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WASHINGTON STATE  
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Aug 26, 2016, 3:11 pm

No. 92436-8

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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ZHAOYUN XIA, et al.,

*Petitioner,*

v.

PROBUILDERS SPECIALTY INSURANCE COMPANY  
RRG, et al.,

*Respondent.*

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AMICUS BRIEF OF PROPERTY CASUALTY  
INSURERS ASSOCIATION OF AMERICA

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## I. INTRODUCTION

In *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 110 P.3d 733 (2005), this Court held that the plain and unambiguous language of an absolute pollution exclusion was enforceable as written, to preclude coverage for a claim for bodily injury caused by exposure to toxic waterproofing sealant fumes. Here Respondent ProBuilders denied a defense for a claim for bodily injury caused by exposure to toxic carbon monoxide fumes from a water heater, based on an absolute pollution exclusion broader than the exclusion at issue in *Quadrant*.

ProBuilders' denial of a defense was proper under Washington law, because Petitioner's claim clearly fell within the plain and unambiguous meaning of the exclusion language. This Court should reject Petitioner's attempt to create ambiguity in an unambiguous exclusion applied to unambiguous circumstances. This Court should reaffirm Washington's plain meaning approach to insurance contract interpretation, and reject Petitioner's call to overrule *Quadrant*. The Court of Appeals should be affirmed.

## II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Property Casualty Insurers Association of America ("PCIA") promotes and protects the viability of a competitive private insurance market for the benefit of consumers and insurers, and advocates its members' positions on important issues in legislatures and courts across the country. PCIA consists of nearly 1,000 member companies, representing the broadest cross section of insurers of any national trade

association. PCIA members write more than \$202 billion in annual premium, 35 percent of the nation's property casualty insurance. Member companies write 42 percent of the U.S. automobile insurance market, 27 percent of the homeowners market, 33 percent of the commercial property and liability market, and 34 percent of the private workers compensation market. In Washington, PCIA members write 26.8 percent of the property casualty market including 28.3 percent of the personal lines market and 24.8 percent of the commercial lines market.

One important way in which PCIA represents its members is through amicus curiae submissions in cases that present issues of statewide concern to PCIA members and their clients. PCIA believes the issues here present such concerns. Most fundamentally, an insurance policy is a contract between an insured and an insurer. Here the insured chose to buy the least expensive liability insurance policy available. That insurance included an absolute pollution exclusion that clearly bars coverage for any bodily injury caused by the discharge of fumes produced as a by-product of *any* process. Petitioner's injury was indisputably caused by such a discharge—carbon monoxide leaking from a water heater. ProBuilders properly relied on the unambiguous exclusion and the equally unambiguous factual circumstances of Petitioner's injury to deny a defense against her claim. This Court should decline Petitioner's invitation to unsettle Washington insurance law, and instead should affirm the Court of Appeals' conclusion that ProBuilders did not breach its duty to defend.

### III. STATEMENT OF THE CASE

PCIA relies on the statement of facts set forth by the Court of Appeals.

### IV. ARGUMENT

**A. The plain and unambiguous language of the absolute pollution exclusion set forth in ProBuilders' policy clearly precludes coverage for Ms. Xia's claim. ProBuilders therefore properly declined to defend against that claim.**

**1. Washington is a plain meaning jurisdiction, enforcing policy language that is clear and unambiguous as written.**

In Washington, insurance policies are “construed as contracts.” *Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 378, 917 P.2d 116 (1996). When construing an insurance policy, this Court gives it “the same construction that an ‘average person purchasing insurance’ would give the contract.” *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52, 164 P.3d 454 (2007). Undefined terms are given their “plain, ordinary, and popular meaning.” *Queen Anne Park Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 183 Wn.2d 485, 490–91, 352 P.3d 790 (2015). Policy language that is “clear and unambiguous” must be enforced as written. *Quadrant*, 154 Wn.2d at 171. Courts will not “modify” unambiguous policy language or “create ambiguity where none exists.” *Id.*

“An ambiguity exists only if the policy language is susceptible to two reasonable but different interpretations.” *Id.* at 179 (internal quotation marks and citations omitted). While an exclusion should be “strictly

construed,” that strict application may not trump the exclusion’s plain language. *Id.* at 172. Nor can an insured’s self-professed “reasonable expectations” override the exclusion’s plain language. *See id.*

**2. The plain language of the absolute pollution exclusion at issue here bars coverage for Petitioner’s claim. Petitioner’s proposed readings of the exclusion violate Washington’s prohibition against modifying unambiguous policy language.**

The absolute pollution exclusion at issue here bars from coverage:

Bodily 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.

Clerk’s Papers (CP) 334 (emphasis omitted). Further, the exclusion “applies regardless of the cause of the pollution and whether any other cause of said bodily injury . . . acted jointly, concurrently or in any sequence with said pollutants or pollution” and “whether any other cause of the bodily injury . . . would otherwise be covered” under the policy. CP 334 (emphasis omitted).

The policy broadly defines “pollutant” to include:

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 335 (emphasis added). This broad definition of “pollutant” expressly encompasses “fumes” and “waste,” “the presence of any or all of which adversely affects human health,” “whether such substances would be or are deemed or thought to be toxic,” and “whether such substances are naturally occurring or otherwise.” *Id.* The policy further defines “waste” to include “any substance or material produced as a by-product or side effect of *any process.*” *Id.* (emphasis added).

In her complaint against the insured, Petitioner alleged that carbon-monoxide inhalation caused her “cognitive deterioration.” CP 84. It is undisputed that her “bodily injury” was alleged to have been caused by the inhalation of carbon-monoxide fumes. The plain language of the policy’s absolute pollution exclusion bars coverage for bodily injury caused by exposure to “fumes” and—even more broadly—to “any substance or material produced as a by-product or side effect of *any process.*” CP 334–35 (emphasis added). The circumstances of Petitioner’s claim clearly fall within the exclusion’s broad and unambiguous language.

Petitioner argues that the exclusion should be read to exclude from coverage only an injury caused by “a substance or instrumentality that was operating as it was *intended* to operate.” Petitioner’s Supp. Br. 12 (emphasis added). In effect, Petitioner would have this Court rewrite the exclusion’s plain language in two ways. First, she would have this Court *write out* of the exclusion its “regardless of the cause” language. Second, she would have this Court *revise* the policy’s definition of pollution so it would be limited to “any substance or material produced as a by-product

or side effect of any process *operating as it was intended to operate.*” This attempt to “modify the contract” by adding language to an unambiguous exclusion “to create an ambiguity where none exists” is barred by clearly settled Washington insurance law. *See, e.g., Quadrant*, 154 Wn.2d at 179 (holding that a party cannot limit the scope of an absolute pollution exclusion based on limiting language absent in the policy); *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 484, 687 P.2d 1139 (1984) (rejecting a party’s attempt to add words that “are clearly not present” to an exclusion in order to create an ambiguity).

Petitioner also urges that the exclusion should apply only to so-called “traditional” environmental harms. But the policy contains no such limitation. On its face, the exclusion does not distinguish between traditional environmental harms and nontraditional environmental harms. *See Quadrant*, 154 Wn.2d at 167, 184 (rejecting an argument construing a similar absolute pollution exclusion that the exclusion applied only to “traditional environmental harms” and concluding that “the *Kent Farms* discussion of traditional environmental harms is limited by the facts of that case.”). A long line of Washington cases, culminating with this Court’s decision in *Quadrant*, establish that absolute pollution exclusions can apply to preclude coverage for nontraditional environmental harms. *See, e.g., Quadrant Corp.*, 154 Wn.2d at 182–84 (holding that an absolute pollution exclusion barred coverage for personal injuries sustained by tenant resulting from fumes); *City of Bremerton v. Harbor Ins. Co.*, 92 Wn. App. 17, 23–24, 963 P.2d 194 (1998) (holding that an absolute

pollution exclusion was unambiguous and precluded coverage for injuries sustained when a sewage treatment plant emitted toxic fumes); *Cook v. Evanson*, 83 Wn. App. 149, 154, 156–57, 920 P.2d 1223 (1996) (holding that an absolute pollution exclusion was unambiguous and precluded coverage for injuries sustained when fumes from negligently applied sealant entered building).

In *Quadrant* this Court expressly “reject[ed] the reasoning of other states that have declined to apply the pollution exclusion to fumes [and other nontraditional environmental harms] cases.” *Quadrant*, 154 Wn.2d at 183–84. Instead, this Court aligned Washington with the many jurisdictions that have held the absolute pollution exclusion should be enforced as written, including for claims involving injury from carbon monoxide fumes virtually identical to the present case.<sup>1</sup> After *Quadrant*

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<sup>1</sup> See, e.g., *Devcon Int’l Corp. v. Reliance Ins. Co.*, 609 F.3d 214, 220 (3d Cir. 2010) (“We conclude that the exclusion means what its plain language says: that the policy provides no insurance coverage when bodily injury or property damage results from airborne solids and fumes such as the dust clouds and engine exhaust complained of in the underlying action.”); *Cont’l Cas. Co. v. Advance Terrazzo & Tile Co., Inc.*, 462 F.3d 1002, 1008–09 (8th Cir. 2006) (concluding that the plain language of an absolute pollution exclusion was unambiguous and precluded coverage for “pollutants occurring in the normal course of business activities, including indoor pollution.”); *Nat’l Elec. Mfrs. Ass’n v. Gulf Underwriters Inc. Co.*, 162 F.3d 821, 826 (4th Cir. 1998) (concluding that the plain language of an unambiguous absolute pollution exclusion applied to preclude coverage for bodily injuries resulting from discharge of fumes); *State Farm Fire & Cas. Co. v. Dantzler*, 852 N.W.2d 918, 923 (Neb. 2014) (noting cases from other jurisdictions holding that an absolute pollution exclusion that bars coverage for all injuries allegedly caused by pollutants is unambiguous as a matter of law). Numerous courts have also concluded that carbon monoxide is a substance that falls within the scope of an absolute pollution exclusion contained in a liability insurance policy. See, e.g., *Church Mut. Ins. Co. v. Clay Cir. Christian Church*, 746 F.3d 375, 379–81 (8th Cir. 2014) (applying Nebraska law) (concluding that because carbon monoxide was a gas that could render air unfit, it was a “pollutant” within the meaning of pollution exclusion clauses, which defined pollutants as any solid, liquid, gaseous or thermal irritant or contaminant); *Nautilus Ins. Co. v. Country Oaks Apartments Ltd.*, 566 F.3d 452, 458 (5th Cir. 2018) (concluding that carbon monoxide was a pollutant under the policy’s definition of pollutant).  
(Footnote continued next page)

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Cir. 2009) (applying Texas law) (concluding that the unambiguous absolute pollution exclusion precluded coverage for injuries caused by the emission of carbon monoxide from a furnace into an apartment); *Assicurazioni Generali v. Neil*, 160 F.3d 997, 1006 (4th Cir. 1998) (applying Maryland law) (concluding that carbon monoxide fell within absolute pollution exclusion contained in a liability policy when guests inside a hotel suffered from carbon monoxide poisoning); *Evanston Ins. Co. v. Harbor Walk Dev., LLC*, 814 F. Supp. 2d 635, 644–55 (E.D. Va. 2011), *aff'd*, 514 F. App'x 362 (4th Cir. 2013) (applying Virginia law) (general liability policy's absolute pollution exclusion barred coverage of underlying lawsuits against insured real estate developer arising from release of noxious gases by defective Chinese drywall installed in residential properties; exclusion unambiguously applied to both traditional and nontraditional pollutants, and underlying complaints alleged both bodily injury and property damage caused by release of gases); *Essex Ins. Co. v. Tri-Town Corp.*, 863 F. Supp. 38, 40–41 (D. Mass. 1994) (applying Massachusetts law) (holding that an unambiguous absolute pollution exclusion barred coverage for injuries resulting from discharge of carbon monoxide from ice resurfacing machine); *Midwest Family Mut. Ins. Co. v. Wolters*, 831 N.W.2d 628, 635–37 (Minn. 2013) (holding that an absolute pollution exclusion was clear and unambiguous, and not limited to traditional environmental pollution, thus precluding coverage for injuries resulting from carbon monoxide fumes); *Reed v. Auto-Owners Ins. Co.*, 667 S.E.2d 90, 92 (Ga. 2008) (carbon monoxide gas was a “pollutant,” under general liability insurance policy excluding coverage for bodily injury caused by pollutants, such that the policy did not cover injuries sustained by tenant from release of carbon monoxide gas inside rental house as alleged result of landlord's failure to keep premises in good repair, where policy defined “pollutant” as any solid, liquid, gaseous or thermal irritant or contaminant, including fumes and waste); *Bituminous Cas. Corp. v. Sand Livestock Sys., Inc.*, 728 N.W.2d 216, 220–22 (Iowa 2007) (holding that unambiguous absolute pollution exclusion barred coverage for claims arising out of death of man caused by accumulation of carbon monoxide released from propane power washer in the facility's washroom); *Matcon Diamond, Inc. v. Penn Nat'l Ins. Co.*, 815 A.2d 1109, 1113–14 (Pa. Super. Ct. 2003) (holding that carbon monoxide fumes constituted a pollutant under a policy's absolute pollution exclusion for purposes of determining whether insurer had duty to defend insured in underlying action brought by subcontractor who was injured after being overcome by carbon monoxide fumes emitted from gasoline-powered saw); *Leo Haus, Inc. v. Selective Ins.*, 801 A.2d 419, 421–23 (N.J. App. Div. 2002) (holding that an absolute pollution exclusion in homebuilder's general liability insurance policy that excluded coverage for injuries resulting from exposure to pollutants arising out of dispersal or discharge was clear and unambiguous, and thus insurer was not obligated to defend homebuilder for claimed injuries that resulted from carbon monoxide escaping from the heating system, where carbon monoxide was a “gaseous contaminant” that was “discharged, dispersed, released or escaped” into the living areas of the home, causing injury to the homeowners); *Bernhardt v. Hartford Fire Ins. Co.*, 648 A.2d 1047, 1052 (Md. Ct. Spec. App. 1994) (holding that an absolute pollution exclusion was clear and unambiguous and therefore precluded coverage for personal injuries resulting from the escape of carbon monoxide fumes from an indoor heating furnace).

there simply is no basis for continuing to argue, as Petitioner does here, that the absolute pollution exclusion is limited by its terms to so-called “traditional” environmental claims.

**3. ProBuilders’ declination of a defense based on the absolute pollution exclusion was proper under Washington duty-to-defend law.**

The duty to defend is triggered if the insurance policy “conceivably” or “arguably” covers the allegations in the complaint. *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404, 229 P.3d 693 (2010); *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 561, 951 P.2d 1124 (1998). An insurer cannot deny a defense based on “an equivocal interpretation of case law.” *Alea*, 168 Wn.2d at 414. An insurer must defend if there is any “reasonable” or “arguable” interpretation of the facts or the law that could result in coverage. *Id.* at 405. But if the claim is “clearly not covered” by the policy, an insurer owes no duty to defend. *Woo*, 161 Wn.2d at 53.

ProBuilders’ declination of defense was not based on a merely “arguable” interpretation of its policy. The declination was based on clear and unambiguous policy language that this Court in *Quadrant* had previously held to be clear and unambiguous. Contrast this case with *Alea*, where this Court concluded the insurer breached its duty to defend when there was no Washington case “directly on point” and conflicting legal authority abounded in other states. *See Alea*, 168 Wn.2d at 407–08. Here, *Quadrant* expressly resolved which side Washington would take in the “traditional environmental claims” debate by siding with the majority

of courts that have rejected such a limitation on the absolute pollution exclusion, and that have instead adopted a plain meaning reading of the exclusion under which there is no coverage for bodily injury caused by fumes. ProBuilders' reliance on the unambiguous language of its exclusion—*broader* than the exclusion in *Quadrant*—to decline a defense in this fumes case was clearly supported by established Washington law.

Petitioner attempts to create an impression of legal uncertainty by asserting a supposed need to “reconcile” or “clarify” *Quadrant* and *Kent Farms*. Petitioner’s Supp. Br. 1, 8. In *Kent Farms*, a man was injured when a faulty intake valve spilled diesel fuel into his eyes, lungs, and stomach. *Kent Farms, Inc. v. Zurich Ins. Co.*, 140 Wn.2d 396, 397–98, 998 P.2d 292 (2000). The insurer denied a defense based on an absolute pollution exclusion. This Court concluded that the absolute pollution exclusion did not apply. *Id.* at 403. This Court distinguished between cases in which the substance at issue was polluting at the time of the injury and cases in which the substance’s toxic character was not germane to the injury:

[The individual] was not polluted by diesel fuel. It struck him; it engulfed him; it choked him. It did not pollute him. Most importantly, the fuel was not acting as a “pollutant” when it struck him any more than it would have been acting as a “pollutant” if it had been in a barrel that rolled over him, or if it had been lying quietly on the steps waiting to trip him.

*Id.* at 401.

This Court need not reconcile *Quadrant* and *Kent Farms* as if the two decisions represented independent lines of arguably applicable

conflicting authority. In fact, this Court in *Quadrant has already done whatever reconciliation might arguably have been necessary*, by adopting the “as written” approach to the absolute pollution exclusion and limiting *Kent Farms* to its facts. *Quadrant*, 154 Wn.2d at 183. Under this Court’s decision in *Quadrant* the result in *Kent Farms* is to be understood as a function of the non-polluting nature of the injurious event, which this Court in *Quadrant* distinguished from “fumes” cases in which coverage is precluded by the absolute pollution exclusion because of the polluting nature of the injurious event. *Id.* at 182. Here, Petitioner was plainly injured by a “polluting event”—the release of toxic levels of carbon monoxide from a water heater. *Kent Farms* requires no new exercise in analytical reconciliation with *Quadrant* to resolve the coverage issue presented by Petitioner’s claim—that exercise was carried out by this Court in *Quadrant* and the result confirms that ProBuilders correctly declined a defense of Petitioner’s claim.

The *Woo/Alea* test to determine whether a claim is “arguably” covered should require more to establish the requisite legal uncertainty than the creative argument of an insured’s counsel, even if that argument manages to pass CR 11 muster. If CR 11 were the measure of “arguability,” insurers would be forced *in every case* to accept a defense under a reservation of rights and to bring a declaratory judgment action to determine its coverage obligations. The contractual right of an insurer to decline a defense would be effectively nullified. Petitioner’s attempt to show “arguability” by claiming there is a need to “reconcile” *Quadrant*

with *Kent Farms* may pass CR 11 muster, but it does not rise to the level of a *genuine* uncertainty about whether this absolute pollution exclusion applies to her claim. The unambiguous exclusionary language and the equally unambiguous “factual circumstances” at issue here are on all fours with *Quadrant*, and ProBuilders’ decision to decline a defense of Petitioner’s claim was proper under clearly established Washington law.

**B. Washington does not follow, and should not now adopt, the so-called “reasonable expectations” test. This Court should continue to adhere to its decision in *Quadrant*. A declination of defense here does not result in an illusory contract of coverage.**

**1. Washington does not follow—and should not now adopt—the so-called “reasonable expectations” test for ascertaining the scope of insurance coverage.**

Petitioner tacitly urges this Court to adopt the “reasonable expectations” test to construe a general liability insurance policy. Petitioner’s Supp. Br. 6 (“This Court . . . interprets the policy to give effect to its purpose in accord with the reasonable expectations of consumers.”); Petitioner’s Supp. Br. 13 (“[ProBuilders’ interpretation of the absolute pollution exclusion] would defeat the expectations of the ordinary purchaser of liability insurance.”). But this Court has consistently rejected calls to adopt the “reasonable expectations” test. See *Findlay*, 129 Wn.2d at 378 (“The ‘reasonable expectation’ doctrine has never been adopted in Washington.”); *Quadrant*, 154 Wn.2d at 172 (“[I]n Washington the expectations of the insured cannot override the plain language of the contract.”).

Petitioner advances no sound basis for this Court to dramatically alter the well-settled “criteria for interpreting insurance contracts in Washington.” *Quadrant*, 154 Wn.2d at 171.<sup>2</sup> Moreover, the “plain meaning” rule followed in Washington is far the better approach to interpreting insurance contracts. Unlike the “plain meaning” rule, the so-called “reasonable expectations” test invites courts to judicially engraft limitations onto unambiguous insurance contracts that can invalidate the basis upon which premiums are determined, years after those determinations are made. Interpreting an insurance contract based on an individual insured’s subjective expectations would lead to uncertainty in the underwriting process and exponentially multiply disputes about

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<sup>2</sup> Many other jurisdictions similarly interpret unambiguous policy language according to its “plain meaning.” *See, e.g., State Farm Fire & Cas. Co. v. Rollins*, \_\_\_ F. Supp. 3d \_\_\_, 2016 WL 2760351, at \*6–7 (E.D. Va. 2016) (applying Virginia law); *Evanston Ins. Co. v. Treister*, 794 F. Supp. 560, 569 (D. Virgin Islands 1992) (applying Florida law); *Farmers Ins. Exch. v. Bradford*, 460 S.W.3d 810, 813 (Ark. Ct. App. 2015); *Parks v. Safeco Ins. Co. of Ill.*, \_\_\_ P.3d \_\_\_, 2016 WL 4043494, at \*4 (Idaho 2016); *Valley Forge Ins. Co. v. Swiderski Elecs., Inc.*, 860 N.E.2d 307, 314 (Ill. 2006); *Milbank Ins. Co. v. Ind. Ins. Co.*, \_\_\_ N.E.3d \_\_\_, 2016 WL 3916395, at \*6 (Ind. Ct. App. 2016); *Hardenbergh v. Patrons Oxford Ins. Co.*, 70 A.3d 1237, 1241 (Me. 2013); *Wells Fargo Bank, N.A. v. Null*, 847 N.W.2d 657, 666–67 (Mich. Ct. App. 2014); *Twin Cities Metro-Certified Dev. Co. v. Stewart Title Guar. Co.*, 868 N.W.2d 713, 716 (Minn. Ct. App. 2015); *Spoleta Const., LLC v. Aspen Ins. UK Ltd.*, 991 N.Y.S.2d 183, 184–85 (N.Y. App. Div. 2014); *Brosovic v. Nationwide Mut. Ins.*, 841 A.2d 1071, 1073 (Pa. Super. Ct. 2004); *Berkley Reg’l Specialty Ins. Co. v. Dowling Spray Serv.*, 860 N.W.2d 257, 260 (S.D. 2015); *Kuhn v. Ret. Bd.*, 343 P.3d 316, 322–23 (Utah Ct. App. 2015); *North Fork Land & Cattle, LLLP v. First Am. Title Ins. Co.*, 362 P.3d 341, 346–47 (Wyo. 2015). Indeed, several courts have expressly dismissed calls to rewrite a policy’s plain language via an insured’s reasonable but subjective expectations of coverage. *See, e.g., Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135, 1140 (Fla. 1998) (“We decline to adopt the doctrine of reasonable expectations.”); *Allen v. Prudential Prop. & Cas. Ins. Co.*, 839 P.2d 798, 807 (Utah 1992) (“In sum, we reject the various versions of the reasonable expectations doctrine advanced by Allen [the insured]. Our existing equitable doctrines have not been shown to be inadequate to the task of protecting insureds from overreaching insurers.”).

coverage as well as defense. This Court should reject Ms. Xia's tacit call to adopt the "reasonable expectations" test to interpret an unambiguous absolute pollution exclusion.

2. **Petitioner has failed to make the showing required under Washington's rule of *stare decisis* for this Court to overrule *Quadrant*. And if this Court does overturn *Quadrant*, such a change in Washington law would compel a holding that ProBuilders cannot have been in bad faith when it declined a defense at a time when *Quadrant* was the controlling authority.**

The Court of Appeals correctly concluded that *Quadrant* controls. In *Quadrant*, a contractor applied a waterproofing sealant containing a toxic substance to an outside deck surface. The contractor failed to ventilate the area, and toxic fumes entered an adjoining apartment, causing bodily injury to a tenant. The insurer denied coverage for the tenant's bodily injury claim based on an absolute pollution exclusion.<sup>3</sup> This Court

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<sup>3</sup> The absolute pollution exclusion in *Quadrant* states:

This insurance does not apply to:

(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured;

....

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations:

(i) if the pollutants are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor;

....

(Footnote continued next page)

in *Quadrant* concluded that the absolute pollution exclusion's plain language "unambiguously" precluded coverage for the tenant's claim. *Id.* This Court declined to rewrite the policy and thereby create ambiguity where none existed. *Id.*

Petitioner's call to overrule *Quadrant* should be rejected. The purpose of *stare decisis* is to provide stability, predictability, and certainty in the law. See *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991); *State v. Shearer*, 181 Wn.2d 564, 571–72, 334 P.3d 1078 (2014). To effectuate this purpose, this Court will reject precedent only when it has been clearly shown to be incorrect and harmful or when the precedent's legal underpinnings have changed or disappeared. *State v. Otton*, \_\_\_ P.3d \_\_\_, 2016 WL 3249468, at \*2 (Wash., June 9, 2016); *W.G. Clark Const. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014). While *stare decisis* does not compel adherence to a prior decision, *Rose v. Anderson Hay & Gray Co.*, 184 Wn.2d 268, 282, 358 P.3d 1139 (2015), this Court does not "lightly set aside precedent." *State v. Kier*, 164 Wn.2d 798, 804–05, 194 P.3d 212 (2008).

Petitioner has not shown that *Quadrant* is incorrect and harmful, or that its legal underpinnings have changed or disappeared. Nor has she

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Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

*Quadrant*, 154 Wn.2d at 169.

shown that *Quadrant* “no longer withstands careful analysis.” Petitioner’s Supp. Br. 14. No Washington court has raised concerns about *Quadrant*. Washington courts have not struggled to apply *Quadrant* in nontraditional environmental “fumes” cases involving an unambiguous absolute pollution exclusion. Under *Quadrant*, Washington follows the majority of courts holding that “absolute pollution exclusions unambiguously exclude coverage for damages caused by the release of toxic fumes.” *Quadrant*, 154 Wn.2d at 173. This Court should reject Petitioner’s call to overrule *Quadrant*.

Alternatively, if this Court decides to overrule *Quadrant*, then ProBuilders still cannot be held liable for bad faith. This Court cannot in fairness overturn *Quadrant* and then allow Ms. Xia to pursue a bad faith claim against ProBuilders, when *Quadrant* was the law when ProBuilders denied a defense. How can ProBuilders have breached its duty to defend when it properly declined a defense based on a reading of its absolute pollution exclusion that at the time was fully consistent with then controlling Washington authority? Insurers cannot fairly be held to a standard requiring them to anticipate whether and how the law might change, to determine coverage and defense obligations. The reasonableness of coverage and defense obligations cannot fairly be based on a retroactive application of a decision that abrogates previously controlling authority. Therefore, even if this Court overrules *Quadrant*, or otherwise materially limits its holding so as to—somehow—create legal uncertainty about when an absolute pollution exclusion applies, this Court

should still affirm the Court of Appeals' decision that ProBuilders did not breach its duty to defend.

**3. A declination of defense under these facts does not result in an illusory contract of coverage.**

A denial of a defense against a claim that falls squarely within the language of the absolute pollution exclusion does not result in an illusory contract that swallows coverage and renders the policy meaningless. Just as in *Quadrant*, the absolute pollution exclusion here does not render the policy "illusory." *Quadrant*, 154 Wn.2d at 186.

For decades the Insurance Services Office ("ISO") has developed industry-approved forms that many insurers then offer and which allow insureds to buy, for an additional cost, coverage that carves out exceptions to the pollution exclusion. In fact, one such ISO-developed form is designed to apply an exception to the pollution exclusion for claims arising from building heating equipment. 1 Susan J. Miller & Philip Lefebvre, *Miller's Standard Insurance Policies Annotated: Policies 284* (6th ed. 2014). The record reflects that here the insured Issaquah Highlands purchased the "least expensive" insurance coverage available. CP 1164 ("Mr. Sacotte further noted in his Declaration that the main goal of [Issaquah Highlands] was to obtain insurance coverage 'at the least expensive' price necessary in order 'to obtain a permit and lender for the project.'"); see *Cook*, 83 Wn. App. at 152 (noting that the insured's vice president indicated "his goal was to obtain the least expensive coverage that would satisfy the state's licensing requirements."). That the insured

here evidently decided not to purchase additional coverage for the exact type of risk at issue here does not render the policy illusory.

**C. An insurer's reliance on an unambiguous absolute pollution exclusion to deny a defense for a claim that squarely fits within the exclusion, without first retaining coverage counsel to research the local law interpreting the exclusion, does not support applying the drastic remedy of coverage by estoppel.**

Coverage by estoppel is a drastic remedy that should be used only in rare circumstances. *See Progressive Cas. Ins. Co. v. Skin*, 211 P.3d 1093, 1103 n.38 (Alaska 2009) (recognizing that coverage by estoppel, the usual remedy for breach of the insurer's duty to defend, is "an extreme remedy."). An insurer that acts in bad faith may later be estopped from denying coverage. *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 393–94, 823 P.2d 499 (1992). But if an insurer has correctly determined it has no duty to defend based on unambiguous exclusionary language applied to the unambiguous allegations of a claim, there is no basis for a court later ruling that the insurer is estopped to deny coverage.

Petitioner fails to show as a matter of law that ProBuilders acted in bad faith. If the Court does not overrule *Quadrant*—and PCIA urges the Court not to do so—it was reasonable for ProBuilders to apply the unambiguous language of the exclusion to reach the same conclusion about coverage that this Court reached in *Quadrant*, under substantively identical factual circumstances: a claim for bodily injury caused by exposure to toxic fumes.

And even if this Court does overrule *Quadrant*, that result still would not make ProBuilders' coverage and defense decisions unreasonable. ProBuilders' handling of Petitioner's claims against Issaquah Highlands was reasonable under the circumstances. See *Kim v. Allstate Ins. Co., Inc.*, 153 Wn. App. 339, 356 n.3, 223 P.3d 1180 (2009) ("Reasonableness of an insurer's actions is a complete defense to any bad faith claim by an insured."). Both the policy language and the factual circumstances as alleged in the tender letters were unambiguous, and together they pointed unambiguously to the conclusion that there clearly was no coverage and therefore no duty to defend. And Ms. Xia's complaint alleged no new information that could have conceivably triggered coverage.

No Washington authority supports a rule under which an insurer has an affirmative duty to research the local law when it has in its policy an unambiguous exclusion that clearly rules out coverage and therefore any duty to defend. Major transactional costs, which insureds would ultimately have to shoulder, would result if claims adjusters were to be required in every case to retain coverage counsel to determine the case law of an individual jurisdiction even though the policy language itself is plain and unambiguous. An insurer should be able to rely on clear and unambiguous language in determining whether the claimant's allegations could conceivably trigger coverage under the policy. That ProBuilders' coverage and defense determinations also were consistent with this Court's analysis in *Quadrant* simply underscores the reasonability of those

determinations. Indeed, having reached the same coverage determination as this Court did in *Quadrant*, under functionally identical circumstances, ProBuilders' coverage and defense determinations were reasonable as a matter of law.

## V. CONCLUSION

This Court should affirm the Court of Appeals and hold that ProBuilders did not owe its insured a duty to defend.

Respectfully submitted this 26<sup>th</sup> day of August, 2016.

**CARNEY BADLEY SPELLMAN, P.S.**

By Michael B. King  
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SUPREME COURT  
OF THE STATE OF WASHINGTON

ZHAOYUN XIA, et al.,  
Petitioner,  
v.  
PROBUILDERS SPECIALTY  
INSURANCE COMPANY RRG, et  
al.,  
Respondent.

NO. 92436-8

DECLARATION OF  
SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the *Motion for Acceptance of Proposed Amicus Curiae Brief of the Property Casualty Insurers Association of America* and *Amicus Brief of Property Casualty Insurers Association* on the below-listed attorney(s) of record by the method(s) noted:

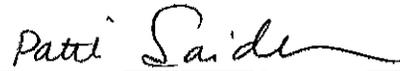
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DATED this 26<sup>th</sup> day of August, 2016.



Patti Saidu, Legal Assistant

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**Subject:** 92436-8; Zhaoyun Xia, et al. v. Probuilders Specialty Insurance Company, et al.

Dear Clerk:

Attached for filing are the following documents:

- *Motion for Acceptance of Proposed Amicus Curiae Brief of the Property Casualty Insurers Association of America;*
- *Amicus Brief of Property Casualty Insurers Association of America ; and,*
- *Declaration of Service.*

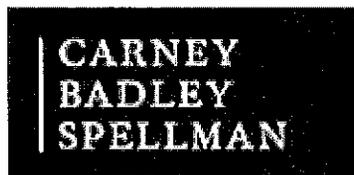
Case Name: Zhaoyun Xia, et al. v. Probuilders Specialty Insurance Company RRG, et al.

Cause #: 92436-8

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