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No. 52210-1-II

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

JOHN WILLIAM WEBB and KRISTA L. WEBB,

Appellants,

v.

USAA CASUALTY INSURANCE COMPANY,

Respondent.

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 3

 A. The Personal Injury Endorsement Covers the Trespass and Nuisance Claims. 3

 1. Under controlling Washington precedent, claims for trespass and nuisance are claims for wrongful entry, which are covered under the Policy as claims for personal injury. 3

 2. The Hogg Complaint seeks a recovery of damages for the nuisance claim. 5

 3. USAA fails to establish the Hogg Complaint alleges the Webbs intended or expected to cause personal injury. 6

 B. The Intentional Harm Exclusion Does Not Apply..... 7

 1. Whether the intentional harm exclusion applies to the Hogg Complaint has nothing to do with an “accident.”..... 8

 2. The Hogg Complaint does not allege the Webbs subjectively intended or expected to cause personal injury—it alleges they were negligent and careless in their actions. 10

 C. The Criminal Acts Exclusion Does Not Apply..... 11

 1. The Webbs may be liable for conduct that is not criminal in nature, and thus USAA has a duty to defend them. 14

 2. The Hogg Complaint does not allege the elements necessary to prove a violation of the Kitsap County Code..... 15

 3. The Hogg Complaint does not allege the elements necessary to prove a violation of RCW 9.41.230. 19

 4. Neither of the cases USAA cites to support its criminal acts analysis are applicable to the Webbs..... 21

 D. The Court Should Find USAA Liable for the Webbs’ IFCA, CPA, and Bad Faith Claims..... 23

III. CONCLUSION 25

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

State Cases

<i>Allstate Ins. Co. v. Peasley</i> 131 Wash.2d. 420, 423 (1997)	21
<i>Allstate Ins. Co. v. Raynor</i> 93 Wash. App. 484 (1999), <i>aff'd</i> , 143 Wash.2d 469 (2001).....	12, 13, 21
<i>Expedia, Inc. v. Steadfast Ins. Co.</i> , 180 Wash.2d 793, 803 (2014)	7
<i>Kitsap County v. Allstate Insurance Co.</i> 136 Wash.2d 567, 573–74 (1998)	3, 4
<i>Mutual of Enumclaw Ins. Co. v. T&G Const., Inc.</i> 165 Wash.2d 255 (2008)	7
<i>Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha</i> 126 Wash.2d 50 (1994)	11
<i>Safeco Ins. Co. of America v. Butler</i> 118 Wash.2d 383 (1992)	8
<i>State Farm Fire & Cas. Co. v. Parella</i> 134 Wash. App. 536 (2006)	9
<i>Woo v. Fireman’s Fund Ins. Co.</i> 161 Wash.2d 43, 53 (2007)	6, 7, 2

Statutes

RCW 9.41.230 19

Other Authorities

KCC 1.12 16
KCC 1.12.010 16
KCC 10.25.020 15, 17, 18, 19
KCC 10.25.020(2)(c), 15
KCC 2.116 16
KCC 2.116.010 16
KCC 2.116.020 16
KCC 2.116.030 16
KCC 2.116.050 17
KCC 2.116.060 17

I. INTRODUCTION

The Webbs demonstrated in their opening brief that the conduct loosely alleged in the Hogg Complaint is conceivably covered by the Policy. To summarize, the Hogg Complaint alleges claims of trespass and nuisance, which are claims for personal injury under controlling Washington precedent. The Hogg Complaint alleges the Webbs negligently or carelessly caused the trespass and nuisance. Thus, the Policy conceivably covers claims for personal injury neither expected nor intended from the Webbs' standpoint. Because the Hogg Complaint alleges negligent or careless trespass and nuisance, the intentional harm exclusion does not bar coverage. All of USAA's counterarguments are based on profoundly wrong interpretations of the Policy, the Hogg Complaint, and controlling law.

USAA's response brief confuses and conflates the bodily injury and property damage coverage with the personal injury coverage, just as it did before the trial court by arguing ad nauseam about "accidents." The Court need only look at the definition for an "occurrence" of personal injury and the intentional harm exclusion, and ask itself, "Does the word 'accident' appear here?" The answer is "No." Yet, USAA insists there is no conceivability of coverage for the Hogg Complaint because no "accident" occurred. Because there is no issue as to whether an "accident"

occurred, each and every one of USAA's arguments about accidents are inapplicable to the Webbs' claims under this Policy.

The Personal Injury Endorsement the Webbs paid extra for covers personal injuries "neither expected nor intended from the standpoint of the insured," and the intentional harm exclusion excludes coverage for personal injuries "expected or intended by the insured." CP at 259. Despite the plain language, USAA ignores those clauses and insists that a "deliberate discharge of firearms" is sufficient to deny its duty to defend the Webbs.

USAA next argues in its response that the criminal acts exclusion bars coverage because the Hogg Complaint alleges conduct that is criminal in nature. Not only does the Hogg Complaint fail to allege conduct that is clearly criminal by any measure, but also an average purchaser of insurance would not understand the Hogg Complaint's allegations to constitute criminal activity—both of which are the controlling legal standards for triggering a criminal acts exclusion. Moreover, the Hogg Complaint does not even allege the elements necessary to establish liability for the ordinance and statute USAA argues the Webbs violated. Thus, USAA has not shown there is no conceivability of coverage for the Hogg Complaint.

Finally, USAA is liable for the Webbs' IFCA, CPA, and bad faith claims because its denial of the duty to defend was unreasonable and in bad faith, as a matter of law. USAA has ignored the terms of its own Policy, the allegations of the Hogg Complaint, controlling precedent, and has construed any and all doubts in its favor, not its insureds.

II. ARGUMENT

A. The Personal Injury Endorsement Covers the Trespass and Nuisance Claims.

1. *Under controlling Washington precedent, claims for trespass and nuisance are claims for wrongful entry, which are covered under the Policy as claims for personal injury.*

USAA argues the trespass and nuisance claims are not covered because they are not expressly enumerated under the definition of “personal injury” in the Policy. USAA’s Resp. at 12–16. USAA further argues *Kitsap County v. Allstate Insurance Co.* is not controlling because the two policies are different—the USAA policy states, “**Personal injury**’ means: . . . wrongful entry,” whereas the policy in *Kitsap County* covers “‘personal injury’ arising out of a ‘wrongful entry.’”¹ CP at 259 (bold in original; italics added); *Kitsap County*, 136 Wash.2d 567, 573–74 (1998) (emphasis added).

¹ USAA states, “Due to the ‘arising out of’ qualifier, this allows the Court to conclude that a nuisance and trespass claim, though not specifically enumerated, may reasonably arise out of one of the offenses listed in the policy.” USAA’s Resp. at 15 (emphasis in original). USAA does not cite *Kitsap County* to support that sentence, which is no accident because that statement is false.

It is immaterial whether a claim covered by the Personal Injury Endorsement “means” wrongful entry or “arises out of” wrongful entry. In focusing on that distinction without a difference, USAA fails to answer the question, “What is a claim for ‘wrongful entry?’”, which was precisely the question before the court in *Kitsap County*. *Kitsap County*, 136 Wash.2d at 586 (emphasis added). In other words, the court had to decide whether “an average purchaser of insurance would think that a trespass [or nuisance] was a wrongful entry.” *Id.* at 586, 589. Contrary to USAA’s description of *Kitsap County*, the court did not hinge any of its analysis on whether the trespass and nuisance arose out of an enumerated offense.

As required by Washington law, the court considered “the plain, ordinary, and popular meanings of the terms[,]” “wrongful” and “entry,” and concluded that those terms, when combined, “make[] a phrase that is essentially synonymous with the word ‘trespass.’”² *Id.* at 587. The court bolstered its holding that trespass and nuisance are each a “wrongful entry” by pointing out that Washington has never acknowledged a tort of “wrongful entry” and that numerous federal courts applying state law have “determined that a trespass is equivalent to a wrongful entry.” *Id.* at 589. Moreover, even if it had deemed “wrongful entry” to be ambiguous, the

² The court also held, “[i]n light of the similarity between a nuisance and a trespass, what we have indicated above in regard to trespass is equally applicable to nuisance.” *Kitsap County*, 136 Wash.2d at 592.

court held the ambiguity would have been construed against the insurer, thus resulting in coverage for the trespass and nuisance claims. *Id.*

USAA does not dispute the trespass claim seeks a recovery of compensatory damages; it only argues that trespass and nuisance are not claims covered by the Personal Injury Endorsement, which, as shown above, is wrong. USAA argues the nuisance claim does not seek a recovery of damages, which, as will be shown below, is also wrong. In sum, the Hogg Complaint's allegations of trespass and nuisance give rise to coverage under the Personal Injury Endorsement because they are claims for wrongful entry for which Hogg and Ladley seek compensatory damages. Thus, USAA breached its duty to defend the Webbs against the Hogg Complaint.

2. The Hogg Complaint seeks a recovery of damages for the nuisance claim.

USAA ignores the Hogg Complaint's prayer for relief, which states: "WHEREFORE, having alleged the foregoing [including the claim for nuisance], Plaintiffs request: . . . A decree requiring Defendants, and each of them to compensate Plaintiffs for their actual damages, according to proof at trial." CP at 267–68. The Hogg Complaint alleges the Webbs committed a nuisance, and the Hogg Complaint seeks compensatory damages resulting from "the foregoing," including the claim for nuisance.

Id. Even if the Hogg Complaint were ambiguous on this issue, the ambiguity would have to be construed in favor of triggering USAA's duty to defend. *Woo v. Fireman's Fund Ins. Co.*, 161 Wash.2d 43, 53 (2007).

3. *USAA fails to establish the Hogg Complaint alleges the Webbs intended or expected to cause personal injury.*

The Webbs established that the Hogg Complaint alleges an occurrence of personal injury that was "neither expected nor intended from the standpoint of the insured." Webbs' Brief at 25–33. USAA did not rebut this argument, but instead argued the intentional harm exclusion applies to the Hogg Complaint, which, as will be shown below, is wrong.

Importantly, USAA failed to distinguish *Woo* from this case. In *Woo*, the underlying complaint sought to hold the insured liable for a personal injury claim. *Woo*, 161 Wash.2d at 65. The insurance policy provided coverage for personal injury claims "neither expected nor intended from the standpoint of the insured." *Id.* at 54. Because the underlying complaint "did not clearly allege" that the insured "expected or intended" his actions to "cause personal injury," the Supreme Court held the insurer had a duty to defend the insured. *Id.* at 64–65.

The personal injury endorsements in *Woo* and this case are identical in that they each require the personal injury to be "neither expected nor intended from the standpoint of the insured." The Hogg

Complaint alleges the Webbs negligently or carelessly caused a trespass and nuisance. CP at 262–65, 267, ¶¶ 1.4–1.5, 3.2, 3.5, 4.1–4.4, 9.1–9.2. Like *Woo*, the Hogg Complaint alleges claims that the Webbs neither intended nor expected. Thus, USAA owed a defense to the Webbs.

B. The Intentional Harm Exclusion Does Not Apply.

The Policy excludes coverage for personal injury “which is expected or intended by the insured.” CP at 259. This exclusion has nothing to do with “accidents.” This exclusion has nothing to do with a “deliberate” act divorced from the resulting injury. This exclusion must be strictly construed against USAA, and USAA bears the burden of showing it clearly removes the conceivability of coverage. *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wash.2d 793, 803 (2014); *Woo*, 161 Wash.2d at 53; *Mutual of Enumclaw Ins. Co. v. T&G Const., Inc.*, 165 Wash.2d 255, 268 (2008). USAA has not carried its burden.

The intentional harm exclusion does apply in this case because the Hogg Complaint does not solely or exclusively allege the Webbs “expected or intended” to commit a trespass or nuisance. The Hogg Complaint alleges the Webbs negligently or carelessly caused bullets to ricochet onto Hogg and Ladley’s property, thereby committing a trespass and nuisance. *Id.* at 262–65, 267, ¶¶ 1.4–1.5, 3.2, 3.5, 4.1–4.4, 9.1–9.2. The Webbs could conceivably be liable for negligent trespass or nuisance

without having expected or intended to commit a trespass or nuisance. Thus, the intentional harm exclusion does not clearly foreclose the conceivability of coverage, as USAA must otherwise prove.

1. Whether the intentional harm exclusion applies to the Hogg Complaint has nothing to do with an “accident.”

USAA is repeating the same flawed arguments on appeal as it did before the trial court, *viz.*, relying on “bodily injury” coverage cases that discuss whether an “accident” occurred to support its argument that the intentional harm exclusion applies to the Hogg Complaint. Here, trespass and nuisance are covered under the Personal Injury Endorsement, and “accident” is not mentioned in either the definition of a personal injury “occurrence” or the intentional harm exclusion. Thus, every time USAA mentions “accident” in its response brief can be dismissed as misleading and irrelevant to determining whether the Hogg Complaint alleges a claim for personal injury or whether the intentional harm exclusion forecloses the conceivability of coverage for the Hogg Complaint.

USAA wrongly relies on *Safeco Ins. Co. of America v. Butler* to argue the alleged discharge of firearms on the Webbs’ property was no “accident.” 118 Wash.2d 383 (1992). In *Butler*, the issue before the court was whether the insurer had a duty to defend the insured against a claim for bodily injury resulting from an “accident.” *Id.* at 400. The insured in

Butler intentionally fired his gun at the victim’s truck while the victim was sitting inside the truck and thus caused the victim bodily injury. *Id.* The insured’s policy provided coverage for the occurrence of an accident that results in bodily injury. *Id.* The insurer denied coverage because the bodily injury did not arise from an “accident.” *Id.* at 400–01. The court held there was no “accident” precisely because the insured intentionally fired his gun directly at the truck in which the insured knew the victim was sitting, and thus the resultant bodily injury could not have been an “accident.” *Id.* at 401.³

Here, trespass and nuisance are not claims for bodily injury. They are claims related to wrongful entry under the personal injury endorsement. An occurrence of personal injury applies to “[a]n event or series of events[.]” CP at 259. An occurrence of personal injury has nothing to do with an “accident.” Because there is no issue as to whether a bodily injury occurred, the Court should reject USAA’s flawed arguments relying on *Butler* to argue the Hogg Complaint does not allege an “accident” occurred.

Similarly, USAA wrongly relies on *State Farm Fire & Cas. Co. v. Parella* to argue that the Webbs’ subjective intent is immaterial to the

³ Even if the correct coverage analysis involved the term “accident,” the *Butler* case’s facts are very different from the Hogg Complaint, which alleges individuals who were target shooting and/or individuals who allowed others to target shoot on their land caused bullets to ricochet onto the Hogg and Ladley property.

Court’s analysis of the intentional harm exclusion. 134 Wash. App. 536 (2006). In *Parella*, the insured admittedly intended to shoot a BB gun at the victim, but the insured maintained that he did not intend to injure the victim. *Id.* at 538, 541. The insurer denied coverage because a bodily injury claim is only covered when it arises from an accident, as stated in the policy’s definition of “occurrence” for “bodily injury.” *Id.* at 539–40. Because it was undisputed the insured intentionally fired his gun directly at the victim, the court agreed that there was no “accident” giving rise to coverage for bodily injury. *Id.* at 538, 542.

Again, the trespass and nuisance claims are covered under the Personal Injury Endorsement (“events” trigger coverage), not as bodily injury claims (“accidents” trigger coverage). Thus, there is no point in discussing whether an “accident” occurred. Moreover, both *Butler* and *Parella* are solely about bodily injury coverage—neither case discusses whether coverage is barred by an intentional harm exclusion.

2. The Hogg Complaint does not allege the Webbs subjectively intended or expected to cause personal injury—it alleges they were negligent and careless in their actions.

Notably, USAA does not dispute that the Washington Supreme Court has construed intentional harm exclusions similar to the one at issue to express a subjective standard that requires the insured to subjectively intend or expect to cause a personal injury. *See Queen City Farms, Inc. v.*

Cent. Nat. Ins. Co. of Omaha, 126 Wash.2d 50, 66–68 (1994). Instead, USAA simply argues that a deliberate discharge of a firearm is no accident, the Webbs’ reply to which is, “So what?” The plain language of the intentional harm exclusion requires the insured to have expected or intended to cause a personal injury in order to exclude coverage, and the Supreme Court has held such exclusions express a subjective standard. The Hogg Complaint alleges the Webbs negligently or carelessly caused a trespass and nuisance, neither of which require intent to impose liability. Thus, the Webbs may conceivably be held liable for committing a trespass or nuisance without having subjectively intended or expected to do so.

USAA bears the burden of proving that an exclusion clearly excludes the conceivability of coverage for all claims, but USAA has not carried its burden.

C. The Criminal Acts Exclusion Does Not Apply.

Although rejected by the trial court, USAA revives its erroneous reliance on the so-called criminal acts exclusion. As the trial court correctly noted, it does not excuse USAA’s duty to defend the Webbs from the Hogg Complaint. The criminal acts exclusion bars coverage for personal injury only “when the conduct is . . . malicious or criminal in

nature.”⁴ CP at 259. Washington law requires an insured’s actions to be “clearly ‘criminal’ by any measure” in order to fall within a criminal acts exclusion. *Allstate Ins. Co. v. Raynor*, 93 Wash. App. 484, 496 (1999), *aff’d*, 143 Wash.2d 469 (2001). Washington law also requires the alleged conduct to be such that an average purchaser of insurance would understand that conduct to be a crime. *Id.* Target shooting on one’s own land does not come anywhere close to meeting that standard. The Hogg Complaint does not allege the Webbs’ conduct was “clearly ‘criminal’ by any measure.” Neither would an average purchaser of insurance understand the Hogg Complaint’s allegations to constitute criminal acts. Thus, USAA must defend the Webbs.

In every Washington case involving a criminal acts exclusion, either the insured had been convicted of a crime, or it was undisputed that the insured had clearly committed a crime.⁵ USAA does not analogize the Hogg Complaint to any Washington case or any cases from other jurisdictions precisely because, to trigger the exclusion, the insured must

⁴ USAA does not argue the Hogg Complaint alleges the Webbs’ conduct was malicious, so the Webbs address only USAA’s “criminal in nature” argument.

⁵ *See, e.g., Allstate Ins. Co. v. Raynor*, 143 Wash.2d 469, 478 (2001) (holding the criminal acts exclusion barred coverage because the insured’s undisputed murder of a mother and her daughter was “clearly ‘criminal’ by any measure”); *Allstate Ins. Co. v. Peasley*, 131 Wash.2d 420, 428 (1997) (holding the criminal acts exclusion barred coverage because the insured pled guilty to second-degree reckless endangerment); *Allstate Ins. Co. v. Thornton*, 147 Wash. App. 1024, 2008 WL 4868882, at *3 (Nov. 12, 2008) (unpublished opinion) (holding the criminal acts exclusion barred coverage because the insured pled guilty to first-degree reckless burning).

have undisputedly committed a crime—something the Hogg Complaint simply does not allege against the Webbs.

Instead, USAA relies on *Raynor* to conclude it is immaterial whether the Webbs were charged or convicted in order for the criminal acts exclusion to apply, but that case actually provides a legal standard that defeats USAA's argument.

In *Raynor*, the court held that neither a charge nor a conviction were necessary to trigger a criminal acts exclusion where the "actions were *clearly* 'criminal' by *any measure*." 93 Wash. App. at 496 (emphasis added). The insured in *Raynor* had shot a twelve-year-old girl twice in the chest and her mother once in the mouth and twice in the chest, both of whom died from their injuries. *Id.* at 489. The insured shot himself in the head and died before the police arrived; thus, he was never charged or convicted of a crime. *Id.* Because the insured's "actions were clearly 'criminal' by any measure," however, the court held the criminal acts exclusion barred coverage. *Id.* at 496. The court further held, the insured's "actions clearly violated criminal statutes, and the average purchaser of insurance would understand such actions to be excluded criminal acts." *Id.* at 495.

Thus, the Hogg Complaint must allege conduct that is clearly criminal by any measure, and an average insured must understand such

conduct to be a criminal act in order for USAA to be relieved of its duty to defend. As discussed below, the Hogg Complaint falls far short of that level of clarity.

1. The Webbs may be liable for conduct that is not criminal in nature, and thus USAA has a duty to defend them.

Before discussing the allegations USAA deems criminal, it is important to note that, even if the Hogg Complaint alleged some criminal conduct, the Hogg Complaint seeks to hold the Webbs liable for conduct that USAA does not argue is criminal in nature, thus triggering USAA's duty to defend the Webbs.

The Hogg Complaint alleges the Webbs and 101 other defendants committed a trespass and nuisance by carelessly causing ricochets, without specifying what each one of them did to cause the ricochets. CP at 263, ¶¶ 3.2, 3.5. One of the 101 other defendants may have "carelessly caused" a ricochet by accidentally discharging or misfiring a firearm. Or, one of those defendants may have discharged a firearm without the Webbs expecting or intending them to do so.

The Hogg Complaint also seeks to hold John and Krista Webb liable for having permitted and consented to the 101 other defendants' alleged trespass and nuisance. *Id.* at 262, 264, 267, ¶¶ 1.5, 4.1, 9.1. Such conduct constitutes an occurrence of personal injury because it is an

“event or series of events . . . proximately caused by [the Webbs’] act or omission.” CP at 259. USAA does not argue that owning property on which guests target shoot is a criminal act, nor would an average purchaser of insurance understand such conduct to be criminal in nature. Thus, USAA has a duty to defend the Webbs even if other allegations against them could be considered criminal in nature.

2. The Hogg Complaint does not allege the elements necessary to prove a violation of the Kitsap County Code.

USAA argues the criminal acts exclusion applies because the Webbs violated KCC 10.25.020(2)(c), which provides:

“The discharge of firearms in the unincorporated areas of Kitsap County is further prohibited in the following instances: . . . (c) Towards any building occupied by people or domestic animals or used for the storage of flammable or combustible materials where the point of discharge is within five hundred yards of such building.”

As an initial matter, a violation of KCC 10.25.020 is not per se a criminal offense. Even if it were, the Hogg Complaint does not allege the elements necessary to prove a violation of KCC 10.25.020, and USAA may not go outside the complaint to determine whether the elements are satisfied.

Nowhere is it stated in KCC 10.25 that a violation of KCC 10.25.020 is a crime, or as USAA alleges, a misdemeanor. Nor does KCC 10.25 cross-reference another ordinance to determine the punishment, if

any, for violating any section of KCC 10.25. Additionally, the Hogg Complaint does not allege the Webbs committed a crime or a misdemeanor. USAA cites the “general penalty” provision, KCC 1.12.010, to conclude a violation of KCC 10.25.020 is a misdemeanor and therefore a crime.

Assuming for the sake of argument that KCC 1.12.010 is the ordinance that governs violations of KCC 10.25.020, KCC 1.12 cross-references KCC 2.116, which applies “to the enforcement of Kitsap County ordinances and codes” that “specifically reference this chapter or the ordinance codified in this chapter.” KCC 2.116.020. Also, KCC 2.116.010 “provides the procedure for the investigation of suspected violations and enforcement of other [Kitsap County] ordinances.” Thus, because KCC 1.12 cross-references KCC 2.116, the enforcement of violations of KCC 10.25.020 is subject to the procedure outlined in KCC chapter 2 (assuming KCC 1.12.010 governs violations of KCC 10.25.020).

“Only an authorized official may enforce the provisions of [KCC chapter 2,]” and private citizens are not among those authorized officials. KCC 2.116.030. Hogg and Ladley are private citizens, so they do not even have standing to prosecute a violation of KCC 10.25.020. If an authorized official were to investigate and prosecute the Webbs for violating KCC 10.25.020, that official would be required to issue the

Webbs a “notice of infraction.” KCC 2.116.050. The notice of infraction must contain, *inter alia*, “[a] statement that the infraction is a *noncriminal offense* for which imprisonment will not be imposed as a sanction[.]” KCC 2.116.060 (emphasis added). It is only if the Webbs refused to sign the infraction as required by KCC 2.116.060(H) or failed to respond to the notice as required by KCC 2.116.060(I) that they would become subject to imprisonment in jail—i.e., it is not the violation of KCC 10.25.020 that is criminal. Rather, it is a crime to refuse to submit to the judicial process in order to determine whether a violation has occurred.

The Hogg Complaint does not allege the Webbs were issued a notice of infraction, let alone that they refused to sign a notice or respond to it. Far from alleging that, the Hogg Complaint alleges the police visited the Webbs’ property “to determine if the shooting done by the Defendants is safe[.]” and the police left without issuing a citation or charging anyone with a crime. CP at 264, ¶ 3.6. Thus, the Hogg Complaint does not allege an element necessary to impose criminal liability on the Webbs.

Even if a violation of KCC 10.25.020 were a criminal offense *per se*, the Hogg Complaint does not allege the elements necessary to prove the Webbs violated that ordinance. KCC 10.25.020(2) prohibits the “discharge of firearms in the unincorporated areas of Kitsap County” under certain circumstances. The Hogg Complaint does not allege either

of the properties at issue are located in, or that firearms were discharged in, the “unincorporated areas of Kitsap County.” USAA may not go outside the complaint to determine whether the Webbs or Hogg and Ladley reside in unincorporated Kitsap County. Thus, it is not clear from the Hogg Complaint whether it is even possible for the Webbs to be in violation of KCC 10.25.020.

Even if the properties at issue were located in unincorporated Kitsap County, there are no allegations that the Webbs discharged firearms within five hundred yards of a building occupied by people or domestic animals. A violation of KCC 10.25.020(2)(c) occurs when a firearm is discharged in unincorporated Kitsap County “[t]owards any building occupied by people or domestic animals . . . where the point of discharge is within five hundred yards of such building.” The Hogg Complaint does not allege a point of discharge was within five hundred yards of a building occupied by people or domestic animals.

The Hogg Complaint only alleges, “Plaintiffs’ real property is within five hundred yards of Defendant WEBB’s property”—there is no mention of “the point of discharge” or “a building” being within five hundred yards of each other. CP at 266, ¶ 6.2. USAA attempts to skip around this insurmountable hurdle by arguing, “Webb’s conduct of discharging a firearm in *close proximity* to the Hogg *property* is criminal

in nature.” USAA’s Resp. at 25 (emphasis added). USAA fails to establish that the Hogg Complaint alleges the elements necessary for a violation of KCC 10.25.020. Thus, even if a violation of KCC 10.25.020 were a crime, USAA fails to establish that the Hogg Complaint alleges the Webbs’ conduct was clearly criminal by any measure.

3. *The Hogg Complaint does not allege the elements necessary to prove a violation of RCW 9.41.230.*

USAA also argues the Webbs violated RCW 9.41.230, which USAA alleges, without citing, the Poulsbo Municipal Code has adopted.

RCW 9.41.230(1)(b)–(c) provides:

“(1) For conduct not amounting to a violation of chapter 9A.36 RCW, any person who: . . . (b) Willfully discharges any firearm, air gun, or other weapon, or throws any deadly missile in a public place, or in any place where any person might be endangered thereby. A public place shall not include any location at which firearms are authorized to be lawfully discharged; . . . (c) . . . is guilty of a gross misdemeanor punishable under chapter 9A.20 RCW.”

The Hogg Complaint neither alleges the Webbs violated RCW 9.41.230, nor does it clearly plead the elements necessary to prove a violation of RCW 9.41.230, and USAA may not go outside the complaint to determine whether the elements of RCW 9.41.230 are satisfied.

USAA summarily concludes RCW 9.41.230 applies to the Hogg Complaint because Mr. Webb’s conduct is criminal “as it is reasonable

that Hogg, a neighbor of Webb, may be endangered from Webb's firearm practice on his property." USAA's Resp. at 25.

First, it is immaterial as to whether it is "reasonable" that Hogg may be endangered by the discharge of firearms on the Webb property. There is no mention of "reasonable" in RCW 9.41.230 or in the criminal acts exclusion, so it appears USAA contrived that standard for determining whether the Webbs violated RCW 9.41.230. The controlling legal standard is "clearly 'criminal' by any measure" and whether an average purchaser of insurance would understand the alleged conduct to be a crime. *Raynor*, 93 Wash. App. at 496.

Second, the Hogg Complaint alleges the Defendants negligently and carelessly discharged firearms. CP at 263-64, ¶¶ 3.2, 3.5. RCW 9.41.230 requires a firearm to be *willfully* discharged. Because the Webbs could be liable for negligently or carelessly discharging firearms without also being liable for willfully discharging firearms, the Webbs' alleged conduct is not clearly criminal by any measure.

Third, RCW 9.41.230 excludes from the definition of "public place" those locations "at which firearms are authorized to be lawfully discharged." There are no allegations in the Hogg Complaint regarding whether the Webbs' property constitutes a "public place," and it is therefore unclear as to whether the Webbs' property is a location where

firearms may or may not be lawfully discharged. The vagueness of the allegations must be construed in the Webbs' favor. *See Woo*, 161 Wash.2d at 53. Thus, USAA cannot establish that the alleged discharging of firearms is clearly criminal by any measure.

4. Neither of the cases USAA cites to support its criminal acts analysis are applicable to the Webbs.

In addition to *Raynor*, USAA relies on *Allstate Ins. Co. v. Peasley* to conclude the criminal acts exclusion bars coverage for the Hogg Complaint. Neither of those cases are analogous to this case.

First, *Raynor* is inapplicable to this case because, unlike the insured in *Raynor* who had “clearly violated criminal statutes” by undisputedly killing a mother and her daughter, there is no such clarity in the Hogg Complaint.

Second, in *Allstate Ins. Co. v. Peasley* the insured had shot the victim during a heated argument inside the insured's home. 131 Wash.2d 420, 423 (1997). The insured pled guilty to second degree reckless endangerment in exchange for a suspended sentence prior to being sued by his victim. *Id.* The issue before the court was whether the criminal acts exclusion applied to both intentional and unintentional crimes, because the insured argued he accidentally shot the victim. *Id.* at 429. Without deciding whether the insured had intentionally or unintentionally

committed a crime, the court concluded that the policy broadly applied to “criminal acts” regardless of whether they were intended. *Id.* at 429. Thus, the court held that the criminal acts exclusion “clearly encompasses [the insured’s] criminal act of reckless endangerment.” *Id.*

Peasley is inapplicable to this case because, regardless of intent or the lack thereof, the insured in *Peasley* had in fact pled guilty to committing a crime, which was sufficient to trigger the criminal acts exclusion.⁶ Whether the Hogg Complaint clearly alleges criminal conduct at all is precisely the issue. As discussed above, the Hogg Complaint does not allege criminal conduct, and if there is any ambiguity in alleging criminal conduct, the ambiguity must be construed in the Webbs’ favor.

In sum, the Hogg Complaint does not make allegations sufficient to conclude the Webbs’ conduct was clearly criminal by any measure. Also, an average purchaser of insurance would not understand target shooting on one’s property to be a crime. USAA must establish the criminal acts exclusion clearly applies to bar coverage for all claims in the Hogg Complaint in order to excuse its duty to defend the Webbs. As the foregoing shows, USAA has not, and cannot, establish as much. Even if the Hogg Complaint clearly alleged—after all ambiguities were construed

⁶ *Peasley* has scant details about the circumstances of the shooting, but in any event, the insured’s admitted crime of shooting the victim in his home during a heated argument is hardly comparable to a group of people allegedly target shooting outdoors on their own property.

in the Webbs' favor—that some of the Webbs' conduct was criminal in nature, USAA would still have a duty to defend because the Webbs could be liable for trespass and nuisance without having committed a crime.

D. The Court Should Find USAA Liable for the Webbs' IFCA, CPA, and Bad Faith Claims.

USAA argues it is not liable for any of the Webbs' statutory or tort claims because it thoroughly evaluated whether the Policy conceivably covered the Hogg Complaint. USAA did no such thing.

When USAA representative Jonathan Wey spoke with John Webb on May 24, 2017 about his tender of the Hogg Complaint, he “advised [Mr. Webb] that his policy affords liability coverage, which [provides coverage] for the damage to others that result from the member’s negligence. [Mr. Wey] advised [Mr. Webb] that [USAA will] determine if [the Webbs] were negligent and have a duty to defend them.” CP at 131.

Two days later, USAA adjustor Sarah Welty reviewed the Hogg Complaint and determined “most of the allegations of the [Hogg Complaint] did not meet the Policies’ definition of ‘occurrence.’” *Id.* at 126. Four days later, claims manager Nichole Bloodworth recommended that coverage be denied simply because there was no occurrence of “bodily injury.” *Id.* Six days later, in-house counsel David Lane determined the trespass claim was not covered as an occurrence of bodily

injury or property damage; he did not even consider whether that claim *or any claim at all* was covered as a claim for personal injury under the Personal Injury Endorsement for which the Webbs paid extra to add to the Policy.⁷ CP at 127. Mr. Lane also concluded coverage for all claims was barred by the intentional harm exclusion “because all the claims arose out of the insured’s deliberate act of shooting a firearm”—despite Mr. Wey telling Mr. Webb that USAA would defend him if there were allegations of negligence. *Id.* at 127, 131. It is undisputed that the Hogg Complaint does allege negligence, yet USAA denied its duty to defend anyway.

USAA did not even consider whether any claim was covered as an occurrence of personal injury and grossly misconstrued the intentional harm exclusion in its favor. To this day, USAA is still proudly waving the banner of “deliberate discharge of a firearm = no coverage.” As the Webbs have shown, USAA has willfully ignored the plain terms of the Policy, the Hogg Complaint, and controlling Washington precedent. The Court should reverse the trial court’s Order that dismissed the Webbs’

⁷ Mr. Lane stated in his analysis of the Hogg Complaint, “If the ultimate finding of trespass is of an intentional nature, coverage would not apply; if the trespass was negligent trespass, coverage would be applicable, to the extent the trespass resulted in [bodily injury] or [property damage].” CP at 140. Plainly contrary to USAA’s description of its review being “thorough,” Mr. Lane conveniently overlooked the allegations of negligence and carelessness, and he did not even look at the personal injury coverage for “wrongful entry,” which is synonymous with trespass and nuisance.

IFCA, CPA, and bad faith claims because USAA's denial was in bad faith as a matter of law, in addition to the reasons stated in the Webbs' brief.

III. CONCLUSION

For the foregoing reasons, the Webbs request the Court to reverse the trial court's Order granting USAA's motion for summary judgment and instead grant the Webbs' motion for partial summary judgment in its entirety. 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 disputes of material fact, the Webbs request the Court to identify those disputes and remand for further trial proceedings.

DATED: January 14, 2019

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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 REPLY BRIEF OF APPELLANTS was served upon the following individuals by via email and via first class mail to the following:

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

DATED: January 14, 2019

CHENOWETH LAW GROUP, PC

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