No. 91871-6

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 72163-1-I

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON, DIVISION I

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.

PETITION FOR REVIEW

LAW OFFICE OF ROBERT B. GOULD
Robert B. Gould, WSBA 4353
Edmonds Bay Building
51 West Dayton St., Suite 208
Edmonds, WA 98020
(206) 633-4442

MASTERS LAW GROUP, P.L.L.C.
Kenneth W. Masters, WSBA 22278
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

IDENTITY OF PETITIONER, CITATION TO DECISION & INTRODUCTION

The Doctors Company (TDC) seeks review of the Court of Appeals decision in ***The Doctors Co. v. Bennett Bigelow & Leedom, P.S.***, Washington State Court of Appeals No. 72163-1-I (May 26, 2015) (copy attached). Insurance-defense counsel (BBL) told TDC that no potential conflicts of interest existed to preclude BBL from representing all three of TDC's insureds, two doctors and their clinic. This was negligent legal advice.

When the actual conflict later developed, BBL lied to TDC and to the insureds (saying that no conflict existed) and then failed to disclose the conflict until the eve of trial. By then it was too late for TDC to remedy the problem with the new counsel it hired, where the trial court denied the new counsel a continuance. This required TDC to pay $7 million above its policy limits to protect its insureds.

When TDC sued BBL for legal malpractice, the trial court dismissed on summary judgment. This Court denied direct review, and then issued ***Stewart Title Guar. Co. v. Sterling Sav. Bank***, 178 Wn.2d 561, 565, 311 P.3d 1 (2013). The Court of Appeals incorrectly held that ***Stewart Title*** bared these claims. TDC has no remedy. The Court should grant review, reverse, and remand for trial.

ISSUES PRESENTED FOR REVIEW

1. Where, as here, an insurance carrier seeks and relies upon legal advice from retained insurance defense counsel regarding conflicts of interest in defending three insureds in one action, but counsel ignore potential conflicts to the sole detriment of the carrier, may the carrier sue counsel for legal malpractice? What if counsel also affirmatively misrepresent an existing conflict to the carrier and the insureds, but only the carrier is harmed by the misrepresentation?

2. In addition, should this Court adopt the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51, where (as here) (a) the interests of the insurer and its insureds wholly align, (b) counsel and clients knew that one of the primary objectives of the representation was that counsel's services would benefit the insurer, (c) imposing such a duty would not impair counsel's performance of obligations to their clients, and (d) the absence of such a duty would make enforcement of those obligations to the client highly unlikely?

3. In the alternative, and under the above facts, is the carrier a third-party beneficiary of the attorney-client relationship, particularly in light of the indisputable fact that if the carrier cannot recover for the attorneys' malpractice, no one can?

STATEMENT OF THE CASE

A. TDC accepted the defense of its insureds without a reservation of rights.

The Court of Appeals correctly states the facts (App. at 2-4), which are also correctly stated, in greater detail and with citations, in TDC's opening and reply briefs. In brief summary, TDC insured Doctors Mitchell Nudelman and Heather Moore, and their employer, Bellegrove Ob/Gyn, Inc. (collectively, the insureds). Mark and Jean Gabarra sued the insureds after their newborn suffered severe disabilities, alleging medical malpractice. TDC accepted the defense of all of its insureds with no reservation of rights.

B. TDC sought, received, and relied upon BBL's legal advice that no conflicts of interest existed.

TDC claims representative Nancy Nucci talked to Bennett Bigelow & Leedom (BBL) attorney Amy Forbis about representing the insureds and conflicts of interest. TDC vice-president Anthony Luttrell told Nucci to ask BBL whether they would have a conflict of interest in representing all three insureds. CP 1851. BBL attorneys Forbis and Jennifer Moore told Nucci that neither a present nor a potential conflict of interest existed. CP 1117-18, 1851. BBL did not disclose a potential conflict or obtain a written waiver under RPC 1.7(4). TDC relied upon BBL's legal advice. CP 1851.

C. BBL falsely told TDC and the insureds that Dr. Manning supported both doctors, failing to disclose an existing conflict of interest.

Dr. Nudelman asked his BBL counsel to retain Dr. Frank Manning, a top expert in his field. CP 521, 1768. By July 20, 2010, attorney Moore had informed Nucci that "Dr. Manning believes the care provided by all was within the standard of care." CP 526. She further stated that Dr. Manning "is not critical at all of the way Dr. Nudelman managed the delivery." *Id.* BBL disclosed Dr. Manning as an expert witness for both doctors. CP 1761.

Attorney Moore's representations to TDC regarding Dr. Manning were false. In an April 2010 call with attorney Moore, Dr. Manning stated unequivocally that while Dr. Moore adhered to the standard of care, Dr. Nudelman did not. CP 1156-57, 1163, 1165,[1] 1758, 1784-85. Dr. Manning was emphatic that he told attorney Moore in no uncertain terms that he could not support Dr. Nudelman:

> I am mortified to read Ms. [Jennifer] Moore's report in which she suggests I was 'not critical of the way Dr. Nudelman managed the delivery.' To offer such a position would require that I accept a 5 or more hours of second stage including picotin augmentation to be within the standard – I simply could never adopt such a position. **I am quite certain Ms. Moore knew I could not serve as an expert for Dr. Nudelman.**

[1] These are Dr. Manning's notes of his conversation with attorney Moore (Ex 200 to his deposition). At the bottom he wrote, "Moore Okay | Can't defend Nudelman." CP 1155, 1165.

CP 1784-85 (emphasis added). But BBL did not disclose Dr. Manning's actual opinion to TDC for months, instead telling TDC that Dr. Manning supported Dr. Nudelman. CP 526.

D. When BBL finally revealed the conflicts shortly before trial, TDC was forced to pay $7 million above its policy limits in order to protect its insureds.

After a continuance, the jury trial was to begin on November 15, 2010. CP 262. The discovery cutoff was September 27, 2010. *Id.* In the weeks before this cutoff, BBL attorneys Forbis and Moore were much more involved in a different medical malpractice trial, ***Costales v. Univ. of Wash. Med. Cntr.***, King County Superior Court No. 08-2-183526-5 SEA. CP 2137, 2142-45, 2210-14, 2247.

In September 2010, Dr. Moore called Nucci to ask for separate counsel. When TDC finally learned that Dr. Manning could not support Dr. Nudelman, TDC told BBL to withdraw due to the conflicts of interest. For each of its insureds, TDC retained both independent counsel (to advise on the insurance situation) and also separate defense counsel. The trial court denied the new counsel's motion for a continuance. TDC was forced to settle with the Gabarras for over $10,000,000 – $7,000,000 above policy limits.

E. TDC sued BBL for legal malpractice, but the trial court granted BBL summary judgment.

TDC sued BBL under various legal theories, including legal malpractice. The trial court granted BBL summary judgment.

F. This Court denied direct review, and the Court of Appeals affirmed, failing to properly analyze any of the legal arguments that TDC raised.

Aware that this Court was considering ***Stewart Title***, TDC sought direct review in this Court in hopes of letting the Court know that another case – involving far more egregious attorney malpractice – was in the pipeline. The Court denied direct review, and much as TDC had feared, it found no cause of action in ***Stewart Title***. As discussed *infra*, however, ***Stewart Title*** does not completely shut the door on an insurer's claim for legal malpractice.

Unfortunately, however, the Court of Appeals felt that ***Stewart Title*** tied its hands. It simply refused to evaluate this case under RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (2000) (App. at 8-10), and held that ***Stewart Title*** eliminates any possibility of an insurer's claim against insurance defense counsel under the third-party beneficiary analysis of ***Trask v. Butler***, 123 Wn.2d 835, 872 P.2d 1080 (1994) (App. at 11-14. Neither analysis is correct.

The Court of Appeals also refused to consider TDC's claim that by giving TDC direct (and faulty) legal advice regarding conflicts

of interest – which TDC reasonably relied upon – and by further withholding and even misrepresenting the existence of an actual conflict of interest, BBL had established and then breached a direct attorney-client relationship with TDC. App. at 4-8. The appellate court held that TDC did not adequately raise this claim in the trial court. *Id.* But it so ruled despite the many places in the record where this issue was discussed (*see infra*); despite the fact that under RAP 2.5(a), it had discretion to consider the issue even if it was not properly raised ("The appellate court ***may*** refuse to review any claim of error which was not raised in the trial court"); and despite RAP 1.2(a) ("Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands"). *Id.*

The upshot is that this Court refused to reach these crucial issues, the Court of Appeals also refused to reach them, and TDC is left without a remedy for millions in damages, where counsel it retained and paid lied about conflicts. If this seems too strong, the Court must remember that ***this is summary judgment***: all facts and reasonable inferences are taken in the light most favorable to TDC.

ARGUMENT

A. The decision is in conflict with numerous decisions of this Court. RAP 13.4(b)(1).

1. This Court's plenary authority over lawyer ethics.

This Court has often repeated its plenary authority over lawyer ethics in Washington. *See, e.g.*, ***In re Dynan***, 152 Wn.2d 601, 98 P.3d 444 (2004) ("In disciplinary proceedings, the Supreme Court has 'plenary authority' and the court's discretion is limited only by the evidence before it"; citing ***In re Disciplinary Proceeding Against Whitt***, 149 Wn.2d 707, 716, 72 P.3d 173 (2003)); ***In re Disciplinary Proceeding Against Anschell***, 149 Wn.2d 484, 501 (2003) (Court "retains the ultimate authority for determining the proper sanction for an attorney's misconduct"; citing ***In re Disciplinary Proceeding Against Anschell***, 141 Wn.2d 593, 607, 9 P.3d 193 (2000)).

This Court thus should be concerned by the ethics violations occurring in this case. This is particularly true in light of the many RPC violations implicated here:

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. Yet if TDC cannot sue due to these ethical breaches, BBL faces no consequences for its serious violations, where TDC stepped up and protected its insureds from suffering any damages as a result of BBL's negligence. This Court should grant review, reverse, and remand for trial in order to protect the integrity of the legal profession.

2. **Stewart Title *and* Trask.**

Stewart Title unequivocally and repeatedly states that the insurer in that case did not show ***enough*** to meet the first ***Trask*** factor, not that an insurer could never meet all of them. *See* ***Stewart Title***, 178 Wn.2d at 567 (mere alignment of interests insufficient to show intent to benefit); 569 (retention letter with limited duty to inform insufficient to show intent to benefit). ***Stewart Title*** does not foreclose an action here.

BBL nonetheless argued 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 facts Stewart Title raised – alignment of interests and contractual duty to report – were, by themselves, insufficient to establish a duty.

By contrast, here we have not only those two factors, but all six ***Trask*** factors. *See* BA 22-27. 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 the 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 exists against creating a safe harbor for malpractice; and

(6) the legal profession is not unduly burdened – or indeed burdened at all – by requiring BBL to properly represent insureds: avoiding and disclosing potential and actual conflicts of interest.

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

Moreover, Stewart Title merely argued 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 and the insureds about the actual conflict;

BBL failed to comply with the case schedule; and

BBL thereby created an untenable litigation situation.

Stewart Title simply did not confront the sorts of egregious malpractice alleged in this case. The strong policies against creating

a safe harbor for legal malpractice, and in favor of ensuring just compensation for those injured by such malpractice, mandate finding a duty under the facts of this case.

3. Stewart Title *and § 51.*

TDC also asks 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 existed between TDC's and the insured's interests; 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 falsely asserted 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*** says nothing dispositive about § 51.

4. Shoemake *and making plaintiffs whole.*

This Court recently restated the fundamental principle that requires reversal here – in a case involving lawyer malpractice – ***Shoemake v. Ferrer***, 168 Wn.2d 193, 198, 225 P.3d 990 (2010) (citing 16 DeWolf &Keller, WASHINGTON PRACTICE: TORT LAW AND PRACTICE §5.1, at 172):

> The guiding principle of tort law is to make the injured party as whole as possible through pecuniary compensation.

That is, tort law fundamentally seeks to ensure that a party harmed by an attorney's legal malpractice may seek just compensation.

Contrary to this bedrock principle, allowing this decision to stand results in an absolute immunity and safe harbor from liability for insurance defense counsel who commit egregious malpractice and misrepresent facts to the insurer. It leaves the only injured party – the insurance company – without a remedy. This Court should grant review and reverse.

B. This petition involves issues of substantial public interest that should be determined by this Court. RAP 13.4(b)(4).

1. TDC adequately raised a direct attorney-client relationship theory and BBL's misrepresentation, but even if it had not, the Court should exercise its discretion to address this important – and fully briefed – question of lawyer ethics.

The appellate court held that TDC did not sufficiently raise its theory that BBL gave TDC direct legal advice regarding conflicts, which TDC justifiably relied upon, and even misrepresented an existing conflict until it was too late to remedy the situation with new counsel. But TDC did properly raise this issue. *See* BA 10-14; Reply 5-7. In addition to the places mentioned at those cites, TDC pled BBL's misrepresentations regarding the absence of potential, and then actual, conflicts (CP 5-7); it argued in response to defendants' summary judgment motions that if the trial court concluded that the defendants owed TDC a duty of care, then summary judgment

should be denied (CP 381); it repeatedly argued BBL's misrepresentations (including vis a vis RPC 4.1) as violations of the attorney-client relationship (CP 389-95).

The simple truth is that TDC – much like the Court of Appeals – felt somewhat hamstrung by decisions like ***Stewart Title***. It plainly argued that BBL misrepresented potential and actual conflicts to TDC, and alleged legal malpractice. The facts in the light most favorable to TDC obviously support this claim. The appellate court simply erred in not reaching the question.

As noted, RAP 2.5(a) is permissive – an appellate court *may* refuse to reach a question it does not believe was sufficiently raised. But even if this Court agrees with the Court of Appeals, it should nonetheless exercise its plenary authority over attorney misconduct and accept review of this monumental question: if an insurer pays above policy limits to protect its insureds from insurance-defense counsel's malpractice, thereby precluding its insureds from suffering damages, does this Court wish to insulate the defense counsel from litigation seeking fair compensation for their malpractice? Creating a safe harbor solely for insurance-defense counsel – where any other lawyer in Washington would be subject to potential liability – raises

the troubling specter of protectionism and unequal treatment. This Court should refuse to shelter wrongdoing of this magnitude.

The counterpoint to this important policy question is an homage to the "independence" of insurance-defense counsel. This Court has limited the heightened duty of such counsel to reservation-of-rights situations. *See* Reply at 9-11. A rule (like RESTATEMENT § 51) that excludes reservation-of-rights situations is sufficient to protect the tripartite relationship among insureds, insurers, and insurance counsel. And where, as here, counsel gives deficient conflict advice, and then goes so far as to misrepresent and hide an actual conflict, counsel should find no safe harbor in this Court.

2. *Assuming* arguendo *that no direct attorney-client relationship exists between TDC and BBL, the Court must allow TDC to enforce RPC 4.1; otherwise, no one can enforce it.*

In a third-party context, the RPC 4.1 violation is perhaps the most troubling. *See* RPC 4.1 ("In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person"). Assuming that no direct attorney-client relationship exists, when BBL misrepresented Dr. Manning's opinion to TDC, it directly 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).

This has nothing to do with whether TDC is a third-party beneficiary of the attorney-client relationship between the insureds and insurance-defense counsel. RPC 4.1 is not limited by any sort of privity doctrine. It simply forbids lawyers from misrepresenting facts or law to any third person. In light of this rule, TDC should be allowed to pursue its claim regarding BBL's obvious negligent misrepresentation of Dr. Manning's willingness to support Dr. Nudelman.

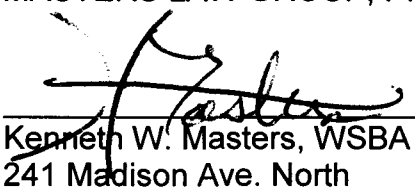
The trial court's refusal to find a duty here essentially eviscerates RPC 4.1: if TDC cannot sue BBL for this violation, no one can. *See, e.g.*, CP 390-91, 1806. This Court should not countenance having an ethics rule designed to protect third parties that even third parties may not enforce. It should reverse and remand for trial.

CONCLUSION

For the reasons stated, this Court should grant review.

RESPECTFULLY SUBMITTED this 25th day of June, 2015.

MASTERS LAW GROUP, P.L.L.C.



Kenneth W. Masters, WSBA 22278
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL AND/OR EMAIL

I certify that I caused to be emailed and/or mailed postage prepaid, via U.S. mail, a copy of the foregoing **PETITION FOR REVIEW** on the 25th day of June 2015, to the following counsel of record at the following addresses:

Robert B. Gould
LAW OFFICE OF ROBERT B. GOULD
Edmonds Bay Building
51 West Dayton St., Suite 208
Edmonds, WA 98020
rbgould@nwlegalmal.com

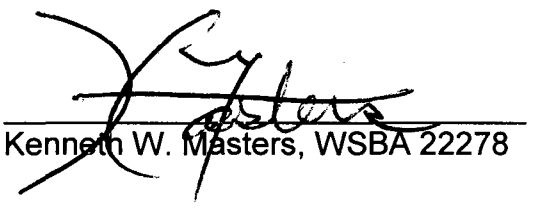
✓ U.S. Mail
✓ E-Mail
____ Facsimile

Bradley S. Keller
Keith D. Petrak
Byrnes Keller Cromwell, LLP
1000 2nd Avenue, Floor 38
Seattle, WA 98104-1094
kpetrak@byrneskeller.com
bkeller@byrneskeller.com

✓ U.S. Mail
____ E-Mail
____ Facsimile

Howard M. Goodfriend
SMITH GOODFRIEND, P.S.
1619 8th Avenue North
Seattle, WA 98109-3007
howard@washingtonappeals.com

✓ U.S. Mail
____ E-Mail
____ Facsimile



Kenneth W. Masters, WSBA 22278

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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.	No. 72163-1-I UNPUBLISHED OPINION FILED: May 26, 2015

VERELLEN, A.C.J. — The Doctors Company (TDC) appeals the summary judgment dismissing its legal malpractice claim against Bennettt Bigelow & Leedom (BBL), the law firm TDC hired to represent its insureds. TDC contends BBL owed it a duty of care based on three legal theories: a direct attorney-client relationship, the *Restatement (Third) of the Law Governing Lawyers* § 51 (2000), and a third party beneficiary of BBL's representation of TDC's insureds. But TDC did not assert a direct attorney-client relationship theory below, our Supreme Court recently declined to adopt *Restatement* § 51, and TDC was not an intended beneficiary of BBL's representation of

TDC's insureds. Therefore, the trial court properly dismissed TDC's legal malpractice claim against BBL. We affirm.

FACTS

TDC insured physicians Mitchell Nudelman and Heather Moore and their employer, Bellegrove Ob/Gyn, Inc. (the insureds). TDC provided a combined $5,000,000 in coverage to its insureds. The two physicians, Bellegrove Ob/Gyn, and Overlake Hospital Medical Center were sued by Mark and Jean Gabarra for medical malpractice after their baby suffered severe disability due to oxygen deficiency during delivery.

TDC undertook the defense without a reservation of rights and retained BBL to defend its insureds. BBL attorneys Amy Forbis and Jennifer Moore represented TDC's insureds. The insureds agreed to joint representation after Forbis, Moore, and TDC's claims representative, Nancy Nucci, explained the risks and benefits of joint representation. Nucci recalled that soon after the case was filed, she discussed with Forbis the possibility of a written conflict waiver. But BBL never obtained the informed written consent of its clients.

Nucci and Anthony Luttrell, TDC's regional assistant vice president, discussed whether BBL's joint representation of TDC's insureds involved a conflict. Luttrell told Nucci "to let [BBL] *tell us* if there was a conflict."[1] In late 2008, Forbis and Moore told Nucci that neither a present nor potential conflict of interest existed in representing all three insureds. Nucci, Forbis, Dr. Nudelman, and Dr. Moore had an "ongoing

[1] Clerk's Papers (CP) at 1851.

discussion" about conflicts throughout the representation.[2] As late as April 2010, Forbis believed "nothing suggested that there were any brewing conflicts" at that time."[3]

Luttrell acknowledged in his deposition that BBL's clients were the insureds, not TDC.

By late July 2010, Moore informed Nucci that Dr. Frank Manning, an expert retained by TDC to represent both physicians, "believe[d] the care provided by all was within the standard of care."[4] Dr. Manning was "not critical at all of the way Dr. Nudelman managed the delivery."[5] Moore stated that when she spoke with Dr. Manning in April 2010, he was fully supportive of both physicians' care. But Dr. Manning adamantly disagreed with Moore's characterization of his expert opinion. He later testified that he was critical of Dr. Nudelman's care, that he could not support him at trial, and that he expressed those views to Moore in April 2010.

Once TDC realized Dr. Manning and several other experts could not fully support Dr. Nudelman, TDC decided BBL should withdraw as defense counsel. Six weeks before trial, BBL withdrew as counsel for TDC's insureds based upon an undisclosed conflict of interest. TDC agreed to pay for independent counsel to represent each of its insureds. TDC also appointed new defense counsel for its insureds. The trial court denied new defense counsels' motion to continue the early November 2010 trial date.

The Gabarras settled with Overlake Hospital for almost $10,000,000. On behalf of its insureds, TDC settled with the Gabarras for $10,150,000, which was $7,000,000

---

[2] CP at 610.

[3] CP at 232.

[4] CP at 71.

[5] CP at 71.

above the insureds' policy limits.

TDC sued BBL under various legal theories, including legal malpractice. The trial court granted BBL summary judgment.

TDC appeals.

ANALYSIS

We review a summary judgment order de novo, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party.[6] Summary judgment is proper when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[7] We review whether a duty of care exists de novo.[8]

TDC argues BBL owed it a duty of care because TDC sought and received legal advice from BBL about conflicts of interest and thus established a direct attorney-client relationship. We disagree. TDC did not raise or preserve this legal theory below.

We "may refuse to review any claim of error" not raised in the trial court.[9] "[A]n argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal."[10] "Similarly, we do not consider theories not presented below."[11] The purpose of this requirement is to ensure that the trial court has an opportunity to

---

[6] Parks v. Fink, 173 Wn. App. 366, 374, 293 P.3d 1275 (2013).

[7] CR 56(c); Bohn v. Cody, 119 Wn.2d 357, 362, 832 P.2d 71 (1992).

[8] Snyder v. Med. Serv. Corp. of E. Wash., 145 Wn.2d 233, 243, 35 P.3d 1158 (2001).

[9] RAP 2.5(a); Bankston v. Pierce County, 174 Wn. App. 932, 941, 301 P.3d 495 (2013); Malgarini v. Wash. Jockey Club, 60 Wn. App. 823, 826, 807 P.2d 901 (1991).

[10] Wash. Fed. Sav. v. Klein, 177 Wn. App. 22, 29, 311 P.3d 53 (2013), review denied, 179 Wn.2d 1019 (2014).

[11] Wilson & Son Ranch, LLC v. Hintz, 162 Wn. App. 297, 303, 253 P.3d 470 (2011).

consider and rule on all claims and legal theories.[12] "We need not consider on appeal a theory which the lower court had no effective opportunity to consider and rule upon at trial."[13]

TDC's numerous motions in the trial court nowhere assert a legal theory of a duty of care based on a direct attorney-client relationship. TDC characterized and argued the issue below as whether BBL owed TDC, as a *nonclient*, a duty of care under Trask v. Butler[14] or under *Restatement* § 51. TDC principally argued BBL owed TDC a duty of care as a "non-client,"[15] based on the "tripartite relationship,"[16] and as an intended third party beneficiary. For example, TDC's first motion for summary judgment framed the duty of care issue under the Trask balancing test and *Restatement* § 51 for nonclients. TDC argued the trial court should conclude that a duty of care arose under the Trask "modified multifactor balancing test."[17] In TDC's "rebuttal" memorandum, TDC framed the issue as whether "professionals [owe] a duty of care to third parties," admitting that BBL's clients were TDC's insureds and not TDC.[18] Moreover, TDC argued in a separate motion for summary judgment that Trask and *Restatement* § 51 govern and that BBL's duty to TDC is derivative from their duty to TDC's insureds: BBL's clients. In TDC's response to BBL's motion for partial summary judgment, TDC concedes it was

---

[12] Evans v. Mercado, 184 Wn. App. 502, 509, 338 P.3d 285 (2014); In re Rapid Settlements v. Symetra Life Ins. Co., 166 Wn. App. 683, 695, 271 P.3d 925 (2012).

[13] Commercial Credit Corp. v. Wollgast, 11 Wn. App. 117, 126, 521 P.2d 1191 (1974).

[14] 123 Wn.2d 835, 872 P.2d 1080 (1994).

[15] CP at 1039.

[16] CP at 1100.

[17] CP at 94.

[18] CP at 813.

not BBL's client, stating that Moore misrepresented a "critical fact to a third person, *not a client*, [TDC]," in July of 2010.[19]

TDC's arguments that it raised the direct attorney-client relationship theory below are not compelling.

First, TDC highlights its trial court references to and quotes from an insurance law treatise regarding the fiduciary duty that an attorney owes to his or her client. Like a legal malpractice claim, "a breach of a fiduciary duty claim must generally be grounded on an attorney–client relationship unless it satisfies the [Trask] multi-factor balancing test."[20] In other words, a lawyer not only owes a client a fiduciary duty but may also owe a nonclient a fiduciary duty under Trask if the "transaction was meant to benefit the [nonclient]."[21] Because TDC argued BBL owed it a fiduciary duty based on the Trask multifactor balancing test for nonclients, TDC's references and quotes about a fiduciary duty did not alert the trial court to a theory that BBL owed TDC a duty of care based on a direct attorney-client relationship with TDC.

Second, TDC argues that its citation of ACE American Insurance Co. v. Sandberg, Phoenix & Von Gontard, PC to the trial court raised the direct duty of care theory.[22] TDC did refer to ACE as recognizing a "direct malpractice claim by a primary insurer against the attorney retained by the primary insurer."[23] But this passing reference did not give the trial court notice that TDC alleged a duty of care based on the

---

[19] CP at 392 (emphasis added).

[20] TOM ANDREWS, ROB ARONSON & MARK FUCILE, THE LAW OF LAWYERING IN WASHINGTON, 15-15 to -16 (2012).

[21] Hetzel v. Parks, 93 Wn. App. 929, 937, 971 P.2d 115 (1999).

[22] 900 F. Supp. 2d 887 (S.D. Ill. 2012).

[23] Id. at 902 (emphasis omitted).

theory that TDC and BBL formed a direct attorney-client relationship. We do not believe that "a single, isolated" citation such as this, made in a response to a partial summary judgment motion, is sufficient to preserve the issue for review.[24] Specifically, TDC never argued to the trial court that an attorney-client relationship was formed between TDC and BBL because TDC requested and received legal advice from BBL.

Third, TDC alleges it apprised the trial court of its duty of care claim in its motion for partial summary judgment. TDC framed the issue as whether an "insurance defense counsel owe[s] a legal duty to the insurance carrier hiring them; paying them; and bearing the financial brunt and results of their negligence."[25] But this general reference was made in the context of a motion clearly based upon Trask, *Restatement* § 51, and duties owed to a nonclient: "Duty Owed by Lawyer to Non-Client"[26]; "lawyer liability to non-clients"[27]; "multifactor balancing test"[28]; "six factors of . . . Trask"[29]; "a duty of care to certain nonclients"[30]; and "a duty pursuant to the modified multifactor balancing test."[31]

Finally, the trial court denied TDC's motion for partial summary judgment focusing on the lack of a duty owed under Trask. The trial court did not mention a direct

---

[24] Olson v. Siverling, 52 Wn. App. 221, 230 n.6, 758 P.2d 991 (1988); see also Wash. St. Boundary Review Bd. for King County, 122 Wn.2d 648, 670, 860 P.2d 1024 (1993) ("In order for an issue to be properly raised before an administrative agency, there must be more than simply a hint or a slight reference to the issue in the record.").

[25] CP at 87.

[26] CP at 88.

[27] CP at 88.

[28] CP at 88.

[29] CP at 90.

[30] CP at 92.

[31] CP at 94.

attorney-client relationship theory or make any reference to whether TDC requested and received legal advice from BBL. Notably, in its motion for reconsideration, TDC did not suggest the trial court failed to address a theory that TDC had formed a direct attorney-client relationship with BBL; rather, TDC argued only that BBL "owed a duty under Trask" to TDC.[32] Therefore, we decline to review TDC's theory raised for the first time on appeal that BBL owed TDC a duty of care based on a direct attorney-client relationship.

TDC argues we should adopt *Restatement* § 51. Because our Supreme Court declined to adopt *Restatement* § 51 in its recent decision of Stewart Title Guaranty Co. v. Sterling Savings Bank, we also decline to adopt it.[33]

Restatement § 51 provides an alternative approach to the limited circumstances in which an attorney owes a nonclient a duty of care. Under *Restatement* § 51(3), an attorney owes this duty to a nonclient when the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient, that such a duty would not significantly impair the lawyer's performance of obligations to the client, and that the absence of such a duty would make enforcement of those obligations to the client unlikely.

The comments to *Restatement* § 51 detail the circumstances when it would apply. For example, an attorney's duty of care to a nonclient arises "when doing so will both implement the client's intent and serve to fulfill the lawyer's obligations to the client without impairing performance of those obligations in the circumstances of the

---

[32] CP at 1037.

[33] 178 Wn.2d 561, 311 P.3d 1 (2013).

representation."[34] This duty "exists only when the client intends to benefit the third person as one of the primary objectives of the representation."[35] In the insurance context under *Restatement* § 51, "a lawyer designated by an insurer to defend an insured owes a duty of care to the insurer . . . [for] matters as to which the interests of the insurer and insured are not in conflict, whether or not the insurer is held to be a co-client of the lawyer."[36] "Recognizing that the lawyer owes a duty to the insurer promotes enforcement of the lawyer's obligations to the insured."[37]

In Stewart Title, a title insurer retained a law firm to defend its insured from a construction company's lien priority claim. The construction company prevailed. The insurer then sued the law firm for legal malpractice. Applying Trask, our Supreme Court held that the law firm did not owe Stewart Title, the nonclient insurer, a duty of care because Stewart Title did not establish it was an intended beneficiary of the law firm's services to the insured.[38]

Stewart Title expressly rejected arguments now advanced by TDC. For example, Stewart Title held that an "alignment of interests is insufficient to find a duty running from [the law firm] to [the title insurer]" for purposes of a legal malpractice claim.[39] An insurer must satisfy Trask to sue its insured's attorney for legal malpractice, and there is

---

[34] RESTATEMENT § 51 cmt. f.

[35] Id.

[36] Id. cmt. g.

[37] Id.

[38] Stewart Title, 178 Wn.2d at 570.

[39] Id. at 567.

no presumption that a nonclient insurer is an intended beneficiary.[40] Importantly, the parties in Stewart Title expressly argued whether *Restatement* § 51 should be adopted. Our Supreme Court did not adopt *Restatement* § 51. Stewart Title's holding, that an insurer must show the "'transaction was *intended* to benefit' a third party to some extent" before a court will permit that party to sue for malpractice, controls here.[41] Further, even if "an insurer's and insured's interests happen to align in some respects," that "does not by itself show that the attorney or client *intended* the insurer to benefit from the attorney's representation" of its insureds.[42] Our Supreme Court "recogniz[ed] that other jurisdictions have come to a different conclusion" by allowing an insurer to sue retained defense counsel for legal malpractice, citing *Restatement* § 51.[43] The holding and analysis of Stewart Title reject the approach taken by states that have adopted *Restatement* § 51.[44]

To the extent TDC contends we should "recalibrate"[45] Trask and Stewart Title by adopting *Restatement* § 51, we decline the invitation. Consistent with Stewart Title's rejection of *Restatement* § 51, we do not adopt it here.

---

[40] See id. (rejecting the argument that "as long as there is no actual conflict of interest between an insurer and its insured, a nonclient insurer is *presumed* to be an intended beneficiary" and can sue the insured's attorney for malpractice).

[41] Id.

[42] Id.

[43] Id. n.2.

[44] Additionally, the dissent in Mazon v. Krafchick vigorously argued for the adoption of the restatement's approach, without success. 158 Wn.2d 440, 455-56, 144 P.3d 1168 (2006) (Sanders, J., dissenting); id. at 447-53 (holding that no duties exist between co-counsel that would allow recovery for lost or reduced prospective fees and declining to expand or abolish the Trask multifactor balancing test by adopting *Restatement* § 51).

[45] Appellant's Br. at 22.

Finally, TDC argues BBL owed TDC a duty of care as a nonclient under Trask. We disagree.

Generally, an attorney owes a duty of care only to clients; privity of contract limits an attorney's liability for malpractice.[46] In other words, only an attorney's client may sue for legal malpractice.[47] But, in limited circumstances, an attorney may owe a nonclient a duty of care based on a multifactor balancing test that our Supreme Court adopted over 20 years ago in Trask.[48] Under this test, we consider six factors to determine if an attorney owes a nonclient a duty of care:

> (1) *The extent to which the transaction was intended to benefit the plaintiff* [, i.e., the nonclient third party suing the attorney];
>
> (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 defendant's conduct and the injury;
>
> (5) The policy of preventing future harm; and
>
> (6) The extent to which the profession would be unduly burdened by a finding of liability.[49]

The first factor "is the 'primary inquiry' in determining an attorney's liability to [nonclient] third parties."[50] "If the attorney's clients or the attorney did not intend the

---

[46] Bohn, 119 Wn.2d at 364-65.

[47] Parks, 173 Wn. App. at 377.

[48] Trask, 123 Wn.2d at 842-43; Stangland v. Brock, 109 Wn.2d 675, 680, 747 P.2d 464 (1987); Dewar v. Smith, ___ Wn. App. ___, 342 P.3d 328, 334-35 (2015).

[49] Trask, 123 Wn.2d at 843 (emphasis added).

[50] Stewart Title, 178 Wn.2d at 566 (quoting Trask, 123 Wn.2d at 842); Leipham v. Adams, 77 Wn. App. 827, 832, 894 P.2d 576 (1995) ("The first of the six Trask factors represents the threshold inquiry.").

representation to benefit a nonclient, that nonclient has no standing to sue."[51] "An 'intended beneficiary' of the transaction under Trask means just that—the transaction must have been intended to benefit [the nonclient third party]."[52] The relevant inquiry is what the client intended to accomplish in the litigation, not what the nonclient hoped to gain by it.[53]

No Washington court has ever applied Trask to hold that an attorney retained by an insurer to defend its insureds owes an additional duty of care to the insurer. Washington courts have generally been reluctant to "extend professional malpractice protection to [nonclient] third parties" because such a duty could create potential conflicts.[54]

In Stewart Title, our Supreme Court recently applied Trask in the insurance defense context, holding that a nonclient insurer who hired an attorney to defend its

---

[51] Dewar, 342 P.3d at 334; see also Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C., 180 Wn. App. 689, 694, 324 P.3d 743, review denied, 181 Wn.2d 1008 (2014).

[52] Strait v. Kennedy, 103 Wn. App. 626, 631, 13 P.3d 671 (2000).

[53] Id. at 631-32.

[54] McKasson v. State, 55 Wn. App. 18, 28, 776 P.2d 971 (1989); see also Trask, 123 Wn.2d at 845 (an attorney hired by the personal representative of an estate did not owe a duty of care to the estate or the estate beneficiaries); Bowman v. John Doe Two, 104 Wn.2d 181, 188-89, 704 P.2d 140 (1985) (an attorney did not owe a duty of care to his client's adversary, the mother, where the attorney was hired by a child seeking alternative residential placement away from his mother); Leipham, 77 Wn. App. at 832-34 (an attorney did not owe estate beneficiaries a duty of care for failing to file a disclaimer of a joint tenancy interest); Harrington v. Pailthorp, 67 Wn. App. 901, 905-10, 841 P.2d 1258 (1992) (an attorney did not owe a former client's ex-husband a duty of care in a custody modification proceeding); Morgan v. Roller, 58 Wn. App. 728, 732-33, 794 P.2d 1313 (1990) (an attorney did not owe beneficiaries of his former client's testamentary plan a duty of care to disclose the attorney's views of the former client's disability); ANDREWS, ARONSON & FACILE, supra, at 15-5 ("[T]he circle of nonclients with standing to raise a malpractice claim remains fairly narrow.").

insured was not an intended beneficiary of the attorney's representation.[55] As we previously noted, the alignment of interests between the insurer and the insured during the representation and the insured's attorney's duty to keep the insurer informed of the litigation's progress were insufficient to establish that the insurer was an intended beneficiary of the representation.[56] An alignment of interests "does not by itself show that the attorney or client *intended* the insurer to benefit from the attorney's representation of the insured."[57] Because neither the attorney nor the client intended the insurer to be a beneficiary of the attorney-client relationship, the insurer did not satisfy the Trask first element.[58] The attorney therefore did not owe the nonclient insurer a duty of care in Stewart Title.

Similarly, Clark County Fire District No. 5 v. Bullivant Houser Bailey PC held that in an insurance defense context, the retention of an attorney to represent a fire district was not intended to benefit the nonclient insurer who retained the attorney to represent its insured.[59]

Consistent with Stewart Title and Clark County Fire, the alleged alignment of interests between TDC and its insureds, together with BBL's corresponding duty to report to the insurer, does not mean that TDC's insureds or BBL intended to benefit TDC. The trial court acknowledged in its detailed order denying TDC's summary judgment motion that TDC "was not the intended beneficiary of [BBL's] representation";

---

[55] Stewart Title, 178 Wn.2d at 569-70.

[56] Id.

[57] Id. at 567.

[58] Id.

[59] 180 Wn. App. 689, 699-700, 324 P.3d 743 (2014).

rather, BBL's clients, the insureds, were the intended beneficiaries to whom BBL owed a duty of care.[60]

The medical malpractice insurance policies here were intended to protect the doctors and their personal assets from liability. The physicians and their employer expected defense counsel "to look out solely and exclusively for [their] interests" in the event of litigation.[61] In sum, TDC retained BBL to represent only TDC's insureds.

TDC's contention that a tripartite, insurance defense relationship is always intended to benefit the insurer as well as the insured would fundamentally alter Trask and "could also 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)."[62] TDC does not establish that BBL or TDC's insureds intended to benefit TDC. Therefore, BBL did not owe TDC a duty of care under Trask.[63]

---

[60] CP at 1958.

[61] CP at 1468.

[62] Stewart Title, 178 Wn.2d at 568. RPC 5.4(c) states that a "lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

[63] TDC's supplemental statement of authorities submitted the day before oral argument in this court cited a case applying a negligent misrepresentation cause of action. But the trial court's summary judgment ruling did not directly or indirectly address any negligent misrepresentation cause of action.

TDC's motions for summary judgment, memorandum submitted on the motions for summary judgment, and its arguments at the summary judgment hearing made no reference to a negligent misrepresentation theory. Although TDC generally alleged BBL's attorneys committed misrepresentation and fraud in their representation of TDC's insureds, these allegations were never offered in the context of a negligent misrepresentation cause of action. The trial court's order did not address any negligent misrepresentation theory, and TDC never referred to negligent misrepresentation theory in its motion for reconsideration. Because TDC did not raise [illegible] theory on summary judgment, that legal theory is not [illegible]

rather, BBL's clients, the insureds, were the intended beneficiaries to whom BBL owed a duty of care.[60]

The medical malpractice insurance policies here were intended to protect the doctors and their personal assets from liability. The physicians and their employer expected defense counsel "to look out solely and exclusively for [their] interests" in the event of litigation.[61] In sum, TDC retained BBL to represent only TDC's insureds.

TDC's contention that a tripartite, insurance defense relationship is always intended to benefit the insurer as well as the insured would fundamentally alter Trask and "could also 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)."[62] TDC does not establish that BBL or TDC's insureds intended to benefit TDC. Therefore, BBL did not owe TDC a duty of care under Trask.[63]

---

[60] CP at 1958.

[61] CP at 1468.

[62] Stewart Title, 178 Wn.2d at 568. RPC 5.4(c) states that a "lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

[63] TDC's supplemental statement of authorities submitted the day before oral argument in this court cited a case applying a negligent misrepresentation cause of action. But the trial court's summary judgment ruling did not directly or indirectly address any negligent misrepresentation cause of action.

TDC's motions for summary judgment, memorandum submitted on the motions for summary judgment, and its arguments at the summary judgment hearing made no reference to a negligent misrepresentation theory. Although TDC generally alleged BBL's attorneys committed misrepresentation and fraud in their representation of TDC's insureds, these allegations were never offered in the context of a negligent misrepresentation cause of action. The trial court's order did not address any negligent misrepresentation theory, and TDC never referred to negligent misrepresentation in its motion for reconsideration. Because TDC did not raise a negligent misrepresentation theory on summary judgment, that legal theory is not before us on appeal.

CONCLUSION

The trial court here properly granted BBL summary judgment concluding that BBL did not owe TDC, a nonclient, a duty of care arising from BBL's representation of TDC's insureds.

We affirm.

WE CONCUR:

COX, J.