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WASHINGTON STATE
SUPREME COURT

No. 47913-3-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE FARM FIRE AND CASUALTY COMPANY,
Plaintiff/Respondent,

v.

WILLIAM D. MORGAN et.al
Defendants/Appellants.

Appeal from underlying Declaratory Judgment Action on coverage
under Pierce County Superior Court Cause Number 12-2-07091-7.
Judge: Honorable Kitty-Ann van Doorninck

BRIEF OF APPELLANT, ROBERT C. JUSTUS

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I. INTRODUCTION

This is an insurance coverage action not a tort liability action. They are separate and distinct. Mr. Robert Charles Justus, defendant/appellant (hereinafter Justus). On June 9, 2010 Justus and Mr. Tobeck were out collecting scrap metal in Pierce County. Mr. William Morgan and Mrs. Donna Morgan are residents in the area. After being told by his wife about a noise outside, Mr. Morgan, went outside to investigate the noise. Mr. Morgan observed Mr. Justus and Mr. Tobeck loading pipes in the back of a truck. Mr. Morgan believed that the pipes that the men were loading into the truck were his. He thought the men were stealing his pipe so he pointed his gun at the men, and directed his wife, Donna Morgan to call 911 and summon law enforcement to the scene. During the process of the detention, Mr. Tobeck was killed and Justus was severely injured. Justus later filed a civil suit against Mr. and Mrs. Morgan who tendered the claims against them to State Farm, their insurer. After lengthy liability litigation, Mr. and Mrs. Morgan felt that they have been severely prejudiced by State Farm's failure to settle the liability claims against them. Therefore, the Morgans, with the assistance of private counsel, to protect their interest from

personal liability exposure, entered into a Settlement Agreement and Release with Justus. The settlement agreement between the Morgans and Justus went through a required reasonableness hearing and the court awarded Justus \$818,900 in damages and entered a judgment against Mr. and Mrs. Morgan.

State Farm and Casualty Company, (hereafter State Farm) sued for declaratory judgment on coverage. Justus counterclaimed for bad faith against State Farm. The court bifurcated the coverage case from the bad faith claims. A coverage trial occurred. After the trial, the court issued Findings of Fact and Conclusions of Law and signed a declaratory judgment in favor of Plaintiff, State Farm. Under the bad faith claim, Justus brought a motion to compel discovery of the State Farm claim file. State Farm brought a partial motion for summary judgment dismissing the extra contractual counter claims by Justus. The coverage court denied Justus' motion to compel and granted State Farms motion for summary judgment and dismissed Justus' extra contractual claims. Justus is appealing both decisions.

II. DECISIONS BELOW

- (1) On April 23, 2015, after the coverage trial, the Honorable Judge Kitty-Ann van Doorninck entered Findings of Facts and Conclusion of law in favor of plaintiff, State Farm. CP 2342-2348. On August 5, 2015 the court ruled and entered a declaratory judgment, concluding that State Farm and Casualty Company has no duty to pay any portion of the \$818,900 settlement between defendant Robert Charles Justus and William and Donna Morgan deemed reasonable in the Order on Reasonableness of Settlement entered in cause no. 12-2-10340-8. CP 2528-2532
- (2) On July 24, 2015 the court entered an order dismissing Justus' extra contractual claims. CP 2519-2521

III. ASSIGNMENT OF ERROR

Assignment No. 1: The trial court erred when it entered Findings of Facts and Conclusion of law unsupported by the record. CP 2342-2348.

Assignment No. 2: The trial court erred when it entered an order ruling that State Farm and Casualty Insurance Company has no duty to pay any portion of the \$818,900 settlement, or any judgment pursuant to that settlement between defendants Robert Charles Justus and William and Donna Morgan deemed reasonable in the Order on Reasonableness of Settlement

entered in cause no. 12-2-10340-8. Amd. CP 2559-2560 sub #11 (Admitted trial exhibit)

Assignment No. 3: The trial court erred when it denied Justus' motion to compel discovery of the claim file and granted State Farm's motion for partial summary judgment dismissing the case. CP 2522-2523.

Assignment No. 4: The trial court erred when it ruled that defendant Justus' extra contractual counter claims for bad faith against State Farm were dismissed with prejudice. CP 2519-2521

ISSUES PRESENTED ON COVERAGE

A. Did the trial court err when it ruled that State Farm and Casualty Company has no duty to pay any portion of the \$818,900 settlement and judgment entered by the tort liability court between defendants Robert Charles Justus and William and Donna Morgan deemed reasonable in the Order on Reasonableness of Settlement entered in cause no. 12-2-10340-8.

B. Did the trial court err when it applied a two-year statute of limitations using a tort liability analysis for a coverage determination; and found that no coverage exists under the policy because Justus did not file his lawsuit against the Morgans until more than two years after June 9, 2010, incident.

C. Did the trial court err when it concluded that no coverage exists under the State Farm umbrella policy for the intentional acts Mr. Morgan on June 9, 2010.

D. Did the trial court err when it concluded that there were no facts supporting a theory of negligence.

E. Did the trial court err when it failed to define the term wrongful detention of person under the personal umbrella policy.

F. Did the trial court err when it ruled that Mr. Morgans' acts on June 9, 2010 were specifically intended to cause harm.

G. Did the trial court err when it denied Justus' motion to compel discovery for the claim file to prosecute his extra contractual counter claims for bad faith, pursuant to the consent judgment and release, and granted State Farms' motion for partial summary judgment dismissing his extra contractual claims with prejudice.

IV. STANDARD OF REVIEW

The standard of review is the method the Appellate court uses to identify its role in deciding a particular issue on review. The appellate court reviews decisions of the trial court related to a contract de novo. The mandate of the appellate courts is to decide the law, and appellate court's review rulings on pure questions of law "de novo." *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 172, 322 P.3d 1219 (2014). The "de novo" or "error at law" standard permits the appellate court to substitute its judgment for that of the decision maker whose decision is being reviewed. *Skamania County v. Columbia River Gorge Comm's*, 144 Wn.2d 30 42, 26 P.3d 241 (2001).

Standard of review:

De novo: Legal issues are reviewed de novo.

The standard of review applies to specific rulings in civil cases such as Findings of Facts and Conclusions of Law and Summary Judgments. The mandate of the appellate courts is to decide the law, and appellate courts review the rules on questions of law, "de novo". See, e.g. *Town of Woodway v. Snohomish County*, 180 Wn.2d 165 172 322 P.3d 1219. Conclusions of law are subject to de novo review. In McCleary, v. State Farm Fire & Cas 173 Wn. 477, 517, 269 P.3d 227 (2012), the Supreme Court explained that it reviews a trial court's challenged findings of fact for substantial evidence. "Substantial evidence" is defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise it true. The Supreme court went on to say that it will not "disturb findings of fact supported by substantial evidence even if there is conflicting evidence.

The Supreme court also indicated that it reviews de novo the trial court's conclusions of law, including its interpretation of statutes, constitutional provisions, motions for summary judgment and interpretation of contracts, *id.* Whether an insurance policy is ambiguous, when there is no disputed evidence concerning the parties' intent.

The appellate courts also “review granting summary judgment de novo.” *Cerrillo v. Esparza*, 158 Wn.2d 194,199, 142 P.3d 155 (2006). In reviewing a summary judgment, the appellate courts “performs the same inquiry as the trial court. *Id.* The court will “treat all facts and reasonable inferences and views the evidence and any inferences that may be drawn from the evidence most favorable to the nonmoving party. *Id.*

V. STATEMENT OF THE CASE

On June 9, 2010, at approximately 9:45 pm, Justus and his friend Tobeck were collecting scrap metal alongside the north side of 358th Street South, Roy, Washington, inside Pierce County, See 4/13/15RP pg. 10 at 12-15. Justus and Tobeck retrieved the scrap pipes from a ditch underneath some briar and sticker bushes that had grown over almost the entire length of the pipes, See 4/13/15RP pg. 10 at 17-20. Defendant Morgan who resides on the other side of the street where Tobeck and Justus located the abandon pipe. See 4/14/15RP pg. 6 at 7-19. Mr. Morgan was inside his home in the living room watching television and listening through his headphones. See 4/14/15RP pg. 10 at 17-24. According to

Morgan, his wife got out of bed and came down the hall and said that she heard noises outside. See 4/14/15RP pg. 9 at 6-11. Morgan got up out of his chair and picked up his gun, which was beside him. Morgan, armed with his hand gun walked outside the front door of his home in the dark and did not see any men. He did see his wood shed, apple trees along the road, and his cars in the carport. Morgan then stepped back into his home and grabbed a flashlight out of the cabinet, and then proceeded up the driveway to see what was going on. Nobody approached Morgan and he couldn't see anything. Morgan then walked from his driveway to his gate made of 6-inch square steel gatepost that were 6 feet high, and has two 3-by-4 angle-iron hinges. Morgan leaned into the steal gate, and peeked around and shined the flashlight and saw the pipes that he admitted he had put in a ditch, and now in the back of Tobeck's pickup. Morgan admitted that he never purchased the scrap pipes, but had obtained them "used" from Simpson Tacoma Kraft, his former employer. Morgan admitted that he had originally stored the scrap pipes for approximately 20 years at an ex-family member's house. He then moved the scrap pipes to a "ditch" across the roadway from his home. According

to Morgan he called to obtain a value of the pipes and determined that the “scrap” value for the pipes in question was \$200.00. While Justus and Tobeck were tying-off the pipes in the back of the truck, they were confronted at gunpoint by Morgan. Justus recalls hearing someone say “hey” or something to that effect See 4/13/15RP pg. 11 at 15-19. Then Morgan said, “Hey, you have my pipe.” Morgan turned his head, saw his wife sticking her head out of the front-door of the house and instructed her to “call the police”. See 4/14/15RP pg. 15 at 6-9.

Tobeck and Justus were fearful and raised their hands and did not feel that neither was free to leave. See 4/13/15RP pg. 13 at 2-3. Morgan detained Justus and Tobeck at gun point while yelling at both young men. See 4/13/15RP pg. 11 at 15-19. Both men were fearful, so Justus attempted to talk to Morgan to defuse the situation, but Morgan would not listen. See 4/13/15RP pg. 12 at 4-7. Justus had his hands up and told Morgan that they (Justus & Tobeck) would take the pipes out. See 4/13/15RP pg. 12 at 9. Morgan became more agitated. Justus and Tobeck slowly moved down the side of the truck with their hand up and opened the doors and slid in.

They attempted to leave the area. See 4/13/15RP pg. 12 at 22-25, and pg.13 at 1-3. Tobeck was driving and Justus was in the passenger seat. When Justus and Tobeck pulled away from Morgan headed in the opposite direction, Justus recalls hearing gunfire. See 4/13/15RP pg. 13 at 5-15. As they pulled away headed towards a cul-de-sac or dead end, Justus hit the floor and thought to himself that we have to drive back past this guy. See 4/13/15RP pg. 13 at 17-25. Morgan randomly fired (9) shots in the direction of the truck that occupied by Tobeck and Justus in an attempt to detain them. When Tobeck and Justus turned around and as they past Morgan, Morgan shot Tobeck in the head causing him to lose control of the truck, leave the roadway, and slam into a tree. See 4/13/15RP pg. 14 at 2-11. Tobeck and Justus were seriously injured. Morgan watched Justus crawl out of the passenger window after the collision with the tree. Morgan confronted, Justus with a lot of four-letter adjectives and ordered him to the ground. See 4/13/15RP pg. 14 at 23-25, pg. 15 at 1-22. (Finding of Fact #20). Justus pleaded with Morgan to allow him (Justus) to help injured Tobeck, but Morgan refused. Justus testified that Morgan ordered him to the ground at

gunpoint and would not let him get up. See 4/13/15RP pg. 15 at 1-3 pg. Justus felt Morgan step-on his back or somewhere as he lay on his stomach spread out on the ground. Morgan held Justus until law enforcement arrived on the scene. The first responding law enforcement officer was Pierce County Sheriff Deputy Jeff Johnson. See 4/16/15RP pg. 5 at 16 at and 23-25; and 4/16/15RP pg. 6 at 8-13. (Finding of Fact #22). After law enforcement arrived Morgan put his gun in his back pocket. See 4/16/15RP pg. 6 at 1-3. Three independent witnesses observed Morgan detain Justus. See 4/13/15RP pg. 71 at 2-10; 21-22; and pg. 88 at 18-20. 4/14/2015RP pg. 68 at 21-25.

VI. ARGUMENT

- A. The trial court erred when it ruled that State Farm has no duty to pay any portion of the \$818,900 settlement and judgment entered by the tort liability court between defendants Robert Charles Justus and William and Donna Morgan deemed reasonable in the Order on Reasonableness of Settlement entered in cause no. 12-2-10340-8. (CP 2528-2531)**

In Washington, the Supreme Court ruled that when an insurer has notice of an action against an insured, and is tendered an opportunity to defend, it is bound by the judgment

therein in the question on the insured's liability. *East v. Fields*, 42 Wn.2d 924, 925 (1953). The judgment, however is not conclusive as to the question of coverage of the policy in question (*Restatement, Judgments 517, § 107 (g)*), for the reason that the causes of action for tort liability and for indemnity liability are separate and distinct. 1 *Freeman, Judgments, 259 P.2d 640 (5th addition) 991, § 450. (Emphasis mine).*

The umbrella policy on page 6 reads in part as follows:

If a claim is made or suit is brought against an **insured** for damages because of a **loss** for which the **insured** is legally liable and to which this policy applies, **we** will pay for such **loss** on behalf of the insured, the damages that exceed the **retained limit**...(emphasis original). Amd. CP 2559-2560 sub #6 (Admitted trial exhibit # 6)

Here, a settlement agreement and release, a *legal document*, was signed between William and Donna Morgan and Justus on May 19, 2014, and entered by the court resolving the tort liability action. A consent judgment between the parties in the amount of 1.3 million dollars was also entered by the court. Amd. CP 2559-2560 sub #1 (Admitted trial exhibit). State Farm intervened and participated in the tort liability action and agreed that the judge can modify the

judgment to an amount that the liability court would find as reasonable. All parties agreed. Amd. CP 2559-2560 sub #11. The tort liability court held a required reasonableness hearing and reduced the damages awarded to Justus to \$818,900.00 as being reasonable and issued an Order on reasonableness of the settlement on January 5, 2015. *Id.* Amd. CP 2559-2560 sub # 11 (Admitted trial exhibit) The trial court entered an amended judgment on April 17, 2015. Under the coverage action, and after a trial on coverage, with live witness testimony, the coverage court did not disturb the order issued by the tort liability court on damages awarded to Justus' settlement. (CP 2342-2348, *Finding of Fact #29*).

- B. The trial court erred when it applied a two-year statute of limitations using a tort liability analysis for a coverage determination; and found that no coverage exists under the policy because Justus did not file his lawsuit against the Morgans until more than two years after the June 9, 2010, incident. CP 2342-2348, (Conclusion of Law #11 & #16).**

The doctrine of collateral estoppel also applies to this case. This doctrine states that the insurer is bound by any material finding of fact essential to the judgment of tort liability, which is also decisive of the question of the coverage of the

policy of insurance. *Restatement, Judgment 293, §68*. After all, it would be anomalous for a court to find such a critical fact one way in the tort action, and the opposite effect in the garnishment proceeding. *Id.* Here, the tort liability court did not dismiss Justus' tort claims against the Morgans for failure to comply with the statute of limitations as indicated in the order dated May 24, 2013 denying the 12(b)(6) motion to dismiss Justus' claim against the Morgans for failing to comply with the statute of limitations. The statute of limitations is a question of law, not a question of fact. The statute of limitation issue was heard by the tort liability court adjudicated and decided. As stated, the tort liability action terminated upon settlement of the parties.

Furthermore, the doctrine of Collateral estoppel can also bind an insurer to factual determinations made in a prior liability action against the insured in a subsequent declaratory judgment action to determine coverage issues. *Finney v. Farmers, Ins. Co. of Wash.* 21 Wash. App 601, 586 P.2d P. 2d 519 (1978), *aff'd*, 92 Wash.2d 748, 600 P.2d 1272 (1979). The coverage court still erred in not affording coverage because it analogized false arrest and false imprisonment to wrongful

detention all three are covered offenses under the umbrella policy and the statute of limitation is not applicable to a coverage issue. CP 2342-2348, (Conclusion of Law #16).

C. The court erred when it concluded that no coverage exists under the State Farm umbrella policy for the intentional acts of Mr. Morgan on June 9, 2010.

The umbrella policy on page 2 reads in part as follows:

7. "loss" means:
 - a....or
 - b. the commission of an offense which first results in **personal injury** during the policy period. A series of similar or related offenses is considered to be one **loss**.

8. "**personal injury**" means injury other than **bodily injury** arising out of one or more of the following offenses:
 - a. false arrest, false imprisonment, wrongful eviction, *wrongful detention of a person*;
 - b. abuse of process, malicious prosecution
 - c. libel, slander, defamation of character; or
 - d. invasion of a person's right of private occupancy by physically entering into that person's personal residence.

As noted above in the personal umbrella policy under section 7(b) and 8 (a) the language is unambiguous and covers intentional acts. False arrest, false imprisonment and wrongful detention of a person are covered occurrences. The coverage court nullified coverage as it relates to the statute of limitation by finding false arrest, false imprisonment and wrongful detention as synonymous occurrences finding a two-year statute of limitation. CP 2342-2348, (*Conclusion of Law #7 and #16*). The coverage court erred in its analysis. If the court is going to use the above analysis for tort liability, the same analysis would apply to the coverage liability. The court found that Mr. Morgan committed false arrest and false imprisonment or both, the same analysis would require a finding of wrongful detention of a person.

D. The trial court erred when it concluded that there were no facts supporting a theory of negligence. CP 2342-2348 (Conclusion of Law #12).

The coverage court found no facts supporting the theory of negligence and at all times, the acts of Mr. Morgan were intentional. CP 2342-2348 (Conclusion of Law #12). Here, the coverage court erred because the theory of negligence as it

relates to tort liability is not before the court in this coverage action. In a coverage action the court is to find as a matter of law whether or not there is coverage under the umbrella policy for its insured conduct. In a declaratory action on coverage, the coverage court found that Mr. Morgan's conduct amounted to false arrest, false imprisonment, (wrongful detention). CP 2342-2348 These are covered occurrences under the umbrella policy and preformed negligently. Here, the term "negligence" is not found anywhere in the State Farm umbrella policy. The coverage court erred when it used it in an analysis under the State Farm Umbrella policy as to exclude coverage. Under section 7(a) the policy defines a loss as it relates to an "accident" which could occur negligently. Justus is claiming not claiming that Mr. Morgan detained him on accident, but is claiming that his (Morgan) conduct was negligent when he wrongfully detained him at gun point at the gate, and again after the collision in the truck.

Mr. Morgan mis-assessed the encounter with Justus on June 9, 2010, believing that he (Morgan) had a legal right to pull his gun and point it at Justus with the intent to detain him until law enforcement arrived. Justus believes that Morgan's

conduct falls under 7(b) a covered occurrence. This is supported in the findings of facts, as soon as Mr. Morgan detained Mr. Justus he directed his wife to call 911 to summon law enforcement to the scene. CP 2342-2348 (Finding of Fact #14). Typically, if a person had specific intent to cause harm he would not summon law enforcement to the scene. Here, Mr. Morgan's was negligent in his assessment and conduct during the entire contact on June 9, 2010.

Negligence has been defined as an act or failure to act.

§ 284. Negligent Conduct; Act or Failure to Act
Negligent conduct may be either:

- (a) act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, or
- (b) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do.

Restatement (second) Torts §284, comment (a).

Here, the actor (Morgan), as a reasonable man, should realize that his act involves an unreasonable risk of causing an invasion of interest of Justus, if a reasonable man knowing so much of the circumstances surrounding the actor at the time of his act as the actor knows or should know, would realize the

existence of the risk and its unreasonable character. The conditions under which the actor should realize the existence and extent of the risk involved in his conduct are stated in *Restatement (second) Torts* §§ 291-293.

Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or the particular manner in which it is done. *Restatement (second) Torts* § 291. Here, the evidence in the record show that Mr. Morgan went outside of his home to investigate a noise. He took with him his gun and a flashlight. He saw two men with his \$200 worth of "scrap" pipe in the back of their truck. Mr. Morgan pulled his gun and pointed at the men and told his wife to call 911. A reasonable person would have attempted to talk prior to pulling a gun. And when he instructed his wife to call the police, a reasonable person would have easily retreated into home, locked the doors and waited for the police to arrive.

Instead, Mr. Morgan negligently assessed his legal authority to detained Justus and Tobeck. The coverage court

should have found coverage when it found in the finding of facts and conclusion of law that Mr. Morgan committed either a false arrest or false imprisonment, or both, (wrongful detention)" upon Mr. Justus. CP 2342-2348, (*Conclusion of Law #8*). The coverage court again misapplied tort liability in a coverage action.

E. The trial court erred when it failed to define the term wrongful detention of person under the personal umbrella policy.

In Washington, the court examines the terms of an insurance contract to determine whether under the plain meaning of the contract there is coverage. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wash.2d 869, 876, 784 P.2d 507, 87 A.L.R.4th 405 (1990). If terms are defined in a policy, then the term should be interpreted in accordance with that policy definition. Undefined terms, however, must be given their "plain, ordinary, and popular" meaning. *Boeing*, 113 Wash.2d at 877, 784 P.2d 507 (*citations omitted*). To determine the ordinary meaning of undefined terms, courts may look to standard English dictionaries. If words have both a legal, technical meaning and a plain, ordinary meaning, the ordinary

meaning will prevail unless it is clear that both parties intended the legal, technical meaning to apply. *Boeing*, 113 Wash.2d at 882, 784 P.2d 507. The court erred because it never defined the term “wrongful detention of a person” as it relates to the case facts. In Washington, the court examines the terms of an insurance contract to determine whether under the plain meaning of the contract there is coverage. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wash.2d 869, 876, 784 P.2d 507, 87 A.L.R.4th 405 (1990). If terms are defined in a policy, then the term should be interpreted in accordance with that policy definition. Undefined terms, however, must be given their “plain, ordinary, and popular” meaning. *Boeing*, 113 Wash.2d at 877, 784 P.2d 507 (citations omitted). To determine the ordinary meaning of undefined terms, courts may look to standard English dictionaries. If words have both a legal, technical meaning and a plain, ordinary meaning, the ordinary meaning will prevail unless it is clear that both parties intended the legal, technical meaning to apply. *Boeing*, 113 Wash.2d at 882, 784 P.2d 507. The court erred because it never defined the term “wrongful detention of a person” under the finding of fact and conclusions of law. The only time you see the term

“wrongful detention” is under conclusion of law 6 & 7, where the court attempts to analogize the offenses with false arrest and false imprisonment to determine whether coverage is excluded because of the two- year statute of limitation. CP 2342-2348 (Conclusion of Law #7).

Even the courts analogy between false arrest, false imprisonment with wrongful detention warrants coverage under the umbrella insurance policy. In *Kitsap County v. Allstate Insurance Company* 136 Wn.2d 567, 964 P.2d 1173, (1998) the court indicated that to determine whether personal injury coverage exists we must look at the type of the offense that is alleged. The *Kitsap* court determined that if claims are analogous to claims for the offense of wrongful entry, wrongful eviction or other invasion of the right of private occupancy, then there is coverage under the personal injury provision of the policies in question unless excluded by other provisions in the policy, *Kitsap at pg. 580*. Here, in the court conclusions of law, like in *Kitsap*, the court adopted false arrest and false imprisonment to wrongful detention. However, under *Kitsap* one of the covered losses was missing so the court had to go through the analogy exercise. Here, no covered offense is

293missing from the language of the policy. The court analogized false arrest, false imprisonment, and wrongful detention of a person. All three are covered losses. So the court obviously erred by going through the Kitsap analysis when it was unnecessary.

F. The trial court erred when it ruled that Mr. Morgan's acts on June 9, 2010 were specifically intended to cause harm.

There were no facts that supports that Mr. Morgan had the specific intent to cause harm during the initial "mini" detention while holding Justus and Mr. Tobeck at the gate while directing Mrs. Morgan to call 911 to summon the police. See 4/14/15RP pg. 15 at 6-9, CP 2342-2348, (Finding of Fact #17), and (*Conclusion of Law #8*). Nor was there any facts that support that Mr. Morgan had any specific intent to cause harm after the truck crashed into a tree and Justus crawled out of the window and was ordered to the ground and held at gunpoint by Mr. Morgan until law enforcement arrived. CP 2342-2348, (Finding of Fact #20). The initial peril that affords coverage under the umbrella policy begins at the Morgans' gate when Morgan detained Justus at gun point. CP 2342-2348, (Finding of Fact #17).

Under Washington law, where a peril specifically insured against (i.e. wrongful detention) sets other causes into motion (i.e. shooting) which, in and unbroken sequence, produced the result for which recovery is sought, the loss is covered, even though other events (the shooting) within the chain of causation are excluded from coverage.” *McDonald v. State Farm Fire & Cas.* 119 Wn.2d 724, 731, 837 P.2d 1000 (1992) (citing McDonald. Co 98 Wn.2d 533, 538 656 P.2d 1077 (1983)). Stated in another fashion, where an insured’s risk itself sets into operation a chain of causation in which the last step may have been an excepted risk, the excepted risk will not defeat recovery. The rule was later reaffirmed in *Safeco Ins. Co. of Am. v. Hirshmann*, 112 Wash.2d 621, 773 P.2d 413 (1989). If the efficient proximate cause (“mini” false imprisonment) (wrongful detention) is a covered peril, then there is coverage under the policy regardless whether subsequent events within the chain, which may be causes-in fact of the loss, are excluded by the policy. *Hirshmann* at 628, 773 P.2d 413. Here, the initial “mini” false imprisonment/detention was a covered peril, as specifically outlined under the State Farm Umbrella Policy. Amd. CP 2559-2560 sub # 6 (Admitted trial

exhibit) The peril began when Mr. Morgan came out of his house and contacted Mr. Justus and Mr. Tobeck at gunpoint CP 2342-2348, (Finding of Fact #17), he instructed his wife to call the police. See 4/14/15RP pg. 15 at 6-9, CP 2342-2348, (Finding of Fact #14 and #17), and (*Conclusion of Law #8*). The evidence shows that Mr. Morgan specific intent was to detain (the peril), both men until law enforcement arrived. See 4/14/15RP pg. 36 at 7-14. When Morgan pointed his gun at Justus and Tobeck it set into motion an unbroken chain of events which culminated in a shooting, a crash and Morgan re-contacting Justus and ordering Justus to the ground at gunpoint until law enforcement arrived. See 4/16/15RP pg. 5 at 16 at and 23-25; and 4/16/15RP pg. 6 at 8-13. (Finding of Fact #22). Here, the coverage court found that Mr. Morgan, State Farm's insured, initially engaged in a "mini" false imprisonment against Justus at the initial contact. CP 2342-2348, (Finding of Fact #17). This would be the covered initial peril.

The umbrella policy on page 2 reads in part as follows:

7. "loss" means:
 - a....or

b. the commission of an offense which first results in **personal injury** during the policy period. A series of similar or related offenses is considered to be one **loss**.

The policy language is clear and unambiguous as it reads that a series of similar or related offenses is considered to be one **loss**. In fact, it mirrors the efficient proximate cause analysis as argued above. Here, the initial contact or “mini” detention was the efficient proximate cause. The findings of fact and conclusions of law does not cite any action that Mr. Morgan undertook during that initial detention that suggests any specific intent to create harm. Any subsequent action of Mr. Morgan secondary to that initial peril does not nullify coverage because the initial “mini” detention (wrongful detention) is specific language and covered under the umbrella policy. Furthermore, after the shooting Mr. Morgan re-contacted Justus and ordered him to the ground at gun point until law enforcement arrived. See 4/16/15RP pg. 6 at 8-13; 4/13/15RP pg. 71 at 2-1 and 4/13/15RP pg. 88 at 15-24. Again the findings of fact and conclusions of law does not cite any action that Mr. Morgan undertook during the second detention of Justus that

suggest that Mr. Morgan had any specific intent to create harm. The court erred because according to the insurance contract this series of events on June 9, 2010 surrounding the contact between Justus and Morgan would be considered one loss and covered under the policy.

Additionally, we have to look at the policy language. Amd. CP 2559-2560 sub #6 (Admitted trial exhibit #6) The exclusion under page 9, section 17 do not apply to this case because under Section 8, the occurrences listed are intentional acts, which in and of itself would cause harm. To allow the exclusion to apply would be contrary to public policy. For example, under section 8-part b, malicious prosecution, which under the legal definition includes "the specific intent to cause harm" would be covered as a qualifying offense under personal injury, but at the same time, when an insured files a claim for malicious prosecution, the claim would be denied because to engage in covered loss would also be excluded on page 9 section 17. State Farm would deny coverage. State Farm cannot have it both ways.

- G. The trial court erred when it ruled that defendant Justus' extra contractual counter claims for bad faith against State Farm were dismissed with prejudice. See 7/24/15RP pg. 24, at 23; pg. 16 at 11—25; CP 2522-2523; See 7/24/15RP pg. 17 at 5, 6. CP 2519-2521.**

Under Washington law, the scope of discovery is very broad. *Coburn v. Seda*, 101 Wash.2d 270, 276, 677 P.2d 173 (1984) (citing *Bushman v. New Holland Div. of Sperry Rand Corp.*, 83 Wash.2d 429, 434, 518 P.2d 1078 (1974)). The right to discovery is an integral part of the right to access the courts embedded in our constitution. *Lowy v. PeaceHealth*, 174 Wash.2d 769, 776-77, 280 P.3d 1078 (2012) (citing *Doe*, 117 Wash.2d at 780-81, 819 P.2d 370).

Justus made a request for the William and Donna Morgan's claim file pursuant to *Cedell v. Farmers Insurance Company of Washington*, 176 Wn.2d 686, 295 P.3d 239 (2013) and the Settlement and Release agreement. Amd. CP 2559-2560 sub #1 (Admitted trial exhibit). Under the agreement, Mr. Justus stands in the shoes of the Morgans, and is entitled to full access to the entire claim file and any and all documents related to the file including the special investigation unit file. This is supported by *Cedell*, where the Supreme Court held that *Cedell*

is entitled to broad discovery, including, presumptively the entire claims file. *Id.*

The insurer may overcome this presumption by showing in camera its attorney was engaged in the quasi-fiduciary tasks of investigating and evaluating the claim. Upon such a showing, the insurance company is entitled to the redaction of communications from counsel that reflected the mental impressions of the attorney to the insurance company, unless those mental impressions are directly at issue in their quasi-fiduciary responsibilities to their insured. Justus propounded to State Farm, State Farm produced a MOODY file and emails that shows the investigation began on June 9, 2010. At this point Mary DeYoung and Joe Hampton were not working on the file. Therefore, no attorney or quasi-fiduciary tasks of investigating or evaluating the claim; nor mental impressions from Mary DeYoung or Mr. Hampton in evaluating the claim existed. Accordingly, State Farm must produce any and all documents from June 9, 2010 to January 2012.

There are numerous recognized actions for bad faith against medical, homeowner, automobile, and other insurers in which the insured must have access to the claim file in order to

prosecute the claim. A first party bad faith claim arises from the fact the insurer (State Farm) has a quasi-fiduciary duty to act in good faith towards its insured (Morgans) which extends to Justus (assignee) because of the settlement and release agreement. For example, there are bad faith investigations, *Safeco Ins. Co. of Am. v. Butler*, 118 Wash.2d 383, 389, 823 P.2d 499 (1992); untimely investigations, *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wash.2d 784, 793, 16 P.3d 574 (2001); failure to inform the insured of available benefits, *Anderson v. State Farm Mut. Ins. Co.*, 101 Wash.App. 323, 2 P.3d 1029 (2000); and making unreasonably low offers, *Kitsap County v. Allstate Ins. Co.*, 81 Wash.App. 624, 915 P.2d 1140 (1996). A first party bad faith claim arises from the fact that the insurer has a quasi-fiduciary duty to act in good faith toward its insured. *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wash.2d 122, 128, 196 P.3d 664 (2008); *Van Noy*, 142 Wash.2d at 793, 16 P.3d 574. State Farm's quasi-fiduciary duty to the Morgans extend to Mr. Justus because under the settlement and release agreement the Morgans assigned their rights to Mr. Justus. State Farm is required to produce what Mr. Justus requests such as the entire insurer's claim file and special unit

investigation file maintained for the insured (Morgan) in order to discover facts to support his bad claim against State Farm.

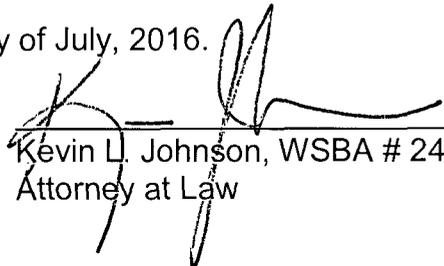
As mentioned above, State Farm claims that the first it knew about Justus claim is June of 2012. If State Farm Properly investigated the claim it would have begun in June 9, 2010. At that point State Farm would have known about Justus. Litigation has not commenced and no attorney was included in the investigation. Even if a lawyer was involved, to permit a blanket privilege in insurance bad faith claims because of the participation of lawyers hired or employed by insurers would unreasonably obstruct discovery of meritorious claims and conceal unwarranted practices. *Cedell at pg. 696 and 697.* Here, on June 2010 Defendant Donna Morgan contacted her State Farm Agent which puts State Farm on notice of a potential claim surrounding the incident on June 9, 2010. State Farm assigned a claims representative to investigate the loss and it was denied on September 9, 2010. At that time, the loss file was investigated and evaluated. Justus had not begun any litigation. Justus stands in the shoes of the Morgans, pursuant to the settlement and release agreement and assignment of rights, thus Justus owns all the Morgans' right, including the

fiduciary duty that an insurer has toward its insured, and claims under the policy. With this assignment, the discovery rules dictate that Mr. Justus have access to any and all documents of the Morgans and the entire claim file held by State Farm, its agents, and its attorneys.

VII. CONCLUSION

The court should find coverage under the umbrella policy and order State Farm to indemnify the legal amended judgment, plus interest and award attorney fees and costs; and remand the extra contractual claims for further proceedings.

DATED this 5th day of July, 2016.



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CERTIFICATE OF SERVICE

I Kevin L. Johnson hereby certify that on 7.5.16 caused to be electronically served the foregoing documents upon the counsel via email as follows:

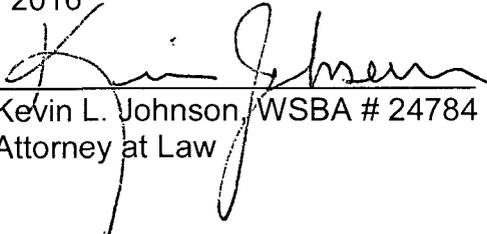
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