

43728-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROBERT SPEED,
Appellant,

vs.

UNITED SERVICES AUTOMOBILE ASSOCIATION,
Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE JOHN. R. HICKMAN

BRIEF OF APPELLANT

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I. INTRODUCTION

This is an insurance bad faith case. Respondent USAA failed to provide a defense to its insured, Dennis J. Geyer, M.D., and failed to timely explore settlement under a homeowner's policy and an auto liability policy, both of which required USAA to defend any "claim" or "suit" brought against Dr. Geyer.

In October of 2009, Dr. Geyer's car was cut off by Robert Speed's vehicle, almost causing a collision. Dr. Geyer tried to get Mr. Speed to pull over. When their vehicles came to a stop, a confrontation ensued. Believing that Mr. Speed was about to strike him with a thermos, Dr. Geyer struck Mr. Speed in self defense. After Dr. Geyer returned to his car, Mr. Speed fell to the pavement striking his head and sustaining a brain injury.

Mr. Speed made a bodily injury claim and settlement demand, which Dr. Geyer reported to USAA. While it issued a reservation of rights letter to Dr. Geyer, USAA nevertheless did not provide a defense to Dr. Geyer and failed to make any attempt to settle the October 2009 claim for many months, during which time Dr. Geyer lost the opportunity to avoid a felony conviction that poses dire consequences to his ability to practice as a neurosurgeon. USAA did not attempt to settle until after Mr. Speed

made a second settlement demand, accusing USAA of bad faith, and did not provide defense counsel to Dr. Geyer until after Dr. Geyer and Mr. Speed settled in 2011 and Mr. Speed commenced a lawsuit to have that settlement judicially approved.

In 2012, the trial court found that there was no coverage for the bodily injury claims of Mr. Speed under either of Dr. Geyer's USAA policies. Based upon this finding, the trial court erroneously determined retroactively that USAA did not have a duty to defend Dr. Geyer in 2009. Because an insurer's duty to defend is broader than its duty to indemnify, this court should reverse and hold that under the plain language of Dr. Geyer's policies, USAA's duty to defend was triggered when Dr. Geyer reported Mr. Speed's claim.

II. ASSIGNMENTS OF ERROR

A. The trial court erred in granting USAA's motion for summary judgment, ruling that USAA had no duty to defend its insured. (CP 917-21) (Appendix A)

B. The trial court erred in denying the insured's motion for summary judgment that USAA acted in bad faith as a matter of law in failing to provide a defense to the insured upon notice of a bodily injury claim. (CP 626-30) (Appendix B)

C. The trial court erred in entering its final judgment of dismissal of Mr. Speed's claims. (CP 948) (Appendix C)

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

A. Did the trial court err in holding that an insurer's breach of its duty to defend its insured in 2009 is excused by a subsequent determination in 2012 that there was no indemnity coverage?

B. Where USAA's insurance policies required it to defend "claims" as well as "suits," did USAA act unreasonably as a matter of law when it failed to provide a defense to its insured, without explanation, after the insured reported a claim and USAA was uncertain whether coverage for the claim existed under its policies?

IV. STATEMENT OF THE CASE

A. Statement Of Facts

1. **Mr. Speed Suffered Serious Head Injuries After An Altercation With Dr. Geyer.**

Dennis J. Geyer, M.D. is a neurosurgeon who on March 2, 2009, was on active duty in the U.S. Army working at Madigan Hospital. (CP 322) As he approached the Tacoma Narrows Bridge on his way home from work, a car driven by Robert Speed cut in

front of him almost causing Dr. Geyer to lose control of his vehicle. Dr. Geyer followed Mr. Speed after the incident, intending to obtain information about Mr. Speed so that Dr. Geyer could report the incident to the authorities. (CP 323)

A confrontation ensued between Mr. Speed and Dr. Geyer. Dr. Geyer claimed that Mr. Speed attempted to strike him with a thermos. (CP 486) Dr. Geyer struck Mr. Speed once in the head and returned to his vehicle. The blow left Mr. Speed stunned and leaning against his car. After Dr. Geyer got into his own vehicle and as he was about to leave he saw Mr. Speed fall to the ground and strike his head on the pavement. Mr. Speed was seriously injured in the incident. (CP 487-90) Dr. Geyer was charged with felony assault alleging that he intentionally harmed Mr. Speed. (CP 323)

2. Dr. Geyer Was Insured Under Two USAA Liability Policies That Promised Him A Defense, Not Just From A "Suit," But From A "Claim" For Bodily Injury.

Dr. Geyer was insured under two policies with USAA: a homeowner's policy with \$500,000 in liability limits (CP 420), and an automobile policy with \$300,000 in liability limits. (CP 422) Many insurers place language in their liability policies that triggers

the duty to defend only when a “suit” is filed. Some insurers use policy language that triggers the duty to defend merely when a “claim” is made. See *Woo v. Fireman’s Fund Ins. Co.*, 161 Wn.2d 43, 55, 61, ¶¶18, 36, 164 P.3d 454 (2007). In this case, USAA chose to use both “claim” and “suit” as triggering events in a broad promise to defend insureds under both its homeowner’s and auto policies.

The homeowner’s policy stated that:

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)

USAA’s auto policy also gave USAA two courses of action regarding bodily injury damages “for which [Dr. Geyer] becomes legally liable because of an auto accident.”:

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)

Thus, both the homeowner's and auto policies required USAA to provide a defense to Dr. Geyer for any claim that USAA did not settle.

3. When Mr. Speed Asserted A Claim Against Dr. Geyer, USAA Accepted Dr. Geyer's Tender of the Claim Under A Reservation of Rights But Failed To Provide Him A Defense.

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

Dr. Geyer informed USAA on October 14, 2009 of Mr. Speed's claim. (CP 385 at p. 25) USAA received Mr. Speed's written demand on October 28, 2009. (CP 389 at p.38) USAA was uncertain as to whether there was coverage for Dr. Geyer under his homeowner's or auto policies. Under a reservation of rights, USAA undertook an investigation into both liability and coverage. (CP

412-418) However, it is undisputed that USAA did not provide Dr. Geyer with a defense until 2011.

USAA assigned adjusters Deborah Martinez and Allyson Heldmann to Mr. Speed's claim, investigating both liability and coverage under both the auto and homeowner's policies (CP 384-85 at pp. 21-22). USAA assigned Ms. Martinez as the lead adjuster on the claim. (CP 383 at pp. 16-17) On October 15, 2009, adjuster Heldmann took a statement from Dr. Geyer in which he indicated that he had acted in self defense in the altercation with Mr. Speed. (CP 529-530) On November 3, 2011, Dr. Geyer called adjuster Martinez and specifically told her that he had acted in self-defense. (CP 386 at p. 26-29)

USAA adjuster Martinez knew that both Dr. Geyer's policies with USAA contained two sections: "a duty to defend and a duty to indemnify." (CP 385 at p. 22) Ms. Martinez understood that when Dr. Geyer reported the claim he was requesting *any* benefits or coverages that he was entitled to under either policy. (CP 391 at p. 46)

USAA did not deny coverage to Dr. Geyer. (CP 409 at p. 120) In fact, Ms. Martinez testified that she was trying to find coverage for Dr. Geyer under his policies, stating "... we look for

coverage when we can possibly find it for our insureds.” (CP 391 at p. 47) In a reservation of rights letter dated October 19, 2009, USAA advised Dr. Geyer that “**potential coverage issues**” existed under both his policies and that there “**may be no coverage under your policies.**” (CP 412, 418) In its reservation of rights letter to Dr. Geyer USAA expressed a willingness to investigate Mr. Speed’s claim, explore settlement and defend Dr. Geyer, telling him:

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) (emphasis added)

In two letters dated October 26, 2009, 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 never elaborated.

Ms. Martinez assumed, based on her “general knowledge” that USAA did not have a duty to defend Dr. Geyer until a lawsuit was filed. (CP 398 at p. 76-77) Ms. Martinez’s supervisor was

operating under the same assumption. (CP 584-85) However, no one at USAA shared this general knowledge with Dr. Geyer. Adjuster Martinez did not read Dr. Geyer's homeowner's policy to determine the extent of USAA's contractual defense obligation. Therefore, she did not analyze for Dr. Geyer USAA's duty to defend him against a *claim*, as well as a suit. (CP 398-99 at pp. 77- 81)

As Ms. Martinez and Ms. Heldmann were "handling" the investigation into both the liability and the coverage aspects of Mr. Speed's claim, their claims supervisors agreed that coverage was unclear and agreed that reserves be set at the maximum limit of coverage under both policies. (CP 397 at p. 71) For example, USAA claim file entries include:

"12-08-2009 - JSJ (initials) - "Staff Review"
"...Coverage is being investigated. ROR [Reservation of Rights] sent due to possible intentional act and injury to clmt may not have been the result of an "auto accident" as defined in the auto policy."

...

"I note IA (independent adjuster) attempting to secure witness r/s (recorded statement) and then to have reviewed by Region Counsel for coverage determination. Agree with handling.

(CP 870-71)

"12-21-2009 - TAK (initials) - "Staff Review" "...ROR has been sent and this appears to be an intentional act, but investigation is still underway. Agree with handling and reserves...

(CP 872)

Dr. Geyer was facing a criminal trial in February 2010 on felony assault charges. The cost of his criminal defense was depleting his savings. (CP 445-47)

While Dr. Geyer had retained criminal defense counsel, Dr. Geyer also needed a civil defense attorney from USAA. Adjuster Martinez had read Mr. Speed's August 25, 2009 settlement demand and was aware of his offer to recommend to the prosecutor that Dr. Geyer be allowed to plead to a misdemeanor, provided a settlement could be reached. She assumed a felony conviction "would have some bearing on (Dr. Geyer's medical) career", but she did not look into what the actual effect would be. (CP 405 at pp. 104-05) She knew that Dr. Geyer did not have a civil defense attorney. (CP 392 at p. 53) She understood that if he did, the duties of that defense attorney would include exploring settlement. Ms. Martinez also understood that if USAA failed to retain defense counsel to represent Dr. Geyer's interests on Mr.

Speed's claim, she had an obligation to explore settlement with Mr. Speed as the adjuster on the claim. (CP 393 at 54)

Nevertheless, USAA did nothing to assist Dr. Geyer in responding to the civil claim or settlement demand of Mr. Speed from October 2009, when USAA received notice of the claim, until three months after Dr. Geyer's criminal trial in February 2010. USAA did not discuss with Dr. Geyer how USAA and Dr. Geyer could respond to Mr. Speed's settlement demand of August 25, 2009. (CP 409 at p. 119-20) USAA made no response to Mr. Speed's settlement demand of August 25, 2009. (CP 408-09 at pp. 116-19) USAA did not retain defense counsel for Dr. Geyer to undertake negotiations with Mr. Speed. Adjusters Martinez and Heldmann did not personally contact any witness to the Speed/Geyer incident (CP 406 at p. 109) and did not request any specific information, such as medical records. (CP 407 at p. 112-13)

Because USAA failed to provide a civil defense attorney or have its adjusters explore settlement with Mr. Speed during the months prior to his criminal trial, Dr. Geyer lost the opportunity to avoid a felony conviction and lost the ability to avoid the adverse consequences of a conviction on his medical practice as a neurosurgeon. (CP 444-47) On February 8, 2010, the jury

returned a verdict finding Dr. Geyer 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. (CP 67, 517) See RCW 9A.36.031(d), (f).

4. USAA Focused Its Investigation On Coverage And Failed To Explore Settlement Until After Dr. Geyer's Felony Conviction.

USAA did not explore settlement with Mr. Speed until after Dr. Geyer's felony conviction and after Mr. Speed accused USAA of acting in bad faith for failing to respond to Mr. Speed's August 25, 2009 settlement demand. After learning of Dr. Geyer's criminal trial testimony of self-defense and conviction of a lesser felony based on criminal negligence, Mr. Speed's attorney sent a second settlement offer dated April 13, 2010 to USAA demanding the limits of both Dr. Geyer's policies totaling \$800,000:

Had we known prior to the criminal trial of Dr. Geyer's position and had USAA responded to the settlement demand that we made in writing to Dr. Geyer and his attorney in August of 2009, it is likely that Dr. Geyer would not now have a felony conviction on his record, or the adverse effects upon his medical license, military career or future as a private physician.

The applicability of insurance coverage to this incident and the reasonable prospect of a settlement would have resulted in Mr. Speed's cooperation when it came to Dr. Geyer's criminal exposure. . . .

Bad Faith of USAA: It now appears has acted unreasonably and therefore in bad faith in the handling of this matter.

. . .

We assume that USAA did not obtain a statement from Dr. Geyer regarding his recollection of the facts. If USAA had done so, it would have recognized the likelihood that this incident was a covered event and commenced settlement negotiations with us. As indicated above, those negotiations would have obtained our cooperation with the prosecutor and probably saved Dr. Geyer from a felony conviction, and adverse military or medical career consequences.

(CP 611-13)

USAA remained uncertain about coverage after receiving this second settlement demand. A USAA claim file entry dated 04-21-2010 entitled "**ATTORNEY COMMUNICATION**" states:

"cov (coverage) questions are being addressed in CCF file. we will be filing a DJA to have the court determine coverage. we will defend the tort suit, should the mbr be served, under ROR (Reservation of Rights)."

(CP 873)

It took months for USAA to request a coverage opinion from an attorney. When it finally did, that attorney recommended providing a defense to Dr. Geyer. In a letter dated May 1, 2010, USAA's coverage counsel, Mr. Derrig, told USAA that he personally

did not believe they had a duty to defend Dr. Geyer. However, he advised USAA:

“...the Washington Supreme Court has indicated that an attorney’s opinion, in and of itself, will not justify withholding a defense. *Since the law is seldom if ever 100% certain*, 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.”

(CP 624) (emphasis added) USAA failed to do either until the following year.

In a letter to Dr. Geyer dated May 10, 2010, USAA advised him that “coverage is still questionable.” (CP 81) USAA’s claim file includes an entry from Ms. Martinez (initials DMM), dated May 20, 2010, stating in part:

“if no offer is made and suit is filed, usaa will prob file dec action

feel would be approp to make offer in order to obtain release for insd...there are still pending cvg (coverage) issues”

(CP 874) Ms. Martinez’s manager responded by giving her settlement authority of “up to \$50k to attempt resolution.” (CP 874)

USAA initiated settlement discussions on behalf of Dr. Geyer only after it was accused of bad faith, almost seven months after USAA received Mr. Speed’s initial offer. On May 20, 2010, three

months after its insured was convicted of a felony, USAA offered \$25,000 to settle Mr. Speed's claim. In communicating this offer to Mr. Speed's attorneys, Ms. Martinez stated:

As you are aware, there is a question of coverage for this loss under both Mr. Geyer's automobile and homeowner's policies. In an effort to resolve this claim, USAA is willing to make a settlement offer of \$25,000...

(CP 897)

5. In 2011, After Dr. Geyer Settled With Mr. Speed, USAA Finally Provided A Defense Attorney To Dr. Geyer.

On January 20, 2011, Dr. Geyer settled with Mr. Speed at a mediation in which Dr. Geyer was represented by privately retained counsel Lincoln Beauregard. USAA received advance notice of the mediation and was invited to attend, but did not provide counsel for Dr. Geyer. USAA participated in the mediation, sending attorney Derrig to represent its own interests. (CP 390 at p. 45)

Ms. Martinez testified that when the case settled at mediation, USAA's coverage for Dr. Geyer was still "in question" under both policies. (CP 410 at p. 122) Up to this point, approximately 18 months after receiving notice of Mr. Speed's claim, USAA had still not denied coverage to Dr. Geyer. Dr. Geyer agreed to entry of a \$1.4 million judgment. In return for Mr.

Speed's covenant not to execute, Dr. Geyer assigned all his claims against USAA to Mr. Speed. (CP 11-13)

On June 7, 2011, Mr. Speed filed a personal injury lawsuit against Dr. Geyer requesting as sole relief that their settlement be approved as reasonable. (CP 4-5) USAA only then provided Dr. Geyer with a civil defense attorney. (CP 390 at p. 45)

B. Procedural History.

As its counsel had suggested eight months earlier, USAA filed a declaratory judgment action in Pierce County Superior Court shortly after Dr. Geyer and Mr. Speed reached their settlement agreement. (CP 6) In a counterclaim, Mr. Speed asserted Dr. Geyer's assigned claims against USAA for bad faith. (CP 326) The case was initially assigned to Judge Linda CJ Lee, who, over the objection of USAA, found that the \$1.4 million settlement was reasonable. (CP 336)

In April of 2011, USAA sought partial summary judgment, arguing that it had no duty to provide a defense to Dr. Geyer for a "claim." However, USAA did not quote the policy language from either its homeowner's or auto policies, which required USAA to defend "if a claim is made or a suit is brought" (CP 14-17) Judge Lee denied USAA's motion. (CP 300)

On May 20, 2011, Judge Lee consolidated Mr. Speed's personal injury suit and USAA's declaratory judgment action. (CP 302) The consolidated case was subsequently transferred to Judge Hickman ("the trial court"). On February 22, 2012, Judge Hickman denied Mr. Speed's Motion for Partial Summary Judgment Re: USAA's Failure to Defend Its Insured Dr. Geyer In Bad Faith. (CP 347-64) While the trial court agreed with Mr. Speed "that the plain language of the policy indicates that if a claim and/or suit is filed, that they (USAA) will at least initially defend on it," (2/17/12 RP 25), it held that USAA's duty to defend was "subordinate" to the issue of whether there was coverage under either of Dr. Geyer's policies:

The court finds that under the terms of the policy that the use of (the) word "claim" as well as suit may give rise to a duty to defend but the Court finds the issue subordinate to the issue as to finding that there is policy coverage under the facts of this case

(CP 630)¹

On June 15, 2012, Judge Hickman granted USAA's second motion for summary judgment, holding that there was no coverage

¹ The trial court denied Mr. Speed's Motion for Reconsideration on March 23, 2012. (CP 704)

for Mr. Speed's claim under USAA's policies and that as a result, USAA had no duty to defend Dr. Geyer and had no liability for bad faith as a matter of law. (CP 917)

On July 13, 2012, Judge Hickman granted USAA's motion dismissing all remaining claims against USAA with prejudice. (CP 948) Mr. Speed timely appealed. (CP 951-965)

V. ARGUMENT

A. USAA Had a Duty to Defend Dr. Geyer Upon Notice of Mr. Speed's Claim in 2009.

The trial court's decision absolving USAA of its duty to provide a defense on the basis of a later coverage determination is contrary to established Washington law. Under the plain language of its two policies, USAA had a duty to defend Dr. Geyer against Mr. Speed's "claim" as soon as it was tendered.

"An insurer's duty to defend is broader than its duty to indemnify". *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002). "[T]he insurer *must* investigate and give the insured the benefit of the doubt that the insurer has a duty to defend." *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 53, ¶18, 164 P.3d 454 (2007) (emphasis in original). "Only if the alleged claim is clearly not covered by the policy is the insurer

relieved of its duty to defend.” **Vanport**, 147 Wn.2d at 760. “If the insurer is uncertain of its duty to defend, it may defend under a reservation of rights and seek a declaratory judgment that it has no duty to defend.” **Woo**, 161 Wn.2d at 54, ¶16, *citing Vanport*, 147 Wn.2d at 761.

The Washington Supreme Court has repeatedly emphasized the critical value of an insurer’s duty to provide a defense to its insured. “The duty to defend is a valuable service paid for by the insured and one of the principal benefits of the liability insurance policy.” **Woo**, 161 Wn.2d at 54, ¶16. As the trial court noted here, the plain language of the USAA policy obligated the insurer to provide a defense upon the tender of any “claim,” not just any “suit.” There is no reasonable explanation for USAA’s failure to provide a civil defense attorney for Dr. Geyer upon receiving notice of Mr. Speed’s claim given the straightforward duty-to-defend language USAA chose to put in its policies. Any doubts USAA had about its duty to defend should have been resolved in favor of providing counsel for Dr. Geyer.

1. **USAA Had A Duty To Defend Dr. Geyer Under Its Homeowner's Policy In 2009.**

An insurance policy is a contract, and its plain language defines the obligations that the parties have assumed. **Boeing Co v. Aetna Cas. & Sur. Co.**, 113 Wn.2d 869, 882, 784 P.2d 507 (1990). Some liability insurance policies trigger the duty to defend merely when a “claim” is made. For example, **Woo v. Fireman's Fund**, 161 Wn.2d 43, involved several liability coverages including a professional liability provision stating that the insurer would “defend any claim brought against the insured,” **Woo**, 161 Wn.2d at 55, ¶18, and an employment practices liability provision also stating that the insurer would defend any claim brought against the insured. **Woo**, 161 Wn.2d at 61, ¶36.

While the “claim” involved in **Woo** was also a “suit” filed against the insured, this court has held that the insurer’s duty to defend a “claim” arises upon tender regardless of whether or not a lawsuit has been filed. See **Moratti ex rel. Tarutis v. Farmers Ins. Co. of Washington**, 162 Wn. App. 495, 503-04, ¶¶ 12-14, 254 P.3d 939, 943 (2011) (duty of good faith attaches upon notice of claim, and not two years later when lawsuit was filed), *rev. denied*, 173 Wn.2d 1022 (2012), *cert. denied*, 2012 WL 2050451 (Oct. 1,

2012). As Mr. Speed's expert explained, where a policy obligates an insurer to defend against "claims" as well as "suits," a lawsuit is not a prerequisite to the insurer's obligation to defend and investigate. (CP 436-38) See **Stein v. International Ins. Co.**, 217 Cal. App. 3d 609, 266 Cal. Rptr. 72, 74-75 (1990) ("Because a 'claim' is not limited to a 'lawsuit,' and because the policy itself contemplates the investigation of 'claims' and the incurring of expenses in connection with such investigation, we must reject International's assertion that the lack of a lawsuit eliminates any obligation it may otherwise have under the policy."); **Katz Drug Co. v. Commercial Standard Ins. Co.**, 647 S.W.2d 831, 835 (Mo. App. W.D. 1983) ("'claim'. . . must include *any* demand made upon Katz-Skaggs . . . and cannot be restricted to lawsuits alone.") (emphasis in original).

In its homeowner's policy, USAA expressly undertook the obligation to defend any "claim," as well as any "suit," for bodily injury against its insured. "If a claim is made or a suit is brought against an insured..." USAA "will" do two things: "1) pay up to [USAA's] limit of liability... and 2) provide a defense...". (CP 546) The homeowner's policy required USAA to defend Dr. Geyer whether a claim was made or a suit was filed against him.

2. USAA Had A Duty to Defend Dr. Geyer Under Its Auto Policy In 2009.

Dr. Geyer's auto policy also establishes a duty to defend on the part of USAA upon receipt of a claim. In the auto policy, USAA agreed: "We will settle or defend, as we consider appropriate, any claim or suit... Our duty to settle or defend ends when our limit of liability... has been exhausted...". (CP 553) This language unambiguously gave USAA two options when it received notice of a claim or suit: 1) settle or 2) defend. Here, it did neither while it undertook its investigation into liability and coverage under a reservation of rights.

3. USAA Failed To Defend Dr. Geyer During The Critical Period Prior To His Criminal Trial At Which He Was Convicted Of A Felony.

USAA did not provide a defense to Dr. Geyer when he needed it most – when he could have settled and avoided a criminal trial in which he was found guilty of felony assault. USAA failed to provide a defense from the time it received Mr. Speed's claim in October 2009 until June 2011, long after Dr. Geyer's criminal trial had resulted in a felony conviction.

The duty to defend includes the good faith duty to affirmatively attempt to settle a claim against an insured. See

Moratti, 162 Wn. App. at 504, ¶13 (“the duty to settle is intricately and intimately bound up with the duty to defend and to indemnify..”). That duty imposes upon the insured the duty to make affirmative efforts to “ascertain the most favorable terms available and make an informed evaluation of the settlement demand.” **Moratti**, 162 Wn. App. at 506, ¶16. See also **Edmonson v. Popchoi**, 172 Wn.2d 272, 282, ¶19 & n.3, 256 P.3d 1223 (2011) (insurer’s duty to investigate is based on the duty to defend in good faith).

Here, USAA failed to provide a civil defense attorney or otherwise investigate and affirmatively explore settlement with Mr. Speed during the months preceding Dr. Geyer’s felony conviction. Mr. Speed was willing to make a recommendation to the prosecutor allowing Dr. Geyer to enter a plea of guilty to a misdemeanor provided a settlement could be reached. Recognizing that coverage was an issue, Mr. Speed acknowledged that Dr. Geyer would likely have to borrow money in order to settle. (CP 375) But USAA did not even explore the possibility of a personal contribution from its insured. (CP 409 at pp.119-20) As a result of USAA’s failure to defend and attempt to settle, Dr. Geyer lost the opportunity to avoid a felony conviction and the ability to maximize

his future income from the practice of medicine. USAA breached its affirmative obligation to “ascertain the most favorable terms available and make an informed evaluation of the settlement demand” at the time its insured needed it the most. *Moratti*, 162 Wn. App. at 506, ¶16.

B. USAA's Breach Of Its Duty To Defend In 2009 Cannot Be Cured By An Indemnity Coverage Determination In 2012.

Washington case law is well settled: if the insurer is not certain about indemnity coverage, it must provide a defense. *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 405, 412-13, ¶¶ 16, 19-20, 229 P.3d 693 (2010) (“[the insurer] must defend until it is clear that the claim is not covered.”). In issuing a reservation of rights letter after receiving Mr. Speed’s claim, USAA recognized that coverage was debatable. Indeed, it provided Dr. Geyer a defense after a lawsuit was filed in 2011. The trial court erred in holding that USAA had no duty to defend Dr. Geyer in 2009 and 2010 based on its subsequent coverage determination made in 2012.

The Washington Supreme Court has consistently required insurers to be absolutely certain that there is no coverage before refusing to defend. In *Woo v. Fireman's Fund Ins. Co.*, 161

Wn.2d 43, 164 P.3d 454 (2007), dentist Woo played a practical joke on one of his employees by inserting and then photographing boar's tusks in her mouth while she was under anesthesia as he was performing dental work on her. The employee subsequently saw the photographs, and sued Dr. Woo. Dr. Woo's insurer denied coverage to Dr. Woo and refused to defend him in part because it considered Dr. Woo's conduct intentional.

The Supreme Court in **Woo** noted that "[t]he duty to defend 'arises at the time an action (in Dr. Geyer's case, a "claim") is first brought, and is based on the potential for liability.'" 161 Wn.2d at 52, ¶14. Here, USAA admitted the potential for coverage when it told its insured that there were "potential coverage issues" under both policies and, subsequently, that coverage remained "questionable."²

Indeed, USAA's attorney, Mr. Derrig, recognizing the broad duty to defend under **Woo**, advised USAA that "...the safest course

² Martinez letter to Dr. Geyer of 5-10-10 at page 1: "Our previous letter of October 19, 2009 [the reservation of rights letter] informed you that **coverage is questionable**. Since that date we have received and reviewed the criminal trial transcripts, and **coverage is still questionable**." (CP 81) (emphasis added) Martinez reservation of rights letter 10-19-09 at page 1 told Dr. Geyer that there were "potential coverage issues" under both his USAA policies. (CP 412)

of action is to provide a defense under a reservation of rights and to obtain a declaratory judgment stating no duty to defend exists.” (CP 624) USAA was obliged to follow the Supreme Court’s advice: “If the insurer is uncertain of its duty to defend, it may defend under a reservation of rights and seek a declaratory judgment that it has no duty to defend.” *Woo*, 161 Wn.2d at 54, ¶16 (citations omitted). See *Standard Fire Ins. Co. v. Blakeslee*, 54 Wn. App. 1, 771 P.2d 1172 (insurer provided a defense under reservation of rights to health care provider accused of sexually assaulting anesthetized patients), *rev. denied*, 113 Wn.2d 1017 (1989). In reviewing this case, the Supreme Court in *Woo* noted “[t]he insurer in *Blakeslee* properly defended under a reservation of rights and sought a declaratory judgment.” 161 Wn.2d at 59 (emphasis added).

The Supreme Court in *Am. Best Food, Inc. v. Alea London*, 168 Wn.2d 398, 229 P.3d 693 (2010) emphasized the broad scope of the duty to defend under a liability policy where a party claims injuries arising from an assault. Customers Antonio and Dorsey had a confrontation inside the nightclub. Security escorted both of them outside where Antonio pulled a gun and shot Dorsey nine times. Nightclub security initially brought Dorsey inside the club after he was shot but then took him back out and

placed him on the sidewalk. Dorsey alleged that the night club exacerbated his injuries. Relying on an exclusion for injuries or damages “arising out of” assault or battery, the insurer denied coverage and refused to defend the nightclub based upon divided case law interpreting similar assault and battery exclusions.

The Supreme Court held that the insurer had breached its duty to provide a defense, a duty that is significantly broader than the duty to indemnify. “We have long held that the duty to defend is different from and broader than the duty to indemnify. The duty to *indemnify* exists only if the policy *actually covers* the insured’s liability. The duty to *defend* is triggered if the insurance policy *conceivably covers* allegations in the complaint.” **Alea**, 168 Wn.2d at 404, ¶6 (emphasis in original and added) (citations omitted). Because there was a “legal uncertainty” as to whether an assault and battery exclusion applied to all the claims, the insurer had a duty to defend. 168 Wn.2d at 408, ¶12.

Here, in the face of Mr. Speed’s claim and Dr. Geyer’s report that he had acted in self defense after a near-miss auto incident, USAA admitted “uncertainty” about coverage under both its homeowner’s and auto policies. USAA told Dr. Geyer that his coverage was “questionable” under *both* his policies. (CP 81)

Such “uncertainty” as to coverage is all that is needed to trigger the duty to defend. “[A]ny *uncertainty* works in favor of providing a defense to an insured.” *Alea*, 168 Wn.2d at 408, ¶12 (emphasis added).

An insurer defending under a reservation of rights owes an “enhanced obligation to its insured as part of its duty of good faith.” *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 387, 715 P.2d 1133 (1986). USAA did not affirmatively attempt to settle and did not provide a defense counsel (Mr. Peizer) to Dr. Geyer until after Mr. Speed filed a lawsuit, over 18 months after receiving notice of Mr. Speed’s claim. Adjuster Martinez testified that she never analyzed the USAA policies regarding the duty to provide a defense to a claim but rather operated under her “general knowledge” that there was no duty to provide a defense until a suit was filed. The fact that USAA eventually provided a defense to Dr. Geyer constitutes an admission by conduct that it had an obligation to do so, because USAA remained uncertain about whether there was coverage. “[A] party’s conduct may be relevant to show liability, or as evidence on some other, more limited issue in the

case.” Tegland, 5 *Wash. Prac., Evidence*, § 402.5 at 283 (5th ed. 2007).³

The trial court’s 2012 conclusion that there was no indemnity coverage under USAA’s policies for Dr. Geyer has no bearing on whether USAA breached its duty to defend Dr. Geyer in 2009, when that duty arose. If an insurer could delay providing a defense until a coverage determination is rendered by a court, no insured would receive the defense promised by the policy. This court should hold that USAA’s duty to defend was triggered in 2009 following receipt of Mr. Speed’s claim.

C. USAA Acted In Bad Faith As A Matter Of Law In Failing To Defend Dr. Geyer Under Its Policies.

The undisputed facts establish that USAA: 1) had a duty to defend claims against Dr. Geyer in 2009, 2) received a claim against Dr. Geyer, 3) was uncertain then about whether that claim was covered under the indemnity portions of its policies and 4) undertook the handling of the claim under a reservation of rights, but provided no defense and failed to explore settlement. This

³ Tegland points out that “[s]uch evidence is often loosely described as evidence of *admissions by conduct* ...” 5B *Wash. Prac.*, § 801.4 at 327 (emphasis in original).

court should hold that USAA's breach of the duty to defend establishes its bad faith as a matter of law.

An insurer that unreasonably fails to provide a defense to its insured acts in bad faith. See, e.g., **Alea**, 168 Wn.2d at 413, ¶20 (“...failure to defend based upon a questionable interpretation of law was unreasonable and Alea acted in bad faith as a matter of law.”); **Anderson v. State Farm Mut. Ins. Co.**, 101 Wn. App. 323, 326, 2 P.3d 1029 (2000) (“We hold, as a matter of law, that an insurer commits bad faith... when it fails to disclose the existence of UIM coverage to an injured insured...”), *rev. denied*, 142 Wn.2d 1017 (2001); **Truck Ins. Exch. v. Vanport Homes**, 147 Wn.2d at 763, (“We concur with the trial court that Truck Insurance breached its duty to defend when it denied coverage without explanation, and this breach was in bad faith.”).

Here, the facts establishing USAA's bad faith for failing to provide a defense to Dr. Geyer are not in dispute:

- Both USAA's homeowner's and auto policies provided “defense coverage” for Dr. Geyer. (CP 385 at p. 22)

- USAA lead adjuster Martinez understood that by reporting Mr. Speed's claim that Dr. Geyer was requesting all benefits under his policies. (CP 391 at p. 46)
- Adjuster Martinez did not read the homeowner's policy to specifically determine what USAA's contractual obligation to defend was (she did not provide a defense because of her "general knowledge" that a lawsuit was necessary). (CP 398 at p. 76 to CP 399 at p.81)
- Apparently no one else at USAA read the policies regarding USAA's duty to defend. (CP 399 at p. 81)
- USAA did not provide Dr. Geyer with any analysis of why it was not providing him with a defense attorney under policy language stating that USAA would defend "(i)f a claim is made or a suit is filed..." (CP 399 at p. 79-81)

USAA had no reasonable justification for withholding a defense to Dr. Geyer under the homeowner's and auto policies. "An insurer acts in bad faith if its breach of the duty to defend was

unreasonable, frivolous, or unfounded.” *Alea*, 168 Wn.2d at 412, ¶19.

USAA acted unreasonably in refusing to provide a defense to Dr. Geyer upon notice of Mr. Speed’s claim. This court should reverse and remand for judgment as a matter of law on Mr. Speed’s bad faith claim, or at a minimum, remand for trial.

D. By Acting In Bad Faith And Failing To Defend Dr. Geyer In 2009, USAA Is Estopped From Denying Coverage.

An insurer that acts in bad faith in refusing to defend its insured is estopped from denying coverage under its liability policy. In particular, the insured is barred from relying on coverage exclusions, as USAA did here, in denying coverage to its insured:

It is unnecessary for us to reach the issue of whether or not coverage was excluded under specific policy provisions because we hold that an insurer that, in bad faith, refuses or fails to defend is estopped from denying coverage.

Truck, Ins. Exch. v. Vanport Homes, 147 Wn.2d 751, 759, 58 P.3d 276 (2002).

The doctrine of coverage by estoppel bars an insurer from denying coverage on the ground of an exclusion for intentional conduct. In *Safeco Insurance Ins. Co. of America v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992), Butler chased after a carload of

boys he believed had blown up his mailbox with firecrackers. When the boys stopped and began to get out of their car, Butler thought that they were going to attack him. Butler grabbed one of the firearms he had with him and fired six shots at the boys' vehicle. One of the shots seriously injured one of the boys. Butler's insurance company (Safeco) filed a declaratory judgment action regarding coverage and agreed to provide Butler with a defense under a reservation of rights. **Butler**, 118 Wn.2d at 387. Butler counter-claimed that Safeco had acted in bad faith in a number of ways in its handling of the claim under a reservation of rights.

While holding that there was no coverage for the shooting, the Court held that Safeco would nonetheless be estopped from denying coverage if it was found to have acted in bad faith: "We now hold that where an insurer acts in bad faith in handling a claim under a reservation of rights, the insurer is estopped from denying coverage." **Butler**, 118 Wn.2d at 392. Even though the gunshot victim, "Zenker's injury is not the result of an 'accident', and Safeco has no obligation to provide coverage to the Butlers for that injury[, i]f, however, the Butlers prevail on the bad faith claim, Safeco is estopped from asserting this coverage defense." **Butler**, 118 Wn.2d at 401. *Accord*, Comment to WPI 320.03 ("the **Butler**

Court stated that if the insured establishes bad faith handling of the claims in a reservation of rights case, the insurer is estopped from denying coverage, *even if a valid contractual exception to coverage would otherwise exist.*" (emphasis added)

In ***Kirk v. Mt. Airy Insurance Company***, 134 Wn.2d 558, 951 P.2d 1124 (1998), the Supreme Court reaffirmed its decision in ***Butler***, again rejecting the argument that a finding of coverage should be a prerequisite to a finding that the insurer breached its duty to defend:

The insured and the insurer contracted for insurance. One of the benefits to this insurance contract is that the insurer will provide a defense when a claim arises alleging facts that may be covered by the contract. . . . We feel it is appropriate to estop the insurer from arguing a coverage defense when the insurer breached the contract in bad faith. In such a situation any claim that should have been defended, but was not, will create liability for the insurer to pay at least policy limits."

Kirk, 134 Wn.2d at 564.

The Supreme Court in ***Kirk*** relied on the strong public policy in enforcing insurers' compliance with their good faith duty to defend, concluding, "Without coverage by estoppel and the corresponding potential liability, an insurer would never choose to defend with a reservation of rights when a complete failure to

defend, even in bad faith, has no greater economic consequence than if such refusal were in good faith. The requirement of acting in good faith cannot be rendered meaningless.” *Kirk*, 134 Wn.2d at 565.

In deciding that its 2012 denial of coverage mandated the denial of the duty to defend Dr. Geyer in 2009 and 2010, the trial court both ignored the duty to defend as defined by this established authority and turned the doctrine of coverage by estoppel on its head. Because USAA acted in bad faith in 2009, it was estopped from denying coverage in 2012. This court should direct entry of judgment against USAA for the adjudicated reasonable covenant judgment imposed against its insured. *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 736, 49 P.3d 887 (2002).

E. Dr. Geyer Is Entitled To Treble Damages And Attorney Fees In The Trial Court And On Appeal Under RCW 48.30.015.

Dr. Geyer is entitled to his remedies under RCW 48.30.015 in addition to judgment on his claim for breach of the duty to defend in good faith. By denying him the defense promised under the policy, USAA deprived Dr. Geyer of one of the main benefits of his liability policy. By suggesting to its insured that he was only entitled

to a defense once a lawsuit was filed, USAA misrepresented the terms of its homeowner's and auto policies. RCW 48.30.015(5)(b).

Dr. Geyer is entitled to attorney fees and costs, including expert witness fees, in the trial court, and on appeal. RCW 48.30.015(3). Dr. Geyer is also entitled to his fees and expenses because by basing its denial of a defense on its subsequent coverage decision, USAA has forced Dr. Geyer to litigate to obtain the benefits of his liability policy. See **McGreevy v. Oregon Mut. Ins. Co.**, 128 Wn.2d 26, 38-40, 904 P.2d 731, 732 (1995); **Olympic S.S. Co. v. Centennial Ins. Co.**, 117 Wn.2d 37, 54, 811 P.2d 673 (1991).

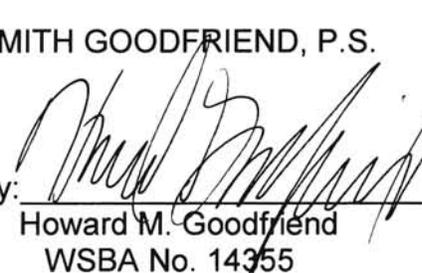
This court should direct entry of judgment against USAA for the reasonable settlement entered into by its insured – \$1.4 million and award Mr. Speed attorney fees on appeal. The court should remand to the trial court for trial on Dr. Geyer's actual damages above and beyond the judicially approved settlement, to set reasonable attorney fees and costs in superior court, and whether to treble the damages award under RCW 48.30.015(2).

VI. CONCLUSION

USAA unreasonably failed to provide a defense to a claim under its policies at the time Dr. Geyer needed it most – when he could have settled to avoid a felony conviction that jeopardizes his ability to practice medicine. It did so based upon an erroneous "understanding" of its policies, which require a defense of "claims" as well as "suits." This court should reverse and direct entry of judgment against USAA and award attorney fees in the trial court and on appeal, and remand for a determination of Dr. Geyer's actual damages above and beyond the reasonable settlement amount with Mr. Speed.

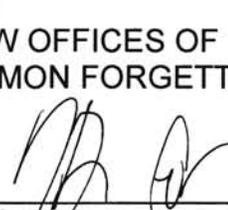
Dated this 21st day of November, 2012.

SMITH GOODFRIEND, P.S.

By: 

Howard M. Goodfriend
WSBA No. 14355

LAW OFFICES OF
SIMON FORGETTE, P.S.

By: 

Simon H. Forgette
WSBA No. 9911

BEN F. BARCUS
& ASSOCIATES, PLLC

By: 

Ben F. Barcus
WSBA No. 15576

Attorneys for Appellant

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:

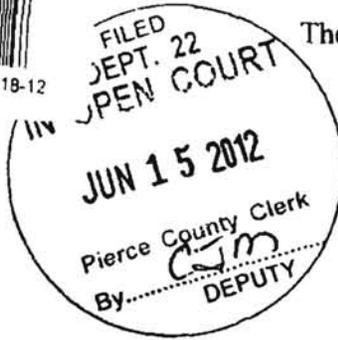
That on November 21, 2012, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Simon Forgette 406 Market St., Suite A Kirkland, WA 98033-6135	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Ben F. Barcus The Law Offices of Ben F. Barcus & Associates, PLLC 4303 Ruston Way Tacoma, WA 98402-5313	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Maureen Falecki Irene M. Hecht Keller Rohrback LLP 1201 3rd Ave., Ste. 3200 Seattle, WA 98101-3052	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 21st day of November,
2012.



Victoria K. Isaksen



The Honorable John R. Hickman
Hearing Date: June 15, 2012
Hearing Time: 9:00 a.m.

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SUPERIOR COURT OF WASHINGTON IN AND FOR PIERCE COUNTY

UNITED SERVICES AUTOMOBILE)
ASSOCIATION,)

Plaintiff,)

No. 11-2-05715-7
Consolidated Cases

v.)

ROBERT J. SPEED,)
Defendant.)

~~(PROPOSED)~~ ORDER GRANTING
PLAINTIFF UNITED SERVICES
AUTOMOBILE ASSOCIATION'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT

ROBERT J. SPEED, individually)
Plaintiff)

No. 11-2-06240-1

v.)

DENNIS J. GEYER, M.D. and "JANE DOE")
GEYER, individually and marital community)
composed thereof,)
Defendants)

This matter having come on for hearing before the Court on plaintiff United Services Automobile Association's Motion for Partial Summary Judgment and the Court having reviewed the records and files herein and the Court having considered the following:

- 1. United Services Automobile Association's Motion for Partial Summary Judgment;

~~(PROPOSED)~~ ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT - 1

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1201 THIRD AVENUE, SUITE 3200
SEATTLE, WASHINGTON 98101-3052
TELEPHONE (206) 623-1900
FACSIMILE (206) 623-3384

1 2. Declaration of Deborah Martinez and attached exhibits:

- 2 a. Exhibit 1: True and correct copy of the USAA claim diary note
3 reflecting details of the March 2, 2009 assault as told to USAA by Dr.
4 Geyer;
- 5 b. Exhibit 2: True and correct copies of relevant portions from certified
6 portions of USAA Homeowner's Policy No. 00872 57 72 90A
7
- 8 c. Exhibit 3: True and correct copies of relevant portions from certified
9 portions of USAA Auto Policy No. 00872 57 72 7101;
- 10 d. Exhibit 4: True and correct copy of a claim diary entry dated
11 October 15, 2009;
- 12 e. Exhibit 5: True and correct copy of USAA's reservation of rights
13 letter dated October 19, 2009 to Dr. Geyer;
- 14 f. Exhibit 6: True and correct copy of Mr. Speed's settlement demand
15 dated August 25, 2009;
- 16 g. Exhibit 7: True and correct copy of one page from Mr. Speed's
17 April 13, 2010 demand;
- 18 h. Exhibit 8: True and correct copy of USAA's May 10, 2010 letter to
19 Dr. Geyer;
20
21

22 3. Declaration of Maureen Falecki filed in Support of Plaintiff United Services
23 Automobile Association's Motion for Partial Summary Judgment, and attached exhibits:

- 24 a. Exhibit A: True and correct copy of excerpts from the criminal trial
25 testimony of Dr. Geyer;
26

(PROPOSED) ORDER GRANTING PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT - 2

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1 of law; and

2 5. Mr. Speed's claims for bad faith failure to defend, settle, and indemnify are
3 hereby DISMISSED with prejudice. *

4 DONE IN OPEN COURT this 15 day of June, 2012.

FILED
DEPT. 22
IN OPEN COURT
JUN 15 2012
Pierce County Clerk
By: C.J.M.
DEPUTY

5
6 The Honorable John R. Hickman

8 Presented By:

9 *Irene M. Hecht*
10 Irene M. Hecht, WSBA #11063
11 *Maureen M. Falecki*
12 Maureen M. Falecki, WSBA #18569
13 *Keller Rohrback L.L.P.*
14 Attorneys for Plaintiff United Services
15 Automobile Association

16 Copy Received, notice of presentation
17 Waived

18 *Benjamin Barcus*
19 Benjamin Barcus, WSBA #15576
20 Ben F. Barcus & Associates

21 *Simon Forgette*
22 Simon Forgette, WSBA # 9911
23 Attorney at Law
24 Attorneys for Defendant Speed

* THE COURT RESERVES
DETERMINATION AS TO
WHETHER THIS AND
RELATED ORDERS SHALL
BE APPROPRIATE FOR
DIRECT REVIEW UPON
MOTION AND ENTRY
OF FINDINGS AND
ORDER IN THAT REGARD.

SHH
[Signature]

25
26 (PROPOSED) ORDER GRANTING PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT - 5

The Honorable John R. Hickman
Hearing Date: February 17, 2012
Hearing Time: 9:00 a.m.



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SUPERIOR COURT OF WASHINGTON IN AND FOR PIERCE COUNTY

UNITED SERVICES AUTOMOBILE)
ASSOCIATION,)

Plaintiff,)

No. 11-2-05715-7
Consolidated Cases

v.)

ROBERT J. SPEED,)
Defendant.)

~~(PROPOSED)~~ ORDER DENYING
DEFENDANT SPEED'S MOTION FOR
PARTIAL SUMMARY JUDGMENT RE:
DUTY TO DEFEND AND BAD FAITH

ROBERT J. SPEED, individually)
Plaintiff)

No. 11-2-06240-1

v.)

DENNIS J. GEYER, M.D. and "JANE DOE"
GEYER, individually and marital community
composed thereof,)
Defendants)



This matter having come on for hearing before the Court on defendant Robert Speed's Motion for Partial Summary Judgment Re: Duty to Defend and Bad Faith, and the Court having reviewed the records and files herein and the Court having considered the following:

- 1. Defendant Speed's Motion for Partial Summary Judgment;
- 2. Declaration of Simon Forgette and attached exhibits;

~~(PROPOSED)~~ ORDER DENYING DEFENDANT SPEED'S
MOTION FOR SUMMARY JUDGMENT - I

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LAW OFFICES OF
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TELEPHONE (206) 623-1900
FACSIMILE (206) 623-3384

- 1 a. Exhibit 1: Mr. Speed's settlement demand to Dr. Geyer dated
2 August 25, 2009;
- 3 b. Exhibit 2: Cover sheet and transcript of Deborah Martinez's
4 deposition (without the correction sheet) taken December 15, 2011 in
5 this consolidated case;
- 6 c. Exhibit 3: A reservation of rights letter from USAA to Dr. Geyer
7 dated October 19, 2009;
- 8 d. Exhibit 4: Two letters from USAA to Dr. Geyer dated October 26,
9 2009;
- 10 e. Exhibit 5: Page 4 of 5 of the "Amendment to Contract Provisions -
11 Washington" from the USAA Homeowner's Policy issued to Dr. Geyer;
- 12 f. Exhibit 6: Page 4 from the USAA Auto Policy issued to Dr. Geyer.
- 13 g. Exhibit 7: Cover sheet and pages 20-21 of the Verbatim Report of
14 Proceedings before Judge Lee on April 15, 2011;
- 15 h. Exhibit 8: Declaration of Robert Dietz dated January 17, 2012; and
- 16 i. Exhibit 9: Cover page and pages 28-30 of Dr. Geyer's deposition
17 transcript taken in this consolidated case on May 26, 2011.
- 18
- 19
- 20
- 21 3. United Services Automobile Association's Opposition to Defendant Speed's
22 Motion for Partial Summary Judgment Re Duty to Defend and Bad Faith;
- 23 4. Declaration of Deborah Martinez dated February 3, 2012 and attached exhibits:
- 24 a. Exhibit 1: True and correct copy of the USAA claim diary note
25 reflecting details of the March 2, 2009 assault as told to USAA by Dr.
26 Geyer;

(PROPOSED) ORDER DENYING DEFENDANT SPEED'S
MOTION FOR SUMMARY JUDGMENT - 2

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LAW OFFICES OF
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- 1 b. Exhibit 2: True and correct copy of Mr. Speed's August 25, 2009
2 demand (without exhibits);
- 3 c. Exhibit 3: True and correct copies of relevant portions from certified
4 portions of USAA Homeowner's Policy No. 00872 57 72 90A;
- 5 d. Exhibit 4: True and correct copies of relevant portions from certified
6 portions of USAA Auto Policy No. 00872 57 72 7101;
- 7 e. Exhibit 5: True and correct copy of a status report from Mr.
8 Montague, an independent adjuster hired by USAA;
- 9 f. Exhibit 6: True and correct copy of USAA's reservation of rights
10 letter dated October 19, 2009 to Dr. Geyer;
- 11 g. Exhibit 7: True and correct copy of USAA's November 16, 2009
12 letter to Mr. Barcus;
- 13 h. Exhibit 8: True and correct copy of USAA's October 15, 2009 letter
14 to Mr. Fricke;
- 15 i. Exhibit 9: True and correct copy of one page from Mr. Speed's
16 April 13, 2010 demand;
- 17 j. Exhibit 10: True and correct copy of USAA's May 10, 2010 letter to
18 Dr. Geyer; and
- 19 k. Exhibit 11: True and correct copy of a claim diary entry dated
20 October 15, 2009.
- 21
- 22 5. Declaration of Michelle McCrea;
- 23
- 24 6. Declaration of Irene M. Hecht and attached exhibits:
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(PROPOSED) ORDER DENYING DEFENDANT SPEED'S
MOTION FOR SUMMARY JUDGMENT - 3

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- 1 a. Exhibit A: True and correct copy of excerpts from the criminal trial
2 testimony of Dr. Geyer;
- 3 b. Exhibit B: True and correct copy of the Settlement Agreement and
4 Covenant Not to Execute, signed on January 20, 2011;
- 5 c. Exhibit C: True and correct copy of excerpts from the deposition of
6 Deborah Martinez, with correction sheet, taken on December 15, 2011;
- 7 d. Exhibit D: True and correct copy of the Order Denying Defendant
8 Speed's Motion for Sanctions, entered on April 15, 2011;
- 9 e. Exhibit E: True and correct copy of Jury Instruction No. 13 from the
10 criminal trial of Dr. Geyer; and
- 11 f. Exhibit F: True and correct copy of Jury Instruction No. 14 from the
12 criminal trial of Dr. Geyer.
- 13
- 14 6. Declaration of Jane Mrozek and attached exhibit:
- 15 a. Exhibit A: Correction Sheet of Deborah Martinez.
- 16
- 17 7. Defendant Speed's Reply;
- 18 8. Supplemental Declaration of Simon Forgette and attached exhibits:
- 19 a. Exhibit 1: *A complete copy of the April 13, 2010 letter from Attorney*
20 *Forgette to USAA adjusters Martinez and Heldman.*
- 21 b. Exhibit 2: *The portion of attorney James Derrig's May 5, 2010 letter in*
22 *which he addresses USAA's duty to defend Dr. Geyer along with the*
23 *first and last pages of the letter.*
- 24

25 And the court having heard oral argument of the parties and being otherwise fully
26 informed on the premises,

(PROPOSED) ORDER DENYING DEFENDANT SPEED'S
MOTION FOR SUMMARY JUDGMENT - 4

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1 Now, therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that
2 Defendant Speed's Motion for Partial Summary Judgment is DENIED. *

3 DONE IN OPEN COURT this 22 day of February, 2012.

4
5 
6 The Honorable John R. Hickman

7 Presented By:

~~* THE COURT FINDS THAT THERE IS A DUTY TO
DEFEND CLAIMS UNDER THE WSAA POLICIES
BUT THAT THIS DUTY IS SUBJECT TO A
FINDING OF COVERAGE FOR
LIABILITY.~~

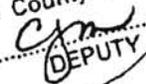
10 Irene M. Hecht, WSBA #11063
11 Maureen M. Falecki, WSBA #18569
12 Keller Rohrback L.L.P.
13 Attorneys for Plaintiff United Services
14 Automobile Association

15 Copy Received, notice of presentation
16 Waived

17 
18 Benjamin Barcus, WSBA #15576
19 Ben F. Barcus & Associates

20 
21 Simon Forgette, WSBA #9911
22 Attorney at Law
23 Attorneys for Defendant Speed

The court finds that
under the terms of the
policy that the use
of word "claim" as well
as that may give rise
to a duty to defend
but the court finds the
issue subordinate to the
issue as to finding
that there is policy
coverage under the
facts of this case.

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26
FILED
DEPT. 22
IN OPEN COURT
FEB 22 2012
Pierce County Clerk
By:  DEPUTY

cc mailed
to all 3
counsel
2-22-12. cjm

(PROPOSED) ORDER DENYING DEFENDANT SPEED'S
MOTION FOR SUMMARY JUDGMENT - 5



The Honorable John R. Hickman
Hearing Date: July 13, 2012
Hearing Time 9:00 a.m

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SUPERIOR COURT OF WASHINGTON IN AND FOR PIERCE COUNTY

UNITED SERVICES AUTOMOBILE)
ASSOCIATION,)

Plaintiff,)

v.)

ROBERT J. SPEED,)

Defendant.)

ROBERT J. SPEED, individually)

Plaintiff)

v.)

DENNIS J. GEYER, M.D. and "JANE DOE"
GEYER, individually and marital community
composed thereof,)

Defendants)

No. 11-2-05715-7
Consolidated Cases

ORDER GRANTING PLAINTIFF
UNITED SERVICES AUTOMOBILE
ASSOCIATION'S MOTION TO DISMISS
REMAINING CLAIMS ASSERTED
AGAINST USAA WITH PREJUDICE

No. 11-2-06240-1



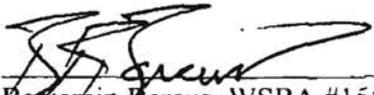
This matter having come on for hearing before the Court on plaintiff United Services
Automobile Association's Motion To Dismiss Remaining Claims and the Court having
reviewed the records and files herein and the Court having considered the following:

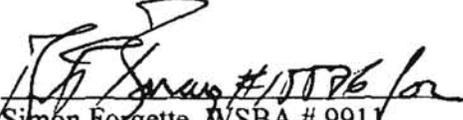
- 1. United Services Automobile Association's Motion To Dismiss Remaining
Claims;

ORDER GRANTING USAA'S MOTION TO DISMISS
REMAINING CLAIMS - - 1
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1 Copy Received, notice of presentation
2 Waived

3 
4 Benjamin Barcus, WSBA #15576
5 Ben F. Barcus & Associates

6 
7 Simon Forgette, WSBA # 9911
8 Attorney at Law
9 Attorneys for Defendant Speed

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ORDER GRANTING USAA'S MOTION TO DISMISS
REMAINING CLAIMS -- 3
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