

No. 69301-8-I

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

DENNIS MORAN and MWW, PLLC,
Plaintiffs–Appellants,

v.

MONITOR LIABILITY MANAGERS, LLC;
CAROLINA CASUALTY INSURANCE COMPANY,
Defendants,

and

PAUL FOGARTY and JANE DOE FOGARTY,
husband and wife and their marital community formed thereof; and
DEARMIN FOGARTY, PLLC,
Defendants–Respondents.

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I. INTRODUCTION

A liability insurer who defends under a reservation of rights owes its insureds enhanced duties under *Tank v. State Farm Fire & Casualty Co.*, 105 Wn.2d 381, 385–87, 715 P.2d 1133 (1986), and under insurance industry standards. Among other things, the insurer must hire an attorney to defend the insured with the understanding that the attorney represents the insured, not the insurance company. *Id.* at 388. Defense counsel owes absolute loyalty to the insured. *Id.* The right to an attorney necessarily includes the right to have privileged communications in furtherance of the defense without fear that the communications will later be used to harm the insured’s coverage position. For this reason, insurance industry standards require that insurance companies segregate the “defense file,” which contains privileged information relating to the defense, from the “coverage file.”

The present case involves one of the clearest, if not the clearest, violations of these fundamental rules ever presented in this Court. Defendant Paul Fogarty—hired by Monitor Liability Managers, LLC and Carolina Casualty Insurance Company (together, Monitor) to handle coverage matters adverse to the insureds—obtained privileged communications from the defense file and used them to harm the insureds’ legal standing. As discussed below, the elements of the tort of intentional

interference with contractual relations fit Mr. Fogarty's conduct like a hand in a glove. The superior court nonetheless dismissed Mr. Fogarty from the case on a CR 12(b)(6) motion, without requiring Mr. Fogarty to provide discovery that will bring to light the nature and full extent of his invasion of the insureds' privileged communications. The superior court's ruling does nothing to discourage attorneys for insurance companies from engaging in the kind of misconduct exhibited here. The insureds, Dennis Moran and MWW, PLLC, respectfully request that this Court reverse the dismissal and remand the case for further proceedings.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in dismissing Mr. Fogarty and Dearmin Fogarty as defendants in the case. CP 299–300 (order of dismissal).

2. The superior court erred in denying Mr. Moran and MWW's motion for reconsideration. CP 559–60 (order denying reconsideration).

III. ISSUES PRESENTED

1. Does the complaint state a claim upon which relief may be granted against Mr. Fogarty and Dearmin Fogarty (Error Nos. 1–2)? **Yes.** *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997). Rulings on CR 12(b)(6) motions to dismiss are reviewed de novo. *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007).

2. Should the superior court have permitted amendment of the complaint instead of dismissing (Error Nos. 1–2)? **Yes.** CR 15(a). Rulings on motions to amend are reviewed for abuse of discretion. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999).

3. Should the superior court have granted reconsideration? **Yes.** CR 59(a). The standard of review for denials of motions for reconsideration is abuse of discretion. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 497, 183 P.3d 283 (2008).

IV. STATEMENT OF THE CASE

The posture of the case commands that the parties rely on the complaint, reasonable inferences that can be drawn from it, and scenarios that are hypothetical or conceivable. *See Howell v. Alaska Airlines, Inc.*, 99 Wn. App. 646, 648–49, 994 P.2d 901 (2000); *Fondren v. Klickitat County*, 79 Wn. App. 850, 854, 905 P.2d 928 (1995).

A. Monitor owed Mr. Moran important duties arising from their insurer–insured contractual relationship.

Dennis Moran is an attorney. CP 20. His law firm, MWW, PLLC, sued Kiribati Seafood Co., LLC, Olympic Packer LLC, and other defendants for unpaid attorney’s fees and costs. *See* CP 21. Kiribati Seafood Co. and Olympic Packer asserted malpractice and breach-of-fiduciary-duty counterclaims against MWW and joined Mr. Moran as a counterclaim defendant. *Id.* For simplicity, we refer to MWW and Mr.

Moran together as “MWW” and refer to the remaining parties in that underlying action together as “Kiribati.”

MWW had a liability insurance policy issued by Monitor and, therefore, tendered to Monitor the defense of the Kiribati counterclaims. *See* CP 122. Monitor provided a defense under a reservation of rights. *Id.* Monitor assigned its senior claims attorney, Temperance Walker, to investigate the claim and oversee the defense. CP 21. Monitor also retained Seattle attorney William Walsh to defend MWW against the Kiribati counterclaims. *Id.* Monitor retained defendant Paul Fogarty and his firm Dearmin Fogarty PLLC (together, Mr. Fogarty) to represent Monitor on coverage matters adverse to MWW. CP 123.

First-party claimants like MWW have a contractual relationship with their insurance company. *E.g.*, RCW 48.30.015 (“First party claimant’ means an individual, corporation, association, partnership, or other legal entity asserting a right to payment as a covered person under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by such a policy or contract.”). The contractual relationship gives rise to numerous benefits owed to the insured. Some of those benefits are enumerated in the unfair claim handling regulations found in WAC 284-30-330 to -380, which include the duty of the insurer to conduct a reasonable and prompt investigation.

The insurer also owes its insured the duty of good faith. *Tank*, 105 Wn.2d at 385–87. An insurance company’s “duty of good faith rises to an even higher level than that of honesty and lawfulness of purpose toward its policyholders: an insurer must deal fairly with an insured, giving equal consideration *in all matters* to the insured’s interests.” *Id.* at 386 (emphasis in original).

Because Monitor defended MWW under a reservation of rights, Monitor owed MWW even greater protections. In *Tank* the Supreme Court concluded “that the potential conflicts of interest between insurer and insured inherent in this type of defense mandate an even higher standard: an insurance company must fulfill an enhanced obligation to its insured as part of its duty of good faith.” 105 Wn.2d at 387. “This enhanced obligation is fulfilled by meeting specific criteria.” *Id.* at 388.

First, “the company must thoroughly investigate the cause of the insured’s accident and the nature and severity of the plaintiff’s injuries.” *Tank*, 105 Wn.2d at 388. Second, the insurer “must retain competent defense counsel for the insured. Both retained defense counsel and the insurer must understand that only the insured is the client.” *Id.* Third, the insurer “has the responsibility for fully informing the insured not only of the reservation-of-rights defense itself, but of all developments relevant to his policy coverage and the progress of his lawsuit. Information regarding

progress of the lawsuit includes disclosure of all settlement offers made by the company.” *Id.* Fifth, “an insurance company must refrain from engaging in any action which would demonstrate a greater concern for the insurer’s monetary interest than for the insured’s financial risk.” *Id.*

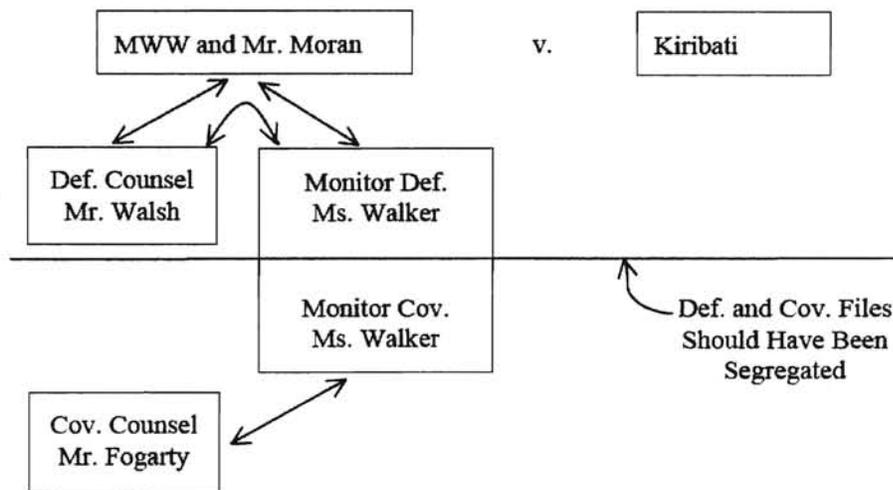
Benefits owed to the insured also arise from insurance industry standards. The insured must be able to have unfettered privileged communications with defense counsel without fearing that such information will later be used to bolster the insurance company’s anti-coverage position. This is why, as the complaint alleges, industry standards “preclude an insurance company from violating attorney-client privileges by transferring privileged information from defense representatives to insurance representatives who might use the information to contest coverage.” CP 27. Industry standards also “require the segregation of claims and coverage files.” *Id.* Indeed, counsel for Monitor conceded to the superior court that “there shouldn’t be cross-pollination between the two files,” meaning the defense and coverage files separately maintained by the insurance company. VRP 37:19–20.

B. Despite having no attorney-client relationship with MWW, Mr. Fogarty took privileged information belonging to MWW. He then used it to harm MWW’s coverage position.

The Monitor adjuster, Ms. Walker, said that Monitor bifurcated the defense file from the coverage file. *E.g.*, CP 178. Although Ms. Walker

wrote an early reservation-of-rights letter, she disclaimed a further role in coverage matters, indicating that her role focused on defending the insureds. *Id.* This was to assure MWW that Monitor was erecting protections as required by *Tank* and industry standards. Mr. Walsh, who was MWW's defense counsel on the Kiribati counterclaims, provided Ms. Walker with defense reports containing privileged information. He did so relying on the truth of Ms. Walker's representations and the existence of protective measures.

The following chart reflects the roles of the various parties in relation to the underlying claim:



Instead of protecting privileged information, Ms. Walker acted as a conduit of privileged information to Mr. Fogarty. CP 123. Mr. Fogarty was an active participant in this misconduct. *Id.* In the superior court,

Monitor withheld a large number of documents from the claim file production. *Id.* But Monitor's privilege log demonstrated that Mr. Fogarty and Ms. Walker had over 100 communications concerning coverage over a prolonged period. *Id.*; CP 249–68. Mr. Fogarty was working hand-in-hand with Ms. Walker to take privileged information from MWW's defense and repurpose it to promote the insurer's position on coverage. CP 123, 249–68.

An example involved a request that MWW made to Monitor asking that it lift the policy limits. CP 168. Mr. Fogarty rejected the request. *Id.* On February 7, 2012, Mr. Fogarty sent a “supplemental coverage letter” asserting new coverage defenses. CP 170–73. The letter quotes privileged reports that Mr. Walsh sent Ms. Walker for the defense file. CP 170–71. One report was dated December 6, 2011. CP 171. Monitor's privilege log reveals an email that day from Ms. Walker to Mr. Fogarty “regarding coverage defenses.” CP 265. Mr. Moran immediately objected to the unauthorized disclosure. CP 175–76. In addition to harming the insureds' coverage position, Mr. Fogarty harmed Mr. Moran's position against Kiribati because the coverage letter would have been discoverable under CR 26(b)(2) had it been requested by Kiribati. CP 124.

C. Mr. Fogarty also used the privileged information in an attempt to defeat MWW's settlement with Kiribati.

MWW alleges that Monitor committed insurance bad faith in its handling of the liability insurance claim. CP 21–28. Monitor's handling of the claim, together with Mr. Fogarty's actions to imperil coverage using privileged matter, exposed MWW to the significant risk of a devastating judgment in excess of the available policy limits. *See* CP 22–23. An insured in this position may independently negotiate a pretrial settlement if his liability insurer refuses in bad faith to settle the plaintiff's claims. *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 736, 49 P.3d 887 (2002). Moreover, an insured who is defended under a reservation of rights always has the right to "make the ultimate choice regarding settlement." *Tank*, 105 Wn.2d at 389. With trial rapidly approaching, and in the face of a likely devastating judgment, MWW negotiated a settlement with Kiribati. MWW then asked the superior court to convene a reasonableness hearing for the settlement under RCW 4.22.060. *See* CP 25.

Meanwhile, Mr. Fogarty still had not sequestered MWW's privileged information. CP 124. He failed to withdraw from his representation of Monitor. *Id.* (citing *In re Firestorm 1991*, 129 Wn.2d 130, 140, 916 P.2d 411 (1996) (discussing disqualification after access to privileged information)). Instead, Mr. Fogarty appeared on behalf of

Monitor and used the privileged information to oppose the settlement with Kiribati during the reasonableness hearing. CP 124. Mr. Fogarty provided the superior court a declaration signed by Ms. Walker. CP 188–91. The declaration paid lip service to the privileged nature of the documents but nonetheless asked the superior court to review the materials in camera. CP 191 (“However, as pointed out in the response, Monitor is prepared to submit further relevant documents to the court for review in camera if requested by the court.”).

In his brief opposing reasonableness, and during the reasonableness argument, Mr. Fogarty again asked to submit the privileged materials. CP 206. He implied that the materials showed collusion and disproved reasonableness. *Id.* The superior court rightly did not accept this invitation, but the invitation itself was improper because Mr. Fogarty effectively represented to the superior court that he had seen the privileged documents, that they demonstrated collusion and unreasonableness, and that the insureds were withholding this evidence from the court. CP 124.

D. Mr. Fogarty’s use of the privileged information interfered with MWW’s contractual relationship with Monitor.

MWW obtained the expert opinion of Professor David Boerner, who concluded that Mr. Fogarty should have known that the insurer owed

obligations to insureds including the enhanced obligations under *Tank*, bifurcation of the file, and the obligation to refrain from elevating the insurer's interest over those of the insured. CP 140–41. Professor Boerner also explained that lawyers are subject to general tort law, including tortious interference. CP 141 (discussing Restatement (Third) of the Law Governing Lawyers § 56 (2000)). Lawyers have a duty to refrain from using an adversary's privileged information. CP 141–42 (discussing RPC 4.4(b) and CR 26(b)(6)). Professor Boerner concluded that Mr. Fogarty directly interfered with the insurer's obligations to MWW by failing to return, sequester, or destroy the documents; by using privileged information to harm MWW's coverage position; and by using the privileged information to oppose the settlement. CP 142–43. "[I]t is my opinion that Mr. Fogarty and Ms. Walker, both attorneys, interfered with Mr. Moran's legitimate expectations of privilege and confidence." CP 144.

Mr. Fogarty's conduct, together with that of Monitor, prevented and delayed settlement with Kiribati. CP 125. Mr. Fogarty exposed the insureds to the risk of a lengthy and expensive trial at which the principal exposure would be the insureds' non-insurance assets. *Id.* After the insureds settled with Kiribati, Mr. Fogarty caused the insureds to incur legal fees relating to Mr. Fogarty's improper use of privilege information. *Id.* Mr. Fogarty damaged the insureds' coverage position by using

privileged and confidential information from the defense of the Kiribati counterclaims. *Id.* Mr. Fogarty also exposed MWW to the unpaid bill of appointed defense counsel. *Id.* See generally CP 22–26 (complaint’s allegations of misconduct and damages).

E. MWW sued Mr. Fogarty for intentional interference with contractual relations. The superior court dismissed the claim.

MWW filed suit against Monitor and Mr. Fogarty. CP 20. Against Monitor, MWW asserted claims for, among other things, violation of the unfair claim handling regulations; violation of the Consumer Protection Act, RCW 19.86.090; violation of the Insurance Fair Conduct Act, RCW 48.30.015; negligent claims handling; breach of contract; constructive fraud; and insurance bad faith. CP 26–31. Against Mr. Fogarty, MWW asserted a claim for intentional interference with contractual relations. CP 29. The allegations also supported a claim against Mr. Fogarty for concerted-action liability. See *infra* Part IV.C.

Mr. Fogarty moved to dismiss under CR 12(b)(6). CP 33–41. Believing that MWW might have alleged breach-of-contract and bad-faith claims against Mr. Fogarty (MWW had not so intended), Mr. Fogarty first argued that MWW failed to state such claims. CP 36–37. Mr. Fogarty also moved to dismiss the claim for intentional interference with contractual relations. CP 38–39. He argued that he owed MWW no duty of non-

interference. CP 38. Mr. Fogarty also argued that MWW could not prove facts establishing bad faith or dishonesty. CP 38–39. Finally, Mr. Fogarty argued that MWW had not alleged that Mr. Fogarty caused MWW any damage. CP 40–41.

MWW filed an opposition, together with a declaration from Professor Boerner and the privilege log showing a large volume of communications between Ms. Walker and Mr. Fogarty. CP 122–285. MWW argued that it did, in fact, state a valid claim for intentional interference with contractual relations. CP 128–31. MWW also argued that Mr. Fogarty could be found liable with Monitor on a concerted action theory of liability. CP 132–33.

In reply, Mr. Fogarty for the first time argued that an agent of one of the contracting parties could not be liable for intentional interference with contractual relations; that Mr. Fogarty was an agent of Monitor; and that the court therefore should dismiss the claim on this new ground. CP 288 (“The Fogarty Defendants, as coverage counsel, were the agent of Monitor/Carolina, a party to the purported contract at issue. Thus, the Fogarty Defendants are not a ‘third party’ and Plaintiffs cannot maintain a tortious interference claim against them.”).

The superior court heard oral argument. VRP 5–22. Afterward, the court entered an order dismissing Mr. Fogarty as a party. CP 299–300.

The court did not specify the basis for its decision. *Id.*

F. The superior court denied reconsideration.

MWW moved for reconsideration. CP 301–12. Among other things, MWW addressed the agency argument raised by Mr. Fogarty in his reply. CP 305–06. Simultaneously, MWW filed a motion for leave to amend the complaint to add conversion and civil-conspiracy claims. CP 465–67. The superior court denied the motion for reconsideration. CP 559–60. But the court never ruled on the motion to amend.

MWW filed a timely notice of appeal. CP 295–300.

V. ARGUMENT

A. Rule 12(b)(6) is reserved for obviously deficient cases in which there is no chance the plaintiff can prevail.

This court reviews CR 12(b)(6) dismissals de novo. *Kinney*, 159 Wn.2d at 842. The classic CR 12(b)(6) situation is when Washington does not recognize a particular cause of action. That is not the case here. Washington recognizes both intentional interference with contractual relations and concerted action theories of liability. *See infra* Parts V.B–C. “Under CR 12(b)(6), dismissal is appropriate only when it appears beyond doubt that the claimant can prove no set of facts, consistent with the complaint, which would justify recovery.” *San Juan County v. No New*

Gas Tax, 160 Wn.2d 141, 164, 157 P.3d 831 (2007). “Such motions should be granted sparingly and with care, and only in the unusual case in which the plaintiff’s allegations show on the face of the complaint an insuperable bar to relief.” *Id.* (quotation omitted).

In ruling on a CR 12(b)(6) motion, the superior court considers hypothetical facts offered by the plaintiff. *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 214, 118 P.3d 311 (2005). “Any hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff’s claim. Hypothetical facts may be introduced to assist the court in establishing the conceptual backdrop against which the challenge to the legal sufficiency of the claim is considered.” *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995) (quotations and brackets omitted). The plaintiff may even articulate hypothetical facts “for the first time on appeal” to show that the superior court erred in dismissing the claim. *Id.*

B. MWW states a valid claim for intentional interference with contractual relations.

1. MWW meets the elements of the claim.

There are five, and only five, elements to a claim for intentional interference with contractual relations:

- (1) the existence of a valid contractual relationship or business expectancy;
- (2) that defendants had knowledge of that relationship;
- (3) an intentional interference inducing or

causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage.

Leingang, 131 Wn.2d at 157. MWW meets each of the elements.

a. Element 1: Existence of a valid contractual relationship or business expectancy

MWW alleged the existence of a valid contractual relationship or business expectancy—namely, the insurance contract with Monitor. By virtue of this contractual relationship, Monitor owed MWW a duty of good faith. *Tank*, 105 Wn.2d at 385–87. Monitor also owed MWW enhanced obligations: Monitor owed MWW a thorough investigation of the claim. *Id.* at 388. Monitor had to retain competent counsel to defend MWW, with the understanding that counsel represents the MWW and not Monitor. *Id.* The insurer had the responsibility of fully informing MWW of all developments relevant to policy coverage and the progress of the lawsuit. *Id.* And Monitor had to refrain from “engaging in any action which would demonstrate a greater concern for the insurer’s monetary interest than for the insured’s financial risk.” *Id.*

Industry standards imposed further obligations on Monitor. As just stated, *Tank* required Monitor to hire competent defense counsel to represent the insured. “Both retained defense counsel and the insurer must understand that only the *insured* is the client.” *Tank*, 105 Wn.2d at 388 (emphasis in original). In other words, the insured in a reservation-of-

rights case has the right to representation by a lawyer who will not use whatever information is learned during the representation to undermine the insured's coverage position. *Id.* (“As stated by the court in *Van Dyke v. White*, 55 Wn.2d 601, 613, 349 P.2d 430 (1960), ‘[t]he standards of the legal profession require undeviating fidelity of the lawyer to his client. No exceptions can be tolerated.’”); RCW 5.60.060 (establishing the attorney-client privilege); RPC 1.6 (establishing the duty of confidentiality); RPC 5.4(c) (“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.”). Industry standards therefore “preclude an insurance company from violating attorney-client privileges by transferring privileged information from defense representatives to insurance representatives who might use the information to contest coverage.” CP 27. As a corollary of this, insurers must segregate the claims and coverage files. *Id.* Counsel for Monitor conceded in the superior court that there shouldn’t be cross-pollination between the two files, meaning the defense and coverage files separately maintained by the insurance company. *See supra* Part IV.A (citing VRP 39:19–20).

b. Element 2: Knowledge of the contractual relationship

Monitor hired Mr. Fogarty to handle coverage issues with respect to MWW, CP 34, and so Mr. Fogarty knew about the contractual relationship. Because Mr. Fogarty is a Washington-licensed attorney who represents insurance companies on coverage matters, it is virtually certain that he knows the duties that insurers owe their insureds.

c. Element 3: Intentional interference inducing or causing a breach or termination of the relationship or expectancy

Mr. Fogarty had no attorney-client relationship with MWW. Indeed, his job was to promote Monitor's anti-coverage position, which necessarily meant undermining MWW's pro-coverage position. Mr. Fogarty nonetheless took and retained privileged information from the defense file, which under *Tank* belonged to MWW alone, and used the information to harm MWW both in its coverage dispute and in its effort to obtain approval for the settlement with Kiribati. *See supra* Part IV.C–D. This was direct interference with the benefits that Monitor owed MWW by virtue of their insurance contract.

Under CR 9(b), the plaintiff is not required to plead intent with particularity. CR 9(b) (“Malice, intent, knowledge, and other condition of mind of a person may be averred generally.”). Nonetheless, it is clear in this case that Mr. Fogarty acted intentionally. On this issue, the jury will

be asked to determine whether Mr. Fogarty desired to bring about the interference or was certain or substantially certain that the interference would occur as a result of his actions. Restatement (Second) of Torts § 766B comment d (1979). The same facts that show that Mr. Fogarty knew about the contractual relationship between Monitor and its insureds—including the duties that Monitor owed MWW—demonstrate that Mr. Fogarty either desired to bring about the interference or was substantially certain that the interference would occur.

d. Element 4: Improper purpose or improper means

In the superior court, Mr. Fogarty cited *Kieburtz & Associates, Inc. v. Rehn*, 68 Wn. App. 260, 267, 842 P.2d 985 (1992), for the proposition that a plaintiff must show that the defendant had “a duty of noninterference.” CP 38. But that opinion makes clear that “duty of noninterference” refers to the element of interference for an improper purpose for using improper means. *Id.* MWW easily satisfies this element.

With respect to impropriety, the Restatement (Second) of Torts gives seven factors: (a) the nature of the actor’s conduct; (b) the actor’s motive; (c) the interests of the other with which the actor’s conduct interferes; (d) the interests sought to be advanced by the actor; (e) the social interests in protecting the freedom of action of the actor and the

contractual interests of the other; (f) the proximity or remoteness of the actor's conduct to the interference; and (g) the relations between the parties. Restatement (Second) of Torts § 767. This is a fact-intensive analysis should be performed by the jury and is beyond the scope of a CR 12(b)(6) motion. *See id.* comment a (stating that “the weight carried by these factors may vary considerably and the determination of whether the interference is improper may also vary”). The comments to Restatement § 767 state: “Since the determination of whether an interference is improper is under the particular circumstances, it is an evaluation of these factors for the precise facts of the case before the court; and, as in the determination of whether conduct is negligent, it is usually not controlling in another factual situation.” *Id.* comment b. Ample facts show that Mr. Fogarty's interference was improper.

Professor Boerner explained that lawyers have a duty to refrain from using an adversary's privileged information. CP 141–42. He concluded that Mr. Fogarty directly interfered with the insurer's obligations to MWW by failing to return, sequester, or destroy the documents; by using privileged information to harm the insureds' coverage position; and by using the information to oppose the Kiribati settlement. CP 142–43; *see also* Restatement (Third) of the Law Governing Lawyers § 60 comment m (“Where deceitful or illegal means

were used to obtain [non-client privileged] information, the receiving lawyer and that lawyer's client may be liable, among other remedies, for damages for harm caused or for injunctive relief against use or disclosure.”).

The misuse of confidential information has been found to support a claim for tortious interference. In *Cardiac Pacemakers, Inc. v. Aspen II Holding Co.*, 413 F. Supp. 2d 1016, 1020 (D. Minn. 2006), a medical device manufacturer tailored its pricing to hospitals and included a confidentiality clause in its sales contracts. However, the defendant, a consulting company, reviewed the confidential pricing terms given to various hospitals to advise them on negotiations with the manufacturer. The court held that the manufacturer was entitled to pursue a tortious interference claim against the consultant based on the consultant's improper use of the confidential pricing information. *Id.* at 1024.

In *Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 757–58 (Iowa 1999), a sensor manufacturer formed an agreement with the John Deere company to supply sensors for John Deere tractors. Later, John Deere formed a side agreement with two employees of the manufacturer to go to an alternative design based on the manufacturer's proprietary information. The court held that Deere's resort to the two employees constituted tortious interference. *Id.* at 762–64. Here too, Mr.

Fogarty's misuse of MWW's privileged information directly undermined MWW's interests in the insurance contract and supports a claim for intentional interference with contractual relations.

e. Element 5: Resultant damage

As discussed above, *see supra* Part III.D, Mr. Fogarty's conduct prevented and delayed settlement with Kiribati. Mr. Fogarty exposed the insureds to the likelihood of a lengthy and expensive trial at which the principal exposure would be the insureds' non-insurance assets. After the insureds settled with Kiribati, Mr. Fogarty caused the insureds to incur attorney fees relating to the improper use of privilege information. Mr. Fogarty also damaged the insureds' coverage position using privileged and confidential information from defense file. And Mr. Fogarty exposed MWW to the unpaid bill of appointed defense counsel.

2. MWW does not have to prove bad faith or dishonesty.

In the superior court, Mr. Fogarty cited *Havsy v. Flynn*, 88 Wn. App. 514, 945 P.2d 221 (1997), for the proposition that the plaintiff must "be able to produce a set of facts showing dishonesty or bad faith. CP 38. The facts in *Havsy* were as follows: Someone was injured in an auto accident and received treatment from Dr. Scott Havsy. 88 Wn. App. at 516. The injured person had insurance from State Farm, which asked Dr. Frederick Flynn to review the medical records and give an opinion on

whether Dr. Havsy's charges were reasonable and necessary. *Id.* Based on Dr. Flynn's report, State Farm refused to pay part of Dr. Havsy's bill. *Id.* at 517. The insured assigned her rights against State Farm to Dr. Havsy, who then sued Dr. Havsy for interference with contract both as an assignee of the insured and in Dr. Havsy's own right. *Id.* The court of appeals affirmed a CR 12(b)(6) dismissal.

The court of appeals first affirmed dismissal of the insured's claim because the complaint failed to allege any damage suffered by the insured. *Havsy*, 88 Wn. App. at 519. With respect to Dr. Havsy's direct claim against Dr. Flynn, the court of appeals relied on Restatement (Second) of Torts § 772, which provides:

One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person

(a) truthful information; or

(b) honest advice within the scope of a request for the advice.

See Havsy, 88 Wn. App. at 519–20. According to *Havsy*, this principle is “a specific application of the fourth element of the tort of intentional interference.” *Id.* at 520. In such a tortious-interference case—one arising from the defendant's giving of information or advice—the plaintiff “must be able to provide a set of facts showing dishonesty or bad faith, for the

plaintiff generally has the burden of proving the elements of the tort on which he or she sues.” *Id.*

Havsy and Restatement (Second) of Torts § 772 do not apply to Mr. Fogarty. MWW does not assert a claim against Mr. Fogarty arising from Mr. Fogarty having given truthful information or honest advice to Monitor. The claim arises from Mr. Fogarty taking that which was not his—privileged information belonging to MWW—and repurposing it to deprive MWW of the contractual benefits owed by Monitor.

3. Lawyers aren’t immune from tort law.

In the superior court, Mr. Fogarty effectively argued that lawyers are immune from tort liability to adversaries. That is simply not the case. No court would immunize a lawyer who committed an intentional act such as battery upon an adverse party. Nor would a court immunize a lawyer who broke into an adversary’s home to take privileged materials. In such cases, a court would find it utterly insignificant that the lawyer was a zealous advocate or that he somehow intended to benefit his client. The superior court erred in immunizing Mr. Fogarty’s conduct before affording the parties the opportunity to conduct discovery regarding the extent of Mr. Fogarty’s taking, retaining, and using of MWW’s privileged matter.

Restatement (Third) of the Law Governing Lawyers § 56 provides, subject to exceptions not relevant here, that “a lawyer is subject to liability

to a client or nonclient when a nonlawyer would be in similar circumstances.” Comment b explains: “Lawyers are subject to the general law. If activities of a nonlawyer in the same circumstances would render the nonlawyer civilly liable ..., the same activities by a lawyer in the same circumstances generally render the lawyer liable”

Mr. Fogarty appeared to argue that all bets are off when parties are engaged as adversaries in a legal dispute. That is not the law, as reflected in the Restatement. In *Safeway Insurance Co. v. Guerrero*, 106 P.3d 1020, 1023 (Ariz. 2005), a third-party insurer sued a plaintiff’s lawyer for tortious interference with the insurer’s contract with the insured. Although the court eventually found that the facts did not establish tortious interference, its statement of the law is fatal to Mr. Fogarty’s motion. Relying on Restatement § 56, the court rejected the notion that counsel would enjoy a “formalistic privilege” from tortious interference claims and held the correct inquiry was whether the elements of the tort were established. *Id.* at 1025.

Washington law rejects the notion that an adversary is immune from tort liability. In *Dussault ex rel. Walker-Van Buren v. American International Group, Inc.*, 123 Wn. App. 863, 866, 99 P.3d 1256 (2004), a severely injured plaintiff sued the third-party insurance company that insured the defendant. She alleged that the insurer made two

misrepresentations during settlement negotiations. *Id.* Because the insurance company was not the plaintiff's insurance company—but, rather, the insurer of her adversary—the court of appeals held that the insurer owed no duty of good faith to the injured plaintiff. *Id.* at 866–67. But the court held otherwise with respect to her tort claims for misrepresentation. Intentional tort claims “do not require a preexisting duty,” and therefore are not barred. *Id.* at 869–70.

Mr. Fogarty relied *Lexington Insurance Co. v. Swanson*, 240 F.R.D. 662 (W.D. Wash. 2007), in his attempt to establish that he did not owe MWW a duty. *Swanson* arose from a discovery dispute. *Id.* at 664. The district court stated that the insured would not “automatically” be entitled to communications between the carrier and its coverage counsel because “coverage counsel is retained solely by the insurer and owes no duty of loyalty to the insured.” *Id.* at 668. The district court's statement about the lawyer's “duty of loyalty” simply recognizes that the carrier is the client of coverage counsel. Nothing in the *Swanson* decision supports the broad proposition that Mr. Fogarty owed no duty to refrain from acting tortiously against MWW.

4. It is premature to decide agency issues on a CR 12(b)(6) motion.

It is true that a party to a contract cannot be liable in tort for inducing its own breach. *Olympic Fish Prods., Inc. v. Lloyd*, 93 Wn.2d 596, 598, 611 P.2d 737 (1980). Mr. Fogarty, for the first time in his reply brief, argued that he was entitled to the benefit of this rule. But it is undisputed that Mr. Fogarty was not a party to the insurance contract. Mr. Fogarty, himself, admitted this when he sought dismissal of a breach-of-contract claim that had never been asserted against him. CP 36 (“Because Plaintiffs cannot prove any set of facts consistent with their Amended Complaint that would support the existence of a contract between Plaintiffs and the Fogarty Defendants, Plaintiff cannot maintain a claim against the Fogarty Defendants for breach of contract.”). The rule that a contracting party isn’t liable for interfering with his own contract simply does not apply to Mr. Fogarty.

Mr. Fogarty also argued that he was an agent of Monitor and therefore should be treated the same as if he had been one of the parties to the contract. His argument fails on a CR 12(b)(6) motion because it presupposes a fact, namely that he was an agent and not an independent contractor. “An independent contractor is generally not considered an agent because the contractor acts in his own right and is not subject to

another's control." *Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co., Inc.*, 125 Wn. App. 227, 235, 103 P.3d 1256 (2005). A non-employee lawyer in general, and Mr. Fogarty here, has the hallmarks of an independent contractor instead of an agent.

Moreover, the question of whether someone is an agent or an independent contractor is inherently fact-specific. The relevant pattern jury instruction cites 10 factors the jury is to consider in making this determination. WPI 50.11.01 (6th ed. 2012). The assumption that a lawyer is an agent flies in the face of common sense. As to the great majority of their work, lawyers are not agents but rather are independent contractors. The first factor listed in WPI 50.11.01 looks to "control over the details of performance of the work." This is the province of the lawyer, rather than the client. In *Evans v. Steinberg*, 40 Wn. App. 585, 588, 699 P.2d 797 (1985), the court held that an insurance company was not liable for the acts of lawyers that it hired because they were independent contractors.

Even if Mr. Fogarty were an agent, his argument further presupposes that his acquisition and use of the privileged material was within the boundaries of his agency authority. An agent can be liable for intentional interference with contractual relations if he acts outside of the scope of the agency. *Houser v. City of Redmond*, 91 Wn.2d 36, 40, 586 P.2d 482 (1978). The scope of agency is fact specific. WPI 50.02. Mr.

Fogarty—if he were an agent and not an independent contractor—could not have been acting within the scope of his agency at the time of the commission of the tort. The deliberate violation of the insured's expectation of a confidential relationship in the handling of the defense could not be within the proper scope of agency of any agent of an insurance company. Mr. Fogarty's argument is analogous to the suggestion that an auto manufacturer's employee who cuts the brake lines of new cars to sabotage them is acting within the scope of agency. This simply cannot be the case.

In all events, the superior court should not have resolved this issue on a CR 12(b)(6) motion, before subjecting Mr. Fogarty to discovery. By prejudging the factual issues, the superior court created the possibility that MWW will be left without a remedy for Mr. Fogarty's wrongful acquisition, retention, and use of MWW's privileged materials. The reason that agents acting within the scope of their agency aren't liable for intentional interference with contractual relations is that the principal, who is a party to the contract, remains liable for the breach and the claimant, therefore, still has a remedy. *Houser*, 91 Wn.2d at 39. But what if Monitor proves that Mr. Fogarty acted outside of his agency authority or that he wasn't an agent at all? Were that to occur, Monitor would surely argue that it can't be vicariously liable for Mr. Fogarty's actions, leaving MWW

without a remedy for the violation of its rights an insured. *Id.* at 40 (“However if these actions were outside the scope of employment, their actions are not chargeable to [the employer] and [the employer] cannot be held liable under the doctrine of respondeat superior.”).

C. MWW may also recover on a theory of concerted action.

In its opposition to dismissal, MWW argued that Mr. Fogarty is also subject to liability based on concerted action with the insurance company. CP 132–33. Washington recognizes “concerted action” as a “theory of liability.” *Westview Invs., Ltd. v. U.S. Bank Nat. Ass’n*, 133 Wn. App. 835, 853, 138 P.3d 638 (2006). *See also Martin v. Abbott Labs.*, 102 Wn.2d 581, 597–600, 689 P.2d 368 (1984) (holding that plaintiffs did not establish liability for concerted action in absence of tacit agreement among defendants).

“For a defendant to be held liable under the theory of concerted action, the plaintiff must show a tacit agreement among defendants to perform a tortious act.” *Westview*, 133 Wn. App. at 853. Liability for concerted arises when a defendant:

(a) does a tortious act in concert with the other or pursuant to a common design with him, or

(b) knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Id. (quoting *Martin*, 102 Wn.2d at 596 (quoting Restatement (Second) of Torts § 876(a)–(c))).

In *Westview*, the developer of an apartment building made progress payments to the contractor constructing the building. 133 Wn. App. at 842–43. The contract between the developer and the contractor required the contractor to hold payments in trust for the payment of subcontractors. *Id.* at 841–42. After the developer wired the funds to the contractor’s U.S. Bank account, U.S. Bank applied the funds to pay off the contractor’s line of credit. *Id.* at 840–41, 843. Subcontractors then placed liens on the apartment building. *Id.* The developer sued U.S. Bank, claiming that U.S. Bank knew or should have known that the progress payments were trust funds that were required to be held for the subcontractors. *Id.* at 843–44.

The court of appeals held that the developer was entitled to submit its claim of concerted action against U.S. Bank to the jury. The court concluded:

The evidence indicates that U.S. Bank’s seizure of the progress payments was subject to a forbearance agreement between U.S. Bank and Construction Associates. This evidence is enough to establish an issue of material fact as to whether the parties converted the funds in concert with each other or pursuant to a common design. *Westview*

should be allowed to argue concerted action theory at trial, although it still will need to prove an underlying tort to succeed.

Id. at 853–54. MWW’s allegations here support the conclusion that Mr. Fogarty engaged in concerted action with Monitor to deprive MWW of its rights as an insured defended under a reservation of rights. Mr. Fogarty is a lawyer who represents insurance companies on coverage matters. There is ample basis to conclude that he knew and well understood the obligations that Monitor owed MWW as well as the privileged nature of the information. Based on *Westview*, Mr. Moran states a claim against Mr. Fogarty under a concerted-action theory.

The complaint did not enumerate a claim denominated as a “concerted action” claim. But the complaint included detailed facts supporting liability on this ground. CP 20–32. Moreover, MWW made the concerted-action argument in opposition to the CR 12(b)(6) motion. CP 132–33. The superior court therefore erred in dismissing Mr. Fogarty as a defendant in this case. “[A] party is permitted to recover whenever she has a valid claim, even though her attorney fails to perceive the proper basis of the claim at the pleading stage.” *Stansfield v. Douglas County*, 146 Wn.2d 116, 123, 43 P.3d 498 (2002) (quotation omitted).

D. The superior court should have permitted amendment instead of dismissing.

Because of the perfunctory nature of the superior court's order, we do not know the precise basis for dismissal. If dismissal rested on a failure to plead any fact otherwise presented to the court, or the failure to include a specifically enumerated claim for concerted-action liability, then the superior court should have granted MWW leave to amend the complaint instead of dismissing. CR 15(a) ("leave shall be freely given when justice so requires"); *Wilson*, 137 Wn.2d at 505 (holding that rulings on motions to amend are reviewed for abuse of discretion). MWW notes that the superior court has never ruled on MWW's subsequent motion to amend the complaint to add claims for conversion and civil conspiracy. That issue is not yet before this Court.

E. The superior court should have granted reconsideration and overturned its dismissal order.

The standard of review for denials of motions for reconsideration is abuse of discretion. *Davies*, 144 Wn. App. at 497. "A trial court abuses its discretion only if its decision is manifestly unreasonable or rests upon untenable grounds or reasons." *Id.* Motions for reconsideration are governed by CR 59(a). Grounds for reconsideration include irregularity in any order of the court by which a party is prevented from having a fair

trial, CR 59(a)(1); error in law occurring in the trial, CR 59(a)(8); and when substantial justice has not been done, CR 59(a)(9).

Mr. Fogarty first made his agency argument in reply, depriving MWW from responding during the original briefing. MWW addressed the agency issue in his motion for reconsideration. As discussed above, *see supra* Part V.B.4, the questions of whether Mr. Fogarty was an agent and, if he was, whether he acted within the scope of his agency are inherently fact specific and inappropriate for adjudication on a CR 12(b)(6) motion. The superior court's premature adjudication of the facts creates the possibility that MWW will be left without a remedy for Mr. Fogarty's wrongful acquisition, retention, and use of MWW's privileged materials—specifically, if Monitor proves that Mr. Fogarty either was an independent contractor or that he acted outside of his authority. *See supra* Part V.B.4. The dismissal of Mr. Fogarty from the case was an irregularity that prevents MWW from obtaining a fair trial (or **any** trial on its interference and concerted-action claims). It was an error in law. Substantial justice was not done. For the reasons stated above, the superior court's dismissal is based on untenable grounds or reasons. The superior court not only erred when it dismissed the claims against Mr. Fogarty, but it abused its discretion when it refused to reconsider the dismissal.

VI. CONCLUSION

This Court should reverse the superior court's dismissal and remand for further proceedings.

RESPECTFULLY SUBMITTED this 25th day of March, 2013.

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I declare under penalty of perjury under the laws of the State of Washington, this 25th day of March, 2013.



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