90199-6

No. 69356-5-I

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

GRANGE INSURANCE ASSOCIATION,

Respondent,

v.

ELIZABETH and WESLEY ROBERTS

Appellants.

GRANGE INSURANCE ASSOCIATION'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

There is nothing new, novel, or groundbreaking about the Court of Appeals' decision, which correctly affirmed that an insurer has no duty to defend where the underlying lawsuit alleges only knowing and intentional conduct by its insured. While the facts of the underlying case—essentially a will dispute among siblings—may be uncommon to insurance coverage disputes (and thus not prone to repetition), the Court of Appeals' analysis was commonplace. To be sure, Division I was both thorough and well-reasoned in its decision. But the application of existing law, even several points of existing law, to infrequent happenings is hardly a circumstance warranting Supreme Court review. Review should thus be denied.

II. IDENTITY OF ANSWERING PARTY

Grange Insurance Association ("Grange"), Respondent in this action, submits this answer to Appellants Elizabeth and Wesley Roberts' Petition for Review.

III. FACTUAL STATEMENT

Appellants Elizabeth "Jane" Roberts and her husband, Wesley Roberts ("the Roberts"), sought insurance coverage for claims against them in an underlying lawsuit brought by Jane's siblings, led by Rebecca Brandis. The underlying action essentially is a will dispute:

Jane's siblings alleged that she obtained the bulk of their mother's estate through fraud and undue influence. Specifically, the siblings alleged that Jane tortiously interfered with the inheritance they expected to receive from their mother, and that Jane tortiously interfered with their relationship with their mother. CP 56–64.

Grange commenced this insurance coverage declaratory judgment action and obtained a judicial declaration in the Superior Court that it did not have a duty to defend the claims being asserted against the Roberts in the underlying action (nor a duty to indemnify).

On October 26, 2013, the Court of Appeals affirmed the Superior Court in a decision that applied established case law to reject the insurance coverage arguments advanced by the Roberts. Though the Court subsequently published the decision, *Grange Insurance Ass'n v. Roberts*, 320 P.3d 77 (2014) ("Opinion"), its initial ruling came via an unpublished decision.

IV. ARGUMENT

The first paragraph of the Opinion succinctly sets forth the unremarkable result in this case, providing in part:

> The policy imposes on Grange a duty to defend its insureds but excludes intentional conduct from the duty to defend. Rebecca Brandis sued Roberts, alleging various torts stemming from Roberts's intentional conduct. The trial

> court ruled in a declaratory judgment action that Grange owed Roberts no duty to defend against the Brandis complaint. Because Roberts's insurance policy provides no conceivable coverage for the allegations in the Brandis complaint, the trial court properly granted declaratory judgment in Grange's favor.

Opinion, 320 P.3d at 81-82. This conclusion was not based on any new or unsettled principle of law, or one that lacks clarity. To the contrary, the Opinion simply represents the application of the long-standing principle of Washington law that the existence of a duty to defend is determined by comparing the applicable policy language with the allegations of a given complaint.

The Roberts make far more of this scenario, finding error in their mischaracterization of the Opinion, rather than the Opinion itself. But the underlying Brandis complaint does not merely "imply" the absence of accidental conduct; it flatly alleges that Jane Roberts made certain statements "*in order to so intentionally* interfere with" relationships. CP 275 (emphasis added). And, while the Court of Appeals did question whether the Brandis complaint stated a claim for defamation at all,[1] the court did so rhetorically, in a footnote, before

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[1] As Division I observed, "Brandis's request for relief mentions no defamation claim and requests no judgment for damages based on such a claim." *Opinion*, 320 P.3d at 93 n.9.

thoroughly analyzing whether the policy conceivably covered the alleged conduct under the Roberts' defamation theory. The Roberts' mischaracterization of dicta[2] from a footnote as the basis for the Opinion is telling.

Far from being in conflict with *Woo v. Fireman's Fund Insurance Co.*, 161 Wn.2d 43, 53, 164 P.3d 454 (2007)—a decision that begins its analysis by observing that "[t]he rule regarding the duty to defend *is well settled in Washington*," *id.* at 52 (emphasis added)—the Opinion faithfully adheres to *Woo*. *See, e.g., Opinion*, 320 P.3d at 85–86 (quoting *Woo's* summary of the law governing an insurer's duty to defend). The mere application of settled law to a particular fact pattern does not demand Supreme Court review.[3]

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[2] "Dicta" is language in an opinion that was not necessary to the decision in the case. *Pedersen v. Klinkert*, 56 Wn.2d 313, 317, 352 P.2d 1025 (1960).

[3] The Roberts rely heavily on a hyperbolic statement in non-party Hickman's motion to publish the Opinion. *See* Petition for Review at 1, 6. But closer review of that motion reveals that none of the factors cited in favor of publication (which presents a lower bar under RAP 12.3 than does review here under RAP 13.4) is particularly novel. For instance, Mr. Hickman notes that the Opinion "[c]oncluded that acting with knowledge that a particular result would occur is not an accident" and "[f]ound no duty to defend a claim of emotional distress if no bodily injury alleged." Motion to Publish at 2. Neither principle is new or unclear. Mr. Hickman also states that the Opinion "sets out an analysis of duty to defend outrage and defamation claims" and "appl[ies] *Alea* analysis." *Id.* If the recitation of and reliance upon prior case law in this

A. The Court of Appeals merely applied well-settled insurance coverage law to a complaint alleging intentional conduct.

Because the Court of Appeals did not reach their desired outcome, the Roberts presume that the court must have liberally construed the policy in favor of the insurer. But it is the Roberts who strain to find a claim of negligent defamation in a complaint that makes no such allegation.

The portion of the policy providing liability coverage for defamation expressly excludes coverage if the defamatory statements were made with (1) knowledge of their falsity or (2) knowledge that they would violate the rights of another. CP 177. The Roberts essentially argue that the exclusions to coverage do not apply because defamation *can* be committed negligently. But as the Court of Appeals correctly recognized, whether defamation can be committed negligently is not the issue. Instead, the issue is what was alleged in the underlying complaint.

First, the "material published with knowledge of falsity" exclusion applies because the Brandis plaintiffs specifically averred that Jane made "false statements" for the specific purpose of

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manner satisfied RAP 13.4, virtually every decision of the Court of Appeals would qualify for review by the Supreme Court.

interfering with their relationship with their mother. CP 59. The plaintiffs did not allege that Jane carelessly made statements that may or may not have been true. Instead the allegation was very specific—Jane made the "false statements . . . in order to so intentionally interfere with their relationships." *Id.*

Second, the Brandis plaintiffs specifically alleged that Jane made the false statements knowing that she would be violating the rights of her siblings. The complaint specifically states that Jane "made false statements" in order to achieve a certain result—to interfere with her siblings' relationship with their mother and their inheritance rights. Thus, even if the Brandis plaintiffs did not allege that Jane knew of the falsity of her statements (something Grange disputes), they do allege that Jane made those statements knowing that she would be interfering with her siblings' relationship with their mother. The claims thus are still excluded under the exclusion for knowingly violating the rights of another.

Even now, the Roberts acknowledge that the "fault" element of any supposed defamation claim by the Brandis plaintiffs could only be satisfied based on the complaint "because Jane intended to interfere with the plaintiffs' relationships." Petiton for Review at 9. But such proof would necessarily mean that the exclusions to coverage applied.

There can be no duty to defend because "in the absence of coverage, there can be no potential for coverage." *W. Nat'l Assurance Co. v. Hecker*, 43 Wn. App. 816, 826-27, 719 P.2d 954 (1986).

"Even our liberal rules of pleading require a complaint to contain direct allegations sufficient to give notice to the court and the opponent of the nature of the plaintiff's claim." *Berge v. Gorton*, 88 Wn.2d 756, 762, 567 P.2d 187 (1977).[4] While "the duty to defend is triggered if the insurance policy *conceivably* covers the allegations in the complaint," *Woo*, 161 Wn.2d at 53 (emphasis added), Washington law does not permit an insured to recharacterize the claims against it to attempt to trigger coverage where it does not otherwise exist. An insurer is properly relieved of its duty to defend where "the *claim* alleged in the complaint is clearly not covered by the policy." *Id.* (internal quotation marks omitted) (emphasis added)).

Here, any way one looks at it, the Brandis complaint does not allege negligent defamation. To find otherwise would beg simple questions that the Roberts are *still* unable to answer: How does one accidentally make false statements "*in order to so intentionally*

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[4] The Roberts argue that the Opinion would require plaintiffs to invoke "magic words" to trigger the duty to defend. Petition for Review at 11. No one has said this. The Opinion merely confirms the longstanding principle that a complaint that cannot conceivably result in a covered liability does not trigger the duty to defend.

interfere" with relationships? How does one "actively" but at the same time "accidentally" "interfere with" a relationship? The answer to both questions, of course, is that one cannot.[5] An individual must act with knowledge and intent to carry out the scheme alleged in the Brandis complaint. The Grange policy expressly excludes coverage for knowing and intentional conduct.

B. The Roberts mischaracterize the Court of Appeals' opinion in several respects.

Given the Court of Appeals' straightforward analysis, the Roberts mischaracterize the Opinion at several points. These straw men are erected to create the illusion of error where none exists.

For instance, as noted above, the Roberts seize upon a footnote to suggest that the court's aside was actually the basis for its decision. Petition for Review at 10. It was not. Moreover, within that footnote the court cited *Ralph v. Department of Natural Resources*, 171 Wn. App. 262, 286 P.3d 992 (2012) for the unremarkable proposition that courts determine the nature of a claim by looking at the alleged facts and the requested relief. *Opinion*, 320 P.3d at 93 n.9. This was the first and only time that the Opinion cites *Ralph*. Yet the Roberts now go

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[5] Despite taking issue with "magic words," the Roberts assert just three pages later that the exclusions for intentional and knowing conduct do not apply because "there is no allegation that [Jane] knew that her comments were false." *Id.* at 14.

so far as to say that "the Opinion wipes out coverage with a citation to [*Ralph*,] a non-insurance coverage case." Petition for Review at 10; *see also id.* at 10 n.8. Such overstatement belies the existence of a meritorious basis for review.

In similarly hyperbolic fashion, the Roberts write: "The *Opinion* suggests that the insurer, and courts reviewing insurance policies, may look beyond the allegations of a complaint to apply exclusions even where coverage is available based on the face of the complaint." *Id.* at 16. Again, the Opinion does no such thing. The Roberts never explain how the Court of Appeals supposedly looked beyond of the face of the complaint. Indeed, the court's analysis was tightly confined to the language of the complaint and the policy. *E.g.*, *Opinion*, 320 P.3d at 94 ("The complaint alleged more than merely false statements. It alleged that Roberts made false statements for a specific tortious purpose.").

The Roberts also imply that the Court of Appeals ignored an Oregon decision, *National Union Fire Insurance Co. of Pittsburgh Pennsylvania v. Starplex Corp.*, 220 Ore.App. 560, 188 P.3d 332 (Or. Ct. App. 2008). Petition for Review at 10 ("Rather than undertaking a close examination of the complaint and the coverage as in *Starplex*. . ."). The Roberts fail to inform this Court that their Petition is

the first time they have ever mentioned *Starplex*. *See* Br. of Appellant, Table of Authorities; Reply Br. of Appellant, Table of Authorities.

In any event, *Starplex* is readily distinguishable. Unlike the Grange policy at issue here, the policies in *Starplex* did not contain exclusions for intentional conduct and the Oregon court never analyzed any exclusion for intentional conduct. *See Starplex*, 220 Ore.App. at 578 n.4 (noting in context of indemnity agreement analysis that the parties "do not argue that intentional [as opposed to negligent] conduct must be addressed in a different way"). Moreover, the elements of a defamation claim are quite different between Washington and Oregon. Relevant here, in Oregon, unlike Washington, defamation does not require a showing of "fault"—that is, knowledge that a statement was false or would create a false impression. *Compare Starplex*, 220 Or.App. at 584 (setting out three elements of defamation in Oregon) *with LaMon v. Butler*, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989) (setting out four elements of defamation and addressing fault element). Reliance on *Starplex* is of little utility in this case, which is presumably why the Roberts have not cited it until now.

C. The remaining errors claimed by the Roberts also are devoid of merit.

The secondary assertions of error involve similar mischaracterizations of the Opinion and are equally meritless. See Petition for Review at 18-20.

(1) The Court of Appeals properly exercised its discretion not to address arguments regarding the Roberts' bad faith counterclaim, raised for the first time on appeal. *Opinion*, 320 P.3d at 97. As the court observed, under the invited error doctrine, "Roberts cannot complain that the trial court dismissed the counterclaim for the 'wrong reason' when she (1) affirmatively asked the court to dismiss the claim rather than keep it open and (2) failed to argue the merits of the claim when prompted by the court." *Id.*; *see also id.*, at 97 n.12 (explaining why *Lavigne v. Chase, Haskell, Hayes, & Kalamon, P.S.*, 112 Wn. App. 677, 50 P.3d 306 (2002) does not apply).

(2) The Opinion does not conclude that bodily injury coverage is unavailable where an insured may not have intended the injuries suffered by the plaintiff. It concludes that where an underlying complaint alleges that the injuries were intended, a policy exclusion for intentional conduct governs.

The Opinion also does not "limit[] *Woo's* analysis [to] policies which define "accident" identically to the definition in Dr. Woo's policy."

Id. Every insurance coverage decision requires analysis of the relevant policy language. The Opinion merely observed that the Roberts' attempts to rely upon *Woo* were misplaced, given the specific definition of "accident" found in the policy there at issue, in contrast to how that term is defined at common law. *Opinion*, 86-87. The common law jurisprudence on this point is ample. The fact that the Roberts attempted to disregard it here, to no avail, does not mean there was a significant issue requiring clarification.

(3) The Opinion likewise, does not conflict with *Woo* or *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 229 P.3d 693 (2010)) with respect to coverage for what the Roberts characterize as "untested torts." *See Opinion*, 320 P.3d at 89-93. The Opinion instead is but another example of the unremarkable proposition set forth in *Alea*, that "when Washington authority is silent regarding a particular claim or cause of action, courts may consider persuasive authority when determining an insurer's duty to defend." *Id.* at 91-92. The Roberts' interference claims are just existing claims by different names. To the extent they have been recognized in other jurisdictions, they have *uniformly* been interpreted to require intentional conduct. The Roberts cannot claim that "uncertainty" in the law triggers coverage where they themselves concede that "perhaps

all[] jurisdictions" require intentional conduct to establish the claimed interference torts. *See id.* at 92.

(4) The Roberts identify no jurisdiction or authority holding that an insurer must defend "an intentional interference with relationships claim" where the policy expressly excludes coverage for intentional conduct. In *Bankwest v. Fidelity & Deposit Co. of Maryland*, 63 F.3d 974 (10th Cir. 1995) and *Yousuf v. Cohlmia*, 718 F. Supp. 2d 1279 (N.D. Okla. 2010), both cited by the Roberts for the first time, the policies contained no exclusion for knowing or intentional defamatory conduct. *See Yousef*, 718 F. Supp. 2d at 1287 ("The language of the commercial general liability policies at issue here preclude coverage for intentional conduct resulting in bodily injury or property damage, but they do not preclude intentional conduct resulting in personal injury" including defamation). It follows that the respective courts engaged in no analysis of any such exclusion.

V. CONCLUSION

Relying on well-settled insurance coverage law, the Court of Appeals engaged in a rigorous and thorough review of this fairly straightforward dispute. Its analysis was spot on. There is no need for this Court or the parties to expend additional resources to reaffirm law that needs no clarification.

DATED this 7th day of May, 2014.

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that on the 18TH day of December, 2013, I caused to be delivered in the manner noted below, a copy of the document to which this certification is attached.

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Attached for filing please find *Grange Insurance Association's Answer to Petition for Review.* Copies to follow to counsel only via U.S. Mail.

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