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No. 72566-1-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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BROUGHTON LAW GROUP, INC. P.S. a Washington  
Corporation,

Appellant,

v.

FIRE INSURANCE EXCHANGE, a California Company and a resident  
of Washington State,

Respondent,

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AMENDED APPELLANT'S REPLY BRIEF

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## **INTRODUCTION**

Appellant Broughton Law Group (“BLG”) is the assignee and current owner of claims by California insured Terry Parks. Parks was insured by Respondent Fire Insurance Exchange (“FIE”) when a Counterclaim was filed against him in a King County Superior Court legal malpractice lawsuit he had filed against attorney Janice Fink. Fink sued the insured alleging the tort of outrage. Her counterclaims were based on a series of threatening and defamatory written statements by the insured to Fink and others.

The insurance company denied coverage and withdrew its defense two months after tender. Applying California law, the trial court opined that the insurance company’s duty to defend and indemnify its insured was limited to the allegations in the Counterclaim. The trial court also opined that additional evidence contained in the King County Superior Court files at the time of tender did not establish any possibility of coverage and therefore did not establish a duty to defend.

BLG appeals the Order of Dismissal by the trial court.

## ARGUMENT

### **I. FIE HAD A DUTY TO DEFEND BECUASE FINK'S ER 904 SUBMISSIONS AND ADDITIONAL DOCUMENTS AVAILABLE TO FIE IN THE KING COUNTY SUPERIOR COURT FILES GAVE RISE TO POTENTIALLY COVERED CLAIMS UNDER THE SUBJECT POLICY'S "PERSONAL LIABILITY" COVERAGE REGARDLESS OF THE CAUSE OF ACTION PLEAD BY FINK.**

FIE asserts it had no duty to defend because Fink asserted no covered claims against Parks under the "Personal Liability" coverage grant of the subject policy. (Respondent's Brief at 23). This argument misstates the law.

A liability insurer owes a broad duty to defend its insured against claims that create a potential for indemnity. *Gray v. Zurich Insurance Co.*, 65 Cal.2d 263, 275, 54 Cal.Rptr. 104 (1966). The duty to defend "arises when the facts alleged in the underlying complaint give rise to a potentially covered claim regardless of the technical legal cause pleaded by the third party." *Barnett v. Fireman's Fund ins., Co.* 90 Cal.App.4th 500, 510, 108 Cal.Reptr.2d 657 (2001). Facts extrinsic to the complaint also give rise to the duty to defend when they reveal the *possibility* that the claim may be covered by the policy. *Horace Mann Ins. Co. v. Barbara B.*, 4 Cal.4th 1076, 1081, 846 P.2d 797, 17 Cal.Rptr. 2d 210 (1993). Any doubt as to whether the facts give rise to a duty to defend is resolved in the insured's favor. *Id.* An insurer may have a duty to defend even though it

ultimately may have no obligation to indemnify, either because no damages are awarded in the underlying matter against the insured or because the actual judgment is for damages not covered under the policy. *Pardee Construction v. Ins. Co. of the West*, 77 Cal.App. 4th 1340, 1351, 92 Cal.Rptr.2d 443 (2000).

The duty to defend is a continuing one arising on tender of defense and lasting until the underlying lawsuit is concluded, *Lambert v. Commonwealth Land Title Ins. Co.*, 53 Cal.3d 1072, 1077, 1079, 282 Cal.Rptr. 445, 811 P.2d137 (1991), or until it has been shown that there is *no* potential for coverage. *Atlantic Mutual Insurance Co. v. J. Lamb, Inc.*, 100 Cal.App.4th 1017, 1033, 123 Cal.Rptr.2d 256 (2002), citing *Montrose Chem. Corp. v. Superior Court*, 6 Cal.4th 287, 295, 861 P.2d1153 (1993). Under California law the settled rule is that “[o]nce the insured has established the potential liability by reference to the factual allegations of the complaint, the terms of the policy, and any extrinsic evidence upon which the insured tends to rely, the insurer must assume its duty to defend **unless and until it can conclusively refute the potential.**” *Id.* at 299-300. (emphasis added). An insurer will be required to defend a suit where the evidence suggests, but does not conclusively establish, that the loss is not covered. *Id.*

Although a carrier remains free to seek declaratory relief, undisputed facts must conclusively show, as a matter of law, there is no potential for liability. *Id.* In order to prevail on a motion for the summary adjudication of the duty to defend, “the insured need only show that the underlying claim may fall within coverage; the insurer must prove it *cannot.*” *Id.* at 300.

A potential for coverage existed for the insured in the case *sub judice* as the facts in support of Fink’s outrage claim were defamatory. The insurer was on actual or constructive notice of these facts, all of which were in the King County Superior Court files. CP 41-43, 197-198. FIE had a duty to defend its insured as Fink could have amended her counterclaim to allege causes of action covered by the policy. FIE never conclusively showed, as a matter of law, that there was no potential for liability. Therefore, at no time was this duty extinguished. FIE failed to defend its insured, Terry Parks, breaching its duty to defend as a matter of law.

- A. Fink’s Complaint did not need to specifically state, as a cause of action, one of the enumerated offenses in the subject policy’s “Personal Liability” coverage grant, to trigger Respondent’s duty to defend.

FIE asserts Fink was required to plead one of the enumerated personal injury offenses in the insured’s policy to

trigger its duty to defend. (Respondent's Brief at 23) This is incorrect.

Courts do not examine only the pleaded word but the potential liability created by the suit. *Gray*, 65 Cal.2d at 276. Thus, the scope of the duty does not depend on the labels given to the causes of action in the third party complaint. Instead, it rests on whether the alleged facts or known extrinsic facts reveal a possibility that the claim may be covered by the policy. *Atlantic Mutual Ins. Co. v. J. Lamb, Inc.*, 100 Cal.App.4th 1017, 1034 (2002). The duty to defend "arises when the facts alleged in the underlying complaint give rise to a potentially covered claim regardless of the technical legal cause pleaded by the third party." *Barnett*, 90 Cal.App.4th at 510.

The law does not require an enumerated offense under a policy to be plead in the underlying claim to create duty to defend. However, FIE contends that "Personal Injury" coverage, under Park's particular policy, only applies to liability for injury that arises out of the commission of certain enumerated offenses (Respondent's Brief at 23). FIE goes on to say that at the time of tender, Fink's counterclaim only contained the allegation of "Outrage", an offense not enumerated in the subject policy's

“Personal Liability” coverage. (Respondent’s Brief at 24). Although FIE recognizes that “libel, slander, and defamation” can be implicated in a Claim for Outrage, it contends that if the specific enumerated act is not plead, it is not covered. (Respondent’s Brief at 23-24).

A case on point factually and legally with the instant dispute is *Billings v. Commerce Insurance Company*, 936 N.E.2d 408 (Mass. 2010). There, the Massachusetts Supreme Court addressed the issue of whether an insurance company has a duty to defend a complaint filed against its insured alleging that the insured was “spreading rumors” as part of a claim for intentional infliction of emotional distress. The court stated as follows:

An insured has a duty to defend an insured when the allegations in a complaint are reasonably susceptible of interpretation that states or roughly sketches a claim covered by the policy term. *Billings* at 414.

In response to the argument by the insurer that the complaint failed to specifically plead a claim for defamation, libel or slander, the court stated that a theory pleaded in a complaint is not decisive in determining whether it is reasonably susceptible of an interpretation that states or roughly sketches a claim for damages because of “personal injury” arising from libel, slander or

defamation of character. The court explained its reasoning as follows:

The process is not one of looking at the legal theory enunciated by the pleader but of “envisaging what kinds of losses may be proved as lying within the range the allegations of the complaint, and then seeing whether any such loss fits the expectation of the policy. *Billings* at 415.

The court then concluded that the allegations in the complaint that the insured had “spread rumors that his neighbors would fill wetlands and build houses in a marsh” triggered defense. Although pleaded as a claim for intentional infliction of emotional distress (outrage), it was reasonably susceptible of an interpretation that roughly sketched a claim of libel, slander, or defamation defense or which is covered under the terms of the policy.

While this authority is from Massachusetts, the legal standard employed there is identical to the standard to be applied under California law in this dispute.

As discussed above, the law is quite clear that even if the cause of action plead is not a covered claim, the insurer still has a duty to defend so long as alleged facts or known extrinsic facts reveal a possibility that the claim may be covered by the policy.

FIE knew there was a possibility of a claim that may be covered by the policy.

Notice of the lawsuit was provided by the insured to Defendant in a timely manner on July 5, 2011. CP 41, 365. On July 13, 2011 the insurance company accepted defense of the claim and retained Seattle attorney Polly Becker of Helsell Fetterman to defend its insured. CP 42, 367, 369. Ms. Becker wrote the company on July 15, 2011 indicating she would keep the company apprised of future developments. CP 369. Attorney Vic Lam, who was defending the insured, provided Ms. Becker with all pleadings filed until that time including Fink's ER 904 submissions and Fink's Declarations. CP 42. In her declarations Fink alleges:

- (1) Email that had been sent by the insured to Judge Trickey that defamed Fink. See Appellant's opening brief at A10,A25; CP 197-237.
- (2) Derogatory comments posted to Parks and other web sites on the internet. See Appellant's opening brief at A25; CP 184, 259-261.
- (3) Cartoons and an altered comic strip (published to illustrator Forst) that defamed Fink. CP 137, 138.

The contents of the court file at the time of tender including Fink's declaration and ER 904 submissions alerted FIE to a

potential defamation claim. CP 42, 197-198, 259-261. FIE had a Duty to Defend.

- B. Fink claimed Park's communication(s) had been published to third parties, giving rise to a potentially covered claim and triggering Respondent's duty to defend.

FIE alleges there were no allegations known to it at the time of tender that rise to the level of "Libel, slander, Defamation of Character," because no communication was ever published to third parties. (Respondent's Brief at 24).

Fink made declarations that were provided to FIE's counsel and were available to FIE in the King County Superior Court files at the time of tender. CP 42. In her declarations Fink alleges:

- (1) Email that had been sent by the insured to Judge Trickey that defamed Fink. See Appellant's opening brief at A10,A25; CP 197-237.
- (2) Derogatory comments posted to Parks' and other web sites on the internet. See Appellant's opening Brief at A25; CP 184, 259-261.
- (3) Cartoons and an altered comic strip (published to illustrator Forst) that defamed Fink. CP 137-138.

Fink's declaration alerted FIE of defamatory statements made and published to third parties, triggering a potential defamation claim. FIE had a duty to defend.

To constitute a publication it is necessary that the defamatory matter be communicated to someone other than the person being defamed. Restatement (Second) of Torts, 577, Comment (b) (1977). Where the underlying complaint alleges publication to third persons, and the content of the statements are allegedly disparaging, those allegations are sufficient to give rise to a potentially covered claim. The underlying complaint does not have to allege all the elements necessary to state a cause of action for defamation. *Barnett 90 Cal.App.4<sup>th</sup>*, at 510, fn 5.

C. Extrinsic facts were known, or should have been known, that triggered FIE's duty to defend.

FIE asserts its duty to defend was not triggered, because extrinsic facts were not known to it at the time of tender. (Respondent's Brief at 24)

FIE relies heavily on *Gunderson v. Fire Ins. Exchange*, 37 Cal.App.4th 1106, 44 Cal. Rptr. 2d 272 (1995), to demonstrate that it properly denied defense based solely on the evidence available at the time of tender. (Respondent's Brief at 24-28). This argument

misapplies *Gunderson*. *Gunderson* was a bad faith case where the insured sued his insurer for unreasonably denying coverage. *Atlantic Mutual Insurance Co.*, 100 Cal.App.4th at 1039, citing *Gunderson v. Fire Ins. Exchange*, 37 Cal.App.4th at 1108. “[Additionally], the insurer did not have any access to any evidence suggesting that the claims in the underlying complaint triggered coverage.” *Id.* Shortly after the insured settled the underlying litigation, he provided his insurer with evidence suggesting that it had a duty to defend.” *Atlantic Mutual Insurance Co.* 100 Cal.App.4th at 1039, citing *Gunderson v. Fire Ins. Exchange*, 37 Cal.App.4th at 1117-18. The court held that because the insured had not provided his insurer with this evidence until after the underlying case had settled, he could not argue that the insurer’s denial was unreasonable and amounted to bad faith. *Id.*

This case is quite different. Notice of the lawsuit was provided by the insured to Defendant in a timely manner on July 5, 2011. CP 41, 365. On July 13, 2011 the insurance company accepted defense of the claim and retained Seattle attorney Polly Becker of Helsell Fetterman to defend its insured. CP 42, 367. Ms. Becker wrote the company on July 15, 2011 indicating she would keep the company apprised of future developments. CP 369.

Attorney Vic Lam, who was defending the insured, provided Ms. Becker with all pleadings filed until that time including Fink's ER 904 submissions and her Declarations. CP 42. On August 16, 2011 the insurance company issued a letter denying coverage of the claim under its policy. CP 371-375.

FIE, at all times, had access to extrinsic evidence showing a potential for liability. It chose to ignore it.

Constructive notice has been codified by the legislature in California. Section 19 of the California Civil Code reads as follows: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, *has constructive notice of the fact itself* in all cases in which, by prosecuting such inquiry, he might have learned such fact." (emphasis added) Cal. Civ. Code 19.

California courts also recognize constructive and implied notice stating as follows:

Given the appropriate circumstances, the law will charge a party with notice of all those facts which he might have ascertained had he diligently pursued the requisite inquiry. *California Shoppers v. Royal Globe*, 175 175 Cal.App.3d 1, 36, 221 Cal.Rptr. 171 (1985) (questioned on other grounds); see also Cal.Civ.Code, § 19 defining constructive notice; and *Sterling v. Title Ins. & Trust Co.*, 53 Cal.App.2d 736, 748-749, 128 P.2d

367 (1942) (citing cases in which parties are charged with constructive notice because their situations impose a duty to pursue the inquiry suggested.). Most commonly where the doctrine of implied notice is applied, “the party chargeable with notice has had a specific duty to perform which requires him to inform himself of pertinent facts or has a had a right involved, the protection of which has required that he proceed with diligence and as a person of reasonable prudence would proceed to ascertain the facts affecting his right.” *Sterling v. Title Ins. & Trust Co.*, 53 Cal.App.2d 736, 749 (1942). “The circumstances must be such that the inquiry becomes a duty, and the failure to make it is a negligent omission.” *Id.*

In *California Shoppers*, a duty to defend case, the court recognized that an insurer has a contractual duty to the insured and thus a duty to investigate under the doctrine of constructive and implied notice. *California Shoppers v. Royal Globe*, 175 Cal.App.3d at 37 (1985). The contractual duty imposed by the terms of insurance policy called on the claims manager to investigate when a summons and complaint was tendered for defense. The court held, if he had made this further inquiry, he would have discovered facts establishing a defense was owed. *California Shoppers* confirms constructive notice applies when evaluating the contractual duty to defend. *Id.*

Here, FIE owed a contractual duty to its insured to investigate and review the King County Superior Court files, and

the ER 904 documents, including Fink's declarations, provided to its counsel. Instead it ignored these facts and focused solely on the face of the counterclaim.

FIE did not properly consider extrinsic facts known to it before refusing to defend Parks.

**II. FINK'S ER 904 SUBMISSIONS AND ADDITIONAL DOCUMENTS AVAILABLE TO FIE IN THE KING COUNTY SUPERIOR COURT FILES WERE SUFFICIENT TO GIVE RISE TO A POTENTIALLY COVERED CLAIM.**

FIE asserts additional documents on which the insured now relies did not provide a potential for a defamation claim. (Respondent's Brief at 34). These documents raised the possibility of Fink's counterclaim falling within policy coverage. FIE was under a duty to defend until such time as they could prove conclusively it did not.

**A. FIE is incorrect in asserting it was relieved of its obligation to defend Appellant because the Avvo.com communication was never published to a third party.**

FIE asserts the Avvo.com communication does not provide a basis for a defamation claim because it was never published. (Respondent's Brief at 34). We disagree.

The insured need only show that that the underlying claim may fall within policy coverage; the insurer must prove it cannot to extinguish its duty to defend. *Montrose Chemical*, 6 Cal.4<sup>th</sup> at 300. "Any doubt as to whether the facts establish [or defeat] the

existence of the defense must be resolved in the insured's favor." *Id.* "Once the insured has established a potential liability by *factual reference* to the factual allegations of the complaint, the terms of the policy, and any extrinsic evidence upon which the insured intends to rely, the insurer must assume the duty to defend unless and until it can conclusively refute the potential." (emphasis added) *Montrose*, 6 Cal.4th at 298-99. If there is a possibility that facts exist that would excuse the duty to defend (publication), the insured needs to investigate that possibility before it refuses to defend its insurer. It is bad faith to wait until after an insured sues its insurer. Once that possibility of coverage has been raised... then the insurer may defeat such claim of coverage by extrinsic evidence, but only where 'such evidence presents *undisputed* facts which *conclusively* eliminate a potential for liability. (emphasis added) *Montrose Chem. Corp. v. Superior Court*, 6 Cal.4th 287, 298-99 (1993).

"Any doubt as to whether the facts give rise to a duty to defend is resolved in the insured's favor." *Horace Mann Ins. Co. v. Barbara B.*, Cal.4th 1076, 1081 (1993).

FIE was required to prove that the Avvo communication was not published *before* withdrawing its defense of its insured.

Any investigation done after Parks filed suit against FIE that may have shown it was not published is moot. At issue is FIE's refusal to defend when there was a possibility of liability.

B. FIE is incorrect in asserting that the letter sent to Judge Trickey does provide a potential basis for a defamation claim. Immunity was a defense FIE should have asserted on behalf of its insured.

FIE asserts the letter to Judge Trickey does not provide a basis for a defamation claim because the litigation privilege provided absolute immunity. (Respondent's Brief at 35). We disagree. Immunity is a defense FIE should have asserted on behalf of its insured. It is not a basis to refuse to defend insured's claim.<sup>1</sup>

The litigation privilege applies to any publication required or permitted *in the course of a judicial proceeding to achieve the objects of the litigation*. [emphasis added]. (Respondent's Brief at 35). The privilege applies to any communication:

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<sup>1</sup> "The fact that the insurer may have known of a good defense, even an iron clad one, to the [underlying] claim [does] not relieve it of its obligation to defend its insured." *CNA Casualty of Ca. v. Seaboard Surety Co.*, 176 Cal.App.3d 598, 609, fn. 4, 222 Cal.Reptr. 171 (1986) (criticized on other grounds).

- (1) made in a judicial or quasi-judicial proceeding;
- (2) by litigants or other participants authorized by law;
- (3) to achieve the objects of the litigation; and
- (4) that have some connection or logical relation to the action. *Rusheen v. Cohen*, 4 Cal.App. 4th 1048, 1057, 39 Cal. Rptr.3d 516, 128 P.3d 17 (2006).

However, FIE incorrectly asserts that Park's email communication was related to a judicial proceeding in any true sense. A final judgment, in the underlying will contest proceeding had already been entered (the TEDRA litigation) and the proceeding was over. CP 197-237. The email (consisting of 34 printed pages) briefly thanked the judge in the opening, "I'd like to thank you for your expertise, time . . .", and then proceeded to make derogatory remarks for the next 30 some pages about Fink, members of the legal community, and other people, culminating in threats. CP 203-237. The email was not in any manner made in the "course of a judicial proceeding to achieve the objects of litigation;" a requirement to make it absolutely immune from tort liability by the litigation privilege. see *Rusheen*, 37 Cal.4th at 1057. Although the privilege *may* extend to statements made after a trial or other proceedings, that privilege does not go so far as to

cover every statement made after litigation that makes reference to the prior litigation. It must be made with at least some purpose of achieving some objective related to the prior trial or proceeding. *Id.*

Parks made clear that it *was not* his intention [objective] to pursue or try and alter the outcome of the prior proceedings. He had no objective related to the prior probate litigation. He stated he needed to “just look out for myself and forget about anyone else . . .”, “I have no intention of carrying on with my civil case against lawyer j. fink . . . . As far as the grievance I filed against lawyer j. fink with the WA bar association, I have no interest in pursuing that any farther . . . would just be a waste of my time.” CP 203-237.

This email consisted of the rantings of an admittedly mentally ill man filled with derogatory remarks about Fink. CP 203-237. In the email, Parks stated, “My constant thoughts revolve around furious anger and vengeance. I know if I seek psychiatric help I would be institutionalized . . . .” CP 203-237.

The email sent to Judge Trickey was not absolutely immune from tort liability by the litigation privilege. It did not meet all factors enumerated by the *Rusheen* court as FIE contends. Although FIE brings up the *possibility* that the email is a privileged

communication; it is just that - a possibility. FIE did not conclusively prove that the published email was privileged. Therefore, it is well established FIE had a duty to defend until *all possibility* of liability was extinguished.<sup>2</sup>

- C. FIE incorrectly contends that the derogatory comments about Fink posted on websites and contained in the Fink's declaration and ER 904 submittals (referred to as the "Press Release") do not create a potential for a defamation claim.

FIE asserts Parks' "Press Releases" do not provide a basis for defamation claim because *appellant lacks evidence* that the press releases were published to a third party and do not specifically refer to Fink. (Respondent's Brief at 37). Fink stated that the "Press Release" did contain derogatory remarks about her and that it was posted on the internet. CP 198. She specifically testifies in her Declaration that the insured "... has not removed his derogatory comments about me from a website...." It is surprising that an insurer would argue that a sworn statement by a Plaintiff is not a basis for defense of an insured.

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<sup>2</sup> Immunity is a defense FIE should have asserted in its defense of its insured. "The fact that the insurer may have known of a good defense, even an iron clad one, to the [underlying] claim [does] not relieve it of its obligation to defend its insured." *CNA Casualty of Ca. v. Seaboard Surety Co.*, 176 Cal.App.3d 598 at fn. 4 (1986) (criticized on other grounds).

The insured need only show that that the underlying claim *may* fall within policy coverage; the insurer *must prove* it cannot to extinguish its duty to defend. *Montrose Chemical*, 6 Cal.4<sup>th</sup> at 300. “Any doubt as to whether the facts establish [or defeat] the existence of the defense must be resolved in the insured’s favor.” *Id.* “Once the insured has established a potential liability by *factual reference* to the factual allegations of the complaint, the terms of the policy, and any extrinsic evidence upon which the insured intends to , the insurer must assume the duty to defend unless and until it can conclusively refute the potential.” *Montrose*, 6 Cal.4<sup>th</sup> at 298-99. (emphasis added). If there is a possibility that facts exist that would make a claim invalid, insured needs to investigate that possibility before it refuses to defend insurer, not wait until after insured brings a claim against the insurer. *Atlantic Mutual Ins. Co. v. J. Lamb, Inc.*, 100 Cal.App.4<sup>th</sup> 1017, 1034 (2002). “Any doubt as to whether the facts give rise to a duty to defend is resolved in the insured’s favor.” *Horace Mann Ins. Co. v. Barbara B.*, Cal.4<sup>th</sup> 1076, 1081 (1993).

The Counterclaim was tendered to the insurer on July 2, 2011. The King County Superior Court files at that time included several declarations from Fink. One of those is attached in

Appellant's opening brief at A-7. CP 259-261. Fink declares she has lived in fear of the insured for years. She claims the insured sent derogatory mail and emails both to her work and home. *She notes the insured has posted threats on his website and to Avvo.com.* She attaches posts by the insured on his website as Exhibit A to her Declaration. CP 197-198, 259-261.

FIE was aware of the fact that its insured posted derogatory remarks to his web site on the worldwide internet, creating a potential for liability. FIE, was required to prove that the derogatory remarks Parks posted to his webpage on the internet was not published *before* refusing to defend its insured.

D. FIE ignores the evidence that the letter and card sent to fink were published to the illustrator.

FIE asserts the cartoons and altered comic strip, created by cartoonist, Bill Forst, provide a basis for defamation. We disagree.

The evidence available to FIE showed Parks did not draw the derogatory cartoons included in his letters to Fink. Bill Forst, a third party signed the illustrations. CP 137-138. Parks did not create the comic strip. Bill Forst did so. His name is on them. CP 137-138. For this third party (Bill Forst) to have created the

cartoon and altered the comic strip, the derogatory information first had to be given to him by Parks so that he could create the cartoon and alter the comic. Without this transfer of derogatory information from Parks to Forst, the cartoon and comic strip would not have been able to be created.

There is no question that in the creation of these illustrations, derogatory information passed between Parks and Forst. Fink alleges the fact that derogatory illustrations are about her – that’s sufficient.

E. FIE fails to conclusively show that the letter to “c. ecklund & wife,” was not defamatory.

FIE asserts the letter to Ecklund and the Halloween card do not provide a basis for a defamation claim. (Respondent’s Brief at 40) FIE contends that since, “there is no evidence whether Parks was referring to Fink when he vaguely referred to ‘all the greedy lawyers.’ . . . there is no evidence that Ecklund understood the intent”, FIE did not have to defend. This argument improperly shift the burden of defending to its insured. CP 164. It was not Parks responsibility to prove to FIE that these references were about Fink or that Ecklund understood the intent. Fink alleged

they were. There existed a *possibility*. These are questions of fact for a jury. It was FIE's responsibility (duty) to defend Parks based on this possibility until it could conclusively prove there was no possibility.

**III. THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, AND DISMISSING APPELLANT'S CAUSE OF ACTION FOR BAD FAITH.**

FIE asserts the trial properly granted its Motion for Summary Judgment and properly dismissed Appellant's cause of action for Bad Faith. We disagree.

FIE wrongfully denied coverage as a matter of law. *The insurance company must defend immediately, entirely, and prophylactically — without reimbursement — as long as a "bare potential" of coverage existed at the time the claim is made.* The information available to the insurance company demonstrated that the claim fell within the insurance coverage promise.

**IV. APPELLANT IS ENTITLED TO FEES PERSUANT TO RAP 18.1.**

Under the law of both Washington and California, an insurance company is responsible for payment of those attorney's fees incurred by

an insured in obtaining coverage that has been wrongfully denied. *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn. 2d 37,811 P. 2d 673 (1991). RAP 18.1 authorizes an award of fees if applicable law grants to a party the right to recover reasonable attorney's fees. Appellant is entitled to attorney's fees on appeal pursuant RAP 18.1 and the authority cited herein.

The insured is entitled to recover attorney's fees on appeal because the refusal of the insurer to defend its insured was unreasonable. *Brandt v. Superior Court*, 37 Cal.3d 813, 210 Cal.Rptr. 211, 693 P.2d 796 (1985). Under *Brandt*, the attorney's fees expended on this appeal have been entirely dedicated toward enforcing the insurance contract breached by Fire Insurance Exchange.

### **CONCLUSION**

This Court should hold that the insurance company wrongfully denied coverage as a matter of law.

**DATED** this 17<sup>th</sup> day of June, 2015

BROUGHTON LAW  
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