

SUPREME COURT OF THE STATE OF WASHINGTON

Plein v. USAA Casualty Insurance Co., 195 Wn. 2d 636

462 P.3d 134 (2020) · No. 97563-9 · Decided May 21, 2020

SUMMARY

The Washington Supreme Court held that a law firm's prior representation of USAA was not the same as or substantially related to its representation of the Pleins in an insurance bad-faith action under RPC 1.9(a). The court ruled that the former client bears the burden of showing a substantial relationship and that USAA failed to demonstrate a substantial risk that confidential factual information would materially advance the Pleins' case. The court reversed the Court of Appeals and reinstated the trial court's decision denying disqualification.

CASE DETAILS

COURT	Supreme Court of the State of Washington
WRITING FOR THE COURT	Gordon McCloud, J.
JURISDICTION	Washington
DECIDED	May 21, 2020
DOCKET	97563-9
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The Pleins sought review of an interlocutory Court of Appeals decision reversing the trial court's denial of USAA's motion to disqualify Keller Rohrback LLP from representing the Pleins in an insurance bad-faith action.
STANDARD OF REVIEW	De novo review applies to whether attorney conduct violates the Rules of Professional Conduct and to interpretation of court rules.
PRECEDENTIAL VALUE	Published and precedential Washington Supreme Court opinion; decided en banc.
PARTIES	Richard Plein, Debra Plein, formerly Debra De Witt, the marital community composed thereof v. USAA Casualty Insurance Company

TOPICS

insurance bad faith

civil procedure

appellate procedure

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PRACTICE AREAS

legal ethics

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QUESTIONS PRESENTED

1. Which party bears the burden of proving that the former and current representations are the same or substantially related under RPC 1.9(a)?
2. Whether Keller Rohrback's prior representations of USAA were the same as or substantially related to the Pleins' action so as to prohibit Keller from representing the Pleins under RPC 1.9(a).
3. Whether general knowledge of USAA's policies, practices, and litigation strategies or a general duty of loyalty independently required Keller's disqualification.
4. Whether RPC 1.9(c)'s restrictions on use or disclosure of former-client information independently barred the Keller attorneys' representation of the Pleins.

HOLDINGS

1. The former client seeking disqualification bears the burden of proving that the former and current matters are the same or substantially related.
2. Under current RPC 1.9(a) and comments 2 and 3, matters are substantially related when they involve the same transaction or legal dispute, or when there is a substantial risk that confidential factual information normally obtained in the prior representation would materially advance the current client's position.
3. Keller's prior representations of USAA were not the same as or substantially related to the Plein matter, so RPC 1.9(a) did not require Keller's disqualification.
4. RPC 1.9(c) independently prohibits a lawyer from using or disclosing former-client information, but it does not itself prohibit representation in a matter that is not substantially related; there is no separate duty of loyalty under RPC 1.9 that automatically bars all adverse representation of a former client.

KEY QUOTATIONS

"We now hold that under current RPC 1.9(a), USAA fails to show a "substantial risk" that Keller obtained "confidential factual information" that would "materially advance" the Pleins' case." (at 641)

"Keller did not represent USAA on the Plein matter or on anything factually related to the Plein matter." (at 664)

"But there is no separate "duty of loyalty" under RPC 1.9 beyond the test outlined in RPC 1.9." (at 668)

FACTUAL BACKGROUND

Keller Rohrback represented USAA and its affiliates in more than 165 matters over approximately a decade, including bad-faith litigation and a matter involving fire and smoke damage and allegedly inadequate alternative housing. After a fire damaged the Pleins' home, USAA accepted coverage but allegedly failed to pay for additional repairs and temporary living arrangements, leading the Pleins to sue USAA and Sterling for bad faith and related claims. The Pleins later retained two Keller attorneys, despite Keller's prior representation of USAA.

USAA moved to disqualify Keller, asserting that the firm possessed confidential information about USAA's claims-handling practices and bad-faith litigation strategies.

PROCEDURAL HISTORY

The Pleins sued USAA and Sterling Group after fire damage to their home, alleging insurance bad faith and related claims. The trial court ruled that Keller Rohrbach's prior representation of USAA was not substantially related to the Plein matter and allowed Keller to continue representing the Pleins. The Court of Appeals accepted discretionary review and reversed, concluding that Keller had confidential information about USAA's bad-faith litigation strategies that could materially advance the Pleins' case. The Washington Supreme Court granted review, reversed the Court of Appeals, and remanded for further proceedings.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Remand for further proceedings consistent with the opinion, including reinstatement of the trial court's order that Keller's disqualification was not required.

CASES CITED

- Plein v. USAA Casualty Insurance Co., 9 Wn. App. 2d 407, 445 P.3d 574 (2019)
- State v. Hunsaker, 74 Wn. App. 38, 43-45, 873 P.2d 540 (1994)
- Sanders v. Woods, 121 Wn. App. 593, 597-98, 89 P.3d 312 (2004)
- Teja v. Saran, 68 Wn. App. 793, 846 P.2d 1375 (1993)
- Wallace v. Evans, 131 Wn. 2d 572, 577, 934 P.2d 662 (1997)
- State v. Nickels, 195 Wn. 2d 132, 136, 456 P.3d 795 (2020)
- Eriks v. Denver, 118 Wn. 2d 451, 457-58, 824 P.2d 1207 (1992)
- In re Firestorm 1991, 129 Wn. 2d 130, 135, 916 P.2d 411 (1996)
- State v. Tatum, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994)
- Public Utility District No. 1 of Klickitat County v. International Insurance Co., 124 Wn. 2d 789, 812, 881 P.2d 1020 (1994)
- Watkins v. Trans Union, LLC, 869 F.3d 514, 516-23 (7th Cir. 2017)
- Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 646 F.2d 1020, 1022-33 (5th Cir. 1981)
- Government of India v. Cook Industries, Inc., 569 F.2d 737, 738-40 (2d Cir. 1978)
- Chugach Electric Association v. United States District Court for the District of Alaska, 370 F.2d 441, 442-43 (9th Cir. 1966)
- Richers v. Marsh & McLennan Group Associates, 459 N.W.2d 478, 481 (Iowa 1990)
- Robbins v. Gillock, 109 Nev. 1015, 1017-18, 862 P.2d 1195 (1993) (per curiam)
- State ex rel. Ogden Newspapers, Inc. v. Wilkes, 211 W. Va. 423, 426, 566 S.E.2d 560 (2002) (per curiam)

- *Johnston v. Harris County Flood Control District*, 869 F.2d 1565, 1569 (5th Cir. 1989)
- *Cox v. American Cast Iron Pipe Co.*, 847 F.2d 725, 728 (11th Cir. 1988)
- *FMC Technologies, Inc. v. Edwards*, 420 F. Supp. 2d 1153, 1157-58 (W.D. Wash. 2006)
- *Amgen, Inc. v. Elanex Pharmaceuticals, Inc.*, 160 F.R.D. 134, 139-40 (W.D. Wash. 1994)
- *Avocent Redmond Corp. v. Rose Electronics*, 491 F. Supp. 2d 1000, 1007 (W.D. Wash. 2007)
- *Velazquez-Velez v. Molina-Rodriguez*, 235 F. Supp. 3d 358, 361-62 (D.P.R. 2017)

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