

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ROBERT C. WOO, D.D.S., and ANNE M.)
WOO, husband and wife; and the marital)
community composed thereof,)

Petitioners,)

v.)

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

Respondents,)

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

Defendants.)
_____)

NO. 77684-9

EN BANC

Filed July 26, 2007

FAIRHURST, J. – This case arises from a practical joke that an oral surgeon,
Dr. Robert C. Woo, played on an employee, Tina Alberts, while he was performing

a dental procedure on her. Alberts brought suit against Woo as a result of the practical joke, and Woo asked his insurer, Fireman's Fund Insurance Company¹ (Fireman's), to defend him, claiming coverage under the professional liability, employment practices liability, and general liability provisions of his insurance policy. Fireman's refused Woo's request to defend.

Woo brought suit against Fireman's, claiming breach of duty to defend, bad faith, and violation of the Consumer Protection Act (CPA), chapter 19.86 RCW. The trial court granted Woo's motion for partial summary judgment, holding that Fireman's had a duty to defend under all three provisions. After trial on the bad faith and CPA claims, a jury found by special verdict that Fireman's failed to act in good faith and violated the CPA. Division One of the Court of Appeals reversed, holding that Fireman's had no duty to defend. Woo seeks review of the Court of Appeals ruling and attorney fees and costs on appeal.

We partially reverse the Court of Appeals and reinstate the trial court's judgment based on the jury's verdict. We hold that Fireman's had a duty to defend

¹ Woo originally sued Fireman's, National Surety Corporation (a corporate affiliate of Fireman's and provider of Woo's professional, employment practices, and general liability coverage), Depositors Insurance Company (Woo's homeowner's and personal excess liability insurer), and the Pacific Underwriters Corporation (Woo's insurance broker). Fireman's stipulated that it would take responsibility for the acts and omissions of its corporate affiliate, National Surety. Depositors defended Woo on a reservation of rights, obtained a partial summary judgment, and assigned its rights to Woo. Woo voluntarily dismissed Pacific Underwriters from the suit.

under the professional liability and general liability provisions but not under the employment practices liability provision. We grant Woo's request for attorney fees and costs on appeal.

I. STATEMENT OF THE CASE

Alberts worked for Woo as a dental surgical assistant for about five years. Her family raised potbellied pigs, and she often talked about them at work. She claims that over the course of her employment, Woo made several offensive comments about her pigs. Woo claims his comments about Alberts' pigs were part of a "friendly working environment" he encouraged in the office. Br. of Resp'ts at 4-5.

The event that precipitated this case occurred during a procedure Woo agreed to perform for Alberts to replace two of her teeth with implants. The procedure required Woo to install temporary partial bridges called "flippers" as spacers until permanent implants could be installed. Pet. for Review at 3. When he ordered the flippers for Alberts' procedure, Woo also ordered a second set of flippers shaped like boar tusks to play a practical joke on Alberts.² While Alberts was under

² Woo claims he was originally planning to show the boar tusk flippers to Alberts at the time of the procedure while she was under local anesthetic. He claims, however, that because Alberts asked for a general anesthetic the morning of the procedure, he decided instead to put them in her mouth while she was under general anesthesia, take photographs, and show the photographs to her afterward.

anesthesia, Woo and his staff removed Alberts' oxygen mask, inserted the boar tusk flippers in her mouth and took photographs of her, some with her eyes pried open. After taking the photographs, Woo completed the planned procedure and inserted the normal flippers.

Woo subsequently had the photographs developed but claims that when he saw them he concluded they were ugly and should not be shown to Alberts. He also claims he told another surgical assistant he thought the photographs were ugly. He claims that he did not expect his staff to give them to Alberts before talking with him. However, about a month later, Woo's staff gave Alberts the photographs at a gathering to celebrate her birthday. Stunned, Alberts proceeded to assist in a dental surgery procedure after receiving the photographs but after that procedure, she went home and never returned to her job. Woo called Alberts several times and wrote to apologize, but Alberts did not respond.

Shortly thereafter, Alberts filed suit against Woo alleging outrage, battery, invasion of privacy, false light, public disclosure of private acts, nonpayment of overtime wages, retaliation for requesting payment of overtime wages, medical negligence, lack of informed consent, and negligent infliction of emotional distress. At the time of Alberts' suit, Woo's policy contained provisions for professional liability, employment practices liability, and general liability.³ About five months

after Alberts filed suit, Fireman's notified Woo that his policy did not cover the claims asserted in Alberts' suit and declined to fund his defense.

Fireman's refused to defend under the professional liability provision on the grounds that the acts alleged in Alberts' complaint did not arise out of the provision of dental services. It refused to defend under the employment practices liability provision on the grounds that the complaint did not allege sexual harassment, discrimination, or wrongful discharge as those terms were defined by the policy. It refused to defend under the general liability provision on the grounds that the alleged practical joke was intentional and was not considered a "business activity." Pl. Ex. 25, at 7.

Because Fireman's refused to defend him, Woo paid attorney John Versnel to defend him against Alberts' suit and settled with Alberts just prior to trial for \$250,000. Woo then brought suit against Fireman's alleging breach of duty to defend under the professional, employment practices, and general liability provisions of Woo's insurance policy, bad faith, and violation of the CPA. He further alleged that Fireman's was estopped from denying coverage under the policy as a result of its breach of the duty to defend.

³ A complete copy of the insurance policy is included in the record. *See* Def. Ex. 40. Pages of defendant exhibit 40 are designated as "NSW" and are numbered from 000001 to 000112. All references to the insurance policy in this opinion will use that designation. In addition, all boldface emphasis contained in the exhibit has been omitted.

The parties submitted cross motions for summary judgment.⁴ The trial court granted Woo's motion for partial summary judgment holding that Fireman's breached its duty to defend.

Following trial on the bad faith and CPA issues, a jury found that Fireman's failed to act in good faith, violated the CPA, and awarded Woo damages in the amount of \$750,000. The trial court entered judgment against Fireman's and awarded damages under the jury verdict, attorney fees and costs pursuant to *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991), and recovery of the \$250,000 settlement Woo negotiated with Alberts.

Fireman's appealed to the Court of Appeals, Division One. *Woo v. Fireman's Fund Ins. Co.*, 128 Wn. App. 95, 114 P.3d 681 (2005). The Court of Appeals reversed the trial court's summary judgment order regarding duty to defend and instructed the trial court to vacate the jury's verdict and dismiss the case. The Court of Appeals did not reach Fireman's remaining issues on appeal. *Id.* at 118. Woo petitioned this court for review, which we accepted. *Woo v. Fireman's Fund Ins. Co.*, 156 Wn.2d 1035, 134 P.3d 1171 (2006). Woo also requests attorney fees and costs on appeal.

⁴ Woo moved for partial summary judgment arguing that Fireman's breached its duty to defend him in the tort action against Alberts. Fireman's sought summary dismissal of Woo's claims.

II. ISSUES

- A. Did Fireman's have a duty to defend Woo under the professional liability, employment practices liability, and general liability provisions of his insurance policy?
- B. Do other issues raised by Fireman's at the Court of Appeals have merit?
- C. Is Woo entitled to attorney fees and costs on appeal?

III. ANALYSIS

An appellate court reviews a partial summary judgment order de novo and engages in the same inquiry as the trial court. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 692 n.17, 15 P.3d 115 (2000). Interpretation of an insurance contract is a question of law reviewed de novo. *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 682, 801 P.2d 207 (1990), *overruled on other grounds by Butzberger v. Foster*, 151 Wn.2d 396, 89 P.3d 689 (2004). When we construe the language of an insurance policy, we give it the same construction that an “average person purchasing insurance” would give the contract. *Id.*

A. The duty to defend

The rule regarding the duty to defend is well settled in Washington and is broader than the duty to indemnify. *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 64, 1 P.3d 1167 (2000). The duty to defend “arises at the time an action is first brought, and is based on *the potential for liability.*” *Truck Ins. Exch. v.*

VanPort Homes, Inc., 147 Wn.2d 751, 760, 58 P.3d 276 (2002) (emphasis added).

An insurer has a duty to defend “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.* (quoting *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 425, 983 P.2d 1155 (1999)). An insurer is not relieved of its duty to defend unless the claim alleged in the complaint is “clearly not covered by the policy.” *Id.* (citing *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 561, 951 P.2d 1124 (1998)). Moreover, if a complaint is ambiguous, a court will construe it liberally in favor of “triggering the insurer’s duty to defend.” *Id.* (citing *R.A. Hanson Co. v. Aetna Ins. Co.*, 26 Wn. App. 290, 295, 612 P.2d 456 (1980)).⁵ In contrast, the duty to indemnify “hinges on the insured’s *actual liability* to the claimant and *actual coverage* under the policy.” *Hayden*, 141 Wn.2d at 64 (emphasis added). In sum, the duty to defend is triggered if the insurance policy *conceivably covers* the

⁵ Fireman’s argues that we should adopt a “reasonable expectations” standard in determining whether an insurer has a duty to defend an insured. Suppl. Br. of Resp’ts at 3 (citing *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 907, 726 P.2d 439 (1986)). It argues “an insurer has no duty to defend when the insured can have no reasonable expectation of coverage.” *Id.* It also suggests the Court of Appeals adopted such a test when it concluded, “[n]o reasonable person could believe that a dentist would diagnose or treat a dental problem by placing boar tusks in the mouth while the patient was under anesthesia in order to take pictures with which to ridicule the patient.” *Id.*; *Woo*, 128 Wn. App. at 103. Fireman’s misreads the Court of Appeals’ statement. The court was referring to whether a reasonable *patient* would believe that the dentist would put boar tusks in her mouth whereas Fireman’s refers to whether a *reasonable insured* would expect his policy to provide coverage. In any case, neither comports with our established rule regarding the duty to defend, and we decline to adopt Fireman’s reasoning.

allegations in the complaint, whereas the duty to indemnify exists only if the policy *actually covers* the insured's liability.

“There are two exceptions to the rule that the duty to defend must be determined only from the complaint, and both the exceptions favor the insured.” *Truck Ins.*, 147 Wn.2d at 761. First, if 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. *Id.* Notice pleading rules, which require only a short and plain statement of the claim showing that the pleader is entitled to relief, impose a significant burden on the insurer to determine if there are *any* facts in the pleadings that could conceivably give rise to a duty to defend. *Hanson*, 26 Wn. App. at 294. Second, if the allegations in the complaint ““conflict with facts known to or readily ascertainable by the insurer,”” or if ““the allegations . . . are ambiguous or inadequate,”” facts outside the complaint may be considered. *Truck Ins.*, 147 Wn.2d at 761 (quoting *Atl. Mut. Ins. Co. v. Roffe, Inc.*, 73 Wn. App. 858, 862, 872 P.2d 536 (1994) (quoting *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 908, 726 P.2d 439 (1986))). The 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. *Id.*

The duty to defend is a valuable service paid for by the insured and one of the principal benefits of the liability insurance policy. *Griffin v. Allstate Ins. Co.*, 108 Wn. App. 133, 138, 29 P.3d 777, 36 P.3d 552 (2001); *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 392, 823 P.2d 499 (1992); *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 390, 715 P.2d 1133 (1986); Thomas V. Harris, Washington Insurance Law § 11.1, at 11-1, 11-2 (2d ed. 2006). If the insurer is uncertain of its duty to defend, it may defend under a reservation of rights and seek a declaratory judgment that it has no duty to defend. *Truck Ins.*, 147 Wn.2d at 761 (citing *Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91, 93-94, 776 P.2d 123 (1989)). Although the insurer must bear the expense of defending the insured, by doing so under a reservation of rights and seeking a declaratory judgment, the insurer avoids breaching its duty to defend and incurring the potentially greater expense of defending itself from a claim of breach. *Id.*

1. Professional liability provision

Woo makes three basic arguments with regard to Fireman's duty to defend under the professional liability provision. First, he argues that the insertion of boar tusk flippers in Alberts' mouth constituted the practice of dentistry as defined in his policy and RCW 18.32.020. Second, he argues that the Court of Appeals improperly extended the "sexual misconduct" rule from *Standard Fire Insurance*

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Co. v. Blakeslee, 54 Wn. App. 1, 771 P.2d 1172 (1989) in concluding that Woo's actions did not constitute the practice of dentistry. Lastly, he argues that application of *Blakeslee* to the facts of this case was uncertain and Fireman's had a duty to defend until the rule was clarified by the court.

a. *Conduct falling within the definition of the practice of dentistry*

The professional liability provision states that Fireman's will defend any claim brought against the insured "even if the allegations of the claim are groundless, false or fraudulent." NSW at 000080. It defines "dental services" as "all services which are performed in the practice of the dentistry profession as defined in the business and professional codes of the state where you are licensed."

NSW at 000102. RCW 18.32.020 defines the practice of dentistry and states:

A person practices dentistry, within the meaning of this chapter, who (1) represents himself as being able to diagnose, treat, remove stains and concretions from teeth, operate or prescribe for any disease, pain, injury, deficiency, deformity, or physical condition of the human teeth, alveolar process, gums, or jaw, or (2) offers or undertakes by any means or methods to diagnose, treat, remove stains or concretions from teeth, operate or prescribe for any disease, pain, injury, deficiency, deformity, or physical condition of the same, or take impressions of the teeth or jaw, or (3) owns, maintains or operates an office for the practice of dentistry, or (4) engages in any of the practices included in the curricula of recognized and approved dental schools or colleges, or (5) professes to the public by any method to furnish, supply, construct, reproduce, or repair any prosthetic denture, bridge, appliance, or other structure to be worn in the human mouth.

Woo argues that the Court of Appeals erred in concluding the insertion of

boar tusk flippers in Alberts' mouth did not constitute the practice of dentistry as defined in RCW 18.32.020. He claims the joke was "intertwined with employee and patient relationships, areas of Woo's ownership and operation of the dental office." Suppl. Br. of Pet'r Woo at 5. Fireman's responds that the allegations in Alberts' complaint unambiguously establish that Woo's practical joke was not connected to treating Alberts' condition. It asserts the boar tusk flippers were not intended to replace Alberts' teeth--they were intended only as a practical joke. Fireman's also asserts that insertion of the boar tusk flippers was not covered under the professional liability provision because Woo "interrupted his rendering of dental services." Resp'ts' Answer to Br. of Amicus Curiae Washington State Trial Lawyers Association Foundation (WSTLA Foundation) at 5.

The Court of Appeals based its conclusion that Fireman's had no duty to defend Woo under the professional liability provision on two flawed premises. First, it concluded, "[n]o reasonable person could believe that a dentist would diagnose or treat a dental problem by placing boar tusks in the mouth while the patient was under anesthesia in order to take pictures with which to ridicule the patient." *Woo*, 128 Wn. App. at 103. As we note in footnote 5, *supra*, what a reasonable patient would believe a dentist would do is irrelevant to our determination of whether Fireman's had a duty to defend under the professional

liability provision. Rather, the rule requires us to determine whether the complaint alleged facts that were conceivably covered under the insurance policy.

Second, the Court of Appeals erred in concluding Fireman's had no duty to defend Woo under the professional liability provision because Woo's actions "could not conceivably be considered a means or method 'to diagnose, treat, remove stains and concretions from teeth, operate or prescribe for any disease, pain, injury, deficiency, deformity, or physical condition.'" *Woo*, 128 Wn. App. at 103 (quoting RCW 18.32.020). The court's definition of what Woo's policy conceivably covers was overly constrained. In addition to covering the rendering of dental services, the professional liability provision covers ownership, maintenance, or operation of an office for the practice of dentistry and Alberts' complaint alleged Woo's practical joke took place while Woo was conducting his dental practice. The insertion of the boar tusk flippers was also intertwined with Woo's dental practice because it involved an interaction with an employee. In fact, that employee interaction was as much a part of his dental practice as the rendering of dental services to his patients.

Moreover, Woo's practical joke did not interrupt the dental surgery procedure, as Fireman's argues. After administering anesthesia and preparing Alberts for surgery, Woo inserted the boar tusk flippers, took photographs, removed the boar tusk flippers, and inserted another set of flippers. The acts that comprised

the practical joke were integrated into and inseparable from the overall procedure.

In sum, Alberts' complaint alleges that Woo inserted a flipper, albeit oddly shaped, during a dental surgery procedure while he was operating an office for the practice of dentistry. 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. Because RCW 18.32.020 defines the practice of dentistry so broadly, the fact that his 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 Alberts' mouth conceivably fell within the policy's broad definition of the practice of dentistry.

b. *Extension of Blakeslee*

Woo next argues that in concluding that his practical joke did not constitute the practice of dentistry, the Court of Appeals improperly extended *Blakeslee* to include more than just sexual assault. He argues that *Blakeslee* should apply only in a sexual assault context because sexual contact during dental treatment presumes intent to injure whereas the same does not hold true for "an innocently conceived group joke." Suppl. Br. of Pet'r Woo at 8. Fireman's counters that *Blakeslee*

merely stands for the general proposition that an insured should not expect insurance coverage to apply to problems that fall outside the policy coverage. It also claims the court did not apply the “intent to injure” rule of sexual assault cases with regard to the professional liability provision--it only applied settled law to a unique set of facts. Resp’ts’ Answer to Amicus Curiae WSTLA’s [Foundation] Memo. in Support of Pet. for Review at 3.

Blakeslee involved a dentist accused of sexually assaulting a patient during a dental procedure while the patient was under the influence of nitrous oxide. 54 Wn. App. at 2. The court noted that medical malpractice insurance policies do not cover a physician’s sexual contact with a patient. *Id.* at 8-9 (citing *Wash. Ins. Guar. Ass’n v. Hicks*, 49 Wn. App. 623, 627, 744 P.2d 625 (1987) (a gynecologist’s sexual assault of a patient)). It concluded, therefore, that because there could be *no legitimate course of treatment* involving sexual contact between a dentist and a patient, the dentist’s insurance policy did not cover his actions. *Id.* at 9.

The Court of Appeals analogized the facts of this case to *Blakeslee* by noting that, like *Blakeslee*, Woo took advantage of Alberts’ anesthetized state for his own purposes. *Woo*, 128 Wn. App. at 104. It also analogized this case to *Blakeslee* on the grounds that the professional services that Woo rendered were not the proximate cause of Alberts’ injuries. *Id.*

We conclude the Court of Appeals improperly analyzed the significance of the act at issue by focusing only on the facts that Woo inserted the boar tusk flippers for his own purposes and the injuries did not arise from the treatment Alberts requested. It ignored the fact that application of *Blakeslee* to other contexts could inappropriately narrow the duty to defend. It also failed to consider that sexual contact is never an appropriate component of dental treatment whereas other actions could conceivably fall within the broad definition set out in the insurance policy and RCW 18.32.020.⁶

Additionally, the Court of Appeals failed to recognize that the *Blakeslee* analysis was based on the duty to indemnify, not the duty to defend. *Woo*, 128 Wn. App. at 103. The insurer in *Blakeslee* properly defended under a reservation of rights and sought a declaratory judgment. *Blakeslee*, 54 Wn. App. at 3. *Blakeslee*'s analysis, therefore, focused on whether the insurance policy actually provided coverage. In contrast, our focus in this case is whether the facts alleged in the

⁶ *Blakeslee* expressly recognized a distinction between factual situations in which sexual contact is necessitated by the treatment being provided and those in which it is not, citing a case involving improper sexual contact by a gynecologist. *Blakeslee*, 54 Wn. App. at 9 (citing *St. Paul Fire & Marine Ins. Co. v. Asbury*, 149 Ariz. 565, 720 P.2d 540 (Ct. App. 1986)). The *Asbury* court concluded that because the improper sexual contact was "intertwined with and inseparable from" a gynecologist's services, it fell within the gynecologist's professional liability policy. *Id.* Although the *Blakeslee* court rejected *Asbury*, we note that the facts here are more analogous to those in *Asbury* than they are to *Blakeslee*. Woo's insertion of the boar tusk flippers was intertwined with and inseparable from the real treatment he performed on Alberts whereas the sexual contact by the dentist in *Blakeslee* was not.

complaint conceivably triggered a duty on the part of Fireman's to defend. Thus, *Blakeslee* does not even provide the proper framework for our analysis.

We conclude that the Court of Appeals improperly extended *Blakeslee* to a nonsexual assault context.

c. *Refusal to defend when there was an undetermined rule of law*

Finally, Woo argues that application of *Blakeslee* to the facts of this case was uncertain at best and Fireman's had a duty to defend until and unless application of the rule in this particular context was clarified by the court. Amicus WSTLA Foundation agrees, arguing that under the "complaint allegation rule," an insurer is obligated to err in favor of defending the insured if the law is uncertain "at the time [the insurer] was required to decide whether to provide [the insured] a defense." Br. of Amicus Curiae WSTLA Foundation at 21 (emphasis omitted). WSTLA Foundation also challenges Fireman's argument to the Court of Appeals that if a legal issue is "fairly debatable" at the time an insured requests defense, the insurer may refuse. *Id.* at 22; Appellants Opening Br. at 24-26 & n.12, 49-53.

Fireman's obtained a formal written legal opinion from attorney Stephen G. Skinner, who advised that Fireman's did not have a duty to defend under the professional liability provision based on *Blakeslee* and *Hicks*. Skinner's opinion acknowledged, however, that neither *Blakeslee* nor *Hicks* were entirely on point and

that a court reviewing them might conclude they relate only to cases involving sexual assault.

Fireman's reliance on Skinner's equivocal advice regarding the application of *Blakeslee* or *Hicks* to this case flatly contradicts one of the most basic tenets of the duty to defend. The duty to defend arises based on the insured's *potential* for liability and whether allegations in the complaint *could conceivably* impose liability on the insured. *Truck Ins.*, 147 Wn.2d at 760. An insurer is relieved of its duty to defend only if the claim alleged in the complaint is "clearly not covered by the policy." *Id.* Moreover, an ambiguous complaint must be construed liberally in favor of triggering the duty to defend. *Id.*

Fireman's is essentially arguing that an insurer may rely on its own interpretation of case law to determine that its policy does not cover the allegations in the complaint and, as a result, it has no duty to defend the insured. However, the duty to defend requires an insurer to give the insured the benefit of the doubt when determining whether the insurance policy covers the allegations in the complaint. Here, Fireman's did the opposite--it relied on an equivocal interpretation of case law to give *itself* the benefit of the doubt rather than its insured.

We conclude that Fireman's inappropriately relied on *Blakeslee* to deny Woo a defense.

2. Employment practices liability provision

The employment practices liability provision states that Fireman's will defend any claim brought against the insured "even if the allegations of the claim are groundless, false or fraudulent." NSW at 000094. It further states, in pertinent part, that Fireman's will "pay all sums which you . . . are legally required to pay as damages as a result of sexual harassment, discrimination, or wrongful discharge that arise out of a wrongful employment practice." *Id.* Woo and Fireman's do not argue that anything other than wrongful discharge applies here. "Wrongful discharge" is defined, in pertinent part, as "the unfair or unjust termination of an employment relationship which . . . inflicts emotional distress upon the employee, defames the employee, [or] invades the employee's privacy." NSW at 000106. "Wrongful employment practice" is defined, in pertinent part, as "any negligent act, error, omission, or breach of duty committed in the course of . . . relations with employees." *Id.*

Woo argues Fireman's had a duty to defend him under the employment practices liability provision because Alberts' complaint can reasonably be read to include allegations of negligent acts that led to an involuntary or constructive discharge.⁷ Fireman's counters that even if the joke qualified as a wrongful

⁷ Woo also takes issue with the Court of Appeals' statement that Fireman's had no duty to defend him under the employment practices liability provision if it determined the complaint alleged no "cognizable cause of action." Pet. for Review at 15-17 (citing *Woo*, 128 Wn. App. at 105). He notes that the duty to defend focuses on "the allegations of the complaint and the

employment practice, it did not trigger the duty to defend because the complaint did not allege that the wrongful discharge arose out of the wrongful employment practice and that the emotional distress resulted from the wrongful discharge. Instead, Fireman's argues Alberts alleged that the wrongful employment practice caused her emotional distress and *the emotional distress caused her to leave her job*. The Court of Appeals agreed, basing its conclusion that Alberts did not allege constructive discharge on the fact that the complaint did not allege violation of an employment contract--only violation of the insurance policy to which she was not a party. *Woo*, 128 Wn. App. at 105.

Alberts' complaint alleged that Woo frequently taunted her about her potbellied pigs. It also alleged that after the office staff showed her the photographs she assisted with a surgical procedure and during that procedure Woo told her she could take the boar tusk flippers home as a trophy. After the procedure, Alberts collapsed in tears and then told the office manager not to have anyone contact her, went home, and never returned. These facts indicate that Alberts' emotional

policy, not on whether a claim happens to be 'cognizable.'" Pet. for Review at 17. The insurance policy states that Fireman's will "defend any claim brought against you . . . seeking damages that are covered under this section of this policy . . . *even if the allegations of the claim are groundless, false or fraudulent.*" NSW at 000094 (emphasis added). Woo seems to be suggesting that insurers should not be involved in determining whether claims are legally cognizable, but that concern does not change the fact that Alberts' complaint did not allege a claim for wrongful discharge as defined by Woo's insurance policy. Therefore, we need not reach this argument.

distress resulted from the taunting and the practical joke, not from a wrongful discharge. Thus, they do not meet the definition of wrongful discharge under Woo's policy.

We conclude Fireman's had no duty to defend under Woo's employment practices liability provision because Alberts' complaint clearly did not allege actions that met the definition of wrongful discharge under the policy.

3. General liability provision

The general liability provision covers bodily injury, personal injury, advertising injury, and property damage. Only the bodily injury and personal injury portions apply in this case.

a. *Bodily injury*

"Bodily injury" is defined as "bodily harm, sickness or disease," NSW at 000102, and is covered under the general liability coverage if "caused by an occurrence." NSW at 000032. "Occurrence" is defined as "[a]n accident, including continuous or repeated exposure to substantially the same general harmful conditions." NSW at 000045. "Accident" is defined as a "fortuitous circumstance, event or happening that takes place and is neither expected nor intended from the standpoint of the insured." NSW at 000043.

Woo argues that Alberts' complaint should be construed liberally in his favor

as triggering a duty to defend because the complaint alleged both intentional and negligent conduct resulting in bodily injury.⁸ Fireman's counters that the inclusion of negligence causes of action in Alberts' complaint did not render the complaint ambiguous regarding whether Woo's conduct was intentional. Fireman's suggests that any ambiguity must be found in the complaint's factual allegations, arguing that none of the conduct alleged in the complaint was accidental or fortuitous.

The Court of Appeals agreed with Fireman's and concluded that any bodily injury alleged in Alberts' complaint⁹ did not result from an accident as defined in the policy because the complaint alleged exclusively intentional conduct. *Woo*, 128 Wn. App. at 106. It also concluded that even if Woo had second thoughts about giving Alberts the photographs, that fact would not render the allegations in Alberts' complaint ambiguous because the conduct related to taking the photographs was intentional. *Id.*

Alberts' complaint alleged that Woo repeatedly taunted her about her pigs

⁸ Woo also argues that Fireman's denial of coverage under the general liability provision contradicts its denial of coverage under the professional liability provision, calling Fireman's denial of coverage a "flip flop." Pet. for Review at 12. He claims Fireman's denied coverage under the professional liability provision because Woo *was not* providing dental services and simultaneously denied coverage under the general liability provision because Woo *was* providing professional services. *Id.*; Pl. Ex. 25, at 9. Fireman's does appear to have denied coverage under the two provisions for contradictory reasons but because this case does not involve Fireman's duty to indemnify, we need not reach this issue.

⁹ In her complaint, Alberts alleged facts that arguably constitute bodily harm, such as acute and chronic depression, anxiety, panic attacks, nightmares, and suicidal ideation.

and that Woo or an assistant working under his supervision ordered boar tusk flippers, placed the flippers in her mouth, pried her eyes open, took photographs of her with the flippers in her mouth, had the photographs developed, and gave the photographs to her. However, three of the claims listed in Alberts' complaint alleged negligent causes of action--medical negligence, lack of informed consent, and negligent infliction of emotional distress.

The insurer's duty to defend is triggered if a complaint is ambiguous. *Truck Ins.*, 147 Wn.2d at 760. The insured must be given the benefit of the doubt if it is not clear *from the face of the complaint* that the policy does not provide coverage. *Id.* at 761. In short, if it is not clear that the complaint does *not* contain allegations that are not covered by the policy, the insurer has a duty to defend.

Woo's policy covers bodily injury that is caused by an "accident," which is defined as a "fortuitous *circumstance, event or happening* that takes place and is *neither expected nor intended* from the standpoint of the insured." NSW at 000043 (emphasis added). The Court of Appeals limited its analysis of the bodily injury coverage to whether Alberts' complaint alleged exclusively intentional *conduct*. However, based on the language of Woo's policy, he had to have "expected or intended" the specific "event or happening" alleged in the complaint. Thus, he would have to have intended not only the "event or happening" of photographing

her with the boar tusk flippers in her mouth but also the “event or happening” that Alberts would sustain the specific injuries she alleged in her complaint. Although Woo’s conduct was likely intentional, it is conceivable that Woo did not intend that conduct to result in Alberts’ injuries.

Moreover, Woo’s policy covers “continuous or repeated exposure to substantially the same general harmful conditions.” NSW at 000045. Woo’s “taunts” and the practical joke could have been part of Woo’s “continuous or repeated” efforts to cultivate a “friendly working environment” in the office. NSW at 000045; Br. of Resp’ts at 4-5.

We conclude it is not clear that Alberts’ complaint does *not* contain allegations that are not covered by Woo’s policy and Fireman’s had a duty to defend him under the bodily injury portion of the general liability provision.

b. *Personal injury*

“Personal injury” is defined, in pertinent part, as “harm that arises out of one or more of the following offenses: assault, battery, mental anguish, mental shock or humiliation; . . . [or] invasion of an individual’s right of privacy.” NSW at 000105. Personal injury is covered under the general liability coverage if it is “caused by an *offense* arising out of *your business*.” NSW at 000032 (emphasis added). “Offense” is defined as “a fortuitous, inadvertent or mistaken business activity

giving rise to . . . personal injury neither expected nor intended from the standpoint of the insured.” NSW at 000045. “Your business” is defined as “the trade, profession or occupation in which you are engaged and which is shown on the declarations page.” NSW at 000047.

Our analysis of Woo’s intent to cause personal injury is comparable to our analysis of his intent to cause bodily injury. Alberts’ complaint alleged that Woo taunted her about her pigs and that he played an arguably offensive practical joke on her but Woo claims he did so only in an effort to create a “friendly working environment” in his business office. Br. of Resp’ts at 4-5. As with bodily injury, Woo’s policy covers personal injury if caused by a “*fortuitous, inadvertent or mistaken business activity* giving rise to . . . personal injury *neither expected nor intended* from the standpoint of the insured.” NSW at 000045 (emphasis added). Because, as we concluded above, Alberts’ complaint did not clearly allege that Woo expected or intended that his taunts or the practical joke would cause personal injury to Alberts, Fireman’s had a duty to defend him.

Woo also argues the Court of Appeals erroneously applied a Louisiana case when it concluded that any personal injury alleged in Alberts’ complaint was not caused by an “offense arising out of your business,” NSW at 000032, because “the particular activities engaged in at the time of the injury were ordinarily *incident* to

business pursuits.” *Woo*, 128 Wn. App. at 107 (citing *Jackson v. Frisard*, 96-0547 (La. App. 1 Cir. 1996 12/20/96); 685 So. 2d 622, 629). *Woo* disputes the court’s interpretation of *Jackson* and argues that because there was no exception to the policy for practical jokes, it covered anything that occurred in the context of running a dental office. He claims the court’s focus ignored all conduct unrelated to the core functions of the business. *Fireman’s* counters that the mere fact that an employer plays a joke on an employee at the office does not convert it into a business activity.¹⁰

Jackson involved an injury incurred when state troopers engaged in horseplay during a defensive training session. 685 So. 2d at 624. The insurance provision at issue excluded coverage for bodily injury arising out of business pursuits of the insured, but the exclusion did not apply to “activities which are ordinarily incident to non-business activities.” *Id.* at 629 (quoting policy). *Jackson* held that the trooper’s actions were the type of activity that were “ordinarily incident to non-business pursuits,” and were not subject to the policy exclusion. *Id.* at 631. Thus,

¹⁰ Amicus WSTLA Foundation also urges us to address the broader issue of whether practical jokes generally fall outside an insurer’s duty to defend. It argues that the Court of Appeals ruling inappropriately implied that practical jokes are outside insurance coverage as a matter of law. It also argues that such a holding disregards the principle of fortuity--in other words, practical joking cannot be considered outside insurance coverage if no injury is intended. We decline to reach the broad issue urged by WSTLA Foundation because we have limited briefing on it and need not reach it to resolve the specific case before us. Moreover, because the issue was raised only by amicus curiae, we need not consider it. *Seeley v. State*, 132 Wn.2d 776, 808 n.20, 940 P.2d 604 (1997).

contrary to Woo's assertion, the Court of Appeals properly interpreted the insurance policy in *Jackson* as providing coverage for personal injury arising from acts that were *not ordinarily incident to business pursuits*. It also properly concluded that the policy in this case provided coverage for personal injury *arising from the business*. *Woo*, 128 Wn. App. at 107.

We conclude the Court of Appeals erred in determining that Woo's conduct did not arise from his business and, therefore, Fireman's had a duty to defend him under the personal injury portion of the general liability provision. Alberts' complaint alleged that Woo's staff participated in playing a practical joke on a colleague during the course of a dental procedure that was undoubtedly part of Woo's business. Woo's policy language provides broad coverage for personal injuries "arising from" his business, and the definition of "your business" is equally broadly defined.

We partially reverse the Court of Appeals and reinstate the trial court's judgment based on the jury's verdict. We hold that the court erred in concluding that Fireman's had no duty to defend Woo under the professional liability and general liability provisions but it did not err in concluding that Fireman's had no duty to defend under the employment practices liability provision. We also hold that the court improperly extended *Blakeslee* to a nonsexual assault context and

Fireman's improperly relied on *Blakeslee* as a basis for refusing to defend Woo.

B. Other issues Fireman's raised at the Court of Appeals

The Court of Appeals did not resolve certain issues because it determined that Fireman's had no duty to defend Woo. RAP 13.7 requires us to either consider and decide those issues or remand the case to the Court of Appeals to decide them. We elect to decide them rather than remand to the Court of Appeals.

Fireman's raised four additional arguments at the Court of Appeals: (1) that the jury's bad faith and CPA violation verdict could not be upheld on appeal if the Court of Appeals found that Fireman's correctly declined to defend Woo on only *some* of the policy provisions, (2) that the jury verdict could not be upheld because the trial court erred in instructing the jury that Fireman's had breached its duty to defend, (3) that the trial court erred in resolving its claim of collusion in the settlement between Woo and Alberts, and (4) that the trial court erred in denying relief from emotional distress damages the jury awarded to Woo based on Fireman's refusal to defend him.

1. A new trial is not warranted if the Court of Appeals is reversed on only some provisions of the insurance policy

Fireman's argues that if the Court of Appeals reversed on only some of the duty to defend claims, it should remand for new trial because there was insufficient proof of bad faith if Fireman's correctly refused to defend with regard to some of

the claims. Fireman's admits, however, that the bulk of Woo's case revolved around the professional liability provision. Woo argues that Fireman's waived this issue because it failed to propose a special verdict identifying the coverages under which the jury found bad faith.

Because Fireman's acknowledges that the bulk of Woo's case related to the professional liability provision and we reverse the Court of Appeals with respect to that provision, we conclude the jury's verdict that Fireman's acted in bad faith is not compromised and a new trial is not warranted.

2. The trial court did not err in instructing the jury that Fireman's breached its duty to defend

Fireman's claims that the trial court erred in instructing the jury that Fireman's breached its duty to defend. The trial court's instruction stated:

The issues for you to decide are whether defendant Fireman's Fund failed to act in good faith in handling and investigating Dr. Woo's claim, and whether defendant Fireman's Fund violated the Washington Consumer Protection Act. The Court has already determined that defendant Fireman's Fund erred in not defending Dr. Woo. However, 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. The Court's earlier decision on the duty to defend does not control your decisions in this case.

Clerk's Papers (CP) at 3559.

Fireman's seems to think the instruction was erroneous because it left the jury to wonder about coverage. However, the jury was not asked to determine if the

policy provided coverage. Woo sought a declaration that Fireman's was estopped from denying coverage based on the duty to defend determination. The jury was asked only to determine if Fireman's acted in bad faith and in violation of the CPA by refusing to defend.

We conclude the trial court did not err in instructing the jury that Fireman's breached its duty to defend.

3. The trial court did not err in resolving Fireman's claim of collusion in the settlement between Woo and Alberts

Fireman's claims the trial court erroneously resolved its claim of collusion in the settlement between Woo and Alberts. It argues that the court conflated the purpose of the reasonableness hearing with the question of whether the agreement was the result of fraud or collusion, thereby failing to conduct the appropriate analysis.

Woo responds that the court analyzes collusion twice, (1) in evaluating the reasonableness of the settlement and (2) in determining whether the settlement was the result of fraud or collusion. Once the court determines the settlement is reasonable, Fireman's has the burden of proving collusion and it failed to provide such evidence at trial. *Truck Ins.*, 147 Wn.2d at 765. In contrast, Woo cited testimony of attorney John Versnel, who stated unequivocally that the settlement was "devoid of any bad faith, collusion or fraud." Br. of Resp'ts at 48-49. Woo

challenged the list of cases cited by Fireman's in which the insured escaped liability, noting that he did not, and noted that Fireman's never provided any suggestions regarding what a reasonable settlement would have been. Finally, Woo pointed to extensive evidence that he mounted a vigorous defense prior to settling with Alberts.

We conclude the trial court did not err in resolving Fireman's collusion claim regarding the settlement between Woo and Alberts.

4. The trial court did not err in denying relief from emotional distress damages the jury awarded to Woo based on Fireman's refusal to defend him

Fireman's argues that the trial court erred in denying relief from the jury's award of damages for emotional distress based on Fireman's refusal to defend him. Appellants' Opening Br. at 66-67. It claims that Woo failed to present evidence about his emotional distress, other than his own testimony. *Id.* The court acknowledged that the damages could be viewed as "extraordinarily high given the absence of any medical, psychiatric or expert testimony," but noted that Fireman's provided "virtually no authority or support for [its] argument" and the court could not substitute its judgment for that of the jury. CP at 3969.

We conclude the trial court did not err in denying Fireman's relief from the jury's damages award.

C. Attorney fees and costs on appeal

The trial court awarded Woo fees under *Olympic Steamship* for Fireman's breach of the common law duty of good faith and under the CPA. Woo requested fees on appeal in his brief to the Court of Appeals and in his supplemental brief to this court under *Svendson v. Stock*, 143 Wn.2d 546, 560, 23 P.3d 455 (2001) and *Amazon.com International, Inc. v. American Dynasty Surplus Lines Insurance Co.*, 120 Wn. App. 610, 619-20, 85 P.3d 974, review denied 152 Wn.2d 1030, 103 P.3d 200 (2004).¹¹

Attorney fees are recoverable at trial, and if the plaintiff prevails on appeal, under the CPA. *Svendson*, 143 Wn.2d at 560. In a duty to defend action, an insured is entitled to fees on appeal, pursuant to RAP 18.1, because the insurer "compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract." *Olympic Steamship*, 117 Wn.2d at 53. Under RAP 18.1, a party has a right to recover reasonable attorney fees or expenses on review before the Supreme Court if granted by applicable law. The party must request fees and costs in its opening brief, but a request made at the Court of Appeals is

¹¹ It is unclear why Woo cites *Amazon.com* as the basis for his claim of attorney fees and costs rather than *Olympic Steamship*. In *Amazon.com*, American Dynasty sued Atlantic claiming that Atlantic should have defended Amazon.com. 120 Wn. App. at 614. American Dynasty prevailed on appeal and requested attorney fees under *Olympic Steamship*. *Id.* at 619. The court held that as an excess insurer, American Dynasty had the same rights as the insured and was entitled to fees. *Id.* In this case, Woo is the insured, not an excess insurer. *Woo*, 128 Wn. App. at 97.

considered a continuing request at the Supreme Court. RAP 18.1(b). Because Woo prevails on appeal and we hold that Fireman's improperly refused to defend him, we grant Woo attorney fees and costs on appeal.

IV. CONCLUSION

We partially reverse the Court of Appeals and reinstate the trial court's judgment based on the jury's verdict. We hold that Fireman's had a duty to defend under the professional liability and general liability provisions but not under the employment practices liability provision. We further hold that the Court of Appeals improperly extended *Blakeslee* to a nonsexual assault context and Fireman's improperly relied on *Blakeslee* as a basis for refusing to defend Woo. Fireman's additional issues are without merit. We grant Woo attorney fees and costs on appeal.

AUTHOR:

Justice Mary E. Fairhurst

WE CONCUR:

Justice Tom Chambers

Justice Susan Owens

Justice Richard B. Sanders

Justice Bobbe J. Bridge
