IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JAMES and DEBORAH SHARBONO, individually and the marital community comprised thereof:

Respondents,

v.

UNIVERSAL UNDERWRITERS INSURANCE COMPANY, a foreign insurer; LEN VAN DE WEGE and "Jane Doe" VAN DE WEGE, individually and the marital community comprised thereof:

Respondents,

CLINTON L. TOMYN, individually and as Personal Representative of the Estate of CYNTHIA L. TOMYN, deceased; and as Parent/Guardian of NATHAN TOMYN, AARON TOMYN, and CHRISTIAN TOMYN, minor children,

Appellants/Intervenors.

No. 40245-9-II

UNPUBLISHED OPINION

Van Deren — Clinton Tomyn, on behalf of himself, his deceased wife's estate, and his minor children, seeks review of a trial court ruling denying the Tomyns' motion to disqualify attorney Timothy Gosselin, who represents James and Deborah Sharbono and their daughter Cassandra in this long-running lawsuit arising from a vehicle accident, which caused Cynthia Tomyn's death. The Sharbonos are liable for Cynthia Tomyn's death. At issue is whether a

settlement agreement between the Sharbonos and the Tomyns or a course of conduct pursued under the settlement agreement (1) made Gosselin the Tomyns' attorney, (2) made the Tomyns third party beneficiaries of Gosselin's services, or, (3) if there was otherwise a common interest privilege, the violation of which warrants Gosselin's disqualification from representing any party in this case.

We affirm the trial court's denial of the Tomyns' disqualification motion, holding that there was no attorney-client relationship between Gosselin and the Tomyns created under the Sharbono/Tomyn settlement agreement, that the Tomyns are not third party beneficiaries of Gosselin's representation of the Sharbonos, and that the Tomyns failed to prove that Gosselin breached any duty to protect confidential information under the "common interest"[1] theory.

FACTS

This case has a long and complicated history. For more than a decade, the case has been involved in various forms of negotiations, settlement, mediation, and litigation. It has yielded numerous appeals and three decisions by this court already.[2] Although the present appeal concerns only the propriety of the trial court's denial of the Tomyns' motion to disqualify the Sharbonos' attorney, Gosselin, the Tomyns' assertions of error reach back to events early in this case's history, including a 2001 settlement agreement and subsequent performance of obligations

[1] *Broyles v. Thurston County*, 147 Wn. App. 409, 442, 195 P.3d 985 (2008).

[2] *Sharbono v. Universal Underwriters Ins. Co*., 139 Wn. App. 383, 161 P.3d 406 (2007); *Sharbono v. Universal Underwriters Ins. Co*., 158 Wn. App. 963, 247 P.3d 430 (2010); *Sharbono v. Universal Underwriters Ins. Co*., noted at 160 Wn. App. 1036 (2011). Our commissioner has consolidated two additional appeals, *Sharbono v. Universal Underwriters Ins. Co*., No. 41931-9-II (Wash. Ct. App. appeal filed Mar. 31, 2011); *Tomyn v. Sharbono*, No. 41981-5-II (Wash. Ct. App. appeal filed Apr. 11, 2011), which are pending.

under that agreement. A brief overview of relevant facts follows.

This case had its genesis in a 1998 car accident, in which a vehicle owned by James and Deborah Sharbono and driven by their 16 year old daughter, Cassandra, struck Cynthia Tomyn's car causing Tomyn's death. *Sharbono v. Universal Underwriters Ins. Co*., 158 Wn. App. 963, 965-66, 247 P.3d 430 (2010). Shortly thereafter, the Tomyns hired attorney Ben Barcus to represent them in pursuing clams against the Sharbonos, and the Sharbonos hired Gosselin to represent their interests.

The Sharbonos had primary liability coverage with State Farm Insurance Company and umbrella coverage under their commercial and personal liability policies with Universal Underwriters Insurance Company. *Sharbono*, 158 Wn. App. at 966. The Sharbonos claimed that they had three umbrella policies; Universal advised them they had only one umbrella policy with a $1,000,000 limit. *Sharbono*, 158 Wn. App. at 966. During settlement negotiations with the Tomyns, the Sharbonos asked Universal several times to produce its underwriting file so that they and the Tomyns could know the extent of the Sharbonos' liability coverage but Universal refused. *Sharbono*, 158 Wn. App. at 966. Settlement negotiations between the Sharbonos and the Tomyns continued for more than a year and were finally successful in March 2001. Ben Barcus represented the Tomyns and Gosselin represented the Sharbonos during these negotiations.

Under the terms of the settlement, the Sharbonos agreed to have judgment entered against them for $4,525,000. They also agreed to file a lawsuit against Universal and to give certain awards against Universal to the Tomyns if they prevailed. The Sharbonos retained their rights to other recoveries, and the Tomyns agreed to execute a full satisfaction of the confessed judgment upon final resolution of the Sharbonos' suit against Universal, regardless of the result of that suit.[3]

In compliance with the settlement agreement, the Sharbonos sued Universal asserting multiple claims against Universal and its agent, who purportedly sold the Sharbonos the multiple umbrella policies. The particulars of this suit are detailed in *Sharbono v. Universal Underwriters Ins. Co*., 139 Wn. App. 383, 161 P.3d 406 (2007). For present purposes we note that the Sharbonos were successful in many of their claims, both on summary judgment and in an ensuing jury trial, after which the trial court entered judgment against Universal for approximately $9,400,000, which included a jury verdict of $4,500,000 regarding the Sharbonos' personal damages. Universal appealed, and we affirmed in part and reversed in part, vacating the $4,500,000 jury award and remanding for further proceedings. *Sharbono*, 139 Wn. App. at 424.

Following denial of further review by our Supreme Court in July 2008, *see Sharbono v. Universal Underwriters Ins. Co*., 163 Wn.2d 1055, 187 P.3d 752 (2008), the case proceeded on remand to the trial court, where the Sharbonos moved to execute on Universal's appeal bond, *see Sharbono*, 158 Wn. App. at 968, and purportedly obtained a trial setting for the Sharbonos' remanded claims. At this point, August 2008, the Tomyns moved to intervene. *Sharbono*, 158 Wn. App. at 968 n.6. On September 5, 2008, the trial court granted the Tomyns' motion, permitting them limited intervention to protect their interest in the 2005 judgment.

On October 3, 2008, the trial court also granted the Sharbonos' motion to execute on Universal's appeal bond, calculated prejudgment and postjudgment interest amounts, and designated the Tomyns as the proper recipients of all such interest amounts. *Sharbono*, 158 Wn. App. at 968. Universal appealed the October 3 order and the Sharbonos cross-appealed the

[3] In affirming the settlement's reasonableness, we have already recognized that the settlement was negotiated through an adversarial process "at arms length" and in "good faith." 139 Wn. App. at 406.

designation of the Tomyns as recipients of all interest amounts.[4] *Sharbono*, 158 Wn. App. at 969. We ultimately vacated the amount of the trial court's interest award, remanded for recalculation of interest, and affirmed the trial court's designation of the Tomyns as the proper recipient of all interest payments. *Sharbono*, 158 Wn. App. at 974.

In the meantime, in August 2009, Gosselin and Barcus, on behalf of the Sharbonos and the Tomyns, respectively, mediated with Universal without success. Later that same month, Gosselin, on behalf of the Sharbonos, mediated with Universal regarding that part of the lawsuit that the Sharbonos had retained for themselves, and this mediation was successful. On August 21, 2009, Gosselin e-mailed Barcus, informing him of the Sharbono/Universal settlement and assuring him that it addressed only the Sharbonos' separate retained interests. Barcus immediately responded, demanding details of the settlement and threatening suit.

The Tomyns then filed a motion to compel disclosure of the Sharbono/Universal settlement negotiations and the terms of the proposed settlement agreement. The trial court granted the motion on September 4, 2009, and Gosselin gave an oral presentation on the record disclosing the terms of the proposed settlement. *Sharbono v. Universal Underwriters Ins. Co*., noted at 160 Wn. App. 1036, 2011 WL 986043, at *1. On October 9, Gosselin further provided the Tomyns with a copy of the final settlement agreement between the Sharbonos and

[4] Universal appealed other rulings of the trial court, but in a separate order we narrowed the scope of Universal's appeal to a challenge of the trial court's interest calculation only. *See Sharbono*, 158 Wn. App. at 969-71.

Universal.[5]

On October 13, the Tomyns filed an ex parte motion for a temporary restraining order (TRO) and order to show cause seeking to impound the $2,350,000 that the Sharbonos had received in their settlement with Universal. At the resulting October 16 show cause hearing, the trial court quashed the TRO and denied a permanent injunction, noting that the court registry contained sufficient funds ($7,900,000) to protect the Tomyns' interest.

On November 18, the Tomyns moved to disqualify Gosselin. They argued that Gosselin should be disqualified on three grounds: (1) he was the Tomyns' attorney and had a conflict of interest serving the Sharbonos' interest, (2) he was hired to represent the Tomyns' interests so they were third party beneficiaries to whom Gosselin owed a duty of loyalty, and (3) the Sharbonos and the Tomyns shared a common interest that gave rise to a privilege that Gosselin could no longer honor because the Sharbonos' and the Tomyns' interests now conflicted. Gosselin argued (1) he could not have an attorney-client relationship with the Tomyns because that relationship would be illegal and an obvious conflict with his obligations to the Sharbonos; (2) the circumstances for a common interest had not occurred and, even if they had, the interest did not create a right to disqualify counsel but, rather, a privilege to protect communications; and (3) a third party beneficiary relationship could not arise because it would have divided Gosselin's loyalties between his clients, the Sharbonos and the Tomyns, and a third party beneficiary relationship did not arise because he was hired only to represent the Sharbonos. The Sharbonos

[5] Universal sought discretionary review of the disclosure order, arguing that the order violated the mediation communication privilege under the Uniform Mediation Act, chapter 7.07 RCW. *Sharbono*, 2011 WL 986043, at *1. Because a copy of the final agreement had been given to the Tomyns by the time we considered the matter, the parties agreed that the matter was moot. We agreed, and declined to address the matter. *Sharbono*, 2011 WL 986043, at *2.

expressly testified that they hired Gosselin to represent them, not the Tomyns.

On December 22, the trial court denied the Tomyns' motion to disqualify Gosselin and on February 5, 2010, the court denied the Tomyns' subsequent motion to reconsider. The Tomyns appeal. Gosselin cross-appealed the trial court's oral ruling that the Tomyns were third party beneficiaries and that they may have a right to sue Gosselin for damages. *See* footnote 8.

ANALYSIS

The Tomyns claim that the trial court erred in finding that Gosselin need not be disqualified from representing any party in this long-standing case based on either a direct attorney-client relationship that arose during his representation of the Sharbonos against Universal, through a third party beneficiary theory, or based on a "common interest" theory. We disagree.

A. Standard of Review

"Whether circumstances demonstrate a conflict under ethical rules is a question of law we review de novo." *RWR Mgmt., Inc. v. Citizens Realty Co*., 133 Wn. App. 265, 279, 135 P.3d 955 (2006). Properly resolving this alleged conflict requires the trial court to exercise discretion and we review the trial court's resolution for abuse of discretion. *RWR Mgmt.*, 133 Wn. App. at 279. We also review denial of a reconsideration motion for abuse of discretion. *RWR Mgmt.*, 133 Wn. App. at 280.

B. Direct Attorney-Client Relationship

The Tomyns first contend that the Sharbono/Tomyn settlement agreement created a direct attorney-client relationship between the Tomyns and Gosselin. We disagree.

> The essence of the attorney[-]client relationship is whether the attorney's advice or assistance is sought and received on legal matters. The relationship need

> not be formalized in a written contract but, rather, may be implied from the parties' conduct. Whether a fee is paid is not dispositive. The existence of the relationship "turns largely on the client's subjective belief that it exists."

Bohn v. Cody, 119 Wn.2d 357, 363, 832 P.2d 71 (1992) (citations omitted) (quoting *In re McGlothen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983)). But the client's subjective belief does not control the issue unless such belief is reasonably formed based on the attending circumstances. *Bohn*, 119 Wn.2d at 363.

The Tomyns contend that, by assigning certain claims to the Tomyns and obligating the Sharbonos to pursue those claims, the Sharbono/Tomyn settlement agreement by its terms made the Sharbonos' retained counsel, Gosselin, the Tomyns' attorney for purposes of pursuing those claims; and that, at the very least, the agreement created joint representation. Throughout their brief, the Tomyns rely on the notion that the settlement agreement assigns claims to the Tomyns. Gosselin answers that the settlement agreement did no more than make the Sharbonos contractually obligated to the Tomyns to perform certain acts, and that he, working for the Sharbonos only, performed the required acts to fulfill the Sharbonos' obligations under the settlement agreement.

This dispute turns on the language of the Sharbono/Tomyn settlement agreement. First, the agreement included an integration clause stating that the written settlement agreement "contains the entire agreement of the parties." Clerk's Papers (CP) at 21. Notably, the agreement expressly states that its purpose is "to protect the assets, earnings and personal liability of [the Sharbono]s" from a verdict in excess of the insurance coverage available to them, "as well as to protect [the Sharbono]s from the expense and hardship of bankruptcy proceedings." CP at 17. The agreement acknowledged that the Tomyns had sued the Sharbonos for damages based on

Cynthia Tomyn's death, that the Sharbonos had primary insurance coverage of $250,000 (as acknowledged by State Farm) and $1,000,000 of umbrella liability coverage (as acknowledged by Universal), and that the Sharbonos contended that Universal was obligated to provide at least $3,000,000 in insurance coverage.

The settlement further stated that the parties through their respective attorneys had conducted independent investigations and concluded that

> [the Sharbono]s face a real and substantial risk that judgment will be entered against [them] in excess of the $250,000 insurance provided by State Farm and the $1[,000,000] insurance Universal acknowledges. Universal's denial of additional insurance has left the [Sharbono]s' property, earnings, and personal assets exposed to substantial risk of attachment to satisfy such judgment.
>
> Therefore, in an effort to settle all of [the Tomyn]s' claims against [the Sharbono]s in a way that offers some protection of [the Sharbono]s' assets; eliminates or reduces the risk that [the Sharbonos] must file bankruptcy to protect their personal financial well-being; as a consequence of the extreme severe adverse financial impact of a judgment which is likely to exceed all available insurance coverages and [the Sharbono]s' net assets; and preserves the ability to challenge any wrongful conduct by Universal or others with regard to the insurance available to [the Sharbono]s, the parties have agreed to settlement on the following terms and conditions.

CP at 18. The settlement agreement then detailed the Sharbonos' confession of judgment, their assignment of specific rights to the Tomyns, and their agreement to sue Universal.[6]

Notably, the assignment of rights to the Tomyns is limited to "amounts awarded against or obtained from Universal" for specific enumerated benefits payable and causes of action. CP at 18. The agreement assigns no claims or causes of action to the Tomyns, rather it contractually

[6] In exchange for these contingent money awards, the Tomyns agreed not to execute or enforce the judgment that the Sharbonos had agreed to; they agreed not to proceed against the Sharbonos' personal assets, earnings or property; and they agreed to confine any collection of the judgment to the funds obtained reflecting the "amounts awarded" as assigned in paragraph 2 of the settlement agreement. CP at 18. The Tomyns also agreed that "[r]egardless of the result, upon final resolution of the suit [against Universal], [the Tomyn]s will execute a full satisfaction of judgment in favor of [the] Sharbono[s]." CP at 20.

obligates the Sharbonos to hand over particular enumerated proceeds to the Tomyns if the Sharbonos successfully sue Universal. This distinction is significant here because, under the express terms of the settlement agreement, the Sharbonos retain all claims against Universal, but they are contractually obligated to pursue those claims and hand over amounts awarded from such litigation as to certain specified claims only.

Accordingly, since no "claims" were assigned to the Tomyns under the settlement agreement, when Gosselin pursued the claims (bad faith, etc.) against Universal, he was not acting on the Tomyns' behalf he was acting on his clients' behalf, the Sharbonos, pursuing the Sharbonos' claims against Universal and fulfilling the Sharbonos' obligations under the settlement agreement. Thus, no attorney-client relationship arose between Gosselin and the Tomyns, and there was no joint representation. Accordingly, the trial court correctly determined that "the settlement agreement in this case d[id] not convert [Gosselin's] adversarial representation to joint representation of the Tomyns."[7] Report of Proceedings (RP) (Dec 22,

[7] Seattle University School of Law Associate Professor John Strait's expert opinion, offered on behalf of the Tomyns, expressed in his declaration to the trial court, also appears to be based on the incorrect factual assumption that the Tomyns were assigned "claims" under the settlement agreement. Seattle University School of Law Professor Emeritus David Boerner's expert opinion declaration, again offered on behalf of the Tomyns, on this issue notes only that whether an attorney-client relationship exists between Gosselin and the Tomyns is disputed; that *if* such a relationship is found, then the Sharbonos and the Tomyns are Gosselin's joint clients, requiring Gosselin to withdraw from representing either client if a conflict develops between such joint clients.

Further, because the Tomyns are not, and never have been, Gosselin's clients, RPC 1.7 (addressing conflicts of interest among current clients) and RPC 1.9 (addressing an attorney's duties to former clients) have no application here. Neither does RPC 1.6 (addressing confidentiality of information relating to the representation of a client) nor RPC 1.16 (providing for mandatory withdrawal from the representation of a client if that representation will result in violation of the rules of professional conduct or other law) apply. Strait's opinion mentions these rules, but without much analysis, opining that Gosselin has violated them. But as we discussed herein, his analysis largely turns on inaccurate factual assumptions.

2009) at 31.

C. Third Party Beneficiary Claim

The Tomyns argue next that, even if there is no direct attorney-client relationship between the Tomyns and Gosselin, because of the "assignment of claims" to the Tomyns, they are intended third party beneficiaries of Gosselin's representation.[8] Br. of Appellants/Intervenors at 28. We disagree.

To determine whether a lawyer owes a duty to a nonclient, Washington courts apply a six element test. *In re Guardianship of Karan*, 110 Wn. App. 76, 81, 38 P.3d 396 (2002) (citing *Trask v. Butler*, 123 Wn.2d 835, 842, 872 P.2d 1080 (1994). The *Trask*[9] factors are:

1. The extent to which the transaction was intended to benefit the plaintiff;
2. The foreseeability of harm to the plaintiff;
3. The degree of certainty that the plaintiff suffered injury;
4. The closeness of the connection between the defendant's conduct and the injury;

[8] As a threshold matter, the trial court opined that although a third party beneficiary theory would apply here, the appropriate remedy would be a claim for damages "if that can be proven," rather than Gosselin's disqualification. RP (Dec. 22, 2009) at 42-43. The trial court signed the order denying the Tomyns' motion to disqualify Gosselin, but it did not enter findings. Gosselin separately appealed the trial court's ruling on the Tomyns' third party beneficiary claim. Our commissioner dismissed his appeal, holding that the trial court's oral comments have no binding effect unless incorporated into the judgment. The commissioner also held that the Sharbonos are not aggrieved parties since the possibility of future litigation based on the trial court's comment is speculative. The commissioner's ruling dismissing Gosselin's appeal puts this issue in an odd procedural posture. Clearly, both the Sharbonos and the Tomyns feel the trial court erred in dealing with the third party beneficiary issue raised and argued below. The Sharbonos feel that the trial court clearly indicated that Gosselin could be found liable for damages because the Tomyns are third party beneficiaries of his representation of the Sharbonos. The Tomyns contend without elaboration that the trial court abused its discretion by finding a third party relationship, but declining to disqualify Gosselin. We address this issue as briefed by the parties due to the long history of litigation between the parties to provide guidance to the trial court, which continues to manage on-going litigation.

[9] The *Trask* court combined the third party beneficiary test with a modified multi-factor balancing test because both relied on the intent to benefit the plaintiff as a threshold inquiry. *See* 123 Wn.2d at 842.

5. The policy of preventing future harm; and
6. The extent to which the profession would be unduly burdened by a finding of liability.

123 Wn.2d at 843. The threshold question is whether the plaintiff is an intended beneficiary of the transaction to which the advice pertained. "While the answer to the threshold question does not totally resolve the issue, no further inquiry need be made unless such an intent exists." *Trask,* 123 Wn.2d at 843.

Here, in arguing that these criteria are met, the Tomyns again rely on inaccurate depictions of the settlement agreement. Regarding the first *Trask* factor, the Tomyns state, "[I]if one examines the Tomyn/Sharbono agreement, the primary purpose of the agreement was to pay the Sharbonos' debts to the Tomyns for the tragic and wrongful death of Cynthia Tomyn." Br. of Appellants/Intervenors at 30. But the plain language of the settlement agreement does not support that contention. As we discussed and quoted in the previous section, the express and repeated purpose (intent) of the agreement is to protect the Sharbonos' assets. While the agreement requires the Sharbonos to pursue their claims against Universal, it specifically requires the Tomyns, upon final resolution of such suit, to "execute a full satisfaction of judgment in favor of [the Sharbono]s," "[*r*]*egardless of the result*" of such suit. CP at 20 (emphasis added). Accordingly, by its terms, the settlement agreement's intent and design are to protect the Sharbonos' assets and only contingently, and thus incidentally, to benefit the Tomyns.

The Tomyns further argue, "[I]f the Tomyns were not an intended beneficiary of the lawsuit to be filed, there would have been no purpose in assigning any claims to the Tomyns." Br. of Appellants/Intervenors at 30. But as we discussed above, the settlement agreement did not assign any "claims" to the Tomyns.

As for the second *Trask* factor, the foreseeability of harm, the Tomyns argue that "under the Tomyn/Sharbono agreement, [Gosselin] was obligated to pursue the interests of both." Br. of Appellants/Intervenors at 30. That, again, mischaracterizes the agreement. The Sharbonos, with Gosselin acting as their attorney—and for their benefit alone—could satisfy the settlement agreement merely by pursuing the Sharbonos' claims against Universal (and later, *if* successful, pay the Tomyns certain specified amounts). Nothing in the settlement agreement obligates Gosselin to the Tomyns. Moreover, any expectation or foreseeability of harm to the Tomyns arising out of Gosselin's conduct in acting as the Sharbonos' attorney is low, because his performance on behalf of the Sharbonos must be in good faith in accordance with the obligations imposed under the Sharbono/Tomyn settlement agreement or the Sharbonos would be liable for breach of the agreement and could face personal liability. There is in every contract an implied duty of good faith and fair dealing, which obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). But the duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract, nor does it inject substantive terms into the parties' contract; rather, the duty requires only that the parties perform in good faith the obligations imposed by their agreement and, thus, the duty arises only in connection with terms agreed to by the parties. *Badgett*, 116 Wn.2d at 569.

Regarding the third *Trask* factor, the degree of certainty that the Tomyns suffered injury, and the fourth factor, the closeness of the connection between Gosselin's conduct and the injury, the Tomyns' brief points to the dispute (appealed separately) over who is entitled to the interest on the judgment. There has been no harm to the Tomyns as they have been awarded the

judgment interest in the appeal decided after they submitted briefing in this appeal. *Sharbono*, 158 Wn. App. at 974 (affirming the designation of the Tomyns as the recipients of all judgment interest). The presence of injury is a prerequisite for *Trask* factors three and four.

The fifth *Trask* factor, the policy of preventing future harm,[10] is not furthered by imposing a duty on Gosselin to the Tomyns and, as we discuss in the sixth factor, such imposition would do more harm than good. Here, the settlement agreement indicated that oversight of the Tomyns' interest was to be performed by their attorney. The provision requiring the Sharbonos to initiate suit against Universal by a specific date also provided that "[the Tomyn]s, through their chosen counsel, may participate and assist . . . as they choose" in the Sharbonos' suit against Universal on the Sharbonos' claims, for which the Sharbonos had assigned the award amounts to the Tomyns. CP at 19. Here, the Tomyns' attorney closely monitored the Sharbonos' and Gosselin's progress and intervened when he felt it was warranted. Accordingly, the Tomyns' interests were already protected and, as we discuss below, the imposition of a duty on Gosselin toward the Tomyns would promote rather than prevent a future harm.

In addressing the final factor, burden on the profession, the *Trask* court noted that public policy must be considered as follows:

> The policy considerations against finding a duty to a nonclient are the strongest where doing so would detract from the attorney's ethical obligations to the client. This occurs where a duty to a nonclient creates a risk of divided loyalties because of a conflicting interest or of a breach of confidence.

[10] The Tomyns again look to the settlement agreement, arguing that, while it did not expressly state that it was a joint representation agreement, it nevertheless created such relationship. They argue that an attorney's duty, once the interests of his joint clients become conflicting, is to advise his clients of the conflict and afford his clients the opportunity to waive the conflict or retain other counsel. But as we already discussed, the settlement agreement did not create a joint representation.

Trask, 123 Wn.2d at 844 (citation omitted). This final factor weighs heavily here. As noted, contrary to the Tomyns' assertions, the settlement agreement did not obligate Gosselin to the Tomyns and to impose such a duty on him would create a risk of divided loyalties. As discussed, each of the *Trask* factors argues against finding that Gosselin had a duty to the Tomyns.

The *Trask* court applied the above six factors in determining that a duty is not owed from an attorney hired by the personal representative of an estate to the estate or to the estate beneficiaries. *Trask*, 123 Wn.2d at 845. This was because

> (1) the estate and its beneficiaries are *incidental*, not intended, beneficiaries of the attorney-personal representative relationship; (2) the estate heirs may bring a direct cause of action against the personal representative for breach of fiduciary duty; and (3) the unresolvable conflict of interest an estate attorney encounters in deciding whether to represent the personal representative, the estate, or the estate heirs unduly burdens the legal profession.

Trask, 123 Wn.2d at 845. Similarly here, (1) the Tomyns are incidental beneficiaries of the Gosselin-Sharbono attorney-client relationship in the context of the Sharbono/Tomyn settlement agreement, (2) given the obligations under the settlement agreement as discussed, the Tomyns can seek relief directly against the Sharbonos for any alleged breach of that agreement, and (3) imposing a duty on Gosselin to the Tomyns under the settlement agreement creates an unwarranted risk of unresolvable conflict of interest in deciding whose interests Gosselin is to represent. Accordingly, applying the *Trask* factors, we hold that Gosselin owed no duty to the Tomyns as nonclients under the Sharbono/Tomyn settlement agreement.

Alternatively, the Tomyns assert that the trial court abused its discretion when it determined that a third party relationship existed, but declined to disqualify Gosselin because the appropriate remedy would be a claim for damages rather than disqualification. Case law supports

the trial court's view that a damages remedy is available if such a duty is found. As the *Karan* court noted, "To determine whether a lawyer owes a duty to a nonclient which then creates standing to sue for malpractice, Washington applies [the] six-element [*Trask*] test." 110 Wn. App. at 81. "Once a relationship giving rise to a duty is established, the elements of a malpractice claim are the same as for any other negligence action." *Karan*, 110 Wn. App. at 87. The trial court did not abuse its discretion in pointing out that damages are a proper remedy if a breach of duty to a nonclient is proven. But here, the Tomyns failed to prove that Gosselin had a duty to them, thus, the Tomyns' claim that the trial court abused its discretion fails.

D. Common Interest

The Tomyns next assert that the trial court should have disqualified Gosselin due to the operation of the common interest privilege. "The 'common interest' doctrine provides that when multiple parties share confidential communications pertaining to their common claim or defense, the communications remain privileged as to those outside their group." *Sanders v. State*, 169 Wn.2d 827, 853, 240 P.3d 120 (2010) (citing *Broyles*, 147 Wn. App. at 442); *see also C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 716, 985 P.2d 262 (1999). Federal courts apply the same rule. "The 'common interest' or 'joint defense' privilege is an exception to the general rule that the voluntary disclosure of a privileged attorney-client or work-product communication to a third party waives the privilege." *Avocent Redmond Corp. v. Rose Elec., Inc.*, 516 F. Supp.2d 1199, 1202 (W.D.Wash. 2007) (citing *Hunydee v. United States,* 355 F.2d 183, 185 (9th Cir. 1965)). "The privilege protects the confidentiality of communications passing from one party to the attorney of another party when made to further a joint effort." *Avocent*, 516 F.Supp. 2d at 1202 (citing *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989)).

"The privilege can give rise to a 'disqualifying conflict where information gained in confidence by an attorney becomes an issue.'" *Avocent*, 516 F.Supp.2d at 1202-03 (quoting *United States v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000)).

"The common interest or joint defense privilege applies where (1) the communication was made by separate parties in the course of a matter of common interest or joint defense; (2) the communication was designed to further that effort; and (3) the privilege has not been waived." *Avocent*, 516 F.Supp.2d at 1203. Relevant here, "[t]he burden of proving that a joint defense or common interest privilege applies falls on the party seeking disqualification." *Avocent*, 516 F.Supp.2d at 1201. While a written agreement regarding the privilege is not required, "the parties must invoke the privilege: they must intend and agree to undertake a joint defense[/common interest] effort." *Avocent*, 516 F.Supp.2d at 1203.

Moreover, even if the parties did intend to create a joint defense or common interest privilege, the party asserting the existence of such privilege must prove that client confidential information was shared. *Avocent*, 516 F.Supp.2d at 1203. To this end, declarations by a party's attorney that the attorneys "shared 'mental impressions, tentative conclusions, opinions, and legal theories' regarding the case" are insufficient; they must identify "specific client confidences that were shared." *Avocent*, 516 F.Supp.2d at 1204 (quotation citation omitted).

In *Avocent*, attorneys for the parties in question "communicated regarding a number of issues pertinent to the litigation, including . . . motions for summary judgment." 516 F.Supp.2d at 1204. But the evidence provided did not establish the sharing of any confidential information. *Avocent*, 516 F.Supp.2d at 1204. "The Court will not assume that just because the parties . . . exchanged drafts of . . . motions that they exchanged *confidential* information." *Avocent*, 516

F.Supp.2d at 1204. Accordingly, the party asserting the existence of the privilege failed to meet its burden of showing that confidential communications were made in support of a joint defense. *Avocent*, 516 F.Supp.2d at 1204. Based on that failing, the court denied the party's motion to disqualify the law firm in question. *Avocent*, 516 F.Supp.2d at 1205; *see also Henke*, 222 F.3d at 638 (that joint defense meetings have occurred does not in itself require disqualification of an attorney that participated in such meetings).

In *Waller v. Financial Corporation of America*, 828 F.2d 579 (9th Cir. 1987), the court applied the joint defense privilege, under which communications by a client to his own lawyer remain privileged when the lawyer subsequently shares them with codefendants for purposes of a common defense. 828 F.2d at 583 n.7. In *Waller*, a defendant accounting firm in a shareholder suit sought to object to a partial settlement between a codefendant bank and plaintiff shareholders. 828 F.2d at 583-84. The accounting firm asserted that the bank's agreement to cooperate in the shareholders' suit against other codefendants would likely result in the bank disclosing confidential communications that the bank received from the accounting firm and that were protected by a joint defense agreement. *Waller*, 828 F.2d at 583-84. The court noted that the partial settlement did not require such disclosures and, in any event, because the accounting firm refused to describe the substance of its allegedly confidential disclosures, the court had no way of knowing whether the bank possessed any privileged communications to share even if the bank was disposed toward disclosure.[11] *Waller*, 828 F.2d at 584.

The same is true here. The Tomyns assert that their attorney shared strategies, concerns,

[11] The *Waller* court observed that the accounting firm could attempt to seek an injunction or disqualification of counsel because these remedies were "expressly prescribe[d]" in the codefendants' joint defense agreement. 828 F.2d at 584. Here, there is no such agreement.

and confidences with Gosselin, but such general averments fail to meet their burden of establishing that *confidential* communications were shared sufficient to trigger a common interest privilege.[12] *See Avocent*, 516 F.Supp.2d at 1204-05. Accordingly, the trial court did not err in denying the Tomyns' motion to disqualify Gosselin based on the "common interest" theory.

We hold that Gosselin did not have an attorney-client relationship with the Tomyns, that no duty to them arose under the third party beneficiary theory, and that Gosselin's disqualification was not required because the Tomyns have not shown that Gosselin revealed confidential information learned from the Tomyns' attorneys. Thus, we affirm the trial court's denial of the Tomyns' motion to disqualify Gosselin.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Penoyar, C.J.

Johanson, J.

[12] Similarly, the common interest analyses of Boerner and Strait *assume* that confidential information was shared.