69356-5

69356-5

No. 69356-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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GRANGE INSURANCE ASSOCIATION,

Respondent,

v.

ELIZABETH and WESLEY ROBERTS

Appellants.

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# BRIEF OF RESPONDENT

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## I. INTRODUCTION

Appellants Jane and Wes Roberts ("Roberts") were named as defendants in a lawsuit instituted by Jane's siblings – Rebecca Brandis, Suella Hershaw, Myra Converse and Myrna Seifert ("the Brandis plaintiffs"). The claims against the Roberts were that Jane exercised "fraud and undue influence" over their mother by making "false statements," "bad mouthing" the other siblings to their mother and that she "actively interfered" with the siblings' relationship with their mother. According to the allegations of the underlying complaint, the motivation for Jane's conduct was to interfere with her siblings' inheritance rights.

The trial court ruled that Grange had no duty to defend or indemnify with regard to this complaint and granted Grange's summary judgment motion, implicitly denied the Roberts' motion to stay and dismissed (a year later) the Roberts' counterclaim. These decisions should be affirmed for the following reasons:

First, the bodily injury section of the Grange policy provided liability insurance for claims arising out of an "occurrence," which is defined as an "accident." The Brandis plaintiffs did not allege that Jane acted accidentally. In fact, the opposite is true. The Brandis plaintiffs specifically pled that Jane Roberts engaged in deliberate conduct that was intended to injure them.

Second, the personal injury section of the Grange policy provides liability coverage for "defamation" but expressly excludes coverage if the defamatory statements were made with (1) knowledge of their falsity or (2) knowledge that they would violate the rights of another. Both exclusions apply to the allegations of the underlying complaint. The Brandis plaintiffs alleged that Jane made "false statements" to their mother for the specific purpose of interfering with their relationship with their mother and to ultimately violate their inheritance rights.

Third, the trial court's denial of the motion to stay should be affirmed. The prohibition on pursuing a declaratory judgment action while an underlying action is pending applies when pursuing the declaratory judgment will involve **developing** facts that are detrimental to the insured in the underlying action. Here, Grange's declaratory judgment action was based solely on the allegations of the applicable complaint and no discovery or fact development was anticipated (or occurred). In such a circumstance proceeding with the declaratory judgment action cannot cause harm to the insured.

Fourth, the dismissal of the Roberts' counterclaim should be affirmed because (1) the determination that the declaratory judgment action was properly pursued mooted the counterclaim, (2) the Roberts did not present any argument or evidence in support of the

counterclaim below and (3) plaintiffs' current counsel, during oral argument, admitted that nothing existed in the counterclaim after dismissal of the declaratory judgment action and agreed that the counterclaim could be dismissed.

## II. COUNTERSTATEMENT OF FACTS

### A. Procedural History

The plaintiffs in the underlying action are the siblings of defendant Jane Roberts. In bringing the action the Brandis plaintiffs sought to set aside transfers of real and personal property their now deceased mother made to Jane. The underlying plaintiffs additionally sought damages from Jane on the grounds that Jane obtained the transfers of property by engaging in fraudulent acts, by exerting undue influence over their mother, by "actively interfering" with their relationship with their mother and by making false statements and "bad mouthing" them. The Brandis plaintiffs alleged that as a result of Jane's conduct they suffered a loss of an expected inheritance, loss of a parent/child relationship and emotional distress. CP 58-59; 62-63 (and) 274-275; 278-278.

The Roberts tendered defense of the underlying action to Grange on June 3, 2010. On July 31, 2010, Grange sent the Roberts a reservation of rights letter and specifically advised them that it was reserving its right to ask a "court of law to determine that Grange has

no duty to defend the potential lawsuit and/or to pay any judgment or settlement of the claims being asserted." CP 69-73.

On September 3, 2010, Grange filed the declaratory judgment action seeking a determination of its duty to defend and indemnify Roberts in the underlying lawsuit. CP 264-270. In January 2011 the defense counsel hired by Grange to defend the underlying action requested that the declaratory judgment action be forestalled so that a motion for summary judgment in the underlying action could be heard. Grange agreed. CP 31 and 18.

On May 25, 2011, approximately nine months after filing the declaratory judgment action, the Roberts answered the complaint for declaratory relief and asserted a counterclaim for bad faith. CP 245-251. The basis for the counterclaim was the assertion that "by filing the coverage action," Grange was prejudicing the Roberts' interests. CP 245-251 and CP 249.

Grange filed its motion for summary judgment on June 14, 2011. CP 229-244. The Roberts' then-counsel responded and moved to stay the declaratory judgment action. CP 35-52. The basis for the motion to stay was the same as was asserted in the counterclaim – that pursuing the declaratory judgment action was causing harm to the Roberts. CP 35-52 at CP 36.

On July 22, 2011, the trial court granted Grange's motion for summary judgment, ruling that Grange had no obligation to defend or indemnify Roberts. CP 15-16. By considering the summary judgment motion the trial court implicitly denied the motion to stay.

Shortly after the court determined Grange could cease providing a defense to the Roberts, the Roberts tendered the lawsuit to a second insurer, Unigard. RP p. 3, ll. 19. Unigard, like Grange, defended the action under a reservation of rights and obtained a ruling that it had no obligation to defend or indemnify the Roberts in the action. RP p. 3, ll. 20-24. The Roberts did not appeal the ruling in the *Unigard* matter. Instead, according to their brief, they have instead opted to tender to yet two more insurance companies who are now providing a defense to the Roberts. Brief of Appellant, p. 10.

Approximately one year after the motion for summary judgment was granted, the Roberts asserted that despite the fact that the grant of the motion for summary judgment mooted the counterclaim, that the July 2011 order was not a final order as the counterclaim had not been formally dismissed. On September 21, 2012 the trial court agreed. However, on stipulation of the Roberts' counsel, the trial court formally dismissed the counterclaim on that date. CP 13-14.

The Roberts have now appealed the trial court's rulings and have asserted a variety of errors. As discussed herein, the trial court's rulings were correct and the court's decisions should be affirmed.

## B. Allegations of the Underlying Complaint

In bringing the action the underlying action the Brandis plaintiffs made very specific allegations, as follows:

- Jane "used fraud and undue influence to convince Elizabeth to give her everything she owned." CP 58.
- Jane "isolated" their mother from friends and family members and "actively interfered" with the relationship between Elizabeth and her family and friends. CP 59.
- Jane made "false statements" and "badmouthed" others "in order to intentionally interfere with their relationships." CP 59.
- Jane's behavior included making false accusations regarding prior child abuse claims, went beyond the bounds of decency, [was] atrocious and intolerable." CP 59.
- The plaintiffs experienced "extreme emotional distress" as a result of Jane's interference with their relationships with Elizabeth. CP 59.
- Jane used "fraud and undue influence to convince Elizabeth to transfer the vast majority of her estate to Jane prior to her death." CP 62.

The Brandis plaintiffs alleged that as a result of this conduct they were entitled to damages for emotional distress, for "tortious interference with expected inheritance" and for "tortious interference with the parent/child relationship." CP 63.

## III. ARGUMENT

### A. STANDARD FOR EVALUATING COVERAGE ISSUES

There is no dispute as to the standard for interpreting insurance policies. In Washington, interpretation of an insurance policy is a question of law. *Kent Farms, Inc. v. Zurich Ins. Co.,* 140 Wn.2d 396, 399, 998 P.2d 292 (2000). "The policy is construed as a whole, and 'should be given a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.'" *Grange Ins. Co. v. Brosseau,* 113 Wn.2d 91, 95, 776 P.2d 123 (1989) (quoting *Sears v. Grange Ass'n,* 111 Wn.2d 636, 638, 762 P.2d 1141 (1988). In interpreting an insurance policy, a court should enforce the policy provisions as written. *Transcontinental Ins. v. Washington Pub. Util. Dist. Util. Sys.,* 111 Wn.2d 452, 456, 760 P.2d 337 (1988); *Holden v. Farmers Ins. Co. of Wash.,* 142 Wn. App. 745, 749, 175 P.3d 601 (2008).

In this case, the clear and unambiguous terms of Grange's policy bar coverage for the claims being made in the underlying action. The trial court correctly determined that Grange did not have a duty to

defend or indemnify for the claims being asserted in the underlying action. This court should affirm.

### B. Standard for Imposing Duty to Defend and Duty to Indemnify on Insurers

The determination of whether an insurance company's duty to defend is triggered depends upon the allegations of a complaint, and it is undisputed that an insurer's defense obligation is triggered if the insurance policy *conceivably covers* the allegations in the applicable complaint. *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404, 229 P.3d 693 (2010). However, the duty to defend is not limitless. Instead, an insurer has no obligation to provide a defense if "it is clear that the claim is not covered" under a policy. *Id.* at 405.

Here, as discussed below, the underlying plaintiffs' complaint does not contain any allegations which would trigger the duty to defend and, thus, the allegations in the complaint did not *conceivably* trigger coverage. Thus, Grange was entitled to a judicial declaration that it had no duty to defend or indemnify Roberts in the underlying action.

### C. The Duty to Defend Was Not Triggered Because The Policy Did Not *Conceivably* Cover the Claims Being Made

The determination of whether an insurer's duty to defend an action is triggered is whether the complaint contains any allegations that are *conceivably* covered under the applicable policy. Here, none of the allegations pled could *conceivably* trigger the indemnification

obligation and, thus, the trial court correctly determined that the duty to defend was not triggered.

### 1. The Bodily Injury Liability Section of the Policy was Not Triggered Because the Complaint Alleged Deliberate and Not Accidental Conduct

The Roberts argue that outrage claim is covered under the "bodily injury" liability section of the policy. The contrary is true. The bodily injury liability section of the policy provides that coverage may be triggered for bodily injury arising out of an "occurrence". An occurrence is defined as

> an **accident**, including continuous or repeated exposure to substantially the same general harmful conditions.

CP 185. (emphasis added). The allegations of the complaint here demonstrate that any injury the underlying plaintiffs sustained did not arise out of an accident and, therefore, there can be no duty to defend. Indeed, the underlying plaintiffs have specifically alleged that their injuries arose out of Jane's deliberate conduct.

The bodily injury section of policy at issue only covers injuries that arise out of an accident. Because the term "accident" is not defined in the policy the term will be defined according to the common law definition. *Detweiler v. J.C. Penney Cas. Ins. Co.,* 110 Wn.2d 99, 104, 751 P.2d 282 (1988). That definition is that

> an accident is never present when a deliberate act is performed unless some additional unexpected,

> independent and unforeseen happening occurs which produces or brings about the result of injury or death. The means as well as the result must be unforeseen, involuntary, unexpected and unusual

*Id.* at 104. "A loss is considered "accidental" when it happens without design, intent, or obvious motivation." *Federated Am. Ins. Co. v. Strong,* 102 Wn.2d 665, 674, 689 P.2d (1971); *Roller v. Stonewall,* 115 Wn.2d 679, 685, 801 P.2d 207 (1990), overruled on other grounds, *Butzberger v. Foster,* 151 Wn.2d 396, 89 P.3d 689 (2004). An act is deliberate when it is "done with awareness of the implications or consequences of the act." *Nationwide Mut. Ins. Co. v. Hayles,* 136 Wn. App. 531, 538, 150 P.3d 589 (2007). "Furthermore, pursuant to the common sense definition, 'accident' is not a subjective term. Thus, the perspective of the insured as opposed to the tortfeasor is not a relevant inquiry." *Roller,* 115 Wn.2d at 685.

The allegations of the Brandis plaintiffs complaint exactly meet this test. That is, the Brandis plaintiffs specifically allege that Jane engaged in specific conduct – isolating their mother, bad mouthing other persons, and making false statements – with deliberate awareness that by doing so she would be interfering with their mother's relationships and their inheritance rights. These are not allegations of "accidental" conduct.

The Roberts do not appear to be genuinely challenging this proposition. Instead, the Roberts argue that the duty to defend was

triggered and that the trial court erred because "outrage" can be committed negligently. However, the issue is not whether a given tort can be committed negligently. The issue is the allegations of the applicable complaint. Here, the *Brandis* plaintiffs specifically alleged deliberate conduct. The claim does not trigger coverage under the bodily injury section of the Grange policy.

*Woo v. Fireman's Fund,* 161 Wn.2d 43, 164 P.3d 454 (2007) does not hold contrary to the above and does not aid the Roberts. As the Roberts themselves point out, the allegations in the *Woo* complaint contained both negligent and intentional conduct. Here, there are no allegations that Jane engaged in negligent conduct.

### 2. The "Interference" Claims Do Not Trigger the Duty to Defend Because The Underlying Plaintiffs Would be Required to Prove Intentional Conduct to Prevail on Their Claims

The Roberts next assert that because the tortious interference claims pled in the underlying complaint have not yet been specifically recognized in Washington that the duty to defend must be triggered. The contrary is true. Washington has already adopted the "interference" torts and Washington case law is clear that the "interference" torts pled by the plaintiffs cannot be committed "accidentally."

a. Interference with an Expected Inheritance

Washington has not recognized the tort called "tortious interference with an expected inheritance." However, Washington has recognized the identical cause of action – the tort of tortious inference with an economic relationship. *Commodore v. University Mechanical Contractors, Inc.,* 120 Wn.2d 120, 137, 93 P.2d 314 (1992). To prevail on such a claim a plaintiff must demonstrate "intentional conduct" and requires a finding that the defendant "interfered for an improper purpose or used improper means." *Commodore,* 120 Wn.2d at 135. Stated otherwise, intentional conduct, in the context of a tortious interference claim, can be met in only one of two ways: (a) by showing that interference was the "**primary purpose** of the interferer" or (b) that the interferer "does not act for the purpose of interfering with the contract or desire it **but knows that the interference is certain or substantially certain to occur as a result of his action.**" WPI 352.01 (citing Restatement (Second) of Torts §766, comment j (1979)) (emphasis added).

Multiple jurisdictions have adopted the tort of tortious interference with an expected inheritance and, in doing so, have uniformly held that the tort is the equivalent of a claim for tortious interference with an economic relationship. *See, e.g., Lindberg v. U.S.,* 164 F.3d 1312, 1319 (10th Cir. 1999) (the "elements of the tort [of

intentional inference with inheritance] are quite uniform across jurisdictions that have recognized it"). *See also Allen v. Hall,* 328 Or. 276, 282, 974 P.2d 199 (1999) ("ultimately an expectancy of inheritance is an interest that fits by logical extension with the concept underlying the tort of intentional interference with prospective economic advantage...).

The Restatement (Second) of Torts describes the tort of Intentional Interference with Inheritance or Gift, and lists cases in jurisdictions that recognize this tort. Restatement (Second) of Torts § 774B (1979). Both the Restatement and those jurisdictions recognizing this tort agree that this is an intentional tort only, which "does not purport to cover liability for negligence." Restatement § 774B Comment a; *Allen v. Hall,* 328 Or. 276, 282, 974 P.2d 199 (1999); *Firestone v. Galbreath,* 67 Ohio St.3d 87, 88, 616 N.E.2d 202 (1993). And no jurisdiction has adopted a tort of negligent interference with inheritance, as a Pennsylvania decision noted. *Cardenas v. Schober,* 2001 Pa. Super. 253, 783 A.2d 317, 324, n.2 (2001).

The tort of interference with an expected relationship is not a tort that can be committed "accidentally" and, therefore, does not trigger coverage under Grange's policy. Moreover, the Brandis plaintiffs have not alleged that Jane committed the tort "accidentally." Instead, the Brandis plaintiffs specifically alleged that their harm was

the result of Jane's acts of exerting undue influence over their mother. An allegation of undue influence necessarily means that a person acted deliberately. Indeed this very issue was addressed in a claim with facts remarkably similar to the instant case, *Drake v. Mutual of Enumclaw Ins. Co.,* 167 Or. App. 475, 1 P.3d 1065 (2000). In that case, as here, the insureds, husband and wife, were sued by the wife's sister who alleged that the insureds exerted undue influence over the wife's mother so as to convince the mother to disinherit the sister. *Id.* at 477. The insurer, Mutual of Enumclaw, moved for summary judgment asserting that the "claim alleged only intentional conduct and, therefore, did not allege an 'occurrence' under the policies." *Id.* The trial and appellate courts agreed. In affirming, the Oregon Court of Appeals specifically noted "[t]he claim for undue influence makes clear that plaintiffs intended to injure [the sister]." *Id.* at 482.

**b. Interference with the Parent/Child Relationship**

The same analysis applies to the claim for tortious interference with a parent/child relationship. Washington already recognizes this tort with respect to a minor child's claim. *See Waller v. State,* 64 Wn.App. 318, 824 P.2d 1225 (1992). Included among the elements for this tort is the requirement that the plaintiff prove "an intention on the part of the third person that such wrongful interference results in a loss of affection or family association." *Id.* at 338. And the intent

element cannot be met by simply showing reckless conduct. Instead, as the *Waller* court explained, intent in the context of an alienation of affections claim requires the plaintiffs prove "malice – that is, an intent that [they] lose the affection of [their mother]" as a result of the conduct of the defendants. *Id.* at 338.

Thus, just as the Brandis plaintiffs must prove intentional conduct to prevail on their tortious interference with expected inheritance claim, they must prove intentional conduct – that Roberts, through malice, intended that by her conduct would result in a loss of the parent/child relationship between her mother and her siblings. Such conduct by definition is not accidental, and, therefore, is not covered under Grange's policy.

**c. Out of State Authority**

The Roberts' argument that any "uncertainty" with respect to the interference torts necessarily means that the duty to defend is triggered is misplaced. First, as discussed above, Washington has already adopted the torts and has held that the torts cannot be committed "accidentally." Second, the Supreme Court in *American Best Food, Inc. v. Alea London, Ltd.,* 168 Wn.2d 398, 229 P.2d 693 (2010), addressed the issue of whether an insurer could rely upon out-of-state authority when determining the duty to defend. The court there held that a "legal uncertainty" was present, and thus that the

duty to defend was triggered. However, the court did so because the out of state authority upon which the insured relied showed that coverage **could** be triggered if Washington were to adopt the analysis of other jurisdictions. 168 Wn.2d at 407-08. Here, the contrary is true: the out-of-state authority demonstrates that coverage would **not** be triggered. In this circumstance there is no "legal uncertainty" or "legal ambiguity" that must be construed in favor of the insured. Instead, this court should affirm the trial court's determination that the duty to defend was not triggered with respect to the "interference" torts.

In summary, for the underlying plaintiffs to prevail on their "interference" claims would require the underlying plaintiffs to prove intentional – and not accidental – conduct. Intentional conduct is not covered under Grange's policy and, thus, Grange was entitled to a judicial declaration that is had no *conceivable* duty to indemnify and thus, had no duty to defend the Roberts for such claims. The trial court's decision should be affirmed.

### 3. The Personal and Advertising Liability Section of the Policy Was Not Triggered Because The Complaint Alleged That Roberts Made False Statements with (1) Knowledge of the Falsity of the Statement and (2) With Knowledge That She Would Violate Rights of Others.

The personal and advertising injury section of the policy provides coverage for defamation subject to two applicable exclusions:

a. Knowing Violation of Rights of Another

> Caused by or at the direction of an insured with the knowledge that the act would violate the rights of another and would inflict personal and advertising injury.

b. Material Published With Knowledge of Falsity

> Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity.

CP 177. Both exclusions are applicable here.

The Roberts assert that the exclusions to coverage do not apply because defamation can be committed negligently. However, whether defamation can be committed negligently is not the issue. Instead, the issue is what was alleged in the underlying complaint.

First, the "material published with knowledge of falsity" exclusion applies because the Brandis plaintiffs specifically averred that Jane made "false statements" for the specific purpose of interfering with their relationship with their mother. CP 59. The plaintiffs did not allege that Jane carelessly made statements that may or may not have been true. Instead the allegation was very specific – Jane made the "false statements ... in order to so intentionally interfere with their relationships." *Id.*

Second, the Brandis plaintiffs specifically alleged that Jane made the false statements knowing that she would be violating the rights of her siblings. The complaint specifically states that Jane "made false statements" in order to achieve a certain result – to interfere with her siblings relationship with their mother and their inheritance rights. Thus, to prevail on their claim, the Brandis plaintiffs necessarily have to show that Jane knew of the falsity of her statements and did so knowing that she would be interfering with her siblings relationship with their mother. Such proof would necessarily mean that the exclusions to coverage applied. The trial court correctly determined that coverage was not triggered under the personal and advertising injury section of the policy.[1]

D. THE MOTION TO STAY WAS PROPERLY DENIED.

The Roberts moved to stay the declaratory judgment action, asserting that pursuing the declaratory judgment action would necessarily cause them harm. CP 35-52. Appellants reiterate that argument on appeal. However, the argument is based on the assumption that Grange was developing facts that would necessarily

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[1] The appellants hypothetical situation is not applicable here. Appellants assert that Defendant X could have made a statement that triggered the exclusion for intentional interference with a business relationship. However, appellants hypothetical does not indicate that the statement made by defendant X was actually false. The contrary is true here – the complaint specifically states that Jane made "false statements."

aid the plaintiffs in the underlying case. Again, the Roberts' argument is misplaced.

In certain circumstances, an insurer may be prohibited from pursuing a declaratory judgment action while an underlying action is pending. The concern is that the pursuit of the declaratory judgment action will include developing facts that will prejudice the insured in the defense of the underlying case. This concern is not applicable in the circumstances of this case. Grange did not develop **any** facts in prosecuting the declaratory judgment action. Instead, the declaratory judgment action was premised solely on the language of the underlying complaint and no discovery was anticipated or undertaken.

The Roberts' argument as to the timing of the motion for summary judgment is similarly misplaced. The motion for summary judgment was heard shortly before the then-scheduled trial date because the Roberts specifically requested that the declaratory judgment action be forestalled so that a summary judgment motion in the underlying case could be prepared and heard. CP 18. Grange agreed. The Roberts requested that the declaratory judgment action be postponed to allow them to pursue a strategy in the underlying claim. In this circumstance to assert that the timing of the motion for summary judgment was prejudicial is erroneous.

The Roberts also complain that they would have to "pay" for their own defense counsel after the determination that the duty to defend was not triggered. This is not a basis for finding that prejudice would occur. An insured is not entitled to a defense in a claim that is not covered under a given policy.

Further, the Roberts did not have to pay their own defense counsel. After Grange obtained its motion for summary judgment, the Roberts tendered to another carrier, Unigard.[2] Unigard, like Grange, accepted the tender of defense and as admitted to by the Roberts' counsel Unigard provided "some coverage for a few months until recently [and] now they are left in a position of not having anybody provide them with a defense, either of the two insurance companies." RP 3, ll. 20-24. And, as admitted to by the Roberts in their opening brief, the Roberts are still not funding the defense of this claim. Instead, they have tendered to yet two other insurance companies who have accepted the defense. See Brief of Appellant, p. 10.

**E. The Dismissal of the Counterclaim Should be Affirmed.**

The Roberts' counterclaim was limited in nature and asserted that Grange was prejudicing the insureds by "filing the coverage

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[2] CP 376

action." CP 245-251. But the Roberts have never submitted any argument in support of this claim.

The trial court essentially determined that the filing of the declaratory judgment action did not "prejudice" the insureds by virtue of having denied the motion to stay which was premised on the same grounds.

When the issue of whether the July 2011 order was a "final" order arose, the trial court did not agree that the counterclaim had been previously dismissed. However, the Roberts provided no argument in support of their counterclaim. Instead, during the hearing on the motion to clarify, the Roberts' counsel stipulated that the counterclaim could be dismissed. The following exchange occurred:

> THE COURT: Let me ask you this: On what basis can your claim of bad faith go forward?
>
> MS. GARELLA: I am not prepared to argue whether there is a basis or not, but I will assume for the purposes of this argument that the counterclaim cannot go forward. The question is whether or not the court has dismissed the counterclaim or not. **I could enter into an agreed order today that the counterclaim is dismissed, and I would have no problem doing that....** Final judgment has not been entered, and, therefore, I would ask that your court deny their form of the order. **And I would be happy to work with counsel on an agreed order on the counterclaim as of today's date.** ...
>
> * * *
>
> THE COURT: Nothing exists in the counterclaim.

MS. GARELLA: And you can so find right now.

THE COURT: It didn't exist as of July of 2011.

MS. GARELLA: But the court did not find that as of July 2011.

THE COURT: I found it my implication. I found it by application.

* * *

THE COURT: ...

I am not prepared to enter an order *nunc pro tunc* amending a July Order.

I think we would – **I'm prepared to take her up on her offer that the matter is dismissed.** The counterclaim. Or else I can sign the order denying the clarification and leave this ting open. Frankly, I think they're going to be hard-pressed to convince the Court of appeals that they have any appellate rights on a claim that hasn't existed by operation of law.

RP, p. 4, ll. 13 – p. 5, ll. 6; p. 7, ll. 19 – 25; p. 9, ll. 3 – 11 (emphasis added). Thereafter the court entered the Order formally dismissing the counterclaim. CP 13-14.

Dismissal of the counterclaim was proper and should be upheld. First, as indicated above, the court implicitly held that Grange was not prejudicing the insureds by prosecuting the declaratory judgment action when the court denied the motion to stay. Second, the Roberts' counsel did not present any argument or evidence to the trial court as to why the counterclaim should not be dismissed. Instead, counsel agreed to the dismissal. The general rule is that the

appellate court will not consider issues raised for the first time on appeal. *Eyman v. McGehee,* ___ Wn. App. ___, 294 P.3d 847, 855 (2013). And case law is clear that a "party cannot set up an error below and then complain of it on appeal. *Casper v. Esteb Enters., Inc.,* 119 Wn.App. 759, 771, 82 P.3d 1223 (2004) (quoting *Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S.,* 112 Wn.App. 677, 681, 50 P.3d 306 (2002)).

**F. Collateral Estoppel Issues.**

The Roberts also argue that if the trial court's decision in this matter is permitted to stand that collateral estoppels principles will arise and the Roberts will lose insurance defense benefits from "two other insurance companies [who] are now co-defending the suit.[3] However, what the Roberts fail to note is that another insurance company – Unigard – obtained the very same order as did Grange and that the appellants have **not** appealed the Unigard order.

The Roberts may argue that the details of the Unigard claim are not in the record. However, the trial court was advised of the Unigard matter. CP 372-378. Moreover the Roberts themselves advised the trial court of the Unigard case stating:

> Your Honor, not all parties believed it, and my clients always believed that they had the right to appeal. They

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[3] See Brief of Appellant, p. 10.

> went off [sic] a second insurer, Union Guard [sic]. In the meantime, they got some coverage for a few months until recently. And now they seek to to [sic] appeal against Grange because they're left in a position of not having anybody to provide them with a defense, either of the two insurance companies.

RP, p. 3, ll. 17-24. Furthermore, even if information about the Unigard matter is considered a supplement to the record this court can take judicial notice of that case without meeting the requirements of RAP 9.11 if the new evidence would serve the "ends of justice." *See Wash. Fed'n of State Employees, Council 28 v. State,* 99 Wn.2d 878, 884-85, 665 P.2d 1337 (1983); *Spokane Airports v. RMA, Inc.,* 149 Wn. App. 930, 937, 206 P.3d 364 (2009).

Here, the ends of justice will be served by considering the Unigard matter. As indicated, appellants assert that a basis for reversing the trial court's decision is the collateral estoppel effect of the ruling in this case. However, collateral estoppel principles are already in effect by virtue of the Roberts' failure to appeal the Unigard decision.

### G. Attorneys Fees

This court should affirm the trial court's decision and, thus, should not award fees to the appellants.

## IV. CONCLUSION

The bodily injury section of the Grange policy is triggered for accidental conduct. The policy was not triggered because the

allegations of the Brandis complaint were that Jane Roberts engaged in deliberate conduct, e.g., she made false statements, engaged in fraud and exerted undue influence and that she did so with the motivation or intention of interfering with their relationship with their mother and to interfere with their inheritance rights. These allegations do not trigger coverage the bodily injury section of Grange's policy.

The personal and advertising liability section of the policy is not triggered because the allegations of the Brandis complaint trigger the exclusions for coverage for knowingly making false statements and for conduct which is designed to interfere with the rights of another. The specific allegations of the complaint are that Jane Roberts made false statements – not that she made statements that later turned out to be false – and that she did so for the purpose of interfering with her siblings inheritance rights. The personal and advertising injury section of the policy was not triggered.

Respondent Grange Insurance Association respectfully requests that this Court affirm the trial court's rulings in this matter.

DATED this 1st day of May, 2013.

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## CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that on the 1st day of May, 2013, I caused to be delivered in the manner noted below, a copy of the document to which this certification is attached.

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