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NO. 68129-0

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

JBC ENTERTAINMENT HOLDINGS, INC., D/B/A JBC
ENTERTAINMENT, INC., JBC OF SEATTLE, WA, INC., GEMINI
INVESTORS AND ALPHA CAPITAL PARTNERS LTD.,
Appellants

v.

CAPITOL SPECIALTY INSURANCE CORPORATION,
Respondent

BRIEF OF RESPONDENT

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I. INTRODUCTION AND SUMMARY

Jackson Mika (“Mika”) claims injury from a firearm shooting at the Jillian’s nightclub owned by JBC. JBC, a sophisticated nightclub operator, had purchased an insurance policy from Capitol Specialty Insurance Corporation (“Capitol”) which contains a Firearms Exclusion. Simply, and in plain language, there is no coverage under Capitol’s policy for:

“Bodily injury” or “property damage” that arises out of, relates to, is based upon or attributable to the use of a firearm(s).

Mika brought suit against JBC and its affiliates asserting a variety of “dressed up” or “companion” negligence claims, claims that all arise out of, relate to, are based upon or are attributable to the use of a firearm. Instead of flatly disclaiming coverage in reliance upon the Firearms Exclusion, Capitol conservatively agreed to defend JBC under a Reservation of Rights. Capitol then brought a Declaratory Judgment action seeking a determination from the trial court that no coverage existed for Mika’s claims based, in part, on the Firearms Exclusion.

Despite the clear application of the unambiguous Firearms Exclusion to these firearm shooting claims, JBC resisted a declaration by the trial court that the Mika claims arising out of the shooting were not

covered. JBC asserted that (a) the Firearms Exclusion should not bind JBC because of the absence of a Washington case directly addressing the applicability of a Firearms Exclusion to a shooting, (b) that Mika's companion negligence claims do not fall within the Firearms Exclusion due to the "concurrent cause" doctrine set forth in California's criticized *Purdie*,¹ and (c) that the Firearms Exclusion was somehow ambiguous in that it should only apply to a shooting by the insured itself.

In granting Summary Judgment in Capitol's favor, the trial court disagreed with JBC's position and ruled that the Firearms Exclusion unambiguously applied to and otherwise precluded coverage for all of Mika's claims, including all companion negligence claims. JBC now appeals.

While there is admittedly no Washington authority directly on point – considering the applicability of a Firearms Exclusion to a Washington shooting – ample authority exists in Washington and in other jurisdictions supporting the trial court's decision. The road map of the Washington assault and battery exclusion cases of *Alea* and *McAllister*, coupled with the available out of state Firearms Exclusion

¹ *Underwriters Ins. Co. v. Purdie*, 145 Cal.App.3d 57, 193 Cal.Rptr. 248 (1983).

authority such as *Williams*, sets a clear course.² All of Mika's claims fall within the Firearms Exclusion.

II. ASSIGNMENT OF ERROR AND ISSUES

The trial court did not err in granting Capitol's Motion for Summary Judgment Regarding Firearms Exclusion and denying JBC's Motion to Strike Portions of Kent Lawson's Declaration. The issues presented by JBC's appeal are appropriately stated as follows:

A. Did the trial court properly grant Capitol's Motion for Summary Judgment Regarding Firearms Exclusion as the Firearms Exclusion is unambiguous and applicable to Mika's shooting related claims and injuries?

B. Did the trial court properly deny JBC's Motion to Strike Portions of Kent Lawson's Declaration as the Declaration testimony was based upon Mr. Lawson's personal knowledge?

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background.

1. Capitol's Policy.

Capitol issued a commercial general liability policy of insurance bearing Certificate No. PR00213034 to JBC Entertainment, Inc./JBC of

² Mika's claims and damages relating to the shooting are allegations only. By discussing those allegations here, Capitol is not intending to acknowledge or otherwise comment on the veracity of the allegations.

Seattle (“JBC”), the owner/operator of the Seattle Jillian’s nightclub, for the period June 26, 2009 to June 26, 2010 (the “Policy” or “Capitol Policy”). CP 166-167, 175-277. The Policy provides certain insurance coverage to JBC, subject to express conditions and exclusions.

Under the Capitol Policy, Capitol agreed to provide insurance as follows:

We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result. But:

(1) The amount we will pay for damages is limited as described in Section III - Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

CP 234.

The Capitol Policy applies to “bodily damage” and “property damage” only if:

(1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”;

(2) The “bodily injury” or “property damage” occurs during the policy period; and . . .

CP 234.

The Capitol Policy defines “bodily injury” as “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.” CP 246. The Capitol Policy further defines “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” CP 247.

The Capitol Policy contains several important exclusions, but none more directly applicable to Mika’s claims than the following

Firearms Exclusion:

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE
PART**

In consideration of the premium charged, it is hereby understood and agreed that:

(i) Clause 2, Exclusions, of Section I – COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY is amended to include the following at the end thereof:

Firearms

“Bodily injury” or “property damage” that arises out of, relates to, is based upon or attributable to the use of a firearm(s).

(ii) *Clause 2(a) of Section I – COVERAGES, COVERAGE B PERSONAL INJURY AND ADVERTISING INJURY LIABILITY, is amended to include the following at the end thereof:*

Firearms

“Personal and advertising injury” arising out the use of a firearm(s).

ALL OTHER TERMS, CONDITIONS AND EXCLUSIONS REMAIN UNCHANGED.

CP 33, 198.

The Capitol Policy further contains other potentially applicable exclusions.³

JBC does not assert that it was not on notice of the Firearms Exclusion in its Policy prior to the underlying shooting. JBC does not assert that it sought any clarification from Capitol regarding the Firearms Exclusion prior to the underlying shooting. CP 431-439.

2. The Mika Shooting And Underlying Lawsuit.

On March 21, 2010, there was a shooting at JBC’s Seattle, Washington Jillian’s nightclub which allegedly resulted in the injury to Mika. CP 492-493.

On January 5, 2011, Mika filed a Complaint against JBC and others -- *Jackson Jacob Mika v. JBC Entertainment Holdings, Inc.; et*

³ Capitol’s Motion for Summary Judgment Regarding Firearms Exclusion addressed the Firearms Exclusion and reserved Capitol’s rights regarding potentially other applicable Policy exclusions and conditions as warranted. CP 151.

al., King County Superior Court No. 11-2-02108-4 SEA (the “Mika Lawsuit”) seeking the recovery of damages relating to the shooting. CP 488, 490-497. Sections 16 and 17 of Mika’s Complaint state:

16. Plaintiff Jackson Mika was standing with friends when he heard the shot(s) fired. He began to run with the other patrons away from the direction of the gunfire and towards the exit. The Plaintiff later realized when he was outside the night club that something felt “funny” and that he had been injured and was hurt. But he didn’t know that he had been shot.

17. The Plaintiff drove himself to Harborview Medical Center for emergency care. He had a gunshot entry wound in his right buttock and exit wound in his groin. A spent bullet was found on a short stairway inside Jillian’s.

CP 493.

In addition to JBC, Mika sued Michael Knudsen (“Knudsen”), a JBC employee at the time of the shooting, Gemini Investors (“Gemini”) and Alpha Capital Partners, Ltd. (“Alpha”), JBC owners/shareholders, and Marquis Holmes (“Holmes”), a non-employee promoter of the event at the time of the shooting. CP 491-492.

Mika’s alleged claims, injuries and damages all arise out of and directly relate to the firearm shooting. CP 490-497. Mika’s claims include negligence for allowing an unsafe condition, negligent failure to provide adequate security, negligent hiring, negligent supervision and negligent training. CP 494-496. Mika would have no claims in the

absence of the shooting at Jillian's. Mika does not assert any claims or allegations for negligence occurring **after** the shooting. CP 490-497, 152, 298-313. Mika's claims against JBC and the other defendants in the Mika Lawsuit are sometimes referred to as "Mika's Claims" below.

JBC and its affiliates tendered the defense of the Mika Lawsuit to Capitol seeking defense and indemnification under the Capitol Policy. Instead of flatly disclaiming defense and indemnification under its Policy, and out of an abundance of caution, Capitol agreed to defend JBC, Knudsen, Gemini and Alpha in the Mika Lawsuit subject to an express "Reservation of Rights." CP 167. Capitol issued a February 3, 2011 Reservation of Rights Letter to JBC, Gemini and Alpha. CP 279-287. Capitol sent a separate February 21, 2011 Reservation of Rights letter to Michael Knudsen. CP 499-500.

Both Reservation of Rights letters, in part, expressly reserved Capitol's rights, conditions and exclusions under the Policy – including the Firearms Exclusion -- and further referenced Capitol's right to address the coverage issues via a declaratory judgment action. CP 279-287, 499-500. Notwithstanding the existence of the applicable exclusions, Capitol arranged for defense counsel to appear on behalf of JBC, Gemini, Alpha and Knudsen in the Mika Lawsuit. CP 167.

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B. History Of Proceedings.

Conservatively following the guidelines set forth by the Washington Supreme Court – defending under a reservation of rights, then pursuing a declaratory judgment action versus outright disclaiming coverage⁴ – Capitol filed its declaratory judgment Complaint on April 15, 2011 against JBC, Alpha, Gemini, Knudsen, Mika and Holmes. CP 1-121.

Capitol filed a Motion for Summary Judgment Regarding Firearms Exclusion against all defendants. CP 148-165. Capitol's Motion for Summary Judgment Regarding Firearms Exclusion was supported, in part, by the Declaration of Kent Lawson, Capitol's Vice President of Claims. CP 166-291. JBC, Alpha and Gemini submitted a response on or about November 21, 2011. CP 298-314. As argued in this appeal, JBC, Alpha and Gemini took the position in the response that the Firearms Exclusion was not applicable to the Mika Claims contending that the companion negligence claims fell outside of the Firearms Exclusion per the criticized California *Purdie* case, and arguing that the Firearms Exclusion was somehow ambiguous as to whether or not it only applied to shootings by the insured. CP 298-314.

⁴ See Woo v. Fireman's Fund Insurance Co., 161 Wn.2d 43, 164 P.3d 454 (2007).

As part of the summary judgment response, JBC, Alpha and Gemini moved to strike portions of the Declaration of Kent Lawson. CP 435-439. Specifically, JBC, Alpha and Gemini contended that the following testimony in the Declaration of Kent Lawsuit lacked proper foundation:

15. *To my knowledge, at no time prior to obtaining the Capitol Policy did the JBC Insureds object to or seek clarification from Capitol regarding the Firearms Exclusion.*

16. *To my knowledge, at no time prior or subsequent to obtaining the Capitol Policy did the JBC Insureds affirmatively seek or request from Capitol coverage options for bodily injury or property damage relating to the use of a firearm.*

17. *To my knowledge, at no time prior or subsequent to obtaining the Capitol Policy did the JBC Insureds indicate any belief that they interpreted the Firearms Exclusion to only apply to the use of a firearm by an insured. (JBC first asserted this alleged belief as part of its motion to vacate the order and judgment of default.) And, of course, Capitol does not interpret the Firearms Exclusion in that manner, nor does it believe that it is a reasonable interpretation of this unambiguous exclusion.*

CP 435-439.

JBC, Alpha and Gemini did not include any supporting testimony from JBC, Alpha or Gemini in the response to Capitol's Motion for Summary Judgment Regarding Firearms Exclusion or the Motion to Strike. CP 301-302. No JBC, Alpha or Gemini testimony was offered

regarding the meaning or any specific interpretation of the Firearms Exclusion, nor to contest the testimony of Mr. Lawson. CP 301-302. Knudsen joined in the response of JBC, Alpha and Gemini. CP 454. Mika responded by joining in the response and arguments of JBC, Alpha and Gemini. CP 431-434.

On December 2, 2011, the trial court granted Capitol's Motion for Summary Judgment Regarding Firearms Exclusion and ruled in part:

a. The Firearms Exclusion contained within the Capitol commercial general liability policy of insurance bearing Certificate No. PR00213034, which policy of insurance provides certain insurance coverage for the period June 26, 2009 to June 26, 2010 (the "Capitol Policy") is binding, applicable and wholly precludes coverage for all claims, injuries and damages asserted by Jackson Jacob Mika ("Mika") in the Jackson Jacob Mika v. JBC Entertainment Holdings, Inc.; et al., King County Superior Court No. 11-2-02108-4SEA lawsuit (the "Mika Lawsuit"). The Claims asserted by Mika in the Mika Lawsuit are hereafter referred to as "Mika Claims."

b. Because the Mika Claims are not covered by the Capitol Policy due to the Firearms Exclusion, Capitol may immediately terminate its pending defense of JBC of Seattle, WA, Inc., JBC Entertainment Holdings Inc., d/b/a JBC Entertainment, Inc., Gemini Investors, Alpha Capital Partners, Ltd., Michael Knudsen, and the marital community of Michael B. Knudsen and Jane Doe Knudsen in the Mika Lawsuit.

c. Because the Mika Claims are not covered by the Capitol Policy due to the Firearms Exclusion, Capitol is not obligated to indemnify any defendant or party against the Mika Claims in or relating to the Mika Lawsuit.

e. Based upon the Capitol Policy Firearms Exclusion, there is no coverage from the Capitol Policy for the Mika Claims asserted against any defendants or party in or relating to the Mika Lawsuit.

CP 475-478.

On December 2, 2011, the trial court further denied JBC, Alpha and Gemini's Motion to Strike portions of the Declaration of Kent Lawson. CP 473-474. In its Order Denying Motion to Strike Portions of Declaration of Kent Lawson, the Court ruled, in part, that "[d]efendants' evidentiary objection is well taken and goes to weight rather than admissibility of Mr. Lawson's statements." CP 473-474.

JBC, Alpha and Gemini (hereafter collectively "JBC" for the purpose of the following argument) appealed the trial court's December 2, 2011 rulings. CP 479-480. Mika, Knudsen and Holmes did not appeal the trial court's rulings.

IV. ARGUMENT

A. Standard Of Review.

Summary judgment orders are reviewed de novo.⁵ Pursuant to CR 56, summary judgment is appropriate in the absence of genuine

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⁵ Manory v. Anderson, 164 Wash. App. 569, 574, 265 P.3d 163 (2011).

issues of material fact.⁶ “A material fact is one upon which the outcome of the litigation depends.”⁷

Once the movant meets its preliminary burden of demonstrating the absence of any genuine issue of material fact, the burden then falls squarely on the shoulders of the non-movant to competently set forth specific facts demonstrating clearly that there is a genuine issue for trial.⁸ The non-movant “may not rely on speculation, argumentative assertions that unresolved factual issues remain, or consideration of its affidavits, at face value[.]”⁹

B. The Trial Court Properly Granted Capitol’s Motion For Summary Judgment Regarding Firearms Exclusion.

1. Insurance Policy Interpretation.

The interpretation of an insurance policy is a question of law.¹⁰ An insurance policy is a contract and, as with any contract, the court’s goal should be to ascertain the parties’ intent.¹¹ The policy must be

⁶ CR 56(c); Huff v. Budbill, 141 Wn.2d 1, 7 (2000).

⁷ Dien Tran v. State Farm Fire & Cas. Co., 136 Wn.2d 214, 223 P.2d (1998) (citing Ruff v. King County, 125 Wn.2d 697, 703 P.2d (1995)).

⁸ CR 56(c); Seaman v. Karr, 114 Wash. App. 665, 678 P.3d (2002); Graff v. Allstate Ins. Co., 113 Wash. App. 799, 802 P.3d (2002).

⁹ Pain Diagnostics & Rehabilitation Assoc., P.S. v. Brockman, 97 Wash. App. 691, 697 P.2d (1999).

¹⁰ Queen City Farms v. Central National Ins. Co., 126 Wn.2d 50, 59-60, 882 P.2d 703 (1994).

¹¹ *Id.*, at 65.

construed in its entirety.¹² However, effect must be given to each policy provision.¹³ Policy language should be interpreted in a manner in which it would be understood by an average person and given a non-technical and practical reading.¹⁴

Insurance policy language which is clear and unambiguous should be enforced by a court without modification; ambiguities must not be created where none exist.¹⁵ Language is ambiguous only if it could be “fairly susceptible” to two different reasonable interpretations.¹⁶ The expectation of the insured cannot override the plain language of the contract.¹⁷

Courts should harmonize clauses that appear to conflict to give effect to the policy as a whole.¹⁸ In the determination of whether insurance coverage exists for a particular loss, the court weighs two elements – (1) has the insured demonstrated that the loss falls within the

¹² *Id.*

¹³ Moeller v. Farmers Ins. Co. of Washington, 173 Wn.2d 264, 271-272, 267 P.3d 998 (2011).

¹⁴ *Id.*, at 272.

¹⁵ Black v. National Merit Ins. Co., 154 Wash. App. 674, 679, 226 P.3d 175 (2010).

¹⁶ *Id.*

¹⁷ Quadrant Corp. v. American States Ins. Co., 154 Wn.2d 165, 172, 110 P.3d 733 (2005).

¹⁸ Certain Underwriters at Lloyd’s London v. Travelers Property Cas., 162 Wash. App. 265, 278, 256 P.3d 368 (2011).

insurance policy's insured loss scope and, if so, (2) is the loss excluded by policy language.¹⁹ JBC's appeal addresses only the second element.

2. Insurer's Duty To Defend Versus Duty To Indemnify.

Respectfully, JBC's argument slightly muddles the duty to defend versus the duty to indemnify in this declaratory action coverage context. An insurer's duty to defend "arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage."²⁰ Thus, the duty to defend is broader than the duty to indemnify.²¹ However, if the complaint's allegations are clearly not covered by the policy, the insurer is relieved of its duty to defend.²² Again, it is the insured's burden to establish that the claim falls within the scope of the policy's insuring agreement.²³ If the insured satisfies this burden, the insurer must then demonstrate that an exclusion applies.²⁴

¹⁹ *Id.*

²⁰ Truck Ins. Exch. v. Vanport Homes, Inc., 147 Wn.2d 751, 760, 58 P.3d 276 (2002).

²¹ Safeco Ins. Co. v. McGrath, 42 Wash. App. 58, 61, 708 P.2d 657 (1985).

²² Kirk v. Mt. Airy Ins. Co., 134 Wn.2d 558, 561, 951 P.2d 1124 (1998).

²³ McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 731, 837 P.2d 1000 (1992).

²⁴ *Id.*

Capitol complied with its duty to defend by fully defending JBC in the Mika Lawsuit up until Capitol demonstrated, via the trial court's Summary Judgment Order, that the Firearms Exclusion applied. After the trial court ruled that the Firearms Exclusion precluded coverage, Capitol then, and only then, discontinued its defense per the trial court's Order.

3. Summary Of Contentions.

Capitol and JBC agreed, via clear language in the Firearms Exclusion, that the Policy does not apply to:

“Bodily injury” or “property damage” that arises out of, relates to, is based upon or attributable to the use of a firearm(s).

CP 33 (emphasis added). This language is unambiguous. It is not subject to two different reasonable interpretations. The language does not include any language limiting its operation to the use of a firearm by any particular person. JBC is a sophisticated nightclub operator. CP 167. JBC does not assert that it objected to or otherwise questioned the Firearms Exclusion's broadly worded language. CP 298-314. JBC implicitly concedes that Mika's Claims all arise out of and relate to a firearm shooting.

As it did in the trial court, and after identifying the reality that no Washington case has specifically considered this Firearms Exclusion,

JBC challenges the applicability of the Firearms Exclusion to Mika's Claims with two approaches. First, JBC relies upon a heavily criticized California Court of Appeals case, *Purdie*, in asserting that the Firearms Exclusion does not bar coverage herein due to the existence of Mika's companion claims for negligent hiring, training, etc. against JBC. In so contending, JBC does not meaningfully address well-settled Washington (and other) authority which has rejected this type of "concurrent cause" theory in the context of insurance policy exclusions.

Second, JBC attempts to create an ambiguity in the Firearms Exclusion out of whole cloth by maintaining that it only applies to the use of firearms by the insured and not by third persons. This effort ignores the plain language of the Firearms Exclusion, runs afoul of tenets of insurance policy interpretation, and hinges upon a misinterpretation of the Missouri Court of Appeals case of *Braxton*²⁵.

4. *Purdie*.

Briefly, in *Purdie*, a deliveryman was shot by a liquor store employee.²⁶ The issue before the California Court of Appeals was whether the insurance policy's Firearms Exclusion precluded coverage for the shooting claims and injuries, including the companion claims for

²⁵ *Braxton v. U. S. Fire Ins. Co.*, 651 S.W.2d 616 (Mo.App.E.D. 1983).

²⁶ *Purdie*, 145 Cal.App.3d at 62.

negligent hiring/retention of the store employee.²⁷ The California court, after acknowledging a division of authorities, ruled that coverage existed notwithstanding the unambiguous Firearms Exclusion because the alleged underlying negligent hiring/retention claim was not “invisibly related to the use of a firearm” and, as such, was an independent or concurrent cause of the shooting injuries.²⁸

5. California State And Federal Courts Have Criticized *Purdie*.

Before discussing controlling Washington authority on the issue, it is noteworthy that several California State and Federal courts have criticized/rejected the independent or “concurrent cause” theory employed in *Purdie* to avoid an unambiguous Firearms Exclusion. The California Court of Appeals’ (Second District, Division 3) 1996 decision in *Century Transit*²⁹ is illustrative.

Century Transit considered the applicability of an assault and battery insurance policy exclusion to an assault and battery claim along with companion negligent hiring, supervision and retention claims. Two

²⁷ *Id.*, at 62.

²⁸ *Id.*, at 70-71.

²⁹ *Century Transit Systems, Inc. v. American Empire Surplus Lines Ins. Co.*, 42 Cal.App.4th 121, 49 Cal.Rptr.2d 567 (Cal.App.2d Dist. 1996).

men were assaulted by a taxi driver.³⁰ The men sued the driver's employer for assault and battery along and included companion claims of negligent hiring, supervision and retention.³¹ The employer's insurer relied upon an assault and battery exclusion along with an intentional acts exclusion in denying defense and coverage. The assault and battery exclusion read: "[n]o coverage shall apply under this policy for any claim, demand or suit based on assault and battery and assault shall not be deemed an accident, whether or not committed by or at the direction of the insured."³²

As JBC contends in its appeal, the *Century Transit* insured argued that the assault and battery exclusion did not apply to the companion negligent hiring, supervision and retention claims. The insured urged that the court follow *Purdie's* "concurrent cause" analysis.³³ The court disagreed and held that the exclusion applied to any claim based upon assault and battery irrespective of the legal theory advanced by the insured:

The assault and battery is clearly the basis for the action against Century; the fact that the claim also includes separate negligent acts by Century cannot avoid the

³⁰ *Id.*, at 123-124.

³¹ *Id.*

³² *Id.*, at 124.

³³ *Century Transit*, 42 Cal.App.4th 121 at 129.

*exclusion. Those alleged acts of negligence were based on the assault and battery committed by Silar on the plaintiffs. The exclusion therefore applies and Century cannot rely upon the allegations of negligence to create a potential for coverage.*³⁴

“It is not the underlying claims’ legal theories that control coverage and exclusions – it is their facts.”³⁵ The *Century Transit* court continued – “[w]e agree with those cases which have criticized the concurrent cause analysis endorsed and applied by *Purdie*.”³⁶

Just three months ago, the United States District Court, Eastern District of California, in *Gonzalez*³⁷ further criticized *Purdie*’s “concurrent cause” theory via an exhaustive examination of the pre-and post-*Purdie* California authority. In ultimately rejecting *Purdie* and holding that the companion negligent hiring claim at issue there was subsumed in the applicable policy exclusion, the court concluded that “*Purdie*’s reasoning with respect to negligent hiring and concurrent cause doctrine is not convincing.” As Capitol urges here, the *Gonzalez*

³⁴ *Id.*, at 128 (emphasis in original).

³⁵ *Southgate Recreation and Park District v. California Assoc. for Park and Recreation Ins.*, 106 Cal.App.4th 293, 302, 130 Cal.Rptr.2d 728 (2003) (Negligence and statutory duty claims arise out of or are related to the construction contract and therefore fall within the policy contract exclusion.)

³⁶ *Century Transit*, 42 Cal.App.4th 121 at 129 (citations omitted).

³⁷ *Maryland Cas. Co. v. Gonzalez*, ___ F.Supp.2d ___, 2012 WL 92928 (E.D.Cal.).

court establishes that the focus be on the insurance policy exclusion's plain language:

This analysis looks at the plain language of the exclusion. When the second negligent act is related to the excluded conduct, it does not constitute a concurrent independent cause. In Partridge, the second negligent act (modifying a gun in an unsafe manner) was totally unrelated to cars and driving. Conceptually, it was not the kind of risk that the insurance policy language was seeking to exclude. In contrast, hiring an individual with a known history of drunk driving and asking him to drive as part of the job straightforwardly relates to an auto exclusion. Indeed, the accident that resulted in this case appears to be the exact sort of incident the exclusion language was designed to exclude in the first place. A rule that applies the exclusion in a direct manner provides certainty for the parties, which is a critical concern in insurance cases.

Likewise, the incident that happened here – a shooting – is the exact sort of incident that the Firearms Exclusion was designed to exclude in the first place. As referenced in *Gonzalez*, the Ninth Circuit disagrees with *Purdie* as well.³⁸

6. Washington Does Not Follow *Purdie*'s Criticized "Concurrent Cause" Doctrine.

Assuming arguendo that *Purdie*'s criticized "concurrent cause" analysis is current California law, it is not the law in Washington.

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³⁸ See *Illinois Union Ins. Co. v. Brookstreet Secs. Corp.*, 444 Fed.Appx. 194, 196 (9th Cir. 2011) ("The exclusion at issue in this case applies irrespective of the legal theory of recovery asserted against the Insured.").

a. McAllister.

The Washington Court of Appeals in *McAllister*³⁹ tracked a similar analysis and ruling as in California's *Century Transit*, as adopted in *Gonzalez*, in holding that an assault and battery exclusion precluded coverage for companion negligence claims relating to the assault. McAllister was struck in the face and injured after nightclub staff allowed patrons involved in an altercation to re-enter the club and the club's security failed to take appropriate action.⁴⁰ McAllister sued the club for negligence. The trial court found that McAllister's claims were excluded by the club's insurance policy's assault and battery exclusion.⁴¹ The Washington Court of Appeals, in deciding an issue of first impression, held that the exclusion precluded coverage for McAllister's companion negligence claims:

In United States Underwriters Ins. Co. v. Val-Blue Corp., 85 N.Y.2d 821, 623, N.Y.S.2d 834, 647 N.E.2d 1342 (N.Y.1995), an off-duty police officer apprehended a suspect outside the insured's nightclub and escorted him into the club at gunpoint. A club security guard told the officer to drop the gun but then shot him twice when he did not immediately comply. The officer sued the nightclub, alleging negligence in the hiring, supervising, and training of the security guard. The club's insurance carrier denied coverage on the basis of an assault and

³⁹ McAllister v. Agora Syndicate, Inc., 103 Wash. App. 106, 11 P.3d 859 (2000).

⁴⁰ *Id.*, at 108.

⁴¹ *Id.*

battery exclusion almost identical to the one in this case. On the issue of whether the claim was “based on assault and battery” or based on negligence as argued by the officer, the court found the exclusion to be unambiguous. The court stated that “[t]he injury being sued upon here is an assault and battery” and that “[t]he plethora of claims surrounding that injury, including those for . . . ‘negligent hiring and supervision’ are all based on that assault and battery, without which the officer would have no cause of action.” Val-Blue, 85 N.Y.2d at 823, 623 N.Y.S.2d 834, 647 N.E.2d 1342.⁴²

b. *Alea*.

In 2010, the Washington Supreme Court upheld and reinforced *McAllister*'s anti-*Purdie* holding in ruling that an assault and battery exclusion precluded coverage for companion claims of pre-injury negligence in *Alea*⁴³ (and in doing so carved out a limited exception for post-injury negligence/ failure to render aid). In *Alea*, two patrons (Antonio and Dorsey) were involved in an altercation at the nightclub. Antonio was escorted outside by security and then let back in and re-started the altercation.⁴⁴ Security took both patrons outside where Antonio shot Dorsey. Club security returned fire and shot Antonio.

⁴² *Id.*, at 110-111; see also Mount Vernon Fire Ins. Co. v. Creative Housing, Ltd., 88 N.Y.2d 347, 645 N.Y.S.2d 433, 668 N.E.2d 404 (N.Y.1996) cited by McAllister.

⁴³ American Best Food, Inc. v. Alea London, Ltd., 168 Wn.2d 398, 229 P.3d 693 (2010).

⁴⁴ *Id.*, at 402.

Club security carried Dorsey inside the club.⁴⁵ Club management instructed security to remove Dorsey from the club. After the shooting, Dorsey was then “dumped on the sidewalk.”⁴⁶

Dorsey brought claims against the nightclub for failing to take reasonable protective measures and for also the exacerbation of his injuries after he was shot. The nightclub’s insurer denied coverage on the basis of the assault and battery exclusion in the policy.⁴⁷ The Washington Supreme Court upheld the ruling in *McAllister* that coverage for pre-injury negligence was precluded by the assault and battery exclusion, but identified a distinction in holding that the exclusion did not apply to post-injury negligence.

*We find persuasive precedent from other states that have found claims that the insured **acted negligently after an excluded event** are covered. Further, a balanced analysis of the case law should have revealed at least a legal ambiguity as to the application of an “assault and battery” clause with regard to postassault negligence at the time Café Arizona sought the protection of its insurer, and ambiguities in insurance policies are resolved in favor of the insured. Because such ambiguity is to be resolved in favor of the insured, we hold that Alea’s policy afforded coverage for postassault negligence to the extent it caused or enhanced Dorsey’s injuries.⁴⁸*

⁴⁵ *Id.*, at 403.

⁴⁶ *Id.*, at 402-403.

⁴⁷ *Alea*, 168 Wn.2d 398, 403.

⁴⁸ *Id.*, at 410-411 (emphasis added).

Again, Mika's Claims against JBC do not include any allegations of post-injury negligence and JBC did not contend below and does not contend here otherwise. JBC offers no meaningful explanation as to why the "concurrent cause" theory should be rejected in the assault and battery exclusion context, yet be embraced for Firearms Exclusions. Pursuant to *McAllister* and *Alea*, Capitol's Firearms Exclusion precludes coverage for all of Mika's Claims, including the companion negligence claims, as they all relate to and arise out of the shooting.

Courts in various jurisdictions, consistent with *McAllister* and *Alea*, insist upon focusing on the facts themselves in determining the applicability of an insurance policy exclusion, versus the types and labels of claims asserted by the injured party.⁴⁹

7. Capitol's Firearms Exclusion Language Is Broader Than Purdie's Exclusion Language.

Notwithstanding the California and Federal court criticism of

⁴⁹ See *Illinois Employers Ins. of Wausau v. Dragovich*, 139 Mich.App. 502, 506-07, 362 N.W.2d 767 (1985) ("[I]t is necessary to focus on the basis for the injury and not the nomenclature of the underlying claim in order to determine whether coverage exists."); *United National Ins. Co. v. The Tunnel, Inc.*, 988 F.2d 351, 354 (2nd Cir. 1993) ("[T]his is a case where the plaintiff is seeking to recover by 'dressing up the substance' of one claim, here a battery, in the 'garments' of another, here negligence."); *Cortinez v. Handford*, 490 So.2d 626, 628-29 (1986) (assault and battery exclusion barred coverage notwithstanding failure to protect, inadequate security, etc. negligence allegations); *Terra Nova Ins. Co., Ltd. v. Thee Kandy Store, Inc.*, 679 F.Supp. 476, 478 (E.D.Pa. 1988) (alleged negligent failure in preventing assault and battery insufficient to avoid assault and battery exclusion); *United Nat'l Ins. Co. v. Entertainment Group, Inc.*, 945 F.2d 210, 213 (7th Cir.1991).

Purdie, and Washington’s *McAllister* and *Alea* mandate, it is worth noting that the firearms exclusion language in *Purdie* is more limiting than Capitol’s Firearms Exclusion. *Purdie*’s exclusion language, issued as part of a liquor store liability insurance policy, and which was expressly tied to the acts of the insured only, reads:

*The insurance provided herein for liability arising out of bodily injury or property damage does not apply to any bodily injury or property damage caused by, or occurring from any use maintenance or possession of a fire arm by insured or its agent or employee.*⁵⁰

Again, Capitol’s Firearms Exclusion broadly disclaims coverage for any bodily injury or property damage “that arises out of, relates to, is based upon or attributable to the use of a firearm(s)” period. This “arises out of, relates to, based upon or attributable” language is significantly more expansive than *Purdie*’s “caused by or occurring from” language.

*The phrase “arising out of” is unambiguous and has a broader meaning than “caused by” or “resulted from.” It is ordinarily understood to mean “originating from”, “having its origin in”, “growing out of”, or “flowing from”.*⁵¹

⁵⁰ *Purdie*, 145 Cal.App.3d at 61.

⁵¹ *Toll Bridge Auth. v. Aetna Ins. Co.*, 54 Wash. App. 400, 404, 773 P.2d 906 (1989) (internal citations omitted); *see also Acceptance Ins. Co. v. Syufy Enters.*, 69 Cal.App.4th 321, 81 Cal.Rptr.2d 557 (1999) (“broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship”).

8. The Firearms Exclusion Is Unambiguous; It Is Not Limited To The Insured's Firearm Use.

a. *Braxton* Is Quickly Distinguishable.

JBC heavily relies upon the Missouri Court of Appeals ruling in *Braxton*⁵² in arguing that Capitol's Firearms Exclusion is ambiguous and applies only to the use of a firearm by or on behalf of the insured. However, a careful reading of *Braxton* reveals that it was the existence of specific limiting language in the exclusion section of that particular insurance policy which led to the ambiguity finding. As explained by the *Braxton* Court:

*The "Exclusions" portion of the policy states that "this insurance does not apply" to bodily injury or property damage "arising out of" certain enumerated acts done "by," "for," or "on behalf of" the named insured.*⁵³

Capitol's Policy does not contain this or similar limiting language regarding its exclusions generally or the Firearms Exclusion specifically. Instead, the introductory language to the Exclusions section of Capitol's Policy succinctly reads "[t]his insurance does not apply to" the identified exclusions. CP 70. The *Braxton* court continued in its analysis that it was precisely the "by, for, or on behalf of the named insured" language which created the ambiguity as to the relevance of the firearm user:

⁵² *Braxton v. U.S. Fire Ins. Co.*, 651 S.W.2d 616 (Mo.App.E.D. 1983).

⁵³ *Id.*, at 618 (emphasis added).

*The exclusion here disputed was added to the policy by typewritten endorsement. It disclaims coverage for “bodily injury and property damage arising out of the ownership or use of any firearm.” Unlike the other exclusionary provisions, it does not specify whether the “ownership or use” must be by, for, or on behalf of the insured.*⁵⁴

Under these circumstances, JBC cannot successfully rely upon *Braxton* to establish any ambiguity in the absence of the “by, for, or on behalf of the insured” language tied to the exclusions.⁵⁵

Washington law is clear. Unambiguous insurance policy language must be enforced as written; courts must not modify it or find ambiguities where none exist.⁵⁶ Equally, courts should not allow the insured’s expectations⁵⁷ to override the plain policy language.⁵⁸ An ambiguity is not created simply because the parties advance different

⁵⁴ *Id.* (emphasis added).

⁵⁵ Ignoring the “by, for, or on behalf of the named insured” critical distinction between the Capitol Policy and the *Braxton* policy for the moment, it is noteworthy that the Capitol Firearms Exclusion language “‘Bodily injury’ or ‘property damage’ that arises out of, relates to, is based upon or attributable to the use of a firearm(s)” is more expansive than *Braxton*’s Firearms Exclusion language “bodily injury or property damage arising out of the ownership or use of any firearm.”

⁵⁶ National Surety Corp. v. Immunex Corp., 162 Wash. App. 762, 771, 256 P.3d 439 (2011).

⁵⁷ Although JBC continues to advance its alternative Firearms Exclusion language interpretation via argument, it offered no evidence, no testimony at the trial court that JBC at any time truly interpreted the Firearms Exclusion in that manner.

⁵⁸ *Id.* (citing Quadrant Corp. v. Am. States Ins. Co., 154 Wn.2d 165, 172, 110 P.3d 733 (2005)).

policy language interpretations.⁵⁹ Strained construction of policy language leading to absurd results must be avoided.⁶⁰ Insurance contracts shall be given a practical and reasonable interpretation.⁶¹ An insurance policy should be construed in its entirety; language should not be analyzed in isolation.⁶² Provisions are not ambiguous simply because coverage is determined through the review of more than one provision.⁶³ Capitol's Policy and Firearms Exclusion does not contain any limiting language supporting JBC's claimed ambiguity. The language is not reasonably susceptible to two interpretations.

JBC's *Braxton* ambiguity argument was previously raised in nearly identical form and summarily rejected by the Missouri Court of Appeals in *Hunt*.⁶⁴ In *Hunt*, a patron was stabbed and killed outside a tavern. The insurer resisted coverage on the basis of an assault and battery exclusion in the tavern's CGL policy.⁶⁵ The assault and battery exclusion provided in part: "This insurance does not apply to bodily

⁵⁹ Quadrant, at 171-72.

⁶⁰ Eurick v. Pemco Ins. Co., 108 Wn.2d 338, 341, 738 P.2d 251 (1987).

⁶¹ Black v. Nat. Merit Ins. Co., 154 Wash. App. 674, 681-82, 226 P.3d 175 (2010).

⁶² No Boundaries, Ltd. v. Pacific Indemnity Co., 160 Wash. App. 951, 954, 249 P.3d 689 (2011).

⁶³ Mutual of Enumclaw Ins. Co. v. Grimstad-Hardy, 71 Wash. App. 226, 235, 857 P.2d 1064 (1993) (internal citations omitted).

⁶⁴ Hunt v. Capitol Indem. Corp., 26 S.W.3d 341 (2000).

⁶⁵ *Id.*, at 342.

injury, property damage or personal injury arising out of assault, battery, or assault and battery.”⁶⁶

Relying on *Braxton*, the *Hunt* plaintiffs argued that the assault and battery exclusion was ambiguous and should only apply to an assault and battery committed by the insured.⁶⁷ The court rejected that argument and in doing so distinguished *Braxton* as we do above:

*Here, the “Exclusions” portion of the policy does not contain the by, for or on behalf of language found in Braxton. Furthermore, in addition to the assault and battery exclusion, other endorsements excluding coverage do not contain the language discussed in Braxton. The exclusion unequivocally excludes coverage from bodily injury arising out of assault, battery or assault and battery. Accordingly, Braxton is distinguishable from the present case. To interpret the exclusion to apply only for an assault and battery by Haverfield, his agents or employees, would be contrary to the plain meaning of the policy.*⁶⁸

b. Courts Have Found Firearms Exclusions To Be Unambiguous In Other Jurisdictions.

Admittedly, to Capitol’s knowledge, no Washington Appellate Court has ruled on the applicability of a Firearms Exclusion to a firearms

⁶⁶ *Id.*, at 343.

⁶⁷ *Id.*, at 344.

⁶⁸ *Hunt*, 26 S.W.3d 341, 344. The court also rejected plaintiffs’ “concurrent cause” theory on the companion negligence claims -- “Without the underlying assault and battery, there would have been no injury and therefore no basis for plaintiffs’ action against Haverfield for negligence. The assault and battery and Haverfield’s negligence are not mutually exclusive; rather the acts are related and interdependent.” *Id.*, at 345.

shooting. However, while not binding on this Court, guidance can be taken from courts in other jurisdictions which have upheld Firearms Exclusions as unambiguous and binding to defeat shooting related claims.

i. *Williams*.

In 2011, the Louisiana Court of Appeals in *Williams*⁶⁹ considered the applicability of a Firearms Exclusion in the face of an ambiguity challenge with facts similar to our case. A bar patron was shot and killed by another patron. The decedent's wife filed suit against the bar, its owners, the gunman and his accomplice.⁷⁰ The bar's insurer sought a determination that no coverage existed under the policy based upon the Firearms Exclusion (and an assault and battery exclusion). The firearms exclusion provided "[t]his insurance does not apply to 'bodily injury,' 'property damage,' 'personal injury,' 'advertising injury' or medical payments arising out of the ownership, rental, maintenance, use or misuse of any firearms."⁷¹

The *Williams* plaintiff challenged the Firearms Exclusion as allegedly ambiguous, albeit with an argument different than JBC's here - he contended that the Firearms Exclusion did not preclude coverage for

⁶⁹ *Williams v. Andrus*, 74 So.3d 818 (La.App. 3 Cir.).

⁷⁰ *Id.*, at 819-820.

⁷¹ *Id.*, at 823.

death or wrongful death resulting from a felony. The *Williams* court rejected that challenge to the Firearms Exclusion and held that its Firearms Exclusion language was “clear and unambiguous.”⁷²

ii. *Farmbrew*.

The New York Supreme Court, Appellate Division, in *Farmbrew*⁷³ considered whether a revised Firearms Exclusion constituted a reduction in insurance coverage in a challenge to its applicability to shooting claims. The original Firearms Exclusion read:

*[i]n consideration of any premium charged, it is understood and agreed that this policy does not apply to Bodily Injury and/or Property Damage arising out of the Ownership Rental, Maintenance, or Use of any Firearms.*⁷⁴

The revised Firearms Exclusion read:

*[i]t is understood that no coverage is afforded by this policy for any injury, death, claims or actions occasioned directly or indirectly or as an incident to the discharge of firearms by person or persons on or about the insured premises.*⁷⁵

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⁷² *Id.* (The *Williams* plaintiff apparently did not make JBC’s argument that the exclusion only applies to an insured shooter.)

⁷³ *Farmbrew Realty Corp. v. Tower Ins. Co.*, 289 A.D.2d 284, 734 N.Y.S.2d 592 (2001).

⁷⁴ *Id.*, at 284-285.

⁷⁵ *Id.*

Giving the original and revised Firearms Exclusions a straightforward reading, the New York court concluded that both “clearly exclude any claim arising out of any use by anyone of any firearm or firearms.”⁷⁶

C. The Trial Court Properly Denied JBC’s Motion To Strike Portions Of The Declaration Of Kent Lawson.

A trial court’s ruling denying a motion to strike made in connection with a summary judgment motion is reviewed de novo.⁷⁷ A trial court shall not consider inadmissible evidence in ruling on a summary judgment motion.⁷⁸

The testimony targeted by JBC in its Motion to Strike as improper was not dispositive in any manner to the trial court’s Summary Judgment ruling. Indeed, the trial court’s order indicates that she did not give much weight to the offered statements -- “[d]efendants’ evidentiary objection is well taken and goes to weight rather than admissibility of Mr. Lawson’s statements.” CP 473-474.

Regardless of the level of weight afforded the testimony, the trial court properly denied JBC’s Motion to Strike, as the testimony, by its own express language, was limited to Mr. Lawson’s personal knowledge. Mr. Lawson testified that he was the Vice President of Claims at Capitol.

⁷⁶ *Id.*

⁷⁷ Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

⁷⁸ Allen v. Asbestos Corp. Ltd., 138 Wash.App. 564, 570, 157 P.3d 406 (2007).

CP 166. In the context of his duties and responsibilities as Vice President of Claims, Mr. Lawson testified that he was “extremely familiar” with the Capitol Policy. CP 166-167.

Based upon Mr. Lawson’s relevant position at Capitol and based upon his level of familiarity with the Policy, he testified, in part, that based upon his personal knowledge (a) JBC did not object to or seek clarification regarding the Firearms Exclusion prior to obtaining the policy (JBC does not now contend otherwise), (b) JBC did not seek or request coverage options for shooting at any time (JBC does not now contend otherwise) and (c) JBC did not previously indicate that it interprets the Firearms Exclusion to only apply to shootings by the insured (JBC does not now contend otherwise) and Capitol does not interpret the Firearms Exclusion in that manner. JBC’s appeal should be denied with or without this particular testimony. However, a sufficient foundation existed for Mr. Lawson to so testify based solely on his personal knowledge.

V. CONCLUSION

Capitol’s Firearms Exclusion is unambiguous and subsumes Mika’s various claims. Capitol has the right to contractually limit the insurance coverage it provides. Capitol asks this Court to affirm the trial court’s orders: granting Capitol’s Motion for Summary Judgment

Regarding Firearms Exclusion and denying JBC's Motion to Strike
Portions of Kent Lawson's Declaration.

RESPECTFULLY SUBMITTED this 23rd day of April, 2012.

McCAFFERTY & STEINMARK, PLLC

By:

A handwritten signature in black ink, appearing to read 'M. McCafferty', written over a horizontal line.

Matthew J. McCafferty, WSBA #23345
Frank J. Steinmark, WSBA #23056
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Specialty Insurance Corporation

CERTIFICATE OF SERVICE

I, Jennifer K. Lehne, hereby certify under penalty of perjury under the laws of the State of Washington that on this date I sent a copy of the foregoing **BRIEF OF RESPONDENT** properly addressed, prepaid, for delivery to the following persons in the manner indicated:

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