

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

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DIVISION II
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STATE OF WASHINGTON
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REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

While many liability insurance policies require an insurer to defend only if a "suit" is brought, both of USAA's policies in this case (a homeowner's policy and an auto policy) required USAA to defend either a "claim" or a "suit." For the first time on appeal, USAA concedes this point. USAA further admits for the first time on appeal that Mr. Speed's claim against Dr. Geyer had the "potential" for creating coverage under USAA's policies, which is why USAA undertook to investigate the claim against its insured and agreed to defend him under a reservation of rights in the first place. Nonetheless, USAA failed to provide the defense to Dr. Geyer for Mr. Speed's claim that both its policies and Washington law required. At the same time, USAA failed to respond to Mr. Speed's settlement demand that included an offer to recommend to the prosecutor that Dr. Geyer be allowed to plead to a misdemeanor. Its failure to timely explore settlement on Dr. Geyer's behalf not only deprived Dr. Geyer of the opportunity to avoid a felony conviction, but exposed him to a \$1.4 million covenant judgment that the trial court found was reasonable.

The trial court erred in relying on its ultimate determination that there was no indemnity coverage to hold that USAA had no

duty to defend a claim tendered three years earlier, when USAA was itself uncertain about coverage and agreed to defend its insured under a reservation of rights. USAA's breach of the duty to defend this claim without explanation was in bad faith as a matter of law. This court should reverse and remand for entry of judgment on Mr. Speed's assigned claim of bad faith.

II. REPLY ARGUMENT

A. The Duty To Defend Is Distinct From, And Broader Than, The Duty To Indemnify.

The duty to defend is separate and much broader than the duty to indemnify and "is one of the main benefits of the insurance contract." *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002). The duty to defend is "based on the *potential* for liability" and any doubts must be resolved in favor of the insured. *Vanport Homes*, 147 Wn.2d at 760 (emphasis added). USAA's argument – that because it had no duty to indemnify Dr. Geyer, it could not have breached its duty to defend – ignores this black letter law.

No Washington court has held that where an insurer is uncertain of coverage, the insurer is absolved of its failure to provide a defense by a finding two years later that there was no

indemnity coverage. To the contrary, an “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, ¶15, 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.

Reflecting its confusion over the scope of the duty to defend, USAA characterizes this as a “coverage case” and relies on authority regarding the duty to indemnify. (Resp. Br. 20) For instance, it cites cases holding that an insurer whose coverage is limited to “accidents” has no obligation to defend or indemnify its insured from injury arising from the insured’s intentional acts. But those cases either deal exclusively with the duty to indemnify, e.g., ***Roller v. Stonewall Ins. Co.***, 115 Wn.2d 679, 801 P.2d 207 (1990), *overruled on other grounds*, ***Butzberger v. Foster***, 151 Wn.2d 396, 89 P.3d 689 (2004), or acknowledge that the issue before the court is not whether a complaint alleging an assault gave

rise to a duty to defend, but only whether “injury resulting from an insured’s act of self-defense is covered” under the policies at issue. See **Grange Ins. Co. v. Brosseau**, 113 Wn.2d 91, 94, 776 P.2d 123 (1989). (Resp. Br. 24)

None of these cases addresses an insurer’s liability for a breach of a duty to defend a claim where indemnity coverage is uncertain. In the case that USAA deems “directly on point,” **Safeco Ins. Co. of America v. Dotts**, 38 Wn. App. 382, 685 P.2d 632 (1984), there was no “claim” to defend before a lawsuit was filed and the insurer immediately sought a declaratory judgment. In that action, the court held that a liability “policy did not cover [the insured’s] liability for the assault” of a decedent that resulted in the insured’s conviction for second degree manslaughter and second degree of assault. 38 Wn. App. at 383.

Mr. Speed is not arguing that the policy obligated USAA to defend “any claims” as USAA asserts. (Resp. Br. 30) However, the Supreme Court has consistently held that the insurer must defend its insured in any case, like this one, in which there is even the slightest potential for coverage until being relieved of that duty by a final declaratory judgment:

A reservation of rights is a means by which the insurer avoids breaching its duty to defend while seeking to avoid waiver and estoppel. "When that course of action is taken, the insured receives the defense promised and, if coverage is found not to exist, the insurer will not be obligated to pay."

Truck Ins. Exch. v. Vanport Homes, Inc., 147 Wn.2d 751, 761, 58 P.3d 276 (2002), quoting **Kirk v. Mt. Airy Ins. Co.**, 134 Wn.2d 558, 563 n. 3, 951 P.2d 1124 (1997). Put simply, the insurer "must defend until it is clear that the claim is not covered." **American Best Food, Inc. v. Alea London, Ltd.**, 168 Wn.2d 398, 405, ¶16, 229 P.3d 693 (2010).

Even the landmark case of **Tank v. State Farm Fire & Cas. Co.**, 105 Wn.2d 381, 715 P.2d 1133 (1986), which held insurers defending under a reservation of rights to an enhanced duty of good faith, involved an assault claim where the insurer provided a complete and competent defense to the insured under a reservation of rights. See also **Allstate Ins. v. Bauer**, 96 Wn. App. 11, 13, 977 P.2d 617 (1999) (involving an assault in which the insurer provided a defense under a reservation of rights and subsequently sought declaratory relief); **Standard Fire Ins. Co. v. Blakeslee**, 54 Wn. App. 1, 3, 771 P.2d 1172 (1989) (sexual assault by dentist on patient; insurer provided a defense under a

reservation of rights), *rev. denied*, 113 Wn.2d 1017 (1989).¹ Having undertaken a duty to defend Dr. Geyer against Mr. Speed's claim while reserving its right to deny indemnity coverage, USAA had the obligation to fulfill that duty in good faith.

The trial court relied on its 2012 declaratory judgment that USAA had no duty to indemnify Dr. Geyer to hold that USAA could not, as a matter of law, have a duty to defend its insured against a claim that it expressed "a willingness to defend" under a reservation of rights some three years earlier. (CP 417; *see also* CP 420, 422) The issue, therefore, is not whether there was ultimately indemnity coverage under the USAA policies. The issue instead is whether upon receipt of Mr. Speed's claim in 2009, USAA had a duty to defend Dr. Geyer, to explore settlement and to procure defense counsel, under the plain language of its policies.

1. For The First Time On Appeal, USAA Admits That Its Policies Required It To Defend *Claims As Well As Suits*.

USAA admits for the first time that the language of its policies required it to provide a defense to its insured for a "claim" as well as for a lawsuit. (Resp. Br. 31: "the USAA policies limit the

¹ The Supreme Court in *Woo* noted that the insurer in *Blakeslee* had "properly defended under a reservation of rights and sought a declaratory judgment." 161 Wn.2d at 59, ¶29.

duty to defend to *claims* covered by the terms of the policy.”) (emphasis added).² USAA’s argument that it only had a duty to defend “covered” claims is wrong. When a claim is initially received it is common for an insurer to be uncertain about indemnity coverage. If the duty to defend is triggered by a “claim,” as it was here, Washington case law makes it clear that the liability insurer must provide a defense while it investigates indemnity coverage.

The duty to defend is a valuable service paid for by the insured and one of the principal benefits of the liability insurance policy. *Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 392, 823 P.2d 499 (1992). USAA had a duty to provide an immediate defense for Dr. Geyer if it was uncertain about indemnity coverage for Mr. Speed’s claim. “[A]ny uncertainty works in favor of providing a defense to an insured.” *Alea*, 168 Wn.2d at 408, ¶12.

² In the trial court, USAA consistently fought the notion that it had a duty to defend “claims.” USAA’s first summary judgment motion (CP 14-17) argued that USAA only had a duty to provide a defense for lawsuits. However, USAA’s motion did not quote the policy language from either its Homeowner’s or Auto policies nor did it advise the court where it could find the contractual terms under which USAA had agreed to defend Dr. Geyer. Instead, USAA’s motion cited several cases holding that there was no duty to defend unless a lawsuit had been commenced. USAA did not tell the court that the wording of its insurance policy, which required USAA to defend “if a claim is made or a suit is brought...” was substantially different than the language at issue in the cases it cited. (CP 195-97) The trial court denied USAA’s initial summary judgment motion. (CP 300-01)

2. USAA Acknowledged It Was Uncertain About Coverage And Promised Dr. Geyer A Defense Under A Reservation Of Rights.

USAA now argues that it should be absolved of any duty to defend because it had no uncertainty regarding the absence of indemnity coverage for Dr. Geyer when it received Mr. Speed's August 2009 claim and settlement demand. However, that is not what USAA told its insured or noted in its claim file. To the contrary, after acknowledging receipt of Mr. Speed's claim, USAA notified its insured of "*potential* coverage issues," (CP 412), and that "coverage *may be* precluded" under Dr. Geyer's homeowner's and auto policies, but expressed its "willingness to *investigate, settle, or defend . . .* on the condition that USAA is fully reserving all of its rights to: deny coverage . . ." (CP 417) (emphasis added).

Further confusing the duty to indemnify and the duty to defend, USAA argues that undertaking the handling of the claim under a reservation of rights is not an admission of coverage. However, undertaking the investigation of both coverage and liability under a reservation of rights *is* an admission of *uncertainty* regarding coverage. USAA concedes as much. (See Resp. Br. at

34: “In short, USAA told Dr. Geyer that there were coverage issues and that it was going to investigate coverage.”³

USAA’s homeowner’s policy adjuster Martinez testified that she was trying to find coverage for Dr. Geyer under his policies (CP 391 at p. 47: “...we look for coverage when we can possibly find it for our insureds.”) As Ms. Martinez stated, she and Ms. Heldmann, USAA’s adjuster for Dr. Geyer’s auto policy, “*were not sure there would be coverage* under the homeowner’s policy or coverage under the auto policy while we were investigating.” (CP (CP 383 at p.16) (emphasis added) Ms. Martinez told her colleague that “I would go ahead and take the lead” because “it appears as though my [homeowner’s] coverage might be the applicable one.” (CP 383 at p.17)

Shortly after telling Dr. Geyer in USAA’s reservation of rights letter that “potential coverage issues” existed under both his policies (CP 412) the adjusters again acknowledged USAA’s duty to defend, issuing two “excess” letters to Dr. Geyer dated October 26, 2009, one under each of his policies, advising him that Mr.

³ See also Resp. Br. 33 (“When USAA was notified of Mr. Speed’s assault claim, it promptly issued a reservation of rights letter to Dr. Geyer and began to investigate both coverage and liability.”); Resp. Br. 34: (USAA “had the *duty* and the right to investigate coverage under a reservation of rights....”) (emphasis added)

Speed's claim was likely to exceed his insurance coverages. Those letters stated: "*If a lawyer is needed to defend you we will hire one.*" (CP 420, 422) (emphasis added)

Importantly, USAA did *not* advise Dr. Geyer, then or at any time over the next 18 months, that it was certain there was no coverage for him and that it would refuse to provide him a defense under his policies. It did not tell Dr. Geyer that he should explore settlement on his own or in conjunction with USAA. Instead, while promising Dr. Geyer a defense, USAA remained focused on its own coverage investigation, and in December 2009 sought to have the claim "...reviewed by Region Counsel for coverage determination." (CP 870-71)

USAA remained uncertain about coverage when a criminal jury returned a verdict finding Dr. Geyer not guilty of intentional assault but guilty of a lesser felony assault involving criminal negligence in February 2010. It pursued its investigation, obtaining "a copy of the criminal trial transcript and jury instructions [and] requested attorney James Derrig provide a coverage opinion based on all the evidence." (Resp. Br. 13) Attorney Dehrig recommended

that USAA provide a defense to Dr. Geyer. (CP 624)⁴ But despite its uncertainty, USAA continued to withhold the defense for Dr. Geyer that its policies and its own correspondence to Dr. Geyer had promised. (CP 417, 420, 422)

3. For The First Time On Appeal, USAA Admits That Mr. Speed's Allegations "Had the Potential For Creating Coverage Under The USAA Policies."

USAA should have recognized that Mr. Speed's claim against its insured presented "facts that could potentially bring the claim within the coverage of its policies" (Resp. Br. at 34) when Dr. Geyer reported to USAA in October 2009 that he had acted in self defense. The fact that Mr. Speed claimed an intentional assault by Dr. Geyer is not dispositive because the duty to defend arises "if the insurance policy *conceivably covers* allegations" against the insured. *Alea*, 168 Wn.2d at 404, ¶16 (emphasis in original). That is why USAA undertook the handling of the claim under a reservation of rights to explore coverage as well as liability.

In June 2011, after Mr. Speed finally filed a lawsuit, USAA hired defense counsel for Dr. Geyer, recognizing the allegations in the complaint "had the potential for creating coverage under

⁴ Attorney Dehrig wrote his opinion letter on May 5, 2010, over a year before Mr. Speed filed his complaint. (CP 620)

USAA's policies." (Resp. Br. 35) Mere allegations of negligence in Mr. Speed's civil complaint were sufficient for USAA to retain counsel to defend Dr. Geyer in the lawsuit under a reservation of rights, as USAA concedes. (Resp. Br. 16: "Given the negligence allegations, USAA retained counsel to defend Dr. Geyer in the lawsuit, under a reservation of rights.") Had USAA adhered to its policies, however, it would have provided a defense to Dr. Geyer when he needed it most – before he was subjected to a felony conviction and before he was sued and forced to consent to a \$1.4 million covenant judgment.⁵

B. USAA Breached Its Duty To Defend, Including The Duty To Hire Counsel And The Duty To Affirmatively Attempt To Settle On Terms Favorable To Its Insured.

1. USAA Breached Its Duty To Defend By Failing To Make Any Attempt At Settlement On Behalf Of Its Insured For Over Six Months Despite Receiving An Extensive Written Settlement Offer.

USAA breached its duty to defend Dr. Geyer and affirmatively explore settlement upon receipt of Mr. Speed's claim and settlement demand in October 2009. As USAA concedes, "[t]he duty to attempt to settle arises out of the duty to defend."

⁵ USAA did not issue an additional reservation of rights letter to Dr. Geyer at the time it provided him with a defense in June of 2011. It provided that defense without qualification or additional reservation.

(Resp. Br. 39) See *Moratti ex rel. Tarutis v. Farmers Ins. Co. of Wash.*, 162 Wn. App. 495, 504, ¶13, 254 P.3d 939 (2011), *rev. denied*, 173 Wn.2d 1022, *cert. denied*, 133 S.Ct. 198 (2012).

USAA's duty included "an obligation to conduct good faith settlement negotiations sufficient to ascertain the most favorable terms available." *Moratti*, 162 Wn. App. at 507-08, ¶20. In *Moratti*, the insurer breached its duty to defend by rejecting the claimant's attempt to engage in settlement negotiations, forcing the claimant to sue its insured and depriving its insured of the opportunity to settle the claim on "the most favorable terms available." 162 Wn. App. at 509, ¶21.

Here, USAA received an extensive written settlement evaluation and demand from Mr. Speed's attorneys via Dr. Geyer in October of 2009. (CP 389 at p.38) This demand letter advised USAA that if a settlement could be reached with Dr. Geyer, Mr. Speed would make a recommendation to the prosecutor that he be allowed to plead guilty to a misdemeanor. (CP 375-76)

As in *Moratti*, USAA made no attempt to discuss *any* settlement, let alone the best settlement terms that Dr. Geyer could obtain prior to Dr. Geyer's felony conviction. (CP 408-09 at pp.116-20) USAA never explored Mr. Speed's expressed willingness to

help Dr. Geyer avoid a felony conviction. USAA never broached with Dr. Geyer, or with Mr. Speed's attorneys the possibility of a joint settlement proposal to which both insurer and insured would contribute. (CP 409 at pp.119-20) As a neurosurgeon in the Army nearing the end of his military commitment, Dr. Geyer had a potentially lucrative civilian medical career ahead of him and could have assigned to Mr. Speed an interest in those future earnings.⁶

No one at USAA conducted a full evaluation of its insured Dr. Geyer's exposure under Mr. Speed's claim because USAA continued to be focused primarily on whether there was coverage for the claim. Ms. Martinez testified:

Not a formal full evaluation of the case, and that is simply because coverage was still pending...

(CP 396 at p.67) USAA's focus on coverage issues, at the expense of its insured's right to a vigorous defense of this financially crippling claim, while purporting to protect its insured under a reservation of rights, was in derogation of its "enhanced obligation" to give equal consideration of its own interests to those

⁶ As discussed below, USAA was subsequently willing to offer at least \$50,000 to any settlement.

of its insured. See *Tank v. State Farm, Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 387-388, 715 P.2d 1133 (1986).

USAA failed to affirmatively attempt to settle until it was too late for Dr. Geyer to avoid a felony conviction. USAA did not make its first settlement offer until May 2010, *after* Dr. Geyer had been convicted of a felony involving criminal negligence and *after* Mr. Speed's attorneys accused USAA of acting in bad faith. (CP 611-13) In May 2010, Ms. Martinez finally obtained settlement authority of \$50,000 from her manager (CP 874) and made a \$25,000 settlement offer to Mr. Speed's attorney, noting that there continued to be "*a question of coverage* for this loss under both Mr. Geyer's automobile and homeowner's policies." (CP 897) (emphasis added) In explaining that it was rejecting the policy limits demand of Mr. Speed, USAA made clear to Dr. Geyer that it still was not denying coverage:

Although USAA is rejecting the demand, neither the rejection nor this letter should be read as a final denial of all policy benefits which may be available to you. Our previous letter of October 19, 2009, informed you that coverage in questionable. Since that date, we have received and reviewed the criminal trial transcripts, and *coverage is still questionable.*

(CP 881) (emphasis added)

In January 2011, after the complaint was filed, Dr. Geyer and Mr. Speed scheduled a mediation hearing and invited USAA to attend. USAA sent its attorney Mr. Dehrig to participate in the mediation. (CP 390 at p.45) Adjuster Martinez testified that when the case settled at mediation, coverage for Dr. Geyer was “still in question” as far as USAA was concerned under both its policies. (CP 410 at p.122) USAA never discussed with Dr. Geyer a joint settlement proposal.

2. USAA Breached Its Duty To Defend By Failing To Provide Counsel For Dr. Geyer Upon Receipt Of A “Claim.”

USAA asserts that it complied with its duty to defend Dr. Geyer by appointing counsel after he was sued in June 2011. But the plain language of its policies obligated USAA to defend Dr. Geyer not just against a lawsuit, but against any “claim.” USAA breached its obligation to provide a lawyer for Dr. Geyer when Mr. Speed asserted his claim in October 2009.

Despite what the policies said, USAA employees were apparently taught to provide a defense only if a *suit* was filed. This was the “general knowledge” of adjuster Martinez and her superior Ms. McCrea. (CP 398 at p.77; CP 585) Ms. Martinez never analyzed either the USAA homeowner’s or auto policies to verify

that the duty to defend extended to claims. (CP 398 at pp. 76-77) Similarly, no one else at USAA actually looked at the language of their policies, which required that a defense be provided to Dr. Geyer if a “claim” or a “suit” was brought. (CP 398-99 at pp.77-81; 546, 553)

USAA’s excess letters in October 2009 promised Dr. Geyer that “[i]f a lawyer is needed to defend you, we will hire one.” (CP 420, 422) USAA’s note to its claim file from April 2010 reflects that “*we will defend the tort suit, should the mbr be served, under ROR.*” (CP 873) (emphasis added) While USAA was willing to hire counsel for Dr. Geyer for a “suit,” it failed to provide Dr. Geyer with counsel during the critical period after USAA received Mr. Speed’s claim and settlement demand. USAA did not hire defense counsel to represent Dr. Geyer at mediation, but waited until June, 2011, over 18 months after initially receiving the claim, when Mr. Speed filed a civil lawsuit against Dr. Geyer asking only that their settlement be approved. (CP 390 at p.45)

USAA ignores the plain language of its policy in arguing that “well established case law hold[s] that the duty to defend is not triggered until a suit is filed alleging facts potentially covered under

the policy.” (Resp. Br. 42)⁷ The policy itself, which established USAA’s duty to defend against “claims” as well as suits, and not inapposite caselaw delineates USAA’s duty to defend its insured.

No one at USAA was assigned to solely protect the interests of Dr. Geyer as would an independent defense lawyer, had one been hired. (CP 405 at pp. 102-03) Because of its 18 month delay in providing Dr. Geyer counsel, he lost the opportunity to have an advocate vigorously defend Mr. Speed’s October 2009 claim and negotiate with Mr. Speed’s lawyers to seek a resolution that would have protected Dr. Geyer from both a felony conviction and a \$1.4 million covenant judgment. This court should hold that USAA breached its duty to defend by failing to provide counsel to Dr. Geyer upon receipt of Mr. Speed’s claim and by failing to respond to the August 2009 settlement demand.

⁷ USAA’s reliance on the Illinois case of **Grinnell Mutual Reinsurance Ins. Co. v. LaForge**, 369 Ill.App.3d 688, 863 N.E. 2d 1132 (2006), *app. denied*, 223 Ill.2d 633 (2007) is misplaced. In **Grinnell**, unlike here, there was no uncertainty on the part of the insurer regarding coverage. Upon receiving the claim, the insurer denied both defense coverage and indemnity coverage. The issue before the court was not whether the insurer should have provided a defense, as USAA claims, but whether the insurer in **Grinnell** had a duty to file a declaratory judgment action after denying coverage and before the filing of a lawsuit. 863 N.E.2d at 1137-40.

C. This Court Should Hold That USAA Acted In Bad Faith As A Matter Of Law, Or At A Minimum, Remand For Trial On Mr. Speed's Assigned Claim Of Bad Faith.

Washington courts have repeatedly emphasized the importance to an insured of a defense under a liability policy, provided by the insurer for its insured and refer to it as one of the "principal benefits of the liability insurance policy." *Woo*, 161 Wn.2d at 54, ¶16. Therefore, an insurer that has breached its duty of good faith by failing to provide a defense to its insured based upon a questionable interpretation of law and without reasonable explanation is liable for bad faith as a matter of law. *Alea*, 168 Wn.2d at 413, ¶20. Here, there are no material issues of fact regarding USAA's breach of the good faith duty to defend.

USAA's initial excuse – that it had no duty to defend a "claim," but only a lawsuit, flies in the face of the plain language of its policy. Its contention that it cannot be liable for breach of the duty to defend because there was ultimately no coverage contravenes established Washington law. This court should hold that USAA is liable as a matter of law on Mr. Speed's assigned bad faith claim.

USAA attempts to excuse its failure to defend by arguing that Dr. Geyer did not ask for a defense and therefore USAA was

not acting unreasonably in failing to provide one. (Response at 46)

This assertion itself is unreasonable and in bad faith.

Ms. Martinez understood that Dr. Geyer was asking for all benefits that he was entitled to under his policies when he informed USAA of the claim. (CP 391 at p.46) Adjuster Martinez had access to the Washington Administrative Code (WAC). (CP 382 at p.12) WAC 284–30–350 requires *full* disclosure of insurance policy benefits. In ***Anderson v. State Farm Mut. Ins. Co.***, 101 Wn. App 323, 2 P.3d 1029 (2000), *rev. denied*, 142 Wn.2d 1017 (2001), the insured was injured by an uninsured motorist. The insured did not request uninsured motorist coverage and the insurer did not advise her that she had such coverage. The court found, 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....” 101 Wn. App. at 326.

Here, USAA never explained to Dr. Geyer that its policies required it to defend him against Mr. Speed’s claim (or suit) and that it had an obligation to explore settlement with him and on his behalf. USAA acted in bad faith as a matter of law for failing to provide “defense coverage” to Dr. Geyer under both of his policies without an explanation.

USAA concedes that an insurer that has acted in bad faith forfeits any defenses to coverage; its insured is entitled to coverage by estoppel and to a presumption that he was harmed from a breach. (Resp. Br. 41-42, *citing Kirk v. Mount Airy Ins. Co.*, 134 Wn.2d 558, 563 n.3, 951 P.2d 1124 (1998) and *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 393, 823 P.2d 499 (1992)). USAA argues, however, that these remedies are “not available in the absence of a bad faith breach of its duty to defend,” (Resp. Br. 41), and that the issue of bad faith is a factual one.

However, the *material* issues of fact – the timely tender of a claim that invoked the unambiguous contractual duty to defend, USAA’s uncertainty about coverage, its reservation of rights, its failure to provide a defense until after its insured was sued, and its failure to ever explore a joint settlement proposal with Dr. Geyer – are all undisputed. USAA’s argument ignores that the trial court granted summary judgment based upon an erroneous legal ruling – that there can be no breach of the duty to defend in the absence of

a duty to indemnify.⁸ Mr. Speed was entitled to judgment on his claim for breach of the duty to defend as a matter of law.

In any event, any factual dispute necessarily mandates reversal and a remand for trial. If a jury finds that USAA breached its good faith duty to defend its insured USAA will have forfeited its defenses to coverage and be liable for its insured's reasonable settlement, and attorney fees under the CPA. *Kirk*, 134 Wn.2d at 564 (insurer acting in bad faith is "estopped from asserting the claim is outside the scope of the contract and, accordingly, that there is no coverage"); *Moratti*, 162 Wn. App. at 512, ¶128 (breach of duty of good faith entitles insured to judgment as a matter of law under CPA).

⁸ USAA also argues that the denial of Mr. Speed's motion for partial summary judgment is not "reviewable" because it was based on disputed issues of fact. (Resp. Br. 43) But this court has the authority to review the denial of summary judgment where, as here, the court has denied summary judgment based upon an erroneous and dispositive legal ruling. *Greenbank Beach and Boat Club, Inc. v. Bunney*, 168 Wn. App. 517, 522, ¶12, 280 P.3d 1133 (2012), *rev. denied*, 175 Wn.2d 1028 (2012). See *Leija v. Materne Bros., Inc.*, 34 Wn. App. 825, 827, 664 P.2d 527 (1983) (even "a nonmoving party *may* be entitled to summary judgment") (emphasis in original).

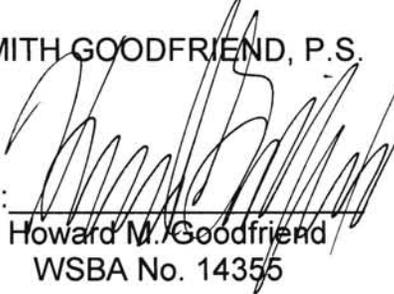
III. CONCLUSION

Having repeatedly told its insured in 2009 and 2010 that coverage was questionable, USAA now tells the court that there was unquestionably no coverage and that it had no duty to defend. This court should reject USAA's attempt to go back in time and rely on the facts uncovered during USAA's two year investigation to absolve itself of a duty to defend that was triggered at the outset, when the claim was received. Under USAA's interpretation of the law, no insured would ever receive a defense in questionable coverage cases such as this.

USAA never denied coverage in this case and was prudent to undertake an investigation into coverage and liability under a reservation of rights. However, it denied its insured the essential benefits of the policy: an affirmative attempt to settle this substantial claim on terms favorable to its insured and a defense attorney who would have explored settlement in a timely manner to help Dr. Geyer avoid a felony conviction. This court should reverse and hold that USAA breached its duty of good faith as a matter of law, or at a minimum, remand for trial on Mr. Speed's assigned claim of bad faith.

Dated this 21st day of February, 2012.

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DECLARATION OF SERVICE

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

That on February 21, 2013, I arranged for service of the
foregoing Reply Brief of Appellant, to the court and to the parties to
this action as follows:

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DATED at Seattle, Washington this 21st day of February,
2013.



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