

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Mar 11, 2013, 4:02 pm
BY RONALD R. CARPENTER
CLERK

E

No. 87087-0

RECEIVED BY E-MAIL

[Handwritten signature]

SUPREME COURT OF THE STATE OF WASHINGTON

STEWART TITLE GUARANTY COMPANY,
a Texas Corporation

Appellant,

v.

WITHERSPOON, KELLY, DAVENPORT & TOOLE, PS,
a Washington corporation; DUANE M. SWINTON and
JANE DOE SWINTON, and the marital community
comprised thereof,

Respondents.

SUPPLEMENTAL BRIEF OF APPELLANT

David P. Hirschi (WSBA No. 35202)
Jeffrey J. Steele (*Pro Hac Vice*)
HIRSCHI STEELE & BAER, PLLC
136 E. South Temple, Suite 1400
Salt Lake City, Utah 84111
801-990-0500
Lead Attorney for Appellant

Brian J. Waid (WSBA No. 26038)
WAID LAW OFFICE
4847 California Ave. S. W., Ste 100
Seattle, Washington 98116
206-388-1926
Local Counsel for Appellant

 ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. STATEMENT OF FACTS	1
III. ARGUMENT	2
A. Stewart’s Requested Holding Follows the Majority Rule That an Insurer May Assert Legal Malpractice Claims Against Counsel Retained to Represent the Insured	2
B. Stewart’s Requested Holding Furthers Sound Policy Considerations	3
C. Stewart’s Requested Holding Comports with <i>Trask</i>	6
1. The transaction was intended to benefit Stewart	8
a. There was no conflict of interest	10
b. The Retention Letter does not prohibit a duty of care	13
2. The remaining <i>Trask</i> factors are also satisfied	14
D. Stewart’s Proposed Holding Comports with <i>Tank</i>	17
E. Stewart’s Proposed Holding Comports with <i>Kommavongsa</i>	18
F. Stewart’s Proposed Holding Comports with <i>Restatement</i> § 51	19
IV. CONCLUSION	20

TABLE OF AUTHORITIES

CASES

American Mutual Liability Insurance Co. v. Superior Court
38 Cal. App. 3d 579 (Cal. Ct. App. 1974)8

Atlanta International Insurance Company v. Bell
475 N.W.2d 294 (Mich. 1991)6

Bohn v. Cody
119 Wn.2d 357, 832 P.2d 71 (1992)6, 14, 15

Christensen v. Royal School District No. 160
156 Wn.2d 62, 124 P.3d 283 (2005)6

Cincinnati Insurance Co. v. Wills
717 N.E.2d 151 (Ind. 1999)8

General Security Insurance v. Jordan, Coyne & Savits, LLP
357 F. Supp. 2d 951 (E.D. Va. 2005)3, 5, 6

Hartford Ins. Co. of the Midwest v. Koepfel
629 F. Supp. 2d 1293 (M.D. Fla. 2009)2, 3, 8

Home Indemnity Co. v. Lane Powell Moss and Miller
43 F.3d 1322 (9th Cir. 1995)3

In re Allstate Insurance Co.
722 S.W.2d 947 (Mo. 1987)8

Johnson v. Continental Casualty Co.
57 Wn. App. 359, 788 P.2d 598 (1990)9, 10, 12, 13

Kommavongsa v. Haskell
149 Wn.2d 288, 67 P.3d 1068 (2003)18, 19

Paradigm Insurance Company v. The Langerman Law Offices
24 P.3d 593 (Ariz. 2001)4, 5

Seattle First National Bank v. Shoreline Concrete Co.
91 Wn.2d 230, 588 P.2d 1308 (1978)6

<i>Shoemake v. Ferrer</i> 168 Wn2d 193, 225 P.3d 990 (2010)	6
<i>State & County Mutual Fire Insurance Co. v. Young</i> 490 F. Supp. 2d 741 (D. W. Va. 2007)	4
<i>Strangland v. Brock</i> 109 Wn.2d 675, 747 P.2d 464 (1987)	7
<i>Tank v. State Farm Fire & Cas. Co.</i> 105 Wn.2d 381, 715 P.2d 1133 (1986)	10, 14, 17
<i>Trask v. Butler</i> 123 Wn.2d 835, 872 P.2d 1080 (1994)	7, 8, 14, 15, 16
<i>U.S. Specialty Insurance Co. v. Burd</i> 833 F. Supp. 2d 1348 (M.D. Fla. 2011)	8, 10

RULES

Model Rules of Professional Conduct 1.7 (2001)	11
Washington Rule of Professional Conduct 1.7	11
Washington Rule of Professional Conduct 2.3	19

OTHER AUTHORITIES

ABA Comments on Professional Ethics and Grievances, Formal Opinion 282 (1950)	9
4 RONALD E. MALLEEN & JEFFREY M. SMITH, LEGAL MALPRACTICE (2013 ed.)	3, 9
<i>Restatement (Third) of the Law Governing Lawyers</i> § 51 (ALI 2000)	19, 20
<i>Restatement (Third) of the Law Governing Lawyers</i> § 121 (ALI 2000)	11

INTRODUCTION

The Court should conclude that:

Witherspoon owed Stewart Title a duty of care because Stewart Title retained Witherspoon and no conflict of interest existed between the insurer and its insured, Sterling Bank.¹

STATEMENT OF FACTS

The facts relevant to the issue of duty are set forth in Stewart Title's ("Stewart") Reply Brief. *See also* Stewart's trial court briefing on the issue at CP 2326-47, 2348-69, 2370-2411, 2412-93, 2624-48, 2834-40, 2841-44, and 2845-50. The following facts are dispositive:

- Stewart accepted Sterling's claim without a reservation of rights.² CP 2414, 2358.
- Stewart's letter retaining Witherspoon (the "Retention Letter") unequivocally identified duties that Witherspoon owed to Stewart, including the duty to keep Stewart informed. CP 2440-47.
- The Retention Letter provided that Witherspoon was "retained because Stewart values [its] legal experience," "[the] pertinent policy provisions entitle Stewart to control and direct the litigation" "Stewart ... does require accurate and timely reporting on all financial and other non-privileged matters," and "[a]ny settlement offer with an opposing party should be reported immediately ... along with your analysis and recommendation." CP 2440-47.
- Witherspoon acknowledged that there was no conflict of interest between Stewart and Sterling at the time of its retention. CP 2358.

¹ A case posing a similar issue is currently pending before Division II of the Court of Appeals, in *American Alternative Insurance Corporation, et al. v. Bullivant Houser Bailey, P.C., et al.*, No. 09-2-03892-2.

² Stewart Title subsequently issued a reservation of rights in July of 2009, after it terminated Witherspoon's representation of Sterling. CP 2414.

- Witherspoon acknowledged that successful resolution of the MWC lien was in the best interests of both Stewart and Sterling. CP 2367.
- Stewart expected and relied upon Witherspoon to competently investigate the MWC lien claim, potential affirmative defenses and provide it with competent advice and recommendations so it could direct the litigation. CP 2370-2411, 2412-93, 2841-44.
- Witherspoon acknowledged it was required to keep Stewart informed, get directions from Stewart, and raise affirmative defenses. CP 2353, 2355-57, 2360, 2364-67
- During the MWC Litigation, Witherspoon provided advice and recommendations upon which Stewart relied. CP 2360, 2370-2411, 2412-93, 2841-44.

ARGUMENT

A. **Stewart’s Requested Holding Follows the Majority Rule That an Insurer May Assert Legal Malpractice Claims Against Counsel Retained to Represent the Insured**

It is well established that “[t]he majority of jurisdictions to decide the issue ... have concluded that the insurer is in privity of contract with the attorney hired to represent insured individuals, or is a third-party beneficiary of the relationship between the attorney and the insured.” *Hartford Ins. Co. of the Midwest v. Koeppe*, 629 F. Supp. 2d 1293, 1298-9 (M.D. Fla 2009). This is because “[i]n a typical insurer-insured relationship, where there is no reservation of rights, **there is no actual conflict of interest** that would preclude an attorney from representing both the insurer and the insured.” *Home Indemnity Co., v. Lane Powell*

Moss and Miller, 43 F.3d 1322, 1330 (9th Cir. 1995) (emphasis added); see also, 4 MALLEEN & SMITH, LEGAL MALPRACTICE, § 30:7, p. 177 (2013 ed.) (“Typically, there is no conflict or risk of adversity to the insured where there is no coverage issue”).

Although jurisdictions differ in how they characterize the relationship between the insurer and counsel retained for the insured, they almost uniformly agree that the insurer can bring a claim for malpractice. “Accordingly, despite sharp doctrinal differences regarding the relationship between the insurer and the firm it retains, nearly all jurisdictions in the United States permit some form of legal malpractice action by an insurer against the firm it retains to defend an insured.” *Gen. Sec. Ins. v. Jordan, Coyne & Savits, LLP*, 357 F. Supp. 2d 951, 956-7 (E.D. Va. 2005). Thus, there are “only two jurisdictions that preclude a direct legal malpractice claim by an insurer against the attorney retained to represent an insured: Michigan and Texas.” *Hartford Ins. Co.*, 629 F. Supp. 2d at 1299 citing *Gen. Sec. Ins.*, 357 F. Supp 2d at 956.

B. Stewart’s Requested Holding Furthers Sound Policy Considerations

Many policy considerations justify allowing the insurer to bring a malpractice claim against counsel retained to represent the insured. Foremost among these policies is a refusal to immunize attorneys from

liability when committing malpractice. As the Arizona Supreme Court explained in *Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 24 P.3d 593 (Ariz. 2001):

If a lawyer's liability to the insurer depends entirely on the existence of an attorney-client relationship and for some reason the insurer is not a client, then the lawyer has no duty to the insurer that hired him, assigned the case to him, and pays his fees. There are many problems with that result: if that lawyer's negligence damages the insurer only, the negligent lawyer fortuitously escapes liability. Or if the lawyer's negligence injures both insurer and insured in a case in which the insured is the only client but refuses to proceed against the lawyer, the insurer is helpless and has no remedy. Such unjust results are not just bad policy but unnecessary.

Id. at ¶ 23. "Simply stated, negligent attorneys should not be permitted to escape liability just because the more recognizable party with standing suffers no real loss; this would have the effect of insulating a negligent party from liability. Such a policy would impair the policy preventing such future harm." *State & County Mut. Fire Ins. Co. v. Young*, 490 F. Supp. 2d 741, 747 (D. W. Va. 2007). Thus, "regardless of its attorney-client status, an insurer should be accorded standing to assert a claim for appropriate relief from the lawyer for financial loss proximately caused by the [attorney's] professional negligence ... because and to the extent that the insurer is directly concerned in the matter financially." *Id. citing Paradigm Ins. Co.*, 24 P.3d 593.

In addition, “permitting an insurer to sue the firm it retains can promote enforcement of [the firm’s] obligations to the insured, because both insurer and insured often share a common interest in developing and presenting a strong defense to a claim that they believe to be unfounded as to liability, damages, or both.” *Gen. Sec. Ins.*, 357 F. Supp. 2d at 957. “Because the insurer rather than the insured is typically required to satisfy a judgment resulting from the firm’s negligence, the insured rarely has any incentive to bring a claim for malpractice against the retained firm. The failure to recognize a cause of action by the insurer, therefore, serves the interests of no one except the entity that committed the malpractice.” *Id.* (internal citation omitted).

This is the exact scenario presented by this case. Indeed, at oral argument of this matter Witherspoon’s counsel repeatedly pointed out to the Court that “[w]hat is very clear here is that **the loss will never fall on Sterling**” because either Witherspoon’s defense would be successful, or Stewart would cover Sterling’s loss pursuant to the title insurance policy.³ This policy consideration has led nearly every jurisdiction to reject immunizing attorneys retained by insurers from malpractice liability.

Another policy concern which justifies an insurer bringing malpractice claims against counsel retained to represent an insured is

³ See also Respondent’s Brief, p. 24, making the same argument.

Washington's stated interest in making tort victims whole. "The cornerstone of tort law is the assurance of full compensation to the injured party." *Seattle First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 236, 588 P.2d 1308 (1978). "Simply stated, a plaintiff is entitled to that sum of money that will place him in as good a position as he would have been but for the defendant's tortious act." *Shoemaker v. Ferrer*, 168 Wn.2d 193, 198, 225 P.3d 990 (2010) (quotations and citations omitted).

Immunizing counsel retained by an insurer to represent an insured from the consequences of their malpractice flies in the face of this interest, and serves no one but the offending attorney. *See, e.g. Atlanta Int'l Ins. Co. v. Bell*, 438 Mich. 512, 475 N.W.2d 294, 298 (1991).

Accordingly, "nearly all courts have concluded that the harms-benefit calculus weighs in favor of recognizing an insurer's legal malpractice claim against the lawyer or law firm it retains to represent an insured." *Gen. Sec. Ins.*, 357 F. Supp. 2d at 957.

C. Stewart's Requested Holding Comports with *Trask*

The existence of a legal duty is a question of law that "depends on mixed considerations of logic, common sense, justice, policy, and precedent." *Christensen v. Royal School District No. 160*, 156 Wn.2d 62, 67, 124 P.3d 283 (2005) (internal citations and quotations omitted). *Bohn v. Cody*, 119 Wn.2d 357, 365-66, 832 P.2d 71 (1992) explained that even

in the absence of an attorney-client relationship, a lawyer may owe a duty of care to third-parties, holding:

Under certain circumstances, an attorney may be held liable for malpractice to a party the attorney never represented. Two theories provide the basis for this expanded liability. First, an attorney may be held liable for negligence toward third party beneficiaries of an attorney/client relationship. Second, an attorney may be held liable under a multifactor balancing test developed in California.⁴

(citing *Stangland v. Brock*, 109 Wn.2d 675, 680, 747 P.2d 464 (1987)).

Trask v. Butler, 123 Wn.2d 835, 872 P.2d 1080 (1994), adopted a modified multi-factor balancing test to determine whether an attorney owes a duty to a nonclient as a third-party beneficiary, stating:

The intent to benefit the plaintiff is the first and threshold inquiry in our modified multi-factor balancing test, which we construe to have the following elements:

- (1) the extent to which the transaction was intended to benefit the plaintiff;
- (2) the foreseeability of harm to the plaintiff;
- (3) the degree of certainty that the plaintiff suffered injury;
- (4) the closeness of the connection between the defendant's conduct and the injury;
- (5) the policy of preventing future harm; and
- (6) the extent to which the profession would be unduly burdened by a finding of liability.

Here, each of the factors enumerated in *Trask* is met and

Witherspoon therefore owed Stewart a duty of care.

⁴ The California multifactor balancing test was subsequently changed by the Washington Supreme Court in *Trask v. Butler*, 123 Wd.2d 835, 872 P.2d 1080 (1994) and became the "modified multi-factor balancing test" as discussed, *infra*.

1. The transaction was intended to benefit Stewart

Witherspoon's defense of Sterling in the MWC Litigation was clearly intended to benefit Stewart. Notably, this factor is **not** focused on whether the attorney-client relationship was established **primarily** or **solely** in order to directly benefit the third party. Rather, the inquiry is "the extent to which the transaction was intended to benefit the plaintiff." *Trask*, 123 Wn.2d at 841.

It is axiomatic that in retaining counsel to defend its insured, the insured and insurer share the same goal – defeating the claims against the insured. "[The insurer] has a contract with the insured, which gives the insurer the duty to provide a defense. This duty includes the right of the insurer to select and the duty to pay counsel. That relationship makes [the insurer] an obvious third party beneficiary." *U.S. Specialty Ins. Co. v. Burd*, 833 F. Supp. 2d 1348, 1353 (M.D. Fla. 2011). Indeed, "an insurer is a readily apparent intended beneficiary of the services provided by the attorney retained to represent an insured." *Hartford Ins. Co.*, 629 F.Supp.2d at 1301.⁵ Thus, both the insurer and insured share an interest in

⁵ See also *Am. Mut. Liab. Ins. Co. v. Superior Court*, 38 Cal. App. 3d 579, 113 Cal. Rptr. 561, 571 (Cal. Ct. App. 1974) ("Both the insured and the carrier have a common interest in defeating or settling the third party's claim."); *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151 (Ind. 1999) ("a vast number of claims have been and presumably will be handled with no significant issue between the insurer and the policyholder"); *In re Allstate Ins. Co.*, 722 S.W.2d 947, 952 (Mo. 1987) ("When coverage is admitted and adequate the interests of the insurer and insured are congruent. Both are interested in disposing of

competent representation of the insured by retained counsel.

Here, the purpose for retaining Witherspoon was to defend Sterling in the MWC Litigation. CP 2355, 2414. In addition to bearing the financial burden for any resulting loss to Sterling in the MWC Litigation, Stewart had a direct duty to provide its insured, Sterling, with competent legal representation. *See, e.g. Johnson v. Continental Casualty Co.*, 57 Wn. App. 359, 362; 788 P.2d 598 (1990) (an insurer must retain competent defense counsel for the insured). The implicated transaction – the retention of Witherspoon to defend Sterling’s lien in the MWC Litigation – was therefore intended to benefit Stewart as much as it was intended to benefit Sterling. In fact, because Sterling was protected regardless of the outcome in the MWC Litigation (either Witherspoon’s defense would be successful or Stewart would cover Sterling’s loss under the title policy), the retention of Witherspoon was intended **primarily** to benefit Stewart. Tellingly, Witherspoon conceded that its efforts were intended to benefit both Stewart and Sterling. CP 2367.

a. There was no conflict of interest

the case on the best possible terms.”); ABA Comments on Professional Ethics and Grievances, Formal Opinion 282 (1950) (“A community of interest exists between the company and the insured growing out of the contract of insurance with respect to any action brought by a third person against the insured within the policy limitations.”); 4 MALLEN & SMITH, LEGAL MALPRACTICE § 30:16, p. 317 (2013 ed.) (“Dual representation by defense counsel usually is harmonious and beneficial to both the insurer and the insured since they typically share the same goals during the pendency of the litigation.”).

“In Washington, there is simply no presumption ... that a reservation of rights situation creates an automatic conflict of interest.”

Johnson v. Cont'l Cas. Co., 57 Wn. App. at 363. The *Johnson* Court explained:

The rule in Washington, however, is not that a conflict arises automatically in these cases [involving a reservation of rights], but that an insurer, defending under a reservation of rights, has an enhanced obligation of fairness toward its insured. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 383, 715 P.2d 1133 (1986). The obligation comes about because of potential conflicts between the interests of insurer and insured, inherent in a reservation of rights defense. *Tank*, 105 Wn.2d at 383. In other words, no actual conflict of interest necessarily exists in a reservation of rights defense. In fact, such a defense is frequently a valuable service to the insured. *Tank*, 105 Wn.2d at 390.

Johnson, 57 Wn. App. at 360 (internal quotations omitted); *see also U.S. Specialty Ins. Co.*, 833 F. Supp.2d at 1348 (concluding that there was no conflict of interest because there was no reservation of rights).

Witherspoon nevertheless argues that a conflict of interest arose because of Sterling's desire to resolve the MWC Litigation as quickly as possible, and claims that it had to assume there was a reservation of rights by Stewart. Witherspoon's arguments fail for several reasons.

First, Witherspoon's arguments are belied by its previous admissions that there was no conflict of interest with Stewart at the time of

retention (CP 2358), and that Sterling's interests in resolving the lien dispute were aligned with Stewart's (CP 2367).

Next, Witherspoon's arguments ignore the difference between a possible conflict of interest and an actual conflict. "The mere possibility of subsequent harm does not itself require disclosure and consent." *See* Rules of Professional Conduct (RPC) 1.7 and comment 8 thereto; *see also* former Model Rules of Professional Conduct 1.7 (2001) and comment 4 thereto ("A possible conflict of interest does not itself preclude the representation"); *Restatement (Third) of the Law Governing Lawyers*, § 121, cmt. c (iii) (2000) ("The standard requires more than a mere possibility of adverse effect").

Here, no conflict of interest existed between Stewart and Sterling because their interests in defeating the MWC lien claim were perfectly aligned. There was no exposure to Sterling over the insurance policy limits and there were no coverage issues. CP 2414, 2358, 2367. Indeed, Witherspoon acknowledged in briefing and oral argument that if Sterling's defense were unsuccessful, Stewart would cover any loss. *Supra*, p. 5.

Moreover, the contention that the defense of equitable subrogation itself constitutes a conflict of interest is a logical fallacy. If the equitable subrogation defense had succeeded in the underlying MWC Litigation (which it would have) no conflict of interest could have arisen.

Likewise, Witherspoon's argument that any delay created by asserting a defense in the MWC Litigation created a conflict of interest, also fails. Stewart had the right under the title insurance policy to pay the claim or defend it. CP 2427. Stewart elected to defend. It was therefore entitled to pursue every potential affirmative defense, including equitable subrogation. Indeed, if defending the insured rather than simply paying the claim constituted a conflict of interest there would be a conflict of interest inherent in every defense by an insurer. *Cf. Johnson*, 57 Wn. App. at 360 (recognizing that there is no automatic conflict in an insurance defense case, even when it involves a reservation of rights).

Although Witherspoon belatedly argues in the malpractice action that pursuing equitable subrogation created a conflict of interest, it never mentioned the conflict to Stewart at any time during the MWC Litigation. Instead, Witherspoon merely informed Stewart (erroneously) that the doctrine did not apply in the MWC Litigation. CP 2479. Furthermore, if Witherspoon truly believed there was a conflict of interest between Stewart and Sterling at any time, it had a duty to inform both Stewart and Sterling of the conflict, and suggest to Sterling that it retain separate counsel. CP 2441, 2355. There is no evidence that Witherspoon ever took these steps.

Moreover, even if Witherspoon thought pursuit of the equitable subrogation defense would constitute a conflict, *Sterling* itself did not share that belief. Rather, Sterling unequivocally intended to be equitably subrogated and cooperated with replacement counsel's efforts to advance the defense in spite of Witherspoon's stipulation. CP 435, 461.

Finally, Witherspoon's argument that a conflict of interest existed because it was forced to assume that there was a reservation of rights between Stewart and Sterling is equally unpersuasive. Importantly, it is undisputed that Stewart accepted Sterling's claim without a reservation of rights. CP 2414. Perhaps more importantly, even if Witherspoon assumed there was a reservation of rights, a reservation of rights does not automatically create a conflict of interest. *Johnson*, 57 Wn. App. at 363. There simply was no conflict of interest between Stewart and Sterling in pursuing a meritorious defense in the MWC Litigation, no matter how desperately Witherspoon now attempts to manufacture one to escape its professional malpractice.

b. The Retention Letter does not prohibit a duty of care

Witherspoon argues that the Retention Letter precludes any duty to Stewart. The two are not mutually exclusive. Stewart does not, and has never contended that Witherspoon owes the same fiduciary duties that Witherspoon owed to Sterling as the client. Rather, consistent with the

Retention Letter (CP 2440-41) and the foregoing legal authority, Stewart contends that it was entitled to direct the litigation, and that Witherspoon owed it a duty of care to inform, to provide competent advice, and to competently defend its insured. The Retention Letter does not prohibit this conclusion, but supports it. Moreover, Stewart's direction to Witherspoon in the Retention Letter that its loyalty is owed to Sterling and that Sterling is Witherspoon's only client, is the exact manner in which Stewart (and presumably every other insurance carrier) satisfies its obligations to the insured under *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 383, 715 P.2d 1133 (1986).

2. The remaining *Trask* factors are also satisfied

As the trial court concluded, *Trask* "factors two through six have been established for the purpose of establishing a duty" owed by Witherspoon to Stewart. CP 525. The second *Trask* factor is the foreseeability of harm to the plaintiff. *Trask*, 123 Wn.2d at 842-3. This element is satisfied here. As in *Bohn*, "[a] reasonable fact finder could also infer that [Witherspoon's] misleading statement would foreseeably harm [Stewart]." *Bohn*, 119 Wn.2d at 365-66. The harm that resulted from Witherspoon's failure to investigate and timely assert the equitable subrogation defense, failure to properly draft the Stipulation, and failure to obtain informed consent before entering into the Stipulation was obviously

foreseeable and actually did occur. As a direct and proximate result of Witherspoon's malpractice Stewart ultimately paid \$1.3 Million to MWC in order to protect Sterling's lien priority. CP 2510, 2839.

The next *Trask* factor is the degree of certainty that the plaintiff suffered injury. *Trask*, 123 Wn.2d at 842-3. Here, the Court in the underlying MWC Litigation specifically held that the stipulation drafted and entered into by Swinton precluded Sterling from asserting the equitable subrogation defense. CP 2463. Because Sterling could not assert the defense of equitable subrogation, Stewart was ultimately required to pay the full amount of the MWC lien claim.

The fourth *Trask* factor is the closeness of the connection between the defendant's conduct and the injury. *Trask*, 123 Wn.2d at 842-3. Witherspoon's failure to identify, investigate and timely assert the equitable subrogation defense, failure to properly draft the stipulation, and failure to obtain informed consent before entering into the stipulation proximately caused Stewart's injuries, which flowed directly from such conduct. *See further, Bohn*, 119 Wn.2d at 366.

The next factor the Court should consider is the policy of preventing future harm. *Trask*, 123 Wn.2d at 842-3. Here, it is crucial that the Court determine that a duty was owed. Sterling did not bear the harm of the MWC lien because Stewart paid over \$1.3 Million to protect

Sterling's lien priority. Sterling has not brought a malpractice claim and obviously has no incentive to do so. If the Court concludes that Witherspoon did not owe any duty to Stewart, then Witherspoon escapes liability for malpractice, the policy concern articulated by nearly every jurisdiction which allows an insured to sue counsel retained for an insured. *See* Section A, *supra*. The better policy is to refuse to immunize defense counsel retained and paid by an insurer against malpractice liability.

The final *Trask* factor is the extent to which the profession would be unduly burdened by a finding of liability. *Trask*, 123 Wn.2d at 842-3. Here, the legal profession would not be burdened by concluding that Witherspoon owed a duty of care to Stewart. In *Trask*, the Court concluded that the legal profession would be burdened because of an “unresolvable conflict of interest an estate attorney encounters in deciding whether to represent the personal representative, the estate, or the estate heirs.” *Id.* at 842-3. That unresolvable conflict does not exist in this case because Stewart seeks to enforce the **identical** standard of care that Witherspoon owed Sterling. Moreover, Stewart and Sterling were not adversarial relative to the transaction giving rise to the legal malpractice claim. There was no conflict of interest between Stewart and Sterling and no danger that Stewart would force Witherspoon to elevate Stewart's interests above the interests of Sterling. Thus, imposing a duty of care on

Witherspoon would not burden the profession.

D. Stewart's Proposed Holding Comports with *Tank*

This Court's holding in *Tank v. State Farm Fire & Casualty Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986) is consistent with and supports Stewart's proposed holding in this case. In *Tank*, the Court imposed an enhanced obligation of good faith on insurers who defend **under a reservation of rights** to protect the insured against the conflict of interest inherent in the situation where the insurer defends, but "it is the insured who may pay any judgment or settlement." *Id.* at 389. Notably, this conflict is absent in the instant matter; Stewart did not defend Sterling under a reservation of rights, and Witherspoon admits that Sterling bore no risk of paying any judgment or settlement in the MWC Litigation. CP 2367; *supra* p. 5. Nevertheless, Stewart's conduct satisfied the obligation of good faith, including its instruction to Witherspoon that Sterling was its only client. However, for all of the reasons explained above, just because Stewart was not Witherspoon's client, it does not follow that Witherspoon owed no duty to Stewart. Indeed, pursuant to *Tank*, Stewart relied on Witherspoon to fulfill its duty to provide competent defense counsel to Sterling. *Tank*, 105 Wn.2d 381 at 388. Unfortunately, Witherspoon did not do so.

E. Stewart's Proposed Holding Comports with *Kommavongsa*

Stewart's requested holding also conforms with *Kommavongsa v. Haskell*, 149 Wn.2d 288, 67 P.3d 1068 (2003) because Witherspoon owed a duty of care directly to Stewart rather than through an assignment of Sterling Bank's claims. Moreover, the policy concerns that supported the holding in *Kommavongsa* do **not** exist here. *Kommavongsa* prohibited the **assignment** of legal malpractice claims, in the specific context of a covenant judgment, based on three public policy grounds [149 Wn.2d at 307]:

(1) that permitting the **assignment of legal malpractice claims to an adversary in the same litigation that gave rise to the legal malpractice claim** ought to be prohibited because of the opportunity and incentive for collusion in stipulating to damages in exchange for a covenant not to execute judgment in the underlying litigation; (2) because "the trial within a trial" that necessarily characterizes most **legal malpractice claims arising from the same litigation that gave rise to the malpractice claim would lead to abrupt and shameless shift of positions** that would give prominence (and substance) to the perception that lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for truth thereby demeaning the legal profession, and; (3) because to permit such assignments would make lawyers hesitant to accept defense of defendants who are judgment-proof or nearly so, and who are uninsured or underinsured. [Emphasis added].

In contrast, there is **no** covenant judgment involved here, Stewart and Sterling Bank were **not** adverse in the underlying matter, Stewart's

assertion of a legal malpractice claim against Witherspoon would **not** lead to any “abrupt or shameless shift of positions,” and allowing an insurer to sue counsel retained by it to defend its insured is the exact opposite situation from lawyers asked to represent “defendants who are judgment-proof or nearly so.” In short, **none** of the policy considerations that supported *Kommavongsa* exist here.

F. Stewart’s Proposed Holding Comports with Restatement § 51

Restatement (Third) of the Law Governing Lawyers § 51 (ALI 2000) (“*Restatement* § 51”) is consistent with Stewart’s proposed holding and also provides an independent alternative basis to conclude that Witherspoon owed a duty of care to Stewart. In fact, Restatement § 51, *comment g* specifically addresses this situation.⁶ See Stewart’s Reply Br., pp. 23-24. The *Restatement* policies are aligned with Washington Rule of Professional Conduct 2.3, Comment 3.⁷ There is no question that raising the affirmative defense of equitable subrogation would have been in harmony with Witherspoon’s duties owed to Sterling Bank.

⁶ A copy of the *Restatement* and comment (g) thereto is included in the Appendix to Stewart Title’s Reply Brief. A discussion of the *Restatement* can also be found in Stewart Title’s Motion for Summary Judgment at CP 2336-2338.

⁷ “When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client.”

Here, Stewart expected and relied upon Witherspoon to: (1) investigate all claims against Sterling and any affirmative defenses; (2) keep it informed in the MWC Litigation; and (3) provide it with competent advice and recommendations in the MWC Litigation. CP 2412-2422. Likewise, Witherspoon acknowledged that it made recommendations to Stewart and had an obligation to keep Stewart informed of the MWC Litigation and seek its input. CP 2353, 2355-57, 2360, 2364-67.

Consistent with *Restatement* § 51, because Witherspoon provided advice to Stewart, and Stewart relied on the advice, Witherspoon owed a duty of care to Stewart. CP 2370-2382.

CONCLUSION

The Court should conclude that Witherspoon owed Stewart a duty of care because there was no conflict of interest between Stewart and Sterling Bank. Alternatively, the Court should adopt *Restatement* § 51 and conclude that Witherspoon owed Stewart a duty of care to the extent that it provided advice and recommendations upon which Stewart relied in directing the MWC Litigation.

DATED this 11th day of March, 2013

/s/ David P. Hirschi
David P. Hirschi, WSBA # 35202
Hirschi Steele & Baer, PLLC
Brian J. Waid, WSBA # 26038
Attorneys for Appellant

No. 87087-0

RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

STEWART TITLE GUARANTY COMPANY,
a Texas Corporation

Appellant,

v.

WITHERSPOON, KELLEY, DAVENPORT & TOOLE, PS,
a Washington corporation; DUANE M. SWINTON and
JANE DOE SWINTON, and the marital community
comprised thereof,

Respondents.

DECLARATION OF SERVICE

David P. Hirschi
WSBA No. 35202
HIRSCHI STEELE & BAER, PLLC
136 E. South Temple, Suite 1400
Salt Lake City, Utah 84111
801-990-0500
Lead Attorney for Appellant

Brian J. Waid
WSBA No. 26038
WAID LAW OFFICE
4847 California Ave. S. W., Ste 100
Seattle, Washington 98116
206-388-1926
Local Counsel for Appellant

I, David P. Hirschi, hereby testify as follows:

1. I am one of the attorneys representing the Appellant Stewart Title Guaranty Company in this case and am competent to testify herein.
2. On March 11, 2013, I did cause to be delivered via first class U.S. mail and email, as per counsel's agreement relative to service of pleadings, a true copy of the attached Supplemental Brief of Appellant to the attorneys for Defendants Witherspoon, Kelley, Davenport & Toole, P.S. and Duane M. Swinton and Jane Doe Swinton, and the martial community comprised thereof: Ralph E. Cromwell, Jr. and Steven C. Minson, at BYRNES KELLER CROMWELL, LLP, 1000 Second Avenue, 38th Floor, Seattle, Washington 98104, rcromwell@byrneskeller.com, sminson@byrneskeller.com, and Michael B. King, at CARNEY, BADLEY, SPELLMAN, P.S., 701 Fifth Avenue, Suite 3600, Seattle, Washington 98104, king@carneylaw.com.
3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED this 11th day of March, 2013, at Salt Lake City, Utah.

/s/ David P. Hirschi
David P. Hirschi, WSBA # 35202
Hirschi Steele & Baer, PLLC
Attorney for Appellant

OFFICE RECEPTIONIST, CLERK

To: Kristen Ricks
Cc: Dave Hirschi; Jeff Steele; Justin Baer; Brent Clayton; rcromwell@byrneskeller.com; sminson@byrneskeller.com; Yoshinaga, Lori; Coleman, Cathy; jcreager@waidlawoffice.com; Brian J. Waid; king@carneylaw.com
Subject: RE: 87087-0 Stewart Title v. Witherspoon Kelly et al

Rec'd 3-11-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Kristen Ricks [<mailto:kristen@hsblegal.com>]
Sent: Monday, March 11, 2013 4:02 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Dave Hirschi; Jeff Steele; Justin Baer; Brent Clayton; rcromwell@byrneskeller.com; sminson@byrneskeller.com; Yoshinaga, Lori; Coleman, Cathy; jcreager@waidlawoffice.com; Brian J. Waid; king@carneylaw.com
Subject: 87087-0 Stewart Title v. Witherspoon Kelly et al

Case No: 87087-0

Case Name: Stewart Title Guaranty Company v. Witherspoon, Kelley, Davenport & Toole, PS., et al.

Dear Court Clerk:

Attached please find the following pleadings to be filed in the above referenced case:

- Supplemental Brief of Appellant
- Declaration of Service Regarding Supplemental Brief of Appellant

Best Regards,
David P. Hirschi, WSBA #35202
Phone: (801)990-0500
Email: dave@hsblegal.com

Thank you,

Kristen C. Ricks

HIRSCHI STEELE & BAER, PLLC
136 E. South Temple, Suite 1400
Salt Lake City, Utah 84111
Ph. 801-990-0500 or 322-0593
Fax 801-322-0594
kristen@hsblegal.com

HIRSCHI STEELE & BAER
ATTORNEYS AT LAW

CONFIDENTIALITY NOTICE: This electronic message transmission contains information from the law firm of Hirschi Steele & Baer, PLLC, which may be confidential or privileged. The information is intended to be for the use of the individual or entity named above. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this information is prohibited. If you have received this electronic transmission in error, please notify me by telephone (801-990-0500) or by electronic mail kristen@hsblegal.com immediately.

IRS CIRCULAR 230 DISCLOSURE: To ensure compliance with requirements imposed by the IRS, we inform you that, unless specifically indicated otherwise, any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any transaction or matter addressed herein.