71951-3

FILED
Mar 13, 2015
Court of Appeals
Division I
State of Washington

No. 71951-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ZHAOYUN XIA, et al.

Appellant,

vs.

PROBUILDERS SPECIALTY INSURANCE COMPANY RRG, et al.,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE CAROL SCHAPIRA

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

An insurer may not seize upon a claimant's "admissions" in a complaint to deny its insured a defense by ignoring known facts that bring the claim within the scope of its insurance coverage. An insurer may not deny its insured a defense to a plaintiff's claim that she suffered bodily injury from the insured's negligent installation of a gas appliance based on a "pollution" exclusion. And an insurer may not assert that the insured never made a formal tender, after denying a claim outright and informing its insured that it will not provide a defense on the basis of policy exclusions, and after then again refusing to defend its insured upon learning that a complaint has been filed.

Respondent Probuilders Specialty Insurance Co. makes all of these arguments, each of which is directly contrary to Washington law, as a basis for its refusal to defend its insured Issaquah Highlands. Probuilders could not ignore the fact that Issaquah Highlands had repeatedly characterized its new homes as unattached "zero lot line" fee simple homes when it denied its insured a defense under a "townhouse" exclusion that did not even define that term. Probuilders could not rely on a pollution exclusion to bar coverage for injuries caused by Issaquah

Highlands' negligent failure to vent a hot water heater. Having previously told Issaquah Highlands that it would under no circumstances provide a defense or indemnity for Ms. Xia's claim, Probuilders could not invoke its insured's failure to make yet another futile demand after being sued as a justification for Probuilders' refusal to defend.

II. REPLY ARGUMENT

A. The trial court erred in relieving Probuilders of its duty to defend on the ground that Issaquah Highlands did not make a formal tender after Probuilders received the complaint.

1. An insured need not undertake the "useless act" of re-tendering a claim its insurer has already denied.

No authority supports Probuilders' contention that its duty to defend was excused by Issaquah Highlands' failure to formally request the very defense that Probuilders unconditionally told Issaquah Highlands it would not provide in its January 17 and June 12, 2008 denial letters. Neither the policy itself nor Washington law supports Probuilders' contention that it may deny its insured a defense where it received a copy of the complaint against Issaquah Highlands from the claimant rather than from its insured.

Probuilders' argument that Issaquah Highlands was required to make another futile demand for a defense or to "contest PSBIC's

coverage position" to trigger the duty to defend Ms. Xia's lawsuit (Resp. Br. 12, 39) is directly at odds with *Moratti v. Farmers Ins. Co. of Wash.*, 162 Wn. App. 495, 254 P.3d 939 (2011), *rev. denied*, 173 Wn.2d 1022, *cert. denied*, 133 S.Ct. 198 (2012). In *Moratti*, the lawyer for an injured claimant "made several demands to the insurance adjuster," who refused to engage in settlement negotiations, finally responding "that the decision on no liability was final." 162 Wn. App. at 499-500, ¶ 2. This Court rejected the insurers' defense that it had no duty to attempt to settle a claim against its insured in the absence of a formal settlement offer, holding that the claimant was entitled to rely on Farmers' stated position that its coverage decision was final and that it would not consider a settlement offer. Plaintiff's counsel was not required to "undertake the expense of submitting a futile demand letter to Farmers . . . as the law does not require someone to do a useless act." 162 Wn. App. at 504-05, ¶ 14, *citing Willener v. Sweeting*, 107 Wn.2d 388, 395, 730 P.2d 45 (1986). *See also* Willston on Contracts, § 47:4 ("tender of performance is not necessary where it would be an idle, vain or useless act") (4th ed. 2014).

Issaquah Highlands had previously tendered Ms. Xia's claim to Probuilders in June 2007, when its insurance agent sent

Probuilders a formal "Notice of Claim." (CP 486) Probuilders unconditionally denied that claim, telling its insured in January 2008 that "PBSIC will *neither defend nor indemnify* Issaquah" and that any damages owed to Ms. Xia "shall be the responsibility of Issaquah and not the responsibility of PBSIC." (CP 431) (emphasis added) In its June 12, 2008 letter to Ms. Xia's counsel and to Issaquah Highlands, Probuilders reiterated that it "will neither defend nor indemnify" Issaquah Highlands from "any judgment or settlement." (CP 418-19)

Having unequivocally told its insured Issaquah Highland that it would "neither defend nor indemnify," Probuilders cannot reasonably assert that its insured "specifically chose not to tender its defense to PBSIC" when Ms. Xia sued Issaquah Highlands (Resp. Br. 15), particularly in light of the "last chance" letter that Ms. Xia's counsel sent to Probuilders' with its insured's consent. (CP 301, 912-14) There is no evidence supporting Probuilders' contention that Issaquah Highlands made a deliberate decision not to tender to Probuilders "to avoid a premium increase . . . [or] to preserve its policy limits for other claims." *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 421-22, ¶ 17, 191 P.3d 866 (2008).

The trial court erred in holding as a matter of law that Issaquah Highlands made a "selective tender." (*See* App. Br. 25-29)

Probuilders' conduct after it received a copy of Ms. Xia's lawsuit in January 2009 confirms that its reliance on Issaquah Highland's failure to make a second tender once it was sued is nothing more than a post-hoc excuse that it never even documented in its claims file. (CP 265-70) Probuilders again asserted that Ms. Xia's residence was excluded as a townhouse or condominium once it received notice that Issaquah Highlands had been sued. (CP 266-69) It reiterated its refusal to provide a defense or coverage due to the townhouse/condominium and pollution in response to the "last chance" letter in January 2011 and in response to the IFCA notice in May 2011, without mentioning the lack of a formal tender. (CP 301, 313-16, 900, 906) Probuilders' post-hoc assertion that Issaquah Highlands failed to ask for a defense is without merit. *See* WAC 284-30-380; *Vision One, LLC v. Philadelphia Indemnity Ins. Co.*, 174 Wn.2d 501, 520, ¶ 43, 276 P.3d 300 (2012) (insurer is estopped from asserting a different basis for denial of an insured's claim than that contained in its denial letter).

2. The policy did not require formal tender of the complaint.

Probuilders' assertion that its refusal to defend is excused because Issaquah Highlands failed to comply with the policy's provisions requiring timely notice of suit is equally without merit. Issaquah Highlands sent Ms. Xia's June 26, 2007 claim to its agent Treacy Duerfeldt on June 29, 2007. (CP 486-87) Issaquah Highlands thus complied with the policy's requirements (a) that an insured notify Probuilders "as soon as possible of an **occurrence** . . . which may result in a **claim,** . . . within thirty (30) days from **your,** or any involved **insured's,** first notice of an **occurrence** or offense" and (b) "Notify **us** as soon as practicable, but not more than fifteen (15) days following initial receipt of the **claim** or **suit**." (CP 384 (emphasis in original))

Nothing in Probuilders' policy requires that its insured formally request a defense in order to be entitled to the benefits of its liability policy. To the contrary, the policy requires that the insured "notify **us**" upon receipt of a "**claim** or **suit**," that the insured "send **us** copies of any . . . legal papers" and that the insured "[c]ooperate with **us** in the investigation, settlement or defense of the **claim** or **suit**." (CP 384) Probuilders' Insuring

Agreement obligated it to "defend . . . the **Named Insured** against any suit . . ." (CP 372), without regard to how it learned of the lawsuit.

Probuilders concedes that it received notice of Ms. Xia's "claim." (Resp. Br. 11) It also concedes that it received notice of Ms. Xia's lawsuit on January 27, 2009 (Resp. Br. 12, CP 396), the very day that lawsuit was filed. (CP 112-21) Probuilders further concedes that under Washington law an "insurer's duty to defend is triggered when a complaint is filed against the insured," (Resp. Br. 11, citing *Mutual of Enumclaw*, 164 Wn.2d at 420-21; Resp. Br. 15), not when its insured asks it to defend. Combined with Probuilders' unconditional repudiation of its duty to defend after receiving notice of the claim, its concessions dispose of Probuilders' argument that it had no duty to defend because Issaquah Highlands "never requested a defense." (Resp. Br. 12)

The Supreme Court has rejected Probuilders' argument that the duty to defend is not "triggered" until the insured formally demands a defense. In *Nat'l Surety Corp. v. Immunex Corp.*, 176 Wn.2d 872, 889, ¶ 36, 297 P.3d 688 (2013), the Court refused to adopt the expansive interpretation of *Mutual of Enumclaw* advocated by Probuilders here, holding that an insurer's obligation

to defend cannot become "legally enforceable until the insured has apprised its insurer that it seeks its performance," but that "the duty to defend arises not at the moment of tender, but upon the filing of a complaint alleging facts that could potentially require coverage." 176 Wn.2d at 889, ¶¶ 36-37. Issaquah Highlands sought Probuilders' performance when it tendered the claim in June 2007. (CP 486-87). Probuilders breached its duty of good faith by unconditonally refusing to defend.

3. Probuilders was not prejudiced by any deficiencies in tender.

The *Immunex* Court analyzed the effect of lack of notice to the insurer as equivalent to the alleged breach of any other policy provision, requiring the insurer to prove that it suffered actual and substantial prejudice:

> As in other contexts involving breach of policy provisions by the insured, the insurer must show that late notice actually and substantially prejudiced its interests before performance of its duties will be excused. *USF,* 164 Wn.2d at 426, 191 P.3d 866. "Prejudice" means a damage or detriment to one's legal claims. Black's Law Dictionary 1299 (9th ed. 2009). In line with this definition, to establish prejudice an "insurer must prove that an insured's breach of a notice provision had an identifiable and material detrimental effect on its ability to defend its interests."

Immunex, 176 Wn. 2d at 890, ¶ 38, *quoting Mutual of Enumclaw*, 164 Wn.2d at 430.

Here, Probuilders knew that Issaquah Highlands sought its performance when Issaquah Highlands tendered Ms. Xia's claim to Probuilders in June 2007. Probuilders then knew that Issaquah Highlands wanted the benefit of its liability insurance – a defense and indemnity. Issaquah Highlands did not have to renew that tender. There is no evidence that Probuilders could have gathered additional evidence or otherwise investigated and defended its insured had Issaquah Highlands renewed that tender when a complaint was filed 18 months later.

Probuilders' duty to defend arose "upon the filing of a complaint" against Issaquah Highlands in January 2009. Even if a second tender was required – and it is not – Probuilders has not identified any prejudice arising from the fact that it learned of the lawsuit from Ms. Xia rather than its insured. The trial court erred in holding that Probuilders was relieved of its duty to defend in the absence of a futile second request for a defense from its insured.

B. Ms. Xia's "zero lot line" home, owned in fee and with no elements of common ownership, does not fall within the policy's "condominium/townhouse" exclusion.

1. Probuilders may not disregard extrinsic evidence that the residence was not a "townhouse" because it did not share a common wall.

This Court should also reject Probuilders' expansive interpretation of its condominium/townhouse policy exclusion. That exclusion failed to define the term "townhouse," which is susceptible to more than one common definition. Given that its insured repeatedly told Probuilders that Ms. Xia's residence was a "zero lot line" fee simple home, its reliance on the "eight corners" rule and Ms. Xia's characterization of her residence in her complaint to categorically deny its duty to defend is without merit.

Probuilders misstates the rule that requires an insurer to give its insured the benefit of the doubt, arguing that a court will "generally examine *only* the allegations against the insured and the insurance policy provisions." *United Servs. Auto. Ass'n v. Speed*, 179 Wn. App. 184, 194, ¶ 16, 317 P.3d 532, *rev. denied*, 180 Wn.2d 1015 (2014) (Resp. Br. 18) (emphasis added). While an insurer may not rely on extrinsic facts to *deny* the duty to defend, it *must*

consider known or readily discernible facts that will trigger a duty to defend:

> If the allegations of the complaint conflict with facts known to or readily ascertainable by the insurer, or if the allegations are ambiguous or inadequate, facts outside the complaint may be considered. The insurer may not rely on facts extrinsic to the complaint to deny the duty to defend – it may do so only to trigger the duty.

Woo v. Fireman's Fund Ins. Co., 161 Wn.2d 43, 54, ¶ 15, 164 P.3d 454 (2007) (alterations, citations, and quotations omitted).

The sound policy behind this established rule of law is that an insurer may not rely on a fortuitous characterization of the underlying facts to deny an insured the benefits of a liability policy when it knows of facts that may trigger the duty to defend. Washington's "notice pleading rules, which require only a short and plain statement of the claim showing that the pleader is entitled to relief, impose a significant burden on the insurer to determine if there are *any* facts in the pleadings that could conceivably give rise to a duty to defend." *Woo,* 161 Wn.2d at 53-54, ¶ 15 (emphasis in original). Ms. Xia's characterization of her residence as a "town home" in the complaint could not be a basis to deny its insured a defense any more than if she had called her home a "condominium" or an "apartment."

Probuilders' representative Andrea Griggs knew when Issaquah Highlands purchased coverage that Issaquah Highlands was building and marketing "single family residences with zero lot line zoning." (CP 331) She distinguished between "duplexes – which have a connecting wall – [and] zero lot lines single family homes that are extremely close – but no connecting walls." (CP 330) Probuilders' president Peter Foley acknowledged that "zero lot line homes were not condominium-townhouses that they would otherwise only insure on a stated project by project basis." (CP 860) When forwarding Issaquah Highlands claim to Probuilders, the agent Duerfeldt again referenced the "zero lot line homes built by Issaquah Highlands who is insured by Pro Builders." (CP 486)

Probuilders could not disregard these known facts in denying its insured a defense. Because the policy did not define the term "townhouse," Probuilders had a duty to investigate "and give the insured the benefit of the doubt that the insurer has a duty to defend." *Woo*, 161 Wn.2d at 53, ¶ 15. Instead, Probuilders not only ignored its prior knowledge, but failed to investigate, and summarily refused to defend based on a mistaken belief that the zero lot line homes built by Issaquah Highlands "involves [a] condo project." (CP 269; *see also* CP 301 ("They said they are basing their

position on the condo exclusion.")) Probuilders' own confusing use of the undefined terms "condominium" and "townhouse" refutes its argument that the term "townhouse" has a fixed definition, readily understood by the common purchaser of insurance, that absolved it of the a duty to defend.

Probuilders is also wrong in asserting that this Court has "disposed of" this issue in *American States Insurance Company v. Delean's Tile and Marble, LLC*, 179 Wn. App. 27, 319 P.3d 38 (2013) (Resp. Br. 25). The *Delean's* court considered a different policy exclusion in the context of a declaratory judgment relating to coverage, not the duty to defend. The issue in *Delean's* was whether a contractor's work on "townhouse building[s]," each described as a "two family dwelling" with "party walls," 179 Wn. App. at 30-31, ¶¶ 3-4, fell within policy language that excluded work involving a "multi-unit residential building" but provided coverage for work performed for the owner "of a detached single family dwelling." 179 Wn. App. at 37-40, ¶¶ 21-29. Refusing to treat the undefined term "as a legal term of art," the *Delean's* court looked to the dictionary to employ a "practical interpretation" of the word "detached" and held that "[n]otwithstanding the one inch air space between the units," the units were not "detached" or "noticeably separate from

one another," because "they have continuous siding, a continuous guttering system, a common roof, and appear to be part of a single building." 179 Wn. App. at 39, ¶ 27.

The meaning of the undefined term "townhouse" was not at issue in *Delean's*, and the question under Probuilders' policy is not whether the units at Issaquah Highlands, described by the City of Issaquah as "single family, zero lot line" residences (CP 983), are "multi-unit residential buildings" or "detached." If *Delean's* has any relevance to the much different language at issue in the Probuilders policy, it confirms that the court should look to the dictionary definition of the undefined term "townhouse" and give it a "practical interpretation."

As Probuilders concedes, the dictionary definition of "townhouse" has as its distinguishing element a "common sidewall" that connects it to an adjoining residence. (Resp. Br. 23, citing http://www.merriam-webster.com/dictionary/townhouse) Probuilders' reliance on photographs that purport to show that the homes at Issaquah Highlands are connected fails in light of its prior knowledge that these residences have no "connecting walls," but instead "have individual walls and an air space," sharing only a "seam between the roofs." (CP 331) *See also* KCC 21A.06.370; IMC

18.02.060 ("common vertical wall" in statutory definition of "townhouse") (App. Br. 32).

Because a "townhouse" is defined by the existence of a common wall, Ms. Xia's residence does not fall within the policy exclusion for work performed at a "condominium" or "townhome" within the meaning of the Probuilders policy. The trial court erred in failing to strictly construe this ambiguous exclusion against Probuilders and in favor of its insured Issaquah Highlands.

2. Probuilders could not refuse to defend its insured based on case law interpreting a different term in a different policy.

Probuilders' reliance on *Delean's* fails for another reason: *Delean's* did not address the duty to defend, but was instead a declaratory judgment action brought by the insurer, seeking a determination that it had no obligation to pay for its insured's settlement of a claim for defective work. 179 Wn. App. at 29, ¶ 1. The court addressed the duty to indemnify, not the much broader duty to defend. *See Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 802, ¶ 16, 329 P.3d 59 (2014) ("This court has long held that the duty to defend is different from and broader than the duty to indemnify.") (citation and quotation omitted).

"An insurer may not refuse to defend based upon an equivocal interpretation of case law to give itself the benefit of the doubt rather than its insured." *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 414, ¶ 21, 229 P.3d 693 (2010), citing *Woo,* 161 Wn.2d at 60. *Delean's* was decided in 2013. In 2007, when Probuilders told its insured that it would provide neither a defense nor indemnity, there was not even "equivocal" legal authority addressing whether a zero lot line single family residence constituted a "townhouse" under a policy exclusion that did not define the term.

In order to give its insured the primary benefit of its liability insurance, a reasonable insurer knowing extrinsic facts that may contradict the notice pleading allegations in a claimant's complaint and lacking controlling legal authority must defend under a reservation of rights and seek a declaratory judgment that it has no duty to defend or indemnify, rather than abandon its insured. Doing so "enables the insurer to protect its interests without facing claims of waiver or estoppel and to walk away from the defense once a court declares it owes no duty." *Immunex,* 176 Wn.2d at 880, ¶ 12; *Woo,* 161 Wn.2d at 54, ¶ 16. Probuilders' failure to defend under a reservation of rights while seeking a judicial

determination that it had no duty to defend Ms. Xia's complaint against Issaquah Highlands was a breach of the duty to defend.

C. Ms. Xia's claim arose from negligence in failing to vent her hot water heater and not from the "release or escape of pollutants."

Probuilders' reliance on the pollution exclusion, which the trial court found did not clearly apply to Ms. Xia's claim for negligent installation of a hot water heater, also fails. (11/2/12 RP 130) The trial court correctly recognized that this case was not clearly controlled by *Quadrant Corp v. Am. States Ins. Co.*, 154 Wn.2d 165, 182, 110 P.3d 733 (2005), and that Washington case law did not provide a clear answer to application of Probuilders' pollution exclusion. In the absence of a clear answer, Probuilders had a duty to defend.

1. The pollution exclusion does not apply to a claim for negligent installation of a hot water heater.

Probuilders concedes that this Court must give the pollution exclusion a reasonable interpretation as it would be understood by the "average person" purchasing its liability policy. (Resp. Br. 29) *See American Star Ins. Co. v. Grice*, 121 Wn.2d 869, 875, 854 P.2d 622 (1993) ("The question then is whether an average person would have understood that the pollution exclusion clauses in the

insurance policies unambiguously denied coverage . . . ."). The average purchaser of insurance would not consider Probuilders' pollution exclusion to exclude from coverage bodily injury caused by the negligent installation of a residential hot water heater.

Ms. Xia was no more injured because of "pollution" than was the claimant in *Kent Farms, Inc. v. Zurich Ins. Co.*, 140 Wn.2d 396, 401, 998 P.2d 292 (2000), who was "struck . . . engulfed [and] . . . choked" by diesel fuel due to a faulty intake valve. Just as a properly operated intake valve does not release diesel fuel into the environment, normal operation of a gas water heater does not release carbon monoxide into a home. The *Kent Farms* Court narrowly construed the pollution exclusion to cover only the release of pollutants into the environment.

Ms. Xia's injury stemmed not from the release of pollutants but from the installer's negligence in failing to connect a hot water heater to an outside vent. The *Kent Farms* Court noted that "an insurance company's attempt to apply the exclusion to injuries resulting from fumes caused by a clogged flue was simply an opportunistic afterthought, at odds with the original purpose" and common understanding of an exclusion for injury caused by pollution. 140 Wn.2d at 402, discussing *Gamble Farm Inn, Inc. v.*

Selective Ins. Co., 440 Pa. Super. 501, 508, 656 A.2d 142 (1995).[1] In refusing to exclude coverage in any case of exposure to a "solid, liquid, gaseous, or thermal irritant" where that exposure was the result of a risk that was clearly covered by the policy – there a faulty intake valve – *Kent Farms* followed Washington's efficient proximate cause rule, which furthers the expectations of parties to insurance contracts by finding coverage where a covered risk sets into motion a chain of events, one of which is an excluded risk. *See, e.g., Villella v. Public Employees Mut, Ins. Co.*, 106 Wn.2d 806, 819, 725 P.2d 957 (1986) (because building contractor's negligence in failing to install drain was a covered risk, earth movement exclusion inapplicable); *Kish v. Ins. Co. of North America*, 125 Wn.2d 164, 172, 883 P.2d 308 (1994) (purpose of efficient proximate cause rule "is to provide a workable rule of coverage that provides a fair result within the reasonable expectations of both the insured and the insurer") (internal quotation and citation omitted).

[1] Probuilders in particular misplaces significance in the citation by the Court of Appeals to a case involving carbon monoxide poisoning from a clogged flue six years before the Supreme Court decided *Kent Farms* in *Cook v. Evanson*, 83 Wn. App. 149, 155, 920 P.2d 1223 (1996). (Resp. Br. 32, n.12, *citing Bernhardt v. Hartford Fire Ins. Co.*, 102 Md. App. 45, 648 A.2d 1047 (1994), *cert. granted*, 337 Md. 641, *cert. dismissed*, 338 Md. 415 (1995).

In contrast to *Kent Farms,* the cases relied upon by Probuilders each involve injury that was caused solely and in the first instance by exposure to a toxic substance. There was no other covered risk in either *Quadrant,* or *Cook v. Evanson,* 83 Wn. App. 149, 920 P.2d 1223 (1996), *rev. denied,* 131 Wn.2d 1016 (1997), where the claimants were injured by fumes from a toxic substance applied to a building surface in accordance with the manufacturer's directions. *Quadrant,* 154 Wn.2d at 179, ¶ 28 (toxic fumes from deck sealant, which "was being used as it was intended"); *Cook,* 83 Wn. App. at 154 (application of concrete sealant described as "a chemical product requiring protective gear and proper ventilation"; "It is difficult to imagine why an insured would take pollutants to a work site if it did not use them in its business operations."). And there was no covered risk in *City of Bremerton v. Harbor Ins. Co.,* 92 Wn. App. 17, 23, 963 P.2d 194 (1998), where nuisance claims alleged exposure to "'noxious and toxic fumes' and 'foul and toxic odors and gases'" that fell squarely within the definition of "'pollutants' within the meaning of the pollution exclusion."

As the *Quadrant* Court held, where there was no other insured risk that a policy holder would consider to provide

coverage, application of the absolute pollution exclusion does not defeat the reasonable expectations of the parties to the contract:

> Where the exclusion specifically includes releases or discharges occurring on the owner's property or as the result of materials brought onto the property at the behest of the insured, and a reasonable person would recognize the offending substance as a pollutant, the policy is subject to only one reasonable interpretation and the exclusion must not be limited.

Quadrant, 154 Wn.2d at 183, ¶ 36. That is not the case here, where Issaquah Highlands would reasonably believe that its liability insurance for constructing residences would cover the negligent installation of a hot water heater.

2. Probuilders breached its duty to defend in failing to give its insured the benefit of the doubt in the face of equivocal case law.

Ignoring that only the narrow duty to indemnify was at issue in *Quadrant,* 154 Wn.2d at 170 n.3, ¶ 7, and in *Cook,* 83 Wn. App. at 152, Probuilders argues that any case involving the inhalation of a toxic gas that "should not have been ingested and/or inhaled" (Resp. Br. 35) necessarily falls within the scope of an absolute pollution exclusion. The trial court correctly rejected that argument, recognizing the ambiguity in the pollution exclusion and the case law *in the context of this case,* and refusing to hold that the pollution exclusion absolved Probuilders of its duty to defend:

"*Quadrant* is not on all fours. *Kent* is not on all fours either" so that "when you take a look at the duty to defend, . . . [the] repeated denials are not – arguably not consistent with a full investigation and treating the insured with – equally to your own interests." (11/12 RP 130)

As the trial court recognized, the *Quadrant* Court itself noted that an absolute policy exclusion cannot categorically preclude coverage, because it can only be applied on a case by case basis to the specific facts at issue:

> The insureds argue that this rule could lead to absurd results in some cases. While we note that the 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. *See Queen City Farms,* 126 Wn.2d at 81; *see also Madison Constr. Co.,* 735 A.2d at 106 ("contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts").

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

Probuilders provides no authority for its misplaced assertion that "merely because there is conflicting case law on a particular topic does not create an ambiguity in the law." (Resp. Br. 35) To the contrary, a liability insurer may not rely on its own interpretation of equivocal case law "to give *itself* the benefit of the

doubt rather than its insured" in deciding whether to defend. *Woo,* 161 Wn.2d at 60, ¶ 34 (emphasis in original). In *Alea*, for instance, the Court held the insurer breached the duty to defend because "Washington courts have yet to consider the factual scenario before us today" and only out-of-state authority addressed an insurer's obligations in cases alleging the insured's failure to protect a patron from an assault. "The lack of any Washington case directly on point and a recognized distinction between preassault and postassault negligence in other states presented a legal uncertainty with regard to Alea's duty." 168 Wn.2d at 408, ¶ 12

The trial court correctly held that the Washington Supreme Court's decisions in *Kent Farms* and *Quadrant* do not definitively answer whether Ms. Xia's claim could be covered. This Court need not determine whether the absolute pollution exclusion precludes coverage of Ms. Xia's claim for negligent installation of a hot water heater – a covered risk – that resulted in Ms. Xia's exposure to carbon monoxide in quantities sufficient to cause brain damage. Probuilders breached the duty to defend by failing to give its insured the benefit of the doubt and seek a prompt determination of its duties in a declaratory judgment action.

D. Probuilders is liable for its insured's reasonable settlement and for penalties and fees under the CPA and IFCA.

Probuilders apparently concedes that if it was wrong in refusing to defend, it is liable for the tort of bad faith, for statutory violations of the IFCA and the CPA, and is estopped to deny coverage of Issaquah Highlands' reasonable settlement with Ms. Xia. Probuilders' response does nothing more than repeat the argument that "the plain language of the policy exclusions barred coverage and . . . [its] insured did not challenge PSBIC's clear position that no coverage existed." (Resp. Br. 39) Probuilders' "failure to defend based upon a questionable interpretation of law was unreasonable," establishing its "bad faith as a matter of law." *Alea*, 168 Wn.2d at 413, ¶ 20.

Probuilders' contention that Ms. Xia failed to argue her statutory IFCA and CPA theories below is also without merit. (CP 1060-62) (Opposition to Summary Judgment) Probuilders' violation of the Insurance Commissioner's claim handling regulations are an independent basis for its liability under RCW 48.30.015 (IFCA) and RCW 19.86.090 (CPA) because Probuilders "refuse[d] to pay claims without conducting a reasonable investigation," WAC 284-30-330(4), and failed to complete its

investigation within 30 days. WAC 284-30-370. Ms. Xia as Issaquah Highlands' assignee has standing to assert these statutory claims against Probuilders. *See Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 210, ¶ 43, 194 P.3d 280 (2008) ("CPA claims are assignable"), *rev. granted in part by* 166 Wn.2d 1015 (2009).

III. CONCLUSION

This Court should reverse and hold that Probuilders breached its duty to defend as a matter of law and is therefore liable for the reasonable amount of its insured's settlement with Ms. Xia, plus statutory penalties under the CPA, RCW 19.86.090, and under IFCA, RCW 48.30.015, as well as attorney fees and expanded costs. At a minimum, it should remand for trial on whether Probuilders' conduct in summarily denying its insured a defense was unreasonable conduct in breach of its duty of good faith.

Dated this 13th day of March, 2015.

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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 March 13, 2015, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	____ Facsimile ____ Messenger ____ U.S. Mail __X__ E-File
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DATED at Seattle, Washington this 13th day of March, 2015.

V. Vigoren

Victoria K. Vigoren