

67471-4

67471-4

NO. 67471-4

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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OREGON MUTUAL INSURANCE COMPANY,

Appellant,

v.

RAIN CITY PIZZA, L.L.C., a Washington limited liability company;  
EDWARD TALIAFERRO, an individual; KEVIN SONNEBORN, an  
individual; ROSE CITY PIZZA, L.L.C., an Oregon limited liability  
company; SEATTLE PJ PIZZA, L.L.C., a Washington limited liability  
company; PAPA WASHINGTON L.L.C., a Washington limited liability  
company; PAPA WASHINGTON II, L.L.C., a Washington limited  
liability company,

Respondents.

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COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE  
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**RESPONDENTS' APPELLATE BRIEF**

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## I. INTRODUCTION

When Appellant Oregon Mutual Insurance Company (“Oregon Mutual”) issued commercial general liability policy no. BSP348307 (“the Policy”), Respondents reasonably believed that they had obtained, at a bare minimum, protection from legal expenses that they might incur in defending against unfounded lawsuits. Indeed, protection from litigation costs is one of the primary reasons why people buy liability insurance. *Lunsford v. American Guar. & Liability Ins. Co.*, 18 F.3d 653, 656 (9<sup>th</sup> Cir. 1994).

Oregon Mutual nevertheless filed a declaratory judgment action in which it sought to strip Respondents of their valuable defense and coverage benefits – even though the complaint against Oregon Mutual’s insureds alleged claims falling within the scope of coverage and five Respondents (all Oregon Mutual insureds) undisputedly had not engaged in the conduct alleged in the underlying lawsuit. The King County Superior Court properly rejected Oregon Mutual’s attempt to escape its contractual duties to its insureds. The Superior Court correctly applied the law to the agreed facts of this case, correctly construed an ambiguous insurance policy provision in Respondents’ favor, and correctly denied Oregon Mutual’s motion for summary judgment and motion for reconsideration. (CP 321-24, Order Denying Plaintiff’s Motion for

Summary Judgment; CP 363, Order Denying Motion for Reconsideration.)

This Court should affirm the decision below.

## II. STATEMENT OF THE CASE

### A. **Most of the Respondents Had Nothing To Do With the Text-Message Advertising Campaign at Issue.**

This case arose out of a limited, short-lived text-messaging campaign. In approximately March and April 2010, Kevin Sonneborn, acting on behalf of Seattle PJ Pizza, LLC (“Seattle PJ Pizza”), gave third-party marketing company On Time 4 U, LLC (“On Time 4 U”) the phone numbers of certain Seattle PJ Pizza customers. (CP 272-73, Sonneborn Decl. at ¶¶ 10-15.) On Time 4 U used these numbers to publish text messages advertising Papa John’s pizza products, which Seattle PJ Pizza sells. (*Id.* at ¶ 12.)

Mr. Sonneborn and Seattle PJ Pizza were subsequently sued, along with numerous other defendants, in a putative class action alleging violations of RCW 19.190.060 and RCW 80.36.400, violations of the Washington Consumer Protection Act, and common-law negligence. *Agne, et al. v. Rain City Pizza, L.L.C. et al.*, United States District Court for the Western District of Washington, Case No. 3:10-cv-01139-JCC (the “Underlying Lawsuit”). The plaintiff in the Underlying Lawsuit has filed at least three amended complaints, the second of which (dated March 30, 2011) added a claim for violation of the federal Telephone Consumer

Protection Act (“TCPA”), 47 U.S.C. § 227, and claims against On Time 4 U and its members. (CP 274-94, Sonneborn Decl., Ex. A.)<sup>1</sup>

Since the filing of her second amended complaint in March 2011, the plaintiff in the Underlying Lawsuit has sought to represent a national class and a Washington subclass (the class definitions set forth at page 2 of Oregon Mutual’s opening brief are therefore incorrect). (CP 285-86, Sonneborn Decl., Ex. A at ¶¶ 42-43.) None of the plaintiff’s complaints have contained allegations of particular prohibited acts by Respondents. (CP 274-94, Sonneborn Decl., Ex. A, *passim*.) All versions of the complaint have been utterly vague, consisting of nonspecific boilerplate contentions that the defendants are “directly and/or vicariously” responsible for the offending text messages. (CP 288, 290, 291, Sonneborn Decl., Ex. A at ¶¶ 55, 63, 71 (emphasis added).)

Mr. Sonneborn is a member of Papa Washington, LLC (“Papa Washington”), which in turn is a member of Seattle PJ Pizza, a Washington limited liability company that operates 21 Papa John’s pizza stores in the Seattle and Peninsula areas of Washington State. (CP 272,

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<sup>1</sup> The plaintiff’s third amended complaint in the Underlying Lawsuit, filed on July 12, 2011 (about a month and a half after the denial Oregon Mutual’s motion for summary judgment in this case), contained further revisions, including additional allegations regarding the plaintiff’s purported damages and deletion of the plaintiff’s claim for violation of RCW 80.36.400. (*See* Respondents’ Opposition to Oregon Mutual Insurance Company’s Motion for Discretionary Review, Appendix, Ex. A (filed in this Court on September 1, 2011).)

Sonneborn Decl. at ¶¶ 3-5.) He solely managed the business affairs of Seattle PJ Pizza in March and April 2010. (*Id.* at ¶ 6.) The other defendants in the Underlying Lawsuit who are insureds under the Policy and Respondents herein are:

- Rain City Pizza, LLC (“Rain City Pizza”), an inactive Washington limited liability company that merged with Seattle PJ Pizza in January 1, 2007 and is now part of Seattle PJ Pizza. (*Id.* at ¶ 7.) Rain City Pizza ran a number of Papa John’s pizza stores that Seattle PJ Pizza operates today. (*Id.*)
- Rose City Pizza, LLC (“Rose City Pizza”), an Oregon limited liability company that operates 12 Papa John’s pizza stores in Portland Oregon. (*Id.* at ¶ 8.) The two members of Rose City Pizza are Kevin Sonneborn and Edward Taliaferro. (*Id.*) Other than similar ownership, Rose City Pizza has no affiliation with Seattle PJ Pizza. (*Id.*)
- Papa Washington, LLC (“Papa Washington”), a Washington limited liability company the members of which are Kevin Sonneborn, his wife, and his two grown children. (*Id.* at ¶¶ 3-4.) As noted above, Papa Washington is a member of Seattle PJ Pizza. (*Id.*)
- Papa Washington II, LLC (“Papa Washington II”), an inactive Washington limited liability company that has no affiliation with Seattle PJ Pizza. (*Id.* at ¶ 9.)
- Edward Taliaferro, a member of Seattle PJ Pizza and Rose City Pizza. (*Id.* at ¶¶ 4, 8.)

Mr. Sonneborn learned about text message advertising in early 2010, and agreed to try it as a way of offering promotions to existing customers of Seattle PJ Pizza. (*Id.* at ¶ 10.) He developed call lists

comprising the names and telephone numbers of individuals who had previously ordered pizza from one of the Papa John's stores operated by Seattle PJ Pizza. (*Id.* at ¶¶ 11, 15.) Some of this information came from records of telephonic orders. (*Id.* at ¶ 11.) Other information came from computer records of customers who had ordered pizza products online. (*Id.*) Mr. Sonneborn provided the call lists to On Time 4 U, which purported to send text messages to some or all of the persons on the lists. (*Id.* at ¶ 12.)

Oregon Mutual has never disputed that Mr. Sonneborn did not consult with Mr. Taliaferro when he agreed to try text messaging, when he put the call lists together, when he engaged On Time 4 U to send text-message advertisements to Seattle PJ Pizza's customers, or when he provided the call lists to On Time 4 U. (*Id.* at ¶ 14.) It is thus an established fact that Mr. Taliaferro was not involved in any of the activities on which the plaintiff in the Underlying Lawsuit bases her claims. (*Id.*; CP 323, Order Denying Plaintiff's Motion for Summary Judgment at 3 (noting that "the insurance company does not dispute . . . that the uncontested facts establish that the defendants involved in this suit did not do the act or [sic] complained of".))

Oregon Mutual also has never disputed that the text messages at issue in the Underlying Lawsuit were only sent on behalf of Seattle PJ

Pizza, and only advertised stores operated by Seattle PJ Pizza. (CP 273, Sonneborn Decl. at ¶ 15; CP 323, Order Denying Plaintiff’s Motion for Summary Judgment at 3.) The messages were not sent on behalf of any other Respondent – not Rain City Pizza, which was defunct in March and April 2010; not Rose City Pizza, an entirely different company that only operates pizza stores in the Portland, Oregon area; not Papa Washington, one of the members of Seattle PJ Pizza; not Papa Washington II, an inactive entity unrelated to Seattle PJ Pizza; and not Mr. Taliaferro, the other member of Seattle PJ Pizza, who had nothing to do with the engagement of On Time 4 U. (*Id.*)

**B. The Policy, and Oregon Mutual’s Declaratory Judgment Action.**

Oregon Mutual brought this action to obtain a declaratory judgment that it was not required to indemnify or defend any of the Respondents, all of whom are also defendants in the Underlying Lawsuit.

The Policy affords liability coverage for “personal and advertising injury” and “property damage.” (CP 212, Policy at § II(A)(1)(a).) It contains a severability clause providing that “this insurance applies: a. As if each Named Insured were the only Named Insured; and b. Separately to each insured against whom claim is made or ‘suit’ is brought.” (CP 222, Policy at § II(E)(5).) The Superior Court ruled that there was “property

damage, violation of personal and advertising injury, and ... an occurrence as defined in the policy”; and that the Policy therefore provided coverage for Respondents absent an applicable exclusion. (CP 323, Order Denying Plaintiff’s Motion for Summary Judgment at 3.)

Oregon Mutual did not dispute this point; instead, it argued that coverage was barred by an exclusion for distribution of material in violation of “[a]ny statute ... that prohibits or limits the sending, transmitting, communicating or distribution of material or information.” (CP 256, Policy Endorsement M2732B at § II(2)(s).) The Superior Court disagreed, holding that “in order for the exclusion to apply there must in fact be an act or omission,” and finding that many of Oregon Mutual’s insureds had committed no act or omission that could have triggered the exclusion. (CP 323, Order Denying Plaintiff’s Motion for Summary Judgment at 3.) This appeal followed.

### III. SUMMARY OF ARGUMENT

#### A. **There Is “Personal and Advertising Injury” and “Property Damage” Coverage Under the Policy.**

The Policy provides coverage for “personal and advertising injury” and “property damage,” and the injuries alleged by the plaintiff in the Underlying Lawsuit fall squarely into those categories. Oregon Mutual’s only argument to the contrary is that some courts have upheld the denial of coverage for unsolicited advertising claims under commercial general

liability policies like the one at issue here. (App. Brief at 9, 16-21.) But many other courts have ruled in favor of coverage. Under Washington law, policy language that is fairly susceptible of two different but reasonable interpretations must be construed in favor of the insured.

Oregon Mutual cannot plausibly contend that the Policy's coverage grant is only capable of an interpretation that is directly at odds with numerous well-reasoned judicial opinions.

**B. The “Distribution of Material” Exclusion Does Not Apply.**

Oregon Mutual argues that the “distribution of material” exclusion bars coverage (App. Brief. at 9, 11-16), but that exclusion is inapplicable for two reasons. First, the second amended complaint in the Underlying Lawsuit alleges that some or all of the Respondents may be vicariously liable for the plaintiff's purported damages. Vicarious liability does not arise from any acts or omissions of the defendant, but rather by operation of law from the acts or omissions of others. As the Superior Court correctly held, however, the “distribution of material” exclusion only applies if the insured seeking coverage actually engaged in actions or omissions that the exclusion proscribes. Since the possibility exists that some Respondents could be held liable on vicarious-liability claims to which the exclusion would not apply, the second amended complaint

alleges potentially-covered claims and thus triggers Oregon Mutual's defense obligation.

Second, Oregon Mutual does not dispute that in fact five of the seven Respondents (all Oregon Mutual insureds) had nothing whatsoever to do with the text-messaging campaign on which the plaintiff's claims in the Underlying Lawsuit are predicated – that is, they engaged in no act or omission that might trigger the “distribution of material” exclusion. The complaint in the Underlying Lawsuit is thus demonstrably and materially false – at least as to five of the seven Respondents. Again, the exclusion requires an actual proscribed action or omission, not merely one that is alleged.

When a complaint against an insured alleges untrue facts that would place the claim within a policy exclusion but true facts known to or ascertainable by the insurer place the claim within coverage, the insurer must defend the suit. Because the “distribution of material” exclusion can only be triggered by actions or omissions in which five of Oregon Mutual's insureds undisputedly did not engage, the exclusion does not apply as to those insureds, and Oregon Mutual must continue to defend them in the Underlying Lawsuit.

#### IV. ARGUMENT

##### A. **The Applicable Summary Judgment and Contract Interpretation Rules.**

The Court of Appeals reviews a summary judgment order *de novo*. *Community Telecable of Seattle, Inc. v. City of Seattle, Dept. of Executive Admin.*, 164 Wn.2d 35, 41 (2008). It can affirm the Superior Court's grant of summary judgment to Respondents on any basis supported by the record. *International Brotherhood of Electrical Workers, Local Union No. 46 v. Trig Electric Constr. Co.*, 142 Wn.2d 431, 435 (2000).

Summary judgment may only be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). The party moving for summary judgment bears the initial burden of demonstrating the absence of an issue of material fact. *Atherton Condominium Apartment-Owners Ass'n Board of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516 (1990). The court must resolve against the moving party all facts and reasonable inferences from the evidence, and any doubt as to the existence of a genuine issue of material fact. *Id.*

Interpretation of an insurance contract presents a question of law. *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52 (2007). In construing

the language of an insurance policy, the court must give it “the same construction that an average person purchasing insurance would give the contract.” *Id.* (citations and internal quotation marks omitted). “Nice distinctions and refinements are not favored. Rather than interpreting the policy in a technical sense, the court should interpret the policy in accordance with its ordinary meaning.” *Ames v. Baker*, 68 Wn.2d 713, 716 (1966). To the extent policy language is ambiguous – that is, fairly susceptible of two different but reasonable interpretations – it must be construed in favor of the insured. *American Nat’l Fire Ins. Co. v. B & L Trucking and Constr. Co., Inc.*, 134 Wn.2d 413, 428-29 (1998); *Thompson v. Ezzell*, 61 Wn.2d 685, 688 (1963) (“where a provision of a policy of insurance is capable of two meanings, or is fairly susceptible of two different constructions, that meaning and construction most favorable to the insured must be applied, even though the insurer may have intended another meaning”) (citation and internal quotation marks omitted). As the Supreme Court noted in *B & L Trucking*:

An insurance obligation is interpreted in a fashion consistent with the undertaking described in the policy label. Insureds are not purchasing “almost comprehensive” coverage. CGL policies are marketed by insurers as comprehensive in their scope and should be strictly construed when the insurer attempts to subtract from the comprehensive scope of its undertaking.

134 Wn.2d at 429 (citations and internal quotation marks omitted).

In disputes over coverage or the duty to defend, the insured bears the burden of showing that coverage or a defense obligation exists, while the insurer bears the burden of proving that an exclusion applies. *Mutual of Enumclaw Ins. Co. v. T & G Constr., Inc.*, 165 Wn.2d 255, 268 (2008); *American Best Food, Inc. v. Alea London, Ltd.*, 138 Wn. App. 674, 683 (2007). Courts must liberally construe insurance policies in favor of coverage. *Bordeaux, Inc. v. American Safety Ins. Co.*, 145 Wn. App. 687, 694 (2008). By contrast, exclusions are “strictly construed against the insurer”; they “are contrary to the fundamental protective purpose of insurance and will not be extended beyond their clear and unequivocal meaning.” *Stuart v. American States Ins. Co.*, 134 Wn.2d 814, 818-19 (1998); *accord Thompson*, 61 Wn.2d at 688.

**B. The Duty to Defend.**

In the Superior Court, Oregon Mutual sought a ruling that it had no duty to defend any of its insureds who were defendants in the Underlying Lawsuit. “The duty to defend is a valuable service paid for by the insured and one of the principal benefits of the liability insurance policy.” *Woo*, 161 Wn.2d at 54. It is broader than the duty to indemnify. *Id.* at 52. It arises when an action is first brought, and is generally “based on the potential for liability.” *Id.* (citations and internal quotation marks omitted). That is, it typically arises “when a complaint against the

insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage." *Id.* (citations and internal quotation marks omitted).

The existence of a duty to defend is ordinarily determined based solely on the allegations of the complaint against the insured. *Id.* at 53 (citing *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 760-61 (2002)). But contrary to Oregon Mutual's erroneous assertions in its brief (at 9-11 and 14-15), there are several exceptions to this rule, all of which favor insureds. *Woo*, 147 Wn.2d at 54-55 (noting that "[t]he insurer may not rely on facts extrinsic to the complaint to deny the duty to defend – it may do so only to trigger the duty") (emphasis added). One such exception is that "if the allegations in the complaint conflict with facts known to or readily ascertainable by the insurer, ... facts outside the complaint may be considered." *Id.* (emphasis added).

It is thus manifestly not true that extraneous facts are never germane, as Oregon Mutual contends. To the contrary, as the Washington Supreme Court clearly stated in *Woo*, 147 Wn.2d at 54-55, one circumstance in which such facts may be considered is when, as here, they are known to the insurer and materially conflict with indisputably false allegations in the complaint. In fact, in its own motion for reconsideration filed in the Superior Court, Oregon Mutual interpreted *VanPort* as

standing for the proposition that “[a]n insurer must investigate the claim, that is, consider facts outside the complaint, if ... the allegations are in conflict with facts known to or readily ascertainable by the insurer.” (CP 328, Plaintiff’s Motion for Reconsideration at 4:1-3) (citing *VanPort*, 147 Wn.2d at 761) (emphasis added). *Accord Woo*, 161 Wn.2d at 53-54 (“[I]f it is not clear from the face of the complaint that the policy provides coverage, but coverage could exist, the insurer must investigate and give the insured the benefit of the doubt that the insurer has a duty to defend”; “if the allegations in the complaint conflict with facts known to or readily ascertainable by the insurer, ... facts outside the complaint may be considered.”).<sup>2</sup>

As discussed more fully below (and as the Superior Court correctly ruled), Oregon Mutual at least has a duty to defend here, because the true and undisputed facts establish that there is coverage under the Policy.

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<sup>2</sup> Oregon Mutual asserts that it would “make[ ] no policy sense to force [it] to have to undermine and attack its insured’s liability defenses in order to prevail on a coverage defense.” (App. Brief at 16.) But that assertion makes no sense, because the law flatly prohibits Oregon Mutual from attacking its insureds’ liability defenses at this time. Under Washington law, an insurance carrier defending under a reservation of rights and litigating a declaratory judgment action against its insured “must avoid seeking adjudication of factual matters disputed in the underlying litigation because advocating a position adverse to its insured’s interests would constitute bad faith on its part.” *Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 161 Wn.2d 903, 915 (2007).

**C. There Is Coverage Under the Policy Unless an Exclusion Applies.**

**1. There Is “Personal and Advertising Injury” Coverage Under the Policy.**

The Policy generally provides liability coverage for “personal and advertising injury,” including “injury ... arising out of ... e. Oral or written publication, in any manner, of material that violates a person’s right of privacy.” (CP 212, Policy at § II(A)(1)(a); CP 224, Policy at § II(F)(14).) The second amended complaint in the Underlying Lawsuit alleges that the plaintiff’s personal information was wrongfully given to On Time 4 U (CP 285, ¶ 37), and that the transmission of text messages advertising Papa John’s products violated the plaintiff’s right of privacy (CP 283-85, 292-93, ¶¶ 34, 40, 85, 86). Oregon Mutual insists that the “right of privacy” referenced in the Policy’s definition of “personal and advertising injury” is the right to have one’s secret information protected, not the right to be left alone. (App. Brief at 16-19.) But the definition in the Policy is plainly ambiguous – something that Oregon Mutual does not dispute – and Oregon Mutual’s argument therefore flies in the face of controlling Washington cases mandating that ambiguous policy language be construed in favor of insureds. *B & L Trucking*, 134 Wn.2d at 428-29; *Thompson*, 61 Wn.2d at 688.

Although no Washington case is directly on point, a substantial number of courts outside Washington that have addressed similar or identical policy language have concluded that claims like those asserted by the plaintiff in the Underlying Lawsuit fall within “personal and advertising injury” coverage. For example, in *Hooters of Augusta, Inc. v. American Global Ins. Co.*, 157 Fed. Appx. 201, 205-07 (11<sup>th</sup> Cir. 2005), the U.S. Court of Appeals for the Eleventh Circuit held that a violation of the TCPA’s unsolicited facsimile prohibition was within the scope of an “advertising injury” provision covering “injury arising out of ... [o]ral or written publication of material that violates a person’s right of privacy.” *See also, e.g., Penzer v. Transportation Ins. Co.*, 29 So.3d 1000, 1002 (Fla. 2010) (“advertising injury” provision covering injury “arising out of ... [o]ral or written publication of material that violates a person’s right of privacy” provided coverage for claim arising from alleged violations of TCPA); *Motorists Mut. Ins. Co. v. Dandy-Jim, Inc.*, 912 N.E.2d 659, 665 (Ohio Ct. App. 2009) (same); *Park University Enters., Inc. v. American Cas. Co. of Reading, PA*, 442 F.3d 1239, 1248-49 (10<sup>th</sup> Cir. 2006) (insurance carrier had duty to defend where “advertising injury” provision provided coverage for TCPA claims); *Valley Forge Ins. Co. v. Swiderski Elec., Inc.*, 860 N.E.2d 307, 317 (Ill. 2006) (fax-advertising claim under

TCPA potentially fell within coverage of insurance policies' "advertising injury" provision).<sup>3</sup>

The courts in the above-referenced cases (among many others) properly construed ambiguous policy provisions similar or identical to the provision at issue here in favor of insureds, just as the courts of this State must do. *B & L Trucking*, 134 Wn.2d at 428-29; *Thompson*, 61 Wn.2d at 688. Given the large number of analogous cases in which "personal and advertising injury" coverage has been found to exist, Oregon Mutual cannot plausibly contend that the "right of privacy" language at issue here is not fairly susceptible of two different but reasonable interpretations. Reading the language in context, as Oregon Mutual suggests in its Motion at 14:17-15:7, does not resolve the ambiguity. Since the language is unquestionably ambiguous, "that meaning and construction most favorable to the insured must be applied" to it, "even though the insurer may have intended another meaning." *Thompson*, 61 Wn.2d at 688 (emphasis added). The Superior Court could not have resolved (and did not resolve) the ambiguity in Oregon Mutual's favor, and this Court may not either.

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<sup>3</sup> As Oregon Mutual suggests in its brief at 18, many of the "fax-blasting" cases in which courts have declined to find coverage under a "personal and advertising injury" provision have involved insurance policies with materially different language than that of the Policy at issue here. *E.g.*, *Dandy-Jim*, 912 N.E.2d at 665 (distinguishing cases involving policies using term "making known" instead of "publication"); *Hooters*, 157 Fed. Appx. at 208 (noting that "making known to any person or organization written or spoken

Based on the foregoing authorities, the Superior Court correctly held that the Policy provides “personal and advertising injury” coverage for all Respondents in this action.

**2. There Is “Property Damage” Coverage Under the Policy.**

The Policy provides liability coverage for “property damage,” including “[l]oss of use of tangible property that is not physically injured.” (CP 225, Policy at § II(F)(17).) The second amended complaint in the Underlying Lawsuit alleges injuries including the monetary cost of text messages, lost and exhausted storage capacity on the plaintiff’s mobile telephone, and disruption of telephone networks (CP 283-84, ¶ 34). These are all plainly injuries constituting “property damage” under the Policy, and Oregon Mutual does not contend otherwise.

Rather, Oregon Mutual argues that there is no “property damage” coverage here because the injuries alleged by the plaintiff in the Underlying Lawsuit were not caused by an “occurrence” (defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions”) (App. Brief at 19-20, *relying on* CP 213, Policy at § II(A)(1)(b)(1)(a)); and because the alleged injuries were “expected or intended from the standpoint of the insured,” thereby

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material that violates a person’s right to privacy” suggests greater focus on secrecy than “[o]ral or written publication” of such material).

triggering an exclusion for “expected or intended injury” (App. Brief at 19-21, *relying on* CP 214-15, Policy at II(B)(1)(a)). There is, however, persuasive authority supporting Respondents’ position that the Policy provides property damage coverage.

In *Park University Enters.*, 442 F.3d 1239, the United States Court of Appeals for the Tenth Circuit addressed the question of whether there could be coverage under a comprehensive general liability policy for claims arising from the transmission of facsimile advertisements in violation of the TCPA. *Id.* at 1242-43. The insured, Park University Enterprises, Inc. (“Park University”), contended that the claims that had been brought against it were covered as “property damage” notwithstanding language in its insurance policy limiting coverage to an “occurrence” and excluding coverage for “‘property damage’ expected or intended from the standpoint of the insured.” *Id.* The Tenth Circuit held that there could be “property damage” coverage under the policy, and that the insurance carrier therefore had a duty to defend the claims brought in the underlying litigation. *Id.* at 1251. The insured did not dispute that it had intentionally sent the offending fax. *Id.* at 1246. Rather, it argued that it had not intended to cause injury to the plaintiff in the underlying litigation because it believed the fax had been solicited, either as part of an existing business relationship or by prior permission. *Id.* The court

concluded that the injury alleged by the plaintiff in the underlying litigation could not be deemed “the natural and probable consequence of Park University’s act in sending the fax when Park University thought [the plaintiff] welcomed the transmission. If Park University intentionally sent a solicited fax, one cannot infer it intended to injure the recipients....” *Id.*

Although there is no Washington case directly on point, there is ample authority in Washington for the proposition that an intentional act will be deemed an “accident” for purposes of a liability policy unless “it was deliberate, meaning done with awareness of the implications or consequences of the act.” *Nationwide Mut. Ins. Co. v. Hayles, Inc.*, 136 Wn. App. 531, 538-39 (2007) (liability policy provided coverage where insured intended to turn on irrigation system but maintained that he did not intend to damage onion crop). *Accord Woo*, 161 Wn.2d at 64 (liability policy could cover claim where insured dentist intended to put boar tusk “flippers” in patient’s mouth but maintained that he did not intend to cause emotional distress or other injuries).

Here, the undisputed testimony of Kevin Sonneborn establishes that the Respondents who were involved in the text message advertising campaign at issue believed that at least some of the messages had been solicited by customers of Seattle PJ Pizza. (CP 273, Sonneborn Decl. at ¶ 13.) Any injury that might have resulted from the transmittal of text

messages to those individuals was accidental and unintended at most. As to the claims of those class members, there is “property damage” coverage under the Policy. *Park University Enters.*, 442 F.3d 1246. At a minimum, genuine issues of material fact regarding Mr. Sonneborn’s intent preclude summary judgment on this issue. CR 56(c); *Atherton*, 115 Wn.2d at 516.

For the foregoing reasons, the Superior Court correctly held that the Policy provides “property damage” coverage for all Respondents in this action.

**D. Oregon Mutual Must Defend Notwithstanding the “Distribution of Material” Exclusion.**

**1. The “distribution of material” exclusion does not bar coverage for vicarious-liability claims.**

Vicarious liability is “legal responsibility by virtue of a legal relationship.” *Thola v. Henschell*, 140 Wn. App. 70, 79 (2007) (quoting 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASH. PRAC.: TORT LAW AND PRAC. § 3. 1, at 116 (3d ed. 2006)). It “allows the negligence of the actual wrongdoer to be imputed to another who otherwise has no direct participation in the tort.” 16 WASH. PRAC. § 3. 1, at 116 (emphasis added).

Vicarious fault does not arise from any acts or omissions of the principal. Vicarious liability arises by operation of law from the acts or omissions of the agent. The principal is liable, “not as if the act was done by himself,” but because of *respondeat superior*.

*Gass v. MacPherson's Inc. Realtors*, 79 Wn. App. 65, 71 (1995) (quoting *Marshall v. Chapman's Estate*, 31 Wn.2d 137, 143-44 (1948) (emphasis added). Accord *Phillips v. Kaiser Aluminum & Chem. Corp.*, 74 Wn. App. 741, 749 (1994) (“Direct liability is liability for breach of one’s own duty of care, while vicarious liability, sometimes called imputed negligence, is liability for breach of another’s duty of care.”).

Vicarious liability can arise in circumstances that may be relevant here. Most significantly, under Washington law, an LLC member like Mr. Sonneborn is generally considered to be an agent of the LLC, and his actions and omissions on the LLC’s behalf can bind the LLC and make it vicariously liable for his torts. RCW 25.15.150; *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn. App. 229, 268 (2009); JOHN M. MAURICE, OPERATIONAL OVERVIEW OF THE WASHINGTON LIMITED LIABILITY COMPANY ACT, 30 Gonz. L. Rev. 183, 197 (1994-95).

The second amended complaint in the Underlying Lawsuit vaguely alleges that Respondents “[n]egligently, recklessly, willfully, and/or intentionally, . . . directly and/or vicariously engaged in acts, omissions and/or other conduct” violative of certain federal and state statutes. (CP 288, 290, 291, Sonneborn Decl., Ex. A at ¶¶ 55, 63, 71 (emphasis added).) Thus, the second amended complaint, on its face, raises the possibility that some Respondents could be found liable to the plaintiff not for having

actually participated directly or indirectly in the text-messaging campaign at issue, but simply by operation of law on a theory of *respondeat superior*.

As to those Respondents in that circumstance, the “distribution of material” exclusion would not relieve Oregon Mutual of its indemnity obligation. The exclusion bars coverage for injuries “arising directly or indirectly out of any action or omission that violates or is alleged to violate” any statute “that prohibits or limits the sending, transmitting, communicating or distribution of material or information.” (CP 256, Policy Endorsement M2732B at § II(2)(s) (emphasis added).) As the Superior Court held, the exclusion, by its terms, does not eliminate coverage for insureds who in fact did not engage in any prohibited action or omission – for example, insureds who are only held vicariously liable for the actions or omissions of others. (CP 323, Order Denying Plaintiff’s Motion for Summary Judgment at 3.) The exclusion could be triggered by actions or omissions that are only alleged to have violated a pertinent statute, but as the Superior Court correctly concluded, “in order for the exclusion to apply there must in fact be an act or omission” in the first place. (*Id.* (emphasis added).) If there is any ambiguity in this regard, it must be resolved in favor of the insureds. *B & L Trucking*, 134 Wn.2d at 428-29; *Thompson*, 61 Wn.2d at 688.

Although Respondents maintain that the Underlying Lawsuit is meritless, because it creates the “hypothetical” (Oregon Mutual’s term, *see* App. Brief at 14) potential for one or more Respondents to be held vicariously liable and thus to be within the coverage provided by the Policy, Oregon Mutual must continue to defend Respondents in the Underlying Lawsuit. This conclusion is compelled by Oregon Mutual’s own characterization of the duty to defend and by the cases on which Oregon Mutual relies. (*E.g., id.* at 14, asserting that “[t]he duty ‘arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy’s coverage’” (*quoting VanPort*, 147 Wn.2d at 760).)

Oregon Mutual appears to contend that the “distribution of material” exclusion was triggered for all Respondents because there was an act or omission proscribed by the exclusion – just not an act or omission committed by any of the five insureds who did not participate in the text-messaging campaign. (App. Brief at 15.) But if this is Oregon Mutual’s argument, all it does is highlight the ambiguity of the language at issue. Oregon Mutual suggests that the exclusion can be read to apply if there has been a proscribed act or omission by any insured. Respondents contend (and the Superior Court found) that the exclusion can be read to require an act or omission by the insured seeking coverage in order for the

insurer to be wholly relieved of its defense obligation. It is beyond reasonable dispute that the “distribution of material” exclusion (which must be strictly construed against Oregon Mutual, *Stuart*, 134 Wn.2d at 818-19) is “capable of two meanings, or is fairly susceptible of two different constructions.” *Thompson*, 61 Wn.2d at 688. The exclusion is therefore ambiguous. *B & L Trucking*, 134 Wn.2d at 428-29; *Thompson*, 61 Wn.2d at 688. Construed against Oregon Mutual, as it must be, the exclusion does not bar coverage for insureds who face potential liability even though they did not engage in any proscribed acts or omissions.

This is particularly true because the Policy contains a severability clause providing that “this insurance applies: a. As if each Named Insured were the only Named Insured; and b. Separately to each insured against whom claim is made or ‘suit’ is brought.” (CP 222, Policy at § II(E)(5) (emphasis added).) Washington’s courts have held that a severability clause stating only that the insurance at issue “applies separately to each insured” does not prevail over an unambiguous exclusion expressly barring coverage for the intentional acts of “an insured.” *Mutual of Enumclaw Ins. Co. v. Cross*, 103 Wn. App. 52, 62 (2000); *Caroff v. Farmers Ins. Co. of Washington*, 98 Wn. App. 565 (1999), amended by 155 Wn. App. 724, 730 (2010). But those cases are distinguishable. First, the severability clause at issue here is more robust than the clauses

discussed in those cases, providing that Oregon Mutual's insurance applies "[a]s if each Named Insured were the only Named Insured." And second, the "distribution of material" exclusion does not expressly bar coverage for claims arising out of the alleged unlawful distribution of materials by "an insured" or "any insured." Rather, the exclusion is silent and ambiguous as to whether the insured seeking coverage must have engaged in a prohibited act or omission in order for the exclusion to apply. A reasonable insurance purchaser would read the severability provision and the exclusion together and conclude that if he did not engage in prohibited acts or omissions, he would at a minimum receive the bargained-for benefit of a defense if he were to be sued based on the actions of another.

**2. At a minimum, Oregon Mutual must provide a defense with regard to claims against its insureds who engaged in no actions or omissions that violated or are alleged to have violated any statutes.**

It is undisputed that (a) there has been no allegation in the Underlying Lawsuit of any particular prohibited acts by any of the Respondents; and (b) in fact, there was no relevant act or omission by most of them. As Mr. Sonneborn's declaration made clear, five of Oregon Mutual's insureds who are defendants in the Underlying Lawsuit – Rain City Pizza, Rose City Pizza, Papa Washington, Papa Washington II, and Edward Taliaferro – in fact did not engage in any action or omission that

could possibly have violated any anti-dissemination statute. (CP 271-73, Sonneborn Decl., *passim*.) Oregon Mutual has not disputed this. Those Respondents are defendants in the Underlying Lawsuit on the mere whim of the plaintiff's counsel in that case, even though they played no role whatsoever in the transmittal of text messages as alleged in the plaintiff's various complaints. The Superior Court correctly ruled that as to those insureds, based on the true facts, the "distribution of material" exemption did not apply because there were no acts or omissions on which to base the exclusion. (CP 323, Order Denying Plaintiff's Motion for Summary Judgment at 3.) Oregon Mutual was therefore not relieved of its defense obligation. (*Id.*)

Oregon Mutual repeatedly asserts that Respondents "claimed" in the Superior Court that they had not all engaged in actions or omissions triggering the "distribution of material" exclusion. (*E.g.*, App. Brief at 8, 14-15.) Oregon Mutual also suggests that Respondents have done nothing more than "set[ ] up an argument" that some of them "either [bore] no responsibility for the texts being sent or did not benefit from the texts." (App. Brief at 15.) Those assertions are misleading and wrong. Respondents did much more than simply "claim" noninvolvement by some of them or "set up an argument" that some of them were not "legally responsible" or "did not benefit" from the texts. As the Superior Court

correctly concluded, Respondents conclusively proved, through the unrebutted declaration of Kevin Sonneborn, that five of them had nothing whatsoever to do with the text-messaging campaign. (CP 271-73, *passim*; CP 323, Order Denying Plaintiff's Motion for Summary Judgment at 3.)

Numerous courts have held that “when the complaint against the insured alleges untrue facts placing the claim within an exception in the policy, but the true facts, known or ascertainable to insurer, are within coverage, the insurer is obligated to defend the suit.” *Loftin v. United States Fire Ins. Co.*, 127 S.E.2d 53, 59 (Ga. Ct. App. 1962). The *Loftin* case is particularly instructive. There Leroy Loftin was sued on a theory of vicarious liability arising out of a car accident caused by Dorothy Campbell, who was alleged to have been Mr. Loftin's employee. *Id.* at 54-55. Mr. Loftin tendered the claim to his insurance carrier, which refused to defend based on an exclusion rendering coverage generally inapplicable to claims arising from the actions of employees. *Id.* Mr. Loftin provided the carrier with evidence that Ms. Campbell had not been his employee at the time of the accident, but the carrier still refused to defend. *Id.* at 55. Mr. Loftin prevailed in the lawsuit against him by proving that Ms. Campbell had not been his employee. *Id.* Mr. Loftin then sued his carrier to recover his defense costs incurred in the underlying lawsuit. *Id.* The Georgia Court of Appeals concluded that the carrier had

breached its duty to defend by ignoring true facts that placed the claim against Mr. Loftin within coverage. *Id.* at 59.<sup>4</sup>

The rule articulated in *Loftin* and like cases is consistent with Washington law, which, as Oregon Mutual acknowledged in its own motion for reconsideration filed in the Superior Court, obligates insurers to consider facts outside the complaint “if ... the allegations are in conflict with facts known to or readily ascertainable by the insurer.” (CP 328, Plaintiff’s Motion for Reconsideration at 4:1-3 (citing *VanPort*, 147 Wn.2d at 61) (emphasis added).) *Accord Woo*, 147 Wn.2d at 54-55 (where “coverage could exist, the insurer must investigate and give the insured the benefit of the doubt that the insurer has a duty to defend”; and

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<sup>4</sup> See also *Revelation Indus., Inc. v. St. Paul Fire & Marine Ins. Co.*, 206 P.3d 919, 928 (2009) (subcontractor exception to liability policy exclusion for “covered work” obligated insurance carrier to defend notwithstanding complaint in underlying lawsuit against insured that failed to allege that work in question had been performed by subcontractors); *Nationwide Mut. Fire Ins. Co. v. Knight*, 2008 WL 4286507, at \*5 (S.D. Miss. Sept. 16, 2008) (denying insurer’s motion for summary judgment on duty to defend where insured was sued for assault and battery, policy’s “intentional acts” exclusion did not, by its terms, apply to injuries inflicted by insured while acting in self-defense, and insured submitted un rebutted declaration providing detailed account of incident that had given rise to underlying lawsuit and swearing under penalty of perjury that he had acted in self-defense); *Firemen’s Ins. Co. of Washington, D.C. v. 860 West Tower, Inc.*, 667 N.Y.S.2d 718, 719 (N.Y. App. Div. 1998) (insurer had duty to defend where insureds were sued based on assault allegedly committed by employee of one insured, policy’s “intentional acts” exclusion did not, by its terms, apply to acts of self-defense, and insurer had “actual knowledge of facts establishing a reasonable possibility that defendant employee was acting in self-defense against the plaintiffs in the underlying action”); *Mavar Shrimp & Oyster Co. v. United States Fidelity & Guaranty Co.*, 187 So.2d 871, 874, 875 (Miss. 1966) (insurer had duty to defend notwithstanding exclusion barring coverage for claims by insured’s employees, where injured party had alleged in underlying lawsuit that he had been employed by insured but record in underlying lawsuit conclusively established that he had not).

“if the allegations in the complaint conflict with facts known to or readily ascertainable by the insurer, ... facts outside the complaint may be considered”) (emphasis added).<sup>5</sup> Simply put, Oregon Mutual may not ignore true and undisputed facts rendering the “distribution of material” exclusion inapplicable as to five of the seven Respondents. As to those insureds, Oregon Mutual must continue to provide a defense.

## V. CONCLUSION

Oregon Mutual’s arguments are without merit. The Superior Court properly denied Oregon Mutual’s motion for summary judgment and motion for reconsideration, and this Court should affirm those rulings.

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<sup>5</sup> In the motion for reconsideration that it filed in the Superior Court (but not in its opening appellate brief), Oregon Mutual cited *Lawrence v. Northwest Casualty Co.*, 50 Wn.2d 282, 286 (1957), for the proposition that an insurer’s duty to defend is determined solely by the allegations of the complaint filed against its insured. (CP 326-27.) *Lawrence*, however, stood for the proposition that an insurer did not need to investigate an occurrence reported to it by its insured in an effort to ascertain whether there might exist facts contrary to those alleged in a complaint against its insured that could trigger a defense obligation. 50 Wn.2d at 286. Neither *Lawrence* nor any other authority cited by Oregon Mutual supports the proposition that when an insured makes known to its insurer undisputed facts triggering a defense obligation, the insurer can simply ignore those facts to its insured’s detriment. This is particularly true in light of recent decisions like *Woo*, 161 Wn.2d at 53-54; and *VanPort*, 147 Wn.2d at 761, which make clear that an insurer must consider facts outside a complaint filed against its insured when the complaint’s allegations conflict with facts of which the insurer has actual or constructive knowledge.

DATED: March 22, 2012.

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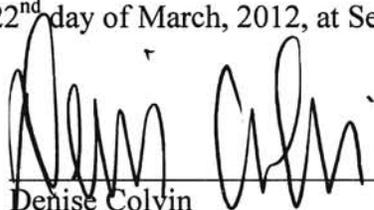
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this date I caused a copy of the attached document to be hand delivered to the attorneys of record listed below:

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I hereby certify, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 22<sup>nd</sup> day of March, 2012, at Seattle, Washington.

  
Denise Colvin

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