No. 46991-0-II

Court of Appeals, Div. II, of the State of Washington

Roff Arden and **Bobbi Arden,**

Appellants,

v.

Forsberg Umlauf, P.S., et al.,

Respondents.

Reply Brief of Appellants

Kevin Hochhalter
Attorney for Respondent

Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501
360-534-9183
WSBA # 43124

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1. Introduction

Ardens' brief argued that the undisputed facts show that Forsberg breached its fiduciary duties under the RPCs and under *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986), entitling Ardens to disgorgement of all fees and costs received by Forsberg in connection with the representation. Ardens also argued that insurance-assigned defense counsel stands in the position of a trustee over the insurance defense asset, which it must manage for the sole benefit of the insured client, and that breach of that trust entitles the client to additional equitable remedies.

Forsberg's response brief does not meaningfully engage these arguments. Instead, Forsberg asks the Court to ignore Ardens' arguments and affirm dismissal on alternative grounds—primarily, lack of evidence. However, Forsberg's arguments require the Court to turn a blind eye to undisputed evidence in the record that supports the elements of Ardens' claims. From the undisputed evidence, this Court can determine Forsberg's liability for breach of fiduciary duty as a matter of law. This Court should reverse summary judgment dismissal, grant Ardens' motion for partial summary judgment of liability for breach of fiduciary duty, and remand for further proceedings.

2. Clarification of Facts

Forsberg relies on the opinion testimony of its standard of care expert, Jeffrey Tilden, to make factual claims that have no reasonable basis in the actual, underlying evidence of the case.

Forsberg claims that Ardens do not dispute Tilden's opinion "that the decades-long practice of hundreds of reasonable, careful, and prudent attorneys across Washington has been to represent insurers in coverage and to simultaneously defend that insurer's policyholders in other matters." Brief of Respondents at 7 (citing CP 365). Tilden provides no foundation for this hyperbole. In fact, in his own practice, he studiously avoids such representation by only representing policyholders. CP 103-04. More importantly, Ardens **do** dispute Tilden's opinion, through the opinion of John Strait. Strait testified that such representation, far from being reasonable, careful, and prudent, creates an unwaivable conflict of interest. CP 422. Ultimately, whether such representation creates a conflict of interest is a question of law for the Court, not a question of expert opinion.

Relying on Tilden's opinion testimony, Forsberg claims that Ardens consented to Forsberg's negotiation strategy and authorized every counteroffer. Brief of Respondents at 9 (citing CP 110), 15 (citing CP 516-17), 18 (citing CP 110-11). Tilden's story cannot be reconciled with the underlying facts.

Ardens never consented to Forsberg's negotiation strategy. Coming out of their one meeting with Gibson, Ardens were not aware of **any** negotiation strategy:

> Q. And did you feel like there was a game plan going out?
> A. [by Roff Arden] Mr. Cushman – Mr. Gibson told us that he would – he was going to put together a … he assumed at this time that we were going to arbitration and that he was going to put together a … I don't know what you'd call it … a list

> or a … an evaluation of what he thought The Hartford's exposure would be in arbitration, and then from that point then they'd [Forsberg] be contacting us.

CP 546. Neither Gibson nor Hayes ever contacted Ardens to discuss a specific litigation or settlement strategy:

> A. [by Roff Arden] … All the offers and counteroffers that went on where they weren't – they didn't follow our instructions, they didn't communicate any, any plan or strategy to us. And it didn't seem to me like they were representing us at all.
> …
> A. … They did not act like my attorneys in that they didn't communicate to me what they were going to do. The only time they did was after the fact. They didn't communicate any strategy to me or anything else.
> …
> A. … they would never respond to my settlement offer – you know, to our settlement demands, not even as much as to say, "Here's our plan."

CP 574, 582. Gibson and Hayes never involved Ardens in any settlement-related decisions, CP 865.

Ardens never authorized any of the counteroffers. When the $55,000 settlement demand came in from Duffys, Ardens immediately informed Gibson of their desire to accept the $55,000 offer, so long as Hartford paid the settlement. CP 256. Ardens repeated their instruction to settle at $55,000 multiple times. CP 329, 344, 642, 673, 683. After reviewing Forsberg's litigation report to Hartford, Cushman expressed confidence in Forsberg's ability to get the case settled at $35,000 if litigation continued, but again repeated Ardens' demand to settle immediately if Hartford would not remove its reservation of rights:

> Arden has demanded that the case be settled within the limits to avoid his exposure to the uninsured claims. However, he i[s] OK with going forward to defend, as you guys are prepared to beat this claim, provided the carrier remove the ROR. … Short of that the carrier should settle.

CP 474.

The $55,000 offer was set to expire on March 4.[1] The morning of March 5, Hayes notified Cushman that he was going to extend a counteroffer of $18,000:

> Hartford is going to let the offer expire but has given us settlement authority up to our recommended $35K value. We are going to start with an $18k offer. Will keep you advised.

CP 263. Hayes did not ask for Ardens' consent; he told them about a decision that had already been made without their participation. Neither Hayes nor Gibson consulted with Ardens or sought their approval.

> Q. Did you or did you not get the client's authority to let that offer expire?
> A. [by Chris Gibson] Me, personally, I did not get the client's authority.

CP 183.

> Q. … Nobody from your office communicated that negotiation strategy to me or my client and got our consent to proceed that way?

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[1] Forsberg asserts the deadline was March 5, citing after-the-fact testimony of its own, favorable witness. Brief of Respondents at 16 (citing RP 444). However, the contemporaneous evidence indicates that Forsberg believed—and represented to Ardens—that the deadline was March 4. *E.g.,* CP 457 (the Phase Litigation Report, which states that the offer "is set to expire two weeks after the defendants received the plaintiff's discovery responses. Those responses were received on February 18, 2013. Thus, the offer will expire on close of business March 4, 2013.").

…

A. [By John Hayes] I don't recall talking to your clients about that, no.
Q. Okay. And Gibson says he didn't. So, if you didn't and –
A. If it wasn't one or the other of us, maybe we didn't.

CP 210.

After being notified of Forsberg's unilateral decision to follow Hartford's settlement instructions, and believing the offer had already expired by its own terms, Cushman responded to Hayes and Gibson, "I hope you succeed." CP 477, 295 ("The offer had already expired fifteen hours earlier. What else was there to say but 'good luck'."). Cushman's resigned response cannot reasonably be interpreted as communicating Ardens' consent to the counteroffer. The only reasonable conclusion is that Forsberg did not ask for consent and Ardens did not give it.

Likewise, Ardens never authorized the second counteroffer. When the second settlement demand of $40,000 came in, Ardens immediately instructed Forsberg to settle with Hartford funds. CP 883. Hartford notified Cushman and Hayes that it would not fund the settlement at $40,000 and instructed Forsberg to let the offer expire, then make a counteroffer at $25,000. CP 767. Cushman objected, warning Hartford and Hayes that their proposed course was bad faith and indicating that Ardens might exercise their right to settle. CP 770. Not 25 minutes later, Hayes rejected the $40,000 offer and made Hartford's counteroffer. CP 267. Neither Hayes nor Gibson had consulted with Ardens or sought their approval before making the counteroffer.

Q. … Do you know of any consent that you, or Mr. Hayes, or anybody else at Forsberg & Umlauf got to make that counteroffer from Arden?
A. [by Chris Gibson] I didn't know of any consent that I got and I can only speak for myself.

CP 198.

Q. So, this is you are making this response to Karp at the direction of Ronda Wein, aren't you?
A. [by John Hayes] Correct.
Q. Okay. Not at the direction of Ardens?
A. No. This was Hartford's direction.

CP 219. The only reasonable conclusion is that Forsberg did not seek Ardens' consent and Ardens did not give it. Ardens consistently opposed the settlement instructions Forsberg received from Hartford, but Forsberg never consulted with Ardens about the conflict. Forsberg's assertion that Ardens consented to the negotiation strategy and authorized the counteroffers has no reasonable basis in the facts of the case.

3. Argument

Ardens' appeal relates to two separate claims: a claim for breach of fiduciary duties (duty of loyalty) and a claim for legal malpractice (breach of the duty of care). Ardens' opening brief presented these claims separately because each requires a different analysis. Forsberg's responding brief conflates the two claims, incorrectly implying that the same analysis applies to both. This reply brief will continue to treat the claims separately and will address Forsberg's opposition arguments in the appropriate places.

Part 3.1 will address Ardens' breach of fiduciary duty claim. This Court can determine from the undisputed evidence that Forsberg owed fiduciary duties to Ardens under the Rules of Professional Conduct, under *Tank*, and as trustees over the insurance defense asset (Part 3.1.1). This Court can determine that Forsberg breached those duties by failing to consult with Ardens regarding potential and actual conflicts of interest and by placing the interests of Hartford above the interests of Ardens (Part 3.1.2). Finally, this Court can determine that Ardens are entitled to disgorgement of Forsberg's fees and other equitable remedies (Part 3.1.3). This Court should reverse the trial court's second summary judgment order, grant summary judgment in favor of Ardens on the breach of fiduciary duty claim, and remand for a determination of appropriate remedies.

Part 3.2 will address Ardens' legal malpractice claim. Ardens presented sufficient evidence to support each of the elements of this claim: duty (Part 3.2.1), breach (Part 3.2.2), causation (Part 3.2.3), and damages (Part 3.2.4). This Court should reverse summary judgment dismissal of the legal malpractice claim and remand for further proceedings.

3.1 Forsberg breached its fiduciary duties of undeviating loyalty to Ardens.

3.1.1 Forsberg owed fiduciary duties to Ardens under the RPCs, under *Tank*, and as trustees over the insurance defense asset.

Ardens' Brief described the fiduciary duties owed to the insured client by insurance defense counsel appointed under a reservation of rights:

the ordinary fiduciary duties of any attorney to a client; enhanced duties under *Tank* because of the reservation of rights; and duties of a trustee over the insurance defense asset. Ardens supported these duties with citations to the Rules of Professional Conduct, *Tank*, and multiple secondary sources consistent with *Tank* and the RPCs.

Forsberg argues that the secondary sources cited by Ardens to illustrate the duties outlined in the RPCs and *Tank* are not "legal authority." Brief of Respondents at 29-30. This argument is based on an unreasonably restrictive understanding of the term "legal authority." Forsberg would have the Court disregard any citation that is not a published opinion of a Washington appellate court.

Black's Law Dictionary defines "authority" as "A legal writing taken as definitive or decisive." Black's Law Dictionary 55 (3d pocket ed. 2006). The definition includes "secondary authority," which is "Authority that explains the law but does not itself establish it, such as a treatise, annotation, or law-review article." *Id.* at 56. Secondary authority is also "persuasive authority," defined as "Authority that carries some weight but is not binding on a court." The treatises cited by Ardens are the type of secondary sources that are commonly accepted and considered by Washington Courts as persuasive authority. *E.g., Del Rosario v. Del Rosario*, 116 Wn. App. 886, 898, 68 P.3d 1130 (2003) ("Viewing these Washington cases in conjunction with the secondary sources and cases from other jurisdictions, the rule that emerges is …"). There is no reason to disregard Ardens' secondary sources.

Forsberg argues that the secondary sources should be disregarded as expert opinion testimony stating conclusions of law. Brief of Respondents at 30. Forsberg faults Ardens for not presenting this "evidence" to the trial court. *Id.* This argument again betrays a misunderstanding of the concept of persuasive authority. Persuasive legal authority is not evidence. It is not expert opinion testimony. Ardens were not required to present the secondary sources to the trial court. Forsberg's proposed rule would defeat the purpose of appellate briefing to bring the legal issues more sharply into focus so that errors that were not perceived in the trial court can be corrected.

It is of note that Forsberg does not argue that the secondary sources are wrong. Indeed, the authorities cited by Ardens are all consistent with the Rules of Professional Conduct and the enhanced duties under *Tank*. The secondary sources aptly illustrate the practical application of those duties to the real-life context of insurance defense work. This Court should not only consider the principles and illustrations set forth in those sources, but also adopt them as legal duties of insurance-appointed defense counsel.

As set forth in Ardens' opening brief, an attorney owes undeviating loyalty to a client. The client of insurance-appointed defense counsel is the insured defendant. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 388, 715 P.2d 1133 (1986). Defense counsel has enhanced duties of "full and ongoing disclosure to the insured," under *Tank*, including full disclosure of potential conflicts of interest, all information relevant to the defense, and all activity involving settlement. *Tank*, 105 Wn.2d at 388-89. The insured client

should never have cause to question who defense counsel actually represents. Thomas V. Harris, *Washington Insurance Law*, § 17.05 (3d ed. 2010).

Defense counsel must obtain the client's prior approval regarding any settlement decisions. William T. Barker, et al., *Insurer Litigation Guidelines: Ethical Issues for Insurer-Selected and Independent Defense Counsel*, ABA Section of Litigation 2012 Insurance Coverage Litigation Committee CLE Seminar, March 1-3, 2012, at 13-15. The duty of loyalty does not permit defense counsel to disregard instructions from the insured client. *See* RPC 1.2(a) ("a lawyer shall abide by a client's decision whether to settle a matter"); RPC 1.4(a)(2) ("A lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished"). When the client disagrees with counsel's (or the insurer's) settlement position, it is counsel's duty to consult with the insured client to seek a resolution of the disagreement and to obtain the client's informed consent. *See* RPC 1.7, Comments [2]-[4] ("Resolution of a conflict of interest problem under this Rule requires the lawyer to … consult with the clients affected … and obtain their informed consent").

In addition to the ordinary fiduciary duties of any attorney to his or her client and the enhanced duties of insurance-assigned defense counsel under a reservation of rights, defense counsel owes the insured client the duties of a trustee managing a valuable asset for the benefit of the client.

Forsberg argues that trust law does not apply to the insurance context because the insurance policy does not expressly create a trust. Brief of Respondents at 26-27. This argument misses the point. Ardens do not

argue that an insurance policy creates an express trust. Rather, Ardens point out that when an insured is sued and the insurer carries out its duty to defend, a relationship is created between the insurer, insured, and defense counsel, which has all of the essential elements of a trust. In such situations, courts recognize what is called a "resulting trust." A *resulting trust* exists by implication, "based on the idea that the law should presume or infer or create a trust if parties put themselves into a certain situation." Bogert, George G., et al., *The Law of Trusts and Trustees*, § 452 (3d ed. 2007). It does not matter that the parties did not expressly create a trust, if their relationship is such that a trust should be implied.

Forsberg does not challenge Ardens' description of the relationship and do not argue that such a relationship should not create a resulting trust. When an insurer assigns defense counsel, the insurer sets its reserves, designating a specific amount of money for expenses of the insured's defense. *See* CP 320-21. Defense counsel must then manage its billable time and other expenses to use that insurance defense asset to provide the best defense for the benefit of the insured client. In doing so, defense counsel must use its own professional judgment and maintain undeviating loyalty to the insured client. This relationship bears all of the indicia of a trust. This Court should recognize it as such and hold that insurance-assigned defense counsel stands in the position of a trustee, subject to the duties of a trustee and the equitable remedies available for breach of those duties.

Because Forsberg breached its duties—its ordinary fiduciary duties, its enhanced *Tank* duties, and trust duties—the trial court erred in denying

Ardens' second motion for summary judgment and dismissing Ardens' breach of fiduciary duty claims. This Court should reverse.

3.1.2 Forsberg breached its fiduciary duties.

As set forth above, Forsberg, as insurance-assigned defense counsel under a reservation of rights, owed Ardens specific, enhanced duties. Forsberg breached those duties by taking on the representation without ever advising Ardens or seeking Ardens' informed consent for actual and potential conflicts of interest in the representation. Forsberg also breached its duties by placing the interests of Hartford above the interests of Ardens. These breaches also constitute breaches of Forsberg's duties as trustee over the insurance defense asset. The trial court should have granted Ardens' motion for partial summary judgment of liability for Forsberg's breach of fiduciary duties.

Forsberg argues that there was no conflict of interest at the time it accepted the representation. Brief of Respondents at 30-32. Forsberg's argument betrays a misunderstanding of conflicts of interest. Rule of Professional Conduct 1.7 requires a lawyer to withdraw or obtain informed consent not only when there is an actual, direct conflict, but any time there is **potential** conflict. *In re Disciplinary Proceeding Against Marshall*, 160 Wn.2d 317, 336-37, 157 P.3d 859 (2007). A potential conflict exists when a lawyer foreseeably might be tempted to favor an interest of the lawyer or of a non-client at the expense of an interest of the client; an actual conflict ripens when a lawyer must choose a course of action and the question is whose

interest will be sacrificed. *See* William T. Barker & Charles Silver, *Professional Responsibilities of Insurance Defense Counsel*, § 12.02 (2014).

It is clear from the record that Hartford was a long-term firm client of Forsberg & Umlauf.

> Q. Have you ever represented the Hartford in coverage?
> A. [by John Hayes] Yes.
> Q. When was the most recent time you've represented the Hartford in coverage?
> A. Oh, a few months ago I got a case in for them.
> …
> Q. … Did the Hartford bring work to Bradbury Bliss Reardon [former name of Forsberg & Umlauf in 1991 (*see* CP 202-03)] when you were there?
> A. You know, I think they did, but I didn't do it, and I didn't have any personal experience with it, but I think that's correct.
> …
> Q. Is the Hartford your client?
> A. It's the firm's client. … I share the Hartford with some other partners.

CP 203-04. Hayes was Forsberg's "go-to" attorney in the Seattle area. CP 120. The vast majority of Gibson's practice is insurance defense work assigned by Hartford. CP 165.

Forsberg never informed Ardens of their existing relationship with Hartford or of the conflict that could result:

> When The Hartford appointed John Hayes and William "Chris" Gibson as my counsel, neither of them informed me they represented The Hartford for decades as coverage counsel. Neither attorney revealed to me that they had any relationship with The Hartford. I never would have agreed to allow either of them to be my attorney if I had known.

CP 227 (Declaration of Roff Arden).[2]

That such a relationship creates a potential conflict is specifically called out in the comments to the RPCs. For example, there is a conflict if there is "significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee." RPC 1.7, Comment [13]. The lawyer's personal interest in pleasing the insurer creates a conflict in the same way that a legal duty of loyalty would. Barker, et al., *Ethical Issues*, at 3-4.

This potential conflict ripens into an actual conflict any time that the interests or instructions of the insured client conflict with those of the insurer. Defense counsel is then faced with the dilemma of whose interests to pursue and whose to sacrifice. Counsel's duty of loyalty to the insured client conflicts with counsel's obligations or interests toward the insurer. Counsel must either withdraw or, through consultation, convince either the insurer or the insured client to consent to compromise its own interests and permit counsel to proceed as desired by the other. That Forsberg fails to recognize this conflict of interest, even after it had ripened into an actual conflict, is particularly troubling.

Forsberg argues that it fulfilled its duty to disclose conflicts when Gibson informed Ardens in their initial meeting that there might be a

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[2] Forsberg argues that Ardens raise this issue for the first time on appeal. Brief of Respondents at 31-32. This Declaration of Roff Arden, submitted in support of Ardens' second motion for summary judgment, squarely addresses the issue. Forsberg did not offer any evidence to dispute Roff Arden's testimony that Forsberg failed to disclose the relationship.

coverage dispute between Ardens and Hartford. Brief of Respondents at 31. However, Forsberg's duty required much more. Forsberg was required to disclose to Ardens that such a coverage dispute would place **Forsberg** in a conflicted position. Forsberg had a duty to disclose that, at some point in the defense, Forsberg might have to choose between a defense strategy that would favor covered claims and one that would favor uncovered claims. Hartford might pressure Forsberg to favor uncovered claims, while Forsberg's duty to Ardens would require Forsberg to favor covered claims. If Hartford ever did instruct Forsberg to engage in a strategy that would favor uncovered claims, Ardens would have to decide whether to consent to allow Forsberg to follow Hartford's instructions. Forsberg never made such a disclosure.

Forsberg argues that it did not breach its duty because it claims to have followed Ardens' settlement instructions. Brief of Respondents at 33-35. Forsberg can only support this argument by ignoring the clear import of Ardens' repeated demands: "We need this case to settle." CP 642; CP 673 ("Ardens want this case settled on these terms."). When Hartford refused to fund the settlement and instructed a counteroffer, Forsberg was placed in a conflicted position: Forsberg could not follow one instruction without violating the other. Forsberg was duty-bound to consult with Ardens to find out how Ardens would like to respond. In order to remain loyal to Ardens, Forsberg had only two options: either convince Hartford to fund the settlement or convince Ardens to consent to the counteroffer. Instead, Forsberg ignored its client and followed Hartford's instructions:

Q. The Ardens never told you to engage in that strategy, did they?
[objection]
A. [by John Hayes] They don't have to tell me.
Q. They don't have to tell you?
A. No.
Q. Okay.
A. What they told me was to get it settled at fifty-five and Hartford pay it. That was rejected.
Q. But –
A. Now we're back to a clean slate and Hartford says, "By the way, we don't agree with the fifty, fifty-five, make this offer." So, we made the offer.

CP 214. Forsberg did not explain the situation to Ardens. Forsberg did not consult with Ardens regarding their options. Forsberg did not ask Ardens to consent to Hartford's plan of letting the offer expire and making a counteroffer. Forsberg did not even give Ardens time or opportunity to react to the developing situation. Hartford instructed, and Forsberg followed, without a single thought for the interests of Ardens, the insured client. Forsberg betrayed Ardens' trust and egregiously breached its fiduciary duties to Ardens by placing the interests of Hartford above the interests of Ardens.

The undisputed evidence demonstrates that Forsberg breached its duties to Ardens. This court should reverse the trial court's second summary judgment order, grant partial summary judgment in favor of Ardens on the issue of Forsberg's liability for breach of fiduciary duties, and remand to the trial court for a determination of damages.

3.1.3 Ardens are entitled to disgorgement of Forsberg's fees and other equitable remedies for breach of trust.

Forsberg argues that Ardens cannot demonstrate a causal link between Forsberg's' breach of fiduciary duty and Ardens' damages. Brief of Respondents at 41-43. However, Forsberg later concedes that a showing of proximate cause and damages is not required. *Id.* at 49. Forsberg's concession is correct. When a lawyer breaches fiduciary duties to a client, the client may be entitled to recover the lawyer's fees from the representation without any further showing of causation or damages. *Eriks v. Denver*, 118 Wn.2d 451, 462-63, 824 P.2d 1207 (1992). When a trustee breaches fiduciary duties, the court has broad equitable powers to craft a remedy to make plaintiffs whole and to prevent the trustee from benefitting from the breach of trust. *Gillespie v. Seattle-First Nat'l Bank*, 70 Wn. App. 150, 173, 855 P.2d 680 (1993); Restatement 2d of Trusts, § 205.

Forsberg argues that its conduct was not egregious enough to warrant disgorgement of fees. Brief of Respondents at 49. Throughout the representation, Forsberg ignored Ardens' instructions, failed to consult with Ardens regarding settlement, failed to advise Ardens of their options, and did nothing more than process the claim on behalf of Hartford. Ardens' insurance defense asset was being wasted to pay for attorneys who were not representing Ardens' interests in any meaningful way. Forsberg's breach of fiduciary duties was egregious and would be a complete defense to a claim for fees. Ardens are entitled to disgorgement of all fees paid to Forsberg for the representation.

Forsberg argues that Ardens are not the proper party to receive any disgorged fees because Ardens did not pay the fees. Brief of Respondents at 49-50. This is incorrect. In *Behnke v. Ahrens*, 172 Wn. App. 281, 294 P.3d 729 (2012), the court awarded the plaintiffs all fees received for representing them, plus prejudgment interest, *Id.* at 289, even though half of those fees were originally paid to the defendant attorney by a third party on the plaintiffs' behalf, *Id.* at 286. Even though a jury found that plaintiffs' only actual damages were the attorney fees plaintiffs paid, *Id.* at 287, the court found that the defendant attorney had violated the RPCs and that disgorgement of **all** fees was the proper remedy, *Id.* at 298. This case should be no different.

Additionally, Forsberg's fees were all derived from Ardens' insurance defense asset, which Ardens had purchased through their insurance premiums. Even though Hartford issued the checks, it only did so on behalf of Ardens. Furthermore, disgorgement is a remedy for Forsberg's breach of duties to Ardens, not to Hartford. Ardens, not Hartford, have been injured by Forsberg's' misconduct. Ardens, not Hartford, are the real party in interest. Ardens are entitled to disgorgement of all fees and costs paid to Forsberg for the representation.

Because Forsberg breached its duties as trustee of the insurance defense asset, Forsberg is subject to the court's broad, equitable powers to craft a remedy to both make Ardens whole and prevent Forsberg from benefiting from its breach of trust. In order for Ardens to be made whole, they must be reimbursed for attorney fees that they were compelled to incur

as a result of Forsberg's breach of trust. As a result of Forsberg's breaches, Ardens had to incur fees for personal counsel to represent their interests in the *Duffy* matter free from any conflicts, as well as in this matter seeking redress for Forsberg's breach. As a result of Forsberg's breaches, Roff Arden was charged with a felony and had to incur fees for criminal defense counsel. *See, e.g.,* CP 418, 424-25.

Forsberg argues that Ardens are not entitled to recover attorney fees incurred in *Duffy v. Arden*, *State v. Arden*, or this case because there is no recognized equitable ground for such an award. Brief of Respondents at 46-47. While courts have previously held that attorney fees are not awardable in an action for an attorney's breach of fiduciary duties, those cases did not involve claims against insurance defense counsel or for breach of trust. *E.g., Behnke v. Ahrens*, 172 Wn. App. 281, 294 P.3d 729 (2012). If this Court determines that Forsberg was a trustee over Ardens' insurance defense asset and that Forsberg breached its trust duties, this court has broad equitable discretion to determine a remedy. Breach of trust is a recognized equitable ground for an award of attorney fees. *Allard v. First Interstate Bank, N.A.*, 112 Wn.2d 145, 151-52, 768 P.2d 998 (1989). The award can include fees incurred throughout the litigation for breach of trust, including all fees at trial and on appeal. *Id.* This Court, or the trial court on remand, should award Ardens all of their fees incurred in the *Duffy* matter, in this case, and in the criminal case.

Forsberg argues that even under a breach of trust theory, Ardens are not entitled to recover attorney fees because Forsberg claims to not be at

fault for any of Ardens' litigation costs. Brief of Respondents at 48. Where litigation is necessitated by the inexcusable conduct of a trustee, the trustee is liable to pay those expenses. *Allard v. Pac. Nat'l Bank*, 99 Wn.2d 394, 408, 663 P.2d 104 (1983) (citing *Wolff v. Calla*, 288 F. Supp. 891, 894 (E.D. Pa. 1968)). A court should hold a trustee liable for fees when his conduct has been "of a gross or inexcusable nature." *Wolff v. Calla*, 288 F. Supp. at 894.

Forsberg's breach of its duties to Ardens was inexcusable. Forsberg entirely ignored its duty of loyalty to Ardens, disregarded Ardens' repeatedly expressed interests, failed to disclose conflicts and material information regarding the representation, and placed its own interests and the interests of Hartford above those of Ardens, the trust beneficiaries. An award of litigation expenses necessitated by Forsberg's breach is proper.

As a result of Forsberg's breaches, Ardens had to incur fees for personal counsel to represent their interests in the *Duffy* matter free from any conflicts, as well as in this matter seeking redress for Forsberg's breach. As a result of Forsberg's breaches, Roff Arden was charged with a felony and had to incur fees for criminal defense counsel. *See, e.g.,* CP 418, 424-25. Ardens have presented sufficient evidence to preclude summary judgment dismissal of this element of damages. This court should remand to the trial court to determine, in the first instance, an appropriate equitable remedy for Forsberg's breach of trust.

Forsberg argues that Ardens are not entitled to emotional distress damages. Those arguments are addressed in Part 3.2.4, below. The trial court should also have the opportunity to determine in the first instance whether

emotional distress damages are proper as part of an equitable remedy for breach of trust.

Ardens presented sufficient evidence to the trial court to establish Forsberg's duties and breach. At the very least, Ardens' evidence was sufficient to raise a material issue of fact to preclude summary judgment dismissal of Ardens' claims. This Court should reverse the trial court's decision on the second summary judgment motions, grant partial summary judgment in favor of Ardens on the issues of duty and breach, and remand to the trial court for a determination of damages.

3.2 Ardens presented sufficient evidence to support the elements of Ardens' malpractice claim, precluding summary judgment dismissal.

The trial court correctly determined that Forsberg owed a duty of care to Ardens and that there were disputes of material fact as to Forsberg's' breach. Ardens' brief presented evidence to support the elements of damages and proximate cause. Forsberg now argues, as alternative grounds for affirming dismissal, that Ardens cannot establish any of the elements of the malpractice claim. There is sufficient evidence in the record to support each of the elements.

3.2.1 Forsberg owed a duty of care as Ardens' defense counsel.

Forsberg argues that it had no duty of care regarding coverage issues or criminal charges because its scope of representation was limited to the defense of *Duffy v. Arden*. Brief of Respondent at 25-26. However, a limited

scope of representation does not limit the range of interests which defense counsel must bear in mind. Barker, et al., *Ethical Issues*, at 5. "A lawyer must respect all interests a client has, including primary interests that relate to the agreed goal of a representation and secondary interests that do not." *Id.* John Strait testified that Forsberg's duty of care included consideration of Ardens' mental health condition and exposure to criminal liability in crafting their defense strategy. CP 423-24. Forsberg was hired to represent **Ardens'** interests in the defense, not Hartford's. In crafting and carrying out a defense strategy, Forsberg had a duty to consider **all** of Ardens' interests, not just those that agreed with Hartford's interests.

3.2.2 Forsberg breached the duty of care.

Forsberg argues that Ardens presented no evidence that Forsberg's judgment decisions were outside the range of those that a reasonable and prudent lawyer would make. Brief of Respondents at 22, 32-33. This is not true. John Strait testified,

> It is my opinion that John Hayes and Chris Gibson **failed to exercise reasonable judgment** in choosing to follow a negotiation strategy dictated by The Hartford and not approved by, the Ardens; by letting settlement offers expire, without the Ardens' knowledge or consent; and by making counteroffers without the Ardens' knowledge or consent. **These actions were not within the range of choices a reasonable, careful, and prudent attorney in Washington would adopt.** My opinion in this regard is not simply a disagreement by me on whether John Hayes, Chris Gibson, and Forsberg & Umlauf selected the "best" choice in how they handled this matter with the Ardens. **It is my opinion the choices they made were not within the range of**

acceptable choices a reasonable attorney performing to the standard of care would make.

CP 421 (emphasis added). Ardens presented sufficient evidence for a reasonable fact finder to conclude that Forsberg breached its duty of care. Summary judgment dismissal was improper.

3.2.3 Forsberg's breach caused damage to Ardens.

Forsberg argues that Ardens cannot demonstrate that Forsberg's breaches were a cause-in-fact of Roff Arden being charged with a felony. Brief of Respondents at 38-40. Ardens presented sufficient evidence to survive summary judgment on this issue.

In any malpractice case, the plaintiff must prove cause-in-fact by showing what would more likely than not have happened if the defendants had not breached their duty of care. Forsberg's evidence showed what happened as a result of their breach: the prosecutor had no knowledge of the civil case and did not consider it. CP 441. Ardens' evidence, on the other hand, showed what would have happened absent a breach: the prosecutor would have been informed of the settlement, would have considered it as a part of the charging decision, and likely would have reduced the charges, placed Roff Arden in a diversion program, or not have charged him at all. *See* CP 417-18, 424-25, 924-25.[3] This evidence meets Ardens' burden of production on the issue of cause-in-fact. Summary judgment was improper.

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[3] Forsberg argues that some of this evidence is inadmissible. However, Forsberg did not object in the trial court to the testimony of Tim Whitehead (CP 417-18) or John Strait (CP 424-25) on this issue. *See* CP 957-58 (Forsberg's motion to strike). Forsberg has waived any objections by failing to make them below. *Bonneville v. Pierce*

Forsberg argues that Ardens cannot demonstrate legal cause because a criminal defendant cannot prevail in a malpractice action without demonstrating his actual innocence. Brief of Respondents at 36-38. However, this is not a malpractice case against a **criminal** defense attorney whose negligence resulted in a guilty verdict. Ardens' claim is that Forsberg's negligence resulted in Roff Arden being **charged** with a felony. As actual guilt is not required for charges to be brought, so actual innocence is not required to show that the charges were a result of Forsberg's negligence.

Forsberg argues that it cannot be responsible for the criminal charges when it has no control over the charging decision. Forsberg did have the opportunity to **influence** the charging decision, however. As demonstrated by Ardens' evidence, swift settlement could have caused the prosecutor not to charge Roff Arden. Principles of legal cause do not bar Ardens' malpractice claim.

3.2.4 Ardens are entitled to emotional distress damages.

Forsberg argues that Ardens' emotional distress is not recoverable because it stemmed only from the ordinary stress of litigation. Brief of Respondents at 46. However, Forsberg does not—indeed, cannot—point to any evidence in the record that indicates that Ardens' emotional distress was caused by the course of litigation rather than by Forsberg's' own conduct. Roff Arden testified his distress was caused by Forsberg's' conduct:

Cnty., 148 Wn. App. 500, 509, 202 P.3d 309 (2008) Mr. Strophy's qualified expert opinion testimony (CP 924-25) was not excluded by the trial court. CP 250.

Q. Okay. In this lawsuit where you're suing Forsberg & Umlauf are you claiming damages related to PTSD?
A. [by Roff Arden] Yes.
Q. And tell me about that.
A. Their actions, or inactions, basically resulted in my being re-traumatized.
Q. How is that?
A. … All the offers and counteroffers that went on where they weren't – they didn't follow our instructions, they didn't communicate any, any plan or strategy to us. And it didn't seem to me like they were representing us at all.

The basic nut with PTSD is, you can't trust somebody. Now, I have to place my trust in attorneys provided to me by the insurance company. We were told they were my attorneys: "They're your attorneys."

Okay. And they weren't acting like my attorneys. And when the specter of criminal prosecution was raised and they did nothing, that was a re-traumatization.

CP 574. Summary judgment was improper.

4. Conclusion

The trial court erred in denying Ardens' second motion for partial summary judgment and dismissing Ardens' breach of fiduciary duty claims. The trial court also erred in granting Forsberg's motion for summary judgment on Ardens' legal malpractice claim where there were disputed issues of material fact. This Court should reverse the trial court's summary judgment orders, grant partial summary judgment to Ardens on Forsberg's liability for breach of fiduciary duties, and remand to the trial court for further proceedings.

Respectfully submitted this 23rd day of July, 2015.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellants

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on July 23, 2015 I caused the original of the foregoing document, and a copy thereof, to be served by the method indicated below, and addressed to each of the following:

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DATED this 23rd day of July, 2015.

/s/ Rhonda Davidson
Rhonda Davidson, Legal Assistant
Cushman Law Offices, P.S.
rdavidson@cushmanlaw.com

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