

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.

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A. INTRODUCTION

Four amici briefs have been submitted in this case – those of the Washington Defense Trial Lawyers Association (“WDTLA”), the Federation of Defense and Corporate Counsel (“FDCC”), the Washington State Association for Justice Foundation (“WSAJF”), and the Associated General Contractors of Washington (“AGC”). These briefs largely focus on the obligations of defense counsel to an insured under this Court’s decision in *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986), although the Ardens have raised additional associated issues. John Hayes, Chris Gibson, and Forsberg & Umlauf P.S. (“Attorneys”) provide this single responsive brief to all of the amici briefs.

WSAJF and AGC, like the Ardens, without complying with this Court’s *stare decisis* protocol, ask this Court to overrule *Tank* and substitute in its place what amounts to a *per se* rule that effectively bars defense counsel from representing an insured if that counsel has represented the insurer in the past in coverage matters or has been appointed by that insurer (or perhaps other insurers) to represent an insured.

Such a rule, with its contours ill defined by the Ardens, WSAJF, or AGC, would disrupt the protocol established by this Court in *Tank* that has well served the profession, insureds, and insurers alike for three decades.

Indeed, the rule advocated by the Ardens/WSAJF/AGC would *harm insureds* by denying them qualified defense counsel.

Further, the associated issues raised by the Ardens are amorphous and unsupported by authority; this Court should reject them.

B. STATEMENT OF THE CASE

Both WSAJF and AGC make factual assertions that are unsupported on this record.

Attorneys represented the Ardens, and the Ardens alone, in this litigation. The Attorneys' engagement letter, CP 426-28, made this *explicit*. See Appendix. Moreover, Attorneys explained this duty to the Ardens orally as well. Op. at 4-5. Finally, and most importantly, the Ardens understood it. CP 544 (Arden knew Attorneys were not giving him any coverage advice; he got such advice from Cushman).

WSAJF asserts that Attorneys had a "long standing" relationship with Hartford. WSAJF br. at 1. However, it declines to define precisely what that term means, *id.* at 17, a vital issue for this case. AGC simply misrepresents the nature of Attorneys' relationship with Hartford, implying that Attorneys concurrently represented Hartford on coverage matters. AGC br. at 2-3. The record here is that some of the Forsberg & Umlauf lawyers represented Hartford on coverage or were appointed to represent Hartford insurers *in the past*. *Nothing* in this record supports the

point that Attorneys represented Hartford on coverage or were appointed to represent Hartford insureds *at any time* during the Ardens' representation.¹ To the extent the Court of Appeals' opinion implies that Attorneys had a current Hartford representation, op. at 4, the record does not support it.

Finally, as highlighted in the WDTLA brief, both WSAJF and AGC are obtuse to the significance of Jon Cushman's representation of the Ardens as their personal counsel *throughout this case*.² When WSAJF suggests that the Ardens were never told about settlement offers or demands by the Duffys, it *ignores* the fact that Attorneys worked closely with Cushman, who was specifically advised of the settlement offers/demands, as noted in Attorneys' supplemental brief at 3-4. *See* CP 484 (Cushman copied on all communications by Attorneys with Hartford, the Ardens, and the Duffys). Thus, the record here is that

- Attorneys, the Ardens, and Cushman agreed that Hartford should pay in full any settlement with the Duffys;

¹ Even if counsel concurrently represents an insurer on a coverage issue, that does not automatically constitute a conflict. For example, counsel could represent an insurer on a variety of coverage issues involving both first party and third party coverages that have literally *nothing* to do with the defense of the insured. That is the reason the Court of Appeals rejected a *per se* rule. Op. at 2, 12, 13 n.5. That court correctly noted that a conflict might be present in a specific case under RPC 1.7(a). *Id.* at 13 n.5.

² Cushman, for example, was fully cognizant that the Ardens had a powerful bad faith claim with coverage by estoppel against Hartford due to its mishandling of the duty to defend. CP 601.

- Attorneys evaluated the Duffys' claim, and Cushman agreed with that evaluation;
- The Ardens and Cushman approved settlement up to \$35,000, only if Hartford funded it in full; and
- Attorneys advised the Ardens and Cushman of the Duffys' demands and settlement offers in response.

Attorneys suppl. br. at 7-8.

C. ARGUMENT

(1) This Court Should Adhere to the *Tank* Protocol that Has Served the Profession, Insureds, and Insurers Well for Thirty Years

Notwithstanding their protestations to the contrary, the Ardens/WSAJF/AGC seek to overrule *Tank*. They have failed to demonstrate the necessary basis for abandoning that well-established precedent. In recent years, this Court has been aggressive in upholding principles of *stare decisis*. In *W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014), this Court emphasized that a common law rule will be abandoned only if the rule is both incorrect *and* harmful. It reaffirmed this principle again in *Deggs v. Asbestos Corp. Ltd.*, 186 Wn.2d 716, 727-28, 381 P.3d 32 (2016), a case involving older precedents that adopted the seemingly anomalous principle that statutory wrongful death claims could be time-

barred before the decedent died and before a personal representative could be appointed to pursue them.

(a) Because the *Tank* Rule Is Not Harmful, the Court Should Not Abandon It

The starting point for this Court’s analysis must be the *Tank* rule itself. That rule is clear and workable.³ Where an insurer is defending an insured under a reservation of rights, the insurer has an “enhanced duty of good faith” to an insured. *Tank*, 105 Wn.2d at 387-88. To satisfy this obligation, the insurer must meet the four criteria set out in the Court’s opinion, including the requirement that “it must retain competent defense counsel for the insured” with the understanding that “[both] retained defense counsel and the insurer must understand that only the *insured* is the client.” *Id.* at 388. (Court’s emphasis.). Pertinent to the Attorneys’ duty to the Ardens, attorneys may be appointed by insurers to satisfy the insurers’ duty to defend the insureds, but those defense counsel have specific obligations:

First, it is evident that such attorneys owe a duty of loyalty to their clients. Rules of Professional Conduct 5.4(c) prohibits a lawyer, employed by a party to represent a third

³ WSAJF references *National Surety Corp. v. Immunex Corp.*, 176 Wn.2d 872, 297 P.3d 688 (2013) in its brief at 6, 14 n.7, implying that this Court expanded upon *Tank* in that decision. A fair reading of the case, however, indicates that it pertains only to the insurer’s duty to defend, holding that an insurer may not recoup defense costs it expended when it defended the insured under a reservation of rights and no coverage was then found to exist for the insured under the applicable policy. The Court’s holding does not implicate the *Tank* protocol, particularly as to defense counsel.

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 exceptions can be tolerated.”

Second, defense counsel owes a duty of full and ongoing disclosure to the insured. This duty of disclosure has three aspects. First, potential conflicts of interest between insurer and insured must be fully disclosed and resolved in favor of the insured. The dictates of RPC 1.7, which address conflicts of interest such as this, must be strictly followed. Second, all information relevant to the insured’s defense, including a realistic and periodic assessment of the insured’s chances to win or lose the pending lawsuit, must be communicated to the insured. Finally, *all* offers of settlement must be disclosed to the insured as those offers are presented. In a reservation-of-rights defense, it is the insured who may pay judgment or settlement. Therefore, it is the insured who must make the ultimate choice regarding settlement. In order to make an informed decision in this regard, the insured must be fully apprised of all activity involving settlement, whether the settlement offers or rejections come from the insured party or the insurance company.

Id. at 388-89. *See generally*, Thomas V. Harris, *Washington Insurance Law* (3d ed.) at § 17.06 (“Harris”).

As the Court of Appeals observed, *op.* at 13, *Tank* implicitly rejects a *per se* rule requiring automatic disqualification of defense counsel from representing an insured if that counsel had a history of representing an insurer on coverage matters or being appointed by that

insurer to represent other insureds.⁴ More than two decades ago, the Court of Appeals held directly that a *per se* rule, a rule that an insurer providing a defense to an insured under a reservation of rights is automatically conflicted as to the insured so that it may not appoint counsel of its own choosing, but must select “independent counsel,” does not apply in Washington. *Johnson v. Continental Cas. Co.*, 57 Wn. App. 359, 362-63, 788 P.2d 598 (1990). In *Johnson*, Division II rejected the insured’s argument that the fact the insurer defended him under a reservation of rights “creates a conflict of interest for the attorney selected by the [insurer] to defend against the above referenced claims.” *Id.* at 362. Harris states that the rejection of a *per se* rule is “entirely appropriate.” Harris at § 17.01, p. 17-5.

As indicated in *W.G. Clark Constr., supra*, the Ardens are obligated to document explicit harm from the *Tank* rule and cannot. Neither the Ardens, nor AGC and WSAJF, have offered a shred of evidence, anecdotal or empirical, indicating that the *Tank* protocol is in any way harmful, as required by this Court’s *stare decisis* decisions. Rather, as well-documented in the FDCC and WDTLA briefs, the rule has

⁴ The *Tank* court pointedly noted that an insurer defending an insured under a reservation of rights only has a “potential” conflict. 105 Wn.2d at 383.

served insureds, insurers, and defense counsel well since 1986. It has been faithfully applied by defense counsel.⁵

It is likely that the Ardens and their amici allies will contend that they are not seeking to abandon the rule in *Tank*, but to “fulfill” it completely. That is *untrue*. At its most basic, the Ardens’ position is an ill-defined *per se* rule – a defense under a reservation is inevitably a conflict of interest for an insurer appointing defense counsel and no attorney who has been appointed by an insurer to represent another insured or who has represented an insurer on a coverage matter can *ever* represent another insured.

A careful review of the briefing here reveals that the Ardens’ argument on the rule has “evolved.” In the Court of Appeals, they sought explicitly a *per se* rule, that is, Hartford’s appointment of Attorneys to represent an unspecified number of defendants in other cases in the past was a “long standing relationship” that was inevitably a conflict of interest

⁵ Indeed, to the extent that insurers have breached their responsibilities to defend an insured under a reservation of rights, they face what this Court described in *Nat’l Surety Corp.* as “potentially disastrous” consequences (176 Wn.2d at 880) of liability based on robust contractual and extracontractual principles that are exceedingly protective of insured’s rights. For example, an insurer’s breach of the duty to defend an insured may result in coverage by estoppel, *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 392, 823 P.2d 499 (1992); liability under the common law tort of bad faith, *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 484, 78 P.3d 1274 (2003); statutory liability under RCW 19.86, the Consumer Protection Act, *Indus. Indem. Co. of the Nw., Inc. v. Kallevig*, 114 Wn.2d 907, 921-22, 792 P.2d 520 (1990) (even a single violation of Insurance Commissioner claims-handling regulations may support a CPA violation); and punitive damages. RCW 48.30.015 (IFCA) (authorizing recovery of treble damages). This liability exposure is a significant incentive for insurers to faithfully apply the *Tank* protocol.

that “*was not consentable.*” Br. of Appellants at 26.⁶ In other words, Attorneys could *never* represent any defendant if they had been appointed to represent other defendants by Hartford.

In their petition, the Ardens obfuscated the precise rule they seek, but their bottom line was that defense counsel’s representation of an insurer on coverage or other insureds at an insurer’s request was, in fact, invariably a conflict of interest. Pet. at 12-16. They made no distinction between representation of other insureds and representation of the insurer on coverage, nor did they draw any distinction between past and present representations, nor did they specify when a “conflict” arose with any precision, *i.e.* a single representation or some indeterminate number of matters.

In their supplemental brief, the Ardens disclaim any intention to seek “a bright line, automatic rule of disqualification.” Suppl. br. at 8 n.3. But that assertion is *disingenuous*. They argue for a *broad* sweep as to Attorneys’ alleged “conflict,” *id.* at 5-9, and they *twice* reaffirm that such “conflict” is *not waivable* by the client. *Id.* at 6, 8 n.3. *Nowhere* do they answer the scope issues noted above. Instead, they contend that *anytime*

⁶ The Ardens’ expert, John Strait, argued for such a *per se* rule when he asserted that Attorneys’ representation of Hartford insureds was a conflict of interest that was not waivable. CP 422. He opined they “should not have taken this assignment as defense counsel for the Ardens.” *Id.* Attorneys’ expert, Jeffrey Tilden, criticized this extreme position. CP 365.

defense counsel represents even a single insured, a conflict is invariably present. *Id.* at 8 n.2.

AGC's amicus brief is a direct, unvarnished request for a *per se* rule.⁷ Without any support in the record, it asserts that Attorneys were acting as Hartford coverage counsel in another case at the same time they represented the Ardens. AGC br. at 3 n.1. It emphasizes that counsel representing an insured and an insurer on coverage issues, no matter how remote from the coverage issues relating to that insured, "can *never* comply with *Tank*" (AGC's emphasis). *Id.* at 8.⁸

As for WSAJF, its argument is somewhat more nuanced than that of the Ardens or AGC, but at the end of the day, it is still seeking what amounts to a *per se* rule precisely because it studiously avoids any precision in defining what the alleged adverse interest is with respect to an insured and defense counsel that precludes defense counsel's

⁷ The AGC brief is odd in that it does not appear to have thought through the implications of its *per se* rule for the construction industry. Its rule would apply any time one company defends another under a contractual tender of defense. That happens all the time in construction cases. Apparently, AGC would rather have experienced construction lawyers disqualified in favor of "independent" ones with little or no experience. *See* WDTLA br. at 17-18.

⁸ AGC does not address the point, but its analysis with regard to present coverage representation by counsel would apply with equal vigor both to present representation of the insureds, covered by other insurers, as well as past representation of the insurer on other coverage matters or past representations of that insurer's insureds. RPC 1.9 addresses conflicts of interest arising out of an attorney's representation of a former client. The language of RPC 1.9(a) is somewhat analogous to the language of RPC 1.7(a)(2), although it requires the matters to be the same, or substantially related, and the attorney's position taken to be materially adverse to that of the client.

representation. The most WSAJF can say is that defense counsel “may be inclined to temper its representation of the insured where it may harm the insurer.” WSAJF br. at 9. But what is a “long-standing relationship?” WSAJF declines to define it, but suggests it is present here. *Id.* at 17. Also, precisely how defense counsel will “temper” their representation of the insured WSAJF does not specify.

Thus, the core of the Ardens’ position is that defense counsel will *inevitably* abandon their zealous representation of the insured’s interests because they have a business relationship with the insurer. But left unaddressed is the highly relevant practical question of when this disqualifying relationship arises:

- Is the attorney disqualified if the attorney represented the insurer in the past on a coverage matter, no matter how different than the coverage issue involving the insured?
- Is the attorney disqualified because the attorney represented another insured at the insurer’s request in the past?
- Is the attorney disqualified in concurrently representing the insurer on a coverage matter discrete from that involving the client?
- Is the attorney disqualified by representing any other insured at the insurer’s request, or does disqualification occur only if the attorney represents a multiple of other insureds?
- Is the attorney disqualified if the attorney has represented in the past, or is currently representing, another insurer on

coverage matters or has, or currently is, representing insureds at the request of that other insurer?⁹

In addition to the sheer impracticality of the rule actually sought by the Ardens and their amici allies, the proposed rule has two significant adverse aspects. First, to the extent that they would have defense counsel become “coverage advocates” for insureds, Arden suppl. br. at 11,¹⁰ they would risk the entanglement of defense counsel in coverage matters the *Tank* court specifically sought to avoid. Op. at 19-20. See RPC 5.4(c) (forbidding any influence over an attorney by an entity other than the client paying for the lawyer’s services); *Stewart Title Guaranty Co. v. Sterling Bank*, 178 Wn.2d 561, 311 P.3d 1 (2013); *Clark Cty. Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, 180 Wn. App. 689, 324 P.3d 743, review denied, 181 Wn.2d 1008 (2014) (insurer has no standing to sue appointed defense counsel for legal malpractice). This would be bad public policy. “Neither the insurer nor the insured should expect defense counsel to provide anything other than a coverage-neutral defense.” Harris at § 17.05, p. 17-15.

⁹ Left unaddressed by the Ardens or their amici allies is this question of other insurer representation. The Ardens and their allies assert that the disqualifying factor is the business interest of defense counsel. Such a putative business interest is likely present if an attorney is representing another insurer on coverage or has been appointed to represent its insureds as defense counsel.

¹⁰ The WSAJF does not contend that defense counsel should act as coverage advocates for the insured as part of the duty to disclose regarding settlement. WSAJF br. at 18-20.

Further, such a rule will bar experienced defense counsel from representing insureds. This Court knows that it is hardly a secret that litigation counsel and law firms often focus their civil representation on either plaintiffs or defendants/insurers. Disqualifying counsel from appointment to defend insureds merely because of past defendant/insurer representation will shrink the pool of experienced, capable defense counsel available to represent insureds. That is a disservice to insureds. WDTLA br. at 15-18; FDCC br. at 11-12. The Ardens and their amici allies have no answer to the concern that such a rule is actually *harmful to insureds*.

In sum, the reality of the Ardens' argument is the overruling of *Tank* and its replacement with a harmful *per se* rule that insurers defending under a reservation of rights are invariably conflicted as to their insureds, barring them from appointing qualified defense counsel to defend them. The Court should decline to abandon *Tank*. The rule in *Tank* has served insureds, insurers, and defense counsel well for three decades. The Ardens fail to meet their burden of documenting harm in it.

(b) The Court of Appeals Correctly Applied the *Tank* Rule

Like the Ardens, WSAJF and AGC are remarkably superficial in their discussion of the specific *Tank* obligations of defense counsel. The Court of Appeals correctly observed that Attorneys met them here.

(i) Attorneys Specifically Advised the Ardens on the Potential Conflict of Interest between the Ardens and Hartford

As the Court of Appeals noted, *op. at* 4-5, Attorneys both advised the Ardens by letter and in person of the potential conflict between them and Hartford. Attorneys made clear in both instances that they represented the Ardens alone, and they manifested such a commitment throughout their representation of them. *See* Appendix. Neither the Ardens, nor their amici allies, appear to fault Attorneys as to their compliance with this first *Tank* element.

(ii) Attorneys Were Not Conflicted under RPC 1.7 When that Rule Is Correctly Applied

The second *Tank* element is that defense counsel owe a duty of full disclosure to their clients. The Ardens, WSAJF, and AGC all assert that Attorneys breached RPC 1.7 in failing to apprise the Ardens of their past representation of Hartford in coverage matters or of defendants upon Hartford's appointment. As noted *supra*, the Ardens, in fact, argue for a *per se* rule of disqualification. They fail to analyze carefully the actual

requirements of our Rules of Professional Conduct, as Attorneys argued in their supplemental brief at 12-13.

First, RPC 1.7(a)(1) is inapplicable here.¹¹ Attorneys had no direct conflict of interest.

The only basis upon which Attorneys allegedly violated RPC 1.7(a) was that allegedly there was “a significant risk” that their representation of the Ardens would be “materially limited” by their “personal interest.” RPC 1.7(a)(2). The terms referenced in RPC 1.7(a) are terms of art, given particular content in the comments to RPC 1.7, as noted in Attorneys’ supplemental brief. The Ardens and their amici allies fail to document how Attorneys’ putative personal interest in future Hartford business posed a “serious risk” that their representation of the Ardens would be “materially limited.” Neither the Ardens nor their amici allies offer any proof that there was any significant risk that Attorneys’ ability to “consider, recommend, or carry out an appropriate course of action for [the Ardens]” was materially limited by their relationship to Hartford. RPC 1.7, cmt. [8]. WSAJF’s amorphous notion of “tempering,”

¹¹ The Ardens do not argue that Attorneys had a direct conflict of interest in representing them under RPC 1.7(a)(1). AGC contends that such a direct conflict is present, but seems to muddle the analysis of direct adversity under RPC 1.7(a)(1) with a conflict under RPC 1.7(a)(2). AGC br. at 3-10. First, this Court should not consider an argument raised only by an amicus. *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 819, 225 P.3d 213 (2009). Second, no direct adversity is present here. Attorneys never acted as an advocate against the Ardens’ interests in any other matter. RPC 1.7, cmt. [6].

for example, does not meet this heavy burden.¹² The interests of the Ardens and Hartford were, in fact, fully aligned in securing an appropriate settlement of the Duffys' action as Harris notes at § 17.05, p. 17-15. ("In many respects, both an insurer and its insured share the same interests in a successful defense.")

The *central tenet* of the defense plan, agreed to by the Ardens, Cushman, and Attorneys, was to have Hartford pay for any settlement with the Duffys.¹³ Given the Ardens' clear instructions, Attorneys were not obligated to accede to any demand by the Duffys, no matter how outrageous, if Hartford would not pay for it.

(iii) Attorneys Breached No Duties to the Ardens in Settlement¹⁴

¹² As noted in cmt. [8] to RPC 1.7, the "mere possibility of subsequent harm" is not enough. Recently, in *In re Disciplinary Proceedings Against Osborne*, ___ Wn.2d ___, ___ P.3d ___, 2016 WL 7437647 (2016), this Court reaffirmed that RPC 1.7(a)(2) requires a *serious* risk that the lawyer's personal interest will *materially* limit the representation of a client. There, the attorney was the personal representative of an estate and its residual beneficiary, meeting that heavy burden. *Id.* at *5.

¹³ WSAJF faults Attorneys for not exploring with the Ardens the possibility of settling for the Duffys' initial, grossly inflated demand. WSAJF br. at 19-20. There is no evidence in this record that the Ardens had *any contemporaneous interest* at the time settlement discussions were ongoing of paying anything out of their own pocket. In fact, Roff Arden stated the Duffys' case wasn't "worth a dime." CP 550. Moreover, any payment by the Ardens ran against their precise, contrary instructions to Attorneys at the time. CP 447. This contention reveals the pernicious effect of what the Ardens and their amici allies are actually advocating: an insurer defending under a reservation of rights should pay *any* demand within coverage limits, no matter how outrageous, and it is the duty of appointed defense counsel to advocate for such an inflated payment. Such a position is transparently designed to benefit the plaintiff bar.

¹⁴ Below, the Ardens contended that Attorneys allegedly breached a fiduciary duty to them in failing to secure a "quick settlement" as to avoid criminal prosecution of

Notwithstanding the complaints of the Ardens to the contrary about being kept in the dark about settlement or that Attorneys breached any duties to them in the settlement of the Duffys' claims, the record here is that the Ardens (and/or their personal counsel, Jon Cushman) were fully informed of the settlement conversations with the Duffys and their counsel; they approved the plan under which settlement discussions occurred; the Court of Appeals correctly concluded that Attorneys conferred with the Ardens and Cushman on settlement. *Op.* at 21-24. The WDTLA brief is pointed in its demonstration that Attorneys fully met their obligation to disclose offers to the Ardens and secure their approval for their course of action on settlement; the Ardens had Cushman's independent counsel. WDTLA br. at 3-4, 13-15, 18-20. If anything, Cushman's unwarranted conduct, independent of Attorneys, frustrated the settlement of the Duffys' claim against the Ardens. CP 448-49.

At the end of the day, Roff Arden shot his neighbors' dog, for which he was plainly liable. Nevertheless, the Ardens did not pay a dime of defense costs and did not incur any responsibility to pay the Duffy settlement. But not being satisfied with escaping from any financial liability for intentionally and viciously killing the Duffys' puppy, the

Roff Arden. *See Op.* at 20-21, 24-27. That argument has been abandoned by the Ardens, as it is not advanced in their petition for review or in their supplemental brief.

Ardens have the audacity to advocate profiting from Roff's conduct by obtaining fees they never paid through their disgorgement theory discussed *infra*.

In sum, the Court of Appeals did not err in its treatment of the *Tank* issues.

(2) The Ardens Argue Issues Associated with Their *Tank* Theory that Are Unsupported and Should Be Rejected by This Court

In addition to their theories related to *Tank*, the Ardens also contend that Attorneys breached a fiduciary duty to them because Attorneys are “trustees” of the “defense asset,” and the attorney judgment rule has no application. They claim the remedy for any alleged breach of fiduciary duty by Attorneys is the disgorgement of the fees Hartford paid Attorneys. The Ardens' arguments are baseless and should be rejected by this Court.

(a) Attorneys Are Not “Trustees” of a “Defense Asset”

The Ardens do not define with any precision what a “defense asset” is, Arden suppl. br. at 16-17, but they claim Attorneys were its trustees. The argument is utterly unsupported in Washington law or anywhere else in America, particularly where this Court described a defense, not as an asset in the property sense, but a “valuable service.”

Tank, 105 Wn.2d at 391. The Court of Appeals readily rejected what it described as a “novel argument.” Op. at 11 n.3.

Trust law does not support the Ardens’ extreme argument:

Express trusts are [t]hose trusts which are created by contract of the parties and intentionally. ... An express trust is one created by the act of the parties; and, where a person has, or accepts, possession of money, promissory notes, or other personal property with the express or implied understanding that he is not to hold it as his own absolute property, but to hold and apply it for certain specified purposes, an express trust exists.

Hartford Fire Ins. Co. v. Columbia State Bank, 183 Wn. App. 599, 334 P.3d 87 (2014), *review denied*, 182 Wn.2d 1028 (2015) (emphasis added, citations omitted) (no trust created with respect to general contractor where it was not required by its contract with subs to hold payments for benefit of subcontractors).

No trust existed here. The Ardens have produced nothing that evidences an intent on the part of Hartford, Attorneys, or the Ardens themselves to make Attorneys trustees of anything. The Hartford policy obligated it to defend the Ardens, but did not create a trust as to its duty to defend under it or fees paid by it in connection with that duty. Simply put, Attorneys did not hold or manage any asset of the Ardens. No one believed or understood Hartford sent Attorneys money belonging to the Ardens. Hartford paid Attorneys for services rendered in defending the

Ardens, and nothing more. The Ardens' trust argument cannot withstand serious scrutiny.

(b) The Attorney Judgment Rule Supported Dismissal of the Ardens' Claims against Attorneys

An attorney has a duty to exercise “the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer” in Washington. *Hizey v. Carpenter*, 119 Wn.2d 251, 261, 830 P.2d 646 (1992). Under the attorney judgment rule, “an attorney cannot be liable for making an allegedly erroneous decision involving honest, good faith judgment if (1) that decision was within the range of reasonable alternatives from the perspective of a reasonable, careful, and prudent attorney in Washington; and (2) in making that judgment decision, the attorney exercised reasonable care.” *Clark Cty. Fire Dist.*, 180 Wn. App. at 703-04. That rule properly foreclosed any liability of Attorneys to the Ardens here.

(c) The Remedy of “Disgorgement” Was Not Available to the Ardens

The Ardens claim that they are entitled to a “disgorgement” of fees paid by Hartford to Attorneys to defend them. Arden suppl. br. at 14-16. Such an argument makes little sense and is unsupported.¹⁵

¹⁵ The Ardens contend that *Behnke v. Ahrens*, 172 Wn. App. 281, 294 P.3d 729 (2012), *review denied*, 177 Wn.2d 103 (2013) stands for the proposition that disgorgement is appropriate even if a third party paid a part of the fees. Arden suppl. br.

A client whose attorney has represented clients in a conflict situation may be entitled to disgorgement of attorney fees, *Eriks v. Denver*, 118 Wn.2d 451, 462-62, 824 P.2d 1207 (1992), but this relief is not available in every case:

[W]hile attorney misconduct can be so egregious as to constitute a complete defense to a claim for fees, not every act of misconduct will justify such a serious penalty.

Kelly v. Foster, 62 Wn. App. 150, 156, 813 P.2d 598, review denied, 118 Wn.2d 1009 (1991). Instead, it should only be applied where the claimed attorney misconduct is “egregious.” *Id.* at 157.¹⁶ See *Restatement (Third)*

at 16. They misrepresent the holding in *Behnke*. *Nowhere* did the Court of Appeals hold that an attorney may be compelled to disgorge fees paid by a third party (the Ardens claim that the court stated this at page 298 of its opinion). Rather, the disgorgement was *only* for fees paid by the client. *Id.* at 289. Similarly, *McRory v. Northern Ins. Co. of N.Y.*, 138 Wn.2d 550, 980 P.2d 736 (1999), cited by the Ardens, does not help it. There, the insured brought an action in its own name to recover attorney fees from one of its insurers after receiving payment for the fees from another insurer. This Court allowed the insured to recover fees under *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). Critically, the insurer who paid had both subrogation rights and rights under a loan and trust agreement for the proceeds that the insured obtained in the action. 138 Wn.2d at 554. The insured did not recover what it was not entitled to recover; the case properly allocated the fees to the party *that actually paid them*.

¹⁶ Generally, the trial court has discretion to award or deny disgorgement. 62 Wn. App. at 156. The court declined to order disgorgement because the attorney’s misconduct did not rise to the *level of fraudulent acts or gross misconduct*. *Id.* at 156-57. The court based its conclusion on this Court’s precedents. See *Kane v. Klos*, 50 Wn.2d 778, 315 P.2d 672 (1957); *Dailey v. Testone*, 72 Wn.2d 662, 664, 435 P.2d 24 (1967); *Ross v. Scannell*, 97 Wn.2d 598, 610, 647 P.2d 1004 (1982).

Washington courts often uphold trial court decisions not to compel the disgorgement of an attorney’s fee for a breach of an RPC provision. *E.g.*, *Kelly*, *supra* (attorney’s disgorgement of fees not required where attorney failed to disclose attorney-client relationship with third parties recommended by attorney to estate executor for sale of property); *Forbes v. American Building Maintenance*, 148 Wn. App. 273, 294-95, 198 P.3d 1042 (2009), *aff’d, in part*, 170 Wn.2d 157, 240 P.3d 790 (2010) (attorney

of the Law of Governing Lawyers § 49 (stating that any fiduciary duty breach must be both “clear” and “serious” before any fee reduction is authorized). *See also*, comment d to § 49 (discussing what constitute “clear” and “serious” violations). In *Kelly*, the Court of Appeals affirmed the trial court’s decision not to award disgorgement of the attorney fees paid by a nonclient. *Id.* at 157. *Kelly* has never been overruled by this Court and controls the analysis here.

The Ardens are not entitled to disgorgement. First, Attorneys’ conduct is not the sort of egregious conduct contemplated in disgorgement cases. Additionally, as in *Kelly*, the party seeking disgorgement did not pay the fees.¹⁷ The trial court, in denying the Ardens’ bid for disgorgement, did not abuse its discretion.

misconduct in representing client did not justify voiding contingent fee agreement and denying her fees where attorney provided exemplary service to client); *Bertelsen v. Harris*, 537 F.3d 1047 (9th Cir. 2008) (applying *Kelly* and upholding district court decision not to require disgorgement despite attorney’s breach of fiduciary duty “when, after all the righteous furor is vented, the fees were eminently reasonable for the result produced”); *Chism v. Tri-State Construction, Inc.*, 193 Wn. App. 818, 374 P.3d 193, *review denied*, 186 Wn.2d 1013 (2016) (in-house counsel’s negotiation of changes to his compensation package did not necessarily constitute a conflict of interest under RPC 1.7, RPC 1.8 or RPC 8.4 where no clear precedent notified him of alleged RPC violations, reversing the trial court’s decision mandating a disgorgement of bonuses earned in his dual capacity as general counsel and corporate executive, noting that the disgorgement remedy may not apply to attorney compensation, as opposed to fees charged to a client).

¹⁷ If anyone had an interest in the disgorgement of fees paid to Attorneys by Hartford, it would be Hartford. Hartford undisputedly paid Attorneys. The Ardens paid nothing. CR 17(a) provides, “every action shall be prosecuted in the name of the real party in interest.” Under this rule, “the real party in interest is the person who, if successful, will be entitled to the fruits of the action.” *Northwest Indep. Forest Mfrs. v. Dep’t of Labor & Indus.*, 78 Wn. App. 707, 716, 899 P.2d 6 (1995). Hartford, not the

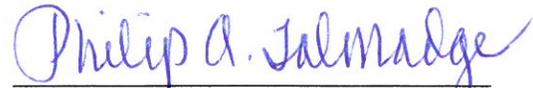
D. CONCLUSION

The trial court's summary judgment decisions were proper, and the Court of Appeals correctly affirmed those decisions based on *Tank* and RPC 1.7. This Court should reject the Ardens' invitation to cast aside *Tank*, a decision that has for thirty years effectively controlled the relationship between insurers, insureds, and defense counsel, in favor of an untested, extreme new rule that will only deprive insureds of experienced defense counsel. Such a radical departure in the law is unwise. The Ardens' other theories against Attorneys are similarly baseless.

This Court should affirm the trial court and the Court of Appeals.

DATED this 4th day of January, 2017.

Respectfully submitted,



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Ardens, would be the real party in interest, if disgorgement were an appropriate remedy, which it is not.

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November 27, 2012

**ATTORNEY-CLIENT PRIVILEGED
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VIA FIRST CLASS U.S. MAIL

Roff and Bobbi Arden
P.O. Box 2369
Shelton, WA 98584

Re: **Duffy v. Arden**
Claim No. YNQLP05795
DOL 12-04-2011
Our File No. 458.0362

Dear Mr. & Mrs. Arden:

This correspondence confirms that John Hayes and I have been retained by The Hartford Insurance Company to defend both of you as defendants in the above-referenced matter. Once we have had a chance to review the file (being sent by your predecessor defense counsel), we will prepare an initial litigation plan and budget. We will be sending our defense bills to the Hartford for payment.

Now that this matter is in litigation, you should not discuss this case with anyone other than your counterclaim attorney(s) and representatives from this office, including legal assistant Susan Allan and Roz Weinberg. Ms. Roz Weinberg is a paralegal who will be assisting us with this case. Mr. John Hayes, a shareholder in our firm, will also be involved in the defense of this case. If you are contacted by anyone else, kindly refer them to us or your counterclaim attorney(s) in this case.

1. Reporting / Assistance

It is our practice to provide copies of correspondence concerning the file to each client as well as to the appropriate adjuster; consequently, you will receive periodic status reports on the progress of this litigation as it proceeds through pre-trial discovery. Often, such status updates will be in a standardized reporting format required by the Hartford.

During the course of this lawsuit, we will need assistance from you in responding to discovery and in preparation of our defense of this case. Your assistance could be needed for depositions, responding to questions from the other side, or in gathering documents. There may be a case schedule issued which might provide deadlines for that assistance. We will communicate with you regarding those upcoming deadlines and when we need your cooperation and help.

2. Evaluation and Assessment

We will from time to time assess the likelihood of prevailing on the claims against you in this lawsuit and also try to evaluate a likely verdict range. We will also provide information necessary to make informed judgments regarding settlement or other important decisions regarding preparation of the defense.

3. Settlement

We will keep you advised of the progress of any settlement discussions, offers and rejections on the claims against you in this lawsuit about which we have any knowledge. We will not attempt to negotiate and reach a settlement with any adverse party unless and until we are instructed to do so. Unless instructed otherwise, we will assume that any settlement authority or instructions we receive from The Hartford to settle the claims against you in this lawsuit are given with your consent and will proceed accordingly.

4. Files

At the end of the case, we will close our file and return any original documents we receive from you. We reserve the right to destroy any remaining documents within the file. Our document retention policy is to keep files for six years and then destroy them unless there are special circumstances. If you have any questions or comments regarding our document retention policy please contact me.

5. No Advice on Insurance Coverage

We are hired to defend you on the claims against you in this lawsuit. We will not give you or The Hartford any advice regarding insurance coverage. Our role is to prepare the defense and to provide realistic evaluations of the case. We have not been retained and will not represent

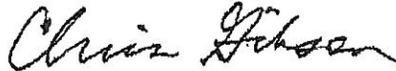
Roff and Bobbi Arden
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Page 3

you for any counterclaims you have or may assert in this case. It is our understanding that Mr. Cushman or another attorney represents you for a pending counterclaim.

We look forward to working with you. If you have any questions, please do not hesitate to contact me at your convenience.

Very truly yours,

FORSBERG & UMLAUF, P.S.



William C. "Chris" Gibson

cc: Jon Cushman

728095 / 458.0362

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the Respondents' Answer to Amici Briefs in Supreme Court Cause No. 93207-7 to the following parties:

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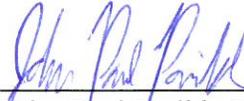
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: January 4, 2017 at Seattle, Washington.



John Paul Parikh, Legal Assistant
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TALMADGE/FITZPATRICK/TRIBE

January 04, 2017 - 4:03 PM

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