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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 361951

**COURT OF APPEALS, DIVISION III
IN AND FOR THE STATE OF WASHINGTON**

GRANGE INSURANCE ASSOCIATION,
a Washington corporation,

Respondent,

v.

MIELKE BROTHERS, INC., a Washington Corporation, and DOUGLAS
MIELKE, an individual,

Appellants.

REPLY BRIEF OF APPELLANTS

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APPELLANTS' RESPONSE TO RESPONDENT'S INTRODUCTION

Normally, we would not comment on misstatements of fact, contrary to the evidence of record, which appear in a Respondent's introductory statement. However, because several erroneous assertions in the Introduction set the tone for Respondent's arguments, we wish to call them to the attention of this Court.

Respondents begin by casually dismissing the claims against Mielke Bros., Inc. and Douglas Mielke for which coverage is sought as “arising from a family dispute over money and control of the family business,” and they continue by mischaracterizing these claims as “a derivative action filed against them by minority MBI shareholders....” Brief of Respondents, p. 1.

It is unclear why Respondent has elected to place great emphasis on the irrelevant fact that the plaintiffs – both individually and collectively, minority shareholders of MBI – are related to other shareholders. Nowhere in the Brief of Respondent is it argued that the presence of familial relationships would constitute a basis for exclusion of the claims in question. Moreover, the litigation which gives rise to the carrier's current action for declaratory relief is not a derivative action at all, and all of the claims by minority shareholders for which coverage is

sought involve allegations of injuries to the various individual shareholders in their capacities as third parties.

These claims do not involve injury to the corporation or devaluation of plaintiffs' shares, as asserted at page 2 of Brief of Respondent. Instead, the allegedly wrongful actions of MBI and its President, Douglas Mielke, are wrongful, in part, because they constitute "oppressive conduct," and in part, because they constitute breach of the fiduciary duty owed to each plaintiff as a minority shareholder whose. We will expand upon these points in the body of this Reply Brief, where the context will aid the Court in understanding their significance.

REPLY TO RESPONDENT'S ARGUMENT

For the convenience of the Court, in this portion of Appellant's Reply Brief, we will utilize Respondent's headings, as we address Respondent's arguments, *seriatim*.

A. "The Duty to Defend." [Brief of Respondent, p. 8]

Relying upon certain language in *United Serv. Auto. Ass'n v. Speed*, 179 Wn.App. 184, 194 (2014), Respondents appear to be suggesting – though not explicitly stating – that courts may only consider the allegations of the complaint to determine whether the duty to defend is triggered. As noted in the initial Brief of Appellants, the *Speed* opinion

acknowledged that, where the allegations of the complaint conflict with known facts or are ambiguous or inadequate, the insurer may consider facts outside the complaint in order to trigger – but not to deny – a duty to defend. 179 Wn.App. at 195-96. See also *Woo v. Fireman’s Fund Ins. Co.*, 161 Wn.2d 43, 54, 164 P.3d 454 (2007). Moreover, “[f]acts that are extrinsic to the pleadings, but readily available to the insurer, may give rise to the duty.” *Nat’l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 879, 297 P.3d 688 (2013).

Consideration of facts that are extrinsic to the pleadings is particularly appropriate where – as the case at bar – the carrier has engaged in substantial discovery and motion practice on behalf of Appellants for more than a year prior to the motion for summary judgment and decision of the trial court which provide the basis for this appeal.¹ The *Declaration of Douglas Mielke* and the pleadings and discovery documents thereto (CP 1020-1218) contain many of these additional facts, and significantly, Respondent offered no objection to the trial court’s consideration of this evidence.

On the contrary, the text of the June 12, 2018 Order Granting Plaintiff Grange Insurance Association’s Motion For Summary Judgment

¹ It should also be noted that the complaint cited by Grange in the underlying motion for summary judgment was not the original Complaint filed in January 2017, but rather, an Amended Complaint dated August 4, 2017. CP 996-1012.

(CP 1246-47) – a pleading prepared by Respondent – states explicitly that the trial court considered this evidence. In any event, by failing to raise any objection below, Respondent has failed to preserve the issue for appeal. *State v. Finch*, 137 Wn.2d 792, 819, 975 P.2d 967 (1999).

B. "The Policies Only Require Grange to Defend a Suit Seeking Covered 'Damages'" [Brief of Respondent, p. 10]

This argument is curious, because Appellants have never asserted that Grange Insurance has a duty to defend MBI or its President, Douglas Mielke, against claims for injunctive relief. Appellants agree that Grange Insurance has only a duty to defend claims for damages. However, those claims for damages are far more extensive than Respondent represents to the court:

The only "damages" sought by the underlying plaintiffs are their unpaid wages, loan payments and financial losses consisting of diminution in value of MBI's shares.

Brief of Respondent, p. 10. This assertion is mistaken in two respects.

First, the Prayer for Relief set forth in the Amended Complaint cited by

Grange in its own pleadings below clearly states, in pertinent part:

"Now, therefore, Plaintiffs request that this Court grant them the following relief:

10.1 That Plaintiffs be awarded final judgment against Defendants for the above-pled causes of action and for all damages proximately caused to them."

CP 1012. Secondly, nowhere in the Prayer for Relief do the plaintiffs in the underlying litigation request compensation for diminution in the value of MBI's shares.

To be clear, Appellants have never contended that Grange's duty to defend was triggered by plaintiffs' claims for unpaid wages or loan payments. The duty to defend was triggered by plaintiffs' express and implied claims for damages proximately resulting from other acts of the defendants which have been characterized as wrongfully "oppressive" and/or in "breach of fiduciary duty" to the plaintiffs as third parties. These are the claims that Grange Insurance was required to defend.

C. "The Underlying Action Is a Derivative Action Alleging Devaluation of MBI Shares" [Brief of Respondent, pp. 10-13]

As mentioned above, nowhere in the Amended Complaint do the underlying plaintiffs allege that the value of plaintiffs' shares in MBI has been diminished as a proximate result of any of the purportedly wrongful actions of which defendants MBI (through its officers and directors) and Douglas Mielke in particular are accused. This is understandable, given the fact that the allegedly wrongful actions of the defendants that triggered insurance coverage – in particular, terminating Robert Mielke's rent-free tenancy, and preventing Robert and the partnership which he controlled from utilizing the corporation's farmland and equipment, by terminating

unfavorable leases – were actions which would naturally tend to benefit MBI financially, and which would therefore have tended to enhance rather than diminish the value of plaintiffs' shares in the corporation. For that very reason, MBI and Douglas Mielke have consistently taken the position that all of the challenged actions were performed in the exercise of sound business judgment and cannot be considered oppressive. *See Scott v. Trans-System, Inc.*, 148 Wn.2d 701, 709, 64 P.3d 1 (2003).

Although the actions of the defendants did not result in devaluation of plaintiffs' shares in the corporation, Appellants do not contend that the actions in question had no negative impact upon plaintiffs' third-party financial interests. When this case goes to trial, plaintiffs will attempt to establish that the Mielke Brothers Partnership (in which Robert Mielke, Cheryl Beymer and Judy Mielke collectively have a controlling interest) has suffered or will in the future suffer lost income as a result of MBI's decision to terminate leases of crop producing land and pastureland to the Partnership, and that damages in question will be passed through directly to them.

In like fashion, plaintiffs will attempt to establish that the Mielke Brothers Partnership has suffered or will in the future suffer diminished profits by reason of the loss of use of many items of equipment, as a proximate result of the allegedly wrongful termination of MBI's lease of

equipment to the Partnership, and that those damages will also be passed through directly to them. Finally, Robert Mielke will have the burden of proving that he was economically disadvantaged as a proximate result of MBI's allegedly wrongful decision to terminate his rent-free lease of a residence on corporate property, and the corporation's threat to evict him from that residence unless he agreed to pay the rent demanded by MBI.

With respect to all of these claims, MBI and its officers and directors have no intention of conceding that Robert, Cheryl and Judy suffered damages as a result of the foregoing actions; but more importantly, from MBI's perspective, the corporation will vigorously contest plaintiffs' characterization of its actions as "oppressive" and/or in "breach of fiduciary duty," without which, they would not be wrongful. These are of course issues of fact which will be resolved at the trial which is scheduled to take place before Judge Moreno in Spokane County Superior Court, in June of 2019.

D. "The Underlying Action Asserts No Cause of Action Remotely Resembling 'Wrongful Eviction'" [Brief of Respondent, pp. 13 - 15]

At pages 16 through 18 of Appellants' initial brief, we anticipated that Respondents would assert that there is no coverage for Robert Mielke's claim to the effect that MBI wrongfully terminated the rent-free residential lease of a house on corporate property that he had enjoyed for

so many years. Appellants have conceded that MBI threatened Robert with eviction unless he agreed to pay the monthly amount of rent demanded, and that Robert only avoided eviction by acquiescing in this demand. However, it is clear that the “wrongful eviction” coverage includes “The wrongful eviction from, wrongful entry into or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor.” CP 632.

Respondent contends that *Cle Elum Bowl, Inc. v. N. Pac. Ins. Co.*, 96 Wash.App. 698, 707–08, 981 P.2d 872, 877–78 (1999) supports Grange’s argument that the claims against MBI and Douglas Mielke do not fall within the “wrongful eviction” section of the policy. However, *Cle Elum* is inapposite, because the claims in that case were for breach of contract and negligent failure to remove snow from a roof, which the Court of Appeals properly found were not analogous to claims of wrongful entry or invasion of the right of private occupancy. *Cle Elum Bowl, supra*, 96 Wash.App. at 707–708, 981 P.2d 872, 877–78 (1999).

By contrast, the essence of Robert Mielke’s claim in the case at bar is that MBI wrongfully terminated his right to occupy the premises rent-free. MBI denies that its actions were in any sense wrongful, but that issue – like all of the other issues of law and fact pertinent to this

declaratory relief action – remains to be resolved during the trial which is scheduled to take place before Judge Moreno in Spokane County Superior Court, in June of 2019.

E. “Exclusion of a Business Using Farmland Is Not a ‘Wrongful Eviction’” [Brief of Respondent, pp. 15 - 18]

Respondent contends that there is no coverage for claims of wrongful termination of leases relating to MBI farmland, because the plaintiffs were merely business invitees, with no possessory or other legal right to occupy the particular premises. On many levels, this argument makes no sense whatsoever.

Mielke Bros. Partnership is a general partnership (CP 1181), and Robert Mielke is its managing partner (CP 1049-53). A general partner has the right to sue directly on a partnership claim, even if the entity is a limited partnership. *Fox v. Sackman*, 22 Wn.App. 707, 709, 591 P.2d 855 (1979).

The Washington Supreme Court, quoting from Restatement (Second), Torts §332 (1965) has defined an “invitee” as follows:

(1) An invitee is either a public invitee or a business visitor.

(2) A public invitee is a person who is invited to enter or remain on land as a member of the public for the purpose for which the land is held open to the public.

3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

McKinnon v. Washington Federal Sav. & Loan Ass'n, 68 Wn.2d 644, 650, 414 P.2d 773 (1966).

The plaintiffs in this case have asserted that the leases of farmland owned by MBI, held by the Mielke Bros. Partnership were wrongfully terminated, and that the damages suffered by the Partnership as a proximate result thereof were passed through to them. Clearly, the leases in question involved possessory interests in land, and just as clearly, any allegedly wrongful termination of a lease implies an allegedly wrongful eviction. If that were not the case, the subject policy's "wrongful eviction" coverage would be so limited as to be meaningless and absurd. An interpretation of this sort is impermissible. See, *Kelley v. Tonda*, 198 Wn.App. 303, 316, 393 P.3d 824, 832 (2017); *Spectrum Glass Co., Inc. v. Public Utility District No. 1 of Snohomish County*, 129 Wn.App. 303, 312, 119 P.3d 854 (2005).

F. “A Threatened Eviction Is Not an Eviction ” [Brief of Respondent, pp. 18 – 19]

As previously discussed in Subsection D,² the “wrongful eviction” coverage in MBI’s policy does not require a successful eviction in order to be triggered. To the extent that the provision is sufficiently ambiguous to permit an interpretation in that manner, any such interpretation would be construed against the carrier, as the party who drafted the insurance contract. *Safeco Ins. Co. of Am. v. McManemy*, 72 Wn.2d 211, 212–13, 432 P.2d 537 (1967); *Wise v. Farden*, 53 Wash.2d 162, 332 P.2d 454 (1958).

As an additional argument, Respondent erroneously asserts:

“As indicated in Appellants’ Brief, the issue of Roberts’s right to live in the house rent-free is the subject of a separate action in Spokane County scheduled to be tried in June 2019.”

Respondent’s Brief, p. 19. To be clear, there is only one trial referenced in this Brief and in Appellants’ initial brief, and that is the trial before Judge Moreno in Spokane County Superior Court, currently scheduled for June of 2019. The lawsuit to be resolved by that trial – in Spokane County Superior Court Case No. 17-2-01036-1 – is the lawsuit that Grange Insurance was defending on behalf of MBI and Douglas Mielke prior to

² Appellant’s Reply Brief, pages 7 - 9.

issuance of the order granting summary judgment which is the subject of this appeal.

Obviously, if MBI and Douglas Mielke are successful in defending these claims, Grange Insurance's obligation to indemnify will be a moot point. However, the mere possibility that Appellants' defense of Robert's claims may be ultimately successful does not determine whether Grange Insurance has a duty to defend, because that duty is based upon the claims asserted – not the outcome of the lawsuit, or the merits of potential defenses.

G. “Financial Harm to the Underlying Plaintiffs’ Investment in MBP Is Not ‘Property Damage ’” [Brief of Respondent, pp. 19 – 22]

As previously discussed in Subsection E,³ Mielke Bros.

Partnership is a general partnership (CP 1181), and Robert Mielke is its managing partner (CP 1049-53). A general partner has the right to sue directly on a partnership claim, even if the entity is a limited partnership. *Fox v. Sackman*, 22 Wn.App. 707, 709, 591 P.2d 855 (1979).

More importantly, Respondent's assertions regarding the underlying plaintiffs' lack of standing to assert this and other claims are irrelevant for the purpose of determining whether Grange Insurance has a duty to defend those claims, because – as noted previously – lack of

³ Appellant's Reply Brief, pages 9 – 10.

standing is nothing more than a potential defense which may ultimately benefit the carrier in terms of its duty to indemnify its insureds. This point was addressed by the Maryland Court of Appeals as follows:

In order for an insurer to be obligated to defend an insured, the underlying tort suit need only allege action that is potentially covered by the policy, no matter how attenuated, frivolous, or illogical that allegation may be.” . . . Rather than filing a motion for summary judgment against the [insureds], [the insurer] should have instead filed a motion on behalf of the [insureds] against the [underlying plaintiffs] on the grounds of lack of causal nexus.

Sheets v. Brethren Mut. Ins. Co., 679 A.2d 540, 544 (Md. 1996). The same principle of law was stated somewhat differently by the Ninth Circuit Court of Appeals:

The insured is not required to defend himself whenever he has a legitimate defense. To the contrary, when there is an action against an insured, and the action raises claims that come within the title insurance policy's coverage, the insurer, not the insured, must defend the action, whether the defense consists of a simple denial of the allegation or the assertion of a statutory, contractual, or equitable bar.

Ticor Title ins. Co. v. American Resources, Ltd., 859 F.2d 772, 775 (9th Cir. 1988). See also *Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 654 F. Supp. 1334, 1345-46 (D.D.C. 1986) (“[T]he duty to

defend is not and cannot be dependent on the defendants' ultimate obligation to indemnify plaintiffs. There is no reason why the insured, whose insurer is obligated by contract to defend him, should have to try the facts in a suit against his insurer in order to obtain a defense.”); *Klein v. Salama*, 545 F. Supp. 175, 177 (E.D.N.Y. 1982) (insurer is obligated to defend regardless of whether the allegations in the complaint are “utterly false and groundless”); *Goldberg v. Lumber Mutual Ins. Co.*, 297 N.Y. 148, 153-54 (1948).

Washington law has recognized that the insurer must give the insured the benefit of the doubt when determining whether the policy covers the allegations in the complaint. *Woo*, 161 Wn. 2d at 60. An insurer may not rely on “an equivocal interpretation of case law to give itself the benefit of the doubt rather than its insured.” *Id.* An insurer also may not put its own interests ahead of its insured. *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn. 2d 398, 404, 229 P.3d 693 (2010). Yet throughout its brief, Respondent claims that the underlying plaintiffs' claims are barred by law and that this, somehow, means that the insurer has no duty to defend. Instead, the law and complaint must be construed in favor of a defense and that the defense is owed no matter how groundless or frivolous the insurer believes the underlying claims to be.

Applying this reasoning to the issues raised by the plaintiffs in the case at bar, if Grange Insurance believed that the plaintiffs lacked standing to assert their claims of damages, counsel hired by Grange to defend the underlying action should have filed an appropriate motion to dismiss the claims in question, rather than utilizing the argument as a means of avoiding its duty to defend the lawsuit.

Contrary to Respondent's contention, the term, "property damage," as utilized in Grange's insurance policy, does not require damage to tangible property, because that term is expressly defined as you including:

"20.b. Loss of use of tangible property that is *not* physically injured. All such loss of use shall be deemed to occur at the time of the occurrence that caused it."
[emphasis supplied] CP 632.

In Douglas Mielke's Declaration, he states, "In addition, plaintiffs have claimed that the Mielke Brothers Partnership purchased much of the equipment in question, and should therefore be permitted to utilize it without charge." CP 1025.

This is clearly stated in plaintiffs' pleading entitled "Opposition To Turnover of Equipment," (CP 1114 – 1116), as supported by the "Declaration of Robert Mielke in Opposition To Turnover of Equipment" (CP 1121 – 1134). In his declaration, Robert asserts that much of the equipment was purchased decades ago – and some of it, even prior to

formation of Mielke Bros., Inc. (CP 1126). At the time that particular equipment was purchased, each partner was considered the ultimate owner of an undivided interest in all of the partnership property, whether the analysis was under the common law, or the Uniform Partnership Act. *State v. Eberhart*, 106 Wash. 222, 225, 170 P. 853 (1919); *State v. Birch*, 36 Wn.App. 405, 408-409, 675 P.2d 246 (1984).⁴

The conflicting claims of ownership over the equipment in question have created not only a controverted question of material fact which remains to be resolved at the trial of this lawsuit in June of 2019, but also, an issue with respect to the accidental nature of this occurrence. If the Mielke Bros., Inc., truly believed that it owned the equipment in question – and that is clearly MBI’s position – then MBI’s retention and use of the equipment, to the exclusion of the Mielke Brothers Partnership and the plaintiffs in the underlying lawsuit, was neither oppressive nor a breach of fiduciary duty, and any infringement upon the property rights of the Mielke Brothers Partnership and the plaintiffs herein – the ultimate harm claimed by the plaintiffs – was neither intended, expected or foreseen. *Nationwide Mut. Ins. Co. v. Hayles*, 136 Wn.App 531, 537-38, 150 P.3d 589 (2009).

⁴ Presumably, equipment acquired after the 1998 enactment of RCW 25.05.060 would be considered property of the partnership, and not of the partners individually.

Put another way, Respondent focuses on the fact that Appellants' purposefully terminated the equipment lease. But while this could give rise to a claim sounding in contract, the independent duty rule would not preclude a separate claim based on a duty owed in tort — such as breach of fiduciary duty as plaintiffs in the underlying action alleged in their Amended Complaint. *See, e.g., Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 393, 241 P.3d 1256 (2010). This claim implicates coverage and requires a defense by the insurer.⁵

CONCLUSION

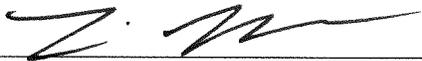
As stated in the initial brief of appellants, many issues of material fact remain to be determined in the underlying litigation before the parties can possibly know whether MBI's minority shareholders will obtain a judgment for which Grange Insurance Association has a duty to indemnify Mielke Bros., Inc. and/or Douglas Mielke. However, based upon the claims asserted in the underlying litigation by MBI's minority shareholders, it is clear that Grange Insurance Association has at least a duty to defend the litigation to its conclusion. The trial court's June 12, 2018 Order granting summary judgment in favor of Grange Insurance

⁵ As part of its argument, Respondent improperly cites to *Group Voyagers, Inc. v. Employers of Wausau*, 66 Fed. Appx. 740 (9th Cir. 2003). Under Federal Rule of Appellate Procedure 32.1, 9th Circuit Rule 36-3, and Washington General Rule 14.1(b), only unpublished decisions issued by the Ninth Circuit after January 1, 2007, may be cited.

Association should be reversed, and this matter should be remanded to the lower court for trial.

RESPECTFULLY SUBMITTED, this 10th day of December, 2018.

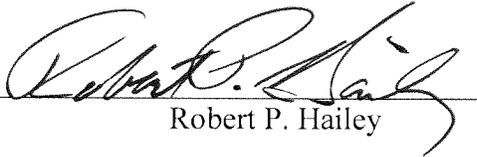
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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the foregoing document on the 10th day of December, 2018, addressed to the following:

William F. Knowles	<input type="checkbox"/>	Hand Delivered
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