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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

AMERICAN BEST FOOD, INC., a Washington corporation d/b/a CAFÉ
ARIZONA; and MYUNG CHOL SEO and HYUN HEUI SEO-JEONG,

Appellants,

v.

ALEA LONDON, LTD., a foreign corporation,

Respondent.

AMENDED BRIEF OF APPELLANTS

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the order of September 30, 2005, granting Alea London, Ltd.'s Motion for Summary Judgment and denying American Best Food, Inc.'s Motion for Partial Summary Judgment, and ruling as a matter of law that Alea had no duty to defend with respect to claims of post-assault negligence.
2. The trial court erred in entering the order of September 30, 2005, granting Alea London, Ltd.'s Motion for Summary Judgment and dismissing all claims, including claims that Alea breached its insurance contract in bad faith.
3. The trial court erred in entering the order of September 30, 2005, granting Alea London, Ltd.'s Motion for Summary Judgment and ruling as a matter of law that Alea had no duty to indemnify with respect to claims of post-assault negligence.
4. The trial court erred in entering the order of September 30, 2005, granting Alea London, Ltd.'s Motion for Summary Judgment and dismissing all claims, including claims that Alea violated Washington's Consumer Protection Act and insurance claims settlement regulations.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether an insurer's duty to defend is triggered when an Assault and Battery Exclusion, which excludes coverage for "[a]ny claim arising out of . . . Assault and/or Battery . . .," does not clearly preclude coverage for post-assault negligence claims made by the victim of an assault against the insured. (Assignment of Error No. 1).
2. Whether an insurer breaches the duty to defend in bad faith as a matter of law when Washington law is unclear as to whether an Assault and Battery Exclusion applies to claims of post-assault negligence and the insurer fails to conduct a reasonable investigation, but still refuses to defend the insured. (Assignment of Error No. 2).
3. Whether the Assault and Battery Exclusion applies to preclude coverage for all claims brought by a victim of assault against an insured, such that there is no duty on the insurer to indemnify for claims of post-assault negligence as a matter of law. (Assignment of Error No. 3).
4. Whether the determination that an insurer had no duty to indemnify with respect to claims of post-assault negligence was

premature because there were unresolved issues in the victim's underlying lawsuit that could have triggered coverage. (Assignment of Error No. 3).

5. Whether there were genuine issues of material fact regarding whether the insurer breached its duty to defend in bad faith which would estop it from denying coverage, thereby precluding summary judgment on coverage. (Assignment of Error No. 2 and 3).

6. Whether there were genuine issues of material fact regarding whether the insurer breached its insurance contract in bad faith and violated Washington's Consumer Protection Act and insurance claims settlement regulations, thereby precluding summary judgment. (Assignment of Error No. 4).

III. STATEMENT OF THE CASE

A. Introduction.

Appellants Myung Chol Seo and Hyun Heui Seo-Jeong, husband and wife, operate American Best Food, Inc., which does business as Café Arizona (appellants are referred to herein collectively as "Café Arizona"). (CP 3). At all times relevant to this appeal, Café Arizona was insured by

Respondent, Alea London Ltd. (“Alea”), under a commercial general liability policy, Policy No. TRB013581 (“Policy”). (CP 46, 49-63). The Policy contains an Assault and Battery Exclusion (“A/B Exclusion”), which states in relevant part, “[t]his insurance does not apply to any claim arising out of . . . Assault and/or Battery committed by any person whosoever, regardless of degree of culpability or intent . . .” (CP 62).

B. Alea’s Denial of Coverage Under the Policy.

On January 19, 2003, Michael Dorsey (“Dorsey”) was shot by an individual in a parking lot adjacent to Café Arizona. (CP 75). Both Dorsey and his assailant were patrons at Café Arizona immediately prior to this altercation. (CP 85). Dorsey brought a lawsuit against his assailant and Café Arizona (the “Dorsey Lawsuit”). (CP 74-91). Dorsey’s original complaint, dated August 27, 2003, alleges, in part, that after Dorsey was shot by his assailant, Café Arizona’s “security guards carried [Dorsey] into the club, however, the club owner/manager ordered to (sic) guards to carry [Dorsey] back outside where the guards dumped him back on the sidewalk.” (CP 78). The original complaint further states, “[a]s a direct and proximate result of the tortious acts by the Defendants, [Dorsey] has suffered severe physical, cognitive and mental injuries and is entitled to be compensated therefore.” (CP 80).

Café Arizona's owner, appellant Myung Chol Seo, stated in his declaration that he had the security guards carry Dorsey outside because he was concerned Dorsey would be injured by the other patrons that were panicking and attempting to leave the premises. (CP 300). Further, at that time the extent of Dorsey's injuries were unclear as even Dorsey believed he had only been shot in the arm. (CP 300).

Café Arizona tendered the claim to Alea on August 30, 2003, and in its response letter of September 19, 2003, Alea recited the allegations in the original complaint and the text of the A/B Exclusion and explained it was denying Café Arizona's request for indemnity and defense because the A/B Exclusion "excludes acts of assault and/or battery 'regardless of the degree of culpability or intent.' The Policy's [A/B] Exclusion also specifically excludes negligence allegations with respect to the insured's alleged failure to supervise its employees and failure to prevent the resultant shooting." (CP 107-109).

Café Arizona's attorney, Kenneth Kagen, responded to Alea's denial of coverage in his November 10, 2003 letter, pointing out the original complaint included factual allegations of post-assault negligent conduct by Café Arizona that, if proven, would be sufficient to give rise to a claim for negligence. (CP 264-67). He also pointed out that such claims of post-assault negligence were not clearly excluded by the A/B Exclusion

under Washington law and the law of other jurisdictions, thereby triggering Alea's broad duty to defend independent of its duty to indemnify. (CP 264-67). Over the next several months, Café Arizona continually requested Alea to reconsider its denial of coverage, but Alea maintained its position there was no duty to defend or indemnify because any claims of post-assault negligence would clearly be excluded from coverage based on *McAllister v. Agora Syndicate, Inc.*, 103 Wn.App. 106, 11 P.3d 859 (2000). (CP 269-79).

Dorsey moved to amend his original complaint and served Café Arizona with his amended complaint on July 15, 2005. (CP 83-91). The factual allegations of the amended complaint stated, "security guards carried the injured [Dorsey] from the lobby of Café Arizona and dumped him on the sidewalk, exacerbating his injuries more, after Mr. Seo negligently ordered the guards to carry [Dorsey] back outside." (CP 87). Dorsey's amended complaint further stated that based on the above facts, "[a]s a direct and proximate result of the negligent and tortious acts by the Defendants, Plaintiff has suffered severe physical, cognitive, and mental injuries and is entitled to be compensated therefore." (CP 90).

Café Arizona forwarded Dorsey's amended complaint to Alea on July 20, 2005 and renewed its request for Alea to change its position on indemnity and defense based on the allegations in the amended complaint.

(CP 214-15, 292-93). On July 25, 2005, Café Arizona's counsel forwarded a copy of a report by Dorsey's expert witness containing additional facts learned through discovery about Café Arizona's post-assault conduct and again renewed the request for Alea to reconsider its coverage position, especially with respect to its refusal to offer a defense. (CP 47, 93-98). Alea never responded to Café Arizona's July 20, 2005 and July 25, 2005 requests. (CP 17-8, 31-32). Alea later stated that a renewed coverage determination regarding its duty to provide a defense to Café Arizona was not required because the amended complaint was "materially the same" as the original complaint. (CP 142). Alea has stated that its entire investigation of Café Arizona's claim for indemnity and defense consisted of: (1) reviewing portions of the criminal proceedings against Dorsey's assailant, (2) contacting Café Arizona's counsel, and (3) searching the Internet for articles related to the incident. (CP 32).

Due to Alea's refusal to offer a defense, even under a reservation of rights, Café Arizona had no alternative but to undertake its own defense in the Dorsey Lawsuit, which was set for trial in May 2005 (the trial was continued to June 6, 2005, and continued once more to October 24, 2005). (CP 4-5, 161). Café Arizona initiated this action against Alea to obtain the benefits of the Policy, including indemnification and a defense, and

recover damages for Alea's bad faith in denying coverage and a defense and violations of the Consumer Protection Act and Washington's insurance claims settlement regulations. (CP 3-8).

C. Trial Court's Ruling on Summary Judgment that there Is No Duty to Indemnify or Duty to Defend as a Matter of Law.

On September 2, 2005, the parties filed cross motions for summary judgment and submitted supporting declarations. (CP 122-37, 46-47, 138-51, 17-30, 31-45). In its Motion for Partial Summary Judgment and Declaratory Judgment ("Café Arizona's Motion for Partial Summary Judgment"), Café Arizona sought entry of a declaratory judgment that Alea was obligated to defend Café Arizona in the Dorsey Lawsuit. (CP 136). Alea filed its Motion for Summary Judgment to Dismiss All Claims and Find as a Matter of Law No Coverage ("Alea's Motion for Summary Judgment"), requesting the trial court to dismiss all of Café Arizona's claims. (CP 138, 150).

At a September 30, 2005 hearing, the trial court granted Alea's Motion for Summary Judgment and denied Café Arizona's Motion for Partial Summary Judgment, ruling that Alea had no duty to defend or indemnify Café Arizona as a matter of law. (CP 389-91). The trial court judge stated in relevant part in his oral ruling at the hearing:

I'm going to grant the defendant's motion and deny plaintiff's motion. I am satisfied that the authority that I

have to follow is the *McAllister* case. (RP 2) [the trial court referred to *McAllister v. Agora Syndicate, Inc.*, 103 Wn. App. 106, 11 P.3d 859 (2000).]

. . . [T]he only way to read the policy and the arising out of language is such that if somebody moves somebody after they've been injured in an assault and battery, that's covered [by the exclusion]. (RP 2-3).

. . . I am satisfied in the facts in this case . . . and the language of the policy, clearly, the exacerbated injuries, if there were such injuries, arose out of the assault and battery, and that the clear meaning and import of that particular provision of the policy is to exclude coverage. (RP 3).

During the pendency of this action and up to the time of the trial court's ruling on the cross-motions for summary judgment on September 30, 2005, the Dorsey Lawsuit had not concluded; therefore, Café Arizona's liability to Dorsey for claims of post-assault negligence had not been resolved. (CP 4-5).

IV. ARGUMENT

A. Standard of Review.

The trial court's ruling on summary judgment is subject to *de novo* review by the Court on appeal and all facts and reasonable inferences are considered in the light most favorable to the nonmoving party. *Liberty Mut. Ins. Co. v. Tripp*, 144 Wn.2d 1, 10, 25 P.3d 997, 1001 (2001). Summary judgment is appropriate only when there are no genuine issues as to any material fact and the moving party is entitled to judgment as a

matter of law. CR 56(c). Furthermore, summary judgment in an insurance coverage case should be granted only where coverage depends solely on the language of the insurance policy. *Stouffer & Knight v. Continental Cas. Co.*, 96 Wn.App. 741, 747, 982 P.2d 105, 109 (1999).

B. McAllister v. Agora Syndicate, Inc. Does Not Apply to this Case.

The trial court relied on *McAllister v. Agora Syndicate, Inc.*, 103 Wn.App. 106, 11 P.3d 859 (2000), in holding that the Policy's A/B Exclusion applied to Café Arizona's alleged post-assault negligence. That reliance was misplaced, as *McAllister* did not involve allegations of post-assault negligence.

1. *McAllister's* analysis of an A/B Exclusion was limited to pre-assault negligence claims.

In *McAllister*, a nightclub patron, Grant McAllister, was injured in an altercation with another patron and filed suit against the assailant and the nightclub owner. *Id.* at 107-08. McAllister's claims against the nightclub owner included pre-assault negligence, but did not include any claims for post-assault negligence by the owner. *Id.* He alleged that security personnel permitted the assailant to reenter the nightclub despite having knowledge that the assailant had been involved in another altercation earlier in the evening and failed to take any action when informed of the ensuing melee between the assailant and McAllister which thereafter erupted into fisticuffs. *Id.* The nightclub's insurance carrier

denied coverage of the claims for pre-assault negligence because of the policy's A/B Exclusion, which provided:

It is agreed that no coverage shall apply under this policy for any claim, demand or suit based on assault and/or battery, and assault and/or battery shall not be deemed an occurrence, whether or not committed by or at the direction of the insured.

Id.

The Court of Appeals, noting the interpretation of an A/B Exclusion was an issue of first impression in Washington, adopted the reasoning of cases from other jurisdictions involving pre-assault negligence. *Id.* at 110. Specifically, the two out-of-state cases cited by the Court held there was no significant difference between the phrases “based on” and “arising out of” in an A/B Exclusion, and applied a “but for” test to determine that there was no coverage for pre-assault negligence under the A/B Exclusion. *Id.* at 110-11. Accordingly, the Court of Appeals held the A/B Exclusion applied to McAllister's claims – which were based on pre-assault negligent conduct only. *Id.* at 111.

Important to analyzing the Court's decision in *McAllister* is that the case only involved claims by the injured patron for pre-assault negligence against the nightclub owner for allowing the assailant to re-enter the nightclub that later resulted in the assault. *Id.* at 107-08. *McAllister* did not involve allegations of post-assault negligence like here,

which related to the conduct of Café Arizona's employees after the assault occurred. (CP 78, 87). *McAllister* is distinguishable from the present case for that reason. The trial court erred in relying on *McAllister* to rule against Café Arizona.

2. Other jurisdictions recognize the legal distinction between pre-assault and post-assault negligence claims.

This is a matter of first impression in Washington. *McAllister* is the only Washington case interpreting the phrase "arising out of" in an A/B Exclusion, but is limited in its application to claims of pre-assault negligence. Therefore, *McAllister* is not on point with respect to the interpretation and application of the A/B Exclusion to claims of post-assault negligence that are present in this case. Several jurisdictions have addressed the issue of post-assault negligence, however, and those cases are in accord that notwithstanding the phrase "arising out of" in an A/B Exclusion, such an exclusion does not bar coverage for claims of post-assault negligent conduct by the insured.

For example, in *Bucci v. Essex Ins. Co.*, a patron was attacked while waiting outside a nightclub and was rendered unconscious and suffered severe injuries to his face. 393 F.3d 285, 287 (1st Cir. 2005). The patron sued the nightclub alleging it failed to provide assistance to him following the assault. *Id.* at 288. The court held the A/B Exclusion did

not apply to preclude coverage for claims of post-assault negligence such as failing to provide assistance to the injured patron. *Id.* at 290-92. In citing to cases involving pre-assault negligence, the insurance carrier argued that the phrase “arising out of assault and/or battery” should be read broadly and the court should adopt a “but for” test since “but for” the attack, there would have been no post-assault injuries. *Id.* at 290. The court disagreed with the insurance carrier and held the cases did not apply because “[Bucci’s] case involves allegations of negligent activities *after* an assault which allegedly caused (or exacerbated) injuries *independent* of (or in addition to) the assault.” *Id.* at 291. Based on its conclusion that the A/B Exclusion did not apply to claims of post-assault negligent conduct, the U.S. Court of Appeals affirmed the district court and held that the insurance carrier breached its duty to defend as a matter of law. *Id.* at 288, 290-91.

The court in *Planet Rock, Inc. v. Regis Ins. Co.*, 6 S.W.3d 484, 491 (Tenn. Ct. App. 1999) applied the same analysis. There, a bar patron was involved in an altercation, which rendered him unconscious. *Id.* at 485. The bar’s owner placed the injured patron inside his office, but did not call for medical assistance and the injured patron died while left inside the office. *Id.* at 485-86, 489. The court held the A/B Exclusion did not apply to preclude coverage when there were allegations of injuries caused by the

insured's post-assault conduct. *Id.* The court reasoned the A/B Exclusion was a valid provision of the insurance policy, but there was some doubt¹ as to the meaning of "arising out of" when applied to claims of post-assault conduct sufficient to trigger the insurance carrier's duty to defend. *Id.* at 491. The court further reasoned that the injury caused by the assault was divisible and separate from the injury caused by the post-assault conduct; therefore, the A/B Exclusion did not apply to preclude coverage for the claim of post-assault negligent conduct. *Id.* at 491-93. Similarly in the present case, Dorsey's complaint alleges both distinct post-assault conduct and injuries resulting from that post-assault conduct.

In *United National Ins. Co. v. Penuche's, Inc.*, the plaintiff was attacked in the insured's bar and the insured's employee, in an attempt to stop the fight, grabbed the plaintiff in a "bear-hug" which caused the plaintiff to fall backwards, striking various obstructions as he fell, resulting in severe spinal cord injury to the plaintiff. 128 F.3d 28, 30 (1st Cir. 1997) (applying New Hampshire law). The court held the A/B Exclusion did not apply to preclude coverage for the post-assault negligence claims as a matter of law and affirmed the lower court's order

¹ The court in *Planet Rock* applied the same analysis in *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002) (which is discussed below in Section IV, Part C) that an insurer is relieved of its broad duty to defend only if the alleged claim is clearly not covered by policy.

granting summary judgment in favor of the insureds. *Id.* at 30, 33. The court reasoned the A/B Exclusion did not apply because the employee's bear-hug was a discrete intervening act of negligence that did not "arise out of" the assault because the employee was acting independently of the assailant. *Id.* at 32. The court further refused to find the assault necessitated the employee's intervention. *Id.* In its analysis, the court noted the phrase "arise out of" is a very broad term meaning "originating from or growing out of or flowing from" and is broader than proximate causation, but it is not so broad as to encompass a "tenuous" connection. *Id.* at 31-32. Similarly, in the present case, the owner's direction to the security guards (as set forth in Dorsey's complaint) resulted in Dorsey being carried back outside and left on the sidewalk, which was not necessitated by the assault, which occurred earlier in the evening.

In *West v. City of Ville Platte*, 237 So.2d 730 (La. Ct. App. 1970), the plaintiff sued the city and its police officers for damages arising out of injuries caused by an unlawful arrest and detention, police-beating, and failure to render aid or secure medical attention for him upon incarceration. *Id.* at 732. The City's insurance carrier refused to provide coverage because of an A/B Exclusion. *Id.* at 731. The Louisiana Court of Appeals reversed summary judgment in favor of the insurance carrier and although it held the claims for injuries from the beating arose from the

assault and hence were excluded from coverage, the claims for injuries caused by failure to render aid or to secure medical help did not arise from the assault. *Id.* at 733. The court reasoned the claim for injuries caused by failure to render aid or secure medical help arose from acts/omissions by the city unrelated to the assault. *Id.*

In *Western Heritage Ins. Co. v. Dean*, 55 F.Supp.2d 646 (E.D. Tex. 1998), a bar patron was served excessive amounts of alcohol, engaged in an altercation with another patron that rendered him unconscious, was left on the floor of the premises to “sleep off” the effects of intoxication for 50 minutes, and eventually died. *Id.* at 647. With respect to the plaintiff’s claims against the bar owner for failure to render aid, the court stated that just because an assault occurred does not mean every claim made by the plaintiff necessarily arose out of the assault. *Id.* Here, the court reasoned the claim for failure to render aid did not arise from the assault because the origin of the harm was not the assault, but rather the independent and separate act of the owner failing to render aid to an injured patron. *Id.*

The above cases highlight the distinction that must be made in analyzing the application of *McAllister* to cases involving post-assault negligence. *McAllister*, the sole Washington case interpreting an A/B Exclusion, is limited in its analysis because it only addresses when the phrase “based upon” or “arising out of” in an A/B Exclusion applies to

preclude coverage for claims of negligence occurring *prior* to an assault and does not address the application of an A/B Exclusion for claims based upon conduct that occurs *after* the assault. *McAllister*, 103 Wn.App. at 108, 110-11. The facts presented to the court did not include any post-assault negligent conduct and therefore the holding in *McAllister* does not address the application of an A/B Exclusion for claims based upon conduct that occurs *after* the assault. *Id.*

The above cases dealing with post-assault negligence clarify the limits of the “but for” analysis applied in *McAllister* to an A/B Exclusion. The primary distinction is that claims of post-assault negligent conduct may be established without proving the underlying assault because such claims for post-assault negligent conduct usually involves conduct by someone other than the assailant and an injury which is separate and divisible from the injury caused by the assault. Because *McAllister* does not address post-assault conduct, the Court should follow the well-reasoned analysis of the cases above to distinguish between pre-assault and post-assault negligence claims in interpreting the A/B Exclusion.

Moreover, the *Bucci* line of cases have appropriately limited the application of the A/B Exclusion consistent with the strong public policy consideration requiring coverage clauses in liability insurance policies to be construed broadly so as to afford the greatest possible protection to the

insured and interpret exclusion clauses narrowly against the insurance carrier who drafted the policy. *See e.g. City of Bremerton v. Harbor Ins. Co.*, 92 Wn.App. 17, 21-23, 963 P.2d 194, 196 (1998) (stating coverage exclusions are contrary to the fundamental purpose of insurance and should not be extended beyond their clear and unequivocal language and where the insurance policy may be reasonably interpreted in multiple ways, the court should apply the meaning most favorable to the insured); *Aetna Cas. and Sur. Co. v. M & S Industries, Inc.*, 64 Wn.App. 916, 924, 827 P.2d 321, 326 (1992) (exclusionary clauses are to be “most strictly” construed against the insurance carrier in light of the fact that the purpose of insurance is to insure and the contract should be construed to make it operative rather than inoperative). This strong public policy favoring coverage is even more compelling when the result of applying an A/B Exclusion to preclude coverage is not limited to prejudicing the insured seeking coverage (as the immediate beneficiary of the insurance policy), but also adversely affects the victims of assaults who may go uncompensated for their injuries resulting not from intentional conduct, but from intervening post-assault negligence of employees of the insured.

3. **At a minimum, the A/B Exclusion is ambiguous regarding claims of post-assault negligence; therefore, it must be construed narrowly and in favor of Café Arizona.**

The interpretation of an insurance policy is a question of law and such language should be construed according to its plain meaning. *McMahan v. Baker, Inc. v. Continental Cas. Co.*, 68 Wn.App. 573, 577, 843 P.2d 1133, 1136 (1993). Ambiguous policy provisions are construed in favor of the insured. *Greer v. Northwestern Nat. Ins. Co.*, 109 Wn.2d 191, 201, 743 P.2d 1244, 1249 (1987). Especially, with regard to an ambiguity in an exclusionary clause, the effect of such language must be construed narrowly and against the insurance company. *City of Bremerton*, 92 Wn.App. at 21-23.

In the context of Dorsey's allegations of post-assault negligence against Café Arizona, it is at least ambiguous as to whether the phrase "arising out of" in an A/B Exclusion applies to preclude coverage when the post-assault injuries allegedly arise out of conduct separate and independent from the assault. At some point, the negligent conduct's connection to the injuries becomes too tenuous to be considered having "arisen out of" an assault and battery so as to trigger an unambiguous application of the A/B Exclusion.

For example, one cannot possibly reach the conclusion that the exclusion unambiguously precludes coverage for a claim for injuries incurred when an assaulted patron, walking away from her assailant, is unintentionally tripped by an employee standing nearby, thereby injuring the patron. This same analysis would apply if the patron is injured in an assault and later receives additional or aggravated injuries due solely to some post-assault negligent act by a person other than the assailant. Unlike claims of pre-assault negligence, it is at a minimum unclear whether such injuries arise out of the assault to trigger the A/B Exclusion. In other words, any link between the assault and the exacerbated injuries is severed, especially in a situation where it is alleged that post-assault medical attention would have lessened the severity of the patron's injuries.

Similarly, it is at a minimum unclear whether the Policy's A/B Exclusion should apply to Dorsey's allegations that Café Arizona acted negligently after the assault in moving him from the premises and leaning him on the sidewalk, thereby causing an exacerbation of his assault injuries.

A policy provision may be unambiguous when applied in one context to a specific set of facts, but may become ambiguous when applied to different set of facts in another context. *Ledbetter v. Concord General Corp.*, 665 So.2d 1166, 1170-71 (La. 1996). In *Ledbetter*, the court

determined the A/B Exclusion was unambiguous and clearly applied to bar coverage for a claim for injuries caused by a rape, but that the A/B Exclusion was ambiguous with respect the claim for injuries caused by a kidnapping, which occurred after the rape. *Id.* Therefore, the *Ledbetter* court interpreted the A/B Exclusion narrowly and against the insurance carrier to support its holding that there was coverage for claim for injuries caused by the kidnapping. *Id.*; *see also McMahan*, 68 Wn.App. at 579 (holding the phrase “arising out of” may not be ambiguous when applied to factual allegations for claims of negligence in making cost estimates, but that the phrase is ambiguous when applied to factual allegations for claims of negligence in making cost estimates following errors in structural engineering analysis).

There is a heavy burden imposed upon insurance carriers when drafting exclusions to make the language “clear and unequivocal.” *See City of Bremerton*, 92 Wn.App. at 21-2. Surely it is not too much to ask that the language of the exclusion clearly refer to post-assault conduct, if that is the intention of the insurance carrier. In fact, insurance carriers who wish not to provide coverage for claims of post-assault conduct do just that. For example, in *Proshee v. Shree, Inc.*, the insurance policy included an A/B Exclusion, which provided in part:

EXCLUSION - - ASSAULT AND BATTERY

1. This insurance does not apply to “bodily injury,” . . . arising out of or resulting from:
 - a. any actual, threatened or alleged assault or battery;
 - b. the failure of any insured or anyone else for whom any insured is or could be held legally liable to prevent or suppress any assault or battery;
 - c. the failure of any insured or anyone else for whom any insured is or could be held legally liable to render or secure medical treatment necessitated by any assault or battery;
 - d. the rendering of medical treatment by any insured or anyone else for whom any insured is or could be held legally liable that was necessitated by any assault or battery;
 - e. the negligent: (i) employment; (ii) investigation; (iii) supervision; (iv) training; (v) retention; of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by 1.(a), (b), (c), or (d) above;
 - f. any other cause or action or claim arising out of or as a result of 1.(a), (b), (c), (d), or (e) above.

893 So.2d 939, 941-42 (La.App. 3rd Cir. 2005). In contrast, the A/B

Exclusion included in the Policy issued by Alea states:

ASSAULT AND BATTERY EXCLUSION

This insurance does not apply to any claim arising out of-

- A. Assault and/or Battery committed by any person whosoever, regardless of degree of culpability or intent and whether the acts are alleged to have been committed by the insured or any officer, agent, servant or employee of the insured or by any other person; or

- B. Any actual or alleged negligent act or omission in the: (1) Employment; (2) Investigation; (3) Supervision; (4) Reporting to the property authorities or failure to so report; or (5) Retention; of a person for whom any insured is or ever was legally responsible, which results in Assault and/or Battery; or
- C. Any actual or alleged negligent act or omission in the prevention or suppression of any act of Assault and/or Battery.

(CP 62).

The insurance carrier in *Proshee* wanted to exclude coverage for post-assault conduct and did so in a clear and unambiguous fashion in Sections 1(c) and 1(d) of its policy. *Proshee*, 893 So.2d at 941. However, Alea did not. While Alea decided to make its A/B Exclusion clear regarding its application to preclude coverage for claims of pre-assault conduct in Sections B and C of its Policy, Alea failed to make its A/B Exclusion clear regarding its application to claims for injuries based upon post-assault negligent conduct. Notably, the language found in Section 1(c) and 1(d) of the *Proshee* policy is missing from Alea's A/B Exclusion.

If Alea intended its A/B Exclusion to apply to preclude coverage for claims for injuries caused by an assault/battery and to also apply to preclude coverage for claims for separate and independent injuries caused by post-assault negligent conduct, Alea could have used clear language to that effect. In fact, Alea did so with respect to claims of pre-assault conduct. Because of this ambiguity in the application of the A/B

Exclusion when applied to claims of post-assault negligence, the A/B Exclusion must be construed narrowly and against Alea as the drafter of the policy language. Thus, the fact that the court in *McAllister* held the A/B Exclusion applied to pre-assault negligence does not prevent a finding that the A/B Exclusion is ambiguous in its application to post-assault negligence.

C. Alea Breached Its Duty to Defend Café Arizona and Its Breach of the Duty to Defend was in Bad Faith.

1. The duty to defend

The duty to defend is one of the main benefits of the insurance contract. *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276, 281 (2002). An insurance carrier's duty to defend is broader than, may arise earlier, and is independent of, its duty to indemnify. *E.g. Allstate v. Bowen*, 121 Wn.App. 879, 883-884, 91 P.3d 897, 901 (2004). Washington law imposes the duty to defend even in circumstances where, with the benefit of hindsight, the court determines there was no duty to indemnify. *Vanport Homes*, 147 Wn.2d at 751-760. The duty to defend arises at the time an action is brought against the insured and the complaint, when construed liberally, contains factual allegations which could, if proven, impose liability upon the insured within the policy's coverage. *Bowen*, 121 Wn.App. at 883, *Vanport Homes*, 147 Wn.2d at 751-760. The insurance carrier is relieved of its

duty to defend “only if the alleged claim is clearly not covered by the policy;” if the complaint is ambiguous, it will be liberally construed in favor of triggering the insurance carrier’s duty to defend. *Vanport Homes*, 147 Wn.2d at 760.

Rules of modern notice pleading, adopted by Washington in 1967, require an insurance carrier to go beyond the stated allegations and terminology in the complaint when determining whether there is a duty to defend. *M & S Industries, Inc.*, 64 Wn.App. at 924; *R.A. Hanson Co., Inc. v. Aetna Ins. Co.*, 26 Wn.App. 290, 295, 612 P.2d 456, 459 (1980). If the factual allegations and terminology in the complaint are ambiguous, such language is to be liberally construed in favor of triggering the duty to defend. *Bowen*, 121 Wn.App. at 883-84 (2004). When the pleadings, as they are liberally construed, are subject to an interpretation that creates a duty to defend, the insurance carrier must comply with that duty. *M & S Industries, Inc.*, 64 Wn.App. at 924. If an insurance carrier is found to have breached its duty to defend, it may be estopped from denying coverage. *Vanport*, 147 Wn.2d at 755.

There are two exceptions to the rule that the duty to defend is triggered solely by the factual allegations of the complaint, and both exceptions are applied in favor of the insured. *Vanport Homes*, 147 Wn.2d at 761. One exception is when the factual allegations of the

complaint set forth a claim that may or may not be covered, the insurance carrier must investigate the claim and give the insured the benefit of the doubt in determining whether the insurance carrier's duty to defend is triggered. *Id.* Facts outside the complaint must be considered if (1) the factual allegations are in conflict with facts known or readily ascertainable by the insurance carrier or (2) the factual allegations of the complaint are ambiguous or inadequate. *Id.* The insurance carrier is also prohibited from relying on facts outside the complaint to deny its duty to defend. *Id.*

The second exception is that when an insurance policy contains ambiguous policy language which renders a provision capable of two meanings, or is fairly susceptible of two constructions, the meaning and construction most favorable to the insured must be employed, even if the insurance carrier intended otherwise. *Greer*, 109 Wn.2d at 201. Exclusionary clauses are to be "most strictly" construed against the insurance carrier in view of the fact that the purpose of insurance is to provide coverage, and the insurance contract should be construed in favor of providing coverage rather than denying coverage. *Id.*; *M & S Industries*, 64 Wn.App. at 924. Thus, only if the alleged claim is clearly not covered by the policy is the insurance company relieved of its duty to defend. *Vanport Homes*, 147 Wn.2d at 760.

2. Alea's duty to defend was triggered because Dorsey's post-assault negligence claims against Café Arizona fall under the Policy's basic coverage provisions.

The Policy provides coverage for:

[T]hose sums the insured becomes legally obligated to pay as damages because of "bodily injury" . . . We will have the right and duty to defend the insured against any "suit" seeking those damages. (CP 49).

The Policy also provides, "this insurance applies to 'bodily injury' . . . only if the 'bodily injury' is caused by an 'occurrence.'" (CP 49). The Policy defines "bodily injury" as "bodily injury, sickness or disease sustained by a person . . ." (CP 58). The Policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (CP 60).

The factual allegations in Dorsey's complaint,² even in the absence of liberal construction, satisfy the "bodily injury" requirement. (CP 87). It provides that after Dorsey sustained gunshot wounds inflicted by the assailant, "security guards carried the injured [Dorsey] from the lobby of Café Arizona and dumped him on the sidewalk, exacerbating his injuries more, after Mr. Seo negligently ordered the guards to carry [Dorsey] back

² Alea has admitted in this litigation that, for the purpose of its coverage determination, Dorsey's original complaint and amended complaint were not materially different. (CP 42). Therefore, with respect to Alea's duty to defend and investigate the claim, it was charged with knowledge of all facts, whether alleged in the original or amended complaint, at the time it received the original complaint.

outside.” (CP 87). Dorsey’s complaint also provides that based on the above facts, “[a]s a direct and proximate result of the negligent and tortious acts by the Defendants, Plaintiff has suffered severe physical, cognitive, and mental injuries and is entitled to be compensated therefore.” (CP 90). If proven, the factual allegations would impose liability on Café Arizona for negligently causing “bodily injury” by carrying an injured patron outside and leaving the injured patron on the sidewalk.

Causing injuries by moving an injured patron meets the definition of an “occurrence” under the Policy. An “occurrence” is defined as an “accident,” which is undefined in the Policy. However, the term “accident” is ordinarily understood to mean an unintended, unforeseen, injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated. *R.A. Hanson*, 26 Wn.App. at 295 (in construing contracts, words are to be given their ordinary and usual meaning); BLACKS LAW DICTIONARY (7th ed. 1999).

Further, in interpreting whether conduct constitutes an accident, it is generally accepted that although the actor may engage in certain conduct with the intent to act, the conduct is an accident if the resulting consequence of the actor’s conduct is unexpected or unintended. *Queen City Farms, Inc. v. Central Nat’l Ins. Co.*, 126 Wn.2d 50, 66-8, 882 P.2d 703, 712-13 (1994) (court interpreting the term “occurrence” and

reasoning that even where an insured may act intentionally, the average purchaser of insurance would understand coverage exists for ordinary acts of negligence where the resulting damage is not intended or expected from the standpoint of the insured); Windt, Insurance Claims and Disputes: Representation of Insurance Companies and Insureds, § 4.8 (4th ed. 2003); *Western Heritage*, 55 F.Supp.2d at 651-52 (bar owner's failure to render post-assault aid constituted an occurrence because employees may have intended to leave the injured, intoxicated, unconscious patron on the floor, but the resulting injury and death to the patron cannot be said to have been expected from the standpoint of the insured).

Therefore, similar to the above cases regarding negligent conduct covered under liability insurance, Café Arizona's personnel may have intended to move Dorsey to the sidewalk, but it does not follow they expected or intended to cause additional injuries. Accordingly, the claim for bodily injury allegedly caused by Café Arizona's post-assault conduct falls within basic coverage provisions, thereby triggering Alea's duty to defend.

3. Alea was not relieved of its duty to defend because no exclusion applied to clearly preclude coverage.

The Policy contains the following exclusion in Section A, Part 2 "[t]his insurance does not apply to . . . "bodily injury" . . . expected or

intended from the standpoint of the insured.” (CP 49) (emphasis added). By endorsement, the Policy contains the A/B Exclusion, which provides that, “[t]his insurance does not apply to any claim arising out of . . . Assault and/or Battery committed by any person whosoever, regardless of degree of culpability or intent . . .” (CP 62).

Once the duty to defend is triggered by a claim that falls within the policy’s basic coverage provisions, an insurance carrier is relieved of such duty only if it can show a policy exclusion applies to clearly preclude coverage of the claim. *Vanport Homes*, 147 Wn.2d at 760. Alea was not relieved of its duty to defend because no exclusions applied to clearly preclude coverage for the claims of post-assault negligence.

a. No bodily injury was expected or intended by Café Arizona.

With respect to the Policy’s “expected” or “intended” exclusion set forth in Section A, Part 2 of the Policy, the factual allegations of Dorsey’s complaint do not indicate, nor lead to any reasonable inference, that Café Arizona expected or intended to cause Dorsey’s bodily injuries. (CP 74-91). The phrase “expected” or “intended” is not defined in the Policy; therefore, the words should be given their ordinary meaning. *R.A. Hanson*, 26 Wn.App. at 295. Their meaning is essentially the same as the definition of “occurrence” previously discussed.

Again, although Café Arizona may have intended to move Dorsey to the sidewalk, it does not necessarily follow that it expected or intended to cause additional injuries or aggravate the injuries Dorsey suffered in the assault. *Queen City Farms*, 126 Wn.2d at 66-8 (court reasoning that even where an insured may act intentionally, the average purchaser of insurance would understand coverage exists for ordinary acts of negligence where the resulting damage is not intended or expected from the standpoint of the insured); *Windt* at § 4.8; *Western Heritage*, 55 F.Supp.2d at 651; *Anastasis v. American Safety Indemnity Co.*, 12 A.D.3d 628, 629-30, 786 N.Y.S.2d 88, 89-90, (2004) (insurance carrier had a duty to defend because it could not be said as a matter of law that the A/B Exclusion applied to clearly preclude coverage when pleadings contained allegations the patron was struck or stepped on, but did not allege patron was struck or stepped on intentionally); *Essex Ins. Co. v. T-Birds Nightclub & Restaurant, Inc.*, 229 A.D.2d 919, 920, 645 N.Y.S.2d 218 (1996) (insurance carrier was not relieved of its duty to defend because the A/B Exclusion did not apply to clearly preclude coverage when the complaint contained factual allegations that the insured's employees negligently and carelessly escorted the injured patron from the nightclub).

Café Arizona's owner, Mr. Seo, stated in his declaration that he had the security guards carry Dorsey outside because he was concerned

Dorsey would be injured by the other patrons that were panicking and attempting to leave the premises. (CP 300). Further, at that time the extent of Dorsey's injuries were unclear as even Dorsey believed he had only been shot in the arm. (CP 300). Therefore, it cannot be said that Café Arizona expected or intended to cause the resulting harm to Dorsey; certainly, at a minimum, the exclusion does not apply to clearly preclude coverage to relieve Alea from its duty to defend.

b. The post-assault negligence did not arise out of an assault and battery.

For the reasoning set forth above in Section IV, Part B above, the A/B Exclusion does not apply to clearly preclude coverage. As previously discussed, the application of an A/B Exclusion to claims of post-assault negligence is a matter of first impression in Washington because *McAllister* dealt only with pre-assault negligence claims. However, the line of cases involving claims of post-assault negligence from other jurisdictions have held that the A/B Exclusion does not apply to eliminate the duty to defend when post-assault negligence claims are involved.

In *Penuche's*, the insurance carrier commenced an action seeking a declaration that it had no duty to defend its insured. 128 F.3d at 30. The U.S. Court of Appeals affirmed the district court's ruling on summary judgment that the insurance carrier had a duty to defend. *Id.* The court

reasoned that although insured's conduct may have been necessitated by the earlier assault, the insured's conduct constituted a discrete intervening act of negligence because the insured acted independently from the assailant. *Id.* at 32. Therefore, the insured's conduct did not arise out of the assault to trigger the A/B Exclusion and the insured had a duty to defend its insured with respect to the claim for injuries caused by the insured's conduct. *Id.*; see also *Western Heritage*, 55 F.Supp.2d at 652 (denying insurance carrier's motion for summary judgment seeking declaratory judgment that it had no duty to defend because insured's conduct following the assault was a separate and independent act of negligence not excluded by the A/B Exclusion); *Bucci*, 393 F.3d at 288 (affirming the lower court's order granting the insured's motion for partial summary judgment, ruling that the insurance carrier had a duty to defend because the A/B Exclusion did not preclude the claims for injuries caused by the insured's post-assault negligence); *Planet Rock*, 5 S.W.3d 484, 491 (affirming the trial court's summary judgment ruling that the insurance carrier had a duty to defend and reasoning the A/B Exclusion was a valid provision of the insurance policy, but left some doubt as to the meaning of "arising out of" when applied to claims of post-assault conduct sufficient to trigger the insurance carrier's duty to defend).

Because Dorsey's complaint, when liberally construed, contains factual allegations which could, if proven, impose liability for claims of post-assault injuries that are within the Policy's coverage, Alea's duty to defend was triggered. Further, Alea was not relieved of such duty to defend because no exclusion applied to clearly preclude the claims of post-assault injuries from coverage, particularly given the ambiguity of the A/B Exclusion as applied to separate and distinct post-assault negligent conduct.

Not only was Alea alerted to the lack of legal clarity in Washington regarding the application and interpretation of the A/B Exclusion to claims of post-assault negligence by numerous communications from Café Arizona's counsel, but Alea was provided with legal authority from other jurisdictions setting forth the legal distinction between claims for pre-assault negligence and post-assault negligence when interpreting and applying the phrase "arising out of" in an A/B Exclusion. (CP 264-67). Despite this information, Alea continued to deny coverage or a defense to Café Arizona.

4. **Alea breached its duty to defend in bad faith**

An insurance carrier has a statutory and common law duty to act in good faith (or refrain from acting in bad faith) towards its insured and a violation of that duty may give rise to a tort action for bad faith.

RCW 48.01.030; *Griffin v. Allstate Ins. Co.*, 108 Wn.App. 133, 143, 29 P.3d 777, 783 (2001). The duty of good faith arises from the fiduciary relationship created by an insurance contract between the insured and insurance carrier in light of the insureds' dependence on their insurance carriers. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 385, 715 P.2d 1133, 1136 (1986). RCW 48.01.030 provides that:

[t]he business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

An insurance carrier is liable for the tort of bad faith breach of the insurance contract if the insurance carrier acted in a manner that was unreasonable, frivolous, or unfounded. *Griffin*, 108 Wn.App. at 143.

Whether or not Dorsey's complaint contained factual allegations when construed liberally that, if proven, could impose liability within the Policy's coverage, as contended by Alea, Alea was still not relieved of its obligation under the Policy with respect to its duty to defend because, at a minimum, the factual allegations were ambiguous or unclear as to whether Dorsey was claiming damages for post-assault injuries. Accordingly, Alea should have investigated facts outside the complaint to determine whether the allegations potentially set forth a claim falling within the Policy's

coverage to trigger Alea's duty to provide Café Arizona with a defense. *Vanport Homes*, 147 Wn.2d at 761.

Washington courts have held that an insurance carrier's failure to conduct a reasonable investigation in connection with its duty to defend constitutes bad faith. *Griffin*, 108 Wn.App. at 146-47; *Vanport Homes*, 147 Wn.2d at 763-64 (insurance carrier breached its duty to defend in bad faith when insurance carrier denied coverage and refused to provide a defense, but conducted little or no investigation of the claims); *Coventry Assoc. v. American States Ins. Co.*, 136 Wn.2d 269, 279, 961 P.2d 933, 937 (stating the insurance carrier is required to fulfill its contractual and statutory obligation to fully and fairly investigate the claim and holding an insured may maintain an action against its insurance carrier for bad faith investigation and violation of the Consumer Protection Act regardless of whether the carrier is ultimately correct in determining coverage did not exist).

An insurance carrier's determination of its duty to defend under the insurance policy may change as additional facts are revealed or clarified over time. *See Windt*, at § 4.8. For example, when an initial pleading is subsequently amended to include factual allegations setting forth a claim that may fall within coverage, or if additional facts are disclosed during the course of discovery indicating there may be a claim falling within

coverage, the duty to defend may be triggered. *Id.* In response to Alea's denial of coverage and refusal to provide a defense, Café Arizona continued to present case law and additional factual information (as such information came into Café Arizona's possession) to urge Alea to reconsider its coverage determination and refusal to provide a defense. (CP 264-279).

Alea did not respond to Café Arizona's July 20, 2005 and July 25, 2005 requests that Alea reconsider its position. (CP 31-32, 17-18). Instead, Alea contends it undertook a sufficient investigation after receiving Café Arizona's complaint on June 20, 2005. (CP 32, 148). By its own admission, Alea's investigation consisted of only a review of the assailant's criminal trial proceedings, a phone call to Café Arizona's attorney, and searches on the Internet for articles related to the assault. (CP 32). This level of investigation was insufficient, but also irrelevant, to make a determination on whether Dorsey was making a claim for injuries caused by Café Arizona's post-assault conduct.

Alea's investigation was inadequate to determine sufficiently whether Dorsey was making a claim for injuries caused by Café Arizona's post-assault negligence because Alea failed to take even the most basic, fundamental steps of a reasonable investigation. For example, had Alea attempted to review documents related to Dorsey's medical treatment, it

would have revealed whether Dorsey incurred injuries separate from or in addition to the injuries caused by the actual assault. Further, had Alea contacted Dorsey's counsel or attempted to interview witnesses with respect to Dorsey's post-assault injuries, it would have confirmed whether Dorsey was making (or could potentially make) a claim for post-assault injuries.

Even when Alea was presented with additional evidence learned through discovery and provided with several written requests for a reconsideration of its coverage determination, especially in light of its broad duty to defend, Alea conducted no further investigation and provided no written response to the insured. (CP 31-32, 17-18). Alea failed to conduct the most basic elements of a reasonable investigation in violation of its duty to defend even where the factual allegations of Dorsey's complaint set forth a claim for injuries caused by post-assault negligence, which was not clearly excluded from coverage by the A/B Exclusion.

Alea wrongfully based its refusal to defend on the *McAllister* case, which does not apply to claims of post-assault negligence, and disregarded the well-established body of law holding that assault and battery exclusions do not apply to claims of post-assault negligence. (CP 264-79). Thus, Alea's refusal to defend was not supported by a coverage exclusion

that was clearly and unambiguously applicable. The only way Alea could have acted in good faith would have been to provide a defense and, if uncertain whether there was coverage either based on its interpretation of *McAllister* or whether Dorsey's complaint set forth factual allegations for a claim of post-assault negligence, it could have defended under a reservation of rights and initiated a declaratory judgment action. Alea failed to do this, however, and thus breached its duty to defend in bad faith as a matter of law. Accordingly, this Court should enter judgment against Alea that it breached its duty to defend in bad faith.

5. There are at least genuine issues of material fact precluding summary judgment on whether Alea breached its duty to defend in bad faith.

Even if Alea cannot be found to have acted in bad faith as a matter of law on this appeal, the trial court erred nevertheless in granting Alea's Motion for Summary Judgment on the issue. At a minimum, there are genuine issues of material fact with respect to the extent of Alea's investigation and whether such steps were adequate and reasonable in light of the circumstances. These issues preclude a ruling of summary judgment dismissing Café Arizona's claim that Alea breached its duty to defend in bad faith. (CP 215).

D. Alea Was Not Entitled to Summary Judgment Dismissing Café Arizona's Indemnity Claim.

1. The A/B Exclusion does not preclude indemnification for post-assault negligence claims as a matter of law.

The trial court erred in ruling as a matter of law that Alea had no duty to indemnify. As discussed above in Section IV, Part B, not only is the interpretation and application of an A/B Exclusion a matter of first impression in Washington, but other jurisdictions have held an A/B Exclusion does not apply to preclude coverage for claims of post-assault negligent conduct.

For example, in *Ledbetter*, the Louisiana Supreme Court reversed the judgment of the appellate court and held there was coverage under the insurance policy for post-assault conduct. 665 So.2d 1166, 1168-69. The court recognized that the claims for injuries caused by the assault (rape) were not covered due to the A/B Exclusion. *Id.* at 1170. However, the court held the claim for injuries which were caused by conduct following the assault (kidnapping) was covered because such injuries did not arise out of the assault. *Id.* at 1170-71.

In *Penuche's*, 128 F.3d at 32, the First Circuit affirmed the district court's order granting the insured's motion for summary judgment and ruling that the insurance carrier had a duty to indemnify because the insured's conduct was an independent act following the assault.

Therefore, the A/B Exclusion was not triggered because the conduct did not arise out of the assault.

2. Alternatively, the trial court's determination of the duty to indemnify was premature.

An action for declaratory judgment with respect to the duty to indemnify should not be entered if it depends on the resolution of factual disputes that are at issue in the underlying lawsuit. Windt at § 8.04 n.3 (quoting *Guaranty Nat'l Ins. Co. v. Beeline Stores*, 945 F.Supp. 1510, 1514-15 (M.D. Ala. 1996)):

Although the existence of the duty to defend may be established by the allegations in the injured party's complaint, the insurer's liability to the insured is ultimately established by what is developed at trial. So determination of the duty to indemnify cannot be made at a preliminary stage in the proceedings, when it is still possible for the plaintiff in the underlying lawsuit to change the theory of liability and assert a claim that is covered by the policy at issue.

When it is apparent the declaratory action cannot be resolved prior to the resolution of the underlying tort lawsuit, the coverage dispute should be stayed until all of the relevant facts have been established in the tort action. Harris, Washington Insurance Law, § 14.2 n.9 (1995) (citing *Western Nat'l Assur. Co. v. Hecker*, 43 Wn.App. 816, 821-22, 719 P.2d 954 (1986)).

While this action was in front of the trial court, including at the time the trial court granted Alea's Motion for Summary Judgment, the

Dorsey Lawsuit had not been resolved. CP (4-5). Material issues of fact unresolved in the Dorsey Lawsuit at the time of the trial court's ruling were whether Café Arizona engaged in negligent conduct following the assault and whether any of Dorsey's alleged injuries were in addition to, or independent of, the injuries incurred from the assault. (CP 300, 315, 318). Without ultimate resolution of these issues, determination of Alea's duty to indemnify was premature and the trial court erred in ruling there was no coverage as a matter of law.

3. Alea also is estopped from denying coverage because it breached its duty to defend in bad faith.

It is well settled that an insurance carrier that refuses or fails to meet its duty to defend in bad faith is estopped from raising any defenses with respect to its duty to indemnify, whether or not such defenses are valid or not. *Vanport Homes*, 147 Wn.2d at 759. Therefore, if this Court rules that Alea breached its duty to defend in bad faith as a matter of law, Alea is estopped from ultimately denying coverage for Café Arizona's claim and this Court must rule that Alea had a duty to indemnify as a matter of law. In other words, a ruling that Alea breached its duty to defend in bad faith will necessarily require a ruling that Alea has a duty to indemnify Café Arizona.

In addition, as discussed above, there are at minimum genuine issues of material fact that precluded the trial court from dismissing Café Arizona's claim that Alea breached its duty to defend in bad faith. As a result, these same genuine issues of material fact precluded the trial court from dismissing Café Arizona's claim for indemnification on summary judgment.

E. Alea Violated Washington's Consumer Protection Act and Insurance Claims Settlement Regulations.

The Washington State Insurance Commissioner has adopted regulations enumerating specific insurance practices that constitute unfair claims settlement practices. WAC 284-30-300; 284-30-330 *et seq.* WAC 284-30-330(2)-(3) provides:

The following are hereby defined as . . . unfair or deceptive acts or practices in the business of insurance, specifically applicable to the settlement of claims: . . . (2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies . . . (3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.

WAC 284-30-360(1), (3) provides:

Every insurer, upon receiving notification of a claim shall, within ten working days . . . acknowledge receipt of such notice unless payment is made within such period of time . . . An appropriate reply shall be made within ten working days . . . on all other pertinent communications from a claimant which reasonably suggest that a response is expected.

It is undisputed based on the record before the Court that Alea did not respond to Café Arizona's requests for reconsideration of Alea's position on coverage and its duty to defend in its letters of July 20, 2005 and July 25, 2005. Thus, Alea violated WAC 284-30-330(2), WAC 284-30-360(1), and WAC 284-30-360(3) as a matter of law and the Court should enter judgment against Alea in accord with that finding. Further, as discussed in Section IV, Part C.4. above Alea's investigation of Café Arizona's claim was insufficient, unreasonable, irrelevant, and done in bad faith as a matter of law because such investigation consisted of only a review of the assailant's criminal trial proceedings, a phone call to Café Arizona's attorney, and searches on the Internet for articles related to the assault. (CP 32). Thus, Alea violated the WAC 284-30-330(3) as a matter of law.

If this Court agrees that Alea violated the insurance claims settlement regulations as a matter of law, then it follows that Alea violated Washington's Consumer Protection Act, Chapter 19.86 RCW, as a matter of law because each violation of Washington's insurance claims settlement regulations constitutes a per se violation of the Consumer Protection Act. *Vanport Homes*, 147 Wn.2d at 765-66; *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 151, 930 P.2d 288, 297 (1997).

Alternatively, there are at least genuine issues of material fact as to whether Alea properly responded to Café Arizona's requests and adequately investigated the claim in light of the circumstances and Alea's admission that it conducted little or no investigation, thereby precluding summary judgment on the issue of whether Alea violated Washington's Consumer Protection Act and the insurance claims settlement regulations.

V. CAFÉ ARIZONA'S REQUEST FOR ATTORNEYS' FEES

Café Arizona is entitled to an award of attorneys' fees pursuant to *Olympic Steamship Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52-3, 811 P.2d 673 (1991) (holding an insured is entitled to recover attorney fees in any legal action where the insurer compels the insured to assume the burden of legal action to obtain the full benefit of the insurance contract, including an award of attorney fees on appeal under RAP 18.1). Alea continually denied Café Arizona's request for indemnity and refused to offer a defense, even under a reservation of rights; therefore, Café Arizona had no alternative but to undertake its own defense in the Dorsey Lawsuit and initiate this action to obtain the benefits of the Policy. (CP 3-8, 161).

Further, Café Arizona is entitled to an award of attorneys' fees under Washington's Consumer Protection Act, RCW 19.86.090, which provides:

Any person who is injured in his or her business or property by a violation of RCW 19.86.020 . . . may bring a civil action in the superior court . . . to recover the actual damages sustained by him or her . . . together with the costs of the suit, including reasonable attorney's fees

Café Arizona was injured in its business or property when Alea violated WAC 284-30-330 *et seq.* and WAC 284-30-360 as set forth in Section IV, Part E above, which are per se violations of the Consumer Protection Act. Such conduct necessitated Café Arizona to expend its own resources to defend the Dorsey Lawsuit and initiate this action to obtain the full benefit of its insurance contract. *See Sorrel v. Eagle Healthcare, Inc.*, 110 Wn.App. 290, 298, 38 P.3d 1024 (2002) (holding that a person is injured in his or her business or property when the person is denied rightful possession of his or her funds).

VI. CONCLUSION

- A. Café Arizona respectfully requests this Court to reverse the trial court's order granting Alea's Motion for Summary Judgment and ruling that Alea had no duty to defend.

- B. Café Arizona respectfully requests this Court to reverse the trial court's order denying Café Arizona's Motion for Partial Summary Judgment and to grant Café Arizona's Motion for Partial Summary Judgment, declaring that Alea had a duty to defend Café Arizona and that it breached that duty.
- C. Café Arizona respectfully requests this Court to rule, as a matter of law, that Alea breached its duty to defend in bad faith.
- D. Café Arizona respectfully requests this Court to reverse the trial court's order granting Alea's Motion for Summary Judgment and ruling that Alea had no duty to indemnify, and rule as a matter of law that Alea had a duty to indemnify Café Arizona because the A/B Exclusion does not apply to post-assault negligence or because Alea is estopped from denying it had a duty to indemnify as a result of its breach of the duty to defend in bad faith.
- E. Café Arizona respectfully requests this Court to reverse the trial court's order granting Alea's Motion for Summary Judgment dismissing all claims, including claims that Alea violated Washington's Consumer Protection Act and insurance claims settlement regulations and to rule as a matter of law that Alea violated Washington's Consumer Protection Act and insurance

claims settlement regulations. Alternatively, this Court should remand the issue because genuine issues of material fact exist regarding Alea's conduct in handling Café Arizona's claim.

F. If this Court (1) reverses the trial court's order denying Café Arizona's Motion for Partial Summary Judgment and grants Café Arizona's Motion for Partial Summary Judgment declaring that Alea had a duty to defend, (2) rules as a matter of law that Alea breached its a duty to defend in bad faith, (3) rules as a matter of law that Alea had a duty to indemnify or that Alea is estopped from denying it had a duty to indemnify as a result of its breach of the duty to defend in bad faith, and/or (4) rules as matter of law that Alea violated Washington's Consumer Protection Act and insurance claims settlement regulations, Café Arizona respectfully requests this Court to award it attorneys' fees related to the Dorsey Lawsuit and this action at both the trial court level and on appeal.

G. In the alternative, if the Court reverses the trial court's order granting Alea's Motion for Summary Judgment and denying Café Arizona' Motion for Partial Summary Judgment because there are genuine issues of material fact and remands this action to the trial court for further fact-finding on those issues, then Café Arizona

respectfully requests the Court to remand to the trial court the issue regarding an award of attorneys' fees related to the Dorsey Lawsuit and this action at both the trial court level and on appeal.

RESPECTFULLY SUBMITTED this 23rd day of May, 2006.

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CERTIFICATE OF SERVICE

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

That on May 24th, 2006, I served a true and correct copy of this document, BRIEF OF APPELLANTS, on the party and in the manner listed below:

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DATED this 24th day of May, 2006, at Seattle, Washington.

Wendy Cooper
Wendy Cooper

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COURT OF APPELLANTS
STATE OF WASHINGTON
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