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No. 93207-7

SUPREME COURT OF THE STATE OF WASHINGTON

ROFF ARDEN and BOBBI ARDEN, husband and wife,

Petitioners,

vs.

FORSBERG & UMLAUF, P.S., a Washington State professional services corporation; JOHN HAYES and "JANE DOE" HAYES, adult Washington State residents including any marital community; WILLIAM "CHRIS" GIBSON and "JANE DOE" GIBSON, adult Washington State residents including any marital community; and DOE DEFENDANTS I through V,

Respondents.

BRIEF OF FEDERATION OF DEFENSE AND CORPORATE  
COUNSEL – AMICUS CURIAE

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### **IDENTITY AND INTEREST OF AMICUS**

The Federation of Defense and Corporate Counsel (“FDCC”), formed in 1936, has an international membership of over 1400 attorneys. The FDCC is composed of attorneys in private practice, general counsel, and insurance claims executives. Membership is available solely by nomination, and is limited to those attorneys who have been judged by their peers to have achieved professional distinction and demonstrated leadership in their areas of expertise. The FDCC is committed to promoting knowledge, professionalism, and high ethical standards among its members.

This case affects the rights and duties of all insurers who write policies in Washington, as well as the rights of Washington insureds, because the positions advocated by Petitioners have the potential to drastically impair insurers’ ability to select qualified and experienced defense counsel to provide a defense to their insureds. For this and many other reasons, the FDCC supports Respondents’ position that this Court reaffirm existing Washington law governing insurers and counsel representing Washington insureds. The FDCC believes its breadth and depth of experience in the fields of insurance defense and insurance coverage will be helpful to the Court in resolving this case.

## INTRODUCTION

This case primarily concerns an attorney's fiduciary duty of loyalty to his or her insured client in a reservation of rights defense while the attorney or other members of the attorney's firm represent, or have represented, the insurer in unrelated cases. Petitioners have also raised the question of an attorney's fiduciary duty of loyalty to an insured where he or she represents other insureds of the same insurer in unrelated matters.

This Court has recognized the potential for a conflict of interest in a reservation of rights situation and has set out a comprehensive framework governing how attorneys defending under a reservation of rights must comply with the duty of good faith applicable in these cases. *See Tank v. State Farm Fire & Casualty Co.*, 105 Wn.2d 381, 388, 715 P.2d 1133 (1986). In this matter, the Court of Appeals applied the *Tank* standard and correctly concluded Respondents had fully complied.

Petitioners, however, advocate a sharp reversal of long-standing Washington precedent and the imposition of unnecessary and impractical restrictions on insurers' ability to provide a defense to their insured while reserving their rights as to coverage issues. Washington's existing law provides protections and benefits for both insurer and insured. Petitioners' drastic claim that a defense attorney retained by an insurer has an automatic conflict of interest if he or she has ever done coverage work for

the insurer on unrelated matters is squarely at odds with well-established and effective precedent. Petitioners even suggest it could be improper for an insurer to retain the same defense counsel to defend different insureds in different, unrelated actions. Prohibiting such a practice could have severe consequences. If an insurer could retain a defense attorney to defend only one of its insureds, ever, insurers could rapidly exhaust the pool of qualified attorneys to retain for their insureds thereby jeopardizing the ability of the insurer to provide an adequate defense. This consequence may also discourage competent attorneys from practicing in certain areas where the need for insurer-appointed defense often arises. Such a state of affairs would serve no one and is wholly unsupported by reason or law.

For these reasons and those set forth below, the FDCC urges this Court to affirm the decision of the Court of Appeals and reaffirm its decision in *Tank*. This brief addresses only the Ardens' argument that this Court should create new law that uniformly prohibits law firms and attorneys from representing insurers in coverage matters while representing the insurance companies' insureds in unrelated defense matters. Such situations should be left to the already established Rules of Professional Conduct, the clear ruling in *Tank*, and other ethical standards applicable to all attorneys on a case-by-case basis.

### **ISSUES PRESENTED BY AMICUS**

- I. It is well-established in Washington that there is no automatic conflict of interest where an insurer retains counsel to defend its insured under a reservation of rights.
- II. An “automatic conflict” rule would have severe negative consequences, including limiting the pool of attorneys available to serve as defense counsel.

### **STATEMENT OF THE CASE**

The dispute underlying this case arose in December 2011 when Roff Arden shot and killed a puppy belonging to his neighbors, Wade and Ann Duffy. The Duffys sued the Ardens, and the Ardens tendered the suit to their insurer, Property and Casualty Insurance Company of Hartford (“Hartford”). After initially declining to defend based on the intentional act exclusion in the Ardens’ homeowners insurance policy, Hartford agreed to defend because the complaint also contained allegations of negligence. Hartford retained the law firm of Forsberg & Umlauf, P.S. to defend the Ardens, and the firm assigned attorneys John Hayes and William “Chris” Gibson to the case. The Ardens had also retained coverage counsel, John Cushman.

After settlement negotiations failed, the Ardens sued Hartford for bad faith. The Ardens added Forsberg & Umlauf, Hayes, and Gibson

(collectively, “Forsberg”) as defendants, alleging that Forsberg had committed malpractice and that the firm and its attorneys had breached their fiduciary duties. A mediation between all parties resulted in an agreement that Hartford would fund a settlement of the lawsuit against the Ardens and that the Ardens would dismiss their claim against Hartford. The Ardens’ claims against Forsberg remained. Following summary judgment in favor of Forsberg, the Ardens appealed and the Court of Appeals affirmed.

### ARGUMENT

I. **Well-established Washington law provides that there is no automatic conflict of interest where an insurer retains counsel to defend its insured under a reservation of rights.**

The Ardens assert “Forsberg had a potential ‘materially limited’ conflict due to its long-standing relationships as coverage counsel and panel counsel for Hartford” and breached its fiduciary duties “by failing to disclose or resolve this conflict of interest.” The Ardens are incorrect. The mere fact that Forsberg had previously acted as coverage counsel for Hartford in unrelated matters, or had previously been retained to defend other Hartford insureds in other actions, does not automatically create a conflict of interest under Washington law.

An attorney’s fiduciary duties are laid out in Washington’s Rules of Professional Conduct (“RPC”). RPC 1.7(a) provides that “a lawyer

shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Additionally, RPC 5.4(c) prohibits a lawyer retained to represent a third party from allowing the employer to influence his or her professional judgment.

At least one Division of the Court of Appeals has interpreted *Tank* as providing that there is no *presumption* of a conflict of interest in a reservation of rights defense. *See Johnson v. Continental Cas. Co.*, 57 Wn. App. 359, 363, 788 P.2d 598 (1990) ("In Washington, there is simply no presumption . . . that a reservation of rights situation creates an automatic conflict of interest."). Rather, the Court in *Tank* set forth specific good faith criteria that must be met by the insurer and assigned defense counsel in reservation of rights cases. *See Tank*, 105 Wn.2d at 388. These duties were put forward by the Court to address the *potential* for a conflict of interest and bad faith by the insurer. Under *Tank*, an insurer has three duties:

First, the company must thoroughly investigate the cause of the insured's accident and the nature and severity of the plaintiff's injuries. Second, it must retain competent defense counsel for the insured. Both retained defense counsel and the insurer must understand that only the *insured* is the client. Third, the company has the responsibility for fully informing the insured not only of the reservation of rights defense itself, but of *all* developments relevant to his policy coverage and the progress of his lawsuit.

*Tank*, 105 Wn.2d at 388 (emphasis in original).

A defense counsel has additional obligations, which are guided by the RPC. First, defense counsel must "understand that he or she represents only the insured, not the [insurance] company." *Id.* Second, defense counsel owes a three-part "duty of full and ongoing disclosure to the insured." *Id.* First, "potential conflicts of interest between insurer and insured must be fully disclosed and resolved in favor of the insured." *Id.* Second, "all information relevant to the insured's defense . . . must be communicated to the insured." *Id.* at 388-89. Third, all offers of settlement "must be disclosed to the insured as those offers are presented." *Id.* at 389.

In crafting these rules for defense counsel, the Court relied primarily on the ethical rules already applicable to *all* attorneys under the RPC. *Tank* did not set forth new rules but merely affirmed the already established ethical standards in the context of a reservation of rights defense. The RPC are as applicable today as they were thirty years ago,

and there is no need, nor any legal basis, to establish a different approach to the RPC for insurers and defense counsel. Whether violations of the RPC exist should be determined on a case-by-case basis, as they always have.

Here, the Court of Appeals correctly concluded on the particular facts of this case “that Forsberg’s representation of the Ardens while it also represented Hartford did not create a conflict of interest and . . . Forsberg had no obligation to notify the Ardens that they represented Hartford in other cases.” *Arden v. Forsberg & Umlauf*, 193 Wn. App. 731, 736-37, 373 P.3d 320 (2016). The Court of Appeals explained “Hartford’s interests were not directly adverse to the Ardens’ interest with regard to Forsberg’s defense of the Duffy lawsuit. Hartford and the Ardens did have adverse interests with regard to coverage issues, but Forsberg made it clear that it did not represent either Hartford or the Ardens on those issues.” *Id.* at 747. And because Forsberg “follow[ed] the criteria outlined in *Tank*, there [wa]s not a significant risk” that Forsberg’s representation of the Ardens would be “materially limited” by Forsberg’s representation of Hartford in other cases. *Id.* Thus, Forsberg complied with *Tank* because it understood that it was representing only the insured, not the insurer, and communicated this and other aspects to the reservation of rights process to the Ardens. *See Tank*, 105 Wn.2d at 388-89.

The *Tank* standard has proven effective for addressing potential conflict of interest issues that could arise in a reservation of rights defense for thirty years. For example, in *Johnson v. Continental Casualty Co.*, the Court of Appeals applied *Tank*, explaining that “[t]he rule in Washington . . . is not that a conflict arises automatically in [reservation of rights] cases, but that an insurer, defending under a reservation of rights, has an ‘enhanced obligation of fairness toward its insured.’” 57 Wn. App. 359, 361, 788 P.2d 598 (1990) (quoting *Tank*, 105 Wn. 2d at 383). The *Johnson* court rejected the insured’s “bare allegation[]” that he “fe[lt] that the refusal of the defendant to provide coverage for certain of the above referenced claims creates a conflict of interest for the attorney selected by the defendant to defend against the above referenced claims.” *Id.* at 362-63.

Other courts have also found the *Tank* framework persuasive. As the Alabama Supreme Court explained,

The standard set forth in *Tank*,[] requiring an enhanced obligation of good faith coupled with the specific criteria that must be met by both the insurer as well as the defense counsel retained by the insurer, provides an adequate means for safeguarding the interests of the insured without, at the same time, engaging in the presumption that any and all defense counsel retained by the insurance industry to represent its insureds under a reservation of rights are conclusively unable to do so without consciously or unconsciously compromising the interests of the insureds.

*L&S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 521 So.2d 1298, 1304 (Ala. 1987). *Accord, Finley v. Home Ins. Co.*, 90 Haw. 25, 36-37, 975 P.2d 1145 (1998) (applying *Tank's* reasoning with respect to the insurer's duties). Numerous other courts have rejected the proposal that a conflict of interest automatically arises in a reservation of rights defense. *See, e.g., Twin City Fire Ins. Co. v. Ben-Arnold-Sunbelt Bev. Co. of S.C., LP*, 433 F.3d 365, 371-74 (4th Cir. 2005) (predicting South Carolina law); *Armstrong Cleaners, Inc. v. Erie Ins. Exch.*, 364 F. Supp. 2d 797, 816 (S.D. Ind. 2005) (applying Indiana law); *Travelers Indem. Co. v. Royal Oak Enters.*, 344 F. Supp. 2d 1358, 1374 (M.D. Fla. 2004) (predicting Florida law); *Cent. Mich. Bd. of Trs. v. Emplrs. Reinsurance Corp.*, 117 F. Supp. 2d 627, 634-36 (E.D. Mich. 2000) (applying Michigan law). Thus, *Tank* effectively addresses the duties of an insurer and defense counsel in a reservation of rights context, and there is no compelling reason to change the law.

Moreover, it should be noted that ethical and competent attorneys have been providing defenses under a reservation of rights pursuant to the guidance of *Tank* and the RPC for thirty years without incident. The duty of loyalty is a duty owed by the attorney. The attorney therefore will always be the gate keeper for his or her own actions regardless of whether an "automatic" rule applies. An additional mandate would provide no

further assistance to defense counsel or the insured that is not already addressed by the current ethical rules.

**II. An “automatic conflict” rule would have severe negative consequences, including limiting the pool of attorneys available to serve as defense counsel.**

In addition to being contrary to Washington law, the Ardens’ proposal would also be extremely impractical and could have harmful consequences for both insurer and insured. Crucially, it would reduce the pool of qualified defense counsel available to represent insureds. If an insurer could never hire the same attorney or law firm, without an express waiver of conflict, for both defense and unrelated coverage work, or could never retain the same defense counsel twice, insurers could actually run out of attorneys to retain for their insureds. Such a rule would be detrimental to both insurers and insureds.

Moreover, such a rule would potentially have a chilling effect on competent defense counsel. Often times, an insurer-assigned defense counsel has the benefit of practicing in one or multiple focused areas of the law resulting in him or her honing and perfecting his or her knowledge in a particular practice area. For example, an insurer may assign one particular attorney or firm to defend insureds for construction defect claims because that firm or attorney has practiced in that area for years representing other insureds, whereas it may assign a different firm or

attorney to defend an insured in an environmental case. The insurer then may be in a better position than the insured to locate and retain competent defense counsel to defend its insured against the particular claims at issue. The defense counsel is thus vetted by the insurer not only through internal processes, but also through years of observed litigation. The insurer has the benefit of seeing that attorney's prior performances and evaluating his or her effectiveness, diligence, and advocacy for the insured. Firms such as Forsberg & Umlauf would have little incentive to continue practicing as assigned defense counsel if they were limited to the defense of only one insured.

Such a rule therefore could hinder the ability of the insurer to provide adequate, competent, and proficient defense counsel to the insured. Unfortunately, it would be the insured who would suffer the most from an inadequate and incompetent defense. Although, in a reservation of rights situation, an insurer and its insured may have an inherent conflict related to coverage, they still have mutual interests in a vigorous, diligent, and effective defense of the underlying action. The relief sought by Petitioner in this case could severely impair those interests.

**CONCLUSION**

For the foregoing reasons, the FDCC urges this Court to affirm the Court of Appeals and reaffirm its decision in *Tank*.

Dated: December 2, 2016.

Respectfully submitted,

s/ Diane L. Polscer

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## DECLARATION OF SERVICE

On December 2, 2016, I electronically served a true and complete copy of the BRIEF OF FEDERATION OF DEFENSE AND CORPORATE COUNSEL – AMICUS CURIAE in Supreme Court Cause No. 93207-7 on the following parties:

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

Dated: December 2, 2016.

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DECLARATION OF SERVICE

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**Re: Arden, et al. v. Forsberg & Umlauf; Hayes; Gibson, et al.  
Case No. 93207-7**

Dear Clerk of the Court:

Attached please find the following Motion and Brief that we would like filed on behalf of the Federation of Defense and Corporate Counsel:

- (1) MOTION OF FEDERATION OF DEFENSE AND CORPORATE COUNSEL FOR PERMISSION TO FILE A BRIEF AS AMICUS CURIAE; and
- (2) BRIEF OF FEDERATION OF DEFENSE AND CORPORATE COUNSEL – AMICUS CURIAE.

I look forward to receiving a response confirming that these were both filed and processed today. Thank you.

Happy Holidays...

Best,

Rebecca

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