal malpractice.

First, TDC never argued, and in fact it conceded below, that TDC was not a "client" of BBL. BBL owed its duties of loyalty only to its clients – Dr. Nudelman, Dr. Moore and the Bellegrove Clinic – and not to TDC, the liability carrier that was paying for the defense.

Second, BBL did not owe TDC a duty of care as a non-client under the *Trask* multi-factor test. As the liability carrier that pays for the defense of its insureds, TDC was not the intended beneficiary of that defense as a matter of law. The Supreme Court in *Stewart Title* held that the "alignment of interests" between a

liability carrier and its insured is insufficient to impose a duty of care in tort. Here, the client's interests in a full defense and indemnity conflicted with TDC's interest to minimize its liability under its policy. TDC was not the intended beneficiary of BBL's legal services to its clients and imposition of a duty of care in favor of the carrier would create irreconcilable conflicts of interest on the part of retained counsel.

Third, TDC has not argued that *Trask* or *Stewart Title* were incorrectly decided or harmful to the public interest, and has not provided any other basis for disregarding the rule of stare decisis. Moreover, its attempt to distinguish *Stewart Title* by arguing that it should not apply to the "egregious" facts here is meritless. (App. Br. 15) As the trial court recognized, the facts here – in which the carrier pursued a defense strategy to save $2 million under Dr. Moore's policy rather than settle – illustrate the wisdom of the rule that precluded BBL from subjugating its loyalties to their clients to the interests of the carrier paying for the defense.

1. TDC was not a client of BBL, the law firm TDC retained to represent TDC's insureds.

TDC acknowledges the general rule that only a client may sue a lawyer for legal malpractice. (App. Br. 11) *See Parks v. Fink*, 173

Wn. App. 366, 377, ¶ 21, 293 P.3d 1275 (2013) ("The general rule is that only an attorney's client may bring an action for attorney malpractice."), *rev. denied*, 177 Wn.2d 1025 (2013); *Strait v. Kennedy,* 103 Wn. App. 626, 630, 13 P.3d 671 (2000) (citing *Trask v. Butler,* 123 Wn.2d 835, 839–40, 872 P.2d 1080 (1994). TDC, the liability carrier that was paying BBL to defend its insureds, was not a client of BBL.

TDC never argued in the trial court, as it now does on appeal, that "TDC was BBL's client." (App. Br. 10) Instead, it argued that the law firm owed TDC a duty as a "non-client," (CP 1039), as a third party beneficiary and in "light of the tripartite relationship between the parties." (CP 1102) This Court should refuse to consider TDC's contention that it was a "client" of the law firm it retained to represent its insureds, as this argument is raised for the first time on appeal. RAP 2.5(a); *Malgarini v. Washington Jockey Club*, 60 Wn. App. 823, 826, 807 P.2d 901 (1991).

In any event, TDC's attempt to raise this issue for the first time on appeal ignores the undisputed summary judgment record. TDC acknowledges that the threshold inquiry into the existence of an attorney-client relationship is "the client's subjective belief that it exists." *Bohn v. Cody,* 119 Wn.2d 357, 363, 832 P.2d 171 (1992)

(App. Br. 11). But TDC conceded that it hired BBL to defend its insureds in the Gabarra litigation and that it considered its insureds, and not TDC, to be the clients of the law firm:

> Q. You understood, at the time that you were contacting Bennett & Bigelow, that you were hiring them to represent your insureds, correct?
>
> A. Yes.
>
> Q. You understood, at the time you were hiring them, that their clients would be your insureds, right?
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> A. That's always been made clear to me, yes.
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> Q. And that's important, isn't it, that the lawyers be representing the insureds, not The Doctors Company, right?
>
> A. Yes.

(CP 697-98)

In light of this undisputed evidence, TDC's repeated contention that it "sought and relied upon BBL's legal advice," (App. Br. 5, 10, 12), is utterly devoid of merit. TDC's rhetoric, no matter how often repeated, cannot establish an issue of fact for trial under CR 56. *See Griswold v. Kilpatrick*, 107 Wn. App. 757, 758, 27 P.3d 246 (2001) (opposition to summary judgment must rely on evidence not speculation).

Where the purported client does not even believe that he or she is entering into an attorney-client relationship, none exists as a matter of law. *See Sherman v. State*, 128 Wn.2d 164, 189, 905 P.2d 355 (1995) ("The record does not suggest that even Dr. Sherman believed he had an attorney-client relationship with AAG Milam."). TDC's own regional vice president, who stated that "Bennett Bigelow & Leedom expressed willingness and ability to represent all three" of TDC's insureds does not so much as hint at a subjective belief that TDC sought legal advice from BBL. (CP 1851) Neither this testimony, nor Ms. Forbis's statement to Ms. Nucci that she "did not believe there was a conflict" (CP 1118), supports TDC's contention that it was BBL's client. (App. Br. 5, 10)

Further, the purported client's subjective belief is insufficient to establish the existence of an attorney-client relationship if that belief is not *objectively* reasonable. *Bohn*, 119 Wn.2d at 364. In *Bohn*, the Court held no attorney-client relationship was formed because "Lucille Bohn's subjective belief was not reasonably based on the attending circumstances." 119 Wn.2d at 364. TDC misrepresents this holding in arguing that here, "as in *Bohn* . . . BBL and TDC had an attorney-client relationship." (App. Br. 12)

If, contrary to the undisputed evidence, TDC had a subjective belief that it was BBL's client, the belief was unreasonable as a matter of law. In holding that a liability carrier's duty of good faith includes the obligation to provide its insured with defense counsel, the Supreme Court in *Tank v. State Farm*, 105 Wn.2d 381, 388, 715 P.2d 1133 (1986), held that "[b]oth retained defense counsel and the insurer must understand that only the *insured* is the client." (Emphasis in original) After *Tank*, a carrier doing business in the State of Washington can have no realistic expectation of entering into an attorney-client relationship with the carrier it has hired to defend its insured under a liability policy.

While the *Tank* Court went on to impose additional specific obligations of counsel retained to provide a defense under a reservation of rights, it characterized the duty to retain competent counsel, who understands that only the insured is counsel's client, as one of the "basic obligations" of the carrier to the insured in *all* cases. 105 Wn.2d at 388.[1] The Supreme Court reaffirmed this most "basic" of rules again in *Stewart Title*, holding that retained insurance defense counsel's "only client" was the insured,

[1] TDC fails to distinguish or even cite *Tank* on this issue.

characterizing the insurer that unsuccessfully sought to impose a duty of care on retained counsel as "a non-client third party payor." *Stewart Title Guar. Co. v. Sterling Sav. Bank*, 178 Wn.2d 561, 565, ¶ 9, 311 P.3d 1 (2013).

Under *Tank* and *Stewart Title,* only the insureds were BBL's clients. As in *Bohn*, even if TDC believed that it was a client of the firm that TDC retained to represent its insureds, that expectation is unreasonable as a matter of law.

2. TDC, the clients' liability carrier, was not the intended beneficiary of the defense provided by the lawyers it retained to represent its insureds under *Trask v. Butler*.

The Supreme 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. *Stewart Title Guar. Co. v. Sterling Sav. Bank,* 178 Wn.2d 561, 567-68, ¶¶ 13-15, 311 P.3d 1 (2013). Anticipating the Court's decision in *Stewart Title*, the trial court correctly refused to impose a duty of care on counsel retained to defend an insured in favor of the liability carrier that pays counsel's fees. This Court should not do so here.

Establishment of a duty of care in tort entails "considerations of public policy which lead the law to conclude that a 'plaintiff's interests are entitled to legal protection against the defendant's conduct.'" *Taylor v. Stevens County,* 111 Wn.2d 159, 168, 759 P.2d 447 (1988) (quoting W. Page Keeton, et al., Prosser and Keeton on Torts § 53, at 357 (5th ed. 1984)) To determine whether, as a matter of law and policy, a duty of care is owed by an attorney to a non-client, the Court in *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994) identified six factors:

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;
4. The closeness of the connection between the lawyer'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 finding liability.

Trask, 123 Wn.2d at 843.

The trial court analyzed each of these factors here. (CP 1958-60, App. A) It properly held, not only that the clients did not intend defense counsel's services to benefit TDC, but further, that extending retained counsel's potential tort liability to the liability

carrier would burden the profession by encouraging conflicts and undermining retained counsel's duty of loyalty to the client. The trial court correctly rejected imposition of a tort duty of care in favor of the liability carrier, holding that the first and sixth *Trask* factor counseled strongly against imposition of a duty of care as a matter of public policy.

The first and most critical inquiry under *Trask* is whether the *client* intended the *primary* purpose of counsel's engagement to serve the interests of someone other than the client. 123 Wn.2d at 842-43; *Stewart Title*, 178 Wn.2d at 566. *See Strait v. Kennedy*, 103 Wn. App. 626, 633-34, 13 P.3d 671 (2000) (relevant inquiry is what client intended to accomplish in litigation, not what non-client plaintiff hoped to gain by it). Here, Dr. Moore and Dr. Nudelman anticipated that after paying annual premiums of $100,000 for liability insurance, retained counsel would "look out solely and exclusively for" their interests in the event they were sued. (CP 1459, 1468, 1479)

Moreover, while TDC's expectations are irrelevant to the inquiry, as a matter of undisputed fact, TDC intended BBL to

represent only its insureds' interests, not TDC's. (CP 697-98)[2] The parties' mutual intent here – that the *insured,* who pays significant premiums for the right to a defense, is the *intended* beneficiary of the attorney-client relationship – is inherent in the nature of liability insurance, in which the defense may be of greater benefit than indemnity. *See Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 765, 58 P.3d 276 (2002).

TDC all but concedes that the *Stewart Title* Court has already rejected its argument that TDC was an "intended" beneficiary of BBL's representation of its insureds, asking this Court to limit the holding of *Stewart Title* to its particular facts. In *Stewart Title,* after analyzing a liability carrier's claim of legal malpractice against a retained law firm under *Trask,* the Court held that only the insured-client was the intended beneficiary of a law firm's representation of that insured, and that the firm owed no duty to the non-client insurance company paying the firm's fees. The Court recognized that while engagement of defense counsel benefits both the liability carrier and its insured, that is not a

---

[2] TDC also cites to BBL lawyer Amy Forbis' testimony that she told Ms. Nucci that "she did not believe there was a potential conflict," (App. Br. 5), but fails to explain the relevance of Ms. Forbis' statement.

sufficient basis for allowing the carrier to sue as a third party beneficiary under *Trask*:

> 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.

178 Wn.2d at 567, ¶ 14.

There is nothing idiosyncratic about this holding. The *Stewart Title* Court expressly rejected the argument that TDC makes here: that "retention of insurance defense counsel is . . . intended to benefit all of the parties the tripartite relationship." (App. Br. 24) The Court "gave no indication in *Stewart Title* that there could be circumstances under which the representation of an attorney retained to represent an insured would be for the benefit of the insurer." *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey PC*, ___ Wn. App. ___, No. 42864-4-II, *8 (April 24, 2014) (liability carrier lacks standing to pursue legal malpractice claims against firm it retained to represent its insured).

TDC's argument, that the "essence of the engagement is to benefit both the insurer and the insured" (App. Br. 24), would eviscerate the *Trask* analysis because it would "make any third party payor an intended beneficiary of a legal services contract to

whom a duty of care runs, in violation of RPC 5.4(c)." *Stewart Title,* 178 Wn.2d at 568, ¶ 15. It would equally eviscerate the relationship between a liability carrier, retained counsel, and the insured-client that the Court carefully crafted in *Tank,* 105 Wn.2d at 388.

Stewart Title obviates the necessity of engaging in the *Trask* analysis as a matter of law. *Clark County Fire Dist.*, at *8. Nonetheless, the trial court properly held that the sixth *Trask* factor "weighs heavily in favor of no duty," because it would be "hugely burdensome" to the legal profession, creating risks of divided loyalties. (CP 1960, App. A) *See Trask*, 123 Wn.2d at 844-45. TDC glosses over this critical factor, blithely stating that "no conflict of interest existed between TDC and its insureds." (App. Br. 27) As the trial court noted however, "there was a huge level conflict between the clients and the plaintiff/insurance company in this case." (CP 1960) TDC embarked on a strategy to save $2 million under Dr. Moore's policy rather than pursue settlement of an excess claim for which liability was reasonably clear as to Dr. Nudelman. (CP 636-37) That strategy conflicted with the interests of some, if not all, of its insureds.

As the trial court recognized, the "potential conflicts and divided loyalties in the present case are even more acute than in *Stewart Title*." (CP 1958) All of the insureds were subject to potential excess liability, a classic potential conflict between carriers and their insureds. *Truck*, 147 Wn.2d at 765. None of the insureds approved of TDC's strategy to delay settlement and oppose an early mediation.

Applying the sixth *Trask* factor, the Court in *Mazon v. Krafchick*, 158 Wn.2d 440, 144 P.3d 1168 (2006), held that the mere *risk* of potential conflicts necessitated a bright line rule rejecting a duty on the part of counsel to co-counsel, even in circumstances where there was *no* conflict as to the particular matter at issue. "Public policy prohibits an attorney from owing a duty to anyone other than the client *when the collateral duty creates a risk of divided loyalty due to conflicts of interest or breaches of confidence*." 158 Wn.2d at 448, ¶ 14 (emphasis added, quoting *Tank*, 105 Wn.2d at 381).

As the trial court noted (CP 1958), the Washington Supreme Court has steadfastly refused to "retreat from or re-write" *Tank's* bedrock principle: retained counsel "must . . . never give[] the insured or the judiciary any reason to ask" whether counsel

represented the policyholder or the insurer. Thomas V. Harris, *Washington Insurance Law* 17-15 (3d ed. 2010). This Court should not do so in this case and affirm the trial court's determination that public policy precludes the imposition of a tort duty of care upon BBL as retained defense counsel in favor of TDC, the liability carrier that retained the firm to represent its insureds.

Ignoring the trial court's focus on the first and last *Trask* factors, TDC places great emphasis on factors two through five, arguing that harm to the carrier caused by retained counsel's malpractice is foreseeable and direct. But as the trial court noted, the foreseeability and certainty of damage could be asserted in any case where a third party non-client alleges malpractice. (CP 1959) In holding that the connection between BBL's conduct and TDC's alleged injury does not "favor either side," the trial court properly identified, but refused to resolve, the "huge causation issues in this case," particularly whether TDC's damages were caused by its own conduct that prompted the insureds to retain counsel at their own expense to purse bad faith claims against TDC. (CP 1960-61)

As to the fifth *Trask* factor – the policy of preventing future harm – the trial court correctly held that TDC failed to show "some huge unmet need" for insurance companies to recover indemnity

payments and defense costs from their retained lawyers. (CP 1960) TDC, a sophisticated carrier with over a billion dollars in assets, does not stand in the same position as the innocent will beneficiaries who were deemed third party beneficiaries in the pre-*Trask* case of *Stangland v. Brock*, 109 Wn.2d 675, 747 P.2d 464 (1987) (App. Br. 26).

Liability carriers are in a unique position to protect themselves from counsel's negligence, as TDC's actions here demonstrate. Liability carriers owe a duty to their insureds to monitor defense counsel. Carriers have the right (and obligation) to direct the defense within certain limits, just as TDC did in this case, when it ordered BBL to move for summary judgment on behalf of Dr. Moore. (CP 638, 805) Carriers may employ internal consultants to review the file, as TDC did here (CP 231, 249), and to avail themselves of the advice of their own attorneys, just as TDC did here. (CP 201)

Moreover, a liability carrier can protect itself by honoring its duty of good faith, as illustrated by what TDC *failed* to do here. Carriers can pursue settlement at any juncture by seeking their insured's consent, and must do so once liability appears probable or otherwise when it is in the interests of its insured. *See Truck Ins.*

Exch. of Farmers Ins. Grp. v. Century Indem. Co., 76 Wn. App. 527, 534, 887 P.2d 455 ("If investigation discloses a likelihood the insured is liable, the insurer has an affirmative duty to make a good faith effort to settle the case."), *rev. denied*, 127 Wn.2d 1002 (1995). Carriers can also, within the confines of RPC 5.4, obtain contractual commitments from, and remedies against, retained counsel that provide protection from excessive fees and deficient services.

The trial court correctly applied the *Trask* factors, holding as did the *Stewart Title* Court, that a liability carrier is not the intended beneficiary of retained counsel's relationship with its client, the insured. This Court should affirm.

3. This Court should not overrule *Trask* to adopt a test for attorney liability to a non-client that was rejected in *Stewart Title*.

The Supreme Court has consistently adhered to *Trask v. Butler's* multi-factor test for attorney liability to a non-party, refusing, most recently, to adopt Section 51 of the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS in *Stewart Title*. This Court should decline to do so now.

This Court refused to deviate from the multifactor test established by *Trask* in *Mazon v. Krafchick*, 158 Wn.2d 440, 144 P.3d 1168 (2006), where the dissent argued, as TDC does here, that

the Court should abandon *Trask* in favor of the three-factor test under RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 51. 158 Wn.2d at 454-56, ¶ 30 (Sanders, J., dissenting). In *Stewart Title*, the Court called for supplemental briefing, in which the parties addressed whether the Court should adopt the RESTATEMENT § 51, under which an attorney can owe a duty to a third party absent an "actual and demonstrable conflict of interest." 178 Wn.2d at 567, ¶ 13. 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 Wn.2d at 567 & n.2.

Given that the *Stewart Title* Court expressly rejected the very standard that TDC now urges this Court to adopt, TDC's assertion that the *Stewart Title* Court "did not discuss" it (App. Br. 16), "did not expressly address § 51" (App. Br. 17), and that "no significant precedent militates against adopting" a different standard (App. Br. 20), is without merit. TDC asks this Court to overrule *Trask* and *Stewart Title*, not to "recalibrate" those decisions. (App. Br. 22) The principle of stare decisis "'requires a clear showing that an established rule is incorrect and harmful before it is abandoned.'"

Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 147, 94 P.3d 930 (2004), quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

Both the *Mazon* and *Stewart Title* Courts refused to deviate from *Trask* to expand the class of third parties who could sue counsel for malpractice, because the client is the only intended beneficiary to whom counsel owes an undivided duty of loyalty and out of concern against encouraging potential conflicts of interest. Making the same arguments that the Supreme Court has already "thoroughly considered and decided" as TDC does here, does not provide a basis for establishing that the prior decisions are "'incorrect and harmful.'" *City of Federal Way v. Koenig*, 167 Wn.2d 341, 347, ¶ 10, 217 P.3d 1172 (2009), quoting *Brutsche v. City of Kent*, 164 Wn.2d 664, 682, 193 P.3d 110 (2008).

Even were TDC to make that argument, nothing in this record shows that the Court's precedent is "incorrect and harmful." TDC is correct that the facts are more "egregious" here, but not for the reasons it asserts. (App. Br. 15, 22) The conflict engendered by the carrier's demands here were not "potential," but palpable: 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.

The trial court correctly anticipated this Court's decision in *Stewart Title*. This Court should affirm dismissal of TDC's complaint because as a non-client, it was owed no duty of care in tort by BBL, the law firm it retained to represent its insureds.

C. TDC's attempt to recover amounts paid to settle its insureds' bad faith claims contravenes the limitations on contribution and indemnity under the Tort Reform Act.

TDC's claims fail for a separate and independent reason – the Tort Reform Act prohibits TDC from recovering in indemnity or contribution the money TDC paid to settle its insureds' bad faith claims. TDC incurred its alleged damages – fees paid to its insureds and payments in excess of limits made to the Gabarras – in settling its insureds' bad faith claims. Even if it holds that BBL owed TDC a duty in care, the Court may affirm on any basis presented in the record. *See* RAP 2.5(a); *Port of Seattle v. Lexington Ins. Co.*, 111 Wn. App. 901, 920, 48 P.3d 334 (2002).

In *Washington State Physicians Insurance Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993), the Court expressly rejected *de facto* claims for indemnification or

contribution against an alleged joint tortfeasor as incompatible with the Tort Reform Act, RCW ch. 4.22, which abolished common law rights of indemnification between tortfeasors, allowing only claims for contribution in limited circumstances. In *Fisons*, a liability carrier sued a potentially liable drug company to recover what the carrier paid to settle the claims against its insured doctor. The Court held that the claims were *de facto* claims for indemnification or contribution, barred by the Tort Reform Act:

> Such an action is simply an indirect attempt to obtain contribution from the drug company. . . .
>
> . . . To allow the insurance company to bring a consumer protection action against Fisons for what is in reality contribution or indemnity would be to allow an 'end-run' around the tort reform act . . . .
>
> Therefore, neither the doctor, nor the doctor's insurer, is entitled to recover settlement amounts paid to the [plaintiff] after their contribution/indemnity rights were extinguished.

Fisons, 122 Wn.2d at 323-24; *accord*, *Toste v. Durham & Bates Agencies, Inc.*, 116 Wn. App. 516, 519-21, 67 P.3d 506 (2003).

TDC claims that BBL's negligence and not its own bad faith, caused its insureds' exposure to an excess judgment at the time it settled the Gabarras' claims, along with its insureds' claims for bad faith. In settling its insureds' bad faith claims rather than litigate

them, however, TDC made certain that it faced no joint and several liability for fault allocated to BBL. TDC also gave up any right to seek indemnity or contribution for any amounts paid to settle its bad faith liability, no matter how TDC labeled those claims. Yet that is exactly what TDC seeks in trying to recover that which it paid to settle bad faith claims –$5 million in extra-contractual payments to settle the *Gabarra* litigation, and roughly $40,000 paid to the insureds' private attorneys – from BBL under the guise of legal malpractice, consumer protection or other causes of action.

Under the Tort Reform Act, TDC cannot seek indemnification or contribution from BBL in the absence of joint and several liability. RCW 4.22.070(1)(a), (b); *see Kottler v. State*, 136 Wn.2d 437, 443-46, 963 P.2d 834 (1998) (party may not seek contribution unless joint and several liability arises under one of the exceptions of RCW 4.22.070). None of the exceptions to RCW 4.22.070 impose joint and several liability on a carrier for the conduct of defense counsel it retains for its insureds. Carriers are not vicariously liable for the negligence of retained counsel because retained counsel is not an agent of the carrier, but rather is an independent contractor. *Evans v. Steinberg*, 40 Wn. App. 585, 588, 699 P.2d 797, *rev. denied*, 104 Wn.2d 1025 (1985). *See also*

Tank, 105 Wn.2d at 388 (retained counsel owes its undivided loyalty to the insured/client and not the carrier that pays its fees). Once TDC settled its insureds' bad faith claims, there was no longer any potential for joint and several liability – nor a corresponding right of contribution under RCW 4.22.070(2).

TDC's attempt to recover what it paid to settle its bad faith liability contravenes public policy. TDC was potentially liable only for its own breach of its duty of good faith. Shifting that liability to retained counsel would render meaningless the non-delegable nature of a liability insurer's duty of good faith and would undermine counsel's duty of undivided loyalty to a client.

D. TDC cannot recover the attorney fees paid to successor counsel in the absence of any evidence that it could have defended its insureds for less than what it actually paid.

The trial court dismissed TDC's claims, under any theory, to recover as damages the fees paid to successor counsel to represent its insureds. (CP 2379) The trial court's order, unchallenged on appeal, was based on undisputed evidence that TDC achieved a significant cost savings in having one law firm jointly represent its insureds over what it would have paid to the separate law firms it hired to take over the case.

TDC has not challenged on appeal the trial court's order that as a matter of law that there was no increased cost, or 'delta' due to the joint representation. That unappealed order it is now the law of the case. *See Beltran v. State, Dep't of Social & Health Services*, 98 Wn. App. 245, 254, 989 P.2d 604 (1999), *rev. granted*, 140 Wn.2d 1021 (2000). Even were this Court to remand, TDC may not recover as damages any fees paid to successor counsel in representing its insureds.

V. CONCLUSION

Insurance defense counsel owes its undivided loyalty to its client, the insured. The trial court correctly refused to impose upon insurance defense counsel a duty of care that could be enforced in a tort action by the liability carrier that pays counsel's fee. This Court should affirm the dismissal of TDC's claims.

Dated this 25th day of April, 2014.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 25, 2014, I arranged for service of the foregoing Brief of Respondents, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 25th day of April, 2014.

V. Vigoren

Victoria K. Vigoren

No. 89178-8

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.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE DEAN S. LUM

APPENDIX TO BRIEF OF RESPONDENTS

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The Honorable Dean S. Lum
Noted for Hearing: April 5, 2013, 10:30 a.m.
With Oral Argument

ORIGINAL

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

THE DOCTORS COMPANY, a California Interinsurance Exchange,

Plaintiff,

v.

BENNETT BIGELOW & LEEDOM, P.S., a Washington professional services corporation; et al.,

Defendants.

No. 12-2-06659-1 SEA

ORDER DENYING TDC'S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT – DUTY OWED

This matter came regularly for hearing on Plaintiff The Doctors Company's (hereafter Plaintiff or TDC) Motion for Partial Summary Judgment – Duty Owed. The Court has considered the record in this case, including but not limited to the following materials submitted by the parties in regard to this motion:

1. Plaintiff's Motion for Partial Summary Judgment – Duty Owed to Be Honest (RPC 4.1(a) and RPC (8.4(c)); Duty to Avoid Conflicts of Interest (RPC 1.7(a)); and Duty to be Competent (RPC 1.1 and RPC 1.3);
2. Declaration of Robert B. Gould in Support of Plaintiff's Motion for Partial Summary Judgment;
3. Defendants' Opposition to TDC's Second Motion for Partial Summary Judgment – Duty Owed;
4. Declaration of Keith D. Petrak in Opposition to TDC's Second Motion for Partial Summary Judgment – Duty Owed;
5. Plaintiff's Motion for Partial Summary Judgment – Duty Owed;

Judge Dean S. Lum
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6. Declaration of M. Anthony Luttrell in Support of Plaintiff's Motion for Partial Summary Judgment – Duty Owed;

7. Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment – Duty Owed;

8. Declaration of Keith D. Petrak in Opposition to TDC's Motion for Partial Summary Judgment – Duty Owed;

9. Declaration of Robert B. Gould in Support of Plaintiff's Rebuttal Memorandum – Motion for Partial Summary Judgment – Duty Owed;

10. Declaration of Robert B. Gould in Support of Plaintiff's Motion for Reconsideration Re: Denying TDC's Motion for Partial Summary Judgment – Duty Owed;

11. Defendants' Motion to Compel Discovery of TDC's Practices Regarding Joint Representation of Insureds and Other Matters;

12. Declaration of Keith D. Petrak in Support of Defendants' Motion to Compel Discovery of TDC's Practices Regarding Joint Representation of Insureds and Other Matters;

13. Declaration of Amy T. Forbis in Support of Defendants' Motion to Compel Discovery of TDC's Practices Regarding Joint Representation of Insureds and Other Matters;

14. Declaration of Sandra Douglas Re: Defendants' Motion to Compel Discovery of TDC's Practices Regarding Joint Representation of Insureds and Other Matters;

15. Plaintiff's Response to Defendants' Motion to Compel Discovery of TDC's Practices Regarding Joint Representation of Insureds and Other Matters;

16. Declaration of Anthony Luttrell in Opposition to Defendants' Motion to Compel Discovery;

17. Declaration of Robert B. Gould in Opposition to Defendants' Motion to Compel Discovery;

18. Declaration of Nancy Nucci in Opposition to Defendants' Motion to Compel Discovery;

19. Defendants' Reply in Support of Motion to Compel Discovery of TDC's Practices Regarding Joint Representation of Insureds and Other Matters;

20. Order Granting Defendants' Motion to Compel Discovery of TDC's Practices Regarding Joint Representation of Insureds and Other Matters;

21. Defendants' Motion for Partial Summary Judgment to Dismiss (1) Claims to Recover What TDC Paid to Settle Bad Faith Claims, (2) Claims for Breach of Fiduciary Duty, and (3) Claims for Breach of Implied Contract;

22. Declaration of Keith D. Petrak in Support of Defendants' Motion for Partial Summary Judgment Regarding Settlement Payments, Breach of Fiduciary Duty and Implied Contract Claims;

23. Declaration of Amy T. Forbis in Support of Defendants' Motion for Partial Summary Judgment Regarding Settlement Payments, Breach of Fiduciary Duty and Implied Contract Claims;

24. Declaration of Robert B. Gould in Opposition to Defendants' Motion for Partial Summary Judgment;

25. Declaration of Daniel F. Mullin;

26. Declaration of Thomas M. Fitzpatrick in Opposition to Defendants' Motion for Partial Summary Judgment;

27. Defendants' Reply in Support of Motion to Dismiss (1) Claims to Recover What TDC Paid to Settle Bad Faith Claims, (2) Claims for Breach of Fiduciary Duty, and (3) Claims for Breach of Implied Contract; and

28. Reply Declaration of Keith D. Petrak in Support of Motion to Dismiss (1) Claims to Recover What TDC Paid to Settle Bad Faith Claims, (2) Claims for Breach of Fiduciary Duty, and (3) Claims for Breach of Implied Contract.

Based on the foregoing and following oral argument by counsel, the Court finds that defendants owed no duty to plaintiff TDC under *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994) as a matter of law under plaintiff's legal malpractice and breach of fiduciary duty claims. Washington law recognizes that a lawyer may owe a duty of care to a third party under certain circumstances if a balancing of the *Trask* factors weighs in favor such a duty. Importantly, however, no Washington appellate court has ever extended such a duty from retained insurance defense counsel to the third party insurer either as a matter of law or as applied to a particular set of facts.

Two trial level cases dealing with this issue, *American Alternative Ins. Corp. v. Bullivant Houser Bailey* and *Stewart Title Guaranty Co. v. Witherspoon Kelly Davenport & Toole, P.S.* (citations in the opening and opposition briefs), are on appeal. In the *Bullivant* case, the trial court found no duty as a matter of law. In the *Stewart Title* case, the trial court found a limited duty to a third party title insurance company and dismissed the lawsuit for other reasons, but on direct

review, several Washington State Supreme Court Justices appeared to be extremely skeptical of Stewart Title's position at oral argument. While it is always dangerous to predict the outcome of a case based on oral argument questions, the questions were consistent with well-established Washington law that a lawyer's sole duty is to his or her client. The Justices appeared to be concerned about conflicting loyalties and duties, and rightfully concerned that expansion of the lawyer's duty would be harmful to clients. If anything, the potential conflicts and divided loyalties in the present case are even more acute than in *Stewart Title* given the insurance defense relationship here. Our Supreme Court has long recognized the conflicts inherent in such a relationship, as discussed in *Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 715 P.2d 1133 (1986)* and this Court has difficulty believing that our Supreme Court would fundamentally retreat from or re-write *Tank*.

Whether defendants owed a duty to plaintiff is governed by the 6 part test in *Trask*, and the Court must balance the following factors: (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; (4) the closeness of the connection between the layer'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 finding liability. The Court has considered and balanced these factors, and finds that they heavily weigh in favor of a finding of no duty, as follows:

1. The extent to which the transaction was intended to benefit the plaintiff.

   The Court considers this a major factor in favor of no duty. The evidentiary record is clear that the plaintiff was not the intended beneficiary of defendants' representation. The clients were the intended beneficiaries to whom the lawyers owed their paramount duty of loyalty, candor, good faith and competence. Plaintiff raises an interesting argument regarding conflicts and requests an order finding that defendants had a "duty to avoid conflicts of interest", but that argument ignores the remainder of the Rules of Professional Conduct, the possibility of waiver of conflicts, and the facts of this case,

including the idea that it may have been (and indeed the likelihood that it was) in the clients' best interest to waive potential conflicts and have Bennett Bigelow & Leedom continue to represent one of the clients. Instead, plaintiff did not ask the clients, fired defendants and hired 3 new law firms. Conspicuously absent from this discussion is any evidence from plaintiff that hiring 3 new law firms on the eve of trial, breaching discovery and deadline agreements with Garbarra's counsel and/or refusing to pursue at least partial conflict waivers with the clients was in the clients' interest.

2. The foreseeability of harm to the plaintiff.

While factually disputed, the Court considers this a minor factor, which could be asserted in every case. Harm to plaintiff is not so remote as to be unforeseeable as matter of law, however.

3. The degree of certainty that the plaintiff suffered injury.

This factor is disputed and does not weigh in either party's favor. As in factor 2, the degree of certainty could be alleged in any case and as discussed in 4, below, there remains a significant dispute about why plaintiff incurred damages.

4. The closeness of the connection between the lawyer's conduct and the injury.

This factor is vigorously disputed factually, and does not favor either side. Defendants assert that plaintiff did not allow them to seek conflict waivers which would have allowed them to represent one of the clients, keep the discovery schedule and keep the trial date. There is no evidence that the individual clients had any objection to this, or that they were even asked, and the evidence suggests that such an arrangement would have been in the clients' best interest, but would have undermined plaintiff's insurance coverage position and defenses. Defendants assert that this strategy went disastrously awry, as neither the Garbarra trial court nor Garbarra's counsel went along, and that the actual clients (insureds) were harmed by plaintiff's attempt to insert its coverage defenses in to the underlying litigation. Defendants assert that this, in addition to other

alleged bad faith conduct by plaintiff, was the reason plaintiff paid millions of dollars in excess of policy limits to settle bad faith claims by the actual clients. Indeed, the actual clients were in huge conflict with the plaintiff much of this time, had hired coverage counsel and were pursuing a bad faith claim against plaintiff. At a minimum, there are huge causation issues in this case.

5. The policy of preventing future harm.

The Court does not find this factor to be dispositive, as Washington has not imposed such a duty to date and there is no evidence to suggest that imposing such a duty would address some huge unmet need or right an unaddressed policy wrong.

6. The extent to which the profession would be unduly burdened by finding liability.

This factor weighs heavily in favor of no duty. Defense counsel has persuasively argued that Washington has not fully adopted the Restatement (3rd) of the Law Governing Lawyers, Section 51, as it would be inconsistent with the majority holding in *Mazon v. Krafchick, 158 Wn.2d 440, 144 P.3d 1168 (2006)* and that insurance defense counsel would be significantly burdened by the proposed "conditional duty" approach. The possibility of conflicts, what is and is not confidential, when interests are aligned and when they diverge: all of these consideration shift over time. In addition and as discussed above, the potential conflicts outline in *Tank* and its progeny have long been recognized in this state, and imposing such a new duty on insurance defense counsel would be hugely burdensome. Indeed, there was a huge level conflict between the clients and the plaintiff/insurance company in this case, and imposing a new duty would conflict with insurance defense counsel's paramount duty to his or her client, be burdensome to counsel and would ultimately draw insurance defense counsel into coverage disputes between the insurer and the insured.

The Court therefore denies plaintiff's motion for partial summary judgment as a matter of law, finding that Washington law does not impose such a duty in the context of a legal malpractice or

breach of fiduciary duty claim at this time. Of course, the Supreme Court or the Court of Appeals (Division II) may decide *Stewart Title* and/or *Bullivant Houser Bailey* differently prior to trial, and the Court would obviously reconsider its order should that occur.

Although defendants did not file a cross-motion for partial summary judgment, they have done so previously, and the Court finds that resolution of this issue is a legal matter for the Court, and that the Court may grant partial summary judgment to defendants on this issue. No genuine issue of material fact exists, as the Court is required to balance the *Trask* factors and make a legal determination of duty as a matter of law.

Thus, it is hereby

ORDERED, ADJUDGED and DECREED that TDC's Motion is denied. As a matter of law, Defendants did not owe a duty of care for the purposes of Plaintiff's Legal Malpractice and Breach of Fiduciary Duty claims. Plaintiff's claims against Defendants for breach of a duty of care and breach of fiduciary duty and its First Cause of Action – Legal Malpractice (Complaint ¶¶ 3.0-3.5) and its Third Cause of Action – Breach of Fiduciary Duty (Complaint ¶¶ 5.0-5.4) are hereby dismissed with prejudice.

The Court also denies plaintiff's motion for partial summary judgment to the extent that it seek of impose a "duty" on defendants as a matter of law on the breach of implied contract claim. However, the Court does not dismiss this claim for several reasons. First, defendant has not filed a cross-motion for partial summary judgment seeking dismissal of this claim, and the implied contract claim does not involve the same *Trask* factors that the Court is required to balance as a matter of law. Second, the fact that defendants have no tort duty as a matter of law to the third party insurer under *Trask* does not mean that they did not breach an implied contract to that third party entity which hired it for the benefit of its insured and which may have suffered damages as a proximate cause of those alleged breaches. Although the evidence may certainly overlap, the implied contract claim must obviously be analyzed differently. Third, even if defendants had filed a cross motion, the record suggests that numerous genuine issues of fact likely exist over the

extent and breach of such an implied contract, causation and damages issues, notwithstanding that these alleged breaches may be characterized as breaching something other than a "duty". Counsel may certainly engage in further motion practice if they believe that the *Trask* factors govern not only legal malpractice duties to a third party, but also implied conditions to a contract directly between the insurer and insurance defense counsel. Absent further motion practice, however, this claim should proceed to trial and the Court suspects that this issue will be a significant matter for jury instructions.

DONE IN OPEN COURT this 23rd day of April, 2013.

Honorable Dean S. Lum

Judge Dean S. Lum
King County Superior Court
516 3rd Avenue
Seattle, WA 98104

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, April 28, 2014 10:08 AM
To: 'Victoria Vigoren'
Cc: Howard Goodfriend; bkeller@byrneskeller.com; kpetrak@byrneskeller.com; ken@appeal-law.com; shelby@appeal-law.com; rbgould@nwlegalmal.com
Subject: RE: The Doctors Company v. Bennett Bigelow & Leedom, et al., Cause No. 89178-8

Rec'd 4-28-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Victoria Vigoren [mailto:victoria@washingtonappeals.com]
Sent: Monday, April 28, 2014 10:02 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Howard Goodfriend; bkeller@byrneskeller.com; kpetrak@byrneskeller.com; ken@appeal-law.com; shelby@appeal-law.com; rbgould@nwlegalmal.com
Subject: The Doctors Company v. Bennett Bigelow & Leedom, et al., Cause No. 89178-8

Attached for filing is an errata letter, in *The Doctors Company v. Bennett, Bigelow & Leedom, P.S., et al.*, Cause No. 89178-8. The attorney filing this document is Howard M. Goodfriend, WSBA No. 14355, e-mail address: howard@washingtonappeals.com.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 28, 2014, I arranged for service of the foregoing errata letter, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 28th day of April, 2014.

V. Vigoren

Victoria K. Vigoren