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BY RONALD R. CARPENTER

**SUPREME COURT  
OF THE STATE OF WASHINGTON**

CLEER

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AMERICAN BEST FOOD, INC.,  
a Washington corporation d/b/a CAFE ARIZONA;  
MYUNG CHOL SEO and HYUN HEUI SE-JEONG,

Respondents,

v.

ALEA LONDON, LTD., a foreign corporation,

Petitioner.

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**SUPPLEMENTAL BRIEF  
OF PETITIONER ALEA LONDON, LTD.**

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## I. INTRODUCTION

Acting in reasonable reliance upon the best available indicators of Washington law, Alea London, Ltd. (“Alea”) determined that there was no duty to defend the claims presented by its policyholder, Café Arizona.<sup>1</sup> The trial court agreed, holding as a matter of law that Alea’s coverage determination was correct. The Court of Appeals, however, dramatically departed from Washington precedent to reach the opposite conclusion. *See Am. Best Food, Inc. v. Alea London, Ltd.*, 138 Wn. App. 674, 158 P.3d 119 (2007). It then deemed Alea’s awareness of non-Washington cases to be evidence of bad faith, despite the existence of controlling Washington law. This Court granted review to address the following issue:

Whether an exclusion in a nightclub’s liability insurance policy for injuries “arising out of” assault applies to the exacerbation of injuries allegedly sustained by a nightclub patron who was shot outside the nightclub, brought inside by security personnel, and then left outside on the sidewalk.

In accordance with established Washington law and sound public policy, Alea seeks confirmation of the following rules: 1) there is no coverage for any claim causally connected to an assault and/or battery under a policy that “does not apply to any claim arising out of” assault and/or battery, and 2) as a matter of law no bad faith claim can be sustained where, as here, an insurer’s coverage decision was rendered in

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<sup>1</sup> American Best Food, Inc. d/b/a Café Arizona, and Myun Chol Seo and Hyun Heui Seo-Jeong are referred to collectively as “Café Arizona.”

accordance with Washington regulations and reflects a reasonable interpretation of Washington law.

## II. STATEMENT OF THE CASE

On January 19, 2003, George Antonio shot Michael Dorsey in the parking lot adjacent to Café Arizona. CP 245. During the moments that followed, as the ambulance was on its way, security guards moved Dorsey. CP 245. In his subsequent suit for damages, Dorsey alleged that Café Arizona's negligence "proximately caused or contributed to the injuries suffered" "[a]s a result of the savage assault." CP 245, 247.

Even though its policy "does not apply to any claim arising out of" assault and/or battery, Café Arizona submitted a claim to Alea. CP 35. Alea responded that the policy provided no coverage, as confirmed by binding Washington precedent, *McAllister v. Agora Syndicate, Inc.*, 103 Wn. App. 106, 111, 11 P.3d 859 (2000) (assault and battery exclusion bars coverage for all claims—including acts of negligence—"based on" assault and/or battery). CP 260-62. Approximately 18 months later, Café Arizona sued Alea, seeking coverage and additional damages under a theory of bad faith. CP 1-8. After the coverage litigation was well underway, Dorsey filed an amended complaint that alleged that Café

Arizona's acts in response to the assault contributed to his injuries.<sup>2</sup> CP 250-58. Specifically, the amended complaint alleged that Café Arizona's negligence "exacerbate[d] Dorsey's injuries more." CP 254. Still, under *McAllister*, there could be no coverage for the negligence claims under the assault and battery exclusion. 103 Wn. App. at 111.

The parties brought cross-motions for summary judgment in the coverage action, and the trial court dismissed all of Café Arizona's claims. CP 389-91. The Court of Appeals, however, declared that the subject exclusion only serves to bar coverage related to acts of negligence that occur before the assault. *Am. Best Food*, 138 Wn. App. at 688.<sup>3</sup> Although it acknowledged that Alea made its coverage determination in accordance with claims handling regulations,<sup>4</sup> the Court of Appeals also questioned the reasonableness of Alea's reliance on binding Washington law given Café Arizona's reference to an allegedly contrary Texas case. *Id.* at 691.

### III. ARGUMENT

Alea assigns error to the following three portions of the Court of

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<sup>2</sup> Although the Court of Appeals stated that "Dorsey alleged that he was injured by the behavior of Café Arizona employees after the shooting[.]" *Am. Best Food*, 138 Wn. App. at 693, neither complaint alleged a separate injury. *See* CP 245, 254.

<sup>3</sup> Like most liability insurance policies, the Alea policy only provides coverage for an occurrence that results in "bodily injury" or "property damage." CP 217. The Policy does not respond to "acts." In reaching the temporally-based decision it did, the Court of Appeals focused on the allegedly distinct negligent act of moving Dorsey subsequent to the gun assault, not his injuries. *See Am. Best Food*, 138 Wn. App. at 688.

<sup>4</sup> *See Am. Best Food*, 138 Wn. App. at 693 ("Café Arizona's evidence does not give rise to an inference that Alea's investigation of the facts was insufficient, or that it violated insurance settlement regulations or CPA provisions.").

Appeals decision. First, the Court of Appeals disregarded the existing body of Washington law that established the meaning of “arising out of” in the context of insurance. Second, it relied upon distinguishable cases from other jurisdictions to conclude that the claims presented triggered a duty to defend under the policy. Finally, it refused to dismiss Café Arizona’s bad faith claim as a matter of law.

**A. An Exclusion for Claims “Arising Out Of” Assault and Battery Precludes Coverage for Any Claim Causally Connected to an Assault and Battery.**

This Court has over time set forth a series of principles that must be followed in the interpretation of insurance policies.<sup>5</sup> In Washington, the duty to defend arises “when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy’s coverage.” *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002) (citation omitted). Conversely, “[a]lthough an insurer has a broad duty to defend, alleged claims which are clearly not covered by the policy relieve the insurer of its duty.” *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 561, 951 P.2d 1124 (1998).

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<sup>5</sup> In *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 907, 726 P.2d 439 (1986), for example, this Court explained: “The contract should be given a practical and reasonable rather than a literal interpretation; it should not be given a strained or forced construction ... which would lead to an extension or restriction of the policy beyond what is fairly within its terms, or which would lead to an absurd conclusion, or render the policy nonsensical or ineffective.” *Id.* (citation omitted).

The Alea policy states: "This insurance does not apply to any claim arising out of ... Assault and/or Battery committed by any person whosoever ... ." CP 35. Dorsey's original complaint alleged:

5.17 Several security guards carried [Dorsey] into the club, however, the club owner/manager ordered to [sic] guards to carry [him] back outside where the guards dumped him back on the sidewalk.

5.18 [Dorsey] was transported by ambulance to Harborview Hospital for trauma treatment ... .

5.20 As a result of the savage assault, [Dorsey] suffered serious and life-threatening injuries from which he has sustained serious permanent injuries and disfigurement ... .

6.1 As owners of the business and premise upon which its customer, Michael Dorsey, was attacked and injured, Defendants breached their duties to take reasonable precautions to protect business invitees, including [Dorsey], against criminal conduct despite notice of the potential harm and thereby proximately caused or contributed to the injuries suffered by [Dorsey].

CP 245, 247 (emphasis added). Dorsey's amended complaint, filed nearly two years later, added the following:

5.12 Several security guards carried the injured Michael Dorsey from the lobby of Café Arizona and dumped him on the sidewalk, exacerbating his injuries more, after [Café Arizona personnel] negligently ordered the guards to carry [Dorsey] back outside where the gunman was.

CP 254.

**1. The Assault and Battery Exclusion at Issue Precludes Coverage for Injuries Causally Connected to an Assault and/or Battery.**

In *McAllister*, 103 Wn. App. at 111, the Court of Appeals

confirmed that an assault and battery exclusion precludes coverage for a nightclub's negligence in the context of an assault. At issue in *McAllister* was the applicability of an assault and battery exclusion slightly more limited in scope than the exclusion contained in the Alea policy. *See id.* at 109 (excluding claims "based on" assault and/or battery). That exclusion barred coverage for a claim that a nightclub was negligent in failing to prevent an assault. *McAllister* held that the patron's claim, though couched in terms of negligence, was ultimately "based on" assault and battery in the sense that "without first establishing the underlying assault, negligence cannot be proved." *Id.* at 111. The exclusion thus operated to preclude coverage for injuries that result due to an insured's negligence where no cause of action would exist "but for" the assault. *McAllister* is on point with this case: absent the assault, Dorsey would have had no cause of action against Café Arizona. This is especially true in light of the fact that *McAllister* reached this conclusion under a more narrow exclusion ("based on") than the "arising out of" exclusion at issue here.

*Toll Bridge Auth. v. Aetna Ins. Co.*, 54 Wn. App. 400, 407, 773 P.2d 906 (1989), explained that the phrase "arising out of" is understood to mean "originating from," "having its origin in," "growing out of," or "flowing from." The phrase is unambiguous and has a broader meaning than "caused by" or "resulted from." *Id.* at 404. Where the

policy contains “arising out of” language, “[a] determination of proximate cause is not a necessary precedent to determination of coverage.” *Id.*

*Toll Bridge* underscored the distinction between “arising out of” and “proximate cause” as follows:

To construe “arising out of” as requiring a finding of “proximate cause” ... does violence to the plain language of the policy. “Arising out of” and “proximate cause” describe two different concepts.

*Id.* Thus, although “proximate cause” can have very broad application, *see, e.g., Joyce v. Dept. of Corrections*, 155 Wn.2d 306, 322-24, 119 P.3d 825 (2005) (State’s failure to obtain a warrant that would have likely placed an offender in jail proximately caused the offender to steal a car and run a red light, killing a woman), “arising out of” has even broader application.

In *Krempl v. Unigard Security Ins.*, 69 Wn. App. 703, 705-07, 850 P.2d 533 (1993), the Court of Appeals confirmed the broad interpretation of “arising out of.” *Krempl* involved a policyholder’s attempt to remove a burning gas tank from an automobile. The policyholder threw the tank to the ground, splashing burning gasoline on the claimant. *Id.* The involved insurance policy precluded coverage for “bodily injury or property damage ... arising out of ... the ownership, maintenance, use, loading or unloading of motor vehicles.” *Id.* Focusing

on the uncovered nature of the initial act (“the ... use, loading or unloading of motor vehicles”) and the policy’s “arising out of” language, *Krempl* affirmed that there was no coverage for the subsequent, allegedly separate, act of throwing the tank to the ground because “the excepted risk ... set into motion what [the claimant] contends is a covered risk.” *Id.* at 705-06 (emphasis in original). The same is true under the facts of this case: the excepted risk (assault and battery) set into motion what Café Arizona claims is a covered risk (exacerbation of assault-derived injuries).

**2. Injuries “Arise Out Of” an Act if there is a Causal Connection Between the Act and the Injuries Sustained.**

This Court’s decisions in *Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wn.2d 99, 109, 751 P.2d 282 (1988), and *Transamerica Ins. Group v. United Pac. Ins. Co.*, 92 Wn.2d 21, 26, 593 P.2d 156 (1979),<sup>6</sup> confirm that the phrase “arising out of” is broadly interpreted in Washington and requires only a causal connection between a specified act and the injuries sustained.<sup>7</sup> *Detweiler* states:

In order for an accident and liability therefor to arise out of the

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<sup>6</sup> *Transamerica* was overruled on other grounds by *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995), on the issue of when an appellate court will not consider the merits of an issue. *Id.* at 321. *Transamerica* was cited in *Krempl*, 69 Wn. App. at 707.

<sup>7</sup> When addressing virtually identical language in a coverage grant and an exclusion, the language must be interpreted consistently. See *Aetna Ins. Co. of Hartford v. Kent*, 85 Wn.2d 942, 947, 540 P.2d 1383 (1975); Harris, WASH. INS. LAW, at 24-3 to 24-4 (2d Ed. 2006); see also *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 172, 110 P.3d 733 (2005) (explaining that although “exclusions should be strictly construed against the drafter, a strict application should not trump the plain, clear language of an exclusion such that a strained or forced construction results”).

“use” of an uninsured motor vehicle, it is not necessary that the use be the proximate cause of the occurrence or of the injuries sustained therein; it is only necessary that there be a causal connection between them.

110 Wn.2d at 109. To prevent his pickup truck from being stolen, Detweiler fired a pistol at the truck, resulting in injury to himself. *Id.* at 101. This Court concluded that the injuries were covered under the involved automobile insurance policy because they “arose out of the driver’s ‘use’ of the pickup[.]” *Id.* at 109. This was deemed true regardless of the fact that the act of firing a pistol at an object in close range was, arguably, a negligent act independent of the use of the vehicle.

In *Transamerica*, the parties disputed coverage for gunshot injuries sustained by the driver of an insured vehicle. 92 Wn.2d at 26. The policy at issue covered damages “arising out of” use of the automobile. *Id.* at 25-26. Focusing on the relationship between the use of the vehicle and the injuries sustained, this Court concluded that “there is a causal connection between a use of the vehicle and the accident.” *Id.* at 28.<sup>8</sup> Likewise, in this case, Café Arizona’s argument that the post-assault conduct was a negligent act independent of the assault does not change the

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<sup>8</sup> See also *Mut. of Enumclaw Ins. Co. v. Jerome*, 122 Wn.2d 157, 162, 856 P.2d 1095 (1993) (explaining that “arising out of the use” of a vehicle has been interpreted to mean “the vehicle itself or permanent attachments to the vehicle causally contributed in some way to produce the injury”); *McCauley v. Metro. Prop. & Cas. Ins. Co.*, 109 Wn. App. 628, 636, 36 P.3d 1110 (2001) (“It is only necessary that there be a causal connection between the use and the accident.”); *Munn v. Mut. of Enumclaw Ins. Co.*, 73 Wn. App. 321, 325, 869 P.2d 99 (1994) (focusing on whether the claimed injuries originated from, flowed from, had their origins in, or grew out of the assault).

fact that all of Dorsey's injuries were causally related to the assault. The very nature of the "exacerbation" of injuries allegation confirms the necessary causal connection to the pre-existing gunshot injuries: exacerbation of assault-derived injuries cannot occur absent existing assault-derived injuries.

Each of the above holdings is consistent with the general principle in Washington insurance cases that where an unbroken causal chain of events produces the loss, a court must look to the preponderant or efficient cause of the loss, *i.e.*, the one that set the others in motion, to determine if there is coverage or if an exclusion applies. *See, e.g., Kish v. Ins. Co. of N. Am.*, 125 Wn.2d 164, 170-72, 883 P.2d 308 (1994) (no coverage under policy exclusion where flood was predominant cause of loss, despite fact that rain was a covered peril); *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 735, 837 P.2d 1000 (1992) (efficient proximate cause only comes into play when initial peril is a covered peril); *Hocking v. British America Assurance Co.*, 62 Wn. 73, 75, 113 P. 259 (1911) (policyholder's home destroyed in fire that stemmed from fumigation of home on order of civil authority; court held no coverage because policy excluded coverage for loss caused directly or indirectly by order of civil authority). Applied here, because the assault was the "preponderant or efficient cause of the loss" that "set the others in motion," the exacerbation

of injuries necessarily arose out of the assault.

The well-developed body of law relating to what constitutes a superseding cause ensures that the “causal connection” analysis is not applied in an absurd fashion. In *Crowe v. Gaston*, 134 Wn.2d 509, 951 P.2d 1118 (1998), this Court confirmed that, to qualify as a superseding cause that would relieve the original tortfeasor of liability, an intervening act must be “so highly extraordinary or improbable as to be wholly beyond the range of expectability.” *See id.* at 519-20 (citing numerous cases). Indeed, it is imminently foreseeable that someone such as Dorsey who is injured in a violent assault may be moved in the moments after the assault. As a matter of law, such movement cannot be deemed “so highly extraordinary or improbable as to be wholly beyond the range of expectability.” *See id.* at 520.<sup>9</sup>

Café Arizona’s argument that it is entitled to coverage is an effort to subvert the plain meaning of the policy. It is undisputed that Dorsey suffered gunshot injuries caused by the assault. It is also undisputed that the policy provides no coverage for these assault-derived injuries. It is further undisputed that, from the language of the complaints, construed

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<sup>9</sup> *See also Lindquist v. Dengel*, 92 Wn.2d 257, 262, 595 P.2d 934 (1979) (“If the negligent actor is liable for another’s bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other’s injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner.”) (quoting REST. (SECOND) OF TORTS § 457 (1965)).

liberally, the alleged exacerbation of those gunshot injuries occurred as Café Arizona was responding to the assault that occurred just moments earlier. The post-assault acts of bringing Dorsey inside and then back outside of Café Arizona in the mayhem following the shooting would not have occurred “but for” the assault. Under the circumstances, binding Washington law provides that there is no coverage, and thus no duty to defend, related to Dorsey’s “assault-exacerbated” injuries.

Following this Court’s holdings in *Transamerica* and *Detweiler*, this Court should hold that the exclusion for any claim “arising out of” assault and/or battery bars coverage for any claim causally connected to an assault and/or battery. If this Court were inclined to hold otherwise, it would need to expressly overrule *Transamerica*, *Detweiler*, *Toll Bridge*, *Krempl*, and *McAllister*.

**3. Exclusions for Injuries that Result from Criminal or Intentional Acts are Widely Recognized and Enforced.**

Courts across the nation recognize an insurer’s right to exclude coverage for injuries that result from criminal or intentional acts. *See Allstate Ins. Co. v. Raynor*, 143 Wn.2d 469, 478, 21 P.3d 707 (2001) (enforcing a broad exclusion for losses resulting from criminal acts); Harris, WASH. INS. LAW, at 22-9 to 22-13 (2d ed. 2006) (citing numerous Washington cases); *see also* COUCH ON INS. § 101:25 (3d ed.); *id.* at

§ 103:26 (citing *Sans v. Monticello Ins. Co.*, 718 N.E.2d 814, 820-21 (Ind. Ct. App. 1999), and *United Nat. Ins. Co. v. Parish*, 717 N.E.2d 1016, 1018-21 (Mass. App. Ct. 1999)); *id.* at § 201:47 (citing *Pilz v. Monticello Ins. Co.*, 599 S.E.2d 220, 221-22 (Ga. App. 2004).

In addition to the Washington cases discussed herein, other courts that have applied “but for” principles to alleged exacerbation of excluded injuries have confirmed that those injuries “arise out of” the excluded injuries.<sup>10</sup> *See, e.g., Canutillo v. Nat’l Union Fire Ins. Co.*, 99 F.3d 695, 705 (5th Cir. 1996) (no coverage for allegations that teachers’ failures to report past abuse exacerbated children’s injuries); *Cont’l Cas. Co. v. City of Richmond*, 763 F.2d 1076, 1080-82 (9th Cir. 1985) (no coverage for allegation that failure to render aid following assault contributed to decedent’s death). Again, only a causal connection is required.

**B. Claims of Bad Faith Relating to a Coverage Determination That is Reasonable Must be Dismissed as a Matter of Law.**

To sustain a bad faith claim, the policyholder has the burden of proving that the insurer acted in a way that was “unreasonable, frivolous, or unfounded.” *Smith v. Safeco*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003).<sup>11</sup> An insurer’s reasonable interpretation of a policy is not bad

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<sup>10</sup> Out of state cases may be considered as persuasive authority if they are consistent with controlling Washington law. *See, e.g., Constr. Indus. Training Council v. Wash. State Apprenticeship*, 96 Wn. App. 59, 67, 977 P.2d 655 (1999).

<sup>11</sup> *Smith* quoted *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 433, 38 P.3d 322 (2002).

faith. *Kirk*, 134 Wn.2d at 560-61. Likewise, an insurer's reliance on even an arguable interpretation of law is not bad faith. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 155, 930 P.2d 288 (1997).

In this case, in accordance with the well-established rule that "the duty to defend must be determined only from the complaint," *Woo v. Fireman's Fund*, 161 Wn.2d 43, 53, 167 P.3d 454 (2007), Alea looked to the complaints to ascertain whether they alleged facts that could, if proven, trigger coverage. The allegations of the complaints in this case are clear, unambiguous, and adequate. Therefore, Alea had no duty to look outside the complaints. *See id.*<sup>12</sup> Alea reviewed and relied upon binding Washington law<sup>13</sup> that applied a similar "assault and battery" exclusion and gave broad meaning to the term, "arising out of." As discussed above, the rule in Washington is that there is no coverage for injuries that result due to a policyholder's negligence if no cause of action would exist "but for" the assault; this is true whether that negligence occurs before or after the assault.

Still, upon receipt of Café Arizona's requests for reconsideration (CP 279, 297), Alea did look further, considering facts outside the

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<sup>12</sup> The Court of Appeals agreed that "the allegations contained in Dorsey's complaint were neither ambiguous nor inadequate." *Am. Best Food*, 138 Wn. App. at 692.

<sup>13</sup> The underlying acts took place in King County within the Court of Appeals Division One, the Division that decided *McAllister*, *Toll Bridge*, and *Krempl*.

complaint in an effort to be sure that a defense was not owed.<sup>14</sup> Nothing in the available materials suggested there was a possibility of coverage under the policy. In light of the body of binding Washington precedent, Alea and the trial court had no alternative but to determine that the allegedly exacerbated gunshot injuries were causally connected to the assault and, therefore, did not give rise to a duty to defend.

None of Alea's actions were unreasonable, frivolous, or unfounded. Alea's denial of coverage was not only reasonable, it was (and indeed still is) fully supported by Washington precedent on the assault and battery exclusion (*McAllister*), "arising out of" law (*Transamerica*, *Detweiler*, *Toll Bridge*, and *Krempf*), and coverage principles. In sharp contrast with the insurer's equivocal interpretation of Washington law that was criticized in *Woo*, 161 Wn.2d at 60, Alea's coverage determination was clear and unwavering. *See, e.g., Am. Best Food*, 138 Wn. App. at 692 ("[I]t was Alea's legal opinion that its policy clearly excluded Café Arizona's liability to Dorsey that led to Alea's refusal to defend."). Indeed, given the existence of binding law, Alea was entitled to be unequivocal. This was reasonable. It was by no means bad

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<sup>14</sup> Alea retrieved the docket from the criminal proceedings against Dorsey's assailant, George Antonio; requested and reviewed the state's trial brief, the defense trial memorandum, and the findings and conclusion on the exceptional sentence; contacted Café Arizona's counsel (who was also defending Café Arizona in the Dorsey litigation) to query as to whether new facts had been revealed that might be material to coverage; and searched the internet for news articles relating to the incident. CP 32.

faith.

Amazingly, the Court of Appeals nonetheless faulted Alea for relying on controlling Washington law in the face of allegedly contrary out-of-state law presented by Café Arizona.<sup>15</sup> *See id.* at 691. The Court of Appeals even suggested that Alea's decision to adhere to Washington law may be tantamount to a failure to give equal consideration to the interests of its insured. *Id.* (citing *Coventry Assoc. v. Am. States Ins. Co.*, 136 Wn.2d 269, 280, 961 P.2d 933 (1998)).

Washington courts had spoken on the issues presented. Under such circumstances, other states' courts' views of coverage cannot support a finding of bad faith. Washington courts have never allowed courts in other states to dictate interpretation of a term in an insurance policy. *See Fed. Ins. Co. v. Pac. Sheet Metal Inc.*, 54 Wn. App. 514, 516 n.2, 774 P.2d 538 (1989). After this Court or the Court of Appeals issues a published opinion, it is binding law. *See In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (discussing *stare decisis* and the stabilizing effect of that principle).

Reasoning presented by out-of-state authorities can be considered as persuasive authority in a Washington case, but only if they are

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<sup>15</sup> The only out-of-state authority presented to Alea before litigation commenced was *Western Heritage Ins. Co. v. Estate of Dean*, 55 F. Supp.2d 646 (E.D. Tex. 1998), which is discussed at 17, *infra*.

consistent with Washington law.<sup>16</sup> Notably, each of the non-Washington authorities cited by the Court of Appeals is materially distinguishable<sup>17</sup>:

- In *Bucci v. Essex Ins. Co.*, 393 F.3d 285, 290-91 (1st Cir. 2005), the court rejected application of the “but for” test that has been adopted in Washington. Notably, *Bucci* indicated that it would have reached a different result if Maine law followed the “but for” test. *See id.*
- In *Western Heritage Ins. Co. v. Estate of Dean*, 55 F. Supp.2d 646 (E.D. Tex. 1998), the court addressed an allegation that the claimant died as a result of the policyholder’s failure to render aid under rather unusual facts. *Id.* at 647. No such allegation was made against Café Arizona. Moreover, *Western Heritage* acknowledged and did not criticize *Canutillo v. Nat’l Union Fire Ins. Co.*, 99 F.3d 695 (5th Cir. 1996), which squarely supports a determination of no coverage in cases involving post-assault negligence, as in this case.<sup>18</sup>
- In *Planet Rock, Inc. v. Regis Ins. Co.*, 6 S.W.3d 484 (Tenn. Ct. App. 1999), the court found ambiguity in the phrase “arising out of” and followed the concurrent causation doctrine. *Id.* at 491-93. In contrast, Washington courts have found this phrase “arising out of” unambiguous, and have explicitly rejected the concurrent causation doctrine when an exclusion contains the phrase. *See, e.g., Krempel*, 69 Wn. App. at 706.

**C. Strong Public Policies Support the Rules Discussed Herein.**

The Court of Appeals decision has negative implications that extend far beyond the issues and litigants in this case. After this Court or

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<sup>16</sup> *See, e.g., Fireman’s Fund Ins. Cos. v. Alaskan Pride P’ship*, 106 F.3d 1465, 1470 (9th Cir. 1997) (concluding that reliance upon a non-Washington case holding contrary to Washington law was “misplaced”), *quoted in Coventry*, 136 Wn.2d at 280.

<sup>17</sup> *See Am. Best Food*, 138 Wn. App. at 686-88. For more extensive analysis of the non-Washington cases cited by the Court of Appeals, see Alea’s br. in the Ct. of Appeals at 25-37; Alea’s mot. for reconsideration in the Ct. of Appeals at 15-17.

<sup>18</sup> *See Canutillo*, 99 F.3d at 705 (no coverage for allegations that teachers’ failures to report past abuse exacerbated children’s injuries).

the Court of Appeals has ruled on an issue in a published opinion, it is binding law. It is the “road map” for commercial and personal activity in Washington state. Where there is no possibility of coverage as confirmed by insurance policy language and Washington precedent, a policyholder cannot be permitted to obtain a defense from its insurer by presenting distinguishable case law from another jurisdiction.<sup>19</sup>

If this Court were to allow the Court of Appeals holding to stand, it would tacitly be adopting a rule that a duty to defend exists if any jurisdiction recognizes any argument in favor of coverage. Insurance claim handlers throughout Washington would be placed in the impossible position of having to analyze and compare multiple (if not all) jurisdictions’ holdings on a particular point of law before making decisions. Uncertainty and confusion would be widespread, and costly declaratory judgment actions would overburden Washington courts. Moreover, interjecting portions of foreign jurisprudence into Washington law creates a risk of inconsistent results. This problem is illustrated by *Western Heritage*, which held there was no coverage, while simultaneously citing to a contrary holding in *Canutillo*. If coverage were extended to the post-assault acts in this case, any allegation of post-assault conduct—no matter how tenuous—will, arguably, trigger the duty to

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<sup>19</sup>See *Pac. Sheet Metal*, 54 Wn. App. at 516 n.2.

defend. Such a reading would ignore a large body of binding Washington precedent, eviscerate the clear meaning of the exclusion for assault and battery, and provide policyholders with a windfall of coverage that was not bargained for, contrary to justice and equity.

Insurers and policyholders need to be able to rely on the plain language contained in their policies. In accord with the principles set forth in *Kirk*, 134 Wn.2d at 560-61, *Leingang*, 131 Wn.2d at 155, and their progeny, this Court should hold that acts performed under a reasonable interpretation of existing Washington law are not in bad faith as a matter of law. This conclusion must stand regardless of whether there exists allegedly contradictory authority from another jurisdiction.

For these same reasons, this Court should also clarify that an insurer's reliance upon binding Washington law over non-binding law from other jurisdictions does not amount to a failure to give equal consideration to the interests of its insured. Lastly, this Court should conclude as a matter of law that Alea did not engage in bad faith in handling this claim.<sup>20</sup>

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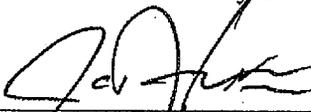
<sup>20</sup> Café Arizona accuses Alea of failing to conduct a reasonable investigation, but offers no evidence that any claims-handling regulations were violated. Instead, it accuses Alea of refusing to look beyond the four corners of the complaints in determining whether there was a duty to defend. This is both false and contrary to Washington coverage law. See *Woo*, 161 Wn.2d at 53 (explaining that the duty to defend must "be determined only from the complaint"). This Court should therefore confirm the views of both the trial court and the Court of Appeals, that Café Arizona has no bad faith claim relating to Alea's investigation. *Am. Best Food*, 138 Wn. App. at 692-93; CP 389-91.

#### IV. CONCLUSION

For the reasons discussed herein, Alea respectfully requests that this Court hold that 1) there is no coverage for any claim causally connected to an assault and/or battery under a policy that "does not apply to any claim arising out of" assault and/or battery, and 2) no bad faith claim can be sustained where, as here, an insurer's claim handling and coverage determination followed Washington law. In this case, the exclusion precludes coverage because the alleged injuries were causally connected to (*i.e.*, arose out of) the assault. Alea's coverage determination and handling of this claim are fully supported by Washington law. The bad faith claim must be dismissed as a matter of law.

The trial court's dismissal of Café Arizona's claims was proper and should be affirmed. The Court of Appeals' decision to the contrary, and its post-decision order awarding attorney fees, should be reversed.

RESPECTFULLY SUBMITTED this 7th day of July, 2008.



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J. C. Ditzler, WSBA # 19209  
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STATE OF WASHINGTON

2008 JUL -7 P 3:07 **DECLARATION OF SERVICE**

BY RONDA A. BOWZER states as follows:

~~I am a citizen~~ I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 21 years, I am not a party to this action, and I am competent to be a witness herein.

On this 7th day of July, 2008, I caused to be filed via electronic filing with the Supreme Court of the State of Washington, the foregoing SUPPLEMENTAL BRIEF OF PETITIONER ALEA LONDON, LTD.

I also served copies of said document on the following parties as indicated below:

<b><i>Counsel for Plaintiffs/Appellants:</i></b> Scott B. Easter Paul J. Miller Montgomery Purdue Blankinship & Austin PLLC 701 Fifth Avenue, Suite 5500 Seattle, WA 98104 Fax: (206) 625-9534	<input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Email <input checked="" type="checkbox"/> Via U.S. Mail
<b><i>Counsel for Plaintiffs/Appellants:</i></b> Shane Moloney Short Cressman & Burgess PLLC 999 Third Avenue, Suite 3000 Seattle, WA 98104 Fax: (206) 340-8856	<input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Email <input checked="" type="checkbox"/> Via U.S. Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 7th day of July, 2008.

  
\_\_\_\_\_  
Dava Bowzer

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