

45593-5-II
No. 42417-7-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

LOCKNER & CROWLEY, INC., P.S.
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 ORIGINAL

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ISSUES OF LAW

Whether the Trial Court properly denied Plaintiff's Motion to Prove Authority to Act on Behalf of the Defendant when all material issues in the case had previously been fully adjudicated by the Trial Court, affirmed by the Court of Appeals and decided in Defendant's favor?

Whether the Trial Court properly denied Plaintiff's Motion to Prove Authority to Act on Behalf of the Defendant when, despite an inability to communicate with Defendant throughout the lawsuit, Defense Counsel had an affirmative duty to defend, zealously defended his client throughout this litigation and took no action that prejudiced Defendant's rights?

STATEMENT OF THE CASE

This action arises out of a motor vehicle collision that occurred on February 21, 2008, in Mason County, Washington. CP 46-48. The Defendant, Heather Hoffenburg, was driving a 2005 Chevrolet pickup owned by Derek Lebeda and insured by GEICO General Insurance Company. CP 107 At the time of this incident, Ms. Hoffenburg was proceeding southbound on North 6th Street near the intersection with West Pine Street in Shelton, Washington. CP 107. While driving, the Ms. Hoffenburg became momentarily distracted and struck the Tori Kruger-Willis' parked and unoccupied 2003 Chevrolet Suburban, resulting in

damage to that vehicle. CP 46-48. The Plaintiff's vehicle was fully repaired, and those repairs were paid for by GEICO, the Defendant's insurer. CP 14. Following the completion of repairs to the vehicle, the Plaintiff filed suit against Defendant Hoffenburg seeking recovery for alleged diminution of the value of her vehicle. CP 46-48.

During the course of discovery, the Plaintiff prepared a Statement of Damages in which she claimed damages totaling \$6,353.00. In so doing, the Plaintiff implicated RCW 4.84.250, which provides for recovery of attorney's fees by the prevailing party in cases involving amounts less than \$10,000. CP 14 & CP 5-7. After the Defendant answered the Complaint, the Plaintiff transferred the case to mandatory arbitration (MAR) where the case was heard and the arbitrator issued an award in favor of the Plaintiff in the amount of \$5044.00. CP 41-42. The Defendant requested trial de novo and filed a demand for jury trial. CP 39. Shortly thereafter, the Defendant extended an Offer of Judgment in the amount of \$1000.00. CP 15. The Plaintiff did not accept the Offer of Judgment, opting instead to proceed to trial. CP 15. On April 28, 2011, following a three day trial, the jury rendered a verdict in favor of the Defendant, thereby making the Defendant the prevailing party for purposes of RCW 4.84.250 and triggering the attorney's fee provisions of that statute. CP 37.

On May 26, 2011, Defendant filed a motion for costs and attorneys fees pursuant to RCW 4.83.250. CP 29-36 & RP 1-13. At the time of the hearing, which was held on June 6, 2011, the court entered judgment on the verdict, but deferred the determination of the Defendant's reasonable attorney's fees. RP 11-12.

On June 15, 2011, Defendant filed a second motion for recovery of costs and reasonable attorney's fees. CP 13-20. At the hearing on that motion, which was held on June 24, 2011, the court granted Defendant's motion and entered an order awarding costs and reasonable attorney's fees in the amount of \$11,490. CP 5-7 & RP 14-20. This amount included \$500.00 in costs, which represented the cost of the jury demand, the filing of the trial de novo, and \$10,990 in reasonable attorney's fees, which represented defense counsel's hours spent on the case multiplied by a rate of \$175.00 per hour. CP 5-7 & RP 14-20.

The Plaintiff appealed the trial court's decision, alleging that the Defendant had unreasonably delayed entry of judgment. The Plaintiff further alleged that the Defendant's request for attorney's fees was untimely. RP 1-13. In addition, the Plaintiff raised the allegation that the Defendant's insurer, GEICO, was not an aggrieved party, and that GEICO lacked standing both to request a trial de novo on behalf of the Defendant and to recover attorney's fees as the prevailing party. CP 74, 107. The

trial court rejected these arguments entirely, and the Court of Appeals affirmed the trial court's order. CP 107. The Court of Appeals specifically held that the Defendant's entry of judgment was timely, and that Hoffenburg, not GEICO, was the party in interest, rejecting any questions regarding GEICO's standing to act on Hoffenburg's behalf. CP 107.

Thereafter, the Plaintiff issued payment of the costs and attorney's fees in a manner contrary to that requested by Defendant's counsel, making payment to the insured rather than the carrier, who had incurred all of the costs associated with the litigation. CP 107. When asked to reissue the check in the form requested, the Plaintiff refused to do so. CP 107. In response, the Defendant was forced to file a motion to enforce the court's prior order and enter judgment against the Plaintiff in the amount of the award for costs and fees. CP 91. During the course of that hearing, the Plaintiff first raised the question of Defense counsel's authority to act on behalf of his client. CP 107. On August 9, 2013, the trial court heard argument on the Defendant's motion. CP 107. The court rejected the Plaintiff's arguments, in their entirety, ordering the Plaintiff to issue payment of the costs and attorney's fees in the manner requested by Defense counsel. CP 120-121. The Court likewise denied the Plaintiff's motion to compel Defense counsel to establish the authority under which

he was defending his client. CP 120.

Rather than comply with the rulings issued by the Court of Appeals and the trial court, the Plaintiff now moves this court for relief, to including an order compelling Defense counsel to produce or prove the authority under which he appeared in this action.

I. STANDARD OF REVIEW

Respondent concurs with Petitioner that the standard of review on appeal is de novo.

II. ARGUMENT

A. THE TRIAL COURT PROPERLY DENIED PLAINTIFF'S MOTION TO PROVE AUTHORITY TO ACT

The trial court properly denied the Plaintiff's motion to prove authority to act because the Court of Appeals had previously affirmed the trial court's order requiring Plaintiff to pay Defendant's costs and reasonable attorney's fees pursuant to RCW 4.84.250. The Plaintiff's argument that Defense counsel lacked the authority to act on behalf of Defendant Hoffenburg is a transparent attempt to relitigate the standing issue previously raised by the Plaintiff and rejected both by the trial court and the Court of Appeals.

**B. DEFENSE COUNSEL HAD THE AUTHORITY TO ACT ON
BEHALF OF DEFENDANT**

**1. Defense Counsel Had A "Duty To Defend" Arising Out Of
The Insurance Contract.**

In the Appellant's Opening Brief, counsel argues that it is improper for an attorney to "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). (Emphasis added).* Despite alleging that no such authorization existed, counsel for Ms. Kruger-Willis has previously acknowledged, in open court, the existence of the very contractual obligation that gives rise to both the authorization and the requirement that GEICO retain counsel to defend Heather Hoffenburg. Specifically, counsel for Ms. Kruger-Willis has represented to the trial court that a contractual relationship existed between GEICO General Insurance Company and Derek Lebeda, the owner of the vehicle that Ms. Hoffenburg was driving at the time of the motor vehicle accident that forms the subject matter of this action. CP 107. Counsel for Ms. Kruger-Willis has likewise represented that Defendant Hoffenburg, as a permissive user of the Lebeda vehicle, was a "third party beneficiary" of

that relationship, and was entitled to the benefit thereof. RP 30.

Washington courts have consistently held that an insurance carrier has a duty to defend its insured, and any "third party beneficiary" of the contract of insurance, that "arises at the time an action is first brought, and is based upon the potential for liability." *Truck Insurance Exchange v. Van Port Homes, Inc.*, 147 Wash.2d 751, 760, 58 P.3d 276 (2002). That duty has consistently been held to be broader than the obligation to indemnify, and to exist even in cases in which the loss may, or may not, be covered pursuant to the terms of the contract. *Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wash.2d 55, 64, 1 P.3d 1167 (2000), *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52-53, 164 P.3d 454. (2007). Accordingly, based upon the contractual relationship between GEICO and Derek Lebeda, the benefit of which extended to Heather Hoffenburg, GEICO had an affirmative duty to defend Ms. Hoffenburg and was both "authorized and required" to do so as contemplated by RPC 1.2(f). Had GEICO failed to provide a defense to Ms. Hoffenburg, it would almost certainly have been acting in "bad faith," having breached its duty to defend. *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52-53, 164 P.3d 454. (2007).

Appellant's briefing makes passing reference to *Tank v. State Farm*, citing that case in support of the principle that "[b]oth [the] retained

defense attorney and the insurer must understand that only the insured is the client." *Tank v. State Farm*, 105 Wn.2d 381, 715 P.2d 1133 (1986). *See Opening Brief of Appellant at 15, Fn.8.* Notwithstanding the Appellant's acknowledgment that defense counsel must represent the interests of the insured, counsel for the Appellant goes on to argue that if Defendant Hoffenburg was unaware of the specific terms of the policy, defense counsel would not have had the necessary legal authority for Defense counsel to act on her behalf. RP 30. Counsel's argument would appear to be that the provisions of a contract requiring the insurer to defend and indemnify Heather Hoffenburg would be unenforceable if she was unaware of their existence. Thankfully for Ms. Hoffenburg, there is no legal support for the principle that the provisions of a contract are enforceable only to the extent that one of the parties is aware of them. Regardless of whether Heather Hoffenburg was aware of her status as a "third party beneficiary" of the policy of insurance with GEICO General Insurance Company purchased by Derek Lebeda, she was entitled to a defense, which GEICO provided.

Morgan Wais, the attorney that was retained by GEICO to defend Heather Hoffenburg, has previously acknowledged that "despite diligent efforts" on his part, he was unable to establish contact with his client during the course of the litigation. RP 25. In response, counsel for Ms.

Kruger-Willis suggested, quite inexplicably, that "Mr. Wais could have denied the policy by the insured or the covered party failing to comply with the cooperation clause under the policy." RP 29. While the syntax of the sentence is not entirely clear, it is abundantly clear what the Appellant is suggesting. Notwithstanding her citation to *Tank v. State Farm* in support of the principle that "the insured is the client," counsel for the Appellant is arguing that if Morgan Wais was unable to establish contact with Heather Hoffenburg, he should have informed GEICO that Ms. Hoffenburg had not complied with the cooperation clause set forth in the policy of insurance, thereby triggering a denial of coverage. *Tank v. State Farm*, 105 Wn.2d 381, 715 P.2d 1133 (1986). It is impossible to reconcile the Appellant's suggestion that Mr. Wais affirmatively undermine his client's right to indemnification with her prior remonstrance that counsel must recall that "the insured is the client." *Id.* Because defense counsel was acutely aware of the principle that "the insured is the client," he did not pursue the course of action endorsed by the Appellant, and did everything that he could in order to maintain coverage for Ms. Hoffenburg, despite his inability to locate her. As a result, Mr. Wais preserved coverage, rather than leaving Ms. Hoffenburg exposed and without indemnification in the event that the Ms. Kruger-Willis was successful in proving her claims.

Moreover, it is preposterous to suggest that the Appellant would have preferred that GEICO deny coverage to Ms. Hoffenburg in this case. Had Ms. Kruger-Willis prevailed at trial, she would have expected GEICO to indemnify Ms. Hoffenburg. In the absence of indemnification, the Ms. Kruger-Willis would have almost certainly requested that Hoffenburg sign over the right to proceed against GEICO for its "bad faith" denial of coverage. *Chaussee v. Maryland Casualty Co.*, 60 Wash.App. 504, 803 P.2d 1339; 812 P.2d 487 (1991), *Safeco Insurance Co. of Am. v. Butler*, 118 Wash.2d 383, 823 P.2d 499 (1992). It was in the interests of both parties that coverage be maintained, not denied or disclaimed. To suggest otherwise simply defies belief.

That defense was unable to communicate with Ms. Hoffenburg during the course of this litigation erected a great many barriers, but defense counsel was well aware that "the insured is the client," and did everything in his power to protect his client's interests regardless of the difficulty in so doing. The inability of an attorney to contact his client should not leave the attorney paralyzed, nor should it leave the client undefended.

2. Defense Counsel's Conduct Neither Harmed, Nor Prejudiced The Interests Of Either Party

Defense Counsel took no action in this lawsuit that was adverse to Respondent's interests in this case. Indeed, there was no harm or prejudice to the Respondent's legal or financial interests by having her attorney effectively defend her throughout the pendency of the lawsuit, resulting in a verdict in her favor. Similarly, the Appellant cannot cite to any harm or prejudice to the Appellant resulting from Mr. Wais' representation of Ms. Hoffenburg. Her objection appears to be that in the absence of an established line of communication between counsel and client, Ms. Hoffenburg's interests should have gone undefended, allowing Ms. Kruger-Willis to obtain a default judgment against her, which GEICO would have had no obligation to indemnify. As indicated above, this argument is not only untenable, it is contrary to longstanding principles of Washington State law, and directly adverse to the interests of both Ms. Hoffenburg and Ms. Kruger-Willis.

Pursuant to RCW 2.44.020, a party may seek relief from the court in order to compel an attorney who has appeared "without authority" to "repair the injury to either party consequent upon his or her assumption of authority." RCW 2.44.020. Counsel for the Appellant has accurately stated the law, but has failed to demonstrate exactly what "injury" requires

repair. As indicated above, Morgan Wais unquestionably had the legal authority to appear on behalf of Heather Hoffenburg pursuant to the GEICO policy purchased by Derek Lebeda, to which Ms. Hoffenburg was a "third party beneficiary." That said, even if Mr. Wais appeared on behalf of Ms. Hoffenburg "without authority," it is unclear what harm, if any, was sustained by the Ms. Kruger-Willis. Unless it is the position of the Appellant that Ms. Hoffenburg was not entitled to a defense, let alone a defense that allowed her to prevail on every count, there does not appear to have been any prejudice to either party as a result of Mr. Wais' appearance on behalf of Ms. Hoffenburg. In the absence of any such prejudice, the question of whether Mr. Wais was, or was not, authorized to appear on her behalf is irrelevant because there was no "injury" to repair.

**C. THE APPEALS COURT SHOULD PROPERLY AWARD
RESPONDENT COSTS AND REASONABLE ATTORNEY'S
FEES ASSOCIATED WITH THIS APPEAL.**

Pursuant to R.A.P 14 et. seq., the Respondent is entitled to recover costs and fees associated with this appeal.

CONCLUSIONS

Under Washington State law, in cases in which an insurance carrier is involved, the carrier has a duty to defend and indemnify its

insured. This is true whether the individual is a "named insured" or where, as here, the individual is "third party beneficiary" of the contract. Because Heather Hoffenburg was a permissive user of a motor vehicle owned by Derek Lebeda, and insured through GEICO, she had rights under contract that GEICO was obligated to fulfill. Having been retained to defend Ms. Hoffenburg, defense counsel was both "authorized and required" to do so and, because "the insured is the client," defense counsel had an obligation to preserve coverage rather than jeopardize it. The Appellant would have this court hold that where retained defense counsel cannot establish contact with his client, the rules that govern the relationship simply cease to exist, and counsel must either withdraw, leaving the client undefended, or affirmatively inform the carrier that the client was uncooperative, resulting in the withdrawal of indemnification. Either result would be inconsistent with the underlying principle that "the insured is the client," and the argument advanced by Ms. Kruger-Willis would undermine, rather than reinforce, the principles enunciated by Washington courts in afford to provide guidance to both counsel and insurers regarding the rights and duties of both.

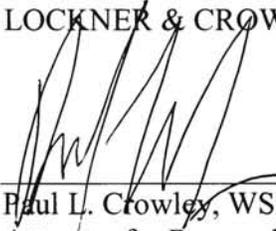
The Appellant's argument that she had been injured in some way by GEICO's performance of its contractual obligations and Morgan Wais' fulfillment of his ethical obligations is similarly at odds with Washington

State law, and with the logic of the decisions cited throughout this brief. Retained counsel must be given free rein to act in the best interest of their clients without fear that their success in so doing will give rise to a challenge regarding their authority to act. In the case before this court, defense counsel has taken the position that he was obligated to defend his client. Plaintiff's counsel has taken the position that he should have either withdrawn, thereby allowing a default to be taken, or informed the carrier that his client had not met her obligations under the "cooperation clause" contained within the policy, thereby jeopardizing coverage. It should be abundantly clear to this court that defense counsel's course of conduct was consistent with both Washington State law and the rules of professional conduct, and there was no "injury" to either the Appellant or the Respondent as the result of defense counsel's zealous, and successful, defense of Ms. Hoffenburg.

DATED this 29th day of June, 2014.

LOCKNER & CROWLEY, INC., P.S.

By:


Paul L. Crowley, WSBA #31235
Attorney for Respondent

No. 42417-7-II

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CERTIFICATE OF SERVICE

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Certificate of Service

I, Kimberly Siemers certify that on July 2, 2014 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:

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



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