

No. 67952-0-1

IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

WESTERN NATIONAL ASSURANCE COMPANY, a Washington  
corporation, Respondent,

v.

MAXCARE OF WASHINGTON, INC., a Washington corporation,  
Appellant.

APPELLANT'S REPLY BRIEF

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## **I. SUMMARY OF REPLY ARGUMENT**

The overarching issue presented by this appeal is whether respondent Western National Assurance Company (“WNAC”) has a duty to defend its policyholder MaxCARE of Washington, Inc. (“Maxcare”) in an underlying suit (the “*Cueva* Suit”) alleging that Maxcare caused bodily injury and property damage to the plaintiffs in the *Cueva* Suit. That overarching issue in turn implicates the following two issues:

- (1) What is Maxcare’s potential liability in that *Cueva* Suit?
- (2) Must the Total Pollution Exclusion (“TPE”) in Maxcare’s liability policy be interpreted as barring coverage for all of that potential liability?

**Maxcare’s Potential Liability.** The cornerstone of the duty to defend determination under Washington law is the policyholder’s potential liability. Potential liability is determined based on the allegations of the complaint against the policyholder and purported facts obtained during discovery (“extrinsic facts”) supporting the existence of a duty to defend.<sup>1</sup>

Extrinsic facts are needed to understand Maxcare’s potential liability in the *Cueva* Suit because those facts clarify and correct the complaint. In fact, the Cuevas could not even present a prima facie case at

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<sup>1</sup> Maxcare’s recitation of various “extrinsic facts” is not intended and may not be construed as an admission that such facts are admissible “evidence,” are in any way true, or render Maxcare liable to the plaintiffs in the *Cueva* Suit. To the contrary, Maxcare denies that those facts are true and that it has any liability in the *Cueva* Suit. Washington law nonetheless requires consideration of those facts in the duty to defend determination.

trial without presenting such extrinsic facts, because they themselves lack personal or specialized knowledge needed to testify to facts relating to several required elements of their claims. And Washington's civil rules allow the complaint to be deemed amended later to conform to such extrinsic facts.

The complaint and extrinsic facts in the *Cueva* Suit confirm that Maxcare faces potential liability for:

- (1) symptoms resulting from a failure to clean organic particulate matter from the Cueva home;
- (2) symptoms resulting from hysterical fears caused by Maxcare's disregard of Ms. Cuevas' instructions concerning the use of cleaning supplies in the Cueva home;
- (3) symptoms resulting from Maxcare's failure to investigate/detect/warn about the pre-existence of formaldehyde throughout the Cueva home; and
- (4) symptoms resulting from Maxcare's use of cleaning supplies to clean the Cueva home.

**Interpretation of the WNAC Policy.** WNAC cannot carry its substantial burden of proving that the only reasonable way to interpret the TPE is as barring coverage for each type of potential liability facing Maxcare in the *Cueva* Suit. That is because it is at least reasonable to interpret the TPE as not applying to bar coverage for one or more types of potential liability facing Maxcare in the *Cueva* Suit. The decisional law relied upon by WNAC is inapposite because it does not involve potential

liability remotely resembling that facing Maxcare in the *Cueva* Suit.

The trial court's entry of summary judgment in favor of WNAC should therefore be reversed.

## II. ARGUMENT

### A. Determining Maxcare's Potential Liability In *Cueva* Suit

#### 1. WNAC Must Consider Known Extrinsic Facts.

An insurer's duty to defend determination must be based upon its policyholder's potential liability.<sup>2</sup> An insurer must give its policyholder the "benefit of the doubt" in determining whether a duty to defend exists.<sup>3</sup> That means the insurer must consider extrinsic facts clarifying the policyholder's potential liability or correcting a complaint's express allegations, but only to support the existence of a duty to defend.<sup>4</sup>

WNAC's response brief asks this Court to rule that in evaluating its duty to defend, an insurer may focus myopically upon the allegations made in the complaint against its policyholder and ignore known extrinsic facts creating potential liability for that policyholder.<sup>5</sup>

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<sup>2</sup> *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002) ("The duty to defend arises at the time an action is first brought, and is based on the potential for liability.").

<sup>3</sup> *Id.* at 761.

<sup>4</sup> *Id.*

<sup>5</sup> Response Brief at 9-11.

WNAC's request relies primarily upon the general rule that the duty to defend attaches upon filing of a complaint against a policyholder.<sup>6</sup> But that rule merely establishes when an insurer must make its initial duty to defend determination, to prevent an insurer from delaying that determination due to lack of information. It does not mean an insurer may ignore known extrinsic facts supporting the existence of a duty to defend.

WNAC also argues that *Vanport* entitles an insurer to ignore known extrinsic facts supporting the existence of a duty to defend because that decision uses the permissive term "may" in discussing an insurer's consideration of such extrinsic facts.<sup>7</sup>

WNAC's argument directly contravenes *Vanport*'s mandate that an insurer give its policyholder the "benefit of the doubt" and consider extrinsic facts only to the extent they support the existence of a duty to defend. WNAC also fails to mention that in *Vanport*, the Washington Supreme Court relied upon two prior Washington decisions, *R.A. Hanson Co. v. Aetna Ins. Co.*, 26 Wn. App. 290, 612 P.2d 456 (1980), and *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 726 P.2d 439 (1986), which held that an insurer must consider known extrinsic

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<sup>6</sup> Response Brief at 8.

<sup>7</sup> Response Brief at 8-11.

facts in evaluating its duty to defend.<sup>8</sup> In *R.A. Hanson*, Division III held:<sup>9</sup>

[T]here are exceptions to the general rule that an insurer need look only to the pleadings to determine the extent of coverage. One exception is where the allegations are in conflict with the facts known to or ascertainable by the insurer.

Appleman states that a duty to defend arises from facts known or reasonably ascertainable by the insurer, and the insurer may not rely on the pleadings alone. An insurer must defend if the claim is potentially within the policy.

And in *E-Z Loader*, the Washington Supreme Court held:<sup>10</sup>

An insurance company is required to look beyond the allegations of the complaint if (a) the allegations are in conflict with facts known to or readily ascertainable by the insurer or (b) the allegations are ambiguous or inadequate.

Moreover, a full reading of *Vanport* and the authority cited therein confirms that the *Vanport* Court intended the permissive term “may” merely to contrast against circumstances also discussed under which an insurer “may not” consider extrinsic facts. Specifically:<sup>11</sup>

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<sup>8</sup> Response Brief at 11. Yet another decision relied upon by WNAC directly supports consideration of extrinsic facts here by acknowledging that an insurer must consider such extrinsic facts when brought to its attention – as Maxcare has done here. *Transamerica Ins. Co. v. Preston*, 30 Wn. App. 101, 632 P.2d 900 (1981) (“No facts have been alleged which could conceivably be within the policy’s coverage. Nor has Mr. Preston suggested any facts under which coverage would exist. In these circumstances, Transamerica is not required to investigate further to determine whether any facts do exist which would require it to defend this action.”) (citing *R.A. Hanson*, 26 Wn. App. at 296).

<sup>9</sup> *R.A. Hanson*, 26 Wn. App. at 294 (citations omitted; underline added).

<sup>10</sup> *E-Z Loader*, 106 Wn.2d at 908 (emphasis added).

<sup>11</sup> *Vanport*, 147 Wn.2d at 761. (underline added; italics in original).

[A]n insurer may not rely on facts extrinsic to the complaint in order to *deny* its duty to defend where, as here, the complaint can be interpreted as triggering a duty to defend.

Nor can WNAC avoid consideration of extrinsic facts by arguing that the TPE unambiguously applies to the allegations of the complaint in the *Cueva* Suit. That argument is nonsensical because the Washington Supreme Court has expressly held that whether or not a pollution exclusion applies to a particular claim depends upon the factual circumstances surrounding that claim.<sup>12</sup> The *Cueva* Suit complaint does not attempt to allege how Maxcare's cleaning supplies caused injury or damage or which of those cleaning supplies caused such injury and damage. Thus, WNAC cannot cite the purported unambiguity of the TPE as its reason for ignoring extrinsic facts needed to clarify Maxcare's potential liability and determine whether the TPE unambiguously applies.

In fact, given WNAC's argument that several decisions – namely, *Cook*, *City of Bremerton*, *City of Spokane*, *Quadrant*, and *Mark I* – are on-point and controlling with respect to the applicability of the TPE, those extrinsic facts are essential to an understanding of why none of those cases

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<sup>12</sup> *Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 183 n. 10, 110 P.3d 733 (2005).

actually controls here – that is, because the *Cueva* Suit involves potential liability that did not exist in those other cases.<sup>13</sup>

## **2. Consideration Of Extrinsic Facts Comports With Civil Rules.**

WNAC's extreme stance is also inconsistent with the civil rules. Washington's CR 8(a) provides that a suit is commenced by the filing of a "notice pleading" that need not specify the plaintiff's alleged injuries/damages or the defendant's alleged conduct giving rise to liability. Rather, the civil rules permit pre-trial discovery through which such specifics can be determined. And CR 15(b) provides that complaint can be deemed retroactively amended to conform to the evidence obtained through discovery. These rules reflect the reality that a plaintiff's "theory of the case" often changes and develops during the course of discovery and litigation.

Thus, although the initial duty to defend determination must be made when the complaint is the sole indicator of potential liability,

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<sup>13</sup> Acceptance of WNAC's argument would effectively authorize insurers to do the exact opposite of giving their policyholders the "benefit of the doubt" required by *Vanport*. Consider the example of an insurer that issues a liability policy insuring its policyholder's operation of a red buick. Under WNAC's argument, if that policyholder were sued in a personal injury suit alleging injury caused by the policyholder while operating a blue dodge, the insurer could refuse to defend its policyholder even if its policyholder provided traffic camera video obtained through discovery which proved that the plaintiff had been injured by the policyholder's insured red buick. The insurer could do so on the ground that although it is legally permitted to consider such extrinsic facts, it is not required to do so. Such a result would directly contravene *Vanport*, just as WNAC's disregard for extrinsic facts does here.

additional facts obtained through discovery effectively become part of the complaint that the insurer must consider in evaluating its duty to defend. In that respect, such facts obtained through discovery are not “extrinsic” at all, because they are part of the complaint the insurer must consider.

**3. Extrinsic Facts From Sources With Personal Or Specialized Knowledge Is Particularly Important.**

WNAC argues that it is entitled to ignore extrinsic facts from sources other than the Cuevas because those facts do not create a separate type of potential liability for Maxcare, but rather merely “call into doubt” the validity of the Cuevas’ claims against Maxcare.<sup>14</sup> As an initial matter, that argument admits that such extrinsic facts contradict the allegations made against Maxcare in the *Cueva* Suit complaint. Thus, those extrinsic facts must be considered under *Vanport* and the other Washington law discussed above. Moreover, that argument improperly attempts to usurp this Court’s authority to determine the potential liability facing Maxcare in the *Cueva* Suit.

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<sup>14</sup> See Response Brief at p. 27 (“Each and every one of these extrinsic facts relates solely to whether the Cuevas can prove that Maxcare’s chemicals caused their injuries (i.e., the uncovered allegations in the Cuevas’ Complaint). None of this testimony raises a potential for covered claims.”); Response Brief at 29 (“This testimony just further reinforces the difficulty that the Cuevas may have in proving their uncovered allegations . . . . They testify, in essence, that something other than Maxcare’s chemicals may have caused the injuries.”) (Emphasis added.)

WNAC also asks this Court to disregard extrinsic facts not set forth in the Cuevas' own discovery responses or deposition testimony.<sup>15</sup> WNAC cannot cite any authority supporting its request. *Vanport* and other Washington decisions simply do not impose such a limitation. In fact, Division I has expressly acknowledged that extrinsic facts from sources other than the claimants are relevant to the duty to defend.<sup>16</sup>

This argument also ignores that the Cuevas themselves contend that the sources of the extrinsic facts WNAC seeks to bar have personal knowledge concerning technical/specialized matters, and thus might be called upon to testify at trial.<sup>17</sup> Such testimony would be needed given the Cuevas' own disclaimers of personal knowledge concerning those matters – such as the actual cause and nature of their symptoms.<sup>18</sup>

Finally, the opinions of the Cuevas' testifying industrial hygienist Dr. Faeder would have been formed at the specific request of the Cuevas. Thus, try as WNAC might to distance the Cuevas from Dr. Faeder's opinions, those opinions are properly imputed to the Cuevas themselves.

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<sup>15</sup> Response Brief at 12-21.

<sup>16</sup> *McMahan & Baker, Inc. v. Continental Cas. Co.*, 68 Wn. App. 573, 580, 843 P.2d 1133 (1993) (expressly relying upon conclusions of claimant's expert in concluding that cost estimate exclusion invoked by insurer did not apply and thus duty to defend existed, stating: "Even if such [complaint] allegations are ambiguous or inadequate, the record contains other material indicating that the true nature of the complaint went to the heart of [policyholder's] engineering analysis.").

<sup>17</sup> CP 500-03; 631-660.

<sup>18</sup> Opening Brief at 14-19 (summarizing testimony in which Cuevas and certain physicians disclaim personal knowledge about cause and origin of Cuevas' symptoms).

WNAC's argument also ignores that at trial the Cuevas can attempt to present extrinsic facts from other sources in support of their claims against Maxcare. And if those extrinsic facts actually do "call into doubt" the Cuevas' ability to prove their "actual exposure" claims against Maxcare, that merely increases the likelihood that the Cuevas would present those extrinsic facts in an attempt to establish Maxcare's liability under alternative theories such as those identified in Maxcare's opening brief as creating other types of potential liability for Maxcare.<sup>19</sup>

**4. WNAC's Duty To Investigate For Extrinsic Facts Is Not At Issue Here.**

WNAC contends several Washington decisions support an insurer's purported right to ignore extrinsic facts supporting the existence of a duty to defend.<sup>20</sup> But those decisions do not support that contention. Rather, those decisions merely address the circumstances under which an insurer must affirmatively conduct its own factual investigation before making a duty to defend determination.

Here, the extrinsic facts supporting the existence of a duty to defend are known to WNAC because they were brought to WNAC's

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<sup>19</sup> WNAC also argues that those other alternative theories do not create potential liability triggering a duty to defend because the Maxcare should not actually be adjudged liable on those other alternative theories. Response Brief at 25-39. But that argument does not enable WNAC to escape its duty to defend because that duty to defend exists regardless of the merit of the claims giving rise to a policyholder's potential liability.

<sup>20</sup> Response Brief at 9-11.

attention by Maxcare. Thus, WNAC's affirmative duty to investigate for such extrinsic facts is not at issue and the decisions cited by WNAC on that issue are irrelevant.

**B. The TPE Does Not Apply To Maxcare's Potential Liability.**

**1. Decisions Relied Upon By WNAC Are Inapposite.**

WNAC's response brief relies upon Washington and non-Washington decisional law which WNAC contends stands for the proposition that the TPE unambiguously applies to bar coverage for the *Cueva* Action.<sup>21</sup> Maxcare's opening brief explained that those decisions are inapposite because they involve fundamentally distinct factual circumstances. For example:

- None of those cases involved the type of potential liability Maxcare faces in the *Cueva* Suit, which are set forth in Section I above and discussed in further detail below.
- *Cook* and *Quadrant* involved the duty to indemnify for an adverse judgment, which is narrower than the duty to defend at issue here. That also means the court in each case was able to base its coverage determination upon specific factual findings concerning the nature and cause of the plaintiff's alleged injuries.
- None of the non-Washington decisions relied upon by WNAC applies Washington law or, consequently, Washington's policy interpretation and duty to defend rules.

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<sup>21</sup> Response Brief at 12-22, 31-35, 38. Rather than restating all reasons why the decisions relied upon by WNAC do not apply here, Maxcare merely notes that that explanation is provided at pages 41-49 of Maxcare's opening brief, which are reincorporated herein by reference.

Given those material distinctions, WNAC's characterization of those decisions as "factually similar" to the *Cueva* Suit is inaccurate.

In addition, given the Washington Supreme Court's *Quadrant* decision specifically recognizing that whether or not a pollution exclusion is ambiguous depends upon the factual circumstances of the suit for which coverage is sought, those decisions simply do not and cannot support WNAC's argument that the TPE unambiguously applies to bar coverage for the materially distinct claims asserted against Maxcare in the *Cueva* Suit.

**2. Extrinsic Facts In *Cueva* Suit Create Potential For Covered Liability.**

Maxcare's opening brief identifies the different types of potential liability that the complaint and extrinsic facts discovered in the *Cueva* Suit create for Maxcare in that suit, and explains that WNAC has a duty to defend the *Cueva* Suit because the TPE does not unambiguously apply to bar coverage for each of those types of potential liability facing Maxcare.

WNAC asks this Court to ignore all but one of those identified types of potential liability – specifically, potential liability for injuries caused by actual exposure to the cleaning supplies Maxcare used in the *Cueva* home – on the ground that the other three types of potential liability

are based upon the testimony and reports of others.<sup>22</sup>

That argument fails because, as explained in Section II.A.3 above, it ignores that the Cuevas lack personal or technical/specialized knowledge needed to testify on certain issues in the *Cueva* Suit – for example, their symptoms, the cause of those symptoms, and conditions in their home – and thus must address such issues through others possessing such knowledge.

WNAC devotes the remainder of its response brief to arguing that even if the extrinsic facts create all four types of potential liability for Maxcare in the *Cueva* Suit, WNAC still has no duty to defend that suit because the TPE unambiguously applies to bar coverage for each type of liability. The specific points made by WNAC with respect to those arguments are addressed below.

**a. Potential Liability For Failing To Clean Organic Particulate Matter From Cueva Home**

The Cuevas’ retained industrial hygienist, Laurence Lee, authored a report and provided testimony concluding that the types of symptoms the Cuevas complain about in their deposition testimony might result from various types of organic – that is, non-chemical – “particulate matter” such as skin flakes, clothing fiber, dog dander, insect debris, etc. remaining in

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<sup>22</sup> Response Brief at 25-39.

the Cueva home after Maxcare finished its work there.<sup>23</sup> Those extrinsic facts create potential liability for failing to clean that organic particulate matter.

Organic particulate matter does not fall within the any reasonable interpretation of the WNAC policy's "pollutant" definition. Thus, Maxcare's potential liability created by those extrinsic facts triggers WNAC's duty to defend.

WNAC's response brief myopically argues that such potential liability does not trigger a duty to defend because the TPE bars coverage for the alleged release of pollutants and the "Cuevas *allege* that their injuries were caused by the release of toxic chemicals."<sup>24</sup> But under *Vanport*, an insurer has a duty to defend its insured in a suit creating any potential for liability that would be covered under that insurer's policy. Sections II.B.2.a-c explain that Maxcare faces other types of liability in the *Cueva* Suit. Thus, WNAC could not escape its duty to defend the *Cueva* Suit even if WNAC could prove that suit also created the potential for liability that would not be covered under that insurer's policy.

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<sup>23</sup> Opening Brief at 18.

<sup>24</sup> Response Brief at 30-31. Section II.B.2.d explains Maxcare's disagreement with the premise for this assertion by WNAC.

The extrinsic facts concerning organic particulate matter create the potential for liability to which the TPE does not apply. That potential liability triggers WNAC's duty to defend.

**b. Potential Liability For Causing Fear Of Chemical Exposure**

Ms. Cueva testified that Maxcare's disregard for her expressed concerns about her family's chemical sensitivities and her instruction that Maxcare obtain her pre-approval of all cleaning supplies used in her home made her fear for her daughter's health.<sup>25</sup> Dr. Van Hee testified that the Cuevas' symptoms resulted from hysterical fears of chemical exposure, not Maxcare's cleaning supplies.<sup>26</sup> Dr. Van Hee also testified that those hysterical fears could be unrelated to any actual chemical exposure.<sup>27</sup>

Those extrinsic facts create the potential that Maxcare could be adjudged liable for symptoms resulting solely from hysterical fears of chemical exposure that are entirely unrelated to actual chemical exposure. The TPE is reasonably interpreted as not applying to such liability.

Moreover, under *Kent Farms*, the TPE does not apply to such liability arising solely out of an alleged defect in Maxcare's manner of doing business, rather than the toxic character of any cleaning supplies

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<sup>25</sup> Opening Brief at 13 (citing Ms. Cueva's deposition testimony).

<sup>26</sup> Opening Brief at 17 (citing Dr. Van Hee's deposition testimony); CP 500-02 (Cuevas' discovery responses identifying Dr. Van Hee as physician with personal knowledge of their symptoms).

<sup>27</sup> *Id.*

used by Maxcare.

WNAC tries to avoid *Kent Farms* by questioning Dr. Van Hee's competency to testify about the nature and cause of the Cuevas' symptoms.<sup>28</sup> But WNAC ignores that the Cuevas disclosed Dr. Van Hee as a physician with knowledge about their physical condition based on his personal examination of them.<sup>29</sup> And WNAC's argument that the Cuevas have not "adopted" Dr. Van Hee's conclusions is a red herring, as *Vanport* does not require such adoption to make extrinsic facts relevant to an insurer's duty to defend determination.<sup>30</sup>

WNAC also argues that the TPE applies to bar coverage for the Cuevas' hysterical fear allegations because those fears arise out of the "threatened" release of pollutants.<sup>31</sup> That argument is flawed because the term "threatened" used in the TPE is reasonably interpreted as referring to a threat arising separate from the claimant alleging injury. Conversely, it is not reasonable to interpret "threat" to mean a claimant's own psychological fears. Moreover, the Cuevas fears did not result from the "threatened" use of unapproved cleaning supplies in their home. Rather,

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<sup>28</sup> Response Brief at 36.

<sup>29</sup> CP 500-02 (Cuevas' discovery responses identifying Dr. Van Hee as physician with personal knowledge of their symptoms). Indeed, the testimony of a physician such as Dr. Van Hee is necessary given that the Cuevas are incompetent to testify about the medical cause and origin of their own symptoms.

<sup>30</sup> See *McMahan & Baker, Inc.*, 68 Wn. App. at 580 (cited at n. 21 above).

<sup>31</sup> Response Brief at 36.

those fears resulted from the fear that they had been injured by the actual use of cleaning supplies in their home. But Dr. Van Hee has testified that the Cuevas were not injured by the cleaning supplies actually used in their home.<sup>32</sup> Thus, WNAC's "threatened" argument falls short.

WNAC also tries to connect the Cuevas hysterical fears (and resulting symptoms) to some prior chemical exposure.<sup>33</sup> Although Dr. Van Hee mentioned prior exposure to chemical smells as one possible source of the Cuevas' fears, he also identified several other possible causes entirely unrelated to chemicals.<sup>34</sup> Thus, WNAC's statement that the Cuevas' fear "is allegedly a remnant of their initial actual exposure to high levels of chemical VOCs in the home" is simply inaccurate. Because a factfinder could conclude that the Cuevas' hysterical fears do not result from prior chemical exposure, Dr. Van Hee's testimony creates the potential that Maxcare could be adjudged liable for causing symptoms entirely unrelated to chemicals.

WNAC also argues that Maxcare's alleged failure to follow Ms. Cuevas' instructions about the use of chemicals triggers the TPE because those instructions mentioned the use of chemicals.<sup>35</sup> This

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<sup>32</sup> Opening Brief at 17 (citing Dr. Van Hee's deposition testimony).

<sup>33</sup> Response Brief at 37-38.

<sup>34</sup> Opening Brief at 17 (citing Dr. Van Hee's deposition testimony).

<sup>35</sup> Response Brief at 37-38. Contrary to WNAC's assertion, the Cuevas are not alleging that Maxcare's alleged lies about chemical use in their home caused them to enter their

argument simply proves too much. Dr. Van Hee testified that the Cuevas were not harmed by chemicals.<sup>36</sup> The TPE applies to injury or damage caused by chemicals, not injury or damage involving chemicals. Accepting WNAC's argument would improperly negate the TPE's causation requirement.

Finally, WNAC argues that the TPE applies to the Cuevas' hysterical fear allegations because those fears are triggered by odors constituting a "pollutant" under the TPE.<sup>37</sup> Although the *City of Bremerton* and *City of Spokane* decisions cited by WNAC held that odors can constitute pollutants, those holdings were based on the noxious/harmful nature of the odors involved in those cases.<sup>38</sup> It is at least reasonable to interpret the term "pollutant" as requiring some degree of harmfulness or objective level of noxiousness. Here, Dr. Van Hee testified that the Cuevas symptoms were caused by their own psychological reaction to smells in their home, and were not not harmed by Maxcare's cleaning supplies.<sup>39</sup> Thus, those harmless smells do not constitute an "odor" to which the TPE might apply.

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home and become exposed. Maxcare has never argued that the Cuevas are making such allegations or that such allegations create potential liability for Maxcare. That assertion is a red herring.

<sup>36</sup> Opening Brief at 17 (citing Dr. Van Hee's deposition testimony).

<sup>37</sup> Response Brief at 38.

<sup>38</sup> *City of Bremerton v. Harbor Ins. Co.*, 82 Wn. App. 17, 23, 963 P.2d 194 (1998); *City of Spokane v. United National Ins. Co.*, 190 F.Supp.2d 1209, 1217-18 (E.D. Wash. 2002).

<sup>39</sup> Opening Brief at 17 (citing Dr. Van Hee's deposition testimony).

The TPE is reasonably interpreted as not applying to liability for symptoms caused solely by hysterical fears of the use of chemicals in the Cueva home that are entirely unrelated to any prior chemical exposure. Thus, that potential liability triggers WNAC's duty to defend.

**c. Potential Liability For Failing To Investigate/Detect/Warn Of Pre-Existing Formaldehyde**

The Cuevas' testifying industrial hygienist, Dr. Faeder, opined that elevated formaldehyde levels existed throughout the Cueva home since it was constructed.<sup>40</sup> He nonetheless blamed Maxcare for negligently failing to investigate/detect/warn the Cuevas about that formaldehyde. Those opinions create the potential that Maxcare could be adjudged liable for symptoms from exposure to formaldehyde not created by Maxcare.

The TPE is reasonably interpreted as not applying to injury resulting from such a "pollutant" which was not discharged or released by Maxcare, and which pre-dated the Cueva home as a habitable structure because it is contained within the materials comprising that home.<sup>41</sup>

WNAC's response brief argues that the TPE applies to such potential liability because the TPE does not require that the policyholder

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<sup>40</sup> Opening Brief at 17-18 (citing Dr. Faeder's deposition testimony).

<sup>41</sup> See *Meridian Mut. Ins. Co. v. Kellman*, 197 F.3d 1178 (6<sup>th</sup> Cir. 1999) (holding that "discharge" is reasonably interpreted as not applying to exposure to toxic substances confined within general area of their intended use); *Bosserman Aviation Equip., Inc. v. U.S. Liab. Ins. Co.*, 183 Ohio App.3d 29, 34, 915 N.E.2d 687 (2009); *Kerr-McGee Corp. v. Georgia Casualty & Surety Co.*, 256 Ga.App. 458, 463, 568 S.E.2d 484 (2002).

discharge or release that pollutant in order to apply.<sup>42</sup> The *Quadrant* decision relied upon by WNAC does not support that argument.<sup>43</sup> WNAC also relies upon the Third Circuit's unpublished *Mark I* decision.<sup>44</sup> But *Mark I* does not apply here because it involved a claim that the policyholder in that case had both discharged pollutants and failed to warn the claimants about those pollutants.<sup>45</sup> That is not the case here.

WNAC strains to make *Mark I* fit here by citing to a single line of admittedly incompetent, speculative causation testimony from Mr. Cueva which conflicts directly with Dr. Faeder's stated opinions.<sup>46</sup> But Dr. Faeder's opinions, if believed by a factfinder, create the potential that Maxcare could be adjudged liable for failing to investigate/detect/warn about formaldehyde not discharged or released by Maxcare.

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<sup>42</sup> Response Brief at 31-33.

<sup>43</sup> *Quadrant* does not support that argument because the appellate court expressly noted that the release at issue was legally attributable to the policyholder because it was caused by the policyholder's subcontractor. *Quadrant Corp. v. American States Ins. Co.*, 118 Wn. App. 525, 527, 76 P.3d 773 (2003) ("Both suits involved claims by or on behalf of Kaczor alleging the Insureds, through their contractor, were negligent in applying the weatherproofing solution....") (emphasis added). Here, there is no dispute that Maxcare was not involved in the construction of the Cueva home, and thus the formaldehyde created by that construction.

<sup>44</sup> Response Brief at 32.

<sup>45</sup> *Mark I*, 112 Fed. Appx. at 157. WNAC's response brief also cites eight other non-Washington decisions as supporting its argument that the TPE applies to bar coverage for a policyholder's claimed failure to warn about the existence of pollutants not discharged or released by that policyholder. Response Brief at pp. 32-33. Those decisions are distinguishable for the reasons set forth at pages 47-49 of Maxcare's opening brief, and do not support WNAC's argument because they involve instances where the policyholder is alleged to be liable for the discharge/release in the first place. Conversely, Maxcare is potentially liable for formaldehyde it did not discharge/release.

<sup>46</sup> Response Brief at 18-19, 33-34.

WNAC attempts to argue that the TPE still applies to the presence of pollutants within a confined space, but is unable to cite any Washington law supporting that argument. Instead, it resorts to its own self-serving explanation for why confinement should not matter, relying upon non-Washington decisions applying the TPE to such confined pollutants.

Notably, WNAC does not even try to distinguish or rebut the extensive decisional law cited in Maxcare's opening brief which holds that the pre-existence/presence of pollutants within an intended confined space does not constitute a discharge or release to which the TPE would apply.<sup>47</sup>

The Washington Supreme Court has held that in the absence of controlling Washington authority on a given policy interpretation issue, an insurer confronted with a split of non-Washington authority on that issue must adopt the interpretation favoring coverage.<sup>48</sup> Indeed, the Court held that it is bad faith for an insurer to deny coverage in those circumstances.<sup>49</sup>

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<sup>47</sup> See Opening Brief at p. 40 n. 44, p. 44 n. 83; see also *Island Associates, Inc. v. Eric Group, Inc.*, 894 F.Supp. 200 (W.D. Pa. 1995) (pollution exclusion was ambiguous as it relates to pollutants confined within the vicinity of their intended use and therefore did not bar coverage for claim alleging injuries caused by fumes from a cleaning compound which was confined to a small area within a worksite).

<sup>48</sup> *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 408, 229 P.3d 693 (2010) ("The lack of any Washington case directly on point and a recognized distinction between preassault and postassault negligence in other states presented a legal uncertainty with regard to Alea's duty. Because any uncertainty works in favor of providing a defense to an insured, Alea's duty to defend arose when Dorsey brought suit against Café Arizona.").

<sup>49</sup> *Id.* at 413.

The TPE is reasonably interpreted as not applying to liability for injury caused by formaldehyde contained in the building materials used to construct the Cueva home, and thus not created by Maxcare. Thus, that potential liability triggers WNAC's duty to defend.

**d. Potential Liability For Using Cleaning Supplies**

The Cuevas also allege that they suffered injury/damage due to Maxcare's use of cleaning supplies in their home. Maxcare's opening brief explains that interpreting all of Maxcare's cleaning supplies as "pollutants" would result in an unreasonably overbroad application of the TPE to Maxcare's insured operations and negate much of the coverage Maxcare purchased from WNAC.<sup>50</sup>

WNAC argues that any item identified as an "irritant" in a Material Safety Data Sheet must constitute a "pollutant" to which the TPE unambiguously applies.<sup>51</sup> That argument reveals that WNAC would apply the TPE to claims arising out of not only Maxcare's cleaning products, but also other innocuous domestic products like Dawn dish detergent, latex paint, minty toothpaste, and "Simple Green" cleaners – because each is identified as an "irritant" in its MSDS.<sup>52</sup> WNAC's application of the TPE to any suit involving such an MSDS is unreasonably broad.

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<sup>50</sup> Opening Brief at 39-40.

<sup>51</sup> Response Brief at 43-44.

<sup>52</sup> CP 943-977, 985 n. 19.

Nor does WNAC deny that it knowingly agreed to insure Maxcare for liability arising out of janitorial/cleaning operations. Instead, WNAC argues that its policy is not wholly illusory because its underwriting file shows that it knew Maxcare also had other operations.<sup>53</sup> The fact that WNAC also insured Maxcare's other operations does not diminish WNAC's agreement to insure Maxcare's cleaning operations. If WNAC intended not to insure Maxcare's cleaning operations, that intention was unexpressed and cannot be enforced against Maxcare.

Another red herring argument by WNAC relies upon other contents of WNAC's underwriting file concerning Maxcare. Specifically, WNAC argues that because a potential customer presented WNAC with a standard form contract requiring those working with that customer to maintain insurance specifically applicable to environmental liability, that somehow means the TPE bars coverage for the *Cueva* Suit.<sup>54</sup>

The fact that Maxcare's potential customer routinely requires separate insurance dedicated to environmental liabilities merely indicates that customer seeks to ensure that the limits available for such potential liabilities are protected from depletion for other more common liabilities. It does not reflect the scope of Maxcare's existing coverage; nor does

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<sup>53</sup> Response Brief at 39-41.

<sup>54</sup> Response Brief at 42-43.

Maxcare's decision not to purchase that insurance. If anything, Maxcare's decision not to purchase the additional insurance required by that potential customer reflected Maxcare's reasonable belief that its WNAC policy already covered liability arising out of Maxcare's janitorial operations.

More important is WNAC's reliance upon its underwriting file concerning Maxcare in an attempt to avoid coverage.<sup>55</sup> By relying upon underwriting history – in an attempt to avoid coverage, in direct violation of *Vanport* – WNAC invites consideration of other extrinsic facts, including those relating to the underwriting of Maxcare's policy. Those facts include the drafting history of the TPE – which supports coverage.

As explained in *Kent Farms*, the purpose of pollution exclusions is to avoid the massive liability associated with CERCLA-like environmental cleanups.<sup>56</sup> The *Cueva* Suit involves alleged injury/damage resulting from Maxcare's cleaning work within the Cueva home, not a CERCLA-like environmental liability. Thus, the TPE should not be applied to bar coverage for that cleaning company's liability to its customers.

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<sup>55</sup> See Response Brief at 39-44.

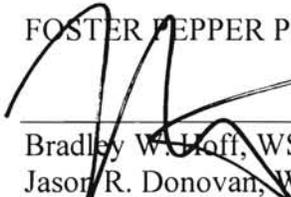
<sup>56</sup> Opening Brief at 39 (citing *Kent Farms*, 140 Wn.2d at 400, 401).

**III. CONCLUSION**

For the foregoing reasons, the trial court should be reversed.

RESPECTFULLY SUBMITTED this 16th day of May, 2012.

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IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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WESTERN NATIONAL ASSURANCE COMPANY, a Washington  
corporation, Respondent,

v.

MAXCARE OF WASHINGTON, INC., a Washington corporation,  
Appellant.

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**CERTIFICATE OF SERVICE**

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<sup>1</sup>  
ORIGINAL

**CERTIFICATE OF SERVICE**

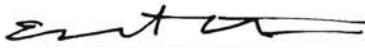
I, Elizabeth Whitney, declare under penalty of perjury under the laws of the State of Washington that I am now and at all times mentioned herein, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On May 16, 2012, I caused to be served in the manner noted a copy of the foregoing Appellant's Reply Brief upon designated counsel:

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- Via KCSC E-Service
- Via Process Service
- Via Hand-Delivery
- Via Email
- Via Facsimile
- Via US Mail

DATED in Seattle, Washington on this 16th day of May, 2012.

  
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Elizabeth Whitney

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