SUPREME COURT OF WASHINGTON

# Woo v. Fireman's Fund Insurance Co.

164 P.3d 454 (Wash. 2007) · No. No. 77684-9 · Decided July 26, 2007

## SUMMARY

The Washington Supreme Court considered whether Fireman's Fund Insurance Company had a duty to defend an oral surgeon against claims arising from a practical joke played on an employee during a dental procedure. The court held that the insurer had a duty to defend under the professional liability and general liability provisions, but not under the employment practices liability provision. The court partially reversed the Court of Appeals, reinstated the trial court's judgment based on the jury's bad-faith and Consumer Protection Act verdict, and awarded attorney fees and costs on appeal.

## CASE DETAILS

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| COURT | Supreme Court of Washington |
| WRITING FOR THE COURT | Fairhurst, J.; Tom Chambers, J.; Susan Owens, J.; Richard B. Sanders, J.; Bobbe J. Bridge, J.; Barbara A. Madsen, J. |
| JURISDICTION | Washington |
| DECIDED | July 26, 2007 |
| DOCKET | No. 77684-9 |
| DISPOSITION | other |
| PROCEDURAL POSTURE | Insureds sought review of a Washington Court of Appeals decision reversing partial summary judgment that held the insurer had a duty to defend and directing dismissal of the insureds' claims. The Washington Supreme Court reviewed the duty-to-defend rulings and related bad-faith, Consumer Protection Act, settlement, damages, and attorney-fee issues. |
| STANDARD OF REVIEW | Partial summary judgment and insurance-contract interpretation are reviewed de novo. The appellate court applies the same inquiry as the trial court. |
| PRECEDENTIAL VALUE | published precedential opinion |
| PARTIES | Robert C. Woo, D.D.S., Anne M. Woo, the marital community composed thereof v. Fireman's Fund Insurance Company, National Surety Corporation |

## TOPICS

duty to defend · insurance coverage · insurance bad faith · consumer protection · declaratory relief insurance

## PRACTICE AREAS

insurance coverage · insurance bad faith · consumer protection · torts

## QUESTIONS PRESENTED

1. Whether Fireman's Fund had a duty to defend under the professional liability provision.
2. Whether Fireman's Fund had a duty to defend under the employment practices liability provision.
3. Whether Fireman's Fund had a duty to defend under the general liability provision's bodily-injury coverage.
4. Whether Fireman's Fund had a duty to defend under the general liability provision's personal-injury coverage.
5. Whether the jury's bad-faith and Consumer Protection Act verdicts, the jury instructions, the settlement ruling, and the emotional-distress damages award could stand.
6. Whether Woo was entitled to attorney fees and costs on appeal.

## HOLDINGS

1. Fireman's Fund had a duty to defend because the complaint's allegations that Woo inserted the boar-tusk flippers during a dental procedure while operating a dental office could conceivably fall within the policy's broad definition of dental services and the practice of dentistry.
2. An insurer may not deny a defense by relying on an equivocal interpretation of case law when the complaint potentially alleges covered conduct; the insurer must give the insured the benefit of the doubt.
3. Fireman's Fund had no duty to defend under the employment practices liability provision because the complaint did not allege a wrongful discharge as defined by the policy.
4. Fireman's Fund had a duty to defend under the bodily-injury coverage because the complaint included negligent causes of action and did not clearly establish that Woo expected or intended the specific injuries Alberts alleged.
5. Fireman's Fund had a duty to defend under the personal-injury coverage because the complaint alleged injuries arising from conduct occurring during Woo's dental business and did not clearly allege that the injuries were expected or intended.
6. A new trial was not warranted because the reversal of the Court of Appeals restored coverage under the professional liability provision, which was the principal focus of the case and supported the jury's bad-faith verdict.
7. The trial court did not err by instructing the jury that Fireman's had breached its duty to defend while leaving the jury to decide whether Fireman's acted in bad faith or violated the Consumer Protection Act.

8. The trial court did not err in resolving Fireman's collusion challenge to the settlement or in denying relief from the jury's emotional-distress damages award.
9. Woo was entitled to attorney fees and costs on appeal because he prevailed in the duty-to-defend action and under the Washington Consumer Protection Act.

### KEY QUOTATIONS

> *"In sum, the duty to defend is triggered if the insurance policy conceivably covers the allegations in the complaint, whereas the duty to indemnify exists only if the policy actually covers the insured's liability."* (at 459)

> *"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."* (at 463)

> *"By these facts, Alberts unambiguously alleges that her injuries were the consequence solely of Woo's intentional conduct, none of which involves providing dental services."* (at 469)

### FACTUAL BACKGROUND

Dr. Robert Woo, an oral surgeon, performed a dental procedure on employee Tina Alberts while she was anesthetized. During the procedure, Woo inserted temporary flippers shaped like boar tusks, had photographs taken of Alberts with the tusks and her eyes pried open, and later allowed staff to give her the photographs. Alberts sued Woo for multiple tort, employment, and negligence claims; Fireman's Fund refused to defend, and Woo defended and settled the underlying action for $250,000.

### PROCEDURAL HISTORY

An employee sued Dr. Woo alleging tort, wage, retaliation, medical-negligence, informed-consent, and emotional-distress claims arising from a practical joke during a dental procedure. Fireman's Fund refused to defend under the professional liability, employment practices liability, and general liability provisions. The trial court granted partial summary judgment for Woo on the duty to defend; after trial, a jury found bad faith and a Consumer Protection Act violation and awarded damages. The Court of Appeals reversed and ordered dismissal. The Supreme Court partially reversed the Court of Appeals and reinstated the trial court's judgment based on the jury verdict.

### DISPOSITION

other

### CASES CITED

- Weyerhaeuser Co. v. Commercial Union Insurance Co., 142 Wash. 2d 654, 692 n. 17, 15 P.3d 115 (2000)
- Roller v. Stonewall Insurance Co., 115 Wash. 2d 679, 682, 801 P.2d 207 (1990)
- Butzberger v. Foster, 151 Wash. 2d 396, 89 P.3d 689 (2004)
- Hayden v. Mutual of Enumclaw Insurance Co., 141 Wash. 2d 55, 64, 1 P.3d 1167 (2000)

- Truck Insurance Exchange v. Van-Port Homes, Inc., 147 Wash. 2d 751, 760-761, 765, 58 P.3d 276 (2002)
- Unigard Insurance Co. v. Leven, 97 Wash. App. 417, 425, 983 P.2d 1155 (1999)
- Kirk v. Mt. Airy Insurance Co., 134 Wash. 2d 558, 561, 951 P.2d 1124 (1998)
- R.A. Hanson Co. v. Aetna Insurance Co., 26 Wash. App. 290, 294-295, 612 P.2d 456 (1980)
- Atlantic Mutual Insurance Co. v. Roffe, Inc., 73 Wash. App. 858, 862, 872 P.2d 536 (1994)
- E-Z Loader Boat Trailers, Inc. v. Travelers Indemnity Co., 106 Wash. 2d 901, 907, 726 P.2d 439 (1986)
- Standard Fire Insurance Co. v. Blakeslee, 54 Wash. App. 1, 771 P.2d 1172 (1989)
- Washington Insurance Guaranty Association v. Hicks, 49 Wash. App. 623, 627, 744 P.2d 625 (1987)
- St. Paul Fire & Marine Insurance Co. v. Asbury, 149 Ariz. 565, 720 P.2d 540 (Ct. App. 1986)
- Grifin v. Allstate Insurance Co., 108 Wash. App. 133, 138, 29 P.3d 777, 36 P.3d 552 (2001)
- Safeco Insurance Co. v. Butler, 118 Wash. 2d 383, 392, 823 P.2d 499 (1992)
- Tank v. State Farm Fire & Casualty Co., 105 Wash. 2d 381, 390, 715 P.2d 1133 (1986)
- Grange Insurance Co. v. Brosseau, 113 Wash. 2d 91, 93-94, 776 P.2d 123 (1989)
- Woo v. Fireman's Fund Insurance Co., 128 Wash. App. 95, 114 P.3d 681 (2005)
- Woo v. Fireman's Fund Insurance Co., 156 Wash. 2d 1035, 134 P.3d 1171 (2006)
- Seeley v. State, 132 Wash. 2d 776, 808 n. 20, 940 P.2d 604 (1997)
- N.Y. Underwriters Insurance Co. v. Doty, 58 Wash. App. 546, 549, 794 P.2d 521 (1990)
- Philadelphia Fire & Marine Insurance Co. v. Grandview, 42 Wash. 2d 357, 255 P.2d 540 (1953)
- Bingaman v. Grays Harbor Community Hospital, 103 Wash. 2d 831, 835, 699 P.2d 1230 (1985)
- Hill v. GTE Directories Sales Corp., 71 Wash. App. 132, 140, 856 P.2d 746 (1993)
- Svendsen v. Stock, 143 Wash. 2d 546, 560, 23 P.3d 455 (2001)
- Amazon.com International, Inc. v. American Dynasty Surplus Lines Insurance Co., 120 Wash. App. 610, 619-620, 85 P.3d 974, review denied, 152 Wash. 2d 1030, 103 P.3d 200 (2004)

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