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NO. 63208-6

COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

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SAFECO INSURANCE COMPANY OF AMERICA, and TAMMY  
RUSSELL, an individual,

Appellant,

v.

ESTATE OF JACLYN JEAN FRANK, a minor, aged 18 months,  
deceased, by LARRY and MICHELE FRANK, husband and wife,  
individually and as Co-Personal Representatives,

Respondents.

Appeal from King County Superior Court  
No. 08-2-13066-5 SEA

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**APPELLANTS' BRIEF**

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## I. INTRODUCTION

An insurer has a duty to defend when a complaint alleges facts which could impose liability on the insured within the policy's coverage. Here, the Franks filed a complaint against Julie Norris d/b/a Julie's Daycare Facility; and the State of Washington Department of Licensing that alleged negligent supervision in the daycare business run out of the Norris's home that lead to the tragic death of Jaclyn Frank.

Unfortunately, Ms. Norris had let her business insurance policy lapse and she presented a claim under her Safeco homeowner's policy which contained a business pursuits exclusion and a home care services exclusion. Per those exclusions, the allegations in the complaint would not impose liability within the homeowner's policy's coverage. Further, Safeco's investigation did not yield any facts outside the complaint that would extend coverage. Accordingly, given the allegations contained within the complaint and the terms of the policy, Safeco had no duty to defend and was not in bad faith when it declined to provide a defense.

The Trial Court initially agreed with Safeco and dismissed the claims made by Ms. Norris's assignees, Plaintiffs Frank. But the Trial Court then reconsidered and granted summary judgment to the Franks. The Trial Court's about face was in error.

Safeco asks this Court to correct the error by ordering summary judgment in favor Safeco reinstated and dismissal of Plaintiffs' claims.

## **II. ASSIGNMENTS OF ERROR**

Appellants make the following assignments of error:

1. The Trial Court erred by granting Plaintiffs' Motion for Reconsideration finding that Safeco owed a defense to Ms. Norris under her Safeco homeowner's insurance policy.
2. The Trial Court erred by entering judgment for the amount of \$4,500,000 when that amount greatly exceeded the amount that would have necessary to put the insured in the same position she would have been in had Safeco defended.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- A. An insurer has a duty to defend when a complaint alleges facts which could impose liability within the policy's coverage. Here, the complaint alleged a daycare death excluded by the policy's business pursuits and home care services exclusions, and Safeco's investigation did not yield any facts outside the complaint that would extend coverage. Under that circumstance, should the Court have granted Safeco's summary judgment motion and denied the Franks motion?
- B. Tort damages are to put parties in the position they would have occupied if the tort not occurred, and contract damages are to put parties in the position they would have occupied if the contract had been fulfilled. Here, the \$4,500,000 judgment greatly exceeded the amount necessary to put Ms. Norris in the same position she would have occupied if Safeco had defended. Should the judgment amount be found excessive and vacated?

## **IV. STATEMENT OF THE CASE**

Safeco insured Julie and Gary Norris under Safeco Quality-Plus Homeowners Policy No. OH1386637, effective December 23, 2004 to

December 23, 2005 with liability limits of \$100,000.<sup>1</sup>

On February 27, 2007, the Norris' insurance agent reported to Safeco that the insured had been running a daycare business from her home and that a child had choked and died.<sup>2</sup>

On the same day, Safeco Claims Specialist Tammy Russell was assigned to work on the Norris' claim.<sup>3</sup> Russell immediately made a telephone call to the Norris' attorney, Larry Setchell, to obtain a copy of the lawsuit and to discuss the nature of the claims being made.<sup>4</sup> Setchell stated he would provide a copy of the complaint, but indicated Ms. Norris would not discuss the claims until he received a certified copy of the Norris' homeowner's policy.<sup>5</sup>

Russell requested a certified copy of the policy on February 28, 2007.<sup>6</sup> On March 14, 2007, Safeco provided that certified copy of the policy to Setchell, and Russell again asked for a copy of the lawsuit.<sup>7</sup>

On March 28, 2007, Safeco finally received a copy of the complaint from Setchell.<sup>8</sup> That complaint was brought by the Estate of Jaclyn Jean Frank, Larry Frank, and Michelle Frank against "Julie Marie Norris, d/b/a Julie's Daycare, a licensed Washington State daycare

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<sup>1</sup> CP 120-180: Decl. of T. Russell Exhibit C (Certified Copy of Norris' policy with Safeco)

<sup>2</sup> CP 182-183: Decl. of T. Russell Exhibit D (Loss Notice Report)

<sup>3</sup> CP 95: Decl. of T. Russell ¶ 2

<sup>4</sup> CP 95: Decl. of T. Russell ¶ 4

<sup>5</sup> CP 95: Decl. of T. Russell ¶ 4

<sup>6</sup> Decl. of T. Russell ¶ 5

<sup>7</sup> CP 185: Decl. of T. Russell Exhibit E (Ltr to Setchell from Russell 3/14/07)

<sup>8</sup> CP 95-96: Decl. of T. Russell ¶ 6; Exhibit F (Ltr from Setchell to Russell 3/26/07).

facility” and the State of Washington Department of Licensing.<sup>9</sup>

The complaint sought damages from the State for failing to adequately supervise the daycare business and listed the following allegations against Julie Norris doing business as Julie’s Daycare:

-That Ms. Norris conducts a family home daycare under the name Julie’s Daycare, and Julie’s Daycare was at all times relevant a Washington State licensed family home daycare facility located at Norris’ home, and that Julie’s Daycare had been licensed by the State since 1993.<sup>10</sup>

-That Michelle and Larry Frank found Julie’s daycare via an online search provided by the King County Child Resource Center which listed Julie’s Daycare as a state “licensed” family child care home.<sup>11</sup>

-That Michelle and Larry Frank’s one year old child Jaclyn and three year child Jacob began attending Julie’s Daycare five days a week in June 2005.<sup>12</sup>

-That between 1997 and 2004, DSHS received multiple complaints about Julie’s Daycare, including that it had been over capacity.<sup>13</sup>

-That Ms. Norris continually failed to properly supervise young children including Jaclyn Frank.<sup>14</sup>

-That on December 1, 2005, Jaclyn Frank choked and died when she wrapped the cord for a set of blinds around her neck after Ms. Norris put Jaclyn down for a nap in a crib that was adjacent to the set of blinds.<sup>15</sup>

-That “Defendant Norris as the owner and operator of Julie’s Daycare, had a duty to provide a safe and hazard free environment

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<sup>9</sup> CP 37: First Amended Complaint For Wrongful Death

<sup>10</sup> CP 37, 39: First Amended Complaint For Wrongful Death, ¶ 3, 10

<sup>11</sup> CP 39: First Amended Complaint For Wrongful Death, ¶ 8

<sup>12</sup> CP 39: First Amended Complaint For Wrongful Death, ¶ 9

<sup>13</sup> CP 39-40: First Amended Complaint For Wrongful Death, ¶ 12

<sup>14</sup> CP 41-42: First Amended Complaint For Wrongful Death, ¶ 15

<sup>15</sup> CP 41-42: First Amended Complaint For Wrongful Death, ¶ 15-18

and exercise proper supervision for children in her care.”<sup>16</sup>  
-That Jaclyn’s death was a direct and proximate result of Ms. Norris’ negligence.<sup>17</sup>

The Safeco policy that insured Ms. Norris contained an exclusion for business pursuits under subsection 1.b.:

#### **LIABILITY LOSSES WE DO NOT COVER**

**1. Coverage E – Personal liability and Coverage F – Medical Payments to Others do not apply to *bodily injury or property damage*:**

...

**b.** arising out of *business* pursuits of any *insured* or the rental or holding for rental of any part of any premises by any *Insured*

This exclusion does not apply to:

**(1)** Activities which are ordinarily incident to non-*business* pursuits except as excluded in h. below;

**(2)** Coverage E for occasional or part-time *business* pursuits of any *insured* who is under 23 years of age;...<sup>18</sup>

Subsection 1.h. of Safeco’s policy also contained a separate exclusion for home care services:

**h.** which results from the legal liability of any *insured* because of home care services provided to any person on a regular basis by or at the direction of:

**(1)** any *insured*;

**(2)** any employee of any *insured*;

**(3)** any other person actually or apparently acting on behalf of any *insured*.

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<sup>16</sup> CP 43: First Amended Complaint For Wrongful Death, ¶ 20

<sup>17</sup> CP 43: First Amended Complaint For Wrongful Death, ¶ 22

<sup>18</sup> CP 151

Regular basis means more than 20 hours per week. This exclusion does not apply to:

- (1) home care services provided to the relatives of any *insured*;
- (2) occasional or part-time home care services provided by any *insured* under 23 years of age.<sup>19</sup>

After the complaint was received, Claims Specialist Russell examined it and saw that, as the complaint was pled, there was no duty to defend because (1) the complaint alleged injury arising out of Ms. Norris' business pursuit of owning and operating a daycare facility, and because (2) the complaint alleged injury resulting from home care services that were being provided by Ms. Norris.<sup>20</sup>

Even though Russell had determined that the complaint's allegations had not provided a duty to defend, she still wanted to interview Norris to determine if there were any facts that would provide for coverage.<sup>21</sup> Russell sent a letter to Setchell on May 21, 2007, requesting an interview of Norris.<sup>22</sup> On June 20, 2007, Setchell informed Russell that Safeco was granted permission to talk to Norris.<sup>23</sup>

Russell was finally allowed to take Norris' recorded statement on June 22, 2007.<sup>24</sup> During her recorded statement, Norris stated that she

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<sup>19</sup> CP 151-153: Decl. of T. Russell Exhibit C: Norris' policy at pages 13, 15

<sup>20</sup> CP 96: Decl. of T. Russell ¶ 7; CP 193: Screen notes 6/22/07

<sup>21</sup> CP 96: Decl. of T. Russell ¶ 7

<sup>22</sup> CP 189: Decl. of T. Russell Exhibit G (Ltr to Setchell from Russell 5/21/07)

<sup>23</sup> CP 96-97: Decl. of T. Russell ¶ 9; CP 191 Exhibit H (Russell screen notes 6/21/07)

<sup>24</sup> CP 198: Decl. of T. Russell Exhibit K (J. Norris Recorded Statement 6/22/07)

operated her daycare business, Julie's Daycare, out of her home 5 days a week, Monday through Friday, from 6:30 a.m. to 6:00 p.m.<sup>25</sup> Norris stated that, consistent with the complaint's allegations, she had opened the business in 1993.<sup>26</sup> After taking Norris' statement, Russell concluded that the interview with Norris confirmed that there was no possible way to extend coverage under the policy.<sup>27</sup>

On June 29, 2007, Russell sent a letter to Norris denying coverage and explaining that "The claim for injuries to Jaclyn Frank is subject to both the business pursuits exclusion and home care services exclusion."<sup>28</sup>

The Franks settled their claim against the State for \$1,500,000.<sup>29</sup> The Franks then obtained a consent judgment against Julie Norris and Julie's Daycare for \$4,500,000. The Franks agreed not to execute on the judgment which was 45 times the Norris' Homeowner's policy limits with Safeco, in exchange for Ms. Norris' assignment of her claim against Safeco.<sup>30</sup> Then, on May 7, 2008, Plaintiffs Frank filed their First Amended Complaint which alleged that Safeco acted in bad faith by denying coverage and not defending Ms. Norris.<sup>31</sup>

Both Safeco and Plaintiffs Frank filed motions for summary

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<sup>25</sup> CP 199: Decl. of T. Russell Exhibit K (J. Norris Recorded Statement, page 2)

<sup>26</sup> CP 198: Decl. of T. Russell Exhibit K (J. Norris Recorded Statement, page 1)

<sup>27</sup> CP 97: Decl. of T. Russell ¶ 12

<sup>28</sup> CP 213: Decl. of T. Russell Exhibit L (Ltr to Norris from Russell 6/29/07, page 8)

<sup>29</sup> CP 282

<sup>30</sup> CP 85

<sup>31</sup> CP 10

judgment.<sup>32</sup> The parties argued those motions to the Court on December 12, 2008.<sup>33</sup> On December 15, 2008, the Trial Court entered an order on summary judgment that denied Plaintiffs Frank's summary judgment motion and that granted Safeco's motion.<sup>34</sup> In granting Safeco's summary judgment motion, the Trial Judge explained that the complaint alleged facts which if proven at trial would not have resulted in coverage under the policy:

The underlying complaint alleges that the insured, doing business as Julie's Daycare and licensed by the State, cared for the decedent and a sibling five days a week. The daycare services were advertised. The daycare had been in business and licensed since 1993. There were multiple complaints referred to DSHS about Julie's Daycare being overcapacity, among other things. If proven at trial, these facts would not result in coverage under the relevant policy.<sup>35</sup>

Plaintiffs Frank brought a motion for reconsideration.<sup>36</sup> On January 14, 2009 the Trial Court heard argument on that reconsideration motion, but did not issue any order.<sup>37</sup> On February 3, 2009 the Court signed Plaintiff Franks' order granting the motion for reconsideration, ordering that "judgment shall be entered in favor of Plaintiffs against Defendants."<sup>38</sup> In contrast to the earlier order that had granted Safeco

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<sup>32</sup> CP 217-236 : Safeco Summary Judgment Motion; CP 23-33: Frank Summary Judgment Motion

<sup>33</sup> CP 299: Clerk's Minutes

<sup>34</sup> CP 300-301

<sup>35</sup> CP 301

<sup>36</sup> CP 302-306

<sup>37</sup> CP 320

<sup>38</sup> CP 321-322

summary judgment, the Order on Reconsideration did not contain any explanation from the Trial Judge as to how he had reached his ruling.<sup>39</sup>

On March 4, 2009, the Court entered judgment against Safeco for \$4,500,000.<sup>40</sup> Safeco now appeals that judgment and the granting of the reconsideration motion that led to it.<sup>41</sup>

## V. ARGUMENT

At issue is whether the Trial Court erred in granting Plaintiffs Franks' summary judgment motion and denying Safeco's summary judgment motion.

Civil Rule 56(c) provides that summary judgment shall be rendered "[w]hen the pleadings, depositions, and admissions in the record, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."<sup>42</sup> Summary judgment is appropriate when there is an absence of evidence to support the Plaintiff's claim.<sup>43</sup> When reviewing a summary judgment order, an appellate court engages in the same de novo inquiry as the trial court.<sup>44</sup>

Plaintiffs Frank did not show that Safeco acted in bad faith by

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<sup>39</sup> CP 321-322

<sup>40</sup> CP 333-336

<sup>41</sup> CP 337-345

<sup>42</sup> *Ruffer v. St. Cabrini Hospital*, 56 Wn.App. 625, 627-28 (1990)

<sup>43</sup> *American Manufacturers v. Osborn*, 104 Wn.App. 686, 696, 17 P.3d 1229 (2001);

*Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989)

<sup>44</sup> *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)

denying a defense because the complaint sought damages for conduct which was clearly excluded from coverage under the policy's business pursuits and home care services exclusions.

The terms of an insurance policy are interpreted as a matter of law.<sup>45</sup> Where the provisions are not ambiguous, they are to be given effect as written.<sup>46</sup> They are reviewed "as an average insurance purchaser would understand them".<sup>47</sup> Here, Julie Norris purchased a **homeowner's** policy. She was aware of the need for a separate policy to cover her business, and in fact had such a business policy, which she allowed to lapse according to her agent.<sup>48</sup> There is a conspicuous absence of any declaration from Ms. Norris alleging she believed that there would be coverage under her homeowner's policy for the death of the child while attending her daycare business. Instead, as discussed below, such coverage was excluded, Plaintiffs' summary judgment motion should have been denied, Safeco's summary judgment motion should have been granted, and Plaintiffs' case should have been dismissed.

**A. When There Was No Coverage, Safeco Had No Duty To Defend And Was Not In Bad Faith**

**1. An insurer has no duty to defend when there would be no**

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<sup>45</sup> *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 423-24, 932 P.2d 1244 (1997)

<sup>46</sup> *McDonald v. State Farm Fire & Casualty Co.*, 119 Wn.2d 724,733, 837 P.2d 1000 (1992)

<sup>47</sup> *Kish v. Ins. Co. of N. Am.*, 125 Wn.2d 164, 170, 883 P.2d 308 (1994)

<sup>48</sup> CP 193: Exhibit I to Declaration of T. Russell

**coverage even if the complaint's allegations were proved true**

An insurer has a duty to defend when a complaint alleges facts which could, if proven, impose liability on the insured within the policy's coverage.<sup>49</sup> Conversely, when the allegations of the complaint, if proven true, would not render the insurer liable to pay out under the policy, then the insurer does not have a duty to defend:

Although an insurer has a broad duty to defend, alleged claims which are clearly not covered by the policy relieve the insurer of its duty. *State Farm Gen. Ins. Co. v. Emerson*, 102 Wash.2d 477, 486, 687 P.2d 1139 (1984). "The key consideration in determining whether the duty to defend has been invoked is whether the allegation, if proven true, would render [the insurer] liable to pay out on the policy."<sup>50</sup>

Thus, when the complaint's allegations describe conduct that is excluded from coverage under the policy, then the insurer is not in bad faith for refusing to defend. For example, in *Holly Mountain Resources Ltd., v. Westport Ins. Co.*,<sup>51</sup> the Court of Appeals held that the insurer did not violate a duty to defend when it denied a defense in a situation where the policy specifically excluded contractual liability and expected or intended injuries and the Plaintiff's complaint alleged intentional timber trespass, fraud, misrepresentation, and breach of contract.<sup>52</sup>

Similarly, Safeco had no duty to defend because coverage was excluded under the policy's business pursuits exclusion, and was also

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<sup>49</sup> *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52-53, 164 P.3d 454 (2007)

<sup>50</sup> *Kirk v. Mt. Airy Insurance Company*, 134 Wn.2d 558, 951 P.2d 1124 (1998)

<sup>51</sup> 130 Wn.App. 635, 104 P.3d 725 (2005)

<sup>52</sup> *Holly Mountain*, 130 Wn.App. at 649-650

excluded under the policy's home care services exclusion.

**2. The complaint's allegations showed that coverage was excluded under the business pursuits exclusion**

The language of the policy excluded liability coverage for bodily injury arising out of business pursuits of any insured:

**LIABILITY LOSSES WE DO NOT COVER**

**1. Coverage E – Personal liability and Coverage F – Medical Payments to Others do not apply to *bodily injury or property damage*:**

...

**b. arising out of *business* pursuits of any *insured*...**

This exclusion does not apply to:

(1)Activities which are ordinarily incident to non-*business* pursuits except as excluded in h. below;

(2)Coverage E for occasional or part-time *business* pursuits of any *insured* who is under 23 years of age;...<sup>53</sup>

The complaint shows a situation where Plaintiffs' claims for damages are based upon the insured's excluded business pursuit of owning and operating a day care facility.

Despite that, Plaintiffs argued the business pursuits exclusion did not apply because (a) the complaint did not allege that daycare was

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<sup>53</sup> CP 151: Decl. of T. Russell Exhibit C [Policy at page 13]

provided on a regular and continuous basis<sup>54</sup>, (b) the complaint did not show the daycare was profit motivated<sup>55</sup>, and (c) coverage might be extended by the “non-business pursuit” exception to the business pursuits exclusion.<sup>56</sup>

It is significant that Plaintiffs never alleged there actually was coverage for their claim against Ms. Norris, only that Safeco should have ignored the allegations in their complaint and imagined some other scenario where there might be coverage. That is not what is required. Accordingly, Plaintiffs’ summary judgment motion should have been denied and Defendants motion should have granted because those three contentions made by Plaintiffs lack merit.

**a. The complaint alleged a regularly operated daycare that had been in business since 1993.**

The caption of Franks’ underlying Complaint names Julie Norris doing business as (D/B/A) Julie’s Daycare as the defendant. Then, throughout the complaint, Franks’ allege facts supporting their claim against Julie’s Daycare as a regularly operating business.

First, by alleging Julie’s Daycare had been licensed since 1993,<sup>57</sup> the complaint alleged a continuous business operation over a fourteen year period, and thus not one that was occasional or part time.

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<sup>54</sup> CP 29: Plaintiffs’ Motion for Summary Judgment at page 9

<sup>55</sup> CP 29: Plaintiff’s Motion for Summary Judgment at page 9

<sup>56</sup> CP 243-246: Plaintiffs’ Response to Safeco’s Motion for Summary Judgment at pages 5-8;

<sup>57</sup> CP 38-39: First Amended Complaint For Wrongful Death, ¶ 3,10

Second, the complaint alleged that the deceased child and her brother had been attending Julie's Daycare 5 days a week since June of 2005<sup>58</sup>, and that again showed the daycare was not alleged to have been an occasional or part-time operation.

Third, the complaint alleged that the Franks had found Julie's Daycare via an online search provided by the King County Resource Center,<sup>59</sup> and that allegation showed a business advertised as being available on a regular basis.

Fourth, the complaint alleged that between 1997 and 2004 DSHS received multiple complaints about Julie's Daycare, including that it had been over capacity.<sup>60</sup> Allegations regarding over capacity complaints over a period of seven years likewise depicted a regular and continuous business operation.

Thus, there are no allegations in the complaint from which to make a rationale inference that Julie's Daycare was part-time or anything other than a business.

**b. Where the complaint alleged injury at a daycare business, Plaintiffs' claim that profit motive must be pled, misreads *Stuart v. American States Ins. Co.***

In *Stuart v. American States Ins. Co.*,<sup>61</sup> the Washington Supreme

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<sup>58</sup> CP 39: First Amended Complaint For Wrongful Death, ¶ 9

<sup>59</sup> CP 39: First Amended Complaint For Wrongful Death, ¶ 8

<sup>60</sup> CP 39: First Amended Complaint For Wrongful Death, ¶12

<sup>61</sup> 134 Wn.2d 814, 953 P.2d 462 (1998), cited at 7 of Plaintiff's Motion for Summary Judgment: CP 29

Court discussed the concept of profit motive in analyzing whether foster care was a business. In that completely different setting, the court found that profit need not be a sole motivator, nor a major source of income for a business pursuits exclusion to apply:

We approve of the *Stoughton* analysis and hold that in order to constitute a business pursuit, the McCabes' foster home must (1) be conducted on a regular and continuous basis, and (2) be profit motivated. It is not necessary that profit be the McCabes' *sole* motivation in operating the foster home. Nor is it necessary that the foster home be the major source of livelihood for Mr. and Mrs. McCabe. All that is required is that the activity be regular and continuous and that a profit motive exist in conducting the activity.<sup>62</sup>

In *Stuart*, the court held that there were questions of fact regarding whether a couple who worked full time jobs and who were also foster parents were engaged in a business pursuit. In finding that question of fact, the court viewed foster care as not necessarily being “business like,” and noted a limited compensation schedule.<sup>63</sup>

The considerations in *Stuart* that created a question of fact are completely absent here.

First, this case does not involve the unique circumstance of foster parenting. As the *Stuart* court discussed, foster parenting is not necessarily different from traditional child raising activities.<sup>64</sup> Foster children are taken into a family home and may be treated as family

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<sup>62</sup> *Stuart*, 134 Wn.2d at 822

<sup>63</sup> *Stuart*, 134 Wn.2d at 823-824

<sup>64</sup> *Stuart*, 134 Wn.2d at 823-824

members. Under those circumstances, the *Stuart* court did not find a profit motive apparent. But Plaintiffs should not be allowed to expand the holding in *Stuart* to more “business-like” activities. To do so would gut the business pursuits exclusion because then there would always be a question of fact regarding whether a business activity was profit motivated. Under Plaintiffs’ logic, there would always be a duty to defend any lawsuit that alleged injuries arising from business activities (like the operation of a grocery store, or a construction operation, or a stock brokerage) because, hypothetically, the insured might not have operated his or her business to make a profit.

Second, as discussed above, the complaint alleges damages against a business activity, so there is no issue of profit motive here. There are no facts alleged which would be the basis for any inference that Julie’s Daycare was not a business.

Third, cases in Washington and elsewhere have consistently found that operating a daycare is a business activity as a matter of law. For example, in *Rocky Mountain Casualty Co. v. St. Martin*<sup>65</sup> the Court of Appeals held that a person who was providing four children with in home child care was engaged in a business pursuit.<sup>66</sup> The *Rocky Mountain* court, sitting in 1990, reached that result before the *Stewart* court’s 1998 opinion endorsed the profit motive test for foster parents. But the *Rocky Mountain*

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<sup>65</sup> 60 Wn.App. 5, 802 P.2d 144 (1990)

<sup>66</sup> *Rocky Mountain*, 60 Wn.App. at 8-9

opinion noted that courts which applied the profit motive test also reached the same result:

The issues presented are of first impression in Washington. Authority from other jurisdictions is divided, but we believe that our holding accords with the better reasoned cases. Representative of the view we adopt, that baby-sitting is a business pursuit if conducted on a regular and continuous basis for compensation, are *Stanley v. American Fire & Cas. Co.*, 361 So.2d 1030 (Ala.1978); *Allstate Insurance Co. v. Kelsey*, 67 Or.App. 349, 678 P.2d 748 (1984); *McCloskey v. Republic Ins. Co.*, 80 Md.App. 19, 559 A.2d 385, cert. denied, 317 Md. 640, 566 A.2d 101 (1989); *Burt v. Aetna Cas. and Sur. Co.*, 720 F.Supp. 82 (N.D.Tex.1989); *United States Fid. & Guar. Co. v. Heltsley*, 733 F.Supp. 1418 (D.Kan.1990). Some courts have reached the same result by applying a test that asks whether there is “continuity” and “profit motive” in the babysitting activity. See e.g., *Susnik v. Western Indem. Co., Inc.*, 14 Kan.App.2d 421, 795 P.2d 71 (1989); *Moncivais v. Farm Bureau Mut. Ins. Co.*, 430 N.W.2d 438 (Iowa 1988).<sup>67</sup>

After *Rocky Mountain*, courts in other jurisdictions continued to find that daycare was a business activity subject to the business pursuits exclusion. One example is *Carroll v. Boyce*.<sup>68</sup> The *Carroll* court used the same test regarding continuity and profit motive that was later used in *Stuart*,<sup>69</sup> and found that test was satisfied when the daycare was not a temporary or casual arrangement and when there was no evidence that the daycare provider lacked a profit motive:

“[W]e are not here dealing with a temporary or casual keeping of children, but rather with a more permanent [full-

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<sup>67</sup> *Rocky Mountain*, 60 Wn.App. at 8

<sup>68</sup> 640 A.2d 298 (N.J. Super.A.D. 1994)

<sup>69</sup> *Carroll*, 640 A.2d at 386

time] arrangement for an agreed upon compensation.” *Stanley, supra*, 361 So.2d at 1031. Additionally, plaintiffs submitted no proof that the compensation was for anything but profit or income, or was all consumed by expenses. Hence, the “business pursuit” exclusion applies.<sup>70</sup>

And in finding that the daycare was a business pursuit, the *Carroll* court held it was incumbent on the plaintiffs to come forward with evidence to show that the daycare activities were not profit motivated:

Plaintiffs suggest that the carrier must prove the profit or profit motive. But given the personal nature of the relevant facts, we disagree. While carriers generally have the burden of proving an exclusion, plaintiffs are more readily able to come forward to show there was no profit or profit motive. *See Biunno, Current N.J. Rules of Evidence*, comment on *N.J.R.E.* 101(b)(2); *J.E. on Behalf of G.E. v. State, Dept. of Human Services, Div. of Developmental Disabilities*, 131 N.J. 552, 569-70, 622 A.2d 227 (1993) (“the party with greater expertise and access to relevant information should bear [the] evidentiary burdens”).<sup>71</sup>

That approach is consistent with *Stuart* because there the Court of Appeals found a question of fact when “there is evidence the McCabes took in children for purely humanitarian reasons,”<sup>72</sup> and because the Supreme Court likewise noted that plaintiff asserted, “the record indicates that the motivation for being foster parents was and is a desire to enrich the lives of the foster children that they take into their home.”<sup>73</sup> By contrast, in the present case, there is no indication in the complaint and no evidence that Julie’s Daycare was operated for purely humanitarian

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<sup>70</sup> *Carroll*, 640 A.2d at 300

<sup>71</sup> *Carroll*, 640 A.2d at 300, fn.2

<sup>72</sup> *Stuart v. American States Ins.*, 85 Wn.App. 321, 326, 932 P.2d 697 (1997)

<sup>73</sup> *Stuart*, 134 Wn.2d at 823

reasons without any profit motive. Instead, as in cases like *Carroll* and *Rocky Mountain*, Julie's Daycare was a business activity and, thus, subject to the business pursuits exclusion.

Fourth, the logic of classifying Julie's Daycare as a business activity is heightened by the complaint's allegations that the daycare had been state licensed since 1993. The *Rocky Mountain* court noted that licensure is a factor that courts have used in determining whether child care is a business pursuit.<sup>74</sup> For example, in *Haley v. Allstate Ins. Co.*<sup>75</sup>, the New Hampshire Supreme Court employed the same profit motive test used in *Stuart* and found that a reasonable person could not but conclude that a state licensed daycare which operated 5 days a week was a business activity:

Thus, the definition of "business pursuit" contains two significant elements: profit motive and continuity. *Camden Fire Ins. Ass'n v. Johnson*, 294 S.E.2d 116, 118-19 (W.Va.1982) (following *Home Insurance Co. v. Aurigemma*, 45 Misc.2d 875, 879, 257 N.Y.S.2d 980, 985 (1965)); see also Annot., 48 A.L.R.3d 1096, 1099 (1973). Therefore, although occasional babysitting or a neighborly accommodation for child care would not be considered a business pursuit, *Camden Fire Ins. Ass'n v. Johnson*, *supra* at 120-21, day care provided on a regular basis for profit is ordinarily so considered. *Stanley v. American Fire & Cas. Co. supra*. Ms. Haley was licensed to provide day care by the State, and at the time Nicholas Antal was bitten, she was providing day care for profit more than eight hours per day, five days per week. Ms. Haley was clearly engaged in a business pursuit. A reasonable person could not conclude

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<sup>74</sup> *Rocky Mountain*, 60 Wn.App. at 9, fn.2

<sup>75</sup> 529 A.2d 394 (N.H. 1987)

otherwise.<sup>76</sup>

Fifth, Safeco's investigation confirmed the complaint's allegation that the daycare was a business and not some purely humanitarian activity. Ms. Norris, in her recorded statement, acknowledged that she opened the "business" in 1993.<sup>77</sup> Likewise, Ms. Norris also confirmed that she signed contracts with parents and received "pay" pursuant to those contracts.<sup>78</sup>

**c. The non-business pursuit exception to the business pursuits exclusion did not apply.**

The non-business pursuit exception provides that the business pursuits exclusion does not apply to "activities which are ordinarily incident to non business pursuits of any insured except as excluded in h below."<sup>79</sup> Section h. is the home care services exclusion.

Plaintiffs argued that the "non-business pursuit" exception was applicable and prevented the business pursuits exclusion from precluding coverage.<sup>80</sup> In making that argument, Plaintiffs relied on the California case of *Crane v. State Farm Fire & Casualty Co.*<sup>81</sup>, and characterized Washington law on the non-business pursuit exception as being "relatively

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<sup>76</sup> *Haley*, 529 A.2d at 514

<sup>77</sup> CP 79: Decl of T. Russell Exhibit K: Norris recorded statement at page 1

<sup>78</sup> CP 80: Decl of T. Russell Exhibit K: Norris recorded statement at page 2

<sup>79</sup> CP 151: Decl. of T. Russell Exhibit C Norris policy at page 13

<sup>80</sup> CP 243-246: Plaintiffs' Response to Safeco's Motion for Summary Judgment at pages 5-8

<sup>81</sup> 485 P.2d 1129 (1971)

underdeveloped.”<sup>82</sup> Plaintiffs’ argument is untenable because there is Washington law directly on point which expressly rejected the *Crane* case as flawed and which shows the claims alleged against Ms. Norris doing business as Julie’s Daycare did not fall into the non-business pursuit exception.

*Rocky Mountain*<sup>83</sup> is the controlling case. It involved injuries sustained by an eleven month old child who was burned after falling against a wood stove at his child care provider’s home.<sup>84</sup> After determining that the child care was a business activity, the *Rocky Mountain* court went on to consider whether the non-business pursuit exception applied to extend coverage, and held that it did not.<sup>85</sup>

In reaching that holding, the *Rocky Mountain* court explicitly considered and rejected the reasoning in *Crane* as “flawed” and held that the non-business pursuit exception could not apply to extend coverage because supervision in the child care context cannot be incidental to a non-business pursuit:

We believe that the reasoning in cases such as *Crane*, *Tilley*, *Collins* and *Moore* is flawed. In our view, the proper focus in analyzing the “non-business activities” exception should not be on the activity, but on the babysitter’s alleged negligence. Here, St. Martin undoubtedly had to heat her house. Her negligence, however, was not in doing that, but

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<sup>82</sup> CP 244-245: Plaintiffs’ Response to Safeco’s Motion for Summary Judgment at pages 6-7

<sup>83</sup> 60 Wn.App. at 5

<sup>84</sup> 60 Wn.App. at 6

<sup>85</sup> 60 Wn.App. at 10-11

in failing to keep Kyle away from the stove. A different question would be presented if, for example, Kyle had been injured in a fire negligently caused by St. Martin's attempt to heat her house.

*\*II* Supervision is at the very heart of child care. As the Supreme Court of Alabama stated:

The business of child care contemplates the exercising of due care to safeguard a child of tender years from household conditions and activities; and, any activity of the insured in this regard from which injury results cannot logically be called an activity ordinarily incidental to a non-business pursuit. In other words, the activity referred to is a failure to supervise rather than making coffee for a third party [as in *Tilley* ]. Undertaking the business relation of child care for compensation is certainly not ordinarily incident to the conduct of a household.

*Stanley v. American Fire*, 361 So.2d at 1032\_(rejecting *Tilley* analysis that focused on brewing coffee as the activity in question).<sup>86</sup>

The approach taken by *Rocky Mountain* (in reliance on the *Stanley* case) is consistent with that adopted by many other courts.<sup>87</sup>

Further, the *Rocky Mountain* approach was used by the Court of Appeals in *Stuart*. While that court ultimately found there was a question

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<sup>86</sup> *Rocky Mountain*, 60 Wn.App. at 10-11

<sup>87</sup> See *Carroll v. Boyce*, 640 A.2d 298, 302 (N.J. A.D 1994) (citing *Stanley* as expressing the majority position, recognizing *Rocky Mountain* as being within that majority, and stating “The very purpose of her business was to care for the infant and to protect him from the dangers of injury. As such, we cannot conclude that a babysitter’s conduct in failing to do so can be considered incident to her non-business pursuits, irrespective of what Mrs. Boyce was doing at the time and how the injuries occurred.”); *Moncivais v. Farm Bureau Mut. Ins. Co.*, 430 N.W.2d 438, 441-442 (Iowa 1988) (In case where child died after choking on twine that was left in crib, the court followed *Stanley* and held that the non-business pursuit exception did not apply because “activities central to home day care cannot be described as incident to non-business pursuits.”); *Ruff v. Grazino*, 583 N.W.2d 185, 189 (Wis.App. 1998) (holding that the non-business pursuits exception did not apply when child was injured on an outing to the beach because the child was taken to the beach as part of the insured’s daycare services).

of fact regarding whether the insured's foster care had a profit motive, the court also found that the non-business pursuit exception was inapplicable because the child's injury related to his role as a foster child:

Ms. Stuart also contends that riding a bicycle was an activity which is not usual to the business of running a foster home. An exception to the business pursuits exclusion exists when (1) the insured is acting out of the scope of employment; (2) the insured is not using an instrument related to the business; or (3) the insured is not motivated by their business purpose. *Transamerica*, 30 Wash.App. at 105, 632 P.2d 900. In *Rocky Mountain*, the court stated that in analyzing this exception to the business pursuits exclusion, courts should look to the actor's negligence, not the activity. *Rocky Mountain*, 60 Wash.App. at 10, 802 P.2d 144. If an actor's negligence was in doing an act which was not usual to the business pursuit, then the exception applies. *Id.*

In this case, the negligent actor was the foster child. He was on an outing with an agency that assisted the foster parents in providing for Jody Collins. The child was participating in an activity related to his role as a foster child. Riding a bicycle is not foster care related. Participating in the outing was. The trial court was correct in concluding this exception to the business pursuits exclusion does not apply.<sup>88</sup>

The reasoning and holdings of the *Stuart* and *Rocky Mountain* courts require a finding that the exception for activities incident to non-business pursuits did not apply. Just as the child's injury in *Rocky Mountain* was related to the insured's failure to supervise and protect the child from injury, the complaint here alleged the child's death was directly related to the daycare activity of Ms. Norris putting the child down for a

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<sup>88</sup> *Stuart*, 85 Wn.App. at 326-327

nap<sup>89</sup> and was related to Ms. Norris' alleged failure to properly supervise the deceased child.<sup>90</sup>

Because the complaint depicted claims that were clearly excluded from the policy's coverage under the business pursuits exclusion, and because the non-business pursuits exception to that exclusion did not apply, the trial court erred.

**3. Coverage was also excluded on additional independent grounds under the home services exclusion**

Further, reading the complaint's allegations, coverage was also excluded under the policy's home care services exclusion, 1.h. That provision, set forth in full above, excludes liability coverage for injuries resulting from legal liability because of; home care services provided to any non-relative on a regular basis by any insured. Regular basis means more than 20 hours per week. Occasional home care services provided by any *insured* under 23 years of age are not excluded.<sup>91</sup>

As discussed above, the complaint alleged a child's death while in Julie's Daycare at Ms. Norris' home, and, does not depict an occasional or part-time home care by an insured under 23 years of age. The complaint alleges home care provided on a regular continuous basis to two Frank children for months, and to other children for 15 years.

While the Complaint does not explicitly set out the number of

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<sup>89</sup> CP 41-42: First Amended Complaint For Wrongful Death, ¶ 15-18

<sup>90</sup> CP 41-42: First Amended Complaint For Wrongful Death, ¶ 15

<sup>91</sup> CP 153: Decl. of T. Russell Exhibit C: Norris' policy at page 15

hours that the daycare operated, when construed in its entirety, the Complaint, with its allegations of 5 day a week care, state licensure, over capacity violations, and advertising on a DSHS website, depicts a longstanding daycare operation conducted on a full-time basis exceeding 20 hours a week.

The home care services exclusion also applied and provided separate grounds showing that there was no coverage and hence no duty to defend.

**4. Safeco's investigation confirmed that there were no facts beyond the complaint's allegations that would extend coverage**

**a. Safeco did not use extrinsic facts to deny coverage**

In their bad faith complaint, Plaintiffs alleged that “an insurer may not rely on facts extrinsic to the complaint in order to deny its duty to defend...”<sup>92</sup> But there is no evidence that shows Safeco relied on extrinsic facts to deny coverage. Instead, the evidence demonstrates that Safeco properly conducted its investigation and relied on information outside the complaint only to potentially extend coverage. Claims Specialist Russell indicated in her claim log notes that as the complaint is pled, there is no duty of defense; however, she wanted to interview Norris to see if there were any facts missing from the complaint that might trigger coverage.<sup>93</sup> Russell confirms in her sworn declaration that she investigated facts

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<sup>92</sup> CP 6: Complaint for Damages Insurance Bad Faith: ¶ 3.1

<sup>93</sup> CP 193: Decl. of T. Russell ¶ 7 Exhibit I (screen notes 6/22/07)

outside the complaint to see if there was a way that Safeco could extend coverage to the insured, and not in order to deny coverage to the insured.

Plaintiffs, however, misconstrued the law regarding when an insurer may investigate. Plaintiffs' summary judgment motion incorrectly asserted that, per the *Woo v. Fireman;s Fund Ins.*<sup>94</sup> case, Safeco's coverage determination should have "solely entailed reviewing the allegations in the operative complaint."<sup>95</sup> But neither *Woo*, nor other cases, state that an insurer may not conduct an investigation in addition to reviewing the complaint's allegations.

*Woo*, in fact, requires such an investigation if it is not clear from the face of the complaint that the policy provides coverage but coverage could exist.<sup>96</sup> And, indeed, Plaintiffs' summary judgment response contends that *Woo* required Safeco to investigate:

According to *Woo*, "if it is not clear from the face of the complaint that the policy provides coverage, but coverage could exist, the insurer *must* investigate and give the insured the benefit of the doubt that the insurer has a duty to defend."<sup>97</sup>

Although Safeco's investigation pre-dated the Washington Supreme Court's decision in *Woo*, Safeco performed the type of investigation referenced in *Woo* and suggested by Plaintiffs. The face of

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<sup>94</sup> 161 Wn.2d 43, 164 P.3d 454 (2007)

<sup>95</sup> CP 28: Plaintiffs' Motion for Summary Judgment at page 6, lines 16-19

<sup>96</sup> *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 53, 164 P.3d 454 (2007)

<sup>97</sup> CP 247: Plaintiffs' Response to Safeco's Motion For Summary Judgment at page 9 lines 1-4

the complaint did not show the policy provided coverage. Safeco investigated to determine if coverage could exist and Safeco's investigation confirmed there were no extrinsic facts that extended coverage.

The *Holly Mountain* case confirms that such an investigation is proper and in good faith. *Holly Mountain* also involved a situation where the allegations of the complaint showed that coverage was excluded but where the insurer nonetheless investigated further by speaking with the insured and by reviewing the timber contract that was referenced in the complaint.<sup>98</sup> The *Holly Mountain* court noted that the insurer undertook its investigation even when it had no duty to look beyond the complaint's allegations:

Because AID's claims were clearly outside Holly Mountain's policy coverage, Westport had no duty to investigate or to look outside the complaint for additional information. Nonetheless, Adams did review the Timber Harvest Agreement, but it did not change her decision to decline coverage. Even Holly Mountain's principal, Zapel, told Westport that he had not expected the AID complaint to fall within Westport's policy coverage.<sup>99</sup>

Further, the *Holly Mountain* Court complimented the insurer on its efforts to look at information outside of the complaint, stating that the insurer acted in good faith by looking beyond the complaint's allegations:

"...Westport acted in good faith. First, Westport went beyond the confines of the insurance policy and reviewed

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<sup>98</sup> *Holly Mountain*, 130 Wn. App. At 642

<sup>99</sup> *Holly Mountain*, 130 Wn.App. at 649-650

Holly Mountain's timber harvest Contract with AID before finally concluding that AID's complaint alleged non-covered breach of contract actions."<sup>100</sup>

The same type of good faith happened in this case. Ms. Russell was faced with a situation where the allegations made in the complaint did not provide for coverage. But, like the adjuster in *Holly Mountain*, she made an extra effort to investigate facts beyond the complaint before reaching a final conclusion denying coverage.

Such good faith efforts should not be penalized. The Trial Court's decision sends a message discouraging insurers from going the extra mile before making a final conclusion to deny or extend coverage. Both the *Holly* case and public policy indicate that no such message should be sent. Safeco should not face liability because its employee made the extra effort to look beyond the complaint to try to extend coverage.

**b. The insurer should be allowed to consider undisputed facts outside the Complaint**

Although Safeco conducted an investigation to see if there were any extrinsic facts to extend coverage to its insured, the carrier should be allowed to rely upon undisputed facts discovered in its coverage investigation when those facts have no bearing on the substantive claims being made in the underlying lawsuit. This refinement strikes a balance between the requirement to investigate and the mandate not to deny

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<sup>100</sup> *Holly Mountain*, 130 Wn.App. at 651

coverage based upon extrinsic facts. In his treatise *Washington Insurance Law*, Tom Harris cited to Windt's *Insurance Claims and Disputes* text and discusses relevant exceptions to the general rule that an insurer cannot rely on extrinsic evidence to avoid a duty to defend:

However, there are relevant exceptions. There are situations in which an insurer may properly rely upon extrinsic evidence as a basis for denying a tender of defense. The following discussion in Windt, *Insurance Claims and Disputes* discusses the relevant, and necessary, exceptions to the general rule:

There are, however, three exceptions to the general rule that extrinsic evidence cannot be used to avoid an otherwise existing duty to defend. First, an insurer should not have a duty to defend an insured when the facts alleged in the complaint ostensibly bring the case within the policy's coverage, but other facts that are not reflected in the complaint and are unrelated to the merits of the plaintiff's action plainly would take the case outside the policy coverage...

*Kepner v. Western Fire Insurance Co.* is illustrative. In that case, the insured was sued because his negligence proximately caused an accident in which the plaintiff was injured. It was undisputed that the insurance policy did not provide indemnity coverage, since the accident occurred during the pursuit of a business activity. Nevertheless, the insured claimed that he was entitled to a defense because the complaint itself did not state whether the activity that was being conducted had a business or nonbusiness purpose. The court rejected the insured's argument, holding that "when the duty to defend depends upon a factual issue which will not be resolved by the trial of the third party's suit against the insured, the duty to defend may depend upon the actual facts and not the allegations in the pleadings."<sup>101</sup>

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<sup>101</sup> Harris, *Washington Insurance Law*, 2<sup>nd</sup> ed., § 13.1 (2<sup>nd</sup> ed. 2006).  
Harris citing Windt, *Insurance Claims and Disputes*, 4<sup>th</sup> ed., § 4.4 (4<sup>th</sup> ed. 2001).

Established Washington law already recognizes that an insurer is required to look to extrinsic evidence when: “...(a) the allegations all in conflict with facts known to or readily ascertainable by the insurer or (b) the allegations of the complaint are ambiguous or inadequate. In the event of ambiguity or inadequacy the insurer must investigate to discover whether there is potential for liability.”<sup>102</sup>

When, as here, that investigation confirms undisputed facts, completely unrelated to the insured’s liability, and those facts leave no doubt that there is no coverage under the insurance contract, there is no duty to defend and there is no bad faith.

**C. The Trial Court Erred By Entering Judgment In The Amount Of \$4,500,000**

For the reasons discussed above, the Trial Court’s decision to award summary judgment to Plaintiff’s Frank is in error and should be reversed. But if that summary judgment is not reversed, then this Court should vacate the \$4,500,000 judgment entered against Safeco and remand for a determination of the actual damages sustained by the insured due to Safeco’s decision not to defend.

Plaintiffs Frank are the creditors of that judgment only because they were assigned the rights of Safeco insured Julie Norris.<sup>103</sup> Thus, at

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<sup>102</sup> E-Z Loader Boat Trailers, Inc v. Travelers Indem. Co., 106 Wn.2d 901, 908, 726 P.2d 439, 444 (1986).

<sup>103</sup> CP 16

the outset, it should be noted that the damages properly at issue here are not the amount which would provide compensation for the tragic death of young Jaclyn Frank; instead the damages at issue are the amount that would be necessary to compensate daycare provider Julie Norris for the harm, if any, done to her by Safeco's decision not to provide a defense for the lawsuit brought by the Franks.

As discussed below, it was error to summarily set \$4,500,000 as the judgment amount because that amount goes far beyond providing damages to Safeco's insured for any harm caused by Safeco's denial to defend.

In asking that the Trial Court enter judgment in the amount of \$4,500,000, Plaintiffs Frank relied on *Besel v. Viking Insurance Company*<sup>104</sup> for the proposition that the amount of the insured's damages for harm caused by an insurer's tortuous bad faith is presumptively set by the covenant judgment amount when an insurer is found to have denied a defense in bad faith.<sup>105</sup> But the May 4, 2009 decision in *Ledcor Industries Inc. v. Mutual of Enumclaw*<sup>106</sup> indicates that a covenant judgment amount does not determine damages when the evidence fails to show that the insurer's conduct resulted in damages to the insured in that amount.

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<sup>104</sup> 146 Wn.2d at 738, 49 P.3d 887 (2002)

<sup>105</sup> CP 33

<sup>106</sup> 150 Wash. App. 1, 206 P.3d 1255 (2009)

*Ledcor* involved a situation where Mutual of Enumclaw (MOE) did not appoint counsel or otherwise defend a suit brought by homeowners against a general contractor who was a MOE insured. While represented by counsel not appointed by MOE, the insured entered into \$1.25 million dollar settlement which included payment by the insured of \$105,000 which was not otherwise funded by its insurers.<sup>107</sup>

In *Ledcor*, the Court of Appeals affirmed a trial court judgment where (1) the trial court found the insurer MOE acted in bad faith by failing to appoint counsel and by failing to contribute to the insured's defense,<sup>108</sup> where (2) the insured claimed that damages for the bad faith conduct amounted to the \$1.25 million dollar settlement the insured entered into plus defense costs incurred by the insured,<sup>109</sup> and where (3) the trial court declined the insured's request use the settlement amount to measure damages and instead awarded judgment for only \$101,873.02, which was the amount of the insurer's unpaid defense obligation.<sup>110</sup>

In limiting the damages awarded to the costs of defense, the *Ledcor* Court noted that there was no evidence that a different outcome would have resulted if MOE had defended:

MOE's bad faith failure to timely accept tender and promptly become engaged in Ledcor's defense thus made no difference in the outcome. As Ledcor ultimately suffered

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<sup>107</sup> *Ledcor*, 206 P.3d at 1259

<sup>108</sup> *Ledcor*, 206 P.3d at 1260

<sup>109</sup> *Lecor*, 206 P.3d at 1260

<sup>110</sup> *Lecor*, 206 P.3d at 1259

no harm resulting from MOE's breach of its duties, the court did not err in awarding no damages for bad faith.<sup>111</sup>

The situation in the present case is similar. First, just as MOE did not appoint defense counsel or fund the insured's defense, here Safeco did not appoint defense counsel or pay for the defense of Ms. Norris.

Second, just as MOE was defended by other counsel not provided or paid for by MOE, here Ms. Norris was defended by counsel who was not provided or paid for by Safeco.

Third, just as the *Ledcor* Court found that MOE's failure to provide a defense was in bad faith, here the Trial Court entered summary judgment finding that Safeco's failure to defend was in bad faith.

Fourth, just as the case against the insured in *Ledcor* was resolved by a \$1,250,000 settlement, here the case against Ms. Norris was resolved by a settlement that provided for entry of a \$4,500,000 with a covenant not to execute against the insured.

Fifth and finally, just as MOE's failure to defend was found not to have to led to a different outcome of the suit against MOE's insured, here, the evidence when viewed most favorably toward Safeco as the non-moving party, supports the same conclusion that Safeco's lack of a defense did not result in a worse outcome for Safeco's insured.

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<sup>111</sup>*Ledcor*, 206 P.3d at 1261

In that regard, there was a consent judgment entered for \$4,500,000 against Ms. Norris for the death of the Frank child, but there is no showing that a lesser judgment would have been entered against Ms. Norris if the case had been defended by Safeco. This was a horrible situation where the child was left unattended by Ms. Norris and she died when the closet blinds entangled her. As noted in the order finding the \$4,500,000 judgment reasonable, DSHS had issued a finding of neglect as to Ms. Norris.<sup>112</sup> Under those circumstances, it is highly unlikely that any defense provided by Safeco would have allowed Ms. Norris to escape legal responsibility for the child's death.

Without a Safeco funded defense, Ms. Norris entered into a settlement which a judge found was a reasonable result given the evidence of liability and damages in the case. Moreover, as a practical matter, it was a very good result for the insured Julie Norris, as the settlement agreement contained a covenant not to execute which shielded the insured from personal liability.<sup>113</sup>

Due to those five similarities, *Ledcor* supports vacation of the \$4,500,000 judgment and a remand to determine the actual damages, if any, sustained by Safeco's insured due to Safeco's denial of a defense. *Ledcor* further supports the proposition that covenant judgments should

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<sup>112</sup> CP 331

<sup>113</sup> CP 85

not be relied on to provide insured's or their assignees windfall damages beyond the amount of harm actually caused by the insurer.

Longstanding legal principles regarding the purposes of tort and contract damages further indicate that it was error to award \$4,500,000 as that sum would go well beyond placing Ms. Norris, who eschewed purchasing a business policy that would cover her daycare, in the position that she would have occupied had Safeco provided a defense.

In *Watkins v. FMC Corp.- Niagara Chemical Division*,<sup>114</sup> the Court of Appeals recited the well established legal principal that the purpose for awarding both tort and contract damages is compensatory – to place injured parties in the position they would have been in had the tort not occurred or the contract not been breached:

We reach this result bearing in mind the observation of C. T. McCormick, *Damages* s 137 (1935), that:

The primary aim in measuring damages is compensation, and this contemplates that the damages for a tort should place the injured person as nearly as possible in the condition he would have occupied if the wrong had not occurred, and that the damages for breach of contract should place the plaintiff in the position he would be in if the contract had been fulfilled.<sup>115</sup>

To be consistent with the long standing legal principal that damages should place injured parties in the position they would have been in but for the wrong conduct, the damages potentially awardable here

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<sup>114</sup> 12 Wn.App. 701, 531 P.2d 506 (1975)

<sup>115</sup> *Watkins*, 12 Wn.App. at 705

should be limited to the amount of harm actually caused by Safeco's decision not to defend and indemnify.

The insurance policy provided two potential benefits to the insured, Ms. Norris: (1) it provided that Safeco would indemnify Ms. Norris for an amount up to \$100,000 per person and (2) it provided that Safeco would provide a defense for covered claims. Given those obligations, there are three elements of damages that could logically flow a wrongful failure to defend:

- 1- \$100,000, which is the amount the insurer would have been obligated to pay under the policy;
- 2- the value of the defense that would have been provided if the insurer had defended; and
- 3- any additional harm caused by the lack of a defense.

In this case, those elements of damages would not add up to anything approaching \$4,500,000.

The judgment entered contained a covenant not to execute which benefited the insured by protecting her personal assets. By contrast, if Safeco had provided a defense, the insured faced the prospect of an excess judgment well over the \$100,000 policy limits, if there was a duty to indemnify.

In ruling on a summary judgment motion a court must look at the facts in the light most favorable to the non-moving party.<sup>116</sup> Particularly, when viewed in the light most favorable to Safeco, the evidence as to damages does not add up to the \$4,500,000 judgment awarded by the Trial Court and if Plaintiffs' summary judgment stands, that amount should be remanded for a factual determination of the damages the insured actually incurred.

## VI. CONCLUSION

While the death of any child is a tragic event, sentiment should not manipulate a result where an insurer is forced to pay out \$4.5 million on a \$100,000 policy that did not cover the loss. Where the wrongful death complaint did not allege claims that were covered under the insured's policy, and where the insurer's investigation revealed no facts that would provide coverage, there was no duty to defend. Safeco's investigation confirmed what is apparent from reading the face of the complaint: the child's death resulted from Ms. Norris' excluded business activity of running Julie's Daycare in her home.

The homeowner's policy specifically excluded such business pursuits. The business pursuit exclusion has been described as a common and necessary exception to coverage provided in homeowner's policies because the hazards associated with income producing activities involve

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<sup>116</sup> *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990)

greater risk than do personal pursuits.<sup>117</sup> And the business pursuits exclusion works to promote fairness because, as was noted by the Vermont Supreme Court, “it is undesirable to force homeowners’ policy premiums to rise to cover a major part of the business tort risk of those homeowners who conduct a business in or out of their home but chose not to purchase insurance to cover their business.”<sup>118</sup>

Accordingly, as the trial court first correctly ruled, Plaintiff’s summary judgment motion should be denied, Defendants summary judgment motion should be granted, and Plaintiffs’ case should be dismissed. On de novo review, this Court should overturn the trial court’s Reconsideration Order and find Safeco had no duty to defend claims against Julie Norris’ daycare business under a homeowner’s policy continuing a business pursuits exclusion.

DATED THIS 15<sup>th</sup> day of July, 2009.

BARRETT & WORDEN, P.S.



M. Colleen Barrett, WSBA 12578  
Gregory S. Worden, WSBA 24262  
Attorneys for Appellants

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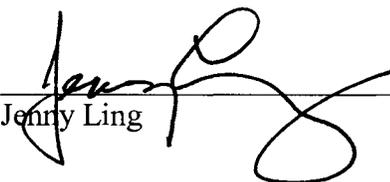
<sup>117</sup> *Ruff v. Grazino*, 583 N.W.2d 185, 187 (Wis.App. 1998)

<sup>118</sup> *Lundean v. Peerless Ins. Co.*, 750 A.2d 1031, 1035

### CERTIFICATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on July 15, 2009, I caused service of the foregoing Brief of Appellant via U.S. mail to:

Lincoln C. Beauregard  
CONNELLY LAW OFFICES  
2301 North 30th Street  
Tacoma, Washington 98403

  
Jenny Ling

NO. 63208-6

COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

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SAFECO INSURANCE COMPANY OF AMERICA, and TAMMY  
RUSSELL, an individual,

Appellant,

v.

ESTATE OF JACLYN JEAN FRANK, a minor, aged 18 months,  
deceased, by LARRY and MICHELE FRANK, husband and wife,  
individually and as Co-Personal Representatives,

Respondents.

Appeal from King County Superior Court  
No. 08-2-13066-5 SEA

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**AFFIDAVIT OF MAILING**

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STATE OF WASHINGTON  
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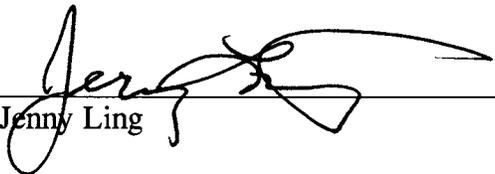
I, Jenny Ling, under penalty of perjury under the laws of the State of Washington, declare and state as follows:

1. I am a paralegal for Barrett & Worden, P.S., attorneys for Appellants herein.
2. On July 15, 2009, I caused to be sent via U. S. Mail the following documents:
  - a) Appellants' Brief; and
  - b) Affidavit of mailing
3. I further declare that said documents were properly addressed to:

Lincoln C. Beauregard  
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2301 North 30th Street  
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Washington State Court of Appeals  
600 University Street  
Seattle, WA 98101

DATED July 15, 2009 in Seattle, Washington.

  
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Jenny Ling