

No. 43728-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

DIVISION II

ROBERT SPEED,

Appellant,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This is an insurance coverage dispute. On March 2, 2009, Dennis Geyer, M.D., a 38 year-old neurosurgeon, assaulted 60 year-old Robert Speed in a road rage incident. Mr. Speed allegedly cut off Dr. Geyer's vehicle as they were driving westbound approaching the Tacoma Narrows Bridge. Dr. Geyer signaled and honked at Mr. Speed to get him to pull over; Mr. Speed ignored Dr. Geyer. At the end of the bridge, Mr. Speed made an abrupt, last minute exit off the freeway. Dr. Geyer did the same and followed Mr. Speed for over five miles. When Mr. Speed finally stopped at a red light, Dr. Geyer got out of his vehicle. When the light turned green, Dr. Geyer stood in front of Mr. Speed's vehicle to prevent him from driving away. Mr. Speed tried to get out of his van, but Dr. Geyer pushed him in the chest. When Mr. Speed came towards Dr. Geyer again, Dr. Geyer intentionally punched Mr. Speed in the face, causing Mr. Speed to stiffen and fall hard to the ground. The assault left Mr. Speed lying unconscious while Dr. Geyer walked back to his car and drove home. Dr. Geyer was arrested within the hour, and charged with second-degree assault with a deadly weapon. Ultimately, Dr. Geyer was found guilty at trial of assault in the third degree.

Mr. Speed did not sue Dr. Geyer, but rather settled his assault claim against Dr. Geyer via a covenant judgment. Mr. Speed and Dr.

Geyer agreed to the entry of a \$1.4 million dollar judgment against Dr. Geyer and an assignment of any rights Dr. Geyer had under his United Services Automobile Association (“USAA”) homeowner’s and auto policies to Mr. Speed. Mr. Speed then sought to hold USAA liable for the agreed judgment, claiming that USAA acted in bad faith by failing to defend, settle and indemnify Dr. Geyer against Mr. Speed’s assault claim.

The trial court properly dismissed Mr. Speed’s claims against USAA as a matter of law. Under Washington law, an insurer has no duty to defend, settle or indemnify when the claim asserted against the insured does not allege facts which, if proven, impose liability upon the insured that would be covered by the insurance policy. Mr. Speed’s assault claim clearly does not come within the terms of the insuring agreements of either the USAA’s homeowner’s or auto policies. The homeowner’s policy only covers bodily injury caused by an “accident” and Washington law is clear: an assault is not an “accident.” The auto policy only covers bodily injury caused by an auto accident and undisputedly, no auto accident occurred here. In addition, both policies have specific exclusions for bodily injury caused by an intentional act. Because the assault claim asserted against Dr. Geyer is clearly not covered by the USAA policies, USAA had no duty to defend, settle or indemnify Dr. Geyer, as a matter of law.

II. STATEMENT OF THE ISSUES

- A. Did the trial court properly determine that USAA had no duty to defend Dr. Geyer under the USAA homeowner's policy, when Mr. Speed claimed Dr. Geyer intentionally assaulted him, the policy only covers bodily injury arising out of an "accident," and Washington case law holds that an assault can never be an accident? (Appellant's Assignment of Error A.)**
- B. Did the trial court properly determine that USAA had no duty to defend Dr. Geyer under the USAA auto policy, when the policy only covers bodily injury arising out of an automobile accident, and it is undisputed that Mr. Speed's injuries did not arise out of an auto accident? (Appellant's Assignment of Error A.)**
- C. Did the trial court properly determine that USAA had no duty to defend Dr. Geyer under either USAA policy when both policies contain exclusions for bodily injury arising out of an intentional and/or purposeful act? (Appellant's Assignment of Error A.)**
- D. Did the trial court properly determine that because USAA had no duty to defend, it likewise had no duty to settle or indemnify, and therefore, could not be held liable for bad faith failure to defend, settle or indemnify? (Appellant's Assignment of Error B.)**
- E. Should the Court refuse to consider Mr. Speed's request for attorney fees, expert fees, and treble damages under RCW 48.30.015, when Mr. Speed failed to raise these issues in the trial court?**

III. STATEMENT OF THE CASE

A. Statement of Facts

1. The Assault and Mr. Speed's Demand.

On March 2, 2009, Dr. Geyer, a 38 year old neurosurgeon, assaulted Mr. Speed in a “road rage” incident. According to Dr. Geyer,¹ he was driving his MINI Cooper westbound approaching the Tacoma Narrows Bridge when Mr. Speed, driving a commercial size van, abruptly cut him off, forcing him to swerve to avoid an accident. (CP 756, ¶ 5; CP 760) Dr. Geyer honked his horn at Mr. Speed and pulled up next to him telling him to pull over. (CP 760) Mr. Speed ignored him. Dr. Geyer continued honking at Mr. Speed to get him to pull over, to no avail. (*Id.*) Once they were across the bridge, Mr. Speed made an abrupt, last minute exit off the freeway. (*Id.*) Dr. Geyer did the same and followed Mr. Speed for over five miles. When Mr. Speed finally stopped behind another vehicle at a red light, Dr. Geyer got out of his vehicle and approached the driver’s side window of Mr. Speed’s van. (*Id.*) When the light turned green, Mr. Speed tried to leave but Dr. Geyer stood in front of Mr. Speed’s van. (CP 760-61) Mr. Speed tried to get out of his vehicle, but Dr. Geyer pushed him back into the van. (CP 761) Mr. Speed reached to his right and Dr. Geyer grabbed Mr. Speed’s leg, holding it because he thought Mr. Speed was reaching for a weapon. (*Id.*) Mr. Speed allegedly grabbed a thermos. Dr. Geyer claims when he let go of Mr. Speed’s leg,

¹ Dr. Geyer provided USAA with his version of events on October 15, 2009, in a telephone interview. (CP 756, ¶ 5)

Mr. Speed came at him in an attempt to strike him with the thermos, so Dr. Geyer pushed him away. (*Id.*) When Mr. Speed came towards Dr. Geyer again, Dr. Geyer punched Mr. Speed in the face. (*Id.*) Mr. Speed stiffened, fell back against his van, and then fell to the ground. (*Id.*) Dr. Geyer went to his car and drove home. (*Id.*) About half an hour later, Dr. Geyer was arrested at his home and charged with second degree assault with a deadly weapon. (*Id.*)

At his criminal trial, Dr. Geyer testified that when Mr. Speed came at him swinging the thermos, he pushed Mr. Speed “really, really hard in the chest.” (CP 733, lines 1-5) When Mr. Speed came back at him a second time, Dr. Geyer “realized this [had] gotten way out of control and I need[ed] to get away, and so at that point in time *my plan was to throw a punch, stun him, and get away from him.*” (CP 735, lines 11-14) (emphasis added) (See also CP 734, lines 5-9) “I reached up, I blocked his arm as it was coming around, and I came with a straight right.” (CP 735, lines 16-17) Dr. Geyer hit Mr. Speed with a closed fist “on the left side, right around the lateral orbital rim of [his left eye].” (CP 735, lines 21-22) Dr. Geyer continued, “immediately upon hitting him, [Mr. Speed] became stiff as a board, and his arms dropped to his side. In neurosurgery, we call that a contact seizure. It’s a tonic seizure that occurs at the moment of impact. So, he became extremely rigid and he fell over to his left onto the van.”

(CP 735, lines 21-25; CP 736, lines 1-3) Despite his medical knowledge of what had occurred, Dr. Geyer left Mr. Speed to “get away” after he saw him fall “very hard, face first, into the pavement.” (CP 736, lines 18-19)

In his demand letter², Mr. Speed claimed that Dr. Geyer became angry over something Mr. Speed had done while driving in front of him and pulled up beside Mr. Speed while on the Tacoma Narrows Bridge and motioned for Mr. Speed to pull over. Frightened, Mr. Speed took the first exit after the bridge. (CP 784-785) Dr. Geyer followed him for an extended period of time before the two vehicles stopped for a traffic signal. (CP 785) According to witnesses, Dr. Geyer got out of his vehicle, opened the door of Mr. Speed’s vehicle and beat Mr. Speed with his fists and a metal thermos, pulling Mr. Speed from his vehicle as he did so. (*Id.*) Dr. Geyer then drove away, leaving Mr. Speed bleeding and unconscious in the street. (*Id.*) According to the demand letter, Mr. Speed suffered a traumatic brain injury, loss of consciousness, brain bleed, bilateral nasal fractures, detached right retina, multiple contusions, abrasions and aggravation to TMJ syndrome. (*Id.*)

Mr. Speed’s demand letter admitted the intentional nature of Dr. Geyer’s assault and that the assault would not be covered by insurance:

² On August 25, 2009, long before USAA was ever notified of the assault, Mr. Speed sent a demand letter to Mr. Wayne Fricke, Dr. Geyer’s criminal attorney, demanding \$650,000 to settle Mr. Speed’s civil claim against Dr. Geyer. (CP 783-790)

This case is aggravated by the *intentional conduct of Dr. Geyer*, including leaving Mr. Speed, potentially for dead, at the scene. Were this a case of negligence that was covered by insurance, Mr. Barcus and I agree that we would be seeing a seven figure verdict or settlement.

Understanding that this matter is not covered by insurance...we make the following settlement demand.

(CP 789) (emphasis added).

Dr. Geyer did not notify USAA of the assault until October 14, 2009, seven months after it occurred. At that time, Dr. Geyer told USAA that Mr. Speed was demanding \$650,000 (CP 756, ¶ 4), but USAA did not actually receive a copy of Mr. Speed's August 25, 2009 demand letter until October 28, 2009. By the time USAA was told about the demand letter and it was forwarded to USAA, the settlement demand had already, by its own terms, been revoked.³ (CP 757, ¶8; CP 790)

2. The Relevant Terms Of The USAA Homeowner's and Auto Policies.

USAA issued both a homeowner's and an auto policy to Dr. Geyer.

a. The Homeowner's Policy.

The homeowner's policy provides coverage for an insured for damages "because of bodily injury or property damage caused by an

³ The demand stated that it would remain open until the end of business on October 2, 2009; after that date, the demand was automatically revoked without further notice. (CP 790)

occurrence to which this insurance applies.” (emphasis added)(CP 767)

The homeowner’s policy defines an “occurrence” as:

“**occurrence**” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in:

- a. **bodily injury**; or
- b. **property damage.**

(CP 765)

The homeowner’s policy also has an exclusion for intentional acts:

1. COVERAGE E – Personal Liability and COVERAGE F – Medical Payments To Others do not apply to...bodily injury...

- a. caused by the intentional or purposeful acts of any insured, including conduct that would reasonably be expected to result in **bodily injury** to any person...

(CP 766)

b. The Auto Policy.

The USAA auto policy agrees to pay compensatory damages for bodily injury which any covered person becomes legally liable for “because of an auto accident.” (CP 773) The Auto policy, like the

homeowner’s policy, also excludes coverage for intentional acts:

We do not provide Liability Coverage for any covered person:

- 1. Who intentionally acts or directs to cause BI or PD, or who acts or directs to cause with reasonable expectation of causing BI or PD.

(CP 774)

3. Upon Notice of the Assault, USAA Immediately Undertook An Investigation And Issued A Reservation of Rights.

After being notified of the assault in mid October 2009, USAA immediately undertook coverage and loss investigations. (CP 523, ¶ 7; CP 756, ¶ 4) When Dr. Geyer provided USAA with his version of the assault incident on October 15, 2009, USAA verbally told him that coverage was questionable under the USAA policies. (CP 581-582; CP 756-757, ¶ 5) That same day, Ms. Martinez, the adjuster assigned to handle the claim under the homeowner's policy, and Ms. Heldmann, the adjuster assigned to handle the claim under the auto policy, conferred with Michele McCrea of USAA's legal department to discuss the coverage issues and determined that USAA would investigate under a reservation of rights. (CP 757, ¶ 6; CP 584, ¶ 3)

Ms. Martinez prepared the reservation of rights letter to Dr. Geyer. (CP 757, ¶ 7) She has worked at USAA for 15 years and is very familiar with both the USAA homeowner's and auto policies' insuring agreements, having worked as a claims examiner with both types of policies since 2006. (CP 756, ¶ 2) Contrary to appellant's assertion, Ms. Martinez did read and review both the homeowner's and auto policies in connection with Mr. Speed's assault claim against Dr. Geyer. (CP 757, ¶ 7) She

specifically testified that she read and understood the language in Dr. Geyer's homeowner's policy and in fact, *typed* the policy provisions in the reservation of rights letter. (CP 504, p. 74:10-15; p. 76:18-25; p. 77:1-4; CP 505, p.84:22-25)

In the reservation of rights letter, USAA specifically set forth the relevant policy provisions from both policies and explained to Dr. Geyer why there was likely no coverage for Mr. Speed's assault claim under either policy. (CP 757, ¶ 7; CP 776-782) USAA explained to Dr. Geyer that Mr. Speed claimed that Dr. Geyer had "intentionally and deliberately struck him in the head, causing him serious injury." (CP 777) USAA continued: "This type of claim does not fall within the definition of occurrence, as it involves an intentional act which is not an 'accident' as defined in the liability insurance policy." (CP 777-778) The reservation of rights letter further stated that "[s]ince this claim may not be the result of an 'occurrence' within the meaning of the policy, and due to the intentional act exclusion within the policy, your Homeowner's Policy may not provide coverage for the loss." (CP 778)

With respect to the auto policy, the reservation of rights letter told Dr. Geyer that the facts of the incident did not indicate that the injuries were the result of an "auto accident," but rather, "[t]he claim arises from a physical altercation that occurred on the street, outside of a vehicle." (CP

779-780) It also noted that Dr. Geyer had told USAA that he struck Mr. Speed in the face, and that such “action may be considered as ‘intentionally’ causing ‘bodily injury’ or acting with ‘reasonable expectation’ of causing bodily injury to Mr. Speed.” (CP 781) The letter clearly told Dr. Geyer that “coverage may be precluded under both your homeowner’s and automobile policies.” (*Id.*)

The reservation of rights letter also explained to Dr. Geyer that USAA’s willingness to investigate the matter was subject to a full reservation of all rights, and that any action it took with regard to the claim asserted against Dr. Geyer “in investigating, defending, negotiating to settle or settling the claims for relief in the underlying case, should not be deemed to be an omission [sic][admission], waiver, estoppel or concession that there is, was, or may be any insurance coverage for the matters now alleged.” (CP 781-782) The letter concluded by inviting Dr. Geyer to contact USAA if he had any questions or if he had additional information to provide. (CP 782)

USAA continued to investigate the assault claim for the next several months but, at every turn, the factual information it gained indicated that Dr. Geyer intentionally and deliberately struck Mr. Speed, conduct that was not covered under either policy. (CP 713, lines 18-20) Ms. Martinez testified that, “As the adjuster, my purpose is to look out for

Dr. Geyer's interest, which is why we complete a thorough investigation...." (CP 508, p. 103:5-10) On October 15, 2009, Ms. Heldmann left a message with the secretary of Mr. Ben Barcus, one of Mr. Speed's two attorneys, who was not available at the time of the call, asking Mr. Barcus to call her and requesting that he forward all information he had in support of Mr. Speed's claim for review. (CP 523, ¶ 7) Ms. Heldmann also sent a letter to Mr. Fricke, Dr. Geyer's criminal attorney, requesting more information about the incident, and specifically asked him for a copy of the police report and Mr. Speed's demand letter. (CP 523, ¶ 7; CP 568) On October 26, 2009, USAA hired an independent investigative service to contact and obtain statements from independent witnesses to the assault and to obtain a statement from Mr. Speed. (CP 524, ¶ 10) The independent adjuster Bill Montague contacted Mr. Simon Forgette (a second attorney representing Mr. Speed), to obtain a statement from Mr. Speed; however, Mr. Forgette would not allow Mr. Montagne to interview Mr. Speed. (CP 524, ¶ 10, 556) As part of its investigation, on November 11, 2009, USAA obtained a copy of the Determination for Probable Cause and the Main Incident [police] report. (CP 525, ¶ 11)

On November 16, 2009, because Mr. Barcus had not returned USAA's earlier call, USAA sent him a letter, asking for a copy of any recorded statements Mr. Speed may have provided about the assault, as

well as any documentation that supported Mr. Speed's claim. (CP 525, ¶11; CP 566) The letter also advised Mr. Barcus that USAA was continuing to investigate coverage and liability and that the letter should not be interpreted as confirmation of coverage or liability. (CP 566)

For the next two months, USAA attempted to obtain statements from the witnesses to the assault. It maintained consistent contact with Mr. Fricke, Dr. Geyer's criminal attorney, who was trying to obtain witnesses statements. (CP 525, ¶ 11) The independent adjuster hired by USAA also continued his attempts to obtain witness statements. (*Id.*) Both were having difficulty contacting the witnesses and obtaining statements. (*Id.*)

On February 8, 2010, Dr. Geyer was convicted of third degree criminal assault.⁴ (CP 757, ¶ 10) Because USAA had been unable to obtain a statement from Mr. Speed and from at least one of the independent witnesses before the criminal trial took place, USAA obtained a copy of the criminal trial transcript and jury instructions. It requested attorney James Derrig provide a coverage opinion based on all the evidence, including the testimony at the criminal assault trial. (*Id.*)

⁴ Whether or not the cost for Dr. Geyer's criminal defense depleted Dr. Geyer's savings as Mr. Speed claims, is irrelevant to any of the issues raised in Mr. Speed's appeal and was also irrelevant to the issues presented to the trial court on summary judgment.

4. Mr. Speed Demands \$800,000.00 From USAA.

Despite Dr. Geyer's criminal conviction, Mr. Speed sent an \$800,000.00 demand to USAA on April 13, 2010, seeking the combined liability limits of Dr. Geyer's homeowner's (\$500,000 limit) and auto (\$300,000 limit) policies. (CP 758, ¶ 11, CP 71-73) Mr. Speed also forwarded a draft Complaint against Dr. Geyer, stating that it would be filed if USAA did not settle his claim. (CP 71, 74-79)

After reviewing the demand and obtaining Mr. Derrig's legal opinion on coverage, USAA advised Dr. Geyer both in a telephone call and in a letter, that it would not be paying Mr. Speed's settlement demand because the assault claim was not covered under either USAA policy. (CP 758, ¶ 12, CP 792-798) In its May 10, 2010 letter, USAA explained in detail why it would not pay Mr. Speed's demand. With respect to coverage under the homeowner's policy, USAA told Dr. Geyer:

For coverage to exist the bodily injury must be caused by an occurrence, which means it must be caused by an accident. The bodily injuries alleged here were caused by you striking Mr. Speed with your fists or with an object, incapacitating him and causing him to fall to the ground. This was a deliberate act on your part. An accident is never present when a deliberate act is performed unless some additional unexpected, independent and unforeseen happening occurs which produces or brings about the result of injury or death. The means as well as the result must be unforeseen, involuntary, unexpected and unusual. The injuries suffered by Mr. Speed, both directly as a result of striking him and afterwards as a result of his fall were not

unexpected, independent, and unforeseen, especially considering your training as a boxer, a combat soldier, and a physician. Therefore, there was no accident....

It appears to USAA that **the bodily injury was inflicted on Mr. Speed as the result of intentional and purposeful actions**, whether in attacking him as Mr. Speed claims or in disarming and incapacitating him as you claim. In either event, striking Mr. Speed with fists or an object would reasonably be expected to result in bodily injury.

(CP 575-576) (emphasis supplied).

With respect to coverage under the auto Policy, USAA explained to Dr. Geyer:

Although the impetus for the confrontation involved a question over Mr. Speed's driving, and although part of the altercation took place in Mr. Speed's van, **the present claim does not involve an "auto accident" as required by the policy.** As previously explained the incident also does not involve an "accident."

(CP 796) (emphasis supplied). USAA also sent a letter to Mr. Forgette declining the demand for \$800,000. (CP 758-759)

In response, Mr. Forgette asked USAA whether it would extend a settlement offer to resolve Mr. Speed's claim. (CP 897) In an effort to resolve the claim and obtain a full release for Dr. Geyer, despite the absence of coverage, USAA offered to settle Mr. Speed's claim for \$25,000. (*Id.*) USAA's letter emphasized that the offer to settle was *not* an admission of coverage. (*Id.*) The offer was rejected.

5. Dr. Geyer and Mr. Speed Enter Into An Agreed Judgment and Covenant Not To Execute.

When the claim did not settle, Mr. Speed did not file the threatened lawsuit against Dr. Geyer. Instead, he and Dr. Geyer agreed to a pre-suit mediation and entered into a settlement that called for the entry of an agreed judgment against Dr. Geyer in the amount of \$1.4 million dollars, with a covenant not to execute against Dr. Geyer's personal assets. (CP 740-42) Under the terms of the agreement, Dr. Geyer assigned any rights or claims he might have under the USAA policies to Mr. Speed. (*Id.*)

After the settlement agreement was reached, Mr. Speed filed suit against Dr. Geyer (one of the two lawsuits in this consolidated matter) alleging that while Dr. Geyer had substantial experience as an amateur boxer as well as military combat training, Dr. Geyer *negligently* caused Mr. Speed's injuries. (CP 3-4) However, the only relief Mr. Speed sought was a finding that the agreed judgment was reasonable. (CP 5) Given the negligence allegations, USAA retained counsel to defend Dr. Geyer in the lawsuit, under a reservation of rights. (CP 759)

B. Procedural History.

USAA filed this declaratory judgment action on January 24, 2011, seeking a declaration that it had no duty to defend or indemnify Dr. Geyer for the assault claim, was not estopped to deny coverage, and had no duty to pay the \$1.4 million agreed judgment. (CP 6-13) Mr. Speed filed a

counterclaim, alleging that USAA acted in bad faith by failing to defend and settle Mr. Speed's claim. (CP 321-31)

Mr. Speed moved for partial summary judgment seeking a ruling that USAA had a duty to defend and acted in bad faith by failing to do so. (CP 347-364) The Honorable John R. Hickman denied the motion by Order entered on February 22, 2012, finding that under the facts of this particular case, the issue of a duty to defend was subordinate to the question of coverage under the USAA policies. (CP 630) Mr. Speed moved for reconsideration of that Order, which was denied on March 23, 2012. (CP 704-06)

USAA then filed its own motion for partial summary judgment requesting an Order declaring that there was no coverage and no potential for coverage under either USAA policy for Dr. Geyer's assault on Mr. Speed as a matter of law, and therefore, that USAA had no duty to defend, settle or indemnify Dr. Geyer, and that USAA was not obligated to pay any portion of the \$1.4 million agreed judgment. (CP 707-726) Judge Hickman granted USAA's motion in its entirety and dismissed Mr. Speed's claims for bad faith failure to defend, settle and indemnify with prejudice. (CP 917-921)

Thereafter, USAA filed a Motion for an Order dismissing Mr. Speed's remaining statutory claims for breach of the Insurance Fair

Conduct Act (RCW 48.30.015) and the Unfair Claims and Settlement Practices Act (WAC 284-30 *et. seq.*) because those claims were inextricably tied to the duties to defend, settle or indemnify, duties that the trial court had ruled USAA did not owe. (CP 922-923) Mr. Speed agreed, and did not oppose entry of the order dismissing the remaining claims, which was entered on July 13, 2012. (CP 946-50) After the Order dismissing the remaining claims was entered, Mr. Speed filed this appeal from the trial court's Orders.

IV. SUMMARY OF ARGUMENT

Under Washington law, when a claim does not allege facts which, if proven, impose liability upon the insured within the terms of the insurance policy, the insurer has no duty to defend, settle, or indemnify the claim. *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 64, 1 P.3d 1167 (2000); *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 951 P.2d 1124 (1998); *Wellman & Zuck, Inc. v. Hartford Fire Ins. Co.*, 170 Wn. App. 666, 675, 285 P.3d 892, 898-99 (2012); *Holly Mountain Resources v. Westport Ins. Group*, 130 Wn. App. 635, 647, 104 P.2d 725 (2005); *see also, Truck Ins. Exchange v. Century Indemnity Co.*, 76 Wn. App. 527, 533-534, 887 P.2d 455 (1995). When there is no duty to defend, settle, or indemnify, there can be no bad faith breach of a duty to defend, settle, or indemnify. *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 433, 38 P.3d 322

(2002); *Wellman & Zuck, Inc.*, 170 Wn. App. at 677; *Holly Mountain Resources*, 130 Wn. App. at 652. And, the remedy of coverage by estoppel is not available in the absence of a bad faith breach of the duty to defend, settle or indemnify. *St. Paul Fire & Marine Ins. Co. v. Onvia*, 165 Wn.2d 122, 133, 196 P.3d 664 (2008); *Wellman & Zuck, Inc.*, 170 Wn. App. at 677-678.

In this case, it is undisputed that Mr. Speed's claim against Dr. Geyer did not allege facts, which if proven, would have imposed liability upon Dr. Geyer within the terms of either of the two USAA insurance policies. It is undisputed that Dr. Geyer assaulted Mr. Speed in a road rage incident. It is also undisputed that the assault was a deliberate, intentional act. Dr. Geyer followed Mr. Speed for over five miles, deliberately confronted him, prevented him from leaving the scene and then intentionally struck him hard enough to cause a "contact seizure," stating in his own words, "*my plan was to throw a punch, stun him, and get away from him.*" (CP 735, lines 11-14) As a result, based upon well settled Washington law, USAA had no duty to defend, settle, or indemnify Dr. Geyer for Mr. Speed's assault claim. USAA respectfully requests the Court affirm Judge Hickman's Orders dismissing Mr. Speed's claims as a matter of law.

V. ARGUMENT

A. Standard of Review On Appeal.

The standard of review on appeal from an order granting a motion for summary judgment is *de novo*. *Capital Specialty Ins. Corp. v. JBC Entertainment Holdings, Inc.*, ___ Wn. App. ___, 289 P.3d 735 (2012). In an insurance coverage case, summary judgment should be granted when there is no dispute about the facts and coverage depends solely on the language of the policy. *Stouffer & Knight v. Continental Cas. Co.*, 96 Wn. App. 741, 747, 982 P.2d 105 (1999). The party seeking to establish coverage bears the initial burden of proving that the loss falls within the scope of the policy. *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 432 P.3d 322 (2002); *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 731, 837 P.2d 1000 (1992).

On review of an order granting or denying summary judgment, the appellate court will only consider argument, issues and evidence called to the attention of the trial court. RAP 9.12; *Kaplan v. Northwestern Mut. Life Ins. Co.*, 115 Wn. App. 633, 213 P.3d 630 (2009). "A summary judgment *denial* cannot be appealed following a trial if the denial was based upon a determination that material facts are disputed and must be resolved by the factfinder." *Brothers v. Pub. Sch. Employees of Washington*, 88 Wn. App. 398, 409, 945 P.2d 208 (1997) (emphasis

added); *Johnson v. Rothstein*, 52 Wn. App. 303, 304, 759 P.2d 471 (1988). Such an order is, however, subject to review "if the parties dispute no issues of fact and the decision on summary judgment turned solely on a substantive issue of law." *University Village Ltd. Partners v. King County*, 106 Wn. App. 321, 324, 23 P.3d 1090 (2001), *rev'd denied*, 145 Wn.2d 1002, 35 P.3d 381 (2001). But the burden is on the appealing party to demonstrate that the trial court's denial of summary judgment turned on an issue of substantive law, rather than an issue of fact. *Bulman v. Safeway, Inc.* 96 Wn. App. 194, 978 P.2d 568, (1999), *rev'd on other grounds*, 144 Wn.2d 335, 27 P.3d 1172 (2001); 15A, Teglund & Ende, Washington Practice: Handbook on Civil Procedure § 85.9 (2012-2013 ed.).

B. Mr. Speed's Assault Claim, If Proven, Would Not Impose Liability On Dr. Geyer Within The Coverage Of Either The USAA Homeowner's Or Auto Policies; Therefore, USAA Had No Duty To Defend The Assault Claim As A Matter of Law.

1. There Is A Duty To Defend When A Complaint Alleges Facts Which Could, If Proven, Impose Liability Upon The Insured Within The Insurance Policy's Coverage.

The rule regarding the duty to defend is well settled in Washington: **a duty to defend exists *only* when the claim alleges facts which could, if proven, impose liability upon the insured within the insurance policy's coverage.** *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002); *Hayden v. Mutual of Enumclaw*

Ins. Co., 141 Wn.2d 55, 64, 1 P.3d 1167 (2000). **“Thus, a duty to defend arises when, on the basis of the allegations in the complaint, there would be a duty to pay.”** *Prudential Prop. and Cas. Ins. Co. v. Lawrence*, 43 Wn. App. 111, 115, 724 P.2d 418 (1986) (emphasis added). **An insurer has no duty to defend an insured when the claims asserted against the insured are clearly outside the coverage of the policy.** *Holly Mountain Resources v. Westport Ins. Corp.*, 130 Wn. App. 635, 647, 104 P.3d 725 (2005), quoting *Truck Ins. Exchange*, 147 Wn.2d at 760; *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 486, 687 P.2d 1139 (1984) (allegations that are clearly not covered under the policy relieve the insurer of its right and duty to defend).

“Consequently, to determine whether the duty to defend exists, [the] court examines the policy’s insuring provisions to see if the complaint’s allegations are conceivably covered.” *Hayden*, 141 Wn.2d at 64. “The key consideration in determining whether the duty to defend has been invoked is whether the allegations, if proven true, would render [the insurer] liable to pay out on the policy.” *Kirk v. Mt. Airy Ins. Co.*, 234 Wn.2d 558, 561, 951 P.2d 1124 (1998), quoting *Farmers Ins. Co. v. Romas*, 88 Wn. App. 801, 808, 947 P.2d 754 (1997).

In this case, Mr. Speed alleges USAA had a duty to defend Dr. Geyer when he sent his initial August 25, 2009 demand letter to Dr.

Geyer. However, even assuming that is true, to establish that USAA had a duty to defend Dr. Geyer with respect to his assault claim, Mr. Speed must establish that his demand letter alleged facts, which, if proven, would have imposed liability on Dr. Geyer *within the coverage* of the USAA insurance policies. If the alleged facts are clearly not covered, there is no duty to defend as a matter of law. *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 731, 837 P.2d 1000 (1992); *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d at 486; *Wellman v. Zuck, Inc. v. Hartford Fire Ins. Co.*, 170 Wn. App. 666, 675-677, 285 P.3d 892, 898-899 (2012) (where no facts alleged against the insured, if proven, would have imposed liability under the terms of the insurance policy, insurer has no duty to defend); *Safeco Ins. Co. of Am. v. McGrath*, 42 Wn. App. 58, 62, 708 P.2d 657 (1985) (“[a]n insurer has no duty to defend its insured...for acts specifically excluded from the policy”). In this case, Mr. Speed claimed, and Dr. Geyer admitted, that Dr. Geyer assaulted Mr. Speed causing bodily injury. Under the terms of the USAA policies and Washington law, an assault is not a covered event. As such, Mr. Speed’s claim as alleged in his August 25, 2009 demand letter, if proven, does not fall within the scope of the insuring agreements of either the USAA homeowner’s or auto policies and the trial court properly found that USAA had no duty to defend as a matter of law.

2. The USAA homeowner's Policy Only Provides Coverage For An "Occurrence," Defined In The Policy As An "Accident" And An Assault Is Not An Accident.

The Homeowner's policy only provides coverage for bodily injury caused by an "occurrence" (CP 767) which is defined by the policy to mean an "accident." (CP 765) Washington courts, in construing the term "accident" as used in insurance policies, uniformly hold that a deliberate act, like punching someone in the face, is not an accident unless there is an additional, unforeseen happening, which caused the injury:

[A]n accident is never present when a deliberate act is performed unless some additional, unexpected, independent, and unforeseen happening occurs which produces or brings about the result of injury or death. The *means* as well as the result must be unforeseen, involuntary, unexpected and unusual."

Grange Ins. Co. v. Brosseau, 113 Wn.2d 91, 96, 776 P.2d 123 (1989)(collecting cases), quoting *Unigard Mut. Ins. Co. v. Spokane Sch. Dist. No. 81*, 20 Wn. App. 261, 263-64, 579 P.2d 1015 (1978) (deliberate act of starting fire was not an "accident" regardless of testimony that resulting spread of fire was neither expected or intended). An intentional act can never be an accident. *Brosseau*, 113 Wn.2d at 95; *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 684, 801 P.2d 207 (1990) (deliberately running down person with a car was not an "accident"), *overruled on other grounds by Butzberger v. Foster*, 151 Wn.2d 396, 408, 89 P.3d 689 (2004). As long as the insured's conduct was deliberate and

nothing unexpected intervened to cause the damage, there is no “accident.”

This definition of “accident” is “founded on the elemental proposition that injuries will not be deemed caused by an accident where the injuries are intentionally inflicted” because to insure someone who intentionally inflicts injury on another would violate public policy.⁵ *Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wn.2d 99, 106-66, 751 P.2d 282 (1988):

Thus, for example, the law will not countenance one intentionally shooting someone and then saying that since he or she did not intend to hurt the person shot, what happened was an “accident” covered by liability insurance.

Id.

Safeco Ins. Co. v. Dotts, 38 Wn. App. 382, 384-386, 685 P.2d 632 (1984), is directly on point. In *Dotts*, the insured Dotts slapped Mr. McKee in the face with his open hand. Later that day, Mr. McKee lapsed into a coma. He died five days later. Dotts was convicted of second degree manslaughter and second degree assault. At his criminal trial, Dotts testified (just as Dr. Geyer allegedly did at his criminal trial) that he did not intend to harm Mr. McKee. *Id.* at 384. In a subsequent declaratory judgment action filed to determine if Safeco, which provided

⁵ Mr. Speed’s argument that USAA caused Dr. Geyer to lose the “opportunity to avoid a felony conviction” by not defending or settling Mr. Speed’s claim is contrary to this public policy. (Brief of Appellant, p. 11).

homeowner's insurance for Dotts, had a duty to defend or indemnify Dotts in a civil damages lawsuit filed by Mr. McKee's estate, Dotts argued that Safeco had a duty to defend him because he had not intended to harm Mr. McKee. *Id.* Like the USAA policy, the Safeco homeowner's policy provided coverage for "bodily injury" caused by an "occurrence" and defined "occurrence" as an accident. The court rejected Dotts' argument, holding that because the slap was voluntary, *even if* Dotts did not intend to cause injury, there was no accident (*Id.* at 386) *as a matter of law* and therefore, Safeco had no duty to defend or indemnify Dotts as a matter of law. *Id.* at 383.

This means that under Washington law, Mr. Speed's assault claim against Dr. Geyer did not arise from an accident *as a matter of law*. Mr. Speed's demand letter alleged that Dr. Geyer "beat Mr. Speed with his fists and a metal thermos, pulling Mr. Speed from his vehicle as he did so. Dr. Geyer then drove away from the scene leaving Mr. Speed bleeding and unconscious in the street." (CP 785) Indeed, the demand letter specifically recognized that Mr. Speed's assault claim was not covered by insurance: "Understanding that this matter is not covered by insurance...we make the following settlement demand." (CP 789) Likewise, Dr. Geyer told USAA on October 15, 2009 that he punched Mr. Speed in the face with his fist and admitted that upon punching Mr. Speed,

Mr. Speed stiffened, fell back against his vehicle and then fell to the ground. (CP 761) These actions are not an “accident” as a matter of law.

Furthermore, the fact that Dr. Geyer claims he was acting in self-defense does not change the deliberate nature of his actions. A claim of self-defense does not turn Dr. Geyer’s deliberate conduct into an accident or create coverage or a duty to defend. *Allstate Ins. Co. v. Bauer*, 96 Wn. App. 11, 15, 977 P.2d 617 (1999) (“[t]he fact that the insured performs a deliberate act in self-defense in no way negates the deliberate nature of the act;” there is no duty to defend an insured who deliberately shot the deceased in self-defense), citing *Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91, 96, 776 P.2d 123 (1989) (death was not the result of an accident where the insured shot and killed the deceased in self-defense; therefore, the insurer had no duty to defend the insured under homeowner’s or auto policies).

Nor does the fact that Dr. Geyer was found criminally liable under a criminal “negligence” standard rather than an “intentional” standard, change the deliberate nature of Dr. Geyer’s act.⁶ *Bauer*, 96 Wn. App. at 16. Dr. Geyer testified at his criminal trial that “*my plan was to throw a punch, stun him, and get away from him.*” (CP 735) (emphasis supplied)

⁶ Further, the burden of proof in a criminal trial – beyond a reasonable doubt - is much higher than the more probable than not standard required in a civil matter.

“I reached up, I blocked his arm as it was coming around, and I came with a straight right.” (*Id.*) Dr. Geyer clearly acted deliberately—he had a plan and he followed through on that plan.

Finally, Mr. Speed’s injuries were not the result of some “additional, unexpected, independent, and unforeseen happening;” they were the direct result of Dr. Geyer’s deliberate plan to punch Mr. Speed in the face. Dr. Geyer admitted that he hit Mr. Speed hard enough to stun him, which not unexpectedly, caused Mr. Speed to fall to the ground. Mr. Speed’s injuries, like Mr. McKee’s injuries in *Dotts*, were the result of an “uninterrupted chain of events put into motion by [Dr. Geyer’s] deliberate [punch].” *Dotts*, 38 Wn. App. at 385. There was no additional, unexpected, independent and unforeseen happening that resulted in Mr. Speed’s injuries.⁷

Here, there is but one possible conclusion—the assault claim asserted against Dr. Geyer, if proven, would not impose liability on Dr. Geyer within the coverage of the USAA Homeowner’s policy. As such, the trial court properly concluded that USAA did not have a duty to defend Dr. Geyer with respect to Mr. Speed’s assault claim as a matter of law.

⁷ Further, “accident” is not a subjective term. *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 685, 801 P.2d 207 (1990). The analysis is objective: could any reasonable person reach the conclusion that the harm was the unforeseen result of the insured’s deliberate act? See, *Detweiler v. J.C. Penney Cas. Ins.*, 110 Wn.2d 99, 108, 751 P.2d 282 (1988).

3. The USAA Auto Policy Only Provides Coverage For Bodily Injuries “Because Of An Auto Accident” And There Was No “Auto Accident.”

The auto policy provides coverage for compensatory damages a covered person becomes legally liable to pay “because of an auto accident.” (CP 773) “The term ‘auto accident’ is not an enigmatic one. The words evoke an image of one or more vehicles in a forceful contact with another vehicle or a person causing physical injury.” *Farmers Ins. Co. v. Grellis*, 43 Wn. App. 475, 478, 718 P.2d 812 (1986) (holding that a stabbing in a parked van was not an “automobile accident). In this case it is clear Mr. Speed’s injuries were not caused by an “auto accident;” they were caused by Dr. Geyer punching Mr. Speed in the face hard enough to cause him to fall to the ground. Mr. Speed has never argued to the contrary. Thus, given the absence of any allegations or evidence that Mr. Speed’s bodily injuries were caused by an auto accident, the trial court properly held that USAA had no duty to defend the assault claim under the Auto policy.

4. USAA Had No Duty To Defend The Assault Claim Because Both The USAA Homeowner’s And Auto Policies Specifically Exclude Coverage For Bodily Injury Caused By An Insured’s Intentional Act.

USAA also had no duty to defend the assault claim under either USAA policy because both policies exclude coverage for bodily injury caused by the insured’s intentional act. (CP 766, CP 774) *See, Unigard*

Mut. Ins. Co. v. Spokane Sch. Dist. No. 81, 20 Wn. App. 261, 264-65, 579 P.2d 1015 (1978) (where insured acts intentionally, insurer has no duty to defend). It is undisputed that Dr. Geyer intentionally hit Mr. Speed: this is exactly what Mr. Speed alleged in his August 25, 2009 demand (CP 785, CP 789), and what Dr. Geyer admitted. (CP 760-761; CP 734-736) As a result, the exclusions in the USAA policies for intentional acts preclude any coverage for the assault on Mr. Speed.

In summary, Mr. Speed's assault claim against Dr. Geyer is clearly outside the coverage of the USAA policies. Because the claim is clearly not covered, USAA had no duty to defend Dr. Geyer as a matter of law.

C. Mr. Speed's Assertion That USAA Is Required To Defend Any Claim Asserted Against An Insured Is Contrary To Both Washington Law And The Clear Terms Of The USAA Policies.

Surprisingly, neither in the trial court nor in this Court, has Mr. Speed made any attempt whatsoever to satisfy his burden of proving that the assault claim he asserted against Dr. Geyer alleged facts, which if proven, could have rendered Dr. Geyer liable under the USAA policies. Instead, for the first time on appeal, Mr. Speed summarily argues without any basis in law or fact, that the USAA policies require USAA to defend *any* claim asserted against its insured. (See Brief of Appellant, pages 5-6, 19, 21). This claim should be rejected outright.

A party who fails to raise an issue at trial waives the right to raise that issue on appeal. *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 191 P.3d 879 (2008); RAP 2.5(a); RAP 9.12. Having failed to make the argument that USAA is obligated to defend any claim asserted against its insured at the trial court level, Mr. Speed is precluded from raising it on appeal and the Court should not consider this argument.

But even if the Court considers this new argument, it should be rejected because neither Washington law nor the USAA policies require USAA to defend *any* claim asserted against its insured. Instead, an insurer only has a duty to defend a claim that alleges facts, which if proven, would impose liability on an insured within the terms of the insurance policy.⁸ Likewise, the USAA policies limit the duty to defend to claims *covered by the terms of the policy*. The homeowner's policy agrees to defend the insured for claims because of bodily injury "caused by an occurrence *to which this coverage applies.*" (CP 767) (emphasis supplied). Notably, Mr. Speed specifically deleted the italicized language from his purported quote of the relevant policy language with respect to USAA's duty to defend. (See Brief of Appellant at page 5). Similarly, the Auto policy states that USAA has "*no duty to defend* any suit or settle any claim for bodily injury or property damage *not covered under this policy.*" (CP

⁸ See case law and analysis set forth in this brief at pps. 21 to 23.

773) (emphasis supplied). *See, State Farm General Ins. Co. v. Emerson*, 102 Wn.2d 477, 486, 687 P.2d 1139 (1984) (where policy qualified coverage and the duty to defend with the words “to which this insurance applies,” insurer had no duty to defend claims that were clearly not covered by the policy). Again, Mr. Speed’s brief omits any reference to this crucial language in the USAA policy when purportedly quoting the relevant language of the auto policy. (See Brief of Appellant at pages 5-6)

In short, both Washington law and the USAA policies only require that USAA defend claims that are covered under the terms of the insurance policies, i.e., claims that allege facts which if proven, would fall within the coverage of the policies. USAA is *not* obligated under Washington law or under the terms of its policies to defend *any* claim that may be asserted against its insured. Mr. Speed’s argument that USAA has such an expansive duty to defend must fail, both as a matter of law and as a matter of fact.

D. Mr. Speed’s Assertion That USAA Had A Duty To Defend Because It Was Allegedly Uncertain About Coverage And/Or Admitted It Had A Duty To Defend Is Belied By The Facts And By Washington Law.

Mr. Speed’s assertion that USAA was “uncertain” whether coverage existed for the assault and/or “admitted” that it owed a duty to defend and, therefore, should have defended, fails on two fronts. First,

provided coverage for an assault claim. However, USAA sought to further investigate for Dr. Geyer's benefit, to determine if there were any facts that could potentially bring the claim within the coverage of its policies. (CP 385, p. 22, lines 3-5) USAA's reservation of rights letter to Dr. Geyer was clear: it told Dr. Geyer that an assault would not be covered and there were coverage issues because Mr. Speed alleged that Dr. Geyer intentionally and deliberately struck Mr. Speed in the head, actions that did not fall within the definition of "occurrence." (CP 777-78) USAA told Dr. Geyer "the claim may not be the result of an "occurrence" within the meaning of the policy, and due to the intentional act exclusion within the policy, your Homeowner's Policy may not provide coverage for the loss." (CP 778) USAA also told Dr. Geyer that the assault claim arose from a physical altercation that occurred on the street, outside of a vehicle and therefore, may not be covered under the auto policy. (CP 780)

In short, USAA told Dr. Geyer that there were coverage issues and that it was going to investigate coverage. USAA had the duty and the right to investigate coverage under a reservation of rights, and by doing so, it did not waive any of its rights, it did not admit that there was potential coverage, and it did not trigger a duty to defend. Mr. Speed's attempt to parlay USAA's duty and right to investigate coverage into a finding that

USAA was “uncertain” about coverage and hence had a duty to defend, is contrary to the very nature of a reservation of rights.

Nor does the fact that USAA retained an attorney to defend Dr. Geyer, under a reservation of rights, when Mr. Speed filed his lawsuit against Dr. Geyer constitute an admission that it had a duty to defend. Mr. Speed’s lawsuit, (filed after Mr. Speed and Dr. Geyer entered into the agreed judgment), unlike his August 25, 2009 demand, did not allege that Dr. Geyer intentionally assaulted him, instead, it alleged that Dr. Geyer acted *negligently* to cause Mr. Speed’s bodily injuries.⁹ (CP 3-4) The negligence allegations arguably, if proven true, had the potential for creating coverage under the USAA policies. USAA agreed to defend Dr. Geyer against those claims, under a reservation of rights.¹⁰ This is a distinction with a difference.

2. *American Best Food, Inc. v. Alea London, And Woo v. Fireman’s Fund Insurance Company Do Not Create A Duty To Defend In This Case.*

Mr. Speed relies on *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 405, 412-13, 229 P.3d 693 (2010) and *Woo v. Fireman’s Fund Insurance Company*, 161 Wn.2d 43, 164 P.3d 454 (2007), to argue

⁹ Mr. Speed’s real purpose in filing the Complaint was to enter the \$1.4 million agreed judgment. Indeed, the only relief sought by Mr. Speed in his complaint was a finding that the agreed judgment be deemed reasonable. (CP 5)

¹⁰ Because of the negligence allegations in the Complaint that was filed, USAA’s coverage counsel, Mr. Derrig, recommended that USAA defend the assault claim. (CP 620-21)

that USAA owed a duty to defend the assault claim. His reliance is misplaced.

The Court in *Alea* reiterated that a duty to defend arises when a complaint alleges facts against the insured which could, if proven, impose liability on the insured within the insurance policy's terms. *Alea*, 168 Wn.2d at 404. The issue in *Alea* was whether the insurer had a duty to defend a claim of *post-assault negligence*. *Id.* at 411. The insurer argued that the assault and battery exclusion in its policy applied to exclude coverage for the post-assault negligence claim and therefore, there was no duty to defend. However, there was no Washington case law supporting the insurer's application of the assault and battery exclusion to a claim of *post-assault negligence*, but there was persuasive authority from other jurisdictions holding that a claim of *post-assault negligence* is covered under policy language similar to that found in *Alea*'s insurance policy. *Id.* The Court determined that the variance of case law in other jurisdictions combined with the absence of authority in Washington, resulted in a *legal uncertainty* as to the application of the policy exclusion.

The lack of any Washington case directly on point and a recognized distinction between pre-assault and post-assault negligence in other states presented a legal uncertainty with regard to *Alea*'s duty [to defend].

Id. at 408 (emphasis supplied). The Court in *Alea* went on to explain that that *legal uncertainty* and a resulting ambiguity in the insurance policy resulted in a *finding of coverage* for the post-assault negligence claim:

[A] balanced analysis of the case law should have revealed at least a legal ambiguity as to the application of an 'assault and battery' clause with regard to post-assault negligence at the time Café Arizona sought the protection of its insurer, and ambiguities in insurance policies are resolved in favor of the insured [citations omitted]. Because such ambiguity [in the insurance policy] is to be resolved in favor of the insured, we hold that Alea's policy afforded coverage for post-assault negligence to the extent it caused or enhanced Dorsey's injuries.

Id. at 411 (emphasis added).

Here, unlike in *Alea*, there is *no legal uncertainty* then or now as to whether Mr. Speed's assault claim is a covered claim under the USAA policies – it is *not* a covered claim.¹¹ Indeed, Mr. Speed has not provided this Court with *any* case law holding that assault claims are covered claims under the policy language used in the USAA policies. Nor is there any ambiguity in the USAA policies. The *Alea* decision and its analysis simply does not support Mr. Speed's assertion that USAA had a duty to defend this assault claim.

Likewise, Mr. Speed's reliance on *Woo v. Fireman's Fund Insurance Company*, 161 Wn.2d 43, 164 P.3d 454 (2007), is misplaced;

¹¹ See cases and analysis at pages 24 to 30.

that case does nothing to create a duty to defend in this case. In *Woo*, the Court was asked to determine whether or not the insurer had a duty to defend and relying on well-settled Washington law, stated that “[a]n insurer has a duty to defend ‘when a complaint against the insured, construed liberally, alleged facts which could, if proven, impose liability upon the insured within the policy’s coverage.’” *Woo*, 161 Wn.2d at 52, quoting *Truck Ins. Exchange v. VanPort Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002). The Court in *Woo* also recognized that **an insurer has no duty to defend when the allegations are not covered by the policy.** *Woo*, 161 Wn.2d at 52.

Unlike Mr. Speed in this case, the insured in *Woo* satisfied his burden of proving that the complaint filed against him alleged facts that, if proven, created a potential for coverage under the insurance policy and therefore, the Court held that the insurer had a duty to defend. *Id.* at 56-57.

The rule for determining whether an insurer has a duty to defend only requires the complaint to allege facts that could impose liability on the insurer. *Truck Ins.*, 147 Wn.2d at 760, 58 P.3d 276. Because RCW 18.32.020 defines the practice of dentistry so broadly, the fact that [the insured’s] acts occurred during the operation of a dental practice conceivably brought his actions within the professional liability provision of his insurance policy.

We conclude that Fireman’s had a duty to defend under *Woo*’s professional liability provision because the insertion

of boar tusk flippers in Albert's mouth conceivably fell within the policy's broad definition of the practice of dentistry.

Woo, 161 Wn.2d at 57. The same cannot be said here. Mr. Speed failed to provide the trial court or this Court with any evidence suggesting the assault claim conceivably fell within the terms of the USAA policies so as to trigger a duty to defend. Mr. Speed's assault claim as asserted in his demand letter (that Dr. Geyer deliberately and intentionally assaulted him) does not even conceivably fall within the coverage terms of the USAA policies. As a result, the trial court properly concluded that USAA had no duty to defend.

E. Because The Assault Claim Did Not Trigger USAA's Duty to Defend, USAA Also Has No Duty To Settle Or Indemnify.

The duty to attempt to settle arises out of the duty to defend. *See, Truck Ins. Exchange v. Century Indemnity Co.*, 76 Wn. App. 527, 533-34, 887 P.2d 455 (1995) (the duty to investigate settlement arises out of the duty to defend), *rev. denied*, 127 Wn.2d 1002 (1995); *see also*, Comments to Washington Practice Jury Instructions, WPI 320.05. Therefore, when there is no duty to defend, there can be no duty to attempt to settle. Because USAA has no duty to defend, it likewise has no duty to attempt to settle Mr. Speed's claim.

The duty to indemnify arises only if the policy *actually covers* the insured's liability. *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 53,

164 P.3d 454 (2007). Since the assault claim is clearly not covered under the terms of either of the USAA policies, USAA has no duty to indemnify Dr. Geyer.

F. When There Is No Duty To Defend, Settle, Or Indemnify, An Insurer Cannot Be Held Liable For Bad Faith Failure To Defend, Settle, Or Indemnify.

Claims of insurer bad faith are “analyzed applying the same principles as any other tort: duty, breach of that duty, and damages proximately caused by any breach of duty.” *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003). A claim for bad faith also requires proof that the breach of the duty complained of was unreasonable, frivolous or unfounded. *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 38 P.3d 322 (2002). However, when an insurer has no duty to defend, it cannot be held liable for bad faith breach of a duty to defend. *Wellman & Zuck, Inc. v. Hartford Fire Ins. Co.*, 170 Wn. App. 666, 285 P.3d 892 (2012) (when allegations, if proven, would not establish liability under the terms of the policy, there can be no bad faith breach of the duty to defend); *Holly Mountain Resources v. Westport Ins. Corp.*, 130 Wn. App. 635, 647, 104 P.3d 725 (2005) (because insurer had no duty to defend, as a matter of law, it did not act in bad faith in refusing to defend). Likewise, where there is no duty to attempt to settle and no duty to indemnify, the insurer cannot be held liable for bad faith failure to settle or

indemnify. *See, Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 53, 164 P.3d 454 (2007). Here, because USAA has no duty to defend Dr. Geyer for his assault on Mr. Speed, the trial court correctly concluded that USAA cannot be held liable for bad faith failure to defend, settle or indemnify and dismissed those claims as a matter of law.

G. The Remedy Of Estoppel Is Not Available In The Absence Of A Bad Faith Breach.

Under Washington law, when an insurer fails to defend in bad faith, it will be estopped to deny coverage, and a settlement between the insured and the claimant that is deemed judicially reasonable, will be the presumptive measure of the insured's damages resulting from the insurer's bad faith breach. *Kirk v. Mount Airy Ins. Co.*, 134 Wn.2d 558, 563 n. 3, 951 P.2d 1124 (1998) (remedy for insurer's bad faith refusal to defend is a presumption of harm and coverage by estoppel). Coverage by estoppel is not a separate estoppel claim, but rather, it is a remedy for the tort of bad faith. *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 393, 823 P.2d 499 (1992).

For the first time in this appeal, Mr. Speed attempts to argue that USAA should be estopped to deny coverage for the assault claim. Fatal to that argument, however, is the fact that the estoppel remedy does not apply in the absence of bad faith.¹² *St. Paul Fire & Marine Ins. Co. v. Onvia*,

¹² Mr. Speed's argument that USAA should be estopped to deny coverage also fails for a second and independent reason: Mr. Speed did not raise the issue before the trial court.

Inc., 165 Wn.2d 122, 133, 196 P.3d 664 (2008); *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 393, 823 P.2d 499 (1992); *Wellman & Zuck, Inc.* 170 Wn. App. at 678 (“a viable estoppel claim requires a finding that the defendant acted in bad faith;” where insurer had no duty to defend, and thus did not act in bad faith, the trial court properly dismissed the estoppel claim). Because USAA had no duty to defend, settle or indemnify Dr. Geyer’s deliberate assault and hence did not act in bad faith, the remedy of coverage by estoppel is simply not available. Nor do *Safeco Insurance Company v. Butler* or *Kirk v. Mount Airy Insurance Company, supra*, support Mr. Speed’s request for coverage by estoppel. In *Butler*, the duty to defend was not at issue; instead, *Butler* stands for the proposition that coverage by estoppel is a proper remedy *if* the insured can prove that the insurer acted in bad faith.¹³ *Butler*, 118 Wn. 2d at 392. *Kirk* involved a certified question from the United States District Court: whether the remedy of coverage by estoppel applies when an insurer denies a defense in bad faith. *Kirk*, 134 Wn.2d at 560. The certified question “required [the Court] to assume the claim against the insured alleged facts giving

Having failed to raise the issue below, he is precluded from raising it on appeal. *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008) (issues and contentions not considered by the trial court when ruling on a motion for summary judgment may not be considered for the first time on appeal); *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 413, 814 P.2d 243 (1991); RAP 2.5(a).

¹³ The Court in *Butler* held that there were material facts in dispute as to whether the insurer acted in bad faith. *Butler*, 118 Wn. 2d at 406.

rise to the insurer's duty to defend, and that the duty was breached." *Id.* at 561. As a result, the Court concluded that coverage by estoppel would be a proper remedy for denying a defense in bad faith. *Id.* at 564. In the present case, however, Mr. Speed's assault claim against Dr. Geyer did not allege facts giving rise to a duty to defend, and therefore, there was no bad faith breach. Coverage by estoppel simply does not apply here.

H. Even If USAA Had A Duty To Defend, There Is No Basis For Finding That USAA Acted in Bad Faith As A Matter of Law.

Mr. Speed attempts to seek review of the trial court's denial of his motion for partial summary judgment wherein he sought an order that USAA had a duty to defend and that it breached the duty in bad faith. (CP 347) As explained above, the denial of a motion for summary judgment is not reviewable when the denial is based on a determination that issues of material fact exist, as was the case here. *Kaplan v. Northwestern Mut. Life Ins. Co.*, 115 Wn. App. 633, 213 P.3d 630 (2009). Thus, this Court should not even review the order denying Mr. Speed's motion for partial summary judgment. Notwithstanding, even if this Court reviews the trial court's denial of Mr. Speed's motion and determines that USAA had a duty to defend, Mr. Speed is not entitled to a judgment in his favor that USAA breached a duty to defend in bad faith as a matter of law.

“Bad faith” claims, like negligence claims, are tort claims that generally involve factual questions for the jury to decide. *American States Ins. Co. v. Symes of Silverdale, Inc.*, 150 Wn.2d 462, 469, 78 P.3d 1266 (2003). An insurance company can be in error in its determination on the duty to defend and not be in bad faith so long as its determination was not unreasonable, frivolous or unfounded. *Woo v. Fireman’s Fund Ins. Co.*, 161 Wn.2d 43, 68, 164 P.3d 454 (2007). To prove bad faith breach of the duty to defend as a matter of law, Mr. Speed must prove based on *undisputed material facts*, that reasonable persons could reach only one conclusion: that USAA had absolutely no reasonable basis for not retaining an attorney for Dr. Geyer when USAA was first notified of the assault claim. *See, Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 486, 78 P.3d 1274 (2003). Mr. Speed has failed to meet this burden. To the contrary, the undisputed facts clearly indicate that USAA had a reasonable basis for not retaining defense counsel for Dr. Geyer when it was notified of Mr. Speed’s assault claim. At the least, a question of fact exists on the issue which must be resolved by a jury.

Mr. Speed claims USAA acted in bad faith because no one at USAA allegedly read the USAA policies regarding the duty to defend. (See Brief of Appellant at pps. 30-32) This is simply not true. Ms. Martinez and other USAA employees who assisted in handling the claim

did, in fact, read and understand the applicable USAA policies and considered the duty to defend. (CP 504 p. 74:10-14; p. 76:18-25, p.77:1-4; CP 522 ¶ 2; CP 524 ¶ 9)¹⁴ Ms. Martinez in fact typed the relevant policy provisions concerning the duty to defend into the reservation of rights letter. (CP 757, CP 777, CP 779)

Moreover, reasonable persons could certainly find that USAA acted reasonably in not retaining a defense attorney when the assault claim was first made. First, Mr. Speed's demand letter alleged an assault, which is not covered by the USAA policies. *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 486, 687 P.2d 1139 (1984) (allegations that are clearly not covered under the policy relieve the insurer of its right and duty to defend). In fact, Mr. Speed's August 25, 2009 demand letter actually acknowledged that there can be no insurance coverage for an assault; it expressly stated that his claim would not be covered by insurance.

¹⁴ At the trial court level, and on appeal, Mr. Speed relies on a declaration drafted by Robert Dietz, who identifies himself as an insurance industry practices expert, to argue that USAA had a duty to defend and that it acted unreasonably in not defending Dr. Geyer. (CP 433-440) Mr. Dietz's opinions are improper and inadmissible legal conclusions and opinions applying legal conclusions to the facts of this case. *See, Tortes v. King County*, 119 Wn. App. 1, 12, 84 P.3d 252 (2003) (no expert may express an opinion that is a conclusion of law); *Charlton v. Day Island Marina*, 46 Wn. App. 784, 732 P.2d 1008 (1987) (an expert may not render an opinion of mixed law and fact; expert's affidavit inadmissible on motion for summary judgment). (See CP 994-1000; 1013-1017). Mr. Dietz's declaration should not be considered by this Court.

Second, neither Dr. Geyer nor his criminal attorney who forwarded Mr. Speed's demand to USAA, asked USAA to provide an attorney to "defend" Mr. Speed's claim. In fact, the first time that Mr. Speed even suggested that USAA had a duty to provide an attorney for Dr. Geyer when the assault claim was first made, was two years later, in September 2011, in Mr. Speed's Counterclaim in this declaratory judgment action. (CP 313-14)

Third, there is no case law in Washington that requires an insurer to provide a defense for a "claim" as opposed to a "lawsuit." The only case addressing this issue is from Illinois, *Grinnell Mutual Insurance Company v. LaForge*, 863 N.E.2d 1132 (Ill. 2006), *appeal denied*, 865 N.E.2d 968 (2007). The court in *Grinnell* specifically held that an insurer does *not* have a duty to defend "claims;" instead, the duty to defend does not arise until a lawsuit is filed. *Id.* at 1138. Thus, *Grinnell* directly supports the conclusion that any alleged failure to hire defense counsel when a mere claim is made, as opposed to a lawsuit, is reasonable. Added to that, the language in the Homeowner's policy that USAA will "provide a defense at our expense by a counsel of our choice, even if the suit is groundless, false or fraudulent," and well established Washington case law holding that the duty to defend is not triggered until a suit is filed alleging facts potentially covered under the policy, provides more than a

reasonable basis for not retaining defense counsel to defend against the assault claim.

In short, it is abundantly clear that Mr. Speed cannot prove bad faith breach of the duty to defend as a matter of law.¹⁵ At the very least, the material facts are in dispute and reasonable persons could conclude that USAA had a reasonable basis for not retaining an attorney for Dr. Geyer when USAA was first notified of the assault claim.¹⁶

¹⁵ While Mr. Speed argues that “USAA’s failure to defend and attempt to settle [caused] Dr. Geyer [to lose] the opportunity to avoid a felony conviction and the ability to maximize his future income from the practice of medicine,” (Brief of Appellant, page 23-24), Mr. Speed failed to come forward with *any* evidence whatsoever to suggest that the prosecutor would have accepted Mr. Speed’s “recommendation” that Dr. Geyer be allowed to plead to a misdemeanor if USAA settled Mr. Speed’s claim. (See also, Brief of Appellant, p. 10, 22-23) As such, this is nothing more than an unsupported allegation that can not be considered by the court in ruling on summary judgment.

¹⁶ With respect to a claimed duty to attempt to settle, Mr. Speed argues that Ms. Martinez testified that she “understood” that because no defense attorney was provided for Dr. Geyer, as the claims examiner she had an obligation to explore settlement with Mr. Speed. (See Brief of Appellant at pages 10-11) This assertion is wholly inaccurate. Mr. Forgette did *not* ask Ms. Martinez if *she* had an obligation to explore settlement with Mr. Speed; instead, Mr. Forgette asked Ms. Martinez a generic question, whether an adjuster is obligated to explore a settlement with a claimant when the insured is not represented by defense counsel. (CP 503, at page 54, lines 18-21) Ms. Martinez agreed in a general sense that an adjuster would have an obligation to explore settlement. (CP 503, at page 54, lines 22-25; 55, lines 1-4) Furthermore, USAA did explore settlement with Mr. Speed. After USAA rejected Mr. Speed’s \$800,000 demand, it did extend a settlement offer in the amount of \$25,000, in an effort to obtain a release for Dr. Geyer, despite the fact that there was no coverage. (CP 527) In addition, when Mr. Speed and Dr. Geyer agreed to a pre-suit mediation, USAA agreed to attend the mediation and came with some settlement authority. (Id.)

I. Mr. Speed Did Not Seek Judgment On His Statutory Claims, And He Did Not Request An Order Awarding Treble Damages Or Attorney Fees In The Trial Court; Therefore He May Not Raise These Issues For The First Time On Appeal.

An issue, theory, or argument not presented to the trial court on summary judgment will not be considered on appeal. *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008) (issues and contentions not considered by the trial court when ruling on a motion for summary judgment may not be considered for the first time on appeal); *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 413, 814 P.2d 243 (1991)(same); RAP 2.5(a); RAP 9.12. Here, Mr. Speed, for the first time on appeal, asks this Court to direct entry of judgment against USAA in the amount of the covenant judgment he and Dr. Geyer agreed to; he seeks an award of attorney fees and treble damages; and he seeks “remedies under RCW 48.30.015. (Brief of Appellant at p. 35-36) (These requests were not even asserted in Mr. Speed’s motion for partial summary judgment. *See* CP 347-363) Because these issues were not raised in the trial court, Mr. Speed’s request for such relief should not be considered by this Court.

In addition, Mr. Speed’s request for attorney fees on appeal under *Olympic Steamship Company v. Centennial Insurance Company*, 117 Wn.2d 37, 54, 811 P.2d 673 (1991) and its progeny should be rejected on

a separate and independent basis: Under *Olympic Steamship*, an insured may be entitled to recover attorney fees it incurs when an insurer refuses to defend a justified claim. But when the insurer has no duty to defend, *Olympic S.S.* simply does not apply. *Holly Mountain Resources v. Westport Ins. Co.*, 130 Wn. App. 635, 652-53, 104 P.3d 725 (2005). Here, USAA had no duty to defend, and therefore, Mr. Speed is not entitled to recover any attorney fees on appeal.

VI. CONCLUSION

There are no material issues of fact in dispute with respect to dismissal of Mr. Speed's claims against USAA. Dr. Geyer assaulted Mr. Speed in a road rage attack. Mr. Speed's August 29, 2009 demand sought damages for Dr. Geyer's intentional and deliberate assault. Under well established Washington law, an assault is not a covered event under either USAA policy. Because an assault is not a covered event, USAA had no duty to defend Dr. Geyer and the trial court properly dismissed Mr. Speed's claims for bad faith failure to defend, settle and indemnify, as a matter of law. Likewise, because Mr. Speed's remaining claims asserted against USAA are inextricably intertwined with a duty to defend, and because Mr. Speed did not oppose entry of the order dismissing those claims, the trial court properly dismissed those claims. USAA respectfully

requests this Court affirm the trial court's Orders, dismissing all of Mr. Speed's claims against USAA as a matter of law.

RESPECTFULLY SUBMITTED this 18th day of January, 2013.

KELLER ROHRBACK L.L.P.

By 

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Declaration of Service

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

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DEPUTY

Dated this 18th day of January, 2013, at Seattle, Washington.



Jane A. Mrozek, Legal Assistant