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Supreme Court No. 93207-7  
Court of Appeals No. 46991-0-II

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**Supreme Court  
of the State of Washington**

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Roff Arden and Bobbi Arden,

Petitioners,

v.

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

Respondents.

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**Supplemental Brief of Appellants (PETITIONERS)**

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## **1. Introduction**

Every attorney owes a duty of undeviating loyalty to their client. The client of insurance-appointed defense counsel is, always and only, the insured defendant. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 388, 715 P.2d 1133 (1986). When the defense is under a reservation of rights, counsel has enhanced duties of “full and ongoing disclosure to the insured.” *Tank*, 105 Wn.2d at 388-89. The purpose of these enhanced duties is to ensure that the insured client is represented by a loyal advocate, the same as if the client had hired the attorney themselves. *See Tank*, 105 Wn.2d at 387. The insured client should never have cause to question who defense counsel actually represents. Thomas V. Harris, *Washington Insurance Law*, § 17.05 (3d ed. 2010).

Unfortunately, Ardens had cause to question whether Forsberg represented them at all. Forsberg failed to disclose conflicts of interest and failed to consult with Ardens regarding their options in response to Hartford’s settlement decisions. Instead, Forsberg carried out Hartford’s instructions without giving Ardens any opportunity to react.

The Court of Appeals essentially rubber-stamped Forsberg’s conduct. The decision of the Court of Appeals allows insurance-appointed defense counsel to act as little more than claims adjusters for the insurance companies, leaving their insured clients effectively unrepresented.

This case presents an opportunity for this Court to reaffirm the principles underlying *Tank* and to clarify the duties of insurance defense counsel and the remedies available when those duties are breached.

## **2. Issues Presented for Review**

Ardens' Petition for Review presented the following issues.

Upon accepting review, this Court did not limit the issues, despite Forsberg's invitation that the Court do so. *See* RAP 13.6. Accordingly, Ardens request the Court address all five issues.

1. Under *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986), insurance-appointed defense counsel must fully disclose potential conflicts of interest and resolve them in favor of the insured client. Forsberg had a potential "materially limited" conflict due to its long-standing relationships as coverage counsel and panel counsel for Hartford, but never disclosed these relationships to Ardens. Did Forsberg breach its fiduciary duties to Ardens by failing to disclose or resolve this conflict of interest?

2. Under *Tank*, defense counsel must keep the insured client fully apprised of all activity involving settlement, to enable the client to make informed decisions regarding settlement. Forsberg failed to consult with Ardens regarding their options in response to Hartford's settlement decisions. Forsberg carried out Hartford's instructions without giving Ardens an opportunity to react. Did Forsberg breach its fiduciary duties to Ardens?

3. Disgorgement of fees is a common remedy for breach of an attorney's duty of loyalty. Forsberg breached its duty of loyalty to Ardens. Are Ardens entitled to disgorgement of all fees received by Forsberg for the representation?

4. When a trustee breaches its duty of loyalty, the court has broad equitable powers to craft a deterrent remedy. The relationship between insurer, insured, and defense counsel bears all of the characteristics of a trust, with defense counsel as trustee over the insurance defense asset. Does Forsberg's breach amount to a breach of trust?

5. Under the "attorney judgment rule" adopted by the Court of Appeals in *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey PC*, 180 Wn. App. 689, 324 P.3d 743 (2014), a legal negligence claim must be supported by expert testimony that the defendant's actions were outside the range of reasonable alternatives from the perspective of a reasonable, careful, and prudent attorney in Washington. Ardens' expert witness provided such testimony. Is the "attorney judgment rule" the law in Washington and did the expert testimony raise a genuine issue of material fact?

### **3. Statement of the Case**

Forsberg & Umlauf and attorneys John Hayes and William "Chris" Gibson ("Forsberg") were appointed by Hartford, Ardens' insurer, to defend Ardens under a reservation of rights. Throughout the representation, Forsberg failed to advise Ardens of potential and actual conflicts of interest and failed to consult with Ardens regarding their options in response to Hartford's settlement decisions. Instead, Forsberg carried out Hartford's instructions without giving Ardens any opportunity to react.

Ardens sued Forsberg for legal malpractice and breach of fiduciary duties. The undisputed facts show that Forsberg breached its fiduciary duties

under the RPCs and under *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986). Forsberg's actions also breached the standard of care. The trial court dismissed Ardens' claims on summary judgment. The Court of Appeals affirmed. This Court accepted review.

For more detailed facts, Ardens respectfully refer the Court to Ardens' Court of Appeals briefs and Petition for Review. *See* Br. of App. at 3-11; Reply Br. of App. at 1-6; Pet. for Rev. at 9-11.

#### **4. Supplemental Argument**

This Court reviews summary judgment orders de novo, engaging in the same inquiry as the trial court. *Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 649, 336 P.3d 1112 (2014). Summary judgment is proper only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The parties dispute the meaning of facts in the record.<sup>1</sup> To the extent this dispute is material, summary judgment was improper.

This Supplemental Brief will address the five issues identified above, in order. First, Forsberg breached fiduciary duties by failing to disclose conflicts of interest. Second, Forsberg breached its duties by failing to consult with Ardens regarding settlement. Third, Forsberg's breach entitles Ardens to disgorgement of fees received by Forsberg. Fourth, Forsberg is

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<sup>1</sup> Forsberg accuses Ardens of misrepresenting the record, but fails to illuminate anything other than divergent interpretations. The material facts set forth in Ardens' briefs are all supported by evidence in the record. The same could not be said for Forsberg's Brief of Respondent. *See* Reply Br. of App. at 1-6.

subject to broad equitable remedies for breach of trust. Fifth, genuine issues of material fact precluded summary judgment on Ardens' malpractice claim.

**4.1 Forsberg breached its fiduciary duties by failing to disclose potential and actual conflicts of interest and to resolve conflicts in favor of Ardens.**

Ardens have described the duties owed by Forsberg under the RPCs and under *Tank*. Br. of App. at 14-20. Defense counsel's only client is the insured, to whom counsel owes "undeviating fidelity." *Tank*, 105 Wn.2d at 388. Defense counsel cannot allow the interests of the insurance company to influence his or her professional judgment. *Id.*; RPC 1.8(f); RPC 5.4(c). Defense counsel must strictly apply RPC 1.7, disclose all potential conflicts of interest, and obtain the client's informed consent. *Id.*; RPC 1.7, Comments [2]-[4]. Defense counsel's duty of "full and ongoing disclosure" of conflicts of interest requires in-depth discussion of potential conflicts that are reasonably foreseeable. Br. of App. at 19 (setting forth an example of what proper disclosure entails).

Forsberg breached this duty by failing to identify and disclose potential conflicts that eventually led Forsberg to favor the interests of Hartford over the interests of Ardens. Br. of App. at 24-33. From the outset, there was a substantial risk that Forsberg's long-standing business relationship with Hartford could materially limit its representation of Ardens under a reservation of rights. *See* RPC 1.7, Comments [6], [13]. Forsberg never disclosed the details of this relationship or how it could impact the representation. Br. of App. at 27.

The Court of Appeals held that neither RPC 1.7 nor *Tank* requires disclosure of a relationship. *Arden v. Forsberg*, 193 Wn. App. 731, 750-51, 373 P.3d 320 (2016). Yet in the very same breath, the court acknowledged that disclosing long-standing relationships may be the “better practice.” *Id.* at 751. The truth of the matter is that both RPC 1.7 and *Tank* **do require disclosure** of a long-standing business relationship whenever there is a risk that defense counsel’s interest in pleasing the insurer could materially limit representation of the insured client. *E.g.*, RPC 1.7, Comment [13]. Such risk existed here. *See* CP 422 (the conflict was so great it was unwaivable). When Forsberg was ultimately faced with conflicting instructions from Ardens and Hartford, Forsberg followed Hartford. The enhanced duty of disclosure under *Tank* was meant to protect insured clients from this kind of outcome. Forsberg had a duty to disclose these potential conflicts from the outset.

The Court of Appeals further eroded *Tank*’s duty of disclosure when it held that Forsberg adequately disclosed “the reservation of rights process.” *Arden*, 193 Wn. App. at 751-52. The court’s opinion takes *Tank*’s requirement of full disclosure of potential conflicts of interest and boils it down to nothing more than a requirement to explain to the client the nuts and bolts of defense under a reservation of rights: that defense counsel’s duties are only to the client, that the insurance company might deny coverage, and that defense counsel will not provide any coverage advice. The Court of Appeals decision would allow defense counsel to satisfy *Tank*’s requirements without disclosing any conflicts at all, so long as counsel explained the “process.”

In *Tank*, this Court recognized that there are potential conflicts of interest inherent in a reservation of rights defense. This Court required that those conflicts be fully disclosed and resolved through informed consent. While the basic explanation described by the Court of Appeals is surely required, it is not sufficient to satisfy defense counsel's duties under *Tank*. Explaining the "process" does not disclose any conflicts of interest—that is, the foreseeable ways in which the attorney might be tempted to favor the interests of the insurance company. The decision of the Court of Appeals would allow defense counsel to explain the "process" and be done; *Tank* requires full disclosure of conflicts and informed consent.

The Court of Appeals appears to misunderstand the nature of a potential conflict of interest. In general, a potential conflict of interest exists whenever a lawyer can foresee that at some point in the representation the lawyer might be tempted to favor an interest of the lawyer or a non-client at the expense of an interest of the client. RPC 1.7(a)(2); *See* William T. Barker & Charles Silver, *Professional Responsibilities of Insurance Defense Counsel*, § 12.02 (2014). Where the lawyer reasonably believes the lawyer will be able to provide competent and diligent representation of the client despite the temptation, the conflict is consentable. RPC 1.7(b)(1). A consentable potential conflict **must be disclosed** and the client's informed consent obtained. RPC 1.7, Comment [2].

The Court of Appeals violated this principle when it held that there are no potential conflicts so long as defense counsel understands that its only

client is the insured. *Arden*, 193 Wn. App. 750 and n. 7.<sup>2</sup> Knowing that one's formal duties run only to the insured client does not eliminate the risk that the lawyer will be tempted by some other interest; it only gives the lawyer a reason to resist the temptation. In other words, it does not eliminate the potential conflict; it only allows the lawyer to reasonably believe that the lawyer will be able to provide competent and diligent representation despite the conflict. The potential conflict still exists and must be disclosed and consented to. *Tank* does not make conflicts go away; *Tank* requires disclosure of conflicts so they can be appropriately resolved in favor of the insured client through informed consent.

Part C of the Court of Appeals opinion addressed the question of whether Forsberg's representation of Hartford in coverage cases created an automatic, non-consentable conflict of interest that would preclude Forsberg from representing Hartford's insured in a reservation of rights case.<sup>3</sup> *Arden*, 193 Wn. App. at 745-49. The court analyzed only whether such a conflict would arise *automatically* as a matter of law whenever an attorney defending under a reservation of rights also represents the insurer. *Id.* at 748 n. 5. The

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<sup>2</sup> The Court of Appeals appears to believe, incorrectly, that potential conflicts only arise in multiple representation. As explained above, a potential conflict of interest can also arise from a lawyer's personal interests, including a lawyer's interest in pleasing the insurance company that is paying the lawyer's bills (especially when that insurance company is also a client, albeit in other matters).

<sup>3</sup> *Ardens* do not seek a bright-line, automatic rule of disqualification. To reverse summary judgment, it is enough that Forsberg breached its duties of full disclosure and of fully involving *Ardens* in settlement. The fact that this conflict of interest was so great it could not be waived is significant in that it makes Forsberg's breach even more egregious, making it a textbook case for disgorgement of fees.

court did not analyze the specific facts of this case. *Id.* The court then relied on this limited analysis to reach its erroneous conclusion that Forsberg had no conflicts to disclose, because no conflict automatically arose. *Id.* at 750. The Court of Appeals never addressed the specific facts of this case in analyzing whether there were any potential conflicts requiring disclosure.

Under the facts of this case, there were potential conflicts requiring full disclosure under *Tank*. Forsberg's long-standing relationship with Hartford created foreseeable risks that Forsberg would be tempted to favor the interests of Hartford over Ardens. Because of the reservation of rights, it was foreseeable that at some point during the litigation, Forsberg would have to choose between Ardens' interest in a finding of negligence (covered) and Hartford's likely interest in a finding of malicious intent (not covered). Forsberg's personal interest in pleasing Hartford in order to maintain its business relationship would foreseeably tempt Forsberg to favor Hartford's position at the expense of its clients, the Ardens. Even if this potential conflict were consentable, *Tank* still required full disclosure and informed consent. Forsberg breached its duties by failing to disclose the conflict.

#### **4.2 Forsberg breached its fiduciary duties by failing to consult with Ardens regarding settlement decisions.**

Ardens have described Forsberg's duties regarding settlement decisions. Br. of App. at 17-18, 28-30. Defense counsel has a duty to keep the insured client apprised of all activity involving settlement. *Tank*, 105 Wn.2d at 389. This duty ensures that the client, "who must make the ultimate choice regarding settlement," can make informed decisions. *Id.*

When the insurer and the insured client disagree about settlement, defense counsel must consult with the client and obtain the client's consent before taking action. *See* RPC 1.2 and Comment [2]; RPC 1.4 and Comment [3]. Defense counsel should seek first to influence the insurer to adopt the client's position; if that fails, counsel must either obtain the client's informed consent to the insurer's position or withdraw from the representation.<sup>4</sup>

Forsberg breached its duties regarding settlement when it failed to advocate for Ardens' position with Hartford, failed to consult with Ardens regarding the conflict between Hartford's instructions and Ardens' desires, and followed Hartford's instructions without giving Ardens any opportunity to react to the developing situation. Br. of App. at 30-33. Ardens demanded that Hartford accept the initial \$55,000 demand and fund the settlement. *E.g.*, CP 256. Hartford refused, preferring to let the offer expire and to counter-offer at \$18,000. *See* CP 263. Forsberg did not consult with Ardens; instead Forsberg informed Ardens of the decision and immediately carried it

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<sup>4</sup> *See* William T. Barker, et al., *Insurer Litigation Guidelines: Ethical Issues for Insurer-Selected and Independent Defense Counsel*, ABA Section of Litigation 2012 Insurance Coverage Litigation Committee CLE Seminar, March 1-3, 2012, at pp. 19-21, available at [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012\\_inscle\\_materials/23\\_1\\_guidelines.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012_inscle_materials/23_1_guidelines.authcheckdam.pdf) (accessed November 28, 2016) ("If counsel believes that some insurer decision poses a substantial risk to the policyholder, counsel should point that out to the insurer and request reconsideration. If the insurer will not reconsider, then counsel must inform the policyholder, fully describe the risks and benefits, and inquire whether the policyholder will consent to having counsel proceed on the basis the insurer requests. . . . If the policyholder refuses to consent, then counsel cannot proceed in the way the insurer requests. If the insurer will not rescind the disputed decision, counsel must then withdraw.").

out. CP 183, 210. Ardens again demanded that Hartford accept and fund the second, \$40,000 demand. CP 883. Hartford refused, preferring to counter-offer at \$25,000. CP 767. Again, Forsberg did not consult with Ardens; instead, Forsberg informed Ardens of the decision and quickly carried it out, over the objection of Ardens' personal counsel. CP 198, 219, 267, 770.

The Court of Appeals correctly noted that in a reservation of rights case, the insured client has the right to settle a case without the insurer's consent. *Arden*, 193 Wn. App. at 752-53. "This means that when the claimant makes a settlement demand, defense counsel must consult with the insured before that demand is rejected or allowed to expire. Otherwise, it may be difficult for the insured to exercise its settlement rights." *Id.* at 755-56.

However, the court was wrong when it held that defense counsel has no duty to persuade the insurer to settle on the client's terms. As noted above, this duty is inherent in the duty of loyalty, which requires counsel to favor and protect the interests of the client.

The Court of Appeals reasoned that a duty to persuade the insurer would create a conflict of interest because it would require defense counsel to advocate or advise on coverage issues. This is not true. For example, in this case, Forsberg could have argued that any delay in resolving the case would put Arden at greater risk of criminal charges, or that bridging the \$5,000 gap would be a minimal expense compared to the risk of taking the case to trial. Defense counsel can advocate for the client's settlement position without arguing coverage.

Even if a coverage argument would create a conflict of interest, the solution is not to eliminate the duty, but to require disclosure of the resulting conflict. The reasoning of the Court of Appeals puts the cart before the horse. The first inquiry is whether there is a duty. Once a duty is found, conflicts of interest can be identified, disclosed, and consented to.

As noted above, defense counsel **does** have a duty—inherent in the duty of loyalty—to advocate for the client when the insurer’s position conflicts with the client’s interests. 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. This is a potential conflict that would have to be disclosed at the outset and resolved in favor of the client. It is a conflict that Forsberg should have disclosed, but did not.

The Court of Appeals was wrong when it held that there was no conflict between Ardens’ desire for quick settlement and Hartford’s deliberate negotiation strategy. The court recognized that settlement was delayed significantly when Forsberg requested an extension of time to respond to the \$55,000 demand. The court reasoned that this was a reasonable judgment decision designed to further the Ardens’ interest in having Hartford fund the settlement. *Ardens*, 193 Wn. App. at 755, 760. However, Forsberg did not have the right to make such a decision without consulting with Ardens. *See* RPC 1.2; RPC 1.4. Defense counsel does not get to choose which of the clients’ interests to pursue—only the client can make

that choice. If counsel's judgment leads them to disagree, counsel must consult with the client before taking action. *Id.*

After Arden had demanded settlement at the \$55,000 figure, Forsberg had a duty to consult with Arden prior to requesting an extension of time on the settlement demand. As a result of the extension, Hartford was able to issue its untimely reservation of rights letter prior to any settlement, possibly prejudicing Ardens' coverage position. Even if counsel can properly request an extension to obtain discovery and evaluate the case, counsel cannot request an extension to enable the insurer to assert coverage defenses.

The Court of Appeals was wrong when it held that summary judgment was proper on the issue of Forsberg's failure to consult with Ardens regarding settlement. The court's analysis misses the forest for the trees. When Hartford refused to fund the settlement demands, Forsberg did not explain to Ardens what their options were; did not tell them to consult with personal counsel; did not give them time to react before the demands were rejected or expired; and even cut off Ardens' ability to settle at \$40,000, by making a counter-offer only 24 minutes after personal counsel indicated that Ardens might exercise their right to settle (*compare* CP 267 *with* CP 770).<sup>5</sup> Forsberg did not even recognize that it owed these duties to Ardens. *See* Reply Br. of App. at 16 (quoting CP 214).

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<sup>5</sup> In response to Hartford's decision to reject the \$40,000 demand, Ardens' personal counsel objected and informed Hartford and Forsberg, at 11:10 a.m., "We are entitled to settle and assign, and we may." CP 770. At 11:34 a.m., Forsberg rejected the \$40,000 demand and made a \$25,000 counter-offer. CP 267.

The result of all of these breaches of Forsberg's duties was that Ardens believed that Forsberg was representing Hartford instead of Ardens. CP 228, 574. Forsberg acted more like claims adjusters than attorneys. Forsberg's breaches left Ardens without a loyal advocate for their interests. Ardens might as well have had no defense counsel at all.

The Court of Appeals incorrectly held that there was a dispute of fact regarding breach but that summary judgment dismissal was proper because there was no evidence that consultation would have led to settlement. *Arden*, 193 Wn. App. at 756. But Arden testified that he **would have been willing** to contribute his own money to accept the \$40,000 demand. CP 575 (at 139:6-11). Arden's personal counsel notified Hartford and Forsberg that Ardens were considering their own settlement. CP 770. If Forsberg had consulted with Ardens in accordance with their duty, a settlement may have resulted. But, more importantly, Forsberg's breaches of duty left Ardens without a loyal advocate defending them in the *Duffy* case. This, in itself, was an injury for which Ardens are entitled to a remedy.

**4.3 As a remedy for Forsberg's breach, Ardens are entitled to disgorgement of all fees received by Forsberg in the *Duffy* case.**

Ardens argued that they were entitled to disgorgement of all fees received by Forsberg for the representation. Br. of App. at 35-37; Reply Br. of App. at 17-18. Where an attorney breaches the duty of loyalty, he should be denied compensation. *Eriks v. Denver*, 118 Wn.2d 451, 462, 824 P.2d 1207 (1992). "It is no answer to say that fraud or unfairness were not shown to

have resulted”—in other words, no showing of causation or actual damages is required beyond the fact of the disloyalty. *Id.*

Forsberg argues that its conduct was not egregious enough to warrant disgorgement of fees. Ans. to Pet. for Rev. at 17 n 16. Forsberg relies on *Kelly v Foster*, 62 Wn. App. 150, 813 P.2d 598 (1991), in which the court noted that disgorgement was justified when an attorney has engaged in gross misconduct, because that would be a complete defense to an attorney’s action for fees. *Kelly*, 62 Wn. App. at 156. Forsberg’s egregious breaches of fiduciary duty constitute such gross misconduct.

Throughout the representation, Forsberg ignored Ardens’ instructions, failed to consult with Ardens regarding settlement, failed to advise Ardens of their options, and did nothing more than process the claim on behalf of Hartford. Ardens’ insurance defense asset was being wasted to pay for attorneys who were not representing Ardens’ interests in any meaningful way. Forsberg’s breach of fiduciary duties was egregious and would be a complete defense to a claim for fees. Ardens are entitled to disgorgement of all fees paid to Forsberg for the representation.

Forsberg argues that Ardens are not the proper party to receive any disgorged fees because Ardens did not pay the fees. Ans. to Pet. for Rev. at 17 n 16. This argument is incorrect. It is similar to the “no damages” argument rejected by this Court in *McRory v N. Ins. Co. of N.Y.*, 138 Wn.2d 550, 558-59, 980 P.2d 736 (1999). In fact, Ardens did pay the fees, by way of paying the premiums for their insurance policy. Even though Hartford issued the checks, it only did so on behalf of Ardens, pursuant to the policy.

Disgorgement of all fees is the correct remedy, even when some or all of the fees were paid by a third party. *Behnke v. Ahrens*, 172 Wn. App. 281, 298, 294 P.3d 729 (2012). Disgorgement is a remedy for Forsberg's breach of duties to Ardens, not to Hartford. Ardens, not Hartford, have been injured by Forsberg's misconduct. Ardens, not Hartford, are entitled to recover.

**4.4 Because insurance defense counsel stands in the shoes of a trustee over the insurance defense asset, Ardens are entitled to broad equitable remedies for Forsberg's breach.**

Ardens argued that they were entitled to broad equitable remedies for Forsberg's breach, including emotional distress damages and other remedies to make Ardens whole and prevent Forsberg from benefitting from its breach. Br. of App. at 37-41; Reply Br. of App. at 18-21. Ardens base their argument on the relationship between insurer, defense counsel, and insured client, which bears the essential characteristics of a trust relationship. Br. of App. at 20-23, 34; Reply Br. of App. at 11.

When a person purchases a liability insurance policy, they purchase two valuable insurance assets: defense and indemnity. *See Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 54, 164 P.3d 454 (2007) ("The duty to defend is a valuable service paid for by the insured and one of the principal benefits of the liability insurance policy."); CP 106, 107 (Forsberg's expert Jeffrey Tilden described the insurance policy as consisting of these two, valuable "assets"). When an insurer assigns defense counsel, the insurer sets its reserves, designating a specific amount of money for expenses of the insured's

defense. *See* CP 320-21. Defense counsel must then manage its billable time and other expenses to use that insurance defense asset to provide the best defense for the benefit of the insured client. In doing so, defense counsel must use its own professional judgment and maintain undeviating loyalty to the insured client. This relationship bears all of the indicia of a trust.

A trust is “a fiduciary relationship in which one person holds a property interest, subject to an equitable obligation to keep or use that interest for the benefit of another.” Bogert, George G., et al., *The Law of Trusts and Trustees*, § 1 (3d ed. 2007); *see also* Restatement 2d of Trusts, § 2. Here, the trust property is the insurance defense asset. The trustee who holds and manages that property is defense counsel. Defense counsel is under an obligation to use the property solely for the benefit of the insured client. Defense counsel owes fiduciary duties to the insured client, including duties of care and undeviating loyalty in managing the defense. The parties create the trust by way of the insurance policy and the acceptance by the insured client of representation by assigned counsel. All of the essential elements of a trust relationship are present.

When parties put themselves into a situation that bears the characteristics of a trust, courts will recognize a “resulting trust” by implication, even when the parties did not create an express trust. Bogert, *Trusts and Trustees*, § 452. Here, the parties—the insurer, the insured, and defense counsel—have structured a relationship that bears all of the characteristics of a trust. This Court should recognize it as such and hold

that defense counsel stands in the position of a trustee, subject to the duties of a trustee and the equitable remedies available for breach of those duties.

The Court of Appeals declined to meaningfully address this argument. *Arden*, 193 Wn. App. at 745 n. 3. Forsberg does not challenge the argument, except to say that trust law does not fit. Ans. to Pet. for Rev. at 17 n 15. Admittedly, Ardens' trust theory is novel. Ardens have not found any prior case law addressing such an argument, either to accept it or reject it. But while the Court of Appeals found this lack of precedent decisive, this Court is better positioned to address novel questions of first impression and to make connections between formerly disparate areas of the law where such connections are appropriate. The relationship between the insurer, the insured client, and defense counsel bears all of the relationships of a trust. Defense counsel uses its professional judgment to manage the insurance defense asset, contributed by the insurer, for the sole benefit of the insured client, with the highest duties of loyalty to the insured client. In other contexts, courts recognize such relationships by finding a "resulting trust." The same result should apply here.

When a trustee breaches fiduciary duties, the court has broad equitable powers to craft a remedy to make plaintiffs whole and to prevent the trustee from benefitting from the breach of trust. *Gillespie v. Seattle-First Nat'l Bank*, 70 Wn. App. 150, 173, 855 P.2d 680 (1993); *Allard v. First Interstate Bank, N.A.*, 112 Wn.2d 145, 151-52, 768 P.2d 998 (1989); Restatement 2d of Trusts, § 205.

This Court should hold that the insurance defense relationship is a trust and that breach of fiduciary duties by defense counsel will subject counsel to the broad equitable remedies available for breach of trust. This Court should remand this case to the trial court to craft an appropriate equitable remedy.

#### **4.5 Genuine issues of material fact precluded summary judgment dismissal of the legal malpractice claim.**

Ardens argued that material issues of fact precluded summary judgment dismissal of their legal malpractice claim. Br. of App. at 41-43; Reply Br. of App. at 21-25. The trial court correctly determined that there were disputes of fact regarding the element of breach. Supp. RP at 4. There were also disputes of fact regarding damages and proximate cause.

The Court of Appeals disagreed with the trial court on the issue of breach. The court relied on the “attorney judgment rule” it had created in *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey PC*, 180 Wn. App. 689, 324 P.3d 743 (2014). Confining its analysis to Forsberg’s decision to seek an extension of time for the original settlement demand, the court held that Ardens had failed to present evidence that Forsbergs’ actions were “outside the range of reasonable alternatives from the perspective of a reasonable, careful, and prudent attorney in Washington.” *Arden*, 193 Wn. App. at 760.

In fact, Ardens did present such evidence, through the expert testimony of Professor John Strait. CP 420-25. Professor Strait testified that Forsberg’s actions in the representation of Ardens “were not within the range of choices a reasonable, careful, and prudent attorney in Washington

would adopt.” CP 421. This testimony by itself creates a genuine issue of material fact under the “attorney judgment rule.”

This Court has not yet taken occasion to adopt or reject the “attorney judgment rule,” which was created by the Court of Appeals in 2014. Regardless of whether the “attorney judgment rule” is the applicable law of this state, Ardens’ evidence presents genuine issues of material fact on all of the elements of Ardens’ legal malpractice claims. This Court should remand to the trial court for trial on this claim.

## **5. Conclusion**

The trial court erred in denying Ardens’ second motion for partial summary judgment and dismissing Ardens’ breach of fiduciary duty claims. The trial court also erred in granting Forsberg’s motion for summary judgment on Ardens’ legal malpractice claim where there were disputed issues of material fact. The Court of Appeals erred in affirming the trial court’s decisions. This Court should reverse the decisions of the trial court and the Court of Appeals, reaffirm *Tank*, and clarify the duties of insurance defense counsel and the remedies available when those duties are breached.

Respectfully submitted this 28<sup>th</sup> day of November, 2016.

/s/ Kevin Hochhalter  
Kevin Hochhalter, WSBA #43124  
Attorney for Appellants

**CERTIFICATE OF SERVICE**

I certify, under penalty of perjury under the laws of the State of Washington, that on November 28, 2016 I filed the foregoing document with the Supreme Court and provided a copy to counsel in the manner indicated below:

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DATED this 28<sup>th</sup> day of November, 2016.

/s/ Rhonda Davidson  
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Dear Supreme Court:

Please accept for filing today the attached Supplemental Brief, submitted on behalf of Petitioners, Roff and Bobbie Arden.

Thank you,

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