

NO. 80753-1

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondents,

v.

ALEA LONDON, LTD., a foreign corporation,

Petitioner.

PROCESSED
SUPREME COURT
STATE OF WASHINGTON
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SUPPLEMENTAL BRIEF OF RESPONDENTS
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I. INTRODUCTION

Petitioner Alea London Ltd. (“Alea”) has done precisely what this Court prohibited insurance companies from doing in *Truck Ins. Exch. v. Vanport Homes*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002): Alea denied its insured a defense based upon a novel legal theory of its own concoction seeking to expand Washington law to exclude coverage. If Alea is permitted to deny its duty to defend upon such shaky legal ground and in violation of the rule set forth in *Vanport Homes*, it would establish harmful precedent and weaken the duty to defend in Washington.

Alea insured respondents American Best Food, Inc. d/b/a Café Arizona and its operators Myung Chol Seo and Hyun Heui Se-Jeong (collectively “Café Arizona”) under a commercial general liability policy (“Policy”). A Café Arizona patron, Michael Dorsey (“Dorsey”), was shot by another patron and subsequently sued Café Arizona for its alleged negligence when Café Arizona personnel removed Dorsey from the premises after he was shot and “dumped him” on the sidewalk, injuring him.

Café Arizona repeatedly tendered defense of the action to Alea, but Alea refused to offer a defense arguing coverage was precluded by an exclusion in the Policy related to assault and battery (“A/B Exclusion”). Café Arizona, through detailed letters from coverage counsel, contradicted

Alea's assertion that the A/B Exclusion precluded coverage. Despite being fully informed that the A/B Exclusion did not clearly preclude coverage under Washington law, Alea refused to defend its insured and ultimately refused to even respond to Café Arizona's letters. Café Arizona was forced to pay for its own defense in the Dorsey lawsuit and to hire counsel to enforce its rights under the Policy.

The trial court erroneously granted summary judgment in Alea's favor – a judgment the Court of Appeals correctly and unanimously reversed. Alea has advanced a multitude of strained arguments in defense of its actions its insured, but it is unable to escape the fact that it refused to defend its insured against claims for post-assault negligence that were not clearly excluded because application of the A/B Exclusion to claims for post-assault negligence was a matter of first impression in Washington. Alea knew this and also knew the vast majority of jurisdictions looking at the issue had ruled in favor of coverage. Alea abandoned its insured in hopes that it would be able to argue for an expansion of then undetermined Washington law if it was sued. Insurers may not take such risks to the detriment of their insureds.

The Court of Appeals followed established Washington law in ruling that Alea must pay Café Arizona's defense costs and attorney fees, and this Court should affirm these rulings. Additionally, the Court of

Appeals held the trial court improvidently dismissed Café Arizona's claims for bad faith and indemnity, although it erroneously failed to rule as a matter of law that Café Arizona is entitled to prevail on these claims. The Court of Appeals also erred in affirming the summary dismissal of Café Arizona's CPA claim.

This Court should affirm the Court of Appeals determination that Alea breached its duty to defend, and further should remand with instructions to enter judgment in favor of Café Arizona on its remaining claims. If this Court finds issues of fact precluding summary judgment in Café Arizona's favor, this Court should affirm the reversal of the trial court's award of summary judgment in favor of Alea dismissing the bad faith and indemnity claims, reverse the summary dismissal of Café Arizona's CPA claim, and remand for trial.

II. SUPPLEMENTAL ASSIGNMENTS OF ERROR

Café Arizona incorporates Assignments of Error 1 - 4 as stated on Page 1 of the Amended Brief of the Appellants and makes additional assignments of error related to the Court of Appeals' decision as follows:

5. The Court of Appeals erred in holding that genuine issues of material fact precluded summary judgment in Café Arizona's favor on its bad faith and indemnity claims.
6. The Court of Appeals erred in affirming the summary dismissal of Café Arizona's Consumer Protection Act claim.

III. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

Café Arizona incorporates the Issues Pertaining to Assignments of Error 1 - 6 as stated on Page 3 of the Amended Brief of Appellants and identifies the following issues pertaining to its supplemental assignments:

7. Whether the Court should determine, as a matter of law, that the insurer breached its duty to defend in bad faith which would estop it from denying coverage. (Assignment of Error Nos. 2, 3, and 5).
8. Whether the Court should determine, as a matter of law, that the insurer breached its insurance contract in bad faith and violated Washington's Consumer Protection Act and insurance claims settlement regulations. (Assignment of Error Nos. 4 and 6).

IV. STATEMENT OF THE CASE

A. Facts.

1. **Dorsey Sued Café Arizona Alleging Separate and Distinct Injuries from Post-Assault Negligence.**

On January 19, 2003, Dorsey was shot by an individual in a parking lot adjacent to Café Arizona and subsequently sued his assailant and Café Arizona (the "Dorsey Lawsuit"). (CP 74-91). Dorsey's original complaint, dated August 27, 2003, alleges a separate and distinct negligence claim against Café Arizona.¹

¹ The Complaint states, in relevant part: "Plaintiff brings this complaint against the Defendants for their respective tortious actions and omissions, which proximately caused Plaintiff to suffer great bodily harm and permanent disabling injuries ... [Café Arizona's] security guards carried [Dorsey] into the club, however, the club owner/manager order to (sic) guards to carry [Dorsey] back outside where the guards dumped him back on the sidewalk ... [a]s a direct and proximate result of the tortious acts by the Defendants, [Dorsey] has suffered severe physical, cognitive and mental injuries and is entitled to be compensated therefore." (CP 75, 78, 80).

2. Alea Refused to Defend Café Arizona.

Café Arizona tendered the claim to Alea on August 30, 2003, and in response, Alea explained it was denying its insured indemnity or a defense because the A/B Exclusion “excludes acts of assault and/or battery ‘regardless of the degree of culpability or intent.’” (CP 107-109).

3. The A/B Exclusion does not Expressly Exclude Claims of Post-Assault Negligence.

The A/B Exclusion states, in relevant part:

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 . . .

(CP 62).

4. Alea Continued to Deny Coverage and a Defense to Café Arizona Despite Knowledge of the Law.

Café Arizona’s attorney responded to Alea’s denial of coverage in November 2003, emphasizing the separate nature of Dorsey’s claims of post-assault negligence against Café Arizona. He further explained that claims of post-assault negligence are not clearly excluded by the A/B Exclusion under Washington law, cited to the majority rule from other jurisdictions that post-assault conduct is not clearly excluded, and explained Alea’s broad duty to defend was triggered under the rule set forth in *Vanport Homes*. (CP 265).

Café Arizona requested Alea reconsider its denial of coverage, but Alea maintained its position there was no duty to defend or indemnify Café Arizona. (CP 269-79). Alea relied upon a single Washington case to support its denial: *McAllister v. Agora Syndicate, Inc.*, 103 Wn.App. 106, 11 P.3d 859 (2000). Alea acknowledged the claims in *McAllister* were claims of pre-assault negligence, yet Alea claimed it believed a Washington Court would “likely” apply *McAllister* to preclude coverage of Dorsey’s post-assault negligence claims. Thus, Alea expressly refused to interpret the A/B Exclusion with inferences in favor of coverage and continued to deny a defense. (CP 269-70).

5. Dorsey Amended his Complaint to Clarify his Separate and Distinct Claims Against Café Arizona of Post-Assault Negligence and Damages.

In July 2006, Dorsey amended his complaint (CP 83-91), setting forth clarified factual allegations of post-assault negligence against Café Arizona.²

6. Café Arizona Resubmitted its Tender Based on the Amended Complaint, and Alea Never Responded.

Café Arizona forwarded Dorsey’s amended complaint to Alea on July 20, 2005 and requested Alea reassess its position on indemnity and

² The Amended Complaint states: “[Café Arizona’s] security guards carried the injured [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 ... [a]s a direct and proximate result of the negligent and tortious acts by the Defendants, Plaintiff has suffered severe physical, cognitive, and mental injuries. . . .” (CP 87, 90).

defense based on the clarified allegations in the amended complaint. (CP 214-15, 292-93). On July 25, 2005, Café Arizona's counsel forwarded a copy of a report by Dorsey's expert witness containing additional facts learned through discovery about Café Arizona's post-assault conduct and again renewed the request for Alea to reconsider its coverage position. (CP 47, 93-98). Alea never responded to Café Arizona's July 20, 2005 and July 25, 2005 requests. (CP 17-8, 31-32).

Due to Alea's refusal to offer a defense, even under a reservation of rights, Café Arizona had no alternative but to undertake its own defense in the Dorsey Lawsuit. (CP 4-5, 161). Café Arizona initiated this action against Alea to obtain the benefits of the Policy. (CP 3-8).

During the pendency of this action and up to the time of the trial court's ruling on the cross-motions for summary judgment in this case on September 30, 2005, the Dorsey Lawsuit had not concluded; therefore, Café Arizona's liability to Dorsey for claims of post-assault negligence had not been resolved and evidence of post-assault injuries were not before the trial court, are not in the record on appeal.³ (CP 4-5).

³ The lack of evidence in the record regarding post-assault injuries is due to the procedural posture of this appeal and not because there is no such evidence as suggested by Alea. Café Arizona anticipates presenting evidence of post-assault injuries to the trial court on remand including evidence that Cafe Arizona lost a motion for directed verdict on the issue of its liability for exacerbation of Dorsey's injuries following the assault and evidence of jury instructions proposed by Dorsey, placing the issue of Cafe Arizona's liability for exacerbation of Dorsey's injuries before the jury.

B. Procedural History.

Café Arizona sued Alea for breach of contract, bad faith, violation of the CPA, and declaratory judgment. (CP 3-8). The parties filed cross-motions for summary judgment. (CP 122-151) Judge Gain granted Alea's motion, denied Café Arizona's motion, and dismissed the action. (CP 395-97).

Café Arizona appealed, and the Court of Appeals reversed the trial court in a unanimous published decision. *American Best Food, Inc. v. Alea London Ltd.*, 138 Wn. App. 674, 158 P.3d 119 (2007). The Court of Appeals correctly reversed the trial court and held: 1) Alea had a duty to defend Café Arizona because no exclusion clearly precluded coverage; 2) the trial court improvidently dismissed Café Arizona's claim for indemnity; and 3) issues of fact precluded summary dismissal of Café Arizona's bad faith claim. *Id.* at 688-92. The Court of Appeals affirmed the trial court's dismissal of Café Arizona's CPA claim, *Id.* at 693, which Café Arizona asserts was in error.

The Court of Appeals denied Alea's Motion for reconsideration and awarded fees and costs to Café Arizona. Alea timely petitioned to this Court for review.

V. ARGUMENT

A. Standard of Review.

This Court reviews rulings on summary judgment *de novo*, considering all facts and reasonable inferences 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). Washington courts interpret insurance policies as a matter of law. *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 575, 964 P.2d 1173 (1998).

B. The Court of Appeals Correctly Held Alea Breached its Duty to Defend Because the A/B Exclusion Does Not Preclude Coverage for Claims of Post-Assault Negligence.

1. The Duty to Defend.

The Court of Appeals appropriately applied clearly-established Washington law regarding the heightened obligations of an insurer to defend its insured from all claims not clearly excluded from coverage.

The duty to defend is one of the main benefits of the insurance contract. *Vanport Homes*, 147 Wn.2d at 760. An insurance carrier's duty to defend is broader than, may arise earlier, and is independent of its duty to indemnify. *E.g.*, *Allstate v. Bowen*, 121 Wn.App. 879, 883-884, 91 P.3d 897 (2004). The duty to defend arises at the time an action is brought against the insured and the complaint, when construed liberally, contains factual allegations which could, if proven, impose liability upon

the insured within the policy's coverage. *Id.*, 121 Wn.App. at 883; *Vanport Homes*, 147 Wn.2d at 751-760. When the pleadings, construed liberally as they must be, are subject to an interpretation that creates a duty to defend, the insurance carrier must comply with that duty. *Aetna Cas. and Sur. Co. v. M & S Industries, Inc.*, 64 Wn.App. 916, 928, 827 P.2d 321 (1992). If factual allegations and terminology in the complaint are ambiguous, such language must be liberally construed in favor of triggering the duty to defend. *Bowen*, 121 Wn.App. at 883-84.

When the factual allegations of the complaint set forth a claim that may or may not be covered, the insurance carrier must investigate the claim and give the insured the benefit of the doubt in determining whether the insurance carrier's duty to defend is triggered. *Vanport Homes*, 147 Wn.2d at 761. Facts outside the complaint must be considered if (1) the factual allegations are in conflict with facts known or readily ascertainable by the insurance carrier or (2) the factual allegations of the complaint are ambiguous or inadequate. *Id.* The insurance carrier is prohibited from relying on facts outside the complaint to deny its duty to defend. *Id.*

Exclusionary clauses are to be "most strictly" construed against the insurance carrier in view of the fact that the purpose of insurance is to provide coverage, and the insurance contract should be construed in favor

of providing coverage rather than denying coverage. *Id.*; *M & S Industries*, 64 Wn. App. at 923.

Thus, as the Court of Appeals aptly applied in this case, once the duty to defend is triggered by a claim that falls within the Policy's basic coverage provisions, an insurance carrier is relieved of such duty only if it can show an exclusion applies to clearly preclude coverage of the claim. Alea was not relieved of its duty to defend because no exclusions applied to clearly preclude coverage for Dorsey's claims of post-assault negligence. *See Vanport Homes*, 147 Wn.2d at 760.

2. Dorsey's Post-Assault Negligence Claims Fall Under the Policy's Basic Coverage Provisions.

The Court of Appeals correctly noted there is no dispute in this case that Dorsey alleged he suffered bodily injury as a result of an "occurrence" and the alleged injury took place within the coverage territory and effective dates. Thus, the Court of Appeals correctly found that Dorsey's allegations in the original and amended complaint, when construed liberally as they must be, constituted claims which would be covered by the Policy if they were not clearly excluded by the A/B Exclusion. *American Best Food*, 138 Wn. App. at 684.

3. The Court of Appeals Correctly Held, as a Matter of First Impression, that the A/B Exclusion does not Preclude Coverage for Dorsey's Post-Assault Negligence Claims.

The A/B Exclusion provides that, “[t]his insurance does not apply to any claim arising out of . . . Assault and/or Battery . . .” (Underline added) (CP 62). Prior to the Court of Appeals’ decision in this case, the application of an A/B Exclusion to claims of post-assault negligence was a matter of first impression in Washington. The Court of Appeals held *McAllister*, the single Washington case analyzing an A/B Exclusion in any context, does not address the issue of post-assault negligence claims presented here. Due to the lack of binding authority on point, the Court of Appeals correctly looked to other jurisdictions and adopted the rule followed by the vast majority of courts that have ruled on the issue: the language of the A/B Exclusion does not preclude coverage for claims of post-assault negligence. The Court of Appeals correctly ruled the express language of the A/B Exclusion does not clearly preclude coverage here.⁴

(a) The Court of Appeals correctly ruled *McAllister* does not apply.

Crucial to the Court of Appeals’ thoughtful analysis was its ruling

⁴ Notably, some insurers have expressly excluded claims of post-assault negligence, which Alea did not do. See *Proshee v. Shree, Inc.*, 893 So.2d 939, 941-42 (La.App. 3rd Cir. 2005). To the extent this provision does not clearly omit a reference to claims of post-assault negligence, it is ambiguous and must be interpreted in favor of coverage. See *Greer v. Northwestern Nat. Ins. Co.*, 109 Wn.2d 191, 201, 743 P.2d 1244 (1987); see also Reply Brief of Appellants at 12-15.

that Alea's and the trial court's reliance on *McAllister* was misplaced because *McAllister* did not involve allegations of post-assault negligence. In *McAllister*, a nightclub patron, Grant McAllister, was injured in a fight with another patron and sued the assailant and nightclub owner. 103 Wn. App. at 107-08. McAllister's claims against the nightclub owner included pre-assault negligence, but did not include any claims for post-assault negligence. *Id.* The nightclub's insurance carrier denied coverage of the claims for pre-assault negligence because of an A/B exclusion. The court determined the A/B exclusion precluded coverage because McAllister would need to establish the assault in order to prove his negligence claims, essentially applying the "but-for" test. *Id.* at 111.

As the Court of Appeals properly noted here, the *McAllister* decision "necessarily centered on prior cases where the assault or battery was alleged to have been the result of pre-assault negligence." *American Best Food*, 138 Wn. App. at 686.⁵ By contrast, Dorsey would not need to establish his underlying assault in order to prove Café Arizona was negligent in having him moved and "dumped" on the sidewalk in his injured state. Thus, the Court of Appeals appropriately limited *McAllister* to its facts and refused to extend its reasoning to this case involving

⁵ Significantly, Judge Coleman, the author of the *McAllister* decision, was on the panel here and joined in the Court of Appeals' decision adopting Café Arizona's argument that *McAllister* is not controlling authority.

separate and distinct claims of post-assault negligence. *Id.* at 688.

As this Court recently clarified, an insurer may not rely on its interpretation of an undetermined rule of law in order to apply an exclusion and deny coverage. *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 60, 164 P.3d 276 (2007). Here, the Court of Appeals correctly reasoned Alea breached the duty to defend when it incorrectly relied upon *McAllister* despite its inapplicability to the facts and claims alleged in this case.

(b) The Court of Appeals correctly adopted the majority rule from other jurisdictions.

Absent binding Washington cases on point, the Court of Appeals correctly looked to other states for guidance on interpreting the A/B Exclusion in a case involving post-assault negligence claims. The Court of Appeals analyzed five out-of-state cases on point.⁶ These cases discuss the crucial distinction between pre-assault and post-assault negligence claims in applying an A/B exclusion. The distinction is crucial because claims of post-assault negligence may be established without proving the underlying assault (i.e. the harm is separate from the assault), whereas proving the assault is a prerequisite to a claim for pre-assault negligence

⁶ *Bucci v. Essex Ins. Co.*, 393 F.3d 285, 290-91 (1st Cir.2005); *United Nat'l Ins. Co. v. Penuche's, Inc.*, 128 F.3d 28 (1st Cir.1997); *W. Heritage Ins. Co. v. Estate of Dean*, 55 F.Supp.2d 646, 650 (E.D.Tex.1998); *Planet Rock, Inc. v. Regis Ins. Co.*, 6 S.W.3d 484, 491 (Tenn.Ct.App.1999); *West v. City of Ville Platte*, 237 So.2d 730, 733 (La.Ct.App.1970).

(i.e. the harm is inseparable).

The Court of Appeals' decision to adopt this majority rule is supported by Washington's long-standing policy requiring insurance exclusion clauses to be strictly construed against the insurance carrier who drafted the policy. This policy favoring coverage is even more compelling here considering the vast potential for adverse affects to the victims of assaults who would go uncompensated for injuries from intervening post-assault negligence of employees of insureds in Café Arizona's position.

The rule adopted by the Court of Appeals fills a gap in Washington insurance coverage case law, is well reasoned and supported, and is consistent with Washington law on insurance policy interpretation.

C. The Court of Appeals Correctly Reversed the Trial Court's Summary Dismissal of Café Arizona's Bad Faith Claim, but it Erred in Failing to Remand with Instructions to Grant Summary Judgment in Café Arizona's Favor.

Alea correctly argues that the issue of bad faith is one that should be determined as a matter of law in this case. Petition for Review, 18-19. Alea's bad faith denial of the duty to defend is supported by undisputed facts in the record before this Court, and Café Arizona's motion for summary judgment on its bad faith claim should be granted on remand.

1. Alea Breached its Duty to Defend in Bad Faith.

An insurance carrier has a statutory and common law duty to act in good faith (or refrain from acting in bad faith) towards its insured and a

violation of that duty may give rise to a tort action for bad faith. RCW 48.01.030; *Griffin v. Allstate Ins. Co.*, 108 Wn.App. 133, 143, 29 P.3d 777 (2001). An insurance carrier is liable for the tort of bad faith breach of the insurance contract if the insurance carrier acted in a manner that was unreasonable, frivolous, or unfounded. *Id.* at 143. An insurer must deal fairly with an insured giving equal consideration in all matters to the insured's interest. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 385-86, 715 P.2d 1133 (1986). Therefore, an insurer acts in bad faith when it overemphasizes its own interests over its insureds. *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn.App. 323, 329, 2 P.3d 1029 (2000).

Here, Alea's conduct constitutes bad faith denial of the duty to defend as a matter of law. Alea reviewed Dorsey's complaint and amended complaint alleging claims of post-assault negligence against Café Arizona, decided it could argue for an extension of *McAllister* despite its inapplicability to post-assault negligence claims, refused to even answer its insurers thoughtful requests for reconsideration in light of the amended complaint, and ultimately forced Café Arizona to defend itself and to file this action to get the insurance benefits it paid Alea for under the Policy. Alea's conduct was unreasonable and its justifications are unfounded. This Court should find Alea refused to defend Café Arizona in bad faith as a matter of law.

2. The Court of Appeals Erred in Failing to Hold Alea is Estopped from Denying Coverage as a Matter of Law.

If an insurance carrier is found to have breached its duty to defend in bad faith, it may be estopped from denying coverage. *Vanport*, 147 Wn.2d at 755. Although the reasonableness of an insurer's breach of its duty to defend often depends upon a factual inquiry, questions of fact may be determined on summary judgment as a matter of law where reasonable minds could reach but one conclusion. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485-86, 78 P.3d 1274 (2003).

This Court should determine, as a matter of law, that Alea's refusal to defend was in bad faith because Alea interpreted equivocal Washington cases and ignored the overwhelming weight of cases from other states to give itself the benefit of the doubt and further admittedly construed the allegations of the complaint narrowly in its own favor, at the expense of its insured. Alea knowingly stretched inapplicable case law to exclude coverage for claims that were not clearly excluded. The Court should remand with instructions to enter judgment in favor of Café Arizona on its bad faith and indemnity claims.

In the alternative, at a minimum there are issues of fact precluding summary judgment against Café Arizona on this issue, and this Court

should affirm the Court of Appeals' remand of Café Arizona's bad faith claim and the duty to indemnify that follows from such a breach.

D. The Court of Appeals Erred in Affirming the Dismissal of Café Arizona's CPA Claim.

The Court of Appeals erroneously determined Café Arizona did not present adequate evidence in support of its CPA claim regarding Alea's failure to respond. This is not the proper analysis on this issue. Alea admits it failed to respond to Café Arizona's July 2005 request for reconsideration of the defense and coverage determination. *See* Br. of Respondent at 40-42. This admitted failure to provide a written response constitutes a per se violation of WAC 284-30-330(2), WAC 284-30-360(1), and WAC 284-30-360(3), which also constitutes a per se violation of Washington's Consumer Protection Act, Chapter 19.86 RCW, as a matter of law. *Vanport Homes*, 147 Wn.2d at 765-66. Café Arizona need not present evidence to support a stipulated fact in order to defeat Alea's motion for summary judgment or prevail on its motion. The only question is whether, as a matter of law, Alea's admitted failure to respond violates the CPA. There is no failure of evidence on this issue.

The Court of Appeals also erred in its analysis of Alea's CPA claim regarding Alea's inadequate investigation. If Alea would have undertaken any reasonable investigation, it would have discovered the

separate and distinct nature of Dorsey's alleged injuries arising from Café Arizona's alleged negligence. Alea's admitted failure to do so constitutes a violation of WAC 284-30-330(3) and the CPA as a matter of law.

This Court should remand with instructions to enter judgment in favor of Café Arizona on its CPA claims regarding Alea's failure to respond and failure to adequately investigate. In the alternative, the CPA claims should be remanded for trial because, at a minimum and when viewed as they must be in the light most favorable to Café Arizona, these questions present genuine issues of material fact precluding summary judgment against Café Arizona.

E. The Court of Appeals Correctly Awarded Café Arizona Attorney Fees and Costs.

The Court of Appeals correctly held Café Arizona is entitled to its attorney fees and costs pursuant to *Olympic Steamship Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991) and RAP 18.1. This Court should affirm the Court of Appeals' award and also award Café Arizona its attorney fees and costs incurred in defending review to this Court.

VI. CONCLUSION

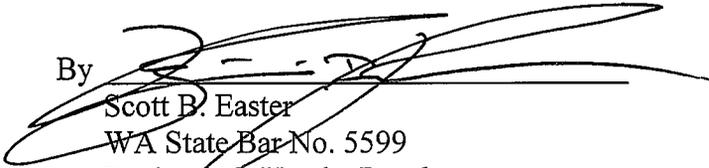
This Court should follow its ruling in *Vanport Homes* and re-affirm the rule that an insurer has a duty to defend unless coverage is clearly excluded. Here, the law was far from clear. To the contrary,

coverage under these facts was a matter of first impression. Alea's refusal to defend violated its obligations under the Policy and Washington law.

The Court of Appeals correctly followed *Vanport Homes* in determining Alea breached its duty to defend Café Arizona. This Court should affirm that decision. However, the Court of Appeals erred by declining to go further to rule as a matter of law that Alea's breach was wrongful, that as such Alea's breach was in bad faith and it is estopped from denying indemnity, and that Alea's conduct violated the CPA. If this court does not reverse the Court of Appeals on these latter claims, it should affirm the Court of Appeals and remand Café Arizona's remaining claims for trial.

RESPECTFULLY SUBMITTED this 3rd day of July, 2008

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July 3, 2008, I deposited in the mails of the United States of America, postage prepaid, an envelope containing a true and correct copy of the Supplemental Brief of Respondents American Best Food, Inc. d/b/a Café Arizona, Myung Chol Seo, and Hyun Heui Se-Jeong, addressed to:

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DATED this 3rd day of July, 2008, at Seattle, Washington.



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