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DIVISION II

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

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STATE FARM FIRE AND CASUALTY COMPANY,

Plaintiff/Respondent,

v.

WILLIAM D. MORGAN and DONNA L. MORGAN, husband and wife;  
CORINNE M. TOBECK, as Personal Representative of the Estate of  
JOSEPH "JOEY" TOBECK; VERNON A. TOBECK, natural father of  
decedent Joseph "Joey" Tobeck; and APRIL D. NORMAN, natural  
mother of decedent Joseph "Joey" Tobeck; and  
ROBERT CHARLES JUSTUS, a single man,

Defendants/Appellants.

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**RESPONDENT'S BRIEF**

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## I. INTRODUCTION

This is an appeal by defendant/respondent Robert Justus from a post-trial judgment in favor of plaintiff/appellant State Farm Fire and Casualty Company (“State Farm”). The case involves an insurance coverage dispute over an incident that took place on June 9, 2010. State Farm’s insured, William Morgan, confronted Mr. Justus and his companion Joseph Tobeck at gunpoint outside Mr. Morgan’s home, and then fired nine shots at them after they got in their pickup truck and began driving away. Most of the shots struck the truck’s passenger cab. Mr. Tobeck died from a bullet to his head. Mr. Justus was traumatized by his participation in the events, which included being next to Mr. Tobeck in the pickup when he was shot, and then being assaulted at gunpoint by Mr. Morgan, who repeatedly threatened to shoot him as well.<sup>1</sup>

State Farm issued the Morgans a homeowners policy and a personal liability umbrella policy that were in effect on the date of the incident. State Farm defended the Morgans against Mr. Justus’s liability lawsuit subject to a reservation of rights as to coverage, and filed a declaratory judgment action to obtain a ruling on its coverage obligations.

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<sup>1</sup> Mr. Tobeck’s claims have been resolved. This appeal involves only Mr. Justus’s claims.

After the underlying liability action was resolved,<sup>2</sup> the coverage claims were tried in a bench trial. The ultimate issue presented was whether State Farm had a duty to indemnify the Morgans for their \$818,900 settlement with Mr. Justus. On April 23, 2015, the trial court entered its Findings of Fact and Conclusions of Law, determining that neither of the State Farm policies provided coverage.

State Farm then moved for summary judgment dismissal of Mr. Justus's bad faith claims. The trial court granted State Farm's motion, and denied Mr. Justus's concurrent motion to compel discovery. It then entered a Judgment and Declaratory Judgment resolving all issues in State Farm's favor. This appeal followed.

## **II. COUNTERSTATEMENT OF THE ISSUES**

Issue No. 1: Is Mr. Justus precluded from assigning error to the trial court's factual findings because of his failure to reference any disputed findings by number, as required by RAP 10.3(g)?

Issue No. 2: Did the trial court correctly conclude that Washington law does not recognize a cause of action for either "negligent wrongful

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<sup>2</sup> The liability action was resolved by a stipulated consent judgment settlement. Under that settlement, the Morgans assigned their rights against State Farm to Mr. Justus. In exchange, Mr. Justus agreed not to execute on the judgment against the Morgans personally. (Trial Ex. 1) A reasonableness hearing was held in the liability action, and the court held that the reasonable value of the settlement was \$818,900. (Trial Ex. 11) The liability court's reasonableness order was appealed by State Farm. That appeal is pending under cause no. 47196-5-II. It is fully briefed and awaiting assignment of an oral argument date.

detention” or “wrongful detention of a person,” and that under Washington law and the State Farm personal liability umbrella policy, the “personal injury” offense of “wrongful detention of a person” is substantially equivalent to the torts of false arrest and false imprisonment?

Issue No. 3: Did the trial court correctly conclude that Mr. Justus’s damages recovery against the Morgans was not based on a theory of “wrongful detention of a person,” because any claim by Mr. Justus for such an offense was time barred by the date he filed his lawsuit?

Issue No. 4: Did the trial court correctly conclude that Mr. Morgan’s actions were intentional, that the facts did not support a theory of negligence, and that Mr. Morgan acted with the specific intent to cause harm?

Issue No. 5: Did the trial court correctly reject Mr. Justus’s argument that an efficient proximate cause analysis applied?

Issue No.6: Did the trial court properly deny Mr. Justus’s motion to compel discovery of the claim file, where no legal basis existed to support his extra-contractual and bad faith claims?

Issue No. 7: Did the trial court properly grant State Farm’s motion for summary judgment dismissing Mr. Justus’s extra-contractual and bad faith claims, where State Farm provided a vigorous reservation of

rights defense to the Morgans, and the court had earlier concluded that the State Farm policies provided no coverage?

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

#### **A. THE INITIAL PROCEEDINGS IN THIS CASE**

After extending a reservation of rights defense to the Morgans, State Farm filed its complaint for declaratory relief below on March 14, 2012. (CP 2-18, 68-79) At that time, only the Tobeck estate had filed a liability lawsuit against the Morgans. (CP 10-17) State Farm's complaint sought declaratory relief as to its obligations to defend and indemnify the Morgans against the Tobeck estate's claims under a homeowners policy and a personal liability umbrella it issued to them.<sup>3</sup>

On May 19, 2014, the Morgans settled with Mr. Justus and, as part of that settlement, assigned their rights against State Farm to him. (Trial Ex. 1) On that same date, the court entertaining the liability suit entered judgment against the Morgans based on the terms of the settlement. (*Id.*, Ex. A)

On June 16, 2014, following settlement of the liability claims, State Farm filed a second amended complaint for declaratory relief with respect to both the Tobeck estate's claims and Mr. Justus's claims.

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<sup>3</sup> State Farm moved for summary judgment on the Tobeck estate's claims. (CP 283-468) That motion was denied. (CP 543-545) State Farm sought discretionary review, which was denied. (CP 551-557, 562-574)

(CP 640-682) Mr. Justus answered the complaint and asserted counterclaims for breach of contract, bad faith, violation of the Consumer Protection Act, negligence and other deceptive acts. (CP 688-692)

## **B. STATE FARM ISSUED TWO POLICIES TO THE MORGANS**

William and Donna Morgan were insured under two State Farm liability policies on the date of the incident. These were homeowners policy no. 47-71-8519-8 (Trial Ex. 5; CP 641, 643-645), and personal liability umbrella policy no. 47-G5-2759-9. (Trial Ex. 6; CP 642, 645-648)

### **1. The Homeowners Policy**

The insuring agreement of the homeowners policy extends coverage to the Morgans for their legal liability “for damages because of ‘bodily injury’ or ‘property damage’ ... caused by an ‘occurrence.’” The homeowners policy defines “bodily injury” as “physical harm, including any resulting sickness or disease” but excluding “emotional distress, mental anguish, humiliation, mental injury, or similar injury unless it arises out of actual physical injury to some person.” It defines “occurrence” as “an accident, including exposure to conditions, which results in ‘bodily injury’ during the policy period.” It excludes “bodily injury” “which is either expected or intended by the insured,” or “which is the result of willful and malicious acts of the insured.” (Trial Ex. 5; CP 641, 643-645)

## 2. The Personal Liability Umbrella Policy

The insuring agreement of the personal liability umbrella policy provides two coverages. One coverage tracks the coverage of the homeowners policy, covering the Morgans for their legal liability for damages because of a “loss,” which is defined as “an accident, including accidental exposure to conditions, which first results in ‘bodily injury’ or ‘property damage’ during the policy period.” Like the homeowners policy, this coverage is subject to exclusions for “bodily injury” “which is either expected or intended by the insured,” or “which is the result of willful and malicious acts of the insured.” (Trial Ex. 6; CP 642, 645-648)

The other coverage is for the Morgans’ legal liability for damages because of a “loss” involving “the commission of an offense which first results in ‘personal injury’ during the policy period.” For purposes of this coverage, “personal injury” is defined as “injury other than ‘bodily injury’” arising out of one or more of several specified offenses. The specified offenses include false arrest, false imprisonment, wrongful eviction, wrongful detention of a person, abuse of process, malicious prosecution, libel, slander, defamation of character, and invasion of a person’s right of private occupancy by physically entering into that person’s personal residence. “Bodily injury” is defined as “physical injury, sickness or disease to a person, including death resulting therefrom,” but

not including either “personal injury” or “emotional distress, mental anguish, humiliation, mental distress, mental injury, or any similar injury or any resulting physical injury unless it arises out of actual physical injury to some person.”<sup>4</sup> Exclusion 17 provides that there is no coverage under the policy for “‘personal injury’ when the insured acts with specific intent to cause harm.” (Trial Ex. 6; CP 642, 645-648)

**C. THE COVERAGE ISSUES WERE TRIED TO THE COURT BETWEEN APRIL 13 AND 16, 2015**

On February 3, 2015, the parties stipulated to bifurcation of the case. (CP 1514-1515) On March 18, 2015, the court entered an order on the stipulation bifurcating the case into two parts. (CP 1856-1858) Under that order, State Farm’s claims for declaratory relief would proceed to trial first. All discovery and motions relating to the defendants’ counterclaims were stayed pending further order of the court. (*Id.*)

On March 20, 2015, the trial court entered an order realigning the parties for trial. (CP 1900-1902) A non-jury trial was held on April 13, 14 and 16, 2015. The following evidence was presented at trial.<sup>5</sup>

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<sup>4</sup> State Farm argued in the trial court that the “personal injury” coverage did not apply because the definition of “personal injury” excludes “bodily injury,” and Mr. Justus clearly sustained “bodily injury” as a result of the incident. (CP 2033-2035) The trial court did not address this argument in its Conclusions of Law, and accordingly it is not an issue on this appeal.

<sup>5</sup> The parties filed separate Statements of Arrangements for different transcripts from the proceedings below. Unfortunately, the transcripts are not consecutively numbered. To assist the court in locating the record citations,

**1. Mr. Morgan Confronts Mr. Justus and Mr. Tobeck at Gunpoint After Seeing that They Have Loaded Mr. Morgan's Pipes into Their Pickup Truck, Upon Which Mr. Justus and Mr. Tobeck Get in the Truck and Begin Driving Away**

The only witnesses to the initial confrontation were Mr. Tobeck, Mr. Justus and Donna Morgan.<sup>6</sup> Mrs. Morgan testified that she and Mr. Morgan live at 8506 358th Street South in Roy, Washington (RP, 4/14/15, 6:6-7, D. Morgan) This is a private road. (RP, 4/14/15, 8:5, D. Morgan) On the evening of June 9, 2010, Mrs. Morgan was in bed reading with her dog, when the dog started getting excited and barking. (RP, 4/14/15, 8:14-9:8, D. Morgan). The bedroom window was open, and Mrs. Morgan heard a lot of noise, which she described as alarming. (RP, 4/14/15, 9:9-24, D. Morgan) She went into the living room, where Mr. Morgan was watching TV with his ear phones on. (RP, 4/14/14, 10:11-24, D. Morgan) She told him that something really loud was going on outside, so he got up, took his head phones off, went out the back door, then came back in. (RP, 4/14/15, 11:2-12:4, D. Morgan).

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below and throughout this brief, citations to the Record of Proceedings (RP) include the date of the proceedings, RP page and line numbers, and the identity of the testifying witness.

<sup>6</sup> Mr. Morgan was not competent to testify, so portions of his deposition testimony from the underlying liability action were admitted into evidence, over State Farm's objection. (Partial VRP, 4/14/15, 5:14-11:7, Morgan competency hearing; CP 2214-2338)

Mr. Morgan then got the flashlight and picked up a gun. (RP, 4/14/15, 12:5-8, D. Morgan) He went back out and told Mrs. Morgan to stay in the house. (RP, 4/14/15, 14:9-11, D. Morgan). Mrs. Morgan watched out the window, and she saw Mr. Morgan by the gate. He then turned back and told her to call the sheriff. (RP, 4/14/15, 14:11-15:8, D. Morgan) She made several attempts to call, the first attempt being at 22:05:42 (*i.e.*, 10:05 p.m.) according to the 911 log, before she finally got through at 22:07:54 (*i.e.*, just before 10:08 p.m.). (RP, 4/14/15, 15:11-16:4, D. Morgan; Trial Exs. 8 and 9) She never saw the two men who were outside. (RP 4/14/15, 29:10-13, D. Morgan)

Mr. Justus testified that, earlier on the day of the incident, he and “Joey” [Mr. Tobeck] had gone to look at a car Mr. Justus wanted to purchase from a dealership in McKenna. (RP, 4/13/15, 6:6-18, R. Justus). Mr. Tobeck was one of his best friends. (RP, 4/13/14, 6:19-22, R. Justus) After they looked at the car, Mr. Justus wanted to show Mr. Tobeck where he had used to live in the area. On the way, Mr. Tobeck started looking for scrap metal. (RP, 4/13/15, 8:3-10, R. Justus) Mr. Tobeck saw some metal and, because it would not fit in Mr. Justus’s car, they drove back to Mr. Tobeck’s parents’ house to get a truck to load up the metal. (RP, 4/13/15, 8:15-25, R. Justus) The metal consisted of four pipes that were on the side of 358<sup>th</sup> Street. (Trial Ex. 4, p. 1, ¶ 1.1)

Hours later, as it was getting dark, they returned to 358<sup>th</sup> Street, and pulled alongside the metal pipes. (RP, 4/13/15, 10:12-15, R. Justus). The pipes had settled in the mud, had briar patches growing over them, and were heavy. It took Mr. Tobeck and Mr. Justus five to 12 minutes to load the pipe into the back of the truck. (RP, 4/13/15, 10:10-25, R. Justus) After fashioning a make-shift tailgate to secure the pipe, they heard a “Hey” to the right, and Mr. Justus saw an old man (Mr. Morgan) holding a pistol directly pointed at him. (RP, 4/13/15, 11:15-19, R. Justus) Mr. Justus took off his hood and began talking to the man, pleading with him not to shoot, but the man kept walking toward him, cursing and telling him to shut up. (RP, 4/13/15, 11:22-12:7, R. Justus) The discussion lasted about two to five minutes (RP, 4/13/14, 18:19-25, 35:23-36:7, R. Justus)

At this point, Mr. Tobeck said, “Forget this guy, let’s go.” (RP, 4/13/15, 12:17-18, R. Justus) Still trying to talk to Mr. Morgan, Mr. Justus got in the truck. (RP, 4/13/15, 12:22-13:1, R. Justus) They began driving away at a slow speed, toward the dead end cul-de-sac at the end of the road. (RP, 4/13/15, 13:5-17, 36:14-19, R. Justus).

Mr. Morgan’s deposition testimony differed slightly from Mr. Justus’s testimony. Mr. Morgan testified that when he saw his pipe in the back of the pickup, he said, “Hey, you have my pipe.” (CP 2253) He admitted he was yelling and used a lot of four-letter adjectives. (CP 2328)

After looking back at his house and telling his wife to call the police because someone was stealing his pipe, he looked at Mr. Justus and Mr. Tobeck and saw they had started moving towards the truck's cab. They then got in, shut the doors and started down the road. (CP 2253-2254) Neither Mr. Justus nor Mr. Tobeck said anything to him; rather, they talked between themselves, but not loud enough for him to hear what they were saying. (CP 2323) Mr. Morgan denied that he had any intention of detaining them. (CP 2309)

## **2. Mr. Morgan Fires Repeatedly at the Fleeing Truck**

Mr. Justus heard gunshots as they were driving toward the cul-de-sac in the truck. (RP, 4/13/15, 13:6, 29:8-12, R. Justus) Then he heard more shots after the truck turned around. (RP, 4/13/15, 29:24-30-3, R. Justus). Mr. Justus was crouched down on the floor in the cab of the truck, trying to put his head under the seat. (RP, 4/13/15, 30:4-6, 32:8-17, R. Justus) He was terrified of the gunshots, and he and Mr. Tobeck were not speaking. (RP, 4/13/15, 31:18-25, R. Justus) All of a sudden it felt like a water balloon burst and Mr. Tobeck's blood was all over him. (RP, 4/13/15, 14:4-6, R. Justus). He looked up at Mr. Tobeck and saw blood on the right side of his face. (RP, 4/13/15, 36:24-37:9, R. Justus) Then they hit a tree, and the truck was screaming because Mr. Tobeck's foot was still on the accelerator. (RP, 4/13/15, 14:9-11, 38:23-39:1, R. Justus)

The gun Mr. Morgan used was a Sig Sauer .40 caliber semiautomatic. (RP, 4/16/15, 11:1-5, Deputy Johnson) This gun recharges itself after each round is fired. (RP, 4/16/15, 11:17-12:2, Deputy Johnson) Mr. Morgan had owned the gun for 15 to 20 years. (CP 2289) On the night of the incident, the gun was loaded and ready to shoot. (CP 2292)

Mr. Morgan testified that he did not remember firing the gun, nor did he remember raising it, but he conceded that he shot it nine times. (CP 2258-2260, 2268, 2272, 2297) Guns have been Mr. Morgan's hobby for many years. He kept other guns in his house in a safe, and prior to the incident he went to gun ranges to practice shooting several times a week. (RP, 4/14/15, 45:17-46:18, D. Morgan; CP 2290, 2292-2293) Mr. Morgan estimated he owned 50 or 60 guns. (CP 2290) As a gun enthusiast, Mr. Morgan knew how to fire a gun. (CP 2295) He agreed that, in firing a gun, the purpose is to hit whatever it is you are aiming at. (CP 2295-2296)

**3. After the Truck Hits the Tree, Mr. Morgan Holds Mr. Justus at Gunpoint, While Repeatedly Telling Him Not to Move or He Will Shoot Him**

After the truck hit the tree, Mr. Justus looked at Mr. Tobeck and heard him gurgling very loudly. He realized that Mr. Tobeck was not getting out of the truck, and determined that he needed to get himself out. (RP, 4/13/15, 14:16-19, 38:14-22, R. Justus). He got out of the truck and saw the flashlight and gun pointed toward him again, and Mr. Morgan

ordered him on the ground. (RP, 4/13/15, 14:24-15:2, R. Justus; CP 2270-2272, 2283) Mr. Justus told Mr. Morgan, "You just shot my best friend." Mr. Morgan replied that Mr. Justus saw what he just did, and that he should not move. (RP, 4/13/15, 15:3-8; 25:2-15, R. Justus)

Several neighbors heard the gunshots, and witnessed the crash or the aftermath. Brandon Doyle lived at 8515 358<sup>th</sup> Street. (RP, 4/13/15, 86:6-18, B. Doyle) He heard two sets of gun shots, four to five in each volley, under a minute apart. (RP, 4/13/15, 87:1-4; 94:23-25, 95:1-36, B. Doyle) Looking out his window, he saw the truck hit the tree, and heard the engine revving. (RP, 4/13/15, 95:7-16, B. Doyle) He went outside and saw Mr. Morgan holding Mr. Justus at gunpoint; Mr. Justus was face down on the ground. (RP, 4/13/15, 88:18-20, B. Doyle) He heard Mr. Morgan tell Mr. Justus, five to seven times, "If you move, I'll shoot you." (RP, 4/13/15, 90:23-91:4, 96:6-18, B. Doyle) When his stepfather walked out, Mr. Doyle heard Mr. Morgan say, "I should shoot him like I shot the other one." (RP, 4/13/15, 96:15-18, B. Doyle)

Vicki Jean, who lives next door to the Morgans, was on the phone talking to her daughter when she heard four or five gunshots that sounded like they were almost in her front yard. (RP, 4/14/15, 52:17-18, 53:18-54:6, V. Jean) She ran in to her kitchen and looked out the window and saw a truck that had gone through her fence and hit a tree. (RP, 4/14/15,

55:17-25, V. Jean) The wheels of the truck were spinning. (RP, 4/14/15, 64:18-22, V. Jean) She went outside and saw Mr. Morgan come running up. (RP, 4/14/15, 55:3-4, 21-25, 66:10-20, V. Jean) She saw someone come out the passenger side of the truck. (RP, 4/14/15, 62:1-15, 66:23-25, V. Jean) She saw that Mr. Morgan had a flashlight, and she heard him tell the person who slid out of the truck to get on the ground. (RP, 4/14/15, 59:1-10, 24-25, 60:1-2, V. Jean)

Kim Hazen lives at 8515 358<sup>th</sup> Street South. (RP, 4/13/15, 67:1-5, K. Hazen). Just before 10:00 p.m., she heard “pop, pop, pop.” (RP, 4/13/15, 67:21-68:4, K. Hazen) Then two and a half to four minutes later she heard several more gunshots fired closer to her house. (RP, 4/13/15, 68:9-11, 78:20-79:2, K. Hazen) She called 911 and went outside. (RP, 4/13/15, 69:1-5, K. Hazen) She saw Mr. Morgan with a gun and a flashlight behind Mr. Justus, who was laying on the ground, facing the other way. (RP, 4/13/15, 71:2-10, K. Hazen) She went to check on the man in the truck. (RP, 4/13/15, 71:24-72:5, K. Hazen) He had very labored breathing, and she noticed a bullet hole in the window right by him. (RP, 4/13/15, 73:7-9, K. Hazen)

As the neighbors came out, Mr. Morgan was ordering everyone to get back and shut up, and that he had the situation under control. (RP, 4/13/15, 16:7-12, R. Justus) The police arrived about 12-15 minutes later,

and secured Mr. Morgan and Mr. Justus in separate police cars. (RP, 4/13/15, 16:14-18, R. Justus) Mr. Justus's face was bloody, and he had broken his nose when he hit it on the dashboard. (RP, 4/13/15, 34:2-9, R. Justus) Mr. Tobeck died the next day. (RP, 4/13/15, 39:11-12, R. Justus)

**4. The Police Investigation Confirms that Mr. Morgan Fired Nine Shots, Most of Them into the Windows and Doors of the Truck's Passenger Cab**

Pierce County Deputy Sheriff Jeff Johnson was dispatched to the scene and was the first to arrive at 2218 (*i.e.*, 10:18 p.m.). (RP, 4/16/15, 5:1-16, 9:15-10:1, Deputy Johnson). He saw a crowd of people, a man on the ground near them with a bloody face, and a vehicle that had impacted a tree. When Deputy Johnson asked the crowd who the shooter or shooters were, everyone pointed to Mr. Morgan. (RP, 4/16/15, 5:19-25, Deputy Johnson) Deputy Johnson secured Mr. Morgan's gun, handcuffed Mr. Morgan, and put him in the rear seat of his vehicle. (RP, 4/16/15, 6:1-5; 8:13-18, Deputy Johnson)

Robert Scott Creek, a forensic investigator with the Pierce County Sheriff's Department, investigated the incident. (RP, 4/16/15, 3:17-4:17, Investigator Creek) Deputies on scene pointed out an older model Chevrolet Silverado pickup truck that had impacted a tree. (RP, 4/16/15, 6:4-6, Investigator Creek) Large metal pipes were in the back of the truck. (RP, 4/16/15, 6:10-11, Investigator Creek) Investigator Creek documented

the scene photographically, taking photos of the truck from several angles. He put markers down where the .40 caliber casings were located. (RP, 4/16/15, 6:18-25, Investigator Creek; Trial Exs. 19 and 20)

Investigator Creek later examined the truck. He determined there were four bullet strikes to the windshield from the outside entering into the cab, and one from the inside exiting through the windshield. (RP, 4/16/15, 11:3-7, 13:24-14:2, Investigator Creek; Trial Ex. 21) He identified additional bullet strikes on the driver's exterior door frame, the driver's door window, and the rear windshield. (RP, 4/16/15, 13:24-14:14, Investigator Creek) A total of nine shell casings were recovered. (RP, 4/16/15, 15:16-18, Investigator Creek) Based on the location of the bullet strikes, Investigator Creek concluded that the shots were fired as the vehicle approached, as it was passing, and after it passed Mr. Morgan. (RP, 4/16/15, 14:18-25, 15:11-15, 21:9-14, Investigator Creek).

**5. Mr. Justus Sustains Multiple Physical Injuries as a Result of the Incident**

Mr. Justus testified that his nose was inflamed from the impact, and is scarred. (RP, 4/13/15, 46:3-8, R. Justus) He also had a concussion. (RP, 4/13/15, 46:15-16, R. Justus) As a result of the traumatic events, he has lost sleep, and had nightmares about Mr. Tobeck's head being blown open. (RP, 4/13/15, 40:2-14, R. Justus) He is easily startled by loud noises.

(RP, 4/13/15, 41:17-22, R. Justus) He cries all the time. (RP, 4/13/15, 45:6-11, R. Justus) For about a year he used methamphetamine to self-treat, which ended when he got arrested. (RP, 4/13/15, 43:24-44:5, R. Justus)

He has seen Gloria Roettger, a therapist, and Dr. Mark Whitehill, a psychiatrist, for his injuries and has been truthful to them about his symptoms. (RP, 4/13/15, 47:16-48:21, R. Justus) Ms. Roettger is a licensed mental health counselor, who has done a lot of work with people dealing with extreme stress, trauma, grief and loss. (RP, 4/14/15, 5:1-14, G. Roettger) She began seeing Mr. Justus in April 2013. (RP, 4/14/15, 6:14, G. Roettger) She diagnosed him with post-traumatic stress disorder, commonly known as PTSD. (RP, 4/14/15, 9:2-4, G. Roettger) In all of her years of working with PTSD, his case was the worse she has ever seen. (RP, 4/14/15, 12:18-20, G. Roettger) He has a number of physical symptoms of PTSD, including very high startle reflex, sleeplessness, loss of appetite, nightmares, headaches, and ruminating, which is caused by high cortisol in the body (RP, 4/14/15, 7:14, 25:1-27:18, 28:10-29:25, 30:22-25, G. Roettger; Trial Ex. 13) She has told Mr. Justus that he would benefit from medication, but he has declined to follow her recommendations. (RP, 4/13/14, 43:13-23, R. Justus; RP, 4/14/15, 34:3-8, G. Roettger)

**D. THE TRIAL COURT’S FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING TRIAL DETERMINE THAT THE STATE FARM POLICIES DO NOT PROVIDE COVERAGE FOR MR. JUSTUS’S CLAIMS**

On April 23, 2015, the trial court issued its Findings of Fact and Conclusions of Law. The trial court ruled that, under Washington law, “wrongful detention of a person” – a covered offense under the personal liability umbrella policy – is the substantial equivalent of the torts of false arrest or false imprisonment, which are intentional torts that were time barred by the time Mr. Justus filed his liability lawsuit against the Morgans. The trial court also concluded that none of the facts presented at trial supported a theory of negligence, that at all times Mr. Morgan’s actions were intentional, that the claim did not involve an accidental “occurrence” or “loss” under the policies, and that Mr. Morgan acted with a specific intent to cause harm when shooting at and assaulting Mr. Justus. (CP 2342-2348)

**E. HAVING CONCLUDED THAT COVERAGE DOES NOT APPLY, THE TRIAL COURT GRANTS SUMMARY JUDGMENT DISMISSAL OF MR. JUSTUS’S BAD FAITH CLAIMS AND DECLINES TO GRANT HIM FURTHER DISCOVERY**

On November 11, 2014, counsel for State Farm and Mr. Justus participated in a Rule 26(i) discovery conference regarding the issues surrounding the production of State Farm’s claim files. (CP 2484-2486) Later that day, and then again on December 8, 2014, Mr. Justus’s counsel

requested that the Morgans sign a waiver of the attorney-client privilege, contending it was required under the terms of the Settlement Agreement. (CP 2514-2516) The Morgans' personal counsel declined to do so and instead told Mr. Justus's counsel to bring the issues before the court. (*Id.* at 2516) Mr. Justus did not seek redress in either action (this coverage action or the underlying liability suit) until June 1, 2015.

On June 1, 2015, Mr. Justus filed a motion to compel in the coverage action even though the trial court had already entered its findings of fact and conclusions of law in State Farm's favor after conclusion of the coverage trial. (CP 2376-2381) The motion to compel sought, *inter alia*, an order compelling State Farm to produce the Morgans' "complete insurance file that State Farm has in its possession." (*Id.* at 2377) This was the first time that Mr. Justus filed and noted a motion to compel after the coverage action had begun. The motion also sought the file of the Morgans' personal counsel, including communications with State Farm contained therein, and based on the terms of the Settlement Agreement. (*Id.*)

On June 17, 2015, based on the trial court's conclusions of law that there was no coverage for the Morgans under either the homeowner's or personal liability umbrella policies, State Farm filed a motion for

summary judgment seeking dismissal of Mr. Justus's breach of contract and extracontractual claims. (CP 2382-2406)

A hearing was held on July 24, 2015 on Mr. Justus's motion to compel and State Farm's motion for summary judgment. Mr. Justus's counsel argued that under the Settlement Agreement the Morgans agreed not to impede Mr. Justus's prosecution of the breach of contract and extracontractual claims that they assigned to Mr. Justus. (RP, 7/24/15, 10:20-23; 14:5-10, Kevin Johnson.) The Morgans' personal counsel noted that the issue of waiver under the Settlement Agreement was not before the trial court and that he never received a discovery request for his file. (RP, 7/24/15, 13:8-19; 14:1-2, Zenon Olbertz.) The trial court denied Mr. Justus's motion to compel (CP 2522-2523) and granted State Farm's motion for summary judgment. (CP 2519-2521). The trial court also noted that the waiver issue was not before her. (RP, 7/24/15, 13:20-25; 14:3; 14:11-18, Hon. Kitty Ann van Doorninck.)

#### IV. ARGUMENT

**A. MR. JUSTUS HAS NOT PROPERLY CHALLENGED THE TRIAL COURT'S FINDINGS OF FACT, AND IS CHALLENGING ONLY SIX OF THE TRIAL COURT'S 16 CONCLUSIONS OF LAW**

Although Mr. Justus's first assignment of error asserts that the trial court erred when it entered its Findings of Fact, he does not identify which

of the findings he is challenging. Such specificity is required by RAP 10.3(g). This Court should summarily affirm all of the Findings of Fact. **Humphrey Indus., Ltd. v. Clay Street Assocs., LLC**, 176 Wn.2d 662, 675, 295 P.3d 231 (2013) (unchallenged findings of fact are verities on appeal).

To the extent this Court engages in a critical review of the trial court's factual findings, review is governed by the substantial evidence standard. Under this standard, a finding of fact will not be overturned if it is supported by substantial evidence. **Thorndike v. Hesperian Orchards**, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." **Bering v. Share**, 106 Wn.2d 212, 220, 721 P.2d 918 (1986). The appellate court is to make all reasonable inferences from the facts in State Farm's favor as the prevailing party below. **Scott's Excavating Vancouver, LLC v. Winlock Props., LLC**, 176 Wn. App. 335, 342, 308 P.3d 791 (2013), **review denied**, 179 Wn.2d 1011 (2014).

Mr. Justus does not appear to challenge the following Conclusions of Law: nos. 1-5, 8-10, 13-14. (CP 2347-2348) These unchallenged Conclusions of Law are therefore the law of the case. **Nguyen v. City of Seattle**, 179 Wn. App. 155, 163, 317 P.3d 518 (2014).

With respect to Conclusions of Law nos. 6, 7, 11, 12, 15 and 16 (CP 2347-2348), appellate review is *de novo*. **Sunnyside Valley Irr. Dist. v. Dickie**, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). If Mr. Justus is claiming that the findings do not support the court’s conclusions – which appears to be the case with his challenges to Conclusions of Law nos. 12 and 15 – appellate review is limited to determining whether the trial court’s findings are supported by substantial evidence and, if so, whether those findings support the conclusions of law. **Am. Nursery Prods., Inc. v. Indian Wells Orchards**, 115 Wn.2d 217, 222, 797 P.2d 477 (1990).<sup>7</sup>

**B. THE TRIAL COURT CORRECTLY CONCLUDED THAT, IF WASHINGTON WERE TO RECOGNIZE A CAUSE OF ACTION FOR WRONGFUL DETENTION OF A PERSON, IT WOULD BE SUBSTANTIALLY EQUIVALENT TO THE TORTS OF FALSE ARREST OR FALSE IMPRISONMENT**

Mr. Justus’s main claim at trial was that his damages settlement was covered under the “personal injury” coverage of the Morgans’ personal liability umbrella policy, and specifically under the “personal injury” offense for “wrongful detention of a person.” He now argues that

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<sup>7</sup> Alternatively, if a trial court erroneously labels a finding of fact as a conclusion of law, it is reviewed as a finding of fact on appeal. **Scott’s Excavating Vancouver, LLC v. Winlock Props., LLC**, 176 Wn. App. 335, 342, 308 P.3d 791 (2013), **review denied**, 179 Wn.2d 1011 (2014). Likewise, if a determination concerns whether evidence shows that something occurred, it is a finding of fact. **Casterline v. Roberts**, 168 Wn. App. 376, 382-83, 284 P.3d 743 (2012). As conclusion of law no. 12 involves factual findings as they relate to issues of Mr. Morgan’s intent, it should be reviewed under the substantial evidence standard.

the trial court erred when it failed to define the term “wrongful detention of a person” as it relates to the facts of the case. Contrary to his contention, the trial court clearly defined this “personal injury” coverage offense when it held that Washington law does not recognize a cause of action for “wrongful detention of a person” and that, under Washington law, “wrongful detention of a person” is the substantial equivalent of false arrest or false imprisonment. (CP 2347; Conclusions of Law nos. 6 and 7).

Mr. Justus has failed to establish that he had a viable claim for “negligent wrongful detention” recognized under Washington law. He cites no authority for his assertion that either “negligent wrongful detention” or “wrongful detention of a person” is a recognized cause of action, because no such authority exists.<sup>8</sup> He makes no effort to define what the elements of such a cause of action would be. The trial court’s Conclusion of Law no. 6 (CP 2347) was correct and should be affirmed.

This Court may look to case law from other jurisdictions to discern the elements of a cause of action not yet adopted in Washington but recognized elsewhere. **Grange Ins. Co. v. Roberts**, 179 Wn. App. 739, 762-766, 320 P.3d 77 (2013) (although Washington has not recognized a

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<sup>8</sup> In Washington, the phrase “wrongful detention” has been used in connection with the unlawful withholding of another’s property and can give rise to a cause of action under the replevin statute. **See Hensrude v. Sloss**, 150 Wn. App. 853, 862-63, 209 P.3d 543 (2009).

cause of action for tortious interference with expected inheritance, other jurisdictions recognizing this tort require an intentional act). Courts elsewhere have held that wrongful detention of a person is substantially equivalent to the intentional torts of false arrest or imprisonment. **E.g.,** **Cowdrey v. City of Eastborough**, 730 F.2d 1376, 1380 (10th Cir. 1984) (“under Kansas law false arrest and wrongful detention are legally indistinguishable from false imprisonment”); **Cornish v. Papis**, 962 F. Supp. 1103, 1109 (C.D. Ill. 1997) (in order to state a cause of action for a wrongful detention or false imprisonment, a plaintiff must prove the same essential elements necessary to maintain a claim of wrongful arrest); **Singleton v. Townsend**, 339 So.2d 543, 544 (La. App. 1976) (action in tort characterized as a case of “wrongful detention” sought damages for fear of life, embarrassment, humiliation, and false imprisonment, resulting from a high-speed automobile chase, shooting, and subsequent arrest for theft); **Jackson v. Navarro**, 665 So.2d 340, 341 (Fla. App. 1995) (“the essential difference between a wrongful detention for which malicious prosecution will lie, and one for which false imprisonment will lie, is that in the former the detention is malicious but under the due forms of law, whereas in the later the detention is without color of legal authority”).

The substance of Mr. Justus’s claim against the Morgans is consistent with the legal elements of a claim for false arrest or

imprisonment, both of which are recognized torts in Washington. A false arrest occurs when a person with actual or pretended legal authority to make an arrest unlawfully restrains or imprisons another person. **Jacques v. Sharp**, 83 Wn. App. 532, 536, 922 P.2d 145 (1996). A party asserting false imprisonment must establish that his liberty of movement or freedom to remain in a place of lawful choice has been restrained by physical force or threat of force. **Moore v. Pay ‘N Save Corp.**, 20 Wn. App. 482, 486, 581 P.2d 159 (1978); **Dang v. Ehredt**, 95 Wn. App. 670, 685-689, 977 P.2d 29 (1999). As the **Moore** court elaborated:

A person is restrained or imprisoned when he is deprived of either liberty of movement or freedom to remain in the place of his lawful choice; and such restraint or imprisonment may be accomplished by physical force alone, or by threat of force, or by conduct reasonably implying that force will be used.

20 Wn. App. at 486 (citing W. Prosser, **Law of Torts** §11). Mr. Justus’s claim that Mr. Morgan wrongfully detained him with threat of force at gunpoint, thus depriving Mr. Justus of his liberty of movement, is fully consistent with the elements of false imprisonment or false arrest.<sup>9</sup>

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<sup>9</sup> Although it appears no Washington case has addressed false imprisonment at gunpoint or other similar fact pattern, at least one court elsewhere has recognized such a claim. See **Brabham v. State**, 240 Ga. App. 506, 524 S.E.2d 1, 2 (1999) (defendant guilty of false imprisonment during a robbery when he forced the victim at gunpoint to sit on the floor and remain there).

Mr. Justus provides this Court no authority to support his assertion that the trial court erred when it concluded that, under Washington law, “wrongful detention of a person” is substantially equivalent to the torts of false arrest or false imprisonment. Accordingly, this Court should affirm the trial court’s Conclusion of Law no. 7 (CP 2347).

**C. THE TRIAL COURT CORRECTLY HELD THAT MR. JUSTUS’S RECOVERY WAS NOT PREMISED ON A TIME-BARRED CAUSE OF ACTION**

The ultimate issue before the court at trial was whether State Farm was required to indemnify the Morgans for their \$818,900 settlement with Mr. Justus. Under Washington law, the duty to indemnify hinges on the insured’s *actual* liability to the claimant and *actual* coverage under the policy. **New Hampshire Indem. Co., Inc. v. Budget Rent-A-Car Systems, Inc.**, 148 Wn.2d 929, 938, 64 P.3d 1239 (2003) (citing **Weyerhaeuser Co. v. Commercial Union Ins. Co.**, 142 Wn.2d 654, 690, 15 P.3d 115 (2000)). Thus, the trial court had to determine whether the Morgans’ liability to Mr. Justus rested on a claim that was actually within the scope of coverage. **Mutual of Enumclaw Ins. Co. v. USF Ins. Co.**, 164 Wn.2d 411, 421, n. 7, 191 P.3d 866 (2008) (“the duty to indemnify arises when an insured is actually liable to a claimant and that claimant’s injury is covered by the language of the policy.”). As detailed above,

Mr. Justus's primary argument was that his claim was covered under the "personal injury" offense of "wrongful detention of a person."<sup>10</sup>

Mr. Justus argues that the trial court erred in holding that a claim for "wrongful detention" was barred by the statute of limitations, because the issue was previously decided in the tort action, and collateral estoppel precludes relitigation of the issue.<sup>11</sup> (CP 2347; Conclusion of Law no. 11)<sup>12</sup>

To establish that collateral estoppel bars a particular claim, four elements must be met: (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom

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<sup>10</sup> As the party seeking coverage, the burden was and is on Mr. Justus, as the Morgans' assignee, to prove that the damages payable to him under the settlement agreement were on a claim covered under the policies' insuring agreement. **Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha**, 126 Wn.2d 50, 70-72, 882 P.2d 703 (1994).

<sup>11</sup> The statute of limitations issue was important because Mr. Justus did not file his damages lawsuit against the Morgans until two years and 18 days after the June 9, 2010 incident. (Trial Ex. 4; CP 2342-2343, Finding of Fact no. 5). Both false arrest and false imprisonment are subject to a two year statute of limitations. RCW 4.16.100(1) (false imprisonment); **Heckart v. Yakima**, 42 Wn. App. 38, 39, 708 P.2d 407 (1985) (false arrest is subject to RCW 4.16.100(1) because it is substantially equivalent to false imprisonment). Because a claim for "wrongful detention" is likewise substantially equivalent to the torts of false arrest or false imprisonment, it too would be barred by the statute of limitations under the reasoning of **Heckart**.

<sup>12</sup> Mr. Justus does not appear to challenge the trial court's conclusions that he did not file his lawsuit against the Morgans until two years after the incident, and that any claims for false arrest and false imprisonment were time barred. Finding of Fact no. 5; Conclusion of Law nos. 9 and 10.

collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. **Christensen v. Grant County Hosp. Dist. No. 1**, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). Collateral estoppel does not apply because Mr. Justus has failed to establish that the statute of limitations issue was actually decided in the liability action.

Mr. Justus contends the issue was decided when the liability court denied the Morgans' CR 12(b)(6) motion on May 24, 2013. Appellant's Brief at 14. However, the May 24, 2013 ruling was not part of the evidentiary record at trial. It therefore may not be considered on appeal.<sup>13</sup>

The only liability court ruling that is in the appellate record is that court's reasonableness ruling directed to the liability settlement, which was admitted as an exhibit at trial. (Trial Ex. 11) However, that ruling did not decide the statute of limitations for a claim of "wrongful detention of a person." To the contrary, the ruling did not specifically identify the legal theory supporting recovery, and it expressly stated that no findings were being made as to whether Mr. Morgan's actions were intentional or negligent. (*Id.*, attached oral decision at 7:14-17)

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<sup>13</sup> Even if this ruling were part of the record, a denial of a CR 12(b)(6) motion is not a decision on the merits sufficient to support collateral estoppel.

Because Mr. Justus has failed to present this Court with any evidence that the statute of limitations issue for “wrongful detention of a person” was actually litigated and decided in the liability case, collateral estoppel does not apply. Moreover, the trial court’s rulings are fully consistent with and not precluded by any of the liability court’s rulings.

Indeed, it was precisely because the liability court did not decide the issue that the trial court below necessarily had to determine whether the theory proposed by Mr. Justus – “wrongful detention of a person” – actually supported liability. The trial court’s determination was properly made based on the facts as established by the evidence at trial, and the law as it exists in this state. It would have been error for the trial court to find coverage based on an offense that was not viable because the statute of limitations had run. But that is what Mr. Justus is arguing the trial court should have done.

The umbrella policy’s “personal injury” coverage is a theory-based coverage. **Kitsap County v. Allstate Ins. Co.**, 136 Wn.2d 567, 580, 964 P.2d 1173 (1998) (“in determining whether personal injury coverage exists we must look to the type of offense that is alleged”). In **Cle Elum Bowl v. North Pac. Ins. Co.**, 96 Wn. App. 698, 707-708, 981 P.2d 872 (1999), the court elaborated:

“[Under] **Kitsap County**, the theory underlying the claim against the insured, not the nature of the alleged injury, determines whether personal injury coverage or bodily injury and property damage coverage applies. **Kitsap County**, 136 Wn.2d at 579-80. To determine whether personal injury coverage applies, the court must first look to the type of offense alleged. **Id.** at 580. Unlike the claims in **Kitsap County**, the claims here for breach of contract and negligence are not analogous to claims for the offenses of wrongful entry or invasion of the right of private occupancy. **Id.** The average purchaser of insurance would not reasonably expect the personal liability provisions to cover a breach of contract and negligence that, as Mr. Lanphere alleged in his complaint, deprived him ‘of the income generated by his ownership of the building that was destroyed.’

**Accord, National Sur. Corp. v. Immunex**, 162 Wn. App. 762, 772, 256 P.3d 439 (2011), **aff’d on other grds**, 176 Wn.2d 872 (2013).

Mr. Justus argues that the trial court improperly analogized “wrongful detention of a person” to false imprisonment and false arrest under the “substantial equivalent” test set forth in **Kitsap County**, because “wrongful detention of a person” was already a specifically defined offense. But the trial court did not analogize “wrongful detention of a person” to false imprisonment and false arrest in order to determine whether “wrongful detention of a person” was a covered offense. Rather, the purpose of the trial court’s analogy was to determine whether the underlying liability for which coverage was sought involved a viable “personal injury” offense. The trial court correctly concluded that it did

not because “wrongful detention of a person” was substantially equivalent to false imprisonment and false arrest and was therefore time barred. The trial court’s rulings on Conclusions of Law nos. 11 and 16 (CP 2347-2348) should be affirmed.

**D. SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT’S CONCLUSIONS THAT, AT ALL TIMES, MR. MORGAN’S ACTIONS WERE INTENTIONAL, NOT NEGLIGENT, AND THAT MR. MORGAN ACTED WITH A SPECIFIC INTENT TO CAUSE HARM**

**1. The Facts Do Not Support a Theory of Negligence Because They Established that Mr. Morgan at All Times Acted Intentionally**

Mr. Justus contends that the trial court erred when it found that no facts supported a theory of negligence, and that at all times Mr. Morgan’s actions were intentional. (CP 2347, Conclusion of Law no. 12) He argues first that the trial court should not have even addressed negligence because it is a tort theory, and the trial court was only ruling on coverage.

Mr. Justus ignores that State Farm’s complaint for declaratory relief sought a ruling not just as to the “personal injury” coverage of the personal liability umbrella policy, but also as to the separate accidental “loss” coverage of that policy, and the accidental “occurrence” coverage of the homeowners policy. (CP 640-649) The issues of negligence and intentional acts were clearly relevant to the question of whether Mr. Justus’s injuries and damages were the result of an accident for

purposes of those coverages. (CP 2348, Conclusions of Law nos. 13 and 14) They were also clearly relevant to the issue of whether Mr. Morgan had an intent to injure for purposes of exclusion 17 to the umbrella policy. (CP 2348, Conclusions of Law nos. 15 and 16)

Mr. Justus is also wrong when he argues that labeling his claim as one of “negligence” automatically makes it so. To establish a claim for negligence rather than an intentional tort, a claimant must establish facts that support a conclusion that the conduct complained of was negligent.

**Grange Ins. Assn. v. Roberts**, 179 Wn. App. 739, 769, 320 P.3d 77 (2013). **Accord, McLeod v. Grant County Sch. Dist. No. 128**, 42 Wn.2d 316, 319, 255 P.2d 360 (1953).

The liability court’s reasonableness ruling described Mr. Morgan’s actions as “outrageous,” “callous,” and “beyond the bounds of human decency,” and the facts of the case as “inflammatory.” (Trial Ex. 11) These statements are completely inconsistent with the conclusion that Mr. Morgan’s liability rested on a negligence foundation. Indeed, Washington courts have recognized that the inclusion of the term “negligence” in a complaint against an insured does not transform otherwise intentional torts into negligence claims. **E.g., St. Michelle v. Robinson**, 52 Wn. App. 309, 315-316, 759 P.2d 467, 471 (1988) (holding that a plaintiff had no claim for negligent infliction of emotional distress

where the facts showed defendant's actions were intentional).<sup>14</sup> Likewise, allegations of negligence in connection with an act do not necessarily create a cause of action. *Id.* at 316 (declining to recognize a specific cause of action for child abuse where existing tort law can redress the wrongs suffered by the victims). **See also, Fondren v. Klickitat County**, 79 Wn. App. 850, 853, 863, 905 P.2d 928 (1995) (declining to recognize a cause of action for “negligent murder investigation”); **Dever v. Fowler**, 63 Wn. App. 35, 38, 45, 816 P.2d 1237, 824 P.2d 1237 (1991) (declining to recognize a cause of action for “negligent investigation of arson and manslaughter”).

The trial court properly rejected Mr. Justus's effort to recharacterize his claim solely to trigger coverage. As the Washington Supreme Court has recognized, a party may not create coverage “merely by affixing an additional label or separate characterization to the act or event causing the loss.” **Kish v. Ins. Co. of N. Am.**, 125 Wn.2d 164, 170,

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<sup>14</sup> Washington courts have also rejected efforts to characterize an intentional act as “negligent” solely for the purpose of creating coverage. **Cf. Farmers Ins. v. Hembree**, 54 Wn.App. 195, 202, 773 P.2d 105 (1989) (action for sexual assault where complaint alleged negligent failure to care for plaintiff's children; where policy excluded coverage for injury arising of intentional acts of an insured, “the claim is clearly not covered by the policy, regardless of the fact that one of the causes of action is negligence”); **N.Y. Underwriters Ins. Co. v. Doty**, 58 Wn.App. 546, 549, 794 P.2d 521 (1990) (no coverage for action for sexual and physical assault; noting that while plaintiff's “carefully crafted complaint for personal injury never uses the legal terms (assault, battery, false imprisonment) [it] nevertheless asserts only intentional torts”).

883 P.2d 308 (1994), **quoting Chadwick v. Fire Ins. Exch.**, 17 Cal.App.4th 1112, 21 Cal.Rptr.2d 871 (Cal. App. 1993) (holding that the insured could not recharacterize its excluded flood loss as a “rain” loss to solely trigger coverage). Similarly, “[w]here a given set of facts gives rise” to a particular cause of action, “it cannot be recharacterized as a [different] cause of action for statute of limitations purposes.” **Eastwood v. Cascade Broad. Co.**, 106 Wn.2d 466, 469, 722 P.2d 1295 (1986) (refusing to allow a plaintiff to recharacterize a defamation cause of action as a false light invasion of privacy cause of action in order to avoid statute of limitations). **See also, Seely v. Gilbert**, 16 Wn.2d 611, 615, 134 P.2d 710 (1943) (“Appellant cannot evade the statute of limitations by disguising her real cause of action by the form of her complaint”); **Boyles v. City of Kennewick**, 62 Wn. App. 174, 178, 813 P.2d 178, 180 (1991) (plaintiff was not able to amend her complaint alleging claims of assault and battery to add a claim for negligence where no additional facts supported anything but the original claims).

Mr. Justus also argues that, while he does not claim that Mr. Morgan detained him on accident, the trial court should have found that Mr. Morgan acted negligently when he mis-assessed his legal authority to detain Mr. Justus until law enforcement arrived. This argument is unsupported both factually and legally.

Preliminarily, to the extent this argument challenges the trial court's factual findings, it is deficient under RAP 10.3(g). See Argument A above. But more to the point, substantial evidence supports the trial court's conclusion that the facts do not support a theory of negligence.

Mr. Morgan did not testify at trial, and so the only direct evidence before the court as to what Mr. Morgan may have believed about his legal right to detain Mr. Justus was Mr. Morgan's deposition testimony.<sup>15</sup> Finding of Fact no. 16 (CP 2345), which was not challenged by Mr. Justus, was that Mr. Morgan's deposition testimony was not credible.

Mr. Morgan's deposition testimony does not provide substantial evidence to support Mr. Justus's assertion. Mr. Morgan testified that he did not remember firing his gun, he could not remember if he intended to shoot at Mr. Justus and Mr. Tobeck, and he could not remember if he was shooting at the truck to disable it. (CP 2258-2260, 2268, 2272, 2297) Although Mr. Morgan testified he instructed his wife to call 911 to summon law enforcement, there was no testimony by Mr. Morgan that he thought he had a legal right to detain Mr. Justus at gunpoint until law enforcement arrived. Rather, his deposition testimony was that he was not

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<sup>15</sup> That deposition testimony was presented over State Farm's objections, and should not have even been considered by the coverage court, as the testimony was taken in the liability case where State Farm was not a party.

trying to detain Mr. Justus; instead he “had no intentions of detaining anyone.” (CP 2309)

Other evidence in the record likewise defeats with Mr. Justus’s argument that Mr. Morgan “negligently” mis-assessed the situation because he believed he had a legal right to hold Mr. Justus. The evidence established that Mr. Morgan, a gun enthusiast who practiced shooting several times a week, fired nine shots at Mr. Justus and Mr. Tobeck and the majority of the bullets struck the passenger cab of the truck. Had he intended to simply disable the truck to strand Mr. Justus and Mr. Tobeck until law enforcement arrived, as a trained marksman he would have aimed at the truck’s tires and not at the passengers. The evidence also established that Mr. Morgan was pointing his gun at Mr. Justus throughout their encounters, while yelling and swearing. Additionally, Mr. Justus testified that, while he was spread eagle on the ground with Mr. Morgan pointing his gun at him, Mr. Morgan told him that he had seen what Mr. Morgan had just done, and that he should not move. This testimony was corroborated by neighbor Brandon Doyle, who heard Mr. Morgan tell Mr. Justus, five to seven times, “If you move, I’ll shoot you,” and also heard Mr. Morgan tell his stepfather, “I should shoot him [Mr. Justus] like I shot the other one.” The evidence also included the liability court’s reasonableness ruling, which characterized Mr. Morgan’s actions as

“outrageous” (twice), “callous,” and “beyond the bounds of human decency,” and the facts of the case as “inflammatory.” This evidence provided substantial, indeed compelling support for the trial court’s conclusion that the facts do not support a theory of negligence, and is inconsistent with a finding that Mr. Morgan acted negligently by mistakenly thinking he had a right to detain Mr. Justus.

An argument similar to Mr. Justus’s was made and rejected in **Allstate Ins. Co. v. Bauer**, 96 Wn. App.11, 977 P.2d 617 (1999). There, the insured deliberately shot the deceased in self-defense. He claimed that the shooting was accidental because he “mistakenly” believed that the deceased was armed. **Id.** at 15-16. The court held that neither the insured’s “mistaken belief” nor the allegations of negligence in the civil lawsuit changed the deliberate nature of the shooting. **Id.** at 16.

So too, here. Even if Mr. Morgan had a mistaken belief that he had the right to detain Mr. Justus until law enforcement arrived – and there is no substantial evidence in the record to support that conclusion – it does not change the deliberate nature of his actions so as to support a finding of coverage. The trial court’s Conclusion of Law no. 12 (CP 2347) should be affirmed.

## 2. The Trial Court Correctly Concluded that the Umbrella Policy's "Intent to Injure" Exclusion Applied

Exclusion 17 to the personal liability umbrella policy provides that there is no coverage under the policy for "'personal injury' when the insured acts with specific intent to cause harm." Mr. Justus argues that the trial court erred when it concluded this exclusion applied. (CP 2348, Conclusions of Law no. 15 and 16)

Mr. Morgan's conduct, as established by the evidence, was compelling circumstantial evidence of intent and amply supported the trial court's conclusion that the plain language of the exclusion applied.<sup>16</sup> Given the nature and circumstances of Mr. Morgan's deliberate and intentional actions, harm was substantially certain to result.<sup>17</sup>

Moreover, Mr. Morgan's actions both in shooting repeatedly at Mr. Justus and Mr. Tobeck, and in threatening Mr. Justus at gunpoint, satisfy the elements of the intentional tort of assault.<sup>18</sup> Case law holds that

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<sup>16</sup> Mr. Justus makes no argument that the exclusion is ambiguous.

<sup>17</sup> **Cf., B.M.B. v. State Farm Fire & Cas. Co.**, 664 N.W.2d 817, 822 (Minn. 2003) ("The general rule is that intent is inferred as a matter of law when the nature and circumstances of the insured's act are such that harm is substantially certain to result.")

<sup>18</sup> An assault is any act of such a nature that causes apprehension of a battery. **McKinney v. City of Tukwila**, 103 Wn. App. 391, 408, 13 P.3d 1361 (2000). Assault includes placing a person in fear of bodily injury by the use of a weapon that has the apparent power to do harm. **State v. Jimerson**, 27 Wn. App. 415, 418, 618 P.2d 1027, review denied, 94 Wn.2d 1025 (1980); **State v. Harris**, 69 Wn.2d 928, 936, 421 P.2d 662 (1966). Assault is an intentional tort. **Morgan**

intent to injure may be inferred in cases of assault. **E.g., N.Y. Underwriters Ins. Co. v. Doty**, 58 Wn. App. 546, 794 P.2d 521 (1990) (intent to injure inferred as a matter of law from insured's felonious abduction, physical and sexual assaults on ex-wife over two-day period); **Standard Fire Ins. Co. v. Blakeslee**, 54 Wn. App. 1, 771 P.2d 1172 (1989), **review denied**, 13 Wn.2d 1017, 781 P.2d 1320 (1989) (inferring intent to injure when insured dentist assaulted patient while she was anesthetized); **Western Nat'l Assur. Co. v. Hecker**, 43 Wn. App. 816, 719 P.2d 954 (1986) (intent to harm an adult victim inferred from the nature of forcible anal intercourse). **Compare, Safeco Ins. Co. of Am. V. McGrath**, 63 Wn. App. 170, 817 P.2d 861 (1991), **review denied**, 118 Wn.2d 1010 (1992). Intent to injure could likewise be reasonably inferred under the evidence presented at trial.

Mr. Justus also argues that the trial court erred by declining to apply the exclusion because all of the "personal injury" offenses listed in the policy involve intentional acts. Mr. Justus reasons that applying the exclusion in this circumstance improperly invalidates coverage.<sup>19</sup>

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**v. Johnson**, 137 Wn.2d 887, 976 P.2d 619 (1999); **Brower v. Ackerly**, 88 Wn. App. 87, 92-93, 943 P.2d 1141 (1997).

<sup>19</sup> Mr. Justus's example of applying the exclusion to a malicious prosecution action is not helpful, because this case does not involve a malicious prosecution claim. This Court should evaluate the exclusion by its terms, as applied to the facts of this case, not the facts of some other hypothetical claim.

Preliminarily, Mr. Justus’s assertion that all of the “personal injury” offenses involve intentional acts was specifically rejected by the Washington Supreme Court in **Kitsap County v. Allstate, supra**. The **Kitsap** court recognized that not all “personal injury” offenses are intentional torts, citing defamation as an example. 136 Wn.2d at 582-583.

Washington courts “will not modify clear and unambiguous language under the guise of construing the policy.” **Rones v. Safeco Ins. Co.**, 119 Wn.2d 650, 654, 835 P.2d 1036 (1992), **quoting O’Neal v. Legg**, 52 Wn. App. 756, 760, 764 P.2d 246 (1988), **review denied**, 112 Wn.2d 1013 (1989). **See also, Brown v. United Pacific Ins. Co.**, 42 Wn. App. 503, 506, 711 P.2d 1105 (1986) (exclusions drafted in clear, unmistakable language will be enforced unless against public policy). Washington courts rarely invoke public policy to override express insurance contract terms. In the very few cases where public policy has been relied on to negate otherwise plain policy provisions, courts have relied on a public policy “convincingly expressed” in state statutes, or prior court decisions. **Fluke Corp. v. Hartford Acc. and Indem. Co.**, 145 Wn.2d 137, 144, 34 P.3d 809 (2001). Mr. Justus cites no statute or prior court decision that supports invalidating the exclusion.

Additionally, Mr. Justus’s argument confuses intent to act with intent to injure. These are two separate and distinct inquiries. Some of the

defined “personal injury” offenses are addressed to torts involving intentional actions. Whether resulting injuries are intended is a separate question. Providing coverage for certain intentional torts, but excluding coverage when the insured acted with a specific intent to injure, is appropriate to avoid or limit the “moral hazard” of insuring against an insured’s deliberate, outrageous attempts to injure persons.

This Court should affirm the trial court’s Conclusions of Law nos. 15 and 16 (CP 2348).

**E. THE TRIAL COURT CORRECTLY REJECTED MR. JUSTUS’S ARGUMENT THAT AN EFFICIENT PROXIMATE CAUSE ANALYSIS APPLIED TO THE COVERAGE DETERMINATION**

Mr. Justus invokes the “efficient proximate cause” rule in a misplaced attempt to establish that his entire encounter with Mr. Morgan should be considered a “wrongful detention.” His argument appears to be that, because Mr. Morgan’s initial confrontation with him involved a covered “mini-detention,” all of his damages flowing from the entire chain of events are covered under the “efficient proximate cause” rule. The trial court correctly declined to find coverage based this argument.

The “efficient proximate cause” rule was developed to address exclusions in first party “all risk” property insurance policies. **See, e.g., Vision One, LLC v. Philadelphia Indem. Ins. Co.**, 174 Wn.2d 501, 276

P.3d 300 (2011) (discussing the nature of “all risk” property policies with “resulting loss” provisions, and how the “efficient proximate cause” rule applies to determine whether the loss that ensues from an excluded event is covered or excluded under such policies). As the **Vision One** court observed, “The efficient proximate cause rule operates as an interpretive tool to establish coverage when a covered peril ‘sets other causes into motion which, in an unbroken sequence, produce the result for which recovery is sought,’” citing **McDonald v. State Farm Fire & Cas. Co.**, 119 Wn.2d 724, 837 P.2d 1000 (1992), which likewise involved the evaluation of exclusions in an “all risk” property policy.

This case, by contrast, involves the insuring agreement of a third party liability insurance policy, to which a different rule applies. To determine whether coverage arises under the insuring agreement of a liability policy, the focus is on the immediate act or omission of the insured (the “occurrence” or “loss”) that caused the injury in question, not earlier events in the causal chain. As the court in **Wellbrock v. Assur. Co. of America**, 90 Wn. App. 234, 242-43, 951 P.2d 367, **review denied**, 136 Wn.2d 1005 (1998) observed:

[T]he coverage triggering “occurrence” refers to the event causing injury to the complaining party, not the earlier event that created potential for future injury. An “occurrence” refers to “the fruits of a negligent act, not to

the sowing of the seeds” because it is the consequence that signifies coverage, and not the cause.

Under **Wellbrock**, the events occurring before Mr. Justus was actually detained have no relevance to the coverage analysis.

Additionally, no detention occurred before the truck crashed into the tree and Mr. Justus climbed out, at which point Mr. Morgan pointed his gun at him and ordered him to remain on the ground. Indeed, when Mr. Morgan first confronted Mr. Justus and Mr. Tobeck as they were loading the pipe into their truck, Mr. Morgan did not detain them, as they quickly got in the truck and began driving away. This initial confrontation was not a detention, it was an assault with a deadly weapon. See discussion at fn. 18, above.

To the extent any detention existed, it was limited to the short time during which Mr. Morgan held Mr. Justus at gunpoint on the ground after the truck crashed into the tree and before the police arrived – a period of under 11 minutes. Thus, an uncovered risk (Mr. Morgan’s assault of Mr. Justus with a deadly weapon) set into motion what Mr. Justus contends is a covered risk (a “negligent wrongful detention”).<sup>20</sup> The

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<sup>20</sup> See, e.g., **Krempl v. Unigard Sec. Ins. Co.**, 69 Wn. App. 703, 850 P.2d 533 (1993) (holding that efficient proximate cause analysis does not apply when an excepted risk sets into motion what the insured contends is a covered risk).

“efficient proximate cause” rule does not support characterizing the entire incident as a single event of “wrongful detention.”

The efficient proximate cause rule is also inapplicable because Exclusion 17 does not raise causation issues. Rather, the exclusion eliminates coverage for “‘personal injury’ when the insured acts with specific intent to cause harm.” There is no causation language or requirement included in this exclusion; the focus instead is on the insured’s intent. Accordingly, a determination of proximate cause is unnecessary to determine coverage or application of the exclusion. The trial court correctly rejected application of the rule.

**F. THE TRIAL COURT’S DENIAL OF MR. JUSTUS’S MOTION TO COMPEL WAS NOT ERROR**

Mr. Justus’s complaint concerning dismissal of his assigned extracontractual claim is that he could not discover the evidence he needed to resist State Farm’s summary judgment motion. Although Mr. Justus took those claims by assignment in May 2014 – while the coverage case was pending – he never made reasonable or timely effort to conduct discovery on them.

Mr. Justus dropped the ball after a November 11, 2014 discovery conference. He did not file and note his motion to compel until June 1, 2015. That was more than a year after he had taken the claims by

assignment, more than half a year since the CR 26(i) discovery conference, and over a month after the trial court's entry of findings of fact and conclusions of law on the coverage issues. Mr. Justus could have filed and noted his motion immediately after the November 11, 2014 discovery conference, which would have been prior to the coverage trial. He did not.

A ruling on a motion to compel discovery is reviewed for abuse of discretion. **Expedia, Inc. v. Steadfast Ins. Co.**, 180 Wn.2d 793, 802, 329 P.3d 49 (2014). Faced with Mr. Justus's year-long right to pursue the claims, and his half-year delay in taking steps to obtain the discovery, the court did not abuse its discretion in denying the motion to compel.

**G. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT DISMISSAL OF MR. JUSTUS'S BREACH OF CONTRACT AND EXTRACONTRACTUAL CLAIMS**

Mr. Justus does not show why the trial court erred in granting State Farm's motion for summary judgment; rather, he argues that the trial court erred in denying the motion to compel (see above). Nonetheless, since a ruling may be affirmed on any correct ground, State Farm briefly discusses why the trial court's dismissal of Mr. Justus's breach of contract and extrac contractual claims was proper.

1. **By Defending the Morgans and Filing a Declaratory Judgment Action, State Farm Avoided Liability for Breach of the Duty to Defend and Indemnify and Related Bad Faith, CPA, and IFCA Claims**

If an insurer has doubts about whether it has an obligation to defend or indemnify its insured, it may undertake the defense under a reservation of rights and seek declaratory relief. **Truck Ins. Exch. v. VanPort Homes, Inc.**, 147 Wn.2d 751, 761, 58 P.3d 276 (2002). By doing so, the defending insurer avoids breach and bad faith liability. In **National Sur. Corp. v. Immunex Corp.**, 176 Wn.2d 872, 297 P.3d 688 (2013), the Supreme Court held that an insurer which defends under a reservation of rights should receive a benefit from doing so. **Id.** at 879-80. That benefit is protection from claims of breach and bad faith. **Id.** at 880. In this way, the Supreme Court encouraged insurers to defend under a reservation.

State Farm did that here. It defended the Morgans, reserved its rights, and commenced the underlying declaratory judgment action. And, as the trial court determined in its findings of fact and conclusions of law, the Morgans' liability to Mr. Justus was not covered under State Farm's policies. Thus, the Morgans received a defense from State Farm and, according to **Immunex**, State Farm obtained the benefit of immunity from breach of contract and bad faith claims.

The **Immunex** rule also extends to the duty to indemnify. There is no bad faith breach of a duty to indemnify because extending a defense under a reservation preserves the issue of the existence of such a duty for judicial determination. Since a breach of an insurer's obligation under the policy cannot occur before that insurer's performance is due, **Immunex**, 176 Wn.2d at 879, there is no bad faith because there was no breach. Moreover, the trial court proceeded to make the indemnity determination in State Farm's favor. After hearing evidence presented at trial, the trial court concluded that State Farm did not have the duty to indemnify the Morgans against the judgment to which they stipulated in favor of Mr. Justus. Therefore, there was no breach, let alone a bad faith breach. Further, State Farm acted reasonably. In order for an insurer to be found in bad faith, to have violated the CPA, or the IFCA, the insurer must have acted at least "unreasonably." See **Insurance Co. of PA v. Highlands Ins. Co.**, 59 Wn. App. 782, 786-7, 801 P.2d 284 (1990) (denial is not bad faith unless it is done without reasonable justification); **Villella v. Public Employees Mut. Ins. Co.**, 106 Wn.2d 806, 821, 725 P.2d 957 (1986) (incorrect denial alone insufficient to show CPA violation); RCW 48.30.010(7) (IFCA claim requires unreasonableness). The reasonableness of State Farm's actions was confirmed when the trial court entered its findings of fact and conclusions of law, concluding after

hearing trial testimony and reviewing the evidence presented that State Farm did not have a duty to indemnify the Morgans for the judgment taken against them by Mr. Justus.

**2. The IFCA Claim Was Properly Dismissed Because There Was No Unreasonable Denial of Coverage or Payment of Benefits**

There is an additional reason why the IFCA claim was properly dismissed. The IFCA only applies to unreasonable denials of coverage or payment of benefits to a first-party claimant. (RCW 48.30.010(7); - 015(1), (2), (3).) Here, State Farm never denied coverage nor payment of benefits. In **Ainsworth v. Progressive Cas. Ins. Co.**, 180 Wn. App. 52, 79, 322 P.3d 6, 20 (2014), Division One held that the insured must show the insurer unreasonably denied a claim for coverage or payment of benefits. If either or both acts are established, a claim exists under IFCA.

**Id.**

Here, State Farm did not deny coverage. Rather, it defended under a reservation of rights and brought the declaratory judgment action for a judicial determination on indemnity, precisely so it would *not* be deemed to have denied coverage or payment of benefits. Moreover, even if it was a denial, it was reasonable because the trial court found that there was no coverage. A correct denial is not an unreasonable denial. **See United**

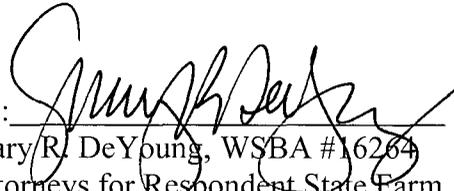
**Services Auto. Ass'n v. Speed**, 179 Wn.App. 184, 203, 317 P.3d 532  
(2014).

**V. CONCLUSION**

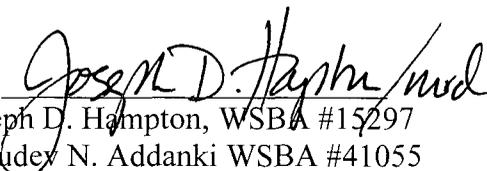
The trial court correctly ruled that the State Farm policies do not provide coverage for Mr. Justus's damages, correctly denied Mr. Justus's motion to compel, and correctly granted summary judgment dismissal of Mr. Justus's extra-contractual claims. Its rulings should be affirmed.

DATED this 4th day of August, 2016.

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