No. 48375-1-II

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

TORI KRUGER-WILLIS,

Appellant,

v.

HEATHER HOFFENBURG and JOHN DOE HOFFENBURG,

Respondent.

RESPONSE BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

By way of background, this action arises out of a motor vehicle collision that occurred on February 1, 2008. The Respondent, Heather Hoffenburg, was the permissive user of a vehicle owned by Derek Lebeda, and insured with GEICO General Insurance Company. While operating the Lebeda vehicle, Hoffenburg struck a parked and unoccupied vehicle owned by the Appellant, Tori Kruger-Willis.

Kruger-Willis filed suit in Mason County Superior Court, naming Heather Hoffenburg and Derek Lebeda. The parties stipulated to the dismissal of Derek Lebeda, and the case proceeded with Heather Hoffenburg as sole Defendant. Retained counsel for Ms. Hoffenburg was unable to establish communication with her during the course of the litigation, but appeared on her behalf and mounted a successful defense to the claims brought by Tori Kruger-Willis. At trial, the jury found for Heather Hoffenburg, awarding no compensation to Tori Kruger-Willis.

Prior to trial, counsel for the Appellant invoked the fee-shifting provisions of RCW 4.84.250, affirmatively pleading that her client's claim had a value of $10,000.00 or less. Because the jury found for Heather Hoffenburg, she was the "prevailing party" within the meaning of RCW 4.84.250, and the court entered an award in her favor, providing for costs and attorney's fees expended in the course of the litigation.

Tori Kruger-Willis appealed the court's award of fees to Heather Hoffenburg, alleging that defense counsel was representing the interests of GEICO rather than GEICO's insured, Heather Hoffenburg. The Court of Appeals uniformly rejected these arguments, remanding the case further action consistent with the trial court's prior order. Upon remand, counsel for the Respondent renewed the request for payment of costs and attorney's fees. In response, counsel for the Appellant raised a new objection, alleging that defense counsel lacked the authority to represent Heather Hoffenburg pursuant to RCW 2.44.030 and RPC 1.2(f) and requesting retroactive disqualification of counsel.

Counsel for Ms. Kruger-Willis demanded that defense counsel "produce or prove the authority under which he or she appear[ed]," and asked that the trial court "stay all proceedings by him or her on behalf of the party for whom he or she assume[d] to appear" until such time as authority to act on behalf of Defendant Hoffenburg was demonstrated to the court's satisfaction. RCW 2.44.030. In response to Kruger-Willis' demand to prove "authority to act" on behalf of Heather Hoffenburg, defense counsel cited the provisions of the contract of insurance that afforded coverage to Hoffenburg, and which obligated GEICO to mount a defense on her behalf. The trial court rejected Ms. Kruger-Willis' argument that defense counsel lacked authority to appear on behalf of

Heather Hoffenburg, but made no formal findings of fact. Accordingly, counsel for Ms. Kruger-Willis filed a second appeal, this time alleging error in the trial court's failure to require defense counsel to establish "authority to act."

The Court of Appeals held that the trial court had abused its discretion in failing to require counsel to prove that authority existed. Accordingly, the Court of Appeals remanded the case to the trial court, with instructions to take up the question of whether counsel had "authority to act" and to issue findings regarding the same.

On remand, counsel for Ms. Kruger-Willis renewed her demand that defense counsel prove "authority to act" on behalf of Heather Hoffenburg. Both parties submitted briefing on the issue, and the trial court issued a Memorandum Decision finding that counsel had "authority to act" pursuant to both Washington State law, and the terms of the contract of insurance providing coverage to Ms. Hoffenburg. In response to question of whether defense counsel had "authority to act" under RCW 2.44.030 and RPC 1.2(f), the court found that the "duty to defend" enshrined in both the contract of insurance and Washington State law, not only permitted defense counsel to appear on behalf of Defendant Hoffenburg, but required counsel to do so.

In response to the trial court's finding that defense counsel had "authority to act" on behalf of Heather Hoffenburg, counsel for Ms. Kruger' Willis filed a third appeal. Counsel for the Appellant is asking that this Court reverse the trial court's finding of "authority to act," retroactively disqualify the attorneys who appeared on behalf of Heather Hoffenburg, and return this case to the trial court for a new trial.

While counsel for Ms. Kruger-Willis has consistently maintained that defense counsel have been "defending this case on behalf of GEICO and not their purported client, [Heather] Hoffenburg," it is counsel for the Appellant who is requesting that counsel be forced to withdraw from representation of Heather Hoffenburg, leaving her with no defense. The unspoken consequence of such a withdrawal would be the immediate entry of an order of default, followed by entry of a default judgment against Heather Hoffenburg. In the wake of court-ordered withdrawal by defense counsel, the insurance carrier would be able to cite the insured's "failure to cooperate" as the basis for denial of coverage. Nonetheless, counsel for the Appellant argues, apparently without irony, that defense counsel has been acting on behalf of GEICO rather than Ms. Hoffenburg. Moreover, counsel for the Appellant argues that leaving Ms. Hoffenburg without defense or indemnification is the required outcome, according to Washington State law, the contract of insurance and the Rules of

Professional Conduct, and that the interests of both parties to this litigation would be best served if there was a denial of coverage by the carrier.

By contrast, Respondent takes the position that defense counsel had the "authority to act" on behalf of Heather Hoffenburg, and that the decision to proceed with that defense was the correct one pursuant to Washington State law, the provisions of the contract of insurance and the Rules of Professional Conduct. It is the Respondent's position that the standard being proposed by the Appellant would undermine the "duty to defend" that is enshrined in both law and contract, and that it would jeopardize the insured's right to defense and indemnification.

II. ARGUMENT

A1. The Trial Court Did Not Err When It Found That Counsel Had Authority to Act

The Appellant first raised the question of whether defense counsel had "authority to act" on behalf of Heather Hoffenburg in 2013. Counsel for Ms. Kruger-Willis filed a motion before the trial court demanding, pursuant to RCW 2.44.030, that counsel produce proof of "authority to act" on behalf of Ms. Hoffenberg. Both parties submitted briefing on the merits, but the trial court resolved the issue without issuing formal findings of fact and conclusions of law affirming counsel's "authority to act." In response, counsel for Tori Kruger-Willis appealed, alleging that

the trial court had abused its discretion in affirming counsel's representation of Heather Hoffenburg without making a formal finding regarding the legal and/or contractual basis for that determination. The parties submitted briefing on the merits, but the Court of Appeals decided Ms. Kruger-Willis' appeal on procedural grounds, remanding the case to the trial court for further proceedings on the substantive question of counsel's "authority to act" on behalf of Heather Hoffenburg.

Notwithstanding this Court's express statement that it rejected "the parties' invitation to decide whether defense counsel had authority to appear for [the Respondent] in this case," the Appellant has chosen to imply that this Court has already ruled on the issue currently before it. The Appellant suggests that "[d]espite the defense attorneys' reliance on the insurance contract as a basis for authority...the Court still reversed the trial court's denial of Kruger-Willis' motion under RCW 2.44.030." Contrary to the Appellant's representation, however, this Court did no such thing. The Court of Appeals neither accepted, nor rejected, the arguments raised by the Appellant or the Respondent, but simply remanded the question to the trial court for resolution. The Appellant's suggestion that the issues has already been resolved by the Court of Appeals is inaccurate and inappropriate.

The Appellant argues that defense counsel lacked the "authority to act" on behalf of Heather Hoffenburg, and that this Court must retroactively disqualify defense counsel, voiding all actions performed by the attorneys retained to defend her and returning this case to the status quo ante as of the date that this litigation was filed. Pursuing this line of reasoning to its logical conclusion, this would mean that defense counsel could not appear on behalf of Ms. Hoffenburg in the absence of a direct line of communication with her, and that counsel for Ms. Kruger-Willis would be able to seek entry of an order of default, to be followed thereafter by a default judgment. Per the Appellant, this is not merely the desired outcome from the perspective of a Plaintiff seeking compensation, but outcome required by both Washington State law and the Rules of Professional Conduct. By contrast, the Respondent argues that the Appellant's position turns on a willfully-tortured reading of Washington State law and an impractical, and impracticable, attempt to bifurcate the insurer's "duty to defend" the insured from the ability of retained defense counsel to act on behalf of their clients.

The Appellant has acknowledged that the carrier has a "'duty to defend" that arises "when a complaint against the insured, construed liberally, alleges facts, which could, if proven, impose liability upon the insured within the policy's coverage." *National Security Corporation v.*

Immunex Corp., 176 Wn.2d 872, 879, 297, P.3d 688 (2013). While acknowledging the carrier's obligations in connection with the "duty to defend," the Appellant envisions a legal framework in which the carrier's ability to fulfill those obligations is null and void in those instances in which the insured is either unable, or unwilling, to communicate with counsel. In support of this theory, the Appellant attempts to draw a distinction between the carrier's "duty to defend" and counsel's "authority to act," suggesting that the two are separate and distinct. The core of the Appellant's argument appears to be the notion that attorney's performance of his or her duties "does not convert an attorney into an insurer" for purposes of the "duty to defend." This argument ignores the simple reality that the "duty to defend" does not convert the carrier *into* an attorney. In order to fulfill its "duty to defend," the carrier must retain counsel for its insured, and must be able to rely upon retained counsel to serve as its agent in fulfilling the "duty to defend." Retained counsel must be held to have "authority to act" on behalf of the insured, or the "duty to defend" would be essentially meaningless.

The Appellant has taken the position that the carrier's "duty to defend" is inviolable, but that the provisions of RCW 2.44.030 and RPC 1.2(f) limit the ability of retained counsel to aid in the fulfillment of the carrier's obligation to the insured. Specifically, the Appellant argues that

counsel must withdraw from representation of the insured in those instances in which counsel is retained by the carrier, but unable to establish contact with the insured. Washington courts have long emphasized the importance of the "duty to defend," construing any ambiguities in favor of the insured, and imposing dire consequences upon carriers that fail to meet this obligation. *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 561, 951. P.2d 1124 (1998) citing *R.A. Hanson Co. v. Aetna, Ins Co.*, 26 Wn.App. 290, 295, 612 P.2d 456 (1980), *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 164 P.3d 454 (2007). Additionally, in cases where carriers breach the "duty to defend," carriers may be estopped from denying coverage, regardless of whether the incident would, or would not, have been a covered loss under the four corners of the policy. *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 158 P.3d 276 (2002).

One of the primary obligations of the carrier is the retention of "competent defense counsel for the insured." *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 388, 715 P.2d 1133 (1986). Counsel, in turn, is obligated to "understand that he or she represents only the insured, not the company." Id. Accordingly, "[t]he standards of the legal profession require undeviating fidelity of the lawyer to his client. No exceptions can be tolerated." *Id.* citing *Van Dyke v. White*, 55 Wn.2d 601, 613, 349 P.2d 430 (1960) and RPC 5.4(c). The standard of "undeviating fidelity"

requires that the attorney act in a manner that is consistent with the best interests of the client. Per *Tank*, that means that all "potential conflicts of interest between insurer and insured must be fully disclosed and resolved in favor of the insured." *Id.* The *Tank* case turned, in part, on the question of whether retained defense counsel provided an improper defense, with the insured alleging that the defense had been conducted in a manner that favored the interests of the carrier over those of the insured. *Id.* In the case before this Court, the Appellant is proposing that the standard enunciated in *Tank* be turned on its head. Rather than requiring retained counsel to act on behalf of the insured, the Appellant argues that counsel was instead obligated to undertake a course of conduct that would deprive the insured of both defense and indemnification. It is the Respondent's position that counsel has both the duty, and the authority, to act on behalf of the insured, preventing entry of default and defending his or her interests throughout the course of litigation. By contrast, the Appellant argues that in those instances in which counsel cannot establish contact with the insured, counsel is obligated to withdraw from representation, informing the trial court and the carrier of the reasons for withdrawal, thereby laying the foundation for the carrier to deny coverage secondary to the insured's failure to cooperate in the defense of the case. The Appellant cannot explain how compelling defense counsel to inform the carrier of

the insured's failure to cooperate with his or her defense would be in the insured's best interests, nor can the Appellant explain how compelling defense counsel to withdraw, thereby leaving the insured unrepresented, would be consistent with the "undeviating fidelity" required by RPC 5.4(c). Neither law, nor logic, favors this position, and the basis for counsel's "authority to act" on behalf of the insured is defined, without any ambiguity, in the contract of insurance.

Accordingly to the provisions of the contract of insurance, Heather Hoffenburg was a third party beneficiary of the policy, entitled to all of the rights and protections afforded to the contracting parties. The policy language states that "PERSONS INSURED" include:

> 1. You and your relatives;
> 2. Any other person using the auto with your permission.
> See CP 693-696.

As an "insured," Heather Hoffenburg was entitled to defense and indemnification, with counsel appointed to represent her, and all costs associated with her representation paid by GEICO. See CP 693-696 "Additional Payments We Will Make Under The Liability Coverages." As with any contractual relationship, the party entitled to the benefits of the contract is also subject to the burdens of the contract.

Washington law has consistently held that carriers may condition coverage upon the cooperation of the insured. *Staples v. Allstate Ins. Co.*,

295 P.3d 201 (2013). The GEICO policy under which coverage was extended to Heather Hoffenburg requires that the insured participate "in the investigation of the occurrence...in the conduct of suits...at trials and hearings...in securing and giving evidence...[and] by obtaining the attendance of witnesses." See CP 693-696. "Assistance And Cooperation Of The Insured." Because the carrier reserves the right to deny coverage "unless the insured has fully complied with all the policy's terms and conditions," the potential consequences of failure to cooperate are substantial. See CP 693-696. "Actions Against Us." The Appellant argues that the provisions of both RCW 2.44.030 and RPC 1.2(f) required defense counsel to inform the court of Heather Hoffenburg's failure to respond to communications, then withdraw from representation. Rather than acknowledge the consequences that would follow this course of conduct, the Appellant simply pretends that they do not exist. This Court is not obligated to labor under the same false pretense. The first consequence of defense counsel's withdrawal would be entry of an order of default by Plaintiff's counsel. If no attorney is able to appear on behalf of the insured due to lack of communication with the insured, there would be no basis for the court to deny the Plaintiff's request that the court find the Defendant to be in default. The second consequence of defense counsel's withdrawal would be entry of a default judgment on behalf of

the Plaintiff. In the absence of counsel, there would be no one to challenge either the entry of a judgment, or the amount thereof. The third, and final, consequence of defense counsel's withdrawal would be action by the carrier to deny coverage to the insured for lack of cooperation. The Appellant seems to be blind to the reality that a court order requiring defense counsel to withdraw from representation based upon a lack of communication with the insured would provide the carrier with a legal, and contractual, basis for denial of coverage to the insured. It is impossible to reconcile the course of conduct that the Appellant advocates, and the resulting consequences to the Defendant, with the provisions of RPC 5.4(c) and with the general principle that counsel is required to act on behalf of his or her client rather than in a manner that actively undermines that client's right to defense and indemnification. As a practical matter, it is equally impossible to reconcile the course of conduct that the Appellant advocates with the resulting consequences to her own client. It defies logic to suggest that it would be consistent with the "undeviating fidelity" required by RPC 5.4(c) for Plaintiff's counsel to actively undermine the Defendant's coverage, thereby denying her own client access to the insurance coverage that would otherwise be available to her should she prevail against the Defendant.

The language of the GEICO policy is clear: "[w]e will defend any suit for damages payable under the terms of the policy. We may investigate and settle any claim or suit." See CP 693-696. This provision complements Washington case law establishing, and outlining the requirements of, the "duty to defend." *National Security Corporation v. Immunex Corp.*, 176 Wn.2d 872, 879, 297, P.3d 688 (2013). The rules of professional conduct state that:

> A lawyer shall not purport to act as a lawyer for any person or organization if the lawyer knows or reasonably should know that the lawyer is acting without the authority of that person or organization, unless the lawyer is authorized or required to so act by law or a court order. RPC 1.2(f).

The Appellant has taken the position that defense counsel cannot act on behalf of Ms. Hoffenburg without her express authorization, ignoring the reality that both RCW 2.44.030 and RPC 1.2(f) contemplate occasions in which the lawyer is "authorized or required to so act by law or a court order." RPC 1.2(f). Generally speaking, those circumstances arise in cases in which criminal defense counsel is appointed to represent the interests of a recalcitrant Defendant, but the principle remains the same. In this case, defense counsel was obligated by the terms of the contract, which require the carrier to appoint counsel for its insured, and by the "duty to defend" which imposes a similar requirement. The Appellant's argument that the "duty to defend" can be viewed as separate and distinct

from the "authority to act" is absurd, illogical and contrary to public policy. Moreover, the Appellant's argument ignores the longstanding presumption that an insurance contract will be interpreted, and enforced, with the ordinary meaning that an average purchaser of insurance would give to the terms of the policy. *Campbell v. Ticor Title Ins. Co.*, 166 Wash.2d 466, 472, 209 P.3d 859 (2009). Insofar as the contract expressly states that the carrier "will defend any suit for damages," it defies logic to suggest that the average purchaser of insurance would not read that term as granting retained defense counsel the "authority to act" on behalf of the insured.

A decision that retained defense counsel lacks the "authority to act" on behalf of the insured would run contrary to the principle that "once the duty to defend attaches, insurers may not desert policyholders and allow them to incur substantial legal costs while waiting for an indemnity determination." *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 405, 229 P.3d 693 (2010) citing *Truck Ins. Exch.*, 147 Wash.2d at 761, 58 P.3d 276. If Washington State law imposes a "duty to defend" upon the insurance carrier, but does not recognize a corresponding "authority to act" by counsel retained to effectuate that duty, it is not an exaggeration to suggest that the outcome would be disastrous for both the

insured, who is denied a defense, and the Plaintiff, who may be denied a recovery.

If Washington State were to adopt the Appellant's legal theory, the carrier's "duty to defend" would remain, but the ability of that duty to be effectuated would be extinguished in those cases in which counsel's ability to communicate with the client is disrupted. In this case, the Appellant's legal theory would require defense counsel to withdraw from representation of Heather Hoffenburg and would retroactively disqualify the counsel who have appeared on her behalf. The Appellant assumes, but does not openly acknowledge, that this would necessarily require the jury's verdict, and the resulting judgment against the Appellant, to be vacated. The Appellant similarly assumes, but does not acknowledge, that Heather Hoffenburg would be left without representation, thereby allowing her to enter a default judgment against Ms. Hoffenburg on behalf of her client. Unless GEICO is obligated to retain a series of attorneys, each of whom is forced to withdraw upon concluding that contact cannot be established with Ms. Hoffenburg, the Appellant cannot explain why her legal theory would not render the "duty to defend" meaningless when applied to a non-compliant insured.

3. THE INSURANCE CONTRACT

Washington State law requires that insurance policies be construed in the same manner as all other contracts. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wash.2d 654, 665, 15 P.3d 115 (2000). Contracts are construed as a whole, and are to be given a "fair, reasonable and sensible construction as would be given to the contract by the average person purchasing insurance." *Id.* at 666. Where the terms of the contract are clear, the court must enforce them as written, and may not modify the contract or otherwise interpose ambiguity where none exists within the contract itself. *Id.* Any ambiguity in the contract will be resolved in favor of the insured. *Id.*

The Appellant contends that "there no words, or any references thereto, which would form a reasonable basis for the defense attorneys to believe they were permitted to act on Hoffenburg's behalf without her authority." See Opening Brief of Appellant at P. 21. As outlined above, the Appellant's view of this question turns on the notion that the carrier's "duty to defend" exists independently of defense counsel's "authority to act." A policy of insurance is a contract, and the language of the GEICO policy affording coverage to Heather Hoffenburg is clear and unambiguous. The terms of the policy specifically state that the carrier will retain counsel on behalf of the insured, and "defend any suit for damages payable under the terms of the policy." See CP 693-696. This

guarantee is not unique to the GEICO policy, and is sufficiently ubiquitous that Washington courts have consistently held that carriers are obligated to retain "competent defense counsel for the insured." *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 388, 715 P.2d 1133 (1986). The Appellant's position that the "duty to defend" does not intersect with the "authority to act" is at odds with the language of the contract affording covered to the insured in this case, case law affirming the intersection of these duties and the clear logic of the obligation itself. The canons of contractual interpretation require this Court to enforce the plain meaning of the contract, as a reasonable person would understand it. No reasonable person, reviewing the GEICO policy, would conclude that it does not extend a promise of defense to the insured, with a corollary "authority to act" on the part of counsel retained to provide that defense.

The Appellant's basic position is that the "duty to defend" is separate and distinct from the "authority to act," and that no "authority to act" can be found within the policy. Both of these contentions are demonstrably false, but even if this Court does not view the terms of the contract as affording retained counsel the "authority to act" on behalf of the insured, this Court should find that the "authority to act" is implicit in the "duty to defend." No rational Plaintiff would propose the interpretation advanced by the Appellant, as carrier would be freed from

its obligations, the insured would be exposed, and the Plaintiff would have no source of funds to compensate for injury.

4. THE INSURANCE DEFENSE PERSPECTIVE

Law, and not opinion, should be the foundation for this Court's decisions. Notwithstanding that basic principle, this Court can, and should, consider the public policy implications of its decisions as it weighs the factual and legal issues raised by this case. Accordingly, while the comments of defense counsel, as quoted at length in the Appellant's Opening Brief, do not rise to the level of legal authority, they do represent a clear and cogent summation of the policy considerations underlying the rules.

5. THE RULES OF PROFESSIONAL CONDUCT

The Appellant states that "Kruger-Willis has never disputed that GEICO had a duty to defend Hoffenburg under the terms of Lebeda's insurance contract...." See Appellant's Opening Brief at P. 25. The Appellant takes the position, however, that a separate set of rules, applicable to retained defense counsel, make that duty impossible to fulfill. The Appellant further contends that the attorneys are "attempting to improperly align their unauthorized appearance and acts with duties imposed upon insurance companies instead of duties imposed upon attorneys by RCW 2.44.030 and by the RPCs, which are distinctly

separate and independent duties." *Id.* As indicated above, the Appellant's logic is strained here. While the evidence is very clear that the Appellant is advancing an argument that would leave the insured with neither defense, nor indemnification, the Appellant nonetheless maintains that defense counsel is improperly aligned with the carrier, and not the insured, in attempting to preserve the insured's right defense and indemnification under the contract. The Respondent need not point out to this Court that such an argument makes absolutely no sense. Indeed, if the counsel retained to represent Heather Hoffenburg were acting on behalf of GEICO rather than Ms. Hoffenburg, there would be no better way to further those interests than to engage in exactly the conduct advised by the Appellant: withdrawal from representation of the insured, with notice to the carrier that counsel was forced to withdraw due to lack of cooperation. The carrier would then be in a position to withdraw coverage. The Appellant cannot explain how this would harm the carrier, but the potential for harm to both the insured and the Plaintiff is readily apparent.

The Appellant's sole authority for the premise that there was no authority to act is a 31 year old WSBA Advisory Opinion that is a single paragraph in length. The opinion states as follows:

> [The lawyer was retained by an insurance company to represent an employee of the insured company. The employee was covered under the terms of the insurance

> policy but was no longer employed by the insured.] In reviewing your inquiry, the Committee understood the facts to be that the employee you had been requested to represent had no contact with you, and that in fact no attorney-client relationship had ever been formed. Based upon that understanding of the facts, the Committee was of the opinion that you had no authority to act as a lawyer for the employee, and therefore should not enter a general denial on his behalf.

The advisory opinion is vague to the point of being nearly meaningless, and it contains the hedge that the committee was making certain assumptions about both the facts of the case and of the terms under which the representation had been authorized. The Appellant would have this Court speculate about both the facts of the case giving rise to the advisory opinion and their relationship to those in this case. This Court need not accept the invitation to travel down that rabbit hole. The rules of professional conduct state that:

> A lawyer shall not purport to act as a lawyer for any person or organization if the lawyer knows or reasonably should know that the lawyer is acting without the authority of that person or organization, unless the lawyer is authorized or required to so act by law or a court order. RPC 1.2(f).

As outlined above, the terms of the contract of insurance providing coverage to Heather Hoffenburg outlines the basis for retained counsel's "authority to act" on behalf of the insured. Counsel is authorized to act on behalf of the insured because the "authority to act" and the "duty to defend" are inoperable independently of one another, and because the

terms of the contract expressly authorize counsel to appear on behalf of the insured in order to fulfill the carrier's obligations under the "duty to defend."

A2. Ratification

It is the Respondent's position that the question of ratification is irrelevant and immaterial to this case. The Respondent does not intend to rely upon the Declaration of Heather Hoffenburg, and relies instead upon the legal issues outlined above.

A3. No Surrender of a Substantial Right

The Appellant argues that counsel surrendered a substantial right on behalf of Heather Hoffenburg. Leaving aside the fact that the cases cited by the Appellant assume that these alleged violations occurred within the context of the "unauthorized appearance of an attorney," the Appellant would have this Court believe that Ms. Hoffenburg's interests would have been better served had defense counsel been forced to withdraw, consistent with the Appellant's legal theory regarding the "authority to act." The Appellant would likewise have this Court believe that Ms. Hoffenburg would have been better served by the entry of an order of default, followed by the entry of a default judgment against her. The legal basis for counsel's "authority to act" is very clear, and the suggestion that counsel's representation of Ms. Hoffenburg did not advance her interests is

belied by the fact that Heather Hoffenburg was the prevailing party at a jury trial, with Tori Kruger-Willis left owing her reasonable attorney fees.

A4. Law of The Case Doctrine

As indicated above, the Appellant disingenuously misrepresents this Court's holding in the second of the three appeals in this case. The Appellant persists in the falsehood that the Court of Appeals has already rendered a decision in favor of the Appellant on the question of "authority to act." This Court's own opinion expressly rejects that theory.

B1. Denial of Motion for Reconsideration

The Appellant's argument that substantial justice has not been done due to procedure irregularities is unsupported by the facts. The only irregularities that the Appellant can cite pertain to questions regarding how payment should be issued to Heather Hoffenburg. Those issues, now resolved, had no bearing on the outcome of this case. Indeed, the irregularities cited by the Appellant all followed the jury's decision. As a result, there is neither a legal basis, nor a practical need, for this Court to revisit these issues.

C1. Entry of Judgment

The Appellant's argument against entry of judgment against Tori Kruger-Willis appears to turn on the presumption that GEICO did not consider Heather Hoffenburg to be the "prevailing party" within the

meaning of RCW 4.84.250. The trial court has addressed this issue, correcting its own prior order and identifying Heather Hoffenburg as the judgment creditor. Insofar as the Respondent does not object to this designation, there is no reason that the Court of Appeals need consider the Appellant's arguments nor render a decision contrary to that reached by the trial court.

D1. Denial of Motion for Reconsideration

The Appellant's suggestion that there were procedural irregularities in this case is belied by the court record. The Appellant begins with the suggestion that the trial court granted relief to the Respondent that had not been requested in the Respondent's Motion for Entry of Judgment against Tori Kruger-Willis. The Appellant neglects to acknowledge the simple truth that it was her failure to file a supersedeas bond pursuant to RAP 8.1 that led to Respondent's motion. Had the Appellant complied with the Rules of Appellate procedure, she would not have been left open to entry of judgment prior to the final resolution of her objections.

Moreover, the Appellant makes reference to the alleged "bad faith" conduct of defense counsel, but cannot adduce any evidence that the outcome would have been altered had events unfolded differently. This case was decided by a jury that was unaware of these issues and gave them no consideration.

III. ATTORNEY'S FEES

Pursuant to RAP 18.1, and RCW 4.84.250, the Respondent reserves the right to recover attorney's fees.

IV. CONCLUSION

Under Washington State law, and the law of contract, the insurance carrier has a "duty to defend" and indemnify the insured. The Appellant would have this Court hold the "duty to defend" is separate and distinct from the "authority to act." Such a holding would eviscerate the "duty to defend," leaving insureds exposed and injured parties unable to recover damages. As outlined above, the theory advanced by the Appellant runs counter to both law and logic. The Respondent had authority to act on behalf of Heather Hoffenburg, according to both the "duty to defend" which necessarily includes the "authority to act," and the terms of the contract, which expressly authorizes defense of the insured. Accordingly, the Respondent requests that this Court affirm the trial court.

RESPECTFULLY SUBMITTED this 16th day of June, 2016.

LOCKNER & CROWLEY, INC., P.S.

By: _____
Paul L. Crowley, WSBA #31235
Attorney for Respondent

No. 48375-1-II

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

TORI KRUGER-WILLIS,

Appellant,

v.

HEATHER HOFFENBURG and JOHN DOE HOFFENBURG,

Respondent.

CERTIFICATE OF SERVICE

LOCKNER & CROWLEY, INC., P.S.
Paul L. Crowley, WSBA #31235
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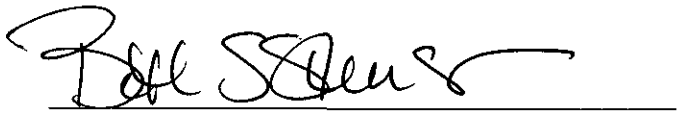
Attorney for Respondent

Certificate of Service

I, Elizabeth Shelton-Stevens, certify that on June 17, 2016 I sent for delivery a true and correct copy of the Response Brief of Respondent drafted by Paul L. Crowley by way of ABC Legal Messenger to be served on the following party:

Counsel for Plaintiff
Alana Kimberly Bullis
1911 Nelson St
Dupont, WA 98327-7743

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



ELIZABETH SHELTON-STEVENS
Paralegal