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STATE OF WASHINGTON
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No. 77684-9

SUPREME COURT
OF THE STATE OF WASHINGTON

C. J. HERRITT

ROBERT C. WOO, D.D.S., and ANNE M. WOO, husband
and wife, and the marital community composed thereof,

Plaintiffs/Petitioners

v.

FIREMAN'S FUND INSURANCE COMPANY,
a California corporation; and NATIONAL SURETY
CORPORATION, an Illinois corporation,

Defendants/Respondents

and

DEPOSITORS INSURANCE COMPANY, an Iowa
corporation; and THE PACIFIC UNDERWRITERS
CORPORATION, a Washington corporation,

Defendants

ON PETITION FOR REVIEW FROM
COURT OF APPEALS, DIVISION I

RESPONDENTS' ANSWER TO BRIEF OF
AMICUS CURIAE WSTLA FOUNDATION

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STATUTES AND COURT RULES

RCW 18.32.020 4, 5

MISCELLANEOUS

A. Windt, Insurance Claims and Disputes § 4.2
(2001 ed.) 9, 10

A. Windt, Insurance Claims and Disputes § 4.2
(2006 Supp.) 9

I.

SUMMARY INTRODUCTION

Reading WSTLA Foundation's Brief, one might easily overlook that it is a contract this Court is called upon to interpret and construe.

As numerous decisions of this Court have recognized, insurance policies are contracts, and their interpretation and construction are governed by the same rules that govern the interpretation of construction of all contracts, including:

- The words of the insurance contract shall be given their ordinary meaning, e.g., Overton v. Consolidated Insurance Co., 145 Wn.2d 417, 428, 38 P.3d 322 (2002) (citing Boeing Co. v. Aetna Casualty & Surety Co., 113 Wn.2d 869, 784, P.2d 507 (1990));

- The plain meaning of the words shall control, e.g., Quadrant Corp. v. American States Insurance Co., 154 Wn.2d 165, 171, 110 P.3d 733 (2005) (citing Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 15 P.3d 175 (2000));

- When the insurance contract defines a term, that definition shall control, e.g., Overton, 145 Wn.2d at 427 (citing Kitsap County v. Allstate Insurance Co., 136 Wn.2d 565, 964 P.2d 1173 (1998)); and

- Courts shall not stretch the meaning of the words in order to reach a particular result -- including a finding of coverage where the words themselves do not support such a conclusion. E.g., Quadrant, 154 Wn.2d at 172 (citing Findlay v. United Pacific Insurance Co., 129 Wn.2d 368, 917 P.2d 116 (1996)); Transcontinental Insurance Co. v. Washington

Public Utilities Districts Utility System, 111 Wn.2d 452, 760 P.2d 337 (1988); E-Z Loader Boat Trailers, Inc. v. Travelers Indemnity Co., 106 Wn.2d 901, 907, 726 P.2d 439 (1986) (citing and quoting Morgan v. Prudential Insurance Co., 86 Wn.2d 432, 545 P.2d 1193 (1976)).

To be sure, insurance contracts are freighted with a public interest, and the elucidation of that interest has influenced the application of some of the rules of contract interpretation. Thus, where the meaning of the words is not plain but ambiguous, the insured will receive the benefit of that ambiguity. But the touchstone principle remains that insurance contracts are just that -- contracts, whose meaning will be derived from the application of the well established rules of contract interpretation and construction, including when the issue before a court concerns whether a liability insurer, in declining a defense, has breached its duty to defend. The Court of Appeals was right to reverse the trial court on the controlling issue of duty to defend precisely because this result was compelled by application of the ordinary -- and controlling -- rules of contract interpretation and construction.

II.

ANSWERING ARGUMENT

A. WSTLA Foundation's Summary of the Argument Reflects the Foundation's Failure to Give Due Weight to the Actual Terms of the Policy.

WSTLA Foundation's argument summary shows just how decoupled the Foundation's argument is from the actual language of the coverages at issue. Thus, the Foundation criticizes the Court of Appeals'

application of the complaint allegation rule with respect to the Professional Liability coverage, because the Court of Appeals supposedly failed to liberally construe the complaint "as encompassing negligence-based allegations." See Foundation's Brief at 10, "Summary of Argument," ¶ A. But the Professional Liability coverage does not insure against "negligence." It covers "damages that result from rendering or failing to render dental services[,] Ex. 40 ("What we will pay . . .," p. 5 of 31, Bates Stamp NSW00080), and Tina Alberts' complaint did not allege damages resulting from either rendering or failing to render dental services. Equally off point is the Foundation's suggestion that resolution of the "horseplay" issue (which bears on whether the practical joke constituted a "mistaken business activity," and therefore an "offense" that might fall under the "personal injury" prong of the General Liability coverage) somehow affects the resolution of whether Fireman's Fund had a duty to defend under the Professional Liability coverage. See Foundation's Brief at 10, "Summary of Argument," ¶ B. But as the Policy's actual language should make plain, the one has nothing to do with the other.

WSTLA Foundation's brief reflects an approach to the question of duty to defend that would effectively gut the long established principle of Washington law, under which insurance contracts are treated as contracts, and replace that rule with an amorphous body of improvised case law rules that would effectively convert liability insurance into a kind of public utility, whose availability would turn on a court's notion of what is in the public interest. Such a radical change in the nature of the insured-insurer

relationship is the province of the Legislature, and this Court should decline the Foundation's implicit invitation to effect such a change.

B. WSTLA Foundation's Analysis of the Coverages at Issue Fails to Come to Grips With the Plain Meaning of Actual Policy Language, and the Interplay Between That Language and the Allegations of the Tina Alberts Complaint.

WSTLA Foundation's analysis of both the Professional Liability and General Liability coverages¹ disregards the actual language of the parties' contract:

1. The Professional Liability Coverage. As stated, the Professional Liability coverage promised to answer for "damages that result from rendering or failing to render dental services[.]" Ex. 40 ("What we will pay . . .," p. 5 of 31, Bates Stamp NSW00080). The Policy defines "dental services" as "all services which are performed in the practice of the dentistry profession as defined in the business and professional codes of the state where [the insured is] . . . licensed." Id. (Definition No. 8, p. 27 of 31, Bates Stamp No. NSW000102).

WSTLA Foundation claims that RCW 18.32.020, the provision of the Washington business and professional code that defines dentistry, does so in "remarkably broad" terms. See WSTLA Foundation Brief at 15-16. But the Foundation does not buttress this rhetoric of breadth with any analysis of the actual terms of the statute, which under the Policy becomes the Policy's definition of "dental services." In fact, under the ordinary

¹The Foundation appears to have abandoned the suggestion, made in its Amicus Memorandum supporting Dr. Woo's Petition, that the Court of Appeals erred in its conclusion that Fireman's Fund owed no duty to defend under the Policy's Employment Practices Liability.

meaning of those terms, it is plainly and unambiguously apparent that no element of Dr. Woo's practical joke constituted "dental services." See Fireman's Fund's Supplemental Brief, § II.B.1, at 5-8; Fireman's Fund's Court of Appeals Reply Brief, § II.A.1.a, at 5-7 (discussing ordinary meaning of key terms found in RCW 18.32.020).

The factual allegations of Tina Alberts' complaint establish that she had no quarrel with the dental services rendered by Dr. Woo. The gravamen of her complaint was this: She was damaged by what Dr. Woo did when he interrupted his rendering of dental services, in order to carry out his planned practical joke. There is no ambiguity about the narrative of events on this dispositive point, which are set forth in paragraphs 2.11 through 2.18 of the Alberts Complaint:

- When Ms. Alberts chipped one of two baby teeth that had never been replaced by permanent teeth, Dr. Woo offered to remove both baby teeth. (CP 32) (Complaint at 3, ¶ 2.11). Dr. Woo took an impression of Alberts' teeth, to use in creating a set of temporary false teeth (called "flippers"). (Id.) The dental services to be rendered ("[t]he treatment as planned") called for Alberts to be given general anesthesia, the baby teeth to be removed, and the flippers to be placed in her mouth. (Id.) (¶ 2.12). And on the day scheduled for the procedure, Alberts was given the anesthesia, the baby teeth were removed, and the flippers placed in her mouth. (Id.) (¶ 2.13).

- Dr. Woo, however, also carried out what the complaint described as "a scheme to humiliate and denigrate Ms. Alberts[.]" (Id.)

Dr. Woo had a second pair of flippers designed in the shape of boar tusks. (Id.) (¶ 2.14). During the procedure, after Alberts had been placed under anesthesia and the baby teeth removed, and before putting the temporary false teeth flippers in place, Dr. Woo (possibly with an assistant's help) put the boar tusk flippers into Alberts' mouth, pried open the still unconscious woman's eyelids, and took several pictures of the result. (Id.) (¶ 2.17). Dr. Woo then finished the procedure; Ms. Alberts awoke and went home -- aware of the completion of the planned procedure, but unaware of Dr. Woo's "playful" frolic and detour. (Id., ¶ 2.18.)

No dentist in Dr. Woo's position could reasonably expect that his liability insurer would be obligated to provide a defense against Ms. Alberts' lawsuit, under the terms of the Professional Liability coverage provided by the Fireman's Fund Policy. The Alberts complaint does not allege that damages resulted from the treatment of her chipped baby tooth. Nor does the complaint allege that damages resulted from any failure to render dental services; to the contrary, the complaint describes a dental procedure complete in every particular. What the complaint describes is a dentist taking advantage of a patient under general anesthetic, and interrupting a dental procedure in order to commit a wrong. And Division II's decision in Standard Fire Insurance Co. v. Blakeslee, 54 Wn. App. 1, 771 P.2d 1172 (1989), demonstrates that such a causal chain does not give rise to a duty to defend.² WSTLA Foundation's

²Regarding Blakeslee, WSTLA Foundation repeats Dr. Woo's misreading of the case as one that turns on sexual misconduct, which
(continued . . .)

contrary contention should be rejected precisely because it would have the Court disregard the actual terms of Dr. Woo's Professional Liability coverage.

2. The General Liability Coverage. WSTLA Foundation misses the controlling point on the General Liability coverage issue, by recasting the issue as a question of whether the principle of fortuity should relieve Fireman's Fund of a duty to defend under this coverage. See Foundation's Brief at 17-18. The Foundation correctly describes the principle of fortuity as "an implied exception to insurance coverage" (see Foundation's Brief at 17) -- a point recently addressed by this Court in ALCOA v. Aetna Casualty & Surety Co., 140 Wn.2d 517, 555-56, 998 P.2d 856 (2000). But neither the "implied exception to insurance coverage" of fortuity, nor any exclusion set forth in the Policy itself, bears on whether Fireman's Fund properly declined to defend Dr. Woo under the Policy's General Liability coverage.

WSTLA Foundation has blurred the basic distinction between a grant of coverage and an exclusion from that grant. Acknowledging the "horseplay" problem, the Foundation proceeds to analyze the issue as if it

(. . . continued)

simply is not a tenable reading of that decision, for reasons Fireman's Fund has previously addressed. See Fireman's Fund's Supplemental Brief at 9-10. WSTLA also suggests that what it calls the "unique status of Alberts as patient and employee" (Foundation's Brief at 21 n.10) should distinguish Blakeslee and support finding a duty to defend under the Professional Liability coverage. Why Alberts' status as an employee should make any difference, in evaluating whether Fireman's Fund had a duty to defend under the terms of the Professional Liability coverage, is a proposition for which the Foundation offers no supporting reasoning, and for which Fireman's Fund finds itself unable to conjure any.

concerned an exclusion, on which the insurer bears the burden. But the "horseplay" issue -- a reference to the facts of Jackson v. Frisard, 685 So. 2d 622 (La. App. 1997), cited by the Court of Appeals' decision in this case -- does not involve any sort of exclusion, whether express or implied. The issue arises under the coverage grant set forth in the Policy's General Liability coverage, under which a claim for "personal injury" is covered if the personal injury is "caused by an offense arising out of [the insured's] business[.]" Ex. 40 ("coverage . . .," subpart b(2)(a), p. 22 of 37, Bates Stamp No. NSW00032) (bold emphasis deleted; underscore emphasis added). In turn, an "offense" is defined to mean "a fortuitous, inadvertent or mistaken business activity[.]" Id. (Liability Definition No. 13, p. 35 of 37, Bates Stamp No. NSW00045) (emphasis added).

The Court of Appeals concluded that Dr. Woo's practical joke did not constitute a business activity under the Policy, and therefore was not covered. See Opinion at 13. Dr. Woo has argued that the practical joke was part of a "convivial office atmosphere" and therefore a "business activity" (see Woo's Petition for Review at 10),³ and WSTLA Foundation has embraced this "just an office lark" interpretation of the doctor's conduct. See Foundation's Brief at 18-21. But the Foundation makes no effort to explain why this sort of patently irresponsible behavior, plainly

³It is truly remarkable that, even to the extent of his arguments to this Court, Dr. Woo continues to assert that he is entitled to characterize his conduct as truly nothing but a practical joke -- as he puts it in his Petition, just part and parcel of the "convivial office atmosphere" the doctor cultivated for his office. All too plainly, Tina Alberts found nothing "convivial" about what was done to the integrity of her person.

lacking any logical connection to the practice of dentistry, should be treated as encompassed within the "business activity" that is the intended subject of the Policy's General Liability coverage.⁴ The Foundation's argument represents precisely the sort of strained reading in favor of coverage which this Court has repeatedly condemned. See, e.g., E-Z Loader, 106 Wn.2d at 908.

C. The Foundation's Proposed Rule, Barring a Declination of Defense Unless Supported by Controlling Case Authority, Should Be Rejected by This Court.

WSTLA Foundation urges this Court to adopt the "unresolved question of law" approach to duty to defend determinations, under which a liability insurer may not refuse a defense unless that refusal is supported by controlling case law authority. See Foundation's Brief at 24, citing A. Windt, Insurance Claims and Disputes § 4.2 at 282-83 & n.31 (2001 ed.); Windt (2006 Supp. at 53-54 & n.31). This Court should take the opportunity presented by this case to reject the rule the Foundation urges.

⁴The Foundation's case authorities do nothing to assist it in making this claim, either. Trafalski v. Allstate Insurance Co., 258 A.2d 888, 685 N.Y.S.2d 351 (1999), and Prosser v. Leuck, 196 Wis. 2d 780, 539 N.W.2d 466 (1995), both involve only the implied exclusion of fortuity. Castro v. Allstate Insurance Co., 724 So. 2d 133 (La. 1999), involved an express exclusion for intention to cause bodily injury, and because the tortfeasor did not intend to cause injury, the exclusion did not apply. Finally, Jackson v. Lajaunie, 270 So. 2d 859 (La. 1973), involved an injury caused by the shooting of a customer of a gas station with a gun brought to the station by an employee, which the Supreme Court of Louisiana held arose out of the operation of the garage, and therefore covered under a clause insuring against damages arising out of the operation of a garage. But in so holding, the Supreme Court agreed with the Court of Appeals that the insured was not engaged in a business pursuit while attempting to play a practical joke with what turned out to be a loaded gun, and that practical jokes ordinarily are incident to nonbusiness pursuits. See 270 So. 2d at 863.

Professor Windt, cited by the Foundation for acknowledging the existence of the (minority) approach the Foundation favors, well puts the reasons for rejecting that approach:

... when one states ... that an insurer must provide the insured a defense if there is a potential for coverage, what one is addressing is the uncertainty created by the claim made against the insured. ... What is not meant ... is that an insurer must defend whenever the coverage issues are not definitively answered by the case law. An insurer should obviously be allowed to take a coverage position based upon its (reasonable) expectation, as to how a court would rule on a coverage issue; accordingly, an insurer can necessarily correctly refuse to defend if its refusal is based upon a correct prediction that a court would hold that the facts alleged against the insured could not result in a covered judgment.

Windt § 4.2 at 282-83 (emphasis added).

The reasons for the (majority) rule should be readily apparent. To demand that an insurer provide a defense, unless the obligation is ruled out by controlling case law, opens the door to argument about what constitutes a "controlling" case. The briefing in this case shows all too clearly where such an approach must lead, as Dr. Woo insists that Blakeslee does not constitute such authority, because the dentist in that case fondled the anesthetized patient's breasts, whereas Dr. Woo merely placed faux boar tusks in Tina Alberts' mouth and took pictures of her with the tusks in place.⁵ This kind of distinction based on factual differences can be drawn in virtually any case. If adopted as the rule by this Court, the result must

⁵Fireman's Fund says "merely" only because the logic of Dr. Woo's argument necessarily implies that what was done to Tina Alberts should be viewed as less offensive than the fondling at issue in Blakeslee. Fireman's Fund demurs to this implied invitation to this Court, to devalue the invasion of bodily integrity Tina Alberts suffered at Dr. Woo's hands.

be to compel a liability insurer in virtually every case to offer a defense, while filing a parallel declaratory judgment action.

WSTLA Foundation may very well applaud such a result. This Court, with its responsibility for the effective administration of justice, should not. No valid public interest is served by adoption of a rule that effectively does away with the contractual nature of the duty to defend inquiry, and replaces it with an alternative that will force liability insurers to file declaratory judgment actions of dubious need, and upon which the courts will be forced to expend resources they do not have and which are truly needed elsewhere. This Court should let the case for such a radical change in Washington liability insurance law be made to the Legislature.

III.

CONCLUSION

WSTLA Foundation fails to make out a compelling case for reversing the Court of Appeals. The decision dismissing Dr. Woo's case should be affirmed.

RESPECTFULLY SUBMITTED this 28th day of August, 2006.

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