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NO. 93207-7

SUPREME COURT OF THE STATE OF WASHINGTON

ROFF ARDEN and BOBBI ARDEN, husband and wife,

Petitioners,

v.

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 *AMICUS CURIAE*
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TABLE OF CONTENTS

I.	IDENTITY AND INTEREST OF AMICUS CURIAE.....	1
II.	SUMMARY OF THE ANALYSIS	1
III.	ANALYSIS	4
	A. This Court’s Opinion in <i>Tank</i> Set out the Duties of Retained Counsel in a Reservation-of-Rights Defense.....	4
	B. This Court, the Washington Appellate Courts, and the Federal Courts in Washington State Have Consistently Adhered to the <i>Tank</i> Principles	5
	C. Most Other Jurisdictions Agree with This Court’s Analysis in <i>Tank</i> , Either Explicitly or Implicitly	7
	D. There Is No Reason to Adopt a Per Se Rule Disqualifying Attorneys Who Sometimes Provide Coverage Opinions to Insurers or Defend Insurers in Coverage Actions.....	11
	E. The Ardens’ Proposed Rule Would Have Pernicious Consequences	16
	F. The Ardens Already Had Their Own Independent Counsel, So They Didn’t Need Any Additional Protection	19
IV.	CONCLUSION	20

TABLE OF AUTHORITIES

Federal Cases

Armstrong Cleaners, Inc. v. Erie Ins. Exch.,
364 F. Supp. 2d 797 (S.D. Ind. 2005) 8

Driggs Corp. v. Pa. Mfrs. Ass'n Ins. Co.,
3 F. Supp. 2d 657 (D. Md. 1998) 8

Fed. Ins. Co. v. X-Rite, Inc.,
748 F. Supp. 1223 (W.D. Mich. 1990)..... 9

HK Sys., Inc. v. Admiral Ins. Co.,
No. 03 C 0795, 2005 WL 1563340
(E.D. Wis. June 27, 2005)..... 10

Ins. Co. of N. Am. v. Spangler,
881 F. Supp. 539 (D. Wyo. 1995)..... 10

Jaco Envtl., Inc. v. Am. Int'l Specialty Lines Ins. Co.,
No. 2:09-CV-0145JLR, 2009 WL 1591340
(W.D. Wash. May 19, 2009)..... 6

Rx.com Inc. v. Hartford Fire Ins. Co.,
426 F. Supp. 2d 546 (S.D. Tex. 2006) 10, 14

Specialty Surplus Ins. Co. v. Second Chance, Inc.,
412 F. Supp. 2d 1152 (W.D. Wash. 2006)..... 6

Trinity Universal Ins. Co. v. Stevens Forestry Serv., Inc.,
335 F.3d 353 (5th Cir. 2003)..... 8

*Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt
Beverage Co. of S.C.*, 433 F.3d 365 (4th Cir. 2005) 9

Tyson v. Equity Title & Escrow Co. of Memphis,
282 F. Supp. 2d 829 (W.D. Tenn. 2003)..... 10

Union Ins. Co. v. Knife Co.,
902 F. Supp. 877 (W.D. Ark. 1995)..... 10

Weinstein & Riley, P.S. v. Westport Ins. Corp.,
No. C08-1694JLR, 2011 WL 887552
(W.D. Wash. Mar. 14, 2011)..... 6, 7

State Cases

Anastasi v. Fid. Nat. Title Ins. Co.,
137 Haw. 104, 366 P.3d 160 (2016) 7

Arden v. Forsberg & Umlauf, P.S.,
193 Wn. App. 1731, 373 P.3d 320 (2016)..... *passim*

Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.,
126 Wn. App. 352, 110 P.3d 1145 (2005)..... 15

<i>CHI of Alaska, Inc. v. Emp'rs Reinsurance Corp.</i> , 844 P.2d 1113, 1121 (Alaska 1993).....	10
<i>Dynamic Concepts, Inc. v. Truck Ins. Exch.</i> , 61 Cal. App. 4th 999, 71 Cal. Rptr. 2d 882 (1998).....	7
<i>Fed. Ins. Co. v. MBL, Inc.</i> , 219 Cal. App. 4th 29, 160 Cal. Rptr. 3d 910 (2013).....	7
<i>Gafcon, Inc. v. Ponsor & Assocs.</i> , 98 Cal. App. 4th 1388, 120 Cal. Rptr. 2d 392 (2002).....	8
<i>Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.</i> , 439 Mass. 387, 788 N.E.2d 522 (2003)	10
<i>Jain v. J.P. Morgan Sec., Inc.</i> , 142 Wn. App. 574, 177 P.3d 117 (2008)	15
<i>Johnson v. Cont'l Cas. Co.</i> , 57 Wn. App. 359, 788 P.2d 598 (1990).....	6, 7
<i>Lifestar Response of Ala., Inc. v. Admiral Ins. Co.</i> , 17 So.3d 200 (Ala. 2009)	7
<i>Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.</i> , 161 Wn.2d 903, 913–19 & nn.9–10 (2007).....	5
<i>Mut. Serv. Cas. Ins. Co. v. Luetmer</i> , 474 N.W.2d 365 (Minn. Ct. App. 1991)	9
<i>National Surety Corp. v. Immunex Corp.</i> , 176 Wn.2d 872, 297 P.3d 688 (2013).....	6
<i>Red Head Brass, Inc. v. Buckeye Union Ins. Co.</i> , 735 N.E.2d 48 (Ohio Ct. App. 1999)	9
<i>Safeco Ins. Co. of Am. v. Butler</i> , 118 Wn.2d 383, 823 P.2d 499 (1992).....	5, 6
<i>San Diego Navy Fed. Credit Union v.</i> <i>Cumis Ins. Soc/, Inc.</i> , 162 Cal. App. 3d 358, 208 Cal. Rptr. 494 (1984).....	8
<i>State Farm Mut. Auto. Ins. Co. v. Hansen</i> , 357 P.3d 338 (Nev. 2015)	9
<i>Tank v. State Farm Fire & Cas. Co.</i> , 105 Wn.2d 381, 715 P.2d 1133 (1986).....	<i>passim</i>
<i>United Servs. Auto Assn. v. Morris</i> , 741 P.2d 246 (Ariz. 1987).....	10

State Statutes

Cal. Civ. Code § 2860	7, 8
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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington Defense Trial Lawyers Association (WDTL), established in 1962, is composed of more than 750 Washington attorneys engaged in the defense of civil actions. The purpose of the WDTL is to promote the highest professional and ethical standards for Washington civil defense attorneys and to serve our members through education, recognition, collegiality, professional development, and advocacy. The WDTL represents its members in part by submitting amicus curiae briefs in cases that present issues of statewide concern to Washington civil defense attorneys and their clients. The WDTL prepares and submits these amicus curiae briefs on a pro bono basis.

The WDTL submits the following brief in support of the respondents and urges this Court to *affirm* the Court of Appeals.

II. SUMMARY OF THE ANALYSIS

Roff Arden, one of the two petitioners in this case, deliberately shot and killed a thirteen-week-old puppy owned by his neighbors, Wade and Ann Duffy. Not surprisingly, the Duffys brought suit against the Ardens for that needless killing. And, even though Roff Arden deliberately and unnecessarily shot and killed the Duffys' puppy, the Ardens asserted counterclaims against the Duffys for negligent infliction of emotional distress and filing a frivolous lawsuit.

The Ardens tendered the defense of the Duffys' action to their insurer, the Hartford. The Hartford initially denied the tender, but then later accepted it. The Hartford retained Forsberg & Umlauf to represent the Ardens in the Duffys' lawsuit. It later issued a letter reserving its right to deny coverage because some of the Duffys' claims against the Ardens were

not covered under the terms of the policy.¹

The Hartford settled the Duffys' claims against the Ardens. But the Ardens continue to pursue their claim against Forsberg in this action.

The Ardens claim that the Forsberg attorneys breached their duties to the Ardens. In *Tank v. State Farm Fire & Casualty Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986), this Court explained clearly the duties owed by attorneys such as the Forsberg attorneys in this matter. For thirty years, Washington courts have applied the teaching of this Court in *Tank*. And attorneys practicing in this state have relied on *Tank* to guide them in determining whether they may ethically represent particular clients.

In defending the Ardens, Forsberg scrupulously observed the *Tank* duties, even before the Hartford issued its reservation-of-rights letter. Forsberg represented only the Ardens—not the Hartford. Forsberg communicated all strategic issues either directly with the Ardens or with the Ardens' own counsel, Jon Cushman.² In addition, both the Ardens and their own counsel, Mr. Cushman, communicated directly with the Hartford's adjuster regarding settlement strategy and tactics. And the Hartford settled the Duffys' claims against the Ardens with its own money; the Ardens paid nothing to defend or settle the Duffys' lawsuit.

Despite these undisputed facts, the Ardens have claimed that Forsberg should have been disqualified from representing them merely because, *in entirely separate matters*, Forsberg advises or represents the

¹ Given the history of this matter, the Hartford may have been estopped from issuing the reservation of rights letter against the Ardens' claim as of the time of that issuance. But that question is only incidental to the current matter for two reasons: (1) Forsberg did not represent either the Hartford or the Ardens in regard to the coverage issue; and (2) the Hartford ultimately settled the Duffys' claim against the Ardens. The coverage issue thus never came to a head. Accordingly, Forsberg did not breach any duty toward the Ardens in regard to the coverage issue, and the Ardens didn't suffer any damages because of Forsberg's conduct.

² Mr. Cushman served as both coverage and counterclaim counsel for the Ardens.

Hartford in coverage decisions. And as part of their claim, the Ardens have asked that Forsberg disgorge to them—that is, the Ardens—fees paid by the Hartford, even though the Ardens, of course, never paid those fees.³

The trial court and the Court of Appeals both rejected the Ardens' arguments. This Court should do so as well. Forsberg adhered to its *Tank* duties. Neither this Court nor any other appellate court in Washington has ever required lawyers to disqualify themselves in such circumstances.

Nor should the Court adopt that rule in this case. There is simply no reason to conclude that an attorney or attorneys might breach their ethical duties in one case simply because of their role in an otherwise unrelated case. If this Court were to adopt the Ardens' proposed rule requiring per se disqualification, insurers would be obligated to seek out new counsel again and again. The costs would be high, and insureds would likely receive poorer representation.

Further, the Ardens' proposed rule would disrupt many contractual relationships. Many businesses enter into contracts that contain indemnification clauses. When one of the contractual partners makes use of such a clause, the indemnitor will very often retain for the defense of the matter an attorney or attorneys with whom it is very familiar—often attorneys who have advised the indemnitor about indemnification issues in other matters. The Ardens' proposed rule would thus upset the approach taken by many businesses, at increased costs to those businesses—with no clear benefit to anyone, and very likely a detriment to all.

Finally, in considering this matter, the Court should keep in mind that the Ardens were represented throughout this litigation by their own

³ CP 96. In asking that Forsberg disgorge its fees to themselves the Ardens are effectively seeking to profit from Mr. Arden's killing of the Duffys' puppy.

counsel, Mr. Cushman. If the Ardens needed additional protection from the Hartford, Mr. Cushman was there to provide that protection. Mr. Cushman worked closely with the Forsberg attorneys and the Hartford throughout the settlement discussions with the Duffys. Thus, the Ardens' claim that they needed independent counsel rings entirely hollow, *as they already had independent counsel.*

For these reasons, the WDTL urges the Court to *affirm* the decisions of the trial court and the Court of Appeals.

III. ANALYSIS

A. This Court's Opinion in *Tank* Set out the Duties of Retained Counsel in a Reservation-of-Rights Defense

In *Tank v. State Farm Fire & Casualty Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986), this Court identified both (1) an insurer's duties toward its insured when defending under a reservation of rights and (2) the duties of defense counsel retained by the insurer to represent the insured in such circumstances.

The Court began by recognizing that potential conflicts of interest are inherent in a reservation-of-rights defense. *Id.* at 383. Because of these potential conflicts, an insurer defending under a reservation of rights has an "enhanced obligation of fairness towards its insured." *Id.* To fulfill this enhanced obligation, an insurer (1) must thoroughly investigate the claim; (2) must retain competent defense counsel for the insured; (3) must fully inform the insured of the reservation of rights defense and all developments relevant to policy coverage and the lawsuit; and (4) must refrain from engaging in activity that would "demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk." *Id.* at 388.

The Court also identified the duties owed by the retained defense

counsel. *Id. First*, defense counsel owes a duty of loyalty to the insured, not the insurer. *Id. Second*, defense counsel “owes a duty of full and ongoing disclosure to the insured.” *Id.* To satisfy the duty of disclosure, defense counsel (1) must fully disclose potential conflicts of interest and resolve them in favor of the insured; (2) must communicate all information relevant to the insured’s defense to the insured; and (3) must disclose all offers of settlement to the insured. *Id.* at 388–89. The Court relied on the Rules of Professional Conduct in developing these criteria. *See id.*

In sum, in *Tank* this Court held that a reservation of rights does not automatically result in a conflict of interest between the insurer and the insured. Rather, this Court held simply that, because of potential conflicts inherent in a reservation-of-rights defense, an insurer must satisfy a heightened obligation of fairness, and the retained defense counsel must meet specific duties of loyalty and disclosure.

B. This Court, the Washington Appellate Courts, and the Federal Courts in Washington State Have Consistently Adhered to the Tank Principles

This Court has repeatedly relied on *Tank* when analyzing rights and duties in the reservation-of-rights context. *See, e.g., Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 161 Wn.2d 903, 913–19 & nn.9–10 (2007) (applying principles discussed in *Tank* to determine whether insurer acted in bad faith and also noting defense counsel’s duties); *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 389–93, 823 P.2d 499 (1992) (relying on *Tank* to hold there is a rebuttable presumption of harm when an insurer acts in bad faith under a reservation of rights).

In *National Surety Corp. v. Immunex Corp.*, for example, this Court addressed whether an insurer may recover defense costs incurred under a

reservation-of-rights defense. 176 Wn.2d 872, 878, 297 P.3d 688 (2013). As this issue was a matter of first impression in Washington, the insurer relied on cases from other jurisdictions to argue that it should be allowed to recoup its defense costs. *Id.* at 881–82. This Court rejected the insurer’s argument, holding the insurer did not have a right to reimbursement. *Id.* at 887. In so holding, this Court noted that allowing recoupment of defense costs would be inconsistent with its decision in *Tank*. *Id.*

The federal courts in Washington routinely apply the principles set forth in *Tank*. See, e.g., *Specialty Surplus Ins. Co. v. Second Chance, Inc.*, 412 F. Supp. 2d 1152, 1160–69 (W.D. Wash, 2006) (discussing *Tank* requirements in the context of settlement offers).

The Washington state and federal courts have also relied on *Tank*’s principles to hold that an insured is not entitled to independent counsel paid for by his or her insurer. See *Johnson v. Cont’l Cas. Co.*, 57 Wn. App. 359, 363, 788 P.2d 598 (1990); *Weinstein & Riley, P.S. v. Westport Ins. Corp.*, No. C08-1694JLR, 2011 WL 887552, at *19 (W.D. Wash. Mar. 14, 2011); *Jaco Envtl., Inc. v. Am. Int’l Specialty Lines Ins. Co.*, No. 2:09-CV-0145JLR, 2009 WL 1591340, at *8 (W.D. Wash. May 19, 2009) (citing *Johnson*, 57 Wn. App. at 600). These cases reason that an insured is not entitled to independent counsel because there is no presumption in Washington that a reservation of rights automatically creates a conflict of interest. See, e.g., *Johnson*, 57 Wn. App. at 363 (citing *Tank*, 105 Wn.2d at 378–88). Instead, the insured is entitled to defense counsel provided by the insurer. *Weinstein & Riley*, 2011 WL 887552, at *19. The defense counsel, in turn, must satisfy the specific duties outlined in *Tank* and the RPCs. *Johnson*, 57 Wn. App. at 362.

C. **Most Other Jurisdictions Agree with This Court's Analysis in Tank, Either Explicitly or Implicitly**

Most other appellate courts have adopted, either explicitly or implicitly, the rule set out in *Tank*.

Alabama and Hawaii have explicitly adopted the standards established in *Tank*. See *Anastasi v. Fid. Nat. Title Ins. Co.*, 137 Haw. 104, 114–15, 366 P.3d 160 (2016); *Lifestar Response of Ala., Inc. v. Admiral Ins. Co.*, 17 So.3d 200, 217 (Ala. 2009).

The California courts also refuse to apply a per se rule, instead determining the issue on a case-by-case basis: “[W]hen an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest *may* exist.” *Fed. Ins. Co. v. MBL, Inc.*, 219 Cal. App. 4th 29, 41, 160 Cal. Rptr. 3d 910, 920 (2013) (emphasis added) (quoting Cal. Civ. Code § 2860).

Some courts mistakenly characterize California as having adopted a per se rule. Indeed, in this matter the Court of Appeals made that error. See *Arden v. Forsberg & Umlauf, P.S.*, 193 Wn. App. 1731, 1748, 373 P.3d 320 (2016). But that interpretation is not accurate. In fact, the California courts determine whether an actual conflict exists based on the facts and circumstances of each case. *Dynamic Concepts, Inc. v. Truck Ins. Exch.*, 61 Cal. App. 4th 999, 1007–08, 71 Cal. Rptr. 2d 882, 887–88 (1998), *as modified* (Mar. 27, 1998).

The confusion stems from the California Court of Appeal's decision in *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc.*, 162 Cal. App. 3d 358, 208 Cal. Rptr. 494 (1984). The *Cumis* opinion contains broad language suggesting that, unless an insured consents to

representation by counsel hired by the insurer, a reservation of rights creates a per se conflict of interest requiring the insurer to pay for independent counsel. *See id.* at 506.

In response to *Cumis*, the California legislature enacted California Civil Code § 2860. *Hous. Grp. v. PMA Capital Ins. Co.*, 193 Cal. App. 4th 1150, 1152 n.1, 123 Cal. Rptr. 3d 603, 605 (2011). Section 2860 “codified the right to independent or *Cumis* counsel but clarified and limited *Cumis*’s stated rights and responsibilities of insurer and insured.” *Gafcon, Inc. v. Ponsor & Assocs.*, 98 Cal. App. 4th 1388, 1420, 120 Cal. Rptr. 2d 392, 416 (2002) (internal quotation marks omitted). Under § 2860, California courts must determine whether an actual conflict exists when an insurer reserves its rights. *See* Cal. Civ. Code § 2860.

Most other states also refuse to apply a per se rule:

Indiana: *Armstrong Cleaners, Inc. v. Erie Ins. Exch.*, 364 F. Supp. 2d 797, 807 (S.D. Ind. 2005) (explaining “not every reservation of rights poses a conflict for defense counsel”) (applying Indiana law).

Louisiana: *Trinity Universal Ins. Co. v. Stevens Forestry Serv., Inc.*, 335 F.3d 353, 356 (5th Cir. 2003) (an insurer is not required to pay for independent counsel when it defends an insured under a reservation of rights) (predicting Louisiana law).

Maryland: *Driggs Corp. v. Pa. Mfrs. Ass’n Ins. Co.*, 3 F. Supp. 2d 657, 659 (D. Md. 1998) (an insurer’s reservation of rights did not create an actual conflict of interest; therefore, the insurer was not required to provide independent counsel “simply because there was a potential conflict”) (applying Maryland law).

Michigan: *Fed. Ins. Co. v. X-Rite, Inc.*, 748 F. Supp. 1223, 1229–

30 (W.D. Mich. 1990) (an insurer's reservation of rights does not automatically entitle the insured to independent counsel) (predicting Michigan law).

Minnesota: *Mut. Serv. Cas. Ins. Co. v. Luetmer*, 474 N.W.2d 365, 368–69 (Minn. Ct. App. 1991) (an insured is not entitled to independent counsel when an insurer defends under a reservation of rights because an actual conflict of interest must exist, not just the appearance of a conflict).

Nevada: *State Farm Mut. Auto. Ins. Co. v. Hansen*, 357 P.3d 338, 343 (Nev. 2015) (“We conclude that the California approach, that a reservation of rights does not create a per se conflict, is most compatible with Nevada law. Courts must inquire, on a case-by-case basis, whether there is an actual conflict of interest. . . . Therefore, an insurer is obligated to provide independent counsel of the insured’s choosing *only when an actual conflict of interest exists.*”) (emphasis added).

Ohio: *Red Head Brass, Inc. v. Buckeye Union Ins. Co.*, 735 N.E.2d 48, 55 (Ohio Ct. App. 1999) (an insurer’s reservation of rights did not require the insurer to pay for independent counsel where the insurer’s and insured’s interests were not “mutually exclusive”).

South Carolina: *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C.*, 433 F.3d 365, 372 (4th Cir. 2005) (“[We] reject the notion that the reservation of rights letter issued in this case creates a per se conflict that must be remedied through the insured selecting counsel and having the insurance companies pay the legal fees.”) (predicting South Carolina law).

Tennessee: *Tyson v. Equity Title & Escrow Co. of Memphis*, 282 F. Supp. 2d 829, 832 (W.D. Tenn. 2003) (“The mere existence of a

relationship between [the insurer] and [the defense counsel retained by the insurer] is not sufficient to create a conflict of interest.”) (applying Tennessee law).

Texas: *Rx.com Inc. v. Hartford Fire Ins. Co.*, 426 F. Supp. 2d 546, 559 (S.D. Tex. 2006) (“Not every reservation of rights creates a conflict of interest allowing an insured to select independent counsel. . . . A conflict of interest does not arise unless the outcome of the coverage issue can be controlled by counsel retained by the insurer for the defense of the underlying claim.”) (applying Texas law).

Wisconsin: *HK Sys., Inc. v. Admiral Ins. Co.*, No. 03 C 0795, 2005 WL 1563340, at *8 (E.D. Wis. June 27, 2005) (“[T]he mere reservation of rights does not create a conflict automatically; instead, the reservation of rights must create opposition between the insured’s and insurer’s legal positions.”) (applying Wisconsin law).

A handful of states apply a per se rule.⁴ But, as set out above, the vast majority of states that have addressed this issue have agreed with this Court’s approach in *Tank*, holding that there is no need for a per se rule.

The Ardens have not provided any reason for this Court to depart from its well-reasoned opinion in *Tank*. The courts, insurers, insureds,

⁴ **Alaska:** *CHI of Alaska, Inc. v. Emp’rs Reinsurance Corp.*, 844 P.2d 1113, 1116–19, 1121 (Alaska 1993) (an insured has the right to choose independent counsel where an insurer has reserved its rights); **Arizona:** *United Servs. Auto Assn. v. Morris*, 741 P.2d 246, 252 (Ariz. 1987) (explaining “[t]he insurer’s reservation of the privilege to deny the duty to pay relinquishes to the insured control of the litigation”); **Arkansas:** *Union Ins. Co. v. Knife Co.*, 902 F. Supp. 877, 880–82 (W.D. Ark. 1995) (an insurer must retain independent counsel for its insured when the insurer reserves its rights) (predicting Arkansas law); **Massachusetts:** *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 406–07, 788 N.E.2d 522, 539 (2003) (“When an insurer seeks to defend its insured under a reservation of rights, and the insured is unwilling that the insurer do so, the insured may require the insurer either to relinquish its reservation of rights or relinquish its defense of the insured and reimburse the insured for its defense costs.”); **Wyoming:** *Ins. Co. of N. Am. v. Spangler*, 881 F. Supp. 539, 544 (D. Wyo. 1995) (“[A]n insurer who reserves the right to deny coverage loses the right to control the litigation.”) (predicting Wyoming law).

attorneys, and other parties have followed *Tank* for thirty years. None of the prior cases has demonstrated any difficulty in adhering to *Tank*. Nothing about this case offers any reason for the Court depart from *Tank*. The Court should decline to overrule *Tank* and should instead confirm that it will continue to adhere to its principles.

D. There Is No Reason to Adopt a Per Se Rule Disqualifying Attorneys Who Sometimes Provide Coverage Opinions to Insurers or Defend Insurers in Coverage Actions

Just as there is no reason to depart wholesale from *Tank*, there is also no reason to alter *Tank* to establish a per se rule disqualifying as insureds' counsel attorneys who may provide coverage opinions to insurers or who defend insurers in coverage actions. The fact that an attorney may directly assist the insurer in Matter A does not automatically mean that he or she will fail to fulfill his or her obligations to the insured in Matter B.

In *Tank*, this Court recognized precisely the possibility of such a conflict of interest and set out rules for both insurers and retained counsel to follow to avoid those problems. This Court recognized that the RPCs provide adequate guidance to attorneys representing insureds under these circumstances, and it explained that attorneys may generally be trusted to adhere to the RPCs. The Ardens are simply rearguing *Tank*—and they bring no new facts or arguments to the matter to suggest any problem. Instead, their argument rests fundamentally on the unsupported allegation that attorneys cannot be trusted to follow the RPCs. There is no reason to believe such a claim, either generally or in this case.

Nor is there any reason to add an additional rule requiring defense attorneys to disclose to insureds the fact that they (the attorneys) may represent insurers in coverage actions in other matters. If an attorney is not

representing an insurer in regard to coverage issues in the case at hand, there is no reason to believe that the attorney's representation of the insured will be affected. After all, in such instances the coverage question is entirely irrelevant to the retained attorney. Because that attorney isn't helping the insurer in the coverage dispute, that nonexistent work can't have any effect on the attorney's representation of the insured.

The Ardens imagine a scenario in which the Forsberg attorneys might have had to choose between two sets of findings, one covered and one uncovered.⁵ They speculate further that, faced with that scenario, the Forsberg attorneys would have chosen the insurer over the insureds.⁶

But that isn't a new or different conflict scenario. That is precisely the conflict scenario faced by any attorney hired by an insurer to represent an insured under a reservation of rights. This Court already laid out the rules in *Tank* for attorneys to follow in such a situation. And, despite the Ardens' plangent complaints, the evidence demonstrates that the Forsberg attorneys fully met and even exceeded their *Tank* obligations.

First, under *Tank* retained counsel must fully disclose potential conflicts of interest and resolve them in favor of the insured. *Tank*, 105 Wn. 2d at 388–89. In this case, no potential conflicts of interest existed as none of the work performed by Forsberg in other cases could rationally have altered their work on behalf of the Ardens. The Ardens never *explain* why the Forsberg attorneys faced a situation different from any retained attorneys in other reservation-of-rights cases. They simply make an unsupported conclusion. This case is no different from *Tank*. Accordingly, the Forsberg attorneys had no obligation to disclose any potential conflicts

⁵ Ardens' Supp. Br. at 9.

⁶ *Id.*

of interest because those conflicts simply didn't exist.

Second, under *Tank* retained counsel must communicate all information relevant to the insured's defense to the insured. *Id.* The Forsberg attorneys did so. They discussed both the facts of the case and the defense strategy directly with the Ardens and with the Ardens' own retained attorney, Jon Cushman.⁷

Third, under *Tank* retained counsel must disclose all offers of settlement to the insured. *Id.* Once more, the Forsberg attorneys did so.⁸ In addition, Mr. Cushman communicated directly with the Hartford's adjuster regarding the various settlement offers.⁹ The Forsberg attorneys advised the Ardens of their settlement valuation, and Mr. Cushman agreed with that valuation.¹⁰ In fact, Mr. Cushman wrote to the Forsberg attorneys and specifically stated: "I bet you can settle the case for the \$35,000 you estimate in value."¹¹

Later, the Forsberg attorneys informed Mr. Cushman that they were going to offer \$18,000 to settle the Duffys' claims.¹² Mr. Cushman responded: "I hope you succeed. I will stay out of the loop. Keep me posted by copy on all offers and responses."¹³ Later, Mr. Cushman himself reached out to the Duffys' counsel and sought a new demand, which the Duffys extended.¹⁴ The Forsberg attorneys sent that demand to the Hartford, along with Mr. Cushman's demand that the insurer fund the settlement at \$40,000.¹⁵

⁷ CP 173, 183, 545-46, 693.

⁸ CP 519, 548, 561-62, 611, 880.

⁹ CP 329.

¹⁰ CP 447, 520, 693, 706-07.

¹¹ CP 693.

¹² CP 518-19, 714.

¹³ CP 714.

¹⁴ CP 760.

¹⁵ CP 158, 212-13, 448.

The Hartford refused to assent to the Duffys' demand (effectively also the Ardens' demand) and instead countered the Duffys' demand with an offer of \$25,000.¹⁶ Shortly thereafter, the Ardens filed suit against the Hartford and then later added Forsberg (as well as John Hayes and William Gibson of that firm) as defendants.¹⁷ Eventually, the Hartford settled the Ardens' claims against itself and the Duffys—leaving intact, though, the Duffys' claims against Forsberg.¹⁸

This history demonstrates that the Forsberg attorneys communicated every step of the settlement negotiations with the Ardens and/or their counsel, Mr. Cushman. The Ardens were not kept in the dark at all. They disagreed with *the Hartford's* settlement strategy—but the Forsberg attorneys cannot be held responsible for that strategy.

In short, the Forsberg attorneys fulfilled their *Tank* duties to the letter. The Ardens' own attorney agreed with the strategy and recommendations offered by the Forsberg attorneys. And the Ardens suffered no harm *from the conduct of the Forsberg attorneys*.

If the Ardens suffered any harm at all (other than self-inflicted harms), their damages flowed from the Hartford's decision to reject the Duffys' \$40,000 demand. But the Forsberg attorneys did not cause the Hartford to reject that demand. And, of course, the Forsberg attorneys could not ethically accept the Duffys' \$40,000 demand given the insurer's refusal to fund that settlement and the Ardens' express instructions to Forsberg to settle the case only if the Hartford would fund the settlement.

Finally, the Ardens offer the absurd argument that Forsberg's

¹⁶ CP 156, 730.

¹⁷ CP 326, 899.

¹⁸ CP 432.

conduct caused Mr. Arden to be charged with a crime. But the Mason County prosecutor chose independently to prosecute Mr. Arden's crime based on his own review of the case.¹⁹

And fundamentally, Mr. Arden was responsible for his being charged with a crime. Mr. Arden chose to shoot and kill a puppy that posed no threat to him. Indeed, Mr. Arden shot the puppy not once, but twice—and the second time he shot the puppy, it was probably already dying. It was that horrific conduct, not Forsberg's conduct, that caused Mr. Arden to be charged with a crime.²⁰ And now the Ardens are seeking to recover money for Mr. Arden's criminal conduct. This Court should reject that argument—an argument that is almost as distasteful as Mr. Arden's needless, cruel killing of a thirteen-week-old puppy.

E. The Ardens' Proposed Rule Would Have Pernicious Consequences

The Ardens urge the Court to adopt a rule requiring an insurer to retain independent counsel with no connection to the insurer in the reservation-of-rights context. The Ardens' proposed rule would have pernicious consequences, and the Court should decline to adopt it.

First, that rule would essentially create a one-and-done scenario for insurer-retained attorneys. Under the Ardens' position, an attorney has a conflict of interest with any insured if that attorney has previously been

¹⁹ CP 441.

²⁰ The Ardens' argument implicates the ABC rule of equitable indemnification. *See Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 358, 110 P.3d 1145 (2005). Under the ABC rule, party B may not recover from A if B's own conduct contributed to C's bringing suit against B. *See, e.g., Jain v. J.P. Morgan Sec., Inc.*, 142 Wn. App. 574, 587, 177 P.3d 117 (2008) (“[A] party may not recover attorney fees or costs of litigation under the theory of equitable indemnity if, in addition to the wrongful act or omission of A, there are other reasons why B became involved in litigation with C. ‘[T]he critical inquiry is whether, apart from A's actions, B's own conduct caused it to be ‘exposed’ or ‘involved’ in litigation with C.”).

employed by the insurer.²¹ And the Ardens explicitly argue that this conflict would appear even in the absence of coverage issues:

A long-standing relationship between defense counsel and the insurer would materially limit representation of the client: for example, counsel would be hesitant to confront the insurer on behalf of the client (*not just on coverage issues*), for fear of poisoning counsel's business relationship with the insurer.²²

This argument would reach *any* attorney who has previously been retained by an insurer—and *any* attorney who might hope to be retained by an insurer in a following matter. There is no reason, beyond mere paranoia or unbridled cynicism, to believe that attorneys can be so readily tempted by greed that they will forget their ethical obligations under *Tank* and the RPCs. And the result would be virtually to disqualify any attorney from serving as retained counsel more than once.

Insurers choose to work with attorneys on multiple occasions because the attorneys are skilled litigators who provide effective representation for insureds. And insureds benefit from the retention of experienced counsel whom the insurer can trust to do a good job for the insured.

Despite the Ardens' cynical take on these matters, the fact is that insurers and insurance counsel alike have compelling financial incentives to act in the best interests of the insureds in this matter. Insurers have a financial incentive to provide effective counsel for their insureds. After all, if an insurer fails to do so, then the insured is likely to take his, her, or its business to another insurer—and the insured is likely to spread that bad

²¹ Ardens' Supp. Br. at 12.

²² *Id.* (emphasis added).

news far and wide. Or the insured may bring a bad-faith claim against the insurer: a far more expensive proposition for the insurer.

Likewise, retained attorneys have financial and professional incentives to do a good job for the insured. If an attorney fails to do so, either the insured or the insurer may well take their business elsewhere. And the attorney may face a malpractice action or bar complaint.

Under the Ardens' rule, though, insurers might be forced to find new, untested counsel for virtually every matter. The cost of insurance would necessarily rise, as insurers would have to factor in to their premiums the increased cost of finding, vetting, and retaining untested counsel. And there would be no realistic benefit to insureds—especially as time goes on, leaving insurers to trail behind them a string of once-hired but now discarded attorneys whom they can no longer retain.

And this problem would affect not only the insurance industry but also businesses in general. Virtually every significant contract between or among businesses contains an indemnification clause, obligating one, both, or all parties to defend and indemnify one another under defined circumstances.

When such a clause is triggered, the indemnitor will very often assign the defense of the matter to counsel with whom that business has worked in the past. That is especially the case in matters requiring specialized knowledge of a particular field.

For example, in a product liability matter, a manufacturer will want to work with attorneys who understand not only the general facets of product liability law but also specific issues involving the product at issue. Thus, the manufacturer will want to retain attorneys with whom it has

previously worked. If the manufacturer accepts a tender of defense by an indemnified reseller of the product, the manufacturer will want to assign its knowledgeable retained counsel to represent both itself and its indemnitee.

But under the Ardens' rule, the indemnitor manufacturer might well have to assign the defense to inexperienced counsel. Thus, even if the attorneys for the manufacturer and reseller cooperate, the indemnified reseller will not have the benefit of the experienced counsel representing the manufacturer. That doesn't help the indemnitee: it hurts it, just as the Ardens' rule would generally disadvantage insureds.

This Court should refuse to adopt a rule that would have such undesirable consequences. For thirty years, courts, insurers, insureds, attorneys, and businesses in the State of Washington have followed *Tank* and the RPCs. Those three decades of experience have not revealed any weaknesses in the *Tank* principles. This case does not reveal any weakness in those principles: Forsberg adhered to those principles, and the Ardens did not suffer any cognizable injury because of Forsberg's representation. Instead, they seek to profit from Mr. Arden's intentional killing of a puppy.

The Court should reaffirm the *Tank* principles.

F. **The Ardens Already Had Their Own Independent Counsel, So They Didn't Need Any Additional Protection**

Perhaps the most curious part of this curious matter is the fact that the Ardens already had what they claim that they needed—that is, their own entirely independent counsel. That fact vitiates their causation claim—but it also demolishes their claim about Forsberg's duties.

The Ardens independently retained Mr. Cushman long before the Hartford accepted their tender and long before the Hartford, in turn, retained Forsberg to represent them. Mr. Cushman was deeply involved in

the settlement discussions, representing the Ardens' interests not only to the Hartford but also to the Forsberg attorneys. Even if the Hartford had retained some unknown attorneys with whom it had no prior connection, those mythical attorneys could not have done anything more than Mr. Cushman did. Given Mr. Cushman's presence, the Ardens cannot establish that they suffered any harm from Forsberg's alleged actions or omissions.

Moreover, Mr. Cushman's presence explodes the Ardens' claims about Forsberg's duties. If attorneys in Washington state owe the duties that the Ardens allege, then Mr. Cushman should also have known that Forsberg owed those duties to the Ardens. Yet he never told the Ardens that they should ask the Forsberg attorneys whether they had ever worked for the Hartford before that time—although any experienced attorney in Washington state (or anywhere else) would likely know that insurers retain the same attorneys again and again. Nor did Mr. Cushman himself ever ask the Forsberg attorneys about their prior work for the Hartford.

By claiming the Forsberg attorneys failed to satisfy their duties, the Ardens implicitly accuse their own counsel of failing to satisfy his ethical obligations to them. In effect, their argument would render Mr. Cushman liable for malpractice.²³

But, of course, they don't intend to make that argument. And the rational conclusion is that Mr. Cushman didn't tell his clients to ask about Forsberg's prior work, and he himself did not ask about that prior work, *precisely because he knew that the Forsberg attorneys had no duty to*

²³ We are not accusing Mr. Cushman of malpractice in regard to this issue. We understand that Forsberg has alleged that Mr. Cushman committed malpractice, but their allegations (and the evidence they adduce in support of those allegations) are not relevant to the argument we advance here.

disclose that work. Unless the Ardens are contending that their own counsel breached his duties to them, they cannot establish that the Forsberg attorneys breached their duties to them.

In short, the Ardens had all the protection that they needed during the underlying case. Because they already had their own independent counsel, they cannot have suffered from not having their own independent counsel. And their argument is as paradoxical as that last sentence. The Court should reject their claim and reaffirm the *Tank* principles.

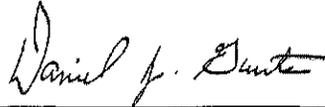
IV. CONCLUSION

In *Tank*, this Court recognized the potential for a conflict of interest when an insurer-retained attorney represents an insured in a matter involving a reservation of rights. And in that case, this Court recognized that attorneys can in fact be trusted to adhere to their ethical duties under Washington's RPCs. The Ardens argue that this Court had it wrong—that, in fact, we really can't trust attorneys to adhere to the RPCs.

The Court should reject that cynical and baseless argument. *Tank* and the RPCs already provide excellent guidance to Washington attorneys. The attorneys at Forsberg & Umlauf adhered to the *Tank* principles. The Court should therefore affirm the Court of Appeals' well-reasoned decision in this matter.

Respectfully submitted this 2nd day of December, 2016.

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Dear Ms. Carlson:

Pursuant to the Court's prior permission, please find attached WDTL's Amicus Curiae Brief in the above matter.

I am hereby contemporaneously serving electronically, by copy of this message, counsel for the parties and the Washington State Association for Justice Foundation who by agreement have accepted this method of service.

Thank you,
Stew
Chair, WDTL Amicus Committee

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