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WASHINGTON STATE
SUPREME COURT

No. 47913-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE FARM FIRE AND CASUALTY COMPANY

Plaintiff/Respondent

v.

WILLIAM D. MORGAN and DONNA L. MORGAN, husband
and wife; CORINNE M. TOBECK, as Personal Representative of
the Estate of JOSEPH "Joey" Tobeck; and APRIL D. NORMAN,
natural mother of decedent Joseph "Joe" Tobeck, and
ROBERT C. JUSTUS, a single man..

Defendants/Appellants

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COURT OF APPEALS
DIVISION II
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DEPUTY

REPLY BRIEF OF APPELLANT

KEVIN. L. JOHNSON, P.S.
ATTORNEY & COUNSELOR AT LAW
1405 Harrison Avenue, NW Suite 204
Olympia, Washington 98502
kevinjohnson230@gmail.com
(360) 753-3066

Attorney for Defendant/Appellant: Robert C. Justus

 ORIGINAL

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I. REPLY ARGUMENT

The Finding of Facts as written afford coverage to Mr. Justus' assertion that on June 9, 2010 Mr. Morgan "wrongfully detained" him at gun point and held him until Deputy Jeff Johnson, the first deputy, arrived and took control of the scene.

A. State Farm argues that Justus did not challenge the finds of facts as required by RAP 10.3(g).

Under RAP 10.3 (g), in part...The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining to review.

Here, the assignment of errors, are clearly disclosed in the associated issue pertaining to review in Justus' brief. Justus contents that this initial detention began at the Morgans' gate and classifies as the initial peril. During the confrontation Mr. Morgan pointed his firearm at Justus and Tobeck and ordered his wife to call law enforcement. (Finding of Fact No. 12) See 4/14/15RP pg. 15 at 6-9. Although State Farm has repeatedly tried to wipe-out the initial peril (detention), as if it did not occur. Finding of Facts #14 & #17 are contrary to State Farms' theory that the occurrence was solely a shooting incident. There is no dispute as to the facts

that Justus and Tobeck were on one side of the Morgan's gate. There is no dispute that Mrs. Morgan heard noises and told Mr. Morgan, who then grabbed a flash light and his firearm and went outside to "investigate". (Finding of Fact #12). There is also no dispute that Mr. Morgan pulled a gun out and pointed it at Justus and Tobeck and directed his wife to call law enforcement. Finding of Fact #14. Mr. Justus felt that he was detained. Mr. Morgan's actions support the offense of wrongful detention of a person. The Court found that Mr. Justus to be truthful in his recollection of most of the events. (Conclusion of law #17). It is undisputed that when Deputy Johnson arrived on the scene, he personally observed Justus lying in the roadway. (Finding of Fact #22). The Court's Finding and Facts #22 failed to include from the record that the neighbors who pointed out Mr. Morgan as being the shooter, also testified in the coverage trial to their personal observation of Mr. Morgan detaining Justus on the ground until Deputy Johnson arrived. See 4/13/15RP pg. 71 at 2-10; 21-22; and pg. 88 at 18-20. 4/14/2015RP pg. 68 at 21-25. There has been absolutely no evidence in the record that the three independent witnesses observed Mr. Morgan discharge his firearm after the Tobeck's truck hit the tree and Justus crawled

out of the truck and was ordered to the ground at the gunpoint by Mr. Morgan. See 4/13/15RP pg. 71 at 2-10; 21-22; and pg. 88 at 18-20. 4/14/2015RP pg. 68 at 21-25. This evidence corroborates Justus' claim for wrongful detention of a person.

Justus does not challenge conclusions of law 1-5, 8-10, and 13-14.

B. State Farm argues that the court correctly that concluded that if Washington state were recognize a cause of action for wrongful detention of a person it would be substantially equivalent to the torts of False imprisonment and false arrest.

Justus agrees with State Farm that his main claim at trial was that his damage settlement was covered under the "personal injury" coverage of the Morgans' "personal liability" policy, and specifically under the "personal injury" offense for "wrongful detention of a person."

On June 27th, 2012 Justus filed a complaint for damages against William and Donna Morgan in Pierce County Superior Court cause number 12-2-10340-8. Admitted trial exhibit #6. The Complaint outlines under the Introduction that Justus alleged the he was wrongfully detained by Mr. Morgan. Under the Facts of the Complaint 3.3, 3.11, and 3.15 Justus alleged

that he was wrongfully detained and that eye witnesses emerged from surrounding homes and observed Mr. Morgan detaining Justus and Tobeck at gunpoint. Justus alleged that Mr. Morgan was “negligent” and “reckless” by “wrongfully detaining” him, and by shooting at him and Tobeck. Under 4.6 Justus alleged that Mr. Morgan was “negligent” when he “wrongfully detained” him causing “personal injury.” Amd. CP 2559-2560 sub #4 (Admitted trial exhibit).

The court erred when it found that “negligent wrongful detention of a person” or “wrongful detention of a person” is not a claim in the state of Washington. CP 2349-2348, (Conclusion of Law #6). Justus continues to argue the following: 1) Justus’s filed Complaint alleged negligence, a three-year statute of limitation; 2) wrongful detention of a person is specifically written in the PULP as a covered offense.

The umbrella policy on page 2 reads in part as follows:

7. “loss” means:

a....or

b. the commission of an offense which first results in **personal injury** during the policy period. A series of similar or related offenses is considered to be one **loss**.

8. “**personal injury**” means injury other than **bodily injury** arising out of one or more of the following offenses:
 - a. false arrest, false imprisonment, wrongful eviction, *wrongful detention of a person*;
 - b. abuse of process, malicious prosecution
 - c. libel, slander, defamation of character; or
 - d. invasion of a person’s right of private occupancy by physically entering into that person’s personal residence.

In Washington, the court examines the terms of an insurance contract to determine whether under the plain meaning of the contract there is coverage. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wash.2d 869, 876, 784 P.2d 507, 87 A.L.R.4th 405 (1990). State Farm argues that wrongful detention of a person is not a claim in the state of Washington. Here, State Farm sold the Morgans an excess policy (PULP) to provide extra coverage should the Morgans be sued for the covered offense of “wrongful detention of a person”. The Morgans paid their premiums and had an active policy on June 9, 2010, the date of the alleged offense. Under the PULP wrongful detention of a person is a covered offense under

personal injury section of the policy. The Court concluded as a matter of law that Mr. Morgan committed either a false arrest or false imprisonment, or both, upon Mr. Justus when pointed the handgun at Mr. Justus and ordered him to lay on the ground. The also indicated that arguably, there was a “mini” false imprisonment when Mr. Morgan pointed the handgun at Mr. Justus, but both Mr. Justus and Mr. Tobeck where able to drive-away with the pipes belonging to Mr. Morgan. CP 2349-2348, (Conclusion of Law #8).

The court erred when it analyzed the insurance contract and only found that Mr. Morgan committed the offense of false arrest or false imprisonment, or both but failed to list the finding of the offense of “wrongful detention of a person” when interpreting the policy under the PLUP. There is no way the court would be able to find otherwise. Justus alleged that he was “wrongfully detained by Mr. Morgan in his Complaint, accordingly the Court was required to interpret the insurance policy as it relates to “wrongful detention of a person, a covered offense”. State Farm wrote “wrongful detention of a person” into the specific language of the policy. State Farm failed to define ‘wrongful detention of a person” in the policy. The court erred because it applied a “legal meaning” to an undefined term in the PULP. Here, the coverage court used *Kitsap* analysis in

efforts to define wrongful detention of a person by being substantially equivalent to false arrest and false imprisonment to exclude coverage by asserting that Justus' claim for wrongful detention should have been time barred in the tort action even though that issue had been heard and adjudicated and decided by Judge Rumbaugh in the tort action. Under Washington Law, a technical or legal meaning should not be applied to undefined terms. If a term in an insurance policy is not defined therein, the terms must be given their plain, ordinary, and popular meaning, and in determining such meaning, a standard English dictionary must be used. *New Hampshire, Indem. Co., Inc., v. Budget Rent-A-Car Systems, Inc.*, 148 Wash. 2d 929, 64 P.3d 1239, (2003). *Jack v. Revere Life Ins. Co.* 97Wash.App 314, 932 P.2d 1228 (Dito v. 1 1999). State Farm spent three pages citing out of state cases which was unnecessary and irrelevant to this issue.

C. The court erred when it found that Justus wrongful detention claim was time barred. This is an insurance coverage action. The court was required to analyze and interpret the written contract and determine if coverage applied. The tort liability or any theory of tort liability was not before the coverage court. State Farm had an opportunity to defend the claims

presented by Justus in the tort liability action. State Farm failed to settle Justus's claim against the Morgans within in the policy limits. The Morgans felt that they had been severely prejudiced by failure of State Farm to accept coverage. The Morgans in an effort to protect themselves from potential personal liability exposure entered into a settlement agreement and release with Justus. The settlement agreement was reviewed in the reasonableness hearing and subject to the *Chaussee* factor test. The reasonableness court found no facts supporting fraud or collusion between Justus and Morgan and therefore found the settlement was reasonable and entered a valid judgment. The *Chaussee* criteria protect insures from excessive judgments especially where, as here, the insurer has notice of the reasonableness hearing and had an opportunity to argue against the settlement's reasonableness. Once the court determined the covenant judgment was reasonable, the burden shifted to *Viking* to show the settlement was the product of fraud or collusion. Having failed to meet this burden, *Viking* was liable for the full settlement amount. *Besel v. Viking Ins. Co.* 146 Wn.2d 730, 738 39, 49 P.3d 887 (2002). See *Aldo Truck Ins. Exch. VanPort Homes, Inc.* 147 Wn.2d 751 765, 58 P.3d (2002). Here, State Farm mirrors *Besel* in it had

an opportunity to participate in the reasonableness hearing and failed to present any evidence of fraud or collusion between Justus and the Morgans. Therefore, State Farm is obligated to indemnify the valid judgment presented by Justus.

In the tort liability action, Intervenor State Farm alleged that the claims are time barred because this action was filed two years and 18 days following the occurrence referenced in Plaintiff's complaint. This is true for intentional torts. However, negligence-based causes of action have a three-year statute of limitation and are not time barred here.

I direct the court to Pg. 29 respondent's brief. State argues that Justus failed to present this Court with any evidence that the statute of limitations issue for "wrongful detention of a person" was actually litigated and decided in the liability case, collateral estoppel does not apply. Establishing and litigating tort liability is not appropriate in a declaratory action on coverage when Justus had a valid judgment presented to State Farm for indemnification. The coverage court was required to analyze the facts that were presented at trial to determine if the facts fall within the scope of the policy. Here, the court found coverage and State Farm is obligated to indemnify the judgment.

D. State Farm asserts that the liability court punted on the issue of intentional vs negligence. This misconstrues the court's ruling. The reasonableness court found that Justus's theory was sound and not time barred. The reasonableness court did not review the insurance contract in the reasonableness hearing nor determine whether there was any specific requirements or exclusions as it relates to wrongful detention of a person.

E. The policies provide that an occurrence is covered "which unexpectedly and unintentionally results in" damage. Queen City Farms, at 854. The policies do not define the term "unexpectedly", nor do they contain language expressly indicating whether a subjective or objective standard applies. The plain, ordinary, and popular meaning of the term "unexpected" may be said to involve state of mind, but that does not resolve the inquiry whose state of mind – the insured's, or a reasonable person's, as the Court of Appeals noted. Queen City Farms, at 855.

However, the average purchaser of insurance would understand that the policy language provides for coverage for damage resulting from most acts of ordinary negligence. As the Court of Appeals in this case recognized, an objective standard is inconsistent with insurance coverage for damage resulting from

ordinary negligence. Thus, the driver who intentionally backs a car up, but does so negligently into the path of a vehicle having the right of way, has acted intentionally in a manner where it can be said that objectively an accident may occur. The average purchaser of insurance would reasonably understand from the policy language that coverage was provided under the occurrence clause. We recognized in Rodriguez v. Williams, 107 Wn.2d 381, 729 P.2d 627 (1986), the difficulty that results if an objective standard were to apply to the "unexpected and unintended" requirement in Rodriguez. *Id.* There, this court was faced with the question whether incest was within the scope of a homeowner's insurance policy exclusion for personal injuries expected or intended by the insured. The court rejected the insurer's argument that objectively if the injury could be expected as the result of an intended act, then it would fall within the exclusion, reasoning that

While doubtlessly the average purchaser of insurance would believe that incest would harm a child, the policy specifically states that the insured must expect or intend harm. Thus, the policy language itself is inconsistent with a blanket objective person standard, and the policy language must control. Moreover, if an objective standard is used, virtually no intentional act would ever be

covered. Intentional acts which result in injury generally can be expected to result in injury. An objective standard, especially provided after the fact, would seem to render meaningless the plain language providing for coverage for certain intentional acts.

1. The coverage court found no facts supporting the theory of negligence and at all times, the acts of Mr. Morgan were intentional. (CP 2342-2348) (Conclusion of Law #12). Here, the coverage court erred because the theory of negligence as it relates to tort liability is not before the court in this coverage action. In a coverage action the court is to find as a matter of law whether or not there is coverage under the umbrella policy for its insured conduct. In a declaratory action on coverage, the coverage court found that Mr. Morgan's conduct amounted to false arrest, false imprisonment, (wrongful detention). (CP 2342-2348). These are covered occurrences under the umbrella policy and preformed negligently. Here, the term "negligence" is not found anywhere in the State Farm umbrella policy. Justus is not claiming that Mr. Morgan detained him on accident, but is claiming that his (Morgan) conduct was negligent when he wrongfully detained him at gun point at the gate, and again after the collision in the truck when he was detained again. Under the coverage action it is not intentional

verses negligent. This is misapplied. The only question to the court is do the facts establish that a wrongful detention occurred.

2. State Farm argues that Mr. Justus claims are excluded because Mr. Morgan acted with specific intent to create harm. This may be so as it relates to the shooting. (Conclusion of law 15). There were no facts that supports that Mr. Morgan had the specific intent to cause harm during the initial “mini” detention while holding Justus and Tobeck at the gate while directing Mrs. Morgan to call 911 to summon the police. (CP-734-866). Mr. Morgan’s intent was to hold Justus and Tobeck until law enforcement arrived. After the truck hit the tree and Mr. Morgan re-contacted Justus, pointed his gun at him and ordered him to remained on the ground. Mr. Morgan’s intent was to hold Justus and Tobeck until law enforcement arrived. Contrary to State Farms argument that pointing the gun at someone creates specific intent the cause harm is unsupported by the record.

State Farm concedes that a “mini”-detention occurred at the gate as found by the court. *Respondent’s brief, at pg. 41*. In addition, State Farm concedes a detention occurred after the truck it the tree and Mr. Morgan pointed his gun at him and ordered him to remained on the ground. *Respondent’s brief, at pg. 43*. What

State Farm cannot get around is that a detention occurred.

Detention is covered under the PULP. State Farm conceded that there were three losses. 1) a mini-detention at the gate; 2) a shooting; and 3) detention at the end when Justus claimed out of the truck and Mr. Morgan ordered him to remain on the ground. Under the policy this would be considered three losses. Two of those losses were covered which under the PULP would be considered one loss. Under the PLUP it states that a series of similar or related offenses is considered to be one loss. This mirrors the efficient proximate cause analysis therefore the concept of the coverage is not limited or restricted to property claims, in fact the concept is actually written into the PLUP. Here, Mr. Justus retains the Morgans' first party rights. State Farm fails to cite any case law that limits the proximate cause analysis to only property claims.

F. The court abused its discretion when it denied Justus motion to compel.

G. The Court erred when it granted State Farm's Summary judgment.

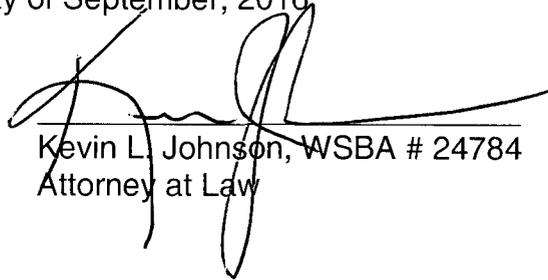
An insurer has a duty to act in good faith in discharging both of its primary contractual duties. Moreover, an insured has the right to assert a damage claim against his insurer for any bad faith in

commits in discharging its duties to defend and settle. The damages to which an insured may be entitled will vary depending on where the bad occurred in the context of the duty to defend or the duty to settle and on the exact nature of both the bad faith and the actual resultant harm suffered by the insured. As a general proposition, an insured who has been harmed by the bad faith conduct of his insurer may recover compensatory damages for a damage that are the direct result of the bad faith. Here, the Morgans prejudiced them by not setting their claim, the Morgan as a first party insured had the right to access their claim file. Mr. Justus were assigned all those rights and authorities. Justus requested the claim file and was denied.

II. CONCLUSION

The court should find coverage under the umbrella policy and order state Farm to indemnify the legal amended judgment plus interest and award attorney fees and costs; the court should also find that the court abused its discretion in denying Justus Motion to Compel; and reverse the trial courts ruling on state Farms Motion for summary Judgment and remand the extra contractual claims for further proceedings.

DATED the 6th day of September, 2016,



Kevin L. Johnson, WSBA # 24784
Attorney at Law

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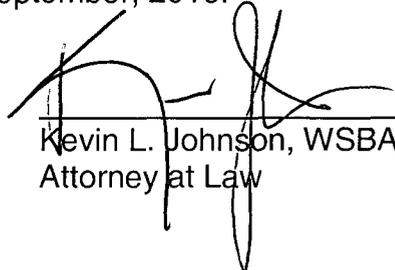
CERTIFICATE OF SERVICE

I Kevin L. Johnson hereby certify that on September 6, 2016
I caused to be electronically served the foregoing documents upon
the counsel via email as follows:

Soha & Lang, P.S.
Attorneys at Law
Mary R. De Young, WSBA #16264
1325 Fourth Avenue, Suite 2000
Seattle, Washington 98101-2570
Tel: (206) 624-1800
Fax: (206) 624-3585
young@sohalang.com

Joseph Hampton, Attorney at Law
One Convention Place
Suite 1400, 701 Pike Street
Seattle, Washington 98101-3927
jhampto@bpmlaw.com

DATED this 6th day of September, 2016.



Kevin L. Johnson, WSBA # 24784
Attorney at Law