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NO. 57181-8-I

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.

REPLY BRIEF OF APPELLANTS

Scott B. Easter
WA State Bar No. 5599
Paul J. Miller
WA State Bar No. 28411
Sandy K. Lee
WA State Bar No. 35463
MONTGOMERY PURDUE
BLANKINSHIP & AUSTIN PLLC
Attorneys for Appellants

5500 Columbia Center
701 Fifth Avenue
Seattle, WA 98104-7096
(206) 682-7090

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I. INTRODUCTION

Appellants Myung Chol Seo, Hyun Heui Seo-Jeong, and American Best Food, Inc. dba Café Arizona (collectively “Café Arizona”) were insured by Respondent, Alea London Ltd. (“Alea”), under a commercial general liability policy, Policy No. TRB013581 (“Policy”). Alea refused to provide Café Arizona with either a defense or indemnity based on an Assault and Battery Exclusion (“A/B Exclusion”) contained in the Policy, which is the subject of this appeal.

Under well-established Washington law, insurance companies are charged with a heightened duty to defend, which is broader than and independent of the duty to indemnify. *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 759-60, 58 P.3d 276 (2002). Washington courts have imposed this broad duty to defend on insurance companies in recognition that the duty to defend is one of the main benefits of the insurance contract. *Id.* An insurer is relieved of its broad duty to defend only when there is clearly no coverage under the insurance policy. *Id.* Here, Alea breached the duty to defend by denying Café Arizona a defense when the A/B Exclusion did not clearly preclude coverage for a claim of post-assault negligent conduct which occurred separate from and independent of an assault.

First, the plain language of the A/B Exclusion does not clearly exclude coverage. Second, the sole Washington case interpreting an A/B Exclusion only involves pre-assault negligent conduct and does not address the applicability of an A/B Exclusion to claims of post-assault negligent conduct. The majority of other jurisdictions which have addressed the issue have reasoned that post-assault conduct is not excluded by an A/B Exclusion. Additionally, Washington cases, relied upon by Alea, applying a broad interpretation of the phrase “arising out of” are not controlling and/or are distinguishable from the interpretation of the A/B Exclusion at issue here. Finally, Washington’s law on extending liability for circumstances where there are multiple tortfeasors is irrelevant to the interpretation of the Policy for insurance coverage purposes. Accordingly, Alea’s wrongful breach of the Policy in failing to offer a defense in light of the foregoing reasons estops Alea from denying coverage under *Vanport Homes*.

II. ARGUMENT

A. Alea Breached Its Broad Duty to Defend.

Alea incorrectly states that an insurer, in determining a policyholder’s right to a defense against third party claims, must only look to the four corners of the complaint. Br. of Respondent at 23. Washington courts have recognized an insurer’s duty to defend is broader

than and independent of the duty to indemnify. *Vanport Homes, Inc.*, 147 Wn.2d at 760-1. Accordingly, insurers have a heightened duty to construe the complaint liberally in favor of the insured (in accordance with Washington's adoption of liberal rules of notice pleading) and the duty to defend will arise based on the potential for liability. *See id.* (further stating that if the complaint is ambiguous, it will be liberally construed in favor of triggering the insurer's duty to defend). Only if the alleged claim is clearly not covered by the policy is the insurer relieved of its broad duty to defend. *Id.* If coverage is not clearly excluded, the insurer must investigate the claim and give the insured the benefit of the doubt in determining whether the insurer has an obligation to defend. *Id.*

Similar to other jurisdictions, Washington has adopted the estoppel doctrine with respect to an insurer's broad duty to defend. The estoppel doctrine essentially provides that when an insurer is presented with a claim, where there is some level of uncertainty whether coverage exists under the policy, the insurer may not simply refuse to offer a defense to its insured based on the belief that no coverage exists, but must either defend the lawsuit under a reservation of rights or seek a declaratory judgment that there is no coverage. *See Vanport* 147 Wn.2d at 759-61. If the insurance company fails to offer a defense or seek a declaratory judgment and is found to have wrongfully breached the insurance policy by refusing

to provide a defense, the insurance company is estopped from raising any policy defenses, even if such defenses may have otherwise been successful. *Id.*

Because Washington only has one case interpreting an A/B Exclusion, which is limited to pre-assault negligent conduct, and numerous out-of-state cases have held A/B Exclusions do not apply to preclude coverage for claims involving post-assault conduct, similar to the claim here, it was, at a minimum, unclear as a matter of law that the claim against Café Arizona for its alleged post-assault negligence was precluded from coverage under the Policy. Contrary to Alea's assertion, the A/B Exclusion did not clearly apply to preclude coverage for the claims of post-assault negligence because the injuries allegedly caused by Café Arizona did not clearly "arise out of" the assault as discussed in Section II, Parts B and C below. Instead, the post-assault conduct occurred separately and independently from the assault and allegedly caused injuries separate and divisible from the assault-caused injuries and/or aggravated those injuries. (CP 83-91). Furthermore, the insurer bears the burden of establishing that a claim is excluded from coverage. *Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, 126 Wn.2d 50, 71, 882 P.2d 703 (1994). At a minimum, Alea was required to both provide a defense and

to investigate more fully than it did regarding the facts related to the alleged post-assault conduct and injuries. It did neither.

Because coverage was not clearly excluded under the broad duty to defend articulated in *Vanport Homes*, Alea was required to give Café Arizona the benefit of the doubt and to either meet its duty to defend under a reservation of rights or initiate a declaratory judgment action. Alea did neither. Accordingly, Alea wrongfully refused to offer Café Arizona a defense and is estopped from raising any defenses to coverage.

B. The Plain Language of the A/B Exclusion Does Not Clearly Exclude Coverage of Post-Assault Negligent Conduct.

The criteria for interpreting an insurance policy in Washington is well settled: insurance policies are contracts and courts must consider the plain language of the policy as a whole and give it a “fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.” *Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005). Contrary to Alea’s conclusory statement, the plain language of the Policy’s A/B Exclusion does not exclude coverage for any claim that “follows from” or “proceeds as a result of” an assault and/or battery, but only excludes claims which “arise out of” an assault and/or battery. Thus, the plain language of the

A/B Exclusion does not clearly exclude coverage for claims of post-assault negligent conduct which occurs separately from the assault.

Specifically, Part A¹ of the A/B Exclusion excludes claims arising out of an assault and/or battery regardless of degree of culpability or intent and whether committed by the insured or an agent of the insured. Part B² excludes coverage for claims arising out of any actual or alleged negligent act related to the employment, retention, or supervision of a person which results in assault and/or battery. Part C³ of the A/B Exclusion excludes claims arising out of any actual or alleged negligent act or omission in the prevention or suppression of an assault and/or battery..

Part B and Part C clearly and unambiguously relate only to pre-assault conduct. Thus, Alea can only rely on Part A to exclude coverage for post-assault conduct. However, if the language in Part A is such a comprehensive exclusion, as suggested by Alea to clearly preclude

¹ Part A of the A/B Exclusion specifically provides: "This 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 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." (CP 62).

² Part B of the A/B Exclusion specifically provides: "This insurance does not apply to any claim arising out of 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." (CP 62).

³ Part C of the A/B Exclusion specifically provides: "This insurance does not apply to any claim arising out any actual or alleged negligent act or omission in the prevention or suppression of any act of Assault and/or Battery." (CP 62).

any claim arising out of an assault and/or battery, then it would not have been necessary for Alea to have included Part B and Part C to clarify that the A/B Exclusion excluded claims for negligent employment practices and acts of negligence in failing to prevent or suppress an assault and/or battery. Because the phrase “arising out of an assault and/or battery” cannot by itself clearly preclude coverage for all types of claims, Alea included additional language in its A/B Exclusion to make it clear the A/B Exclusion applied to pre-assault conduct. Significantly, Alea did not include any additional language with respect to post-assault conduct.

A reading of the Policy as a whole, including Parts A, B, and C, by the average person would not envision coverage would be excluded for ordinary acts of post-assault negligent conduct occurring separate from an assault. Notably, the plain language of Alea’s A/B Exclusion does not include the additional policy language set forth in *Proshee v. Shree, Inc.*, 893 So.2d 939, 941-2 (La. Ct. App. 3rd Cir. 2005), which explicitly excluded coverage for specific conduct that “follows from” or “proceeds as a result of” an assault and/or battery. Br. of Appellants at 22. Therefore, contrary to Alea’s assertion, the plain language of the A/B Exclusion does not clearly exclude all claims that “follow from” or “proceed as a result of” an assault and/or battery. At most, the plain language of the Policy’s A/B Exclusion is ambiguous as to whether it

excludes claims for post-assault negligent conduct committed independently from the assault. Such ambiguity should be construed against the insurer; therefore, as discussed in Section II, Part A above, Alea wrongfully refused to offer Café Arizona a defense because coverage was not clearly excluded by the A/B Exclusion.

C. **McAllister Does Not Apply to Clearly Preclude Coverage of a Claim for Post-Assault Negligence.**

Contrary to Alea's assertion that Washington law is clear regarding the interpretation of an A/B Exclusion based on *McAllister v. Agora Syndicate, Inc.*, the court in *McAllister* explicitly acknowledged the interpretation of an A/B Exclusion was "an issue of first impression in Washington" and relied upon the reasoning of "several cases from other jurisdictions in which courts found nearly identical assault and battery exclusions to be applicable to claims similar to *McAllister's*." 103 Wn.App. 106, 110, 11 P.3d 859 (2000). At the time Café Arizona tendered its claim for a defense in the Dorsey Lawsuit, there was no controlling authority in Washington regarding the interpretation of an A/B Exclusion with respect to post-assault negligent conduct. *McAllister's* holding necessarily is limited to its facts, which involved only allegations of pre-assault conduct.

Claims for injuries caused by pre-assault negligence have been held to “arise out of an assault and/or battery” because such claims require the insured to prove duty, breach, causation, and harm, such that the assault must be established to show harm as part of the claimant’s cause of action. Therefore, the pre-assault negligence claims (i.e. claims for negligent hiring, negligent supervision, negligent failure to prevent the assault, etc.) are “based on” an assault such that without first establishing the assault, negligence cannot be proved as set forth under *McAllister’s* “but for” analysis.

Recognizing the ambiguity in the phrase “arising out of,” insurance companies have clarified the application of the A/B Exclusion by specifically including provisions in A/B Exclusions to address claims of pre-assault negligence, as Alea has done in Part B and Part C of the Policy. Other insurers have clarified the application of the A/B Exclusion to address claims of post-assault conduct. *Proshee*, 893 So.2d at 941-2. However, Alea did not include language regarding post-assault conduct in its A/B Exclusion.

Courts facing claims for post-assault negligence (i.e. post-assault conduct by a party acting independently from the assailant that causes additional injuries following the assault) have addressed the application of an A/B Exclusion and noted the “but for” test (used in *McAllister*) is

unsound when applied to claims of post-assault negligence. *See e.g. Western Heritage Ins. Co. v. Dean*, 55 F.Supp.2d 646, 651 (1998). Courts have recognized the “but for” test can extend to near infinity and result in a preclusion of coverage for claims traditionally covered by general liability policies merely because an assault occurred in the sequence of events. *Id.* Accordingly, courts have reigned in the broad application of the “but for” test when addressing claims of post-assault negligence to hold such claims do not “arise out of” the assault and/or battery since the conduct occurs separate and independent of the assault. *Id.*

Given the lack of Washington authority regarding the interpretation of an A/B Exclusion to post-assault negligent conduct, the Court should look to other jurisdictions for guidance on applying an A/B Exclusion to such conduct. Other jurisdictions have held an A/B Exclusion does not apply to clearly preclude coverage for claims involving allegations of post-assault conduct that occurs separately and independent from other conduct preceding an assault. *See Western Heritage*, 55 F.Supp.2d at 650-51 (recognizing there are circumstances where there is an intervening act of negligence that ends the “but for” analysis, especially when there is an injury separate from any assault-caused injuries and such injury is inflicted by the negligent conduct of a party acting independently

from the assailant);⁴ *Bucci v. Essex Ins. Co.*, 393 F.2d 285, 290 (1st Cir. 2005) (applying Maine law);⁵ *United Nat'l Ins. Co. v. Penuche's, Inc.*, 128 F.3d 28, 30 (1st Cir. 1997) (applying New Hampshire law).⁶

For this reason alone, post-assault conduct, as alleged in Dorsey's Complaint, was not clearly excluded so as to justify a denial of a defense under Washington's broad duty to defend, especially in light of the limitations of the holding in *McAllister* to claims of pre-assault conduct and the reasoning of cases from other jurisdictions, both of which were brought to Alea's attention at the time Café Arizona tendered its claim for a defense.

Further, Alea only cites one case from another jurisdiction analyzing a claim for injuries caused by conduct separate from an assault. Br. of Respondent at 35, citing *Britamco Underwriters, Inc. v. Logue's Tavern*, 1995 U.S. Dist. LEXIS 17954 (E.D. Pa. 1995). Although

⁴ The court specifically considered and rejected *Canutillo v. National Union Fire Ins. Co.*, 99 F.3d 695 (5th Cir. 1996) to permit a claim for post-assault conduct which occurred separately and independently from the assault and could be proved without having to establish the specific details of the assault.

⁵ The court refused to extend the "cause in fact" or "but for" analysis to Bucci's claims of post-assault negligence "where the conduct of the employees of [the insured] after the attack caused identifiable injury separate in kind from the injuries from the attack or a worsening of the injuries from the attack."

⁶ Reliance upon *Penuche's* is appropriate because it does not make a difference whether a claimant also asserts a cause of action for injuries sustained from the assault so long as there is a valid claim for injuries caused by the insured's conduct that, although

Britamco involves facts similar to Café Arizona’s claim, the case is a 1995 unpublished decision from Pennsylvania District Court and several cases since *Britamco* have arrived at a contrary determination to reign in the broad “arising out of” language of an A/B Exclusion when faced with claims for conduct inflicted separately from an assault. The fact that *Britamco* is unpublished warrants strict scrutiny from the Court. Not only is the decision unsuitable for citation as controlling authority in Pennsylvania because the district court declined to publish the decision, but its inclusion as Alea’s sole authority in the context of applying an A/B Exclusion to claims of post-assault conduct is indicative of the weakness of Alea’s argument. Although Alea’s citing of *Britamco* does not technically violate of RAP 10.4(h) (which prohibits citation of an unpublished opinion from the Washington Court of Appeals) it certainly has violated the spirit of RAP 10.4(h) and the Court should give *Britamco* no weight of authority.

D. “Arising Out of An Assault and/or Battery” May Be Construed as an Ambiguous Policy Provision.

Although Washington courts have held the phrase “arising out of” is unambiguous in specific contexts when interpreting an insurance policy

occurring after an assault, were inflicted separate and independent of the assailant’s conduct, sufficient to constitute an intervening act of negligence.

exclusion, several courts have also held the phrase may be ambiguous depending on the specific facts at hand. In *Quadrant Corp.*, 154 Wn.2d at 181, the court noted the “absolute pollution exclusion clause can be ambiguous with regard to the facts of one case but not another” and further noted “contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts.” In *Kent Farms, Inc. v. Zurich Ins. Co.*, the Washington Supreme Court held the phrase “arising out of . . . the actual, alleged, or threatened discharge, dispersal, seepage, migration, release, or escape of pollutants” was ambiguous under the specific facts of the case because the pollution exclusion could be read either as excluding any injury involving fuel or excluding only traditional environmental harms. 140 Wn.2d 396, 401-2, 998 P.2d 292 (2000).

In *McMahan & Baker v. Continental Casualty Co.*, the court determined the phrase “arising out of cost estimates” in the insurance policy exclusion might not be ambiguous where the gravamen of a complaint is for errors in calculating costs by specifying an improper quantity of materials or by making an improper determination of component costs. 68 Wn.App. 573, 579, 843 P.2d 1133 (1993). However, in the context of alleged errors in engineering analysis, the phrase was held to be ambiguous. *Id.* Contrary to Alea’s argument, because the court

in *McMahan* found the phrase “arising out of cost estimates” was susceptible of two different interpretations, it held the exclusion was ambiguous and must be construed against the insurance company and in favor of the insured. *Id.* at 580.

The Court of Appeals in *McMahan* recognized the phrase “arising out of” had been construed as unambiguous and to mean “originating from” or “flowing from”, but held the facts of the insured’s claim did not “originate from” or “flow from” providing cost estimates; therefore, the policy exclusion was ambiguous. *Id.* Similarly, the facts regarding Café Arizona’s claim do not indicate the claim for injuries caused by Café Arizona, acting separate and independent from the assailant, “flowed from” or “originated from” the assault, but rather originated from an independent act of negligence by Cafe Arizona.

Similar to *Kent Farms* and *McMahan*, the most Alea can argue is that the phrase “arising out of an assault and/or battery” is susceptible to two reasonable interpretations, one of which is that the A/B Exclusion does not apply to preclude coverage if, as here, a claimant suffers additional injuries caused by the insured’s independent act of negligence – where the claimant was involved in an altercation off-site from the insured’s premises at a neighboring business; wanders outside with visible

assault-inflicted injuries; is placed inside the insured's premises; and is subsequently removed from the insured's premises and left outside.

Certainly, the claimant could bring a lawsuit solely against the insured for the injuries caused by the insured's negligent conduct in removing the injured patron from the premises for which the insured would be held liable. In such a lawsuit, the claimant would not need to prove the facts regarding the off-site altercation, but would only need to prove the insured's negligent conduct caused him or her to suffer injuries he or she would not otherwise have sustained absent the insured's negligence. This is precisely the reasoning applied by out-of-state authorities presented above. *E.g., Bucci*, 393 F.2d at 290. This reasoning especially holds true where the A/B Exclusion contains language addressing pre-assault negligent conduct and is silent as to post-assault conduct.

From the plain language of the A/B Exclusion in Alea's Policy, one can infer Alea specifically intended not to exclude claims of post-assault conduct. At a minimum, a clear ambiguity was created when the A/B Exclusion is construed in the context of a claim for post-assault conduct. Thus, the A/B Exclusion must be construed against Alea as the drafter of the insurance contract and in favor of finding coverage for Café Arizona.

E. Toll Bridge Authority and Krempl and Are Not Controlling Authority.

Contrary to Alea's contention that *Toll Bridge Authority v. Aetna Ins. Co.*, 54 Wn.App. 400, 773 P.2d 906 (1989) and *Krempl v. Unigard Security Ins.*, 69 Wn.App. 703, 850 P.2d 533 (1993) are instructive with respect to the interpretation of the phrase "arising out of" in an A/B Exclusion, the two cases are distinguishable and are not controlling authority.

1. The Efficient Proximate Cause Rule Does Not Operate to Exclude Coverage.

Although Washington courts have held the efficient proximate cause rule⁷ does not preclude coverage for a loss caused by an unbroken sequence of events involving both excluded conduct and covered conduct where the policy exclusion includes the phrase "arising out of," Washington courts have also held the converse of the efficient proximate cause rule will not apply to exclude coverage. In *Key Tronic Corp., Inc. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wn.2d 618, 626, 881 P.2d 201 (1994), the Washington Supreme Court rejected the insurance

⁷ The efficient proximate cause rule provides that where a peril specifically insured against sets other causes into motion which, in an unbroken sequence between the act and final loss, produce the result for which recovery is sought, the loss is covered, even though other events within the chain of causation are excluded from coverage. *Graham v. Public Employees Mut. Ins. Co.*, 98 Wn.2d 533, 538, 656 P.2d 1077 (1983) (emphasis added).

company's reasoning (similar to Alea's argument) that the converse of the efficient proximate cause rule should apply "where an excluded act sets into motion a causal chain, coverage should be precluded as to all the causal events in the chain." The court noted insurance policies should generally be construed in favor of coverage and adopting the converse of the efficient proximate cause rule would operate in favor of no coverage. *Id.*

Contrary to the holding in *Key Tronic*, Alea cites *Hocking v. British America Assurance Co.*, 62 Wn. 73, 113 P. 259 (1911) for the proposition that the converse of efficient proximate cause rule should apply to preclude coverage. Br. of Respondent at 19. In *Hocking*, the insurance policy covered claims against loss or damage by fire, but included an exclusion for losses caused directly or indirectly by order of civil authority. *Id.* at 74. The board of health ordered fumigation of the insured's home, which resulted in a fire and the court held the exclusion applied because the board's order was the "preponderating cause of the fire" and "there was no intervening cause." *Id.* at 75. Unlike *Hocking*, however, there is a significant intervening cause here: Dorsey was injured by the assailant's conduct; following the assault, Dorsey was placed inside Café Arizona's nightclub; thereafter, Dorsey was negligently removed from the premises by Café Arizona and sustained additional injuries.

Accordingly, Café Arizona's negligent conduct, not the assailant's conduct, was the preponderating cause of Dorsey's additional injuries. Although the assault occurred, it did not cause additional injuries, but rather it was the alleged separate and independent negligent conduct by Café Arizona that produced the injuries. Therefore, *Hocking* is distinguishable and not persuasive authority that the converse of the efficient proximate cause rule should be applied here.

2. *Toll Bridge Authority* and *Krempl* Are Factually Distinguishable.

Toll Bridge Authority and *Krempl* do not control here for another reason. The insureds in *Toll Bridge Authority* and *Krempl* argued the courts should apply the efficient proximate cause rule and/or joint causation rule⁸ to permit a finding of coverage where there was a loss caused by excluded conduct and covered conduct. *Toll Bridge Authority*, 54 Wn.App. at 405; *Krempl*, 69 Wn.App. at 705. Both courts refused to apply the efficient proximate cause rule and/or joint causation rule to permit a finding of coverage because they concluded the phrase "arising out of" means "originated from" or "flowed from" which precludes any causation analysis. *Id.*

⁸ The joint causation rule provides that when an insured risk and an excluded risk jointly cause an accident, that is, "constitute concurrent proximate causes," the insurer is liable so long as one of the causes is covered by the policy. *Krempl*, 69 Wn.App. at 706.

However, in both *Toll Bridge Authority* and *Krempf* there was a single loss and the insureds needed the courts to apply the efficient proximate cause rule and/or joint causation rule to find coverage despite the existence of excluded conduct (operation of ferry vessel in *Toll Bridge Authority* and operation of an automobile in *Krempf*). *Id.*

Here, Café Arizona is not requesting the Court to apply the efficient proximate cause rule or the joint causation rule to find coverage for the claim of post-assault negligence. This is because two separate losses are involved here. There is the first loss for injuries from the assault, which is conduct likely excluded by the A/B Exclusion, along with associated acts of negligence which can be construed as also causing the first loss (i.e. negligent supervision, negligent failure to suppress the assault). (CP 83-91). Then, there is another loss separate and divisible from the first loss for assault injuries, which occurred after the assault and was inflicted by conduct separate and independent of the assault. (CP 83-91). In other words, Café Arizona is not asking the court to apply the efficient proximate cause rule or joint causation rule to find coverage because an independent inquiry into the separate and independent conduct and resulting separate injury caused by Café Arizona's post-assault negligence permits a finding of coverage without engaging in a causation inquiry. Thus, *Toll Bridge Authority* and *Krempf* are not instructive here.

3. *Krempf* and *Toll Bridge Authority* Implicate Different Policy Considerations.

Toll Bridge Authority and *Krempf* are further distinguishable because they involved duplicate (overlapping) coverage. *Toll Bridge Authority*, 54 Wn.App. at 403; see *Krempf*, 69 Wn.App. at 705. Both cases implicate the policy consideration that the exclusions at issue were the result of insurers' efforts to avoid duplication of coverage where discrete risks may be identified and insured in accordance with suitable premium rate structures.

Exclusions like those in *Toll Bridge Authority* and *Krempf* are inserted by insurers to eliminate coverage of risks for which insurance is available under another type of liability coverage; that is the fleet policy still provided coverage for the loss even though it was excluded under the liability policy in *Toll Bridge Authority* and an automobile policy would provide coverage for the loss even though it was excluded in the homeowner's policy in *Krempf*. See *Toll Bridge Authority*, 54 Wn.App. at 403; *Krempf*, 69 Wn.App. at 705; see also Appleman on Insurance Law & Practice 2d, §133.3[B][1][c]. Therefore, interpretation and application of such exclusions require courts to consider the policy consideration against duplication of coverage in situations where discrete risks may be identified

and specifically contracted for inclusion in an insurance policy's coverage.

Id.

The scope and purpose of an A/B Exclusion, however, is not to avoid duplication of coverage, but rather to preclude coverage for claims where an assault is the immediate cause of an injury and no more because there is no other type of policy which would overlap to provide coverage and an insured would not be expected to have an additional policy that could insure assault and battery. *See Penuche's Inc.*, 128 F.3d at 32 (court citing *Winnacunnet Coop. Sch. Dist. v. National Union Fire Ins. Co.*, 84 F.3d 32, 35 (1st Cir. 1996)). Therefore, the policy considerations which prompted Washington courts to depart from the general rule of insurance contract interpretation (which is to interpret coverage clauses broadly so as to afford the greatest possible protection to the insured and interpret exclusion clauses narrowly against the insurer) in *Krempl* and *Toll Bridge Authority* are not implicated when interpreting the A/B Exclusion here because there is no risk of duplication of coverage under another type of policy. Absent this concern about duplication of coverage, extension of the reasoning in *Krempl* and *Toll Bridge Authority* to the present facts is unsound because in the context of liability coverage, "by insuring liability for 'bodily injury' and agreeing to cover the insured for the insured's negligence, the insurer agrees to cover the insured for a broader spectrum

of risks.” Appleman on Insurance Law & Practice 2d, §133.3[B][3]. Accordingly, *Krempl* and *Toll Bridge Authority* are inapplicable to the interpretation of the A/B exclusion here.

F. Multiple Tortfeasor Analysis for Determining Liability Is Not Applicable or Persuasive.

Alea’s discussion of Washington’s law on multiple tortfeasors is neither relevant nor persuasive to the Court’s determination of whether there is coverage under the Policy. Br. of Respondent at 20-22. The public policy holding a tortfeasor liable for all damages that reasonably and foreseeably follows tortious conduct serves not only to deter such tortious behavior, but more importantly serves to provide full compensation to the victim, who is not the party in the best position to bear the loss. The rule on multiple tortfeasor liability allows the victim to recover all damages from the initial tortfeasor or from the second tortfeasor who can thereafter pursue the initial tortfeasor for indemnification. The policy underlying the law on multiple tortfeasor liability is significantly different than the policy underlying interpretation of insurance policies. In fact, the policy underlying interpretation of insurance policies is the reverse; that is, to construe exclusions narrowly and in favor of coverage:

In tort cases, the rules of proximate cause are applied for the single purpose of fixing culpability, with which

insurance cases are not concerned. For that purpose, the tort rules of proximate cause reach back of both the injury and the physical cause to fix the blame on those who created the situation in which the physical laws of nature operated. The happening of an accident does not, in itself, establish negligence and tort liability. . . . Insurance cases are not concerned with why the injury occurred or the question of culpability, but only with the nature of the injury and how it happened [for purpose of determining coverage].

Graham, 98 Wn.2d at 537.

Accordingly, the multiple tortfeasor cases cited by Alea regarding the fixing of liability onto the initial tortfeasor are not applicable when determining whether the A/B Exclusion applies to clearly preclude coverage for claims of post-assault negligence. In fact, application of the rule on extending liability for multiple tortfeasors to exclude insurance coverage here, as proposed by Alea, is contrary to the tort policy of compensating victims of tortious conduct. Excluding coverage under such a rule potentially results in tort victims going uncompensated because insureds may have not sufficient funds with which to pay the victim's damages. Alea's attempt to interject the multiple tortfeasor rule is a red herring and speaks volumes about the strength of its case.

G. Alea's Failure to Respond to Café Arizona's Request for Reconsideration of the Coverage Decision Based Upon the Amended Complaint Constituted a Violation of Washington's Consumer Protection Act and Fair Claims Settlement Regulations.

Alea does not dispute that it did not provide a written response to Café Arizona's July 2005 request for reconsideration of the defense and coverage determination. *See* Br. of Respondent at 40-42. This admitted failure to provide a written response violated WAC 284-30-330(2), WAC 284-30-360(1), and WAC 284-30-360(3), which also constitutes a violation of Washington's Consumer Protection Act, Chapter 19.86 RCW, as a matter of law.

H. Café Arizona Is Entitled to Attorneys' Fees if It Prevails.

Alea does not dispute that if Café Arizona shows it was entitled to either a defense or coverage (by estoppel or otherwise) or both, Café Arizona will be entitled to its attorneys' fees. Alea also does not deny that Café Arizona will be entitled to its attorneys' fees if it shows Alea violated Washington's Fair Claims Settlement Regulations and the Consumer Protection Act. Thus, should Café Arizona prevail here, it is entitled to an award of its attorneys' fees.

III. CONCLUSION

Washington law imposes upon insurance companies a broad duty to defend based upon the potential for coverage. In other words, so long

as coverage is not clearly precluded, an insurance company is required to provide its insured with a defense. Here, Alea failed to meet its broad duty to defend because Washington law did not clearly apply to exclude coverage for claims of post-assault negligent conduct, especially in light of the plain language of the A/B Exclusion. The only Washington case interpreting an A/B Exclusion was limited to claims involving pre-assault conduct. Other jurisdictions interpreting A/B Exclusions with respect to post-assault conduct have permitted coverage. Based on the lack of clear authority applying the A/B Exclusion to preclude coverage for claims of post-assault conduct, Alea was not relieved of its broad duty to defend. At a minimum, Alea should have defended under a reservation of rights or sought immediate declaratory relief. Alea did neither. Accordingly, Alea's wrongful breach of the insurance contract estops it from denying coverage.

RESPECTFULLY SUBMITTED this 9th day of
June, 2006.

MONTGOMERY PURDUE
BLANKINSHIP & AUSTIN PLLC

By Sandy K. Lee
Scott B. Easter
WA State Bar No. 5599
Paul J. Miller
WA State Bar No. 28411
Sandy K. Lee
WA State Bar No. 35463
5500 Columbia Center
701 Fifth Avenue
Seattle, WA 98104-7096
(206) 682-7090
Attorneys for Appellants

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 June 9, 2006, I served a true and correct copy of this document, REPLY BRIEF OF APPELLANTS, on the party and in the manner listed below:

J.C. Ditzler
Molly K. Siebert
Cozen O'Connor
Suite 5200, Washington Mutual Tower
1201 Third Avenue
Seattle, WA 98101-3071
Attorneys for Respondent, Alea London, Ltd.

- Via Facsimile
 Via U.S. Mail
 Via Legal Messenger

DATED this 9th day of June, 2006, at Seattle, Washington.



Patty Friedman

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