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COURT OF APPEALS DIVISION II  
OF THE STATE OF WASHINGTON

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JOHN WILLIAM WEBB and KRISTA L. WEBB,

Appellants,

v.

USAA CASUALTY INSURANCE COMPANY,

Respondent.

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**BRIEF OF APPELLANTS**

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## I. INTRODUCTION

Appellants Krista Webb and John Webb (the “Webbs”) petition this Court to reverse the trial court’s decision granting Respondent USAA Casualty Insurance Company’s (“USAA”) motion for summary judgment, denying the Webbs’ motion for partial summary judgment, and dismissing with prejudice each of the Webbs claims, as stated in the *Order Granting Defendant USAA Casualty Insurance Company’s Motion for Summary Judgment and Denying Plaintiffs’ Motion for Partial Summary Judgment* dated July 10, 2018 (the “Order”). Clerk’s Papers (“CP”) at 564–65 (Appendix 1). The Webbs further petition this Court to vacate the Order and instruct the trial court to grant the Webbs’ motion for partial summary judgment finding that USAA has a duty to defend the Webbs and that USAA is liable on each of the Webbs’ claims.

The central issue in this appeal is whether the trial court erred by concluding USAA has no duty to defend the Webbs under their USAA liability insurance policy (the “Policy”) (CP at 199–260) against the underlying complaint (the “Hogg Complaint”) (CP at 261–68). The Hogg Complaint sought damages for trespass and nuisance allegedly caused by stray and ricocheted bullets resulting from target shooting on the Webbs’ neighboring property on January 21, 2017. The Webbs paid for extra homeowners coverage for trespass and nuisance claims.

The Hogg Complaint alleges each of the Webbs “carelessly” caused the ricochets, but does not specify exactly what each of the Webbs did to cause them. The Hogg Complaint also alleges the ricochets were caused by a third person (John Anderson) and “DOES 1 through 100,” although it fails to clearly allege how any of these defendants caused the ricochets. The Hogg Complaint suggest that on January 21, 2017 Krista Webb was not even present when the ricochets occurred. The Hogg Complaint is ambiguous as to whether Krista Webb, John Webb, or any of 101 other defendants fired the shots that produced the ricochets. The Hogg Complaint is vague and ambiguous as to how the shots were fired, in what direction they were fired, or why they produced the ricochets.

In spite of all this, the trial court agreed with USAA’s argument that there was no duty to defend because “the claims against [the Webbs] in the underlying [Hogg] Complaint arise from an intentional act and could not conceivably be covered according to particular provisions within the policy at issue.” CP at 565. The intentional act referred to by the court and USAA was the target shooting itself. This was error because the applicable coverage in the Policy excludes intentional harms, not intentional acts, and the Hogg Complaint could impose liability for harm the Webbs did not intend or expect to cause. Under well-established

Washington law regarding the duty to defend, the trial court should have concluded that USAA has a duty to defend the Webbs.

Because the trial court concluded there was no duty to defend, it dismissed at summary judgment each of the Webbs' claims: (1) breach of contract; (2) breach of duty of good faith and fair dealing; (3) violation of the Insurance Fair Conduct Act (IFCA), RCW 48.30.015; and (4) violation of the Consumer Protection Act (CPA), RCW 19.86. These dismissals were in error because USAA has a duty to defend. The trial court should have granted the Webbs' cross-motion for partial summary judgment holding USAA has a duty to defend and either holding USAA liable on each of the Webbs' claims as a matter of law or finding the extent to which the claims raised genuine issues of material fact.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred when it concluded USAA "has no duty to defend because the claims against [the Webbs] in the underlying [Hogg] Complaint arise from an intentional act and could not conceivably be covered according to particular provisions within the policy at issue" because the applicable Policy provisions exclude coverage for intentional harms, not intentional acts, and the Hogg Complaint satisfies every element required to trigger USAA's duty to defend under the "Personal Injury Endorsement" in the Policy.

2. The trial court erred when it dismissed each of the Webbs' claims on the sole ground that USAA had no duty to defend because USAA did have a duty to defend.

3. The trial court erred in denying the Webbs' motion for partial summary judgment holding USAA liable for breach of contract because USAA had a duty to defend the Webbs pursuant to the Policy and there is no genuine issue of material fact that USAA denied that duty and chose not to defend them.

4. The trial court erred in denying the Webbs' motion for partial summary judgment holding USAA liable for breach of the duty of good faith and fair dealing, violation of the IFCA, and violation of the CPA, where USAA's reasons for denying defense coverage were unreasonable as a matter of law and undisputed fact because they were contrary to the relevant aspects of the Policy, the Hogg Complaint, and controlling Washington law.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

A. Where the underlying complaint alleges the insureds and over 100 other people are liable for unspecified acts that "carelessly" or "negligently" caused harm because of ricocheted bullets fired during target shooting, where the applicable provisions of the insurance policy exclude intentional harms but not intentional acts, and where the

underlying complaint satisfies every element of coverage for “personal injury,” does the insurer have a duty to defend? (Assignments of Error 1 through 4.)

B. Where an insurer has a duty to defend, should a trial court grant the insurer’s motion for summary judgment dismissing each of the claims against it on the grounds that the insurer does not have a duty to defend? (Assignment of Error 2.)

C. Where an insurer had a duty to defend and there is no genuine issue of material fact that it denied that duty and chose not to defend its insureds, should a trial court grant the insureds’ motion for partial summary judgment holding the insurer liable for breach of contract? (Assignment of Error 3.)

D. Where an insurer denies defense coverage on unreasonable grounds that contradict the relevant aspects of the insurance policy, underlying complaint, and Washington law, should a trial court grant the insureds’ motion for partial summary judgment holding the insurer liable for breach of the duty of good faith and fair dealing, violation of the IFCA, and violation of the CPA? (Assignment of Error 4.)

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#### IV. STATEMENT OF THE CASE

##### A. **The Webbs' Liability Insurance from USAA**

Since 2009 USAA has insured both John Webb and Krista Webb against liability arising out of activities at their residential property. The Policy at issue in this case was in effect from August 26, 2016 to August 26, 2017. CP at 200 (Appendix 2).

In addition to basic homeowners liability coverage against claims for property damage or bodily injury, the Webbs paid an additional premium for a “Personal Injury Endorsement,” which protects them from claims alleging liability for “personal injury.” *Id.* at 259–60.

The Policy’s grant of personal injury coverage provides, in pertinent part:

“If a claim is made or a suit is brought against any ‘insured’ for damages because of . . . ‘personal injury’ caused by an ‘occurrence’ to which this coverage applies, we will . . . [p]rovide a defense at our expense . . . even if the suit is groundless, false or fraudulent.”

*Id.* at 259.

The Policy defines “personal injury” to include “wrongful entry” and “invasion of rights of privacy.” *Id.* The Policy defines an “occurrence” to mean

“[a]n event or series of events, including injurious exposure to conditions proximately caused by an act or omission of any ‘insured’, which results, during the policy period, in

**‘personal injury’**, neither expected nor intended from the standpoint of the **‘insured’**.”

*Id.* (bold in original).

The Policy contains an exclusion for bodily injury or property damage

“a. Which is reasonably expected or intended by any ‘insured’ even if the resulting ‘bodily injury’ or ‘property damage’

(1) Is of a different kind, quality or degree than initially expected or intended; or

(2) Is sustained by a different person, entity, real or personal property, than initially expected or intended.”

*Id.* at 236.<sup>1</sup>

“[W]ith respect to personal injury,” however, the “Personal Injury Endorsement,” replaces this entire exclusion with the phrase, “[w]hich is expected or intended by the ‘insured’[.]” *Id.* at 259. Thus, the policy still excludes bodily injury and property damage that is “reasonably expected or intended” by “any” insured, but it only excludes personal injury that “is expected or intended” by “the” insured. *Compare* CP at 236 with 259.

## **B. The Hogg Complaint**

On May 9, 2017, the Webbs’ neighbors, Steven P. Hogg (“Hogg”) and Candace K. Ladley (“Ladley”), filed a complaint against Krista and

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<sup>1</sup> This exclusion contains an exception for “‘bodily injury’ resulting from the use of lawful reasonable force by any ‘insured’ to protect persons or property.” CP at 236. This exception to the exclusion, however, is not relevant to this appeal so it is omitted from the quotation above and will not be mentioned again.

John Webb and John J. Anderson (“Anderson”) (the “Hogg Complaint”). CP at 261 (Appendix 3). The complaint alleges that Hogg and Ladley are a married couple who own and reside at the property at 25448 Port Gamble Road NE in Poulsbo, Washington. *Id.* ¶ 1.1. The complaint alleges the Webbs own and reside at the property at 5045 NE Minder Road, Poulsbo; and Anderson owns and resides at 5003 NE Minder Road, Poulsbo. *Id.* ¶¶ 1.2, 1.3.

The Hogg Complaint alleges the following occurrences:

- “On January 21, 2017, Defendants and each of them . . . carelessly . . . caused multiple rounds of ammunition, fragments thereof and/or ricocheted [sic] projectiles to be shot and strafed across [Hogg and Ladley’s] property from the property of Defendants WEBB.” *Id.* at 263, ¶ 3.2 (underline added).
- “Directly after the incident of the bullets, fragments and/or ricocheted [sic] projectiles entered onto [Hogg and Ladley’s] property, Plaintiff HOGG went to WEBB’S property and confronted the defendants JOHN WILLIAM WEBB, JOHN ANDERSON, and DOES 1 regarding the shooting onto Plaintiffs’ property.” *Id.* ¶ 3.3.
- “The defendants appeared to be shooting at a small target positioned South of WEBB’S residence so that the shots fired were directed southerly, without the benefit of a back stop and/or berm or any safety precautions. Said bullets were either directed at [Hogg and Ladd’s] property or were the result of ricochet [sic].” *Id.* (underline added).
- “Plaintiffs fear another incident will occur where Defendants will negligently [or] carelessly . . . fire again onto Plaintiffs’ property . . .” *Id.* at 264, ¶ 3.5 (emphasis added).

- “Defendants DOES 1 through 100, inclusive,” were “each . . . in some manner . . . negligently . . . proximately responsible for the events and happenings alleged in this complaint and for plaintiffs’ injuries and damages.” *Id.* at 262, ¶ 1.4.

The Hogg Complaint incorporates each of these allegations into its claims of common law trespass and nuisance. *Id.* at 265–67.

In describing the harm suffered by Hogg and Ladley, the trespass claim alleges that “Defendants, and each of them trespassed on Plaintiffs’ land, without the consent or authority of [Hogg or Ladley].” *Id.* at 265, ¶ 4.2. The nuisance claim similarly alleges that the Webbs’ and Anderson’s

“use of firearms and other deadly weapons on their properties, imminently threaten the physical safety of [Hogg and Ladley] on their property so as to essentially interfere with the comfortable enjoyment of [Hogg and Ladley’s] property, and constitutes a nuisance and should be abated.”

*Id.* at 267, ¶ 9.2. In addition to ricochets, the Hogg Complaint alleges the sound of gunfire constitutes a trespass and nuisance because Hogg and Ladley fear it. *Id.* at 264–65, 267, ¶¶ 3.5, 3.7, 4.1, 9.1, 9.2.

The trespass claim in the Hogg Complaint alleges that Hogg and Ladley “have been damaged, according to proof at time of trial.” *Id.* at 265, ¶ 4.5. The nuisance claim expressly incorporates this allegation. *Id.* at 267, ¶ 9.1. The Hogg Complaint contains a statement of “Relief

Sought” that does not distinguish between the remedies sought for one claim as opposed to another. *Id.* at 267–68, ¶ 10.2. The relief sought in the Hogg Complaint includes a “decree requiring [the Webbs], and each of them to compensate [Hogg and Ladley] for their actual damages, according to proof at trial.” *Id.*

To summarize, the Hogg Complaint alleges each of the Webbs is liable for damages on claims of trespass and nuisance allegedly caused by one or more ricocheted bullets and fear resulting from target shooting on the Webbs’ neighboring property on January 21, 2017. CP at 263 ¶¶ 3.2, 3.5. The Hogg Complaint alleges each of the Webbs “carelessly” caused the ricochets, but does not specify exactly what each of the Webbs (or anyone else) did to cause them. *Id.* The Hogg Complaint also alleges the ricochets were caused by a third person (John Anderson) and “DOES 1 through 100.” CP at 262–63, ¶¶ 1.3, 1.4, 3.2. It is unclear from these allegations whether Krista Webb, John Webb, or any of 101 other defendants fired the shots that produced the ricochets. It is unclear how the alleged shots were fired, in what direction they were fired, or why they produced the ricochets.

After alleging the ricochets occurred, the complaint alleges that Hogg went to the Webbs’ property and informed John Webb and Anderson about them. *Id.* ¶ 3.3. When Hogg visited the Webb property

he notes Bill Webb and John Anderson were present, but there are no allegations Krista Webb was even present. *Id.* There is no allegation that any of the defendants had prior knowledge that the ricochets had occurred or that they knew ahead of time they were going to occur. There is no allegation that John Webb, Krista Webb, or any of the 101 other defendants had notice before the events of January 21, 2017, that the sound of gunfire would cause Hogg or Ladley to suffer actionable levels of fear.

**C. USAA’s First Denial of Coverage**

The Webbs tendered the Hogg Complaint to USAA on or about May 24, 2017. CP at 4, ¶ 6. USAA responded by denying coverage on June 20, 2017. *Id.* at 270. USAA’s explanation for the denial states:

“[There is] no duty to defend under the Homeowners and Umbrella Policies because *some* of the allegations in the complaint do not meet the definition of an occurrence. Intentional acts and Punitive damages are excluded from the policy.”

*Id.* (emphasis added) (Appendix 4).

**D. The Webbs’ Notice to USAA That Its Denial Was in Violation of the Insurance Fair Conduct Act**

The Webbs, in a letter from their counsel dated September 15, 2017, notified USAA that its denial was improper under Washington law, constituted a bad faith denial of coverage, and violated Washington’s

Consumer Protection Act (CPA), RCW 19.86, and Insurance Fair Conduct Act (IFCA), RCW 48.30.015. *Id.* at 274–75. The letter also provided, pursuant to RCW 48.30.015(8), 20 days’ notice of the Webbs’ basis for a cause of action under the IFCA. *Id.* at 275. The Webbs’ counsel provided a copy of the letter to the Office of the Insurance Commissioner of Washington. *Id.* at 197–98, 275.

**E. USAA’s Second Denial of Coverage**

After receiving the Webbs’ letter, USAA issued a second letter denying coverage on October 4, 2017. *Id.* at 276 (Appendix 5). It states: “The allegations of intentional infliction of emotional distress, negligent infliction of emotional distress and nuisance are intentional acts and excluded from the policy.” *Id.* USAA further asserted, “[i]n addition the following allegations are not covered because they do not meet the definition of an occurrence as outlined in the policy; Trespass . . . .” *Id.*

**F. The Webbs’ Suit for Breach of the Duty to Defend**

On September 15, 2017, the Webbs filed their complaint initiating this action against USAA and filed an amended complaint on October 20, 2017. *Id.* at 3–9. The Webbs alleged USAA had a duty to defend them against the Hogg Complaint and its denial of defense coverage was unreasonable. *Id.* at 4–9. The Webbs alleged claims for breach of insurance contract, breach of implied duty of good faith and fair dealing,

violation of the IFCA, and violation of the CPA. *Id.* at 4–7. USAA’s answer denied all liability. *Id.* at 23–29.

**G. The Parties’ Cross-Motions for Summary Judgment**

On May 2, 2018, USAA moved for summary judgment on the grounds that there was no duty to defend because: (1) the Policy provides coverage “only for injuries caused by an *accident* and all causes of action in the underlying suit arose out of Webb’s *deliberate discharge* of firearms” (*id.* at 160 (italics in original)); (2) “as to the trespass claim . . . the policy’s criminal act exclusion precludes coverage as Webb’s discharge of firearms constitutes a misdemeanor under both the Kitsap County Code and Poulsbo Municipal Code” (*id.* at 160–61); and (3) “the policy excludes coverage for *intentional* conduct under its ‘Intentional Act’ exclusion” and “*all* the claims contained within the underlying suit . . . were the result of Webb’s deliberate acts” (*id.* at 161 (italics in original)).

The Webbs cross-moved for partial summary judgment that USAA had a duty to defend on the grounds that the Hogg Complaint could impose liability within the coverage of the Policy. *Id.* at 181–83. The Webbs sought partial summary judgment on their breach of contract claim based on USAA’s denial of defense coverage. *Id.* at 181. The Webbs also moved for partial summary judgment on their claims for breach of duty of

good faith and fair dealing, violation of the IFCA, and violation of the CPA, on the grounds that USAA's denial of defense coverage was unreasonable and contradicted the relevant aspects of the Policy, Hogg Complaint, and controlling Washington law. *Id.* at 181.

## V. ARGUMENT

### A. Standard of Review

Washington appellate courts “review a summary judgment order de novo, engaging in the same inquiry as the trial court.” *Keck v. Collins*, 181 Wash. App. 67, 78 (2014). Accordingly, summary judgment is proper where “the records on file with the trial court show there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” *Id.* at 78–79 (internal quotations omitted).

Whether an insurer has a duty to defend is often decided as a matter of law and undisputed fact at summary judgment. *United Services Auto. Ass'n v. Speed*, 179 Wash. App. 184, 194 (2014). If a court errs in that decision, an appellate court can reverse and hold there is a duty to defend. *E.g., Woo v. Fireman's Fund Ins. Co.*, 161 Wash.2d 43, 48–49 (2007) (reversing Court of Appeals' decision that there was no duty to defend as a matter of law and reinstating trial court's decision that there was a duty to defend). Here, the Webbs ask this Court to reverse the trial court and hold that USAA has a duty to defend.

When parties cross-move for summary judgment on claims alleging that an insurer breached its duty of good faith and fair dealing or otherwise violated the law by unreasonably denying coverage and the trial court dismisses the claims, the Court of Appeals has several options. It can either affirm the dismissal, reverse and hold the insurer liable on the claims as a matter of law and undisputed fact, or reverse and remand for further proceedings to resolve genuine issues of material fact raised by the claims.

**B. The Law Regarding an Insurer’s Duty to Defend**

“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 Wash.2d at 54. An insurer’s

“duty to defend arises when an action is first brought, and it is based on *the potential for liability*[, i.e.,] . . . when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy’s coverage.”

*Id.* at 52–53 (emphasis in original) (internal quotations omitted).

Washington courts have “long held that the duty to defend is different from and broader than the duty to indemnify.” *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wash.2d 793, 802–03 (2014), *as corrected* (Aug. 6, 2014). “While the duty to indemnify exists only if the policy covers the insured’s liability, the duty to defend is triggered if the insurance policy

conceivably covers allegations in the complaint.” *Id.* at 802. “The duty to defend arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy’s coverage.” *Id.* at 802–03.

“Construction of an insurance policy is a question of law for the courts, the policy is construed as a whole, and the policy should be given a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.” *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha* (“*Queen City*”), 126 Wash.2d 50, 65 (1994), *as amended* (Sept. 29, 1994), *as clarified on denial of recons.* (Mar. 22, 1995).

“[I]t has been almost the unanimous holding of all courts that insurance contracts must be liberally construed in favor of a policyholder or beneficiary thereof, whenever possible, and strictly construed against the insurer in order to afford the protection which the insured was endeavoring to secure when he applied for the insurance.”

*Id.*

“[E]xclusionary clauses in the insurance contract are to be most strictly construed against the insurer.” *Expedia, Inc.*, 180 Wash.2d at 803. “The insured bears the burden of showing that coverage exists; the insurer that an exception applies.” *Mutual of Enumclaw Ins. Co. v. T&G Const., Inc.*, 165 Wash.2d 255, 268 (2008).

The duty to defend “is triggered if the insurance policy *conceivably covers* the allegations in the complaint.” *Woo*, 161 Wash.2d at 53 (emphasis in original). The “insurer is not relieved of its duty to defend unless the claim alleged in the complaint is clearly not covered by the policy.” *Id.* (internal quotations omitted). “[I]f a complaint is ambiguous, a court will construe it liberally in favor of triggering the insurer’s duty to defend.” *Id.* (internal quotations omitted).

“It is a cornerstone of insurance law that an insurer may never put its own interests ahead of its insured’s.” *Expedia*, 180 Wash.2d at 803. “[T]he duty to defend requires an insurer to give the insured the benefit of the doubt when determining whether the insurance policy covers the allegations in the complaint.” *Id.* (quoting *Woo*, 161 Wash.2d at 60). A court will construe an ambiguous complaint liberally in favor of triggering the duty to defend. *Id.* (citing *Woo*, 161 Wash.2d at 52). “An insurer may not refuse to defend based upon an equivocal interpretation of case law to give itself the benefit of the doubt rather than its insured.” *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wash.2d 398, 414 (2010).

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**C. The Trial Court Erred in Concluding USAA Has No Duty to Defend the Webbs Because the Hogg Complaint, With Its Allegations of “Carelessness” and “Negligence,” Could Result in a Covered Liability.**

The trial court erred when it held USAA has no duty to defend the Webbs on the grounds that the claims in the Hogg Complaint “arise from an intentional act and could not conceivably be covered according to [the Policy].” CP at 565. At the outset, it is important to recognize that intentional acts are present in virtually every case of trespass or nuisance. In the case of trespass, a person can intend to walk through a forest without knowing she is entering her neighbor’s property. In a nuisance case, a homeowner can intend to play music without intending to disturb his neighbors. These situations involve intentional acts that personal injury liability insurance is designed to cover.

Here, the Webbs’ Personal Injury Endorsement does not exclude coverage for personal injury claims arising from an intentional act. CP at 259. It does not even require an “accident” for a personal injury claim to be covered. Thus, there are many ways in which the broad allegations in the Hogg Complaint could conceivably result in a covered liability.<sup>2</sup> The

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<sup>2</sup> By discussing how the Hogg Complaint could conceivably impose liability, the Webbs do not intend to suggest there is any merit to the Hogg Complaint or any of its factual allegations. The Webbs are merely interpreting the allegations against them that show USAA has a duty to defend.

Court should reverse the Order and hold that USAA has a duty to defend the Webbs against the Hogg Complaint.

The Personal Injury Endorsement provides coverage as follows:

“If a claim is made or a suit is brought against any ‘insured’ for damages because of . . . ‘personal injury’ caused by an ‘occurrence’ to which this coverage applies, we will . . . [p]rovide a defense at our expense . . . even if the suit is groundless, false or fraudulent.”

*Id.* at 259.

This grant of coverage requires the insured to show: (1) allegations of personal injury, (2) for which the insured could be held liable for damages, (3) arising from an occurrence. During the summary judgment proceedings, USAA contested each of these elements of coverage in its 55 pages of briefing. The Webbs will therefore address each of them below to show as a matter of law that USAA has a duty to defend unless a policy exclusion forecloses all possibility of a covered liability. The Webbs will then show that the reasoning in the trial court’s Order is erroneous because the so-called “intentional acts” exclusion emphasized by USAA applies only to intentional harms and does not excuse its failure to defend. If USAA raises any other coverage exclusions in its response brief (such as the “criminal acts” exclusion that the trial court’s Order explicitly rejected), the Webbs will address them in their reply brief.

***1. The Trespass and Nuisance Claims in the Hogg Complaint Allege “Personal Injury.”***

The first question raised by USAA’s grant of personal injury coverage is whether the Hogg Complaint alleges “personal injury.” To answer this question, Washington law looks to “the type of offense that is alleged.” *Kitsap County v. Allstate Insurance Co.*, 136 Wash.2d 567, 586–87 (1988).

In *Kitsap County*, the Washington Supreme Court interpreted an insurance policy’s definition of “personal injury” that was virtually identical to the definition in the USAA Policy. Under this controlling precedent, the claims for trespass and nuisance in the Hogg Complaint are claims for “personal injury” within the meaning of the Policy.

The insurance policies at issue in *Kitsap County* defined “personal injury” to include “wrongful entry or eviction, or other invasion of the right of private occupancy.” *Id.* at 573–74. The claims in the underlying lawsuit were for trespass, nuisance, and interference with use and enjoyment of property. *Id.* at 585–86. The Washington Supreme Court concluded these claims were for wrongful entry or other invasion of the right of private occupancy and therefore constituted claims for “personal injury” within the meaning of the policy. *Id.* at 586–92.

*Kitsap County* holds that the “combination of the terms ‘wrongful’ and ‘entry’” in an insurer’s definition of “personal injury” “makes a phrase that is essentially synonymous with the word ‘trespass.’” *Id.* at 587. “[A]n average purchaser of insurance” would understand the phrase “other invasion of the right of private occupancy” in the insurer’s definition to “include a trespass[.]” *Id.* at 590. “In light of the similarity between a nuisance and a trespass,” a nuisance claim is also “equivalent to a claim for wrongful entry and other invasion of the right of private occupancy” within the insurer’s definition of “personal injury.” *Id.* at 592. The court did not find any ambiguity in the policy’s definition of “personal injury,” but noted that any such ambiguity would be construed against the insurer. *Id.* at 589.

Like the insurance policy at issue in *Kitsap County*, the Webbs’ Policy covers liability for “personal injury.” CP at 259. The Personal Injury Endorsement defines “personal injury” to include “wrongful entry” and “invasion of rights of privacy.” *Id.* *Kitsap County* construed these terms to encompass claims for trespass and nuisance. The claims for trespass and nuisance in the Hogg Complaint therefore allege “personal injury” within the meaning of the Policy.

The claims for trespass and nuisance in the Hogg Complaint allege that each of the Webbs somehow caused “multiple rounds of ammunition,

fragments thereof, and/or ricocheted [sic] projectiles to be shot and strafed across [Hogg and Ladley's] property from the [Webbs'] property." CP at 263, ¶ 3.2. The trespass claim alleges the Webbs "trespassed on Plaintiffs' land, without the consent or authority of [Hogg or Ladley]." *Id.* at 265, ¶ 4.2. The nuisance claim alleges the "use of firearms" on the Webbs' property threatened "the physical safety" of Hogg and Ladley "on their property so as to essentially interfere with" its "comfortable enjoyment[.]" *Id.* at 267, ¶ 9.2. The trespass and nuisance claims also allege liability because of fear. *Id.* at 264, 265, 267, ¶¶ 3.5, 3.7, 4.1, 4.3, 9.1, 9.2.<sup>3</sup>

These trespass and nuisance allegations in the Hogg Complaint describe "wrongful entry" and "invasion of rights of privacy." They therefore allege "personal injury" within the meaning of the USAA Policy.

***2. The Claims for Trespass and Nuisance Could Result in the Webbs Becoming Liable for "Damages."***

The second question raised by USAA's grant of personal injury coverage is whether the claims for trespass and nuisance in the Hogg Complaint could result in the Webbs becoming liable for "damages." The answer is "Yes" because the Hogg Complaint clearly seeks damages as a

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<sup>3</sup> "Where a defendant's conduct causes a reasonable fear of using property, this constitutes an injury taking the form of an interference with property." *Kitsap County v. Kitsap Rifle & Revolver Club* ("KRRC"), 184 Wash. App. 252, 284–85 (2014), *amended on denial of recons.* (Feb. 10, 2015). Whether fear is reasonable depends on both the probability of harm and its potential severity. *Id.* To be actionable, fear "need not be scientifically founded, so long as it is not unreasonable." *Id.*

remedy for both trespass and nuisance. If the Hogg Complaint were at all ambiguous on this issue, it would need to be construed “liberally in favor of triggering the insurer’s duty to defend.” *Woo*, 161 Wash.2d at 53. The Hogg Complaint alleges damages because of personal injury.

The trespass claim in the Hogg Complaint alleges that Hogg and Ladley “have been damaged, according to proof at time of trial.” CP at 265, ¶ 4.5. The nuisance claim expressly incorporates this allegation. *Id.* at 267, ¶ 9.1. The “Relief Sought” by the Hogg Complaint includes a “decree requiring [the Webbs], and each of them to compensate [Hogg and Ladley] for their actual damages, according to proof at trial.” *Id.* at 267–68, ¶ 10.2. Thus, the trespass and nuisance claims in the Hogg Complaint could result in the Webbs becoming liable for “damages” within the personal injury coverage granted by the Policy.

***3. The Trespass and Nuisance Claims Against the Webbs Allege an “Occurrence.”***

The third question raised by the grant of coverage in the Personal Injury Endorsement is whether the trespass and nuisance claims in the Hogg Complaint allege an “occurrence” within the meaning of the Policy. The Policy defines “occurrence” to mean

“[a]n event or series of events, including injurious exposure to conditions proximately caused by an act or omission of any **‘insured’**, which results, during the policy period, in

**‘personal injury’**, neither expected nor intended from the standpoint of the **‘insured’**.”

CP at 259 (bold in original).

As discussed above, the trespass and nuisance claims in the Hogg Complaint allege “personal injury.” The Hogg Complaint alleges an occurrence, then, if it alleges: (a) the trespass or nuisance arose during the policy period; (b) the trespass or nuisance resulted from an event or series of events, including injurious exposure to conditions proximately caused by an act or omission of any insured; and (c) the trespass or nuisance was neither expected nor intended from the Webbs’ standpoint. The Webbs will now address each of these elements to show that the Hogg Complaint alleges an “occurrence” within the meaning of the Personal Injury Endorsement.

- (i) The alleged trespass and nuisance arose during the policy period.

The policy period ran from August 26, 2016, to August 26, 2017. CP at 200. The Hogg Complaint alleges a trespass and nuisance arose on January 21, 2017, when each of the Webbs allegedly caused ricochets to wrongfully enter the Hogg and Ladley property, interfere with their rights, and cause them fear. CP at 263, ¶¶ 3.2, 3.5. The trespass and nuisance claims allegedly arose “during the policy period.” CP at 200.

(ii) The trespass and nuisance allegedly resulted from an event or series of events, including injurious exposure to conditions proximately caused by an act or omission, of each of the Webbs.

The Hogg Complaint alleges that on January 21, 2017, Krista Webb and John Webb caused bullet fragments, ricochets, and the sound of gunfire to wrongfully enter Hogg and Ladley’s property and interfere with their rights as a result of target shooting at the Webbs’ property. CP at 263–64, ¶¶ 3.2–3.3, 3.5. These allegations describe an event or series of events, including injurious exposure to conditions proximately caused by an act or omission of any insured, within the definition of “occurrence” in the Personal Injury Endorsement. CP at 200.

(iii) The alleged trespass and nuisance were neither expected nor intended from the Webbs’ standpoint.

The only remaining question in determining whether the Hogg Complaint alleges an “occurrence” is whether it alleges a personal injury that was “neither expected nor intended from the standpoint of the insured.” CP at 259 (emphasis omitted). It does.

In *Woo*, there was coverage for personal injury only if the underlying complaint alleged a “fortuitous, inadvertent or mistaken business activity giving rise to . . . personal injury neither expected nor

intended from the standpoint of the insured.” 161 Wash.2d at 54 (italics omitted). The underlying complaint alleged the insured dentist had “taunted” the plaintiff and played an “arguably offensive practical joke on her.” *Id.* at 65. The complaint “did not clearly allege” that the insured “expected or intended that his taunts or the practical joke would cause personal injury[.]” *Id.* Even if the taunting and practical joke were intentional acts, there was a duty to defend because the alleged *personal injuries* were “neither expected nor intended from the standpoint of the insured.” *Id.* at 64–65.

Like the personal injury coverage in *Woo*, the Personal Injury Endorsement in the USAA Policy requires the underlying complaint to allege a personal injury that was “neither expected nor intended from the standpoint of the insured.”<sup>4</sup> The trespass and nuisance claims in the Hogg Complaint are not limited to scenarios in which the Webbs expected and intended to cause harm. Instead, the Hogg Complaint alleges the Webbs “carelessly” or “negligently” caused the alleged trespass and nuisance. CP at 263–64, ¶¶ 3.2, 3.5.

The torts of trespass and nuisance do not require proof that the alleged tortfeasor intended or expected to cause injury. “Nuisance can be

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<sup>4</sup> The USAA Policy defines “occurrence” with reference to an “event or series of events,” which creates broader coverage than the “fortuitous, inadvertent or mistaken business activity” required for personal injury coverage in *Woo*. CP at 259.

based upon intentional, reckless, or negligent conduct.” *Hurley v. Port Blakely Tree Farms L.P.*, 182 Wash. App. 753, 769 (2014) (underline added). “Trespass occurs when a person intentionally or negligently intrudes onto or into the property of another.” *Id.* (underline added). “To prove negligent nuisance or negligent trespass, a plaintiff must prove the elements of negligence.” *Donner v. Blue*, 187 Wash. App. 51, 65 (2015).

“Negligence is the failure to exercise reasonable or ordinary care.” *Gordon v. Deer Park Sch. Dist. No. 414*, 71 Wash.2d 119, 122–23 (1967). “Reasonable or ordinary care is that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances or conditions.” *Id.*

The element of causation requires proof that the tortfeasor’s actions were the cause-in-fact and legal cause of the alleged injuries. *Lynn v. Labor Ready, Inc.*, 136 Wash. App. 295, 307 (2006). “Cause-in-fact is a cause which in a direct sequence [unbroken by any new independent cause,] produces the [injury] complained of and without which such [injury] would not have happened[,]” which is generally a question for a jury. *Id.* (internal quotations omitted). Legal causation is a question of law that requires the court to decide “whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability.” *Id.* at 311–12.

Thus, the law of trespass and nuisance does not require proof that the alleged tortfeasor intended or expected the harm alleged by the plaintiff. By alleging the Webbs carelessly or negligently caused a trespass and nuisance, the Hogg Complaint would hold them liable even if they did not expect or intend those harms to occur.

Moreover, the Hogg Complaint alleges that on January 21, 2017, the Webbs “carelessly . . . caused multiple rounds of ammunition, fragments thereof and/or ricocheted [sic] projectiles to be shot and strafed across [Hogg and Ladley’s] property from the” Webbs’ property. CP 263, ¶ 3.2 (underline added). This allegation fails to clearly identify who fired the shots that produced the alleged ricochets. This shows the Hogg Complaint intends to hold the Webbs liable regardless of *who* was shooting at their property on January 21, 2017. The Hogg Complaint makes that intent even clearer by naming “DOES 1 through 100” as defendants and alleging they are

“each . . . in some manner intentionally, negligently, recklessly, or as the result of extra hazardous activity, proximately responsible for the events and happenings alleged in [the Hogg Complaint] and for [Hogg and Ladley’s] injuries and damages.”

CP 262, ¶ 1.4 (underline added). As with the Webbs and Anderson, the Hogg Complaint broadly alleges the “100 Does” are each liable for

causing the ricochets—without clearly saying what any of the defendants did to cause them.

According to these allegations, the ricocheted shots that caused or contributed to Hogg and Ladley’s personal injuries on January 21, 2017, might have been fired by someone other than Krista Webb, John Webb, or even Anderson. Krista Webb and/or John Webb might not have expected or intended the person to shoot. The person who fired the shots might have done so accidentally. Their finger might have slipped, or a gun might have misfired. A bullet fired in a safe direction might have missed its target and ricocheted unpredictably off an uneven surface, such as a rock.

The Hogg Complaint alleges that on January 21, 2017, “[m]ultiple rounds of ammunition, fragments, shrapnel and/or richoteted [sic] projectiles cut through [Hogg and Ladley’s] trees.” CP 263, ¶ 3.2. “A round, fragment or richoteted object also landed in the bed of [Hogg and Ladley’s] pick-up truck[.]” *Id.* “Said bullets were either directed at Plaintiffs’ property or were the result of richotet [sic].” *Id.* ¶ 3.3 (underline added). These allegations show that the Hogg Complaint intends to hold the Webbs liable even if every object that crossed or entered Hogg and Ladley’s property resulted from an unexpected and

unintended ricochet or splatter of bullet fragments off an irregular surface or object.

Likewise, the Hogg Complaint is not limited to allegations that the Webbs intended and expected to cause every instance of fear that Hogg and Ladley allegedly suffered. Hogg and Ladley's fears could have suddenly and unexpectedly occurred to them the moment they first heard gunfire on January 21, 2017, or the fears might have only occurred to them after they thought a ricochet had entered their property. Either way, there is no allegation that the Webbs had advance notice or awareness that Hogg and Ladley were going to fear the sound of gunfire. Shooting sounds routinely occur during hunting activities, private target practice, and near shooting ranges operated by law enforcement agencies and others throughout the state. Many people are accustomed to shooting sounds and do not fear them. *E.g.*, *KRRC*, 184 Wash. App. at 287 (describing witnesses who were not bothered by shooting sounds from the Club). Like the allegations about the 100 Does and the ricochets, the allegations of fear in the Hogg Complaint would impose liability on the Webbs regardless of whether they expected or intended to cause personal injury.

The Hogg Complaint includes allegations that the Webbs acted “without regard for human or animal life” and said they would “continue to shoot their guns whenever they want to.” CP at 266, ¶¶ 3.2, 3.6. These

and other allegations in the Hogg Complaint that arguably describe intent to cause harm do not change the analysis. Each of these allegations might prove false; none of them clearly describes exactly who or what caused each of the offending ricochets and sounds of gunfire; and none foreclose the possibility that at least some of the alleged harm was unexpected and unintended from the standpoint of one or both of the Webbs. There are many conceivable fact patterns consistent with the allegations under which the Webbs could incur liability for carelessly or negligently causing ricochets or the sound of gunfire without expecting or intending them to occur and without intending to cause any personal injury to Hogg or Ladley.

An insurer has a duty to defend if *any portion* of an alleged claim could result in a covered liability. *National Steel Const. Co. v. National Union Fire Ins. Co. of Pittsburgh* (“*National Steel*”), 14 Wash. App. 573, 575–76 (1975). In *National Steel*, the underlying complaint alleged that the plaintiff had purchased defective water tanks manufactured by the insured and that the tanks had no value. *Id.* The insurance policy excluded claims for damage to the tanks. *Id.* at 576. It did, however, cover claims for consequential damages. *Id.* The underlying complaint sought consequential damages above the cost or value of the installed tanks. *Id.* The insurer, therefore, had a duty to defend. *Id.*

In *American Best Food*, the Washington Supreme Court held an insurer had a duty to defend a complaint that alleged assault and battery and also alleged “discrete intervening act[s] of negligence, many of which occurred after the assault.” 168 Wash.2d at 407. The policy arguably excluded coverage for assault and battery, but it did not clearly exclude coverage for harm caused by post-assault negligence. *Id.* at 410–11. The court construed this ambiguity in favor of coverage “for post[-]assault negligence to the extent it caused or enhanced [the plaintiff’s] injuries.” *Id.* at 411. The insurer therefore had a duty to defend. *Id.* at 411–13. Its decision to give itself the benefit of the doubt by resolving an ambiguity against the insured was contrary to law, unreasonable, and in bad faith as a matter of law. *Id.* at 413.

In *Allstate Property and Casualty Insurance Co. v. Giroux* (“*Giroux*”), the Western District of Washington concluded an insurer had a duty to defend even though the underlying complaint alleged the insured intended to cause harm because it also alleged the insured acted negligently. Case No. C15-5954 BHS, 2016 WL 3632490, at \*3–4 (W.D. Wash. July 7, 2016). The insurer in *Giroux* denied coverage on the grounds that all of the claims stemmed “from deliberate acts, which do not constitute an ‘occurrence’ under the [policies’] coverage provisions.” *Id.* The court disagreed, explaining:

“Although [the underlying] complaint contains allegations of intentional conduct, [it] also alleges the [insureds] negligently caused him emotional distress and failed to use reasonable care to avoid causing him damages.”

*Id.*

Under *Giroux*, *American Best Food*, and *National Steel*, a mix of allegations regarding negligence and intent to cause harm describes an occurrence triggering an insurer’s duty to defend. The Hogg Complaint alleges the Webbs acted carelessly and negligently. It alleges unpredictable ricochets and fears. It alleges the Webbs are liable regardless of who fired the ricocheted shots on January 21, 2017, and without specifying what the Webbs did to cause them. It does not allege the Webbs expected and intended every harmful entry, interference, or fear for which Hogg and Ladley seek damages. The Hogg Complaint could therefore impose liability on the Webbs for causing a trespass or nuisance “neither expected nor intended from the standpoint of the insureds” within the definition of “occurrence” in the Personal Injury Endorsement.

***4. The Hogg Complaint Alleges Personal Injury for Which the Webbs Could Be Held Liable for Damages Arising from an Occurrence, Triggering USAA’s Duty to Defend.***

To summarize, any uncertainty about the meaning of the Hogg Complaint or USAA Policy must be resolved in favor of defense coverage.

*Woo*, 161 Wash.2d at 53. The Hogg Complaint alleges trespass and nuisance claims, which constitute “personal injury” under Washington law. To remedy the trespass and nuisance, the Hogg Complaint alleges the Webbs are liable for money damages.

The Hogg Complaint alleges the trespass and nuisance occurred because of an “event or series of events” involving target shooting at the Webbs’ property. It alleges at least some of the trespass and nuisance occurred “during the coverage period.” It could impose liability on the Webbs for causing wrongful entries, interferences, and actionable fears that the Webbs did not expect or intend. It therefore alleges an “occurrence” within the personal injury coverage of the Policy.

The Hogg Complaint alleges personal injuries for which the Webbs could be held liable for damages arising from an occurrence. The Hogg Complaint therefore satisfies every element necessary to trigger USAA’s duty to defend under the Personal Injury Endorsement.

***5. The Trial Court Erred in Construing the Policy to Exclude All Liability Arising from “Intentional Acts.”***

The trial court erred when it found USAA had no duty to defend the Webbs on the grounds that “the claims against Plaintiffs in the underlying Complaint arise from an intentional act.” CP at 565. The trial court appears to have misinterpreted the Policy to exclude coverage for

any personal injury arising from intentional acts or conduct, regardless of whether the insureds expected or intended the resulting personal injury. As shown above, this interpretation is contradicted by the text of the Personal Injury Endorsement, the allegations in the Hogg Complaint, and the applicable laws governing their interpretation. It is also contradicted by the language of the intentional harm exclusion in the Policy and the law surrounding that exclusion.

The Hogg Complaint does not clearly allege that intentional acts of Krista Webb or John Webb caused all of the harm for which it intends to hold them liable. Even if it did, however, the trial court's Order would be in error because the Policy excludes coverage for intentional harms, not intentional acts.

The Policy contains an exclusion for bodily injury or property damage

“a. Which is reasonably expected or intended by any ‘insured’ even if the resulting ‘bodily injury’ or ‘property damage’

- (1) Is of a different kind, quality or degree than initially expected or intended; or
- (2) Is sustained by a different person, entity, real or personal property, than initially expected or intended.”

*Id.* at 236. “[W]ith respect to personal injury,” however, the “Personal Injury Endorsement” replaces this entire exclusion with the following text:

“a. Which is expected or intended by the ‘insured’[.]” *Id.* at 259. Thus, the policy contains a simple exclusion for personal injury that is expected or intended by the insured. *Compare* CP at 236 *with* 259. If the insured did not expect or intend the alleged harm, the exclusion does not apply, regardless of whether the harm arose from acts of the insured that were intentional.

“[E]xclusionary clauses in the insurance contract are to be most strictly construed against the insurer.” *Expedia, Inc.*, 180 Wash.2d at 802. The Webbs’ interpretation of the intentional harm exclusion is based on its plain language. It is also based on the context in which it appears. As discussed above, the grant of coverage is limited to the definition of “occurrence,” which includes only personal injuries that were “neither expected nor intended from the standpoint of the insured.” *See supra*, Part V.C.3. The definition of “occurrence” is consistent with the Webbs’ interpretation of the intentional harm exclusion. Both clauses in the Policy preclude defense coverage only for harm the insured is clearly alleged to have expected or intended to cause.

***6. The Webbs’ Subjective State of Mind Decides Whether They Expected or Intended the Alleged Trespass and Nuisance.***

Whether the Webbs expected or intended to cause the personal injuries alleged in the Hogg Complaint depends on their subjective state of

mind. The intentional harm exclusion applies to personal injury that is “expected or intended by the ‘insured,’” whereas the definition of occurrence applies to personal injury that was “neither expected nor intended from the standpoint of the insured.” CP at 259. Each formulation expresses a “subjective” standard that provides coverage unless the insured *subjectively* intended or expected the harm to occur. *Queen City*, 126 Wash.2d at 66–67 (affirming Court of Appeals’ application of subjective standard based on similar policy language); *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 64 Wash. App. 838, 866 (1992).

In *Queen City*, the Washington Supreme Court (en banc) analyzed policy language that defined “occurrence” to include an “event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury [or] property damage[.]” *Id.* at 64. *Queen City* interpreted this language to express a subjective standard because that was a reasonable interpretation of an ambiguity in the policy that was consistent with the general purpose of the policy and the expectations of an ordinary insured and it favored the insured. *Id.* at 68.

Here, the intentional harm exclusion in the Webbs’ Personal Injury Endorsement applies to personal injury that is “expected or intended by the ‘insured’” while the definition of “occurrence” applies to personal

injury that was “neither expected nor intended from the standpoint of the insured.” CP at 259. This policy language expresses a subjective standard even more clearly than the applicable language in *Queen City*. Because the Hogg Complaint could result in liability for harm the Webbs did not subjectively expect or intend, USAA has a duty to defend, and the trial court’s Order must be reversed.

*Queen City* emphatically distinguished Washington court opinions applying an objective standard. 126 Wash.2d at 68. This Court should do the same. *Queen City* explains:

“[M]any of the cases relied upon by the insurers concern the meaning of the term ‘accident,’ and not specifically the issue whether expectation of harm should be determined under an objective or subjective standard. The determination of what constitutes an accident, *i.e.*, whether injury or damage has resulted from an ‘accident,’ is not dispositive on the standard for expectation of the damages. Thus, this court’s holding in *Roller v. Stonewall Ins. Co.*, . . . that whether an accident has occurred is an objective determination, does not control the question whether the expectation of injury or damage is to be decided under an objective or subjective standard. Some of the cases relied upon by the insurers involve the rule that an ‘accident’ is an unusual, unexpected and unforeseen happening, and that where the insured acts deliberately, no accident occurs unless there is an additional unexpected, independent and unforeseen happening which caused the harm. Again, these cases do not concern the standard for expectation of the resulting harm.<sup>[1]</sup>”

*Id.* at 68–69 (footnote and internal citations omitted) (underline added).

In *Queen City*, the policy defined “occurrence” to include not only an “accident” but also an “event” that “unexpectedly and unintentionally results in personal injury, property damage[.]” *Id.* at 64. Because “event” is broader than “accident,”<sup>5</sup> case law construing the latter term did not apply. Here, the relevant provisions of personal injury coverage do not use the word “accident” at all, and they contain no language expressing or implying an objective standard. CP at 259. This Court should therefore reject any effort by USAA to escape its duty to defend by arguing for an objective standard or that the Hogg Complaint alleges an “accident.”

***7. Other Jurisdictions Agree a Claim for Negligently Causing a Trespass or Nuisance Triggers an Insurer’s Duty to Defend.***

Courts in other jurisdictions agree that a claim for negligently causing a trespass or nuisance triggers an insurer’s duty to defend under a general liability policy.

In *Collum v. State Farm & Cas. Co.*, for example, a New York court of appeals found a duty to defend a suit alleging the insured negligently caused a nuisance. 547 N.Y.S.2d 423, 425, 155 A.D.2d 581 (N.Y. App. 1989). Because “negligence includes conduct which may not be expected or intended by the insured, there [was] an obligation to defend.” *Id.* Even if the insureds intended the nuisance, that did not mean

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<sup>5</sup> *E.g., Yakima Cement Products Co. v. Great American Ins. Co.*, 93 Wash.2d 210, 216 (1980) (“We note further that the word ‘accident’ is but part of the definition of the broader term ‘occurrence.’”).

the “bodily injury or property damages as a result of that conduct were intended or expected within the meaning of the insurance policy.” *Id.*

In *Meyers Lake Sportsman’s Club, Inc. v. Auto-Owners (Mut.) Ins. Co.*, the Ohio Court of Appeals affirmed that the insurer had a duty to defend a suit alleging trespass, ejectment, and conversion because the insured did not intend the alleged harm or injury. 2013 WL 3787437, at \*4–6 (Ohio Ct. App. July 15, 2013) (unpublished opinion). To exclude coverage, the insurer had to show “not only that [the] insured intended [the] act, but also that [the] insured intended to cause harm or injury.” *Id.* at \*4. The insurer did not establish that the insured intended to cause harm or injury so it had a duty to defend. *Id.* at \*5.

In *American Continental Ins. Co. v. Pooya*, 666 A.2d 1193, 1199 (D.C. Ct. App. 1995), the policy excluded coverage for injury that was neither expected nor intended from the standpoint of the insured. The insurer had a duty to defend the insured against a suit alleging libel, slander, and intentional infliction of emotional distress (IIED) because the torts could involve negligent infliction of injury that the policy did not exclude. *Id.* at 1198–99.

These cases from other jurisdictions further support the Webbs’ position that USAA has a duty to defend them against the Hogg Complaint, and the trial court erred in deciding otherwise.

**D. The Trial Court Erred in Granting USAA's Motion for Summary Judgment and Denying the Webbs' Motion for Partial Summary Judgment Holding USAA Liable for Breach of Its Duty to Defend.**

For all the reasons discussed above, the Hogg Complaint triggers USAA's duty to defend. The trial court erred in concluding otherwise. Because of that error, the trial court granted USAA's motion for summary judgment and denied the Webbs' cross-motion for partial summary judgment that USAA had a duty to defend. This Court should vacate the Order, reverse the trial court's decision to grant USAA's motion, and hold that USAA has a duty to defend each of the Webbs against the Hogg Complaint.

In addition, the Court should reverse the trial court's decision to deny the Webbs' motion for partial summary judgment holding USAA liable on the Webbs' breach of contract claim. There is no genuine dispute that USAA denied defense coverage and failed to defend the Webbs against the Hogg Complaint. Because USAA has a duty to defend, there is no genuine issue of material fact that its failure to do so constitutes a breach of contract. As a matter of law and undisputed fact, USAA is liable for breach of its contractual duty to defend. The amount of its liability must be determined in further trial proceedings on remand.

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**E. The Trial Court Erred in Dismissing the Webbs' Claim for Breach of the Duty of Good Faith and Fair Dealing and Not Granting Partial Summary Judgment to the Webbs Holding USAA Liable on That Claim.**

If the Court finds that USAA has a duty to defend the Webbs, it should also reverse the trial court's decision to dismiss and not grant partial summary judgment to the Webbs on their claim for breach of the duty of good faith and fair dealing. The analysis above shows, overwhelmingly, that the applicable policy provisions, allegations in the Hogg Complaint, and controlling Washington case law required USAA to defend the Webbs. Any insurer, especially with the use of its counsel, can easily understand this case. In spite of this, USAA issued two erroneous and unreasonable coverage denials, leaving its long-standing insureds to fend for themselves when they needed it most. Because USAA's failure to defend was unreasonable as a matter of law, it acted in bad faith.

“The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters.” RCW 48.01.030. An insurer acts in bad faith if its breach of the duty to defend was unreasonable, frivolous, or unfounded. *American Best Food*, 168 Wash.2d at 412. The “fiduciary duty to act in good faith is fairly broad and may be breached by conduct short of intentional bad faith or

fraud.” *Industrial Indem. Co. of the Northwest, Inc. v. Kallevig* (“*Kallevig*”), 114 Wash.2d 907, 916–17 (1990) (affirming jury verdict in favor of insured on bad faith claim).

If there is any reasonable interpretation of the facts or the law that could result in coverage, the insurer must defend. *American Best Food*, 168 Wash.2d at 413. If the insurer questions whether a duty to defend exists, it is well established under Washington law that an insurer must give the insured “the benefit of any doubt as to the duty to defend” while it “avail[s] itself of legal options such as proceeding under a reservation of rights or seeking declaratory relief.” *Id.* at 412–13. Here, USAA did the exact opposite.

In *American Best Food*, the Washington Supreme Court found that the insurer’s denial of its duty to defend was based upon a questionable interpretation of law that was unreasonable, constituting bad faith as a matter of law. *Id.* The insurer in *American Best Food* based its refusal to defend on case law that involved only the duty to indemnify. *Id.* at 411. The court held it is very well established in Washington that “the duty to defend is different from and broader than the duty to indemnify” and the insured must receive “the benefit of any doubt as to the duty to defend.” *Id.* at 413–14. The insurer’s reasons for refusing to defend the insured were manifestly unreasonable because they were “based upon an

equivocal interpretation of case law to give itself the benefit of the doubt rather than its insured.” *Id.* at 414; *see also Anderson v. State Farm Mutual Insurance Co.*, 101 Wash. App. 323, 330–33 (2000) (holding insurer acted in bad faith as matter of law where its determination that there was no uninsured motorist coverage depended on an “impermissibly self-serving view of the available evidence”).

The unreasonableness of USAA’s denial and nondisclosure in this case is even more drastic than in *American Best Food*. There is no questionable issue of law. As set forth above, the nuisance and trespass claims trigger USAA’s duty to defend against personal injury claims under Washington Supreme Court precedent such as *Woo*, *Kitsap County*, *American Best Food*, and *Queen City*. USAA ignored this controlling legal authority and denied coverage in contradiction to the mandates of Washington law. Its actions were unreasonable, frivolous, and unfounded as a matter of law. The Webbs suffered substantial harm as a result of USAA’s unreasonable coverage denial, such as by incurring legal fees and costs in the Hogg Suit.

In its first denial, USAA incorrectly stated there was no coverage and no duty to defend “because *some* of the allegations in the [Hogg] complaint do not meet the definition of an occurrence.” CP at 270 (emphasis added). This explanation flatly contradicts Washington law.

“The duty to defend arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy’s coverage.” *Expedia*, 180 Wash.2d at 802. USAA’s statement would turn these basic principles of Washington insurance law on their head by requiring each and every allegation in a complaint to describe a covered liability in order for the complaint to trigger the duty to defend. If that were the law, the duty to defend would be rendered worthless.

USAA’s first denial further asserted that “Intentional Acts” and “Punitive Damages” are excluded under the Policy, but neglected to address the allegations of careless or negligent activity and the causes of action for nuisance and trespass. CP at 270. USAA’s first denial offered no explanation as to why it did not analyze its duty to defend the nuisance and trespass claims pursuant to the Personal Injury Endorsement. In fact, it made no mention of the personal injury coverage at all.

In USAA’s second denial, which was in response to a letter from the Webbs’ counsel, USAA again unreasonably denied coverage and ignored the relevant aspects of the Policy, Hogg Complaint, and Washington law. In a cursory, one-paragraph explanation, the second denial asserted the trespass claim did “not meet the definition of an occurrence” and the nuisance claim was an “intentional act[] and excluded

from the policy.” CP at 276. As discussed above, however, the trespass and nuisance claims triggered the duty to defend because they alleged careless or negligent conduct that the Webbs did not clearly expect or intend to cause harm. *See supra*, Part V.C.

The Court should reverse the trial court’s dismissal of the Webbs’ claim for breach of the duty of good faith and fair dealing. It should then hold USAA liable on the claim as a matter of law and undisputed fact in an amount to be determined on remand.

**F. The Trial Court Erred in Dismissing the Webbs’ Claim for Violation of the Insurance Fair Conduct Act and Not Granting Partial Summary Judgment to the Webbs Holding USAA Liable on That Claim.**

The trial court erroneously dismissed the Webbs’ claim for violation of the IFCA as a result of its decision that USAA has no duty to defend the Webbs against the Hogg Complaint. USAA has a duty to defend and there is no genuine issue of material fact regarding its liability on the IFCA claim. This Court should therefore reverse the trial court’s decision to dismiss the IFCA claim and hold USAA liable on that claim as a matter of law and undisputed fact.

The IFCA provides that “an insurer engaged in the business of insurance may not unreasonably deny a claim for coverage or payment of benefits” to an insured. RCW 48.30.010(7). At least one court has treated

this “unreasonably deny” standard as functionally equivalent to the “unreasonable, frivolous, or unfounded” standard used to determine bad faith. *Merrill v. Crown Life Ins. Co.*, 22 F. Supp. 2d 1137, 1147–48 (E.D. Wash. 2014). If an insurer unreasonably denies coverage, the IFCA allows the insured to recover actual damages, costs, and attorney fees. RCW 48.30.015(1), (3). The Court may also increase the total damages award to an amount not to exceed three times actual damages. RCW 48.30.015(2).

As shown above, USAA’s denial of its duty to defend the Webbs in the Hogg Suit was patently unreasonable because it contradicted relevant aspects of the Policy, Hogg Complaint, and controlling Washington law. *See supra*, Part V.C. USAA’s denial of defense coverage was therefore in violation of the IFCA.

If the Court concludes USAA has a duty to defend the Webbs, it should reverse the trial court’s dismissal of the IFCA claim. It should also hold USAA liable on that claim in an amount to be decided in further proceedings on remand.

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**G. The Trial Court Erred in Dismissing the Webbs' Claim for Violation of the Consumer Protection Act and Not Granting Partial Summary Judgment to the Webbs Holding USAA Liable on That Claim.**

The trial court erroneously dismissed the Webbs' claim for violation of the CPA as a result of its decision that USAA has no duty to defend the Webbs against the Hogg Complaint. If the Court finds that USAA has a duty to defend the Webbs, it should also reverse the Order dismissing the Webbs' claim for violation of the CPA and hold USAA liable on that claim as a matter of law and undisputed fact.

Washington's CPA provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." RCW 19.86.020. The CPA is to be liberally construed. RCW 19.86.920. A citizen may prove a violation of the CPA by establishing: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) public interest impact, (4) injury to plaintiff in his business or property, and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780 (1986).

A violation of RCW 48.30.010 (the IFCA) is *per se* an unfair trade practice and satisfies the first element. *Kallevig*, 114 Wash.2d at 920–23; *see also* WAC 284–30–300 et seq. As discussed above, USAA violated

RCW 48.30.010(7) by unreasonably denying coverage and ignoring relevant aspects of the Personal Injury Endorsement, Hogg Complaint, and controlling Washington law.

The other elements of the CPA are also satisfied as a matter of law and undisputed fact. The Webbs have been lifelong customers of USAA because their fathers were service members, and they purchased the Policy through the regular course of commerce. CP at 282. USAA's actions impacted the public interest as a matter of law because "[t]he business of insurance is one affected by the public interest[.]" RCW 48.01.030. The Webbs have been injured in their business or property because they have incurred legal fees and costs in defending themselves against the Hogg Suit. CP at 431–32; see *Griffin v. Allstate Ins. Co.*, 108 Wash. App. 133, 148 (2001) ("Loss of use of money is a recognized damage [under the CPA]."). USAA's conduct proximately caused the Webbs' injury because the Webbs were forced to defend themselves against the costly Hogg lawsuit as a direct result of USAA's denial of its duty to defend.

If USAA has a duty to defend the Webbs against the Hogg Complaint, the Court should reverse the trial court's dismissal of the Webbs' claim for violation of the CPA. The Court should then hold USAA liable on that claim in an amount to be determined on remand.

///

## VI. CONCLUSION

For the foregoing reasons, the Court should reverse the trial court's Order granting USAA's motion for summary judgment that held USAA had no duty to defend and dismissed each of the Webbs' claims, which were for breach of contract, breach of the duty of good faith and fair dealing, violation of the IFCA, and violation of the CPA. The Court should hold that USAA has a duty to defend and that it is liable as a matter of law and undisputed fact on each of the Webbs' claims in an amount to be determined in further trial proceedings on remand. Alternatively, if the Court concludes the Webbs' claims for breach of the duty of good faith and fair dealing and violation of the IFCA and CPA raise genuine issues of material fact, it should identify the nature of those issues and remand for further trial proceedings to resolve them.

DATED: November 13, 2018

CHENOWETH LAW GROUP, P.C.

*s/ Brian D. Chenoweth*

Brian D. Chenoweth WSBA No. 25877

*Attorneys for Appellants*

510 SW Fifth Ave., Fifth Floor

Portland, OR 97204

(503) 221-7958

## **APPENDIX**

Pursuant to RAP Rule 10.3(8) and 10.4(c), Appellants John William Webb and Krista L. Webb respectfully submit the attached Appendix.

- (1) *Order Granting Defendant USAA Casualty Insurance Company's Motion for Summary Judgment and Denying Plaintiffs' Motion for Partial Summary Judgment*
- (2) The Webb Insurance Policy
- (3) *Hogg, et al. v. Webb, et al.* Complaint
- (4) USAA's June 20, 2017 denial letter
- (5) USAA's October 4, 2017 denial letter

1 Hearing Date: June 1, 2018  
2 Hearing Time: 9:00 a.m.  
3 Judge/Calendar: Judge Carol Murphy/Dispositive Motion Calendar

**FILED**

**JUL 18 2018**

Superior Court  
Linda Myhre Enlow  
Thurston County Clerk

8 IN THE SUPERIOR COURT OF WASHINGTON  
9 IN AND FOR THE COUNTY OF THURSTON

10 JOHN WILLIAM WEBB and KRISTA L.  
11 WEBB,  
12  
13 Plaintiffs,  
14  
15 v.  
16  
17 USAA CASUALTY INSURANCE  
COMPANY,  
18  
19 Defendant.

Case No. 17-2-05117-34

**[PROPOSED] ORDER GRANTING  
DEFENDANT USAA CASUALTY  
INSURANCE COMPANY'S MOTION  
FOR SUMMARY JUDGMENT AND  
DENYING PLAINTIFFS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

20 THIS MATTER came on before this Court on Defendant USAA Casualty Insurance  
21 Company's ("USAA CIC") Motion for Summary Judgment and Plaintiffs' John and Krista Webb's  
22 ("Plaintiffs") Motion for Partial Summary Judgment. The Court has considered the parties'  
23 respective cross-Motions for Summary Judgment, the parties' respective Oppositions, the parties'  
24 respective Replies, the papers submitted therewith, and the argument at counsel at the June 1, 2018  
25 hearing in open court. Now, therefore,

26 THE COURT FINDS AS FOLLOWS:

27 USAA Casualty Insurance Company's Motion for Summary Judgment is GRANTED and  
28 Plaintiffs' Motion for Partial Summary Judgment is DENIED.

ORDER GRANTING USAA CIC'S MSJ  
AND DENYING PLAINTIFF'S MPSJ  
Case No. 17-2-05117-34  
Page 1

DKM LAW GROUP LLP  
801 Second Avenue, Suite 800  
Seattle, Washington 98104  
Tel: 206.489.5580

1 The Court finds USAA CIC has no duty to defend because the claims against Plaintiffs in the  
2 underlying Complaint arise from an intentional act and could not conceivably be covered according  
3 to particular provisions within the policy at issue.

4 However, the Court further concludes that the criminal act exclusion does not apply to bar  
5 coverage.

6 Accordingly, USAA CIC's Motion for Summary Judgment is granted as to all of Plaintiffs'  
7 causes of action and this matter is dismissed with prejudice.

8 IT IS SO ORDERED.  
9 Dated this 9<sup>th</sup> day of July, 2018.

CAROL MURPHY

The Honorable Carol Murphy  
SUPERIOR COURT JUDGE

14 Presented By:  
DKM LAW GROUP, LLP

15  
16 By:   
17 Robert S. McLay, WSBA #32662  
18 Joshua N. Kastan, WSBA #50899  
*Attorneys for Defendant USAA Casualty Insurance Company*

19 Approved as to Form By:  
CHENOWETH LAW GROUP, PC

20  
21 By:   
22 Brian D. Chenoweth, WSBA #25877  
23 Sandra S. Gustitus, WSBA #49527  
*Attorneys for Plaintiffs John and Krista Webb*

2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. 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 or protects the interest of the "insured". This coverage does not provide defense to any "insured" for criminal prosecution or proceedings.

We will not pay for punitive damages or exemplary damages, fines or penalties.

#### COVERAGE F - Medical Payment To Others

We will pay the necessary medical expenses that are incurred or medically ascertained within three years from the date of an accident causing "bodily injury". Medical expenses means reasonable charges for medical, surgical, x-ray, dental, ambulance, hospital, professional

nursing, prosthetic devices and funeral expenses. This coverage does not apply to you or regular residents of your household except "residence employees". As to others, this coverage applies only:

1. To a person on the "insured location" with the permission of any "insured"; or
2. To a person off the "insured location", if the "bodily injury":
  - a. Arises out of a condition on the "insured location" or the ways immediately adjoining;
  - b. Is caused by the activities of any "insured";
  - c. Is caused by a "residence employee" in the course of the "residence employee's" employment by an "insured"; or
  - d. Is caused by an animal owned by or in the care of any "insured".

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## SECTION II - EXCLUSIONS

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1. Coverage E - Personal Liability and Coverage F - Medical Payments to Others do not apply to "bodily injury" or "property damage":
  - a. Which is reasonably expected or intended by any "insured" even if the resulting "bodily injury" or "property damage":
    - (1) Is of a different kind, quality or degree than initially expected or intended; or
    - (2) Is sustained by a different person, entity, real or personal property, than initially expected or intended.

However, this exclusion does not apply to "bodily injury" resulting from the use of lawful reasonable force by any "insured" to protect persons or property.
- b. (1) Arising out of or in connection with a "business" engaged in by any "insured". This exclusion applies but is not limited to an act or omission, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the "business".
  - (2) Arising out of the rental or holding for rental of any part of any premises by any "insured". This exclusion does not apply to the rental or holding for rental of any "insured location".
    - (a) On an occasional basis if used only as a residence;
    - (b) In part for use only as a residence, unless a single family unit is intended for use by the occupying family to lodge more than two roomers or boarders; or

## THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## PERSONAL INJURY ENDORSEMENT

For an additional premium, Section II – LIABILITY COVERAGES, **COVERAGE E - Personal Liability** is deleted and replaced by the following:

**COVERAGE E - Personal Liability**

If a claim is made or a suit is brought against any **"insured"** for damages because of **"bodily injury"**, **"property damage"** or **"personal injury"** caused by an **"occurrence"** to which this coverage applies, we will:

1. Pay up to the limit of liability for the damages for which the **"insured"** is legally liable; and
2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claims or suit that we decide is appropriate. 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"**. This coverage does not provide defense to any **"insured"** for criminal prosecution or proceedings.

We will not pay for punitive **"damages"** or exemplary **"damages"**, fines or penalties.

The following definition is added:

**"Personal Injury"** means:

- a. Wrongful eviction, wrongful entry.
- b. Libel.
- c. Slander.
- d. Defamation of character.
- e. Invasion of rights of privacy.
- f. Wrongful detention, false arrest or false imprisonment.
- g. Malicious prosecution or humiliation.
- h. Assault and battery if committed by any insured or at his direction to protect persons or property. This applies only when the conduct is not criminal.

**"Personal injury"** only applies when the conduct is not malicious or criminal in nature.

The definition of **"occurrence"** is deleted and replaced by the following:

**"Occurrence"** means:

- a. An accident, including continuous or repeated exposure to substantially the same generally harmful conditions, which results, during the policy period, in **"bodily injury"** or **"property damage"**.
- b. An event or series of events, including injurious exposure to conditions, proximately caused by an act or omission of any **"insured"**, which results, during the policy period, in **"personal injury"**, neither expected nor intended from the standpoint of the **"insured"**.

**SECTION II - EXCLUSIONS**

Under Item 1. **Coverage E - Personal Liability** and **Coverage F - Medical Payments to Others**, with respect to personal injury only, paragraph a., is deleted and replaced by:

- a. which is expected or intended by the **"insured"**:

The following exclusions are added with respect to **"personal Injury"**:

1. Arising out of an **"insured's"** activities as an officer or director of any organization; this does not apply to non-profit religious or charitable organizations when the activity is not connected with the **"insured's"** **"business"**, profession or occupation and the **"insured"** is not compensated for the activity.

Coverage for officers or directors of religious or charitable organization does not extend in any way to liability which arises out of, involves or is directly or indirectly founded upon any person's or organization's rendering or failure to render:

- a. clinical services;
  - b. mental, dental or physical health services;
  - c. medical services of any kind, including therapeutic or rehabilitative services;
2. Arising out of discrimination and violation of civil rights where recovery is permitted by law.

3. Arising out of any actual, alleged or threatened:
  - a. sexual misconduct;
  - b. sexual harassment; or
  - c. sexual molestation.
4. Arising out of any actual, alleged or threatened physical or mental abuse.
5. Arising out of libel, slander or defamation of character that is published by the "insured" on the internet.

Except as specifically modified in this endorsement, all provisions of the policy to which this endorsement is attached also apply to this endorsement.

**Term Premium** \$14.58

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HO-82WA (07-08)

Page 2 of 2

**WEBB\_CP\_062**

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USAA Confidential

Exhibit 1 - Page 62 of 62

Page 260

APPENDIX 2

COPY

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SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KITSAP

17 2 00812 7

STEVEN P. HOGG and  
CANDACE K. LADLEY,

Plaintiffs

V.

JOHN WILLIAM WEBB and  
KRISTA L. WEBB, husband and  
wife, JOHN J. ANDERSON, and  
DOES 1-100, Inclusive.

Defendants.

CASE NUMBER:

COMPLAINT FOR:

- 1. TRESPASS
- 2. ASSAULT
- 3. VIOLATION OF STATUTE
- 4. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS
- 5. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
- 6. NUISANCE
- 7. INJUNCTION

Come now the plaintiffs, STEVEN P. HOGG and CANDACE K. LADLEY, by and through their attorneys of record, and allege against the defendants as follows:

I. PARTIES

1.1 STEVEN P. HOGG ("HOGG") and CANDACE K. LADLEY, ("LADLEY") husband and wife, are residents of Kitsap County, Washington, and reside at, were in possession of, and owned the property located at 25448 Port Gamble Road NE, Poulsbo, Washington at relevant times herein.

1.2 Defendants JOHN WILLIAM WEBB and KRISTA L. WEBB ("WEBB")

COMPLAINT - 1

CANDACE K. LADLEY  
Attorney at Law  
25448 Port Gamble Road NE  
Poulsbo, WA 98870-8827  
Tel: (360) 297-8800 Fax: (360) 297-8808

1 are residents of Kitsap County Washington and reside at, were in possession of, and  
2 owned the property located at 5045 NE Minder Road, Poulsbo, Washington at all  
3 relevant times herein.

4 1.3 Defendant JOHN J. ANDERSON ("ANDERSON") is a resident of Kitsap  
5 County, Washington and resides at, was in possession of, and owned the property  
6 located at 5003 NE Minder Road, Poulsbo, Washington at all relevant times herein.

7 1.4 Defendants DOES 1 through 100, inclusive, are unknown to the Plaintiffs  
8 and therefore sue them by those fictitious names. Plaintiffs are informed and  
9 believes, and on the basis of that information and belief alleges, that each of those  
10 defendants was in some manner intentionally, negligently, recklessly, or as the  
11 result of an extra hazardous activity, proximately responsible for the events and  
12 happenings alleged in this complaint and for plaintiffs' injuries and damages.

13 1.5 Plaintiffs are informed and believes and thereon alleges that at all times  
14 herein mentioned each of the defendants was the agent, employee and/or co-  
15 conspirators of each of the other defendants, and in doing the things herein alleged  
16 was acting within the course and scope of such agency and employment and with  
17 the permission and consent of the co-defendants.

18 1.6 All of the properties owned by the parties herein are contiguous.

## 19 II. JURISDICTION

20 2.1 All of the conduct alleged herein occurred in Kitsap County, State of  
21 Washington, and therefore jurisdiction and venue are appropriately in Kitsap  
22 County Superior Court.

## 23 III. FACTUAL ALLEGATIONS

24 3.1 On January 21, 2017, Plaintiffs were using their property described  
25 herein above as a llama and alpaca farm which is open to the public for visitors to

26 COMPLAINT - 2

27 CANDACE K. LADLEY  
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1 tour the farm to see the animals. Two visitors, one adult and a minor child, were  
2 present on the farm at said time as was Plaintiff STEVE HOGG and his farm  
3 employee.

4 3.2 On January 21, 2017, Defendants and each of them, without the consent  
5 or authority and against the will of the Plaintiffs, carelessly, recklessly, and  
6 without regard for human or animal life, caused multiple rounds of ammunition,  
7 fragments thereof and/or ricocheted projectiles to be shot and strafed across  
8 Plaintiffs' property from the property of Defendants WEBB. Multiple rounds of  
9 ammunition, fragments, shrapnel and/or ricocheted projectiles cut through  
10 Plaintiffs' trees. A round, fragment or ricocheted object also landed in the bed of  
11 Plaintiffs' pick-up truck that was parked in front of Plaintiffs' barn, and near to  
12 which Plaintiff HOGG and the visitors were standing. The farm visitor, who trains  
13 special forces and Navy Seals, stated that the gun fire sounded like it was on full  
14 automatic as it was being shot rapid fire as opposed to single shots. Plaintiffs' farm  
15 employee, an ex-military person, also agreed with that assessment.

16 3.3 Directly after the incident of the bullets, fragments and/or ricocheted  
17 projectiles entered onto Plaintiffs' property, Plaintiff HOGG went to WEBB'S  
18 property and confronted the defendants JOHN WILLIAM WEBB, JOHN  
19 ANDERSON and DOES 1 regarding the shooting onto Plaintiffs' property. There  
20 appeared to be alcohol present and minor children were present at the WEBB'S  
21 property at that time. The defendants appeared to be shooting at a small target  
22 positioned South of WEBB'S residence so that the shots fired were directed  
23 southerly, without the benefit of a back stop and/or berm or any safety precautions.  
24 Said bullets were either directed at Plaintiffs' property or were the result of  
25 ricochet.

26 COMPLAINT - 3

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28

1 3.4 Even though the Defendants were advised by Plaintiff HOGG that their  
2 careless and reckless conduct endangered others on the Plaintiffs' property, the  
3 Defendants continued to shoot their guns that day.

4 3.5 Plaintiffs have requested that Defendants cease their ultra hazardous  
5 activity of shooting their guns on Defendants' properties as Plaintiffs fear another  
6 incident will occur where Defendants will negligently, carelessly or recklessly fire  
7 again onto Plaintiffs' property thereby endangering the Plaintiffs' and their visitors,  
8 many of which are small children from schools and Navy day care. But to no avail,  
9 Defendants continue to target practice on their properties on a regular basis and  
10 refuse to cease to do so.

11 3.6 Each time that Defendants start shooting guns on their properties,  
12 Plaintiffs call 911 and a sheriff's deputy goes to the property to determine if the  
13 shooting done by the Defendants is safe. The sheriff's deputies have stated that  
14 they have advised the Defendants to install a back stop and/or other safety  
15 measures to prevent other incidents of rounds, fragments and/or projectiles from  
16 entering onto Plaintiffs' property. Plaintiffs are informed and believe and based on  
17 such information and belief allege that Defendants have refused, failed and  
18 continue to refuse and fail to take any precautions to prevent any further gun fire  
19 from entering onto Plaintiffs' property. Instead they have blatantly stated that  
20 they will continue to shoot their guns whenever they want to.

21 3.7. Plaintiffs are concerned that the next incident of gun fire being shot onto  
22 Plaintiffs' property can cause serious injury, even death, to anyone in its path.  
23 Plaintiffs live in constant fear of such an event happening every time they hear the  
24 defendants start shooting their guns. Visitors to the farm have expressed their fear  
25 also when on the farm and ask if it is safe to be there.

26 COMPLAINT - 4  
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**IV: FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS  
TRESPASS**

4.1. Plaintiffs incorporate all of the paragraphs herein above.

4.2. Defendants, and each of them trespassed on Plaintiffs' land, without the consent or authority of the Plaintiffs.

4.3. Defendants, and each of them have caused irreparable damage to Plaintiffs in that Plaintiffs suffer discomfort, annoyance and mental suffering caused by fear for their safety and that of their visitors, farm workers, and animals, according to proof at time of trial.

4.4. The acts of the Defendants were reckless, wanton, and oppressive when engaged in such an extra hazardous activity, and in conscious disregard of Plaintiffs' physical safety and mental well being. Plaintiffs are therefore entitled to punitive damages.

4.5. As a result of the Defendants' conduct, Plaintiffs have been damaged, according to proof at time of trial.

4.6. Plaintiffs are entitled to recover their attorneys' fees from said Defendants.

4.7. Plaintiffs are entitled to treble damages caused by Defendants' trespass on Plaintiffs' land.

**V: SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS  
ASSAULT**

5.1. Plaintiffs incorporate paragraphs 1.1 through 3.7, 4.3 through 4.5, inclusive, herein above.

5.2. Defendants, and each of them, in doing the acts herein alleged, recklessly caused Plaintiff HOGG to be in apprehension of his safety constituting an invasion of Plaintiffs' right to live without being put in fear of personal harm.

COMPLAINT - 5

CANDACE K. LADLEY  
Attorney at Law  
25448 Port Gamble Road NE  
Poulsbo, WA 98370-8827  
Tel: (360) 297-8800 Fax: (360) 297-8808

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**VI: THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS  
VIOLATION OF KITSAP COUNTY CODE 10.25.020**

6.1 Plaintiffs incorporate paragraphs 1.1 through 3.7, 4.3 through 4.5, inclusive, herein above.

6.2 Plaintiffs' real property is within five hundred yards of Defendant WEBB'S property.

6.3 On said date, Defendants discharged their guns in violation of Kitsap County Code 10.25.020 towards Plaintiffs' barn which was occupied by people and domestic animals and which was and is also used for the storage of flammable or combustible hay and other materials.

**VII: FOURTH CAUSE OF ACTION AGAINST ALL DEFENDANTS  
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

7.1 Plaintiffs incorporate paragraphs 1.1 through 3.7, 4.3 through 4.5, inclusive, herein above.

7.2 Defendants' conduct was done with a wanton and reckless disregard of the consequences to Plaintiffs.

7.3 As the proximate result of the acts alleged above, Plaintiffs suffered and continue to suffer mental anguish, and emotional and physical distress whenever Defendants continue to shoot their guns on their properties.

**VIII: FIFTH CAUSE OF ACTION AGAINST ALL DEFENDANTS  
NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS**

8.1 Plaintiffs incorporate paragraphs 1.1 through 3.7, 4.3 through 4.5, inclusive, herein above.

8.2 Defendants knew, or should have known, that their failure to exercise reasonable due care in the discharge of their firearms in the direction of Plaintiffs' property would cause Plaintiffs severe emotional distress.

COMPLAINT - 6

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**IX : SIXTH CAUSE OF ACTION AGAINST ALL DEFENDANTS  
NUISANCE**

9.1 Plaintiffs incorporate paragraphs 1.1 through 3.7, 4.3 through 4.5, inclusive, herein above.

9.2 Defendants, and each of their use of firearms and other deadly weapons on their properties, imminently threaten the physical safety of Plaintiffs on their property so as to essentially interfere with the comfortable enjoyment of Plaintiffs' property, and constitutes a nuisance and should be abated.

**X: SEVENTH CAUSE OF ACTION AGAINST ALL DEFENDANTS  
TEMPORARY RESTRAINING ORDER AND PERMANENT  
INJUNCTION**

10.1 Plaintiffs incorporate paragraphs 1.1 through 3.7, 4.3 through 4.5, inclusive, herein above.

10.2 Defendants' wrongful conduct, unless and until enjoined and restrained by order of this court, will cause great and irreparable injury and will deprive Plaintiffs of peace of mind and a safe and secure dwelling and will cause said damages to the public visitors to Plaintiffs' property.

10.3 Plaintiffs have no adequate remedy at law for their injuries in that Defendants, and each of them, and their invitees, are and will continue to shoot their guns thereby endangering Plaintiffs and others unless restrained and Plaintiffs would be required to maintain a multiplicity of judicial proceedings to protect their interests.

**RELIEF SOUGHT**

WHEREFORE, having alleged the foregoing, Plaintiffs request:

10.1 That the Court adjudge and decree that the Defendants have engaged in the conduct complained of herein.

10.2 A decree requiring Defendants, and each of them to compensate

COMPLAINT - 7

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1 Plaintiffs for their actual damages, according to proof at trial.

2 10.3 For punitive damages against Defendants, and each of them.

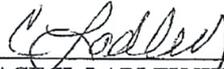
3 10.4 That Plaintiffs recover their costs herein, including reasonable  
4 attorney fees and costs.

5 10.5 For treble damages, according to proof at time of trial.

6 10.6 For preliminary and permanent injunctions against Defendants, and  
7 each of them, and their invitees, discharging any and all firearms on Defendants'  
8 properties.

9 10.7 That Plaintiff have such other and further relief, as the court deems  
10 appropriate.

11 DATED this 5th day of May, 2017.



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13 CANDACE K. LADLEY WSB #18414  
14 Attorney for Plaintiffs

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27 COMPLAINT - 8

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9800 Fredericksburg Road  
San Antonio, TX 78288

JOHN W WEBB  
5045 NE MINDER RD  
POULSBO WA 98370-8813

June 20, 2017

Reference: Denial

Dear Mr. Webb,

I'm writing regarding the claim referenced below.

<b>Policyholder:</b>	John W Webb
<b>Reference #:</b>	004698532-19
<b>Date of loss:</b>	January 21, 2017
<b>Loss location:</b>	Poulsbo, Washington

USAA's review of your policy and the lawsuit has found there is no coverage and no duty to defend under the Homeowners and Umbrella Policies because some of the allegations in the complaint do not meet the definition of an occurrence. Intentional acts and Punitive damages are excluded from the policy.

Please refer to your USAA Homeowners Policy number CIC 00469 85 32 93A, Form Homeowners HO-3RWA (07-08), HO 2008 Program and endorsement Ho-82WA. Please also refer to your USAA Umbrella Policy number CIC 00469 85 32 71U, Umbrella (005)

**Definitions** page 1

In this policy, "you" and "your" refer to the "named insured" shown in the Declarations and the spouse when a resident of the same household. "We", "us" and "our" refer to the Company providing this insurance. Certain words and phrases are defined and are printed in bold face and quotation marks when used.

3. "**Bodily injury**" means bodily harm, sickness or disease, except a disease which is transmitted by an "**insured**" through sexual contact. "**Bodily injury**" includes required care, loss of services and death resulting from covered bodily harm, sickness or disease.

6. "**Damages**" means compensatory damages the "**insured**" is legally obligated to pay as a result of "**bodily injury**" or "**property damage**" covered by this insurance, but does not include punitive, exemplary or multiple damages.

11. "**Insured**" means:

a. The "**member**"

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- b. Spouse when a resident of the same household; and
- c. Residents of your household who are:

- (1) Your relatives; or
- (2) Other persons under the age of 21 and in care of any person named above.

13. **"Member"** means the owner of the policy who is the person who meets all eligibility requirements for membership and whose membership number is shown in the Declarations of this policy.

20. **"Property Damage"** means physical damage to, or destruction of tangible property, including loss of use of this property.

## SECTION II-LIABILITY COVERAGES

### COVERAGE E-Personal Liability, PERSONAL INJURY ENDORSEMENT

If a claim is made or a suit is brought against any **"insured"** for damages because of **"bodily injury"**, **"property damage"** or **"personal injury"** caused by an **"occurrence"** to which this coverage applies, we will:

- 1. Pay up to our limit of liability for the damages for which the **"insured"** is legally liable; and
- 2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. 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 or protects the interest of the **"insured"**. This coverage does not provide defense to any **"insured"** for criminal prosecution or proceedings.

We will not pay for punitive **"damages"** or exemplary **"damages"**, fines or penalties.

The following definition is added:

**"Personal Injury"** means:

- a. Wrongful eviction, wrongful entry.
- b. Libel.
- c. Slander.
- e. Invasion of rights of privacy.
- f. Wrongful detention, false arrest or false imprisonment.
- g. Malicious prosecution or humiliation.
- h. Assault and battery if committed by any insured or at his direction to protect persons or property. This applies only when the conduct is not criminal.

**"Personal injury"** only applies when the conduct is not malicious or criminal in nature.

**"Occurrence"** means:

- a. An accident, including continuous or repeated exposure to substantially the same generally harmful conditions, which results, during the policy period, in **"bodily injury"** or **"property damage"**.
- b. An event or series of events, including injurious exposure to conditions, proximately caused by an act or omission of any **"insured"**, which results, during the policy period, in **"personal injury"**, neither expected nor intended from the standpoint of the **"insured"**.

**SECTION II- EXCLUSIONS**

Homeowners Page 24 and HO-82 (07-08)

1. **Coverage E Personal Liability and Coverage F Medical Payments to Others** do not apply to **"bodily injury"** or **"property damage"**:

a. which is expected or intended by the **"insured"**:

- (1) Is of a different kind, quality or degree than initially expected or intended; or
- (2) Is sustained by a different person, entity, real or personal property, than initially expected or intended.

However this exclusion does not apply to **"bodily injury"** resulting from the use of lawful reasonable force by any **"insured"** to protect persons or property.

**EXCLUSIONS**

Umbrella page 6

A. This insurance does not apply to:

3. Punitive or exemplary damages, fines or penalties.

E. This insurance does not apply to **bodily injury** or **property damage**:

1. Caused by the intentional or purposeful acts of any **insured** that would be expected by any reasonable person to result in **bodily injury** or **property damage**. This applies even if the resulting **bodily injury** or **property damage**:

- a. Is of a different kind, quality or degree than initially expected or intended; or
- b. Is sustained by a different person, entity, real property or personal property than initially expected or intended.

This exclusion (E.1.) does not apply to **bodily injury** or **property damage** resulting from the use of lawful reasonable force by any **insured** to protect persons or property.

G. This insurance does not apply to **bodily injury, property damage, or personal injury**:

7. Arising out of a criminal act or omission by, or with either the knowledge or consent of, any **insured**.

Should new facts regarding this incident come to light or if the Complaint is amended, please let us know. USAA reserves the right to review our position on coverage when changes are brought to our attention.

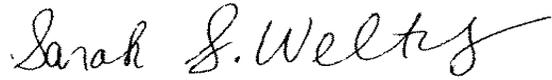
Please call with any questions or concerns.

You may submit correspondence or questions to me using one of the following options:

**usaa.com or our mobile app:** Upload documents or post a secure message to your claim file through the Claim Communication Center.

**Address:** Auto Injury Solutions  
Attn: USAA Medical Mail Dept.  
P.O. Box 26001  
Daphne, AL 36526  
**Fax:** 866-828-2330  
**Phone:** 1-210-531-8722 x40129

Sincerely,



Sarah J Welty  
USAA MOUNTAIN STATES REGIONAL OFFICE  
USAA Casualty Insurance Company

cc : Bruce Danielson



9800 Fredericksburg Road  
San Antonio, TX 78288

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BRIAN A JENNINGS  
CHENOWETH LAW GROUP  
510 SW FIFTH AVE FIFTH FLR  
PORTLAND OR 97204-2115

October 4, 2017

Reference: Your Clients: John and Krista L. Webb

Dear Mrs. Webb in care of Brian A Jennings,

I'm writing regarding the claim referenced below.

<b>Policyholder:</b>	John W Webb
<b>Reference #:</b>	004698532-19
<b>Date of loss:</b>	January 21, 2017
<b>Loss location:</b>	Poulsbo, Washington

We are in receipt of your letter dated September 15, 2017 putting USAA on notice of the IFCA filing pursuant to RCW 48.30.015 (8). In response to this letter please disregard the prior denial letter sent on June 20, 2017 and see the amended denial letter below.

USAA's review of your policy and the allegation in the lawsuit has found there is no coverage and no duty to defend under the Homeowners and Umbrella Policies. The allegations of intentional infliction of emotional distress, negligent infliction of emotional distress and nuisance are intentional acts and excluded from the policy. Punitive damages are excluded from the policy. In addition the following allegations are not covered because they do not meet the definition of an occurrence as outlined in the policy; Trespass, Assault, Violation of Kitsap County Code 10.25.020, Temporary Restraining Order and Permanent Injunction.

Please refer to your USAA Homeowners Policy number CIC 00469 85 32 93A, Form Homeowners HO-3RWA (07-08), HO 2008 Program and endorsement Ho-82WA. Please also refer to your USAA Umbrella Policy number CIC 00469 85 32 71U, Umbrella (005)

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Page 1 of 4



6. "**Damages**" means compensatory damages the "**insured**" is legally obligated to pay as a result of "**bodily injury**" or "**property damage**" covered by this insurance, but does not include punitive, exemplary or multiple damages.

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**SECTION II-LIABILITY COVERAGES**

**COVERAGE E-Personal Liability, PERSONAL INJURY ENDORSEMENT**

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- 1. Pay up to our limit of liability for the damages for which the "**insured**" is legally liable; and
- 2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. 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 or protects the interest of the "**insured**". This coverage does not provide defense to any "**insured**" for criminal prosecution or proceedings.

We will not pay for punitive "**damages**" or exemplary "**damages**", fines or penalties.

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**"Personal injury"** only applies when the conduct is not malicious or criminal in nature.

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Homeowners Page 24 and HO-82 (07-08)

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### **EXCLUSIONS**

Umbrella page 6

A. This insurance does not apply to:

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G. This insurance does not apply to **bodily injury, property damage, or personal injury**:

7. Arising out of a criminal act or omission by, or with either the knowledge or consent of, any **insured**.

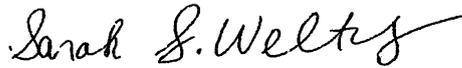
Should new facts regarding this incident come to light or if the Complaint is amended, please let us know. USAA reserves the right to review our position on coverage when changes are brought to our attention.

Please call with any questions or concerns.

You may submit correspondence or questions to me using one of the following options:

**Address:** Auto Injury Solutions  
Attn: USAA Medical Mail Dept.  
P.O. Box 26001  
Daphne, AL 36526  
**Fax:** 866-828-2330  
**Phone:** 1-210-531-8722 x40129

Sincerely,



Sarah J Welty  
USAA MOUNTAIN STATES REGIONAL OFFICE  
USAA Casualty Insurance Company

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Page 4 of 4

CERTIFICATE OF SERVICE

I, Brian Martinez, declare under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned a resident of the State of Oregon, over the age of eighteen years, not a party to or interested in the above-titled action, and competent to be a witness herein.

On the date given below, a copy of BRIEF OF APPELLANTS was served upon the following individuals by via email, pursuant to an e-service agreement between the parties, to the following:

Robert S. McLay  
Joshua N. Kastan  
DKM Law Group, LLP  
535 Pacific Avenue, Suite 101  
San Francisco, CA 94133  
rsm@dkmlawgroup.com  
jnk@dkmlawgroup.com

I filed the BRIEF OF APPELLANTS electronically with the Court of Appeals, Division II, through the Court's online e-filing system.

DATED: November 13, 2018

CHENOWETH LAW GROUP, PC

s/ *Brian Martinez*  
Brian Martinez, Paralegal  
bmartinez@northwestlaw.com

**CHENOWETH LAW GROUP**

**November 13, 2018 - 2:28 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52210-1  
**Appellate Court Case Title:** John Webb and Krista Webb, Appellants v. USAA Casualty Insurance Co.,  
Respondent  
**Superior Court Case Number:** 17-2-05117-6

**The following documents have been uploaded:**

- 522101\_Briefs\_20181113134834D2607942\_9751.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was Appellants Brief.pdf*

**A copy of the uploaded files will be sent to:**

- DLC@dkmlawgroup.com
- JNK@dkmlawgroup.com
- rsm@dkmlawgroup.com
- swashabaugh@northwestlaw.com

**Comments:**

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Sender Name: Brian Martinez - Email: bmartinez@northwestlaw.com

**Filing on Behalf of:** Brian David Chenoweth - Email: briancc@northwestlaw.com (Alternate Email: paralegal@northwestlaw.com)

Address:  
510 SW 5th Ave 5th Floor  
Portland, OR, 97204  
Phone: (503) 221-7958

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