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NO. 72566-1-I

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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

Appellant,

v.

FIRE INSURANCE EXCHANGE,  
a California insurance company and Washington resident.

Respondent.

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**BRIEF OF RESPONDENT FIRE INSURANCE EXCHANGE**

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## I. INTRODUCTION

### A. Respondent's Motion for Summary Judgment of Dismissal.

The trial court properly granted Respondent's Motion for Summary Judgment and dismissed all claims asserted by appellant against Fire Insurance Exchange (FIE). FIE owed no duty to defend Terry Parks against claims asserted by Lynn Fink and Fink Law Group, PLLC (collectively, Fink) in *Parks v. Fink*, King County Cause No. 10-2-04520-1 SEA (the Underlying Lawsuit). Additionally, under California law,<sup>1</sup> the trial court properly found that appellant's claim for bad faith failed as a matter of law, because there was no potential for coverage.

Appellant is the assignee of claims from Terry and Elizabeth Parks (individually "Parks," collectively "Parkses"), who were insured under a policy issued by Fire Insurance Exchange (FIE) (the "Subject Policy"). Appellant erroneously claims Parks was entitled to a defense pursuant to the Subject Policy's Personal Liability coverage part, which affords coverage for "any injury arising from: ... (3) libel, slander, defamation of character."

Although appellant admits Fink never asserted any of the claims enumerated in the Subject Policy's "Personal Liability" coverage grant,

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<sup>1</sup> The parties agree that California law governs the insurance and policy-interpretation issues in this case. As a result, Respondent and Appellant both provide citations to California law on the legal issues to be addressed.

appellant erroneously contended that based on facts inherent in Fink's allegations concerning the tort of outrage, Fink *could have* asserted a claim for defamation, based on two – and only two – communications that Parks made to and about Fink. The first was quoted in Fink's counterclaim and comprised a single, *private* letter that Parks mailed to Fink. The second was contained in Fink's ER 904 disclosures and comprised a *private* e-mail sent from Parks to Fink through the Avvo.com website.<sup>2</sup> Fink never alleged that either communication was published to a third party.

Under California law, a communication, regardless of content, is not libel, slander or defamation unless it is published to a third person. Thus, relying on the undisputed facts, the trial court properly concluded that Fink never asserted a covered claim and none of the facts inherent in Fink's claim could have formed the basis for a covered claim. Accordingly, FIE properly denied Parks's claims, and the trial court properly granted FIE's motion for summary judgment.

**B. Appellant's Motion for Partial Summary Judgment.**

Appellant also appeals the trial court's denial of its cross motion for partial summary judgment. That appeal fails for two reasons.

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<sup>2</sup> The private Avvo.com e-mail was not known to FIE when Fink asserted claims against Parks in her counterclaim. That communication was not disclosed to FIE until four months later.

First, pursuant to RAP 2.2, the trial court's order denying appellant's Motion for Partial Summary Judgment is not appealable as a matter of right.

Second, appellant impermissibly attempts to rely on facts that, under California law, cannot give rise to a duty to defend. Under California law, an insurer's duty to defend cannot be triggered by extrinsic facts unless those facts were known by the insurer at the inception of the third party lawsuit. Until appellant filed its motion for partial summary judgment, it had never identified any communication or document that it contended was relevant in any way to coverage other than the two private communications referenced above. As discussed above, when Fink asserted her counterclaims against Parks, the only communication known to FIE was the private letter she quoted in her counterclaim pleading. Then, more than three years later and long after the subject claim had resolved, appellant filed its motion for partial summary judgment in this case and impermissibly attempted to rely on new, previously-unidentified extrinsic facts. In that motion, appellant, for the first time, asserted that Fink had alleged Parks authored other insulting communications that could have been a basis for a covered defamation claim. None of these additional communications provide any basis for a covered claim as a matter of law.

Appellant identified four categories of documents that it argues constitute defamatory statements made by Parks about Fink. Even if California law did not prohibit this type of speculation into what claims Fink might have brought (but did not), none of those documents could have triggered coverage under the Subject Policy. See § III.C at pp. 12-21 *infra*; § IV.C at pp. 34-40 *infra*. No other documents were ever communicated or published by Parks that could even conceivably form the basis of a defamation claim. Fink never asserted a defamation claim against Parks based on any of those documents, and Fink never sought damages for the publication of those documents. Prior to appellant's Motion for Partial Summary Judgment, *no one* had ever taken the position that those documents triggered coverage under the Subject Policy.

Accordingly, the trial court properly denied Appellant's Motion for Partial Summary Judgment.

**C. Appellant's Request for Fees.**

Appellant's request for fees is premised on its argument that this Court should reverse the trial court's order denying appellant's Motion for Partial Summary Judgment. As discussed above, that argument is defective both procedurally and substantively. As such, appellant is not entitled to fees pursuant to RAP 18.1.

This Court should affirm the trial court's order granting

Respondent's Motion for Summary Judgment of Dismissal and denying Appellant's Motion for Partial Summary Judgment.

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

1. Did the trial court properly grant FIE's Motion for Summary Judgment of Dismissal under California law, where (1) Fink never asserted against Parks any of the enumerated offenses contained in the Subject Policy's "Personal Liability" coverage grant; (2) none of the facts known to FIE at the inception of Fink's lawsuit against Parks could rise to the level of a covered claim; (3) appellant assigned no error to the trial court's dismissal of its extra-contractual claims; and (4) in the absence of coverage, appellant's extra-contractual claims fail as a matter of law?

2. Must this Court reject appellant's appeal of the trial court's order denying its Motion for Partial Summary Judgment, because pursuant to RAP 2.2, an order denying summary judgment is neither a Final Judgment nor a Decision Determining the Action?

3. Even if this Court considers appellant's appeal of the trial court's order denying its Motion for Partial Summary Judgment, did the trial court properly deny appellant's motion, because (1) the extrinsic facts upon which appellant relies were not known to FIE at the inception of Fink's claims against Parks; and (2) none of those extrinsic facts could rise

to the level of a defamation claim?

4. Must this court reject appellant's request for fees pursuant to RAP 18.1, where (1) appellant's request for fees is inextricably linked to its appeal regarding its Motion for Partial Summary Judgment; and (2) appellant's appeal regarding its motion is flawed both procedurally and substantively?

### **III. STATEMENT OF THE CASE**

#### **A. The Subject Policy.**

Appellant the Broughton Law Group (BLG) is the assignee of claims from FIE insureds, the Parkses. CP 2. Parks was an insured under the Subject Policy, a Protector Plus Homeowners Policy (no. 92470-41-14) issued by FIE for policy period 2/08/08 to 2/08/09. *Id.*; *see also* CP 412-463.

The Subject Policy's Personal Liability coverage grant provided in relevant part as follows:

We pay those damages which an insured becomes legally obligated to pay because of bodily injury, property damage or personal injury resulting from an occurrence to which this coverage applies. Personal injuries means any injury arising from:

- (1) False arrest, imprisonment, malicious prosecution and detention.
- (2) Wrongful eviction, entry, invasion of rights of privacy.

- (3) **Libel, slander, defamation of character.**
- (4) Discrimination because of race, color, religion or national origin. Liability prohibited by law is excluded. Fines and penalties imposed by law are covered.

At our expense and with attorneys of our choice, we will defend an insured against any covered claim or suit.

CP 427 (emphasis added).

The Subject Policy insured the Parks' residence, which is located in San Bruno, California, and afforded the Parks with coverage for liability as owners of that residence. CP 412-463.

**B. The Underlying Lawsuit.**

In 2006, Parks's relative, John J. Balko, Jr. ("Balko"), hired Janyce Fink and Fink Law Group PLLC (collectively "Fink") to prepare a new will. CP 466. In 2010, Parks filed suit in King County Superior Court against Fink for legal malpractice (the "Underlying Lawsuit"). CP 465-468. In response to that complaint, Fink filed a counterclaim in April 2011, against Parks alleging civil assault, the tort of outrage and frivolous litigation in violation of CR 11 and RCW 4.84.185. CP 470-475. Fink's counterclaim did not assert any causes of action for libel, slander or defamation. *Id.*

In July 2011, the court dismissed Parks's entire lawsuit and dismissed Fink's claim of civil assault and frivolous litigation. CP 477-

479; CP 481-484. This left Fink’s claim for the tort of outrage as the only remaining claim. *Id.*

**1. First alleged defamatory communication: a private letter from Parks to Fink, dated September 16, 2008.**

Fink’s outrage claim alleged that Parks had used insulting and threatening language. CR 470-475. Although she vaguely referred to “death threats and insults” (CP 474 at ¶ 36; Appellant’s Opening Brief at 3) and alleged that Parks had threatened her “[o]n several occasions” (CP 474 at ¶ 35), Fink identified only a single communication from Parks in her counterclaim (CP 474 at ¶ 35). *See* CP 470-475. That communication was a private letter dated September 16, 2008, that Parks mailed to Fink. CP 474 at ¶ 35. Fink’s counterclaim identified no other communication made by Parks. CP 470-475. While the September 16, 2008 letter is unquestionably vulgar and unseemly, the actual content of the communication is irrelevant here, because Fink’s counterclaim did not allege that the letter was ever published to a third party. *Id.* Appellant conceded in its deposition that Parks’s private letter to Fink was never published to a third party. CP 556 (lines 1-18). And, Fink never sought damages arising from any alleged publication of any threatening or insulting communications. CP 470-475.

On July 5, 2011, Parks tendered defense of the outrage claim to

FIE. CP 486. Appellant concedes that at the time of the tender, FIE had no reason to know of any other communications that Parks made that could have triggered coverage. CP 568 (lines 8-28), 569 (lines 14-17); *see also* CP 563-568.

Initially, FIE provided Parks with a defense subject to a full reservation of rights. CP 488, CP 490, CP 492-498. On July 13, 2011, FIE appointed Ms. Polly Becker of Helsell Fetterman to represent and defend Parks. CP 492-498, CP 500-501. Ms. Becker entered a Notice of Appearance in the Underlying Lawsuit on July 14, 2011.<sup>3</sup> CP 509 (at docket entry 216).

On August 8, 2011, FIE denied Parks's claim and declined to provide any further defense. CP 492-498. FIE stated that because there was no specific claim for defamation or any other "personal liability" and no allegations indicated that any threatening or insulting language had ever been published to a third party, coverage was not afforded under the Personal Liability coverage grant of the Subject Policy. *Id.*

**2. Second alleged defamatory communication: a private e-mail from Parks to Fink, dated September 26, 2008.**

Over the next six months, Parks, through his attorney BLG (the appellant), and FIE exchanged multiple letters disputing coverage. CP

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<sup>3</sup> Ms. Becker filed a Notice of Intent to Withdraw on September 12, 2011. CP 500-01.

517-553. FIE repeatedly asked Parks and appellant to provide any additional facts that could impact coverage. *Id.* FIE requested Parks and appellant identify *any* communications from Parks that had been published to third parties. *Id.* On November 16, 2011 (approximately 4 months after Fink’s claim had been tendered to FIE), Parks and Broughton identified one additional communication and claimed that it established publication of defamatory material and thus triggered coverage. CP 529-533; *see also* CP 570-571. The communication was a private e-mail sent from Parks to Fink on September 26, 2008. CP 529-533. The message stated, in part:

fink – BE WARNED THE MESSAGE BELOW  
CONTAINS THE TRUTH IT MAY BE HARMFUL TO  
YOUR LYING, EVIL, [sic] WAYS!!!

...

you know the truth, [sic] you destroyed the good natured,  
giving spirit of John Joseph Balko, Jr. – you destroyed his  
wishes, his intent, his plans, his dreams [sic]

you’re a lying, conniving, evil, selfish human being[.]

...

HAVE A HAPPY HALLOWEEN – BURN WITCH  
BURN

*Id.* Because the communication was sent via the Avvo.com website, appellant argued that the message had been “published.” *Id.* In the present litigation, however, appellant has conceded that Parks never published this e-mail to any third party. CP 580 (lines 3-17).

Q: [I]t's [appellant's] testimony ... that the documents that went through the Avvo.com site were not published or disclosed to third parties by Terry Parks, correct?

A: Correct.

CP 557 (lines 19-25); *see also* 580 (lines 1-18).

Appellant's admission that this e-mail was never published is not surprising, because in the Underlying Lawsuit, Fink herself never alleged that this e-mail was published to a third party. *Id.*; *see also* CP 470-475; CP 580 (lines 3-17). Moreover, Fink never alleged that this message constituted slander, libel or defamation. CP 470-475. Instead, Fink claimed only that this message was evidence of conduct that constituted "outrage." *Id.*

**3. Appellant conceded that no other communications by Parks about Fink triggered coverage.**

On November 29, 2011, appellant provided copies of Fink's ER 904 disclosures to FIE through its counsel. CP 537-538. Contained within those ER 904 disclosures, was the private Avvo.com e-mail dated September 26, 2008 discussed above. Neither Parks nor appellant ever took the position that any other document contained in Fink's ER 904 disclosures triggered coverage, CP 574 (lines 3-7); 574-575 (BLG dep. at 129:20 – 130:5), CP 576-577 (BLG dep. at 132:16-133:1), and prior to appellant's Motion for Partial Summary Judgment, neither Parks nor

appellant provided any other documents to FIE in support of Parks's claims for coverage. CP 578-579 (BLG dep. at 161:22 – 162:15). Thus, FIE did not know and had no reason to know of any documents relevant to coverage other than (1) the private letter dated September 16, 2008, as quoted in Fink's counterclaim; and (2) the private e-mail dated September 26, 2008, as contained in Fink's ER 904 disclosures until July 2, 2014.

**C. Documents Disclosed with Appellant's Motion for Partial Summary Judgment.**

Appellant filed its Motion for Partial Summary Judgment on July 2, 2014, more than three years after Parks initially tendered the subject claim and long after the claim had resolved. CP 22-40. In it, appellant, for the first time, contended that Fink alleged Parks authored other insulting communications contained within Fink's ER 904 disclosures that supported a covered, but un-asserted, defamation claim in the Underlying Litigation. *Id.*

**1. Letter dated September 11, 2008, to Judge Michael Trickey of King County Superior Court.**

Appellant alleges that “[t]he insured [Parks] sent a September 11, 2008 letter to the trial court after he lost his claims to probate an unwitnessed will in the underlying TEDRA dispute.” *See* Appellant's Brief at 13; *see also* CP 202-236. Appellant alleges that “[Parks] made

numerous potentially defamatory statements in that letter.” *See* Appellant’s Brief at 13 (citing CP 204, 214, 221, 235-236); *see also* Appellant’s Brief at 4 (citing CP 203-237 [sic]); *see also* CP 202-236.

The purpose of Mr. Parks’s letter to Judge Trickey was “to express his dissatisfaction” (CP 653, lines 2-3) at the probate case involving his cousin’s estate and “to request that Judge Trickey correct some errors that [Mr. Parks] felt had occurred” (CP 653, lines 7-10); *see also* CP 649-653 (BLG dep. at 207:25 – 211:10).

The letter was attached to an e-mail and sent to King County Superior Court via the “Customer Service Email, DJA.” CP 649 (lines 4-20). On September 23, 2008, a copy of it was forwarded to appellant. *Id.* But, no one ever notified FIE of the letter to Judge Trickey prior to appellant’s Motion for Partial Summary Judgment. CP 623-624 (BLG dep. at 86:23 – 87:6); CP 625 (lines 6-21); CP 626 (lines 21-25); CP 627-628 (BLG dep. at 161:21 – 162:15).

The appellant argues that “[t]his letter was known to the insurer (actually and constructively) as it was submitted by Fink in her declaration submitted in response to the insureds [sic] Motion for Summary Judgment filed in June 2011.” *See* Appellant’s Opening Brief at 13 (citing CP 197-198 [sic]). The document at CP 196-197 is a Declaration of Janyce Lynn Fink in Opposition to Parks’s Motion for Summary Judgment in the

Underlying Litigation. CP 196-197. In that declaration, Fink references the letter to Judge Trickey. *Id.* But nowhere in that declaration does it state that the letter was tendered to FIE. CP 196-197. And, appellant conceded in its own deposition that no one ever notified FIE of the letter to Judge Trickey prior to appellant's Motion for Summary Judgment in this case.

Q: The [appellant] never had a conversation with [FIE] about the Janyce Fink Declaration that contains the letter to Judge Trickey, correct?

A: Correct.

Q: And to [Appellant's] knowledge, no one had a conversation with [FIE] about the Janyce Fink Declaration that contains the letter to Judge Trickey, correct?

A: Correct.

CP 623-624 (BLG dep. at 86:23 – 87:6).

Q: Why didn't – you have stated that [appellant] or anyone else to [appellant's] knowledge never provided a copy of Ms. Fink's declaration and the attached letter to Judge Trickey to [FIE], right?

A: Um --.

Q: [Appellant] never provided a copy. No one else that [appellant] knows provided a copy of that to [FIE], correct? It's what you --

A: Correct.

Q: -- just testified to, I believe, twice now. Why not?

A: That's a good question. I thought that was – it seemed like a pretty relevant thing.

Q: So do you know why not?

A: No.

CP 625 (lines 7-21).

Thus, despite appellant's unsupported allegations, it is beyond dispute that no one provided the letter sent to Judge Trickey to FIE in connection with a claim for coverage under the policy's Personal Liability coverage prior to Appellant's own Motion for Summary Judgment in this case, which was filed on July 2, 2014.

## **2. Press Releases (undated).**

Appellant alleges that the insured “posted threats on his website” (Appellant's Opening Brief at 4), and that these threats constituted “‘derogatory statements’ about Fink” (*id.*), and that they were a “publically accessible statement ... via the Internet” (*id.* at 14 (citing CP 185-196 [sic])). Like the letter to Judge Trickey, printouts from this website were contained in Fink's ER 904 disclosures.<sup>4</sup>

On their face, the printouts, which are titled “Press Releases” (CP 184), were placed on a website for a charity called “Finding Our Children

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<sup>4</sup> As noted above, Ms. Fink's ER 904 documents were not provided to FIE until November 29, 2011 – four months after they were provided to Mr. Broughton and six months after Ms. Fink asserted her claims against Mr. Parks.

Under Stress” (F.O.C.U.S.).<sup>5</sup> CP 184-196. Appellant argues that the following statement refers to Ms. Fink:

[T]he attorney I hired to help me ... was lying, withholding information, failing to provide correct legal counsel, manipulating the interpretation of the law for his [sic] own financial benefit, [sic] abusing and exploiting me.

CP 193; *see also* Appellant Opening Brief at 14. In its own deposition testimony, however, appellant admitted that the references to this unnamed attorney were *not* about Ms. Fink at all. Instead, they were about Mr. Broughton!

Q: The first sentence of this second half of page 6 starts, “When I realized the attorney ... was lying, withholding information, failing to correct – provide correct legal counsel, manipulating the interpretation of the law for his own financial benefit.” Who was he talking about here? Assuming it’s Mr. Parks [who wrote this].

A: I think he is talking about Mr. Broughton in the probate case.

Q: So he is accusing Mr. Broughton of lying, withholding information, and failing to provide correct legal counsel?

A: Yeah. He didn’t get a favorable ruling on – on that probate challenge.

Q: Okay. So Mr. Parks is referring to Mr. Broughton in this –

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<sup>5</sup> According to the charity’s website, FOCUS is “an organization set – up [sic] in assisting families of the missing, by families with a missing loved one. By means of regional representatives, it’s [sic] purpose is to act as a resource to families of the missing and also to law enforcement.”

A: M-hmm.

Q: -- first three lines here. And then it continues, “For his own financial benefit.” And “his” there is referring to Mr. Broughton, right?

A: Yes.

Q: Okay. “Abusing and exploiting me, plus the judge in the case.” Do you follow where I am reading?

A: Yeah.

Q: “Didn’t allow a court date, rather made a ‘Summary Judgment’ ruling against my side of the case without consideration of any of the evidence I had or without any testimony from the dozens of witnesses I have, I became angry and vented my rage and frustration of being swindled and defrauded of the money and property my cousin Johnny Balko intended for me to administer.”

So far, all we are referring to is Mr. Broughton, correct?

A: Yeah.

CP 639-641 (BLG dep. at 190:24 – 192:8).

During the probate of Mr. Parks’s cousin’s estate, approximately “a dozen” attorneys were involved in the litigation. CP 642 (BLG dep. at 195:23 – 196:9). Appellant admitted that the press releases referencing the various attorneys – all of whom were unnamed – was confusing and that it was difficult to identify which attorneys were referenced. CP 642 (lines 8-12); CP 632 (lines 7-13); CP 644-646 (BLG dep. at 200:18 – 202:11).

Appellant admits it has no evidence regarding who authored the

press releases (CP 637-639), who posted it on the website (*id.*; *see also* CP 648), when it was posted (CP 647-648), whether it was posted for public access on the website (CP 646-647), whether a password was required to access the press release (CP 647), whether hyperlinks forwarded someone to the press release or if someone needed the full website address<sup>6</sup> to access it (*id.*), how long the press release remained on the internet (*id.*), when it was taken down from the website (CP 648), or who took it down (*id.*).

### **3. Cartoons and Altered “Non Sequitur” Comic Strip.**

Appellant also points to certain cartoons (CP 136-137) and comic strips (CP 134) contained in Fink’s ER 904 documents. Specifically, appellant alleges that “Fink’s ER 904 documentation ... suggests that the insured relayed potentially defamatory statements to illustrator Bill Forst so he could draw cartoons depicting Fink committing acts constituting malpractice extrinsic to the complaint.” *See* Appellant’s Opening Brief at 13 (citing CP 137 “(cartoon signed by ‘Wm Forst’)”). Appellant’s Opening Brief contains no other facts or arguments regarding these cartoons or comic strips and a review of the documents themselves reveals that they do not support appellant’s argument.

First, Mr. Parks was not the author of the cartoons; a cartoonist and

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<sup>6</sup> <http://www.threechildrenfocus.org/pressreleases.htm>

personal friend of his, Mr. William Forst, drew them. CP 629 (lines 1-3).  
Second, the subject cartoons were never sent to anyone other than Ms. Fink. CP 629 (lines 14-19); CP 633 (2-5).

Third, and most importantly, while Ms. Fink included the cartoons in her ER 904 documents and may have been insulted by those cartoons (authored by someone else), she never sought damages due to any defamatory communication made by *Parks*. CP 630-631 (BLG dep. at 169:25 – 170:9); CP 631-633 (BLG dep. at 170:18 – 172:1).

Mr. Parks purportedly mailed these cartoons to Ms. Fink. In doing so, he allegedly attached a “Non Sequitur” comic strip<sup>7</sup> that he had altered to read as follows: “How to stop a ~~corporate~~ any lawyer in Washington.” CP 134, 620. Appellant has admitted that it *assumes* Mr. Parks made these alterations, and has further admitted that its assumption is based on pure conjecture. CP 634-635.

More importantly, even if Mr. Parks made the alterations at issue, the comic strip was never published or disclosed to any third party. CP 636. Even if the comic strip had been published or disclosed, it does not name, identify or reference Ms. Fink. CP 134. Moreover, even if it was somehow a reference to Ms. Fink, there is no evidence that any third party that saw the altered comic strip had any understanding of how it applied to

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<sup>7</sup> The comic strip was first provided to Fire Insurance Exchange on November 29, 2011.

Ms. Fink, if at all. *Id.*

**4. Letter to “c. ecklund & wife” (undated) and Halloween Card (undated).**

Contained within Ms. Fink’s ER 904 documents was a letter purportedly written by Mr. Parks and sent to “c. ecklund & wife.”<sup>8,9</sup> CP 163, 621-622. The letter is a one-page, typed, single-spaced letter to Mr. Craig Ecklund, who was a primary beneficiary of Mr. Balko’s will and ultimately inherited the bulk of Mr. Balko’s estate. *Id.* The vast majority of the letter accuses Mr. Ecklund of engaging in deceptive behavior in order to obtain the inheritance at issue. *Id.* At the very end of the letter, Mr. Parks includes the following sentence: “You and all the greedy lawyers involved in this have ruined my life.” CP 163. Appellant argues that because Ms. Fink was one of many attorneys involved in the probate litigation, the letter must necessarily have referenced her and, thus, constitutes defamation.

This argument fails for several reasons. The letter never identified Ms. Fink. *Id.* There is no evidence that Mr. Ecklund or his wife knew Ms. Fink or her law firm. *Id.* Even if they did, there is no evidence that Mr. Ecklund or his wife knew that Ms. Fink was involved in the litigation. *Id.*

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<sup>8</sup> The letter to “c. ecklund” is not referenced in Appellant’s Opening Brief. However, appellant designated the letter in its Designation of Clerk’s Papers. *See* CP 163.

<sup>9</sup> This document was provided to FIE for the very first time on November 29, 2011.

Even if they did, there is no evidence that Mr. Ecklund and his wife knew that the comment (“all the greedy lawyers”) applied to Ms. Fink in any way. *Id.*

In addition to the letter addressed to “c. ecklund,” Fink’s ER 904 documents also include a Halloween Card.<sup>10,11</sup> CP 172-173. The card does not name or refer to Ms. Fink. *Id.* Instead, the front cover of the card states “It’s Halloween” (CP 172), and the pre-printed text inside the card states “Let the Booing Begin!” (CP 173). Hand written inside the card are the following comments:

“Belief” or “Believes” denotes that a person involved actually supposed the fact in question to be true. A persons [sic] belief may be inferred from circumstances.

Circumstances determine the truth!

I “know”, “knowingly” & “known” or knows denotes actual knowledge of the fact in question. A person’s knowledge may be inferred form circumstances.

Please post “Endangered Missing Person” flyer.

CP 173. No other comments were included in the card. *Id.* The card is unsigned and undated. *Id.* There is no evidence that this card was published or disclosed to any third party. CP 172-173.

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<sup>10</sup> The Halloween Card is not referenced in Appellant’s Opening Brief. However, appellant designated the card in its Designation of Clerk’s Papers. *See* CP 172-173.

<sup>11</sup> This document was provided to FIE for the very first time on November 29, 2011.

#### IV. ARGUMENT

FIE was entitled to judgment as a matter of law because appellant failed to present evidence sufficient to raise a genuine issue of material fact in support of its coverage and extra-contractual claims. An appellate court reviews an order granting summary judgment *de novo*. *Green v. Am. Pharmaceutical Co.*, 136 Wn.2d 87, 94, 960 P.2d 912 (1998). This court may affirm a judgment on any ground established by the pleadings and supported by the evidence. *Jenson v. Scribner*, 57 Wn. App. 478, 480, 789 P.2d 306 (1990).

**A. The trial court’s order denying appellant’s Motion for Partial Summary Judgment is not appealable as a matter of right.**

RAP 2.2 delineates the only decisions of the superior court which may be appealed as a matter of right. That list of decisions does not include the trial court’s order denying appellant’s Motion for Partial Summary Judgment.

An order denying summary judgment is not a final judgment within the meaning of RAP 2.2(1). *Johnson v. Rothstein*, 52 Wn. App. 303, 305, 759 P.2d 471 (1988) (citing *Morgan v. American Univ.*, 534 A.2d 323, 327 (D. C. App. 1987)).

Nor is it a Decision Determining the Action, defined by RAP 2.2(a)(3) as “[a]ny written decision affecting a substantive right ... which in effect determines the action and prevents a final judgment or discontinues the action.” RAP 2.2(a)(3); *Johnson*, 52 Wn. App. at 305-06.

The trial court's order denying appellant's Motion for Partial Summary Judgment is not appealable as a matter of right. The only appealable decision in this case is the trial court's granting of appellee's Motion for Summary Judgment. That decision should be affirmed.

**B. Fink asserted no covered claims against Parks under the "Personal Liability" coverage grant of the Subject Policy.**

**1. Fink's Complaint included none of the enumerated offenses in the Subject Policy's "Personal Liability" Coverage Grant.**

"Personal Injury" coverage applies to liability for injury that arises out of the commission of certain enumerated acts or offenses. *Fibreboard Corp. v. Hartford Accident & Indem. Co.*, 16 Cal. App. 4th 492, 511, 20 Cal. Rptr. 2d 376 (1993) (citing 3 Cal. Insurance Law & Practice (1992) sec. 49.51[1], pp. 49-111 – 49-112; *Titan Holdings Syndicate, Inc. v. City of Keene, N.H.*, 898 F.2d 265, 269 (1st Cir. 1990)). Coverage thus is triggered by the offense, not the injury or damage that a plaintiff suffers. *Id.*

The personal injury coverage in the FIE policy requires that the personal injury arise from one of four general categories of enumerated offenses.

We pay those damages which an insured becomes legally obligated to pay because of bodily injury, property damage or personal injury resulting from an occurrence to which this coverage applies. Personal injury means any injury arising from:

(1) false arrest, imprisonment, malicious prosecution and detention.

(2) wrongful eviction, entry, invasion of rights of privacy.

**(3) libel, slander, defamation of character.**

(4) discrimination because of race, color, religion or national origin. Liability prohibited by law is excluded. Fines and penalties imposed by law are covered.

At our expense and with attorneys of our choice, we will defend an insured against any covered claim or suit.

CP 427 (emphasis added). The third category, “libel, slander, defamation of character,” is the only category of offense implicated by the underlying claim.

It is undisputed that the only claims included in Fink’s counterclaim were Civil Assault, Outrage and Malicious Prosecution. At the time of tender, only the claim of outrage remained. None of these “offenses” are enumerated in the Subject Policy’s “Personal Liability” coverage grant and no covered claim was ever asserted against Parks and by the time of tender, only the claim of Outrage remained.

**2. Of those allegations known to FIE at the inception of Fink’s claims against Parks, none rise to the level of “Libel, Slander, Defamation of Character,” because no communication was ever published to third parties.**

**a. An insurer’s duty to defend cannot be triggered by extrinsic facts, unless those facts were known by the insurer at the inception of the third party lawsuit.**

Under California law, a liability insurer must defend a suit that makes claims potentially within the coverage of the policy. *Gunderson v. Fire Ins. Exch.*, 37 Cal. App. 4th 1106, 1113, 44 Cal. Rptr. 2d 272 (1995) (citing *Montrose Chem. Corp. v. Superior Court*, 6 Cal. 4th 287, 861 P.2d

1153 (1993); *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 419 P.2d 168 (1966)). Facts extrinsic to the allegations of the complaint may give rise to a duty to defend when they reveal a *possibility* that the claim may be covered by the terms of the insurance policy. *Gunderson*, 37 Cal. App. 4th at 1113-14 (citing *Montrose Chem. Corp.*, 6 Cal. 4th 287; *Gray*, 65 Cal. 2d, 264).

Nevertheless, the California Supreme Court has also repeatedly affirmed that

[E]xtrinsic facts which may create a duty to defend must be **known by the insurer** at the **inception** of the third party lawsuit; and that the duty to defend ceases as soon as it has been shown that there is no potential for coverage. ... Thus, contrary to appellants' position, an insurer does not have a continuing duty to investigate whether there is a potential for coverage. If it has made an informed decision on the basis of the third party complaint and the extrinsic facts **known** to it at the time of tender that there is no potential for coverage, the insurer may refuse to defend the lawsuit.

*Gunderson*, 37 Cal. App. 4th at 1114 (citing *Montrose Chem. Corp.*, 6 Cal. 4th at 295-296; *Gray*, 65 Cal. 2d at 276; *Hurley Constr. Co. v. State Farm Fire & Cas. Co.*, 10 Cal. App. 4th 533, 538-539, 12 Cal. Rptr. 2d 629 (1992); *Saylin v. California Ins. Guarantee Assn.*, 179 Cal. App. 3d 256, 263, 224 Cal. Rptr. 493 (Ct. App. 1986); *State Farm Mut. Auto. Ins. Co. v. Flynt*, 17 Cal. App. 3d 538, 548, 95 Cal. Rptr. 296 (Ct. App. 1971)) (emphasis in original).

An insured may not create a duty to defend by speculating about extrinsic “facts” regarding potential liability or ways in which the third

party claimant might amend its complaint at some future date. *Gunderson*, 37 Cal. App. 4th at 1114. That approach misapplies the principle of “potential liability” under an insurance policy. *Id.* (citing *Hurley Constr. Co.*, 10 Cal. App. 4th at 538). *Gunderson* and *Hurley* both illustrate the significant limitations placed on how extrinsic facts may be applied to determine a liability insurer’s duty to defend.

**i. *Gunderson v. Fire Ins. Exch.*, 37 Cal. App. 4th 1106, 44 Cal. Rptr. 2d 272 (1995).**

In *Gunderson*,<sup>12</sup> the insureds brought an action against their homeowners insurer for breach of contract and tortious bad faith arising from the insurer’s denial of the insureds’ tender of defense of a third party suit. The third party complaint sought injunctive and declaratory relief and to quiet title to property over which the insureds claimed an easement. Coverage was triggered under the Subject Policy only when a third party suffered tangible property damage or bodily injury that the insureds neither expected nor intended to occur. The trial court granted summary judgment for the insurer on the ground that there was no potential for coverage under the policy.

The Court of Appeal affirmed. It held that the trial court properly granted summary judgment for the insurer. Although the insureds claimed the third party *could* have sought damages based on the insureds’ removal of a fence from the claimed easement, this property damage would not

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<sup>12</sup> *Gunderson* remains controlling law in California. See *Ulta Salon, Cosmetics & Fragrance, Inc. v. Travelers Prop. Cas. Co. of Am.*, 197 Cal. App. 4th 424, 127 Cal. Rptr. 3d 444 (2011).

have been unexpected or unintended by the insureds, and allegations concerning it were never incorporated into the third-party complaint. Moreover, most of the alleged extrinsic evidence of a potential damage claim arose after the complaint was filed and the defense tendered to the insurer.

[The insureds] assert that there was a potential for liability under the Policy because [claimant] **could** have made a claim for “physical injury to or destruction of tangible property” in connection with the fence across a portion of the easement which [insureds] removed at the outset of the dispute. They point to complaints made in letters by [claimant’s] attorney; [claimant’s] interrogatory responses mentioning “property damage” based on removal of the fence and damage to shrubbery and trees; deposition testimony by [claimant] discussing [insureds’] removal of the fence; [claimant’s] assertion as an undisputed fact that the fence had obstructed the easement until [insureds] removed it; and [insured’s] deposition statement that when she tendered the [claimant’s] complaint to [the insurer], an unidentified “elderly man” remarked “[o]nly if there was a fence involved.” On this basis they contend that [the insurer] had sufficient extrinsic evidence of a potential property damage claim under the Policy to create a duty to defend the [claimant’s] lawsuit.

The contention fails for several reasons. ...

[N]one of the allegations concerning damage to the fence, as found in the several letters of [claimant’s] attorney and in her responses to discovery requests, were **ever** incorporated in her complaint against [insureds].

...

[M]ost of this alleged extrinsic evidence of a potential claim for property damage arose after [claimant’s] complaint was filed and tendered to [the insurer] for defense. [The insurer] was entitled to base its determination of whether or not to accept the tender on the facts available

to it at that time. Once it determined on the basis of the lawsuit itself and the facts known to it at that time that there was no potential for coverage, it did not have a continuing duty to investigate or monitor the lawsuit to see if the third party later made some new claim, not found in the original law suit. Had any of these statements in the letters from [claimant's] attorney or in discovery actually raised a potential claim for property damage covered under the Policy, [the insureds] could have notified [the insurer] at the time. [The insureds] never brought any of this information to [the insurer's] attention. In the absence of any new tender of defense from [the insureds], [the insurer] had no way to know of these new extrinsic facts, and no obligation to find them out by itself.

*Id.* at 1115-17 (citing *Hurley*, 10 Cal. App. 4th at 538-539; *Saylin*, 179 Cal. App. 3d at 263; *Flynt*, 17 Cal. App. 3d at 548) (citations omitted) (emphasis in original)).

ii. ***Hurley Constr. Co. v. State Farm Fire & Cas. Co.*, 10 Cal. App. 4th 533, 12 Cal. Rptr. 2d 629 (1992).**

*Gunderson* relied, in part, on *Hurley*. In that case, a general contractor furnished insurance repair services to the owners of homes and businesses insured by Fireman's Fund Insurance Company. 10 Cal. App. 4th at 536. Fireman's Fund filed suit against the general contractor for fraud, negligent misrepresentation, and breach of contract based on the allegation that the contractor conspired with a Fireman's Fund property claims supervisor and other contractors to overcharge for the repair and restoration of four properties. *Id.* at 536-37. The contractor tendered defense of the case to State Farm. *Id.* at 537. State Farm denied coverage, prompting the contractor's counsel to send eight demand letters to State Farm insisting that State Farm provide a defense. *Id.* The contractor's

counsel asserted that the Fireman’s Fund action could potentially become an action for property damage and bodily injury, thereby triggering coverage. *Id.* State Farm still denied coverage. *Id.*

The contractor filed suit against State Farm alleging breach of contract and bad faith. *Id.* State Farm filed a motion for summary judgment, which was granted, and the contractor appealed. *Id.* at 537-38. On appeal, the California Court of Appeals affirmed the trial court’s order dismissing the contractor’s complaint. *Id.* at 541. The appellate court noted that the basis for the contractor’s action against State Farm was the argument that “the insurer must furnish a defense when it learns of facts from **any** source that create the potential of liability under its policy.” *Id.* at 538. But, the appellate court found that the Fireman’s Fund complaint, on its face, alleged no facts showing a potential for coverage. *Id.* **“The extraneous ‘facts’ regarding potential liability came from the contractor’s counsel who speculated about how Fireman’s Fund might amend its complaint at some future date.”** *Id.* The appellate court stated that the contractor had misconstrued the concept of “potential liability.” *Id.*

Although an insurer’s duty to defend is broader than the duty to indemnify, the duty to defend depends upon facts *known* to the insurer at the inception of the suit<sup>13</sup>. ... Our

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<sup>13</sup> Here, the date of tender was the functional equivalent of “the inception of the suit.” Fink filed her counterclaim against Parks in April 2011. On July 5, 2011 after the trial court had dismissed all of Fink’s claims except the Tort of Outrage, Parks tendered the defense of the claim to FIE. As a result, FIE has applied the date of tender as the operative “inception of the suit” for purposes of analyzing its duty to defend.

Supreme Court, anticipating imaginative counsel and the likelihood of artful drafting, has indicated that a third party is not the arbiter of the policy's coverage. A corollary to this rule is that **the insured may not speculate about unpled third party claims to manufacture coverage.**

*Id.* (citations omitted) (emphasis in original) (emphasis added).

**iii. FIE properly considered all extrinsic facts known to it at the inception of Fink's claims against Parks.**

As required by California law, FIE properly considered all extrinsic facts known to it **at the inception of Fink's claims against Parks.** *Gunderson*, 37 Cal. App. 4th at 1114; *Hurley Constr. Co.*, 10 Cal. App. 4th at 538. Parks tendered Fink's claims to FIE on July 5, 2011. Appellant concedes that, as of that date, only the private letter dated September 16, 2008 had been provided to FIE. Appellant concedes that FIE did not know, and had no reason to know, of any other communications that Parks made to or about Fink as of the date the claim was tendered. CP 568. Under California law, this private communication comprises the only "facts" that can implicate FIE's duty to defend under the Subject Policy's Personal Liability coverage. *Gunderson*, 37 Cal. App. 4th at 1114; *Hurley Constr. Co.*, 10 Cal. App. 4th at 538

**b. No coverage was afforded under the "Personal Liability" coverage grant, because Fink never alleged that Parks's communication had been published to third parties.**

The private communication dated September 16, 2008 could not form the basis of a defamation claim, because appellant has admitted that the message was never published to a third party. Under California law,

the lack of publication is fatal to appellant's coverage case.

The Subject Policy language at issue, when applied to potential defamation claims, has been addressed by California appellate courts in a total of two cases. *Turner v. State Farm Fire & Cas. Co.*, 92 Cal. App. 4th 681, 690, 112 Cal. Rptr. 2d 277, 283 (2001) (finding insurer had no duty to defend, because the alleged defamatory statements were not causally connected to the insured property); *State Farm Fire & Cas. Co. v. Wier*, A127243, 2012 WL 5279790 (Cal. Ct. App. Oct. 26, 2012), *rev. denied* (Jan. 30, 2013) (finding insurer had no duty to defend, because the insured's actions were intentional rather than accidental.). Neither case is helpful to the present dispute.

However, one case from Massachusetts<sup>14</sup> analyzed an insurer's duty to defend under somewhat similar facts and policy language identical to the Subject Policy. *See Billings v. Commerce Ins. Co.*, 458 Mass. 194, 200, 936 N.E.2d 408 (2010). In *Billings*, the insureds were sued for malicious prosecution and the intentional infliction of emotional distress (outrage)<sup>15</sup> arising from a dispute involving a real estate zoning board decision. The insureds were not sued for defamation. The outrage claim repeatedly alleged that the insureds had "**spread rumors**" to third parties

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<sup>14</sup> Massachusetts analyzes an insurer's duty to defend in a nearly identical fashion to California. In Massachusetts, the duty to defend is determined based on the facts alleged in the complaint, and on facts known or readily knowable by the insurer that may aid in its interpretation of the allegations in the complaint. *Boston Symphony Orchestra, Inc. v. Commercial Union Ins. Co.*, 406 Mass. 7, 10, 545 N.E.2d 1156 (1989); *Desrosiers v. Royal Ins. Co. of Am.*, 393 Mass. 37, 40, 468 N.E.2d 625 (1984).

<sup>15</sup> In Washington, outrage and intentional infliction of emotional distress are synonyms for the same tort. *Kloepfel v. Bokor*, 149 Wn.2d 192, 193-94, 66 P.3d 630, 631 (2003).

that had damaged the claimant's reputation. *Billings*, 458 Mass. at 200. Focusing on the fact that the plaintiff had alleged these rumors **had been spread to third parties**, the Supreme Judicial Court of Massachusetts concluded that the claimant's complaint roughly sketched a defamation claim. *Id.*

Similarly, in California, in order to state a claim for libel or slander, a claimant must allege the defamatory statement was **published** to a third party.<sup>16,17</sup> Publication, which may be written or oral, is defined as a communication to some third person who understands both the defamatory meaning of the statement and its application to the person about whom the statement is made. *Ringler Associates Inc. v. Maryland Cas. Co.*, 80 Cal. App. 4th 1165, 1179, 96 Cal. Rptr. 2d 136 (2000) (citing *Smith v. Maldonado*, 72 Cal. App. 4th 637, 645, 85 Cal. Rptr. 2d 397 (1999); Cal. Civ. Code §§ 45, 46 (West); 5 Witkin, Summary of Cal. Law (9th ed. 1988), Torts sec. 471, pp. 557-58)).

Here, appellant concedes that Fink's counterclaim fails to allege that any defamatory communication had been published to any third parties. And, appellant admits that the communication, in fact, had not

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<sup>16</sup> *Total Call Int'l, Inc. v. Peerless Ins. Co.*, 181 Cal. App. 4th 161, 169, 104 Cal. Rptr. 3d 319 (2010) (citing *Polygram Records, Inc. v. Superior Court*, 170 Cal. App. 3d 543, 549, 216 Cal. Rptr. 252 (Ct. App. 1985)).

<sup>17</sup> Appellant argues that "Personal Liability" coverage for defamation may be triggered by communications in the complete absence of evidence that those communications were published by third parties. See Appellant's Opening Brief at 29-30. Appellant cites no legal authority in support of its position. Where no authorities are cited, the court may assume that counsel, after diligent search, has found none. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

been published to any third party. Thus, Fink's claims regarding the private letter dated September 16, 2008 did not constitute a claim for "Libel, Slander, Defamation of Character," because the communication was never published to any third parties and did not fall within the Personal Liability coverage of the Subject policy.

Appellant argues only that the Subject Policy does not explicitly require "publication" of a defamatory statement to trigger coverage. Appellant argues that because the Subject Policy differs from standard ISO policy language, then the interpretation in the various policies must necessarily be different. Appellant argues that the Subject Policy must therefore provide coverage for defamation for any private insult between a claimant and the insured. Notably, appellant offers no legal authority whatsoever that supports its argument.

As discussed above, under California law, to potentially fall within coverage under the Subject Policy, Fink's counterclaim must include a claim for "libel, slander, or defamation of character" (all of which require publication), or the facts alleged in her counterclaim must include the essential elements to support that claim. The undisputed evidence establishes that Fink's counterclaim against Parks did not include any of the covered "offenses" enumerated in the Subject Policy's "Personal Liability" coverage grant and no extrinsic evidence known to FIE at the inception of Fink's claims could have formed the basis for a covered offense. As a result FIE owed no duty to defend and the trial court properly granted FIE's Motion for Summary Judgment of Dismissal.

**C. The additional documents on which appellant *now* relies did not provide a potential basis for a defamation claim.**

It was not until November 29, 2011 – four months after Ms. Fink’s claims had been tendered to FIE and *long after* Ms. Fink asserted her counterclaims against Parks – that Parks and appellant provided FIE with the remaining documents<sup>18</sup> identified above. Under California law, these documents and the extrinsic facts they communicate cannot trigger FIE’s duty to defend, because these facts were not known to FIE at the inception of Fink’s claims against Parks. *Gunderson*, 37 Cal. App. 4th at 1114; *Hurley Constr. Co.*, 10 Cal. App. 4th at 538.

Even if these documents were somehow within the realm of “extrinsic facts” relevant to FIE’s duty to defend under California law, they still provide no basis for a defamation claim or coverage under the Subject Policy.

**1. The Avvo.com communication does not provide a basis for a defamation claim, because it was never published to a third party.**

Like the private letter quoted in Fink’s counterclaim, Parks’s e-mail dated September 26, 2008 constituted a private communication that was sent from Parks to Fink. Appellant concedes that the e-mail was never published to any third party. As a result, Fink’s allegations regarding the private e-mail does not constitute a claim for defamation.

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<sup>18</sup> While Fink’s ER 904 disclosures contained a printout of the docket to the Underlying Litigation referencing the letter to Judge Trickey, a copy of that letter was never provided to FIE until appellant filed its Motion for Partial Summary Judgment on July 2, 2014. Copies of all other documents were contained in Fink’s ER 904 disclosures and provided to FIE for the first time on November 29, 2011.

The trial court properly denied appellant's Motion for Partial Summary Judgment in this respect

**2. The Letter to Judge Trickey does not provide a basis for a defamation claim, because the Litigation Privilege provides absolute immunity to communications made in the course of judicial proceedings.**

The litigation privilege is codified in California Civil Code § 47: “[a] privileged publication or broadcast is one made ... [i]n any ... judicial proceeding ....” *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1057, 128 P.3d 713, 39 Cal. Rptr. 3d 516 (2006). The privilege derives from common law principles establishing a defense to the tort of defamation. *Rusheen*, 37 Cal. 4th at 1057 (citing *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, 42 Cal. 3d 1157, 1168, 232 Cal. Rptr. 567, 728 P.2d 1202 (1986)).

Although originally enacted with reference to defamation, the privilege is now held applicable to any communication, whether or not it amounts to a publication, and all torts except malicious prosecution. Further, it applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved. The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (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*, 37 Cal. 4th at 1057 (citing *Silberg v. Anderson*, 50 Cal. 3d 205, 212, 266 Cal. Rptr. 638, 786 P.2d 365 (1990)). Thus, “communications with ‘some relation’ to judicial proceedings” are “absolutely immune

from tort liability” by the litigation privilege. *Rusheen*, 37 Cal. 4th at 1057 (citing *Rubin v. Green*, 4 Cal. 4th 1187, 1193, 17 Cal. Rptr. 2d 828, 847 P.2d 1044 (1993)). The privilege is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards. *Rusheen*, 37 Cal. 4th at 1057 (citing 5 Witkin, Summary of Cal. Law, 10th ed. 2005, Torts, §§ 470, 505, pp. 554, 591).

The litigation privilege is absolute and applies regardless of malice. *Rusheen*, 37 Cal. 4th at 1063 (citing *Silberg*, 50 Cal. 3d at 213-14). Moreover, “[i]n furtherance of the public policy purposes it is designed to serve, the privilege prescribed by section 47(2) has been given broad application.” *Rusheen*, 37 Cal. 4th at 1063 (citing *Silberg* 50 Cal. 3d at 211).

In the present case, the primary purpose of Mr. Parks’s letter to Judge Trickey was two fold: (1) for Mr. Parks to express his satisfaction with the outcome of the probate litigation; and (2) to request Judge Trickey correct what Mr. Parks considered errors with respect to the same. CP 649-653. Unquestionably, Mr. Parks’s communications to Judge Trickey had “some relation” to the judicial proceedings and are therefore “absolutely immune from tort liability” by the litigation privilege. Additionally, all factors enumerated by the *Rusheen* Court support application of the Litigation Privilege. First, Mr. Parks’s letter was made in or after a judicial or quasi-judicial proceeding (the probate litigation). Second, the communication was made by a litigant to the proceeding (Mr. Parks). Third, the primary purpose of the communication was to achieve

an object of the litigation (the correct and reverse what Mr. Parks considered errors with Judge Trickey's ruling). And fourth, Mr. Parks's letter had a connection and logical relation to the probate litigation. As a result, Mr. Parks's letter is absolutely immune from any claim of defamation and cannot form the basis of a defamation claim. The trial court properly denied appellant's Motion for Partial Summary Judgment in this respect.

**3. The undated Press Releases do not provide a basis for a defamation claim.**

**a. Appellant lacks evidence that the press releases were published to a third party.**

In the present case, appellant lacks any evidence that the press releases were ever published to a third party. Appellant admits it has no evidence regarding whether the press releases were posted for public access on the website (CP 646-647), whether a password was required to access the press release (CP 647), whether hyperlinks forwarded someone to the press release or if someone needed the full website address to access it (*id.*), how long the press release remained on the internet (*id.*), when it was taken down from the website (CP 648), or who took it down (*id.*). Appellant is unable to name a single third party who observed the press releases while they were posted on the charity's website. Without any evidence suggesting that these communications were "published" to a third party, the press releases do not provide a basis for a defamation claim.

- b. Even if the press releases were published to a third party, the press releases do not specifically refer to Fink and are not “of and concerning” Fink in any way.**

In order to satisfy the “publication” element of a defamation claim, the defamatory statement must be “communicated to a third person who understands its defamatory meaning as applied to the plaintiff.” *Shively v. Bozanich*, 31 Cal. 4th 1230, 1242, 7 Cal. Rptr. 3d 576, 80 P.3d 676 (2003). Stated differently, “[i]n defamation actions[,] the First Amendment ... requires that the statement on which the claim is based must specifically refer to, or be ‘of and concerning,’ the plaintiff in some way.” *Tamkin v. CBS Broad., Inc.*, 193 Cal. App. 4th 133, 146, 122 Cal. Rptr. 3d 264, 273-74 (2011) (citing *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1042, 232 Cal. Rptr. 542, 728 P.2d 1177 (1986)). Whether defamatory statements can reasonably be interpreted as referring to plaintiffs is a question of law for the court. *Tamkin*, 193 Cal. App. 4th at 146 (citing *Alszev v. Home Box Office*, 67 Cal. App. 4th 1456, 1461, 80 Cal. Rptr. 2d 16 (1998)).

Here, the press releases do not specifically refer to Ms. Fink. Nor are the press releases “of and concerning” Ms. Fink in any way. Appellant conceded that the comments made in the press releases were about Mr. Broughton! Moreover, anyone who reads the press releases – regardless of how familiar they are with the underlying probate litigation – is unable to determine the individuals to which the statements refer. In its deposition, appellant conceded that the press releases were extremely confusing. Appellant was unable to identify whether – or even if – the

press releases referred to Ms. Fink in any way. As a result, the press releases cannot form the basis of a defamation claim, and the trial court properly denied appellant's Motion for Partial Summary Judgment in this respect.

**4. The cartoons and altered comic strip do not provide a basis for a defamation claim.**

Like the prior documents, appellant is unable to identify a single person to whom the subject cartoons or comic strips were published or disclosed. More importantly, Ms. Fink never asserted a claim for defamation against Mr. Parks for this – or any other – document, and never sought damages from Mr. Parks for any published, defamatory material. Like the prior documents, that is fatal to appellant's case.

Additionally, like the press releases, the comic strip does not specifically refer to Ms. Fink. Instead, it references “any lawyer in Washington State.” Anyone who may have seen the comic strip – even in its altered state – could not possibly have contemplated that it applied to Ms. Fink. Moreover, appellant lacks any evidence that the alterations to the comic strip were made by Mr. Parks himself.

The cartoons and altered comic strip do not provide a basis for a defamation claim, and the trial court properly denied appellant's Motion for Partial Summary Judgment in this respect.

**5. The letter to “c. ecklund & wife” and the Halloween Card do not provide a basis for a defamation claim.**

Neither the letter addressed to “c. ecklund & wife” nor the

Halloween Card provides a basis for a defamation claim, because they do not specifically refer to Ms. Fink. Ms. Fink is never named in either document.

With respect to the letter addressed to “c. ecklund,” a single sentence is buried at the end of it that states “You [c. ecklund] and all the greedy lawyers involved in this have ruined my life.” There is no evidence whether Mr. Parks was referring to Ms. Fink when he vaguely referred to “all the greedy lawyers.” Even if Mr. Parks was including Ms. Fink in that reference, there is no evidence that Mr. Ecklund understood that intent. As such, there is no evidence to support the publication element of a defamation claim by Ms. Fink against Mr. Parks.

The Halloween Card is even further removed from any basis that could constitute a defamation claim. Like the letter to “c. ecklund,” the card does not identify Fink. But, unlike the letter to “c. ecklund,” there is no evidence that it was published or disclosed to any third party and there is nothing stated in the card that could be defamatory in any way. The card merely defines the words “belief” and “know.” Like the “ecklund” letter, there is no evidence that anyone who may have seen the card understood how it was to be applied to Fink, if at all.

Not surprisingly, perhaps, appellant does not even refer to either of these documents in its Brief. These documents do not provide a basis for a defamation claim, and the trial court properly denied appellant’s Motion for Partial Summary Judgment in this respect.

**D. The trial court properly granted FIE's Motion for Summary Judgment and Dismissed Appellant's Cause of Action for Bad Faith.**

**1. Appellant assigned no error to the trial court's dismissal of its bad faith claims.**

On appeal, appellant does not identify or brief any issue related to the trial court's dismissal of its bad faith claims. By failing to assign error to and argue against the trial court's decision to dismiss its bad faith claims, appellant waives any argument to the contrary. *See Smith v. King*, 106 Wn.2d 443, 451–52, 722 P.2d 796 (1986).

**2. The trial court properly dismissed Appellant's bad faith claims.**

Every contract imposes on each party an implied duty of good faith and fair dealing. *Egan v. Mut. of Omaha Ins. Co.*, 24 Cal. 3d 809, 818, 620 P.2d 141 (1979). A prerequisite to the implied covenant of good faith and fair dealing is a potential for coverage. *Turner*, 92 Cal. App. 4th 690, citing *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal. 4th 1, 36, 44 Cal. Rptr.2d 370, 900 P.2d 619 (1995)). Because there is no such potential for coverage in this case, there can be no breach of the implied covenant. *Id.* Accordingly, the trial court properly dismissed appellant's claim for bad faith.

Even if California permitted a claim of bad faith to proceed in the absence of coverage, appellant's claim for bad faith still fails. While the reasonableness of an insurer's claims-handling conduct is ordinarily a question of fact, it becomes a question of law where the evidence is

undisputed and only one reasonable inference can be drawn from the evidence. *Paulfrey v. Blue Chip Stamps*, 150 Cal. App. 3d 187, 196, 197 Cal. Rptr. 501 (Ct. App. 1983). “[A] court can conclude as a matter of law that an insurer’s denial of a claim is not unreasonable, so long as there existed a genuine issue as to the insurer’s liability.” *Fraley v. Allstate Ins. Co.*, 81 Cal. App. 4th 1282, 1292, 97 Cal. Rptr. 2d 386 (2000).

“The mistaken [or erroneous] withholding of policy benefits, if reasonable or if based on a legitimate dispute as to the insurer’s liability under California law, does not expose the insurer to bad faith liability.” *Tomaselli v. Transamerica Ins. Co.*, 25 Cal. App. 4th 1269, 1280, 1281, 31 Cal. Rptr. 2d 433 (1994); *Nager v. Allstate Ins. Co.*, 83 Cal. App. 4th 284, 288, 99 Cal. Rptr. 2d 348 (2000); *Opsal v. United Servs. Auto. Assn.*, 2 Cal. App. 4th 1197, 1205, 10 Cal. Rptr. 2d 352 (1991). Without more, such a denial of benefits is merely a breach of contract. Moreover, the reasonableness of the insurer’s decisions and actions must be evaluated as of the time that they were made; the evaluation cannot fairly be made in the light of subsequent events which may provide evidence of the insurer’s errors. *Filippo Indus., Inc. v. Sun Ins. Co. of New York*, 74 Cal. App. 4th 1429, 1441, 88 Cal. Rptr. 2d 881 (1999).

Here, the facts known to FIE at the time it rendered its coverage determination are not in dispute and establish as a matter of law that FIE’s coverage determination was reasonable. Moreover, for appellant, there was, at best, a “genuine issue” as to FIE’s duty to defend Parks. Accordingly, the trial court properly denied appellant’s extra-contractual

claims.

**E. Appellant’s reliance on California’s “reasonable expectations” test is misplaced.**

Relying on *Minkler v. Safeco Ins. Co. of America*, 49 Cal. 4th 315, 110 Cal. Rptr. 35 612 (2010), appellant misapplies California’s “reasonable expectations” test. Under California law, the principles governing the interpretation of insurance policies in California are well settled. *Minkler*, 49 Cal. 4th at 321. The goal in construing insurance contracts, as with contracts generally, is to give the effect to the parties’ mutual intentions. *Id.* (citing *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1264, 10 Cal. Rptr. 2d 538 (1992); Civ. Code, § 1636). If contractual language is clear and explicit, it governs. *Minkler*, 49 Cal. 4th at 321 (citing *Bank of the West*, 2 Cal. 4th at 1264; Civ. Code, § 1638). If the terms are ambiguous (i.e., susceptible of more than one reasonable interpretation), California courts interpret them to protect “the objectively reasonable expectations of the insured.” *Minkler*, 49 Cal. 4th at 321 (citing *Bank of the West*, 2 Cal. 4th at 1265 (quoting *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 822, 274 Cal. Rptr. 820 (1990))).

Appellant argues that under the “reasonable expectations” test, Parks (FIE’s insured) might reasonably have expected that a claim for “Outrage” would not be susceptible to an “Intentional Acts” exclusion. *See* Appellant’s Brief at 23-25. In effect, appellant argues that an insured might reasonably expect that tortious conduct rising to the level of “Outrage” should not be excluded under an “Intentional Acts” exclusion,

because such conduct could be committed accidentally. Appellant misses the point.

In its Motion for Summary Judgment of Dismissal, FIE did not rely on the “Intentional Acts” exclusion. Instead, FIE argued only that the claims and extraneous facts known to it at the inception of Fink’s claims against Parks did not fall within the “Personal Liability” coverage grant. Whether the intentional acts exclusion is applicable and whether the tort of outrage can be committed accidentally is irrelevant for purposes of FIE’s Motion for Summary Judgment of Dismissal.

Moreover, the “reasonable expectations” test only applies where insurance terms are ambiguous or susceptible of more than one reasonable interpretation. *Minkler*, 49 Cal. 4th at 321. Here, however, appellant does not even argue that the “Personal Liability” coverage grant is ambiguous. In the cases in which California courts have considered such language, it has never been found to be ambiguous. *See, Turner*, 92 Cal. App. 4th 681; *State Farm Fire & Cas. Co.*, A127243, 2012 WL 5279790.

Appellant completely misapplies the “reasonable expectations” test under California law and the doctrine has no application to this case.

**F. Appellant is not entitled to fees pursuant to RAP 18.1.**

Appellant’s request for fees is based on *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). Essentially, appellant argues that had the trial court granted its Motion for Partial Summary Judgment, it would have been entitled to attorney fees under

*Olympic Steamship Co.* And, appellant further argues that because this Court should reverse the trial court's order denying its Motion for Partial Summary Judgment, it is entitled to fees at the appellate court level pursuant to RAP 18.1. Thus, appellant's request for fees is inextricably linked to its appeal regarding its Motion for Partial Summary Judgment.

As noted above, appellant's appeal regarding its Motion for Partial Summary Judgment is flawed both procedurally and substantively. Incorporating herein and based upon respondent's arguments against appellant's Motion for Partial Summary Judgment, this Court should deny appellant's request for fees.

#### **V. CONCLUSION**

For the reasons discussed above, respondent requests this Court affirm the trial court's Order Granting Defendant's Motion for Summary Judgment of Dismissal. California law is clear that there were no potentially covered claims asserted against Parks and, as a result, FIE had no obligation to provide Parks with a defense.

Respondent requests this Court dismiss appellant's appeal regarding the trial court's Order Denying Plaintiff's Motion for Partial Summary Judgment, because its appeal in that respect is not appealable as a matter of right. Alternatively, respondent requests this Court affirm the trial court's Order Denying Plaintiff's Motion for Partial Summary Judgment.

Respondent further requests this court deny appellant's request for fees pursuant to RAP 18.1.

Respectfully submitted this 10th day of April, 2015.

NICOLL BLACK & FEIG PLLC

A handwritten signature in black ink, appearing to read "Curt H. Feig & Michael A. Guadagno", written over a horizontal line.

Curt H. Feig, WSBA #19890  
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Attorneys for Respondent  
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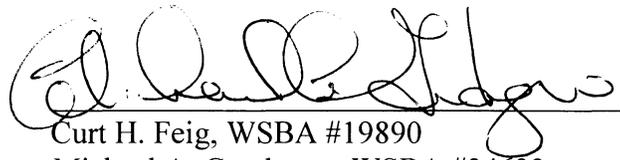
**CERTIFICATE OF SERVICE**

I certify that on the 10th day of April, 2015, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below:

William H. Broughton	_____	VIA HAND DELIVERY
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DATED this 10th day of April, 2015.

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