No. 89972-0

SUPREME COURT OF THE STATE OF WASHINGTON

43728-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROBERT SPEED,

Petitioner,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION,

Respondent.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF RESPONDENT

United Services Automobile Association ("USAA") was respondent in the Court of Appeals and plaintiff in the underlying consolidated action.

II. COURT OF APPEALS DECISION

The Court of Appeals decision filed on January 28, 2014, applies well-established Washington Supreme Court precedent to properly hold that USAA did not have a duty to defend its insured, Dennis Geyer ("Geyer"), for his intentional and deliberate road rage assault on Robert Speed ("Speed"), because the allegations against Geyer could not conceivably have been covered by the terms of the USAA policies. (App. A)

III. STATEMENT OF THE CASE

A. Geyer Deliberately Assaulted Speed In A Road Rage Incident.

On March 2, 2009, Geyer, a 38 year-old neurosurgeon, assaulted 60 year-old Speed in a "road rage" incident, seriously injuring Speed. (CP 760-61; 784-789) Geyer was criminally charged with second degree assault with a deadly weapon. (CP 761) On August 25, 2009, Speed's attorney sent a demand letter to Geyer seeking payment of $650,000. (CP 783-790) Speed's letter stated that the road rage incident began when Geyer became angry over something Speed had done while driving in front of him. Geyer pulled up beside Speed while on the Tacoma Narrows Bridge and motioned for Speed to pull over. Frightened, Speed took the first exit after the bridge.

(CP 784-785) Geyer followed him for an extended period of time before the two vehicles stopped for a traffic signal. (CP 785) According to witnesses, Geyer got out of his vehicle, opened the door of Speed's vehicle and beat Speed with his fists and a metal thermos, pulling Speed from his vehicle as he did so. (*Id.*) Geyer then drove away, leaving Speed bleeding and unconscious in the street. (*Id.*)

Notably, Speed's demand letter *admits* the intentional nature of Geyer's assault and that the assault would *not* be covered by insurance:

> This case is aggravated by the *intentional conduct of Dr. Geyer*, including leaving Speed, potentially for dead, at the scene. Were this a case of negligence that was covered by insurance, Mr. Barcus and I agree that we would be seeing a seven figure verdict or settlement.
>
> *Understanding that this matter is not covered by insurance*...we make the following settlement demand.

(CP 789) (emphasis added).

B. Geyer Admitted That He Deliberately and Intentionally Struck Speed In The Face Intending To Knock Him Out.

Geyer did not notify USAA of the assault until October 14, 2009, seven months after it occurred. He readily admitted that he had deliberately struck Speed and had been arrested for second degree assault with a deadly weapon, although he claimed he acted in self-defense. (CP 756, ¶5)[1]

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[1] Geyer also told USAA that Speed was demanding $650,000 for injuries incurred in the assault. (CP 756, ¶4) However, USAA did not actually receive a copy of Speed's August 25, 2009 demand letter until October 28, 2009. (CP 757, ¶8) By the time USAA was

At his criminal trial, where he was found guilty of third degree assault, Geyer admitted that he deliberately struck Speed in the face. (CP 757, ¶10) He testified that "*my plan was to throw a punch, stun him, and get away from him.*" (CP 735, lines 11-14) (emphasis added) (CP 734, lines 5-9) Geyer admitted that he hit Speed with a closed fist "on the left side, right around the lateral orbital rim of [his left eye]." (CP 735, lines 21-22) Geyer testified that Speed

> became stiff as a board, and his arms dropped to his side. In neurosurgery, we call that a contact seizure. It's a tonic seizure that occurs at the moment of impact. So, he became extremely rigid and he fell over to his left onto the van.

(CP 735, lines 24-25; CP 736, lines 1-3) Geyer also admitted that he just left the scene after he saw Speed fall "very hard, face first, into the pavement." (CP 736, lines 14-19)

C. Upon Notice of the Assault Claim, USAA Did Not Agree To Defend Geyer; Instead, USAA Immediately Undertook An Investigation Under A Reservation of Rights.

USAA issued both a homeowner's and an auto policy to Geyer. The homeowner's policy provides coverage for an insured for damages "because of bodily injury or property damage caused by an occurrence to which this insurance applies." (CP 767) It defines an "occurrence" as an "accident" resulting in bodily injury. (CP 765) Similarly, the USAA auto

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told about the demand and it was forwarded to USAA, the demand had already, by its own terms, been revoked. (*Id.*; CP 790)

policy agrees to pay damages for bodily injury which a covered person becomes legally liable to pay because of an "auto accident." (CP 773)

After being notified of the assault in October 2009, USAA did not agree to defend Geyer, as Speed argues in his Petition for Review. Instead, USAA undertook coverage and loss investigations, under a full reservation of all rights, advising Geyer that there was likely no coverage for the assault claim under either of the USAA policies. (CP 756-757, ¶¶4-9; CP 776-782; CP 584, ¶3) Nor was USAA "uncertain" about coverage, as Speed argues. While USAA investigated the assault claim over the next several months to determine if any facts existed to create a potential for coverage under the USAA policies, at every turn, the factual information it gained indicated that Geyer intentionally and deliberately struck Speed, conduct that is clearly not covered under the USAA policies. (CP 733-739)

In its reservation of rights letter, USAA explained to Geyer that there was likely no coverage for the assault claim under the USAA policies because Speed was alleging that Geyer had "intentionally and deliberately struck him in the head, causing him serious injury." (CP 757, ¶ 7; CP 776-782) USAA told Geyer, "This type of claim does not fall within the definition of occurrence, as it involves an intentional act which is not an 'accident' as defined in the liability insurance policy," and would also be excluded under the intentional act exclusion, therefore, "your Homeowner's

Policy may not provide coverage for the loss." (CP 777-778) Likewise, the reservation of rights letter told Geyer that the injuries were not the result of an "auto accident," but rather, "[t]he claim arises from a physical altercation that occurred on the street, outside of a vehicle." (CP 779-780) USAA's reservation of rights letter clearly told Geyer that "coverage may be precluded under both your homeowner's and automobile policies." (*Id.*) The letter also explained that USAA's investigation was subject to a full reservation of all rights, and that any action it took with regard to the claim asserted against Geyer was not and should not be deemed an admission, waiver, estoppel or concession "that there is, was, or may be any insurance coverage for the matters now alleged." (CP 781-782)[2]

D. Activity After Geyer Is Criminally Convicted of Assault.

Despite Geyer's criminal conviction, Speed demanded USAA pay him $800,000.00, the combined limits of the USAA homeowner's and auto policies issued to Geyer. (CP 758, ¶11, CP 71-73) After reviewing Speed's demand, USAA advised Geyer that it would not be paying the demand because the assault claim was not covered under either USAA policy. (CP 758, ¶12, CP 792-798) The assault was not an "accident" for purposes of coverage under either policy, and the claim did not involve an "auto

[2] USAA also notified Speed's attorney by letter that USAA was investigating coverage and liability and that the letter should not be interpreted as confirmation of coverage or liability. (CP 566).

accident" with respect to the auto policy. (*Id.*) USAA also sent a letter to Speed's attorney declining the demand for $800,000.[3] (CP 758-759)

Thereafter, without a lawsuit having been filed, Speed and Geyer entered into a settlement that called for the entry of an agreed judgment against Geyer in the amount of $1.4 million dollars, with a covenant not to execute against Geyer's personal assets. (CP 740-42) In return, Geyer assigned any rights or claims he might have under the USAA policies to Speed. (*Id.*) Speed then filed suit against Geyer (one of the two lawsuits in this consolidated matter) alleging that Geyer had *negligently* caused Speed's injuries; however, the only relief Speed sought was a finding that the agreed judgment was reasonable. (CP 3-5) Given the negligence allegations asserted in the lawsuit filed against Geyer, USAA agreed to defend Geyer in the lawsuit, under a reservation of rights. (CP 759)

E. Procedural History

USAA filed this declaratory judgment action on January 24, 2011, seeking a declaration that it had no duty to defend or indemnify Geyer for the assault claim, was not estopped to deny coverage, and had no duty to pay the $1.4 million agreed judgment. (CP 6-13) Speed filed a

[3] In response, Speed's attorney asked USAA whether it would extend a settlement offer to resolve Speed's claim. (CP 897) In an effort to resolve the claim and obtain a full release for Geyer, despite the lack of coverage, USAA offered to settle Speed's claim for $25,000, emphasizing, however, that the offer to settle was *not* an admission of coverage. (*Id.*) The offer was rejected.

counterclaim, alleging that USAA acted in bad faith by failing to defend and settle Speed's claim. (CP 321-31) Speed moved for partial summary judgment arguing that USAA had a duty to defend Geyer against the assault claim and a duty to settle the claim, and that USAA's failure to defend and settle breached its duties in bad faith. (CP 347-364) The trial court denied Speed's motion. (CP 626-630)

Thereafter, USAA brought its own motion for partial summary judgment arguing that under well-established Washington law, USAA had no duty to defend or settle Speed's assault claim and no duty to indemnify Geyer because the assault claim did not allege facts that were potentially covered under the terms of the insurance policies. The assault claim did not allege bodily injuries caused by an "accident" (homeowner's policy) and it did not allege bodily injuries caused in an "auto accident" (auto policy). (CP 707 – 726) USAA also argued that because it had no duty to defend, it could not be held liable for bad faith failure to defend, settle or indemnify and that it was not estopped to deny coverage. *Id.* The trial court agreed with USAA, granted the motion and dismissed Speed's claims for bad faith failure to defend, settle and indemnify, with prejudice. (CP 917-921) Thereafter, USAA moved to dismiss Speed's remaining "bad faith" claims on the basis that the claims were inexplicably tied to the duties to defend, settle, or indemnify, duties that the trial court had ruled USAA did not owe

to Geyer. (CP 922-926) Speed did not oppose the motion (CP 947) so the Court entered an Order dismissing the claims. (CP 946-50) Thereafter, Speed appealed. (CP 951-965)

The Court of Appeals correctly affirmed, holding that under well-established Washington law, USAA had no duty to defend, settle or indemnify Geyer for his assault on Speed because the allegations supporting the claim, if proven, could not have conceivably been covered under the terms of the USAA policies: the assault claim did not constitute an accident or an "auto accident" as required under the terms of the policy. *United Services Auto. Ass'n v. Speed,* __ Wn. App. __, 317 P.3d 532 (2014). Because USAA had no duty to defend, the Court held that USAA's failure to defend did not constitute bad faith, and USAA was not estopped to deny coverage. (Op. ¶¶46-47)

Notably, Speed conceded long ago that his assault claim does not allege damages caused by an "accident." He also conceded that the assault claim does not allege bodily injuries arising out of an "auto accident." In fact, Speed has *never* argued that the assault claim was potentially covered under the two USAA policies. (*See* CP 347-364; 590-625; 799-903)

IV. ARGUMENT WHY REVIEW SHOULD NOT BE GRANTED

The only basis on which Speed seeks discretionary review by this Court is under RAP 13.4(b)(1), but to do so, Speed must establish that the

Court of Appeals' decision is in conflict with a decision of the Supreme Court. This he fails to do, and therefore, the Petition for Review must be denied.

A. The Court of Appeals Properly Applied Supreme Court Precedent In Holding That USAA Had No Duty To Defend Geyer For His Deliberate Assault On Speed Because The USAA Policies Could Not Conceivably Cover The Assault Claim.

1. Under Well Settled Washington Precedent, There Is No Duty To Defend If The Claim Allegations Are Not Conceivably Covered By The Policy.

The Court of Appeals began its analysis with a thorough review of the Supreme Court's decisions regarding the duty to defend: "The duty to defend exists if the policy *conceivably* covers the claim allegations, while the duty to indemnify exists only if the policy *actually* covers the claim." (Op. ¶15) (emphasis in original), citing *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404, 229 P.3d 693 (2010). "A duty to defend exists if the facts alleged in the complaint against the insured, if proven, would trigger coverage under the policy. (Op. ¶21), citing *Am. Best Food*, 168 Wn.2d at 404. "The duty to defend is based on the *potential* for coverage." (Op. ¶23) (emphasis in original), citing *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52-53, 164 P.3d 454 (2007). The Court of Appeals also recognized that despite the broad rules favoring insureds, an insurer does not have an unlimited duty to defend. "Although [the] duty to defend is broad, it is not triggered by claims that clearly fall outside the policy." (Op.

¶ 27), quoting *Nat'l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 879, 297 P.3d 688 (2013). The Court of Appeals applied these rules to the allegations in Speed's assault claim to properly conclude that the USAA policies could not conceivably cover the claim and therefore, the duty to defend was not triggered. (Op. ¶¶ 33, 39).

2. Under Well Settled Washington Precedent, An Assault Is Not An Accident.

The USAA policies only provide coverage for bodily injuries caused by an "accident." (Op. ¶2) Relying on Supreme Court precedent holding that an insured's deliberate conduct generally does not constitute an "accident," the Court of Appeals held that Speed's assault allegations did not allege an "accident" as required to trigger a duty to defend:

> [A]n accident is never present when a deliberate act in performed unless some additional unexpected, independent and unforeseen happening occurs which produces or brings about the result of injury or death. The means as well as the result must be foreseen, involuntary, unexpected and unusual.

(Op. ¶31), quoting *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 401, 823 P.2d 499 (1992), quoting *Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wn.2d 99, 104, 751 P.2d 282 (1998). As the Court of Appeals recognized, "Speed's demand letter unambiguously described Geyer's conduct as deliberate." (Op. ¶ 33) The letter claimed Geyer "beat Speed with his fists and a metal thermos," and admitted that "the case was aggravated by

Geyer's 'intentional conduct' and was not a case involving negligence." (*Id.*) "Even interpreting the allegations liberally and resolving doubts in favor of a duty to defend, the USAA homeowner's policy does not conceivably coverage the allegations in Speed's demand letter." (*Id.*) And, while Geyer may have claimed he acted in self-defense, this did not change the result because this Court has long held that "no accident exists even when the insured's deliberate conduct is performed in self-defense." (Op. ¶35), citing *Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91, 96, 776 P.2d 123 (1989) (insured's claim that he acted in self-defense when intentionally causing bodily injury to another "in no way negates the deliberate nature of his act" and does not render his conduct an "accident"). Thus, the Court of Appeals properly held that USAA had no duty to defend the assault claim under its homeowner's policy as a matter of law, because the assault did not constitute an "accident" as the policy required. (Op. ¶36) Likewise, USAA, had no duty to defend the assault claim under its auto policy as a matter of law, because the assault did not constitute an "auto accident" as required by the terms of the auto policy. (Op. ¶ 39)[4]

[4] Speed's Petition for Review repeatedly mischaracterizes the Court of Appeals' well-reasoned and thorough analysis and application of the law to the facts. For instance, Speed claims that the Court of Appeals "conclude[ed], years after the fact, that because USAA had no contractual duty to indemnify, it had no duty to defend, investigate or explore settlement." (Petition at p.19) To the contrary, the Court of Appeals *specifically* stated that an indemnity determination is *irrelevant* to the existence of a duty to defend:

3. Because the Assault Claim Did Not Trigger USAA's Duty to Defend, USAA Had No Duty To Settle Or Indemnify, It Did Not Act In Bad Faith, And It Was Not Estopped To Deny Coverage.

The duty to attempt to settle arises out of the duty to defend. *See*, *Truck Ins. Exch. v. Century Ins. Co.*, 76 Wn. App. 527, 533-34, 887 P.2d 455 (1995) (the duty to investigate settlement arises out of the duty to defend), *rev. denied*, 127 Wn.2d 1002 (1995). As the Court of Appeals here acknowledged, under certain circumstances, for instance, when the duty to defend is not in dispute, an insured is required to make reasonable efforts to pursue settlement. (Op. ¶44), citing *Truck Ins. Exch.*, 76 Wn. App. at 534 (discussing the duty to explore settlement in a context where the duty to defend was not in dispute); and *Moratti v. Farmers Ins. Co.*, 162 Wn. App. 495, 504, 254 P.3d 939 (2011), *rev. denied*, 173 Wn.2d 1022, 272 P.3d 850 (2012) (no dispute that insurer had duty to defend, and therefore, it had a duty to attempt to settle). On the other hand, no Washington case holds that an insurer has a duty to explore settlement when the insurer has no duty to defend, and Speed failed to cite any such authority. (Op. ¶45)[5]

In addition, when an insurer has no duty to defend, it cannot be

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"whether or not a court subsequently finds no duty to indemnify is irrelevant to the existence of a duty to defend." (Op. ¶28)

[5] Notwithstanding, USAA did attempt to settle Speed's claim when it offered $25,000 despite the absence of a duty to defend or indemnify. (CP 897) Thus, Speed's assertion that USAA did not attempt to settle is not accurate.

found liable for bad faith failure to defend or attempt to settle. (Op. ¶46), citing *Wellman & Zuck, Inc. v. Hartford Fire Ins. Co.*, 170 Wn. App. 666, 677, 285 P.3d 892 (2012), *rev. denied*, 176 Wn.2d 1019, 297 P.3d 707 (2013) Likewise, Speed's estoppel claim failed for the same reason. (Op. ¶47), citing *Mut. of Enumclaw Ins. Co. v. T & G Constr. Inc.*, 165 Wn.2d 255, 267, n.4, 199 P.3d 376 (2008) (in the absence of bad faith, coverage by estoppel does not apply).

B. The Court of Appeals Decision Does Not Conflict With Any Supreme Court Precedent.

Notably, Speed does not argue that the Court of Appeals improperly applied Washington precedent; nor does he argue that his assault claim, as alleged in his demand letter, if proven, could have conceivably been covered under the USAA policies. Instead, in an obvious attempt to create a conflict with Supreme Court precedent where none exists, Speed sidesteps the Court of Appeals' opinion entirely. He asserts instead, in a convoluted argument, that USAA "agreed" to defend Geyer upon notice of the claim, and that USAA was "uncertain" whether coverage existed and therefore, USAA had a duty to defend Geyer. Speed's assertions are both factually and legally inaccurate and must fail.

First, USAA did not agree to defend Geyer when the claim was first made, it only agreed to investigate coverage and liability, under a full

reservation of rights. Second, Speed fails to cite to any Supreme Court decision holding that an agreement to investigate triggers a duty to defend. Third, USAA was never "uncertain" about coverage for the assault claim. Fourth, even assuming USAA was "uncertain" (which it was not) Speed fails to cite to any Supreme Court decision holding that when an insurer is "uncertain" as to coverage, its duty to defend is triggered. Finally, Speed's reliance on *Tank*, *National Surety*, *Woo* and *American Best Food* for his arguments is wholly flawed and entirely misplaced.

1. Actions Taken By An Insurer Under A Reservation Of Rights Do Not Trigger A Duty To Defend.

USAA did not "agree," "affirmatively represent" or "tell" Geyer that it would defend him or settle the claim when USAA first learned that Geyer had assaulted Speed, as Speed repeatedly and disingenuously tries to convince this Court.[6] Instead, USAA agreed to *investigate* coverage and liability under a reservation of rights; a significant and undeniably crucial distinction. USAA had the right and the duty, under its policy and under Washington law, to investigate coverage when the claim was made and it did so under a reservation. *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 405, 229 P.3d 693 (2010) ("[t]he insurer is entitled to investigate the facts"). The very purpose of a reservation of rights letter is

[6] Speed has never presented any testimony from Geyer to suggest that USAA agreed to defend him or that he believed or understood that USAA agreed to defend him.

to advise the insured that the insurer's conduct in investigating the claim is being done under a full reservation of rights and defenses, and therefore, actions taken under a reservation of rights are *not* an admission of any coverage, or of any duty to defend. Indeed, RCW 48.18.470(c) specifically provides that "investigating any loss or claim under any policy or engaging in negotiations looking toward a possible settlement of any such loss or claim" shall not be deemed to constitute a waiver of any provision of a policy or of any defense of the insurer" under the policy. USAA's reservation of rights letter specifically stated that any actions undertaken by USAA *should* not be deemed to be a concession or admission that there was any coverage of any kind. (CP 781-82). USAA's conduct in investigating coverage and liability under a reservation of rights simply cannot be parlayed into an agreement to defend.[7]

More importantly, Speed has failed to cite to a single Washington Supreme Court decision holding that an offer to investigate coverage and

[7] Moreover, Speed's assertion that USAA agreed to defend Geyer is nothing short of preposterous. As Speed is well aware, when the assault claim was made, USAA believed no duty to defend could be triggered until a lawsuit was actually filed against its insured alleging claims potentially covered under the terms of the insurance policies. (CP 523, 584-585; *See*, Speed's Brief of Appellant, at p. 8, citing CP 398 at p. 76-77). It defies logic to argue that USAA would have "agreed" to defend Geyer when USAA had this belief, whether mistaken or not. Likewise, Speed's assertion, without any support in the record, that "USAA's 'uncertainty' motivated USAA to affirmatively represent to Dr. Geyer that it was willing to "investigate, settle or defend" (Petition for Review, p. 13), at a time when USAA did not believe it had any such duties, defies logic and common sense.

liability under a reservation of all rights triggers an insurer's duty to defend. While he cites to *Tank v. State Farm Fire & Casualty Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986), the issue in *Tank* was not whether the insurer's duty to defend was triggered. Rather, the insurer had agreed to defend under a reservation of rights and the Court was tasked with determining the parameters of an insurer's duty to defend when it agrees to defend under a reservation of rights. *Id.* at 384. Likewise, Speed's reliance on *National Surety Corp. v. Immunex,* 176 Wn.2d 872, 297 P.3d 688 (2013), is equally flawed. As in *Tank*, the Court in *National Surety* did not address a claim that an agreement to investigate coverage and liability under a reservation of rights triggers the insurer's duty to defend; instead, the issue before the Court was whether an insurer who defends under a reservation of rights, can recoup its defense costs when it is later determined that the insurer had no duty to defend. *Id.* at 891. Neither of these cases stand for the proposition that an offer to investigate coverage and liability constitutes an offer to defend, triggering a duty to defend.

2. An Insurer's Alleged Uncertainty as to Coverage Does Not Trigger a Duty to Defend under Washington Law.

It must first be noted that contrary to Speed's argument, at no time was USAA "uncertain" about coverage nor did USAA believe its policies

provided coverage for the assault claim.[8] Instead, in an effort to determine if there were any facts that could potentially bring the claim within the coverage of its policies, USAA undertook to investigate, for Geyer's benefit. (CP 385, p.22, lines 3-5) But at every turn, all facts confirmed that the assault was an intentional, deliberate act, one that could not conceivably be covered by the USAA policies. While Speed cites to USAA's reservation of rights letter for his factual assertions, nothing in that letter establishes any admission of or uncertainty about coverage. Instead, that letter was clear: it told Geyer that an assault would not be covered and there was likely no coverage for Speed's assault claim under either policy because Speed was alleging that Geyer had intentionally and deliberately struck him in the head. (CP. 776-782) The letter also advised Geyer that any action by USAA under the reservation of rights could not be construed as a waiver or admission of any of its defenses or of any coverage. (CP 781-782)

Notwithstanding, even if USAA was "uncertain" about coverage, the Supreme Court has never held that an insurer's alleged subjective uncertainty triggers a duty to defend, or that an insurer *must* defend if it is uncertain about coverage. Speed's reliance on *Tank*, *National Surety*, *Woo*,

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[8]Speed again mischaracterizes the facts and the Court of Appeals discussion regarding uncertainty, suggesting that the Court accepted Speed's assertion that USAA was "uncertain." It did not. Instead, the Court of Appeals clearly recognized that it was Speed's assertion *only* that USAA was "alleged[ly] uncertain." Op. ¶40.

and *American Best Food*, once again, is wholly misplaced. This Court explained in *National Surety*, 176 Wn.2d at 879, and in *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 54, 164 P.3d 454 (2007), that *if* an insurer is unsure about coverage, it *may* choose to defend under a reservation of rights and by defending under a reservation of rights, the insurer avoids breaching its duty to defend and claims of waiver or estoppel, should a court later find that insurer had a duty to defend. *National Surety*, 176 Wn.2d at 879 ("When an insured is uncertain of its duty to defend, it may defend under a reservation of rights while seeking a declaratory judgment relieving it of its duty to defend); *Woo*, 161 Wn.2d at 54 (defending under a reservation of rights allows the insurer to protect its interests without facing claims of waiver or estoppel and if a court finds no duty to defend, the insurer is free to walk away). The Court did not hold in either of these cases, that when an insurer is subjectively uncertain about its duty, it *must* defend.

Finally, *American Best Food v. Alea London, Ltd.*, 168 Wn.2d 398, 408, 229, P.3d 693 (2010) is of no help to Speed. In that case, a *legal* uncertainty was at issue, not the insurer's alleged subjective uncertainty. The Court held that where a *legal* uncertainty exists as to a duty to defend or coverage, the insurer must defend. *Id.* at 408, 411. There, the insurer was unable to point to any Washington case law supporting its interpretation of an exclusion in its insurance policy, but case law in other jurisdictions

held the exclusion did not apply to preclude coverage under the facts presented. *Id.* at 408. Under those circumstances, the Court held that a *legal ambiguity* existed, coupled with an ambiguity in the policy, and that all ambiguities are to be construed in favor of the insured. *Id.* at 408, 411. Here, there was never a legal uncertainty as to whether Speed's assault claim could conceivably be covered under the USAA policies – it could not – and Speed has never argued to the contrary.[9] Speed has thus failed to satisfy his burden of establishing that the Court of Appeals' decision is in conflict with Washington Supreme Court precedent. Accordingly, his Petition for Review should be denied.

3. There Is No Duty To Attempt To Settle In The Absence Of A Duty To Defend.

Finally, Speed's argument in his Petition for Review that USAA had a duty to explore settlement is again premised on his flawed assertion that USAA had a duty to defend and/or was defending under a reservation of rights. He cites to *Moratti ex. Rel. Tarutis v. Farmers Ins. Co.*, 162 Wn.

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[9] Further, as the Court of Appeals explained, determining whether a duty to defend exists is a question of law for the court to decide, based solely on the claim allegations asserted against the insured – here the assault allegations – and the terms of the insurance policy. (Op. ¶41), citing *Woo*, 161 Wn.2d at 52-53. As a result, "an insurer's alleged subjective beliefs have no place in the analysis." (Op. ¶43) To allow an insurer's alleged subjective uncertainty regarding coverage to trigger a duty to defend, "would conflict with the rule that insurance coverage cannot be created by equitable estoppel." (Op. ¶42), citing *Shows v. Pemberton*, 73 Wn. App. 107, 111, 868 P.2d 164 (1994)("'[U]nder no conditions can . . . coverage or restrictions on the coverage be extended by the doctrine of waiver or estoppel.") (quoting *Carew, Shaw & Bernasconi v. Gen. Cas. Co. of Am.*, 189 Wash. 329, 336, 65 P.2d 689 (1937).

App. 495, 503, 254 P.2d 939 (2011), *rev. denied*, 173 Wn.2d 1022, *cert. denied*, 133 S.Ct. 198 (2012), but in that case, unlike here, the insurer had a duty to defend and therefore, it also had a duty to attempt to settle. *See also, Hamilton* v. *State Farm Ins. Co.*, 83 Wn.2d 787, 523 P.2d 193 (1974) (addressing the parameters of an insurer's duty to settle where there was no dispute as to the duty to defend). Speed does not cite any legal authority imposing a duty to attempt to settle in the absence of a clear duty to defend. In short, his assertion that the Court of Appeals decision conflicts with Supreme Court precedent on this issue is simply not accurate.

V. CONCLUSION

The Court of Appeals properly applied well-established Washington Supreme Court precedent to hold that USAA had no duty to defend, settle or indemnify Geyer for his intentional, deliberate assault on Speed. The Court of Appeals' opinion and conclusions do not conflict with any of the cases Speed cites in his Petition for Review. Speed has failed to satisfy his burden of establishing that the Court of Appeals' decision conflicts with any Supreme Court decision. Accordingly, the standard for accepting discretionary review set forth in RAP 13.4(b)(1) has not been met and the Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 28th day of April, 2014.

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Declaration of Service

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

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Cc: Simon Forgette; Ben@benbarcus.com; Howard Goodfriend; Irene Hecht; Maureen Falecki; HeatherS@benbarcus.com; Victoria@washingtonappeals.com
Subject: RE: 89972-0 - Robert J. Speed v. United Services Automobile Association

Rec'd 4-29-14

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From: Barbara Creely [mailto:bcreely@KellerRohrback.com]
Sent: Tuesday, April 29, 2014 9:43 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Simon Forgette; Ben@benbarcus.com; Howard Goodfriend; Irene Hecht; Maureen Falecki; HeatherS@benbarcus.com; Victoria@washingtonappeals.com
Subject: 89972-0 - Robert J. Speed v. United Services Automobile Association

Supreme Court No. 89972-0 Robert Speed v. United Services Automobile Association
Court of Appeals No. 43728-7-II

Attached please find the following brief for filing in the above-referenced matter:

1. Respondent United Services Automobile Association's Answer to Petition for Discretionary Review.

Thank you for your attention to this matter.

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