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No. 55068-3-I

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

PLANET EARTH FOUNDATION, JOHN KEITH BLUME, JR. and
LISA BLUME,

Plaintiffs/Appellants,

v.

GULF UNDERWRITERS INSURANCE COMPANY and AMERICAN
BUSINESS & PERSONAL INSURANCE, INC.,

Defendants/Respondents.

BRIEF OF APPELLANTS

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I. ASSIGNMENTS OF ERROR

The Superior Court erred in denying Plaintiffs' and Appellants' Motion for Partial Summary Judgment Re: Duty to Defend. Specifically, the Superior Court erred in failing to hold that:

1. Where the liability insurance policy issued by defendant and respondent Gulf Underwriters Insurance Company ("Gulf") to plaintiffs and appellants, Planet Earth Foundation, John Keith Blume, Jr. and Lisa Blume (collectively "Planet Earth"), contained an exclusion for liability "with respect to the rendering of, or failure to render professional services for any party," and where Washington law defines "professional services" so as to exclude Planet Earth's entire business, and where that "professional services" exclusion was reasonably susceptible to multiple interpretations that would lead to coverage, the exclusion was ambiguous as applied to the business operations of Planet Earth and must be interpreted in favor of coverage; and

2. Therefore, Gulf was obligated to defend Planet Earth against the underlying lawsuit brought against Planet Earth by New York University.

II. STATEMENT OF THE CASE

A. Planet Earth Foundation and its Business

Planet Earth is a Washington non-profit foundation. It is a public-service media agency. Its work has included the production of public-service advertising for other non-profits. Clerk's Papers at 66 (hereinafter "CP __"). Planet Earth has been in business since 1977. Planet Earth's core business is the creation of advertising campaigns for a wide variety of public-service organizations. Its clients hire Planet Earth for the creative abilities of its founders and principals, Keith Blume and Lisa Blume. It is undisputed that Planet Earth does not transmit or broadcast any of the advertising content it creates. CP 66-67.

B. The Non-Profit Management and Organization Liability Policy Issued by Defendant Gulf Underwriters Insurance Company

During the time relevant to this appeal, Gulf insured Planet Earth and the Blumes under three liability policies: (1) a commercial general liability ("CGL") policy; (2) an excess CGL policy; and (3) a "Non-Profit Management and Organization Liability Insurance Policy" (hereinafter "the Policy"). CP 67. The CGL policies insured Planet Earth against liability claims for property damage or bodily injury. CGL policies protect the insured against claims for physical injury to a third party's property or person.

The Policy, which is the contract at issue in this appeal, granted coverage by the following insuring agreement:

The Insurer will pay on behalf of the Insureds Loss . . . which is incurred by the Insureds as the result of any Claim first made against the Insureds and reported in writing to the Insurer during the Policy Period . . . for a Wrongful Act.

CP 104.

The Policy further defines “Wrongful Act” in relevant part as follows:

Wrongful Act means any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed or attempted, by [Planet Earth] or by [the Blumes], individually or collectively
.....

CP 105.

The Policy, then, in contrast to the CGL policy’s requirement of physical injury to property or person, insured Planet Earth against liability claims resulting from non-physical “Wrongful Acts”: errors, omissions, misleading statements, breaches of duty, and the like.

The Policy required Gulf to pay on behalf of Planet Earth any covered liability incurred by Planet Earth, whether by judgment in favor of or settlement with a third-party claimant. CP 104. This duty is commonly known as the “duty to indemnify” or the “duty to pay.” The Policy also

required Gulf to defend Planet Earth: “The Insurer shall have the right and duty to defend any Claim covered by this Policy, even if any of the allegations are groundless, false or fraudulent.” Id. This appeal concerns Gulf’s duty to defend its insured.

C. The Dealings Between Planet Earth and New York University

On July 27, 2002, Planet Earth entered into a contract with New York University (“NYU”) to create public-service advertising content to promote NYU’s child mental-health services. The work called for by the contract was to be completed within a 12-month period. The contract had a total value to Planet Earth of \$750,000. Neither of the Blumes contracted with NYU in their individual capacity. CP 67.

D. The Dispute and Litigation Between Planet Earth and NYU

In the ensuing months, the business relationship between Planet Earth and NYU deteriorated. These difficulties culminated on June 30, 2003, when NYU filed suit against Planet Earth and the Blumes in U.S. District Court for the Southern District of New York. NYU filed its First Amended Complaint on October 7, 2003 (hereinafter collectively “the NYU Action”). NYU’s allegations and claims included the following:

- Planet Earth delivered one advertising concept when four were required under the contract. CP 139.

- Planet Earth delivered advertising concepts of sub-standard quality. Id.
- Planet Earth failed to account for NYU's money. Id.
- Planet Earth failed to pay various media outlets that had distributed NYU's advertising. Id.
- Planet Earth and Lisa Blume breached fiduciary duties to NYU and committed fraud by allocating NYU's funds to non-charitable purposes. CP 158-60.
- Planet Earth infringed on NYU's trademark "About Our Kids" and tried to appropriate it for Planet Earth's uses. CP 139, 203.
- Planet Earth and Lisa Blume made a variety of misrepresentations to NYU during negotiations prior to entering into the contract. CP 142-46; 199-200.
- Planet Earth and Keith Blume made false statements on a trademark application to the U.S. Patent and Trademark Office for the phrase "Caring About Our Kids." CP 152, 203.
- Keith Blume's false statements and Planet Earth's infringement on NYU's trademark constituted tortious unfair competition. CP 203.

Based on these allegations, NYU asserted the following causes of action against Planet Earth and Lisa Blume:

- Breach of contract against Planet Earth. CP 155, 198.
- Breach of implied covenants of good faith and fair dealing against Planet Earth. CP 156-57.
- Breach of fiduciary duty against Planet Earth and the Blumes. CP 158-59.
- Equitable accounting against Planet Earth. CP 159-60.
- Fraud against Planet Earth and Lisa Blume. CP 160-63; 199-202.
- Rescission of the contract. CP 163-65.
- Trademark infringement and unfair competition against Planet Earth and Keith Blume. CP 165-67; 202-03.
- Claims for injunctive relief against Planet Earth and the Blumes associated with the trademark-infringement and unfair-competition claims. CP 167, 204.

At the time of the commencement of the NYU Action, NYU had paid Planet Earth the full amount called for by the contract, \$750,000. NYU did not, however, seek merely a reduction or return of the contract payment. Instead, pursuant to its various tort claims, NYU pleaded for damages “not less than \$18,000,000 plus costs and interest.” CP 204. At

the time of the Superior Court's ruling below, the NYU Action was proceeding but had not yet been tried.

E. Planet Earth's Tender of the NYU Action and Gulf's Refusal to Defend

On or about August 14, 2003, Planet Earth tendered the NYU Action to Gulf. CP 67. Gulf did not respond with a prompt and definitive coverage position. Instead, Thomas Rizzuto, the Director of EPL and Non-Profit claims in Gulf's New York City office, had a series of telephone conversations with Jim Miller, who was the representative of Planet Earth's insurance broker, American Business & Personal Insurance, Inc. ("ABPI") on the Planet Earth account. In ABPI's discovery responses in this case, Mr. Miller recounted Mr. Rizzuto's belief that some counts of the NYU Action might trigger Gulf's duty to defend:

James Miller had a telephone conversation with Tom Rizzuto shortly after the claim was submitted Mr. Rizzuto stated that many of the claims in the NYU lawsuit were not covered, that he had coverage concerns and was not comfortable denying coverage for all claims at that time, and that Gulf would retain counsel to review the matter. There was also a follow-up conversation, on September 25, 2003, in which Mr. Rizzuto informed Mr. Miller of the names of the NY counsel, and stated that Gulf would either deny coverage or would defend under strong reservation of rights.

CP 222.

Thus, even the insurance professionals employed by Gulf believed the NYU Action presented a close case with respect to the duty to defend.

It was not until October 14, 2003, two months after Planet Earth's tender of the claim to its insurer, that Gulf definitively responded. By letter from Gulf's outside counsel, the insurer denied coverage for the NYU Action, both for defense and indemnity. As relevant to this appeal, Gulf based its denial on two exclusions found in the Policy. First, the insurer relied on the following exclusion that is found in the pre-printed, standard policy form on which the Policy is written:

The Insurer shall not be liable to make any payment for Loss in connection with any Claim made against any of the Insureds . . . for liability under or breach of any oral, written or implied contract or agreement . . . ; however, this exclusion shall not apply to the extent (a) the Insured would have been liable in the absence of such contract or agreement; or (b) the Claim is a Claim for Wrongful Employment Practices[.]

CP 106-07.

Second, the denial cited an exclusion that was added to the policy by Endorsement No. 3:

In consideration of the payment of premium, it is hereby understood and agreed that the Insurer shall not be liable to make any payment for Loss in connection with any Claim made against any of the Insureds for, based upon, arising out of, directly or indirectly resulting from, in consequence of or in any way involving an actual or alleged act, error or omission by any Insured with respect to the rendering of, or failure to render professional services for any party.

CP 114 (emphasis added).

Gulf denied Planet Earth and the Blumes' request for a defense despite admitting in deposition that no one at Gulf knew what "professional services" Planet Earth and the Blumes provided to NYU. As Gulf's Vice-President, Meryl Groudan, and CR 30(b)(6) designee testified:

- Q. From an underwriting perspective what wrongful act . . . as defined in Paragraph S, could either Planet Earth, Keith Blume or Lisa Blume commit between the hours of 9:00 and 5:00 that would be covered by that policy given . . . Endorsement No. 3?
- A. Anything that was not within the scope of their professional service that they were providing.
- Q. And with regard to the New York University claim, what is the scope of the professional service that is at issue there, if you know?
- A. I don't know.
- Q. And professional service is not defined in the policy, correct?
- A. Correct.

CP 269. Not only was the phrase not defined in the Policy, it was not defined anywhere at Gulf either. Ms. Groudan testified that there were no documents, claims manuals, written articles, industry trade publications or

industry circulars at Gulf containing the definition of “professional services” Gulf used to deny Planet Earth and the Blumes’ request for a defense. CP 260-61.

Planet Earth subsequently tendered NYU’s First Amended Complaint to Gulf, and the insurer denied coverage on substantially the same grounds. CP 242-45.

F. The Litigation Over Gulf’s Duty to Defend and the Proceedings Below

On October 21, 2003, Planet Earth filed suit against Gulf. Planet Earth’s Complaint sought damages for breach of the duty to defend against the NYU Action, a declaration that the NYU Action was covered under the Policy, and damages for breach of Gulf’s duties of good faith and fair dealing to its insureds. CP 5-13. Planet Earth contends that Gulf was obligated to defend it against the NYU Action. In the alternative, however, were the courts to determine that the Policy does not cover the NYU Action, Planet Earth contends that its broker, ABPI, negligently failed to advise Planet Earth as to the scope of the Policy. Accordingly, Planet Earth also named ABPI as a defendant. CP 12.

Planet Earth filed a Motion for Partial Summary Judgment Re: Duty to Defend. CP 72. The Motion sought a ruling that: (1) the NYU Action satisfied the Policy’s insuring agreement; (2) that the above-cited

breach-of-contract and “professional services” exclusions did not apply to all of the allegations in the NYU Action and thus did not relieve Gulf of its duty to defend; and (3) Gulf was obligated to fund the defense of the entire NYU Action. The Motion did not seek judgment for a sum certain with respect to the costs of defense, nor did it address Planet Earth’s claims for indemnity coverage or for liability for insurance bad faith. Id. Gulf opposed the Motion. CP 558.

On August 19, 2004, the King County Superior Court, by Judge Steven Scott, denied Planet Earth’s Motion. The court’s letter ruling held that the “professional services” exclusion applied to all of the allegations and claims in the NYU Action. CP 948-50. Following that ruling and the Superior Court’s denial of Planet Earth’s Motion for Reconsideration, the parties filed a Stipulated Motion for Order Directing Judgment in Favor of Defendant Gulf Underwriters Pursuant to CR 54(b). CP 984. The Superior Court granted that Motion, finding no just reason for delaying entry of final judgment in favor of Gulf. CP 988-89. The parties further agreed to stay all remaining proceedings against defendant ABPI. Id. Planet Earth timely filed a Notice of Appeal. CP 974.

III. ARGUMENT

A. In Washington, the Liability Insurer's Duty to Defend is Robust—Gulf's Refusal to Defend and the Decision Below are Irreconcilable with Washington's Clear Rules of Policy Interpretation Favoring the Trigger of the Defense Obligation.

The Washington appellate courts repeatedly have addressed the scope of the liability insurer's duty to defend and the relationship between the duty to defend and the duty to indemnify. That extensive body of law establishes beyond argument the following principles:

- Exclusionary clauses are to be strictly construed against the insurer. R. L. Rowland Constr. v. St. Paul Fire & Marine Ins. Co., 72 Wn.2d 682, 688, 434 P.2d 725 (1967).
- "Overall, a policy should be given a practical and reasonable interpretation rather than a strained or forced construction that leads to an absurd conclusion, or that renders the policy nonsensical or ineffective." Transcon. Ins. Co. v. Wash. Pub. Utils. Dists.' Util. Sys., 111 Wn.2d 452, 457, 760 P.2d 337 (1988).
- The purpose of insurance is to insure, and that construction should be taken which will render the contract operative, rather than inoperative." Scales v. Skagit Cy. Med. Bur., 6 Wn. App. 68, 70, 491 P.2d 1338 (1971).

- An insurer's duty to defend is broader than its duty to indemnify, Hayden v. Mut. of Enumclaw Ins. Co., 141 Wn.2d 55, 64, 1 P.3d 1167 (2000), and is one of the main benefits of the insurance contract. Safeco Ins. Co. v. Butler, 118 Wn.2d 383, 392, 823 P.2d 499 (1992). The duty to defend may exist even when coverage is in doubt and ultimately does not develop because the duty to defend is "broader than [the] duty to indemnify." See Overton v. Consolidated Ins. Co., 145 Wn.2d 417, 435, 38 P.3d 322 (2002).
- If the underlying complaint is "subject to an interpretation that creates a duty to defend, the insurer must comply with that duty." APA-The Engineered Wood Ass'n v. Glens Falls Ins. Co., 94 Wn. App. 556, 562, 972 P.2d 937, 940 (1999)
- 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). "Only if the alleged claim is clearly not covered by the policy is the insurer relieved of its duty to defend." Id.

The result of the cited decisions, and the scores of cases applying each cited principle, is that the duty to defend is robust—it is readily triggered and difficult to terminate, even in a case in which indemnity coverage is doubtful or potentially available only for a subset of the underlying causes of action. Gulf’s denial of Planet Earth’s tender is irreconcilable with the strength and breadth of the duty to defend in Washington.

B. The “Professional Services” Exclusion is Ambiguous and Must be Interpreted in Favor of a Duty to Defend.

Gulf does not dispute that the insuring agreement was satisfied and that the only exclusion relevant to the Duty to Defend was the “Professional Services” exclusion.¹ NYU’s complaint against Planet Earth contain^s allegations that go beyond this exclusion, and, therefore, trigger Gulf’s duty to defend. ✓

¹ Planet Earth agrees that NYU’s breach-of-contract cause of action falls within the Policy’s exclusion for contractual liability. It cannot be disputed, however, that the contractual-liability exclusion does not apply to NYU’s tort claims. Where some but not all causes of action potentially covered, the insurer must defend the entire action. National Steel Constr. Co. v. National Union Fire Ins. Co., 14 Wn. App. 573, 576, 543 P.2d 642 (1975); Nordstrom, Inc. v. Chubb & Son, Inc., 54 F.3d 1424, 1430 (9th Cir. 1995).

1. Planet Earth Provides No “Professional Service” as a Matter of Law, and the “Professional Services” Exclusion Therefore is Inherently Ambiguous Without Further Analysis.

Planet Earth is a public-service media agency. During the time relevant to this case, its core work was providing creative content—i.e., writing and producing advertising and public-relations campaigns—for non-profit entities. It does not engage in the traditional professions, such as the practice of law, medicine, or engineering. Nor does its work require any licensure or specialized training or education. To be sure, experience in the advertising field is a part of Planet Earth’s success, but experience in the industry aside, their work requires only the broad range of basic intellectual and communication skills—creativity, analysis, writing, and speaking—that virtually any non-manual-labor job requires.

The Washington legislature has very specifically defined the term “professional services”:

The term “professional service” means any type of personal service to the public which requires as a condition precedent to the rendering of such service the obtaining of a license or other legal authorization and which prior to the passage of this chapter and by reason of law could not be performed by a corporation, including, but not by way of limitation, certified public accountants, chiropractors, dentists, osteopaths, physicians, podiatric physicians and surgeons, chiropodists, architects, veterinarians and attorneys at law.

RCW 18.100.030(1).

The indisputable characteristics of Planet Earth's business render Gulf's "professional services" exclusion meaningless as applied to Planet Earth under Washington law. The exclusion simply has no place in an insurance policy issued to a business that does what Planet Earth does. The Court should find the exclusion inherently ambiguous as applied to Planet Earth's business, and thus hold that it does not apply to defeat Gulf's duty to defend.

2. Even Under the Broadest Interpretation of "Professional Services," Many of the Underlying Allegations Pertain to Administrative Activity by Planet Earth—Not Alleged Harm Caused by Planet Earth's Skilled, Creative Work as a Content Provider.

Planet Earth has amply demonstrated that it has not provided and cannot provide "professional services" as a matter of law, and that the "professional services" exclusion thus must be disregarded as a matter of law. Planet Earth recognizes that some non-Washington courts have chosen to apply a broader definition of "professional services," which essentially would include any work other than manual labor. These authorities should be disregarded as inconsistent with Washington law. To the extent this Court were to consider those foreign authorities, however, they do not relieve Gulf from the duty to defend even on their own terms.

Under Washington law, the terms of a policy should be given a "fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." Overton v. Consol. Ins. Co., 145 Wn.2d 417, 424, 38 P.3d 322 (2002). Because the term "professional service" is not defined in the policy, it must be given its "plain, ordinary and popular" meaning. Boeing Co. v. Aetna Cas. and Sur. Co., 113 Wn.2d 869, 877, 784 P.2d 507 (1990). Washington courts interpret policy terms by looking to "the common perception of the common man." Id. at 881, 784 P.2d at 513.

The average purchaser of insurance would equate "professional services" with activities that require specialized skill, knowledge or training, state licensure, and self-regulation. However, even under an alternative definition, which might be termed a colloquial and diluted definition, of "professional," the need for specialized education and skill is central. Indeed, the dictionary definition of "professional" supports this understanding. In assessing "plain meaning," Washington courts often look to standard English dictionaries to determine the ordinary meaning of an undefined term. Boeing, 13 Wn.2d at 877. The American Heritage College Dictionary for example, defines "professional" in relevant part as: "Of , relating to, engaged in, or suitable as a profession...[and] A skilled practitioner; an expert." "Profession" is in

turn defined as “[a]n occupation requiring considerable training and specialized study; American Heritage College Dictionary, 1092 (3d Ed. 1997). Miriam-Webster’s online dictionary parallels this definition, defining professional as “of, relating to, or characteristic of a profession” and defining profession as “a calling requiring specialized knowledge and often long and intensive academic preparation.” [Http://www.m-w.com/cgi-bin/dictionary](http://www.m-w.com/cgi-bin/dictionary) (May 5, 2005).

Even if Gulf were to espouse a more expansive interpretation of the term “professional services,” Planet Earth’s interpretation must prevail. Any “doubts, ambiguities and uncertainties arising out of the language used in the policy must be resolved in [the policyholder’s] favor.” Phil Schroeder, Inc. v. Royal Globe Ins. Co., 99 Wn.2d 65, 69, 659 P.2d 509 (1983), corrected as modified, 101 Wn.2d 830, 683 P.2d 186 (1984). This rule of construction is heightened here because the Washington courts broadly construe coverage-granting provisions of an insurance policy in order to provide coverage, whereas they construe exclusionary provision strictly against the insurer, again so as to maximize coverage. Ross v. State Farm Mut. Auto Ins. Co., 132 Wn.2d 507, 523, 940 P.2d 252 (1997). Because the term “professional services” is contained in an exclusion, it must be construed narrowly. To fall within the “professional services” exclusion, therefore, the activities must relate

to the services performed that require such specialized skill and knowledge.

Here, Planet Earth was hired for its skills in developing public-service advertising content for NYU. Although the Complaint does contain allegations that Planet Earth failed to render these services (e.g., claims that Planet Earth delivered sub-standard and insufficient advertising content) the Complaint also alleges that Planet Earth improperly accounted for NYU's money and failed to pay various media outlets that had distributed NYU's advertising. CP 139. These accounting allegations relate to Planet Earth's administrative activities, and not to its "professional services" activities. Because the Complaint contains some allegations that are potentially subject to coverage, Washington's robust duty to defend was triggered, and Gulf was obligated to defend Planet Earth.

3. The Complaint Against Planet Earth Contains Allegations of Harm Arising from Conduct that is Merely Incidental to the Services Rendered and, Therefore, Do Not Fall Within the Exclusion.

Not only do the allegations discussed above fall outside the "professional services" exclusion, but the Complaint also alleges additional wrongs—including fraud, trademark infringement and unfair

competition—that are independent of the professional services rendered by Planet Earth, and thus do not fit within the exclusion.

Courts consistently distinguish between acts or omissions that arise out of the rendering of “professional services” and those acts or omissions that are unrelated or incidental to those services. The former are excluded while the later are not. Multiple courts, for example, have held that “professional services” exclusions do not apply to bar an insurer’s duty to defend where an insured contractor or engineer is alleged to have negligently either failed to warn of dangerous conditions or failed to ensure a safe work environment. The rationale is that the duty of care is a general one—and is not a duty that is tied to the specific professional services rendered. In Williams v. Insurance Co. of N. Am., 961 F.2d 90 (5th Cir. 1992), the insured, a marine surveyor, was hired to determine the extent of damage to a barge and to hire contractors to fix the damage. An explosion occurred during the course of the repair work, and numerous injuries and deaths resulted. Williams, 961 F.2d at 91. The contractors sued the surveyor alleging negligence and gross negligence in failing to insure a safe work environment. Id. The surveyor’s insurance company refused to defend, citing an exclusion that precluded coverage for “bodily injury of property damage due to the rendering of or failure to render any professional service.” Id. (emphasis added) The Fifth Circuit reversed the

dismissal of the policyholder's claim, holding that: "Liberally construed, these pleadings include claims that go beyond the purview of professional service." Id. at 92.

Similarly in Camp Dresser & McKee, Inc. v. The Home Ins. Co., 568 N.E.2d 631 (Mass. 1991), the court held that the insurer breached its duty to defend its policyholder, an engineering firm, against a negligence action. The court applied the following test: "in determining whether an omission or activity falls within the scope of a professional services exclusion, courts generally look to the nature of the conduct rather than to the title or the position of those involved." Camp Dresser, 568 N.E. 2d at 634; see also Gregoire v. AFB Construction, 478 So.2d 538, 541 (La. App. 1985) (suit against policyholder engineer for negligent supervision raises duty to defend despite professional services exclusion because "a duty to warn could be found to be outside of the "professional"...services [the policyholder] agreed to perform in its contract"); Chemstress Consultant Co. v. Cincinnati Ins. Co., 715 N.E.2d 208 (Ohio App. 1998) (same).

Here, NYU alleged in its Complaint, among other things, that Planet Earth: (a) committed fraud by allocating NYU's funds to non-charitable purposes; (b) infringed on NYU's trademark and tried to appropriate it for Planet Earth's uses; (c) made false statements on a trademark application; and (d) committed tortious unfair competition. CP

139, 152, 160-63, 165-167, 202-03. These allegations are analogous to the negligence and gross negligence claims against the contractors and engineers—the claims arise not out of the professional services rendered by Planet Earth for NYU, i.e., the skilled, creative work for which Planet Earth was hired, but instead are incidental to that work. The duties to refrain from trademark infringement, tortuous unfair competition and fraud are independent of the professional services. Just as with a claim for negligence, a claim for trademark infringement or fraud does not require the existence of a professional-services relationship.

Even in cases in which the policies specifically provide coverage for “professional services” (and, therefore, in which the court is interpreting the term expansively in favor of coverage), courts have continued to distinguish between claims that arise out of the professional services rendered and claims that are incidental to those professional services. In Roe v. Federal Ins. Co., 587 N.E.2d 214 (Mass. 1992), for example, the court concluded that a dentist’s professional liability insurance did not cover a patient’s claims for sexual molestation committed in the dental office during the course of otherwise legitimate professional services. In relevant part, the policy provided coverage for:

injury arising out of the rendering of or failure to render during the policy period, professional services by the individual insured . . . performed in the practice of the insured's profession as a dentist.

Roe, 587 N.E.2d at 216 (emphasis added). The court adopted the following interpretation of “professional services”:

Something more than an act flowing from mere employment or vocation is essential. The act or service must be such as exacts the use or application of special learning or attainments of some kind. The term ‘professional’ in the context used in the policy provision means something more than mere proficiency in the performance of a task and implies intellectual skill as contrasted with that used in an occupation for production or sale of commodities. A ‘professional’ act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor or skill, and the labor or skill involved is predominately mental or intellectual, rather than physical or manual. . . . In determining whether a particular act is of a professional nature of a ‘professional service’ we must look not to the title or character of the party performing the act, but to the act itself.

Id. at 217 (emphasis added). The court went on to hold that no coverage applied because “[i]t is self-evident that [the dentist’s] professional services—the cleaning and examination of teeth—did not call for sexual contact between him and his patient.” Id. at 218.

The analysis used in Roe is informative here: Here, the professional services rendered by Planet Earth and the Blumes—preparation and distribution of advertising content—did not “call for” or

necessarily entail trademark infringement, fraud or tortuous unfair competition alleged by NYU. Thus, these allegations in the Complaint fall outside the definition of “professional services.”

Because the Complaint against Planet Earth is “subject to an interpretation that creates a duty to defend, the insurer must comply with that duty.” APA-The Engineered Wood Ass’n v. Glens Falls Ins. Co., 94 Wn. App. 556, 562, 972 P.2d 937 (1999).

4. Gulf’s Application of the “Professional Services” Exclusions is So Broad as to Render the Coverage Illusory—Had the Insurer Wished to Exclude Liability to All Planet Earth Clients, it Could Have Done So Unambiguously.

Under Gulf’s reading of the policy, any claim even tangentially related to work for one of Planet Earth’s clients’ would be excluded from coverage. To prevail, Gulf not only has to claim that this expansive reading of the exclusion is reasonable, but that Planet’s Earth reading is unreasonable. This is not unfair to Gulf. The Washington Supreme Court has admonished that the insurance company’s burden is to draft “clear and unmistakable [policy] language.” Dairyland Ins. Co. v. Ward, 883 Wn.2d 353, 359, 517 P.2d 966 (1974). Had it wished to limit Planet Earth’s coverage in the manner it now advocates, it could have easily and unequivocally included such language in the Policy. “The [insurance] industry knows how to protect itself and it knows how to write exclusions

and conditions.” Boeing, 113 Wn.2d at 887. In the face of such compelling mandates from the Washington courts, had Gulf intended to exclude all claims brought by clients of Planet Earth, it could have written the following simple words:

This Policy does not cover Claims Against the Insured asserted by a client of the Insured or arising out of the Insured’s business relationship with any client.

Gulf did not do so, and Planet Earth respectfully urges this Court not to rewrite the Policy in this manner. To hold otherwise would eviscerate the coverage purchased by Planet Earth. Several non-Washington cases support this analysis. In Psychiatric Assoc. v. Neumeyer, 647 So.2d 124 (Fla. Ct. App. 1994), the policyholder, a psychiatric professional association, was sued by another doctor who provided psychiatric services at the same hospital as the doctors in the association. The plaintiff sued the association for interference with a business relationship as well as antitrust violations. Neumeyer, 647 So.2d at 136. The association’s primary policy contained an exclusion that provided: “we won’t cover injury of damage resulting from the performance of or the failure to perform any professional service.” Id.

Similar to Gulf’s position here, the Neumeyer insurer asked the court to apply a very broad construction of the exclusion: “[the insurer] contends that it should be applied to any activities in any way related to

the practice of the individual insureds' profession of psychiatry." Id. at 138. Applying policy interpretation principles identical to Washington's, the court rejected this interpretation, holding that:

Because they tend to limit or avoid liability, exclusionary clauses are construed more strictly than coverage clauses. Moreover, if the former are ambiguous or susceptible to more than one meaning, they must be construed in favor of the insured and coverage." To construe the "professional services" exclusion as the insurer urges would result in the virtual emasculation of the policies, which are clearly intended to provide liability coverage for many different types of risks associated with the insureds' business.

Id. (emphasis added) (internal citation omitted); see also Federal Ins. Co. v. Hawaiian Electric Indus., 12997 U.S. Dist. LEXIS 24129. *32-33 (D. Haw. Dec. 23, 1997) (in the context of a D&O policy, the broad reading of the professional services exclusion urged by the insurers "would vitiate most of the coverage provided by such a policy").

C. Planet Earth is Entitled to Recover its Attorneys' Fees and Costs Under the Rule in Olympic Steamship.

Where a policyholder prevails in coverage litigation against its insurer, it is well established that the insurer is liable for the policyholder's reasonable attorneys' fees and costs. Olympic Steamship Co. v. Centennial Ins. Co., 117 Wn.2d 37, 52, 811 P.2d 673 (1991). This Court should reverse the decision below and hold Gulf liable for Planet Earth's defense costs in the underlying case. Accordingly, the Court should also

award Planet Earth its fees and costs in this coverage litigation pursuant to the rule in Olympic Steamship and consistent with the further procedures established by RAP 18.1.

IV. CONCLUSION

For the reasons set forth herein, the Court should reverse the decision below, hold that Gulf was obligated to provide Planet Earth with a defense against the underlying action, award Planet Earth its Olympic Steamship fees, and remand the case for further proceedings.

Respectfully submitted this 9th day of May,
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