

FILED
Court of Appeals
Division II
State of Washington
12/13/2018 2:31 PM

No. 52210-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

John William Webb et al,
Appellant,

v.

USAA Casualty Insurance Company,
Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW..... 2

III. RESPONDENT’S STATEMENT OF THE CASE..... 3

A. The Hogg Suit..... 3

B. Webb Tenders Defense and Indemnity of the Underlying Hogg Suit to USAA CIC 4

C. USAA CIC Reviews the Hogg Suit 4

D. USAA CIC Declines Coverage and Duty to Defend 6

E. USAA CIC’s Motion for Summary Judgment is Granted..... 7

IV. STANDARD OF REVIEW 7

A. Order Granting USAA’s Motion for Summary Judgment..... 7

V. THE TRIAL COURT’S GRANT OF SUMMARY JUDGMENT SHOULD BE AFFIRMED..... 9

A. The Court Should Affirm the Summary Judgment as to Webb’s Breach of Contract Claim 9

 1. The Hogg Suit Failed to Trigger Coverage Under Both the Primary Homeowners Policy and Umbrella Policy 9

 a. The Trespass Claim Did Not Trigger a Duty to Defend.....12

 (1) The Trespass Claim Is Not a Claim for "Damages" Because of "Bodily Injury".....13

 (2) The Trespass Claim Is Not a Claim for "Damages" Because of "Property Damage".....13

 (3) The Trespass Claim Is Not a Claim for "Damages" Because of "Personal Injury".....14

 b. The Nuisance Claim Did Not Trigger a Duty to Defend Because It Does Not Allege Any "Damages".....16

 2. Two Exclusions Precluded Coverage and No Duty to Defend Arose..... 17

 a. The Policy's Intentional Act Exclusion Removed Any Duty to Defend.....18

(1) The Intentional Act Exclusion Modifies the Shooting of Guns– <i>Not</i> the Resulting Harm.....	20
(2) Webb Mistakenly Conflates the Elements of Trespass and Nuisance with His Intentional Discharge of a Gun....	21
(3) Webb's Non-Intention to Injure Hogg and/or the Hogg Suit's Allegations of Negligence Have No Bearing on Webb's Intention to Shoot His Gun.....	22
b. The Policy's "Crime Exception" Exclusion Precluded Coverage.....	23
(1) The Exclusion Does Not Require a Charge, a Conviction or a Certain Type of Crime to Apply.....	26
B. The Court Should Affirm the Summary Judgment of Webb's Statutory and Bad Faith Claims Because USAA CIC Reasonably Investigated the Claim and Had a Reasonable Basis for Finding No Duty to Defend and No Coverage.....	27
1. Webb's IFCA Claim Fails	27
2. Webb's CPA Claim Fails	29
3. Webb's Common Law Bad Faith Claim Fails	30
VI. CONCLUSION	32

TABLE OF AUTHORITIES

Cases

<i>Allstate Ins. Co. v. Peasley</i> , 80 Wash.App. 565 (1996).....	25, 26, 28
<i>Allstate Ins. Co. v. Raynor</i> , 93 Wash. App. 484, 495 (1999).....	26
<i>American Star Ins. Co. v. Grice</i> , 121 Wash. 2d 869, 874 (1993)	14
<i>Anderson v. State Farm Mut. Ins. Co.</i> , 101 Wash. App. 323, 329-30, 2 P.3d 1029 (2000),.....	31
<i>Atherton Condominium Apartment-Owners Ass’n Bd. Of Directors v. Blume Dev. Co.</i> , 115 Wn.2d 506, 516, 799 P.2d 250 (1990).....	8
<i>Boeing Co. v. Aetna Cas. & Sur. Co.</i> , 113 Wash. 2d 869, 876 (1990)	14
<i>Dombrosky v. Farmers Ins. Co. of Wash.</i> , 84 Wash.App. 245, 260 (1996)	29
<i>Estep v. Hamilton</i> , 148 Wn. App. 246, 255-56, 201 P.3d 331 (2008), <i>rev. denied</i> , 166 Wn.2d 1027 (2009)	8
<i>Grange Ins. Co. v. Brosseau</i> , 113 Wash.2d 91, 95 (1989)	10
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wash. 2d 778, 780 (1986).....	29
<i>Hayden v. Mut. Of Enumclaw Inc. Co.</i> , 141 Wash.2d 55, 64 (2000)	9
<i>Indus. Indem. Co. of the Nw., Inc. v. Kallevig</i> , 114 Wash.2d 907, 921 (1990).....	29
<i>Kirk v. Mt. Airy Ins. Co.</i> , 85 Wash. App. 113, 931 P.2d 1124 (1998).....	30
<i>Kitsap County v. Allstate Ins. Co.</i> , 136 Wash. 2d 567 (1998)	14, 15
<i>Lakey v. Puget Sound Energy, Inc.</i> , 176 Wn.2d 909, 922, 296 P.3d 860 (2013).....	8
<i>Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.</i> , 161 Wash. 2d 903, 916, 169 P.3d 1 (2007).....	30
<i>Nast v. Michels</i> , 107 Wn.2d 300, 308, 730 P.2d 54 (1986)	8
<i>Qwest Corp. v. City of Bellevue</i> , 161 Wn.2d 353, 358, 166 P.3d 667 (2007).....	8
<i>Roller v. Stonewall Ins. Co.</i> , 115 Wash.2d 679, 685 (1990).....	10, 11
<i>Safeco Ins. Co. of Am. V. Butler</i> , 118 Wash.2d 383 (1992).....	passim
<i>Schwindt v. Underwriters at Lloyd’s of London</i> , 81 Wash.App. 293, 298 (1996).....	9
<i>Shields v. Enterprise Leasing Co.</i> , 139 Wash.App. 664, 676 (2007) .	29, 30
<i>Smith v. Safeco Ins. Co.</i> , 150 Wash. 2d 478, 78 P.3d 1274 (2003)	31
<i>St. Paul Fire and Marine Ins. Co. v. Onvia, Inc.</i> , 165 Wash. 2d 122 (2008)	30
<i>State Farm Fire and Casualty Company v. Parrella</i> , 134 Wash.App 536, 541 (2006).....	23

<i>Transcontinental Ins. Co. v. Washington Pub. Utils. Dists. Util. Sys.</i> , 111 Wash.2d 452, 456 (1988).....	24
<i>United Servs. Auto. Ass'n v. Speed</i> , 179 Wash.App. 184, 194 (2014).....	10
<i>Werlinger v. Clarendon Nat'l Ins. Co.</i> , 129 Wash. App. 804, 808, 120 P.3d 593 (2005).....	31
<i>Woo v. Fireman's Fund Ins. Co.</i> , 161 Wash.2d 43, 54 (2007).....	10
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 225, 770 P.2d 182 (1989).....	8

Statutes

Kitsap County Code 10.25.020	3, 25
RCW 19.86 <i>et seq.</i>	7
RCW 19.86.020	29
RCW 48.30.015	7, 27, 28
RCW 48.30.015(1).....	27
RCW 9.41.230	25

I. INTRODUCTION

This Appeal from the Trial Court’s granting of summary judgment arises from a homeowner’s insurance duty to defend coverage action stemming from a lawsuit between Appellants John and Krista Webb (collectively, “Webb”) and their neighbors Steven Hogg and Candace Ladley (collectively, “Hogg”) over Webb’s alleged shooting of rifles and other firearms on his property and the alleged injuries to Hogg as a result (the “Hogg Suit”). Webb tendered the Hogg Suit to his homeowners insurer, Respondent USAA Casualty Insurance Company (“USAA CIC”), requesting a defense under the USAA CIC policy (the “Policy”). Webb contends USAA CIC wrongfully declined coverage of the claim, had a duty to defend Webb, and failed to reasonably investigate the claim. However, the duty to defend did not arise for at least three reasons that independently preclude coverage and thus no duty to defend was triggered. Without a duty to defend, USAA CIC is not liable to Webb and the Trial Court’s grant of summary judgment must be affirmed.

First, none of the causes of action in the underlying suit, save for the trespass claim (which itself is not covered for reasons discussed below), trigger the insuring agreement of the subject homeowners insurance policy. Because the insurance contract provides coverage only for injuries caused by an *accident* and all the causes of action in the underlying suit arose out of Webb’s *deliberate discharge* of firearms, the bulk of the claims against Webb do not trigger coverage under the Policy.

Second, as to the trespass claim against Webb, *even if* that cause of

action triggered a duty to defend under the Policy's Personal Injury Endorsement, the Policy's Crime Exception exclusion precludes coverage as Webb's discharge of firearms constitutes a misdemeanor under both the Kitsap County Code and Poulsbo Municipal Code.

Third, separate and apart from the Crime Exception exclusion, the Policy excludes coverage for *intentional* conduct under its "Intentional Act" exclusion. As a result, because *all* the claims contained within the underlying suit against Webb – including trespass – were the result of Webb's deliberate act of conducting target practice, no duty to defend exists.

Accordingly, without coverage, USAA CIC did not breach the insurance contract by declining Webb's claim as no duty to defend Webb arose and the language of the Policy expressly precluded coverage.

Finally, USAA CIC conducted a reasonable investigation into its duty to defend Webb. Based on its determination that the underlying suit arose out of Webb's alleged target practice on his property – a deliberate act – it was reasonable for USAA CIC to find that the language of the Policy precluded a duty to defend. Therefore, Webb's extracontractual causes of action were appropriately dismissed.

USAA CIC respectfully requests the Court affirm the Trial Court's entry of summary judgment.

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether summary judgment on Webb's breach of contract

cause of action should be affirmed because there is no coverage and no duty to defend under the subject Policy and Umbrella Policy for Webb's claim because all the claims alleged in the Hogg Suit were the result of the intentional act of discharging firearms and could not conceivably be covered under the Policies?

2. Whether summary judgment on Webb's Washington Insurance Fair Conduct Act, Washington Consumer Protection Act and Breach of the Duty of Good Faith and Fair Dealing claims should be affirmed because USAA CIC's investigation and denial of Webb's claims was reasonable as a matter of law?

3. Whether the subject Policy's Crime Exception exclusion operated to preclude Webb's claim as the willful discharge of a firearm in any place where any person might be endangered thereby is a gross misdemeanor under the Poulsbo Municipal Code and a violation of the Kitsap County code?

III. RESPONDENT'S STATEMENT OF THE CASE

A. The Hogg Suit

The underlying suit alleged seven causes of action against Webb: (1) Trespass; (2) Assault; (3) Violation of Kitsap County Code 10.25.020; (4) Negligent Infliction of Emotional Distress; (5) Intentional Infliction of Emotional Distress; (6) Nuisance and (7) Injunction ("the Hogg Suit"). Clerk's Papers ("CP") 117-124.

The underlying suit alleged, *inter alia*, that Webb and co-defendant John Anderson caused multiple rounds of ammunition to be shot and

strafed across Hogg's property, a residential property as well as a llama and alpaca farm open to the public, from Webb's property. CP 119-120. The suit also alleged the discharge of firearms took place on more than one occasion. CP 120.

B. Webb Tenders Defense and Indemnity of the Underlying Hogg Suit to USAA CIC

On or about May 24, 2017, Webb advised USAA CIC that his neighbors, Steven Hogg and Candace Ladley (collectively "Hogg"), filed suit against him. CP 131. The claim was assigned to a bodily injury claims examiner, Sarah Welty, for review, who, just two days after the tender, on or about May 26, 2017, reviewed the underlying suit. CP 133.

C. USAA CIC Reviews the Hogg Suit

Based on Welty's initial review, she noted in the claims activity log that most of the allegations asserted by the the Hogg Suit did not meet the subject homeowners policy and umbrella policy's (collectively, "the Policies") definition of "occurrence." CP 133. She also noted punitive damages were not covered under the Policies and the "Intentional Act" exclusion would preclude coverage of the suit's Intentional Infliction of Emotional Distress claim. CP 133. Welty then referred the claim to the legal department for further coverage review. CP 135.

On or about May 30, 2017, claims manager Nichole Bloodworth reviewed the legal referral and recommended that coverage be declined as it did not appear the underlying suit met the definitions of "occurrence" and "bodily injury" under the Policies. CP 137.

On or about June 5, 2017, USAA CIC in-house counsel David Lane reviewed the claim and concluded there was no coverage or duty to defend and recommended the duty to defend be denied based on the following:

- The Trespass claim did not allege any “bodily injury” or “property damage”, therefore, there was also no “occurrence” such that coverage or a duty to defend would be triggered; CP 139-141;
- The Assault claim did not meet the definition of “bodily injury”, therefore there was also no “occurrence” such that coverage or a duty to defend would be triggered; CP 139-141;
- The Kitsap County Code violation claim did not allege any “bodily injury” or “property damage”, therefore, there was also no “occurrence” such that coverage or a duty to defend would be triggered; CP 139-141;
- The Intentional Infliction of Emotional Distress claim was excluded under the “Intentional Act” exclusion and precluded coverage and a duty to defend for the deliberate act of the insured; CP 139-141;
- The Negligent Infliction of Emotional Distress claim did not meet the definition of “bodily injury” within the primary Policy or the Personal Injury Endorsement, therefore, there was also no “occurrence” such that coverage or a duty to defend would be triggered; CP 139-141;

- The “Intentional Act” exclusion precluded coverage of the Nuisance claim and all the causes of action because all the claims arose out of the insured’s deliberate act of shooting a firearm; CP 139-141;
- The TRO and Permanent Injunction claim did not allege any “bodily injury” or “property damage”, therefore there was also no “occurrence” such that coverage or a duty to defend would be triggered; CP 139-141; and
- The Policies expressly precluded coverage and a duty to defend for any suit seeking punitive damages. CP 139-141.

D. USAA CIC Declines Coverage and Duty to Defend

Welty advised Webb in a letter sent on or about June 20, 2017, that USAA CIC was declining coverage of the claim and that no duty to defend was owed under both the Policies. CP 143-146.

On or about September 15, 2017, Webb advised USAA CIC of his intent to file suit based on USAA CIC’s declination of coverage. CP 148-149. On October 4, 2017, Lane reiterated in an activity log note within the claim file that USAA CIC’s declination was appropriate under the terms, conditions, and limitations of the Policies. CP 151. Lane recommended an amended denial be sent to Webb that included a further explanation of why none of the claims in the underlying suit triggered coverage or a duty to defend, which Welty sent to Webb later that day. CP 153-156.

E. USAA CIC's Motion for Summary Judgment is Granted

After Webb filed suit against USAA CIC, USAA CIC filed a Motion for Summary Judgment, or, in the alternative, Partial Summary Judgment on May 2, 2018. CP 157-180. USAA CIC's motion asked the court to address two separate issues that could be framed as follows:

First, whether the breach of contract claim against USAA CIC should be dismissed because there is no coverage and no duty to defend under the subject Policies for Webb's claim?

Second, whether Webb's three tort causes of action for Violation of the Insurance Fair Conduct Act ("IFCA"), RCW 48.30.015; Violation of the Consumer Protection Act, RCW 19.86 *et seq.*; and Breach of the Duty of Good Faith and Fair Dealing/Bad Faith should be dismissed because USAA CIC's investigation of Webb's claims was reasonable as a matter of law?

The Trial Court granted USAA CIC's Motion for Summary Judgment and denied Webb's Motion for Partial Summary Judgment, finding and concluding that USAA CIC has no duty to defend because the claims against Webb in the Hogg Complaint arise from an intentional act and could not conceivably be covered according to particular provisions within the policy at issue. CP 564-565.

IV. STANDARD OF REVIEW

A. Order Granting USAA's Motion for Summary Judgment

The Trial Court's order granting USAA CIC's Motion for

Summary judgment is subject to *de novo* review. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013). The Court of Appeals performs the same inquiry as the trial court and should affirm the order granting summary judgment when “there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Id.*, quoting *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007).

The Court must review the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party’s favor. *Lakey*, 176 Wn.2d at 922. However, the nonmoving party “may not rest upon the mere allegations or denials of his pleading” to resist a motion for summary judgment. CR 56(e). If a plaintiff’s response “fails to make a showing sufficient to establish the existence of an element essential to his case,” then the defendant’s motion for summary judgment should be granted. *Atherton Condominium Apartment-Owners Ass’n Bd. Of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A trial court ruling, including a grant of summary judgment, may be affirmed on any ground supported by the record, *Estep v. Hamilton*, 148 Wn. App. 246, 255-56, 201 P.3d 331 (2008), *rev. denied*, 166 Wn.2d 1027 (2009), even if the trial court did not consider it, *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

V. THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT SHOULD BE AFFIRMED

A. The Court Should Affirm the Summary Judgment as to Webb's Breach of Contract Claim

The Trial Court's grant of USAA CIC's Motion for Summary Judgment as to Webb's breach of contract claim must be affirmed because:

First, under Washington law, it is the insured's burden to establish that the loss falls within the scope of the policy's insured losses. *Schwindt v. Underwriters at Lloyd's of London*, 81 Wash.App. 293, 298 (1996).

None of the Hogg Suit's claims fell within the scope of the insuring agreement. Even if a claim potentially triggered covered, which no claim did, two separate exclusions unambiguously excluded coverage.

Second, USAA CIC's duty to defend was *not* triggered because neither of the subject Policies could conceivably cover any of the Hogg Suit's claims because all of the causes of action arose from Webb's deliberate act of shooting guns on his property for the purpose of target practice. Two separate exclusions operated to preclude coverage as a result of Webb's intentional discharge of firearms.

1. The Hogg Suit Failed to Trigger Coverage Under Both the Primary Homeowners Policy and Umbrella Policy

Under Washington law, an insurer's duty to defend is broader than the duty to indemnify. *Hayden v. Mut. Of Enumclaw Inc. Co.*, 141 Wash.2d 55, 64 (2000). "The duty to defend exists if the policy *conceivably* covers the claim allegations, while the duty to indemnify

exists only if the policy *actually* covers the claim.” *United Servs. Auto. Ass’n v. Speed*, 179 Wash.App. 184, 194 (2014). Accordingly, if no duty to defend exists because the policy does not conceivably cover the underlying claims, there can be no duty to indemnify as the duty to indemnify exists only for underlying claims that are *actually* covered.

The duty to defend is determined *only* from the complaint against the insured. *Id.* [emphasis added]. A court will examine only the allegations against the insured and the insurance policy provisions in determining whether the duty to defend has been triggered. *Id.* Moreover, an insurer cannot rely on facts extrinsic to the complaint to deny a duty to defend. *Woo v. Fireman’s Fund Ins. Co.*, 161 Wash.2d 43, 54 (2007). “The duty to defend exists if the facts alleged in the complaint against the insured, if proved, would trigger coverage under the policy.” *Speed, supra*, at 196.

Here, the Policies provided coverage for “bodily injury” or “property damage” caused by an “occurrence.” CP 69, 108. “Occurrence” is defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions, ...”. CP 49, 107. An accident in the insurance context has been defined by Washington courts as “an unusual, unexpected, and unforeseen happening” *Grange Ins. Co. v. Brosseau*, 113 Wash.2d 91, 95 (1989), and a loss that happens “without design, intent, or obvious motivation.” *Roller v. Stonewall Ins. Co.*, 115 Wash.2d 679, 685 (1990). “Whether an event constitutes an accident is determined objectively and does not depend on the insured’s subjective

perspective. ...Either an incident is an accident or it is not.” *Roller, supra*, at 685.

In applying this accident requirement, Washington courts have held that “an accident is never present when a deliberate act is performed unless some additional unexpected, independent and unforeseen happening occurs which produces or brings about the result of injury or death.” *Safeco Ins. Co. of Am. V. Butler*, 118 Wash.2d 383 (1992).

Webb argues, for the first time in his Appellant Brief, that the Hogg Suit is somehow unclear as to how the alleged shots were fired, in what direction they were fired, or why they produced the ricochets. Appellant’s Brief 2, 10. This argument directly contradicts Webb’s Motion for Partial Summary Judgment where he never disputed the clarity or factual circumstances of the Hogg Suit. Indeed, in Webb’s Motion for Partial Summary Judgment, he admits the Hogg Suit was the result of alleged target shooting on Webb’s property. CP 182. It is puzzling why Webb now claims the Hogg Suit is vague regarding these target practice allegations.

Webb’s argument blatantly ignores the express allegations of the Hogg Suit. The Hogg Suit unambiguously described the nature and location of the conduct, the persons involved, and unambiguously described Webb’s conduct as deliberate. The Hogg suit alleged “[t]he 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.

...**Defendants continue to target practice** on their properties on a regular basis and **refuse to cease to do so.**” CP 119-120. The Hogg Suit made no factual allegations that would support that Webb’s target shooting was anything but intentional, deliberate and purposeful.

Accordingly, the Policies did not conceivably cover the allegations of the underlying suit and the duty to defend is not triggered. In addition, as the Policies could not conceivably cover the claims made in the underlying suit, the Policies could not *actually* cover the underlying claims, therefore the duty to indemnify is also not triggered.

a. **The Trespass Claim Did Not Trigger a Duty to Defend¹**

Webb argues that the Hogg Suit’s claims of trespass in the underlying suit constituted “personal injury” under the primary Policy’s Personal Injury Endorsement, therefore triggering coverage.

However, the Hogg Suit’s trespass claim did not trigger a duty to defend or coverage because the trespass claim did not allege any of the specific injuries or damages afforded coverage under the Personal Injury Endorsement of the Policy.

The Personal Injury Endorsement provides liability coverage “[i]f a claim is made or a suit is brought against any “insured” for “damages” because of “bodily injury”, “property damage” or “personal injury” caused

¹ The Hogg Suit alleged seven causes of action against Webb. In USAA CIC’s Motion for Summary Judgment, it argued that none of the causes of action triggered coverage under the Policies. As Appellant’s Brief argues only that the Hogg Suit’s Trespass and Nuisance causes of action triggered coverage, Webb concedes the remaining five causes of action did not trigger coverage under the Policies and therefore USAA CIC will only address the Trespass and Nuisance claims contained in the Hogg Suit.

by an “occurrence” to which this coverage applies, ...”. CP 93. Put differently, coverage is afforded and a duty to defend is triggered only if a claim is made for damages because of “bodily injury”, “property damage” or “personal injury” caused by an “occurrence.”

(1) **The Trespass Claim Is Not a Claim for “Damages” Because of “Bodily Injury”**

Here, the Hogg Suit’s trespass claim certainly does not allege any “bodily injury” as “bodily injury” is defined under the Policy – “bodily harm, sickness or disease.” CP 47. Hogg’s trespass claim very specifically alleges that trespass occurred by Webb’s trespass onto Hogg’s *land*. CP 121. The claim in no way alleges any harm to a person’s body. Therefore, the trespass claim is not a claim for “damages” because of “bodily injury.”

(2) **The Trespass Claim is Not a Claim for “Damages” Because of “Property Damage”**

The trespass claim also does not allege any “property damage” occurred from the trespass. The Policy defines “property damage” as physical damage to, or destruction of tangible property, including loss of use of this property.” CP 49. The Hogg Suit alleges Webb “trespassed on Plaintiffs’ land, without the consent or authority of the Plaintiffs.” CP 121. Hogg further alleges Webb “[has] caused irreparable damage to Plaintiffs in that Plaintiffs suffer discomfort, annoyance and mental suffering...”. CP 121. There is no factual allegation that physical damage has occurred to tangible property or that tangible property has been destroyed. Accordingly, the trespass claim is not a claim for “damages”

because of “property damage”.

(3) **The Trespass Claim is Not a Claim for “Damages” Because of “Personal Injury”**

Webb claims the trespass claim is a “personal injury” under the Personal Injury Endorsement. The Endorsement unambiguously states what is “personal injury” by stating: “**“Personal Injury” *means*:**” before listing the enumerated injuries. CP 93. Trespass is not one of the injuries listed as a “personal injury.” Therefore, it cannot be considered a “personal injury” under the Policy.

Under Washington law, a court will examine the terms of an insurance policy to determine whether under the plain meaning of the contract there is coverage. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wash. 2d 869, 876 (1990). If policy language is clear and unambiguous, a court may not modify the insurance contract or create an ambiguity. *American Star Ins. Co. v. Grice*, 121 Wash. 2d 869, 874 (1993).

Here, the terms of the Personal Injury Endorsement are plain and clear, trespass is not named as a “personal injury”, therefore it cannot be considered a claim for “damages” because of “personal injury” and is not covered by the Policy.

Moreover, the instant case is distinguishable from the language of the policies examined in *Kitsap County v. Allstate Ins. Co.*, 136 Wash. 2d 567 (1998), as relied on by Webb. In *Kitsap County*, the personal injury coverage was defined as “ ‘Personal Injury’ means bodily injury or if arising out of bodily injury, mental anguish. It also includes *injury arising*

out of one or more of the following offenses ...”. *Id.* at 573 [emphasis added]. The policies examined by the court included the qualifier “arising out of”. *Id.* at 573-574. 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.

However, Webb’s Policy does not use “arise out of” to describe a “personal injury,” the Policy at issue here states: “ “Personal Injury” *means*: ...” CP 93. Merriam-Webster defines “means” as “to serve or intend to convey, show, or indicate: signify.” Whereas “arise” is defined as “to originate from a source.” The instant Policy’s use of “means” denotes an intention to convey that the enumerated injuries indicate a “personal injury.”

The policies examined in *Kitsap County* used the term “injury *arising out of*”, which does not, and cannot, carry the same meaning as “personal injury” *means*”. Where the policies in *Kitsap County* allow room for coverage of offenses not enumerated, so long as they originate from an enumerated offense, the instant policy covers only the injuries listed as signifying a “personal injury”. Accordingly, the underlying trespass claim is not a “personal injury.”

Finally, Webb’s reliance on case law from outside this jurisdiction and unpublished case law from outside this jurisdiction carries no weight here. As discussed above, the language of the subject policy controls. Webb has not demonstrated how the insurance contracts at issue in the

cited out of state cases are similar to the language of the Policy at issue here. Moreover, none of the cited out of state case law addresses the subject Policy's Intentional Act Exclusion which operated to preclude coverage of the entire Hogg Suit and a duty to defend Webb.

Even *if* Webb contends that the trespass claim potentially presented a covered claim, it would regardless have been excluded by the "Intentional Act" exclusion discussed below.

b. The Nuisance Claim Did Not Trigger a Duty to Defend Because It Does Not Allege Any "Damages"

Webb argues that the Hogg Suit's nuisance claim against him constituted a "personal injury." However, the nuisance claim is also not a "personal injury" for the same reasons the trespass claim, as discussed above, is not a "personal injury" – under the plain and clear terms of the Policy, nuisance is not stated as one of the "personal injur[ies]".

In addition, the nuisance claim fails to allege facts supporting the presence of a "bodily injury" or "property damage". The nuisance claim alleges Webb's "use of firearms and other deadly weapons on their propert[y] 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.*" CP 123.

There are no allegations of physical harm to a person's body. There are also no allegations that there was damage incurred to, or destruction of, tangible property. Accordingly, the nuisance claim is not

one of “bodily injury” or “property damage.”

Moreover, aside from the fact that Hogg’s nuisance claim is not a claim of “bodily injury”, “property damage” or “personal injury,” **it is also not a claim for “damages.”** The nuisance claim is one in *equity*: “use of firearms and other deadly weapons... constitutes a nuisance ***and should be abated.***” CP 123. Hogg is seeking equitable relief through the abatement of Webb’s target practice. Under the Policy, “damages” is defined as compensatory damages, not including punitive, exemplary or multiple damages. CP 47. There is no coverage for equitable claims under the Policy. Accordingly, the nuisance claim also fails to satisfy as a claim or a suit brought against Webb “for “damages””.

Finally, even if the nuisance claim potentially presented a covered claim, which it did not, it is excluded by the “Intentional Act” exclusion. Webb’s deliberate act of firing a gun falls squarely under this exclusion, as will be discussed in greater detail below.

2. Two Exclusions Precluded Coverage and No Duty to Defend Arose

Although none of the claims brought by Hogg triggered coverage or USAA CIC’s duty to defend, even if the Court assumes *arguendo* that the underlying suit potentially presented a covered claim, at least two exclusions operated to remove coverage and to remove any duty to defend Webb: (1) The “Intentional Act” exclusion and (2) the Crime Exception exclusion.

Webb’s conclusion that the “Intentional Act” exclusion does not

preclude coverage of his claim is a result of his misapplication of the exclusion. As is discussed further below, the exclusion turns on the intentionality of Webb's conduct of discharging a gun for target practice. The exclusion does not hinge on Webb not intending his target practice to result in harm to Hogg. Accordingly, as Webb intended to engage in target practice, such conduct falls squarely within the Intentional Act exclusion.

The Crime Exception exclusion also unambiguously excludes coverage of any conduct malicious or criminal in nature. As Webb's conduct may be in criminal violation of at least two statutes, this exclusion would preclude coverage and would remove any duty to defend the entire Hogg Suit against Webb.

a. **The Policy's "Intentional Act" Exclusion
Removed Any Duty to Defend**

The primary Policy contains an "Intentional Act" exclusion that pertains to "bodily injury" or "property damage" claims:

"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.”

CP 70.

The Personal Injury Endorsement also includes an “Intentional Act” exclusion as applied to claims of “personal injury”:

“Coverage E – Personal Liability and Coverage F – Medical Payments to Others do not apply to “personal injury”:

- a. which is expected or intended by the “insured”...”.

CP 93.

As Webb’s discharge of a firearm is a deliberate act and was the conduct that caused Hogg’s injuries, the “Intentional Act” exclusion in both the primary Policy and Personal Injury Endorsement precludes coverage of not only the wrongful entry claim alleged against Webb but for *all the underlying causes of action*. Thus, *even if* one of the other causes of action alleged by Hogg triggered coverage – which USAA CIC contends they did not – and *even if* the Crime Exception exclusion discussed below did not preclude coverage, which USAA CIC contends it did preclude coverage, the “Intentional Act” exclusion precludes a duty to defend any of the claims made by Hogg against Webb in the underlying suit.

(1) **The Intentional Act Exclusion
Modifies the Shooting of Guns –
Not the Resulting Harm**

Webb mistakenly focuses his analysis on how he did not intend the *harm resulting from the target practice*. This allows him to reach the conclusion that because Webb did not intend for stray bullets to ricochet and land on Hogg's property, there is no intentional act present and therefore the Intentional Act exclusion does not apply. This is simply a misapplication of the exclusion.

The Intentional *Act* exclusion turns on the act or conduct itself, *not* the resulting harm from that act. Indeed, if we were to follow Webb's reasoning, so long as an insured that has committed an intentional act denied that she intended the consequences of her act, such conduct is effectively removed from the scope of the Intentional Act Exclusion and the exclusion does not apply. This is not a reasonable interpretation of the exclusion.

Perhaps more significantly, Webb's logic fails to reconcile how Washington courts have found the act of shooting a gun intentional in other cases, yet would somehow find Webb's shooting of guns unintentional here.

Indeed, in *Safeco Inc. Co. of America v. Butler*, 118 Wash.2d 383 (1992), the shooter intended to shoot a vehicle, yet when he shot at the vehicle it resulted in injuries to the victim. The Court found that although the shooter did not foresee that his shots fired at a vehicle would injure the victim, he intentionally fired his gun, therefore, there was no accident. *Id.*

Here, Webb intended to shoot at a target, yet when he shot at the target it resulted in injuries to Hogg. It strains logic to argue Webb's actions here are somehow unlike the actions of the shooter in *Butler*.

Finally, the fact that the Hogg Suit made some allegations that Webb acted negligently or carelessly is of no consequence in evaluating the act that caused Hogg's alleged damages in the first instance – the rifle target practice. The correct analysis evaluates whether the insured's underlying conduct that caused the alleged injuries or damages was deliberate – not whether the legal elements of the tort require intent.

(2) **Webb Mistakenly Conflates the Elements of Trespass and Nuisance with His Intentional Discharge of a Gun**

Webb incorrectly argues that the “Intentional Act” exclusion does not operate to remove USAA CIC's duty to defend because “[t]he torts of trespass and nuisance do not require proof that the alleged tortfeasor intended or expected to cause injury” Appellant's Brief 26.

However, in examining whether the exclusion applies, the alleged tort's legal elements are of no consequence and are not part of the coverage analysis. In other words, here, the operation of the exclusion turns on Webb's conduct that caused Hogg's alleged damages and whether such conduct was intentional.

As will be discussed in further detail below, simply because nuisance and trespass can be based on either intentional *or* negligent conduct, that has no bearing on the fact that Webb's undertaking of target

practice at his home was absolutely intentional and deliberate and such intentional conduct resulted in the harm to Hogg.

(3) **Webb's Non-Intention to Injure Hogg and/or the Hogg Suit's Allegations of Negligence Have No Bearing on Webb's Intention to Shoot His Gun**

Merely because the underlying suit alleges Webb was negligent in allowing stray bullets or ricochet bullets to enter Hogg's property, does not somehow make Webb's discharge of a gun an accident or unintentional and not within the "Intentional Act" exclusion.

Washington law supports a finding that Webb's decision to conduct a firearms target practice in his backyard constitutes intentional conduct that would preclude coverage. Washington courts have held that "an accident is never present when a deliberate act is performed unless some additional unexpected, independent and unforeseen happening occurs which produces or brings about the result of injury or death." *Safeco Ins. Co. of Am. v. Butler*, 118 Wash.2d 383 (1992).

Here, no part of Webb's conduct is an accident, a surprise or unintentional. He purposefully chose to shoot guns on his property for target practice. As a result, bullets and bullet fragments allegedly landed on Hogg's property and caused Hogg to be frightened to be on his own property. The law is clear that the discharge of a firearm is an intended act as a matter of law.

Webb's subjective intent is of no consequence. In *State Farm Fire and Casualty Company v. Parrella*, 134 Wash.App 536, 541 (2006), the

Court found that although the shooter did not intend to injure the victim, it was undisputed he intended to shoot the gun. Similarly, as discussed above, in *Safeco Inc. Co. of America v. Butler*, 118 Wash.2d 383 (1992), the Court found that although the shooter did not foresee nor intend his shots at a car to harm the victim, the gun was intentionally fired, which was determinative of the existence of an intentional act. *Id.*

A similar set of facts are present here. As Webb intended to shoot his guns for the purpose of target practice, it does not matter that “ricocheted bullets and fragments... are an unintended result of normal shooting activities.” CP 190. The “shooting activity” was the entire purpose of his conduct. Although Webb may not have intended that shooting his guns might result in shrapnel and bullet fragments to land on Hogg’s property--and he may not have intended that his target practice frighten Hogg and cause emotional distress--none of this is of any consequence. Washington courts have determined that discharging a firearm, *regardless of the shooter’s intent* – whether that be to shoot at a person, at an object, at a target, or into thin air – is an intentional act.

Accordingly, as the *entire* Hogg complaint arose from Webb’s deliberate shooting of firearms, such conduct falls squarely within the “Intentional Act” exclusion and precludes coverage and a duty to defend.

**b. The Policy’s “Crime Exception”
Exclusion Precluded Coverage**

In addition to the “Intentional Act” exclusion, even if the underlying claims presented potentially triggered coverage under the

Personal Injury Endorsement, which USAA CIC contends it did not, the Endorsement's Crime Exception exclusion precluded coverage and any duty to defend Webb.

The Personal Injury Endorsement expressly precludes coverage for any "personal injury" when the conduct is criminal in nature.² CP 93. Here, even if any of the underlying claims presented constituted "personal injury" – they did not – the hypothetical "personal injury" was a result of conduct deemed a criminal misdemeanor under two separate statutes and is thus criminal in nature.

Where the language in an insurance policy is clear and unambiguous, the court must enforce it as written and cannot modify the contract or create ambiguity where none exists. *Transcontinental Ins. Co. v. Washington Pub. Utils. Dists. Util. Sys.*, 111 Wash.2d 452, 456 (1988). The Personal Injury Endorsement's preclusion of coverage for injuries resulting from conduct criminal in nature is clear and unambiguous:

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

CP 93.

Webb's discharge of a firearm is criminal in nature based on the conduct being in violation of Kitsap County and Poulsbo Municipal codes. Under Kitsap County Code 10.25.020, the statute identifies a violation

² The "personal injury" coverage of the Umbrella Policy also includes coverage for wrongful entry, however, the coverage is limited to landlord-tenant situations. CP 107. Therefore, there is no coverage under the Umbrella Policy.

when a firearm is discharged “toward any building occupied by people or domestic animals...where the point of discharge is within five hundred yards of such building.” Furthermore, under Kitsap County Code 1.12.010, any person violating or failing to comply with any of the Kitsap County ordinances is guilty of a misdemeanor. Therefore, Webb’s conduct of discharging a firearm in close proximity to the Hogg property is criminal in nature and falls within the exclusion.

Similarly, the Poulsbo Municipal Code has adopted RCW 9.41.230, which considers the willful discharge of any firearm in any place where any person might be endangered thereby a gross misdemeanor. Therefore, Webb’s conduct is also criminal in nature under the Poulsbo Municipal Code and Revised Code of Washington as it is reasonable that Hogg, a neighbor of Webb, may be endangered from Webb’s firearm target practice on his property.

Washington law has interpreted the criminal acts exclusion in general, broadly, applicable to both intentional **and** unintentional criminal acts. *See Allstate Ins. Co. v. Peasley*, 80 Wash.App. 565 (1996). Moreover, “criminal” has been defined in the context of similar crime exclusions as “involving or being a crime”, “relating to crime or its punishment” and “an offense against public law (as a misdemeanor, felony, or act of treason) providing a penalty against the offender but not including a petty violation of municipal regulation...”. *Allstate Ins. Co. v. Peasley*, 131 Wash.2d 420 (1997). Therefore, it is not necessary that Webb even be charged with a crime, the conduct being a crime is

sufficient.

Under the Personal Injury Endorsement, “personal injury” only applies when the conduct is not criminal in nature. Accordingly, to the extent that Webb’s shooting of a firearm violated Kitsap County code 10.25.020, or the similar Poulsbo Municipal Code, this conduct is considered a *misdemeanor* and therefore, criminal in nature. As Webb’s discharge of a firearm constitutes a criminal conduct, coverage is precluded.

(1) **The Exclusion Does Not Require a Charge, a Conviction or a Certain Type of Crime to Apply**

Under Washington law, “neither a criminal charge nor a conviction is prerequisite to operation of the policy’s exclusion of coverage for criminal acts.” *Allstate Ins. Co. v. Raynor*, 93 Wash. App. 484, 495 (1999); see also *Allstate Ins. Co. v. Peasley*, 131 Wash.2d 420 (1997).

Accordingly, Webb does not have to be charged with or convicted under the above-named statutes for the Crime Exception exclusion to apply.

Here, based on the allegations of the Hogg Suit, it is reasonable to conclude that performing rifle target practice anywhere other than within the confines and protection of an enclosed gun shooting range may not only be incredibly hazardous, unsafe and result in harm to anyone nearby, but is also unlawful and criminal. In fact, one of Hogg’s claims was that a criminal statute had been violated. CP 122.

As mentioned above, the express and unambiguous language of the

exclusion precludes coverage of conduct malicious or criminal in nature. It does not state that only crimes of a certain caliber fall within the exclusion. Therefore, Webb cannot claim that while certain crimes are criminal in nature, others are not. They all fall under the crime umbrella, accordingly, they are all criminal in nature.

Moreover, USAA CIC anticipates Webb will argue that Hogg's allegations are not clearly criminal. This misstates the language of the Crime Exception exclusion. The exclusion does not require allegations that are "clearly criminal." Indeed, target shooting on one's own property when it may endanger persons nearby or is in the direction of a building occupied by persons is indeed a misdemeanor—and a reasonably dangerous and unlawful activity—and therefore a reasonable interpretation of the Policy.

B. The Court Should Affirm the Summary Judgment of Webb's Statutory and Bad Faith Claims Because USAA CIC Reasonably Investigated the Claim and Had a Reasonable Basis for Finding No Duty to Defend and No Coverage

1. Webb's IFCA Claim Fails

Codified at RCW 48.30.015, Washington's Insurance Fair Conduct Act ("IFCA") establishes a cause of action for first-party insurance claimants in certain, narrow circumstances. In order to qualify for relief under IFCA, an insurer must have "unreasonably denied a claim for coverage." RCW 48.30.015(1).

To support the claimed IFCA violation within the Complaint, Webb alleges that the handling of the subject claim violated RCW

48.30.015 and USAA CIC's denial without conducting a reasonable investigation was in violation of Washington Administrative Code ("WAC") section 284-30-330(4) involving unfair claims settlement.

In this case, USAA CIC conducted a reasonable investigation of Webb's claim, thoroughly reviewed the allegations of the underlying suit, and reasonably concluded there was no coverage of the claim or duty to defend based on the facts that were presented.

Webb tendered his defense of the underlying suit to USAA CIC on May 24, 2017. CP 131. Just two days later, adjuster Welty reviewed the allegations made in the underlying suit, determined there was no coverage, and created a referral to the legal department for further review. CP 133. On June 5, 2017, in-house counsel Lane reviewed the underlying suit and concluded there was indeed no coverage and no duty to defend based on the allegations. CP 139-141. As explained above, all claims arose out of Webb's conduct of the deliberate act of shooting a gun, therefore the underlying suit's causes of action were *all* precluded under the "Intentional Act" exclusion. *Id.* Moreover, there existed a separate basis for exclusion of each cause of action alleged. Webb was advised of USAA CIC's declination on June 20, 2017, shortly after Lane's review of the underlying suit. CP 143-146.

Three months later, on September 26, 2017, when Webb threatened suit against USAA CIC, USAA CIC responded by advising Webb it was maintaining its declination and provided additional explanation for the basis of its declination. CP 153-156. Therefore, there is

no basis for the alleged IFCA claim because USAA CIC conducted a thorough and reasonable investigation of the presented claim.

2. Webb's CPA Claim Fails

Washington's Consumer Protection Act ("CPA") provides that unfair or deceptive acts in the conduct of trade or commerce are unlawful. RCW 19.86.020. To prevail on a CPA claim, a plaintiff must prove five elements: (1) the defendant engaged in an unfair or deceptive act; (2) the act occurred in trade or commerce; (3) the act impacted the public interest; (4) the plaintiff was injured in his or her business or property; and (5) the act actually caused the injury. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 780 (1986).

A reasonable basis for denial of an insured's claim constitutes a complete defense to any claim that the insurer acted in violation of the CPA. *See Shields v. Enterprise Leasing Co.*, 139 Wash.App. 664, 676 (2007) citing *Dombrosky v. Farmers Ins. Co. of Wash.*, 84 Wash.App. 245, 260 (1996).

The first element of the test may be established by showing that the alleged act constitutes a per se unfair trade practice. *Indus. Indem. Co. of the Nw., Inc. v. Kallevig*, 114 Wash.2d 907, 921 (1990). "A per se unfair trade practice exists when a statute which has been declared by the Legislature to constitute an unfair or deceptive act in trade or commerce has been violated." *Id.* Similarly, an insured can show an unfair or deceptive practice that impacts the public interest by establishing a

violation of the regulations related to unfair insurance company practices as set forth in WAC 284-30. *Shields, supra*, 139 Wash.App. at 675.

Here, Webb is unable to show that USAA CIC “engaged in an unfair or deceptive act”, that Webb or the public was injured due to unfair or deceptive acts, and that the unfair or deceptive act caused him injury or injured the public interest. As explained above, USAA CIC properly denied coverage and a duty to defend because none of the underlying suit’s claims fell within the scope of coverage and/or were excluded by the “Intentional Act” exclusion. Even assuming, *arguendo*, that USAA CIC engaged in an unfair or deceptive act, there is no evidence to support Webb’s claim that he was injured due to the denial of coverage or duty to defend or that there are quantitative damages sufficiently plead in his Complaint. Thus, his claim under the CPA fails.

3. Webb’s Common Law Bad Faith Claim Fails

In Washington, an action for bad faith under an insurance contract sounds in tort, and subjects an insurer to all damages proximately caused, including punitive damages. *St. Paul Fire and Marine Ins. Co. v. Onvia, Inc.*, 165 Wash. 2d 122 (2008); *Safeco Ins. Co. of Am. v. Butler*, 118 Wash. 2d 383, 823 P.2d 499 (1992). To establish a breach of the common law duty of good faith, an insured is required to prove that the insurer’s action was unreasonable, frivolous, or unfounded. *Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 161 Wash. 2d 903, 916, 169 P.3d 1 (2007); *Kirk v. Mt. Airy Ins. Co.*, 85 Wash. App. 113, 931 P.2d 1124 (1998); *Smith v. Safeco Ins. Co.*, 150 Wash. 2d 478, 78 P.3d 1274 (2003).

An insurer does not act in bad faith where it “acts honestly, bases its decision on adequate information, and does not overemphasize its own interest.” *Werlinger v. Clarendon Nat'l Ins. Co.*, 129 Wash. App. 804, 808, 120 P.3d 593 (2005), *review denied*, 157 Wash. 2d 1004, 136 P.3d 759 (2006). The determinative question is the reasonableness of the insurer’s actions in light of all the facts and circumstances of the case. *Anderson v. State Farm Mut. Ins. Co.*, 101 Wash. App. 323, 329-30, 2 P.3d 1029 (2000), *review denied*, 142 Wash. 2d 1017, 20 P.3d 945 (2001).

As previously discussed, USAA CIC’s declination of coverage and determination that a duty to defend did not exist was reasonably based on the facts presented to it. There is no evidence that USAA CIC’s declination was in any way unreasonable, frivolous or unfounded as Webb suggests. To the contrary, USAA CIC’s investigation and resulting determination that there was no duty to defend was anything but frivolous and based on a thorough investigation of the claim, the underlying suit and the Policies. Based on the unambiguous and express terms, definitions, conditions and exclusions of the Policy, there was no duty to defend and two exclusions served to remove coverage.

USAA CIC’s investigation was reasonable. Upon Webb’s tender of defense, adjuster Welty promptly reviewed all the of allegations made in the underlying suit. CP 133. She then referred the matter for further investigation to Lane, in-house counsel for USAA CIC. CP 135. All of Hogg’s allegations arose out of Webb allegedly conducting firearms target

practice – an intentional and deliberate act. The Policy’s “Intentional Act” exclusion expressly precludes coverage for intentional acts of the insured.

Moreover, throughout the investigation of the claim, adjuster Welty kept an open mind, and never made any decision or conducted any activity on his claim with any intent to cause harm. CP 128. She simply reviewed the claim subject to the terms, conditions, and limits contained within the Policies. CP 128-129. Accordingly, USAA CIC’s declination of coverage and duty to defend was reasonable and there is no basis for Webb’s bad faith claim.

VI. CONCLUSION

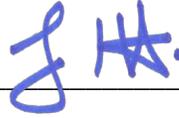
The entirety of the Hogg Suit is based on Webb’s alleged target practice conducted on his property. Such an action is unambiguously an intentional one – no matter the subjective intent of Webb to not cause harm or damage. The subject Policy expressly excludes coverage arising from the intentional conduct of the insured. Therefore, the Trial Court appropriately found that the Hogg Suit could not conceivably be covered pursuant to the provisions of the subject Policy.

Moreover, as there was no duty to defend, there can also be no violation of the IFCA, the CPA and no bad faith by USAA CIC.

For the reasons enumerated herein, USAA CIC respectfully requests this Court affirm the Trial Court’s summary judgment of all of Webb’s claims against USAA CIC.

RESPECTFULLY SUBMITTED THIS 13th day of December, 2018.

DKM LAW GROUP, LLP

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FILED
Court of Appeals
Division II
State of Washington
12/13/2018 2:31 PM

No. 52210-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

John William Webb et al,
Appellant,

v.

USAA Casualty Insurance Company,
Respondent.

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Declaration of Service

On said day below, I electronically served and served via U.S. mail true and accurate copies of the BRIEF OF RESPONDENT to the following:

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I declare under penalty of perjury under the laws of the State of California, Washington and the United States that the foregoing is true and correct.

DATED THIS 13th day of December, 2018.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Summer Bertolet", written over a horizontal line.

Summer Bertolet

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December 13, 2018 - 2:31 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

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