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No. 92436-8

No. 71951-3-I

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

ZHAOYUN XIA, et al.,

Appellant,

v.

PBSIC SPECIALTY INSURANCE COMPANY RRG, et al.,

Respondent.

BRIEF OF RESPONDENT
PBSIC SPECIALTY INSURANCE COMPANY RRG

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TABLE OF CONTENTS

Title		Page
I.	INTRODUCTION	1
II.	COUNTERSTATEMENT OF ISSUES ON APPEAL	3
III.	COUNTERSTATEMENT OF THE CASE	5
	A. Ms. Xia Purchased a Townhouse from Issaquah Highlands	5
	B. Ms. Xia Made a Claim against Issaquah Highlands; PBSIC Denied Coverage	6
	C. Ms. Xia Filed Suit against Issaquah Highlands	7
	D. Ms. Xia and Issaquah Highlands Entered into a Consent Judgment	8
	E. Ms. Xia Filed Suit against PBSIC	9
IV.	ARGUMENT	10
	A. Standard of Review	10
	B. No Breach of Duty to Defend or Indemnify	11
	1. Duty to defend not triggered because Issaquah Highlands failed to tender	11
	2. No duty to defend because no facts could give rise to coverage	17
	a. Townhouse exclusion clearly bars coverage	20
	b. Pollution exclusion clearly bars coverage	28
	3. No duty to indemnify	36

C. No Bad Faith 36

1. No bad faith premised on duty to defend or indemnify 36

2. No IFCA claims independent of duty to defend or indemnify 40

D. No Attorney Fees 44

V. CONCLUSION 45

TABLE OF AUTHORITIES

Table of Cases Page

Am. Best Food, Inc. v. Alea London, Ltd., 168 Wn.2d 398, 229 P.3d 693 (2010) 18

Am. States Ins. Co. v. Delean's Tile and Marble, LLC, 179 Wn. App. 27, 319 P.3d 38 (2013) 25-26

Blue Diamond Gp., Inc. v. KB Seattle 1, Inc., 163 Wn. App. 449, 266 P.3d 881 (2011) 28

Boeing Co. v. Aetna Cas. & Sur. Co., 113 Wn.2d 869, 784 P.2d 507 (1990) 20

City of Bremerton v. Harbor Ins. Co., 92 Wn. App. 17, 963 P.2d 194 (1998) 31, 36

Cook v. Evanson, 83 Wn. App. 149, 83 Wn. App. 149 (1996) 19-20, 24, 26, 29- 32, 33, 36

Evans v. Mercado, __ Wn. App. __, 338 P.3d 285 (Nov. 17, 2014) 41

Expedia, Inc. v. Steadfast Ins. Co., 180 Wn.2d 793, 329 P.3d 59 (2014) 18, 27

Indust. Indem. Co. v. Kallevig, 114 Wn.2d 907, 792 P.2d 420 (1990) 37

Kent Farms, Inc. v. Zurich Insurance Co., 140 Wn.2d 396, 998 P.2d 292 (2000) 32-35

Kidwell v. Chuck Olson Oldsmobile, Inc., 4 Wn. App. 471, 481 P.2d 908 (1971) 16-17

Kim v. Allstate Ins. Co., 153 Wn. App. 339, 223 P.3d 1180 (2010) 37

Kirk v. Mt. Airy Ins. Co., 134 Wn.2d 558, 951 P.2d 1124 (1998) 37, 40

Kitsap County v. Allstate Ins. Co., 136 Wn.2d 567, 964 P.2d 1173 (1998) 19, 20, 27

Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 296 P.3d 860 (2013) 10

Mut. of Enumclaw Ins. Co. v. T&G Const., Inc., 165 Wn.2d 255, 267 n. 4, 199 P.3d 376 (2008) 40

Mut. of Enumclaw Ins. Co. v. USF Ins. Co., 164 Wn.2d 411, 191 P.3d 866 (2008) 11, 12, 15

Nat'l Sur. Corp. v. Immunex Corp., 176 Wn.2d 872, 297 P.3d 688 (2013) 18

Olympic Steamship Co. v. Centennial Ins. Co., 117 Wn.2d 37, 811 P.2d 673 (1991) 44

Quadrant Corp. v. Am. States Ins. Co., 154 Wn.2d 165, 110 P.3d 733 (2005) 31, 33-36

Qwest Corp. v. City of Bellevue, 161 Wn.2d 353, 166 P.3d 667 (2007) 10

Rash v. Providence Health Servs., __ Wn. App. __, 334 P.3d 1154 (Sept. 16, 2014) 40-42

Roller v. Stonewall Ins. Co., 115 Wn.2d 679, 801 P.2d 207 (1990) 19

Safeco Ins. Co. of Am. v. Butler, 118 Wn. 2d 383, 823 P.2d 499 (1992) 36

St. Paul Fire & Marine Ins. Co. v. Onvia, Inc., 165 Wn.2d 122, 130, 196 P.3d 644 (2008) 37

Tyrrell v. Farmers Ins. Co. of Washington, 140 Wn.2d 19, 23, 24

129, 994 P.2d 833 (2000)

United Servs. Auto. Ass'n v. Speed, 179 Wn. App. 184, 317 P.3d 532 (2014) 14, 18

Vision One, LLC v. Philadelphia Indem. Ins. Co., 174 Wn.2d 501, 276 P.3d 300 (2012) 19

Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 840 P.2d 860 (1992) 40-41

Woo v. Fireman's Fund Ins. Co., 161 Wn.2d 43, 164 P.3d 454 (2007) 11, 18, 27, 36

Statutes

RCW 19.86.090 44

RCW 19.86.170 37

RCW 48.30.010 37

RCW 48.30.015 37, 44

Regulations

WAC 173-460-150 34

WAC 284-30-330 37, 40, 43

WAC 284-30-370 40, 43

Court Rules

CR 56 10

RAP 2.5 40-42

Other Sources

Merriam-Webster Online Dictionary, 23

http://www.merriam-webster.com/dictionary/townhouse, viewed on December 28, 2014

I. INTRODUCTION

This case involves the interpretation of exclusions contained in a commercial liability insurance policy issued by ProBuilders Specialty Insurance Company (PBSIC) to Issaquah Highlands, the developer of a townhouse construction project in Issaquah. Appellant, Zhaoyun Xia, purchased one of Issaquah Highlands' townhouses and allegedly suffered personal injuries resulting from a carbon monoxide leak due to the faulty installation of her water heater. PBSIC denied coverage to Issaquah Highlands for Ms. Xia's claim based on two policy exclusions: the townhouse exclusion and the pollution exclusion.

The application of both exclusions to the undisputed facts of this case is straightforward. The townhouse exclusion barred coverage for injuries arising out of the construction of townhouses. All available evidence in this case, including the project description, official city and county records, and Ms. Xia's own complaint, clearly state that Ms. Xia's home was a townhouse. The trial court agreed and granted summary judgment to PBSIC based on the application of the townhouse exclusion.

The pollution exclusion barred coverage for injuries arising out of exposure to "pollutants," which the policy defined as contaminants that adversely affect human health. Based on Ms. Xia's allegations that she was injured when she inhaled carbon monoxide and testimony by Ms.

Xia's own expert that carbon monoxide is hazardous to human health in certain concentrations, the pollution exclusion also clearly barred coverage. Washington case law uniformly supports application of nearly identical pollution exclusions to similar cases involving airborne toxins. The trial court did not base its decision on the pollution exclusion; however, it is an alternative ground for affirming the trial court's order granting PBSIC's motion for summary judgment.[1]

Two years after PBSIC denied coverage to Issaquah Highlands under these exclusions, Ms. Xia filed suit against PBSIC. Issaquah Highlands did not tender the claim to PBSIC and failed to comply with PBSIC's request that Issaquah Highlands notify PBSIC if suit was filed. Instead, Issaquah Highlands entered into a covenant judgment with Ms. Xia for $2 million and assigned its rights against PBSIC to Ms. Xia. Claiming that PBSIC improperly denied coverage and a defense, Ms. Xia filed suit against PBSIC, alleging bad faith breach of the duty to defend and indemnify at common law and under the Insurance Fair Conduct Act (IFCA) and the Consumer Protection Act (CPA).

Where Issaquah Highlands never tendered Ms. Xia's lawsuit to PBSIC, no duty to defend or indemnify arose and, therefore, Ms. Xia's

[1] Notwithstanding the fact that this court can affirm on any basis supported by the record, PBSIC has filed a notice of cross-appeal on this matter to clearly inform this Court of its intent to argue for affirming on this alternative ground presented in PBSIC's original motion for summary judgment.

claims fail as a matter of law. The trial court agreed and granted summary judgment to PBSIC on this ground. Further, where Ms. Xia's claims are wholly premised on the duty to defend and indemnify, the clear, unambiguous application of the policy exclusions to the facts of this case disposes of her claims. Although the trial court ruled that there was an issue of fact precluding summary judgment on the pollution exclusion, the trial court agreed that the townhouse exclusion applied and granted summary judgment to PBSIC on this alternative ground. This court should affirm the trial court's grant of summary judgment to PBSIC based on failure to tender and the application of the townhouse exclusion. In the event that this court disagrees with those rulings, this court should nevertheless affirm the trial court's grant of summary judgment to PBSIC on the alternative ground that the pollution exclusion clearly applied to the facts of this case.

II. COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Should this court affirm the trial court's summary judgment dismissal of Ms. Xia's claims against PBSIC on the ground that Issaquah Highlands, PBSIC's insured, failed to tender Ms. Xia's claim to PBSIC after suit was filed against Issaquah Highlands? Answer: Yes.

2. Should this court affirm the trial court's summary judgment dismissal of Ms. Xia's claims against PBSIC on the alternative ground that

the townhouse exclusion in PBSIC's insurance contract with Issaquah Highlands clearly and unambiguously applied to the facts of the present case, when all evidence available to PBSIC revealed that Ms. Xia's home was a townhouse? Answer: Yes.

3. In the event that this court disagrees with the trial court's summary judgment dismissal of Ms. Xia's claims based on (1) failure to tender and (2) the townhouse exclusion, should this court affirm on the alternative ground that the absolute pollution exclusion clearly barred coverage, where the undisputed facts reveal that Ms. Xia allegedly suffered personal injuries as the result of carbon monoxide, an airborne toxin? Answer: Yes.

4. Where no duty to defend or indemnify arose under the policy, should this court dismiss Ms. Xia's claims for bad faith breach of those duties at common law, under IFCA, and under the CPA, as well as her claims for attorney fees under those theories? Answer: Yes.

5. Where Ms. Xia did not argue before the trial court that any alleged failure by PBSIC to timely investigate her claims under IFCA caused her damage independent of the duty to defend and/or indemnify, should this court reject Ms. Xia's attempt to raise those claims for the first time on appeal? Answer: Yes.

III. COUNTERSTATEMENT OF THE CASE

A. Ms. Xia Purchased a Townhouse from Issaquah Highlands

In May 2006, Ms. Xia purchased a townhouse in a community called the "Villaggio TownHomes at Issaquah Highlands." CP at 82, 108. Issaquah Highlands 50, LLC was the property's developer, and Issaquah Highlands 48, LLC was the property's general contractor. CP at 82. Gottlieb Issaquah Highlands 48, LLC and Gottlieb Issaquah Highlands 50, LLC were the property's sellers, and Sacotte Issaquah Highlands 48, LLC and Sacotte Issaquah Highlands 50, LLC were the construction managers (collectively "Issaquah Highlands"). CP at 82.

In 2004, Issaquah Highlands applied for a permit to construct the townhouse that Ms. Xia ultimately purchased. CP at 58. On the permit application, Issaquah Highlands listed the project name as "Issaquah Highlands Division 96 Townhomes." CP at 58. Issaquah Highlands also stated on the application that the work to be performed was "[n]ew construction for 1 new SF Ground related Townhome." CP at 58. The City granted the application and issued a permit to Issaquah Highlands, describing the unit as a "[n]ew townhome." CP at 57. The King County Auditor's records also classify Ms. Xia's home as a "townhouse," and the King County Department of Assessments describes Ms. Xia's home as a "Townhome" on a "Townhouse Plat." CP at 54, 60.

Issaquah Highlands marketed the development in which Ms. Xia ultimately purchased her townhouse as the "Villaggio TownHomes at Issaquah Highlands." CP at 108. The home was also listed in an external real estate listing as a "townhome." CP at 134. The project's developer, Joe Sacotte of The Sacotte Companies, also lists the "[t]ownhomes at Issaquah Highlands" as a completed project on his website. CP at 131.

B. Ms. Xia Made a Claim against Issaquah Highlands; PBSIC Denied Coverage

Upon moving into her home, Ms. Xia allegedly suffered personal injuries resulting from carbon monoxide exposure due to improper installation of her hot water heater. CP at 117-18, 143. In a letter dated June 26, 2007, Ms. Xia gave notice to Issaquah Highlands of her personal injury claim and requested that her claim be tendered to Issaquah Highlands' liability insurer. CP at 64. Issaquah Highlands subsequently forwarded Ms. Xia's letter to its insurance broker, Lambin Insurance. CP at 1328. On July 19, 2007, PBSIC, via its third-party administrator, NBIS, received notice of Ms. Xia's claim. CP at 1328. On July 23, NBIS issued an acknowledgement of the claim to Ms. Xia on PBSIC's behalf. CP at 442.

On January 17, 2008, PBSIC notified Issaquah Highlands by letter that it was declining coverage for the claim under both the policy's

"townhouse liability exclusion" and the policy's "pollution exclusion." CP at 278-86. PBSIC also sent a courtesy copy of the letter to Ms. Xia on June 12, 2008. CP at 71.

At the time the declination letter was issued, no lawsuit had been filed against Issaquah Highlands. Therefore, whether to provide a defense to Issaquah Highlands was not at issue at that time. At no point following the January 17, 2008 declination letter did Issaquah Highlands contest PBSIC's coverage position, provide additional information or request a defense. CP at 1237.

C. Ms. Xia Filed Suit against Issaquah Highlands

On January 27, 2009, one year after PBSIC issued its coverage declination, Ms. Xia filed suit against Issaquah Highlands 50, LLC and Issaquah Highlands 48, LLC. CP at 116. She claimed that she suffered personal injuries resulting from Issaquah Highlands' negligent construction and failure to disclose a latent defect.[2] CP at 118-19.

Ms. Xia sent a courtesy copy of the lawsuit to PBSIC on the date the lawsuit was filed. CP at 396. However, Issaquah Highlands did not tender the suit to PBSIC and instead retained personal defense counsel.

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[2] In November 2009, Ms. Xia filed an amended complaint, adding as defendants Gottlieb Issaquah Highlands 48, LLC and Gottlieb Issaquah Highlands 50, LLC, the property's sellers, and Sacotte Issaquah Highlands 48, LLC and Sacotte Issaquah Highlands 50, LLC, the property's development managers, as well as Extreme Heating and Air Conditioning, the subcontractor that installed the water heater. CP at 78-90.

See CP at 129 (Answer to Ms. Xia's complaint signed by Michael P. Scruggs of Scruggs Law Offices). After hiring defense counsel, Issaquah Highlands tendered the suit to a non-party to the present matter: American States Insurance Company.[3] CP at 136.

D. Ms. Xia and Issaquah Highlands Entered into a Consent Judgment

On December 23, 2010, Ms. Xia notified PBSIC that she planned to enter into a $2,000,000 consent judgment with Issaquah Highlands unless PBSIC agreed to "provide coverage and defend" PBSIC. CP at 299. Although Ms. Xia mentioned the proposed settlement to PBSIC, no communications regarding the settlement were received from the insured, Issaquah Highlands. There was no representation that Ms. Xia was acting on behalf of Issaquah Highlands when notifying PBSIC of the proposed settlement.

The trial court ultimately approved the settlement and a judgment was entered in favor of Ms. Xia for $2,000,000. CP at 7, 303-09. Under the agreement, Ms. Xia covenanted not to execute the judgment against Issaquah Highlands in exchange for an assignment of Issaquah Highlands' rights against PBSIC. CP at 7, 96-106, 732-42.

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[3] American States Insurance Company was the insurer for Extreme Heating and Air Conditioning.

E. Ms. Xia Filed Suit against PBSIC

On June 8, 2011, Ms. Xia filed suit against PBSIC, alleging that PBSIC wrongfully denied coverage and wrongfully refused to defend and/or indemnify Issaquah Highlands and failed to perform a reasonable investigation before denying coverage, claiming breach of contract, insurer bad faith, violation of the CPA and IFCA. CP at 9-14. She also requested a declaratory judgment stating that PBSIC had a duty to provide coverage to Issaquah Highlands, including defense and indemnification in connection with Ms. Xia's personal injury suit.[4] CP at 14.

In the fall of 2012, both parties moved for summary judgment. CP at 23, 221. Ms. Xia argued that PBSIC breached its duty to defend by failing to provide a defense to Issaquah Highlands when coverage was questionable. CP at 231-48. PBSIC argued that it properly denied coverage under both the policy's pollution exclusion and the policy's townhouse liability exclusion and, therefore, requested dismissal of all of Ms. Xia's claims. CP at 31-46.

The trial court granted PBSIC' motion for summary judgment and denied Ms. Xia's motion. CP at 1297. The court concluded:

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[4] Ms. Xia also claimed in the alternative, that if coverage did not exist under the policy, Issaquah Highlands' insurance brokers were negligent in failing to procure adequate insurance for the Issaquah Highlands project and the work performed on her home. CP at 8, 15-18. She alleged claims for negligent misrepresentation, breach of contract, breach of fiduciary duties, and a violation of the CPA. CP at 15-18. The claims against Issaquah Highlands' insurance brokers are not at issue in this appeal.

> When PBSIC denied coverage in its January 17, 2008 letter it was correct because the townhouse exclusion properly applied and excluded all coverage. Nothing thereafter changed the situation for the insurer, including that there was no request for a defense of the suit from or on behalf of the insureds to Defendant PBSIC. Based on the foregoing, PBSIC owed no duty to defend or indemnify its insureds with respect to the underlying lawsuit and later consent judgment.

CP at 1299. Thus, the trial court dismissed Ms. Xia's complaint against PBSIC with prejudice. CP at 1298.

IV. ARGUMENT

A. Standard of Review

The Court of Appeals reviews a trial court's ruling on summary judgment de novo, engaging in the same inquiry as the trial court. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013). Thus, this Court "will affirm an order of summary judgment when 'there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.'" *Id.* (quoting *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007)); CR 56(c). This Court must "review the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *Id.*

B. No Breach of Duty to Defend or Indemnify

Issaquah Highlands' failure to tender Ms. Xia's claim to PBSIC after Ms. Xia filed suit against PBSIC is dispositive of any claim regarding PBSIC's duty to defend. Moreover, regardless of the tender issue, PBSIC owed Issaquah Highlands no duty to defend or indemnify because the allegations on the face of Ms. Xia's original claim letter and complaint gave no rise to coverage as a matter of law. Accordingly, this court should affirm the trial court's dismissal of Ms. Xia's claims for breach of the duty to defend and/or indemnify.

1. The duty to defend was not triggered because Issaquah Highlands failed to tender the lawsuit.

The insurer's duty to defend is triggered when a complaint is filed against the insured. See *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 420–21, 191 P.3d 866 (2008); see also *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52, 164 P.3d 454 (2007). Here, the only notice Issaquah Highlands provided to PBSIC regarding Ms. Xia's claim was on July 19, 2007, *before* suit was filed. CP at 1328. Subsequently, on January 17, 2008, after investigating the claim, PBSIC issued its letter denying coverage under both the pollution exclusion and the townhouse exclusion. CP at 278-85. PBSIC also stated in that letter: "If you have any information that would have a material bearing on PBSIC's coverage

position, or if a lawsuit is filed, you are requested to contact the undersigned." CP at 286. Because PBSIC's declination letter was issued pre-suit, no duty to defend had yet been triggered and that duty was not at issue when PBSIC issued its letter. See *USF*, 164 Wn.2d at 420–21. Further, after PBSIC issued the letter, Issaquah Highlands at no point responded to the letter, provided additional information regarding the claim or contested PBSIC's position.

It was not until January 27, 2009 that Ms. Xia filed suit against Issaquah Highlands. CP at 118. Although PBSIC had specifically requested that Issaquah Highlands notify PBSIC when a suit was filed, Issaquah Highlands never notified PBSIC of Ms. Xia's lawsuit, never challenged PBSIC's initial coverage position, and never requested a defense. The only notice PBSIC received of the lawsuit was not from its insured but, rather, from Ms. Xia herself when Ms. Xia submitted a courtesy copy of the complaint to PBSIC. CP at 396. However, Ms. Xia is not PBSIC's insured and has no authority under Washington law to tender a defense to an insurer with which she has no contractual relationship.

Similarly, Ms. Xia appears to claim that a subsequent letter she sent to PBSIC notifying PBSIC of the proposed consent judgment acted as a tender to PBSIC. Br. of Appellant at 22-23. However, again, Ms. Xia

was not and has never been PBSIC's insured and, therefore, her communications with PBSIC are wholly irrelevant to the issue of tender—an issue that turns entirely on Issaquah Highlands' communications with its insurer.[5]

Ms. Xia nevertheless appears to argue that the duty to defend arose at the time PBSIC first received notice of her claim, not when suit was filed. See Br. of Appellant at 20. In support of this assertion, she claims that Issaquah Highlands' policy with PBSIC did not require a formal tender but, rather, required only that Issaquah Highlands "notify" PBSIC of a claim or suit. Section IV(6)(b), relied upon by Ms. Xia, provides: "If a claim or suit is received by an insured, you or that insured must, as a condition to recovery under this policy ... [n]otify us as soon as practicable, but not more than fifteen (15) days following initial receipt of the claim or suit." CP at 384. But contrary to Ms. Xia's assertion, this

[5] Below, Ms. Xia attempted to recharacterize her letter to PBSIC as one submitted jointly by her and Issaquah Highlands in order to avoid the reality that Issaquah Highlands never tendered the suit to PBSIC. She submitted a declaration by her former counsel stating that Issaquah Highlands' counsel "was willing to write the last chance letter" but that Ms. Xia's counsel "ended up writing the letter." CP at 905. However, there is nothing in the letter itself that supports Ms. Xia's position that the letter was issued on behalf of Issaquah Highlands or that Issaquah Highlands had any participation in issuing the letter.

The first line of the letter stated, "my office represents Zhaoyun Xia." CP at 912. The letter refers to Issaquah Highlands not by name, but as "your insureds," and makes no mention of Issaquah Highlands' involvement in the writing of the letter or the position contained therein. CP at 912. The only demands in the letter relate to Ms. Xia, informing PBSIC that "Ms. Xia will be left with no other option but to enter into the settlement" and that "Ms. Xia will immediately bring actions against PBSIC." CP at 914. The letter is signed only by Ms. Xia's attorney, not Issaquah Highlands or its attorney. Accordingly, the trial court determined, and this Court should agree, that Ms. Xia's post-hoc characterization of her own letter is unpersuasive.

provision does not govern the duty to defend. Rather, the contours of that duty are explicitly stated at the outset of the policy in Section I.A, which provides: "We will have the right and duty to defend you, the Named Insured, against any suit seeking [damages for bodily injury or property damage to which the policy applies]." CP at 72.

The policy defines a "suit" as

> a civil proceeding in which damage because of bodily injury, property damage, personal injury or advertising injury to which this insurance applies are alleged. Suit includes:
>
> a. An arbitration proceeding in which such damages are claimed and to which an insured must submit or does submit with our consent; or
>
> b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which an insured submits with our consent.

CP at 390. Notably, the definition of a "suit" clearly includes only a formal lawsuit, not merely a "claim" submitted by an injured party. Thus, no duty to defend was triggered in this case until Ms. Xia brought her lawsuit against Issaquah Highlands.[6] Because Issaquah Highlands failed to tender its defense to PBSIC at that time by notifying PBSIC of the lawsuit, the duty to defend was not triggered.

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[6] Cf. *United Servs. Auto. Ass'n v. Speed*, 179 Wn. App. 184, 195, 317 P.3d 532 (2014) (duty to defend arose when demand letter was sent to insurer based on policy provision explicitly stating that duty to defend was triggered when any "claim" was made for damages arising from acts covered under the policies).

This result is consistent with Washington's status as a "selective tender" state. See *USF*, 164 Wn.2d at 421-22. "Selective tender preserves the insured's right to invoke or not to invoke the terms of its insurance contracts. An insured may choose not to tender a claim to its insurer for a variety of reasons." *Id.* It is clear from Issaquah Highlands' actions after Ms. Xia filed suit that Issaquah Highlands specifically chose not to tender its defense to PBSIC. By contrast to Issaquah Highlands' absolute silence to PBSIC when the lawsuit was filed, Issaquah Highlands clearly and explicitly tendered its defense to American States Insurance Company, the insurer of the company that performed work on the water heater.[7] CP at 136.

As evidenced by this letter, Issaquah Highlands was capable of explicitly tendering the defense of the lawsuit to PBSIC, but chose not to do so. The letter also demonstrates that American States had made the same request to Issaquah Highlands for notification of when a lawsuit was

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[7] The tender letter to American States provided:

> I am writing to formally tender the defense of the above-captioned lawsuit to American States to fully defend and indemnify Issaquah Highlands 48 LLC and Issaquah Highlands 50 LLC. Issaquah Highlands 48 LLC is an additional insured under the above-referenced policy.
>
> This claim was previously reported to you and in a letter dated April 11, 2008, adjuster Alden Swan acknowledged the notice of claim and requested a copy of the lawsuit when and if it was filed. I have enclosed a copy of the filed lawsuit as requested and have filed a notice of appearance to protect Issaquah Highlands 48 and 50 until your company begins providing a defense.

CP at 136.

filed and that Issaquah Highlands complied with American States' request, but not PBSIC's. Further, Issaquah Highlands' decision to tender to American States was eminently reasonable because Issaquah Highlands' contract with its subcontractor (1) required the subcontractor to defend and indemnify it for claims involving the subcontractor's work and (2) required the subcontractor to have Issaquah Highlands named as an insured under its policy. CP at 161.

Ms. Xia also argues that the duty to defend was triggered when she submitted a courtesy copy of the complaint to PBSIC. However, as discussed above, the insurance policy itself required that Issaquah Highlands notify PBSIC when a lawsuit was filed. See CP at 384. Further, Ms. Xia is not PBSIC's insured and does not have standing to invoke the provisions of Issaquah Highlands' policy, provisions that Issaquah Highlands clearly chose not to invoke by remaining silent after Ms. Xia's lawsuit was filed.

Ms. Xia nevertheless relies on *Kidwell v. Chuck Olson Oldsmobile, Inc.*, 4 Wn. App. 471, 481 P.2d 908 (1971), in support of her contention that mere notice of the lawsuit, however given, is sufficient to trigger the duty to defend. See Br. of Appellant at 20. However, contrary to Ms. Xia's representation of that case, the issue in *Kidwell* was not whether an unrelated third party's notice of the lawsuit to an insurer was sufficient to

trigger the duty to defend. Rather, *Kidwell* involved an insurance policy covering two insureds, and the court held that one insured could invoke the duty to defend on behalf of the other insured when the claim to coverage for both insureds arose out of the same occurrence. *Id.* at 474. Here, Ms. Xia was a third-party claimant, not an additional insured under the PBSIC policy, and therefore had no entitlement to invoke the provisions of the policy in this case.

Issaquah Highlands' decision not to tender its defense to PBSIC is dispositive here. At no point after PBSIC issued its letter denying coverage for Ms. Xia's pre-suit claim did Issaquah Highlands contact PBSIC to contest PBSIC's coverage denial, to tender the defense once suit was filed one year later, or otherwise. Issaquah Highlands' silence throughout this litigation can only be reasonably interpreted to mean that Issaquah Highlands agreed with PBSIC's coverage position. Accordingly, no duty to defend arose as a matter of law and, therefore, the trial court properly dismissed Ms. Xia's duty to defend claim.

2. No duty to defend because no facts could give rise to coverage

Notwithstanding Issaquah Highlands' failure to invoke the duty to defend by tendering Ms. Xia's lawsuit to PBSIC, no duty to defend arose as a matter of law because Ms. Xia's complaint does not allege any facts

that, if taken as true, could have given rise to coverage under the policy. The duty to defend arises if the complaint "construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage." *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404, 229 P.3d 693 (2010) (internal quotation marks omitted). When determining whether the duty to defend was triggered, the court is limited to examining "the four corners of the complaint and the four corners of the insurance policy." *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 806, 329 P.3d 59 (2014).

"The duty to defend exists if the policy *conceivably* covers the claim allegations." *Am. Best Food*, 168 Wn.2d at 404. Therefore, a duty to defend will be found unless it is clear from the face of the complaint that the policy does not provide coverage. *Woo*, 161 Wn.2d at 64. However, "[d]espite these broad rules favoring the insured, insurers do not have an unlimited duty to defend." *United Servs. Auto. Ass'n v. Speed*, 179 Wn. App. 184, 196, 317 P.3d 532 (2014). The duty to defend "is not triggered by claims that clearly fall outside the policy." *Nat'l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 879, 297 P.3d 688 (2013).

Courts "generally examine only the allegations against the insured and the insurance policy provisions to determine whether the duty to defend is triggered." *Speed*, 179 Wn. App. at 194 (citing *Woo*, 161 Wn.2d

at 52). Therefore, whether a claim triggers a duty to defend is a question of law subject to de novo review. *Id.*

Resolving whether PBSIC had a duty to defend in this case requires interpretation of PBSIC's insurance contract with Issaquah Highlands. "In construing the language of an insurance policy, the policy should be given a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." *Tyrrell v. Farmers Ins. Co. of Washington*, 140 Wn.2d 129, 133, 994 P.2d 833 (2000) (quoting *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 682, 801 P.2d 207 (1990)). The court "examines the policy's terms 'to determine whether under the plain meaning of the contract there is coverage.'" *Tyrrell*, 140 Wn.2d at 133 (quoting *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 576, 964 P.2d 1173 (1998)).

A policy is ambiguous if the language, on its face, is fairly susceptible to two different reasonable interpretations." *Cook v. Evanson*, 83 Wn. App. 149, 152, 83 Wn. App. 149 (1996). Ambiguities and policy exclusions are construed against the drafter-insurer. *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 512, 276 P.3d 300 (2012).

However, when policy language is unambiguous, courts must enforce the policy as written and may not create an ambiguity where none exists. *Tyrrell*, 140 Wn.2d at 133; *Cook*, 83 Wn. App. at 152.

Washington courts will "not allow an insured's expectations to override the plain language of the contract." *Cook*, 83 Wn. App. at 155.

In light of these principles, we turn to the two policy exclusions at issue in this case.

a. Townhouse exclusion clearly bars coverage

The allegations contained in Ms. Xia's complaint clearly fall outside of the policy provisions because she alleged that she purchased a "town house" and/or a "town home" from Issaquah Highlands. The policy's townhouse liability exclusion excludes from coverage:

> Property damage or bodily injury within the products-completed operations hazard arising from, related to or in any way connected with your work or your product which is, is part of or is incorporated into or upon a condominium, or townhouse project, or to personal injury or advertising injury arising or resulting from your operations performed upon, at or for a condominium or townhouse project.

CP at 337 (boldface omitted). The policy does not define the term "townhouse."

Where terms in an insurance contract are undefined, they "must be given their 'plain, ordinary, and popular' meaning." *Kitsap County*, 136 Wn.2d at 576 (quoting *Boeing Co. v. Aetna Cas. & Sur. Co.,* 113 Wn.2d 869, 877, 784 P.2d 507 (1990)). The undisputed facts of this case make clear that all parties that referenced Ms. Xia's home in this matter believed

her home to be a townhouse and, therefore, it is clear that the home falls within the ordinary and popular meaning of the term "townhouse."

First, Ms. Xia herself has consistently referred to her house as a "town home" or "town house" throughout this litigation. Most importantly, both her original and amended complaints allege that her home was a "town home" and/or a "town house." CP at 78-90, 116-121. Specifically, she stated:

> Ms. Xia purchased a Villagio **town home** (hereinafter the "Property") in Issaquah Highlands in May of 2006. …
>
> Upon moving into her new **town home**, Ms. Xia began to feel ill and started to experience unusual symptoms.
>
> In or around October 2006, due to the symptoms Ms. Xia was experiencing while living in her Villagio **town home** she pre-purchased a condo in downtown Bellevue.
>
> On December 8, 2006, Puget Sound Energy found an indoor leak of Carbon Monoxide into Ms. Xia's **town home**.
>
> Puget Sound Energy discovered that the exhaust hose for Ms. Xia's hot water tank had never been connected and thus was allowing carbon monoxide to flow freely into Ms. Xia's **town home**.

CP at 83, 117-18 (boldface added). She further stated that Issaquah Highlands "had a duty to exercise reasonable care in constructing the **town house** purchased by Ms. Xia." CP at 84-85, 118 (boldface added).

In addition, in a June 26th, 2007 letter to Issaquah Highlands regarding her health concerns, Ms. Xia stated, "I purchased one of your

new villaggio townhouses." CP at 64. And in her subsequent demand letter to Issaquah Highlands, a letter from Ms. Xia's attorney stated, "my office represents Zhaouyun Xia as it relates to injuries she sustained arising out of the purchase and ownership of a townhome in Issaquah, Washington." CP at 67.

Second, the property was marketed as a "townhome." Issaquah Highlands marketed the development as the "Villaggio TownHomes at Issaquah Highlands, and the home was listed in an external real estate listing as a "townhome." CP at 108, 134. The project's developer, Joe Sacotte of The Sacotte Companies, also lists the Villaggio "[t]ownhomes at Issaquah Highlands" as a completed project on his website. CP at 131.

Finally, all official city and county records pertaining to the property explicitly stated that the property was a "townhouse" or "townhome." Issaquah Highlands' permit application for the home Ms. Xia purchased listed the project name as "Issaquah Highlands Division 96 Townhomes" and stated that the work to be performed was "[n]ew construction for 1 new SF Ground related Townhome." CP at 58. The City granted the application and issued a permit to Issaquah Highlands, describing the unit as a "[n]ew townhome." CP at 57. King County Auditor's records also classify Ms. Xia's home as a "townhouse" and

King County Department of Assessments records list the home as a "Townhome" on a "Townhouse Plat." CP at 54, 60.

Thus, all of the people and entities that have referred to or classified the home, including the City of Issaquah, the King County Department of Assessments, the King County Auditor's Office, Issaquah Highlands, and Ms. Xia herself, have classified the home as a townhouse or townhome. Under these circumstances, the townhouse exclusion in the insurance policy clearly and unambiguously applies to Ms. Xia's claim.

Further, in determining the ordinary and popular meaning of an undefined term in an insurance policy, "standard English dictionaries may be used." *Tyrrell*, 140 Wn.2d at 133. Webster's Dictionary defines "town house" as "a usually single-family house of two or sometimes three stories that is usually connected to a similar house by a common sidewall."[8] It is undisputed that Ms. Xia's home was a two-story, single family house. CP at 54, 57. Photographs of the Villagio townhouses and of Ms. Xia's unit in particular reveal that the homes are connected by shared walls with no visible air space between the units. CP at 134, 142. Clearly, the homes fall within the dictionary definition of a "town house."

Ms. Xia nevertheless attempts to create an ambiguity by introducing extrinsic evidence purporting to show that her home was not a

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[8] http://www.merriam-webster.com/dictionary/townhouse, retrieved on December 28, 2014.

townhouse because it did not share walls with neighboring homes. Ms. Xia cites testimony by her expert, architect Michael Lierman, stating that her unit's status as a "fee simple, zero lot line" home[9] means that it was not a townhouse. Mr. Lierman testified that such homes do not share common walls with adjoining residences and instead have adjacent side walls separated by a narrow air gap through which the lot line runs. Thus, Mr. Lierman opined, fee simple, zero lot line homes are not townhouses. CP at 176-77.

However, Ms. Xia's introduction of Mr. Lierman's opinion is a red herring that the trial court properly found unpersuasive. When determining the meaning of an undefined word in an insurance policy, courts look to the plain, ordinary meaning of the term, which can be aided by the term's dictionary definition. Where all relevant parties in this matter have consistently described Ms. Xia's home as a "town house" or a "town home" and where Ms. Xia's home squarely falls within the dictionary definition of a "town house," the term is not ambiguous and extrinsic evidence may not be introduced to vary its plain meaning or to create an ambiguity where none otherwise exists. See *Tyrrell*, 140 Wn.2d at 133; *Cook*, 83 Wn. App. at 152.

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[9] See, e.g., CP at 339 (building permit for "SFA," or single family attached, home); CP at 983 (letter from City of Issaquah discussing Issaquah Highlands' permit applications for "single-family, zero lot line" homes); CP at 343 (Issaquah Highlands' project description for "fee simple attached affordable townhouse units").

Further, Ms. Xia's argument on this matter was disposed of by this Court in *American States Insurance Company v. Delean's Tile and Marble, LLC*, 179 Wn. App. 27, 319 P.3d 38 (2013). At issue in *Delean's* was an insurance policy provision excluding coverage for claims related to property damage arising from construction involving "townhouses" but providing coverage for construction involving "a detached single family dwelling." *Id.* at 32. Relying on the latter provision, the contractors seeking coverage urged that the work they performed on the townhouses was covered under the policy because there were one-inch air spaces between the townhouses. *Id.* at 39. This Court rejected the argument, holding that the contractors were "incorrect in their contention that the one inch air space between the inner walls of the buildings legally separates the units." *Id.* The Court reasoned:

> The units within the townhouse buildings are not detached from each other because they have continuous siding, a continuous guttering system, a common roof, and appear to be part of a single building. Notwithstanding the one inch air space between the units, a practical interpretation of the term "detached" suggests that the units be noticeably separate from one another, and these are not.

Id.

As in *Delean's*, the Villaggio townhouse units at issue here were not noticeably separate from one another and were for all appearances part of a single building with shared siding and a shared roof. Accordingly,

based on this Court's clear ruling in *Delean's*, this Court should reject any argument that a narrow air gap between the townhouses in the present case changed their character from townhouses to detached single-family dwellings.

Ms. Xia also attempts to introduce evidence of Issaquah Highlands' intent when it constructed the townhouses, citing its desire to avoid the litigation it had experienced when it had constructed condominiums in the past. Br. of Appellant at 5 (citing Geisenbrecht testimony, CP at 896-97). However, Issaquah Highlands' unstated subjective belief that its townhouses did not qualify as "townhouses" cannot override the plain language of the parties' insurance contract. See *Cook*, 83 Wn. App. at 155.

Ms. Xia further urges that her home is not a townhouse based on the fact that the term "townhouse" in the policy is placed next to the term "condominium," which, she claims, demonstrates that the policy "indicates an intent to apply the exclusion to those residential arrangements having the common ownership attributes of a condominium." Br. of Appellant at 32-33. In so arguing, Ms. Xia appears to claim that the term "townhouse" is intended to have an identical meaning to the term "condominium," simply by virtue of the proximity of the two words in the contract. However, such an interpretation would

render the use of the term "townhouse" meaningless, which runs counter to basic principles of insurance policy interpretation requiring courts to give meaning to all terms in an insurance policy. See *Kitsap County*, 136 Wn.2d at 591.

Finally, Ms. Xia argues that PBSIC breached its duty to defend by failing to investigate whether her home, which was described to PBSIC as a "town house" or "town home" was, in fact, a "townhouse" under the policy. Br. of Appellant at 41-42. This argument fails for two reasons. First, whether a duty to defend exists is determined by examining only the four corners of the complaint and the insurance policy at issue. *Expedia*, 180 Wn.2d at 806. As discussed at length above, the unambiguous terms of the policy and the clear language used in Ms. Xia's complaint reveal that it was clear that no coverage existed. Therefore, no duty to defend arose as a matter of law. See *Woo*, 161 Wn.2d at 64.

Second, even if this court were to look beyond the four corners of the insurance policy and Ms. Xia's complaint, no further investigation was necessary where *every* description of Ms. Xia's home characterized her unit as a "town house" or "town home." It would be preposterous to require PBSIC to "investigate" further to determine whether, based on the common meaning of the unambiguous term, Ms. Xia's home was a "townhouse" under these circumstances. All evidence reasonably

available to PBSIC in its investigation of the claim revealed that Ms. Xia's home was a "town house" and/or "town home." If, notwithstanding this information, Issaquah Highlands believed there to be evidence to the contrary, it was incumbent upon Issaquah Highlands to bring that information to PBSIC's attention. See CP at 286 (Coverage letter to Issaquah Highlands stating: "If you have any **information that would have a material bearing on PBSIC's coverage position**, or if a lawsuit is filed, you are requested to contact the undersigned.").[10]

b. Pollution exclusion clearly bars coverage

Although the trial court did not base its dismissal of Ms. Xia's claims on the pollution exclusion, this court can affirm on any basis supported by the record. *Blue Diamond Gp., Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 453, 266 P.3d 881 (2011). Thus, even if this Court disagrees with the trial court on the issues of tender and the townhouse exclusion, this court should nevertheless affirm the trial court's order granting PBSIC's summary judgment motion on the ground that the pollution exclusion barred coverage under the policy. In light of the abovementioned principles regarding the duty to defend, "[t]he question

[10] It is possible that this "information" was not provided to PBSIC because it did not exist at the time Issaquah Highlands made its claim to PBSIC. The only evidence Ms. Xia has regarding the non-townhouse status of her home is the testimony of Ms. Xia's expert architect obtained in preparation for litigation. PBSIC cannot reasonably be expected to retain an expert to determine whether a policy exclusion barring coverage for injuries related to "townhouses" barred coverage for what was described as and for all intents and purposes appeared to be a "townhouse."

here is whether an average person would understand that the pollution exclusion clause unambiguously denied coverage for [Ms. Xia's] injuries." *Cook*, 83 Wn. App. at 153. Here, the policy's plain, unambiguous language clearly applies to the carbon monoxide exposure at issue in the present case. Further, Washington courts have consistently applied the exclusion to bar coverage in cases nearly identical to the present.

i. Policy language unambiguously bars coverage

The policy's pollution exclusion excludes from coverage:

> Bodily injury, property damage, or personal injury caused by, resulting from, attributable to, contributed to, or aggravated by the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants, or from the presence of, or exposure to, pollution of any form whatsoever, and regardless of the cause of the pollution or pollutants.

CP at 334 (boldface omitted).

The policy defines "pollutant" as:

> Any solid, liquid, gaseous or thermal irritants or contaminants, which include but are not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste, biological elements and agents, and intangibles such as noise, light and visual esthetics, the presence of any or all of which adversely affects human health or welfare, unfavorably alters ecological balances or degrades the vitality of the environment for esthetic, cultural or historical purposes, whether such substances would be or are deemed or thought to be toxic, and whether such substances are naturally occurring or otherwise.

CP at 335 (boldface omitted).

Because it is undisputed that Ms. Xia suffered "bodily injury" and that her injury was "caused by" carbon monoxide, the sole issue before this court is whether the cause of her injury, carbon monoxide, is a "pollutant" under the policy. It is clear from the plain language of the policy and the allegations contained in Ms. Xia's complaint that carbon monoxide is a "pollutant." Ms. Xia alleges in her complaint that she suffered "cognitive deterioration, resulting from her continuous inhalation of carbon monoxide." CP at 84.[11] Thus, based on the allegations in her complaint alone, carbon monoxide is a "gaseous … contaminant" that "adversely affects human health or welfare." CP at 334.

Further, Ms. Xia submitted an expert report analyzing the toxicity of carbon monoxide and the negative effects of carbon monoxide exposure on human health. CP at 141. Citing multiple sources, the report stated that, depending on the concentration of carbon monoxide in the air, symptoms of exposure can range from mild headache, fatigue, nausea, and dizziness to death. CP at 148-50. Accordingly, it is clear that an average person purchasing insurance would understand that the pollution exclusion clause unambiguously denied coverage for Ms. Xia's injuries. See *Cook*, 83 Wn. App. at 153.

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[11] See also CP at 118-19.

ii. Washington courts have consistently held that pollution exclusions bar coverage in similar cases

Not only does the plain language of the pollution exclusion clearly apply to the carbon monoxide-related injuries at issue in this case, but Washington law interpreting such exclusions dictates the same result. Washington courts have repeatedly affirmed the applicability of nearly identical pollution exclusions to injuries sustained as a result of hazardous airborne toxins. See *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 182, 110 P.3d 733 (2005) (pollution exclusion barred coverage for personal injuries sustained by tenant resulting from fumes from waterproofing material); *City of Bremerton v. Harbor Ins. Co.*, 92 Wn. App. 17, 24, 963 P.2d 194 (1998) (pollution exclusion barred coverage for claims based on emission of toxic fumes from municipal sewage treatment plant); *Cook*, 83 Wn. App. at 157 (pollution exclusion applied to respiratory injuries sustained when fumes from concrete sealant entered building).

This court first interpreted a pollution exclusion in *Cook*, where this court held that an exclusion nearly identical to that in the present case barred claims for respiratory injuries resulting from sealant fumes applied to the outside of a building. 83 Wn. App. at 154. This court held that the policy "language is not ambiguous on its face and there are not two

reasonable interpretations." *Id.* In so holding, the court rejected the plaintiffs' argument that the exclusion was intended to apply only to traditional environmental pollution based on the exclusion's drafting history. *Id.* The court reasoned that "[a] party can present drafting history to assist in determining a reasonable construction *after* the court finds a clause ambiguous, ... [w]e cannot use the drafting history to find the clause ambiguous."[12] *Id.* at 156.

Ms. Xia nevertheless makes the same arguments regarding the pollution exclusion's drafting history that this court rejected in *Cook*, relying entirely on the Washington Supreme Court's ruling in *Kent Farms, Inc. v. Zurich Insurance Co.*, 140 Wn.2d 396, 402, 998 P.2d 292 (2000). In *Kent Farms*, a fuel deliveryman was injured when he was sprayed with fuel while trying to remedy a fuel leak resulting from a faulty shutoff valve. 140 Wn.2d at 397-98. The Court held that although the fuel could be a "pollutant" when released into the environment, it was not acting as a pollutant in the case of the fuel deliveryman because the fuel injured him when it hit him with force, causing it to enter his lungs and stomach. *Id.* at 401-02.

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[12] The court further recognized that cases in other jurisdictions had reached similar results, including one case involving carbon monoxide poisoning. *Cook*, 83 Wn. App. at 155 (citing *Bernhardt v. Hartford Fire Ins. Co.*, 102 Md. App. 45, 648 A.2d 1047 (1994)).

In *Quadrant Corp.*, the Washington Supreme Court subsequently made clear that *Kent Farms* did not overrule previous cases (see, e.g., *Cook*), in which courts had rejected the "environmental pollution" distinction. Rather, the Court held that the critical inquiry when determining the applicability of a pollution exclusion is whether the injury was primarily caused by the toxic character of the pollutant. 154 Wn.2d at 179. Thus, the Court held that a pollution exclusion barred coverage for personal injuries sustained by a tenant in an apartment building after a restoration company applied sealant to a nearby deck, causing toxic fumes to enter the apartment building. *Id.* In reaching this result, the Court distinguished *Kent Farms*, holding that in that case, "the offending substance's toxic character was not central to the injury" because in that case, the injured party "'was not polluted by diesel fuel. It struck him; it engulfed him; it choked him. It did not pollute him.'" *Id.* at 182 (quoting *Kent Farms*, 140 Wn.2d at 401). By contrast, in *Quadrant*, the Court recognized that:

> The Kaczor estate claims that she suffered bodily injury and property damage when the deck sealant fumes drifted or migrated into her apartment. … The parties agree that the sealants at issue here, PC–220 and Polyglaze AL, contained TDI, a toxic substance which can irritate the respiratory tract and, in high concentrations, can cause central nervous system depression. The material safety data sheet for these products indicates that their ingredients are toxic and recommends precautions such as adequate

> ventilation, respiratory protection, protective clothing, and eye protection. Furthermore, the Federal Clean Air Act lists TDI as a hazardous air pollutant. See 42 U.S.C. § 7412(b)(1). The contents of the sealant unambiguously fall within the policy definition of pollutant.

Id. at 180-81 (some citations omitted).

This case is clearly analogous to *Quadrant Corp.*, not *Kent Farms*. Here, as in *Quadrant*, the parties agree that carbon monoxide exposure, in certain concentrations, can cause serious bodily injury, including death. CP at 148-50. Further, the Washington Department of Ecology defines carbon monoxide as a "toxic air pollutant." WAC 173-460-150.[13] Accordingly, the carbon monoxide in this case unambiguously falls within the policy definition of a pollutant. See *Quadrant*, 154 Wn.2d at 180-81.

Ms. Xia nevertheless argues that the present case falls under *Kent Farms*, not *Quadrant*, because unlike in *Quadrant*, the carbon monoxide here was not "a substance whose toxicity could cause injury even when used as intended." *Quadrant*, 154 Wn.2d at 179. She argues that carbon monoxide is not harmful in small quantities and that therefore her injuries would not have occurred if the water heater had been used as intended. Br. of Appellant at 39.

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[13] See *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 181, 110 P.3d 733 (2005) (noting that the substance was classified under Federal Clean Air Act as a hazardous air pollutant).

However, the dispositive issue in *Kent Farms* was that the diesel fuel, when used as intended, was not a pollutant because it should not have been ingested and/or inhaled. Thus, it only became hazardous to human health because it was projected with force down the injured party's throat. By contrast, here, carbon monoxide is by definition an air pollutant, and Ms. Xia was injured by the carbon monoxide as such when she inhaled it. There is no claim in the present case that the carbon monoxide that injured Ms. Xia was acting as anything other than an airborne pollutant or that the cause of Ms. Xia's injuries was anything other than the toxicity of the carbon monoxide itself. Accordingly, Ms. Xia's attempt to distinguish *Quadrant* is misplaced.

Nevertheless, Ms. Xia argues that it was at the very least unclear under Washington law whether her claim fell under *Quadrant* or *Kent Farms*, thereby requiring PBSIC to resolve ambiguities in the law in Issaquah Highland's favor and defend. However, merely because there is conflicting case law on a particular topic does not create an ambiguity in the law. *Kent Farms* dealt with a liquid being forcibly propelled down the injured party's throat in a clearly unintended manner. By contrast, the present case involves an airborne toxin that caused injury by inhalation. Every Washington case involving a similar airborne pollutant has held that pollution exclusions nearly identical to the one in the present case have

applied. See *Quadrant*, 154 Wn.2d at 182; *City of Bremerton*, 92 Wn. App. 17; *Cook*, 83 Wn. App. 149. Accordingly, contrary to Ms. Xia's assertion, this is not a case involving an "arguable legal interpretation" of PBSIC's policy. Br. of Appellant at 43. Rather, this is a case in which the plain language of the policy and Washington law clearly and unambiguously bar coverage.

Because coverage is barred based on the facts alleged on the face of Ms. Xia's complaint under both the townhouse and pollution exclusions, the duty to defend was not triggered and the trial court properly dismissed Ms. Xia's duty to defend claim accordingly.

3. No duty to indemnify

"The duty to indemnify exists only if the policy *actually* covers the insured's liability." *Woo*, 161 Wn. 2d at 53. As discussed at length above, the unambiguous facts in this case show that coverage under the policy was clearly barred by both the townhouse and pollution exclusions. Accordingly, Ms. Xia's claim for breach of the duty to indemnify fails as a matter of law.

C. No Bad Faith

1. No bad faith premised on duty to defend or indemnify

An action for bad faith claims handling sounds in tort. *Safeco Ins. Co. of Am. v. Butler*, 118 Wn. 2d 383, 389, 823 P.2d 499 (1992). The

elements of a bad faith claim are the same as any tort: duty, breach of duty, harm, and damages proximately caused by any breach of duty. *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 130, 196 P.3d 644 (2008). Further, the breach must be "unreasonable, frivolous, or unfounded." *Id.* Reasonableness of an insurer's actions is a complete defense to a bad faith allegation. *Kim v. Allstate Ins. Co.*, 153 Wn. App. 339, 356 n. 3, 223 P.3d 1180 (2010). In short, bad faith will not be found where a denial of coverage or a failure to provide a defense is based upon a reasonable interpretation of the insurance policy. *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 951 P.2d 1124 (1998). Moreover, the insurer is relieved of the duty when alleged claims are clearly not covered by the policy. *Id.*

Claims for bad faith failure to defend or indemnify can also be brought under the Insurance Fair Conduct Act (IFCA), chapter 48.30 RCW, and the Consumer Protection Act (CPA), chapter 19.86 RCW. IFCA imposes liability on insurers for unreasonably denying coverage. RCW 48.30.015. The Act also prohibits insurers from engaging in unfair trade practices, including those enumerated in WAC 284-30-330. RCW 48.30.010(1). A violation of RCW 48.30.010(1) constitutes a per se unfair or deceptive act or practice for the purposes of establishing a CPA claim. RCW 19.86.170; *Indust. Indem. Co. v. Kallevig*, 114 Wn.2d 907, 923, 792

P.2d 420 (1990).

Here, as discussed at length above, even when construing the complaint liberally, there was clearly no coverage under the insurance policy at issue based on both the townhouse exclusion and the pollution exclusion. All evidence available to PBSIC at the time it learned of Ms. Xia's claim dictated that her unit was a townhouse for the purposes of the policy exclusion, including all relevant municipal and county designations of the property as well as Ms. Xia's own characterizations of her unit. Clearly it was not unreasonable for PBSIC to determine that Ms. Xia's unit, which was consistently described as a "town home" or "town house" and which looked like a townhouse based on the common understanding of the term, was a "townhouse" for the purposes of the policy exclusion.

Further, it was clear to PBSIC at the time it learned of Ms. Xia's claim that the carbon monoxide that Ms. Xia inhaled was a "pollutant" under the policy based on the plain terms of the policy language. Where carbon monoxide is characterized as an airborne toxin by relevant regulations and where the allegations in Ms. Xia's claim stated that she suffered bodily injury from inhaling the substance, there was no reasonable argument against characterization of carbon monoxide as a "pollutant" under the policy's plain terms.

Moreover, as to both policy exclusions, Issaquah Highlands failed to present any information to "correct" PBSIC's reasonable interpretation of the policy exclusions after Issaquah Highlands received PBSIC's coverage position letter. Where the plain language of the policy exclusions barred coverage and where PBSIC's insured did not challenge PBSIC's clear position that no coverage existed, it was clearly reasonable for PBSIC to not only deny a defense and indemnity to Issaquah Highlands, but also to believe that Issaquah Highlands did not contest PBSIC's coverage position. This is particularly so where PBSIC explicitly requested that Issaquah Highlands (1) provide any additional information to PBSIC that Issaquah Highlands believed bore on PBSIC's coverage interpretation and (2) requested that Issaquah Highlands provide PBSIC with notice if a complaint was filed. CP at 286. Issaquah Highlands did neither and, therefore, PBSIC reasonably believed not only that no challenge to its coverage position existed, but also that no defense was being sought by Issaquah Highlands. Therefore, any bad faith claims based on the duties to defend or indemnify, whether at common law, under IFCA, or under the CPA, are without merit.

Ms. Xia also argues that because PBSIC breached its duty to defend and indemnify in bad faith, Issaquah Highlands was entitled to coverage by estoppel. "Where an insurer acts in bad faith in failing to

defend, … coverage by estoppel is one appropriate remedy." *Kirk*, 134 Wn.2d at 563. However, because, as discussed above, PBSIC's denial of defense and indemnity was based on a reasonable interpretation of the policy language, there can be no bad faith and, therefore, no coverage by estoppel. See *Mut. of Enumclaw Ins. Co. v. T&G Const., Inc.*, 165 Wn.2d 255, 267 n. 4, 199 P.3d 376 (2008) ("coverage by estoppel is only applicable when the insurer acts in bad faith").

2. No IFCA claims independent of duty to defend or indemnify

Ms. Xia also claims that PBSIC violated IFCA independent of any duty to defend or indemnify. Br. of Appellant at 46-47. Specifically, she argues that (1) PBSIC failed to conduct a reasonable investigation before denying coverage for Ms. Xia's claim, in violation of WAC 284-30-330(4); and (2) PBSIC failed to complete its investigation within thirty days after notification of the claim, in violation of WAC 284-30-370. Br. of Appellant at 46-47.

"An appeals court will not review an issue, theory, argument, or claim of error not presented at the trial court level." *Rash v. Providence Health Servs.*, __ Wn. App. __, __, 334 P.3d 1154, 1161 (Sept. 16, 2014); (citing RAP 2.5(a)); see also *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 290, 840 P.2d 860 (1992) ("Arguments or theories not presented to

the trial court will generally not be considered on appeal."). The rule dictates that "[a] party must inform the court of the rules of law it wishes the court to apply and offer the trial court an opportunity to correct any error." *Evans v. Mercado*, __ Wn. App. __, __, 338 P.3d 285, 288 (Nov. 17, 2014). The purpose of the rule is to "give the trial court an opportunity to correct errors and avoid unnecessary rehearings." *Rash*, 334 P.3d at 1161. The purpose of RAP 2.5(a) is met "where the issue is advanced below and the trial court has an opportunity to consider and rule on relevant authority." *Washburn*, 120 Wn.2d at 291.

Before the trial court on summary judgment, Ms. Xia's argument was limited to a claim for bad faith breach of the duties to defend and indemnify. Although she asserted as part of those arguments that PBSIC's investigation was improper, she at no point argued that PBSIC breached any IFCA provision giving rise to an independent claim for liability. See CP at 245-48. Accordingly, the purpose of RAP 2.5(a) was not met because the issue was not advanced below. See *Washburn*, 120 Wn.2d at 291. Further, Ms. Xia at no point presented to the trial court the specific WAC provisions she now claims constitute independent IFCA violations. Thus, Ms. Xia failed to give the trial court the opportunity to rule on the relevant authority and she may not now obtain a rehearing on her summary judgment motion based on issues she did not give the trial court

the opportunity to consider. See *id.*; *Rash*, 334 P.3d at 1161. Accordingly, this court should reject Ms. Xia's arguments regarding independent IFCA violations for failure to preserve them on appeal under RAP 2.5(a).

Moreover, even if this court were to examine Ms. Xia's bad faith investigation claims, they fail as a matter of law because PBSIC's investigation was patently reasonable under the circumstances. PBSIC received notice of Ms. Xia's claim on July 19, 2007. CP at 1238. Promptly upon receiving such notice, on July 23, 2007, PBSIC acknowledged receipt of the claim. CP at 442. On January 17, 2008, after conducting a thorough investigation, PBSIC notified Issaquah Highlands by letter that it was denying coverage under both the townhouse exclusion and the pollution exclusion. CP at 278-85.

Ms. Xia asserts that PBSIC's investigation was not timely completed within 30 days of receiving notice of the claim and that the investigation itself was insufficient. In support of her argument, she cites portions of the adjuster's notes regarding the claim in an attempt to create an issue of fact warranting remand. For example, she cites an adjuster's note from September 11, 2007, stating that "no contact has been made with insd. or clmt." CP at 256. However, Ms. Xia fails to cite the portion of the note immediately following the cited portion, which states: "left

several messages with no call back." CP at 256. Thus, contrary to Ms. Xia's assertion, this note does not reveal that PBSIC did anything other than diligently investigate her claim for purposes of WAC 284-30-330(4). Further, it does not show a violation of WAC 284-30-370, which provides:

> Every insurer must complete its investigation of a claim within thirty days after notification of claim, unless the investigation cannot reasonably be completed within that time. *All persons involved in the investigation of a claim must provide reasonable assistance to the insurer in order to facilitate compliance with this provision.*

(Emphasis added). Ms. Xia's and Issaquah Highlands' failure to respond to PBSIC regarding Ms. Xia's claim cannot be a basis for a violation of this provision.

Relying on the same adjuster's note, Ms. Xia also claims that NBIS only requested Ms. Xia's medical records and a list of contractors, "but did not undertake any factual investigation of Ms. Xia's carbon monoxide poisoning, how it occurred, or the nature of the zero lot line fee residences built by its insured." Br. of Appellant at 10. Ms. Xia again misrepresents the record. The adjuster's note upon which she relies states in full that documents "regarding t[he] claim with a list of subcontractors *and other needed info*" could be obtained. CP at 256 (emphasis added). Ms. Xia's misrepresentation of the record cannot create an issue of material fact sufficient for remand, particularly where the policy language,

the undisputed facts available to PBSIC at the time it denied coverage, and Washington law unambiguously demonstrated that no coverage existed, and rendered any further "investigation" unnecessary.

Further, when attempting to prove an IFCA violation independent of a claim based on the failure to defend or indemnify, the claimant must prove actual harm and resulting damages. *Onvia*, 165 Wn.2d at 134. Here, Ms. Xia has not alleged that PBSIC's failure to properly and/or promptly investigate her claim caused damage to Issaquah Highlands, other than her claim that a more extensive investigation would have demonstrated that PBSIC had a duty to defend if and when a lawsuit was ever filed. Accordingly, Ms. Xia has failed to state a stand-alone damages claim under IFCA, and this court should therefore reject any such claims.

D. No Attorney Fees

Ms. Xia claims attorney fees in the trial court based on IFCA, RCW 48.30.015(1), the CPA, RCW 19.86.090, *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52, 811 P.2d 673 (1991), and RAP 18.1. However, because Ms. Xia is not the prevailing party for the purposes of IFCA, the CPA, or *Olympic Steamship*, and because PBSIC did not breach its duty to defend or indemnify, no attorney fees are available to Ms. Xia and this court should decline her request.

V. CONCLUSION

For the foregoing reasons, this court should affirm the trial court's summary judgment dismissal of Ms. Xia's claims against PBSIC based on Issaquah Highlands' failure to tender Ms. Xia's claim to PBSIC's and the clear application of the townhouse exclusion to the facts of this case. In the alternative, if this Court disagrees with the trial court regarding the tender issue and the applicability of the townhouse exclusion, this court should nevertheless affirm on the ground that the pollution exclusion unambiguously precluded coverage for Ms. Xia's claim.

RESPECTFULLY SUBMITTED this 14th day of January, 2015.

ANDREWS ▪ SKINNER, P.S.

By _____ WSBA #45333 For:

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DECLARATION OF SERVICE

I, Sally Gannett, hereby declare as follows:

1. I am a citizen of the United States and of the State of Washington, living and residing in King County, in said State, I am over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness therein.

2. On the 14th day of January, 2015, I caused a copy of the foregoing Brief of Respondent ProBuilders Specialty Insurance Company RRG to be sent for service upon the following in the manner indicated:

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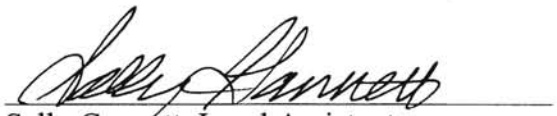
STATE OF WASHINGTON
2015 JAN 14 PM 4:24

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

DATED this 14th day of January, 2015, at Seattle, Washington.



Sally Gannett, Legal Assistant