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SUPREME COURT
STATE OF WASHINGTON

2009 FEB 17 P 4: 17

BY RONALD R. CARPENTER


Clerk

No. 78287-3

SUPREME COURT
OF THE STATE OF WASHINGTON

PLANET EARTH FOUNDATION, JOHN KEITH BLUME, JR. and
LISA BLUME,

Petitioners

v.

GULF UNDERWRITERS INSURANCE COMPANY, and AMERICAN
BUSINESS & PERSONAL INSURANCE, INC.,

Respondents.

RESPONDENT GULF UNDERWRITERS' ANSWER TO AMICUS
CURIAE BRIEF FILED BY WASHINGTON STATE ASSOCIATION
FOR JUSTICE FOUNDATION

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CASES

Babcock v. State, 116 Wn.2d 596, 809 P.2d 143 (1991)3

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STATUTES

RCW 18.100.0103, 4

I.
INTRODUCTION

The Washington State Association for Justice Foundation, in its amicus brief, is contending that *Woo v. Fireman's Fund Ins.*, 161 Wn.2d 43, 164 P.3d 454 (2007) should lead this Court to reach a different conclusion than the court of appeals' ruling that Gulf had no duty to defend Planet Earth Foundation because all of the allegations in the complaint arose from Planet Earth providing professional services to New York University. The WSAJF is arguing that the situation in *Woo* is similar to the situation here and thus Gulf had a duty to defend Planet Earth. The facts in *Woo*, however, are materially different than the facts here. The court of appeals' ruling should be affirmed.

II.
**UNLIKE *WOO*, THIS DISPUTE DID NOT INVOLVE AN
EQUIVOCAL INTERPRETATION OF CASE LAW.**

In *Woo v. Fireman's Fund Ins.*, 161 Wn.2d 43, 164 P.3d 454 (2007), Fireman's Fund was informed by its counsel that if the doctrine set forth in *Standard Fire Ins. v. Blakeslee*, 54 Wn. App. 1, 771 P.2d 1172 (1989) were extended, then the insurer would not have a duty to defend the insured. Fireman's Fund counsel, however, was equivocal in his opinion as to whether a reviewing court would extend the *Blakeslee* exception to a case not involving sexual assault.

Fireman's refused to provide a defense and was ultimately sued by its insured for bad faith and violation of the Consumer Protection Act. The trial court ruled as a matter of law that Fireman's had a duty to defend. A jury found in the insured's favor on both the CPA and bad faith claim. On appeal, the court of appeals reversed holding that Fireman's did not have a duty to defend. This Court reversed the court of appeals and held that Fireman's had a duty to defend its insured.

This Court noted that Fireman's relied on an equivocal interpretation of case law to give itself the benefit of the doubt instead of giving the benefit of the doubt to the insured. As quoted by WSAJF:

The duty to defend requires an insurer to give the insured the benefit of the doubt when determining whether the insurance policy covers the allegations in the complaint. Here, [the insurer] did the opposite – it relied on an equivocal interpretation of case law to give *itself* the benefit of the doubt rather than its insured.

Woo, 161 Wn.2d at 60 (emphasis in original).

Here, there was no interpretation of case law at issue. Instead, the only issue was the reasonable definition of the term, “professional services.” Both the trial court, and the court of appeals, applied the definition used by numerous jurisdictions for over forty years. In contrast,

Planet Earth is proposing a definition that simply makes no sense.¹ Planet Earth is arguing that a definition of “professional services” found in RCW 18.100.030(1) should be applied to an insurance policy.² However, the Washington legislature explicitly stated that the terms found in the statute only applied to the statute: “As used in this chapter the following words shall have the meanings indicated: ... ‘professional service.’” (Emphasis added.) Moreover, Planet Earth ignores the purpose of the statute: it was enacted to allow a professional services corporation to render services to clients and patients even though the corporation itself did not hold a license necessary to provide those services. As set forth in RCW 18.100.010:

It is the legislative intent to provide for the incorporation of an individual or group of individuals to render the same professional service to the public for which such individuals are required by law to be licensed or to obtain other legal authorization.

RCW 18.100.010 does not provide a reasonable definition for the term “professional services” as used in an insurance policy. The legislature never intended the term to be applied to an insurance policy

¹ In addition, Planet Earth never raised this argument before the trial court. Accordingly, the argument should not be considered on appeal. See *Babcock v. State*, 116 Wn.2d 596, 606, 809 P.2d 143 (1991).

² See Petition for Discretionary Review, p. 18.

and its use in that statute has no connection to the term being used in an insurance policy.

WSAJF also argues that a dictionary definition supports the argument that the services provided by Planet Earth to New York University were not professional services. However, WSAJF did not attempt to explain how the media services that Planet Earth provided were not professional services. In addition, Planet Earth itself has admitted that the services it was providing to NYU were professional services in its briefing: "Planet Earth's business involves specialized knowledge and skills, but only with respect to the creation of effective content for public-service media." (Planet Earth's Supplemental Brief, p. 13.) Planet Earth itself has apparently given up on the argument that applying a dictionary definition would have somehow lead to a different result as it did not raise this argument in its petition for discretionary review to this Court or in its supplemental brief. As noted, it instead is contending that a definition found in RCW 18.100.010 should be used. Finally, as Gulf pointed out in its briefing before the court of appeals, a dictionary definition of the term "professional services" easily encompasses the media services that Planet Earth was providing to NYU. (Gulf Court of Appeals' brief, pp. 26-27.)

III.
CONCLUSION

This dispute is different than the dispute found in *Woo*. In *Woo*, the insurer relied on the prospects that a doctrine would be extended to a different scenario. Its own counsel noted that the doctrine being extended was debatable. The insurer used the benefit of the doubt to deny providing a defense.

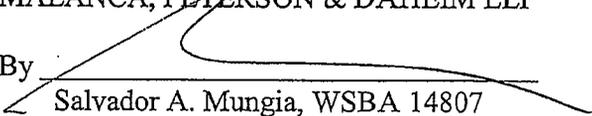
Here, there is no equivocal interpretation of case law. Instead, there was an insurance policy that clearly excluded coverage for any claims "arising out of" Planet Earth providing, or failing to provide, "professional services." The factual allegations of the complaint made it clear that all of NYU claims arose out of Planet Earth's agreeing to provide professional services, i.e., media services, to NYU. Planet Earth does not dispute that it was providing professional services to NYU. Under these facts, the trial court and court of appeals properly ruled that Gulf had no duty to defend Planet Earth for the claims being made by NYU. Gulf requests this Court to affirm the court of appeals' ruling.

Dated this 17 day of February, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 17 day of February, 2009, emailed a true and correct copy of the Respondent Gulf Underwriters Insurance Company's Answer to Amicus Curiae Brief filed by Washington State Association for Justice Foundation to counsel of record a emails provided to her:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.


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