

57181-8

57181-8

80753-1

NO. 57181-8-I
King Cause No. 05-2-17163-4 KNT

COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

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

Plaintiffs/Appellants,

v.

ALEA LONDON, LTD., a foreign corporation,

Defendant/Respondent.

BRIEF OF RESPONDENT

J.C. Ditzler, WSBA No. 19209
Melissa O'Loughlin White, WSBA No. 27668
Molly K. Siebert, WSBA No. 35474
COZEN O'CONNOR
1201 Third Avenue, Suite 5200
Seattle, WA 98101-3071
(206) 340-1000
Attorneys for Defendant/Respondent
Alea London, Ltd.

FILED
COURT OF APPEALS DIV. I
2006 MAY 12 PM 4:43

ORIGINAL

Table of Contents

	<u>Page</u>
I. INTRODUCTION	1
II. ISSUES.....	1
1. Did the trial court properly conclude that a claim of exacerbation of assault-derived injuries immediately following an assault “arises out of” the assault?	1
2. Where the Policy’s Assault and Battery Exclusion bars coverage for any claims that “arise out of” an assault, and all claims against Café Arizona “arose out of” an assault, did the trial court properly conclude that Alea did not have a duty to defend Café Arizona?.....	1
3. Where Washington law requires an insurer to examine the allegations of the complaint in determining the duty to defend, and the allegations of the complaint against Café Arizona clearly did not trigger a duty to defend, did the trial court properly conclude that Alea’s refusal to defend Café Arizona was not in bad faith?	1
4. Where the Policy’s Assault and Battery Exclusion bars coverage for any claims that “arise out of” an assault, and all claims against Café Arizona “arose out of” an assault, did the trial court properly conclude that Alea could not have a duty to indemnify Café Arizona?	2
5. Should Café Arizona’s request for an award of attorney fees be denied?	2
III. COUNTER STATEMENT OF THE CASE	2
A. The Assault and Battery Exclusion in the Alea London Policy.....	2

B. The Dorsey Litigation	4
C. Coverage Determination	5
D. Café Arizona’s Suit Against Alea	7
E. Amended Complaint in the Dorsey Litigation	8
F. Cross-Motions for Summary Judgment	9
G. Trial Court’s Ruling on Summary Judgment: No Duty To Defend or Indemnify As A Matter Of Law.....	10
IV. ARGUMENT	11
A. Summary Judgment Standard and Applicable Insurance Contract Interpretation Principles Confirm That Dismissal Was Required	11
B. Alea Properly Declined to Defend Café Arizona: All Claims Asserted In the Dorsey Litigation Arose From An Assault and Battery	12
1. McAllister Confirms the Applicability of an Assault and Battery Exclusion	13
2. Washington Courts Have Held The Phrase “Arising Out Of” Is Unambiguous and Has Broad Application.....	15
3. Washington Courts Have Explicitly Rejected the Joint Causation Rule When An Exclusion Uses the Phrase “Arising Out Of.”	17
4. Washington Law On Multiple Tortfeasors Demonstrates That Any Claim Based On Post-Assault Negligence Arose Out Of the Assault.....	20
5. Information from Outside the Four Corners of the Complaint Confirmed There Was No Duty to Defend	23
6. Out of State Authority Cited By Café Arizona Is Not On Point	25

C. Alea’s Refusal to Defend Café Arizona Was In Good Faith.....	38
D. Alea Has No Obligation To Indemnify Café Arizona.....	41
E. Café Arizona Is Not Entitled To An Award Of Attorney Fees	43
V. CONCLUSION	44

Table of Authorities

	<u>Page</u>
Cases	
<u>Adams v. Allstate Ins. Co.</u> , 58 Wn.2d 659, 364 P.2d 804 (1961)	20
<u>Allstate Ins. Co. v. Bowen</u> , 121 Wn. App. 879, 91 P.3d 897 (2004)	12
<u>Allstate Ins. Co. v. Watts</u> , 811 S.W.2d 883 (Tenn. 1991)	29
<u>Britamco Underwriters, Inc. v. Logue's Tavern</u> , 1995 U.S. Dist. LEXIS 17954 (E.D. Pa. 1995)	35, 37
<u>Bucci v. Essex Ins. Co.</u> , 393 F.3d 285 (1st Cir. 2005)	27, 28
<u>Canutillo v. Nat'l Union Fire Ins. Co.</u> , 99 F.3d 695 (5th Cir. 1996)	35
<u>Doyle v. Nor-West Pac. Co.</u> , 23 Wn. App. 1, 594 P.2d 938 (1979)	22
<u>Everett v. American Empire Surplus Lines Ins. Co.</u> , 64 Wn. App. 83, 823 P.2d 1112 (1991)	11, 17
<u>Felice v. St. Paul Fire & Marine Ins. Co.</u> , 42 Wn. App. 352, 711 P.2d 1066 (1985)	39
<u>Graham v. Public Employees Mut. Ins. Co.</u> , 98 Wn.2d 533, 656 P.2d 1077 (1983)	19
<u>Hayden v. Mutual of Enumclaw Ins. Co.</u> , 141 Wn.2d 55, 1 P.3d 276 (2002)	12, 13, 23
<u>Hocking v. British America Assurance Co.</u> , 62 Wn. 73, 113 P. 259 (1911)	19

<u>Isaacson Iron Works v. Ocean Acc. & Guar. Corp.</u> , 191 Wn. 221, 70 P.2d 1025 (1937)	41
<u>Krempl v. Unigard Security Ins.</u> , 69 Wn. App. 703, 850 P.2d 533 (1993)	17, 18, 28, 30, 37
<u>Ledbetter v. Concord General Corp.</u> , 665 So.2d 1166 (La. 1996).....	32, 33
<u>Lindquist v. Dengel</u> , 20 Wn. App. 630, 581 P.2d 177 (1978)	20, 21, 22
<u>McAllister v. Agora Syndicate, Inc.</u> , 103 Wn. App. 106, 11 P.3d 859 (2000).....	6, 11, 13, 14, 15, 16, 27, 28, 37
<u>McDonald v. State Farm Fire & Cas. Co.</u> , 119 Wn.2d 724, 837 P.2d 1000 (1992)	19
<u>McMahan v. Baker, Inc. v. Continental Cas. Co.</u> , 68 Wn. App. 573, 843 P.2d 1133 (1993)	16
<u>Olympic Steamship Co., Inc. v. Centennial Ins. Co.</u> , 117 Wn.2d 37, 811 P.2d 673 (1991)	43
<u>Overton v. Consol. Ins. Co.</u> , 145 Wn.2d 417, 38 P.3d 322 (2002)	38
<u>Planet Rock, Inc. v. Regis Ins. Co.</u> , 6 S.W.3d 484 (Tenn. Ct. App. 1999)	28, 29
<u>Safeco Ins. Co. v. JMG Restaurants, Inc.</u> , 37 Wn. App. 1, 680 P.2d 409 (1984)	38
<u>Smith v. Safeco Ins. Co.</u> , 150 Wn.2d 478, 78 P.3d 1274 (2003)	11, 38
<u>Toll Bridge Authority v. Aetna Ins. Co.</u> , 54 Wn. App. 400, 773 P.2d 906 (1989)	15, 16, 17, 18, 20, 37
<u>Truck Ins. Exch. v. Vanport Homes, Inc.</u> , 147 Wn.2d 751, 58 P.3d 276 (2002)	12, 23, 40

<u>United Nat'l Ins. Co. v. Penuche's Inc.,</u> 128 F.3d 28 (1st Cir. 1997)	29, 30, 31
<u>Waite v. Aetna Cas. & Sur. Co.,</u> 77 Wn.2d 850, 467 P.2d 847 (1970)	41
<u>West v. City of Ville Platte,</u> 237 So.2d 730 (La. Ct. App. 1970)	31, 32
<u>Western Heritage Ins. Co. v. Dean,</u> 55 F. Supp. 2d 646 (E.D. Tex. 1998)	6, 33, 34, 35
Statutes	
RCW 19.86.020.....	43
RCW 19.86.090.....	43
Restatement (Second) of Torts, § 457 (1965)	21
Rules	
CR 56(c).....	11

I. INTRODUCTION

This is an insurance coverage dispute in which Appellants American Best Foods, Inc. dba Café Arizona, Myung Chol Seo and Hyun Heui Se-Jeong (collectively “Café Arizona”) seek coverage from their insurer, Respondent Alea London, Ltd. (“Alea”), for claims that arise out of an assault, despite the fact that such claims are clearly and unambiguously excluded by the Assault and Battery Exclusion in the Alea policy at issue. The trial court properly dismissed Café Arizona’s claims on summary judgment, and Café Arizona filed this appeal.

II. ISSUES

1. Did the trial court properly conclude that a claim of exacerbation of assault-derived injuries immediately following an assault “arises out of” the assault?

2. Where the Policy’s Assault and Battery Exclusion bars coverage for any claims that “arise out of” an assault, and all claims against Café Arizona “arose out of” an assault, did the trial court properly conclude that Alea did not have a duty to defend Café Arizona?

3. Where Washington law requires an insurer to examine the allegations of the complaint in determining the duty to defend, and the

allegations of the complaint against Café Arizona clearly did not trigger a duty to defend, did the trial court properly conclude that Alea's refusal to defend Café Arizona was not in bad faith?

4. Where the Policy's Assault and Battery Exclusion bars coverage for any claims that "arise out of" an assault, and all claims against Café Arizona "arose out of" an assault, did the trial court properly conclude that Alea could not have a duty to indemnify Café Arizona?

5. Should Café Arizona's request for an award of attorney fees be denied?

III. COUNTER STATEMENT OF THE CASE

A. The Assault and Battery Exclusion in the Alea London Policy.

Café Arizona is the named insured under Alea London Certificate No. TRB013581, effective from May 8, 2002 to May 8, 2003 (the "Policy"). The Policy provides coverage for bodily injury and property damage that is caused by an occurrence within the policy period; there is no coverage for a pure occurrence absent injury or damage. Moreover, coverage for bodily injury and property damage is limited by the Policy's clearly worded, comprehensive 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 proper 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 negligent act or omission in the prevention or suppression of any act of Assault and/or Battery.

(CP 35, emphasis added). As expressly stated in the Exclusion, the Policy does not provide coverage for any claim that arises out of, follows from, or proceeds as a result of an assault and battery, including claims of negligence.

B. The Dorsey Litigation.

On January 19, 2003, an assault and battery occurred in the parking lot adjacent to Café Arizona's place of business, during which one patron, George Antonio, repeatedly shot another patron, Michael Dorsey. On August 27, 2003, Dorsey filed suit against Antonio and Café Arizona for injuries sustained as a result of the assault and battery, citing Café Arizona's alleged negligence in connection with the shooting (hereinafter the "Dorsey Complaint").

In regard to Café Arizona's conduct after Dorsey was shot, the original Dorsey Complaint contains the following allegation:

5.17 Several security guards carried [Dorsey] into the club, however, the club owner/manager ordered to guards to carry [Dorsey] back outside where the guards dumped him back on the sidewalk.

(CP 245). The rest of the Dorsey Complaint focuses upon the assault, Café Arizona's alleged negligence in preventing the assault, and the injuries stemming from the assault. The subsequent paragraphs provide, in part, as follows:

5.18 [Dorsey] was transported by ambulance to Harborview Hospital for trauma treatment. . . .

5.20 As a result of the savage assault, [Dorsey] suffered serious and life-threatening injuries from which he has sustained serious permanent injuries and disfigurement.

(CP 245 ¶¶ 5.18, 5.20, emphasis added).

C. Coverage Determination.

On September 5, 2003, Café Arizona notified Alea of the Dorsey litigation and requested that Alea provide it a defense. Following a review and assessment of the allegations of the Dorsey Complaint and the terms of the Policy, as required by Washington law, Alea determined that there was no coverage. Accordingly, Alea denied the tender of defense. (CP 260-62). The September 19, 2003 denial letter reminded Café Arizona that the Policy contained a broad Assault and Battery Exclusion, which precluded coverage because absolutely all of the claims asserted in the Dorsey Complaint arose from or out of an assault. See id.

Café Arizona requested reconsideration based on its mistaken belief that the Dorsey Complaint contained an allegation that “Café Arizona personnel or ownership failed to render aid to Mr. Dorsey after he had been shot, which he appears to claim caused him further injuries and damages” and that such allegation was a “separate, covered occurrence, and entitles . . . Café Arizona to indemnification and defense.” (CP 265, 266). The Dorsey Complaint contains no such

language. (CP 241-248). Café Arizona pointed solely to Texas law set forth in Western Heritage Ins. Co. v. Dean, 55 F. Supp. 2d 646 (E.D. Tex. 1998), in claimed support of its position that a claim for failure to render aid is a separate occurrence not excluded by an assault and battery exclusion such as the one in the Alea Policy.

Alea responded to affirm its coverage position and to remind Café Arizona of this Court's holding in McAllister v. Agora Syndicate, Inc., 103 Wn. App. 106, 11 P.3d 859 (2000). Under McAllister, an assault and battery exclusion is properly applied to bar coverage for all claims arising out of an assault and battery, including claims of negligence. In light of this clear statement of Washington law, it was unnecessary to even consider other jurisdictions' treatment of the issue. Nevertheless, Alea noted that, even if Texas law did somehow bear upon the coverage determination, Western Heritage was materially distinguishable: the court's decision focused on the presence of a failure to render aid claim and was heavily fact-specific. Unlike the underlying complaint in Western Heritage, the Dorsey Complaint did not contain a cause of action based upon failure to render aid.¹ Alea's final response

¹ The Dorsey Complaint states the following counts against Café Arizona and Antonio:

to Café Arizona was a letter dated December 19, 2003, which ended by stating: “If you have any further questions, please do not hesitate to contact us.” (CP 276, 277).

D. Café Arizona’s Suit Against Alea.

Nearly 18 months later, in May 2005—two weeks before trial in the Dorsey litigation was originally scheduled to commence²—Café Arizona commenced the instant action against Alea. Despite the Policy’s explicit exclusionary language to the contrary, the Complaint sought coverage for claims arising out of an assault and battery. (CP 1-8). Café Arizona alleged that Alea’s denial of coverage constituted a

VI. NEGLIGENCE OF DEFENDANTS

Plaintiff realleges paragraphs 1 through 5.

6.1 As owners of the business and premise upon which its customer, Michael Dorsey, was attacked and injured, Defendants breached their duties to take reasonable precautions to protect business invitees, including Plaintiff, against criminal conduct despite notice of the potential harm and thereby proximately caused or contributed to the injuries suffered by Plaintiff.

VII. TORTIOUS CONDUCT OF DEFENDANT ANTONIO.

7.1. Defendant Antonio assaulted and battered Plaintiff. He committed the intentional torts of assault and battery by attacking him in the manner described previously on January 19, 2003, causing and contributing to the injuries and damages suffered by Plaintiff.

(CP 247 ¶¶ 6.1, 7.1, emphasis added). Café Arizona’s selective quoting of the Dorsey Complaint improperly suggests that the “dumping” of Dorsey onto the sidewalk was the only factual allegation Dorsey made in support of his claims against Café Arizona. Although even if it had been the only allegation coverage would have been barred by the Assault and Battery Exclusion, the language in the Dorsey Complaint confirms that this was not the case.

² Café Arizona obtained a continuance in the Dorsey action. At the time they filed suit against Alea, however, such continuance had not been granted. (CP 291).

breach of contract, bad faith and violation of the Consumer Protection Act. Id.

Given the passage of time, and Café Arizona's silence since its December 19, 2003 letter, Alea had been under the impression that Café Arizona had accepted the propriety of the denial. It therefore immediately sought to obtain information about the litigation between Dorsey and Café Arizona so as to determine whether that litigation had developed in such a manner so that there may now be a possibility of coverage. (CP 32 at 2, ¶ ¶ 4-6). Nothing learned, not even through conversations with Café Arizona's then counsel, revealed information that would change Alea's coverage determination.

E. Amended Complaint in the Dorsey Litigation.

On July 15, 2005—almost two years after the original Complaint was filed in the Dorsey litigation; 19 months after Alea had rejected Café Arizona's request to apply distinguishable Texas law to a matter already settled by the Policy and Washington's courts; and one day after Alea had filed its Answer to Café Arizona's Complaint—Dorsey provided Café Arizona a copy of a draft Amended Complaint in the Dorsey litigation. (CP 250-58). Café Arizona in turn passed the draft to Alea.

With respect to Café Arizona's alleged conduct after Dorsey was shot, the Amended Complaint had been changed very slightly. It now read:

5.12 Several security guards carried the injured Michael 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 Michael back outside where the gunman was.

(CP 254 ¶ 5.12, emphasis added). On August 1, 2005, Dorsey received leave to file the Amended Complaint.

F. Cross-Motions for Summary Judgment.

On September 2, 2005, Café Arizona and Alea each filed a motion for summary judgment. (CP 122-137, 138-151). Alea's Motion sought dismissal of all claims on the basis that: (1) Alea had no duty to defend Café Arizona under either the original or the amended complaint in the Dorsey litigation, (2) there was no potential for indemnity coverage, and (3) Alea had not acted in bad faith. (CP 138-151). Café Arizona's Motion sought a declaratory judgment regarding the duty to defend only. (CP 122-137).

G. Trial Court's Ruling on Summary Judgment: No Duty To Defend or Indemnify As A Matter Of Law.

On September 30, 2005, the trial court heard oral argument on the parties' cross-motions for summary judgment and issued its ruling. The court denied Café Arizona's Motion for Partial Summary Judgment and Declaratory Judgment, and granted Alea's Motion for Summary Judgment, finding as a matter of law that Alea had no duty to defend or indemnify Café Arizona. The court aptly stated, in part:

I am satisfied that the authority that I have to follow is the McAllister case.

And I am satisfied that even with the issues of . . . when do you tender and how do you handle situations where you can have amended complaints that may give sufficient basis for coverage, in this case, I am satisfied that it is clear direction to me from the Court of Appeals that . . . the 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 Assault and Battery Exclusion].

. . . I am satisfied in the facts in this case, as I understand them, 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 at 2:16-3:12 (emphasis added).

IV. ARGUMENT

A. **Summary Judgment Standard and Applicable Insurance Contract Interpretation Principles Confirm That Dismissal Was Required.**

A motion for summary judgment is properly granted where “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” CR 56(c); Smith v. Safeco Ins. Co., 150 Wn.2d 478, 485, 78 P.3d 1274 (2003). Questions of fact must be determined on summary judgment as a matter of law where reasonable minds could reach but one conclusion. Smith, 150 Wn.2d at 485.

A court may not give an insurance contract a strained or forced construction that would lead to an extension or restriction of the policy beyond what is fairly within its terms. See McAllister v. Agora Syndicate, Inc., 103 Wn. App. 106, 109, 11 P.3d 859 (2000). The parties’ plain agreement must not be rendered ambiguous. See id. at 110; see also Everett v. American Empire Surplus Lines Ins. Co., 64 Wn. App. 83, 87, 823 P.2d 1112 (1991) (“the court may not modify the contract or create an ambiguity where none exists”). The trial court

properly adhered to these principles when it granted Alea's Motion for Summary Judgment.

B. Alea Properly Declined to Defend Café Arizona: All Claims Asserted In the Dorsey Litigation Arose From An Assault and Battery.

In determining whether there is a duty to defend, an insurer must look at the insurance policy and the four corners of the underlying complaint. See Allstate Ins. Co. v. Bowen, 121 Wn. App. 879, 883-85, 91 P.3d 897 (2004). Although an insurer's duty to defend arises when a complaint against the insured, construed liberally, alleges fact that could, if proven, impose liability upon the insured within the policy's coverage, Truck Ins. Exch. v. Vanport Homes, Inc., 147 Wn.2d 751, 760, 58 P.3d 276 (2002), a complaint should not be misconstrued to afford coverage. See id. (if the alleged claims are clearly outside the policy's coverage, then the insurer has no duty to defend); see also Hayden v. Mutual of Enumclaw Ins. Co., 141 Wn.2d 55, 66-67, 1 P.3d 276 (2002) (looking to the "gravamen" of the complaint).³ Notably, an insurer is not required to

³ Specifically, the court stated: "The gravamen of Hayden Farms' complaint is the failure of either Krause's grafts or grafting work to live up to the parties' expectations. The complaint does not assert that there was any physical injury to the tangible property that would render the exclusion inapplicable under either the exclusion's general language or its exception for 'sudden and accidental physical injury.'"

presume the presence of assertions not made in the complaint. See Hayden, 141 Wn.2d at 66-67.

In this case, all claims asserted in the Dorsey complaint—whether the original or amended version—are clearly outside the Alea Policy’s coverage. Washington law confirming this result is plentiful.

1. **McAllister Confirms the Applicability of an Assault and Battery Exclusion.**

The Policy’s Assault and Battery Exclusion bars coverage for all of Dorsey’s claims against Café Arizona. This Court has specifically upheld the validity, and applicability, of an assault and battery exclusion under similar circumstances.

In McAllister v. Agora Syndicate, Inc., 103 Wn. App. 106, 11 P.3d 859 (2000), this Court addressed the applicability of an assault and battery exclusion materially identical to, if not slightly more restricted than, the exclusion contained in the Policy at issue.⁴ This Court found that such an exclusion unambiguously barred coverage for the nightclub

⁴ In McAllister, the policy’s assault and battery exclusion read: “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.” McAllister, 103 Wn. App. at 109. When read in comparison to the Alea Policy at issue, it is clear that the Alea Policy language is even more comprehensive than that in McAllister in that it bars any claim “arising out of” assault and battery.

patron's claim that the nightclub was negligent in failing to prevent the assault. This Court stated that the patron's claim, though couched in terms of negligence, was ultimately "based on" assault and battery in the sense that "without first establishing the underlying assault, negligence cannot be proved." Id. at 111. It therefore found that coverage of the claim was properly denied. Id.

Under the reasoning of McAllister, Washington law is clear: In the face of an assault and battery exclusion, where the operative act giving rise to any recovery is an assault, if no cause of action would exist "but for" the assault, then there is no coverage for injury that results due to an insured's negligence. See McAllister, 103 Wn. App. at 111. Here, every one of these criteria is met: The Policy contains a broad assault and battery exclusion, the operative act or event giving rise to liability exposure is undeniably Antonio's assault on Dorsey, and Dorsey would have had no cause of action against Café Arizona "but for" the assault. There is no coverage, and no duty to defend, for Dorsey's injuries that may have resulted due to Café Arizona's negligence. Alea properly denied coverage based on the Policy's Assault and Battery Exclusion.

Café Arizona place undo emphasis on the fact that McAllister did not specifically address allegations of negligent actions that occurred in response to an assault, as are present in the Dorsey Amended Complaint.⁵ Regardless of whether this Court had an opportunity to address every conceivable claim that could possibly be precluded by an assault and battery exclusion, the standard set forth in McAllister controls. The principles articulated therein require a finding of no duty to defend. Indeed, support for this result becomes even more clear when McAllister is read in conjunction with other Washington cases addressing the definition and use of the phrase “arising out of.”

2. Washington Courts Have Held The Phrase “Arising Out Of” Is Unambiguous and Has Broad Application.

Washington courts have specifically held that the phrase “‘arising out of’ is unambiguous and has a broader meaning than ‘caused by’ or ‘resulted from.’” Toll Bridge Authority v. Aetna Ins. Co., 54 Wn. App. 400, 404, 773 P.2d 906 (1989). The phrase is understood to mean “originating from,” “having its origin in,” “growing out of,” or “flowing from.” See id. Indeed, the phrase has a much broader application than “proximate cause:”

⁵ See, e.g., Br. of Appellants at 10.

To construe “arising out of” as requiring a finding of “proximate cause” . . . does violence to the plain language of the policy. “Arising out of” and “proximate cause” describe two different concepts.

Id. at 407 (holding that, where the policy contains “arising out of” language, “[a] determination of proximate cause is not a necessary precedent to determination of coverage.”).

Here, the Alea Policy unambiguously⁶ precludes coverage for “any claim arising out of . . . Assault and/or Battery.” (CP 35, emphasis added). By definition, any claim that Café Arizona’s actions after the assault exacerbated Dorsey’s injuries—which injuries he sustained as a result of the assault—necessarily “originates from,” “grows of,” or

⁶ Café Arizona argues that the phrase “arising out of” is ambiguous when applied to the facts presented here. See Br. of Appellants at 19-24. Washington law under McAllister and Toll Bridge Authority confirms that is not the case. In McMahan v. Baker, Inc. v. Continental Cas. Co., 68 Wn. App. 573, 843 P.2d 1133 (1993), cited by Café Arizona on page 21 of its brief, this Court held that the phrase was ambiguous as applied to those facts, which are materially distinguishable from the facts at issue here. Indeed, this Court noted that the claim arose out of a covered event: “We agree that the term ‘arising out of’ is not ambiguous However, the facts of this case do not indicate that [the] claim arose out of, that is, originated or flowed from [errors in] providing cost estimates [which would be excluded]. Rather, the claim arose from . . . alleged omissions in failing to pursue certain engineering analyses. The claim was in essence one alleging negligence in basic engineering work, precisely what the policy was designed to cover.” Id. at 579 (emphasis added). This Court’s holding that the phrase was ambiguous as applied was in recognition of the fact that the availability of coverage under an errors and omission policy “should not turn on the particular phrase selected to describe the task” performed. Id. at 579.

“flows from” that assault:⁷ clearly there can be no exacerbation of injury where there is no injury.

3. Washington Courts Have Explicitly Rejected the Joint Causation Rule When An Exclusion Uses the Phrase “Arising Out Of.”

Numerous cases since Toll Bridge have confirmed the broad meaning of the phrase “arising out of.”⁸ Krempf v. Unigard Security Ins., 69 Wn. App. 703, 850 P.2d 533 (1993), is especially instructive. There, plaintiff was injured when the insured tried to remove a burning gas tank from an automobile and threw it to the ground, splashing burning gasoline on plaintiff. The insurer refused to defend plaintiff’s suit based on an exclusion in the homeowner’s policy at issue that precluded coverage for “bodily injury or property damage . . . arising out of . . . the ownership, maintenance, use, loading or unloading of motor vehicles.” Id. at 705. The insured settled with plaintiff and assigned his rights against his insurer.

The plaintiff in Krempf argued that throwing the flaming tank of gasoline was a covered risk independent of the insured’s use or maintenance of the automobile. Plaintiff also argued that the efficient

⁷ See Toll Bridge Authority, 54 Wn. App. at 404.

⁸ See, e.g., Everett, 64 Wn. App. 83.

proximate cause doctrine⁹ would apply. This Court rejected plaintiff's arguments, holding that an efficient proximate cause analysis would not apply to the case, because "the excepted risk . . . set into motion what [plaintiff] contends is a covered risk." Id. at 705-06 (emphasis in original). The efficient proximate cause rule only comes into play if the initial peril is covered. See id.

This Court also rejected plaintiff's request to apply the joint causation rule, which provides that an insurer is liable if an insured risk and an excluded risk jointly cause an accident. This Court held that, although other jurisdictions might reach a different result, "when an exclusion uses the phrase 'arising out of,' the joint causation rule is inapplicable in Washington." Id. at 706 (citing to, among others, Toll Bridge Authority, supra). It thus concluded that the policy at issue excluded the claimed loss as a matter of law. Id. at 707.

This holding is consistent with the general principle in Washington insurance cases that where an unbroken causal chain of events produces the loss, a court must look to the preponderant or

⁹ The efficient proximate cause rule states that where a peril specifically insured against sets other causes into motion which, in an unbroken sequence, 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. See, e.g., Krempf, 69 Wn. App. at 705.

efficient cause of the loss, *i.e.*, the one that set the others in motion, to determine if there is coverage or if an exclusion applies. See, e.g., Hocking v. British America Assurance Co., 62 Wn. 73, 75, 113 P. 259 (1911) (insured's home destroyed in fire that stemmed from fumigation of home on order of civil authority; court held no coverage because policy excluded coverage for loss caused directly or indirectly by order of civil authority); Graham v. Public Employees Mut. Ins. Co., 98 Wn.2d 533, 537-38, 656 P.2d 1077 (1983) (the "immediate physical cause analysis . . . should be discarded"; jury could find Mt. St. Helens eruption was the efficient proximate cause of the mudflows causing the loss); McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 735, 837 P.2d 1000 (1992) (efficient proximate cause only comes into play when initial peril is a covered peril). Applying this principle to the present matter, the assault was clearly the "preponderant or efficient cause of the loss" that "set the others in motion." Thus, coverage is precluded.

**4. Washington Law On Multiple Tortfeasors
Demonstrates That Any Claim Based On Post-Assault
Negligence Arose Out Of the Assault.**

Washington law regarding proximate cause—though not a necessary analytical precedent to determine coverage¹⁰—provides even further support for the fact that all of Dorsey’s claims “arise out of” the assault committed by Antonio, and therefore are not covered under the Policy.

Washington courts have affirmed:

The prevailing rule is that one who has been injured . . . can recover all damages proximately traceable to the primary negligence. This right of recovery extends even to subsequent aggravations whose probability the law regards as a sequence and natural result likely to flow from the original injury.

Lindquist v. Dengel, 20 Wn. App. 630, 633, 581 P.2d 177 (1978) (citation omitted) (emphasis added). Stated another way, “the original tort-feasor is responsible for any exacerbation of the injuries by negligent treatment.” Adams v. Allstate Ins. Co., 58 Wn.2d 659, 669, 364 P.2d 804 (1961). Likewise, a negligent actor who is liable for another’s bodily injury is also subject to liability for any additional bodily harm

¹⁰ Proximate causation analysis is actually more stringent than that required here: “A determination of proximate cause is not a necessary precedent to determination of coverage [in cases involving ‘arising out’ language].” Toll Bridge Authority, 54 Wn. App. at 407.

resulting from normal efforts of third persons in rendering aid, regardless of whether such acts are performed in a negligent manner. See Lindquist, 20 Wn. App. at 632-33 (quoting Restatement (Second) of Torts, § 457 (1965)). Here, the allegation is that Café Arizona’s agents may have exacerbated Dorsey’s gunshot wounds in the moments immediately following his assault. This is a clear example of a continuum of closely related, foreseeable events: Dorsey’s movement after the shooting—whether by Café Arizona’s agents or EMTs—immediately followed from, “grew out of” or “flowed from” that assault in a foreseeable and predictable way.

When there are multiple tortfeasors (here Antonio and, allegedly, Café Arizona or its agents), the second tortfeasor’s actions will only be deemed to supersede the first tortfeasor’s actions if the latter’s acts are unforeseeable:

The intervening negligent act of another will not supersede the original actor’s negligence as a proximate cause of an injury where the original actor should reasonably foresee the occurrence of such an event. . . . Only when the intervening negligence is so highly extraordinary or unexpected that it can be said to fall without the realm of reasonable foreseeability as a matter of law, will it be held to supersede defendant’s negligence.

Doyle v. Nor-West Pac. Co., 23 Wn. App. 1, 6-7, 594 P.2d 938 (1979)
(citations omitted) (emphasis added).

Implicit in these rules is the fact that the resulting exacerbation of injuries arises out of the original tortious conduct. In the instant case, because the Policy's "arising out of" language is broader than and does not equate to "proximate cause," there is no need to determine proximate cause prior to determining whether Dorsey's claims "arise out of" Antonio's assault. It is nevertheless instructive that, under Washington law, the actions of the first tortfeasor, assailant Antonio, would be deemed the proximate cause of Dorsey's exacerbation injuries, despite Café Arizona's alleged negligence, because Café Arizona's alleged negligence was reasonably foreseeable and was a "natural result likely to flow from the original injury." See Lindquist, 20 Wn. App. at 634. Café Arizona's efforts to reach a different result are based on materially distinguishable—and hypothetical—facts. See Br. of Appellants at 20 (setting forth examples in which one "cannot possible reach the conclusion that the [Assault and Battery] exclusion unambiguously precludes coverage").

5. Information from Outside the Four Corners of the Complaint Confirmed There Was No Duty to Defend.

As noted above, in determining a policyholder's right to a defense against third party claims, an insurer must look to the four corners of the complaint. Hayden, 141 Wn.2d at 64. The insurer's duty to look beyond the face of the complaint is only triggered if one of two exceptions exists: (1) coverage is not clear from the face of the complaint but may exist, or (2) the allegations are in conflict with facts known to or readily ascertainable by the insurer or the allegations of the complaint are ambiguous or inadequate. See Vanport Homes, 147 Wn.2d at 761.

Neither of the above exceptions applies here: it was clear from the face of both the original and amended Dorsey Complaints that no coverage existed, there were no inconsistencies between the Complaint and the facts known, and the allegations of the complaint were not ambiguous or inadequate. Despite this, Alea looked outside the four corners to verify there was no potential for coverage; it collected and evaluated information outside the Dorsey Complaint. By doing so, Alea went above and beyond its duties under Washington law. That information only served to confirm that Alea's denial of coverage was—and still is—proper.

As previously noted, from December 2003 to June 2005, Café Arizona did not contact Alea, and Alea reasonably presumed that Café Arizona had accepted the propriety of the denial. Thus, upon receipt of Café Arizona's Complaint against Alea in June of 2005, Alea sought to obtain information about the litigation between Dorsey and Café Arizona so as to determine whether, over the approximately 20 months since Alea had denied coverage, the case had developed in such a manner so that there may now be a possibility of coverage. (CP 32). Specifically, Alea retrieved the docket from the criminal proceedings against Dorsey's assailant, George Antonio; requested and reviewed the State's Trial Brief, the Defense Trial Memorandum, and the Findings and Conclusion Re: Exceptional Sentence; contacted Café Arizona's counsel at the time (who was also defending Café Arizona in the Dorsey litigation) to query as to whether new facts had been revealed via discovery or otherwise that might be material to coverage; and searched the internet for recent news articles relating to the incident. (CP 32). Nothing in the materials reviewed or in the conversations engaged in indicated that there was a possibility of coverage under the Policy. Indeed, to the contrary, Alea's

investigation simply confirmed that Dorsey's claims against Café Arizona arose out of the assault committed by Antonio.

Café Arizona repeatedly asserts that Alea failed to conduct a reasonable investigation, stating that Alea should have "attempted to review documents related to Dorsey's medical treatment" to determine "whether Dorsey incurred injuries separate from or in addition to the injuries caused by the actual assault." See Br. of Appellant at 37-39. Café Arizona's argument is centered, however, on their mistaken belief that claims of post-assault negligence are covered under the Policy. As set forth herein (and in numerous ways and numerous times by Alea since it first received notice of this claim in September 2003), any claims of post-assault negligence that could possibly be created from the facts of the Dorsey Complaint are not covered under the Policy. Thus, although it did in fact do so, Alea had no obligation to look beyond the four corners of the complaint in assessing its duty to defend. The out of state authority cited by Café Arizona does not change this result.

6. Out of State Authority Cited By Café Arizona Is Not On Point.

Café Arizona cites numerous out-of-state cases in claimed support for the proposition that other jurisdictions have concluded that

post-assault negligence constitutes a separate occurrence not precluded by a broadly worded assault and battery exclusion. See, e.g., Br. of Appellant at 12. As a starting point, out of state case law is persuasive authority at best, and it not binding on Washington courts, especially where Washington courts have addressed the issue. Regardless, however, the cases cited by Café Arizona are materially distinguishable from the case at hand and/or contrary to established Washington law. Moreover, the cases do not stand for the proposition that allegations of post-assault negligence can never be excluded by an assault and battery exclusion—some of the cases do not even involve post-assault negligence—and none of the cases create a bright line distinction between pre- and post-assault negligence. Indeed, not one of the cases assesses an allegation of exacerbation of injury such as the one alleged by Dorsey against Café Arizona. Each case is addressed briefly in turn below.

Bucci v. Essex Ins. Co.

Café Arizona frequently cites to Bucci v. Essex Ins. Co.¹¹ and its “line of cases”¹² in support of its arguments that Alea had a duty to defend. Café Arizona ignores the fact that, in order to follow the rule—or result—in Bucci, this Court would have to overturn itself; it would have to reject the “but for” test it explicitly adopted in McAllister.

In Bucci, the plaintiff patron was attacked while waiting outside the insured nightclub. He sued the nightclub alleging that it “failed to take reasonable measures to assist [him] or to prevent the assault” and “assisted the [assailant] by telling him to run inside the nightclub to avoid the [police].” Id. at 288. In assessing whether the insurer’s refusal to defend the nightclub was in error, the court explicitly refused to apply the “but for” test advocated by the insurer. The court acknowledged that the insurer’s argument in favor of the “but for” test was “not frivolous and . . . cases from elsewhere . . . support [the argument],”¹³ but ultimately found that “Maine law does not use the ‘but for’ test” and found “no reason to do so here.” Id. at 291 (emphasis added). Thus,

¹¹ 393 F.3d 285 (1st Cir. 2005) (applying Maine law).

¹² Br. of Appellant at 17.

¹³ 393 F.3d at 290.

because the “but for” test did not apply, it was unclear whether the assault and battery exclusion precluded coverage for post-assault negligence claims, and the insurer had a duty to defend. Again, this Court explicitly adopted the “but for” test in McAllister. Bucci is therefore not persuasive authority, and should not be considered in support of Café Arizona’s arguments.

Planet Rock, Inc. v. Regis Ins. Co.

In Planet Rock, Inc. v. Regis Ins. Co.,¹⁴ the plaintiff patron was involved in an altercation outside the bar that rendered him unconscious. The bar owner placed the patron inside his office, but did not call for medical assistance and the patron died. The bar’s insurer declined to provide a defense. In holding that the refusal was in error, the court did not conduct a “but for” analysis and found ambiguity in the phrase “arising out of.” See id. at 491. Moreover, applying Tennessee law, it followed the concurrent causation doctrine,¹⁵ which, as discussed above, has been explicitly rejected by Washington courts in the face of an exclusion containing the phrase “arising out of.” See, e.g., Krempf, 69 Wn. App. 703. Indeed, the Planet Rock court stated:

¹⁴ 6 S.W.3d 484 (Tenn. Ct. App. 1999).

¹⁵ See id., 6 S.W.3d at 491-93.

We reject the contention that there can be no coverage when the chain of events leading to the ultimate harm is begun by an excluded risk.

6 S.W.3d at 493 (emphasis in original, quoting Allstate Ins. Co. v. Watts, 811 S.W.2d 883 (Tenn. 1991)). These three factors render Planet Rock materially distinguishable from the instant case.

Finally, it must be noted that Café Arizona cites Planet Rock for the proposition that allegations of injuries caused by the insured's post-assault negligence are not clearly excluded by an assault and battery exclusion, but the Planet Rock court did not emphasize any distinction between pre- and post-assault negligence. For all of these reasons, the case should not be considered in support of Appellants' arguments.

United Nat'l Ins. Co. v. Penuche's, Inc.

In United Nat'l Ins. Co. v. Penuche's Inc.,¹⁶ the insured bar employee sought to intervene in an altercation between plaintiff and another patron and placed plaintiff in a "bear hug." This action caused plaintiff to fall backward, injuring his spine. Plaintiff sued the insured, alleging that his injuries resulted from the insured's employee's negligence in carelessly intercepting and restraining him.

¹⁶ 128 F.3d 28 (1st Cir. 1997) (applying New Hampshire law).

In arguing that it had no duty to defend the insured, the insurer maintained that plaintiff's injuries arose out of the altercation with the other patron insofar as that altercation necessitated the insured's "doomed" intervention. The court found that the insured's bear hug constituted a "discrete intervening act of alleged negligence" and noted that the plaintiff's "eventual injuries were not caused by the blows he received in the fight." Penuche's, 128 F.3d at 32.

Penuche's is materially distinguishable from the instant case in that all of the alleged injuries resulted from the bear hug, not the assault. See id. at 32. There was no allegation that the plaintiff had been injured by the assault prior to the bear hug. To the contrary, in the present case, the allegations clearly state that the assault caused Dorsey's injuries, and that Café Arizona's actions exacerbated his injuries. (CP 78 at ¶ 5.20, CP 87 at ¶ 5.12). Café Arizona's post-assault negligence, if any, cannot amount to a "discrete intervening act of negligence." Moreover, even if Café Arizona's actions constituted a separate, concurring cause, because Washington courts have rejected the joint causation rule when an exclusion uses broad "arising out of" language, coverage would be excluded. See Krempf, 69 Wn. App. at 703.

Again, it must be noted that the “bear hug” in Penuche’s occurred during the course of the assault, not after it. Thus, Café Arizona’s claim that Penuche’s somehow supports a pre-assault versus post-assault distinction in assessing coverage under an assault and battery exclusion has no basis.

West v. City of Ville Platte

In West v. City of Ville Platte,¹⁷ plaintiff was stopped by city police officers while driving his vehicle and, “without provocation or legal cause” placed under arrest. When plaintiff asked why he was being arrested and what would happen to his five year old sister left alone in the car, the policemen beat him with security clubs, causing injury. Plaintiff sued the city and its general liability insurer¹⁸ for damages based on unlawful arrest and detention; unreasonable, unprovoked, and illegal beating; unreasonable, unlawful, and excessive use of force; and, after incarceration, failure to render aid or to secure medical attention for him. The insurer moved for summary judgment based on the policy’s exclusion for “accidents arising out of an assault or alleged assault.”

¹⁷ 237 So.2d 730 (La. Ct. App. 1970).

¹⁸ Unlike Washington, Louisiana allows plaintiffs to maintain a direct cause of action against a defendant’s insurer.

In holding that the exclusion did not preclude coverage for all claims, the West court's brief analysis did not address the broad scope of the arising out of language, as is required under Washington law, nor did it apply a "but for" test. See 237 So.2d at 733. West should not, therefore, have any bearing on this Court's application of clearly established Washington law.

Ledbetter v. Concord General Corp.

In Ledbetter v. Concord General Corp.,¹⁹ plaintiff was a guest at the insured motel when an assailant broke into her room and raped her. The assailant then kidnapped plaintiff by ordering her into her car. As they drove out of the motel parking lot, plaintiff managed to jump out of the moving car, sustaining numerous bruises and gashes as a result. Plaintiff sued the insured and the insurer. The insurer contested coverage, relying on the policy exclusion for claims "arising out of Assault and Battery." The court found that the claims for injuries caused by rape were precluded by the exclusion, but that the kidnapping constituted a separate act that did not necessarily involve the intentional use of force and/or violence upon the person of another. Id. at 1170.

¹⁹ 665 So.2d 1166 (La. 1996).

Unlike the present case, Ledbetter involved two distinct claims, which resulted in separately identifiable injuries; the rape did not “set into motion” the kidnapping. It is therefore materially distinguishable, and not persuasive authority.

Western Heritage Ins. Co. v. Dean

Café Arizona’s citations to Western Heritage Ins. Co. v. Dean²⁰—both in the fall of 2003²¹ and now²²—are not persuasive. In Western Heritage, the claimant in the underlying litigation alleged that, while on the insured premises, the decedent was severely beaten by another patron and collapsed to the floor. Instead of calling for medical attention, the employees of the insured bar let decedent lay on the floor. Emergency personnel were not contacted until approximately 50 minutes later, and then only because another patron discovered decedent on the floor. The court found that “the failure to render aid cause of action . . . is separate and independent from the acts excluded under the policy exceptions.”²³ 55 F. Supp. 2d at 650 (emphasis added). It highlighted

²⁰ 55 F. Supp. 2d 646 (E.D. Tex. 1998).

²¹ (CP 264-67).

²² Br. of Appellants at 16, 29, 31, 33.

²³ Dorsey did not make such an allegation against Café Arizona in this case.

the fact that “the tavern employees did nothing to render aid or obtain medical assistance for [the decedent].” Id. at 651.

Despite Café Arizona’s efforts to characterize the court’s holding as one that distinguishes between pre- and post-assault allegations of negligence,²⁴ the Western Heritage decision cannot be read to create coverage based on a temporal distinction. Nowhere did the Western Heritage court hold, or even imply, that acts of negligence after an assault were always independent of and could never arise out of an assault. Nor did it state that such acts would always constitute a separate occurrence. Rather, based on the extreme circumstances of the case before it and the “slippery slope” that could result if the insured’s complete failure to render any aid was not treated as an independent cause of action, the Western Heritage court found the claim was an occurrence separate from the assault. The court’s determination was in acknowledgement of the unusual circumstances of the case before it. Indeed, the court cited to a Fifth Circuit case, applying Texas law, which held that allegations that the insured’s post-assault negligence had exacerbated the underlying claimants’ injuries would not defeat

²⁴ See, e.g., Br. of Appellants at 17.

application of an assault and battery exclusion. See Western Heritage, 55 F. Supp. 2d at 649 (citing Canutillo v. Nat'l Union Fire Ins. Co., 99 F.3d 695 (5th Cir. 1996)).²⁵ Western Heritage cannot, therefore, be read to support Café Arizona's claim that an allegation of post-assault exacerbation of injuries is not excluded by a broadly worded assault and battery exclusion. To the contrary, the Western Heritage court's citation to Canutillo supports the trial court's dismissal here.

Britamco Underwriters, Inc. v. Logue's Tavern

Washington law and the Policy language provide sufficient guidance for this Court to determine the outcome of this case. Should this Court wish to consider out of state authority, however, the law of Pennsylvania provides further persuasive support for the conclusion that Alea's denial was required under the Policy.

In Britamco Underwriters, Inc. v. Logue's Tavern, 1995 U.S. Dist. LEXIS 17954 (E.D. Pa. 1995) the insurer sought a declaration that

²⁵ In Canutillo, the insurer sought declaratory judgment that it had no duty to defend the insured school district against claims arising from a teacher's alleged sexual abuse, including claims that the other teachers' failure to adequately respond to the children's complaints of abuse exacerbated the children's emotional injuries. In holding that the assault and battery exclusion barred coverage for *all* claims, the court noted: "while the teachers' failure to adequately respond to the children's complaints of abuse may have exacerbated the emotional injuries of the children, there clearly would have been no injury at all absent that abuse." 99 F.3d at 705 (cited in Western Heritage, 55 F. Supp. 2d at 649).

it had no duty to defend or indemnify its insured in a state court action that alleged that a tavern patron was assaulted and fatally injured by another patron based on an assault and battery endorsement. Among other things, the decedent in the underlying action stated that the insured was negligent in directing that the decedent be placed outside on the freezing pavement, and in failing to summon medical help, and that this negligence caused decedent to suffer additional injuries.

Accepting the factual allegations as true for purposes of the motion before it, and construing any ambiguities in the policy against the insurer as drafter of the instrument, the Pennsylvania District Court held that the assault and battery endorsement served to bar coverage for all claims, including the allegations of post-assault negligence. Specifically, the court stated:

We are not persuaded that the distinction which the Brickle Plaintiffs urge raises a material issue of fact as to which harm inflicting event produced the injuries causing death. The Brickle Complaint states that Logue's misfeasance, in permitting or directing that the decedent be placed outside on a freezing pavement, and nonfeasance, in not summoning medical help, caused decedent to further suffer injuries from the time he was injured to his death. . . . The assault and battery exclusion is broadly written to preclude coverage for harm that "arises out of" the harmful or offensive contact by Cavella "without regard to . . . whether the acts are

alleged to be by or at the instruction or at the direction of the insured” . . . That language plainly encompasses any harm the decedent suffered as a result of being placed on the pavement. Similarly, it was the shooting, and not Logue’s alleged failure to summon medical help, which caused the decedent’s fatal injuries. Because the assault and battery exclusion encompasses claims sounding in negligence which derive from a precluded event, we conclude that the claims against Logue are not covered.

Logue’s Tavern, 1995 U.S. Dist. LEXIS 17954, at *25-26 (emphasis added, internal citations omitted).

Here, as in Logue’s Tavern, the assault and battery exclusion “is broadly written to preclude coverage for harm that ‘arises out of’” the harmful or offensive contact by Antonio, “without regard to whether the acts are alleged to be by or at the instruction or at the direction of the insured.” That language “plainly encompasses any harm” Dorsey suffered as a result of being moved outside the club. Likewise, it was the shooting, and not Café Arizona’s alleged negligent rendering of aid, which caused Dorsey’s injuries. Because the assault and battery exclusion encompasses claims sounding in negligence which derive from a precluded event, the claims against Café Arizona are not covered. This result is in line with Washington law under McAllister, Toll Bridge Authority, Krempl, and the Policy language at issue here.

C. **Alea's Refusal to Defend Café Arizona Was In Good Faith.**

To succeed on a bad faith claim, the policyholder must show the insurer's breach of the insurance contract was unreasonable, frivolous, or unfounded. Overton v. Consol. Ins. Co., 145 Wn.2d 417, 433, 38 P.3d 322 (2002). In evaluating an insurer's conduct, neither the court nor the trier of fact is permitted to consider evidence and/or testimony developed at a later date and is not permitted to use hindsight to judge an insurer's claims handling conduct. See Safeco Ins. Co. v. JMG Restaurants, Inc., 37 Wn. App. 1, 10, 680 P.2d 409 (1984). If an insurer can point to a reasonable basis for its action, this reasonable basis is significant evidence that it did not act in bad faith. Smith v. Safeco Ins. Co., 150 Wn.2d 478, 486, 78 P.3d 1274 (2003). The insurer is entitled to summary judgment if reasonable minds could not differ that its denial of coverage was based upon reasonable grounds. Id. at 485.

As set forth above, Alea's denial in this case was not only reasonable, it was, and indeed still is, fully supported by Washington law. In light of the foregoing, even assuming *arguendo* this Court were to find that Café Arizona was entitled to a defense of the Dorsey Complaint, Café Arizona's claim for bad faith has no basis. See Felice

v. St. Paul Fire & Marine Ins. Co., 42 Wn. App: 352, 361, 711 P.2d 1066 (1985) (“Denial of coverage due to a debatable question of coverage . . . is not bad faith”).²⁶

Café Arizona’s bad faith argument relies solely on their belief that, if Dorsey “was claiming damages for post-assault injuries,”²⁷ Alea would have had a duty to defend, and that Alea therefore had a duty to conduct additional investigation to verify whether such a claim may be made. See Br. Appellants at 35-39. Alea has made it abundantly clear, however, that, based on the unambiguous facts of the claim, it had no duty to defend against any possible post-assault injuries, as any such injuries would have necessarily arisen out of the assault.

The only conceivable way that post-assault injuries could be deemed covered would be if they were caused by a separate, unrelated occurrence, *i.e.* they did not “arise out of” the excluded event. Here, the Dorsey Complaint contained no allegations of such an occurrence, nor was there evidence from outside the four corners of the Complaint that

²⁶ In addition to showing the insurer’s bad faith, to prevail, the insured must prove, by a preponderance of the evidence: (1) that the insured was injured or damaged by the insurer’s actions; and (2) that the insurer’s bad faith was a proximate cause of the insured’s injury or damage. In this case, because Appellants cannot demonstrate the threshold requirement of bad faith, Alea need not address the remaining requirements.

²⁷ See Br. Appellants at 35, 37, 38, 39.

such allegations could or would be made.²⁸ Alea does not have an obligation to assume the presence of facts not in any way stated or indicated in the Complaint or elsewhere. See, e.g., Vanport Homes, 147 Wn.2d at 760.

Alea repeatedly advised Café Arizona that none of the allegations or information reviewed indicated that Dorsey's injuries did not arise out of the assault. (CP 260-62, 269-71, 276-77). Alea's refusal to be swayed by Café Arizona's erroneous arguments is not evidence of bad faith.²⁹

Café Arizona also claims that Alea did not respond to its July 2005 request for new defense and coverage determinations, citing to the declarations of counsel for Alea,³⁰ despite the fact that neither declaration evidences such a failure. (CP 31-32, 17-18). Moreover, there is no authority to support Café Arizona's implied assertion that Alea is somehow in bad faith for failing to issue yet another written confirmation of its position to Café Arizona—outside of the context of

²⁸ Under the circumstances, Alea was required to view only the facts as alleged within the "four corners" of the underlying Complaint. Because the allegations of the Dorsey Complaint and Amended Complaint are *not* ambiguous, Alea went above and beyond its duties under the law by collecting and evaluating information outside the four corners of the Dorsey Complaint.

²⁹ Because it did not act in bad faith, Alea is not estopped from denying coverage.

³⁰ Br. of Appellants at 37, 38.

the litigation between the parties, and in addition to discovery requests, discovery answers, and pleadings exchanged—after Alea’s coverage determination had been repeatedly communicated to Café Arizona. At the very least, Alea’s submissions in respect to the parties’ cross motions for summary judgment made its position clear.³¹

D. Alea Has No Obligation To Indemnify Café Arizona.

A party claiming benefits under an insurance policy has the burden to bring itself within the terms of the policy before it can establish the insurer’s liability thereon. Waite v. Aetna Cas. & Sur. Co., 77 Wn.2d 850, 853, 467 P.2d 847 (1970) (citing Isaacson Iron Works v. Ocean Acc. & Guar. Corp., 191 Wn. 221, 224, 70 P.2d 1025 (1937)). Here, for all of the reasons set forth above, none of the damages allegedly sustained by claimant Dorsey fall within the coverage available under the Policy. Thus, Alea has no obligation to indemnify Café Arizona.

Café Arizona accurately asserts that “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

³¹ Furthermore, because the alleged failure to reassess coverage occurred after Café Arizona had filed its Complaint against Alea, it cannot be cited as support for the allegations in that Complaint.

underlying lawsuit.” Br. of Appellants at 41 (citations omitted, emphasis added). It necessarily follows that when coverage obligations do not hinge on factual disputes at issue in the underlying lawsuit, summary dismissal of a claim for coverage is inappropriate. To hold otherwise would defeat the purpose of declaratory judgment actions in the context of insurance.

Café Arizona’s assertion that there were material issues of fact in the Dorsey litigation that should have precluded the trial court’s ruling that there was no coverage as a matter of law has no basis. Café Arizona did not, and does not, dispute that there was in fact an assault on Dorsey and that the Policy contains an Assault and Battery Exclusion. Although it might dispute whether its actions contributed to Dorsey’s injuries, this issue is not relevant to Alea’s coverage determination. As set forth at length herein, because none of the facts alleged by Dorsey fall within the Policy’s coverage grant, none of the factual evidence at trial in the Dorsey litigation could have possibly created coverage. The trial court properly ruled that Alea had no duty to indemnify Café Arizona.³²

³² Café Arizona also argues that Alea “is estopped from denying coverage because it breached its duty to defend in bad faith.” Br. of Appellants at 42. As discussed in Section IV. C., supra, Alea’s actions were not in bad faith. Café Arizona’s estoppel argument is without merit.

E. Café Arizona Is Not Entitled To An Award Of Attorney Fees.

Café Arizona is not entitled to an award of attorney fees. Attorney fees are only available under Olympic Steamship Co., Inc. v. Centennial Ins. Co. where the insurer compels the insured to assume the burden of legal action to obtain the full benefit of his insurance contract. 117 Wn.2d 37, 53, 811 P.2d 673 (1991).

Here, no coverage exists. Alea properly denied Café Arizona's request for defense and indemnity. Thus, Café Arizona has obtained the full benefit of its insurance contract, and it cannot recover its fees.

Likewise, Café Arizona cannot recover its fees under RCW 19.86.090. That statute provides that "Any person who is injured in his or her business or property by a violation of RCW 19.86.020 . . . may . . . recover . . . reasonable attorney's fees." RCW 19.86.090 (emphasis added). As set forth in Section IV. C., supra, Alea has not violated any provisions of the Washington Administrative Code. Even assuming *arguendo* that Alea did engage in a technical violation by failing to submit a written response outside the context of the coverage litigation to Café Arizona's July 2005 requests for reconsideration, as Café Arizona

alleges, Café Arizona was not injured by that alleged violation. The fact remains that there is no duty to defend nor indemnify under the Policy.

V. CONCLUSION

All of the allegations in the Dorsey Complaint—whether pre- or post-assault—“arise out of” an assault; the Policy’s Assault and Battery Exclusion unambiguously serves to bar coverage for each and every claim that Dorsey asserted against Café Arizona. The trial court properly found that reasonable minds could reach but one conclusion, and that Alea is entitled to judgment as a matter of law on all the claims against it. Alea respectfully requests that this Court adhere to established Washington law, decline Café Arizona’s invitation to rewrite the terms of the parties’ contract pursuant to distinguishable out-of-state law, and affirm the trial court’s order granting Alea’s Motion for Summary Judgment.

DATED: May 12, 2006

COZEN O'CONNOR



J.C. Ditzler, WSBA No. 19209
Melissa O'Loughlin White, WSBA No. 27668
Molly K. Siebert, WSBA No. 35474
COZEN O'CONNOR
1201 Third Avenue, Suite 5200
Seattle, WA 98101-3071
(206) 340-1000
Attorneys for Defendant/Respondent
Alea London, Ltd.

Appendix

Kreml v. Unigard Security Ins., 69 Wn. App. 703, 850 P.2d 533 (1993)

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

Toll Bridge Authority v. Aetna Ins. Co., 54 Wn. App. 400, 773 P.2d 906 (1989)

*533 850 P.2d 533

69 Wn.App. 703

Court of Appeals of Washington,
Division 1.

Stephen KREMPL, Appellant,
v.

UNIGARD SECURITY INSURANCE
COMPANY, Respondent.

No. 30019-9-I.
April 19, 1993.

Publication Ordered May 7, 1993.

Assignee of insured's claims against insurer under homeowner's policy brought suit against insurer, contending that policy provided coverage for burn injuries he suffered when insured threw burning motorcycle gasoline tank to the ground, splashing burning gasoline on assignee. The Superior Court, King County, George Finkle, J., ruled that automobile use exclusion excluded coverage and entered judgment for insurer. Plaintiff appealed. The Court of Appeals, Pekelis, Acting C.J., held that: (1) efficient proximate cause analysis was not applicable where excepted risk, use or maintenance of automobile, set into motion allegedly covered risk of throwing flaming motorcycle gasoline tank being used as temporary fuel supply for automobile, and (2) policy excluded claimed loss, for injury clearly "flowed from" or "grew out of" insured's use of automobile.

Affirmed.

West Headnotes

[1] Insurance ☞2274

217 ----
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2274 In General.

(Formerly 217k433.1, 217k433(1))

Efficient proximate cause rule states that where peril specifically insured against sets other causes into motion which, in an unbroken sequence, produce result for which recovery is sought, loss is covered, even though other events within chain of causation are

excluded from coverage.

[2] Insurance ☞2274

217 ----
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2274 In General.

(Formerly 217k433.1, 217k433(1))

Under efficient proximate cause rule, where insured risk itself sets into operation chain of causation in which last step may have been an excepted risk, the excepted risk will not defeat recovery.

[3] Insurance ☞2278(13)

217 ----
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(13) Vehicles and Related

Equipment.

(Formerly 217k435.36(3))

Efficient proximate cause analysis was not applicable to defeat automobile use exclusion of homeowner's policy where excepted risk, use or maintenance of automobile, set into motion chain of events which included allegedly covered risk of throwing flaming tank of gasoline from automobile.

[4] Insurance ☞1825

217 ----
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1825 Particular Words or Terms.

(Formerly 217k146.5(5))

When an exclusion uses the phrase "arising out of," joint causation rule is inapplicable; phrase "arising out of" in exclusion precludes inquiry into causation of accident.

[5] Insurance ☞2274

217 ----
217XVII Coverage--Liability Insurance
217XVII(A) In General

217k2273 Risks and Losses
217k2274 In General.

(Formerly 217k433.1, 217k433(1))

It is not necessary to analyze causation issues where policy language does not expressly require it.

[6] Insurance  2278(13)

217 ----

217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(13) Vehicles and Related
Equipment.

(Formerly 217k435.36(3))

Automobile use exclusion of homeowner's policy precluded coverage of burn injuries suffered by bystander when insured grabbed motorcycle gasoline tank being used as temporary fuel supply for automobile and threw it to the ground, splashing burning gasoline on bystander; injury clearly "flowed from" or "grew out of" insured's use of automobile; moreover, use exclusion also excluded injuries arising from automobile maintenance, and installing fuel tank in automobile so that it could run was "maintenance"; ensuing injury arose "out of" that maintenance.

[69 Wn.App. 704] David A. Larson, Seattle, for appellant.

Timothy J. Donaldson, Bellevue, for respondent.

PEKELIS, Acting Chief Judge.

Plaintiff Stephen Krempl appeals the trial court's order of summary judgment in this insurance coverage dispute. Krempl, the policyholder's assignee, contends that as a matter of law the homeowner's insurance policy issued by Unigard Security Insurance *534 Company (Unigard) provided coverage for his injuries. We disagree and affirm.

The facts are undisputed. In May of 1988, Stephen Krempl accompanied Kirk Wilson and his father, Sidney Wilson, to pick up a 1955 Buick that Sidney had purchased for his son's use. Because the fuel pump was broken, Sidney jerry-built a temporary fuel supply using a motorcycle gasoline tank and silicone tubing. On the return trip, the Wilsons drove the

Buick and Krempl followed behind in another automobile. Krempl noticed flames emerging from underneath the Buick and signaled the Wilsons to pull over. The Wilsons and Krempl pulled over, opened the hood, and found the tank and carburetor in flames. Sidney Wilson yelled "get it out." Krempl unsuccessfully tried to remove the burning tank. Kirk Wilson then grabbed the tank and threw it to the ground, splashing burning gasoline on Krempl. Krempl was severely injured.

Krempl sued the Wilsons. The Wilsons were insured under the liability provisions of a homeowner's insurance policy issued by Unigard. Unigard denied coverage and refused to defend the Wilsons against Krempl's lawsuit, claiming that Krempl's injuries arose out of the use of a vehicle and that coverage was excluded by the automobile use exclusion in their policy. Krempl settled with the Wilsons; the settlement included an assignment of the Wilsons' claims against Unigard for its failure to defend and indemnify. As assignee, Krempl sued Unigard.

[69 Wn.App. 705] On cross motions for summary judgment, the trial court ruled that the automobile use exclusion validly excluded coverage as a matter of law and entered judgment for Unigard. Krempl appeals from this order.

The homeowner's policy that Unigard issued to the Wilsons provided liability coverage for any claim brought against an insured for "bodily injury ... caused by an **occurrence**", defined as an accident that results in bodily injury during the policy period. It included an exclusion for "**bodily injury or property damage** ... arising out of ... the ownership, maintenance, use, loading or unloading of motor vehicles ... owned or operated by ... an **insured**." Krempl contends that this automobile use exclusion in Unigard's policy does not exclude coverage for the injury in this case because the excluded risk contributed to an injury also caused by an independently covered act. Arguing that the principle of "efficient proximate cause" is applicable here, Krempl claims that *throwing the flaming tank of gasoline* is a covered risk independent of Kirk's use or maintenance of the automobile.

[1][2] The efficient proximate cause rule states that "where a peril specifically insured against sets other causes into motion which, in an unbroken sequence, 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."

McDonald v. State Farm Fire & Cas. Co., 119 Wash.2d 724, 731, 837 P.2d 1000 (1992) (citing *Graham v. Public Employees Mut. Ins. Co.*, 98 Wash.2d 533, 538, 656 P.2d 1077 (1983)). "Stated in another fashion, where an insured risk itself sets into operation a chain of causation in which the last step may have been an excepted risk, the excepted risk will not defeat recovery." *Villella v. Public Employees Mut. Ins. Co.*, 106 Wash.2d 806, 815, 725 P.2d 957 (1986); *accord Safeco Ins. Co. of Am. v. Hirschmann*, 112 Wash.2d 621, 773 P.2d 413 (1989).

[3] We do not find the efficient proximate cause analysis to be applicable to the facts of this case. In all of the aforementioned cases, an *uninsured* risk set into motion a chain of events that included an *excepted* risk. Here, by contrast, the [69 Wn.App. 706] *excepted* risk, use or maintenance of an automobile, set into motion what Krempf contends is a *covered* risk, throwing the flaming tank of gasoline. Accordingly, applying the well-established definition, the "efficient proximate cause" analysis does not apply. See *McDonald*, 119 Wash.2d at 735, 837 P.2d 1000 (noting that only if the initial peril is covered does the efficient proximate cause rule come into play).

*535 Nevertheless, Krempf argues that the rationale of the "efficient proximate cause" cases compels us to adopt the "joint causation" or "concurrent causation" rule for automobile use exclusions, which is the rule in some jurisdictions. In a leading case, *State Farm Mut. Auto. Ins. Co. v. Partridge*, 10 Cal.3d 94, 109 Cal.Rptr. 811, 514 P.2d 123 (1973), the plaintiff sought homeowner's coverage for an accident caused when the insured accidentally fired a modified handgun while driving a car. The insurer contended that an automobile use exclusion excluded coverage. The court applied the rule that when an insured risk and an excluded risk jointly cause an accident, that is, "constitute concurrent proximate causes", the insurer is liable as long as one of the causes is covered by the policy. Since the insured was negligent in tampering with the gun's trigger mechanism, it did not matter that the accident arose out of the use of an automobile; the liability of the insured arose from his non auto-related conduct and existed independently of any use of his car. 109 Cal.Rptr. at 817, 514 P.2d at 129; *accord Waseca Mut. Ins. Co. v. Noska*, 331 N.W.2d 917 (Minn.1983); *Lawver v. Boling*, 71 Wis.2d 408, 238 N.W.2d 514 (1976).

Analogizing to these cases, Krempf argues that the act of throwing the gasoline tank was an independent,

non-vehicle-related, covered act, and therefore he concludes that any concurrent or joint cause arising from use of the vehicle does not defeat coverage.

[4][5] We conclude, however, that when an exclusion uses the phrase "arising out of," the joint causation rule is inapplicable in Washington. Under *Toll Bridge Auth. v. Aetna Ins. Co.*, 54 Wash.App. 400, 773 P.2d 906 (1989), the phrase "arising out of" in an exclusion precludes an inquiry into the causation [69 Wn.App. 707] of an accident. 54 Wash.App. at 406-07, 773 P.2d 906 (distinguishing *Graham*, *Villella*, and *Hirschmann*, which involved exclusions for losses "caused by" an excluded peril). Instead, the arising out of clause is "understood to mean 'originating from,' 'having its origin in,' 'growing out of,' or 'flowing from'." 54 Wash.App. at 404, 773 P.2d 906. Observing that the "arising out of" phrase is unambiguous, the *Toll Bridge* court held as a matter of law that the accident, which occurred while a ferry unloaded passengers, arose from use or operation of the vessel and therefore was excluded by the policy's watercraft exclusion. *Toll Bridge*, at 404, 773 P.2d 906; see also *Everett v. American Empire Surplus Lines Ins. Co.*, 64 Wash.App. 83, 89, 823 P.2d 1112 (1991) (holding that it is unnecessary to employ a causation analysis where the exclusion at issue used the term "arising from"); *Transamerica Ins. Group v. United Pac. Ins. Co.*, 92 Wash.2d 21, 26, 593 P.2d 156 (1979) ("In order to arise out of the 'use' of the vehicle it is not necessary that the use be the proximate cause of the accident."). Accordingly, our authorities, unlike *Partridge* and its progeny, establish that under Washington law it is not necessary to analyze causation issues where the policy language does not expressly require it. (FN1)

[6] Applying *Toll Bridge* and *Everett*, we hold that the trial court was correct to rule as a matter of law that the policy at issue excluded the claimed loss, for Krempf's injury clearly "flowed from" or "grew out of" the Wilsons' use of the automobile. (FN2)

[69 Wn.App. 708] Moreover, even if the joint/concurrent causation rule applied, it would not avail Krempf, because it applies only to "divisible" *536. acts, *i.e.*, one that is covered and another that is not. See *Auto-Owners Ins. Co. v. Selisker*, 435 N.W.2d 866, 868 (Minn.Ct.App.1989), *review denied* (1989). Accordingly, Krempf's authority is distinguishable. In the *Partridge* case, for example, "[t]here were two separate, distinct and different acts of negligence committed by Partridge, one of which was entirely disconnected with the use of a motor vehicle". 109 Cal.Rptr. at 815, 514 P.2d at 127; see also *Waseca*,

331 N.W.2d at 921, 923 (finding "two distinct acts" on the part of the insured).

Here, on the other hand, Kirk Wilson's act cannot legitimately be characterized as "entirely disconnected" from the use of the automobile. Hence, applying a joint/concurrent causation analysis, Krempf's conduct was connected to the use of the automobile and therefore within the exclusion. See *Volkswagen Ins. Co. v. Dung Ba Nguyen*, 405 So.2d 190 (Fla.Ct.App.1981), review denied, 418 So.2d 1280 (1982) (holding that injury arose from "use" of an automobile when insured tossed a flaming container of gasoline during an attempt to pour the gasoline into an automobile carburetor).

Finally, we hold that Unigard properly denied coverage for an additional reason: Krempf's injuries arose from Wilson's "maintenance" of the automobile. Unigard's use exclusion also excludes injuries arising from automobile maintenance. This court has defined maintenance as the labor of keeping something in a state of repair or efficiency. *Truck Ins. Exch. v. Aetna Cas. & Sur. Co.*, 13 Wash.App. 775, 778, 538 P.2d 529, review denied 86 Wash.2d 1001 (1975). Installing a fuel tank in an automobile so that it may run is maintenance, and Krempf's ensuing injury "arose out of" that maintenance. See *North Star Mut. Ins. Co. v. Carlson*, 442 N.W.2d 848, 855 (Minn.Ct.App.1989), review denied (1989); *Volkswagen Ins. Co. v. Dung Ba Nguyen*, supra (both holding injury arose from "maintenance" of an automobile when insured tossed a flaming container of gasoline [69 Wn.App. 709] during an attempt to pour the gasoline into an automobile carburetor). Moreover, Kirk Wilson's removal of a badly malfunctioning fuel tank was itself maintenance. We

reject Krempf's argument that "[r]endering a vehicle inoperative" is not maintenance; many maintenance and repair operations require rendering a vehicle temporarily inoperative. Thus, coverage for Krempf's injuries is excluded by this provision as well.

We conclude that Krempf's injuries arose from the use or maintenance of an automobile. The trial court properly granted summary judgment for Unigard on the basis of the automobile use exclusion.

Because we affirm on this basis, we do not reach the issues raised by Unigard's cross appeal.

Affirmed.

FORREST and GROSSE, JJ., concur.

(FN1.) We also note that the "joint/concurrent causation" rule is not universal. In *Vanguard Ins. Co. v. Clarke*, 438 Mich. 463, 475 N.W.2d 48 (1991), the Michigan Supreme Court reversed a court of appeals' decision relying on *Partridge*, supra, rejected the concurrent causation rule, and held that coverage for asphyxiation deaths was excluded because the asphyxiation "arose from" closing a garage door with a motor vehicle running. 475 N.W.2d at 52-53; see also *Northern Assur. Co. of Am. v. EDP Floors, Inc.*, 311 Md. 217, 533 A.2d 682 (1987).

(FN2.) Krempf's argument that Unigard's use exclusion is ambiguous is without merit. Both *Toll Bridge* and *Everett* state that the term "arising out of" in a vehicle use exclusion is not ambiguous under Washington law. 64 Wash.App. at 89, 823 P.2d 1112; 54 Wash.App. at 404, 773 P.2d 906.

*859 11 P.3d 859

103 Wn.App. 106

Court of Appeals of Washington,
Division 1.

Grant E. McALLISTER, Appellant,
v.
AGORA SYNDICATE, INC., an
Illinois corporation, a foreign insurer,
Respondent.

No. 45597-4-I.
Oct. 30, 2000.

Nightclub patron, who had been assigned the nightclub's rights under its commercial general liability (CGL) insurance policy, sought declaration that CGL insurer had to provide coverage for patron's negligence claim against nightclub for injuries sustained in altercation with another patron. The Superior Court, King County, Ann Schindler, J., granted summary judgment for insurer. Patron appealed. The Court of Appeals, Coleman, J., held, as a matter of first impression, that insurance policy's assault and battery exclusion precluded coverage of patron's negligence claim for injuries sustained in altercation with another patron.

Affirmed.

West Headnotes

[1] Insurance ☞ 1808

217 ----

217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1808 Ambiguity in General.

[See headnote text below]

[1] Insurance ☞ 1832(1)

217 ----

217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1830 Favoring Insureds or Beneficiaries;
Disfavoring Insurers
217k1832 Ambiguity, Uncertainty or Conflict
217k1832(1) In General.

Language in an insurance policy that is susceptible of two different but reasonable interpretations is

ambiguous and must be liberally construed in favor of the insured.

[2] Insurance ☞ 1835(2)

217 ----

217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1830 Favoring Insureds or Beneficiaries;
Disfavoring Insurers
217k1835 Particular Portions or Provisions of Policies
217k1835(2) Exclusions, Exceptions or Limitations.

Exclusionary clauses in insurance policies should be construed against the insurer with special strictness.

[3] Insurance ☞ 1827

217 ----

217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1827 Construction to Be Unstrained.

[See headnote text below]

[3] Insurance ☞ 1828

217 ----

217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1828 Construction to Be Fair.

A court may not give an insurance contract a strained or forced construction which would lead to an extension or restriction of the policy beyond what is fairly within its terms.

[4] Insurance ☞ 1832(2)

217 ----

217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1830 Favoring Insureds or Beneficiaries;
Disfavoring Insurers
217k1832 Ambiguity, Uncertainty or Conflict
217k1832(2) Necessity of Ambiguity.

The rule that ambiguous contract language is to be construed in favor of the insured and most strongly against the insurer should not be permitted to have the effect of making a plain agreement ambiguous.

[5] Insurance ☞2278(5)

217 ----

217XVII Coverage--Liability Insurance
 217XVII(A) In General
 217k2273 Risks and Losses
 217k2278 Common Exclusions
 217k2278(2) Intentional Acts or Injuries
 217k2278(5) Assault and Battery.

Assault and battery exclusion in commercial general liability insurance policy issued to nightclub precluded coverage of patron's negligence claim against nightclub for injuries sustained in an altercation with another patron.

[103 Wn.App. 107] Heidi Nuss Imhof, Erik Francis Ladenburg, Krilich La Porte West & Lockner PS, Tacoma, for Appellant.

Jerret E. Sale, Elizabeth Curie Kim, Bullivant Houser Bailey P.C., Seattle, for Respondent.

COLEMAN, J.

This case involves the interpretation and application of an assault and battery exclusion in a commercial general liability insurance policy issued by respondent Agora Syndicate, Inc. to Entertainment Unlimited, Inc., (d/b/a DV8 Nightclub). Appellant Grant McAllister was injured in an altercation with another patron at DV8 and subsequently filed suit against his assailant and Entertainment Unlimited. Entertainment Unlimited executed an admission of liability and entered into a settlement agreement with McAllister in which it assigned to him its rights under the Agora policy. Agora denied coverage of the claim on the ground that it fell under the policy's assault and battery exclusion.

*860 Although McAllister's claim alleged Entertainment Unlimited's negligence, the underlying occurrence was the assault and battery. Because the assault and battery exclusion applied to claims "based on assault and/or battery," the trial court's dismissal of the claim is affirmed.

[103 Wn.App. 108]

FACTS

On an evening in May 1996, Grant McAllister and two friends went to the DV8 Nightclub. Earlier that evening, one of the men accompanying McAllister had been removed from the club following an altercation with another patron--Michael Fuller. DV8

staff allowed both Fuller and McAllister's friend to reenter the club. Fuller confronted McAllister and began yelling at him. McAllister's friends informed DV8 security personnel of the ensuing melee, but they failed to take any action. Following a lengthy verbal tirade, Fuller struck McAllister in the face, fracturing his left orbital lobe and rendering him unconscious. Fuller was arrested, taken to jail, and subsequently convicted of assault.

McAllister filed suit against Entertainment Unlimited in January 1997. Agora Syndicate, Inc., denied coverage of the claim on the ground that it fell within the assault and battery exclusion in Entertainment Unlimited's policy. Pursuant to a settlement agreement, Entertainment Unlimited assigned to McAllister its rights under the insurance contract and executed an admission of liability.

McAllister commenced a declaratory action against Agora, and both parties filed motions for summary judgment. The trial court granted Agora's motion for summary judgment and denied McAllister's motion. Specifically, the court held: (1) McAllister's claims against Agora were excluded by the assault and battery exclusion contained in the policy issued by Agora to Entertainment Unlimited; (2) Agora had no duty to defend or indemnify Entertainment Unlimited against McAllister's claims; and (3) all of McAllister's other claims against Agora were dismissed with prejudice. (FN1)

[103 Wn.App. 109]

DISCUSSION

The policy issued by Agora to Entertainment Unlimited covers bodily injury and property damage that is caused by an "occurrence" that takes place in the coverage territory. (FN2) The policy also includes an endorsement entitled "Assault and Battery Exclusion" that reads: "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." Agora based its denial of Entertainment Unlimited's claim on this provision.

McAllister argues that the denial of the claim was inappropriate because it was based on alleged negligence and thus did not fall under the assault and battery exclusion. He proposes that the exclusion should be read to cover only intentional acts of the club's employees. (FN3) McAllister concludes that the endorsement is at best ambiguous in its

application to a negligence claim against the insured.

[1][2][3][4] Language in an insurance policy that is susceptible of two different but reasonable interpretations is ambiguous and must be liberally construed in favor of the insured. *Teague Motor Co. v. Federated Serv. Ins. Co.*, 73 Wash.App. 479, 482, 869 P.2d 1130 (1994). In addition, exclusionary clauses should be construed against the insurer with special strictness. *Tewell, Thorpe, & Findlay, Inc. v. Continental Cas. *861. Co.*, 64 Wash.App. 571, 575, 825 P.2d 724 (1992) To view preceding link please click here . But a court may not give an insurance contract a " 'strained or forced construction which would lead to an extension or restriction of the policy beyond what is fairly within its terms...' " *Tewell*, 64 Wash.App. at 576, 825 P.2d 724 (quoting *Morgan v. Prudential Ins. Co. of Am.*, 86 Wash.2d 432, 434, 545 P.2d 1193 (1976)). [103 Wn.App. 110] Similarly, the rule that ambiguous contract language is to be construed in favor of the insured and most strongly against the insurer should not be permitted to have the effect of making a plain agreement ambiguous. *West Am. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 80 Wash.2d 38, 44, 491 P.2d 641 (1971).

[5] Agora argues that the exclusion is unambiguous and precludes coverage in this case. Although the interpretation of an assault and battery exclusion is an issue of first impression in Washington, Agora points to several cases from other jurisdictions in which courts found nearly identical assault and battery exclusions to be applicable to claims similar to McAllister's. (FN4) We find the courts' reasoning in these cases to be persuasive and applicable to the present case.

In *United States Underwriters Ins. Co. v. Val-Blue Corp.*, 85 N.Y.2d 821, 623 N.Y.S.2d 834, 647 N.E.2d 1342 (N.Y.1995), an off-duty police officer apprehended a suspect outside the insured's nightclub and escorted him into the club at gunpoint. A club security guard told the officer to drop the gun but then shot him twice when he did not immediately comply. The officer sued the nightclub, alleging negligence in the hiring, supervising, and training of the security guard. The club's insurance carrier denied coverage on the basis of an assault and battery exclusion almost identical to the one in this case. On the issue of whether the claim was "based on assault and battery" or based on negligence as argued by the officer, the court found the exclusion to be unambiguous. The court stated that "[t]he injury being sued upon here is an assault and battery" and that "[t]he plethora of claims surrounding that injury, including those for ...

'negligent hiring and supervision' are all based on that assault and [103 Wn.App. 111] battery, without which the officer would have no cause of action." *Val-Blue*, 85 N.Y.2d at 823, 623 N.Y.S.2d 834, 647 N.E.2d 1342.

In *Mount Vernon Fire Ins. Co. v. Creative Hous., Ltd.*, 88 N.Y.2d 347, 645 N.Y.S.2d 433, 668 N.E.2d 404 (N.Y.1996), a tenant sued a landlord for negligent supervision, management, and control of the property after the tenant was assaulted by a third party. Again, the landlord's insurance policy contained an assault and battery exclusion similar to the one in this case. The court found that the exclusion precluded coverage of the claim, stating that "[w]hile the insured's negligence may have been a proximate cause of the plaintiff's injuries, that only resolves the plaintiff's liability; it does not resolve the insured's right to coverage based on the language of the contract between him and the insurer." *Creative Hous.*, 88 N.Y.2d at 352, 645 N.Y.S.2d 433, 668 N.E.2d 404.

We find the assault and battery exclusion in the Agora policy to be unambiguous in its application to McAllister's claim, which is ultimately "based on" assault and battery in the sense that without first establishing the underlying assault, negligence cannot be proved. We are convinced that an average policyholder would reach the same conclusion. Furthermore, the policy covers damage caused by "occurrences" and the exclusion explicitly removes assault and/or battery from that definition. Therefore, we find that coverage of the claim was properly denied.

Affirmed.

BECKER, J., and COX, J., concur.

(FN1.) In addition to the claim for negligent failure to protect his person, McAllister also brought claims against Agora for violation of the Consumer Protection Act, violation of insurance laws under RCW Title 48, breach of contract, and bad faith. None of these claims are before this court.

(FN2.) "Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

(FN3.) McAllister suggests that a reasonable policyholder could interpret the exclusion to apply only to assault and battery committed by the insured and its employees. The exclusion states,

however, that no coverage shall apply to any claim for assault and/or battery "whether or not committed by or at the direction of the insured."

(FN4.) See *Taylor v. Duplechain*, 469 So.2d 472 (La.Ct.App.1985) (assault and battery exclusion applied to negligence claim against bar following plaintiff's injury in a fight with another patron); *Terra Nova Ins. Co. v. North Carolina Ted, Inc.*,

715 F.Supp. 688 (E.D.Pa.1989) (assault and battery exclusion applied to negligence claim against bar after plaintiff was shot by another patron); *Roloff v. Taste of Minnesota*, 488 N.W.2d 325 (Minn.Ct.App.1992) (assault and battery exclusion applied to negligence claim against festival sponsor after plaintiff was assaulted by another festival patron).

*906 773 P.2d 906

217k2350(1) In General.

54 Wn.App. 400

(Formerly 217k435.38)

Court of Appeals of Washington,
Division 1.

TOLL BRIDGE AUTHORITY,
Appellant,

v.

AETNA INSURANCE CO.; Insurance
Company of North America,
Respondents.

No. 22243-1-I.

June 12, 1989.

State Toll Bridge Authority brought action against insurers to obtain indemnity for amounts paid to ferry passengers for injuries sustained while disembarking from ferry. The Superior Court, King County, Robert C. Dixon, J., entered judgment in favor of insurers. Authority appealed. The Court of Appeals, Scholfield, J., held that exclusions in ferry terminal policies precluded imposition of liability on insurers.

Affirmed.

West Headnotes

[1] Insurance ☞ 2278(15)

217 ----

217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(15) Watercraft.

(Formerly 217k2350(1), 217k435.38)

Endorsement in ferry terminal policy providing exclusion for claims or accidents "arising out of" operations, maintenance of use of any watercraft precluded imposition of liability on insurer for injuries to disembarking ferry passengers struck by automobile leaving ferry.

[2] Insurance ☞ 2350(1)

217 ----

217XVII Coverage--Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2347 Governmental Liabilities
217k2350 Particular Exclusions

Ferry terminal policy endorsement stating policy did not apply to "unloading of any watercraft," precluded imposition of liability on insurer for injuries to disembarking ferry passengers struck by automobile leaving ferry.

[54 Wn.App. 401] Delbert W. Johnson, Asst. Atty. Gen., Olympia, for Washington State Toll Bridge Authority.

*907 William Olson, Aiken, St. Louis & Siljeg, Seattle, for Aetna Ins. Co.

SCHOLFIELD, Judge.

The plaintiff, Washington State Toll Bridge Authority (TBA), appeals the judgment in favor of Aetna Insurance Company (Aetna) and Insurance Company of North America (INA) in its action against Aetna and INA to obtain indemnity for amounts paid to three ferry passengers for injuries sustained while disembarking from the M/V *Quinault*. We affirm.

FACTS

TBA is engaged in the operation, maintenance, and use of a fleet of vessels and owns numerous dock facilities to carry on its ferry business. On August 19, 1974, TBA's ferry M/V *Quinault* arrived at the Fautleroy ferry terminal. The dock facilities at that terminal provided a single ramp for ingress and egress by both vehicles and foot passengers. After the vessel was secured, the safety line was dropped and the passengers who had assembled on the bow started walking up the ramp.

Unloading was under direction of First Mate Clyde Murray, assisted by two or more crew members. The first vehicle in line had been blocked by a 6-inch block under the front tire to prevent movement. The driver of that vehicle started and raced her engine at a high r.p.m. Foot passengers were still on the ramp. Murray started toward the car and signaled the driver to stop. He saw the driver put the car in gear, and he yelled at her, trying to get her to stop. The car jumped the block and sped up the ramp and onto the dock, striking and injuring four foot passengers who were in various locations along the ramp.

Passengers Jay Lillquist, Joanie Noll, and Kaiso

Eng filed lawsuits against TBA, and the defenses of each claim were tendered to Aetna and INA. The claims of Noll and [54 Wn.App. 402] Eng were settled prior to trial for \$33,000 each. Aetna contributed one-third (\$11,000 for each claimant), TBA paid one-third (\$11,000 each claimant), and the insurer for the driver of the auto paid one-third (\$11,000 each claimant). The claim of Jay Lillquist went to trial on the issue of liability in early 1977. It was tried to a jury in King County Superior Court. Lillquist contended that TBA was negligent in the following particulars:

1. In failing to prohibit automobile drivers on the ferry from starting their car motors until ferry foot passengers have exited the ferry by means of walking up the unloading ramp to the protected sidewalk on the ferry dock.
2. In failing to provide a physical barrier to restrain automobiles from leaving the ferry boat until foot passengers have cleared the ramp.
3. In failing to provide a safe walkway for foot passengers extending from the ferry boat to the dock.

Instruction 2(I). The trial judge instructed the jury that TBA was a common carrier and owed the passengers "the highest degree of care". Instruction 8. She further instructed that:

Among the duties cast upon the Defendant Washington State Toll Bridge Authority, as a common carrier, is that of anticipating that a motor vehicle, driven upon the ferry, may have defective equipment, or that it may be in the control of an inattentive driver. It is the duty of a common carrier operating a ferry to protect passengers against these risks. The common carrier is charged with knowledge that automobiles may not be under adequate control as they enter, ride upon or leave from the ferry.

Instruction 10. The jury returned a general verdict, finding TBA liable for Lillquist's injuries. Subsequently, his claim was settled for \$178,940. Aetna paid \$76,970, and TBA paid \$76,970, with the insurer for the driver of the auto paying \$25,000. Payment by TBA to Eng, Noll and Lillquist was by agreement with Aetna and INA conditioned on the liability of Aetna and INA to TBA for the losses involved.

[54 Wn.App. 403] TBA purchased two separate

types of insurance, fleet and terminal, for its operation of the ferry system. Its coordinated insurance program was arranged through its insurance broker, LaBow, Haynes Company, Inc. Fleet insurance is placed *908 through a hull subscription policy, covering all of the ferry vessels and providing protection and indemnity coverage for third party liability. Hull Subscription Policy No. 453, covering the period from August 1, 1974 to August 1, 1975, is the policy applicable to this incident. A pool of insurance companies provides the indemnity protection under this policy up to an amount of \$27,388,000, with a \$250,000 deductible.

Terminal facilities were covered by standard form liability policies. Aetna issued a policy providing primary coverage for the period April 9, 1972 to April 9, 1975. INA provided excess coverage for the period April 9, 1974 to April 9, 1977. Endorsements were added to the Aetna policy and to the INA policy to exclude risks covered under the liability provisions of the fleet policy. The Aetna endorsement states that the policy does not apply to incidents "arising out of the operations, maintenance or use of any watercraft ..." Similarly, the INA endorsement states that the policy does not apply to the "operation, maintenance, use, loading or unloading of any watercraft." The purpose of these endorsements is to avoid overlapping coverage because incidents arising out of the use of the ferries are covered by the fleet policy.

TBA commenced an action for indemnity and other relief against Aetna and INA. Aetna and INA sought a summary judgment ruling that the fleet policy, providing protection and indemnity coverage, applied to the loss. The trial judge granted summary judgment in favor of Aetna and INA. This appeal timely followed.

APPLICABILITY OF EXCLUSIONARY CLAUSE

[1] The issue in this case is whether the trial court erred in ruling as a matter of law that the accident arose out of [54 Wn.App. 404] "operations, maintenance or use" of the vessel and therefore falls within the exclusion to the terminal policy. TBA argues that there is a material question of fact as to whether the injuries were caused by dock inadequacy or crew negligence and that resolution of this issue is necessary to a determination of whether the terminal policy applies.

On review of a summary judgment, the appellate court places itself in the position of the trial court and,

considering the evidence in the light most favorable to the nonmoving party, must assess whether " 'the pleadings, depositions, ... and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Del Guzzi Constr. Co. v. Global N.W. Ltd.*, 105 Wash.2d 878, 882, 719 P.2d 120 (1986) (quoting CR 56(c)).

Construction of a contract and the legal effect of its terms present questions of law for the trial court which may properly be resolved by summary judgment. *Marquez v. University of Washington*, 32 Wash.App. 302, 306, 648 P.2d 94 (1982), cert. denied, 460 U.S. 1013, 103 S.Ct. 1253, 75 L.Ed.2d 482 (1983).

The Aetna endorsement provides the following exclusion:

It is further understood and agreed that such insurance as if afforded by the policy shall not apply to any claims or accidents arising out of the operations, maintenance or use of any watercraft ...

The phrase "arising out of" is unambiguous and has a broader meaning than "caused by" or "resulted from." *State Farm Mut. Auto. Ins. Co. v. Centennial Ins. Co.*, 14 Wash.App. 541, 543, 543 P.2d 645 (1975), review denied, 87 Wash.2d 1003 (1976). It is ordinarily understood to mean "originating from", "having its origin in", "growing out of", or "flowing from". *Avemco Ins. Co. v. Mock*, 44 Wash.App. 327, 329, 721 P.2d 34 (1986).

In the present case, the accident originated on the ferry during the process of unloading passengers. Thus, we find as a matter of law that the accident "originated from", [54 Wn.App. 405] "grew out of", or "flowed from" use or operation of the vessel. Accordingly, the Aetna exclusion applies.

[2] Similarly, the INA endorsement provides as follows:

*909 This policy does not apply to the operation, maintenance, use, loading or unloading of any watercraft.

Because the accident occurred during unloading of the ferry, we find that the INA exclusion applies.

This result is supported by *Farmers Home Mut. Ins. Co. v. Insurance Co. of N. America*, 20

Wash.App. 815, 583 P.2d 644 (1978). In *Farmers*, a guest of the insured was injured while on the dock assisting another in disembarking from the insured's yacht, which was moored at a pier on his property. Farmers had issued a homeowner's policy covering the insured's home and premises, including the dock. INA had issued a vessel policy which provided coverage to insured for damages arising by reason of his interest in the vessel. *Farmers Home Mut. Ins. Co.*, at 817, 583 P.2d 644. The court found that at the time of the injuries, all parties were involved in activities necessary to leaving the yacht. Thus, the liability arose by reason of the owner's " 'interest' " in the insured vessel and the vessel policy applied. *Farmers Home Mut. Ins. Co.*, at 820-21, 583 P.2d 644.

TBA argues that because the accident occurred on the ramp to the dock, there is a material issue of fact as to whether dock inadequacy or crew negligence "proximately caused" the injuries, and that summary judgment was premature in this case since the issue of proximate cause of the injuries has not yet been determined. The issue of proximate cause must be resolved by the trier of fact except in those cases where the facts are so clear, there is no room for a difference of opinion. *Graham v. PEMCO*, 98 Wash.2d 533, 656 P.2d 1077 (1983). In making this argument, TBA relies upon the reasoning in *Graham* and *Safeco Ins. Co. of America v. Hirschmann*, 52 Wash.App. 469, 760 P.2d 969 (1988), *aff'd*, 112 Wash.2d 621, 773 P.2d 413 (1989). The *Graham* case was followed by [54 Wn.App. 406] *Villella v. PEMCO*, 106 Wash.2d 806, 725 P.2d 957 (1986).

Graham, *Villella* and *Hirschmann* all involve the application and interpretation of language in homeowner's insurance policies purporting to exclude losses resulting from or caused by earth movement. In *Graham* and *Villella*, the court was faced with exclusionary language which caused the court to adopt a rule that where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produce the result for which recovery is sought, the insured peril is regarded as the "proximate cause" of the entire loss. In so saying, the court adopted the principle that coverage would be determined by the "proximate cause" of the loss, rather than the immediate physical cause of the loss, which was formerly the rule as announced in *Bruener v. Twin City Fire Ins. Co.*, 37 Wash.2d 181, 222 P.2d 833, 23 A.L.R.2d 385 (1950).

In *Hirschmann*, the Court of Appeals was faced

with exclusionary language which would have excluded coverage for any loss "caused by, resulting from, contributed to or aggravated by" any kind of earth movement. (Italics omitted.) *Hirschmann*, 52 Wash.App. at 473, 760 P.2d 969. Following the principles announced in *Graham* and *Villella*, the Court of Appeals adopted the "efficient proximate cause" rule, stating at page 476, 760 P.2d 969 of the opinion:

Where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produce the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss.

The *Graham*, *Villella* and *Hirschmann* cases are not determinative here. As previously stated, the rule followed in those cases involved exclusionary language which logically raised the causation issues decided by the court.

[54 Wn.App. 407] The present case may be distinguished from *Graham* and *Hirschmann* due to the use of the "arising out of" language in the Aetna policy. To construe "arising out of" as requiring a finding of "proximate cause" before we would know whether the accident arose out of the use or operation of the vessel does violence to the plain language of the policy. "Arising out of" *910. and "proximate cause" describe two different concepts.

The terms of an insurance policy must be construed in light of the plain, ordinary and popular meaning of

the words used. *State Farm Mut. Auto. Ins. Co. v. Centennial Ins. Co.*, *supra*, 14 Wash.App. at 543, 543 P.2d 645.

A determination of proximate cause is not a necessary precedent to determination of coverage in this case.

TBA next argues that Aetna is suggesting that all activities of the ferry system involve operation, maintenance or use of watercraft and that this renders the State's annual premium a gift and nullifies the State's twofold insurance program. However, Aetna is arguing only that activities in disembarking a ferry involve operations, maintenance or use of watercraft. There are numerous terminal facility operations creating potential liability unrelated to any activity or actions of the vessel.

TBA also points out that during the State's earlier motion for partial summary judgment, Aetna's counsel told the court that there were material facts yet to be resolved. This earlier motion was denied. TBA argues that no additional facts have come to light and if a material fact concerning the proximate cause of the injuries remained to be resolved at the time of the earlier motion, then the same material fact must now remain. We find TBA's argument to be without merit. This court's determination is independent of both counsel's prior assertions and the earlier denial of a motion for partial summary judgment.

[54 Wn.App. 408] The trial court's decision is therefore affirmed.

WEBSTER and SWANSON, JJ., concur.

DECLARATION OF SERVICE

I, Susan Ferrell, states as follows:

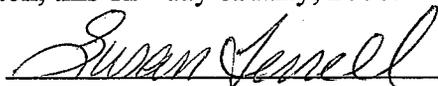
I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 21 years, I am not a party to this action, and I am competent to be a witness herein.

On this 12th day of May, 2006, I caused copies of the foregoing BRIEF OF RESPONDENT to be served on the following party as indicated below:

<i>Counsel for Plaintiff/Appellant:</i> Scott B. Easter Paul J. Miller Sandy K. Lee Montgomery Purdue Blankinship & Austin PLLC 5500 Columbia Center 701 Fifth Avenue Seattle, WA 98104 Fax: 206.625.9534	<input checked="" type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via U.S. Mail
--	---

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

Executed at Seattle, Washington, this 12th day of May, 2006.


SUSAN FERRELL

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2006 MAY 12 PM 4:44