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,

vs.

UNITED SERVICES AUTOMOBILE ASSOCIATION,

Respondent.

PETITION FOR REVIEW

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I. Identity Of Petitioner.

Robert Speed was plaintiff below and appellant in the Court of Appeals.

II. Court Of Appeals Decision.

Mr. Speed seeks review of the Court of Appeals published opinion of January 28, 2014, affirming the trial court's dismissal of his claim that respondent United Services Automobile Association breached its duty to defend under its homeowner's and automobile liability policies. *United Services Auto. Ass'n v. Speed*, _ Wn. App. _, 317 P.3d 532 (2014) (App. A).

III. Issue Presented For Review.

Can an insurer's failure to defend a claim or explore settlement after telling its insured that it will handle the tendered claim under a reservation of rights be excused by a court finding years later that there was no indemnity coverage for the claim?

IV. Statement Of The Case.

A. USAA agreed to handle a claim against Dr. Geyer under a reservation of rights while investigating coverage.

In 2009, Dennis J. Geyer, M.D. was a neurosurgeon who was on active duty in the U.S. Army. (CP 322) On March 2, 2009, Dr. Geyer was returning home from Madigan Hospital when he

narrowly avoided losing control of his car after being cut off by petitioner Robert Speed. (Op. ¶ 2; CP 322-23) Dr. Geyer followed Mr. Speed intending to obtain information to report the incident. (CP 323)

A confrontation ensued between Mr. Speed and Dr. Geyer. (Op. ¶¶ 1-2) Dr. Geyer struck Mr. Speed and returned to his vehicle. (Op. ¶ 2; CP 324) The blow left Mr. Speed stunned and leaning against his car. (CP 324, 488-89) After Dr. Geyer got into his own vehicle to leave he saw Mr. Speed fall to the ground and strike his head on the pavement. (CP 324, 489-90) Mr. Speed was seriously injured in the incident. (Op. ¶ 2; CP 487-90) Dr. Geyer was charged with felony assault. (Op. ¶ 2; CP 323)

In August 2009, Mr. Speed sent a written claim for bodily injury and an offer of settlement to Dr. Geyer. (Op. ¶ 2; CP 369-76) Anticipating that Dr. Geyer's insurer would resist coverage based upon his allegation that Dr. Geyer "beat Mr. Speed," Mr. Speed's demand asserted that as a neurosurgeon, "Dr. Geyer has the ability to borrow money." (CP 371, 375) Mr. Speed sought $650,000 and offered to "recommend to the prosecutor that Dr. Geyer be allowed to plead to a misdemeanor assault charge." (Op. ¶ 2; CP 375)

Dr. Geyer tendered the claim to USAA on October 14, 2009. (Op. ¶ 3; CP 385) Dr. Geyer's version of what happened differed from the version contained in Mr. Speed's August 2009 settlement demand letter, which USAA received on October 28, 2009. (Op. ¶ 3; CP 389) On October 15, Dr. Geyer suggested to USAA's adjuster in a recorded statement that he had acted in self defense in the altercation with Mr. Speed. (Op. ¶ 3; CP 529-530) Dr. Geyer expressly stated that he acted in self defense in a phone conversation with the adjuster on November 3. (CP 386 at p. 26-29)

USAA's duty to provide a defense to Dr. Geyer upon tender of Mr. Speed's claim is not in dispute. (Op. ¶ 18) Dr. Geyer was insured under two policies with USAA, a homeowner's policy with $500,000 in liability limits (Op. ¶ 3; CP 420), and an automobile policy with $300,000 in liability limits. (Op. ¶ 3; CP 422) Both the homeowner's and auto policies required USAA to provide a defense

to Dr. Geyer for a "claim" as well as a "suit."[1] (Op. ¶ 18) As the Court of Appeals noted, "in this case USAA's homeowners and auto policies both provided that USAA's duty to defend arose not only when a 'suit' was brought against the insured, but also when any 'claim' was made for damages arising from acts covered under the policies. USAA . . . concedes on appeal that the language in these policies triggered a duty to defend when Speed asserted a claim." (Op. ¶ 18)

Having received different versions of the incident from Mr. Speed and its insured, USAA was uncertain as to whether there was

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[1] The homeowner's policy stated:

> **If a claim is made** or a suit is brought against an insured...**we will:**
>
> 1. **pay** up to our limit of liability... **and**
>
> 2. **provide a defense at our expense** by counsel of our choice, even if the suit is groundless, false or fraudulent... **Our duty to settle or defend** ends when the amount we pay or tender for damages resulting from the occurrence equals our limit of liability, so long as such payment or tender represents and protects the interests of the insured.

(CP 546) (emphasis added). The auto policy provided:

> **We will settle or defend**, as we consider appropriate, **any claim or suit** asking for these damages. **Our duty to settle or defend** ends when our limit of liability for these coverages has been exhausted by payment of judgments or settlements.

(CP 553) (emphasis added)

coverage for Dr. Geyer under his homeowner's or auto policies. (Op. ¶¶ 4-5) On October 19, 2009, USAA notified Dr. Geyer that because there were "potential coverage issues under your automobile and homeowner's policies," it would investigate the claim while reserving its right to deny coverage. (Op. ¶ 4; CP 412, 417-18) In its reservation of rights letter to Dr. Geyer, USAA stated that it would investigate Mr. Speed's claim, explore settlement and defend Dr. Geyer pending a coverage determination:

> Please be advised that USAA's willingness to investigate, settle, or defend you in any way, in the above referenced matter, is based solely on the condition that USAA is fully reserving all of its rights to: deny coverage; have coverage judicially determined at an appropriate time; withdraw from providing any type of defense assistance at any time; and to recover its defense expenditures, if allowable by the laws in your state, once coverage is determined.

(CP 417)

In two letters dated October 26, 2009 (one for each policy), USAA advised Dr. Geyer that Mr. Speed's claim was likely to exceed his insurance coverages and noted: "**If a lawyer is needed to defend you, we will hire one.**" (CP 420, 422) (emphasis added) USAA did not thereafter deny coverage. According to its adjuster, USAA's practice is to "look for coverage when we can possibly find it for our insureds." (CP 391 at p. 47)

B. USAA failed to provide a defense or explore settlement when it had the opportunity to protect Dr. Geyer from a felony conviction.

As the Court of Appeals noted, "USAA did not retain counsel to defend Geyer at this time and did not advise Geyer whether or not it believed that it had a duty to defend Speed's claim. USAA apparently assumed that it had no duty to defend until a lawsuit was filed." (Op. ¶ 5)

Although Mr. Speed had expressed a willingness to urge the prosecutor to drop felony assault charges against Dr. Geyer as part of a settlement, USAA did not have its adjusters explore settlement with Mr. Speed during the months leading up to his criminal trial. (Op. ¶ 6) It is undisputed that USAA did not respond to Mr. Speed's August, 2009 settlement demand letter. (CP 408-09 at p. 116-17)

On February 8, 2010, Dr. Geyer was found not guilty of assault in the second degree, but guilty of the lesser felony of assault in the third degree, which requires a finding of criminal negligence, rather than criminal intent. (Op. ¶ 6; CP 67, 517) *See* RCW 9A.36.031(d),(f). The cost of defending the criminal charge depleted Dr. Geyer's savings and the felony conviction jeopardized his ability to practice medicine as a neurosurgeon. (CP 405 at 105, 444-47, 611-13)

Following Dr. Geyer's conviction on April 13, 2010, Mr. Speed's attorney sent a second settlement offer of $800,000, accusing USAA of bad faith in refusing to previously respond to Mr. Speed's initial demand. (Op. ¶ 7; CP 611-13) USAA advised Dr. Geyer that "coverage is still questionable," but that it was not finally denying "all policy benefits which might be available to you." (Op. ¶ 7; CP 81) On May 20, 2010, USAA's adjuster received authority from her manager to make a $50,000 offer "to attempt resolution." (CP 874) USAA offered Mr. Speed $25,000, emphasizing that "there is a question of coverage for this loss." (CP 897)

On January 20, 2011, Dr. Geyer settled with Mr. Speed at a mediation where Dr. Geyer was represented by privately retained counsel and USAA had a lawyer represent its own interests. (Op. ¶ 8; CP 390 at pp. 44-45) Dr. Geyer agreed to entry of a $1.4 million judgment in exchange for Mr. Speed's covenant not to execute, and assigned his claims against USAA to Mr. Speed. (Op. ¶ 8)

On Feb. 8, 2011, Mr. Speed filed a lawsuit against Dr. Geyer in order to have their settlement approved by the court. (Op. ¶ 10; CP 4-5) It was only then that USAA provided Dr. Geyer with a lawyer to defend the lawsuit. (Op. ¶ 10; CP 390 at p. 45) Over the

objection of USAA, the superior court found that the $1.4 million settlement was reasonable. (CP 336)

C. In a published decision, the Court of Appeals absolved USAA of its failure to defend Dr. Geyer based upon the subsequent determination that the claim fell outside the scope of USAA's indemnity coverage.

USAA did not request a coverage opinion from an attorney until after Dr. Geyer was convicted of a felony assault. (Op. ¶ 6) In May 2010, that attorney told USAA that he did not believe there was coverage under the policy but that, under Washington Supreme Court decisions, "...the safest course of action is to defend under a reservation of rights regardless of what the law appears to be, file a declaratory action, and have a judge determine whether a duty to defend exists." (Op. ¶ 6; CP 624) However, USAA did not file its declaratory judgment action until 2011, after Dr. Geyer and Mr. Speed had reached their settlement agreement. (CP 6) In a counterclaim, Mr. Speed asserted Dr. Geyer's assigned claims against USAA for bad faith. (CP 326-30)

The trial court denied summary judgment to Mr. Speed on his claim that USAA breached its duty to defend, holding that the duty to defend was "subordinate to the issue as to finding that there is policy coverage under the facts of this case." (CP 630) It then

granted USAA summary judgment, holding that there was no coverage for Mr. Speed's claim, and that USAA owed Dr. Geyer no duty to defend him under its automobile and homeowner liability policies. (CP 917-21)

Division Two affirmed in a published decision. *United Services Auto. Ass'n v. Speed*, ___ Wn. App. ___, 317 P.3d 532 (2014). While recognizing that the duty to defend was broader than the duty to indemnify, the court held that Mr. Speed's claim did not trigger a duty to defend because his demand letter "unambiguously described Geyer's conduct as deliberate" and did not constitute an "accident." (Op. ¶¶ 33, 36, 39)

The court held that USAA had no duty to defend, notwithstanding its uncertainty reflected in its reservation of rights letter and other correspondence with its insured, because the "existence of a duty to defend is a question of law for the court, based solely on the claim allegations" and not based on the "insurer's subjective uncertainty regarding coverage:"

> We reject the argument that an insurer's subjective uncertainty regarding coverage can trump the court's legal determination that no duty to defend exists based on the claim allegations and the policy language. We hold that USAA's statements indicating "uncertainty" regarding coverage have no bearing on our holding that USAA had no duty to defend Speed's

claim as a matter of law based on the claim allegations and USAA's policy language.

(Op. ¶¶ 41, 43)

V. Argument Why Review Should Be Granted.

A. The Court of Appeals published decision undermines this Court's consistent precedent requiring an insurer to provide a defense when it is uncertain about indemnity coverage, and allows an insurer to avoid its defense obligations based on a finding years later that no indemnity coverage exists.

An insurer's duty to vigorously defend its insured once it undertakes to handle a claim under a reservation of rights cannot turn on a coverage determination made years later. Having acknowledged its willingness to "investigate, settle, or defend" Dr. Geyer while reserving the right to deny coverage, and having delayed in obtaining a judicial determination that the claim was not covered, USAA had the obligation to do more than investigate whether the claim was covered under its liability policy. *See Tank v. State Farm, Fire & Cas. Co.*, 105 Wn.2d 381, 388, 715 P.2d 1133 (1986). Its obligation here included the duty to provide its insured Dr. Geyer with defense counsel and to attempt to settle Mr. Speed's claim on terms that would protect Dr. Geyer. *Moratti ex rel. Tarutis v. Farmers Ins. Co. of Washington*, 162 Wn. App. 495, 503, ¶ 11, 254 P.3d 939 (2011), *rev. denied*, 173 Wn.2d 1022, *cert.*

denied, 133 S.Ct. 198 (2012). Once the duty to defend has been triggered, a subsequent determination that there was no indemnity coverage does not excuse an insurer's failure to provide a good faith defense under a reservation of rights. *See National Surety Corp. v. Immunex*, 176 Wn.2d 872, 878-88, ¶¶ 9-33, 297 P.3d 688 (2013).

This Court has consistently and scrupulously protected an insured's right to a defense, not just as a matter of contract interpretation, but as a matter of public policy. The Court of Appeals correctly recognized that USAA's obligations were triggered when USAA received Mr. Speed's "claim," but its holding that USAA had no obligation to provide a defense to Dr. Geyer after it accepted its insured's tender under a reservation of rights conflicts with established precedent. RAP 13.4(b)(1), (2). This Court should accept review, reverse the Court of Appeals, and hold that USAA had a good faith duty to defend its insured against a claim, as it policies required, until the indemnity coverage issue was resolved.

1. The Court of Appeals decision conflicts with *Tank*, *Woo*, and *National Surety*, because an insurer that undertakes the handling of a claim under a reservation of rights must vigorously defend its insured.

Since *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986), this Court has consistently held that where, as here, coverage is uncertain, an insurer must defend its insured under a reservation of rights. The insurer may seek a prompt determination of coverage by filing a declaratory judgment action, but must vigorously defend its insured while that determination is pending and, while doing so, may not put its own interests above those of its insured. *See National Surety Corp. v. Immunex*, 176 Wn.2d 872, 878-88, ¶¶ 9-33, 297 P.3d 688 (2013); *Woo v. Firemen's Fund Ins. Co.*, 161 Wn.2d 43, 54, ¶ 16, 164 P.3d 454 (2007). *See also American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 405, ¶ 16, 229 P.3d 693 (2010) (insurer must "defend until it is clear that the claim is not covered.").

While the Court of Appeals correctly noted that USAA's adjusters repeatedly stated their "uncertainty" regarding coverage,

(Op. at ¶ 40),[2] that subjective uncertainty about coverage is not the sole basis for Dr. Geyer's bad faith claim. USAA's "uncertainty" motivated USAA to affirmatively represent to Dr. Geyer that it was willing to "investigate, settle or defend . . . on the condition that USAA is fully reserving all of its rights to: deny coverage. . ." in its October 19 letter, but USAA failed to recognize that, under its policy, its duty was triggered upon receipt of Dr. Geyer's "claim." (CP 417) Once USAA undertook the handling of Mr. Speed's claim against Dr. Geyer under a reservation of rights it had the obligation to do so competently and in good faith, even if, as in *Tank*, as in *Woo*, and as in *Alea*, the underlying allegations of assault made coverage "uncertain."

USAA's obligation to provide its insured with the defense promised by its policies came with "unquestionable benefits" to USAA, because an insurer that fulfills its duty to defend under a reservation of rights may avoid the "potentially disastrous findings

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[2] *See* CP 383 at p. 16 (USAA adjusters in May 2009 "were not sure there would be coverage under the homeowner's policy or coverage under the auto policy while we were investigating"); CP 391 at p. 47 (USAA "look[s] for coverage when we can possibly find it for our insureds."); CP 870 ("[c]overage is being investigated" in December 2009); CP 874 (adjuster notes that as of May 2010, "there are still pending [coverage] issues").

of breach, bad faith, waiver, and coverage by estoppel." *National Surety*, 176 Wn.2d at 880, ¶ 13. USAA's obligation to defend fully and in good faith is the price it pays for avoiding the harsh consequences that Washington law imposes upon an insurer that abandons its insured. *See National Surety*, 176 Wn.2d at 880, ¶ 13; *Tank*, 105 Wn.2d at 387-88.

Conversely, Dr. Geyer, who was told that USAA would "investigate, settle, or defend," his claim had the right to assume that USAA would be looking out for his interests, including exploring settlement with Mr. Speed's attorneys. Had USAA flatly denied him a defense and indemnity coverage, Dr. Geyer could have hired counsel, or negotiated directly with Mr. Speed to protect himself against the ruinous consequences of a felony conviction.

A reservation of rights letter does not give an insurer a free pass to ignore its fundamental obligation to defend in good faith. The Court of Appeals decision undermines the duty to defend that this Court has scrupulously enforced since *Tank*.

2. The Court of Appeals published decision conflicts with established precedent imposing upon insurers the obligation to investigate and attempt settlement on terms favorable to its insured.

An insurer's duty to defend a claim under a reservation of rights includes the duty to explore settlement on terms favorable to the insured. The Court of Appeals erroneously excused USAA's failure to defend or explore settlement at a time when Dr. Geyer was threatened with the loss of his livelihood on the basis of the trial court's finding years later that Mr. Speed's indemnity claim was not covered by USAA's policy.

The *Tank* court imposed upon an insurer defending under a reservation of rights an "enhanced obligation" of good faith because of the "potential conflicts of interest between insurer and insured inherent in this type of defense." *Tank*, 105 Wn.2d at 387-88. In defending its insured, the insurer "must refrain from engaging in any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk." 105 Wn.2d at 388.

The duty of good faith requires an insurer to defend its insured irrespective of any coverage issues, and includes the duty to investigate, to provide defense counsel, and "an obligation at least

to conduct good faith settlement negotiations sufficient to ascertain the most favorable terms available and make an informed evaluation of the settlement demand." *Truck Ins. Exchange of Farmers Ins. Group v. Century Indemn. Co.*, 76 Wn. App. 527, 534, 887 P.2d 455, *rev. denied*, 127 Wn.2d 1002 (1995); WPI 320.05; *see Moratti*, 162 Wn. App. at 504, ¶ 13. "The flat refusal to negotiate, under circumstances of substantial exposure to liability, a demonstrated receptive climate for settlement, and limited insurance coverage may show lack of good faith." *Hamilton v. State Farm Ins. Co.*, 83 Wn.2d 787, 794, 523 P.2d 193 (1974) (quotation omitted). As USAA conceded below (Resp. Br. 39 and CP 393 at p. 54), USAA's duty to investigate and explore settlement arose not out of a duty to indemnify, but from its duty to defend Dr. Geyer in good faith. *See Truck*, 76 Wn. App. at 533-34.

After issuing its reservation of rights letter, USAA focused its efforts on investigating coverage, at the expense of its insured's defense. Even though USAA's policies "both provided that USAA's duty to defend arose not only when a 'suit' was brought against the insured, but also when any 'claim' was made for damages arising from acts covered under the policies," (Op. ¶ 18), USAA's adjusters failed to take any steps to defend Dr. Geyer under the mistaken

assumption "that it had no duty to defend until a lawsuit was filed." (Op. ¶ 5) Mr. Speed had offered to seek a resolution of his claim that would protect Dr. Geyer from the devastating consequences of a felony conviction. However, USAA refused to explore any type of settlement, refused to determine whether Dr. Geyer would contribute his own assets, and refused to substantively respond to Mr. Speed's settlement offer, doing nothing more than acknowledging its receipt. (CP 566)

An insurer defending under a reservation of rights cannot put its own interest in resolving the question of coverage ahead of its insured's interest in obtaining a vigorous defense. The Court of Appeals decision provides an incentive to insurers to ignore their insureds' interests while investigating coverage issues. Its published decision conflicts with decisions from this Court and the Court of Appeals. RAP 13.4(b)(1), (2).

3. The Court of Appeals published decision allows a subsequent indemnity coverage determination to retroactively defeat the insurer's good faith duty to defend, in conflict with *National Surety v. Immunex*.

By excusing an insurer's failure to actively defend its insured under a reservation of right based upon a subsequent

determination of no indemnity coverage, the Court of Appeals decision makes the promised for defense under a reservation of rights illusory. This Court expressly rejected this very reasoning in *National Surety v. Immunex.*

In *National Surety*, this Court held that an insurer defending under a reservation of rights is not entitled to recoup defense costs where a court later determines that the tendered claim is not covered under its policy. The Court reasoned that a contrary rule "renders the *defense* portion of a reservation of rights defense illusory" to the insured. *National Sur. Corp. v. Immunex Corp.*, 176 Wn.2d at 885, ¶ 26 (emphasis in original). "By insuring itself against potentially disastrous findings of breach, bad faith, waiver, and coverage by estoppel, an insurer unquestionably benefits from its decision to defend under a reservation of rights – even when, as here, a court later finds that it owes no duty to continue that defense." *Nat'l Surety*, 176 Wn.2d at 880, ¶ 13.

Here, USAA sought to reap the benefits of reserving its right to deny coverage without fulfilling its obligation to provide its insured the defense that this Court requires as a condition to those benefits. This is the same "all reward, no risk proposition" that this Court rejected in *Nat'l Surety*, 176 Wn.2d at 885, ¶ 26. In excusing

USAA from its defense obligations based upon a subsequent determination that there was no indemnity coverage, the Court of Appeals left Dr. Geyer worse off than had USAA "refused to defend outright," 176 Wn.2d at 885, ¶ 26, because then at least Dr. Geyer would have looked to his insurer to "investigate, settle, or defend" Mr. Speed's claim. (CP 417)

A court's subsequent determination of non-coverage cannot nullify an insurer's obligation to defend under a reservation of rights. In concluding, years after the fact, that because USAA had no contractual duty to indemnify, it had no duty to defend, investigate or explore settlement, the Court of Appeals excused the insurer's failure to protect Dr. Geyer against a ruinous claim. The Court of Appeals decision conflicts with *National Surety*, and encourages insurers who owe a duty to defend under a reservation of rights to ignore their obligations. This Court should accept review and reverse.

VI. Conclusion.

The Court of Appeals decision conflicts with *Tank*, with *National Surety* and with this Court's consistent and emphatic refusal to undermine the duty of good faith owed by an insurer handling a claim under a reservation of rights. This Court should

accept review and hold that USAA had a duty to defend Dr. Geyer in good faith, including the duty to explore settlement at the critical juncture when Dr. Geyer was facing a felony conviction.

Dated this 27th day of February, 2014.

SMITH GOODFRIEND, P.S.

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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:

That on February 27, 2014, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 27th day of February, 2014.

V. Vigoren

Victoria K. Vigoren

317 P.3d 532
Court of Appeals of Washington,
Division 2.

UNITED SERVICES AUTOMOBILE ASSOCIATION, Respondent,
v.
Robert J. SPEED, Appellant.

No. 43728–7–II. | Jan. 28, 2014.

Synopsis
Background: Insurer filed a complaint for declaratory judgment against injured party, who by that time was insured's assignee, seeking a declaration that it had no duty to defend or indemnify insured with respect to injured party's claim for compensation, that it was not estopped from denying coverage under insured's homeowners' and automobile liability policies, and that it had no duty to pay a judgment stipulated by insured and injured party in a settlement. Injured party asserted counterclaims for bad faith. He later filed a separate personal-injury complaint against insured but sought as relief only a ruling that the amount of the settlement was reasonable. The Superior Court, Pierce County, John Russell Hickman, J., ruled that the settlement was reasonable, consolidated the cases, denied injured party's motion for partial summary judgment, granted insurer's motion for partial summary judgment on injured party's claims for bad-faith failure to defend, settle, or indemnify, and dismissed injured party's remaining bad-faith claims. Injured party appealed.

Holdings: The Court of Appeals, Maxa, J., held that:

[1] any duty by insurer to defend was triggered when injured party sent a demand letter to insured;

[2] road-rage incident described in the demand letter did not constitute an "accident" under the homeowners' policy as a matter of law;

[3] road-rage incident described in the demand letter did not constitute an "accident," auto or otherwise, under the automobile policy as a matter of law; and

[4] statements by insurer that indicated its uncertainty regarding coverage had no bearing on a court determination that insurer had no duty to defend.

Affirmed.

Attorneys and Law Firms

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Opinion

MAXA, J.

¶ 1 Robert Speed appeals the trial court's summary judgment dismissal of his duty to defend, duty to explore settlement and bad faith claims against United Services Automobile Association (USAA) arising from Speed's allegation that a USAA insured had deliberately assaulted him in a road rage incident. Speed had filed suit against USAA as the assignee of the insured following entry of a stipulated judgment. We hold that (1) USAA had no duty to defend Speed's claim under either his homeowners or auto insurance policies because the claim did not allege an "accident" as required for coverage under the policies, (2) USAA's "uncertainty" whether to provide a defense did not create a duty to defend when the unambiguous claim allegations did not trigger such a duty, (3) in the absence of a duty to defend USAA had no duty to explore settlement, and (4) the trial court properly denied Speed's bad faith claims. Accordingly, we affirm.

FACTS

Speed's Claim

¶ 2 On March 2, 2009, Dennis Geyer and Speed were involved in an altercation and Speed suffered serious personal injuries. The State charged Geyer with second degree assault with a deadly weapon. On August 25, 2009, Speed's attorney sent a demand letter to Geyer seeking $650,000 to compensate Speed for his injuries. The letter described the incident as follows:

> On March 2, 2009, Mr. Speed and Dr. *536 Geyer[1] were operating their motor vehicles in the vicinity of the Tacoma Narrows Bridge. Dr. Geyer apparently became angry over something Mr. Speed had done while driving in front of him. Once they were on the bridge, Dr. Geyer pulled along side [sic] Mr. Speed and motioned for him to pull over. Frightened, Mr. Speed took the first exit after the bridge. Dr. Geyer followed Mr. Speed for an extended period of time before the two vehicles stopped for a traffic signal. According to witnesses, Dr. Geyer got out of his vehicle, opened the door of Mr. Speed's vehicle and beat Mr. Speed with his fists and a metal thermos, pulling Mr. Speed from his vehicle as he did so. Dr. Geyer then drove away from the scene leaving Mr. Speed bleeding and unconscious in the street.

Clerk's Papers (CP) at 56–57. The letter stated that "[t]his case is aggravated by the intentional conduct of Dr. Geyer, including leaving Mr. Speed, potentially for dead, at the scene" and that "[w]ere this a case of negligence that was covered by insurance" Speed's attorneys would be seeking a seven-figure verdict or settlement. CP at 61. The letter further stated that if Geyer agreed to pay the requested amount, Speed and his attorneys would recommend to the prosecutor that Geyer be allowed to plead guilty to a misdemeanor assault charge.

¶ 3 Geyer carried homeowners and auto insurance with USAA. On October 14, 2009, seven months after the incident, Geyer notified USAA of the incident and Speed's claim. He requested coverage under both policies. By that date, the settlement offer in Speed's demand letter, by its terms, already had been revoked. A USAA adjuster interviewed Geyer the next day, and Geyer's statements suggested that he was claiming self-defense.

USAA's Reservation of Rights and Investigation

¶ 4 In a letter dated October 19, 2009, USAA informed Geyer that "[t]he current facts of this incident give rise to potential coverage issues under both your automobile and homeowner's policies" and that it was investigating his claim under a reservation of its right to deny coverage. CP at 210. With regard to the homeowners policy, the letter stated that the incident facts indicated that Speed's injuries may not have been the result of an "occurrence" as defined in the policy because Speed alleged that Geyer had intentionally and deliberately struck him in the head. The letter also stated that the policy may not provide coverage because of the intentional act exclusion. With regard to the auto policy, the letter stated that Speed's claim might not be the result of an "auto accident" as defined in the policy and that the policy may not provide coverage under the intentional act exclusion. CP at 213–14.

¶ 5 USAA did not retain counsel to defend Geyer at this time and did not advise Geyer whether or not it believed that it had a duty to defend Speed's claim. USAA apparently assumed that it had no duty to defend until a lawsuit was filed. However, USAA did undertake a liability and coverage investigation regarding Speed's claim. USAA also informed Speed's attorney that it had received notice of the claim and that "[a]ny pending claim(s) is unresolved because we continue to investigate coverage and liability in this matter." CP at 566.

¶ 6 USAA continued to monitor and investigate Speed's claim for the next several months. The trial on Geyer's criminal charges occurred in February 2010. Geyer admitted that he had deliberately hit Speed, but claimed he was acting in self-defense. A jury found Geyer guilty of third degree assault. Following the verdict, USAA obtained a coverage opinion from an attorney. In a May 5 letter, the attorney concluded that USAA should not have a duty to defend or provide indemnity for Speed's claim, but that the "safest course of action" would be to provide a defense under a reservation of rights. CP at 620.

Settlement Negotiations

¶ 7 On April 13, 2010, Speed offered to release Geyer from all claims if USAA would agree to pay the combined policy limits under Geyer's homeowners and auto insurance *537 policies, totaling $800,000. In a May 10, 2010, letter, USAA explained to Geyer why it would not pay the demand. USAA stated that it was unlikely that it had a duty to indemnify Geyer because Speed's injuries were not caused by an accident or an auto accident and the policies excluded coverage for an intentional or purposeful act. However, the letter also stated:

> Although USAA is rejecting the demand, neither the rejection nor this letter should be read as a final denial of all policy benefits which

> might be available to you. Our previous letter of October 19, 2009, informed you that coverage is questionable. Since that date, we have received and reviewed the criminal trial transcripts, and coverage is still questionable.

CP at 81. USAA ultimately did make a $25,000 settlement offer, which Speed rejected.

¶ 8 On January 20, 2011, Geyer and Speed agreed to a settlement. Geyer stipulated to the entry of a $1.4 million judgment in exchange for Speed's covenant not to execute the judgment against Geyer's assets. Geyer also assigned all his potential breach of contract and bad faith claims against USAA to Speed.

Litigation

¶ 9 On January 24, 2011, USAA filed a complaint for declaratory judgment against Speed, seeking a declaration that it had no duty to defend or indemnify Geyer for the claim, was not estopped from denying coverage, and had no duty to pay the $1.4 million stipulated judgment. Speed counterclaimed, alleging that USAA acted in bad faith in failing to defend, properly investigate or settle the Speed claim and that USAA violated the Insurance Fair Conduct Act (IFCA), chapter 48.30 RCW, and the Unfair Claims Settlement Practices Regulation, chapter 284–30 WAC.

¶ 10 On February 8, Speed filed a separate personal injury complaint against Geyer, alleging that Geyer had negligently caused Speed's injuries. However, the only relief requested was a ruling that the settlement amount was reasonable. After Speed filed the complaint, USAA provided Geyer with a defense attorney. The trial court concluded that the settlement was reasonable.

¶ 11 The trial court consolidated Speed's personal injury suit and USAA's declaratory judgment action. Speed moved for partial summary judgment, asking the trial court to rule that USAA had a duty to defend Geyer upon receiving notice of Speed's personal injury claim and that USAA's failure to provide counsel to Geyer constituted bad faith. The trial court denied Speed's summary judgment motion, ruling that the issue of whether USAA had a duty to defend was "subordinate to the issue as to finding that there is policy coverage under the facts of this case." CP at 630.

¶ 12 USAA subsequently moved for partial summary judgment, asking the trial court to declare as a matter of law that (1) there was no coverage under either policy, (2) USAA had no duty to defend Geyer, (3) USAA's failure to defend was not in bad faith, and (4) USAA was not estopped from denying coverage. The trial court granted the motion and dismissed Speed's claims for bad faith failure to defend, settle, or indemnify. USAA then moved to dismiss Speed's statutory and regulatory bad faith claims. Speed did not oppose the motion and agreed that those claims were "inextricably tied to USAA's duties to defend, settle or indemnify which the Court has now dismissed with prejudice." CP at 947.

¶ 13 Speed appeals the trial court's orders denying his summary judgment motion, granting USAA's summary judgment motion, and granting USAA's motion to dismiss his remaining bad faith claims.

ANALYSIS

[1] [2] ¶ 14 The trial court dismissed Speed's claims on summary judgment. We review a summary judgment order de novo, engaging in the same inquiry as the trial court. *Woo v. Fireman's Fund Ins. Co.*, 161 Wash.2d 43, 52, 164 P.3d 454 (2007). In addition, the interpretation of an insurance policy generally is a question of law that we review de novo. *Woo*, 161 Wash.2d at 52, 164 P.3d 454.

*538 A. DUTY TO DEFEND

1. Introduction

[3] [4] ¶ 15 Most standard liability insurance policies impose upon the insurer two distinct duties: the duty to defend the insured against lawsuits or claims and the duty to indemnify the insured against any settlements or judgments. *See St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wash.2d 122, 129, 196 P.3d 664 (2008). Significantly, the duty to defend is different from and broader than the duty to indemnify. *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wash.2d 398, 404, 229 P.3d 693 (2010). 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. *Am. Best Food*, 168 Wash.2d at 404, 229 P.3d 693. An insurer's duty to defend is "one of the principal benefits of the liability insurance policy." *Woo*, 161 Wash.2d at 54, 164 P.3d 454. "The entitlement to a defense may prove to be of greater benefit to the insured than indemnity." *Am. Best Food*, 168 Wash.2d at 405, 229 P.3d 693.

[5] [6] [7] ¶ 16 We generally examine only the allegations against the insured and the insurance policy provisions to determine whether the duty to defend is triggered. *See Woo,* 161 Wash.2d at 53–54, 164 P.3d 454; *Holly Mountain Res., Ltd. v. Westport Ins. Corp.,* 130 Wash.App. 635, 647, 104 P.3d 725 (2005), *overruled on other grounds by Nat'l Sur. Corp. v. Immunex Corp.,* 176 Wash.2d 872, 297 P.3d 688 (2013). Therefore, whether a claim triggers a duty to defend is a question of law that we review de novo. *See Woo,* 161 Wash.2d at 52, 164 P.3d 454 (interpretation of insurance contract is question of law subject to de novo review). Based on a review of the allegations against the insured and the insurance policy provisions, the trial court—and this court on de novo review—must decide as a matter of law either that the insurer has a duty to defend or that no duty to defend exists. While the duty to indemnify may depend upon resolution of factual issues, there generally are no questions of fact for the duty to defend.

2. Trigger of Duty To Defend

¶ 17 Most Washington cases recite that the insurer's duty to defend is triggered when a complaint is filed against the insured. *E.g., Mut. of Enumclaw Ins. Co. v. USF Ins. Co.,* 164 Wash.2d 411, 420–21, 191 P.3d 866 (2008); *see also Woo,* 161 Wash.2d at 52, 164 P.3d 454 (duty to defend arises when an "action" is brought). The cases reference a "complaint" because most standard policies only require the insurer to defend a "suit" against the insured. *See Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.,* 123 Wash.2d 891, 902, 874 P.2d 142 (1994).

[8] ¶ 18 However, in this case USAA's homeowners and auto policies both provided that USAA's duty to defend arose not only when a "suit" was brought against the insured, but also when any "claim" was made for damages arising from acts covered under the policies. USAA argued below that its duty to defend arose only when Speed filed a lawsuit, but concedes on appeal that the language in these policies triggered a duty to defend when Speed asserted a claim. Accordingly, here any duty to defend was triggered when Speed sent his demand letter to Geyer, and the duty to defend is based on the allegations in that letter.

3. Scope of Duty To Defend

¶ 19 Our Supreme Court repeatedly has confirmed that insurers have a broad duty to defend. *E.g., Am. Best Food,* 168 Wash.2d at 404, 229 P.3d 693; *Woo,* 161 Wash.2d at 52–54, 164 P.3d 454. These cases have emphasized the following rules:

¶ 20 1. The duty to defend generally " 'must be determined only from the complaint.' " *Woo,* 161 Wash.2d at 53, 164 P.3d 454 (quoting *Truck Ins. Exch. v. VanPort Homes, Inc.,* 147 Wash.2d 751, 761, 58 P.3d 276 (2002)). The insurer cannot rely on facts extrinsic to the complaint to deny a duty to defend. *Woo,* 161 Wash.2d at 54, 164 P.3d 454.

¶ 21 2. A duty to defend exists if the facts alleged in the complaint against the insured, if proven, would trigger coverage under the policy. *Am. Best Food,* 168 Wash.2d at 404, 229 P.3d 693.

***539** ¶ 22 3. If the complaint is ambiguous, it must be construed liberally in favor of triggering a duty to defend. *Woo,* 161 Wash.2d at 53, 164 P.3d 454.

¶ 23 4. The duty to defend is based on the *potential* for coverage. *Woo,* 161 Wash.2d at 52–53, 164 P.3d 454. The duty is triggered if the insurance policy *conceivably* covers the allegations in the complaint. *Am. Best Food,* 168 Wash.2d at 404, 229 P.3d 693.

¶ 24 5. The insured must be given the benefit of the doubt and a duty to defend will be found unless it is clear from the face of the complaint that the policy does not provide coverage. *Woo,* 161 Wash.2d at 64, 164 P.3d 454.

¶ 25 6. "[I]f there is any reasonable interpretation of the facts or the law that could result in coverage, the insurer must defend." *Am. Best Food,* 168 Wash.2d at 405, 229 P.3d 693.

[9] ¶ 26 There are two exceptions to the rule that the duty to defend must be determined only from the complaint. First, if the complaint allegations are unclear, the insurer must investigate to determine if there are any facts in the complaint that could conceivably give rise to a duty to defend. *Woo,* 161 Wash.2d at 53–54, 164 P.3d 454. Second, if the complaint allegations conflict with known facts or are ambiguous or inadequate, the insurer may consider facts outside the complaint in order to trigger—but not to deny—a duty to defend. *Woo,* 161 Wash.2d at 54, 164 P.3d 454.

[10] ¶ 27 Despite these broad rules favoring the insured, insurers do not have an unlimited duty to defend. "Although this duty to defend is broad, it is not triggered by claims that clearly fall outside the policy." *Immunex,* 176 Wash.2d at 879, 297 P.3d 688.

[11] [12] [13] [14] [15] ¶ 28 Because the duty to defend is determined based on the allegations in the complaint (or

in this case, in the demand letter) and is broader than the duty to indemnify, whether or not a court subsequently finds no duty to indemnify is irrelevant to the existence of a duty to defend. The duty to defend arises when the claim is first brought. *Woo,* 161 Wash.2d at 52, 164 P.3d 454. If a duty to defend exists, the insurer must defend until a determination of no coverage. *Am. Best Food,* 168 Wash.2d at 405, 229 P.3d 693. " 'Once the duty to defend attaches, insurers may not desert policyholders and allow them to incur substantial legal costs while waiting for an indemnity determination.' " *Am. Best Food,* 168 Wash.2d at 405, 229 P.3d 693 (quoting *VanPort Homes,* 147 Wash.2d at 760, 58 P.3d 276). If an insurer does defend, a finding of no coverage eliminates the duty to defend only from that point forward. *Immunex,* 176 Wash.2d at 885–86, 297 P.3d 688 (insurer has no right to obtain reimbursement of defense costs based on a later determination of no coverage).[2]

4. USAA Homeowners Insurance Policy

[16] ¶ 29 USAA's homeowners insurance policy provided coverage for bodily injury caused by an "occurrence", which the policy defines as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in ... bodily injury." CP at 210–11. The question here is whether it is conceivable that the incident described in Speed's demand letter could be considered an "accident."

[17] [18] ¶ 30 Our Supreme Court has referenced two similar definitions of the term "accident" in insurance coverage cases: (1) "an unusual, unexpected, and unforeseen happening," *Grange Ins. Co. v. Brosseau,* 113 Wash.2d 91, 95, 776 P.2d 123 (1989); and (2) a loss that happens " 'without design, intent, or obvious motivation.' " *Roller v. Stonewall Ins. Co.,* 115 Wash.2d 679, 685, 801 P.2d 207 (1990) (quoting *Federated Am. Ins. Co. v. Strong,* 102 Wash.2d 665, 674, 689 P.2d 68 (1984)), *overruled on other grounds by Butzberger v. Foster,* 151 Wash.2d 396, 89 P.3d 689 (2004). Whether an event constitutes an accident is determined objectively and does ***540** not depend on the insured's subjective perspective. *Roller,* 115 Wash.2d at 685, 801 P.2d 207. "Either an incident is an accident or it is not." *Roller,* 115 Wash.2d at 685, 801 P.2d 207.

[19] [20] ¶ 31 In applying the accident requirement Washington courts repeatedly have held that the insured's deliberate conduct generally does not constitute an accident.

> "[A]n accident is never present when a deliberate act is 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 unforeseen, involuntary, unexpected and unusual."

Safeco Ins. Co. of Am. v. Butler, 118 Wash.2d 383, 401, 823 P.2d 499 (1992) (internal quotation marks omitted) (quoting *Detweiler v. J.C. Penney Cas. Ins. Co.,* 110 Wash.2d 99, 104, 751 P.2d 282 (1988)). Under this standard, there is no accident even if the insured did not expect or intend any injury. *See Butler,* 118 Wash.2d at 400–01, 823 P.2d 499 (no accident even assuming injury resulted from an unintentional ricochet of bullet); *State Farm Fire & Cas. Co. v. Parrella,* 134 Wash.App. 536, 541, 141 P.3d 643 (2006) (no accident even though it was undisputed that insured did not intend to injure claimant).

¶ 32 *Safeco Ins. Co. of Am. v. Dotts,* 38 Wash.App. 382, 685 P.2d 632 (1984) is illustrative. In that case, the insured slapped a person he found at his girlfriend's home in order to get the person's attention. *Dotts,* 38 Wash.App. at 383–84, 685 P.2d 632. The insured testified that he was not angry and did not intend to hurt the person. *Dotts,* 38 Wash.App. at 384, 685 P.2d 632. The person seemed unaffected, but later lapsed into a coma and died. *Dotts,* 38 Wash.App. at 384, 685 P.2d 632. Division Three of this court held that because the slap was a deliberate act, the death did not result from an accident. *Dotts,* 38 Wash.App. at 385–87, 685 P.2d 632.

¶ 33 Here, Speed's demand letter unambiguously described Geyer's conduct as deliberate. The letter alleged that Geyer chased after Speed in his vehicle for an extended period and, when the vehicles stopped for a traffic signal, Geyer got out of his vehicle and beat Speed with his fists and a metal thermos. The letter also stated that the case was aggravated by Geyer's "intentional conduct" and was not a case involving negligence. CP at 61. Further, the letter provides no allegations that would support the conclusion that there was an " 'additional, unexpected, independent and unforeseen happening' " that would convert Geyer's deliberate acts into an accident. *Butler,* 118 Wash.2d at 401, 823 P.2d 499 (internal quotation marks omitted) (quoting *Detweiler,* 110 Wash.2d at 104, 751 P.2d 282). Even interpreting the allegations liberally and resolving doubts in favor of a duty to defend, the USAA homeowners policy does not conceivably cover the allegations in Speed's demand letter.

¶ 34 Even if USAA were required to consider evidence outside the demand letter, that evidence only confirmed that Geyer's conduct was deliberate. Geyer testified in his criminal trial that he did deliberately hit Speed, but contended that he was acting in self-defense.

¶ 35 However, Washington law is clear that no accident exists even when the insured's deliberate conduct is performed in self-defense. *Brosseau,* 113 Wash.2d at 96, 776 P.2d 123 (insured's claim that he was acting in self-defense when causing intentional bodily injury to another "in no way negates the deliberate nature of his act" and does not bring the conduct within the definition of an "accident"). And although Geyer's third degree assault conviction was based on a criminal negligence standard, this fact establishes only that the jury was not convinced beyond a reasonable doubt that Geyer intended to injure Speed. The conviction does not change the deliberate nature of Geyer's conduct. And as noted above, the insurer's intent to cause injury does not affect the "accident" analysis. Further, we rejected a similar argument in *Allstate Ins. Co. v. Bauer,* 96 Wash.App. 11, 16, 977 P.2d 617 (1999).

¶ 36 We hold that USAA had no duty to defend against Speed's demand letter under its homeowners policy because as a matter of ***541** law, the incident described in the letter did not constitute an "accident" as the policy required.[3]

5. USAA Auto Insurance Policy

[21] ¶ 37 Geyer's auto insurance policy provided coverage for bodily injury caused by an "auto accident." CP at 213. A duty to defend exists only if it is conceivable that the incident described in Speed's demand letter could be considered an "auto accident."

¶ 38 The policy does not define "auto accident." However, as discussed above the term "accident" has an established meaning in Washington. Our holding that Speed's claim did not allege an accident for purposes of the homeowners policy applies equally to the "auto accident" requirement in USAA's auto policy. *See, e.g., Roller,* 115 Wash.2d at 685, 801 P.2d 207 (vehicle intentionally ramming another vehicle was not an accident).

¶ 39 We hold that USAA had no duty to defend against Speed's demand letter under its auto policy because as a matter of law, the incident described in the letter did not constitute an "auto accident" as the policy required.[4]

B. EFFECT OF USAA'S "UNCERTAINTY" REGARDING COVERAGE

[22] ¶ 40 Speed argues that even if the language of his demand letter did not trigger a duty to defend, USAA still had a duty to defend because it was "uncertain[ ]" regarding coverage. Br. of Appellant at 27–28. Speed emphasizes that after USAA received Speed's demand letter, it informed Geyer that his claim was still unresolved because "we continue to investigate coverage and liability in this matter." CP at 566. USAA later told Geyer that coverage was "questionable" under both policies, CP at 81, and that "[c]overage *may* be precluded" under both policies. CP at 781 (emphasis added). Speed argues that because USAA made these statements and because USAA's adjusters allegedly were unsure about coverage, USAA "admitted the potential for coverage" and created the "uncertainty" regarding coverage necessary to trigger. the duty to defend. Br. of Appellant at 25, 27–28. We disagree.[5]

¶ 41 Speed's argument apparently derives from *American Best Food,* where the court stated that "any uncertainty works in favor of providing a defense to an insured." 168 Wash.2d at 408, 229 P.3d 693. But Speed fails to cite any authority suggesting that the insurer's uncertainty regarding coverage can trigger a duty to defend. As stated above, the existence of a duty to defend is a question of law for the court, based solely on the ***542** claim allegations. *Woo,* 161 Wash.2d at 52–53, 164 P.3d 454. The court in *American Best Food* was addressing uncertainty in the applicable law, not an insurer's uncertainty regarding coverage. 168 Wash.2d at 408, 229 P.3d 693. What the insurer believes about the duty to defend or policy coverage is immaterial to the court's duty to defend determination.

¶ 42 Further, to allow an insurer's conduct to give rise to the duty to defend would conflict with the rule that insurance coverage cannot be created by equitable estoppel. *See Shows v. Pemberton,* 73 Wash.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)).

[23] ¶ 43 We reject the argument that an insurer's subjective uncertainty regarding coverage can trump the court's legal determination that no duty to defend exists based on the claim allegations and the policy language. We hold that USAA's statements indicating "uncertainty" regarding coverage have no bearing on our holding that USAA had no duty to defend Speed's claim as a matter of

law based on the claim allegations and USAA's policy language.

C. DUTY TO EXPLORE SETTLEMENT

¶ 44 Speed argues that the insurer's duty to defend includes a duty to make affirmative efforts to settle claims against its insured. Washington courts have recognized that under certain circumstances an insurer must make reasonable efforts to pursue settlement. *See Moratti v. Farmers Ins. Co. of Wash.*, 162 Wash.App. 495, 504, 254 P.3d 939 (2011), *review denied*, 173 Wash.2d 1022, 272 P.3d 850 (2012); *Truck Ins. Exch. of the Farmers Ins. Grp. v. Century Indem. Co.*, 76 Wash.App. 527, 534, 887 P.2d 455 (1995).

¶ 45 But here, as a matter of law USAA had no duty to defend against Speed's demand letter. Speed cites no authority for the proposition that an insurer has a duty to explore settlement under these circumstances.

D. BAD FAITH CLAIMS

[24] [25] ¶ 46 Because USAA had no duty to defend against Speed's demand letter, we hold that USAA's failure to defend did not constitute bad faith. When an insurer correctly denies a duty to defend, there can be no bad faith claim based on that denial. *See Wellman & Zuck, Inc. v. Hartford Fire Ins. Co.*, 170 Wash.App. 666, 677, 285 P.3d 892 (2012) (because insurer did not breach duty to defend, trial court properly dismissed bad faith claim), *review denied*, 176 Wash.2d 1019, 297 P.3d 707 (2013).

[26] ¶ 47 Speed's coverage by estoppel claim fails for the same reason. Estoppel to deny coverage is one remedy for breaching a duty to defend in bad faith. *Butler*, 118 Wash.2d at 392–94, 823 P.2d 499. But in the absence of bad faith, coverage by estoppel does not apply. *Mut. of Enumclaw Ins. Co. v. T & G Constr., Inc.*, 165 Wash.2d 255, 267 n. 4, 199 P.3d 376 (2008).

¶ 48 Although Speed has no bad faith claim arising from USAA's failure to defend, an insured can assert bad faith claims that are not dependent on the duty to defend, settle, or indemnify. *Onvia*, 165 Wash.2d at 132, 196 P.3d 664. Below, Speed did assert other bad faith claims against USAA based on chapter 284–30 WAC, which may not have been directly related to USAA's failure to defend. And in his briefing Speed argued that USAA mishandled his claim in a number of ways. Speed assigns error to the trial court's dismissal of these claims. However, in the trial court Speed did not oppose the dismissal of his bad faith claims because those claims were "inextricably tied to USAA's duties to defend, settle or indemnify which the Court has now dismissed with prejudice." CP at 947. Moreover, Speed has not presented any argument on appeal to support his assignment of error on this issue so we decline to consider it further. RAP 10.3(a)(6); *Kadoranian v. Bellingham Police Dep't*, 119 Wash.2d 178, 191, 829 P.2d 1061 (1992).

¶ 49 Similarly, Speed asserted a claim against USAA for violation of the IFCA. RCW 48.30.015(1). As with the other bad ***543** faith claims, Speed did not oppose dismissal of the IFCA claim and does not present any argument on appeal on this claim. Accordingly, we do not consider the issue further.

E. ATTORNEY FEES

[27] [28] ¶ 50 Speed requests attorney fees in the trial court and on appeal under *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wash.2d 37, 811 P.2d 673 (1991). Under *Olympic Steamship*, "an award of fees is required in any legal action where the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract." 117 Wash.2d at 53, 811 P.2d 673. Because Speed is not the prevailing party, he is not entitled to fees under *Olympic Steamship. Humleker v. Gallagher Bassett Servs. Inc.*, 159 Wash.App. 667, 686, 246 P.3d 249 (2011).

[29] ¶ 51 Speed also requests attorney fees under the IFCA. RCW 48.30.015(3) allows an insured to recover attorney fees as the prevailing party in an IFCA action. But because Speed is not the prevailing party here, he is not entitled to fees under the IFCA.

¶ 52 We affirm the trial court's summary judgment orders.

We concur: JOHANSON, A.C.J. and BJORGEN, J.

Footnotes

1 Dennis Geyer is a physician and he is often referred to in the record as "Dr. Geyer."

2 The trial court concluded that the issue of USAA's duty to defend was "subordinate to the issue as to finding that there is policy coverage under the facts of this case." CP at 630. To the extent that the trial court was suggesting that USAA had a duty to defend only if there was a duty to indemnify, this is an incorrect statement of the law.

3 We need not address whether coverage also would be precluded under the intentional act exclusion in USAA's homeowners policy, which excludes coverage for injury "caused by the intentional or purposeful acts of any insured, including conduct that would reasonably be expected to result in bodily injury to any person." CP at 212 (boldface omitted). We do note that the demand letter unambiguously alleges purposeful acts, and hitting someone with fists and a metal thermos reasonably would be expected to cause injury.

4 Because there was no "accident" here, we need not decide whether Speed's injury was caused by an "auto" accident. We note that Speed's injuries did not involve the use of an auto, but rather, his vehicle was the "mere situs" of the assault. *Mut. of Enumclaw Ins. Co. v. Jerome,* 122 Wash.2d 157, 163, 856 P.2d 1095 (1993) (addressing issue under policy requiring that a claim arise out of the use of a vehicle). And as with the homeowners policy, we need not decide whether coverage also would be precluded under the intentional act exclusion in USAA's auto policy, which excludes coverage if the insured "intentionally acts or directs to cause [bodily injury] or who acts or directs to cause with reasonable expectation of causing [bodily injury]." CP at 214. Again, we note that the demand letter unambiguously alleges intentional acts, and hitting someone with fists and a metal thermos reasonably would be expected to cause injury.

5 We note that USAA's alleged "uncertainty" appeared to derive from its mistaken belief that it did not need to decide whether a duty to defend existed until Speed filed suit. As a result, it made sense for USAA to continue to investigate and to hold open the possibility of coverage while awaiting a formal complaint. In fact, as USAA conceded on appeal, USAA had a duty to defend against Speed's demand letter if its allegations raised a potential for coverage. As discussed below, we need not address whether USAA could be subject to bad faith liability even in the absence of a duty to defend when it failed to make a defense decision upon receiving Speed's demand letter. That issue was not raised in this case.

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