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No. 92436-8

SUPREME COURT  
OF THE STATE OF WASHINGTON

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ZHAOYUN XIA, et al.

Petitioner,

vs.

PROBUILDERS SPECIALTY INSURANCE  
COMPANY RRG, et al.,

Respondent.

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SUPPLEMENTAL BRIEF OF PETITIONER ZHAOYUN XIA

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## I. INTRODUCTION

This case gives this Court the opportunity to clarify its holdings in *Kent Farms, Inc. v. Zurich Ins. Co.*, 140 Wn.2d 396, 998 P.2d 292 (2000) and *Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 110 P.3d 733 (2005). This Court should hold that a general liability policy's absolute pollution exclusion does not bar coverage of a claim for the negligent manufacture, installation or maintenance of a common non-polluting product.

Because a liability insurer must defend any claim that presents a reasonable possibility of coverage under the facts or the law, even if this Court now holds that injury caused by negligent installation of a product that is not itself a pollutant may fall within a pollution exclusion, it should hold that Probuilders breached its core duty to defend in this case because the state of the law governing pollution exclusions in 2009 did not justify its refusal to defend a claim against its insured for permanent cognitive injuries suffered as a result of its insured's negligent failure to vent the gas hot water heater in the claimant's home.

## II. SUPPLEMENTAL STATEMENT OF THE CASE

Zhaoyun Xia was the first purchaser of a new home from builder Issaquah Highlands. (CP 393-94, 660) Issaquah Highlands

had failed to connect the gas hot water heater inside Ms. Xia's home to the external exhaust vent, preventing the hot water heater from operating as intended and resulting in toxic levels of carbon monoxide that slowly caused Ms. Xia to suffer permanent, disabling cognitive impairment. (CP 191, 194-95, 200-01, 660-61)

On June 26, 2007, Ms. Xia gave written notice of her negligence claim to Issaquah Highlands (CP 487), which tendered the claim to respondent Probuilders, Issaquah Highlands' insurer under a builders' liability policy with coverage of \$1 million per occurrence and an aggregate limit of \$2 million. (CP 347, 483-87, 898) Ignoring its adjuster's recommendation that the insurer defend under a reservation of rights (CP 257-58), and without investigating the relevant Washington authority (CP 255-76), Probuilders rejected the tender, notifying its insured that Probuilders "will neither defend nor indemnify Issaquah . . . [from] any judgment or settlement." (CP 285)<sup>1</sup>

Probuilders relied on its policy's "Pollution Exclusion," which excluded from coverage injury caused by the discharge of "pollutants" or exposure to "pollution:"

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<sup>1</sup> Probuilders had delegated adjusting authority to its claims agent, NBIS Claims & Risk Management. (CP 483-84)

**Bodily injury, property damage, or personal injury** caused by, resulting from, attributable to, contributed to, or aggravated by the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of **pollutants**, or from the presence of, or exposure to, **pollution** of any form whatsoever, and regardless of the cause of the **pollution** or **pollutants**.

This Exclusion applies regardless of the cause of the **pollution** and whether any other cause of said **bodily injury, property damage, or personal injury** acted jointly, concurrently or in any sequence with said **pollutants** or **pollution**. This Exclusion applies whether any other cause of the **bodily injury, property damage, or personal injury** would otherwise be covered under this insurance.

(CP 334) (emphasis in original)

The exclusion defines “**pollution**” as “any form of **pollutant** which forms the basis for liability,” and broadly defines “**pollutant**” to include “any solid, liquid, gaseous or thermal irritants or contaminants,” whether toxic or naturally occurring:

**Pollutant[s]** . . . include but are not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste, biological elements and agents, and intangibles such as noise, light and visual esthetics, the presence of any or all of which adversely affects human health or welfare, unfavorably alters ecological balances or degrades the vitality of the environment for esthetic, cultural or historical purposes, whether such substances would be or are deemed or thought to be toxic, and whether such substances are naturally occurring or otherwise.

(CP 335) (emphasis in original)

Probuilders again refused to defend when Ms. Xia sued for negligence in January 2009 (CP 265-67), forcing Issaquah Highlands to defend Ms. Xia's suit at its own expense. (CP 898) Issaquah Highlands eventually agreed to a \$2 million stipulated judgment in favor of Ms. Xia. (CP 736) In return for a covenant not to execute, Probuilders gave Ms. Xia an assignment of its claims against Probuilders. (CP 297-99, 732-42, 905) Probuilders received notice but declined to appear at a reasonableness hearing and did not object to the settlement. The court found the settlement reasonable under RCW 4.22.060. (CP 303-09)

Ms. Xia brought this action against Probuilders as Issaquah Highlands' assignee, alleging insurance bad faith, negligence, breach of contract, and violation of the CPA and IFCA. (CP 1-20) On cross-motions for summary judgment, the trial court held that the pollution exclusion did not justify the denial of a defense because it was not clear whether Ms. Xia's claims were controlled by *Kent Farms* or by *Quadrant* (11/2/12 RP 130), but nonetheless dismissed the lawsuit, relying on the policy's "Condominium or Townhouse Liability Exclusion" and on Issaquah Highlands' claimed failure to tender the complaint for a defense after Ms. Xia filed suit. (CP 1299) The Court of Appeals affirmed on the grounds that Ms. Xia's allegations fell within the liability policy's pollution exclusion and that Probuilders

did not breach the duty to defend or to indemnify its insured against Ms. Xia's claim.<sup>2</sup> This Court accepted Ms. Xia's petition for review on the proper scope of the pollution exclusion and whether Probuilders breached its duty to defend in relying on the pollution exclusion.

### III. SUPPLEMENTAL STATEMENT OF ISSUES

1. Does an absolute pollution exclusion bar coverage for claims arising from the defective design, installation, maintenance or operation of a product that, in the absence of negligence, is safe and non-polluting?

2. In the absence of Washington precedent, did an insurer breach its good faith duty to defend by relying on a pollution exclusion to deny its insured a defense of a claim alleging the negligent installation of a gas water heater on the ground that the claimant's injuries were attributable to carbon monoxide poisoning?

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<sup>2</sup> The Court of Appeals correctly held that Ms. Xia's single family residence did not fall within the "Condominium or Townhouse Liability Exclusion" (Op. 18-23) and that Probuilders had unconditionally rejected its insured's tender in 2008. (Op. 23-30) While rejecting her claims for insurance bad faith, the court remanded for trial on Ms. Xia's claims for breach of claims handling regulations under the CPA and IFCA. (Op. 31-33) Probuilders did not cross-petition or argue in its answer to the petition that the Court of Appeals decision was erroneous in any respect. Thus, the proper scope of the pollution exclusion and whether Probuilders breached the duty to defend are the only issues before this Court. RAP 13.7(b) ("the Supreme Court will review only the questions raised in . . . the petition for review and the answer, unless the Supreme Court orders otherwise . . ."); see *State v. Gossage*, 165 Wn.2d 1, 6, ¶15, 195 P.3d 525 (2008), *cert. denied*, 557 U.S. 926 (2009).

#### IV. SUPPLEMENTAL ARGUMENT

**A. An absolute pollution exclusion does not bar coverage for a negligence claim alleging the defective installation of an ordinary household appliance.**

- 1. This Court interprets exclusions narrowly, interprets the policy to give effect to its purpose in accord with the reasonable expectations of consumers, and resolves any ambiguity in favor of coverage.**

Three established principles govern this Court's interpretation of the absolute pollution exclusion at issue in this case. First, exclusions to coverage are construed "strictly against the insurer" because they are "contrary to the fundamental protective purpose of insurance." *Vision One, LLC v. Philadelphia Indemnity Ins. Co.*, 174 Wn.2d 501, 512, ¶120, 276 P.3d 300 (2012) (internal quotation omitted); *Lynott v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 691, 871 P.2d 146 (1994). *Accord*, *Aetna Cas. & Sur. Co. v. M & S Industries, Inc.*, 64 Wn. App. 916, 923, 827 P.2d 321 (1992) ("Exclusionary clauses are to be 'most strictly' construed against the insurer in view of the fact that the purpose of insurance is to insure, and the contract should be construed so as to make it operative rather than inoperative.").

Second, if a policy is ambiguous – susceptible to two different but reasonable interpretations – "the court will apply a meaning and

construction most favorable to the insured, even though the insurer may have intended another meaning.” *Transcontinental Ins. Co. v. Washington Pub. Utilities Districts’ Util. Sys.*, 111 Wn.2d 452, 457, 760 P.2d 337 (1988). Policy language “can be ambiguous with regard to the facts of one case but not another.” *Quadrant*, 154 Wn.2d at 181, ¶32.

Third, “a policy should be given a practical and reasonable interpretation rather than a strained or forced construction that leads to an absurd conclusion, or that renders the policy nonsensical or ineffective.” *Transcontinental*, 111 Wn.2d at 457. That “practical and reasonable” interpretation is one that would be adopted by “the average purchaser of a comprehensive liability policy” who “reasonably expects broad coverage for liability arising from business operations.” *Kent Farms*, 140 Wn.2d at 401.

These principles mandate reversal of the Court of Appeals’ decision that Probuilders’ pollution exclusion categorically barred coverage of Ms. Xia’s claim for its insured’s negligent failure to vent the hot water heater in her home.

2. **The Court should reconcile *Quadrant* and *Kent Farms* by holding that a pollution exclusion does not deny an insured protection from claims arising from a common non-polluting product that results in subsequent exposure to what the policy defines as a “pollutant.”**

Where, as here, an accident or injury is caused in the first instance by negligence in the design, construction or installation of a non-polluting product that, in turn, subsequently results in exposure to “solid, liquid, gaseous or thermal irritants or contaminants,” a pollution exclusion must be narrowly interpreted so as to not defeat coverage under an occurrence-based liability policy. This reading gives effect to the holdings of both *Kent Farms* and *Quadrant* – the two cases that address the scope of similarly worded “absolute” pollution exclusions.

In *Kent Farms*, this Court held that a pollution exclusion did not bar coverage of a deliveryman’s claim for injuries caused by diesel fuel that backflowed due to a defective fuel intake valve. Just as Probuilders here argues that “carbon monoxide is by definition an air pollutant” (Answer 17), the insurer in *Kent Farms* argued that “the pollution exclusion clause applies because diesel fuel is a

pollutant.”<sup>3</sup> 140 Wn.2d at 401. Because “the average purchaser of a comprehensive liability policy reasonably expects broad coverage for liability arising from business operations,” however, this Court concluded that an insured would view the pollution exclusion as limited to “environmental harm caused by pollution,” and held that the pollution exclusion did not apply to a claim for “acute bodily injury caused by negligently maintained or operated equipment.” *Kent Farms*, 140 Wn.2d at 399, 401-02.

*Quadrant*, decided by a closely divided Court five years later, distinguished “on its facts” but did not overrule *Kent Farms*. *Quadrant*, 154 Wn.2d at 167, ¶3. The Court held a pollution exclusion identical to the one at issue in *Kent Farms* excluded coverage of an apartment tenant’s claim that she was “overcome by fumes and became ill after a restoration company applied sealant to a nearby deck” in *Quadrant*, 154 Wn.2d at 167, ¶¶1, 3. The *Quadrant* Court characterized the mechanism of injury in *Kent Farms* as “a defect in the shutoff valve, not the toxic character of the fuel, that was

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<sup>3</sup> The clause at issue in *Kent Farms* excluded coverage for “bodily injury’ and ‘property damage’ arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants,” defined as “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.” 140 Wn.2d at 399.

central to the injury.” *Quadrant*, 154 Wn.2d at 176, ¶21. The Court held that *Kent Farms* does not apply when the “fumes caused injury and where the pollutant was being used as it was intended.” *Quadrant*, 154 Wn.2d at 179, ¶28.

When viewed through the lens of the mechanics of the accident or occurrence, or “efficient proximate cause,” *Kent Farms* and *Quadrant* can be reconciled, as both further the reasonable understanding of a purchaser of insurance. The “efficient proximate cause” rule provides coverage “where a covered peril sets in motion a casual chain the last link of which is an uncovered,” or excluded, peril. *Key Tronic Corp., Inc. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wn.2d 618, 625, 881 P.2d 201 (1994). The pollution exclusion in *Quadrant* plainly applied to damages caused in the first instance by exposure to a product that was toxic when used as intended – an excluded peril. The sealant was itself a pollutant – “a toxic substance which can irritate the respiratory tract and, in high concentrations, can cause central nervous system depression” – even if used properly. *Quadrant*, 154 Wn.2d at 180, ¶31. “[A] reasonable person would recognize that a chemical product requiring protective gear and proper ventilation could be a pollutant under the policy definition.” *Cook v. Evanson*, 83 Wn. App. 149, 154, 920 P.2d 1223

(1996) (injury caused by concrete sealant fumes excluded under absolute pollution exclusion), *rev. denied*, 131 Wn.2d 1016 (1997).

Moreover, contrary to Probuilders' argument here (Answer 17), *Quadrant* makes clear that the exclusion from coverage turns on whether the pollutant causes injury in the first instance, and not whether the insurer has 'clearly' or 'plainly' defined a "pollutant" as any substance that causes injury. Instead, the central inquiry is whether a reasonable purchaser of insurance could view the pollution exclusion as ambiguous when applied to the mechanics of injury under the specific "factual circumstances" presented. *Quadrant*, 154 Wn.2d at 183, ¶36, n.10.

This is entirely consistent with the reasoning of *Kent Farms* that when "the underlying injury and cause of action are rooted in negligence, not in environmental harm," the court "must decide whether the fact a pollutant appears in the causal chain triggers application of the exclusion clause." 140 Wn.2d at 399. Probuilders' contention that "[e]very Washington case involving a similar airborne pollutant has held that pollution exclusions nearly identical to the one in the present case have applied" (Answer 18) ignores that the accident or occurrence in each cited case was the result *in the first*

*instance* of exposure to harmful fumes from a substance or instrumentality that was operating as it was intended to operate.<sup>4</sup>

Unlike deck sealant, or the gases normally produced by a sewage treatment plant, the instrumentality causing injury to Ms. Xia was not itself a pollutant, and the negligence had nothing to do with the misuse of a polluting product. Ms. Xia was injured as a result of Issaquah Highlands' negligent installation of a hot water heater, a household appliance that when installed as intended does not produce carbon monoxide or any toxic substance. (CP 194, 200) Instead, deprived of an outside source of air, the hot water heater depleted the oxygen in Ms. Xia's home, creating carbon monoxide rather than carbon dioxide, the normal product of the chemical reaction caused by combustion.

Probuilders' attempt to categorically exclude coverage for any claim that alleges harm by a substance that "is by definition a[] . . . pollutant" (Answer 17), whether "deemed or thought to be toxic, and

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<sup>4</sup> See *Quadrant*, 154 Wn.2d at 180-81 (exposure to deck sealant used as intended); *Cook*, 83 Wn. App. at 151 (exposure to concrete sealant described as a "[r]espiratory irritant") (alteration in original); *City of Bremerton v. Harbor Ins. Co.*, 92 Wn. App. 17, 23, 963 P.2d 194 (1998) (nuisance claim against City for design and operation of sewage disposal plant; reasonable person reviewing this language would expect that "noxious and toxic fumes" and "foul and toxic odors and gases" are "pollutants") (Answer 18).

whether such substances are naturally occurring or otherwise,” appears in the causal chain of injury, and regardless of “whether any other cause of the . . . injury would otherwise be covered under” its policy (CP 334-35), would defeat the expectations of the ordinary purchaser of liability insurance. A manufacturer sued for improper design or manufacture of plumbing fixtures for lead poisoning (“chemicals”), an excavation contractor sued for causing an explosion by rupturing a natural gas pipeline (“gaseous”), a restaurant sued for improper food handling (“biological elements and agents”), or a sunscreen manufacturer sued by skin cancer patients for misrepresenting its product’s ability to protect against harmful ultraviolet radiation (“light”), would each reasonably expect coverage for such non-polluting occurrences. This Court should reject as an “opportunistic afterthought” an interpretation of absolute pollution exclusions that would so drastically negate the coverage provided by a comprehensive general liability policy. *Kent Farms*, 140 Wn.2d at 402, citing *Gamble Farm Inn, Inc. v. Selective Ins. Co.*, 440 Pa. Super. 501, 656 A.2d 142 (1995) (CGL policy covers carbon monoxide poisoning from restaurant’s clogged flue).

3. **If necessary to reach the right result, this Court should overrule *Quadrant* and limit absolute pollution exclusions to traditional polluting events such as the negligent disposal of hazardous waste.**

This Court need not overrule *Quadrant* to hold that a pollution exclusion does not bar coverage for claims arising from negligence in the use or installation of a non-polluting product. However, this case demonstrates the mischief that inevitably results when insurers are given carte blanche to draft an “absolute” pollution exclusion that purports to encompass occurrences that far exceed its intended purpose to address environmental harms. The *Quadrant* majority’s emphasis on “unambiguous” policy language invited that abuse, and *stare decisis* does not require the Court to adhere to a decision that “no longer withstands careful analysis” and is both “incorrect and harmful “as applied. *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 282, ¶25, 358 P.3d 1139 (2015).

Both *Quadrant* and *Kent Farms* explained that the pollution exclusion derives from insurers’ reasonable expectation to avoid “liability for massive environmental cleanups required by CERCLA and similar legislation,” where “injury was caused by *environmental damage*.” *Quadrant*, 154 Wn.2d at 177, ¶23, quoting *Kent Farms*, 140 Wn.2d at 401 (emphasis in original). The *Quadrant* Court

applied the exclusion to a case involving a single plaintiff's injury from chemical "*fumes [that] drifted or migrated* into her apartment," because the injury arose from the intended use of a toxic product. 154 Wn.2d at 180, ¶31 (emphasis in original). While holding that the exclusion was "unambiguous" in that case, the Court cautioned that ambiguity will be a case-specific inquiry that turns not on the language of the exclusion but on the facts of a specific case. *Quadrant*, 154 Wn.2d at 183, ¶36, n.10.

The *Quadrant* Court's failure to provide clear guidance in distinguishing those facts that would make the exclusion "clear and plain" in one case and ambiguous in another is confusing and harmful to insureds, insurers, their advisors, and the lower courts. As is clear from Probuilders' attempt to define not just chemicals but also light, sound, and other naturally occurring elements as "pollutants," insurers will use "clear and unambiguous" language to expand the scope of the exclusion beyond any conscionable limits, to the point of negating the principal purpose of liability insurance for a broad spectrum of construction and inherent risks in other non-polluting businesses. *See Century Sur. Co. v. Casino W., Inc.*, 329 P.3d 614, 617 (Nev. 2014) ("Taken at face value, the policy's definition of a pollutant is broad enough that it could be read to

include items such as soap, shampoo, rubbing alcohol, and bleach insofar as these items are capable of reasonably being classified as contaminants or irritants.”). Neither insurers, insureds, nor consumers are well served if a declaratory judgment action is required in every case to determine whether the injury arises from a “pollutant.”

This Court should therefore adopt the reasoning of Justice Chambers’ dissent in *Quadrant* and interpret pollution exclusions “in accord with . . . the traditional meaning of pollution.” 154 Wn.2d at 191, ¶155. The exclusion, as drafted, thus applies to the “discharge, dispersal, seepage, migration, release or escape of pollutants,” (CP 334) giving the exclusion “plain, ordinary, and popular meaning in accord with the understanding of the average purchaser of insurance” and its “traditional purpose of avoiding massive exposure for environmental damage.” *Quadrant*, 154 Wn.2d at 191, ¶155 (Chambers, J., dissenting).

“[W]hat a misuse of language it would be to say that the workers [injured by carbon monoxide from a faulty furnace] had been injured by pollution. If one commits suicide by breathing in exhaust fumes, is that death by pollution?” *Scottsdale Indemnity Co. v. Village of Crestwood*, 673 F.3d 715, 717 (7<sup>th</sup> Cir. 2012) (Posner,

J.).<sup>5</sup> This Court should provide clear guidance by overruling *Quadrant* and holding that pollution exclusions are limited to traditional industrial environmental pollution claims.

**B. Probuilders breached its duty of good faith by relying on the pollution exclusion to deny its insured a defense to potentially covered claims in the face of conflicting precedent.**

Because “the duty to defend is different from and broader than the duty to indemnify,” *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404, ¶6, 229 P.3d 693 (2010), this Court need not hold the pollution exclusion inapplicable to Ms. Xia’s claim in order to hold that Probuilders breached the duty to defend as a matter of law. As Probuilders concedes, “[t]he duty to defend exists if the policy *conceivably* covers the claims allegations,” based on the terms of the policy and the language of the complaint or demand. (Answer 9, quoting *Alea*, 168 Wn.2d at 404, ¶6 (emphasis in original)). Probuilders’ policy conceivably covered Ms. Xia’s claim,

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<sup>5</sup> In addition to the cases cited at Petition 19, n.4, courts have rejected application of absolute pollution exclusions to claims arising from carbon monoxide poisoning in *American Nat. Property & Cas. Co. v. Wyatt*, 400 S.W.3d 417, 425 (Mo. App. 2013); *Langone v. American Family Mut. Ins. Co.*, 2007 WI App. 121, 300 Wis. 2d 742, 731 N.W.2d 334, 338, *rev. denied*, 305 Wis.2d 128 (2007) and *Thompson v. Temple*, 580 So.2d 1133, 1135 (La. App. 1991). See also *MacKinnon v. Truck Ins. Exch.*, 31 Cal.4th 635, 73 P.3d 1205, 1216, 3 Cal.Rptr.3d 228 (2003) (“Limiting the scope of the pollution exclusion to injuries arising from events commonly thought of as pollution, i.e. environmental pollution, also appears to be consistent with the choice of terms ‘discharge, dispersal, release or escape.’”).

which alleged “the vent was disconnected from the water heater” (CP 487) and that her damages were caused by its insured’s “[f]ailure to properly install venting for the hot water heater.” (CP 119)

Probuilders’ reliance on the “eight-corner rule,” comparing the complaint to the policy, fails to acknowledge that an insurer may not deny a defense based “on an equivocal interpretation of case law.” *Woo v. Fireman’s Fund Ins. Co.*, 161 Wn.2d 43, 60, ¶37, 164 P.3d 454 (2007). “[I]f there is any reasonable interpretation of the facts or the law that could result in coverage, the insurer must defend.” *Alea*, 168 Wn.2d at 405, ¶7. Where an insurer can cite to no case “directly on point” and there is “legal uncertainty” concerning its coverage obligations due to conflicting authority in other states, the insurer may not abandon its insured, but must defend under a reservation of rights and obtain a declaratory judgment regarding its obligations under its policy. *Alea*, 168 Wn.2d at 413, ¶¶12, 20; *National Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 879, ¶11, 297 P.3d 688 (2013).

Whether Probuilder’s insured faced liability because Ms. Xia’s claim could be characterized as arising from “pollution” when Probuilders denied Issaquah Highlands a defense in 2009 was no more certain than whether the insured in *Alea* faced liability arising

out of “assault” within the meaning of the exclusion in its liability policy. 168 Wn.2d at 408, ¶¶12-13. Probuilders faced “legal uncertainty” that mandated a defense of its insured until a court ruled it had no further obligation to do so. But Probuilders did not even look at the Washington authorities or do *any* legal research before concluding that the pollution exclusion “should preclude coverage as carbon monoxide would meet the definition of pollutant.” (CP 257; see CP 255-69)

Nor would any fair reading of *Kent Farms* and *Quadrant* remove all uncertainty concerning coverage on the facts of this case. Even had it cited the case in denying a defense, Probuilders could not avoid that “legal uncertainty” by relying exclusively on *Quadrant*, especially given the Court’s express admonition in that case that “ambiguity” depends not just on the language of the pollution exclusion but on the specific factual context to which it is applied:

[T]he policy language is unambiguous *in the context of this case*, that is not to say that the language would not be ambiguous in the context of another case involving very different factual circumstances.

*Quadrant*, 154 Wn.2d at 183, ¶36, n.10 (emphasis in original).

As the trial court concluded, “*Quadrant* is not on all fours. *Kent* is not on all fours either[,]” so “when you take a look at the duty to defend, . . . repeated denials are not . . . consistent with a full

investigation and treating the insured with – equally to your own interests.” (11/2/12 RP 130) This Court should hold that Probuilders breached its good faith duty to defend its insured as a matter of law.

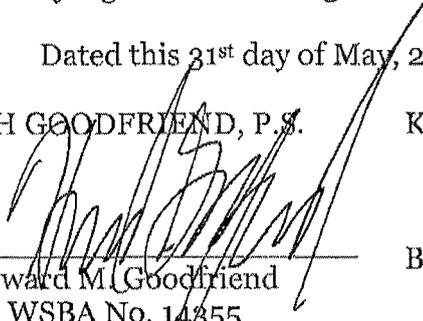
## V. CONCLUSION

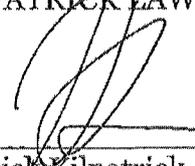
The pollution exclusion does not apply to Ms. Xia’s claim for negligent installation of a hot water heater. Even if it does, Probuilders breached its duty to defend by abandoning its insured in the face of conflicting precedent, neither of which controlled the facts presented by Ms. Xia’s claim. In either event, this Court should remand for an award of damages that includes, at a minimum, the reasonable judgment entered against its insured.

Dated this 31<sup>st</sup> day of May, 2016.

SMITH GOODFRIEND, P.S.

KILPATRICK LAW GROUP, PC

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WSBA No. 14855  
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By:   
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Attorneys for Petitioner

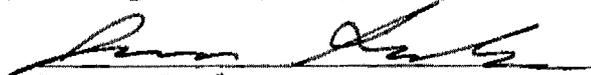
**DECLARATION OF SERVICE**

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

That on May 31, 2016, I arranged for service of the foregoing Supplemental Brief of Petitioner Zhaoyun Xia, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 31<sup>st</sup> day of May, 2016.

  
Jenna L. Sanders

**SMITH GOODFRIEND, PS**

**May 31, 2016 - 4:12 PM**

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