

NO. 66815-3

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

OBERTO SAUSAGE COMPANY, a Washington corporation,

Respondent,

v.

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, identifiable
under Contract No. 071083 and subscribing to Certificate No. MPT-
0027300,

Appellant.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Respondent Oberto Sausage Company's ("Oberto") Brief fails to establish a basis for why this Court should to affirm the three Superior Court orders that are the subject of Appellant Certain Underwriters at Lloyd's London's ("Underwriters") appeal. Oberto makes several errors in its Brief ("Resp. Br."). Oberto's attempt to establish coverage under Section 1 of the Policy relies on a flawed reading of "malicious" and a string of inapposite cases. Oberto's attempt to establish coverage under Section 2 of the Policy is similarly flawed; it relies on a strained interpretation of "may likely" and once again cites a string of cases that miss their respective marks. Oberto also fails to establish that Underwriters acted in bad faith with respect to the denial of coverage under Section 1 of the Policy and thus violated the CPA and IFCA. Finally, Oberto fails to demonstrate why this court should not require a showing of malice as a condition precedent for awarding increased damages. While the IFCA may not contain an express malice requirement, both Washington courts and courts from other jurisdictions have historically required such a showing before awarding punitive damages. Accordingly, this Court should overrule the Superior Court's judgment and summary judgment orders.

II. ARGUMENT

A. Oberto Cannot Establish Coverage Under Section 1 Because the Alleged Contamination Was Not Malicious

In order to establish coverage under Section 1 of the Policy, Oberto must present evidence of (1) actual or threatened, (2) intentional, malicious **and** illegal (3) alteration or contamination (4) of Oberto's product (including its ingredients) (5) so as to (a) render such products unfit or dangerous for their intended use, or (b) create such an impression with the public. Appellant's Brief ("App. Br.") at 20. The Policy does not define "malicious," and as a result, the Court must ascertain the "plain, ordinary, and popular" meaning of the word in order to determine whether the acts that allegedly caused the contamination were, in fact, malicious. As Underwriters established in its Opening Brief, in order to satisfy the Policy's "malicious" requirement, actions must be taken with the "conscious objective" to harm another. *Id.* at 25-27. Oberto has presented no evidence that the Hallmark/Westland employees' failure to follow the regulations was motivated by an intention or desire to harm another. *Id.* at 26-27. Therefore, there is no coverage under Section 1.

Oberto encourages this Court to adopt a limited definition of "malice" to mean only "reckless disregard for the rights of another." In support, Oberto relies on a self-serving dictionary definition and several impertinent cases. First, Oberto relies on a specialized legal definition of

“malicious” rather than the term’s plain, ordinary, and popular meaning. Resp. Br. at 23. Oberto openly admits that the definition it advocates is a subordinate “legal” variant. *Id.* at 23 n.10. The term’s “legal” variant is inherently distinct from the term’s plain, ordinary, and popular meaning. In contrast, Underwriters advances a definition of “malicious” that is not afflicted by any qualifications and therefore is more appropriate for this Court’s present interpretive purposes. App. Br. at 25-26. The definition advanced by Underwriters clarifies that actions are only “malicious” where they are taken with the “intention or desire to harm another usu[ally] seriously through doing something unlawful or otherwise unjustified.” *Id.*

Oberto supports its limited definition of “malicious” by relying on several inapposite cases. In the first such case, *Bowers v. Farmers Ins. Exch.*, 99 Wn. App. 41, 991 P.2d 734 (2000), the subject insurance policy covered damage to property caused by “malicious mischief.” That term was undefined by the *Bowers* policy, so the court relied on dictionary definitions and how “malicious mischief” was defined in a Washington criminal statute. 99 Wn. App. at 45. Oberto focuses narrowly on the following statement:

In this context, malice does not require ill will, hatred, or vindictiveness of purpose. Malice may be inferred from the act of destruction. It is sufficient if the actor is guilty of wanton or intentional disregard of the rights of others.

Id. at 46 (emphasis added); *see* Resp. Br. at 24. It is essential to understand the “context” that qualifies the foregoing statement. The *Bowers* court was tasked with defining “malicious mischief,” not “malicious.” 99 Wn. App. at 45. Although these terms are facially similar, they are definitionally distinct. Importantly, the *Bowers* court relied on dictionary and statutory definitions of “malicious mischief,” rather than *independent* definitions of “malicious” and “mischief.” *Id.* The court made the foregoing context-centric statement in order to define the meaning of “malice” in the specific *context* of “malicious mischief.” In contrast to *Bowers*, Section 1 of the Policy requires that the subject actions be “malicious,” but does not require that actions constitute “malicious mischief.” Therefore, Oberto’s reliance on *Bowers*’ construction of “malicious mischief” is misplaced.¹

Oberto also relies on *Koch v. Mut. of Enumclaw Ins. Co.*, 108 Wn. App. 500, 31 P.3d 698 (2001) to support the proposition that courts view “malice” as akin to “reckless disregard.” Resp. Br. at 24. Oberto misapplies that case. In *Koch*, an insured brought a claim for tortious

¹ Similarly, Oberto’s subsequent suggestion that *Bowers* rejected the “‘actual malice’ approach” taken in *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147 (Minn. Ct. App. 2001) (*see* discussion, *infra*), is confused. First, as explained above, *Bowers* was concerned with the definition of “malicious mischief” rather than “malicious,” and is therefore inapplicable to this Court’s current definitional task. Second, Oberto fails to explain what it means by *Gen. Mills*’ “‘actual malice’ approach.” As explained below, Underwriters cites *Gen. Mills* to help establish what types of actions establish actual malice; *Gen. Mills* is not offered to for the purposes of defining “malicious.” This is because the term “malicious” is properly explained by dictionary definitions.

interference with contractual relations and a second claim under the CPA. The Defendant was a physician whose independent review of the insured's medical records led to the suspension of the insured's personal injury protection payments. The *plaintiff*—not the court—asserted that “the absence of any support in the record for [the physician's] conclusion raise[d] an inference that he acted with malice or ‘reckless disregard.’” *Id.* at 508. While the *Koch* court *described* the plaintiff's foregoing assertion, the court did not expressly adopt the plaintiff's position. The court merely explained why the physician's actions did not constitute “reckless disregard.” *Id.* Further, the *Koch* court was never tasked with defining “malicious” or any derivative thereof, so any statement directed toward the textual meaning of “malicious” would be dicta. Accordingly, the court did not engage in any type of definitional analysis that might be applicable to this case. Oberto's reliance on *Koch* is therefore misplaced.

Finally, Oberto relies on *Sears v. Int'l Bhd. of Teamsters, Local No. 524*, 8 Wn.2d 447, 453, 112 P.2d 850 (1941), for the proposition that the term “‘malicious’ does not necessarily mean ill-will or actual malice, but does mean an intentional interference with a right without lawful justification.” Resp. Br. at 24. In *Sears*, the plaintiff-respondent initially brought an action to recover damages for breach of contract, on the part of the defendant-appellant. The theory of the plaintiff-respondent's case was that the defendant-appellant's business agents conspired to prevent the

plaintiff-respondent from carrying out its contract. The Supreme Court of Washington was asked to determine whether there was enough evidence in support of the charge of conspiracy to take the case to a jury. 8 Wn.2d at 452. The court observed that “the definitions of ‘conspiracy,’ in many instances, use the word ‘malicious’ as an element necessary to be established.” *Id.* The court, in determining the meaning of “malicious” in this context, relied on how that term was used in conspiracy cases. *Id.* (citing *Ran W Hat Shop v. Sculley*, 98 Conn. 1, 118 A.55, 60, 29 A.L.R. 551 (1922) (plaintiff brought suit for an injunction to restrain defendants from combining and conspiring to restrain interstate trade and commerce)). Neither *Sears* nor any of the conspiracy cases cited therein construe the meaning of “malicious” in the specific context of an insurance policy or any other type of contract. In other words, unlike in the case at hand, the *Sears* court was not tasked with determining and applying the term’s plain, ordinary, and popular meaning. While *Sears* may be applicable to conspiracy cases, it is inapplicable to the current definitional controversy and Oberto’s reliance thereon is once again misplaced.

Oberto unsuccessfully attempts to distinguish the cases cited by Underwriters in support of its accurate definition of “malicious.” First, Oberto criticizes Underwriters for its reliance on *In re Juarez*, 143 Wn.2d 840, 24 P.3d 1040 (2001), because the case “does not even mention the

word ‘malicious’ or any derivation thereof, let alone address its meaning.” Resp. Br. at 25. However, Underwriters cites *Juarez* in order to explain the meaning of “intentional” rather than malicious as that term is used in the Section 1 of the Policy. 143 Wn.2d at 876 (“Intent involves acting with the conscious objective to accomplish a particular result.”); see App. Br. at 25 (explaining that under the Policy, covered actions “must be taken with the ‘conscious objective’ to harm another”).

Oberto also attacks Underwriters’ reliance on *Gen. Mills, Inc. v. Gold Metal Ins. Co.*, 622 N.W.2d 147 (Minn. Ct. App. 2001), because that case applied a New York law under which “‘malicious mischief’ requires actual, not ordinary, malice.” Resp. Br. at 25. Oberto misreads Underwriters’ use of *Gen. Mills*. Underwriters does not cite *Gen. Mills* in order to define “malicious” as requiring actual malice; such reliance on case law is unnecessary because the plain, ordinary, and popular meaning of “malicious” is readily provided by dictionary definitions. App. Br. at 26. Instead, Underwriters cites *Gen. Mills* for the proposition that, where actual malice is a required element for coverage under an insurance policy, that element is not established where the subject actor “knew it was wrong to” engage in an action, but “assumed that [the action] would never be discovered and that no one would be harmed by his action.” 622 N.W.2d at 155; App. Br. at 26. Underwriters does not cite *Gen. Mills* to support the

mere *application* of the actual malice criterion, but instead uses the case to explain the type of conduct that falls short of establishing that standard.

Finally, Oberto once again does not cite any evidence that the Hallmark/Westland employees' failure to follow the regulations was motivated by an intention or desire to harm another. This is largely due to Oberto's erroneous conviction that the term "malicious" does not require actual malice. Oberto simply reiterates that the Hallmark/Westland employees violated applicable regulations. *See* Resp. Br. at 26-27 (noting that the employees are presumed to have known the law that they violated). The employees' mere knowledge of the regulations is irrelevant to the narrow issue of whether their actions were motivated by an intention or desire to harm another. Indeed, none of Oberto's arguments regarding the mental state of the Hallmark/Westland employees suggest that the employees acted with "actual malice." Accordingly, Oberto effectively concedes that there is no evidence to suggest that the Hallmark/Westland employees acted in a manner that would establish all of the required elements for coverage under Section 1 of the Policy.

B. Oberto Cannot Establish the "may likely" Requirement for Coverage Under Section 2

Oberto cannot establish that consumption or use of the accidentally contaminated product "may likely" result in sickness, injury, or death to any person or damage or destruction to any tangible property.

Consequently, even if Oberto were able to present evidence of contamination or that the Hallmark/Westland meat was unwholesome—which it cannot—there still would not be coverage under Section 2 of the Policy. Underwriters have extensively and accurately treated the plain, ordinary and popular meaning of “may likely” in its Brief. *See* App. Br. at 30-32. Underwriters’ Brief explains that “may” and “likely” are synonyms and that something “may likely result” if it has “a better chance of . . . occurring than not.” *Id.* at 30-31. Therefore, coverage exists under Section 2 of the Policy only if physical injury, sickness or disease or death will more likely than not result from consumption or use of the accidentally contaminated products.

In response to Underwriters’ reasoned analysis of “may likely,” Oberto offers a critically flawed interpretation of the phrase and—once again—supports its efforts with inapposite case law. First, Oberto encourages this Court to adopt a strained interpretation of “may likely” that is founded upon a strategic manipulation dictionary definitions. *See* Resp. Br. at 33 (resorting to an alternate, abridged dictionary in order to find support for its position). Oberto commits further error by assuming that “may” somehow “modif[ies]” or “tempers the probability inherent in [the term] ‘likely.’” Resp. Br. at 35. Oberto fails to cite any support for this grammatical presumption. In fact, “may” is an auxiliary verb and its function is to provide grammatical context for the main verb that follows it

(e.g., “likely”). *Webster’s Third New International Dictionary of the English Language* 1396 (2002); *The Chicago Manual of Style* 5.132 (15th ed. 2003) (explaining that an auxiliary verb “is used with other verbs to form voice, tense, and mood”). While an auxiliary verb may *contextualize* a main verb, it is incapable of functionally *modifying* the main verb’s plain, ordinary, and popular meaning. Based on the flawed support and arguments described above, Oberto asserts that it is somehow “reasonable to interpret ‘may likely’ to be the equivalent of FSIS’s determination, inherent in a Class II recall, that there was a *remote probability* of adverse health consequences.” Resp. Br. at 33 (emphasis added).

In an effort to discredit Underwriters’ reasonable explanation of “may likely,” Oberto mischaracterizes Underwriters’ interpretation and relies on inapposite case law. First, Oberto asserts that Underwriters’ interpretation “relies solely on the definition of ‘likely’ rendering the word ‘may’ superfluous.” Resp. Br. 35 (internal citation omitted). This is incorrect. A review of Underwriters’ Opening Brief shows that its explanation of “may likely” references, relies on and incorporates the definitions of both “may” and “likely.” App. Br. at 30-31. As explained above, Underwriters acknowledges both “may” and “likely” in a manner which heeds their respective grammatical utility. Underwriters’ frank treatment of these terms does not render “likely” superfluous.

Oberto subsequently cites *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 837 P.2d 1000 (1992) to support its flawed argument that Underwriters' interpretation of "may likely" violates established rules by rendering "likely" superfluous. Resp. Br. at 35. *McDonald* is inapplicable to this Court's interpretive task because it discusses the relationship between separate provisions in an insurance policy and not the relationship between two terms located within a single provision. In order to decide the coverage dispute in *McDonald*, the court was required to determine whether the policy's exclusionary language was ambiguous. 119 Wn.2d at 733. The plaintiffs targeted one of the policy's exclusions and argued that the policy did not exclude coverage for the damages at issue. The court observed that the plaintiffs overlooked a separate exclusionary provision. *Id.* ("The [plaintiff's] reading of exclusion 3 overlooks the language contained in exclusion 4."). The court determined that the second exclusion excluded the subject damages. In explaining the relationship between *separate provisions* in an insurance policy, the court observed that "[a]n agreement should be interpreted in a way that gives effect to each provision." *Id.* at 734; *see* Resp. Br. at 34 (seizing upon the foregoing quotation). *McDonald* focuses narrowly on the interaction of separate provisions; the case is inapplicable to the relationship between two terms within a single provision. Oberto's reliance of *McDonald* is therefore misplaced.

Oberto next seeks to support its attack on Underwriters' interpretation of "may likely" by citing a decontextualized passage from *Caroff v. Farmers Ins. Co. of Wash.*, 155 Wn.App. 724, 989 P.2d 1233 (1999); Resp. Br. at 35. Oberto once again confuses terms with provisions. In *Caroff*, the court was required consider the relationship between an insurance policy's severability clauses and its exclusion clauses. The *Caroff* court agreed that "a severability clause does not negate an unambiguous exclusion clause." 155 Wn.App. at 731. The court further noted that it could not read "an" and "any"—as those terms were used in *separate clauses*—in a manner that would cause those clauses to lose their respective effect. *Id.* (noting that a court "must give effect to every provision and cannot create ambiguities in the language"). *Caroff* and *McDonald* are inapplicable to this Court's interpretive task for the same reason—neither case provides any guidance on how this court must construe the relationship between two *terms* contained in a single policy provision. Accordingly, even if Underwriters' interpretation of "may likely" somehow makes "likely" superfluous, Oberto cannot show why such an interpretation of a single provision would spark controversy.

As explained above, Oberto is unable to (1) provide any reasonable alternative interpretation of "may likely," or (2) show why Underwriters' interpretation of "may likely" is anything but reasonable. Oberto's patent failure in this respect lends further support to Underwriters' assertion that

coverage exists under Section 2 only if physical injury, sickness or disease or death will more likely than not result from consumption or use of the accidentally contaminated products. Therefore, even if Oberto was able to present evidence that its product was contaminated or that the Hallmark/Westland meat was unwholesome, which it cannot, it could not recover under Section 2. *See App. Br. at 28-30.*

C. Oberto Is Not Entitled to Recover Under Theories of Bad Faith, Violation of the CPA, or Violation of the IFCA

Oberto fails to establish that Underwriters acted in bad faith with respect to the denial of coverage under Section 1 of the Policy and thus violated the CPA and IFCA. Under all three causes of action, Underwriters is liable only if (1) they unreasonably denied Oberto's claim or violated one of the unfair claims settlement practices regulations and (2) Oberto was harmed as a result of the denial or regulatory violation. *App. Br. at 38.* Although Oberto would have favored a different outcome, Underwriters' decision to deny Oberto's claim was reasonable, they conducted a reasonable investigation, and even if Oberto presented evidence that Underwriters committed a technical violation of the regulations, Oberto was not harmed thereby.

As shown in Underwriters' Brief, Underwriters' decision to deny coverage was correct and, consequently, not made in bad faith. *App. Br. at 38.* Even if Oberto could establish that Underwriters' decision to deny

coverage was incorrect, Oberto would need to establish that Underwriters' decision was not based on a reasonable interpretation of the Policy. App. Br. at 39. Oberto is incapable of making such a showing and instead relies on factually unsupported arguments that Underwriters "completely ignored" and "disregard[ed] [Oberto's] explanations" for why the Policy might cover Oberto's claim. Resp. Br. 40-41.

Oberto was fully entitled to advocate for the adoption of its own policy interpretation, but Underwriters was legally obligated to make a decision based on a demonstrably reasonable interpretation of the same. Importantly, Underwriters' obligation to act reasonably did not compel them to adopt Oberto's competing policy interpretation. The mere fact that Oberto's naturally biased interpretation differed from Underwriters' interpretation does not lead to the conclusion that Underwriters acted unreasonably. Yet, this is exactly the logically unjustified inference Oberto asks this Court to make.

An unbiased assessment of Underwriters' interpretation underscores its reasonableness. Underwriters' Brief shows that its decision was based on the dictionary definitions of undefined policy terms, as well as the public statements by the FSIS. App. Br. at 41. Oberto's suggestion that "Underwriters were interested only in denying coverage" constitutes yet another factually unsupported attack. In fact, the record shows that Underwriters engaged in a considered analysis before reaching the

conclusion—based on the Policy’s language and the available evidence—that the Policy simply did not cover Oberto’s claim.

D. Oberto Is Not Entitled to Increased Damages

As explained in Underwriters’ Brief, Washington allows an award of punitive or increased damages when specifically authorized by statute, but such an award requires something more than a mere finding of liability in order to avoid an unmerited windfall to the plaintiff. App. Br. at 44. Unfortunately, the IFCA does not specify what this “something more” might be, and because the statute is only a couple of years old, Washington case law does not yet provide guidance on this issue. Given the novelty of this subject matter, Underwriters encouraged this Court to look at what other states require for an increased award. *Id.* at 44-46. A review of what other states require shows that courts often require the prevailing plaintiff to establish that the defendant acted with evil intent or malice in denying coverage. App. Br. 46-47.

Oberto does not dispute that “something more” is required for this Court to award increased damages under the IFCA. Likewise, Oberto does not cite any Washington authority that might clarify what this “something more” might be. *See* Resp. Br. 44-48. Instead, Oberto encourages this Court eschew all trace of nuance from its analysis by focusing solely on the fact that the IFCA’s treble damages provision does not contain an express malice prerequisite. *Id.* at 47. Oberto misses the point; the IFCA

may not contain an express malice requirement, but Washington courts have historically imposed similarly stringent requirements when punitive damages are authorized by statute.

Oberto supports its position regarding the non-existence of a malice prerequisite by encouraging this Court to inappropriately consider the IFCA's legislative history. *Id.* at 48 n.27. Even if this history were helpful, this Court is barred from looking beyond the face of the IFCA because the statute is not ambiguous. This Court's "objective is to ascertain and carry out the legislature's intent, and if the statute's meaning is plain on its face, [this Court] must give effect to that meaning." *Pierce County v. State*, 144 Wash.App. 783, 806, 185 P.3d 594 (2008). Under the Plain Meaning Rule, courts

look at both the wording of the statute and the wording of related statutes or other provisions of the same act. If the statute remains susceptible to more than one reasonable meaning after such an inquiry, the statute is ambiguous and we resort to various statutory construction aides, including legislative history.

Id. Absent a finding of ambiguity, it is improper for a court to resort to the extrinsic aid of legislative history. The plain language of the IFCA is unambiguous, and neither Oberto nor Underwriters have suggested otherwise. *See* Resp. Br. at 48. Instead, Underwriters has observed that Washington courts that award punitive damages have consistently required something more than a mere finding of liability, e.g., malice.

App. Br. 44. Accordingly, applying a malice prerequisite to the IFCA is wholly appropriate.

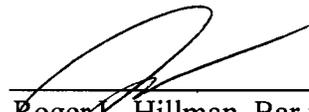
III. CONCLUSION

For the reasons stated above, Underwriters respectfully requests that this Court reverse the Superior Court's orders denying Underwriters' motion for summary judgment, and granting Oberto's motions for summary judgment as to liability, bad faith and damages.

DATED September 7, 2011.

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CERTIFICATE OF SERVICE

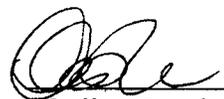
I, Marilyn Rowley, certify under penalty of perjury under the laws of the State of Washington that, on September 7, 2011, I caused to be served on the persons listed below in the manner shown:

APPELLANT'S REPLY BRIEF

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Marilyn Rowley