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No. 69356-5

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

GRANGE INSURANCE ASSOCIATION,
Respondent,

v.

ELIZABETH and WESLEY ROBERTS,
Appellants.

BRIEF OF APPELLANT

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I. INTRODUCTION

This case involves an insurance coverage dispute between Appellants Elizabeth (also, "Jane") and Wesley Roberts (the Roberts) and their insurer, Grange Insurance Company ("Grange"). Grange filed a declaratory judgment action to determine whether third-party allegations against the Roberts were covered under the Roberts' insurance policy. In the underlying lawsuit, the Roberts are sued for a variety of tort claims by Brandis, *et al.* (herein, "Brandis" or the "underlying plaintiffs"). The trial court granted summary judgment in favor of Grange, holding that neither the duty to defend nor the duty to indemnify was triggered by the underlying Complaint. The trial court erred because the Brandis' factual allegations give rise to the duty to defend and also may compel Grange to indemnify, depending upon the outcome of the Brandis v. Roberts matter.

The Roberts ask this Court to reverse the trial court's orders (1) releasing the insurance company from its coverage duties, (2) denying a stay pending trial of the underlying matter, and (3) dismissing the Roberts' counterclaim for insurance bad faith. The judgment in favor of Grange should be reversed, the counterclaim reinstated, and costs and attorneys' fees awarded to the Appellants.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred by granting Grange's Motion for Summary Judgment, relieving Grange of its duties to defend and indemnify the Roberts in the Brandis matter.

Issues Pertaining to Assignment of Error No. 1:

A. Whether the trial court erred when it concluded that the Insurer's duty to defend was not triggered notwithstanding the legal principle that coverage is triggered by any allegation that is "conceivably" covered by the Policy, and where, as in this case, the underlying claims asserted against the Insureds are ambiguous as to whether they sound in negligence, which is covered, and intentional tort, which is not covered.

B. Whether the trial court erred when it found, before the conclusion of the underlying lawsuit, that the Insurer had no duty to indemnify where the allegations against the Insureds sound both in negligence, which is covered, and intentional tort, which is not covered.

C. Whether the trial court erred by not finding coverage under the Policy where the Policy insures against "Personal and Advertising Injury" and the underlying Complaint (1) alleges the covered claim that the Insured "bad-mouthed" the underlying plaintiffs and made "false statements" and (2) fails to allege that the defamation was 'knowing' or 'intentional', and so fails to trigger any exclusion.

D. Whether the trial court erred by not finding coverage under the Policy where the Policy insures against "Bodily Injury and Property Damage" and the underlying Complaint alleges "outrage", which is not necessarily an intentional tort and therefore does not trigger the exclusion for intentional acts.

E. Whether the trial court erred by not finding a duty to defend where the underlying Complaint alleges two torts that are not recognized in Washington (tortious interference with expected inheritance and tortious interference with a parent/adult child relationship) and therefore the elements of these torts are not defined and may be covered by the Policy.

Assignment of Error No. 2: The trial court erred when it implicitly denied the Roberts' request for a stay on the coverage action pending the outcome of the Brandis trial.

Issue Pertaining to Assignment of Error No. 2:

Whether the trial court erred in not addressing the merits of the motion to stay the coverage action, where the insurer's prosecution of the coverage action could prejudice the insured's position in the underlying tort trial.

Assignment of Error No. 3: The trial court erred when it dismissed the Roberts' counterclaim for insurance bad faith.

Issue Pertaining to Assignment of Error No. 3:

Whether this Court should reinstate the Roberts' counterclaim for Insurance Bad Faith, which was dismissed by the trial court because it granted the Insurer's motion for summary judgment, where the court did not adjudicate the counterclaim on its merits.

III. STATEMENT OF THE CASE

Appellants Roberts were sued by the siblings of Elizabeth Roberts (collectively "Brandis") for a variety of complaints relating to the Roberts' interactions with their mother in the last five to ten years of their mother's life. CP 56-64, 272-280[1]; Superior Court, County of Snohomish, No. 08-4-00999-3. The Roberts tendered the Brandis claim to Grange. While providing a defense under full reservation of rights, Grange brought a coverage action under the Declaratory Judgment Act seeking a ruling that Grange had no duty to defend or indemnify. CP 264-280. The Roberts brought a counterclaim alleging the bad faith of the Insurer. CP 245-251. The Roberts also sought a stay of the coverage action pending resolution of the underlying Brandis v. Roberts case. CP 50-51. The trial court granted summary judgment in favor of Grange, holding that neither the

[1] The copy of the underlying Complaint at CP 56-64 is virtually illegible. Therefore, in this Brief, Petitioners will cite to another copy that appears in the record at CP 272-280.

duty to defend nor the duty to indemnify were triggered by the Roberts' insurance policy; implicitly denied the Roberts' motion to stay the coverage action; and dismissed the Roberts' counterclaim.

A. THE BRANDIS COMPLAINT

In 2008, Elizabeth Roberts' sisters, Rebecca Brandis, Suella Hershaw, Myra Converse, and Myrna Seifert, brought a TEDRA Petition (herein "the underlying Complaint" or "the Brandis Complaint") against their sister, Elizabeth Roberts and her husband, Wesley Roberts. The sisters generally claim that the Roberts had engaged in a multi-year pattern of conduct which resulted in the transfer of assets from their mother (Elizabeth Wiggins) to the Roberts. CP 272-280. Elizabeth Wiggins died at the age of 90 in October of 2007. In support of these claims, Brandis alleges, *inter alia*, that Mrs. Roberts[2]:

> made false statements about, and "badmouthed" th[e] other parties in order to intentionally interfere with their relationships. Jane's behavior towards the other family members, including making false accusations regarding prior child abuse claims, went beyond the bounds of decency, atrocious and intolerable [sic]. CP 275.

Brandis alleges a laundry list of demands for equitable and monetary relief based on both familiar and novel tort claims, including, but not limited to: (1) defamation; (2) fraud; (3) tortious interference with

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[2] Elizabeth Roberts is also known as Jane, and the underlying Complaint calls her Jane.

expected inheritance; and (4) tortious interference with the parent/adult child relationship. CP 273.

The Roberts vigorously deny each of the venomous and baseless allegations in the underlying Complaint.

B. THE INSURANCE POLICY

The Roberts contracted with Grange for "FarmPak Policy" No. FP01010054 (the "Policy"). CP 231, CP 77- 186. With respect to the allegations in the Brandis Complaint, the Roberts aver that the Policy provides coverage under the "Farming and Personal Liability Insurance" section. CP 170-186. In particular, the Roberts draw this Court's attention to the provisions relating to "Personal and Advertising Injury Protection" (CP 176-177), and "Bodily Injury and Property Damage" (CP 170-171). Definitions relating to both coverages are found at CP 183-186.

The policy provides in pertinent part:

> COVERAGE I - PERSONAL AND ADVERTISING INJURY LIABILITY
>
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of **personal and advertising injury** to which this insurance applies. We will have the right and duty to defend the insured against any **suit** seeking those damages. However, we will have no duty to defend the insured against any **suit** seeking damages for **personal or advertising injury** to which this insurance does not apply. CP 176 ...

2. Exclusions

This insurance does not apply to **personal and advertising injury**:

a. Knowing Violation Of Rights Of Another

Caused by or at the direction of an insured with the knowledge that the act would violate the rights of another and would inflict personal and advertising injury.

b. Material Published With Knowledge Of Falsity

Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity. CP 177. ...

SECTION V – DEFINITIONS

18. **"Personal and advertising injury"** means injury, including consequential bodily injury, arising out of one or more of the following offenses:

...

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services:

e. Oral or written publication, in any manner, of material that violates a person's right of privacy; ... CP 185.

COVERAGE H - BODILY INJURY AND PROPERTY DAMAGE

1. Insuring Agreement

a. We will pay those sums that an insured becomes legally obligated to pay as damages because of **bodily injury or property damage** to which this insurance

applies. We will have the right and duty to defend an Insured against any **suit** seeking those damages.

However, we will have no duty to defend an Insured against any suit seeking damages for **bodily injury or property damage** to which this insurance does not apply.

b. This insurance applies to **bodily injury and property damage** only if:

(1) The **bodily injury or property damage** is caused by an **occurrence**; CP 170 ...

2. Exclusions: This insurance does not apply to:

a. Expected Or Intended Injury

Bodily injury or property damage expected or intended from the standpoint of an insured. CP 171.

SECTION V – DEFINITIONS

2. **Bodily injury** means bodily injury, sickness or disease sustained by a person, and includes death resulting from any of these at any time. CP 183.

17. **Occurrence** means an accident, including continuous or repeated exposure to substantially the same general harmful conditions. CP 185.

C. PROCEDURAL HISTORY

The Roberts tendered the Brandis Complaint to Grange for defense and indemnification. By letter dated August 6, 2010, Grange advised the Roberts that it would defend under full reservation of rights and asserting that there may be no coverage under the Policy. CP 69-73. Grange served and filed its Declaratory Judgment action in September of 2010. CP 264-

270. The defendants to the coverage action were the Roberts and all the Brandis.[3] CP 264.

The Roberts timely answered Grange's Complaint and filed a counterclaim against the Insurer seeking a stay of the coverage action pending full and final resolution of the underlying action, damages caused by Grange's bad faith, and reasonable attorney fees and costs incurred in bringing the counterclaim and defending the coverage action. CP 250.

Nine months after filing its Complaint for Declaratory Relief, and only four months before the then-scheduled trial date, Grange brought a Motion for Summary Judgment seeking judgment that the underlying Complaint did not trigger coverage. CP 229-244. The Roberts opposed Grange's motion (CP 35-52) and brought a cross-motion seeking a stay pending the resolution of the underlying litigation. CP 50-51.

On July 22, 2011, the trial court heard argument on Grange's motion and the Roberts' cross-motion for a stay. The trial court ruled:

> [T]he Court... DECLARES that the claims being made against defendants Elizabeth and "John Doe" Roberts in the underlying action of *Brandis, et al. v. Elizabeth Roberts, et al.*, Snohomish County Cause No. 08-4-00999-3 do not trigger coverage under Grange's Policy No. FP01010054 and, thus, that Grange has no duty to indemnify, or to continue providing a defense to Roberts for the claims

[3] The Brandis plaintiffs have not participated in the litigation of the Grange v Roberts, et. al. matter.

being made in the underlying. Consequently, Grange may cease providing a defense to Roberts. CP 15-16.

On September 21, 2012, the trial court dismissed the Roberts' counterclaim (CP 14), and this appeal timely followed. See Commissioner's ruling, December 21, 2012 (CP 1).

The Brandis v. Roberts case has not yet been tried. Two other insurance companies now are co-defending the suit under a full reservation of rights. Because those policies are virtually identical to the Grange policy, the Roberts anticipate that they will lose all insurance defense benefits (and indemnification) under collateral estoppel principles if the Grange judgment is permitted to stand.

IV. ARGUMENT

A. STANDARD OF REVIEW AND CONSTRUCTION OF INSURANCE POLICIES.

Respondent Grange obtained a declaratory judgment that it had no duty to defend the Roberts in the underlying Brandis action. Declaratory judgments, when decided on the merits, are reviewed *de novo*. Nollette v. Christianson, 115 Wn.2d 594, 599, 800 P.2d 359 (1990) (The ordinary standards of appellate review apply when a trial court considers a declaratory judgment action on its merits). Conclusions of law are reviewed *de novo*, and the trial court's findings of fact which are

supported by substantial evidence are not disturbed on appeal. Id. at 600. Like the trial court, the appellate court considers all facts and reasonable inferences in a light most favorable to the non-moving party. McNabb v. Dep't of Corr., 163 Wn.2d 393, 397, 180 P.3d 1257 (2008).

The interpretation of an insurance policy is a question of law that is reviewed *de novo*. Woo v. Fireman's Fund Ins. Co., 161 Wn.2d 43, 52, 164 P.3d 454 (2007). It is well settled that insurance contracts are construed in accordance with the plain language of the policies. Boeing Co. v. Aetna Casualty & Sur. Co., 113 Wn.2d 869, 882, 784 P.2d 507 (1990). Any ambiguities will be interpreted liberally in favor of the insured and strictly against the insurer who prepared the policy. Greer v. Northwestern Nat'l Ins. Co., 109 Wn.2d 191, 201, 743 P.2d 1244 (1987).

Washington law is equally well settled that coverage clauses are to be construed in the broadest possible manner in order to effect the greatest extent of coverage. Ross v. State Farm Mut. Auto. Ins. Co., 132 Wn.2d 507, 515-16, 940 P.2d 252 (1997). Consistent with the mandate to broadly interpret insurance contracts to provide coverage is the principle that "exclusionary clauses are to be most strictly construed against the insurer." Phil Schroeder, Inc. v. Royal Globe Ins. Co., 99 Wn.2d 65, 68 659 P.2d 509 (1983).

B. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT THE CLAIMS MADE AGAINST THE ROBERTS IN THE UNDERLYING ACTION DO NOT TRIGGER COVERAGE.

In the underlying Complaint, Brandis alleges at least four torts that trigger coverage under the Grange Policy: (1) slander/libel, (2) outrage, (3) tortious interference with an expected inheritance, and (4) tortious interference with a parent/child relationship. CP 273-275. Each of these claims, as pleaded by Brandis, is ambiguous as to whether it sounds in negligence or is an intentional tort. Washington follows the "complaint allegation rule" (also known as the "Four Corners Rule") which requires the insurer to err in favor of the insured if the law or the facts are uncertain at the time the insurer is required to decide whether or not to provide a defense. Woo, 161 Wn.2d 59-60.

The trial court, therefore, erred when it denied Policy coverage based upon a narrow analysis of the Brandis Complaint, and before trial of the underlying action could develop the facts and circumstances relating to the claims that might resolve the ambiguity. If even one of the asserted torts potentially is covered by the Policy, defense coverage is triggered. Woo, 161 Wn.2d at 53, See 22 Holmes' Appleman On Insurance 2d § 136.2(D) (noting that, "when there are covered and non-covered claims in the same lawsuit, the insurer is obligated to provide a defense to the entire

suit, at least until it can limit the suit to those claims outside of the policy coverage").

The trial court's decision ran afoul of the fundamental principle that the duty to defend is triggered by any complaint that, when broadly construed, presents allegations that, if proven, could possibly impose liability on the insured that is within the policy coverage. Unigard Ins. Co. v. Leven, 97 Wn. App. 417, 425, 983 P.2d 1155 (1999). It also prematurely concluded that Grange has no duty to indemnify.

1. The Duty to Defend Is a Far Broader Coverage than the Duty to Indemnify, and Is Triggered by any Allegation that is "Conceivably" Covered by the Policy.

In its ruling, the trial court held that that "the claims being made against ...[the] Roberts in the underlying action of *Brandis, et al. v. Elizabeth Roberts, et. al.* ... do not trigger coverage under Grange's Policy... thus, Grange has no duty to indemnify, or to continue providing a defense to Roberts." CP 16. In other words, the trial court apparently agreed with Grange's analysis that tort theories asserted in the Brandis Complaint (defamation, outrage, tortious interference, etc.) do not trigger coverage, [4] and therefore Grange has no duty to defend. This is clear error of law because the duty to defend is based on a liberal construction of the

[4] CP 236-244. In fact, several of the Brandis' tort theories do trigger coverage, as discussed at sections IV.B.2 of this Brief at pages 17-28.

factual allegations in the third-party complaint. The duty to defend simply is not co-extensive with the duty to indemnify.

Unlike the duty to indemnify, an insurer's duty to defend "arises at the time an action is first brought, and is based on *the potential for liability.*" Truck Ins. Exch. v. VanPort Homes, Inc., 147 Wn.2d 751, 760, 58 P.3d 276 (2002) (emphasis added). "[W]hen a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage" the duty to defend is imposed on the insurer. Id., (quoting Unigard Ins. Co. v. Leven, 97 Wn. App. 417, 425, 983 P.2d 1155 (1999) (emphasis added). The insurer is not relieved of its duty to defend unless the claim alleged in the complaint is "clearly not covered by the policy." Id. (citing Kirk v. Mt. Airy Insurance Company, 134 Wash.2d 558, 561, 951 P.2d 1124 (1998)). The decisional law emphasizes that the insurer's duty to defend its insured "is a valuable service paid for by the insured and one of the principal benefits of the liability insurance policy." Woo, 161 Wn.2d at 54.

In contrast, the duty to indemnify is considered only after the verdict has been reached. "The duty to indemnify exists only if the policy *actually covers* the insured's liability." Am. Best Food, Inc. v. Alea London, Ltd., 168 Wn.2d 398, 404, 229 P.3d 693 (2010). "The duty to indemnify hinges on the insured's actual liability to the claimant and actual

coverage under the policy." Hayden v. Mutual of Enumclaw Ins. Co., 141 Wn.2d 55, 64, 1 P.3d 1167 (2000). The actual liability of the Roberts will be determined only after trial of the underlying case, and will rest upon whether or not any of the claims in the underlying Complaint are proven.

The leading case of Woo v. Fireman's Fund Insurance Company, 161 Wn.2d 43, 164 P.3d 454 (2007) provides an excellent example of how broadly the courts construe an underlying complaint when coverage is in question. In Woo, a dentist was sued by a patient because he allegedly placed a set of dental prosthetics shaped like boar tusks in her mouth while she was under anesthesia, took photographs of the patient, and then removed the tusks. Woo, 161 Wn.2d at 49-50. The Court of Appeals held that the facts described a practical joke that did not trigger coverage under the dentist's professional liability policy because "'[n]o reasonable person could believe'" that the treatment of "'a dental problem by placing boar tusks in the mouth while the patient was under anesthesia in order to take pictures with which to ridicule the patient'" constitutes the practice of dentistry. Woo, 161 Wn.2d at 56 (quoting Woo v. Fireman's Fund Ins. Co., 128 Wn. App. 95, 103, 114 P.3d 681 (2005)).

Reversing the Court of Appeals, the Supreme Court held: "[T]he rule requires us to determine whether the complaint alleged facts that were conceivably covered under the insurance policy." Woo, 161 Wn.2d at 56

(emphasis added). The Court concluded that the insurer bore the duty to defend "because the insertion of boar tusk flippers in [the patient's] mouth conceivably fell within the policy's broad definition of the practice of dentistry." Woo, 161 Wn.2d at 57.

Woo stands for the well-established proposition that insurance policies are to be construed broadly in favor of coverage, particularly where the duty to defend is in issue. Whether or not the facts alleged are "likely" covered is not the inquiry – rather the question is whether or not they are "conceivably" covered by the Policy. Grange has the duty to defend the Brandis matter. Furthermore, the Superior Court's ruling that Grange has no duty to indemnify is premature.

2. The Brandis Complaint Triggers the Duty to Defend Because It Alleges Defamation, Outrage, Tortious Interference with Expected Inheritance and Tortious Interference with a Parent/Child Relationship, All of Which Claims are Potentially Covered by the Policy.

The primary question before this Court is whether or not the Brandis Complaint alleges claims or facts that trigger coverage. In order to determine whether or not the allegations are within the scope of the policy's coverage, Washington courts focus on all aspects of an underlying complaint, and especially on the facts alleged. "Thus, modern rules of notice pleading, which do not require the definiteness of former

rules, may change the general rule. There is a greater duty placed on the insurer to determine if there are any facts which could fall within the pleadings, thus giving rise to an obligation to defend." R. A. Hanson Co. v. Aetna Ins. Co., 26 Wn. App. 290, 294, 612 P.2d 456 (Div. III, 1980). This is because the insurer must defend "when any part of the claim is potentially or arguably within the scope of the policy's coverage, even if the allegations of the suit are false, fraudulent, or groundless." Am. Best Food, Inc. v. Alea London, Ltd., 138 Wn.App. 674, 682, 158 P.3d 119 (Div. I, 2007) (citing 14 Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 200:12, at 200-35 to -36 (3d ed. 2005).

With the principle in mind that the duty to defend "arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage," Unigard Ins. Co., 97 Wn. App. at 425, Appellants now turn to the specific facts and claims set forth in the underlying Complaint.

a. The defamation allegation is covered by the Personal and Advertising Injury coverage of the Policy.

In the instant case, Brandis' Complaint against the Roberts alleges, in part:

> Jane [Roberts] made false statements about and "badmouthed" th[e] other parties in order to so intentionally interfere with their relationships. Jane's behavior towards the other family members, including

> making false accusations regarding prior child abuse claims, went beyond the bounds of decency, atrocious and intolerable [sic]. [Emphasis added]. CP 275, ¶ 4.4.

Brandis' allegations that Mrs. Roberts "made false statements," "bad mouthed" the plaintiffs and leveled "false accusations regarding prior child abuse claims," fall well within Grange's Policy coverage for Personal and Advertising Injury which provides coverage for "[o]ral or written publication, in any manner, of material that slanders or libels a person..." and/or "[o]ral or written publication, in any manner, of material that violates a person's right of privacy." CP 176, 185.

In its Motion for Summary Judgment, Grange argued that the Policy did not provide coverage for the "bad-mouthing" claim because it fell under the exclusion for "Knowing Violation of Rights of Another." [5] CP 243. That provision of the Policy states:

> 2. Exclusions
>
> This insurance does not apply to **personal and advertising injury**:
>
> Knowing Violation Of Rights Of Another

[5] The record is a bit confused here. In the trial court, and in its reservation of rights letter mailed to the Roberts even before the litigation commenced, Grange repeatedly and incorrectly entitled the text of the "Knowing Violation Of Rights Of Another" provision as "Material Published With Knowledge Of Falsity" or "false statements." *See e.g.*, CP 71, 233, ll. 5-8, CP 253. Grange did not reference the text of the actual "Material Published With Knowledge Of Falsity" exclusion. Grange's failure to advise the Roberts of this basis for denial may develop as an issue supporting the Roberts' bad faith counterclaim upon remand.

> Caused by or at the direction of an insured with the knowledge that the act would violate the rights of another and would inflict personal and advertising injury. (emphasis added) CP 177

For this exclusion to apply, Grange would have to establish that Brandis alleged that Mrs. Roberts caused plaintiffs' damages with knowledge that her acts (a) were in violation of the Brandis' rights and (b) would inflict "personal and advertising injury," which is defined by the Policy as "material that slanders or libels a person." CP 185.

The exclusion does not apply. The underlying Complaint does not allege that Mrs. Roberts knew both that her alleged defamation "would violate the rights of another and would slander Brandis. At most, the Complaint urges that Mrs. Roberts "actively" and "intentionally" interfered with relationships by "badmouthing" the underlying plaintiffs. CP 275, ¶ 4.4. Grange casually applies the Brandis allegation of intentionality to the slander (CP 243, ll. 18-24), but the Complaint itself only references the intentionality with respect to the charge of interference with relationships.

Grange also argued (for the first time in its MSJ Reply)[6] that the Brandis defamation allegations are excluded by the policy because they were supposedly made with "knowledge of their falsity." CP 29-30.

[6] See footnote 5, above.

While Grange did not specify the particular exclusion, it may have been alluding to the following exclusion for personal and advertising injury in the Policy:

> 2. Exclusions
>
> This insurance does not apply to **personal and advertising injury**:
>
> ...
>
> b. Material Published With Knowledge Of Falsity
>
> Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity. CP 177

The exclusion also does not apply. The underlying Complaint does not in fact allege that Mrs. Roberts had actual knowledge that her alleged statements were false. Again, the Complaint's allegations of intentionality refer exclusively to the claim that Mrs. Roberts "actively" or "intentionally" interfered with familial relationships.

Grange, of course, is seeking to describe the "bad-mouthing" claim as an intentional or knowing tort in order to deny coverage to the Roberts. However, defamation may be either intentional or negligent in nature. As a private individual, Brandis need only demonstrate that Mrs. Roberts' statements were negligently made to establish fault. Dunlap v. Wayne, 105 Wn.2d 529, 542, 716 P.2d 842 (1986). Grange may wish that Brandis had directly alleged intentional and knowing defamation – but the

Complaint does not so state.[7] And when confronted with an ambiguous and unclear complaint, coverage issues tip in favor of the insured. As was noted over thirty years ago:

> ... modern rules of notice pleading, which do not require the definiteness of former rules, ...[place] a greater duty ... on the insurer to determine if there are any facts which could fall within the pleadings, thus giving rise to an obligation to defend.

R. A. Hanson Co., 26 Wn. App. at 294. Brandis' failure, therefore, to allege that Mrs. Roberts knowingly slandered the plaintiffs is fatal to Grange's claim that the Complaint does not trigger the duty to defend.

Under the policy language, the exclusions do not apply unless the allegations against the Insured assert both knowledge that the slanderous statement "would violate the rights of another and would inflict 'personal and advertising injury'" (Exclusion 2.a.) or that the Insured had "knowledge of its falsity" (Exclusion 2.b.). With respect to the alleged false statements and badmouthing, the Brandis complaint fails to assert any of those types of knowledge. The exclusions do not apply because it

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[7] For example, an allegation that a "Defendant X stated that Plaintiff Y has been convicted of fraud in order to intentionally ruin Plaintiff Y's business" might be construed, under the Policy, to allege intentional interference with business relationships. But that allegation does not assert that Defendant X knew that the statement was false (an element of defamation, and arguably triggering Exclusion 2.b.), and therefore Grange, were it Defendant X's insurer, would have to provide for his defense. There is no basis for leaping to the conclusion that Defendant X knew that the fraud conviction claim was false and therefore engaged in intentional slander. Defendant X may have been negligent in making the statement.

is easily "conceivable" that the Complaint includes allegations that are covered under the Policy.

b. The outrage allegation is covered by the Bodily Injury and Property Damage coverage of the Policy.

The Brandis Complaint directly seeks damages based on outrage, asserting:

> Jane's behavior towards the other family members, including making false accusations regarding prior child abuse claims, went beyond the bounds of decency, atrocious, and intolerable. The family and friends experienced extreme emotional distress as a result of Jane's interference with their relationships with Elizabeth, which were adversely affected.

CP 275, ¶ 4.4 and 279, ¶ 5.8. This outrage allegation falls within Grange's Policy coverage for Bodily Injury and Property Damage.

In the trial court, Grange pointed to the definition of "occurrence"[8] in the Policy to argue that "to prevail on these claims will require the underlying plaintiffs to prove that Roberts' [conduct] was not accidental, as is required by the Policy..." CP 236, ll. 17-19. Therefore, according to Grange, the outrage claim is excluded from coverage because outrage encompasses intentional conduct, and is not therefore an accident. CP 242. However, the basic elements of the tort of outrage do not require intentional conduct. Rather, "intentional or reckless infliction of

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[8] "Occurrence" is defined as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." CP 185, 237-8.

emotional distress" may prove the claim. Rice v. Janovich, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987); Restatement (Second) of Torts § 46 (1965).

Grange apparently relies on the allegation, earlier in the paragraph, that "Jane made false statements . . . in order to so intentionally interfere which their relationships" to conclude that the outrage allegation is based on intentional misconduct. But this conclusion is inconsistent with Grange's (and the court's) duty to examine the factual allegations to decide whether both intentional acts and intended results are present. The fact that a plaintiff alleges "intentional" is not binding upon the coverage analysis. For example, in the reverse situation in which a third-party complaint asserts that a clearly intentional act was "negligent," coverage will be denied. See, e.g., Middlesex Ins. Co. v. Mara, 699 F. Supp. 2d 439 at 449-450 (D.Ct Conn. 2010).

Even where the facial allegations of a complaint appear, at first blush, to describe intentional acts, Washington courts will construe them broadly in order to find the duty to defend even if the acts have only a remote possibility of being unintentional. In Woo, for example, the insurer argued that the dentist's general liability policy provision excluded coverage for the boar tusk prank because that conduct was clearly "intentional." Woo, 161 Wn.2d at 63. The Supreme Court disagreed, stating that "[a]lthough Woo's conduct was likely intentional, it is

conceivable that Woo did not intend that conduct to result in Alberts' injuries." Woo, 161 Wn.2d at 64.

The facts relating to Woo's holding finding coverage for a "likely" intentional act are at subtle variance from the facts in the instant case. The complaint against Woo specifically alleged both negligent and intentional conduct, whereas the Brandis Complaint does not employ the word "negligence." However, Woo clarifies:

> The insurer's duty to defend is triggered if a complaint is ambiguous. Truck Ins., 147 Wn. 2d at 760. The insured must be given the benefit of the doubt if it is not clear from the face of the complaint that the policy does not provide coverage. Id. at 761. In short, if it is not clear that the complaint does not contain allegations that are not covered by the policy, the insurer has a duty to defend.

Woo, 161 Wn.2d at 64.

With respect to Brandis' outrage claim, Grange's duties are triggered because it is "not clear" that the Brandis Complaint does not contain allegations that are not covered by the Policy. Id.. Brandis is not precluded from proving the allegations set forth above on grounds of reckless conduct alone, in light of modern generalized and nonspecific pleadings practice. It readily can be imagined that Brandis could establish liability for outrage based upon reckless conduct alone.[9] Thus, the Policy

[9] This is an important distinction because in insurance law, "questions about intent focus on the consequences, not the acts." Keeton & Widiss, Insurance

triggers the duty to defend because the outrage claim is not necessarily excluded by the "occurrence" limitation in the definitions. Again, the allegations need only be "conceivably" covered by the Policy to trigger Grange's duties.

c. The allegations of tortious interference with expected inheritance and tortious interference with a parent/ adult child relationship trigger coverage because those torts are not yet recognized in Washington.

As noted above, Brandis alleges two untested theories of tort recovery: (1) Tortious interference with expected inheritance and (2) tortious interference with the relationship between an adult child and parent. With respect to tortious interference with expected inheritance, Grange admits that "no Washington court has recognized such a tort." CP 239, l. 6. With respect to tortious interference with the parent/ child relationship, Grange similarly concedes that "it is unclear whether Washington courts would recognize such a claim in the context of an adult's claim." CP 241, ll. 2-3.

Nonetheless, Grange bravely predicts that if Washington were to recognize these torts, the courts would hold that each tort includes an element of intention. CP 239-241. Relying on its presumption that intention would be an element, Grange concludes that the Roberts are not

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Law, §5.3 at 475 (1988).

covered for the purposes of a defense or indemnification under the Bodily Injury and Property Damage coverage of the Policy that they purchased because coverage only applies to "occurrences." "Occurrences" are, as explained at footnote 7, above, defined as accidents.

Whether Grange's prophesies regarding the possible development of Washington law are correct or not is immaterial. Grange may not rely upon self-serving forecasts in order to deny coverage to its insureds. Even an educated guess cannot defeat coverage where, as here, the law is unclear. As noted in Woo:

> [The insurer] is essentially arguing that an insurer may rely on its own interpretation of case law to determine that its policy does not cover the allegations in the complaint and, as a result, it has no duty to defend the insured. However, the duty to defend requires an insurer to give the insured the benefit of the doubt when determining whether the insurance policy covers the allegations in the complaint. Here, [the insurer] did the opposite—it relied on an equivocal interpretation of case law to give itself the benefit of the doubt rather than its insured.

Woo, 161 Wn.2d at 60. It is unknown whether or not the innovative tortious interference torts claimed by Brandis will, if recognized in Washington, require proof of intention to cause the consequential harm, or just proof of the intention to undertake the harmful act, or simply proof of

reckless disregard or even merely negligence.[10] In other words, we do not know, and cannot know, whether these untested torts will require elements that establish that the damage caused was the result of an occurrence or not. Relying, as Grange does, on out-of-state authority imports only argument, not certainty, into the analysis. And, of course, "[a]ny uncertainty works in favor of providing a defense to an insured." Am. Best Food, 168 Wn.2d at 408. Therefore, where the tort claimed is new to Washington, and could include elements that would be covered by the Policy, the Insurer must provide coverage.

C. THE TRIAL COURT ERRED WHEN IT DENIED THE ROBERTS' MOTION TO STAY THE PROCEEDINGS.

Following Grange's Motion for Summary Judgment, the Roberts cross-moved for a stay of the Grange v. Roberts case pending the resolution of the Brandis v Roberts matter. CP 50-51. There is no trial court order relating to the stay motion in the record. However, by granting Grange's Motion for Summary Judgment, the trial court implicitly denied the Motion to Stay.

The trial court's refusal to order a stay was in error. It is bad faith for an insurer to pursue a declaratory judgment action while defending under a reservation of rights if the action "might prejudice its insured's

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[10] See, also, the arguments relating to the broad construction of underlying allegations in section IV.B.2.b incorporated herein by this reference.

tort defense." Mut. of Enumclaw Ins. Co. v. Dan Paulson Contr., Inc., 161 Wn.2d 903, 918, 169 P.3d 1 (2007).

This issue is mooted if this Court simply determines that the underlying Complaint in fact triggered coverage and reverses the trial court's ruling on that point. However, in the unlikely event that this Court remands for further fact-finding, Petitioners respectfully request that this Court reverse the trial court's *sub silentio* ruling denying stay, and direct that further proceedings relating to the coverage action be stayed or that the motion be reconsidered in light of the posture of the underlying case upon remand.

In this case, the Roberts were, are, and will be prejudiced by the failure to stay the coverage action in at least two ways. First, Grange's own interests are enhanced if it can establish that its own Insured, Mrs. Roberts, in fact intended to harm the underlying plaintiffs. Further proceedings on the coverage action may lead to the untenable situation in which Mrs. Roberts' insurer will attempt to establish Mrs. Roberts' intent in order to prove that coverage has not been triggered. In other words, the coverage action might assist Brandis by developing facts against the Roberts. To avoid this scenario, it is appropriate for the court "to stay that proceeding until all the facts have been determined in the underlying tort action." Western Nat'l Assurance Co. v. Hecker, 43 Wn.App 816, 821 n.1, 719 P.2d 954 (1986) (citing Hartford Ins. Group v. District Court, 625

P.2d 1013 (Colo. 1981); see also Thomas V. Harris, Washington Insurance Law, § 14.0 (3rd ed. 2010) ("if it is clear that a declaratory action cannot be resolved prior to the resolution of the underlying tort lawsuit [due to potential prejudice to the insured in the tort case], the coverage dispute should be stayed until all of the relevant facts have been established in the tort action.").

Second, Grange filed its Motion for Summary Judgment only four months before the then-scheduled trial date, in the middle of intensive discovery and trial preparation. CP 51. As predicted by the Roberts' trial counsel in the coverage action, the result was that Grange deprived the Roberts of their attorney in the underlying action in the "final, crucial stages of discovery and trial." CP 51. The Roberts in fact were faced with "the daunting prospect of having to scramble and locate and retain new counsel, somehow find a way to pay for their defense..." CP 51. Indeed, the changes in counsel are among the reasons that the Brandis matter has not yet been tried. While it is possible that Brandis v. Roberts will be resolved by the time this Court issues its opinion in this matter, if it has not, the situation (or similar circumstances) should not be repeated, as the prejudice to the Insureds is extraordinary.

As noted above, this Court should determine that the trial court erred when it decided that coverage was not triggered. However, if the

matter is remanded for further proceedings, those proceedings should be stayed until the underlying matter is resolved.

D. THE TRIAL COURT ERRED BY DISMISSING THE ROBERTS' COUNTERCLAIM FOR INSURANCE BAD FAITH.

The Roberts brought a counterclaim for insurance bad faith against Grange, alleging, generally, that by filing the Coverage Action, Grange favored its financial interests over those of its Insureds and jeopardized the viability of the Roberts' defenses in the underlying lawsuit. CP 248-249. These claims allege the breach of Grange's duty of good faith to its Insureds, a duty that is greatly enhanced where an insurance company is defending under a reservation of rights. Tank v. State Farm Fire & Casualty Co., 105 Wn.2d 381, 383, 715 P.2d 1133 (1986).

Over a year after the trial court granted Grange's Motion for Summary Judgment, the court dismissed the Roberts' counterclaim for insurance bad faith. CP 14. Grange did not move to dismiss the counterclaim at the time of the Motion for Summary Judgment, and the dismissal order itself does not articulate a basis for the decision. The inference is that the trial court concluded that a counterclaim for bad faith could not proceed where the Insurer prevailed in the coverage action.[11] This is incorrect—in Safeco Ins. Co. v. Butler, 118 Wn.2d 383, 823 P.2d

[11] A Motion to Clarify brought by Grange which led to the dismissal of the Counterclaim. The record will be supplemented by Appellants.

499 (1992), for example, the Supreme Court remanded for trial on the issue of whether Safeco acted in bad faith after affirming that coverage did not apply because the injuries caused by the insured were the result of his intentional act, and therefore his policy did not cover those injuries. Id., at 386. The decision notes that summary disposition of a bad faith claim puts the insurer to "the burden of showing there is no material fact at issue with regard to whether it acted in bad faith... We do not prejudge the issue of bad faith or prejudice." Id., at 395.

Whether or not this Court holds that the trial court erred when it held that Grange owed no duty to defend or indemnify, it must reverse the dismissal of the bad faith counterclaim so that the claim may be considered on the merits.

V. REQUEST FOR FEES

The Roberts have been compelled to litigate and appeal this matter in order to receive the benefits of coverage. Therefore, pursuant to RAP 18.1 and Olympic Steamship Co. v. Centennial Insurance Co., 117 Wn.2d 37, 52-53, 811 P.2d 673 (1991), the Roberts respectfully request attorney fees and costs on appeal. See, also, Mut. of Enumclaw Ins. Co. v. T&G Constr., Inc., 165 Wn.2d 255, 273-274, 199 P.3d 376 (2008).

VI. CONCLUSION

If even one of the factual allegations brought by the underlying plaintiffs is conceivably covered by Grange's Policy, this Court must reverse the trial court. This threshold is met four times over by the defamation, outrage, and the two tortious interference claims.

The purchase of insurance is a pledge of "security and peace of mind through protection against calamity."[12] That promise is enforced by Washington's enduring policies to (1) resolve ambiguities in the favor of the policyholder, (2) construe exclusionary clauses strictly against the insurer and (3) direct that "the scope of an insurer's duty to defend is broader than the terms of the policy."[13]

The Roberts have been denied the benefits of their insurance policy—defense, indemnification, and peace of mind. The trial court's judgment must be reversed, the denial of their motion to stay the coverage action reconsidered, and the cross-claim for insurance bad faith reinstated. Finally, Appellants should be granted their reasonable attorney fees and costs for this appeal and all other losses relating to this coverage action.

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[12] Nat'l Sur. Corp. v. Immunex Corp., 176 Wn.2d ____ (2013), 2013 Wash. LEXIS 155, 6, citing Love v. Fire Ins. Exch., 221 Cal. App. 3d 1136, 1148, 271 Cal.Rptr. 246 (1990).

[13] Nat'l Sur. Corp., 2013 Wash. LEXIS 155 at 8.

RESPECTFULLY SUBMITTED this 30 day of March, 2013.

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Certificate of Service

I, the undersigned, certify that on the 1 day of April, 2013, I caused a true and correct copy of this pleading to be served, by the method(s) indicated below, to the following person(s):

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