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CLERK OF SUPREME COURT  
STATE OF WASHINGTON

**SUPREME COURT  
OF THE STATE OF WASHINGTON**

**Cause No. 57181-8-I**

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

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

Plaintiffs/Appellants,

v.

ALEA LONDON, LTD., a foreign corporation,

Defendant/Respondent.

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**PETITION FOR REVIEW**

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## I. IDENTITY OF PETITIONER

Petitioner is Alea London, Ltd. ("Alea"), a defendant in the Superior Court and a respondent in the Court of Appeals.

## II. CITATION TO COURT OF APPEALS DECISION

Alea respectfully requests that this Court grant review of the published opinion filed on May 21, 2007, by Division One of the Washington State Court of Appeals captioned *American Best Food, Inc. d/b/a Café Arizona v. Alea London Ltd.*, --- Wn. App. ---, 158 P.3d 119 (2007) (Dwyer, J.). See A-1 through A-11, *infra*. Alea timely sought reconsideration and Café Arizona<sup>1</sup> filed an Answer as ordered by the Court of Appeals. On July 18, 2007, the Court of Appeals denied reconsideration. See A-12, *infra*.

## III. INTRODUCTION

The underlying published opinion admonishes Alea for declining to follow Texas law that contradicts Washington precedent. Under Washington law, the insurance policy purchased by Café Arizona provides no coverage. Nonetheless, the Court of Appeals concluded that there was a duty to defend, citing law from other jurisdictions, and then deemed Alea's mere awareness of contrary non-Washington cases to be evidence of bad faith.

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<sup>1</sup> Plaintiffs/Appellants 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."

At issue is troubling new precedent that impacts three important and distinct areas of law. First, and most importantly, the underlying opinion inappropriately elevates distinguishable case law from other jurisdictions over Washington precedent. Second, it provides a counterintuitive interpretation of the term “arising out of” that defies established Washington law. Finally, it improperly calls for triers of fact to resolve complex issues of law. If allowed to stand, it will result in widespread confusion and unpredictability in business and social relationships. For all of the reasons below, review should be granted.

#### **IV. ISSUES PRESENTED FOR REVIEW**

1. Where there is no possibility of coverage as confirmed by insurance policy language and Washington precedent, can a policyholder nonetheless obtain a defense from its insurer by presenting distinguishable case law from another jurisdiction?

2. Where an insurance policy excludes coverage for bodily injury that “arises out of” assault, can there be coverage for alleged “exacerbation” of assault-derived injuries?

3. Where an insurer makes a coverage determination in accordance with applicable Washington regulations and precedent based upon the allegations reflected in the complaint, must a policyholder’s bad faith claim be dismissed as a matter of law?

## V. STATEMENT OF THE CASE<sup>2</sup>

Café Arizona purchased insurance to cover certain liability exposures related to the operation of its nightclub in Federal Way. The insurance policy Café Arizona elected to purchase from Alea is subject to certain agreed limitations. Significantly, the Policy “does not apply to any claim arising out of” assault and/or battery.<sup>3</sup>

On January 19, 2003, an assault and battery occurred in the parking lot adjacent to Café Arizona. George Antonio repeatedly shot Michael Dorsey, causing him serious injury. On August 27, 2003, Dorsey filed suit against Antonio and Café Arizona. At issue in this case are

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<sup>2</sup> While Alea contends that review is appropriate based upon the published Court of Appeals opinion as written, the corrected facts set forth herein help demonstrate the widespread problems with the Court of Appeals’ holdings. As explained in the Motion for Reconsideration filed by Alea in the Court of Appeals, a number of facts appearing in the underlying opinion are not supported by the record and in some instances are directly contradicted by the record. *See* Motion for Reconsideration, at 2-3 (including explanations provided in footnotes 2 through 10).

<sup>3</sup> CP 35. The Assault and Battery Exclusion provides as follows:

This insurance does not apply to any claim arising out of-

- A. Assault and/or Battery committed by any person whosoever, regardless of degree of culpability or intent and whether the acts are alleged to have been committed by the insured or any officer, agent, servant or employee of the insured or by any other person; or
- B. Any actual or alleged negligent act or omission in the:
  - 1. Employment;
  - 2. Investigation;
  - 3. Supervision;
  - 4. Reporting to the proper authorities or failure to so report; or
  - 5. Retention;of a person for whom any insured is or ever was legally responsible, which results in Assault and/or Battery; or
- C. Any actual or negligent act or omission in the prevention or suppression of any act of Assault and/or Battery.

*Id.*

Dorsey's allegations against Café Arizona and whether those allegations gave rise to a duty to defend Café Arizona under the Alea Policy.

**A. The Original Allegations Against Café Arizona.**

The original Dorsey Complaint contained the following relevant allegations:

5.17 Several security guards carried [Dorsey] into the club, however, the club owner/manager ordered to guards to carry [Dorsey] 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. Thus, although Dorsey alleged Café Arizona took certain actions in response to the assault and battery immediately after it occurred, he did not allege that those actions caused injury. Instead, the Complaint makes clear that the "savage assault" was the cause of Dorsey's injuries.

**B. Alea's Response to Café Arizona's Tender.**

Café Arizona requested that Alea provide a defense to the allegations made in the Dorsey Complaint. In accordance with

Washington's "rule that the duty to defend must be determined only from the complaint,"<sup>4</sup> Alea analyzed the language of the Complaint under relevant Washington common law. Because the Policy purchased by Café Arizona "does not apply to any claim arising out of" assault and/or battery, the tender of defense was denied. CP 260-62. Café Arizona asked Alea to reconsider based upon Texas law set forth in a decision issued by a Federal District Court, *Western Heritage Ins. Co. v. Dean*, 55 F. Supp. 2d 646 (E.D. Tex. 1998).<sup>5</sup>

In response, Alea explained that binding Washington precedent held that an assault and battery exclusion is properly applied to bar coverage for all claims (including negligence) "based on" assault and/or battery, as stated in *McAllister v. Agora Syndicate, Inc.*, 103 Wn. App. 106, 11 P.3d 859 (2000). As the phrase "based on" assault and/or battery is more restrictive than the phrase "arising out of" assault and/or battery, *McAllister* confirmed that coverage was excluded.<sup>6</sup>

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<sup>4</sup> *Woo v. Fireman's Fund Ins. Co.*, --- P.3d ----, 2007 WL 2128357 \*3 (Wash. No. 77684-9, July 26, 2007).

<sup>5</sup> In *Western Heritage*, the allegation was that the claimant died as a result of the policyholder's failure to render aid. *Western Heritage*, 55 F. Supp. 2d at 647. Inaccurately characterizing Dorsey's allegation against it as a claim for "failure to render aid," Café Arizona argued that *Western Heritage* determined this type of claim to be a separate occurrence that was not excluded by an assault and battery exclusion. CP 265-66.

<sup>6</sup> Addressing Café Arizona's proffered federal case interpreting Texas law, Alea pointed out that it was not only contrary to Washington law, but also materially distinguishable (*Western Heritage* focused on the presence of a "failure to render aid" claim that allegedly caused the claimant's death). CP 276-77.

**C. Café Arizona Sues Alea and, Thereafter, New Allegations are Asserted Against Café Arizona.**

Eighteen months later, Café Arizona sued Alea, alleging breach of contract, bad faith, and violation of the Consumer Protection Act. CP 1-8. After this instant litigation was well underway, Dorsey filed an Amended Complaint. CP 250-58. Café Arizona's alleged conduct after Dorsey was shot had been changed very slightly, as follows:

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. Again, the original Complaint contained no allegation that Café Arizona's acts or omissions in response to the assault contributed to Dorsey's injuries. The Amended Complaint was the first time that Dorsey alleged that Café Arizona's acts in response to the assault contributed to any injury whatsoever. CP 254 ("exacerbating Dorsey's injuries more").

By definition, however, the injuries that were allegedly exacerbated (*i.e.*, made worse) were the very injuries caused by the assault. The fact remained that the Policy "does not apply to any claim arising out of" assault and/or battery. CP 35. Given that an assault and battery exclusion is properly applied to bar coverage for all claims (including negligence) "based on" (and, necessarily, "arising out of") an assault under *McAllister*, 103 Wn. App. 106, the allegations made in the

Amended Complaint did not alter available coverage.

**D. The Trial Court Dismissal and Court of Appeals Reversal.**

Alea moved for summary dismissal and the trial court concluded as a matter of law that there was no duty to defend or indemnify:

I am satisfied that the authority that I have to follow is the *McAllister* case. . . . [I]t is clear direction to me from the Court of Appeals . . . I am satisfied in the facts in this case, as I understand them, and the language of the Policy, clearly, the exacerbated injuries, if there were such injuries, arose out of the assault and battery, and that the clear meaning and import of that particular provision of the Policy is to exclude coverage.

RP 2:16-3:12; *see also* CP 389-91.

The Court of Appeals reversed this ruling in a published opinion that limited *McAllister*, 103 Wn. App. 106,<sup>7</sup> and concluded that Alea had a duty to defend Café Arizona based upon the original Complaint as well as the Amended Complaint. In so ruling, the Court of Appeals relied upon law from other jurisdictions, created allegations that did not exist in either complaint (that the act of “dumping” caused a distinct “subsequent” injury to Dorsey), and imposed a temporal limitation on the words “arising out of” that is inconsistent with Washington law as well as the plain meaning

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<sup>7</sup> *McAllister* held that an assault and battery exclusion is properly applied to bar coverage for negligence claims based on an assault and battery. As discussed herein, the “arising out of” language used in the Alea Policy has been held to be broader than the phrase “based on.” Despite this established bar to coverage, the underlying opinion limited the *McAllister* holding. The Court of Appeals declared that that an assault and battery exclusion is properly applied to bar coverage for only those negligence claims arising out of an assault and battery that take place before the assault (as opposed to those that take place after the assault). *See American Best Food*, 158 P.3d at 127.

of the phrase. Although the phrase “arising out of” is commonly used in reference to an event or outcome precipitated by a prior act, the Court of Appeals nonetheless held that Café Arizona’s negligence would have had to occur prior to the assault in order to be excluded under the Policy.

Despite finding error with Alea’s conclusion that the Policy barred coverage under Washington law, the Court of Appeals acknowledged that Alea made its coverage determination in accordance with Washington claims handling regulations.<sup>8</sup> Even so, pointing to the fact that Café Arizona called Alea’s attention to a contrary Texas case as evidence of bad faith, it remanded the bad faith claim.

#### **VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

Alea respectfully requests that this Petition be granted because the decision of the Court of Appeals is in direct conflict with previous decisions of both this Court and the Court of Appeals. In addition, the Petition implicates a matter of substantial public interest, and should be determined by this Court. *See* RAP 13.4(b)(1), (2) & (4). If the underlying opinion is allowed to stand, Washington citizens will not be able to rely upon Washington common law that resolves a particular issue, but instead would be subject to any interpretation of that issue offered by

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<sup>8</sup> *See American Best Food*, 158 P.3d at 129-30 (“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.”).

any court in any jurisdiction. In addition, juries will be asked to decide complex legal issues relating to policy interpretation. Confusion and unpredictability will result.

A. **The Underlying Opinion Conflicts With Established Washington Legal Principles.**

The underlying opinion cannot be reconciled with important and longstanding Washington legal doctrines. Alea strictly adhered to these rules, and was then admonished for doing so by the Court of Appeals. Alea followed “the rule that the duty to defend must be determined only from the complaint.” *Woo v. Fireman’s Fund Ins. Co.*, --- P.3d ----, 2007 WL 2128357 \*3 (Wash. No. 77684-9, July 26, 2007). Even so, the Court of Appeals determined that a duty to defend had been triggered based upon hypothetical facts never alleged.

Alea followed Washington case law addressing the broad scope of “arising out of.” *See, e.g., Toll Bridge Authority v. Aetna Ins. Co.*, 54 Wn. App. 400, 404, 773 P.2d 906 (1989) (“To construe ‘arising out of’ as requiring a finding of ‘proximate cause’ . . . does violence to the plain language of the policy.”). The Court of Appeals in this case, however, undertook a causation analysis to determine that the assault-derived injury triggered coverage. Finally, although the record contains no evidence that Alea’s actions were “unreasonable, frivolous, or unfounded” as required to

establish bad faith, *see, e.g., Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 486, 78 P.3d 1274 (2003), the Court of Appeals declined to dismiss the bad faith claims as a matter of law and, instead, remanded for a re-determination of these legal issues.

**B. The Underlying Opinion Elevates Case Law From Other Jurisdictions Over Washington Precedent.**

Although Washington precedent (*McAllister*, 103 Wn. App. 106) had established that an assault and battery exclusion bars coverage for negligence claims “based on” (and by extension the broader scope of “arising out of”) an assault and battery, the underlying opinion rejected this law in favor of contrary and distinguishable law from other jurisdictions. *American Best Food*, 158 P.3d at 126 (“[C]ourts in other jurisdictions have held that allegedly negligent acts occurring after an assault or battery do not necessarily ‘arise out of’ the assault or battery.”).<sup>9</sup> The Court of Appeals then admonished Alea for relying upon Washington precedent in the face of contrary out-of-state authority. *Id.* at 128.

Washington courts have long held that non-Washington authorities inconsistent with established Washington law will not be adopted. Reasoning presented by out-of-state authorities can only be considered as

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<sup>9</sup> The cases from other jurisdictions relied upon by the Court of Appeals are materially distinguishable and, in at least one instance, directly at odds with Washington law. The material distinctions are discussed in detail in the underlying briefing. *See* Respondent’s Br. at 25-37; Motion for Reconsideration, at 15-17.

persuasive authority in Washington if it is consistent with Washington law. *See, e.g., Constr. Indus. Training Council*, 96 Wn. App. 59, 67, 977 P.2d 655 (1999);<sup>10</sup> *see also State v. Salavea*, 151 Wn.2d 133, 144 n.9, 86 P.3d 125 (2004).<sup>11</sup> Despite this, the underlying opinion elevated case law from other jurisdictions over Washington law. This Court and the Court of Appeals have produced thoughtful analyses of issues that citizens of Washington rely upon in good faith. This precedent forms the bedrock of Washington common law. If the underlying opinion stands, parties facing adverse Washington precedent will be encouraged to disregard that established Washington law in favor of selected caselaw developed in some other jurisdiction.

In the insurance coverage context, the implications of this practice would be far-reaching, impacting the rights and duties of insurers, policyholders, and claimants throughout Washington state. Washington follows “the rule that the duty to defend must be determined only from the complaint.”<sup>12</sup> *Woo*, 2007 WL 2128357 \*3; *accord Truck Ins. Exch. v.*

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<sup>10</sup> *Constr. Indus.*, 96 Wn. App. at 67 (“Although federal decisions are persuasive authority for construing state acts that are similar to a federal act, we are not compelled to adopt a federal procedure which is at odds with the usual and customary practice in Washington.”).

<sup>11</sup> *Salavea*, 151 Wn.2d at 144 n.9 (rejecting other states’ interpretations of statutes similar to a Washington statute).

<sup>12</sup> As explained by this Court in *Woo*, there are two exceptions to this “four corners” rule. *Woo*, 2007 WL 2128357 \*3. Because neither are applicable in this case, further discussion is not warranted.

*VanPort Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002). If the defense obligation is uncertain, this Court has advised insurers to provide a defense while seeking a declaratory judgment that there is no duty to defend. *See, e.g., Truck Ins. Exch.*, 147 Wn.2d at 761.

In this case, the complaints did not allege separate injury caused by Café Arizona's acts immediately after the assault. Rather, they only alleged injury arising out of the assault. Consequently, the Policy provides no coverage. The Court of Appeals determined that there was a duty to defend after 1) considering assumed facts inserted by the Court of Appeals (that the alleged act of "dumping" caused a distinct "subsequent" injury), and 2) disregarding prior Washington courts' instruction as to the proper interpretation of the phrase "arising out of" in favor of common law created in other jurisdictions. *See Part VI.C, infra.*

The underlying opinion implies that coverage might be appropriate if any jurisdiction recognizes any argument in favor of coverage. Should this stand, policyholders submitting claims for which there is no coverage under the policy they purchased need only present some non-binding authority in order to circumvent well-established Washington precedent and obtain a windfall of coverage. Insurance claim handlers throughout Washington will 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 will be widespread, and costly declaratory judgment actions will overburden Washington courts. Policyholders, in turn, will be unfairly burdened. After initially being provided with a defense, they will be forced to litigate parallel declaratory judgment actions only to have their defenses withdrawn following judicial confirmations of no coverage. In short, if allowed to stand, the process suggested by the underlying opinion would significantly impact policyholders, insurers, and businesses.

Under established Washington law, after this Court or the Court of Appeals has ruled on an issue in a published opinion, it is binding law. Likewise, where there is no possibility of coverage as confirmed by the insurance policy and Washington precedent, a policyholder should not be permitted to obtain a defense from its insurer by presenting distinguishable and contrary case law from another jurisdiction. Alea respectfully requests that this Court accept review to affirm these principles that have been called into doubt by the underlying opinion. Absent such review and clarification, confusion and unpredictability will result.

C. **The Court of Appeals' Interpretation of the Phrase "Arising Out Of" Conflicts With Washington Precedent.**

The original Complaint filed against Café Arizona alleged injury caused by an assault. It in no way alleged that Café Arizona's negligence

related to the “dumping” caused or contributed to Dorsey’s injury. The issue raised by the Amended Complaint is whether the Policy excludes coverage for alleged “exacerbation” of preexisting assault-derived injuries caused by an act that immediately followed the assault, where the injuries that were allegedly exacerbated (*i.e.*, made worse) were the very injuries caused by the assault. By operation of the Policy’s express exclusion for liability that “arises out of” assault and/or battery and established Washington law, no coverage is available.<sup>13</sup>

By nonetheless concluding that these allegations triggered a duty to defend, the Court of Appeals created a clear conflict with existing Washington law. Even though an injury can only “arise out of” an assault if an assault has already taken place, the Court of Appeals’ counterintuitive analysis purports to re-define the phrase “arise out of” to somehow encompass only those injuries that result from events that took place before the assault. Moreover, it never even addressed Washington’s prior interpretation and application of the phrase “arising out of” when used in an insurance exclusion. According to *Toll Bridge Authority*, 54 Wn. App. at 404, the phrase “arising out of” has a much broader application than proximate cause and “is ordinarily understood to mean

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<sup>13</sup> It is axiomatic that “the court may not modify the contract or create an ambiguity where none exists.” *Everett v. American Empire Surplus Lines Ins. Co.*, 64 Wn. App. 83, 87, 823 P.2d 1112 (1991).

‘originating from,’ ‘having its origin in,’ ‘growing out of,’ or ‘flowing from.’” *Id.* (citation omitted). The Court of Appeals explained:

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.* at 407. The Court then confirmed that when an exclusion contains the phrase “arising out of,” a proximate cause analysis is not warranted. *Id.*

Numerous cases since *Toll Bridge* have confirmed the broad meaning of the phrase “arising out of.” *Krempf v. Unigard Security Ins.*, 69 Wn. App. 703, 850 P.2d 533 (1993), is especially instructive. There, a plaintiff was injured when the policyholder tried to remove a burning gas tank from an automobile and threw it to the ground, splashing burning gasoline on plaintiff. The insurer refused to defend based on an exclusion in the homeowner’s policy at issue that precluded coverage for “bodily injury or property damage . . . arising out of . . . the ownership, maintenance, use, loading or unloading of motor vehicles.” *Id.* at 705.

The plaintiff in *Krempf*<sup>14</sup> argued that throwing the flaming tank of gasoline was a covered risk independent of the insured’s use or maintenance of the automobile, and that the efficient proximate cause

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<sup>14</sup> The plaintiff sued the insurer standing in the shoes of the insurer’s policyholder.

doctrine<sup>15</sup> applied. The Court of Appeals rejected these arguments, holding that an efficient proximate cause analysis would not apply to the case, because “the *excepted* risk . . . set into motion what [plaintiff] contends is a *covered* risk.” *Id.* at 705-06 (emphasis in original). The efficient proximate cause rule only comes into play if the initial peril is covered. *See id.* *Krempl* also rejected plaintiff’s request to apply the joint causation rule, which provides that an insurer is liable if an insured risk and an excluded risk jointly cause an accident. The Court held that, although other jurisdictions might reach a different result, “when an exclusion uses the phrase ‘arising out of,’ the joint causation rule is inapplicable in Washington.” *Id.* at 706 (citing to, among others, *Toll Bridge*, 54 Wn. App. 400).

The *Krempl* holding 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.<sup>16</sup> Here, the assault was clearly the

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<sup>15</sup> The efficient proximate cause rule states that where a peril specifically insured against sets other causes into motion which, in an unbroken sequence, produce the result for which recovery is sought, the loss is covered, even though other events within the chain of causation are excluded from coverage. *See, e.g., Krempl*, 69 Wn. App. at 705.

<sup>16</sup> *See, e.g., Hocking v. British America Assurance Co.*, 62 Wash. 73, 75, 113 P. 259 (1911) (policyholder’s home destroyed in fire that stemmed from negligent fumigation of home on order of civil authority; court held no coverage because policy excluded

“preponderant or efficient cause of the loss” that “set the others in motion.”<sup>17</sup> Simply put, absent the original assault, there could be no assault-derived injury to “exacerbate.”

By omitting any discussion whatsoever of the phrase “arising out of,” the Court of Appeals created a conflict with preexisting law from this Court and the Court of Appeals that places insurers, policyholders, and those seeking to purchase insurance in impossible positions. Alea urges this Court to accept review in order to resolve this important conflict.

**D. The Underlying Opinion Calls For Jury Trials to Resolve Complex Legal Issues.**

The Court of Appeals affirmed that Alea handled Café Arizona’s claim in strict adherence to Washington claims handling regulations.<sup>18</sup> Thus, Café Arizona’s bad faith claim can only survive if it meets the common law standard for bad faith claims.<sup>19</sup> To succeed on a bad faith claim, the policyholder must show that the insurer breached the insurance

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coverage for loss caused directly or indirectly by order of civil authority); *Graham v. Public Employees Mut. Ins. Co.*, 98 Wn.2d 533, 537-38, 656 P.2d 1077 (1983) (the “immediate physical cause analysis . . . should be discarded”; jury could find Mt. St. Helens eruption was the efficient proximate cause of the mudflows causing the loss); *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).

<sup>17</sup> Significantly, Dorsey never alleged that Café Arizona’s act of “dumping” caused injury separate and distinct from the assault-derived injury.

<sup>18</sup> See *American Best Food*, 158 P.3d at 129-30 (“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.”).

<sup>19</sup> The underlying opinion makes no mention of the Washington standard applicable to bad faith claims.

contract, and that said breach was “unreasonable, frivolous, or unfounded.” *Smith*, 150 Wn.2d at 486 (citation omitted). The standard for assessing whether an insurer’s actions were in bad faith is one of reasonableness that can (and, in cases such as this, must) be decided as a matter of law:

If the insurer can point to a reasonable basis for its action, this reasonable basis is significant evidence that it did not act in bad faith and may even establish that reasonable minds could not differ that its denial of coverage was justified.

*Id.* at 486.

Despite the undisputed facts that confirm Alea’s actions were not unreasonable, frivolous, or unfounded, the Court of Appeals called for a jury trial to resolve this legal issue. Alea made its coverage determination based upon the allegations against Café Arizona as stated in the complaints and in reliance upon then-existing Washington precedent.

The Court of Appeals correctly noted that there was no doubt raised about the coverage determination, stating that “it was Alea’s legal opinion that its policy clearly excluded Café Arizona’s liability to Dorsey that led to Alea’s refusal to defend.” *American Best Food*, 158 P.3d at 129. Thus, this is not a situation like the one presented in the *Woo* case, which involved equivocal opinions about coverage. *See Woo*, 2007 WL 2128357 \*7. Alea’s denial was based on a reasonable interpretation of

Washington law as it then existed. The very fact that Café Arizona had to draw on out-of-state authority implicitly acknowledges that its argument was not supported by Washington law. The trial court agreed with Alea that Washington precedent provided “clear direction” with “clear meaning,” and concluded that Alea’s denial was proper. *See* RP 2:16-3:12. By publishing its reversal, the Court of Appeals indicated that it was setting new precedent in the state of Washington on this issue. *See* RAP 12.3(d).

Given that Alea’s coverage determination had a reasonable basis and was not frivolous or unfounded, it could not have been in bad faith as a matter of law. By ordering a remand under these circumstances, the Court of Appeals has turned a purely legal issue into a jury question. This conflicts with precedent from this Court and from the Court of Appeals. Moreover, if the underlying published opinion is allowed to stand, juries will be asked to render legal rulings on whether an insurer’s coverage determination was reasonable. Given the complex legal interpretations of policy language that underlie such a determination, expert testimony will be required on both sides in order to advise the jury as to a finding of reasonableness. A battle of the experts and a jury critique of the insurer’s conduct will follow in every case where a policyholder alleges bad faith. This scenario is problematic on many levels, and wholly inappropriate

considering the serious consequences that could follow from a bad faith finding (*e.g.*, coverage by estoppel). Alea respectfully requests that this Court accept review in order to resolve this conflict in law and to address this issue of substantial public interest.

## VII. CONCLUSION

The underlying opinion elevates distinguishable case law from other jurisdictions over Washington precedent, interprets the phrase “arising out of” contrary to Washington common law, and inappropriately calls for triers of fact to make findings on complex legal issues. In order to reaffirm the longstanding doctrine of *stare decisis*, resolve conflicts in law, and avoid confusion and unpredictability in insurance claims handling, Alea respectfully requests that this Court grant review under RAP 13.4(b)(1), (2) and/or (4).

RESPECTFULLY SUBMITTED this 16th day of August, 2007

COZEN O'CONNOR



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**DECLARATION OF SERVICE**

I, Leslie Nii Yamashita, states as follows:

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 17th day of August, 2007, I caused to be filed with the Court of Appeals of the State of Washington, Division I, the foregoing PETITION FOR REVIEW. I also served copies of said document on the following parties as indicated below:

FILED S.D.M.#1  
 COURT OF APPEALS  
 STATE OF WASHINGTON  
 2007 AUG 17 2:12:57 PM

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

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 17th day of August, 2007.

*Leslie Nii Yamashita*  
LESLIE NII YAMASHITA

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Café Arizona notified Alea of the Dorsey lawsuit, and asserted that the Alea policy both required Alea to defend Café Arizona against Dorsey's claims and provided Café Arizona the right to indemnity for sums that it "becomes legally obligated to pay [Dorsey] as damages because of 'bodily injury.'" Alea refused to defend Café Arizona against Dorsey's claims and denied that Café Arizona was entitled to indemnity for liability to Dorsey. Alea based its refusal on the liability insurance policy's exclusionary clause, which states: "This insurance does not apply to any claim arising out of . . . Assault and/or Battery."

Café Arizona then initiated this lawsuit against Alea, seeking monetary damages and declaratory relief, and asserting that Alea breached the insurance contract, acted in bad faith, violated the Washington Consumer Protection Act, and violated the Washington insurance code and insurance commissioner's regulations. Café Arizona and Alea each filed a motion for summary judgment. The trial court granted Alea's motion for summary judgment and dismissed Café Arizona's claims. In so ruling, the trial court relied on our holding in McAllister v. Agora Syndicate, Inc., 103 Wn. App. 106, 11 P.3d 859 (2000), to conclude that the injuries Dorsey suffered as a result of allegedly negligent acts by employees of Café Arizona, occurring both before and after the shooting, necessarily "arise out of" the assault or battery.

We conclude that Café Arizona's potential liability for its employees' alleged negligence after Dorsey was shot did not necessarily "arise out of" an assault or battery upon Dorsey. Therefore, Alea had a duty to defend Café Arizona. In

addition, unresolved issues of fact exist concerning both Café Arizona's claimed right to indemnity and whether Alea acted in bad faith, rendering summary judgment inappropriate. Conversely, the trial court ruled correctly in dismissing the remaining claims based on the Consumer Protection Act, the insurance code, and insurance regulations. The trial court's ruling is thus affirmed in part and reversed in part, and the cause is remanded to that court for further proceedings.

### FACTS

On January 19, 2003, in the parking lot of the Café Arizona, George Antonio repeatedly shot and severely injured Michael Dorsey. Dorsey subsequently brought a lawsuit against both Antonio and Café Arizona. Dorsey's original complaint alleged that, while Dorsey was at Café Arizona, Antonio started a confrontation with him. Antonio was escorted out of the club by security personnel but was subsequently allowed to re-enter, whereupon Antonio again confronted Dorsey. Security personnel again intervened, and escorted both men out of the club. The men continued their verbal dispute outside the club, and the security guards began to surround Antonio. Antonio pulled out a gun and shot Dorsey several times. After Dorsey was shot, "[s]everal security guards carried [Dorsey] into the club, however, the club owner/manager ordered [the] guards to carry [Dorsey] back outside, where the guards dumped him back on the sidewalk."

The liability insurance policy Café Arizona purchased from Alea expressly provides coverage for sums that Café Arizona "becomes legally obligated to pay

as damages because of 'bodily injury.'" The policy imposes upon Alea "the right and duty" to defend Café Arizona against any suit seeking such damages.

However, the policy contains several exclusionary clauses, including the following:

This insurance does not apply to any claim arising out of-

- A. Assault and/or Battery committed by any person whatsoever, regardless of degree of culpability or intent and whether the acts are alleged to have been committed by the insured or any officer, agent, servant or employee of the insured or by any other person; or
- B. Any actual or alleged negligent act or omission in the:
  - 1. Employment;
  - 2. Investigation;
  - 3. Supervision;
  - 4. Reporting to the proper authorities or failure to so report; or
  - 5. Retention;of a person for whom any insured is or ever was legally responsible, which results in Assault and/or Battery; or
- C. Any actual or alleged negligent act or omission in the prevention or suppression of any act of Assault and/or Battery.

Café Arizona notified Alea of the commencement of Dorsey's lawsuit, asserting both that Café Arizona had a right to indemnity for monetary damages it might incur as a result of Dorsey's claims, and that Alea had a duty to defend Café Arizona against those claims. By letter, Alea responded that Dorsey's claims fell within the insurance policy's assault and battery exclusion and that, therefore, Café Arizona was not entitled to indemnity and Alea had no duty to defend Café Arizona in the Dorsey litigation.

Café Arizona's counsel wrote Alea disputing Alea's interpretation of the policy, noting that Dorsey's complaint contained factual allegations concerning the actions of Café Arizona's employees following the shooting, and that Dorsey

“appears to claim [that those actions] caused him further injuries” that would not necessarily be excluded by the assault and battery exclusion. In response, Alea’s counsel stated that, based on McAllister, 103 Wn. App. 106, Dorsey’s injuries from Café Arizona employees’ allegedly negligent acts “arise out of” the assault or battery. Alea’s counsel stated that, based on the policy’s assault and battery exclusion, Alea had no duty to defend Café Arizona against Dorsey’s claims, and Café Arizona had no right to indemnity for its liability to Dorsey. In reply, counsel for Café Arizona wrote to counsel for Alea stating, in part:

[B]ecause neither the Court of Appeals nor the Supreme Court have addressed the issue raised in the instant case, and because there is at least one case out there that does support my clients’ position,<sup>2</sup> it is certainly conceivable that this claim would ultimately be found to be a covered occurrence, thereby entitling my clients to a defense and coverage.

Alea’s response reaffirmed its position that it had no duty to defend Café Arizona against Dorsey’s claims, and that Café Arizona was not entitled to indemnity for its liability to Dorsey.

In May 2005, Café Arizona initiated this lawsuit against Alea. In July 2005, Dorsey served Café Arizona with a motion to amend his complaint.<sup>3</sup> Dorsey’s amended complaint states:

[S]ecurity guards carried the injured Michael Dorsey from the lobby of Café Arizona and dumped him on the sidewalk, exacerbating his

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<sup>2</sup> Counsel’s reference was to Western Heritage Insurance Co. v. Estate of Dean, 55 F. Supp.2d 646 (E. D. Tex. 1998) (claim for failure to render aid following an assault was not excluded by assault and battery exclusion).

<sup>3</sup> Dorsey received leave to file his amended complaint on August 1, 2005.

injuries more, after Mr. Seo negligently ordered the guards to carry [Dorsey] back outside.

Café Arizona's counsel then engaged in further correspondence with Alea's counsel. On July 20, 2005, Café Arizona sent Alea a copy of Dorsey's amended complaint and asserted, based on the allegations set forth in the amended complaint, that Café Arizona had a right to coverage and that Alea had a duty to defend Café Arizona in the Dorsey litigation. On July 25, 2005, Café Arizona sent Alea portions of a report by Michael Comte, Dorsey's expert witness. Comte's report stated:

Dorsey was able to stagger into the alcove of the club. He said the owner of the club ordered security officers to carry him out and place him on the sidewalk, which they did. I was rather startled by Mr. Dorsey's description of the owner's behavior. I thought common sense would dictate you do not move a victim who has been shot.

The parties' correspondence did not produce a resolution of their dispute.

Café Arizona and Alea each filed a motion for summary judgment. The trial court granted Alea's motion for summary judgment and dismissed Café Arizona's claims.

#### DISCUSSION

An appellate court engages in de novo review of a trial court's ruling on summary judgment, considering all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. Liberty Mut. Ins. Co. v. Tripp, 144 Wn.2d 1, 10, 25 P.3d 997 (2001).

Duty to Defend

Café Arizona's initial contention is that Alea breached its duty to defend Café Arizona against Dorsey's claims. We agree.

The duty to defend is a primary benefit of an insurance contract. Truck Ins. Exch. v. VanPort Homes, Inc., 147 Wn.2d 751, 760, 58 P.3d 276 (2002) (citing Safeco Ins. Co. of Am. v. Butler, 118 Wn.2d 383, 392, 823 P.2d 499 (1992)). An insurer's duty to defend against a claim is broader in scope and distinct from its duty to indemnify. Allstate Ins. Co. v. Bowen, 121 Wn. App. 879, 881, 91 P.3d 897 (2004) (citing Truck Ins. Exch., 147 Wn.2d at 760). The insurer's duty to defend arises when an action is brought against its insured, and is based on the potential for the insured's liability. Bowen, 121 Wn. App. at 883 (citing Truck Ins. Exch., 147 Wn.2d at 760. "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." Bowen, 121 Wn. App. at 883 (quoting Truck Ins. Exch., 147 Wn.2d at 760). "[A]n insurer's duty to defend arises when any part of the claim is potentially or arguably within the scope of the policy's coverage, even if the allegations of the suit are false, fraudulent, or groundless." 14 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 200:12 at 200-35 to 200-36 (3d ed. 2005). Any ambiguity in the complaint against the insured is liberally construed in favor of triggering the insurer's duty to defend. Truck Ins. Exch., 147 Wn.2d at 760.

Once the duty to defend is triggered by a claim that potentially falls within the policy's basic coverage provisions, the insurer is relieved of that duty only if the claim is clearly excluded by an applicable exclusionary clause within the policy.

Truck Ins. Exch., 147 Wn.2d at 760; Bowen, 121 Wn. App. at 883-4.

Although an insurer will be obligated to defend more cases than it will be required to indemnify under the "potentiality rule" because the mere possibility that the insurer will have to indemnify triggers the duty to defend, a duty to defend does not extend to circumstances in which there is no duty to indemnify as a matter of law. Only if there is no possible factual or legal basis on which the insurer might be obligated to indemnify will there be no duty to defend.

14 RUSS & SEGALLA, supra, § 200:12 at 200-37. The insurer bears the burden of proving the applicability of such an exclusionary clause. Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 674, 15 P.3d 115 (2000). Once the duty to defend attaches, insurers may not desert policyholders and allow them to incur substantial legal costs while waiting for an indemnity determination. Truck Ins. Exch., 147 Wn.2d at 761. Instead,

[i]f the insurer is unsure of its obligation to defend in a given instance, it may defend under a reservation of rights while seeking a declaratory judgment that it has no duty to defend. A reservation of rights is a means by which the insurer avoids breaching its duty to defend while seeking to avoid waiver and estoppel. "When that course of action is taken, the insured receives the defense promised and, if coverage is found not to exist, the insurer will not be obligated to pay."

Truck Ins. Exch., 147 Wn.2d at 761 (quoting Kirk v. Mt. Airy Ins. Co., 134 Wn.2d 558, 563 n.3, 951 P.2d 1124 (1998)) (internal citation omitted).

Our initial inquiry is whether Dorsey's complaint against Café Arizona, construed liberally, alleges facts which could, if proved, impose liability upon Café Arizona for occurrences covered by the Alea policy. The liability insurance policy Café Arizona purchased from Alea expressly provides coverage for sums that Café Arizona "becomes legally obligated to pay as damages because of 'bodily injury'" that "is caused by an 'occurrence' that takes place in the 'coverage territory'" and that "occurs during the policy period." It is not disputed that Dorsey alleged, in both his original complaint and his amended complaint, that he suffered bodily injury as a result of an "occurrence." There is also no dispute that the alleged injury took place within the coverage territory, and during the time the policy was in effect.<sup>4</sup>

Our next inquiry, therefore, is whether the policy contained a clause that clearly excluded from coverage Café Arizona's potential liability for the alleged injury to Dorsey. Truck Ins. Exch., 147 Wn.2d at 760; Bowen, 121 Wn. App. at 883-84. Alea claims that it does. We disagree.

An appellate court engages in de novo review of a trial court's interpretation of an insurance policy, which is a question of law. Stouffer & Knight v. Continental Cas. Co., 96 Wn. App. 741, 747-48, 982 P.2d 105 (1999). Language in an insurance policy that is susceptible to two different but reasonable interpretations is ambiguous and must be liberally construed in favor of the insured. Teague

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<sup>4</sup> "Bodily injury" is defined to include "bodily injury . . . sustained by a person." "Occurrence" is defined as "an accident." "Coverage territory" is defined as "[t]he United States of America." The policy was in effect at the time Dorsey was allegedly injured.

Motor Co. v. Federated Serv. Ins. Co., 73 Wn. App. 479, 482, 869 P.2d 1130

(1994). Exclusionary clauses should be construed against the insurer with special strictness. Tewell, Thorpe & Findlay, Inc. v. Cont'l Cas. Co., 64 Wn. App. 571, 575, 825 P.2d 724 (1992). However, a court may not give an insurance contract a strained or forced construction that would lead to an extension or restriction of the policy beyond what is fairly within its terms. Tewell, 64 Wn. App. at 576. In construing an insurance policy, the policy should be given a fair, reasonable, and sensible construction, consistent with the way an average person purchasing insurance would understand the policy language. E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co., 106 Wn.2d 901, 907, 726 P.2d 439 (1986):

The applicable assault and battery exclusion provides:

This insurance does not apply to any claim arising out of-

- A. Assault and/or Battery committed by any person whatsoever, regardless of degree of culpability or intent and whether the acts are alleged to have been committed by the insured or any officer, agent, servant or employee of the insured or by any other person; or
- B. Any actual or alleged negligent act or omission in the:
  - 1. Employment;
  - 2. Investigation;
  - 3. Supervision;
  - 4. Reporting to the proper authorities or failure to so report; or
  - 5. Retention;of a person for whom any insured is or ever was legally responsible, which results in Assault and/or Battery; or
- C. Any actual or alleged negligent act or omission in the prevention or suppression of any act of Assault and/or Battery.

As a preliminary matter, parts B and C of the applicable assault and battery exclusion clearly exclude the alleged preassault negligence of Café Arizona

employees from coverage, insofar as such negligence resulted in or failed to prevent or suppress an assault or battery. However, parts B and C do not necessarily exclude the alleged postassault negligence of Café Arizona employees, because such postassault negligence is neither alleged to have resulted in, nor to have failed to prevent or suppress, an assault or battery.

Thus, the critical question is whether Café Arizona's potential liability to Dorsey for its employees' alleged postassault negligence clearly "arise[s] out of" an assault or battery. Alea contends that it does, arguing that McAllister v. Agora Syndicate, Inc., 103 Wn. App. 106, 11 P.3d 859 (2000), is dispositive of this issue.

In McAllister, a nightclub patron was injured in an altercation with another patron. The injured patron brought a negligence claim against the nightclub owner, asserting that, before the assault, the nightclub's employees negligently failed to protect him. The applicable assault and battery exclusion in that case stated that "no coverage shall apply under this policy for any claim, demand or suit based on assault and/or battery." McAllister, 103 Wn. App. at 109. This court reasoned that McAllister's claim was "ultimately 'based on' assault and battery in the sense that without first establishing the underlying assault, negligence cannot be proved." McAllister, 103 Wn. App. at 111. Thus, we held that McAllister's negligence claims were excluded from coverage under the relevant policy. McAllister, 103 Wn. App. at 111.

However, McAllister involved only claims of preassault negligence. Thus, our analysis necessarily centered on prior cases where the assault or battery was

alleged to have been the result of preassault negligence.<sup>5</sup> 103 Wn. App. at 110-11. By contrast, Dorsey alleged that he was injured by the behavior of Café Arizona employees after the shooting.

As noted by Café Arizona, courts in other jurisdictions have held that allegedly negligent acts occurring after an assault or battery do not necessarily “arise out of” the assault or battery. For example, in Bucci v. Essex Ins. Co., 393 F.3d 285, 290-91 (1st Cir. 2005), the court analyzed an insurance policy exclusion for claims “arising out of assault and/or battery” and held that the policy did not necessarily exclude coverage for claims of postassault negligence, such as a failure to provide needed assistance to an injured patron. Similarly, in United Nat’l Ins. Co. v. Penuche’s, Inc., 128 F.3d 28 (1st Cir. 1997), a bar patron was first battered by another patron but was also subsequently injured by a bar employee who placed the patron in a “bear hug.” The first circuit held that the patron’s injuries did not “arise out of” the initial attack

All of the damages in this tort action stem from a discrete intervening act of alleged negligence, and this claim cannot be said to arise out of earlier actions. [The bar employee] had a completely different objective from the brawling patron, and [the assaulted patron’s]

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<sup>5</sup> These included Terra Nova Ins. Co. v. N.C. Ted, Inc., 715 F. Supp. 688 (E.D. Pa. 1989) (alleging that bar failed to take measures that might have prevented the alleged shooting assault upon bar patron by a fellow patron); Mount Vernon Fire Ins. Co. v. Creative Hous. Ltd., 88 N.Y.2d 347, 668 N.E.2d 404 (1996) (tenant assaulted by a third party sued landlord for negligent supervision, management, and control of the property); U.S. Underwriters Ins. Co. v. Val-Blue Corp., 85 N.Y.2d 821, 647 N.E.2d 1342 (1995) (off-duty police officer shot by a club security guard sued the nightclub, alleging negligent hiring, supervising, and training of the security guard); Roloff v. Taste of Minn., 488 N.W.2d 325 (Minn. Ct. App. 1992) (alleging negligence by festival sponsor for failing to provide adequate security, leading to an assault by festival attendee on fellow attendee); and Taylor v. Duplechain, 469 So. 2d 472 (La. Ct. App. 1985) (bartender allegedly acted negligently both by taking action that tended to cause the fight between two patrons and by not taking action to prevent or to end the fight).

eventual injuries were not caused by the blows he received in the fight.

Penuche's, 128 F.3d at 32.

Additionally, in W. Heritage Ins. Co. v. Estate of Dean, 55 F.Supp.2d 646, 650 (E.D. Tex. 1998), a case referenced by Café Arizona during the prelitigation discussions, an acutely intoxicated bar patron was battered by another patron and was then left by bar employees on the floor of the bar for fifty minutes before medical aid was summoned. The injured patron was dead by the time medics arrived. In analyzing the issues presented, the federal court recognized that “the origin of the damages in the underlying suit is an assault and battery” but noted:

The deceased was a patron in [the] tavern when he was injured as a result of an assault and battery; although the deceased collapsed to the floor, the tavern employees did nothing to render aid or obtain medical assistance for him. [The tavern owner's] role . . . implied a duty to render aid to an injured patron, regardless of the cause of the injury.

Dean, 55 F.Supp.2d at 651. These and other cases<sup>6</sup> recognize the logical distinction between allegations of preassault negligence and allegations of postassault negligence.

Dorsey alleged that employees of Café Arizona exacerbated his gunshot injuries. Dorsey's original complaint alleged that, after he had been shot, employees of Café Arizona “dumped him back on the sidewalk,” and his amended

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<sup>6</sup> See, e.g., Planet Rock, Inc. v. Regis Ins. Co., 6 S.W.3d 484, 491 (Tenn. Ct. App. 1999) (injury caused by an assault was divisible and separate from injury caused by postassault conduct, therefore assault and battery exclusion did not preclude coverage when there were allegations of injuries caused by insured's postassault conduct); West v. City of Ville Platte, 237 So. 2d 730, 733 (La. Ct. App. 1970) (claims for injuries from a beating arose from an assault and were excluded from coverage, but claims for injuries caused by failure to render aid or secure medical help did not arise from the assault and did not fall within a policy exclusion).

complaint clarified that allegation. The alleged act of ordering employees to carry a gravely wounded Dorsey outside, and the alleged act of “dumping” him on the sidewalk constitute “discrete intervening act[s] of alleged negligence” that Dorsey claims caused injury. Penuche's, 128 F.3d at 32. The harm these alleged acts occasioned is distinct from the prior harm caused by the assault or battery.

Carrying and “dumping” a severely wounded patron posed a substantial risk of grave injury, regardless of the initial cause of the patron’s physical distress. Unlike the situation in McAllister, negligence can here be proved “without first establishing the underlying assault.” McAllister, 103 Wn. App. at 111. Thus, Dorsey’s alleged subsequent injury at the hands of Café Arizona employees does not clearly “arise out of” the prior assault or battery.

The trial court’s order granting summary judgment on this issue is reversed.

#### Indemnity

Café Arizona next asserts that the evidence it proffered raised issues of material fact as to whether Alea breached the insurance contract by refusing to indemnify Café Arizona for liability in the Dorsey lawsuit, precluding summary judgment on this issue. We agree.

“The duty to indemnify hinges on the insured's actual liability to the claimant and actual coverage under the policy.” Hayden v. Mut. of Enumclaw Ins. Co., 141 Wn.2d 55, 64, 1 P.3d 1167 (2000). Where, as here, an insurer’s duty to indemnify depends upon the resolution of factual issues relating to coverage, the duty arises only when the injured party in the underlying action against the insured prevails on

facts that fall within the policy's coverage. W. Nat'l Assurance Co. v. Hecker, 43 Wn. App. 816, 821-22, 719 P.2d 954 (1986). Alea's duty to indemnify depends upon whether Café Arizona is found liable to Dorsey based on proof that postassault negligence caused Dorsey injury. The record on review is silent as to the outcome of the Dorsey litigation. Café Arizona's liability for any injury to Dorsey based on its preassault negligence is excluded from coverage by the policy's assault and battery provision. McAllister, 103 Wn. App. at 110-11. However, Café Arizona's liability for any injury to Dorsey based on its employees' negligence after Dorsey was shot is covered and not excluded by the insurance policy. Whether Café Arizona was found liable to Dorsey for bodily injuries proximately caused by the postassault negligence is a factual question that must be resolved on remand.

The trial court's summary judgment dismissal of Café Arizona's claim relating to Alea's refusal to indemnify Café Arizona is reversed.

#### Bad Faith-Duty to Defend

Café Arizona also assigns error to the trial court's dismissal of its claim that Alea's refusal to provide a defense amounted to bad faith. Because the evidence submitted by Café Arizona raises issues of material fact on this question, summary judgment was improperly granted.

An insurer has a duty of good faith to its policyholder. Smith v. Safeco Ins. Co., 150 Wn.2d 478, 484, 78 P.3d 1274 (2003). The duty to act in good faith, and liability for acting in bad faith, arise from the fiduciary relationship between the

insurer and insured. Coventry Assocs. v. Am. States Ins. Co., 136 Wn.2d 269, 280, 961 P.2d 933 (1998). This fiduciary relationship implies a broad obligation to deal fairly, and a responsibility to give equal consideration to the insured's interests. Coventry, 136 Wn.2d at 280. An insurer who unreasonably denies its defense obligation may be found to have acted in bad faith. Wolf v. League Gen. Ins. Co., 85 Wn. App. 113, 122, 931 P.2d 184 (1997) (citing Indus. Indem. Co. of the Nw., Inc. v. Kallevig, 114 Wn.2d 907, 917, 792 P.2d 520 (1990)). However, bad faith will not be found where the failure to provide a defense is based upon a reasonable interpretation of the insurance policy. Kirk, 134 Wn.2d at 560. The question of whether an insurer unreasonably denies coverage is generally an issue of fact. Liberty Mut. Ins. Co. v. Tripp, 144 Wn.2d 1, 23, 25 P.3d 997 (2001); Van Noy v. State Farm Mut. Auto. Ins. Co., 142 Wn.2d 784, 796, 16 P.3d 574 (2001).

The trial court granted summary judgment dismissal of this claim based primarily on its belief that the McAllister decision compelled the conclusion that all of Dorsey's injuries "arise out of" the assault or battery and, therefore, that Alea had correctly determined that it had no duty to defend. However, Alea was incorrect in its determination that it had no duty to defend. Our inquiry, therefore, is whether the evidence and the reasonable inferences drawn therefrom, viewed in the light most favorable to Café Arizona, raise a genuine issue of material fact concerning whether Alea's refusal to defend was unreasonable. We conclude that they do.

The evidence on this issue includes the letters from Café Arizona to Alea asserting that McAllister did not apply to postassault negligence and citing authorities from other jurisdictions in support of its position, and Alea's responses thereto. These communications raise a factual issue as to whether Alea unreasonably denied its defense obligation. This evidence precludes summary judgment because it places the reasonableness of Alea's actions in question. The reasonableness of an insurer's denial of its defense obligation is the critical factual issue in determining whether such a denial was made in bad faith. Wolf, 85 Wn. App. at 122.

The fact that Alea incorrectly determined that it had no duty to defend is evidence of bad faith. The proffered evidence raises doubts concerning the reasonableness of Alea's actions, particularly in light of the fact that Café Arizona called Alea's attention to authorities contrary to its position, and given the requirement that an insurer give equal consideration to the interests of its insured. Coventry, 136 Wn.2d at 280. On the other hand, Alea's failure to provide a defense does not constitute bad faith if the trier of fact determines that Alea's decision was based upon a reasonable interpretation of the insurance policy. Kirk, 134 Wn.2d at 560. The determination of whether Alea's interpretation was reasonable is an unresolved question of fact. Tripp, 144 Wn.2d at 23.

The trial court's summary judgment dismissal of Café Arizona's bad faith claim relating to Alea's denial of a defense is reversed.

Remedy for Bad Faith Refusal to Defend

Cafe Arizona also asserts that, if Alea's refusal to provide a defense is found to constitute bad faith, then Alea should be estopped from asserting policy defenses to coverage of Café Arizona's claim, including any sums paid by Café Arizona to Dorsey in settlement of Dorsey's claims against Café Arizona.

"Where an insurer acts in bad faith in failing to defend, . . . coverage by estoppel is one appropriate remedy." Kirk, 134 Wn.2d at 563 (citing Safeco Ins. Co. of Am. v. Butler, 118 Wn.2d 383, 393, 823 P.2d 499 (1992)). Although an insurer's denial of coverage based on a debatable question of coverage or a reasonable interpretation of the policy is not necessarily bad faith, Felice v. St. Paul Fire & Marine Ins. Co., 42 Wn. App. 352, 361, 711 P.2d 1066 (1985), "when an insurer wrongfully refuses to defend, it has voluntarily forfeited its ability to protect itself against an unfavorable settlement, unless the settlement is the product of fraud or collusion." Truck Ins. Exch., 147 Wn.2d at 765-66. "To hold otherwise would provide an incentive to an insurer to breach its policy." Truck Ins. Exch., 147 Wn.2d at 766.

However, because we are remanding this cause for the trier of fact to determine whether the refusal to defend was made in bad faith, the question of the appropriate remedy for Alea's alleged bad faith is premature.

Bad Faith Investigation

The trial court also granted summary judgment in favor of Alea concerning Café Arizona's allegations that Alea violated the CPA and insurance claims settlement regulations. We affirm these decisions by the trial court.

Café Arizona asserts that Alea did not respond to Café Arizona's July 20, and July 25, 2005 letters. Thus, Café Arizona asserts, Alea violated WAC 284-30-330(2), WAC 284-30-360(1), and WAC 284-30-360(3). Café Arizona also asserts that Alea's investigation of Café Arizona's claim violated WAC 284-30-330(3). In support of the contention that Alea failed to respond to Café Arizona's letters, Café Arizona cites only to the declarations of its counsel. However, neither declaration provides evidence of such a failure. Accordingly, Café Arizona produced insufficient evidence on this issue to raise a factual issue.

In addition, although Café Arizona asserts that Alea conducted an insufficient investigation, the allegations contained in Dorsey's complaint were neither ambiguous nor inadequate. The insurer must investigate the claim if coverage is not clear from the face of the complaint but may exist, or if the allegations are in conflict with facts known to or readily ascertainable by the insurer, or if the allegations are otherwise ambiguous or inadequate. Truck Ins. Exch., 147 Wn.2d at 761. Such an investigation is directed to factual matters. See Ins. Co. of N. Am. v. Ins. Co. of State of Pa., 17 Wn. App. 331, 334, 562 P.2d 1004 (1977).

However, it was Alea's legal opinion that its policy clearly excluded Café Arizona's liability to Dorsey that led to Alea's refusal to defend. Café Arizona has not shown that, given Alea's legal conclusion, further investigation of factual materials would have led Alea to a different understanding of the facts, or a different result. Accordingly, 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. Truck Ins. Exch., 147 Wn.2d at 761; Ins. Co. of N. Am., 17 Wn. App. at 334.<sup>7</sup>

We affirm the trial court's dismissal of these claims.

#### Attorney Fees

An insured that is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to recover an award of attorney fees to compensate it for the legal expenses incurred in vindicating the right to the claimed benefit. Olympic S.S. Co. v. Centennial Ins. Co., 117 Wn.2d 37, 52-3, 811 P.2d 673 (1991). Because Café Arizona was required to initiate this action in order to obtain the benefits to which it was entitled, it is entitled to an award of attorney fees in both this court and in the trial court.<sup>8</sup> As to fees on appeal, subject to compliance with RAP 18.1, a commissioner of this court will determine an appropriate award. As to fees incurred in the trial court, application should be made to that court upon remand.

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<sup>7</sup> As a result, Café Arizona's request for attorney fees on this basis was properly denied.

<sup>8</sup> Attorney fees incurred in prosecuting this action are to be distinguished from attorney fees incurred in defending the underlying Dorsey litigation, which are recoverable as damages in this action given our conclusion that Alea breached its duty to defend.

CONCLUSION

Affirmed in part, reversed in part, and remanded.

Dery, J.

WE CONCUR:

Elemyon, J.

Colman, J.

(Cite as: 158 P.3d 119)

**H**

Court of Appeals of Washington,  
Division 1.  
AMERICAN BEST FOOD, INC., a Washington  
corporation d/b/a Café Arizona; and  
Myung Chol Seo and Hyun Heui Seo-Jeong,  
Appellants,  
v.  
ALEA LONDON, LTD., a foreign company,  
Respondent.  
No. 57181-8-I.

May 21, 2007.

Reconsideration Denied July 18, 2007.

**Background:** Insured nightclub brought action against its liability insurer, alleging breach of insurance contract and bad faith stemming from insurer's failure to defend nightclub in lawsuit brought by injured patron. The Superior Court, King County, Brian D. Gain, J., granted insurer summary judgment. Insured appealed.

**Holdings:** The Court of Appeals, Dwyer, J., held that:

- (1) liability insurer had a duty to defend nightclub in negligence action brought by patron;
  - (2) genuine issues of material fact existed regarding whether insured's post-assault conduct contributed to patron's injuries, precluding summary judgment on indemnity claim;
  - (3) genuine issues of material fact existed as to whether insurer's refusal to defend was unreasonable, precluding summary judgment on bad faith claim;
  - (4) insurer's investigation of the insured's claim was sufficient under insurance claims settlement regulations; and
  - (5) insured was entitled to attorney fees.
- Affirmed in part, reversed in part, and remanded.

## West Headnotes

**[1] Insurance**  **2911**  
217k2911 Most Cited Cases

The duty to defend is a primary benefit of an insurance contract.

**[2] Insurance**  **2913**  
217k2913 Most Cited Cases

An insurer's duty to defend against a claim is broader in scope and distinct from its duty to indemnify.

**[3] Insurance**  **2913**  
217k2913 Most Cited Cases

**[3] Insurance**  **2918**  
217k2918 Most Cited Cases

The insurer's duty to defend arises when an action is brought against its insured, and is based on the potential for the insured's liability.

**[4] Insurance**  **2914**  
217k2914 Most Cited Cases

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.

**[5] Insurance**  **2914**  
217k2914 Most Cited Cases

Any ambiguity in the complaint against the insured is liberally construed in favor of triggering the insurer's duty to defend.

**[6] Insurance**  **2913**  
217k2913 Most Cited Cases

Once the duty to defend is triggered by a claim that potentially falls within the policy's basic coverage provisions, the insurer is relieved of that duty only if the claim is clearly excluded by an applicable exclusionary clause within the policy.

**[7] Insurance**  **2939**  
217k2939 Most Cited Cases

With regard to determination of duty to defend, the insurer bears the burden of proving the applicability of an exclusionary clause in a policy.

**[8] Insurance**  **2926**  
217k2926 Most Cited Cases

Once the duty to defend attaches, insurers may not desert policyholders and allow them to incur substantial legal costs while waiting for an indemnity determination.

**[9] Insurance**  **2927**  
217k2927 Most Cited Cases

If the insurer is unsure of its obligation to defend in a

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given instance, it may defend under a reservation of rights while seeking a declaratory judgment that it has no duty to defend.

**[10] Insurance**  **2927**  
217k2927 Most Cited Cases

**[10] Insurance**  **3120**  
217k3120 Most Cited Cases

A reservation of rights is a means by which the insurer avoids breaching its duty to defend while seeking to avoid waiver and estoppel; when that course of action is taken, the insured receives the defense promised and, if coverage is found not to exist, the insurer will not be obligated to pay.

**[11] Appeal and Error**  **893(1)**  
30k893(1) Most Cited Cases

**[11] Insurance**  **1863**  
217k1863 Most Cited Cases

An appellate court engages in de novo review of a trial court's interpretation of an insurance policy, which is a question of law.

**[12] Insurance**  **1808**  
217k1808 Most Cited Cases

**[12] Insurance**  **1832(1)**  
217k1832(1) Most Cited Cases

Language in an insurance policy that is susceptible to two different but reasonable interpretations is ambiguous and must be liberally construed in favor of the insured.

**[13] Insurance**  **1835(2)**  
217k1835(2) Most Cited Cases

Exclusionary clauses should be construed against the insurer with special strictness.

**[14] Insurance**  **1827**  
217k1827 Most Cited Cases

A court may not give an insurance contract a strained or forced construction that would lead to an extension or restriction of the policy beyond what is fairly within its terms.

**[15] Insurance**  **1816**  
217k1816 Most Cited Cases

**[15] Insurance**  **1820**  
217k1820 Most Cited Cases

**[15] Insurance**  **1828**  
217k1828 Most Cited Cases

In construing an insurance policy, the policy should be given a fair, reasonable, and sensible construction, consistent with the way an average person purchasing insurance would understand the policy language.

**[16] Insurance**  **2278(5)**  
217k2278(5) Most Cited Cases

Liability insurer had a duty to defend insured nightclub in negligence action brought by patron; nightclub's potential liability for its employees' alleged negligence in dumping gravely wounded patron on sidewalk was based on conduct that occurred after patron was shot and did not necessarily arise out of the assault or battery on patron, and thus, the exclusionary provision in policy, which excluded coverage for conduct arising out of assault or battery, did not necessarily apply.

**[17] Judgment**  **181(23)**  
228k181(23) Most Cited Cases

Genuine issues of material fact existed as to whether insured nightclub's liability for patron's injuries was based on employee's negligence after patron was shot, precluding summary judgment on insured's claim against liability insurer, relating to insurer's refusal to indemnify insured.

**[18] Insurance**  **2268**  
217k2268 Most Cited Cases

**[18] Insurance**  **2269**  
217k2269 Most Cited Cases

The duty to indemnify hinges on the insured's actual liability to the claimant and actual coverage under the policy.

**[19] Insurance**  **2271**  
217k2271 Most Cited Cases

Where an insurer's duty to indemnify depends upon the resolution of factual issues relating to coverage, the duty arises only when the injured party in the underlying action against the insured prevails on facts that fall within the policy's coverage.

**[20] Judgment**  **181(23)**  
228k181(23) Most Cited Cases

Genuine issues of material fact existed as to whether liability insurer's refusal to defend insured nightclub in negligence action by patron was unreasonable,

(Cite as: 158 P.3d 119)

precluding summary judgment on insured's bad faith claim against insurer.

**[21] Insurance**  **1867**  
217k1867 Most Cited Cases

**[21] Insurance**  **3419**  
217k3419 Most Cited Cases

An insurer has a duty of good faith to its policyholder.

**[22] Insurance**  **1866**  
217k1866 Most Cited Cases

**[22] Insurance**  **1867**  
217k1867 Most Cited Cases

**[22] Insurance**  **3419**  
217k3419 Most Cited Cases

The duty to act in good faith, and liability for acting in bad faith, arise from the fiduciary relationship between the insurer and insured; this fiduciary relationship implies a broad obligation to deal fairly, and a responsibility to give equal consideration to the insured's interests.

**[23] Insurance**  **2931**  
217k2931 Most Cited Cases

An insurer who unreasonably denies its defense obligation may be found to have acted in bad faith.

**[24] Insurance**  **2931**  
217k2931 Most Cited Cases

Bad faith will not be found where the failure to provide a defense is based upon a reasonable interpretation of the insurance policy.

**[25] Insurance**  **3382**  
217k3382 Most Cited Cases

The question of whether an insurer unreasonably denies coverage is generally an issue of fact.

**[26] Insurance**  **2934(4)**  
217k2934(4) Most Cited Cases

**[26] Insurance**  **3111(3)**  
217k3111(3) Most Cited Cases

**[26] Insurance**  **3371**  
217k3371 Most Cited Cases

Where an insurer acts in bad faith in failing to defend, coverage by estoppel is one appropriate

remedy.

**[27] Insurance**  **3371**  
217k3371 Most Cited Cases

Although an insurer's denial of coverage based on a debatable question of coverage or a reasonable interpretation of the policy is not necessarily bad faith, when an insurer wrongfully refuses to defend, it has voluntarily forfeited its ability to protect itself against an unfavorable settlement, unless the settlement is the product of fraud or collusion.

**[28] Insurance**  **3353**  
217k3353 Most Cited Cases

It was liability insurer's legal opinion that its policy clearly excluded insured nightclub's liability to patron, who was shot at the club, that led to insurer's refusal to defend insured in patron's action, and thus, insurer's investigation of the insured's claim was sufficient under insurance claims settlement regulations, where, given insurer's legal conclusion, further investigation of factual materials would not have led to a different result. WAC 284-30-330(3).

**[29] Insurance**  **3353**  
217k3353 Most Cited Cases

The insurer must investigate the claim if coverage is not clear from the face of the complaint against insured but may exist, or if the allegations are in conflict with facts known to or readily ascertainable by the insurer, or if the allegations are otherwise ambiguous or inadequate; such an investigation is directed to factual matters.

**[30] Insurance**  **3585**  
217k3585 Most Cited Cases

An insured that is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to recover an award of attorney fees to compensate it for the legal expenses incurred in vindicating the right to the claimed benefit.

**[31] Insurance**  **2934(1)**  
217k2934(1) Most Cited Cases

**[31] Insurance**  **3585**  
217k3585 Most Cited Cases

**[31] Insurance**  **3586**  
217k3586 Most Cited Cases

Insured nightclub was entitled to an award of attorney fees in both the appellate court and the trial

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court since it was required to file action against liability insurer with regard to insurer's failure to defend insured in action brought by patron in order to obtain benefits to which insured was entitled.

\*122 Scott R. Sleight, Ahlers & Cressman PLLC, Shane A. Moloney, Scott Easter, Sandy Kang Mi Lee, Montgomery Purdue Blankinship & Austin, Seattle, Paul Jeffrey Miller, South Surrey, British Columbia, for Appellants.

J.C. Ditzler, Molly K. Siebert, Melissa O'Loughlin White, Cozen O'Connor, Seattle, for Respondents.

DWYER, J.

¶ 1 In this case we resolve a dispute between the proprietor of a nightclub, Café Arizona, [FN1] and its liability insurer, Alea London, Ltd., concerning Alea's duty to defend and Café Arizona's right to indemnity. The dispute stems from a separate lawsuit brought by Michael Dorsey, who was repeatedly shot by George Antonio while both men were patrons of Café Arizona. Dorsey initiated a lawsuit that included allegations that the negligence of Café Arizona's employees, both before and after the shooting, was a proximate cause of Dorsey's injuries. Café Arizona notified Alea of the Dorsey lawsuit, and asserted that the Alea policy both required Alea to defend Café Arizona against Dorsey's claims and provided Café Arizona the right to indemnity for sums that it "becomes legally obligated to pay [Dorsey] as damages because of 'bodily injury.'" Alea refused to defend Café Arizona against Dorsey's claims and denied that Café Arizona was entitled to indemnity for liability to Dorsey. Alea based its refusal on the liability insurance policy's exclusionary clause, which states: "This insurance does not apply to any claim arising out of ... Assault and/or Battery."

FN1. Café Arizona is operated by American Best Food, Inc., a Washington corporation. Hyun Heui Seo-Jeong wholly owns American Best Food. Seo-Jong and her husband, Myung Chol Seo, operate American Best Food, Inc. Seo was managing the nightclub on the night Dorsey sustained his injuries. Café Arizona, American Best Food, Inc., Seo-Jong and Seo were named as defendants in the Dorsey litigation. We refer to Café Arizona, American Best Food, Inc., Seo-Jong and Seo collectively as Café Arizona.

¶ 2 Café Arizona then initiated this lawsuit against Alea, seeking monetary damages and declaratory relief, and asserting that Alea breached the insurance contract, acted in bad faith, violated the Washington Consumer Protection Act, and violated the Washington insurance code and insurance commissioner's regulations. Café Arizona and Alea each filed a motion for summary judgment. The trial court granted Alea's motion for summary judgment and dismissed Café Arizona's claims. In so ruling, the trial court relied on our holding in McAllister v. Agora Syndicate, Inc., 103 Wash.App. 106, 11 P.3d 859 (2000), to conclude that the injuries Dorsey suffered as a result of allegedly negligent acts by employees of Café Arizona, occurring both before and after the shooting, necessarily "arise out of" the assault or battery.

¶ 3 We conclude that Café Arizona's potential liability for its employees' alleged negligence after Dorsey was shot did not necessarily "arise out of" an assault or battery upon Dorsey. Therefore, Alea had a duty to defend Café Arizona. In addition, unresolved issues of fact exist concerning both Café Arizona's claimed right to indemnity and whether Alea acted in bad faith, rendering summary judgment inappropriate. Conversely, the trial court ruled correctly in dismissing the remaining claims based on the Consumer Protection Act, the insurance code, and insurance regulations. The trial court's ruling is thus affirmed in part and reversed in part, and the cause is remanded to that court for further proceedings.

#### FACTS

¶ 4 On January 19, 2003, in the parking lot of the Café Arizona, George Antonio repeatedly shot and severely injured Michael Dorsey. Dorsey subsequently brought a lawsuit against both Antonio and Café Arizona. Dorsey's original complaint alleged that, while Dorsey was at Café Arizona, Antonio started a confrontation with him. Antonio was escorted out of the club by security personnel but was subsequently allowed to re-enter, whereupon Antonio again confronted Dorsey. Security personnel again intervened,\*123 and escorted both men out of the club. The men continued their verbal dispute outside the club, and the security guards began to surround Antonio. Antonio pulled out a gun and shot Dorsey several times. After Dorsey was shot, "[s]everal security guards carried [Dorsey] into the club, however, the club owner/manager ordered [the] guards to carry [Dorsey] back outside, where the guards dumped him back on the sidewalk."

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¶ 5 The liability insurance policy Café Arizona purchased from Alea expressly provides coverage for sums that Café Arizona "becomes legally obligated to pay as damages because of 'bodily injury.' " The policy imposes upon Alea "the right and duty" to defend Café Arizona against any suit seeking such damages. However, the policy contains several exclusionary clauses, including the following:

This insurance does not apply to any claim arising out of-

A. Assault and/or Battery committed by any person whosoever, regardless of degree of culpability or intent and whether the acts are alleged to have been committed by the insured or any officer, agent, servant or employee of the insured or by any other person; or

B. Any actual or alleged negligent act or omission in the:

1. Employment;
2. Investigation;
3. Supervision;
4. Reporting to the proper authorities or failure to so report; or
5. Retention;

of a person for whom any insured is or ever was legally responsible, which results in Assault and/or Battery; or

C. Any actual or alleged negligent act or omission in the prevention or suppression of any act of Assault and/or Battery.

¶ 6 Café Arizona notified Alea of the commencement of Dorsey's lawsuit, asserting both that Café Arizona had a right to indemnity for monetary damages it might incur as a result of Dorsey's claims, and that Alea had a duty to defend Café Arizona against those claims. By letter, Alea responded that Dorsey's claims fell within the insurance policy's assault and battery exclusion and that, therefore, Café Arizona was not entitled to indemnity and Alea had no duty to defend Café Arizona in the Dorsey litigation.

¶ 7 Café Arizona's counsel wrote Alea disputing Alea's interpretation of the policy, noting that Dorsey's complaint contained factual allegations concerning the actions of Café Arizona's employees following the shooting, and that Dorsey "appears to claim [that those actions] caused him further injuries" that would not necessarily be excluded by the assault and battery exclusion. In response, Alea's counsel stated that, based on McAllister, 103 Wash.App. 106, 11 P.3d 859, Dorsey's injuries from Café Arizona

employees' allegedly negligent acts "arise out of" the assault or battery. Alea's counsel stated that, based on the policy's assault and battery exclusion, Alea had no duty to defend Café Arizona against Dorsey's claims, and Café Arizona had no right to indemnity for its liability to Dorsey. In reply, counsel for Café Arizona wrote to counsel for Alea stating, in part:

[B]ecause neither the Court of Appeals nor the Supreme Court have addressed the issue raised in the instant case, and because there is at least one case out there that does support my clients' position, [FN2] it is certainly conceivable that this claim would ultimately be found to be a covered occurrence, thereby entitling my clients to a defense and coverage.

FN2. Counsel's reference was to Western Heritage Insurance Co. v. Estate of Dean, 55 F.Supp.2d 646 (E.D.Tex.1998) (claim for failure to render aid following an assault was not excluded by assault and battery exclusion).

Alea's response reaffirmed its position that it had no duty to defend Café Arizona against Dorsey's claims, and that Café Arizona was not entitled to indemnity for its liability to Dorsey.

¶ 8 In May 2005, Café Arizona initiated this lawsuit against Alea. In July 2005, Dorsey served Café Arizona with a motion to \*124 amend his complaint. [FN3] Dorsey's amended complaint states:

FN3. Dorsey received leave to file his amended complaint on August 1, 2005.

[S]ecurity guards carried the injured Michael Dorsey from the lobby of Café Arizona and dumped him on the sidewalk, exacerbating his injuries more, after Mr. Seo negligently ordered the guards to carry [Dorsey] back outside.

¶ 9 Café Arizona's counsel then engaged in further correspondence with Alea's counsel. On July 20, 2005, Café Arizona sent Alea a copy of Dorsey's amended complaint and asserted, based on the allegations set forth in the amended complaint, that Café Arizona had a right to coverage and that Alea had a duty to defend Café Arizona in the Dorsey litigation. On July 25, 2005, Café Arizona sent Alea portions of a report by Michael Comte, Dorsey's expert witness. Comte's report stated:

Dorsey was able to stagger into the alcove of the

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club. He said the owner of the club ordered security officers to carry him out and place him on the sidewalk, which they did. I was rather startled by Mr. Dorsey's description of the owner's behavior. I thought common sense would dictate you do not move a victim who has been shot.

The parties' correspondence did not produce a resolution of their dispute.

¶ 10 Café Arizona and Alea each filed a motion for summary judgment. The trial court granted Alea's motion for summary judgment and dismissed Café Arizona's claims.

#### DISCUSSION

¶ 11 An appellate court engages in de novo review of a trial court's ruling on summary judgment, considering all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. Liberty Mut. Ins. Co. v. Tripp, 144 Wash.2d 1, 10, 25 P.3d 997 (2001).

#### Duty to Defend

¶ 12 Café Arizona's initial contention is that Alea breached its duty to defend Café Arizona against Dorsey's claims. We agree.

[1][2][3][4][5] ¶ 13 The duty to defend is a primary benefit of an insurance contract. Truck Ins. Exch. v. VanPort Homes, Inc., 147 Wash.2d 751, 760, 58 P.3d 276 (2002) (citing Safeco Ins. Co. of Am. v. Butler, 118 Wash.2d 383, 392, 823 P.2d 499 (1992)). An insurer's duty to defend against a claim is broader in scope and distinct from its duty to indemnify. Allstate Ins. Co. v. Bowen, 121 Wash.App. 879, 881, 91 P.3d 897 (2004) (citing Truck Ins. Exch., 147 Wash.2d at 760, 58 P.3d 276). The insurer's duty to defend arises when an action is brought against its insured, and is based on the potential for the insured's liability. Bowen, 121 Wash.App. at 883, 91 P.3d 897 (citing Truck Ins. Exch., 147 Wash.2d at 760, 58 P.3d 276). "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.'" Bowen, 121 Wash.App. at 883, 91 P.3d 897 (quoting Truck Ins. Exch., 147 Wash.2d at 760, 58 P.3d 276). "[A]n insurer's duty to defend arises when any part of the claim is potentially or arguably within the scope of the policy's coverage, even if the allegations of the suit are false, fraudulent, or groundless." 14 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 200:12 at 200-35 to 200-36 (3d

ed.2005). Any ambiguity in the complaint against the insured is liberally construed in favor of triggering the insurer's duty to defend. Truck Ins. Exch., 147 Wash.2d at 760, 58 P.3d 276.

[6][7][8][9][10] ¶ 14 Once the duty to defend is triggered by a claim that potentially falls within the policy's basic coverage provisions, the insurer is relieved of that duty only if the claim is clearly excluded by an applicable exclusionary clause within the policy. Truck Ins. Exch., 147 Wash.2d at 760, 58 P.3d 276; Bowen, 121 Wash.App. at 883-4, 91 P.3d 897.

Although an insurer will be obligated to defend more cases than it will be required to indemnify under the "potentiality rule" because the mere possibility that the insurer will have to indemnify triggers the duty to defend, a duty to defend does not extend to circumstances in which there is no \*125 duty to indemnify as a matter of law. Only if there is no possible factual or legal basis on which the insurer might be obligated to indemnify will there be no duty to defend.

14 RUSS & SEGALLA, *supra*, § 200:12 at 200-37. The insurer bears the burden of proving the applicability of such an exclusionary clause. Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wash.2d 654, 674, 15 P.3d 115 (2000). Once the duty to defend attaches, insurers may not desert policyholders and allow them to incur substantial legal costs while waiting for an indemnity determination. Truck Ins. Exch., 147 Wash.2d at 761, 58 P.3d 276. Instead,

[i]f the insurer is unsure of its obligation to defend in a given instance, it may defend under a reservation of rights while seeking a declaratory judgment that it has no duty to defend. A reservation of rights is a means by which the insurer avoids breaching its duty to defend while seeking to avoid waiver and estoppel. "When that course of action is taken, the insured receives the defense promised and, if coverage is found not to exist, the insurer will not be obligated to pay."

Truck Ins. Exch., 147 Wash.2d at 761, 58 P.3d 276 (quoting Kirk v. Mt. Airy Ins. Co., 134 Wash.2d 558, 563 n. 3, 951 P.2d 1124 (1998)) (internal citation omitted).

¶ 15 Our initial inquiry is whether Dorsey's complaint against Café Arizona, construed liberally, alleges facts which could, if proved, impose liability upon Café Arizona for occurrences covered by the Alea policy. The liability insurance policy Café Arizona

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purchased from Alea expressly provides coverage for sums that Café Arizona "becomes legally obligated to pay as damages because of 'bodily injury' " that "is caused by an 'occurrence' that takes place in the 'coverage territory' " and that "occurs during the policy period." It is not disputed that Dorsey alleged, in both his original complaint and his amended complaint, that he suffered bodily injury as a result of an "occurrence." There is also no dispute that the alleged injury took place within the coverage territory, and during the time the policy was in effect. [FN4]

FN4. "Bodily injury" is defined to include "bodily injury ... sustained by a person." "Occurrence" is defined as "an accident." "Coverage territory" is defined as "[t]he United States of America." The policy was in effect at the time Dorsey was allegedly injured.

¶ 16 Our next inquiry, therefore, is whether the policy contained a clause that clearly excluded from coverage Café Arizona's potential liability for the alleged injury to Dorsey. *Truck Ins. Exch.*, 147 Wash.2d at 760, 58 P.3d 276; *Bowen*, 121 Wash.App. at 883-84, 91 P.3d 897. Alea claims that it does. We disagree.

[11][12][13][14][15] ¶ 17 An appellate court engages in de novo review of a trial court's interpretation of an insurance policy, which is a question of law. *Stouffer & Knight v. Continental Cas. Co.*, 96 Wash.App. 741, 747-48, 982 P.2d 105 (1999). Language in an insurance policy that is susceptible to two different but reasonable interpretations is ambiguous and must be liberally construed in favor of the insured. *Teague Motor Co. v. Federated Serv. Ins. Co.*, 73 Wash.App. 479, 482, 869 P.2d 1130 (1994). Exclusionary clauses should be construed against the insurer with special strictness. *Tewell, Thorpe & Findlay, Inc. v. Cont'l Cas. Co.*, 64 Wash.App. 571, 575, 825 P.2d 724 (1992). However, a court may not give an insurance contract a strained or forced construction that would lead to an extension or restriction of the policy beyond what is fairly within its terms. *Tewell*, 64 Wash.App. at 576, 825 P.2d 724. In construing an insurance policy, the policy should be given a fair, reasonable, and sensible construction, consistent with the way an average person purchasing insurance would understand the policy language. *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wash.2d

901, 907, 726 P.2d 439 (1986).

¶ 18 The applicable assault and battery exclusion provides:

This insurance does not apply to any claim arising out of-

A. Assault and/or Battery committed by any person whosoever, regardless of degree of culpability or intent and whether the acts are alleged to have \*126 been committed by the insured or any officer, agent, servant or employee of the insured or by any other person; or

B. Any actual or alleged negligent act or omission in the:

1. Employment;
2. Investigation;
3. Supervision;
4. Reporting to the proper authorities or failure to so report; or
5. Retention;

of a person for whom any insured is or ever was legally responsible, which results in Assault and/or Battery; or

C. Any actual or alleged negligent act or omission in the prevention or suppression of any act of Assault and/or Battery.

¶ 19 As a preliminary matter, parts B and C of the applicable assault and battery exclusion clearly exclude the alleged preassault negligence of Café Arizona employees from coverage, insofar as such negligence resulted in or failed to prevent or suppress an assault or battery. However, parts B and C do not necessarily exclude the alleged postassault negligence of Café Arizona employees, because such postassault negligence is neither alleged to have resulted in, nor to have failed to prevent or suppress, an assault or battery.

¶ 20 Thus, the critical question is whether Café Arizona's potential liability to Dorsey for its employees' alleged postassault negligence clearly "arise[s] out of" an assault or battery. Alea contends that it does, arguing that *McAllister v. Agora Syndicate, Inc.*, 103 Wash.App. 106, 11 P.3d 859 (2000), is dispositive of this issue.

¶ 21 In *McAllister*, a nightclub patron was injured in an altercation with another patron. The injured patron brought a negligence claim against the nightclub owner, asserting that, before the assault, the nightclub's employees negligently failed to protect him. The applicable assault and battery exclusion in

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that case stated that "no coverage shall apply under this policy for any claim, demand or suit based on assault and/or battery." McAllister, 103 Wash.App. at 109, 11 P.3d 859. This court reasoned that McAllister's claim was "ultimately 'based on' assault and battery in the sense that without first establishing the underlying assault, negligence cannot be proved." McAllister, 103 Wash.App. at 111, 11 P.3d 859. Thus, we held that McAllister's negligence claims were excluded from coverage under the relevant policy. McAllister, 103 Wash.App. at 111, 11 P.3d 859.

[16] ¶ 22 However, McAllister involved only claims of preassault negligence. Thus, our analysis necessarily centered on prior cases where the assault or battery was alleged to have been the result of preassault negligence. [FN5] 103 Wash.App. at 110-11, 11 P.3d 859. By contrast, Dorsey alleged that he was injured by the behavior of Café Arizona employees after the shooting.

FN5. These included Terra Nova Ins. Co. v. N.C. Ted, Inc., 715 F.Supp. 688 (E.D.Pa.1989) (alleging that bar failed to take measures that might have prevented the alleged shooting assault upon bar patron by a fellow patron); Mount Vernon Fire Ins. Co. v. Creative Hous. Ltd., 88 N.Y.2d 347, 645 N.Y.S.2d 433, 668 N.E.2d 404 (1996) (tenant assaulted by a third party sued landlord for negligent supervision, management, and control of the property); U.S. Underwriters Ins. Co. v. Val-Blue Corp., 85 N.Y.2d 821, 623 N.Y.S.2d 834, 647 N.E.2d 1342 (1995) (off-duty police officer shot by a club security guard sued the nightclub, alleging negligent hiring, supervising, and training of the security guard); Roloff v. Taste of Minn., 488 N.W.2d 325 (Minn.Ct.App.1992) (alleging negligence by festival sponsor for failing to provide adequate security, leading to an assault by festival attendee on fellow attendee); and Taylor v. Duplechain, 469 So.2d 472 (La.Ct.App.1985) (bartender allegedly acted negligently both by taking action that tended to cause the fight between two patrons and by not taking action to prevent or to end the fight).

¶ 23 As noted by Café Arizona, courts in other jurisdictions have held that allegedly negligent acts

occurring after an assault or battery do not necessarily "arise out of" the assault or battery. For example, in Bucci v. Essex Ins. Co., 393 F.3d 285, 290-91 (1st Cir.2005), the court analyzed an insurance policy exclusion for claims "arising out of assault and/or battery" and held that the policy did not necessarily exclude coverage for claims of postassault negligence, such as a failure to provide needed assistance to an injured patron. Similarly, in \*127 United Nat'l Ins. Co. v. Penuche's, Inc., 128 F.3d 28 (1st Cir.1997), a bar patron was first battered by another patron but was also subsequently injured by a bar employee who placed the patron in a "bear hug." The first circuit held that the patron's injuries did not "arise out of" the initial attack

All of the damages in this tort action stem from a discrete intervening act of alleged negligence, and this claim cannot be said to arise out of earlier actions. [The bar employee] had a completely different objective from the brawling patron, and [the assaulted patron's] eventual injuries were not caused by the blows he received in the fight.

Penuche's, 128 F.3d at 32.

¶ 24 Additionally, in W. Heritage Ins. Co. v. Estate of Dean, 55 F.Supp.2d 646, 650 (E.D.Tex.1998), a case referenced by Café Arizona during the prelitigation discussions, an acutely intoxicated bar patron was battered by another patron and was then left by bar employees on the floor of the bar for fifty minutes before medical aid was summoned. The injured patron was dead by the time medics arrived. In analyzing the issues presented, the federal court recognized that "the origin of the damages in the underlying suit is an assault and battery" but noted:

The deceased was a patron in [the] tavern when he was injured as a result of an assault and battery; although the deceased collapsed to the floor, the tavern employees did nothing to render aid or obtain medical assistance for him. [The tavern owner's] role ... implied a duty to render aid to an injured patron, regardless of the cause of the injury. Dean, 55 F.Supp.2d at 651. These and other cases [FN6] recognize the logical distinction between allegations of preassault negligence and allegations of postassault negligence.

FN6. See, e.g., Planet Rock, Inc. v. Regis Ins. Co., 6 S.W.3d 484, 491 (Tenn.Ct.App.1999) (injury caused by an assault was divisible and separate from injury caused by postassault conduct, therefore assault and battery exclusion did

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not preclude coverage when there were allegations of injuries caused by insured's postassault conduct); West v. City of Ville Platte, 237 So.2d 730, 733 (La.Ct.App.1970) (claims for injuries from a beating arose from an assault and were excluded from coverage, but claims for injuries caused by failure to render aid or secure medical help did not arise from the assault and did not fall within a policy exclusion).

¶ 25 Dorsey alleged that employees of Café Arizona exacerbated his gunshot injuries. Dorsey's original complaint alleged that, after he had been shot, employees of Café Arizona "dumped him back on the sidewalk," and his amended complaint clarified that allegation. The alleged act of ordering employees to carry a gravely wounded Dorsey outside, and the alleged act of "dumping" him on the sidewalk constitute "discrete intervening act[s] of alleged negligence" that Dorsey claims caused injury. Penuche's, 128 F.3d at 32. The harm these alleged acts occasioned is distinct from the prior harm caused by the assault or battery. Carrying and "dumping" a severely wounded patron posed a substantial risk of grave injury, regardless of the initial cause of the patron's physical distress. Unlike the situation in McAllister, negligence can here be proved "without first establishing the underlying assault." McAllister, 103 Wash.App. at 111, 11 P.3d 859. Thus, Dorsey's alleged subsequent injury at the hands of Café Arizona employees does not clearly "arise out of" the prior assault or battery.

¶ 26 The trial court's order granting summary judgment on this issue is reversed.

#### *Indemnity*

[17] ¶ 27 Café Arizona next asserts that the evidence it proffered raised issues of material fact as to whether Alea breached the insurance contract by refusing to indemnify Café Arizona for liability in the Dorsey lawsuit, precluding summary judgment on this issue. We agree.

[18][19] ¶ 28 "The duty to indemnify hinges on the insured's actual liability to the claimant and actual coverage under the policy." Hayden v. Mut. of Enumclaw Ins. Co., 141 Wash.2d 55, 64, 1 P.3d 1167 (2000). Where, as here, an insurer's duty to indemnify depends upon the resolution of factual issues relating to coverage, the duty arises only when the injured

party in the underlying action against the insured prevails on facts that fall within the policy's coverage. W. \*128Nat'l Assurance Co. v. Hecker, 43 Wash.App. 816, 821-22, 719 P.2d 954 (1986). Alea's duty to indemnify depends upon whether Café Arizona is found liable to Dorsey based on proof that postassault negligence caused Dorsey injury. The record on review is silent as to the outcome of the Dorsey litigation. Café Arizona's liability for any injury to Dorsey based on its preassault negligence is excluded from coverage by the policy's assault and battery provision. McAllister, 103 Wash.App. at 110-11, 11 P.3d 859. However, Café Arizona's liability for any injury to Dorsey based on its employees' negligence after Dorsey was shot is covered and not excluded by the insurance policy. Whether Café Arizona was found liable to Dorsey for bodily injuries proximately caused by the postassault negligence is a factual question that must be resolved on remand.

¶ 29 The trial court's summary judgment dismissal of Café Arizona's claim relating to Alea's refusal to indemnify Café Arizona is reversed.

#### *Bad Faith-Duty to Defend*

[20] ¶ 30 Café Arizona also assigns error to the trial court's dismissal of its claim that Alea's refusal to provide a defense amounted to bad faith. Because the evidence submitted by Café Arizona raises issues of material fact on this question, summary judgment was improperly granted.

[21][22][23][24][25] ¶ 31 An insurer has a duty of good faith to its policyholder. Smith v. Safeco Ins. Co., 150 Wash.2d 478, 484, 78 P.3d 1274 (2003). The duty to act in good faith, and liability for acting in bad faith, arise from the fiduciary relationship between the insurer and insured. Coventry Assocs. v. Am. States Ins. Co., 136 Wash.2d 269, 280, 961 P.2d 933 (1998). This fiduciary relationship implies a broad obligation to deal fairly, and a responsibility to give equal consideration to the insured's interests. Coventry, 136 Wash.2d at 280, 961 P.2d 933. An insurer who unreasonably denies its defense obligation may be found to have acted in bad faith. Wolf v. League Gen. Ins. Co., 85 Wash.App. 113, 122, 931 P.2d 184 (1997) (citing Indus. Indem. Co. of the Nw., Inc. v. Kallevig, 114 Wash.2d 907, 917, 792 P.2d 520 (1990)). However, bad faith will not be found where the failure to provide a defense is based upon a reasonable interpretation of the insurance policy. Kirk, 134 Wash.2d at 560, 951 P.2d 1124.

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The question of whether an insurer unreasonably denies coverage is generally an issue of fact. Liberty Mut. Ins. Co. v. Tripp, 144 Wash.2d 1, 23, 25 P.3d 997 (2001); Van Noy v. State Farm Mut. Auto. Ins. Co., 142 Wash.2d 784, 796, 16 P.3d 574 (2001).

¶ 32 The trial court granted summary judgment dismissal of this claim based primarily on its belief that the McAllister decision compelled the conclusion that all of Dorsey's injuries "arise out of" the assault or battery and, therefore, that Alea had correctly determined that it had no duty to defend. However, Alea was incorrect in its determination that it had no duty to defend. Our inquiry, therefore, is whether the evidence and the reasonable inferences drawn therefrom, viewed in the light most favorable to Café Arizona, raise a genuine issue of material fact concerning whether Alea's refusal to defend was unreasonable. We conclude that they do.

¶ 33 The evidence on this issue includes the letters from Café Arizona to Alea asserting that McAllister did not apply to postassault negligence and citing authorities from other jurisdictions in support of its position, and Alea's responses thereto. These communications raise a factual issue as to whether Alea unreasonably denied its defense obligation. This evidence precludes summary judgment because it places the reasonableness of Alea's actions in question. The reasonableness of an insurer's denial of its defense obligation is the critical factual issue in determining whether such a denial was made in bad faith. Wolf, 85 Wash.App. at 122, 931 P.2d 184.

¶ 34 The fact that Alea incorrectly determined that it had no duty to defend is evidence of bad faith. The proffered evidence raises doubts concerning the reasonableness of Alea's actions, particularly in light of the fact that Café Arizona called Alea's attention to authorities contrary to its position, and given the requirement that an insurer give equal consideration to the interests of its \*129 insured. Coventry, 136 Wash.2d at 280, 961 P.2d 933. On the other hand, Alea's failure to provide a defense does not constitute bad faith if the trier of fact determines that Alea's decision was based upon a reasonable interpretation of the insurance policy. Kirk, 134 Wash.2d at 560, 951 P.2d 1124. The determination of whether Alea's interpretation was reasonable is an unresolved question of fact. Tripp, 144 Wash.2d at 23, 25 P.3d 997.

¶ 35 The trial court's summary judgment dismissal of

Café Arizona's bad faith claim relating to Alea's denial of a defense is reversed.

#### *Remedy for Bad Faith Refusal to Defend*

¶ 36 Café Arizona also asserts that, if Alea's refusal to provide a defense is found to constitute bad faith, then Alea should be estopped from asserting policy defenses to coverage of Café Arizona's claim, including any sums paid by Café Arizona to Dorsey in settlement of Dorsey's claims against Café Arizona.

[26][27] ¶ 37 "Where an insurer acts in bad faith in failing to defend, ... coverage by estoppel is one appropriate remedy." Kirk, 134 Wash.2d at 563, 951 P.2d 1124 (citing Safeco Ins. Co. of Am. v. Butler, 118 Wash.2d 383, 393, 823 P.2d 499 (1992)). Although an insurer's denial of coverage based on a debatable question of coverage or a reasonable interpretation of the policy is not necessarily bad faith, Felice v. St. Paul Fire & Marine Ins. Co., 42 Wash.App. 352, 361, 711 P.2d 1066 (1985), "when an insurer wrongfully refuses to defend, it has voluntarily forfeited its ability to protect itself against an unfavorable settlement, unless the settlement is the product of fraud or collusion." Truck Ins. Exch., 147 Wash.2d at 765-66, 58 P.3d 276. "To hold otherwise would provide an incentive to an insurer to breach its policy." Truck Ins. Exch., 147 Wash.2d at 766, 58 P.3d 276.

¶ 38 However, because we are remanding this cause for the trier of fact to determine whether the refusal to defend was made in bad faith, the question of the appropriate remedy for Alea's alleged bad faith is premature.

#### *Bad Faith Investigation*

[28] ¶ 39 The trial court also granted summary judgment in favor of Alea concerning Café Arizona's allegations that Alea violated the CPA and insurance claims settlement regulations. We affirm these decisions by the trial court.

¶ 40 Café Arizona asserts that Alea did not respond to Café Arizona's July 20, and July 25, 2005 letters. Thus, Café Arizona asserts, Alea violated WAC 284-30-330(2), WAC 284-30-360(1), and WAC 284-30-360(3). Café Arizona also asserts that Alea's investigation of Café Arizona's claim violated WAC 284-30-330(3). In support of the contention that Alea failed to respond to Café Arizona's letters, Café Arizona cites only to the declarations of its counsel.

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However, neither declaration provides evidence of such a failure. Accordingly, Café Arizona produced insufficient evidence on this issue to raise a factual issue.

[29] ¶ 41 In addition, although Café Arizona asserts that Alea conducted an insufficient investigation, the allegations contained in Dorsey's complaint were neither ambiguous nor inadequate. The insurer must investigate the claim if coverage is not clear from the face of the complaint but may exist, or if the allegations are in conflict with facts known to or readily ascertainable by the insurer, or if the allegations are otherwise ambiguous or inadequate. *Truck Ins. Exch.*, 147 Wash.2d at 761, 58 P.3d 276. Such an investigation is directed to factual matters. See *Ins. Co. of N. Am. v. Ins. Co. of State of Pa.*, 17 Wash.App. 331, 334, 562 P.2d 1004 (1977).

¶ 42 However, it was Alea's legal opinion that its policy clearly excluded Café Arizona's liability to Dorsey that led to Alea's refusal to defend. Café Arizona has not shown that, given Alea's legal conclusion, further investigation of factual materials would have led Alea to a different understanding of the facts, or a different result. Accordingly, Café Arizona's evidence does not give rise to an inference that Alea's investigation of the \*130 facts was insufficient, or that it violated insurance settlement regulations or CPA provisions. *Truck Ins. Exch.*, 147 Wash.2d at 761, 58 P.3d 276; *Ins. Co. of N. Am.*, 17 Wash.App. at 334, 562 P.2d 1004. [FN7]

[FN7]. As a result, Café Arizona's request for attorney fees on this basis was properly denied.

¶ 43 We affirm the trial court's dismissal of these claims.

#### *Attorney Fees*

[30][31] ¶ 44 An insured that is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to recover an award of attorney fees to compensate it for the legal expenses incurred in vindicating the right to the claimed benefit. *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wash.2d 37, 52-3, 811 P.2d 673 (1991). Because Café Arizona was required to initiate this action in order to obtain the benefits to which it was entitled, it is entitled to an award of attorney fees in both this court and in the trial court. [FN8] As to fees on appeal, subject to compliance with RAP 18.1, a

commissioner of this court will determine an appropriate award. As to fees incurred in the trial court, application should be made to that court upon remand.

[FN8]. Attorney fees incurred in prosecuting this action are to be distinguished from attorney fees incurred in defending the underlying Dorsey litigation, which are recoverable as damages in this action given our conclusion that Alea breached its duty to defend.

#### *CONCLUSION*

¶ 45 Affirmed in part, reversed in part, and remanded.

ELLINGTON, J., COLEMAN, J. concur.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

AMERICAN BEST FOOD, INC., a )  
Washington Corporation d/b/a CAFÉ )  
ARIZONA; and MYUNG CHOL SEO )  
and HYUN HEUI SEO-JEONG, )  
Appellants, )  
v. )  
ALEA LONDON LTD., a foreign )  
company, )  
Respondent. )

No. 57181-8-I

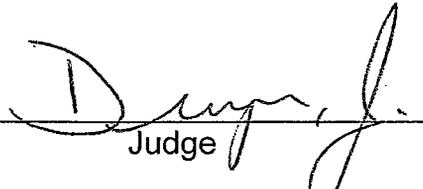
ORDER DENYING MOTION  
FOR RECONSIDERATION

Respondent, Alea London, Ltd., filed a motion for reconsideration of this court's May 21, 2007 opinion, and the court called for an answer thereto. The panel has considered the motion and the answer, and has determined that said motion for reconsideration should be denied. Now, therefore, it is hereby

ORDERED that respondent's motion for reconsideration is denied.

DATED this 18<sup>th</sup> day of July, 2007.

FOR THE PANEL:

  
\_\_\_\_\_  
Judge

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STATE OF WASHINGTON  
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