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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.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Gulf advocates a reading of the disputed “professional services” exclusion so broad as to be non-sensical. In doing so, Gulf fails to meaningfully rebut the following controlling principles:

- Under Washington law, only licensed practitioners are “professional services” providers. Thus, the “professional services” exclusion is inapplicable to Planet Earth, or at the very least is ambiguous. Such ambiguity must be interpreted in Planet Earth’s favor.
- Even if the Court concludes that the “professional services” exclusion applies to Planet Earth’s business, the harm pled in the NYU litigation—financial misfeasance and trademark infringement—results from alleged misconduct that is collateral to Planet Earth’s purportedly “professional” activities.

Moreover, Gulf’s reliance on extrinsic evidence is unavailing. The complete record of the communications leading up to Planet Earth’s purchase of the subject insurance policy reveals that Planet Earth was assured that the policy covered exactly the type of litigation subsequently brought by NYU. The fact that the Blumes, who are neither lawyers nor

insurance professionals, were offered a variety of other insurance options is utterly irrelevant to the interpretation of the policy they purchased.

II. PLANET EARTH IS NOT A “PROFESSIONAL SERVICES” PROVIDER AS DEFINED UNDER WASHINGTON LAW

A. Washington Law Clearly Defines the Term “Professional Services”

As set forth more fully in Planet Earth’s opening brief, Washington law clearly defines “professional services,” and the Court need look no further in order to reverse the decision below. “Professional services” are a narrow range of activities that require licensing or other governmental oversight:

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) (emphasis added). Given this statutory language, the exclusion does not apply to Planet Earth, a Washington not-for-profit corporation consisting of unlicensed media consultants.

Gulf argues only that RCW 18.100.030(1) is not an insurance-oriented statute. That is true but irrelevant; the existence of the statute is conclusive evidence that the term “professional services” is reasonably susceptible to more than one meaning, one of which results in coverage. That meaning must control. See Greer v. Northwestern Nat’l Ins. Co., 109 Wn.2d 191, 201, 743 P.2d 1244 (1987).

B. Any Ambiguity in the Policy Must Be Resolved in Planet Earth’s Favor

Gulf suggests that limiting the “professional services” exclusion to licensed professionals renders the exclusion meaningless as included in a policy issued to a business that does not engage in such licensed activity. To the extent that Gulf created an ambiguity in the policy by its inclusion of a boilerplate and unnecessary exclusion, that ambiguity must be interpreted in Planet Earth’s favor. See 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) (Any “doubts, ambiguities and uncertainties arising out of the language used in the policy must be resolved in [the policyholder’s] favor.”). Exclusionary provisions especially are construed strictly against the insurer. Ross v. State Farm Mut. Auto Ins. Co., 132 Wn.2d 507, 523, 940 P.2d 252 (1997).

III. EVEN IF PLANET EARTH IS A “PROFESSIONAL SERVICE” PROVIDER WITHIN THE MEANING OF THE POLICY, COVERAGE IS TRIGGERED BY THE NYU CLAIMS

A. Gulf’s Interpretation of the Policy is Non-Sensical, as it Creates an Exception to Coverage that Vitiates the Policy

Gulf advocates an absurdly broad reading of the exclusion that effectively swallows the policy. Assuming, arguendo, that Planet Earth is a provider of “professional services,” Gulf’s strained reading of the exclusion still does not bar coverage.¹

The exclusion (Endorsement No. 3) reads as follows:

. . . 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 reads the exclusion to apply to any act or omission of Planet Earth pertaining to client work, no matter how attenuated such activity is from the provision of services to the client. This interpretation would relieve Gulf from its duty to defend under nearly any conceivable circumstance. This reading, however, is not only contrary to the plain

language of the exclusion but is also violative of Washington's well-established principles of policy interpretation. "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 (1998) (emphasis added). Gulf's proposed reading of the "professional services" exclusion would strip Planet Earth of coverage for nearly any claim. This makes no sense, and the Court should adopt "that construction . . . 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).

B. The Harm Alleged in Multiple Claims in the Underlying Complaint Does Not Flow from Planet Earth's Purported "Professional" Conduct

Gulf's broad reading of what constitutes a "professional service" is contradicted not only by the plain language of the policy, but also by common law. This Court was recently called upon to evaluate the boundaries of "professional service" for purposes of professional liability coverage. Woo v. Fireman's Fund Ins. Co., 2005 Wash. App. LEXIS 1456 (2005). The Woo case involved a dentist who performed a cruel and

¹ Gulf half-heartedly asserts that Planet Earth failed to argue this issue below. See Resp. Mem. 1 n. 2. To the contrary, Planet Earth's entire argument before the trial court concerned the scope of the exclusion. See, e.g., CP 876, 911.

elaborate prank on a patient (and employee) while that person was under general anesthesia. The dentist inserted false teeth shaped like boar tusks into the patient's mouth, and then pried the patient's eyes open and photographed the patient in a pose reminiscent of a hunting trophy. Id. at * 3. The patient sued the dentist, claiming various causes of action arising from this intentional act. The insurer refused to defend, on the grounds that the complained of acts were far outside the scope of the dentist's professional activities. This Court agreed, noting that "no conceivably legitimate course of dental treatment includes boar tusks." Id. at * 14. Significantly, the court also relied on the fact that the Complaint did not "allege any damages proximately caused by actual dental services rendered or a failure to render dental services." Id.

The analysis in Woo is equally persuasive in the instant case. The plaintiff in Woo sued for conduct of a "professional" taking place in a professional office, but which was alleged misconduct collateral to the true "professional services" performed by the defendant. This Court therefore held that the collateral misconduct was not part of the "professional services." In the case at bar, NYU alleged that Planet Earth engaged in misconduct, including fraud and trademark infringement, that was collateral to Planet Earth's purported "professional services." The Court should apply the Woo decision and reverse the decision below.

Gulf may argue that this Court examined the scope of “professional services” coverage in the Woo decision, whereas the issue in the instant case is the scope of a “professional services” exclusion. That distinction does nothing to weaken the import of the central holding of Woo, that misconduct performed by a professional in his or her work environment may nonetheless be wholly unrelated to that person’s professional activities. Moreover, the fact that the Court in this case is called upon to interpret a policy exclusion weighs in Planet Earth’s favor, as exclusionary provisions must be strictly construed against the insurer so as to maximize coverage. Ross v. State Farm Mut. Auto Ins. Co., 132 Wn.2d 507, 523, 940 P.2d 252 (1997).

Gulf offers no legal authority to contradict this Court’s analysis of the limits of “professional services,” and the out-of-state authority relied upon by Gulf is entirely consistent with the Woo decision. In American Motorists Insurance Co. v. Southern Security Life Insurance Co., for example, the Court found that an insurance company that misrepresented the terms of a policy to a customer “render[ed] or fail[ed] to render professional services in effecting insurance . . . coverages.” Am. Motorists Ins. Co. v. S. Sec. Life Ins. Co., 80 F. Supp. 2d 1285, 1288 (M.D. Ala. 2000). In that case, the complete and accurate explanations of

policy terms was precisely the professional service that the defendant insurance company was hired to perform.

Similarly, in Harad v. Aetna Casualty and Surety Co., the Court found that a claim of malicious prosecution against an attorney, predicated on the signing of an Answer and Counterclaim, “ar[ose] out of the rendering or failure to render . . . professional service” such that coverage was not warranted for the claim. Harad v. Aetna Cas. and Sur. Co., 839 F.2d 979, 984-85 (3rd Cir. 1988). Again, the signing of verified pleadings is exactly the professional service that a licensed attorney is retained to perform.

In each of these cases, relied upon heavily by Gulf, the Court found that a professional services exclusion operated to bar coverage where the complained-of act by the insured was part and parcel of the insured’s professional services. Gulf makes no attempt, however, to address the significant distinction between these cases and the matter at hand, where multiple claims arose not from the provision of advertising services but from alleged mismanagement of funds and unlawful appropriation of protected trademarks.

IV. PLANET EARTH HAD NO KNOWLEDGE OF ANY RELEVANT GAP IN COVERAGE

Gulf suggests that Planet Earth made a calculated business decision to forego coverage for claims arising from the provision of professional services. The record belies this contention. In fact, Planet Earth had a good faith belief that the policy sold by Jim Miller, Planet Earth's insurance broker, covered claims related to client services. When considered in conjunction with Gulf's and Mr. Miller's testimony—that Gulf had no clear or consistent understanding of the scope of the “professional services” exclusion—it is not credible to suggest that Planet Earth knowingly waived coverage.

On December 17, 1988 Travelers Property Casualty, the company operating Gulf at the time, issued a press release announcing the availability of a new insurance product. This policy was entitled a Non-Profit Management and Organization Liability Policy. The press release read in relevant part:

Travelers . . . has launched a new directors and officers liability coverage for non-profit organizations, responding to the increased need for protection. Non-Profit Management and Organization Liability Insurance safeguards directors and officers of non-profit organizations from paying high defense costs and damage awards resulting from lawsuits alleging wrongful termination, discrimination, general breach of fiduciary

duty and other types of claims. . . . Possible claimants include employees, members, beneficiaries, clients and the government.

CP 824 (emphasis added).

In reliance on the advice of Jim Miller, Planet Earth's insurance broker, Planet Earth purchased the policy. Planet Earth and its principals, Keith and Lisa Blume, were repeatedly informed by Mr. Miller that the policy (in conjunction with Planet Earth's CGL Policy) was sufficient to provide coverage for any claim brought by a disgruntled client:

[S]ince the time Planet Earth began purchasing the Gulf Non-Profit Management and Organization Liability policies, Mr. Miller represented to us that the non-profit policy covered liability to Planet Earth's consumers and clients for claims including trademark infringement.

* * * *

Up through the time we received notice of the NYU lawsuit, I understood that the Non-Profit policy covered claims made by clients and consumers against Planet Earth and my wife and I, as directors and officers of the company.

K. Blume Dec. (CP 842-43). Accord, L. Blume Dec. (CP 839) ("Mr. Miller always told me that the Non-Profit policy covered liability to Planet Earth's consumers and clients for claims including trademark infringement."). Mr. Miller himself confirmed in deposition that he

believed NYU's claims for trademark infringement were covered under the policy. CP 729.

Planet Earth purchased the coverage recommended by Mr. Miller. In reliance on that recommendation as well as Mr. Miller's repeated assurances, Planet Earth believed that it had complete coverage for all claims initiated by its clients. The extrinsic evidence does nothing to support Gulf's contention that Planet Earth intentionally forewent coverage necessary for the defense of such claims. The Blumes indeed had an opportunity to purchase a variety of additional insurance policies, but their understanding of the function of the various policies on offer is vigorously controverted, and simply too unclear, to have any bearing on the issues of contract interpretation before this Court. Planet Earth purchased a "Non-Profit Management and Organization Liability Policy," CP 606, and that is the policy at issue.

V. CONCLUSION

Planet Earth obtained the policy from its insurance broker after repeated assurances that the Policy provided coverage for just the type of suit brought by NYU. In an effort to avoid its defense obligations under the Policy, Gulf relies on an exclusion for acts related to the rendering or failure to render "professional services." Gulf's overly expansive interpretation of this exclusion would result not just in wrongful denial of

coverage for Planet Earth under the circumstances of this case, but in fact for any conceivable claim brought by any conceivable client of the policyholder. This strained interpretation reveals Gulf's true intention: to deny coverage despite the plain language of the policy and the requirements of Washington law.

The Court should reverse the decision below, hold that Gulf breached its contractual duty to defend, award Planet Earth its Olympic Steamship fees, and remand this matter for further proceedings.

Respectfully submitted this 22nd day of July, 2005.

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