

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.

RESPONDENTS' ANSWER TO BRIEF OF
AMICUS CURIAE STATE FARM

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I. INTRODUCTION

Respondents American Best Food, Inc. d/b/a Café Arizona and its operators Myung Chol Seo and Hun Heui Se-Jeong (collectively “Café Arizona”) agree with the Brief of Amicus Curiae State Farm Fire & Casualty Company (“State Farm Brief”) to the extent it asserts the efficient proximate cause doctrine has no application in this case. Café Arizona disagrees with the remaining portions of the State Farm Brief, as the following response explains.

II. FACTS

The facts of this case have been adequately briefed by the parties. For brevity, Café Arizona will not repeat relevant facts in this Answer and instead incorporates the facts sections from its prior briefing by this reference.

III. RESPONSE

A. **The Court of Appeals Correctly Considered Out-of-State Authority.**

State Farm repeatedly argues the Court of Appeals incorrectly “relied on” and “base[d] its decision on” out-of-state authority. State Farm Brief at 11, 17. This fundamentally misapprehends and/or misstates the *American Best Food* decision. *American Best Food, Inc. v. Alea London, Ltd.*, 138 Wn. App. 674, 688, 158 P.3d 119 (2007). To the

contrary, the Court of Appeals first considered Washington law and ruled, as Café Arizona's counsel had pointed out to Alea at the time of the tender of defense, that construction of the "arising out of an assault" exclusion ("A/B Exclusion"), as applied to post-assault conduct, was an issue of first impression in Washington. Thus, the Court of Appeals appropriately considered cases from other jurisdictions and ultimately included references to these cases in the *American Best Food* opinion because the analyses were so similar and because the cases presented nearly identical facts. State Farm attempts to frame the issue as if the Court of Appeals relied on the out-of-state authorities to interpret the language of the A/B Exclusion at issue in this case. This is simply incorrect.

Prior to the *American Best Food* decision, the only Washington case to interpret and apply an A/B Exclusion was *McAllister v. Agora Syndicate, Inc.*, 103 Wn. App. 106, 11 P.3d 859 (2000). In *McAllister*, an individual was assaulted and injured at a nightclub and sued the club owner alleging negligence because the security guards knew of the melee but took no action. The injured party made no allegation of negligence for any action or harm aside from the assault. *Id.* at 108. Because the alleged negligence of the club owner could only be established by first proving the assault occurred, the court determined the A/B Exclusion precluded coverage. *Id.* at 111.

In stark contrast to *McAllister*, here a club patron alleged he was shot outside the club, walked back inside the club, and was subsequently forcibly removed by security guards who dumped him on the sidewalk. The plaintiff alleged separate and distinct claims of negligence against Café Arizona for its conduct in allegedly having him removed and dumped on the sidewalk after the assault. The plaintiff also alleged this treatment caused him separate injury. Thus, the underlying case here presents a distinct claim of post-assault negligence.

Because there was no Washington authority on point, the Court of Appeals decided the issue as a matter of first impression, which it unquestionably was, and merely cited to factually similar out-of-state decisions where the same conclusion had been reached. State Farm urges it was error to “rely” on these cases, yet a careful reading of *American Best Food* leads to the conclusion the Court of Appeals arrived at its own reasoned determination of this previously undecided issue and did not “rely” on the cases it cited to as persuasive authority.

The court’s analysis in *American Best Food* is quite easy to follow. The court first cites to *McAllister*, although it quickly determines *McAllister* does not apply. 138 Wn. App. at 686. The court then lists several out-of-state decisions based on similar allegations of post-assault negligence, all of which determine such claims are not precluded by an

A/B Exclusion because they allege distinct and separate claims of negligence and harm occurring after the assault. *Id.* at 687. After considering these cases, and the lack of applicable authority reaching a contrary result, the court states its key analysis:

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 acts of alleged negligence' that Dorsey claims caused injury. 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.' Thus, Dorsey's alleged subsequent injury at the hands of Café Arizona employees does not clearly "arise out of" the prior assault or battery.

Id. (Emphasis added, internal citations omitted).

Thus, the Court of Appeals determined, as a matter of first impression and based upon a well-reasoned analysis, that the A/B Exclusion does not preclude coverage because the complaint alleges separate and distinct claims of negligence against Café Arizona for its conduct after the assault, and from which the plaintiff alleges separate and distinct harm. It is also crucial to point out the Court of Appeals used the correct standard by determining the exclusion did not "clearly" apply to

preclude coverage. *E.g. Woo v. Firemen's Fund Ins. Co.*, 161 Wn.2d 43, 53, 164 P.3d 454 (2007) (an insurer must defend “unless the claim alleged in the complaint is clearly not covered by the policy.”); *accord Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 761, 58 P.3d 276 (2002).

State Farm’s criticism of the *American Best Foods* decision for “relying” on out-of-state authority lacks merit.

B. *American Best Food* is not Inconsistent with Washington Courts’ Definition of “Arising out of.”

State Farm argues at length that the Court of Appeals utilized the wrong definition of “arising out of” in the *American Best Food* decision. This argument is a red herring. In fact, the *American Best Food* decision does not parse the definition of “arising out of” because no reasonable definition of that term could lead to a differing result here. This argument is merely an effort on State Farm’s and Alea’s part to refocus the Court’s attention from the material elements of the *American Best Food* decision to a quagmire of inapplicable case law.

The Court of Appeals applied the appropriate rationale in *American Best Food* – a rationale based on the nature of the claims alleged in the assault and following events distinct from the assault. The key points in the decision are the allegation of separate acts of negligence,

allegation of separate harm, and the timing of such alleged acts and negligence occurring after and unrelated to the underlying assault.

1. The Washington “Arising out of” Cases Cited by State Farm are Inapposite.

State Farm cites to a multitude of inapplicable Washington cases that include the phrase “arising out of” in one context or another. State Farm attempts to convolute the issue by focusing not on the operative facts of the case and the nature of the specific claims, as this Court must, but instead by throwing up a hastily constructed façade of cases linked only by the existence of the phrase “arising out of” in the insurance policy at issue. Many of these cases deal with first party policies, and many analyze the phrase “arising out of” in the grant of coverage instead of an exclusion. These cases are not controlling regarding the key issue before the court in *American Best Food* because none of these cases deal with a claim of post-assault negligence or the application of an A/B Exclusion from a commercial general liability policy.

As an example, State Farm cites positively to *Beckman v. Connolly*, 79 Wn. App. 265, 898 P.2d 357 (1995). In *Beckman*, an individual ignited a gas can in the cab of a truck while driving, causing an accident and burning his passenger. *Id.* at 267. Thus, the negligence claims all related to a single accident caused by a single negligent act and

resulting in a single harm. No facts were alleged in *Beckman* that would establish any manner of separate or distinct claim occurring after the accident.

Another case relied on by State Farm, *McDonald Industries, Inc. v. Rollins Leasing Corp.*, 95 Wn.2d 909, 631 P.2d 947 (1981), suffers from the same inapplicability. *McDonald* also deals with a single event and a single harm – the case (another auto accident) involves an insured who was driving a tractor, lost his load, and caused a two-car accident. *Id.* at 910. The phrase “arising out of” appeared in the broad grant of coverage section of the policy. *McDonald* deals with a single occurrence with no allegation of separate negligence aside from the use of the tractor, and there can be no doubt the accident “arose from” the use of the tractor. Because there is no allegation of a separate act of negligence causing a second harm, and because the language is not interpreted in an exclusion from coverage, this case is not helpful in analyzing the post-assault negligence claims alleged here.

Also notable is State Farm’s reliance on *Allstate Ins. Co. v. Bowen*, 121 Wn. App. 879, 91 P.3d 879 (2004) because *Bowen* strongly supports

the conclusion that Alea breached its duty to defend here in bad faith.¹ In *Bowen*, a purchaser of a home sued the seller and the seller's son for intentional and/or negligent misrepresentations about the existence of problems with the sewer system. The seller and her son both tendered defense of the claim to Allstate on their respective homeowners policies. *Id.* at 881. Allstate offered a defense under a reservation of rights and then filed a declaratory action to have the court determine whether it owed its insureds a duty to defend or indemnify. *Id.* at 882. Recognizing the breadth of the duty to defend, Allstate explained its limited defense to its insured, stating "because Washington Courts have not specifically ruled on homeowner policy coverage related to the allegation of negligent misrepresentation, there may be coverage and defense for the Plaintiff's Misrepresentation Cause of Action in this lawsuit under your Allstate policy." *Id.* at 885. The court ultimately ruled that although there was no duty to indemnify, Allstate did have a duty to defend its insureds. *Id.* at 886.

¹ *Bowen* is also inapposite because the case dealt with claims of misrepresentation related to an existing condition and the application of the broad grant of coverage in a homeowners policy. These facts are clearly distinguishable from the post-assault negligence claims alleged here and the application of the A/B Exclusion to such claims.

Thus, unlike Alea's bad faith breach of its duty to defend here, in *Bowen Allstate* took the appropriate step of defending under a reservation of rights. Although *Bowen* is not factually on point, it is a clear example of the breadth of the duty to defend and also demonstrates how easily an insurer may follow the direction of this Court and simply defend under a reservation of rights and file a declaratory action where there is an absence of controlling Washington law clarifying whether coverage exists.

None of the Washington cases cited by State Farm control here because none of them deal with distinct claims of post-assault negligence. Moreover, none of these cases deal with the temporal scope of an exclusion to a CGL policy. The Court of Appeals had no guidance from any Washington decision on how to apply an A/B Exclusion to claims of post-assault negligence, so the court correctly considered factually similar cases from other jurisdictions.

2. The Out-of-State "Arising out of" Cases Cited by State Farm are not Controlling Law and are Inapposite.

State Farm also cites to several out-of-state cases in support of a broad definition of "arising out of," which is curious given State Farm's criticism of the Court of Appeals for merely quoting out-of-state case law. Regardless, State Farm's two out-of-state cases suffer from the same

infirmity as the Washington cases – neither deals squarely with claims of separate and distinct acts of negligence occurring after an assault.

In *Canutillo Independent School District v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, a Texas case, the question was whether an exclusion precluded coverage for a claim against a school district that it failed to prevent sexual abuse committed by an elementary school teacher and a claim of emotional distress from the conduct of other teachers related to the sexual assault. 99 F.3d 695, 702 (5th Cir. 1996). The court determined the exclusion applied because the claims were “related to and dependent upon” the excluded sexual assault. *Id.* at 705. Because the plaintiffs did not allege separate and distinct claims and separate and distinct harm, *Canutillo* is not applicable to this case even as persuasive out-of-state authority.

In *Continental Casualty Co. v. City of Richmond*, a California case, plaintiffs sued the City of Richmond for wrongful death and civil rights claims stemming from the death of an inmate during an altercation with prison guards. 763 F.2d 1076, 1078 (9th Cir. 1985). The court applied the claims to an exclusionary provision with notably different language than the A/B Exclusion here. In *City of Richmond*, the exclusion precluded coverage for claims “arising directly or consequentially from . . . [injury or death].” The court noted the inclusion of the words “directly or

consequentially” required an especially broad interpretation of “arising out of” to include even a slight connection. *Id.* at 1081. The court ultimately determined the claims were all connected to the excluded injury and death of the decedent. *Id.* Thus, as in *Canutillo*, in *City of Richmond* there were no allegations of separate and distinct negligence or harm occurring after the excluded injury.

In contrast to the dissimilar cases cited by State Farm, the Court of Appeals cited to several out-of-state cases that were directly on point. In fact, the only reported cases cited in the years of briefing associated with this action that are factually on point are the cases noted by the Court of Appeals in *American Best Food*.

3. Applying the Definition of “Arising out of” Advanced by State Farm does not Preclude Coverage of Post-Assault Negligence Claims.

State Farm argues a broad definition of “arising out of” as defined in *Beckman* should have been specifically included in the *American Best Food* decision. This argument presupposes *American Best Food* uses an incorrect and narrow definition, but the opinion does not support that conclusion. To the contrary, the opinion utilized the appropriate definition and analysis without specifically defining the phrase “arising out of.”

Beckman defines “arising out of” as meaning “that the claimed injury must have originated from, had its origin in, grown out of, or

flowed from the [excluded event].” 79 Wn. App. at 273-74. This definition is in no way incompatible with *American Best Food*. The ultimate irrelevance of State Farm’s argument can be demonstrated by simply swapping “arising out of” for the definition above in the key holding from *American Best Food*:

The alleged act[s] . . . constitute ‘discrete intervening acts of alleged negligence’ that Dorsey claims caused injury. The harm these alleged acts occasioned is distinct from the prior harm caused by the assault or battery. . . . Thus, Dorsey's alleged subsequent injury at the hands of Café Arizona employees does not clearly [originate from, have its origin in, grow out of, or flow from] the prior assault or battery.

138 Wn. App. 688.

The holding is unaltered by the specific use of the broadest definition of “arising out of” set forth by State Farm. Thus, the Court of Appeals applied the phrase correctly even though it did not specifically define it earlier in the opinion. Perhaps this example explains the utter lack of analysis in the State Farm Brief of how this broad definition would lead to a different result if it had been specifically stated by the Court of Appeals in *American Best Food*.

Instead, the State Farm Brief attempts to characterize the *American Best Food* decision as having applied a proximate causation test, based solely on the use of the word “intervening” in its key analysis. Again, this

misstates the holding in *American Best Food*. The test applied was whether separate and distinct acts of negligence had been alleged to have occurred after the assault, which does not equate to proximate causation. The court did not analyze whether an “intervening cause” acted to break a chain of events for the purposes of tort liability, as a proximate causation analysis would require, but instead simply asked if the complaint alleged separate acts of negligence and harm occurring after the assault. Because such separate acts of negligence and harm were alleged, they do not clearly fall within the ambit of the A/B Exclusion. This is the case whether the phrase “arising out of” stands alone or whether its definition is spelled out.

Moreover, granting the premise that “but for” the assault there would have been no post-assault negligence does not answer the coverage question. In addition to the fact that the none of the cases cited by Alea deal with distinct claims for conduct occurring after an excluded event, exclusions are to be strictly construed in favor of the insured (and finding coverage). Therefore, normal rules of strict construction must act to restrict Alea’s argument for an open-ended interpretation of “arising out of” in the A/B Exclusion. To hold otherwise would mean there would be no coverage for any claim against Café Arizona for any conduct related to Dorsey after the assault, because he would not have come back into the

club were it not for the assault. Under Alea's application of "arising out of" there would be no coverage if Café Arizona employees had run a red light while driving Dorsey to the hospital, or any other manner of imaginable negligent conduct. There must be a bright line where claims "arising out of" the assault cease, and *American Best Food* creates the appropriate line with a temporal distinction between claims arising out of the assault and distinct claims for conduct occurring after the assault with distinct harm.

C. Efficient Proximate Cause Doctrine does not Apply to Exclude Coverage.

Café Arizona agrees with State Farm that the efficient proximate cause doctrine has no place in the analysis here. Café Arizona also took this position in its briefing before the Court of Appeals. The Court should disregard Alea's citation to efficient proximate cause authority.

D. Alea's Bad Faith Does not Hinge on Out-of-State Case Law.

State Farm argues Alea should not be determined to have breached its duty to defend in bad faith because it would be unfair to hinge such a ruling on Alea's misinterpretation of out-of-state case law. Again, this argument simply misapprehends the *American Best Food* holding.

The correct standard to apply to an allegation of a bad faith breach of the duty to defend is whether it was reasonably debatable that the claims were clearly not covered. Café Arizona addresses this standard at

length in its Answer to Brief of Amicus Curiae Washington State Trial Lawyers Association Foundation, which is incorporated here by this reference.

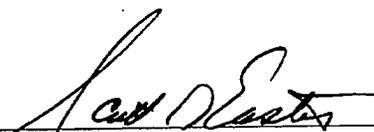
The Court of Appeals first clarified Alea had a duty to defend Café Arizona because the underlying claims were not clearly excluded. *Id.* at 688. The court then correctly determined “[t]he fact that Alea incorrectly determined that it had no duty to defend is evidence of bad faith.” 138 Wn. App. at 691. Therefore, Alea’s bad faith ultimately turns on its decision to abandon its insured and deny a defense despite the claim raising an issue of first impression in Washington which had been squarely resolved on similar facts in other jurisdictions in favor of coverage. Alea did not need to inquire any further or read any cases in order to make the appropriate decision under Washington law; it had a duty from the moment it realized there was no binding Washington authority on point to make all inferences in favor of coverage for the insured and to defend under a reservation of rights and seek declaratory judgment. Instead, Alea interpreted the law in its own best interest and refused to defend a claim that was not clearly excluded. This violated the prohibition outlined by this Court in *Woo* against exactly this conduct by insurers. Alea acted in bad faith as a matter of law.

IV. CONCLUSION

Much of the State Farm Brief's analysis simply misconstrues the *American Best Food* decision or misdirects the Court's attention to immaterial matters. With the exception of its efficient proximate cause analysis, Café Arizona requests the Court disregard the State Farm Brief, as argued above.

RESPECTFULLY SUBMITTED this 13th day of October, 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 October 13, 2008, I caused to be delivered by email pursuant to prior authority a true and correct copy of Respondents American Best Food, Inc. d/b/a Café Arizona, Myung Chol Seo, and Hyun Heui Se-Jeong's Answer to Brief of Amicus Curiae State Farm to:

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DATED this 13th day of October, 2008, at Seattle, Washington.



Patricia Thompson