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SUPREME COURT OF THE STATE OF WASHINGTON

STEWART TITLE GUARANTY COMPANY,

Plaintiff/Appellant

v.

WITHERSPOON, KELLEY, DAVENPORT & TOOLE, P.S.; AND
DUANE M. SWINTON,

Defendants/Respondents,

STERLING SAVINGS BANK; AND STERLING FINANCIAL
CORPORATION,

Defendants.

RESPONDENTS' SUPPLEMENTAL BRIEFING RE DUTY

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No one can serve two masters. Either he will hate the one and love the other, or he will be devoted to the one and despise the other.

Matthew 6:24.

A. **Introduction.**

Our culture has long recognized that no one can serve two masters. No matter how things start, eventually their interests will diverge and the servant will be forced to choose between them. Accordingly, this Court has long held that an attorney serves no one but the client:

Washington ethical rules are clear that “[t]he standards of the legal profession require undeviating fidelity of the lawyer to his client. No exceptions can be tolerated.”

Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 388, 715 P.2d 1133 (1986).

This case asks whether a rare exception to this rule should be recognized to impose a duty on the attorney for an insured to also competently represent the interests of the insurer. As this Court has previously recognized, any such duty will create conflicts, be difficult to administer, subject attorneys to second-guessing, and undermine the attorney’s loyalty to the client. Accordingly, this Court should decline to recognize any such duty and affirm the dismissal entered by the Superior Court.

B. **Stewart’s Present Claim That Witherspoon Owed It a Duty of Care Is Directly Contrary to Its Written Directions to Witherspoon.**

First, the claim of Stewart Title Guaranty Company (“Stewart”) that Witherspoon Kelley, Davenport & Toole, PS (“Witherspoon”) owed it

a duty of care directly contradicts the written instructions that Stewart gave to Witherspoon at the start of this matter. In this regard, it was Sterling Savings Bank (“Sterling”)—not Stewart—that retained Witherspoon to represent it in the Mountain West litigation. CP 1000:5-8. Witherspoon’s Duane Swinton tendered the defense to Stewart on July 18, 2008. CP 1140. Four days later, one of Stewart’s local in-house lawyers, Kelly Rickenbach, acknowledged receipt and said she would respond after conducting an internal investigation. CP 2150. In the interim, to avoid a default, Witherspoon filed an answer on behalf of Sterling and sent it to Rickenbach. CP 2152.

More than one month later, Stewart still had not responded, and Witherspoon wrote to inquire whether tender had been accepted because Sterling was being “pressured” by Mountain West to begin responding to discovery. CP 2154. A week after that, Stewart still had not responded, and Witherspoon wrote yet again. CP 2156. Finally, on August 28, 2008, well past the 30-day limit imposed by the Unfair Claims Settlement Practices provisions of WAC 284-30-370, Rickenbach wrote to approve Witherspoon’s continued representation of Sterling. CP 1142. At this point, Rickenbach understood that Witherspoon was already representing Sterling in the Mountain West action and was Sterling’s “long time firm.” CP 1986:15-21.

Rickenbach then wrote a retention letter to Swinton that repeatedly instructed Witherspoon that its only duty was to Sterling. Stewart’s letter begins by defining the term “your client” to mean Sterling Savings Bank:

Stewart . . . is pleased that your firm is able to accept employment to represent the interests of Sterling Savings Bank (“your client”). . . .

CP 1142. Having defined Sterling as “your client,” Stewart assumed the role of an expert on the nature of Swinton’s duties as counsel for the insured, telling Swinton that they were “unusual” and that it was “extremely important” that he understand them:

The nature of your employment in this case may be unusual in comparison to your normal attorney/client relationships. It is extremely important that you understand the nature of this employment.

Id. Having cautioned Swinton that it was going to explain something important, Stewart again instructed Swinton that his only client was Sterling and that it was “solely and exclusively” with Sterling that his relationship as an attorney would lie:

You have been retained to represent the interests of your client, with whom your privileged relationship of attorney to client will lie solely and exclusively.

Id. Specifically, with regard to the standard of care, Stewart told Swinton that it is Sterling on whose behalf he must “exercise . . . competence”:

Your client shall at all times be entitled to your full and undivided professional loyalty through exercise of competence and preservation of confidences.

Id. Further down the page, Stewart again emphasized that Swinton was “to confine your representation solely to the interests of your client.” *Id.* On the top of the second page of its retention letter, Stewart reiterated that, although Stewart was paying Swinton’s fees, “[t]he payment of your fees shall in no way be interpreted as representation of Stewart.” CP 1143. In the General Guidelines attached to the retention letter, Stewart pounded home its

message that Swinton's only role was to protect Sterling:

Your retention is *solely* for the representation and protection of your client in this case.

CP 1144, emphasis added.

In the same vein, Stewart's letter instructed Witherspoon that its duties to Stewart would be effectively limited to keeping Stewart informed as to case developments and to seeking approval for conduct of the defense. In this regard, the retention letter said that it is "important that both Stewart and your client be kept well advised of all major developments and progress in the case," identifying Rickenbach as Swinton's "primary contact in this case." CP 1143. Similarly, Stewart's letter told Swinton that "[t]he pertinent policy provisions entitle Stewart to control and direct the litigation affecting the interest[s] of your client." CP 1143. However, in stating that it had the right to control the defense, Stewart's letter again "charged" Swinton that he was to consult with Sterling about any instruction that he believed was not in Sterling's best interests so that Sterling could address the issue with Stewart. CP 1143.

The retention letter provides that these instructions and limitations reflected Stewart's "expectations" and would "define the relationship" between Stewart and Witherspoon:

[T]hese guidelines are intended to set forth Stewart's expectations and to define the relationship between Stewart and you in order to work together effectively, communicate well with each other and complement each other

CP 1144. Not surprisingly then, in his deposition, Swinton repeatedly testified that he understood Stewart's retention letter to mean that he

represented only Sterling:

Q. Did you think at that time that you represented Stewart--excuse me, Stewart Title?

A. No.

Q. Why is that?

A. Because the terms of my understanding based on the letter from Stewart to me was that I represented Sterling.

CP 2732:4-10, *accord* at CP 2738:4-5 (“[b]ased on their representation [letter] to me, Sterling was my only client in this matter”). Similarly, as for his duties to Stewart, Swinton testified that he understood the retention letter to mean that he should keep Rickenbach informed and that he should seek her input on significant decisions. CP 2733:23-2734:3.

C. Here, the Duty Issue Could Be Decided on Contractual Grounds.

Thus, here, the duty issue could be decided solely on contractual grounds. Whatever duties counsel for the insured might owe to the insurer in other situations, Stewart’s retention letter limited the scope of Witherspoon’s duty to reporting case developments and seeking approval of defense strategy. Rule of Professional Conduct (“RPC”) 1.2 specifically allows a lawyer’s duties to be so limited.

Moreover, there is no dispute that Witherspoon followed Stewart’s directions to report case developments and to seek its approval for significant decisions. Shortly after Stewart approved Witherspoon’s representation of Sterling, Mountain West filed a motion for partial summary judgment that its mechanic’s lien was superior to Sterling’s deed of trust.

CP 2453. After providing a copy of the motion papers to Rickenbach, Witherspoon wrote to outline its investigation to date of several possible defenses, and reported that, based on these possible defenses, it could not articulate a basis for opposing Mountain West's motion. CP 1899-1900. Witherspoon's letter then asked Rickenbach whether Witherspoon should agree to Mountain West's priority to avoid further fees and costs. *Id.*

After receiving no response to its request, Witherspoon emailed Rickenbach again on November 3, 2008: "I am assuming you are in agreement that there is no basis for opposing Mountain West's motion for partial summary judgment on the issue of priority." CP 1151. Her response, on behalf of Stewart, was: "Yes. I agree with that. Thanks." *Id.* As was noted above, Rickenbach was the in-house attorney through which Stewart exercised "control" of the litigation and also the attorney who had investigated the lien dispute before accepting tender. Accordingly, on November 7, 2008, Witherspoon stipulated that Mountain West's lien had priority over Sterling's deed of trust. CP 1153-54.

On this record, Stewart should be contractually bound to the terms of its retention letter which instructed Swinton that it was Sterling, his client, to whom he "solely and exclusively" owed duties as an attorney. CP 1142. The retention letter says nothing about Witherspoon recommending courses of action that would be in Stewart's best interests or about second-guessing approvals given by Rickenbach. CP 1142-49. Moreover, the whole purpose of taking the time to write a retention letter is to avoid any misunderstanding as to whom the lawyer represents or what the lawyer is being retained to do:

The primary purpose of using written engagement agreements is to prevent misunderstandings between law firms and their clients. That written confirmation can be essential evidence to prevent a fee dispute, professional responsibility issue, or legal malpractice claim.

1 Ronald E. Mallen, Jeffrey M. Smith & Allison D. Rhodes, *Legal Malpractice*, § 2.11 at 87 (2013 ed.). The terms of an engagement letter are contractual in nature. *Avocent Redmond Corp. v. Rose Elecs.*, 491 F. Supp. 2d 1000, 1002-04 (W.D. Wash. 2007). The interpretation of an unambiguous contract is for the court to determine as a matter of law. *See, e.g., State Farm Mut. Auto Ins. Co. v. Avery*, 114 Wn. App. 299, 311, 57 P.3d 300 (2002).

Accordingly, even if Witherspoon might otherwise have owed Stewart a duty of care, Stewart's claim of duty is barred by its retention letter. Any contrary ruling would place an attorney for the insured in an intolerable position, allowing the insurer to unilaterally change the scope and terms of engagement after the fact to suit the convenience of the insurer.

D. Recognizing a Duty Broader Than That Stated in Stewart's Retention Letter Would Create a Conflict for Witherspoon.

If this Court declines to limit Witherspoon's duties to those stated in the retention letter, then recognizing a broader duty to Stewart would create a risk of conflicts of interest and undercut Witherspoon's loyalty to its client, Sterling. Although the retention letter does not say so expressly, Stewart's instruction that Witherspoon's duty was limited to serving the interests of Sterling reflects the requirements of the RPCs. First, RPC 1.8(f) allows payment of a lawyer's fees by a third party such as Stewart only where

“there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship.” Comment 11 to RPC 1.8 recognizes that these limitations are necessary “[b]ecause third-party payers frequently have interests that differ from those of the client. . . .” RPC 1.8 cmt. 11. Similarly, RPC 5.4(c) requires that “[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.” RPC 5.4(c). In *Tank v. State Farm Fire & Casualty Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986), this Court construed RPC 5.4(c) to “demand[] that counsel understand that he or she represents only the *insured*. . . .” 105 Wn.2d at 388. Although *Tank* was addressing a reservation of rights situation, RPCs 5.4(c) and 1.8(f) are not so limited and require allegiance to the client, not the insurer, in all situations.

Thus, in oral argument on February 14, 2013, the Court asked counsel for Stewart whether the interests of Sterling and Stewart could be in conflict if a broader duty of care was recognized.¹ In response, Stewart’s counsel assured the Court that here, “the interests of the insured and the insurer are perfectly aligned.” *Id.* at 4:50. In fact, Stewart viewed its interests as being anything but perfectly aligned with those of Sterling with regard to the assertion of an equitable subrogation defense. Indeed, they were so divergent that Stewart took the extraordinary measure of firing

¹ Oral Argument video, TVW (Feb. 14, 2013), http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2013020002C (“TVW”) at 4:19.

Witherspoon, because Swinton insisted on a course of action which he viewed as being in Sterling's best interests, but which Stewart viewed as contrary to its own interests.

E. **Sterling and Stewart's Interests Differed Regarding the Assertion of an Equitable Subrogation Defense.**

In particular, after Witherspoon asked for significant settlement authority, Rickenbach retained coverage counsel to see if Stewart could shift more than \$400,000 of the \$800,000 loss to Sterling. CP 2158.² In considering this request, coverage counsel suggested—in passing—that the doctrine of “equitable subrogation” might be a defense to the priority of Mountain West's lien. CP 3136. In response, Stewart's “recoupment counsel” in the Mountain West action expressed doubt about applicability but nevertheless promoted raising the defense, explaining to Stewart's in-house lawyers that “anything we can do to delay the onset of foreclosure works somewhat in our favor.” CP 1472.

Swinton had made an initial determination that he did not believe equitable subrogation was a viable defense. CP 2722, 2739-40, 2741-42, 2747. On May 5, 2009, after the defense had been suggested by Stewart's coverage counsel, Rickenbach specifically asked Witherspoon about the applicability of the equitable subrogation defense. CP 1931. After some initial openness to the defense, Swinton analyzed the issue in greater depth and again concluded that equitable subrogation was unlikely to succeed. *Id.*

² Another clear instance in which Stewart and Sterling's interests were obviously not aligned. Stewart was trying to shift the loss caused by its own negligence to Sterling on any theory its coverage counsel could find. *See* CP 3131-36.

at CP 2724-25, 2749-51, 2767, 1935-37, 2753. Moreover, unlike Stewart's recoupment counsel, Swinton believed that it was not in Sterling's interest to assert a weak defense that would have the effect of delaying the resolution of Mountain West's lien claim. Because the value of the real estate securing Sterling's loan was dropping along with the general real estate market, Sterling wanted to get the property securing its loan foreclosed as quickly as possible in order to realize on its collateral. CP 2728:7-24, *accord* at 2729:21-23. In short, while it was in Stewart's interests to stall and explore every defense possible, it was in Sterling's interest to quickly get to the bottom line and recover its collateral.

Accordingly, on June 2, 2009, Swinton wrote to Rickenbach saying he had given further thought to an equitable subrogation defense and doubted that the doctrine would apply for several reasons. CP 2218; 1935-37. Because of this expression of doubt about Stewart's desire to assert the defense, *Stewart immediately fired Swinton and replaced him with more compliant counsel*. CP 2219. Internally, Stewart's in-house lawyers acknowledged that the decision to fire Witherspoon came *because Swinton was being too loyal to his client*, Sterling, and was not supporting Stewart's desire to pursue its own interests:

. . . Duane clearly cannot be neutral to the situation. He is acting as counsel for the bank, and doesn't understand the difference between covered title claims and being the insured's personal counsel. . . . I think he's probably decent counsel for the lender individually, but he won't be able to assist in our resolution of the claim or minimize any loss.

CP 1468-69.

We haven't been overly impressed and have felt on several occasions that his closeness to Sterling Savings as a longtime client has impacted his ability to fulfill his obligations to us.

Id.

In short, notwithstanding Stewart's assurances, this was not a situation where its interests were "perfectly aligned" with those of Stewart with regard to an equitable subrogation defense. The interests of Sterling and Stewart were in direct conflict.

F. **Witherspoon Did Not Owe a Duty of Care to Stewart, an Admitted Nonclient, Under *Trask*.**

The possibility of creating conflicting loyalties is, of course, directly relevant to whether this Court would recognize a duty from a lawyer to a nonclient. In this regard, Stewart is not arguing that it was Witherspoon's client. Any such assertion would be contrary to the repeated statements in Stewart's retention letter that Sterling was Witherspoon's only client.

The absence of an attorney-client relationship between Witherspoon and Stewart is significant. An attorney normally owes a duty of care only to the client such that it is only the client who can bring a malpractice claim. *See Bohn v. Cody*, 119 Wn.2d 357, 364-65, 832 P.2d 71 (1992); *Stangland v. Brock*, 109 Wn.2d 675, 679, 747 P.2d 464 (1987). Accordingly, here, to create a duty from Witherspoon, Stewart must fit itself within the holding of *Trask v. Butler*, 123 Wn.2d 835, 840, 872 P.2d 1080 (1994). In *Trask*, this Court decided that, in rare circumstances, an attorney could owe a duty of care to a nonclient. To determine if such a duty exists, the *Trask* court adopted a multifactor balancing test as follows:

- 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.

Trask, 123 Wn.2d at 842-43.

However, no Washington appellate decision has ever applied *Trask* to impose a duty of care on the part of an insured's lawyer to the insurer. Moreover, to find such a duty would create potential conflicts, contrary to the sixth *Trask* factor, and would fail to satisfy other factors as well, precluding the recognition of any duty from Witherspoon to Stewart.

1. **Sterling Did Not Intend Witherspoon's Representation to Benefit Stewart.**

In this regard, the threshold question under *Trask* is not whether conflicts would be created, but whether the first factor, regarding an intent to benefit the nonclient, is satisfied. This Court has interpreted this factor to require that the nonclient be "an intended beneficiary of the transaction to which the advice pertained." *See id.* at 843. This first factor is a threshold inquiry because, if it is not satisfied, there is no duty to the nonclient and no other *Trask* factor need be considered. *Id.* That the nonclient is an incidental beneficiary is not enough. *Id.* at 845.

Moreover, the determinative inquiry regarding whether the nonclient

was an “intended beneficiary” is what the client, *Sterling*, intended to accomplish through the representation. See *Strait v. Kennedy*, 103 Wn. App. 626, 633-34, 13 P.3d 671 (2000) (relevant inquiry is what client intended to accomplish in litigation, not what nonclient plaintiff hoped to gain by it); see also 1 Ronald E. Mallen, Jeffrey M. Smith & Allison D. Rhodes, *Legal Malpractice* § 7.8 (2013 ed.) (“[T]he determinative inquiry is whether the expressed intent of the client to benefit the plaintiff was the direct and agreed purpose of the transaction or relationship.”). Thus, whatever Stewart hoped to accomplish or receive by Witherspoon’s representation of Sterling is irrelevant. *Id.* Were it otherwise, a nonclient could unilaterally create conflicting duties on the part of counsel for another party.

Here, there is no evidence that Sterling established its attorney-client relationship with Witherspoon with the express purpose of generating a benefit for Stewart. Witherspoon was not an “insurance defense” firm that had a longstanding relationship with Stewart. CP 55:10-23; 1986:16-1987:2. Rather, as Stewart knew at the outset, Witherspoon was *Sterling’s* long-time counsel, which Sterling retained before Stewart was even contacted. CP 51:15-25, 1986:16-1987:2. Moreover, it defies common sense to say that an insured buys insurance coverage with the intent of benefitting the insurer. An insured buys a policy—spending thousands of dollars in this case³—to protect its own interests.

Nor does taking advantage of the defense offered under an insurance

³ See CP 1071 and 1108.

policy transform the insured's intent to protect its own interests into an intent to protect those of the insurer. For example, there is no evidence here that Sterling wanted Witherspoon to assert a weak defense that would cause a delay in its efforts to recover its collateral simply because Stewart thought delay was in its interest. To the contrary, Sterling wanted to recover its collateral quickly before the real estate market could deteriorate even further.

In any event, *Tank v. State Farm Fire & Casualty Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986), recognizes that an insurer's obligation to provide a defense to its insured does not transform the insurer into the "intended beneficiary" of the representation and does not mean that the insurer can rely on the insured's attorney to protect its interests. To the contrary, *Tank* cites RPC 5.4(c) for the proposition that a lawyer for the insured cannot allow the insurer to influence his representation of the insured and must understand that he or she represents only the insured:

[RPC] 5.4(c) prohibits a lawyer, employed by a party to represent a third party, from allowing the employer to influence his or her professional judgment. In a reservation-of-rights defense, RPC 5.4(c) demands that counsel understand that he or she represents only the *insured*, not the company. As stated by the court in *Van Dyke v. White*, 55 Wn.2d 601, 613, 349 P.2d 430 (1960), "[t]he standards of the legal profession require undeviating fidelity of the lawyer to his client. No deviations can be tolerated."

105 Wn.2d at 388. Although *Tank* involved a reservation of rights defense,⁴

⁴ Notably, Stewart's retention letter pointedly refused to say whether it was reserving rights to dispute coverage:

[I]n certain cases (but not necessarily in this case), Stewart's ultimate obligation to your client may be the subject of a Reservation of Rights communicated or to

RPC 5.4(c) is not so limited and would apply to any issue where the insurer's wishes or interests might differ from those of the insured. Moreover, as comment 11 to RPC 1.8 recognizes, such conflicts frequently occur in third-party payer situations such as the insured-insurer relationship and may manifest in many ways. RPC 1.8 cmt. 11.

Accordingly, because under *Tank* and the applicable RPCs the lawyer for the insured must consider only the interests of the client, the nonclient insurer cannot be the intended beneficiary of the representation. To hold otherwise would contravene, and effectively eviscerate, the clearly-defined relationship between insurer, insured, and retained counsel carefully crafted by this Court in *Tank* to ensure that "no exceptions" to counsel's "undeviating fidelity . . . to his client" would arise. 105 Wn.2d at 388. While the insurer may be an *incidental* beneficiary of the defense provided to the insured, that is not enough to satisfy the first *Trask* factor. See *Trask*, 123 Wn.2d at 845.

2. **Creating a Duty to Competently Represent the Interests of the Insurer Would Create Conflicts and Divided Loyalty on the Part of the Attorney.**

In short, there simply was no basis on which the first *Trask* factor can be satisfied—Stewart cannot make itself the intended beneficiary of Witherspoon's representation of Sterling. However, even if one ignored Stewart's inability to satisfy this threshold inquiry, Stewart cannot satisfy the final *Trask* factor. This factor considers the extent to which the legal

be communicated to your client by Stewart. Stewart does not intend that you should ever become knowledgeable of such a reservation. . . . CP 1142.

profession would be burdened by recognition of a duty to a nonclient. As this Court in *Trask* observed, the “policy considerations against finding a duty to a nonclient are the strongest where doing so would detract from the attorney’s ethical obligations to the client.” 123 Wn.2d at 844. For example, the *Trask* court noted that the interests of a personal representative are not necessarily harmonious with those of an estate beneficiary, even though a fiduciary relationship is owed, and that imposing a duty running from the attorney for the personal representative to the estate beneficiaries would thus create a risk of the attorney having divided loyalties. *See id.*

Here, the same concerns exist with regard to whether a duty should be imposed on the insured’s attorney to competently represent the interests of the insurer. As this case illustrates, there are numerous potential conflicts between the interests of the insurer and the insured. For example, Sterling’s interest was to obtain a prompt resolution of Mountain West’s \$800,000 mechanic’s lien claim so that it then could foreclose on the Cook Addition, the value of which was falling. By contrast, Stewart’s interest was to delay and avoid in any manner possible the contractually-assumed losses caused by its own admitted negligence. There were other potential conflicts as well, such as Stewart’s retention of coverage counsel to try to shift its own loss to Sterling, and Stewart’s belated reservation of rights one year into the underlying litigation. Imposing a duty of care on the insured’s attorney to competently represent the interests of the insurer would thus create a risk of divided loyalties on both and countless other potential conflicts.

Stewart’s response has been to argue that, at the point Witherspoon

asked for permission to stipulate to the priority of Mountain West's lien, none of these issues had yet manifested. In essence, Stewart suggests that a conditional duty of sorts be adopted under *Trask*. Under this conditional duty, the insured's attorney would owe a duty of care to the insurer whenever the interests of the insured and insurer are aligned, but this duty would vanish when a conflict arose. The problem with such a now-you-see-it-now-you-don't duty is that it is practically unworkable—it would require the attorney to continually monitor and evaluate whether the client's interests are consistent with those of the insurer and then communicate the attorney's conclusion with all concerned. It also would require both the client and the insurer to communicate openly and candidly with the attorney about all of their goals and interests. In the day-to-day world, open communication from the insurer is unlikely and evaluating whether interests are aligned is an uncertain process that would subject an attorney to second-guessing and undermine the attorney's focus on the client's interests. Similar concerns in *Mazon v. Krafchick*, 158 Wn.2d 440, 144 P.3d 1168 (2006), lead this Court to reaffirm *Tank*'s holding that an attorney's duty is only to the client and to adopt a "bright-line rule" that no duty of care can exist between cocounsel.

In particular, Mazon and Krafchick jointly represented a client in a personal injury case. 158 Wn.2d at 443. The action was then dismissed after Krafchick failed to timely commence suit. *Id.* After settling the client's malpractice case, Mazon sued Krafchick to recover his expected contingent fee and the money his carrier paid towards the settlement. *Id.* It was clear that the interests of the client and cocounsel were aligned in regard

to the duty that Mazon argued existed in that case—to timely commence suit, and conduct the case in a manner that would not diminish the recovery. *See id.* at 447. Thus, if Stewart’s proposal of a duty conditioned on alignment of interests were adopted, *Mazon* would present a situation where a duty should be recognized.

Instead, this Court adopted a bright-line rule that no duty was owed between cocounsel in *any* circumstance. In so holding, the Court reiterated that a lawyer’s only duty must be to the client, even where the client’s interests are seemingly aligned with those of some third party seeking to impose a duty:

The [Court of Appeals] recognized that Mazon’s claim in this case did not create an actual conflict with [counsel’s] . . . undivided loyalty to [the client], but decided that public policy dictates against allowing claims between cocounsel for lost prospective fees because of the potential conflict with the undivided loyalty owed to the client. The court reasoned that a bright-line rule is preferable because it prevents conflicts from arising at any point during the representation, assures the client’s interest is paramount regardless of the issue, and is easy to administer. *Mazon*, 126 Wn. App. at 220.

....

... [T]he Court of Appeals . . . recognized that “Washington ethical rules are clear that ‘[t]he standards of the legal profession require undeviating fidelity of the lawyer to his client. No exceptions can be tolerated.’”

Id. at 447-49 (quoting *Tank*, 105 Wn.2d at 388). Thus, the mere *potential* for conflicts to arise over the course of the case between the interests of the client and nonclient required a bright-line rule that would avoid such debates after the fact. Indeed, the lone dissent in *Mazon* describes this bright-line

rule as seeking “to prevent *any possible conflict at any possible time in any possible case.*” 158 Wn.2d at 453.

In part, the rationale for adopting this bright-line rule was the practical difficulty in telling when a potential conflict existed and the possibility that judgment call decisions by counsel would later be second-guessed by the nonclient:

Additionally, the question of whether an attorney’s claim conflicts with the client’s best interests may be difficult to answer. Discretionary, tactical decisions, such as whether to advise clients to settle or risk proceeding to trial and determining the amount and structure of settlements, could be characterized by cocounsel as a breach of the contractual duties or general duties of care owed to one another and provide a basis for claims seeking recovery of prospective fees.

Id. at 449. Here, for all the same reasons, a lawyer such as Mr. Swinton should not have to continually worry whether the interests of his long-time client are consistent with those of an insurance company. If Mr. Swinton can be sued by Stewart, then he will naturally be tempted to consider not just Sterling’s best interests, but also Stewart’s own reactions. Thus, creating a simultaneous duty to Stewart, even when its interests are seemingly aligned with those of Witherspoon, would tend to undermine Mr. Swinton’s undivided duty to the client. Moreover, if this Court adopts a rule allowing insurance companies to sue their insured’s counsel for malpractice, this will subject attorneys to second-guessing by the insurance company where, as here, the insurer does not like the outcome and seeks to blame its insured’s counsel rather than accept responsibility for its own negligence.

In short, because “policy considerations against finding a duty to a nonclient are the strongest where doing so would detract from the attorney’s ethical obligations to the client,” the final *Trask* factor cannot be met in this case. Accordingly, this Court should not impose a duty on the attorney for the insured to competently represent the insurer. *See Trask*, 123 Wn.2d at 844.

G. No Duty Exists Under the RESTATEMENT § 51.

Finally, as an alternative to *Trask*, Stewart also argued that this Court should adopt the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (2000) (“RESTATEMENT”) and impose a duty. Reply Br. 23-24. However, no Washington authority has ever adopted RESTATEMENT § 51. Indeed, in the only case to reference it, this Court necessarily rejected it. In *Mazon, supra*, the *dissent* argued, as Stewart does here, that the court should adopt Restatement § 51. *Mazon*, 158 Wn.2d at 454-55. However, the *Mazon majority* did not expand the *Trask* standard by adopting § 51. To the contrary, citing *Tank*, it held that “a bright-line rule is preferable” under which the attorney’s duties are owed solely to the actual client “because it prevents conflicts from arising at any point during the representation, assures the client’s interest is paramount regardless of the issue, and is easy to administer.” *Id.* at 447. Thus, RESTATEMENT § 51 does not apply because Washington already has controlling principles to govern when a duty to a nonclient exists and those principles impose different, more restrictive elements barring Stewart’s claim.

RESPECTFULLY SUBMITTED this 11th day of March, 2013.

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true copy of the foregoing was served on each and every attorney of record herein:

VIA EMAIL & MAIL:

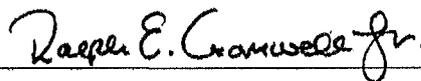
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED in Seattle, Washington, on this 11th day of March, 2013.



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Please see the attached Respondents' Supplemental Briefing re Duty as required by the Court's order of February 20, 2013.

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