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STATE OF WASHINGTON

No. 77684-9

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SUPREME COURT
OF THE STATE OF WASHINGTON

BY C.J. MERRITT

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

CLERK)

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

SUPPLEMENTAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. SUPPLEMENTAL STATEMENT OF THE CASE	1
II. SUPPLEMENTAL ARGUMENT	2
A. The Court of Appeals Correctly Applied a Reasonable Expectation Standard, When It Determined That Fireman's Fund Did Not Breach Its Duty to Defend Under Any of the Three Coverages	2
B. Dr. Woo Had No Reasonable Expectation of a Defense Under Any of the Coverages at Issue	5
1. Dental Professional Liability	5
2. Employment Practices Liability	10
3. General Liability	12
C. The "Have It Both Ways" Red Herring	15
D. Affirmance of the Court of Appeals' Duty to Defend Determinations <u>Does</u> End the Case	17
E. The Judgment Cannot Be Reinstated if This Court Affirms the Court of Appeals on the Dental Professional Liability Coverage.....	18
III. CONCLUSION	19

TABLE OF AUTHORITIES

Page

CASES

<u>E-Z Loader Boat Trailers, Inc. v. Travelers Indemnity Co.</u> , 106 Wn.2d 901, 726 P.2d 439 (1986).....	3, 4, 15
<u>Kirk v. Mt. Airy Insurance Co.</u> , 134 Wn.2d 558, 951 P.2d 1124 (1998).....	2
<u>Overton v. Consolidated Insurance Co.</u> , 145 Wn.2d 417, 38 P.3d 332 (2002)	5
<u>Standard Fire Insurance Co. v. Blakeslee</u> , 54 Wn. App. 1, 771 P.2d 1172 (1989)	9, 10
<u>Truck Insurance Exchange v. Vanport Homes, Inc.</u> , 147 Wn.2d 751, 58 P.3d 276 (2002).....	4

STATUTES AND COURT RULES

RCW 18.32.020	6, 8, 10
RCW 18.32.020(1)	6, 7
RCW 18.32.020(3)	6
RCW 18.32.020(5)	6, 7
ER 404(b)	19

MISCELLANEOUS

<u>Merriam-Webster's Collegiate Dictionary</u> 998 (11th ed. 2003).....	8
<u>Merriam-Webster's Collegiate Dictionary</u> 1296 (11th ed. 2003).....	7
<u>Mosby's Dental Dictionary</u> 505 (1998 ed.).....	7
<u>Webster's Third New International Dictionary of the English Language</u> 2372 (1981 ed.).....	7

I.

SUPPLEMENTAL STATEMENT OF THE CASE

Fireman's Fund will not restate the facts bearing on the decision to decline a defense of Dr. Woo against Tina Alberts' lawsuit. These have been set forth fully in Fireman's Fund's Opening Brief to the Court of Appeals (§§ II.B & C, pp. 9-31) and its Answer to Dr. Woo's Petition for Review (§ C, pp. 2-10).

The issue of duty to defend was resolved by a pretrial partial summary judgment ruling, in which the trial court found a violation of the duty to defend under all three coverages: Dental Professional Liability, General Liability, and Employment Practices Liability. See (CP 753-58) (Order); VRP (Mar. 1, 2002) 41-42 (Ruling).¹ Fireman's Fund was then forced to defend against Dr. Woo's bad faith claims under the shadow of instructions telling the jury that the court had previously determined that Fireman's Fund had erred in denying Dr. Woo a defense. See (CP 3945) (Order Certifying the Parties' Proposed Neutral Statement of the Case at 2, handwritten interlineated findings by Judge Lum regarding preliminary charge given by the court to the venire panel); (CP 3559) (Jury Instruction No. 11).² Accordingly, review of the trial court's duty to defend

¹For a discussion of the procedural posture and the proceedings leading up to this ruling, see Fireman's Fund's Opening Brief to the Court of Appeals at 33-35.

²The trial court's Neutral Statement of the Case, read to the venire panel at the commencement of voir dire, was lost. See (CP 3945) (Certification order at 2) (handwritten interlineated finding by Judge Lum). Over Dr. Woo's opposition, the trial court certified a reconstruction
(continued . . .)

determinations should be limited to the record before the trial court at the time of those rulings.

II.

SUPPLEMENTAL ARGUMENT

A. The Court of Appeals Correctly Applied a Reasonable Expectation Standard, When It Determined That Fireman's Fund Did Not Breach Its Duty to Defend Under Any of the Three Coverages.

Dr. Woo's proposed standard, for evaluating whether a duty to defend has been triggered, has evolved between his Answering Brief submitted to the Court of Appeals, and his Petition for Review by this Court. Before the Court of Appeals, Dr. Woo asserted that a liability insurer can only decline a defense if the insurer is "certain" there is no coverage. See Woo's Brief at 23-25. Before this Court, Dr. Woo has receded from a "certainty of no coverage" showing requirement claim, urging instead that the duty to defend applies to all claims except those that "are clearly not covered by the policy" See, e.g., Woo's Petition at 10 (citing and quoting Kirk v. Mt. Airy Ins. Co., 134 Wn.2d 558, 561, 951 P.2d 1124 (1998)).

Dr. Woo's tactical retreat, albeit unacknowledged, presumably reflects his recognition that a "certainty of no coverage" showing requirement is wholly without support in our state's insurance

(. . . continued)

of the statement for the record on appeal. See (CP 3945) (Order at 2, handwritten interlineation by Judge Lum).

jurisprudence.³ Yet Dr. Woo's proposed application of this Court's actual duty to defend inquiry continues to ignore the bedrock Washington insurance law principle of reasonable expectations. As this Court explained in E-Z Loader Boat Trailers, Inc. v. Travelers Indemnity Co., 106 Wn.2d 901, 726 P.2d 439 (1986):

A contract of insurance should be given a fair, reasonable and sensible construction, consonant with the apparent object and intent of the parties, a construction such as would be given the contract by the average man purchasing insurance. Ames v. Baker, 68 Wn.2d 713, 415 P.2d 74 (1966). The contract should be given a practical and reasonable rather than a literal interpretation; it should not be given a strained or forced construction which would lead to an extension or restriction of the policy beyond what is fairly within its terms, or which would lead to an absurd conclusion, or render the policy nonsensical or ineffective. Philadelphia Fire & Marine Ins. Co. v. Grandview, 42 Wn.2d 357, 255 P.2d 540 (1953); 44 C.J.S. Insurance § 296 (1945).

106 Wn.2d at 907 (quoting Morgan v. Prudential Ins. Co., 86 Wn.2d 432, 434-35, 545 P.2d 1193 (1976)) (affirming summary judgment finding no duty to defend).

As the Court of Appeals correctly recognized in this case, an insurer has no duty to defend when the insured can have no reasonable expectation of coverage for the claim. See, e.g., Opinion at 8 (discussing the dental professional liability coverage). The determination of whether the insured can be credited with such an expectation turns on the interplay of the allegations of the claimant's complaint and the language of the insured's insurance policy. As to the allegations of the complaint, as this

³For a discussion of the reasons why a "certainty of no coverage" showing requirement would be unsound and should be rejected, see Fireman's Fund's Opening Brief to the Court of Appeals at § IV.A.1, pp. 45-46.

Court explained in Truck Insurance Exchange v. Vanport Homes, Inc.,

147 Wn.2d 751, 58 P.3d 276 (2002):

The duty to defend "arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage." Unigard Ins. Co. v. Leven, 97 Wn. App. 417, 425, 983 P.2d 1155 (1999). . . . "If the complaint is ambiguous, it will be liberally construed in favor of triggering the insurer's duty to defend." R.A. Hanson Co. v. Aetna Ins. Co., 26 Wash. App. 290, 295, 612 P.2d 456 (1980).

147 Wn.2d at 760. As to the language of the policy, the rules are equally well established:

If the policy language is clear and unambiguous, the court may not modify the contract or create an ambiguity where none exists. Tucker v. Bankers Life & Cas. Co., 67 Wn.2d 60, 406 P.2d 628 (1963). However, where the clause in the policy is ambiguous, a meaning and construction most favorable to the insured must be applied, even though the insurer may have intended another meaning. Glen Falls Ins. Co. v. Vietzke, 82 Wn.2d 122, 508 P.2d 608 (1973); Thompson v. Ezzell, 61 Wn.2d 685, 379 P.2d 983 (1963).

E-Z Loader, 106 Wn.2d at 907 (quoting Morgan v. Prudential Insurance Co., (supra), 86 Wn.2d at 435). Thus, a defense may be declined if the complaint's unambiguous allegations do not give rise to coverage under unambiguous policy language, and under such circumstances an insured cannot reasonably expect a defense.⁴

⁴There are two exceptions to this general rule of referencing only the allegations of the complaint, in determining whether a defense must be provided. First, if coverage is not apparent from the face of the complaint, but may nonetheless exist, the insurer must investigate the claim and give the insured the benefit of the doubt in determining whether the insurer has a duty to defend. E.g., Truck Insurance Exchange, 147 Wn.2d at 761. Second, the insurer may consider facts outside the complaint if either the allegations are in conflict with facts known to, or readily ascertainable by, the insurer, or the allegations are ambiguous or inadequate. Id. (citing E-Z Loader, 106 Wn.2d at 908). Neither of these exceptions applies in this case, for reasons set forth later in this brief.

As the Court of Appeals recognized in this case, and as Fireman's Fund will address more specifically in Section II.B of this Brief, the trial court's duty to defend determinations effectively disregarded the concept of reasonable expectations. The trial court's approach transformed the inquiry into a semantic contest, in which the linguistic cleverness of the insured's counsel became the touchstone for determining whether a duty to defend was owed. Such an approach contradicts this Court's declared imperative that insurance policy language should not be stretched to cover problems that fall outside the scope of intended coverage. A reaffirmation that the principle of reasonable expectations should guide the duty to defend inquiry would go far toward minimizing the chance of errors of the sort committed by the trial court in this case, while still affording insureds full protection of our state's duty to defend jurisprudence.

B. Dr. Woo Had No Reasonable Expectation of a Defense Under Any of the Coverages at Issue.

When a policy defines a policy term, that definition controls in determining the scope of coverage. Overton v. Consolidated Ins. Co., 145 Wn.2d 417, 427, 38 P.3d 332 (2002) (citations omitted). Or, to restate the matter in the language of reasonable expectations: When a policy defines a policy term, that definition (including the ordinary meaning of the definition's terms) defines the expectations as to scope of coverage. Here, the fundamental defect in Dr. Woo's duty to defend analysis is his unwillingness to come to grips with how the Policy defines the key terms.

1. Dental Professional Liability. The coverage clause of the dental professional liability provisions of the Policy states that Fireman's

Fund "will pay those sums which [the insured] . . . [is] legally required to pay as damages that result from rendering or failing to render dental services[.]" Ex. 40 ("What We Will Pay . . .," p. 5 of 31, Bates Stamp No. NSW000080) (bold emphasis deleted). Dr. Woo has acknowledged that: (1) the professional liability coverage 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 you are licensed[.]" compare Woo's Brief to the Court of Appeals at 31 with Ex. 40 (Definition No. 8, p. 27 of 31, Bates Stamp No. NSW000102); and (2) RCW 18.32.020 is the portion of our state's business and professional code which defines the practice of dentistry. See Woo's Brief at 31-32.

Dr. Woo now claims his practical joke qualifies as the practice of dentistry under subsections (1) and (5) of RCW 18.32.020.⁵ Dr. Woo's practical joke does not constitute the practice of dentistry, under the ordinary meaning of these subsections.

⁵Before the Court of Appeals, Dr. Woo also invoked subsection (3), which refers to ownership, maintenance, and operation of an office for the practice of dentistry. As Fireman's Fund previously noted in its Answer, Dr. Woo raised only subsections (1) and (5) in his Petition. See Answer to Petition for Review at 14, n.9. Fireman's Fund will not separately brief subsection (3) to this Court, as Dr. Woo has waived any claim he might make based on that subsection by omitting it from his Petition for Review. Fireman's Fund also notes that, before the Court of Appeals, Dr. Woo offered neither argument nor authority to buttress a summary assertion, made in one sentence of his answering brief, that the practical joke somehow constituted the practice of dentistry under subsection (3). See Woo's Brief to the Court of Appeals at 32.

Subsection (1) of RCW 18.32.020 in relevant part defines the practice of dentistry as the ability to diagnose and "treat" various conditions of the teeth and other portions of the human mouth. Dr. Woo has admitted that, when he had the boar tusk flippers put into Ms. Alberts' mouth and pictures taken of the flippers in place, those actions had no therapeutic purpose whatsoever. See, e.g., (CP 579) (Woo Dep., p. 70, ll. 15-21); (CP 598) (Woo Dep., p. 135, l. 25; p. 136, ll. 1-18 and 24-25; p. 137, ll. 1-4). General English language, as well as specialty dentistry dictionaries define "therapy" and "therapeutic" as "to . . . treat medically" (Webster's Third New International Dictionary of the English Language 2372 (1981 ed.) (emphasis added)), "of or relating to the treatment of disease or disorders" (Merriam-Webster's Collegiate Dictionary 1296 (11th ed. 2003) (emphasis added)), and "the treatment of disease" (Mosby's Dental Dictionary 505 (1998 ed.) (emphasis added)). Dr. Woo cannot be credited with a reasonable expectation that his practical joke fell within the scope of treating a condition of Tina Alberts' teeth or any other portion of her mouth, precisely because the joke had no therapeutic purpose.

Dr. Woo also could not reasonably have expected that the boar teeth flippers would be deemed a "prosthetic denture, bridge, appliance, or other structure to be worn in the human mouth," and therefore the practice of dentistry under RCW 18.32.020(5). The same dictionary sources that establish the synonymy of "therapeutic" and "treat" define "prosthetic" to mean "the surgical or dental specialty concerned with the design,

construction, and fitting of . . . artificial device[s] to replace a missing part of the body" Merriam-Webster's Collegiate Dictionary 998 ((definitions of "prosthetics" and "prosthesis") (emphasis added); see also id. ("prosthetic" means "of or relating to a prosthesis or prosthetics"). The boar tusk flippers plainly were not intended to replace Ms. Alberts' baby teeth. As Dr. Woo knew full well, those flippers were made and placed in Ms. Alberts' mouth for just one purpose: to play a practical joke. And once that joke had been played, the boar tusk flippers were immediately removed so that the true prosthetic device (the spacer flippers) could be put in place.

In sum, no reasonable dental professional in Dr. Woo's position could believe that, when he caused the boar tusk flippers to be made, placed in Ms. Alberts' mouth, and pictures taken of them in Alberts' mouth while she was sedated, he was engaged in the practice of dentistry under RCW 18.32.020 and therefore entitled to a defense against Tina Alberts' lawsuit under the Policy's dental professional coverage.⁶ Nor is the mere fact that Dr. Woo exploited an opportunity created by rendering dental services, to commit a wrong that itself clearly does not constitute dental services, sufficient to give rise to a duty to defend. As the Court of

⁶As Tina Alberts' complaint makes clear, she had no quarrel with the dental services Dr. Woo did render: removing baby teeth and putting in a spacer flipper to avoid crowding until the replacement adult teeth grew in. The factual allegations on which her causes of action rest unambiguously establish that the sole source of her claims was the practical joke.

Appeals recognized, Standard Fire Insurance Co. v. Blakeslee, 54 Wn. App. 1, 771 P.2d 1172 (1989), is fatal to such a claim.

Dr. Woo would have Blakeslee limited to cases involving sexual misconduct. Yet Blakeslee was not announcing some rule of public policy, under which the sexual nature of a dentist's wrongdoing would deprive the dentist of a defense to which he (or she) would otherwise be entitled. The issue in Blakeslee was whether the dentist's wrongdoing could reasonably be said to "aris[e] out of the rendering or failure to render . . . professional [i.e., dental] services by the insured[,] thereby triggering a duty to defend. See 54 Wn. App. at 8 (edits by Division II in part). In affirming summary judgment in favor of the insurer, then Chief Judge Alexander wrote for a unanimous panel of Division II that the court "kn[e]w of no legitimate course of treatment that involved sexual contact between a practitioner of the healing arts and his or her patient," and that the court "c[ould] conceive of none." See id. at 9.

As the Court of Appeals correctly recognized, Blakeslee applies with equal force here: No legitimate course of dental treatment could reasonably involve the temporary placement in a patient's mouth of faux flippers in the shape of boar's tusks, for the sole purpose of taking pictures of the tusks in the patient's mouth while the patient is sedated. Blakeslee is squarely grounded in precisely the kind of reasonable expectations analysis that should govern duty to defend determinations, and Dr. Woo's proposed restrictive reading of the case is patently at odds with a

reasonable expectations reading of his policy's "results from . . ." coverage clause.⁷

2. Employment Practices Liability. The Court of Appeals correctly recognized that the only portion of the employment liability coverage potentially at issue was that in which Fireman's Fund agreed to "pay all sums which you and others protected under this section are legally required to pay as damages as a result of . . . [a] wrongful discharge that arises out of a wrongful employment practice." Ex. 40 (Coverage V. Employment Practices Liability, p. 19 of 31, Bates Stamp No. NSW000094) (bold emphasis deleted); see Opinion at 10. The Policy defines "wrongful discharge" as "the unfair or unjust termination of an employment relationship which" (in relevant part) "inflicts emotional distress upon the employee . . ." Ex. 40. (Definition No. 34, p. 31 of 31, Bates Stamp No. NSW000106). For such an act to be covered, it must "arise out of a wrongful employment practice," which is defined as "any negligent act, error, omission or breach of duty committed in the course of" (in relevant part) "relations with employees . . ." Id. (Definition No. 35, p. 31 of 31, Bates Stamp No. NSW000106).

⁷If anything, the coverage language at issue here is narrower in scope than the clause at issue in Blakeslee. Here the Policy specified that the damages must "result from" the rendering or failure to render dental services, and dental services are expressly defined as coterminous with the scope of the practice of dentistry set forth in RCW 18.32.020. In Blakeslee, the clause only referred to damages "arising out of" the rendering or failure to render undefined "professional services," leaving the court to determine reasonable expectations based on the specific context at issue.

Dr. Woo has focused on "wrongful employment practice," and attempted to characterize the practical joke as a "negligent act, error, omission or breach of duty committed in the course of the employment relationship," which caused emotional distress to Tina Alberts. See Woo's Brief to the Court of Appeals at 38. But even assuming that the practical joke could reasonably be deemed a "wrongful employment practice" as the Policy defines that term,⁸ a duty to defend would only be triggered if Alberts' complaint also alleged that: (1) a wrongful discharge (i.e., "the unfair and unjust termination Woo . . . [Tina Alberts'] employment relationship" with Dr. Woo) arose out of the wrongful employment practice; and (2) the wrongful discharge "inflicted emotional distress" upon Ms. Alberts. And as the allegations of the complaint make clear, it was the practical joke that caused Alberts emotional distress, not her subsequent decision to quit her job.

Perhaps recognizing this flaw in his analysis, Dr. Woo argues that Fireman's Fund should have construed the complaint as stating a claim for "constructive" wrongful discharge. See Woo's Brief to Court of Appeals at 37-39. But as the Court of Appeals recognized, termination of employment, in response to boorish behavior by one's employer, does not describe a wrongful discharge, which requires that such behavior also violate

⁸In fact, the practical joke could not reasonably be deemed a "wrongful employment practice." The Policy squarely defines a "wrongful employment practice" as a "negligent act, error, omission or breach of duty" and -- as Fireman's Fund discusses more fully, in § II.B.3 of this Brief -- the allegations of the complaint describing the practical joke unambiguously describe intentional wrongdoing only.

an employment contract, discrimination statutes, the constitution, or public policy. See Opinion at 11. As nothing in the complaint so much as hints at facts alleging a violation of an employment contract, discrimination statutes, the constitution, or public policy, there was no constructive discharge claim for Fireman's Fund to construe.

Under the plain language of the employment liability coverage, Fireman's Fund is obligated to pay those damages the insured is required to pay for a wrongful discharge that inflicts emotional distress. Dr. Woo would have this Court turn the policy's plain language on its head, and create coverage for a practical joke that resulted in emotional distress, merely because the practical joke also induced Tina Alberts to quit her job. To draw that conclusion, one must find in the Alberts complaint a cause of action for constructive wrongful discharge, and as the Court of Appeals recognized, the absence in the Alberts complaint of elements essential to state such a claim forecloses that reading.

3. General Liability. At issue are the "bodily injury" and "personal injury" provisions of the general liability coverage. See Ex. 40 (Section II -- G. "Coverage," Subsection 1. "Coverage C -- Liability," subpart a, p. 21 of 37, Bates Stamp No. NSW000031) (bold emphasis deleted). Regarding "bodily injury," the coverage applies only if (in relevant part) "[t]he bodily injury is caused by an occurrence[.]" Id. ("Coverage . . . , "subpart b(1), p. 22 of 37, Bates Stamp No. NSW000032) (bold emphasis deleted). "[O]ccurrence" is defined to mean "[a]n accident," and "accident" in turn is defined to mean "a fortuitous

circumstance, event or happening that takes place and is neither expected nor intended from the standpoint of the insured." Id. (Liability Definition No. 1, p. 33 of 37, Bates Stamp No. NSW000043, and Liability Definition No. 12.b, p. 35 of 37, Bates Stamp No. NSW000045). Regarding "personal injury" the coverage applies only if the personal injury is "caused by an offense arising out of [the insured's] business[.]" Id. ("Coverage . . .," subpart b(2)(a), p. 22 of 37, Bates Stamp No. NSW000032) (bold emphasis deleted). "[O]ffense" is defined to mean "a fortuitous, inadvertent or mistaken business activity giving rise to" (in relevant part) "personal injury neither expected nor intended from the standpoint of the injured." Id. (Liability Definition No. 13, p. 35 of 37, Bates Stamp No. NSW000045). "[Y]our business" is defined to mean "the trade, profession or occupation in which . . . [the insured is] engaged and which is shown on the declarations page." Id. (Liability Definition No. 27, p. 37 of 37, Bates Stamp No. NSW000047). The "General Declarations" page of the Policy lists Dr. Woo's "Business or Occupation" as a "Dental Office." Id. (p. GD-1, Bates Stamp No. NSW000001).

As the Court of Appeals recognized, the unambiguous allegations of the Alberts' complaint ruled out any duty to defend under the bodily injury prong of the general liability coverage:

[T]he complaint unambiguously alleges only intentional conduct by Dr. Woo leading to Alberts' injuries: "devis[ing] a scheme to humiliate and denigrate Ms. Alberts," ordering boar tusks, placing them in Alberts' mouth, taking pictures, having the pictures developed, and telling Alberts that she had a trophy to take home. Even broadly construed, these allegations cannot be read to describe an "accident," defined by the policy as "a fortuitous

circumstance, event or happening that takes place and is neither expected nor intended from the standpoint of the insured."

Opinion at 11-12. Dr. Woo has asserted, based on his deposition testimony given in the Alberts lawsuit, that Fireman's Fund should have known that, notwithstanding the unambiguous allegations of the complaint, Dr. Woo changed his mind about giving Alberts the pictures and the tusks. See, e.g., Woo's Brief to the Court of Appeals at 6 & 39-40. Yet even assuming his deposition testimony materially diverged from the course of events described in the Alberts complaint -- a point Fireman's Fund does not concede, see Fireman's Fund's Answer to Petition for Review at 5, n.5 -- Dr. Woo ignores that any last-minute change of heart about whether to present the pictures and tusks to Alberts does not change the intentional nature of Dr. Woo's wrongdoing that caused the tusks to be created, placed in Alberts' mouth, and pictures taken of them in Alberts' mouth while she was sedated. Those actions caused Alberts' injury; they clearly were not accidental; and, therefore, they do not constitute an occurrence -- the precondition for a duty to defend under the "bodily injury" prong of the general liability coverage.

The allegations of the complaint prove equally fatal to Dr. Woo's claim to a defense under the "personal injury" prong, which requires an "offense" that "arises out of ... [the insured's] business[.]" Ex. 40 ("Coverage ...," subpart b(2)(a), p. 22 of 37, Bates Stamp No. NSW000032) (bold emphasis deleted). An "[o]ffense" means "a fortuitous, inadvertent or mistaken business activity[.]" id. (Liability Definition No. 13, p. 35 of 37, Bates Stamp No. NSW000045), and as the

Court of Appeals correctly determined, the practical joke did not qualify as a business activity:

... the activities involved here -- ordering boar tusks, placing them in a patient's mouth, taking pictures, and telling the patient that the tusks and pictures were "a trophy to take home" -- are not incident to providing the professional dental services of administering anesthesia, removing teeth, and fitting temporary false teeth.

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; see also Woo's Answer to WSTLA's Amicus Memorandum at 2-4. But just because a joke is played by an employer and his employee cohorts on another employee, and at the office, is not enough to convert the joke into a business activity. To conclude otherwise is to engage in precisely the sort of "stretch[ing]" to find coverage condemned by this Court in E-Z Loader (106 Wn.2d at 908).

C. The "Have It Both Ways" Red Herring.

Throughout this case Dr. Woo has impugned the integrity of Fireman's Fund's decision-making process, claiming Fireman's Fund tried to "have it both ways" when it declined a defense under the professional and general liability coverages. This claim is groundless.

Fireman's Fund declined a defense under the general liability coverage because its coverage terms had not been satisfied, not because the allegations of Alberts' complaint fell within the coverage's professional services exclusion. In concluding that Tina Alberts' claims were not covered under the general liability coverage, the San Francisco office

expressly based the declination of a defense on both the nonfortuitous nature of Dr. Woo's alleged wrongdoing set forth in Alberts' complaint, as well as failure to satisfy the "arising out of your business" condition applicable to the "personal injury" coverage prong. See (CP 400) (declination letter from San Francisco office at 7). The supposed "flip-flop" between the Bellevue and San Francisco offices was not a flip-flop at all, but merely the subsequent identification by San Francisco of general liability coverage exclusions, and the statement following that identification that, "[t]o the extent that the allegations made and the damages sought fall within the scope of the exclusions . . . , no coverage is provided under the [General] Liability Insurance insuring agreement to which the exclusionary agreement applies." (CP 401) (letter at 8) (emphasis added).

In short, there was no "flip-flop," and no attempt to "have it both ways." The decisions to decline a defense under the dental professional and general liability coverages were each squarely based on the interplay between the allegations of Alberts' complaint and the coverage terms of the respective coverages, and those decisions are in no way in conflict.⁹

⁹Even if the San Francisco office had opined that a defense under the general liability coverage should be declined because the claims involved "the rendering or failure to render . . . professional service[.]" see (CP 401) (letter at 8) (quoting professional service exclusion), such an error in legal reasoning on the part of the San Francisco office would not entitle Dr. Woo to a defense when -- as shown -- there was no duty to defend under the professional liability coverage.

D. Affirmance of the Court of Appeals' Duty to Defend Determinations DOES End the Case.

Dr. Woo suggests his case should survive even if the Court of Appeals' duty to defend determinations are affirmed. That claim is groundless, given the facts and circumstances of this case.

First, there is no basis for finding a duty to indemnify if Fireman's Fund had no duty to defend. The trial court denied Fireman's Fund's motion for summary judgment on the issue of duty to defend (and the duty to indemnify) at the same time the court found a breach of the duty to defend. The same summary judgment record upon which the trial court based its duty to defend determinations makes clear that, if those determinations are in error, Fireman's Fund should have received summary judgment on the issue of duty to indemnify.

The same fate must befall Dr. Woo's "bad faith" and CPA claims. Dr. Woo sought to recover the following elements of damage: (1) emotional distress for being left without a defense by his insurer; (2) the attorney fees and costs he incurred in defending against the Alberts lawsuit when Fireman's Fund declined a defense; and (3) the settlement paid to Alberts to resolve her claims. All of those damages arise out of the same, single cause -- Fireman's Fund's decision to decline a defense. If Fireman's Fund was right in that decision, Dr. Woo has no cognizable basis left for seeking to recover any of those damages from Fireman's Fund.¹⁰

¹⁰Even if this Court should reverse a portion of the Court of Appeals' duty to defend determinations, this Court should still affirm the dismissal of Dr. Woo's bad faith claims. It is inconceivable that Fireman's
(continued . . .)

E. The Judgment Cannot Be Reinstated if This Court Affirms the Court of Appeals on the Dental Professional Liability Coverage.

At trial, Dr. Woo's case focused almost entirely on Fireman's Fund's decision to decline a defense under the dental professional liability coverage. In his brief to the Court of Appeals, Dr. Woo identified eight areas of alleged wrongdoing by Fireman's Fund. See Woo's Brief to the Court of Appeals at 12-25 ("Restatement of Facts," § G, discussing Fireman's Fund's "fail[ure] to act in good faith"). But of the 82 trial record entries offered to support those claimed wrongs, only four were specific to employment liability coverage, and only five were specific to general liability coverage. See id. at 20-21 (citing RP 141-42; Ex. 40 & Ex. 43) (employment coverage citations); id. at 18-19 & 23 (citing CP 3728-29; RP 994, 1002 & 1193; Ex. 44) (general liability coverage citations). Moreover, Dr. Woo's claims-handling expert (Mr. Dietz) opined there was no coverage against Alberts' claims under the employment liability coverage (RP V 771, ll. 21-25, 772, ll. 1-16), and offered no opinion about Fireman's Fund's handling of the decision not to defend under the general liability coverage.

Dr. Woo has attempted to show that an appellate court could uphold the judgment on the jury's verdict, even if Fireman's Fund did not err in denying a defense under the dental professional liability coverage,

(... continued)

Fund could be held liable for "bad faith," which requires proof of unreasonable, frivolous, or unfounded denial of a defense, when three members of the Court of Appeals have held Fireman's Fund's decisions to have been legally correct.

by treating the evidence admitted on that issue at trial as otherwise admissible (e.g., ER 404(b)). See, e.g., Woo's Brief to the Court of Appeals at 43-45 (discussing purported admissibility of evidence under exceptions to ER 404(b)'s general prohibition against admission of "other wrongs" evidence). For the reasons set forth in Fireman's Fund's Reply Brief to the Court of Appeals, the alternative theories of admissibility cannot be used on appeal to salvage the judgment on the jury's verdict. See Fireman's Fund's Reply Brief to the Court of Appeals at 19-23. Even if this Court affirms the Court of Appeals only on the dental professional liability coverage, there is no safe harbor available to save the judgment on the jury's verdict, and a new trial must be ordered

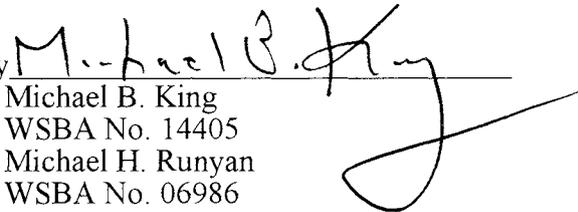
III.

CONCLUSION

This Court should affirm the Court of Appeals.

RESPECTFULLY SUBMITTED this 29th day of June, 2006.

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