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STATE OF WASHINGTON

2007 SEP 28 A 11: 04

No. _____

BY RONALD R. CARPENTER **SUPREME COURT
OF THE STATE OF WASHINGTON**

CLERK

No. 57181-8-I

FILED
OCT 17 2007

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

CLERK OF SUPREME COURT
STATE OF WASHINGTON

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

Plaintiffs/Appellants,

v.

ALEA LONDON, LTD., a foreign corporation,

Defendant/Respondent.

**ALEA'S REPLY TO CAFÉ ARIZONA'S ANSWER
TO PETITION FOR REVIEW**

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I. SUMMARY OF REPLY

As set forth in the Petition for Review filed by Alea,¹ review of the underlying Court of Appeals opinion should be granted to address three important issues that satisfy the criteria set forth in RAP 13.4(b)(1), (2) & (4). In its Answer, Café Arizona² devotes two of its twenty pages to a “Contingent Petition for Review” that affirmatively seeks review of two new issues. Answer at 17-20. Alea submits this Reply to address these new issues. RAP 13.4(d).

Instead of focusing on the RAP 13.4(b) factors, Café Arizona merely complains that portions of the Court of Appeals’ opinion—which confirmed that Alea did not violate the Consumer Protection Act (“CPA”) or claims handling guidelines and yet identified issues of fact as to whether Alea breached a duty to defend in bad faith—did not “go as far as requested by Café Arizona.” Answer at 18. Because Café Arizona has not established any appropriate bases on which these independent issues should be reviewed by this Court, Café Arizona’s “Contingent Petition for Review” should be denied.

¹ Petitioner is Alea London, Ltd. (“Alea”).

² Respondents are American Best Food, Inc. d/b/a Café Arizona, and Myun Chol Seo and Hyun Heui Seo-Jeong (collectively “Café Arizona”).

II. STATEMENT OF PERTINENT FACTS

In the underlying published opinion, the Court of Appeals concluded that Alea had a duty to defend Café Arizona based upon “facts” not reflected in the record before it. *Am. Best Food, Inc. v. Alea London Ltd.*, 138 Wn. App. 674, 688, 158 P.3d 119 (2007). It then deemed Alea’s mere awareness of contrary non-Washington cases to be evidence of bad faith. *Id.* at 689. The Court of Appeals also confirmed that Alea did not violate the CPA or the claims handling guidelines, but nonetheless remanded for further proceedings on whether Alea breached a duty to defend in bad faith. *Id.* at 689-90, 692-93.

As discussed in Alea’s Petition for Review, there are three important issues addressed in the Court of Appeals’ holdings that demonstrate direct conflict with previous decisions of this Court and the Court of Appeals, and implicate matters of substantial public interest. Café Arizona has asked this Court to review two entirely different issues.

In its “Contingent Petition for Review,” Café Arizona asserts that the Court of Appeals should have found as a matter of law that Alea “wrongfully refused to provide a defense in bad faith and failed to conduct a reasonable investigation in bad faith.” Answer at 18. As set forth below, Supreme Court review is not appropriate on either of the new issues raised by Café Arizona.

III. ARGUMENT WHY REVIEW SHOULD NOT BE GRANTED ON CAFÉ ARIZONA'S ISSUES

Café Arizona has failed to satisfy the requirements for obtaining review on either of the new issues raised in its Answer. RAP 13.4(b) provides, in pertinent part:

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or . . . (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The two new issues raised by Café Arizona do not conflict with any decision from any appellate court in the state, do not involve an issue of substantial public interest, and thus do not fall within any one of the above criteria.³

A. **The Court of Appeals' Determination That Alea Completed A Proper Investigation Of the Claim Does Not Conflict With Any Appellate Court Decision And Does Not Implicate An Issue of Substantial Public Interest.**

Where the allegations of the complaint are neither ambiguous nor inadequate, an insurer is not required to investigate facts outside the complaint to evaluate coverage. *Woo v. Fireman's Fund Ins. Co.*, --- Wn.2d ---, 164 P.3d 454, 459 (2007); *Am. Best Food, Inc.*, 138 Wn. App.

³ RAP 13.4(b)(3) authorizes the Supreme Court to accept review if the decision involves a significant question of law under the Constitution of the State of Washington or of the United States. The parties appear to agree that this case does not present any constitutional issues.

at 692 (citing *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 761, 58 P.3d 276 (2002)). In line with these principles, the Court of Appeals properly concluded that “it was Alea’s legal opinion that its policy clearly excluded [coverage for the claim]” and that Café Arizona’s evidence did “not give rise to an inference that Alea’s investigation of the facts was insufficient, that it violated insurance settlement regulations or CPA provisions.” *Am. Best Food Inc.*, 138 Wn. App. at 692-93. As for Café Arizona’s claim that Alea failed to respond to Café Arizona’s requests for a renewed coverage determination,⁴ the Court of Appeals properly noted that Café Arizona cited only to the declarations of its counsel, neither of which provided evidence of such a failure. *Am. Best Food, Inc.*, 138 Wn. App. at 692. Accordingly, the Court of Appeals confirmed that Alea did not violate the CPA or violate insurance claims settlement regulations. *Id.*

Café Arizona’s “Contingent Petition for Review” does not identify a single case that contradicts the Court of Appeals opinion on these issues, nor does it specify how the Court of Appeals opinion could have a substantial impact on the public interest. Café Arizona’s claim that, under the Court of Appeals opinion, “insurers will not be held accountable for the extreme prejudice resulting from a wrongful refusal to tender a

⁴ Answer at 18.

defense,”⁵ ignores the fact that additional remedies remain available to Café Arizona should it ultimately prevail in this case. Specifically, the Court of Appeals remanded for a determination of whether Café Arizona can receive additional remedies if it is determined that Alea breached a duty to defend in bad faith.⁶ In addition, Café Arizona will be entitled to recover its attorney fees under *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 54, 811 P.2d 673 (1991). Thus, Café Arizona’s stated reason for requesting review—insurer accountability—is not a valid concern. Review under RAP 13.4(b) is simply not warranted on these issues.

B. The Court of Appeals’ Refusal to Find That Alea Acted In Bad Faith As A Matter Of Law Does Not Conflict With Any Appellate Court Decision And Does Not Implicate An Issue of Substantial Public Interest.

Where there is no evidence that an insurer’s actions were unreasonable, frivolous, or unfounded, the insurer cannot be found in bad faith as a matter of law. *See, e.g., Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 486, 78 P.3d 1274 (2003). Despite the utter lack of evidence of such conduct by Alea, the Court of Appeals found that there were questions of fact as to whether Alea was in bad faith. *Am. Best Food, Inc.*, 138 Wn. App. at 689-90. Alea has asked this Court to review the Court of Appeals’

⁵ Answer at 19.

⁶ *Am. Best Food, Inc.*, 138 Wn. App. at 689-90.

finding and make it consistent with established Washington law. *See* Petition for Review. In contrast, Café Arizona has asked this Court to review the Court of Appeals' finding and make it inconsistent with established Washington law—it has asked this Court to consider whether an insurer can be in bad faith as a matter of law where there is no evidence that the insurer's actions were unreasonable, frivolous, or unfounded. *See* Answer at 17-19.⁷

Where an insurer's coverage determination has a reasonable basis, a court's refusal to find bad faith as a matter of law cannot be in conflict with any precedent and cannot present an issue of substantial public interest. As this Court has made clear:

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.

Smith, 150 Wn.2d at 486.

Here, the trial court agreed with Alea that Washington precedent provided "clear direction" with "clear meaning," and concluded that Alea's denial was proper and not in bad faith as a matter of law. *See*

⁷ Notably, Café Arizona's motion for summary judgment at the trial court level was limited to whether Alea had breached the duty to defend; Café Arizona did not address the question of whether Alea acted in bad faith or violated any of the insurance regulations or the Consumer Protection Act. *See, e.g.*, Plaintiff's Reply in Supp. Of Mot. Partial Summ. J. at 1-2 (CP 334-35). The trial court found, as a matter of law, that Alea had not acted in bad faith. It was only on appeal that Café Arizona asserted that Alea acted in bad faith as a matter of law. Am. Opening Brief of Appellant at 34-39.

RP 2:15-3:12. The Court of Appeals reversed, finding a duty to defend based on assumed facts that did not exist in either complaint, and ordered a remand on the bad faith issue simply because Café Arizona had presented out-of-state authority for Alea to consider. *Am. Best Food, Inc.*, 138 Wn. App. at 690.

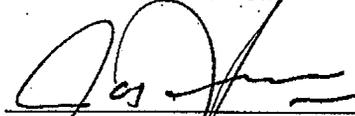
As with the CPA and insurance regulations issue, the only basis upon which Café Arizona contends review of the bad faith issue is required is to ensure that insurers are held accountable for their actions. Answer at 19. As set forth above, however, lack of accountability is not a concern under the Court of Appeals opinion: the Court of Appeals remanded for a determination of whether Café Arizona can receive additional remedies if it is determined that Alea breached a duty to defend in bad faith (despite the lack of evidence of improper conduct by Alea). In addition, Café Arizona will be entitled to recover its attorney fees if it ultimately prevails. The Court of Appeals' refusal to find Alea in bad faith as a matter of law simply does not warrant review by this Court. Rather, as set forth in Alea's Petition for Review, 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.

IV. CONCLUSION

The only issues addressed in the Court of Appeals' opinion that satisfy the RAP 13.4(b) criteria are set forth in the Petition for Review filed by Alea. Notwithstanding Café Arizona's apparent dissatisfaction with small portions of the opinion, neither of the new issues raised are appropriate for review. Café Arizona made no effort to explain why review of the new issues it identified is warranted under RAP 13.4(b). Indeed, the Court of Appeals did nothing more than 1) confirm that Alea did not violate the CPA or claims handling guidelines, and 2) identify issues of fact on whether Alea breached a duty to defend in bad faith. Accordingly, Alea respectfully requests that this Court deny Café Arizona's "Contingent Petition for Review" and decline to address the new issues raised by Café Arizona.

RESPECTFULLY SUBMITTED this 28th day of September,
2007.

COZEN O'CONNOR



J. C. Ditzler, WSBA No. 19209
Melissa O'Loughlin White, WSBA No. 27668
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Attorneys for Petitioner
Alea London, Ltd.

RECEIVED
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DECLARATION OF SERVICE

2007 SEP 28 A 11: 04
 BY DAYA BOWZER states as follows:
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 CLERK

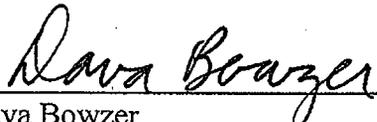
~~Tam-a-citizen~~ of the United States of America and a resident of the State of Washington, I am over the age of 21 years, I am not a party to this action, and I am competent to be a witness herein.

On this 28th day of September, 2007, I caused to be filed via electronic filing with the Supreme Court of the State of Washington, the foregoing ALEA'S REPLY TO CAFÉ ARIZONA'S ANSWER TO PETITION FOR REVIEW. I also served copies of said document on the following parties as indicated below:

<p><i>Counsel for Plaintiffs/Appellants:</i> Scott B. Easter Paul J. Miller Sandy K. Lee Montgomery Purdue Blankinship & Austin PLLC 701 Fifth Avenue, Suite 5500 Seattle, WA 98104 Fax: (206) 625-9534</p>	<p>() Via Legal Messenger () Via Facsimile () Via Email (X) Via U.S. Mail</p>
<p><i>Counsel for Plaintiffs/Appellants:</i> Shane Moloney Short Cressman & Burgess PLLC 999 Third Avenue, Suite 3000 Seattle, WA 98104 Fax: (206) 340-8856</p>	<p>() Via Legal Messenger () Via Facsimile () Via Email (X) 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 28th day of September,
2007.



Dava Bowzer

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