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NO. 77684-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ROBERT C. WOO, D.D.S.,

Petitioner,

v.

FIREMAN'S FUND INSURANCE COMPANY, a California corporation; and NATIONAL SURETY CORPORATION, an Illinois corporation,

Respondents,

and

DEPOSITORS INSURANCE COMPANY, an Iowa corporation; and THE PACIFIC UNDERWRITERS CORPORATION, a Washington corporation,

Defendants.

PETITIONER WOO'S ANSWER TO THE BRIEF OF AMICUS CURIAE WASHINGTON STATE TRIAL LAWYERS ASSOCIATION FOUNDATION

Richard B. Kilpatrick, P.S.
Richard B. Kilpatrick, WSBA 7058
9 Lake Bellevue Drive, Ste 210
Bellevue, WA 98005
(425) 453-8161

WIGGINS & MASTERS, P.L.L.C.
Charles K. Wiggins, WSBA 6948
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

R. Andrew Bergh, WSBA 17924
Law Office of Andrew Bergh
900 4th Ave Ste 3250
Seattle, WA 98164-1072
(206) 382-0000

Attorneys for Petitioner

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INTRODUCTION

Dr. Robert Woo files this answer to the Brief of Amicus Curiae Washington State Trial Lawyers Association Foundation ("WSTLAF"). With some exceptions, Dr. Woo agrees with the analysis of amicus.

ARGUMENT

A. Woo and Fireman's have argued the complaint allegation rule consistently with WSTLAF's amicus brief, but the appellate court failed to liberally construe the complaint and the dental practice statute, instead mistakenly focusing on an incorrect "reasonable expectations" test.

The parties, amicus WSTLAF, and the Court of Appeals have all described the complaint allegation rule in generally consistent terms[1]:

- The duty to defend arises if the allegations of the complaint could render the insurer liable to the insured under the policy. BA 44, BR 29, ***Woo v. Fireman's Fund Ins. Co.***, 128 Wn. App. 95, 102, 114 P.3d 681 (2005), *rev. granted* 156 Wn.2d 1035 (2006); Pet. Rev. ("PR") 9-10; Woo Supp. Br. 1; Fireman's Supp. Br. 4; Amicus Br. 12.

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[1] Fireman's has bizarrely accused Dr. Woo of arguing that a duty to defend exists unless there is a "certainty of no coverage." Fireman's Supp. Br. 2-3; *see also* Reply Br. 1-2. Fireman's bases this accusation, not on the argument in Woo's Brief, but on a statement in Woo's description of the facts in his Brief of Respondent. *Id.* It is unclear why Fireman's persists in battling this straw man, but suffice it to say that Woo has argued the complaint allegation rule consistently with the amicus description. BR 1, 29; Mot. For Recon. 1-4; Pet. For Rev. 9-10; Woo Supp. Br. 1-2.

- The allegations of the complaint must be construed liberally and any ambiguities interpreted in favor of finding coverage. BA 44; BR 33; Amicus Br. 12.
- The insurer owes a duty to defend unless all the claims are clearly not covered. BA 44, BR 29, ***Woo*** at 102; PR 10; Amicus Br. 13.

1. Amicus appropriately omits the "arguably covered" formulation mentioned in dictum in *Kirk.*

One difference between the amicus formulation of the complaint allegation rule and the prior arguments of the parties and opinion of the appellate court is this: amicus does not cite to or rely on this Court's description of the complaint allegation rule as whether the complaint alleges facts and circumstances "***arguably*** covered by the policy." ***Kirk v. Mt. Airy Ins. Co.***, 134 Wn.2d 558, 561, 951 P.2d 1124 (1998) (emphasis supplied). This statement is *dictum* in ***Kirk***, in which the Court was required to assume that the insurer had wrongly denied its duty to defend. *Id.* This formulation of the complaint allegation rule has apparently not been repeated by this Court and does not appear to originate anywhere in Washington law. Rather, ***Kirk*** cites as the only authority for the "arguably covered" test 7C John A. Appleman, ***Insurance Law and Practice*** § 4681, at 16 (Walter F. Berdel ed., rev. ed.1979).

Both Woo and Fireman's Fund cited to the "arguably covered" test in their briefs, BA 44-45, BR 29, as did the Court of Appeals. ***Woo*** at 102. But in light of the amicus brief, Woo submits that the "arguably covered" test can be misleading and was so in this case. The term "arguably covered" suggests that the opposite term would be "arguably not covered." But this is incorrect. Anything that is "arguably covered" is logically also "arguably not covered." The opposite of "arguably covered" is "clearly not covered", as ***Kirk*** notes immediately after stating the "arguably covered" formulation: "Although an insurer has a broad duty to defend, alleged claims which are clearly not covered by the policy relieve the insurer of its duty." ***Kirk*** at 561.

The "arguably covered" formulation is not only misleading, it is inconsistent with this Court's more recent formulation that the duty to defend arises if the allegations are "conceivably covered." ***Hayden v. Mut. of Enumclaw Ins. Co***., 141 Wn.2d 55, 64, 1 P.3d 1167 (2000). Unlike ***Kirk***, in which the "arguably covered" test was only *dictum*, the "conceivably covered" formulation of ***Hayden*** was central to the decision, which involved breach of the duty to defend.

"Arguable" and "conceivable", while close in meaning, are not synonymous. "Arguable" means "capable of being argued:

open to argument, dispute, or question." ***Webster's Third New Int. Dictionary***, 116 (1993). "Conceivable" means "capable of being conceived, imagined, or understood", or "logically possible." *Id.* at 469. The term "arguable" also introduces into the discussion extraneous arguments such as the "reasonable expectations" test that Fireman's promotes, the sexual misconduct cases on which the appellate relied, and the "horseplay" or "practical joke" exception argued by Fireman's and adopted by the appellate court.

Dr. Woo respectfully submits that the Court should clarify that the duty to defend is to be determined under the "clearly not covered" and/or "conceivably covered" tests, not the "arguably covered" test.

2. The appellate court failed to liberally construe the allegations of the complaint.

Amicus appropriately calls for liberal construction of the allegations of the complaint, citing this Court's decision in ***Truck Ins. Exch. v. VanPort Homes, Inc***., 147 Wn.2d 751, 760, 58 P.3d 276 (2002). Amicus Br. 12. Although both Fireman's and Dr. Woo cited this standard in their appellate briefs, BA 44, BR 33, the appellate court ignored this principle, never mentioning liberal construction.

This failure is one of the factors that led the appellate court into error. The court restrictively interpreted the extremely broad provisions of RCW 18.32.020, which was incorporated into the terms of the Fireman's policy. ***Woo*** at 98-99, citing Ex. 40 at 102; *see* Woo Supp. Br. 3-6. The appellate court considered only subsection (2) of the statute, incorrectly construing it and totally ignoring the other subsections of the statute. *Id.*

The appellate court totally ignored subsection (3) of the statute[2], which provides that a person practices dentistry who "owns, maintains or operates an office for the practice of dentistry . . ." Dr. Woo's creation of the boar tusks was integrally tied into the operation of his dental office, the atmosphere among his staff, and even the fact that Alberts was unexpectedly presented with the flippers and photos as part of an office birthday party. BR 5-6.

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[2] Tacitly recognizing the importance of subsection (3) of the statute, Fireman's argues untenably, "Fireman's Fund will not separately brief subsection (3) to this Court, as Dr. Woo has waived any claim he might make based on that subsection by omitting it from his Petition for Review." Fireman's Supp. Br. 6 n.5. This is both legally and factually wrong. Legally, the purpose of the petition for review is to explain why the Court should accept review, not to woodenly recite every single argument. Factually, Dr. Woo argued in his Petition that the appellate court ignored four of the five subsections of the statute, and that operating a dental office is part of the practice of dentistry. PR 10, 13-14.

The appellate court again failed to liberally construe the complaint when it focused on the sexual misconduct cases instead of the allegations of the complaint and the provisions of the policy. ***Woo*** at 103-04; *see* PR 13-15, Woo Supp. Br. 8-10.

The appellate court partially quotes Alberts' allegation of Dr. Woo's "devis[ing] a scheme to humiliate and denigrate Ms. Alberts." ***Woo*** at 106, Complaint at 2.13, CP 32. But the appellate court omits the immediately following phrase "while she was anesthetized." Read literally, the complaint alleges humiliation and denigration "***while she was anesthetized***." This would give rise to damages for the indignation of having her co-workers observe her with ridiculous boar tusks in her mouth. But it would not give rise to damages for presenting the photos and tusks to her and her allegation of "frequent panic attacks, nightmares as well as suicidal ideation." Complaint at 2.25, CP 34. Reading the complaint liberally, and construing any ambiguity in favor of coverage, the complaint alleges actions and damages never intended by Dr. Woo.

Perhaps the most glaring failure of the appellate court to liberally construe the allegations of the complaint was its refusal to credit the allegations of negligent infliction of emotional distress. PR 17-18, Woo Supp. Br. 13-17.

3. Fireman's emphasis on reasonable expectations is contrary to the complaint allegation rule.

Amicus' discussion demonstrates how the complaint allegation rule is inconsistent with Fireman's proposed "reasonable expectations" test of the duty to defend.[3] Reply Br. 1-2, 7; Answer to PR 10, 11, 13, Fireman's Supp.Br. 2-5. Fireman's proposed analysis is inconsistent with the complaint allegation rule because it diverts the court from looking to the allegations of the complaint and the broad terms of the insurance policy. Instead, Fireman's asks the court to think abstractly and indefinitely about what some reasonable person might initially expect without even looking at the complaint and the policy.

Fireman's denied coverage in the first place based on a cursory inquiry into what constitutes the practice of dentistry. Despite the policy definition incorporating the statue, the adjusters never reviewed the Washington statute defining the practice of dentistry. RP 75-76. The adjuster actually read the statute for the first time in her deposition and concluded it may have been broad enough to have provided coverage. RP 76. Fireman's ultimate

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[3] Dr. Woo has also pointed out that Fireman's "reasonable expectations" test has been rejected by this Court. Woo Supp. Br. 18-19.

decision-maker at Interstate Insurance, Melissa Kaplan, had no recollection of reviewing the policy language, let alone the Washington Statute. Kaplan Dep., CP 1042. The opinion letter obtained from attorney Skinner similarly failed to address the broad statutory definition of dental services. RP 255; Ex. 22 at 657.

Instead of advancing the analysis of the complaint allegation rule, Fireman's approach points away from the allegations into a morass of unreliable speculations about others' expectations. Fireman's approach would open the door to an insurer's subjective intentions, despite whatever language may be in the policy, by projecting those intentions onto the reasonable person.

B. Even intentional conduct is covered under the professional liability portion of the policy unless Dr. Woo intended or expected bodily injury or property damage.

Dr. Woo offers a subtle but important clarification for one statement by amicus, i.e., that the appellate court held there was no duty to defend under the professional liability policy because "the complaint unambiguously alleges only intentional conduct by Dr. Woo leading to Alberts' injuries . . . ." Amicus Br. 14, quoting ***Woo*** at 106. In truth, the professional liability portion of the policy does not even depend on unintentional action: "The dental professional

liability portion of the policy provided coverage for damages 'that result from rendering or failing to render dental services.'" ***Woo*** at 98-99, quoting Ex. 40 at 080. Although misplaced there too, the "intentional conduct" language quoted by amicus comes from the portion of the appellate decision analyzing the general liability coverage.

It is the nature of professional malpractice that the professional's actions are usually intentional. Liability arises for medical malpractice when the professional fails to follow the standard of care. RCW 7.70.030. The failure to follow the standard of care is generally unintentional, but it may be intentional and still constitute actionable malpractice. That is why professional liability insurance is not written in terms of accidental or unintentional action. The only thing in the Fireman's policy that restricts the duty to defend professional liability in this regard is when the harm itself is intended. *See* the exclusion for bodily injury or property damage "expected or intended from the standpoint of the insured." Ex. 40 at 83.

Amicus states that the appellate court "misapplied the complaint allegation rule, ***at least*** with regard to the professional liability coverage." Amicus Br. 14 (emphasis supplied). Dr. Woo

submits that the appellate court misapplied the complaint allegation rule with regard to all parts of the policy.

C. Amicus correctly focuses the inquiry on the principle of fortuity instead of pejorative characterizations about "practical jokes."

The discussion in the Amicus Brief of the fortuity requirement for insurance coverage explicitly places on the table what has really been Fireman's implicit argument throughout this lawsuit: that a reasonable person should not expect practical jokes to be covered by insurance. Fireman's aims for a visceral negative response by prominently appending the pictures of the tusk flippers in Alberts' mouth to its Court of Appeals brief, showing large blow-ups of the photos to the Court of Appeals at oral argument and consistently referring to the incident as a practical joke. Fireman's hopes an initial negative reaction will be substituted for a careful analysis of the policy language under the complaint allegation rule.

The fortuity analysis helps place any initial negative reaction in appropriate legal context. Strange claims may not be covered if no element of fortuity is present but they certainly will often be covered after analysis of both the claims and the policy language. Application of appropriate coverage principles is required <u>before</u> any correct answer can be determined. Amicus cited numerous

strange and unusual cases, involving accidental shootings, fires, and playfully tickling another person's ear with a radio antenna, which on first blush would not appear covered but after analysis were either covered or had the potential to be covered and had to be defended. Amicus Br. 18-19.

Even when part of the insured's conduct is intentional (or even all of it for that matter), a claim may be covered if no harm was intended by the insured. A policy excluding injury expected or intended from the standpoint of the insured is evaluated for subjective intent to injure. ***Rodriguez v. Williams***, 107 Wn.2d 381, 387, 729 P.2d 627 (1986). In ***Rodriguez***, this Court fashioned a special presumption of intent in cases of felonious sexual abuse. *Id.* The Court of Appeals applied this presumption in ***Standard Fire Ins. v. Blakeslee***, 54 Wn. App. 1, 4-5, 771 P.2d 1172, *rev. denied*, 113 Wn.2d 1017 (1989).

It would be inappropriate to presume intent to injure from a practical joke. Indeed, it would be counter-intuitive. Practical jokes are seldom if ever intended to cause harm. That is why other courts have found a duty to defend or even coverage for practical jokes. Amicus Br. 18-20.

In fact the coverage opinion in Fireman's claim file reported these rules to Fireman's:

> With limited exception, Washington courts generally apply a subjective standard to the "expected or intended" language found in liability policies. In other words, the finder of fact must consider the insured's state of mind to determine whether the harm was "expected or intended." The exceptions involve instances where the conduct is so egregious that intent must be inferred such as cases involving sexual or felonious physical assault.

Ex. 22 at 664.

Fireman's policy did not restrict what claims could be considered fortuitous. To the contrary the policy expressed the broadest possible coverages. Its definition of the practice of dentistry incorporated the very broad regulatory statue of the state, plus it added further unexpected definitions such as acting as an expert witness, assistance at autopsy and work on committees. Ex. 40 at 102. Nor did the policy require that the acts complained of themselves <u>be</u> dental services, only that the claim "result from" such services. Ex. 40 at 80. This policy even expressly agreed to defend claims that could never be covered:

> We do not cover **claims** that arise out of a willful violation of law or regulation that imposes criminal penalties. <u>But we will provide a defense for any such **claims** that seek to hold an **insured** civilly liable for **damages**</u>. We won't, however, cover any **damages** that may be assessed against the **insured**.

Exclusion 5, Ex. 40 at 82 (Bold in the original, underline added).

Instead of the limitations seemingly implicit for a "wrongful employment practice," the policy actually defined that term as "any negligent act...in the course of . . . relations with employees [that caused emotional distress]." Ex. 40 at 94 & 106. Similarly the business coverage definition of occurrence specifically stated the fortuity of events for an occurrence was analyzed "from the standpoint of the insured," not from some determination of what a reasonable person might think were the natural and probable consequences of any acts. Ex. 40 at 43.

If Fireman's had interviewed Dr. Woo and the female assistants who were part of the joke, Fireman's then would have realized: 1) none of them had any intent to harm Tina Alberts, (2) neither Dr. Woo nor his staff knew of anything in Alberts' background that would make her more susceptible to emotional distress, RP 471-72, and 3) even the final acts that caused any harm (giving Alberts her anesthetized pictures) were not by then intended at all by Dr. Woo. RP 478-79. Indeed, even without this information the coverage opinion prominent in Fireman's claim file stated:

> In the present case, Dr. Woo's conduct does not rise to the level of the exceptions to the general rule. Consequently, he will be judged on a subjective intent standard. Based on the

> materials provided to our office, it appears that Dr. Woo did not expect his "joke" to upset Ms. Alberts. Of course if evidence develops that Dr. Woo acted with some malice, then it may be easier to prove that the harm was expected from the standpoint of the insured.
>
> It is important to note that many of the causes of action contained in the draft complaint are allegations of intentional misconduct, i.e., assault, battery, outrage. Based on these allegations, Fireman's Fund certainly has a legitimate argument that the exclusion operates to bar coverage and it would be appropriate to take that position in any declination letter. However, with respect to other allegations, such as medical negligence, lack of informed consent, or negligent infliction of emotional distress, the exclusion would probably not be applicable.

Ex. 22 at 665.

Regardless of any initial negative reaction, there is simply nothing about these claims that prevents potential coverage under analysis of fortuity or the policy language.

In short, Dr. Woo agrees with amicus that the principle of fortuity, properly applied, results in the conclusion that Fireman's breached its duty to defend.

D. Amicus' proposed "fairly debatable" focusing tool applies only to bad faith in a refusal to defend, not to breach of the contractual duty to defend.

Amicus proposes a "focusing tool" to determine whether an insurer has acted in bad faith in refusing to defend a claim:

> An insurer should only be able to avoid liability for bad faith in refusing to defend if, at the time it denied a defense, *it was*

> *fairly debatable that the claim was clearly not covered* under the policy and/or governing law.

Amicus Br. 23 (emphasis in original). Amicus suggests that the "dispositive issue before the Court" is whether Fireman's is entitled to rely on the holdings in ***Blakeslee*** and ***Hicks***, given the uncertainty in the law. *Id.* at 21. Dr. Woo clarifies that the Court can easily resolve this appeal without ever reaching this issue simply by applying the complaint allegation rule and finding that Fireman's breached its duty to defend.

If the Court does reach this issue, two distinctions are important. First, there is a difference between breach of the insurer's contractual duties and the tort of bad faith breach of the insurer's contractual duties—breach of contract is determined under contract rules and gives rise to contract damages, but an insurer may be liable for the tort of bad faith if the breach of contract was "unreasonable, frivolous, or unfounded." ***Kirk*** at 560-61. Second, there is a difference between the duty to defend and the duty to indemnify. The insurer owes a duty to defend if the allegations of the complaint are "conceivably covered", but the duty to indemnify arises only if the facts of the case give rise to actual coverage.

The amicus discussion can be helpful in analyzing bad faith breach of the duty to defend. It would not make sense regarding a determination of the contractual duty to defend and WSTLA does not appear to suggest any "fairly debatable" standard should apply to the initial duty to defend. The insurer owes a duty to defend unless the claim is clearly not covered. It would unnecessarily confuse the "clearly not covered" standard for the contractual duty to defend if the Court asked whether it is fairly debatable that the claim is clearly not covered.

Application of a fairly debatable standard to the contractual duty to defend would also encourage insurers not to defend claims if the law is unclear and might result in coverage. The insured has purchased the policy for peace of mind and to provide a defense. The risk of legal uncertainty should fall on the insurer, not on the insured. It is the insurer who knows what law is settled and what law is uncertain and can draft its contract accordingly.[4] A claim is no less uncertain whether the facts are unclear or the law is unclear

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[4] Since at least the 1800's courts have quite successfully determined when law is settled or unsettled because attorneys have a defense to malpractice when the law on which they advise is not settled. See numerous citations in Mallen & Smith, *Legal Malpractice* (2006 ed.) §18.1, p. 1105 and ***Halvorsen v. Ferguson***, 46 Wn. App. 708, 718, 735 P.2d 675 (1986) *rev. denied*, 108 Wn.2d 1008 (1987).

so the one single standard for both factual and legal issues should apply – i.e, the insurer owes a duty to defend unless the claim is clearly not covered.

Dr. Woo takes no position on the use of the "fairly debatable" standard in the context of bad faith, except to note that a jury already fairly found that Fireman's acted in bad faith (i.e., failed to act in good faith) when Fireman's denied any further duty to defend. CP 3570-72. The jury was instructed that the court had already determined that Fireman's "erred in not defending Dr. Woo", but that this determination did not mean that Fireman's acted in bad faith, and that "[t]he Court's earlier decision on the duty to defend does not control your decisions in this case." CP 3559. The jury was instructed that bad faith is "the doing of some act that is unreasonable, frivolous or unfounded," and that "[a]n incorrect denial of coverage does not constitute bad faith if the insurer had a reasonable justification for doing so." CP 3557. Fireman's did not request a jury instruction on the "fairly debatable" standard and did not except to the failure to give one. CP 1869-1908, RP 1335-37.

The "fairly debatable" standard may not be presented in this case. The jury verdict establishes that Fireman's denial of coverage was "unreasonable, frivolous or unfounded", that

Fireman's did not have a "reasonable justification" for denying coverage, and that Fireman's did not make "[r]easonable mistakes." CP 3557. There will be no occasion to re-visit these issues. Fireman's argues that a new trial is required if this Court finds a duty to defend under some but not all of the portions of the policy. Fireman's Supp. Br. 18-19. But, as Dr. Woo noted his Brief of Respondent, Fireman's waived any such claim of error when it failed to propose a special verdict identifying the coverages under which the jury found bad faith. BR 43 n. 10, citing ***Davis v. Microsoft Corp.***, 149 Wn.2d 521, 539-40, 70 P.3d 126 (2003).

CONCLUSION

The Court of Appeals erred in failing to apply the principles adopted by this Court and agreed by both parties, all of which establish that Fireman's breached its duty to defend Dr. Woo. The principle of fortuity is satisfied with respect to all portions of the Fireman's policy. Dr. Woo asks the Court to reverse and reinstate the judgment on the jury verdict.

DATED this 28th day of August 2006.

Richard Kilpatrick, P.S.

/s/
Richard Kilpatrick, WSBA 7058
9 Lake Bellevue Drive, #210
Bellevue, WA 98005
(425) 453-8161

Wiggins & Masters, P.L.L.C.

/s/
Charles K. Wiggins, WSBA 6948
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033

Law Office of R. Andrew Bergh

/s/
R. Andrew Bergh, WSBA 17924
900 4th Ave Ste 3250
Seattle, WA 98164-1072
(206) 382-0000

CERTIFICATE OF SERVICE BY MAIL AND ELECTRONIC MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **ANSWER TO THE BRIEF OF AMICUS CURIAE WASHINGTON STATE TRIAL LAWYERS ASSOCIATION FOUNDATION** postage prepaid, via U.S. mail and electronic mail on the 28th day of August 2006, to the following counsel of record at the following addresses:

Counsel for Respondents

Michael B. King
Michael H. Runyan
Emilia L. Sweeney
LANE POWELL SPEARS
LUBERSKY, LLP
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101
Email kingm@lanepowell.com

Co-counsel for Petitioner

R. Andrew Bergh
Law Office of R. Andrew Bergh
900 4th Ave Ste 3250
Seattle, WA 98164-1072
Email andy@berghlaw.com

Richard B. Kilpatrick, P.S.
Richard B. Kilpatrick, WSBA 7058
9 Lake Bellevue Drive, Ste 210
Bellevue, WA 98005
(425) 453-8161
Email dickkilpat@earthlink.net

Counsel for amicus curiae, Washington State Trial Lawyers Association

Bryan P. Harnetiaux
Attorney at Law
517 E. 17th Avenue
Spokane, WA 99203-2210
Email
wstla@winstoncashatt.com

Debra L. Williams Stephens
Attorney at Law
6210 E. Lincoln Lane
Spokane, WA 99217-9332
Email
debra@debrastephenslaw.com

/s/
Charles K. Wiggins, WSBA 6948