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SUPREME COURT
OF THE STATE OF WASHINGTON

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WASHINGTON STATE
SUPREME COURT

Roff Arden and Bobbi Arden,

Petitioners,

v.

Forsberg Umlauf, P.S., et al.,

Respondents.

BRIEF OF AMICUS CURIAE
ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON

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 ORIGINAL

TABLE OF CONTENTS

	PAGE
I. Identity and Interest of Amicus	1
II. Argument	3
III. Conclusion	10

TABLE OF AUTHORITIES

	PAGE
Cases	
<i>Arden v. Forsberg & Umlauf, P.S.</i> , 193 Wn. App. 731, P.3d 320 (2016).....	<i>passim</i>
<i>Bird v. Best Plumbing Grp., LLC</i> , 175 Wn.2d 756, 287 P.3d 551 (2012).....	7
<i>Johnson v. Cont'l Cas. Co.</i> , 57 Wn. App. 359, 788 P.2d 598 (1990).....	9
<i>Tank v. State Farm Fire & Cas. Co.</i> , 105 Wn.2d 381, 715 P.2d 1133 (1986).....	8, 9, 10
Rules	
RPC 1.7	<i>passim</i>
RPC 1.8	7, 8
Secondary Sources	
https://en.wikipedia.org/wiki/Bill_Frieder	10

I. IDENTITY AND INTEREST OF AMICUS

The Associated General Contractors of Washington (“AGC”) has existed since 1922 and is the state’s largest, oldest, and most prominent construction industry trade association. The three chapters of the AGC serve more than 1,000 general contractors, subcontractors, construction suppliers, and industry professionals. Many of these members perform public works projects for the state’s various agencies and local governments. AGC members perform both private and public sector construction. They are involved in virtually all types of construction in the state, including office, retail, industrial, highway, healthcare, utility, educational, and civic projects. Construction is a significant sector of the state’s economy, and provides significant jobs to Washington citizens.

Every member of AGC is likely insured under some kind of liability insurance policy. When contractors get sued, their insurers often defend them subject to a “reservation of rights”—reserving the insurer’s right to not pay on the contractor’s behalf at the conclusion of the case. It is AGC’s position that this reservation of the right to deny coverage creates a conflict of interest between the contractor and its insurer. The contractor obviously wants the insurer to pay on its behalf if the contractor doesn’t prevail. The insurance company has an inherent financial interest in not paying on the contractor’s behalf. Regardless of whether the insurer (or the counsel it

appoints) actually seeks to *further* the insurer's interests, as long as an insurer has taken the position that it may not pay at the end of a case, the insurer's and policyholder's interests are in conflict. It follows that if the insurer's and contractor's interests are in conflict in a reservation of rights case, then a lawyer cannot represent both parties without also having a conflict of interest.

Particularly in a reservation of rights case, contractors want assurance that the lawyer who their liability insurer is appointing to represent them is truly "their" lawyer—not a lawyer who is also representing an insurance company whose financial interests are adverse to the contractor's. AGC therefore urges this Court to reverse the holding by the Court of Appeals that no conflict of interest exists when appointed defense counsel represents a policyholder in a reservation of rights case while also representing the policyholder's insurer, and that counsel in this case therefore had no duty to the policyholder to disclose that conflict. *See Arden v. Forsberg & Umlauf, P.S.*, 193 Wn. App. 731, 736–37, 373 P.3d 320 (2016) ("We hold as a matter of law that Forsberg's representation of the Ardens while it also represented Hartford did not create a conflict of interest and that Forsberg had no obligation to notify the Ardens that they represented Hartford in other cases. We also hold that there is no evidence

that Forsberg breached its duty of disclosure regarding the potential conflicts of interest between Hartford and the Ardens.”).

II. ARGUMENT

The crux of this case is whether insurance-appointed defense counsel has a conflict of interest when it represents both a liability insurer and the insurer’s policyholder in a reservation of rights case. Thus, the Court’s analysis should begin with the relevant conflict of interest rule, RPC 1.7:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent¹ 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.

RPC 1.7(a).

The Court of Appeals first concluded that the Forsberg firm’s representation of the Ardens was not “directly adverse” to the firm’s

¹ Although not explicit, the Court of Appeals decision indicates that Forsberg & Umlauf was actually representing Hartford at the time the firm represented the Ardens, such that if the representations were adverse, the conflict would be a “concurrent” one. *See Arden* 193 Wn. App. at 736–37 (referring to “Forsberg’s representation of the Ardens while it also represented Hartford”) (emphasis added).

representation of Hartford under 1.7(a)(1)—“with regard to . . . the Duffy lawsuit”—because Forsberg wasn’t giving Hartford coverage advice *in that particular lawsuit*:

Hartford’s interests were not directly adverse to the Ardens’ interests 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.

Arden, 193 Wn. App. at 747.

That reasoning is flawed for several reasons.

First, RPC 1.7(a)(1) doesn’t address whether the policyholder’s and insurer’s interests are adverse “with regard to” a particular lawsuit or particular work that the lawyer is doing. The question is whether the two clients’ interests are adverse at all. Nothing in the rule says that a conflict exists only if the lawyer is actively suing one client on behalf of another, or giving one client advice to use against another in the same case. If the interests of Client A conflict with the interests of potential Client B, then representing Client B would create a conflict—no matter what the lawyer would be doing for Client B.

Consistent with that, Comment Six to RPC 1.7 states that a conflict can exist when clients have adverse interests even in matters that are “wholly unrelated”:

Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, *even when the matters are wholly unrelated*. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, *i.e.*, that the representation may be materially limited by the lawyer's interest in retaining the current client.

RPC 1.7, Cmt. 6 (emphasis added).

The Court of Appeals focused on the fact that Forsberg didn't give Hartford coverage advice *in the Duffy case*. But Forsberg did give Hartford coverage advice in other cases. And nothing in the record demonstrates that the advice in those other cases was not something Hartford could have used against the Ardens in the Duffy case (*e.g.*, advising Hartford on arguments it could use to avoid coverage where "intentional acts" are at issue). As the Court of Appeals acknowledged, "Hartford and the Ardens did have adverse interests with regard to coverage issues" generally. *Arden*, 193 Wn. App. at 747. According to Comment Six, the fact that Forsberg represented those adverse interests of Hartford in unrelated matters, as opposed to the Duffy case, is irrelevant under RPC 1.7(a).

Ironically, the Court of Appeals actually identified a conflict arising out of the Duffy representation in particular, but then ignored it. The Court of Appeals explained that an “actual conflict of interest” would exist if defense counsel were to attempt to persuade its insurer client to settle a case in which coverage is disputed:

When coverage is disputed, an insurer’s decision to settle necessarily involves an evaluation of the strength of its coverage defenses. Imposing a duty on defense counsel to attempt to persuade an insurer to settle would require that attorney either to argue the insured’s position on coverage or advise the insurer on coverage issues, both of which would give rise to actual conflicts of interest.

Arden, 193 Wn. App. at 753. One of the Forsberg attorneys testified his practice was to do exactly that—to persuade his insurer client to “pay everything”: “I specifically said that . . . my practice is to try to get the insurance company to pay everything and have you not pay a penny out of your pocket, even in a reservation of rights case.” *Arden*, 193 Wn. App. at 752. Although the potential harm in this scenario is to the insurer client, as opposed to the policyholder, it nevertheless illustrates exactly the kind of “actual conflict[] of interest” that the Court of Appeals itself described—and that RPC 1.7(a) prohibits.

The Court of Appeals also identified, and again ignored, another possible conflict—offers to settle by way of a covenant judgment:

[U]nder certain circumstances the insured can enter into an agreement with the plaintiff to execute a stipulated judgment. This type of agreement usually involves an assignment of the insured's bad faith claims against the insurer in exchange for the claimant's covenant not to execute on the judgment against the insured.

Arden, 193 Wn. App. at 753 (citing *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 764–65, 287 P.3d 551 (2012)). If a claimant offers to settle via a stipulated judgment, the policyholder obviously has an interest in accepting that offer and assigning its rights against its insurer in exchange for a release of claims against the policyholder's non-insurance assets. The insurer, on the other hand, has a financial interest in the policyholder not accepting the offer—the insurer would then immediately become the target of a direct action by the claimant, for which only the insurer would be potentially liable. Thus, whether the defense lawyer is advising its insurer client on “coverage” or not, the mere offer of a covenant judgment creates a conflict between the lawyer's two clients.

The Court of Appeals' reasoning about RPC 1.7(a) is flawed for an even simpler reason. Comment 12 to RPC 1.8 plainly states that when a lawyer's client pays another client's bills—as is true when a liability insurer pays its own lawyer to represent an insured—a “conflict of interest exists” under RPC 1.7(a):

Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client

will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (*for example, when the third-party payer is a co-client*). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

RPC 1.8, Cmt. 12 (emphasis added).

The Court of Appeals' analysis of subsection (2) of RPC 1.7(a) is also misplaced. The appellate court reasoned that a lawyer won't violate RPC 1.7(a)(2) as long as the lawyer complies with *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986): "[A]s long as the defense attorney follows the criteria outlined in *Tank*, there is not a significant risk that the attorney's representation of the insured will be materially limited by the attorney's representation of the insurer in other cases." *Arden*, 193 Wn. App. at 747. Yet a lawyer who has both the policyholder and its insurer as clients can *never* comply with *Tank*—because according to *Tank*, only the policyholder can be a client: "A defense attorney handling a reservation of rights case knows that, under *Tank*, **he or she represents only the insured, not the insurer . . .**" *Arden*, 193 Wn. App. at 747 (emphasis added). Nothing in *Tank* says a defense lawyer in a reservation of rights case can also represent its client's insurer—as long as

the lawyer does so in a different case. “Not the insurer” means “not the insurer.”²

Despite the dictates of *Tank*, the Court of Appeals reasoned that Forsberg’s representation was acceptable because Hartford and the Ardens both had an interest in resolving or prevailing in the Duffy case: “Hartford’s interests and the Ardens’ interests were aligned on the defense aspect of the claim. Both were interested in winning the case or settling it.” *Arden*, 193 Wn. App. at 747.

The problem is: “winning” and “settling” aren’t the only potential outcomes in a reservation of rights case. The policyholder obviously might lose. If so, the insurer would have a financial interest in not paying on the policyholder’s behalf.

That interest doesn’t just suddenly appear when the case ends. Throughout a reservation of rights case, the insurer has an inherent interest in identifying facts that will help it bolster its denial of coverage if the policyholder is ultimately liable. Likewise, the insurer would have an interest throughout the case in minimizing the insured’s exposure on the potentially covered claims, as opposed to the potentially uncovered ones.

² The Court of Appeals also mistakenly relied on *Johnson v. Cont’l Cas. Co.*, 57 Wn. App. 359, 361, 788 P.2d 598 (1990), for the proposition that “[t]he rule in Washington . . . is not that a conflict arises automatically in these cases.” *Johnson* isn’t one of “these cases” because the appointed defense counsel in *Johnson* didn’t also represent the insurance company.

It's true that the insured's and insurer's opposing financial interests may never manifest—the policyholder might win or the case might settle with the insurer's money. But the fact the parties' adverse interests are for a time inchoate doesn't change their conflicting nature. As long as the insurer and insured's interests might eventually diverge—and that's *always* the case in a reservation of rights defense—then the parties have a conflict of interest. That's precisely why this Court laid out the rules it did in *Tank*. It's also why insurers should not appoint their own lawyers to represent their policyholders in reservation of rights cases.

III. CONCLUSION

AGC's primary concern is that its members not be forced to accept appointed defense counsel who aren't truly "their" lawyers. As Bo Schembechler once famously said, "A Michigan man will coach Michigan . . ."³ Particularly in a reservation of rights case, policyholders should not have to accept lawyers who coach for another team.

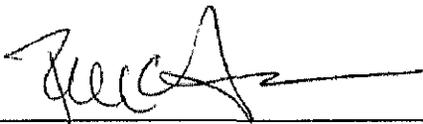
This Court should reverse the Court of Appeals and hold that a conflict of interest exists as a matter of law when an insurance company

³ See https://en.wikipedia.org/wiki/Bill_Frieder ("Just before the 1989 NCAA Tournament, [Michigan basketball coach William] Frieder announced that he would leave Michigan for Arizona State at the end of the season. Michigan athletic director Bo Schembechler ordered Frieder to leave immediately, and named top assistant Steve Fisher as the interim coach for the tournament. Schembechler famously announced, 'A Michigan man will coach Michigan, not an Arizona State man.'").

appoints its own lawyer to represent its policyholder in a reservation of rights case.

DATED this 2nd day of December, 2016.

HARPER | HAYES PLLC

By: 

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CERTIFICATE OF SERVICE

The undersigned certifies that on *Friday, December 02, 2016*, I caused a true and correct copy of this document to be delivered in the manner indicated to the following parties:

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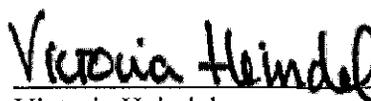
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Subject: WA Supreme Court Case 93207-7, Arden v. Forsberg Umlauf, P.S.

Clerk of the Court,

Attached is the following document to be filed in the Supreme Court of Washington:

- Brief of Amicus Curiae Associated General Contractors of Washington (including Certificate of Service)

Sent on behalf of

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Thank you.

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