No. 69356-5

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

GRANGE INSURANCE ASSOCIATION,
Respondent,

v.

ELIZABETH and WESLEY ROBERTS,
Appellants.

REPLY BRIEF OF APPELLANT

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I. REPLY ARGUMENT

Each of the arguments presented in Grange's Response are addressed in strict reply herein.

A. INTRODUCTION

The parties agree that 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). Respondent concedes, by way of failing to point to any contrary authority, that this Court must consider all facts and reasonable inferences in a light most favorable to the Roberts, the non-moving party, and that Grange's insurance policy must be construed in the broadest possible manner in order to effect the greatest extent of coverage for the Roberts. McNabb v. Dep't of Corr., 163 Wn.2d 393, 397, 180 P.3d 1257 (2008); Ross v. State Farm Mut. Auto. Ins. Co., 132 Wn.2d 507, 515-16, 940 P.2d 252 (1997).

Finally, the parties agree that coverage must be extended to the Roberts if any of the allegations of the Brandis complaint "conceivably trigger" coverage. Woo, 161 Wn.2d at 56. The Roberts argue that the Brandis Complaint triggers coverage; Grange insists that it does not. This is the essence of the dispute: **Does the Brandis Complaint, which sets forth a jumble of facts and claims relating to defamation and other familiar and unfamiliar causes of action, conceivably trigger coverage**

under the Personal and Advertising Injury Liability and/or the Bodily Injury and Property Damages sections of their policy?

The answer is YES. The Roberts are entitled to a defense, and depending upon the results of the Brandis v. Roberts trial, indemnification as well. The Roberts purchased insurance and have been erroneously denied the "security and peace of mind through protection against calamity[1]" to which they have a right.

B. BODILY INJURY COVERAGE IS TRIGGERED BY THE BRANDIS COMPLAINT.

Respondent's first, and most extensive, argument asserts that the tortious interference with expected inheritance, tortious interference with parent/adult child relationship, and outrage claims do not trigger the bodily injury liability coverage because that coverage only arises out of an "occurrence," which must be an "accident" to generate coverage. Response, pp. 9-16. Grange asserts that the Complaint alleges intentional conduct, which is not an "accident." Grange is incorrect – under the law cited by Grange, Mr. Roberts is owed a defense irrespective of the intentional allegations by Brandis; the outrage claim may be proven

[1] Nat'l Sur. Corp. v. Immunex Corp., 176 Wn.2d 872, 878, 297 P.3d 688 (2013), citing Love v. Fire Ins. Exch., 221 Cal. App. 3d 1136, 1148, 271 Cal.Rptr. 246 (1990).

without the element of intentionality, and the elements of the tortious interference claims are uncertain. All of these factors trigger coverage.

1. Wes Roberts is owed a defense by Grange.

In support of its argument, Grange points to Federated Am. Ins. Co. v. Strong, 102 Wn.2d 665, 674, 689 P.2d 68 (1984), which notes that "A loss is considered 'accidental' when it happens without design, intent, or obvious motivation." However, a closer look at Federated establishes that Grange has a duty to defend.

In Federated, Lisa Strong intentionally smashed her husband's (Clyde Strong) Oldsmobile into two other cars. The policy at issue covered both liability and collision coverage, but excluded "bodily injury or property damage caused intentionally by or at the direction of the insured." Federated, 102 Wn.2d at 667-668. The trial court held that the insurance policy did not provide coverage to either husband or wife for any damages or injuries arising out of the intentional collisions. Federated, 102 Wn.2d at 667.

On appeal, the Washington Supreme Court reversed. Noting that it was the wife, not the husband, who engaged in the intentional act, the Court found that the husband, as a separate insured, was owed coverage:

> [W]e hold that the plain terms of the FAIC insurance policy entitle Clyde Strong to liability coverage. Liability coverage is provided to "the insured." Coverage is

> excluded for injury or damage caused intentionally by "the insured." Since coverage and exclusion have been defined in terms of "the insured," there are separate contracts between FAIC and its insureds, and the excluded act of Lisa Strong does not bar coverage for Clyde Strong.

Federated, 102 Wn.2d at 669. In other words, the insurer cannot deny coverage to one separate insured based upon allegations of the intentional acts of another insured. Federated, 102 Wn.2d at 670. Federated notes that the Strong's liability insurance "applies separately to each insured against whom claim is made..." 102 Wn.2d at 669-670.

The Grange policy also applies separately to Wes and Jane Roberts. The policy states "this insurance applies: a. As if each Named Insured were the only Named Insured; and b. Separately to each insured against whom claim is made or suit is brought." CP 183 ("Separation Of Insureds"). "The severability clause included in the ... policy clearly and unambiguously provides that liability coverage applies separately to each insured." Federated, 102 Wn.2d at 670. Wes Roberts, like Clyde Strong, is owed a defense by his insurer.

Federated cites to U.S.F. & G. Ins. Co. v. Brannan, 22 Wn. App. 341, 589 P.2d 817 (Div. III, 1979), which held where a spouse's intentional torts create community liability, public policy prevents the provision of insurance coverage to the community. Federated

distinguished Brannan by noting that the Strongs would not have community liability. 102 Wn.2d at 671.

The same is true in this case. There is no community liability arising out of the Brandis Complaint. That complaint alleges only tortious acts by Jane Roberts: "Jane fostered a confidential relationship and used fraud and undue influence to convince Elizabeth to give her virtually everything she owned...," "Jane isolated Elizabeth...," "Jane gained access to her bank accounts...," "Jane commingled her finances...," "Jane convinced Elizabeth to take out a loan...," etc.. CP 274-275.

Furthermore, the Complaint alleges that the effect of Jane's individual acts was to augment Jane's separate property: "Jane induced her to gift that and other pieces of real property to [Jane] at no charge...," "Jane received virtually everything from Eizabeth's [sic] estate..." etc. CP 275-278. Drake v. Mutual of Enumclaw, an Oregon case cited by Grange, is readily distinguished, as the underlying complaint in Drake alleged that both spouses engaged in the undue influence, and both spouses profited from that act. Drake,167 Or. App. 475, 478-479 1 P.3d 1065 (2000).

Under settled Washington law, gifts and inheritances made to one spouse is the separate property of the receiving spouse. RCW 26.16.010. The Roberts' community did not profit from Mrs. Roberts' alleged wrongdoing, and therefore the community is not liable. Because there is

no allegation that Mr. Roberts was involved in the alleged wrongdoing the event was an "occurrence" from his standpoint. Roller v. Stonewall, 115 Wn.2d 679, 685, 801 P.2d 207 (1990) (overruled on other grounds, Butzberger v. Foster, 151 Wn.2d 396, 89 P.3d 689 (2004). Wes Roberts is therefore owed a defense by Grange under Federated,

2. The outrage claim triggers a duty to defend.

Grange incorrectly asserts that because the Brandis plaintiffs alleged conduct that would appear to be deliberate, the outrage claim does not trigger coverage. However, as noted in the Appellant's brief, even alleged conduct that is apparently intentional triggers coverage where the insured might not have intended the consequences. Woo, 161 Wn.2d at 64.

In Woo, the insured dentist inserted boar tusks into his patient's mouth while she was unconscious and then took humiliating photographs of his prank. 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 [the underlying plaintiff's] injuries." Woo, 161 Wn.2d at 64.

Similarly, the Brandis Complaint alleges outrageous conduct that may, depending upon how the issues and facts evolve, constitute reckless

infliction of emotional distress rather than intentional infliction. The Brandis jury may find, for example, that the "extreme emotional distress" allegedly suffered by the underlying plaintiffs was recklessly inflicted by Jane Roberts when she "isolated Elizabeth from her... family," or "badmouthed" the family. CP 275. In other words, the jury might find that Mrs. Roberts inflicted emotional distress but that she did not "intend that conduct to result in" the Brandis plaintiffs' injuries. This is the same scenario discussed in Woo, 161 Wn.2d at 64.

At page 11 of its Response, Grange points out that the underlying plaintiffs in Woo asserted negligent conduct, whereas the Brandis complainants do not plead negligence. But this does not make a difference. The Brandis plaintiffs allege outrage, and Mrs. Roberts' alleged outrageous conduct may be found to be either intentional or reckless.[2] After all, "Personal injury coverage focuses on the nature of the specified tort that causes the damage. To the extent the listed offenses are framed in generic terms, they should be construed broadly to encompass all specific torts which reasonably could fall within the general category." Fibreboard Corp. v. Hartford Accident & Indemnity Co., 16 Cal. App. 4th 492, 515, 20 Cal. Rptr. 2d 376 (Cal. App. 1st Dist. 1993).

[2] Reckless infliction is sufficient to prove a claim of outrage. Rice v. Janovich, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987); Restatement (Second) of Torts § 46 (1965).

As discussed in Appellants' opening brief, in light of modern generalized and nonspecific pleadings practice, the Brandis plaintiffs are not precluded from prevailing on grounds of reckless conduct:

> Since the instant action presented the potentiality of a judgment based upon nonintentional conduct, and since liability for such conduct would fall within the indemnification coverage, the duty to defend became manifest at the outset. ... In light of the likely overstatement of the complaint and of the plasticity of modern pleading, we should hardly designate the third party as the arbiter of the policy's coverage.

Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 419 P.2d 168, 176, 54 Cal. Rptr. 104, (Cal. 1966). *See, also*, R. A. Hanson Co. v. Aetna Ins. Co., 26 Wn. App. 290, 294, 612 P.2d 456 (1980) (citing Gray v. Zurich Ins. Co. with approval).

Grange's duties are triggered by the outrage allegation because the facts alleged in the Brandis complaint may establish liability for nonintentional acts. Nonintentional acts fall within the coverage of the policy. Grange must defend the suit. Woo, 161 Wn.2d at 56.

3. Untested torts should trigger a duty to defend.

Finally, it is conceded that the overwhelming majority, and perhaps all, jurisdictions which have considered the two tortious interference claims (inheritance, adult child/parental relationship) require

an intentional act. However, tort law is fluid and ever-changing.[3] It has been noted that "it is quite difficult to make a convincing showing of reliance upon tort law." Murray v. Amrine, 28 Wn. App. 650, 653 fn 1, 626 P.2d 24 (1981) (citing to Keeton, Creative Continuity in the Law of Torts, 1962, 75 Harv.L.Rev. 463, 488, n. 62).

Unless and until a published Washington case sets forth the elements of the untested interference claims, the elements of those claims remain uncertain. Any uncertainty with respect to coverage must be resolved in favor of the insureds. Where there is any potential for liability within the policy's coverage, the duty to defend is triggered. Truck Ins. Exch. v. VanPort Homes, 147 Wn.2d 751, 760, 58 P.3d 276 (2002). It is urged that the Court, in light of the peculiar and inartful Brandis Complaint, should find that Grange has duty to defend the Roberts under Coverage H, "Bodily Injury and Property Damage Liability."

C. PERSONAL AND ADVERTISING LIABILITY COVERAGE IS ALSO TRIGGERED BY THE BRANDIS COMPLAINT.

In the shortest section of its argument, Grange attempts to slide its weakest position past the attention of the Court. Response, pp. 16-18.

[3] "The novelty of an asserted right and the lack of precedent are not valid reasons for denying relief to one who has been injured by the conduct of another. The common law has been determined by the needs of society and must recognize and be adaptable to contemporary conditions and relationships." Strode v. Gleason, 9 Wn. App. 13, 17, 510 P.2d 250 (Div I. 1973).

Grange asserts that two exclusionary clauses are applicable, "Material Published with Knowledge of Falsity" and "Knowing Violation of Rights of Another."

1. The "Knowledge of Falsity" exclusion does not apply.

The Brandis Complaint references to defamation with the allegation that "Jane made false statements about and 'badmouthed' those other parties in order to so intentionally interfere with their relationships." CP 275. The allegations of intentionality refer exclusively to the intentional interference with familial relationships. Contrary to Respondent's assertions, the Brandis Complaint does not assert that Mrs. Roberts knew that the statements themselves were false.

For example, let us assume that Clarence brings a claim alleging that his brother Bob "made false statements that Clarence is an alcoholic in order to intentionally interfere with Clarence's relationship with their father." It could certainly be established at trial that Bob genuinely believed Clarence to be an alcoholic, and that Bob told their father that tale with no intention of interfering with Clarence and the father's relationship. In such a case, Bob would be covered for defamation under a policy excluding "Knowledge of Falsity" because his defamatory

statement was not made with knowledge that it was untrue.[4]

Grange, at footnote 1 of its Response, attempts to distinguish a similar hypothetical presented in the Roberts' opening brief. But Grange's argument misses the point. The Brandis complaint does not allege that Mrs. Roberts knew that her alleged "false statements" were in fact false. The complaint's assertion that the statements were false simply pleads a defamation claim, and such a claim may be negligent in nature. Dunlap v. Wayne, 105 Wn.2d 529, 542, 716 P.2d 842 (1986). It is thus covered by the Grange policy.

While Grange contends that the Brandis Complaint does not assert that Jane Roberts' alleged statements were made "carelessly," (Response, p.17) it does not matter. The complaint does not attribute any level of knowledge—such as "careless," "intentional," "knowing," or "reckless" —to Mrs. Roberts. Under Washington's "complaint allegation" rule, the carrier has the duty to defend "when a complaint against the insured, construed liberally, **alleges facts which could, if proven**, impose liability upon the insured within the policy's coverage." Truck Ins. Exch. v.

[4] Interestingly, the converse is also true: If it were established at trial that Bob genuinely believed Clarence to be an alcoholic, and that Bob negligently defamed Clarence by reporting that to the father with the intention of interfering with Clarence and the father's relationship, the policy would still cover Bob for the defense of the entire case and indemnification for the damages arising out of the negligent defamation (but not the intentional interference).

VanPort Homes, Inc., 147 Wn.2d 751, 760, 58 P.3d 276 (2002) (emphasis added) (quoting Unigard Ins. Co. v. Leven, 97 Wn. App. 417, 425, 983 P.2d 1155 (1999)). *See, also*, argument at pp. 7-8, *supra*.

Grange's policy covers defamation where it was made without knowledge of falsity. The carrier must be compelled to provide that coverage, where, as here, the Complaint alleges defamation which may be either intentional or negligent.

Finally, as pointed out at footnote 5 on page 18 of Appellants' opening Brief, Grange never cited the provision for "Material Published With Knowledge of Falsity" in its pleadings in the trial court. Rather, Grange argued exclusively that the Brandis Complaint established the "Knowing Violation of Rights of Another." See e.g., CP 243, CP 28-30. Any argument, therefore, based on the "Knowledge of Falsity" provision was not preserved in the trial court and may be disregarded by this Court. Hansen v. Friend, 118 Wn.2d 476, 485, 824 P.2d 483 (1992).

2. The "Knowing Violation of Rights of Another" exclusion does not apply.[5]

Tellingly, Grange does not address the fact that the "Knowing Violation" exclusion has two prongs. To apply, this exclusion provides that the insured must have undertaken the wrongful act both with

[5] *See, also*, the arguments at C.1 of this brief (pp. 10- 12), many of which also apply to the "Knowing Violation" exclusion.

knowledge that it would a) "violate the rights of another" and b) "inflict 'personal and advertising' injury":

> 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. CP 177. (emphasis added)

The relevant part of the definition of "personal and advertising injury" is "[o]ral or written publication... of material that slanders or libels a person..." CP 185.

In its one paragraph reference to the "Knowing Violation" exclusion, Grange argues that the Brandis complaint alleges that Mrs. Roberts knew that her acts "would violate the rights of another." Response, p. 18. But Grange entirely omits mention of the second prong, that the insured knew that her acts would "inflict 'personal and advertising' injury." The reason for the omission is clear: There is absolutely nothing in the underlying complaint that asserts that Mrs. Roberts knew that she was publicizing material that constitutes slander or libel. The failure to establish that second prong of knowledge bars application of the exclusion in itself.

Grange's argument focuses entirely on the first prong, "knowledge

that the act would violate the rights of another." In support of this argument, Grange claims:

> [T]o prevail on their claim, the Brandis plaintiffs... have to show that Jane knew of the falsity of her statements and did so knowing that she would be interfering with her siblings relationship with their mother. Response, p. 18.

But this argument once again improperly conflates the "intentional interference" claim with the defamation claim. Brandis' allegation raises the risk that the Roberts will be found liable for negligent defamation. Under the facts alleged by the Brandis complaint, the underlying plaintiffs could be awarded damages because Jane "made false statements," without prevailing on the intentional interference claim. Construing the Brandis complaint broadly, as this Court must, the potential for liability for negligent defamation requires Grange to provide a defense.

D. DENIAL OF MOTION TO STAY MUST BE REVERSED IF TRIAL IS ORDERED UPON REMAND.

Grange asserts that it "did not develop any facts in prosecuting the declaratory judgment action" and therefore the trial court did not err when it failed to grant the Roberts' Motion for Stay. Response, p. 19. This argument misses the point of the Roberts' requested relief. In their Brief, p. 28, the Roberts stated:

> [I]n 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 other words, the Roberts urge this Court to reverse the trial court's determination that the Grange policy does not provide coverage. However, should this Court remand with an order for trial, the denial of the Motion to Stay, or at least reconsideration of that motion, should be required, because that would put the insureds in the untenable position of having their own insurer attempt to develop facts against them. Western Nat'l Assurance Co. v. Hecker, 43 Wn.App 816, 821 n.1, 719 P.2d 954 (1986); *see also* Thomas V. Harris, Washington Insurance Law, § 14.0 (3rd ed. 2010).

Grange then proceeds to deliver a cheap shot. At page 20 of its Response, it asserts "as admitted by the Roberts in their opening brief, the Roberts are still not funding the defense of this claim." What the Roberts actually said was "[t]wo other insurance companies now are co-defending the suit..." Opening Brief, p. 10. The fact is, there have been two gaps in coverage for several months each since Grange left the scene. See, e.g., RP 3, ll. 20-21. During those periods, the Roberts did indeed fund their own defense. As noted in the Roberts' initial Brief, the situation may recur if the current insurers prevail on their summary judgment motions.

The Roberts have been, and likely will be, severely damaged by the failure of Grange to provide the defense it owes to its insureds.

Finally, Grange fails to offer any rationale as to why it should be permitted to shirk its duty to provide a defense simply because other insurers have stepped up to the plate.

E. COUNTERCLAIM IMPROPERLY DISMISSED

Grange contends that the trial court's dismissal of their counterclaim for insurance bad faith must be affirmed because the Roberts agreed to the dismissal. Response, pp. 20-24. The argument is factually and legally incorrect.

The counterclaim was dismissed following the hearing on Grange's Motion to Clarify. In that motion, Grange requested that the Court enter an order *nunc pro tunc* dismissing the Roberts' counterclaim as of July 22, 2011, when Grange's Motion for Summary Judgment was granted and the Roberts' Motion to Stay was implicitly denied. CP 376-378. The Roberts opposed the motion on grounds that the request for a *nunc pro tunc* order was simply a gambit to deny the Roberts the opportunity to appeal. CP 282.

Ultimately, the trial court dismissed the counterclaim (while denying Grange's Motion for Clarification) because it previously had ruled that Grange does not owe any duties to the Roberts, and therefore the

counterclaim fell with the summary judgment in Grange's favor. In the words of Grange's trial counsel:

> the motion to stay was based on the very same allegations as the [the counterclaim[6]]. That by bringing the action, Grange was prejudicing their insureds. There's a response in ... [Grange's] reply to that assertion. The Court denied the motion to stay, and, therefore, found—implicitly found that the factual basis for the counterclaim wasn't true.

The trial court agreed, stating that "[n]othing exists in the counterclaim" and the "counterclaim [for] all intents and purposes doesn't exist because the underlying action is gone." RP p. 7, l. 19, p. 8, l. 25 – p.9, ll. 1-2.

Recognizing the inutility of prosecuting a counterclaim under the posture of the case, trial counsel for the Roberts offered to expedite matters by agreeing to an order that dismissed the counterclaim. RP 4, ll. 15-21. Everyone in the court room that day—the trial court, Grange's counsel, and the Roberts' counsel—understood that the Roberts agreed to dismissal simply to avoid another trip to the courthouse and to expedite the appeal:

> Ms. Garella: "And now [the Roberts'] seek to appeal against Grange because they're left in a position of not having anybody to provide them with a defense..." RP p. 3, ll. 21-23, see, also RP p. 4, l. 21–p. 5, l. 6, p. 6, ll. 4–7, p. 7, ll. 2 – 10.
>
> ...
>
> The Court: "Nothing exists in the counterclaim."

[6] Counsel actually stated "the motion for summary judgment." In context, however, it appears that she was referencing the counterclaim.

> Ms. Garella: "And you can so find right now."
>
> The Court: "It didn't exist of as of July of 2011."
>
> Ms. Garella: "But the Court did not find that as of July 2011."
>
> The Court: "I found it by implication. I found it by application." RP p. 7, ll. 19-25.
>
> ...
>
> The Court: "I'm prepared to take her up on her offer that the matter is dismissed. The counterclaim. **Or else I can sign an order denying the clarification and leave this thing open.** Frankly I think they're going to be hard-pressed to convince the Court of Appeals that they have any appellate rights on a claim that hasn't existed by operation of law.
>
> Ms. Menely: I'm happy – if the Court will not enter the order requested, I'm happy if the Court formally dismissed the counterclaim. RP p. 9, ll. 5-16. (emphasis added)

Nothing in this colloquy suggests that the Roberts abandoned the counterclaim on its merits, had settled the counterclaim, or intended to do anything other than merely acknowledge the fact that the trial court rejected the counterclaim. After all, as Grange's counsel urged, and the trial court agreed, the counterclaim could not proceed following the order on summary judgment. There was no reason to compel the parties to finance another trip to the courtroom for a hearing on the counterclaim.

Grange asserts that the Roberts' practical resolution of the counterclaim is "invited error." Response, p. 23. But the case it cites, Casper v. Esteb Enters., 119 Wn. App. 759, 82 P.3d 1223 (Div. II 2004),

bears no relation to the facts before this Court. In Casper, the appellant complained that the trial judge snapped at him during his testimony, improperly conveying a dark view of the appellant's credibility to the jury. The court held, however, that the appellant had invited the error by making repeated attempts to violate the court's pretrial discovery rulings during his trial testimony. Casper, 119 Wn. App at 771. In contrast, the Roberts did nothing to lead the trial court to the erroneous conclusion that their counterclaim is without merit.

The Roberts case is more similar to that of Lavigne v. Chase, Haskell, 112 Wn. App. 677, 50 P.3d 306 (Div. III, 2002). There, the respondent argued that appellant invited dismissal when it conceded to the trial court that an adverse evidentiary ruling "eviscerated" its case and that summary judgment was appropriate. The Court of Appeals held:

> The doctrine does not apply here because [appellant] did not "set up" an error. When the verbatim report of the summary judgment hearing is viewed in context, it is apparent [appellant] felt compelled by the trial court's negative evidentiary ruling to go along with resolution by summary judgment. [Appellant] did not concede the merits of its case, and the trial court agreed on that point.

Lavigne, 112 Wn. 2d at 682. This is what happened in the instant case—the Roberts simply acknowledged the posture of the case following an extremely negative ruling against them.

The Roberts did not set up the error at trial and they do not now complain of that error on appeal. As urged in the Roberts' opening brief, this Court should reverse the dismissal of the bad faith counterclaim so that the claim may be considered on the merits.

F. THE COLLATERAL ESTOPPEL DOCTRINE IS NOT AVAILABLE TO RESPONDENT.

At p. 23 of its Response, Grange advises this Court that another insurer, Unigard, obtained an order on summary judgment relieving Unigard of its coverage duties to the Roberts. This information appears nowhere in the record and is presented in violation of RAP 10.3(a)(5) and (6). Grange then maintains that the fact that the Roberts elected to not appeal the Unigard order collaterally estops them from prosecuting this appeal. Response, pp. 23-24. For both procedural and substantive reasons, this argument may be generously characterized as audacious.

1. Grange is barred from introducing new evidence.

Procedurally, Grange's argument should be disregarded, and the discussion of the Unigard case stricken. The insurer urges this Court to take additional evidence relating to the Unigard decision. However, RAP 9.11 provides that this court may direct that additional evidence on the merits of the case be taken where:

> (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

Grange provides no basis for taking additional evidence, aside from the wishful, conclusory statement that "the ends of justice will be served by considering the Unigard matter." Response, p. 24. Certainly this is not the case. Introducing evidence that another case was decided against the Roberts based upon the Grange case in order to argue preclusive effect against the Roberts is circular reasoning, and merely redoubles the error. If the Grange trial court's decision is error in one case, it is error in both. By appealing the Grange decision, the Roberts request that this Court end the compounding of error as their insurers line up to use the Grange decision to relieve themselves of a duty to defend. To estop the Roberts from unraveling this cycle of error is unjust. Collateral estoppel may not be employed where it results in a substantial injustice upon those against whom it is applied. Hadley v. Maxwell, 144 Wn.2d 306, 315, 27 P.3d 600 (2001).

In addition, there is no evidence that the trial court in Grange considered the summary judgment obtained by Unigard.[7] It would have been, of course, a temporal impossibility, as the Unigard judgment was obtained a year after the Grange judgment. For the same reason, Grange did not argue collateral estoppel to the trial court. The issue is therefore not preserved and may not be raised for the first time on review. RAP 2.5(a), Hansen, 118 Wn.2d at 485.

2. Grange's argument that subsequent litigation estops appellate review is substantively nonsensical.

We now turn to the merits of Grange's argument. First, a clarification. "[C]ollateral estoppel establishes that 'when an issue of **ultimate fact** has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" State v. Mullin-Coston, 152 Wn.2d 107, 113, 95 P.3d 321 (2004) (quoting Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970) (emphasis added). Grange points to no "facts" determined in the Unigard v Roberts action that would trigger the doctrine.

[7] Grange states that "the trial court was advised of the Unigard matter." In its Motion for Clarification, Grange informed the trial court that the Roberts, in response to Unigard's Motion for Summary Judgment, asserted that the Grange litigation was not completed because the Roberts' counterclaim against Grange had not been dismissed. CP 372, ll. 3-8. The trial court was also advised, in oral argument on the Motion for Clarification, that Unigard was no longer providing coverage. RP 3. ll. 19-21. These references are the only information conveyed to the Grange trial court regarding the Unigard litigation.

On these grounds alone, the collateral estoppel argument must be discarded.

Most importantly, however, "collateral estoppel is... an equitable doctrine that will not be applied mechanically to work an injustice." Hadley, 144 Wn.2d at 315. And an injustice is exactly what Grange urges with its offensive collateral estoppel argument. Grange obtained summary judgment in its favor in 2011. Unigard, calling the court's attention to the Grange judgment, obtained summary judgment against the Roberts in 2012.[8] Grange argues that the Roberts are foreclosed from appealing their case because the Roberts did not appeal a case which was decided subsequent to the Grange v. Roberts case.

There is no law cited by Grange, and none discovered by the Roberts, to support the offensive use of the doctrine in appellate courts based upon subsequent litigation. And there is no way, on this record, that this court can establish that the Roberts had a "full and fair" opportunity to litigate the coverage issue in the Unigard case. Dunlap, 22 Wn. App. at 591.

The Roberts are not collaterally estopped from pursuing this appeal. Indeed, Grange's collateral estoppel argument suggests that they

[8] This information, that Unigard relied on the Grange summary judgment, also does not appear in the record. Counsel apologizes to the court, but notes in her defense that the comment was necessitated by Grange's argument based on material outside the record.

have resorted to a "kitchen sink" approach because its arguments on the coverage issues themselves are weak.

G. ATTORNEYS FEES

Reversal of the trial court requires the award of fees to the Appellants pursuant to Olympic Steamship Co. v. Centennial Insurance Co., 117 Wn.2d 37, 52-53, 811 P.2d 673 (1991).

II. CONCLUSION

Insurers owe their customers a duty to defend (and, depending upon the outcome of the underlying case, the duty to indemnify) where even one factual allegation triggers coverage. Woo, 161 Wn.2d at 53, See 22 Holmes' Appleman On Insurance 2d §136.2(D).

In this case, the Brandis' allegations of "badmouthing" and "false statements" trigger coverage under the Personal and Advertising Liability section of the policy because the underlying allegations do not state that Jane Roberts knew that the statements were false or intended them to cause the injuries supposedly suffered. The "outrage" claim triggers coverage under the Bodily Injury coverage, because it may be established with proof of nonintentional conduct. The tortious interference claims trigger coverage because the elements of those torts have yet to be determined under Washington law, and any uncertainty redounds to the

benefit of the insured. Finally, the Brandis Complaint does not accuse Wes Roberts of any intentional conduct whatsoever. As a separate insured, Mr. Roberts is entitled to coverage with respect to all the Brandis' claims.

The Court is respectfully urged to reverse the trial court and grant the Roberts the benefits of the insurance contract for which they paid. The dismissal of the counterclaim should also be reversed. Attorneys' fees should be awarded to the Roberts.

RESPECTFULLY SUBMITTED this 31 day of May, 2013.

By: Elena Garella

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Certificate of Service

I, the undersigned, certify that on the 31 day of May, 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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