

No. 92436-8

SUPREME COURT
OF THE STATE OF WASHINGTON

ZHAOYUN XIA, et al.

Petitioner,

vs.

PROBUILDERS SPECIALTY INSURANCE
COMPANY RRG, et al.,

Respondent.

PETITIONER'S ANSWER TO AMICUS BRIEFS

SMITH GOODFRIEND, P.S.

By: Howard M. Goodfriend
WSBA No. 14355
Catherine W. Smith
WSBA No. 9542

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

KILPATRICK LAW, PC

By: Dick Kilpatrick
WSBA No. 7058

1408 140th PL N.E., Suite D-150
Bellevue, WA 98007
(425) 453-8161

Attorneys for Petitioner

ORIGINAL

filed via
PORTAL

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I. INTRODUCTION

Under the guise of “plain meaning,” and ignoring basic principles of contract interpretation, Amicus Property Casualty Insurers Association of America (“the Insurers”) espouse the most sweeping possible interpretation of what they repeatedly characterize as a “broadly drafted” pollution exclusion, arguing that the objective understanding and reasonable expectations of the ordinary purchaser of insurance have no bearing on whether carbon monoxide is always a “pollutant” and whether Ms. Xia’s brain damage was caused by “pollution.” This Court should hold that these policy terms are ambiguous under the facts of this case, and must be narrowly interpreted to provide, rather than evade, coverage for ordinary negligence in the insured’s construction business that prevented Ms. Xia’s water heater from operating as intended.

The ultimate resolution of the scope of this pollution exclusion is, however, of no moment to respondent Probuilders’ breach of its good faith duty to defend its insured, Issaquah Highlands. This Court did not “expressly resolve[]” Issaquah Highlands’ claim for coverage in *Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 110 P.3d 733 (2005), (Insurers Br. 9), but instead limited the exclusion to a “pollutant . . . used as it was intended.” 154 Wn.2d at

179, ¶28. The carbon monoxide poisoning that Ms. Xia suffered as a result of Issaquah Highlands' negligence indisputably was not the result of any use of a "pollutant" as intended.

As Amicus WSAJ Foundation demonstrates, respondent Probuilders wrongly denied any defense outright to its insured in the face of uncertain precedent regarding the scope of an absolute pollution exclusion. Thus, even if this Court were to adopt the Insurers' sweeping interpretation and now hold that carbon monoxide poisoning caused by the negligent installation of a common household appliance falls within the pollution exclusion, it must nonetheless hold that Probuilders breached its duty of good faith here by failing to provide its insured a defense under a reservation of rights in 2006.

II. ARGUMENT

A. The absolute pollution exclusion must be narrowly interpreted to give effect to the reasonable understanding of the ordinary purchaser of liability insurance expecting protection from claims of ordinary negligence in construction.

1. This Court interprets policy exclusions narrowly to further the reasonable expectations of an insured for protection from negligence claims, rather than broadly to defeat coverage.

The Insurers posit a false and unhelpful dichotomy between “the plain language” of an insurance policy and the “reasonable expectations” of persons purchasing liability insurance, arguing that “Washington is a plain meaning jurisdiction.” (Insurer Br. 3, 12) The Insurers’ attempt to create a distinction between the meaning of “plain language” and an insured’s reasonable interpretation of policy language is baseless. Their argument mischaracterizes this Court’s established precedent, which holds that policy language is not interpreted in a vacuum, but with reference to the objective and reasonable expectations and “understanding of the average purchaser” of insurance. *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 66, 882 P.2d 703 (1994).

The Insurers cite no authority for their claim that the universe is divided between “plain meaning” and “reasonable expectation”

jurisdictions. Courts that have held that an absolute pollution exclusion did not bar coverage of negligence that resulted in carbon monoxide poisoning look to the language of the policy in light of the objective understanding of the average purchaser of insurance, just as this Court does.¹

An insurance policy “must be read as the average person would read it; it should be given a practical and reasonable rather than a literal interpretation, and not a strained or forced construction leading to absurd results.” *Moeller v. Farmers Ins. Co. of Washington*, 173 Wn.2d 264, 272, ¶12, 267 P.3d 998 (2011) quoting *Eurick v. Pemco*

¹ See, e.g., *Century Sur. Co. v. Casino W., Inc.*, 329 P.3d 614, 617 (Nev. 2014) (“As drafted here, the absolute pollution exclusion permits multiple reasonable interpretations of coverage.”); *Langone v. American Family Mut. Ins. Co.*, 300 Wis.2d 742, 731 N.W.2d 334, 337, ¶8, rev. denied, 305 Wis.2d 128 (2007) (“Courts consider the language’s plain and ordinary meaning as understood by a reasonable insured,” holding exclusion did not unambiguously exclude carbon monoxide poisoning); *MacKinnon v. Truck Ins. Exch.*, 31 Cal.4th 635, 73 P.3d 1205, 1214, 3 Cal.Rptr.3d 228 (2003) (because policy language establishes a reasonable expectation that the insured will have coverage, coverage will be found unless the pollution exclusion “conspicuously, plainly and clearly apprises the insured” that certain acts will not be covered); *Motorists Mut. Ins. Co. v. RSJ, Inc.*, 926 S.W.2d 679, 682 (Ky. Ct. App. 1996) (exclusion ambiguous; noting that “absurd consequences would result from a blind application of the literal terms of the pollution exclusion”); *Stoney Run Co. v. Prudential-LMI Comm. Ins. Co.*, 47 F.3d 34, 37 (2nd Cir. 1995) (exclusion ambiguous under New York law; “[w]hen construing an insurance policy, the tests applied are ‘common speech’ and ‘reasonable expectation and purpose of the ordinary businessman’”); *Thompson v. Temple*, 580 So.2d 1133, 1135 (La. App. 1991) (“when there is any doubt about the meaning of an agreement, the court must ascertain the common intention of the parties, rather than adhering to the literal sense of the terms”).

Ins. Co., 108 Wn.2d 338, 341, 738 P.2d 251 (1987) (internal quotations omitted). The average business owner purchasing “a comprehensive liability policy reasonably expects broad coverage for liability arising from business operations.” *Kent Farms, Inc. v. Zurich Ins. Co.*, 140 Wn.2d 396, 401, 998 P.2d 292 (2000). Here, the average home builder purchasing liability insurance that includes coverage for “bodily injury or property damage caused by an occurrence,” or “accident,” “including a continuous or repeated exposure to substantially the same generally harmful condition,” (CP 372, 389) “would understand that coverage is provided for ordinary acts of negligence.” *Queen City Farms*, 126 Wn.2d at 67.²

The Insurers also fail to acknowledge a second basic tenet of insurance policy interpretation: Because “the fundamental protective purpose of insurance” is to defend and indemnify policy holders from liability for ordinary acts of negligence, this Court construes exclusions to coverage “strictly against the insurer.” *Vision*

² With no competent supporting evidence, and relying on hearsay from Probuilders’ “expert” that purports to quote Issaquah Highlands’ principal Joe Sacotte, the Insurers argue that Probuilders’ policy excludes Ms. Xia’s claim because the insured Issaquah Highlands “decided not to purchase additional coverage” for “claims arising from building equipment.” (Insurers Br. 17-18, citing CP 1164) There is no evidence what coverage Issaquah Highlands’ principal Joe Sacotte asked for, no evidence what coverages Probuilders offered the company, and no evidence that Issaquah Highlands “chose to buy the least expensive liability policy available.” (Insurers Br. 2)

One, LLC v. Philadelphia Indemnity Ins. Co., 174 Wn.2d 501, 512, ¶20, 276 P.3d 300 (2012) (internal quotation omitted). While ambiguous language is always interpreted in favor of the insured, *American Star Ins. Co. v. Grice*, 121 Wn.2d 869, 875, 854 P.2d 622 (1993), this rule applies with “added force” to exclusionary language, which must be examined “in light of [the policy’s] language as a whole.” *Queen City Farms*, 126 Wn.2d at 83, 74.

Third, as *Quadrant* makes clear, an exclusion cannot be interpreted as “clear and unambiguous” (Insurers Br. 9) in the abstract, but only “with regard to the facts of the case.” 154 Wn.2d at 181, ¶32, discussing *Kent Farms*. Thus, policy language “can be ambiguous with regard to the facts of one case but not another,” *Quadrant*, 154 Wn.2d at 181, ¶32. The Court applies this principle because it interprets exclusions narrowly to further the reasonable expectations of the ordinary policy holder.

The Insurers additionally disregard a fourth crucial limitation on the “plain language” of what they characterize as a “broad” exclusion from coverage (Insurers Br. 4-5): This Court “will not enforce an exclusion that will make coverage ‘illusory,’ that ‘devours’ the policy, or that ‘swallows’ the insurance contract.” Harris, *Washington Insurance Law*, §6.10 at 6-31 (3d ed. 2010), quoting

Olympic S.S. Co., Inc. v. Centennial Ins. Co., 117 Wn.2d 37, 51, 811 P.2d 673 (1991); *McDonald Industries, Inc. v. Rollins Leasing Corp.*, 95 Wn.2d 909, 915, 631 P.2d 947 (1981); *Greengo v. PEMCO*, 135 Wn.2d 799, 806, 959 P.2d 657 (1998). Thus, the language of an exclusion may be ambiguous when, if applied literally, it will defeat the primary purpose of a liability policy – to defend and indemnify claims alleging acts of ordinary negligence.

That objective reasonableness provides the standard for insurance policy interpretation does not, as the Insurers argue, “invite[] courts to judicially engraft limitations onto unambiguous language,” “lead to uncertainty,” or “exponentially multiply disputes.” (Insurer Br. 13) The mandate for interpreting coverage broadly and exclusions narrowly is inherent in the expansive legislative definition of casualty insurance to include coverage “[a]gainst legal liability for the death, injury or disability of any human being, or for damage to property,” and in particular, “[a]gainst any liability . . . resulting from accidents to or explosions of boilers, pipes, pressure containers, machinery, or apparatus . . .”. RCW 48.11.070(1), (7). It gives effect to the Legislative mandate that the “business of insurance is one affected by the public interest,” RCW 48.01.030, and to the good faith requirement that liability insurers defend first, and argue about

coverage later. See *Nat'l Surety Corp. v. Immunex Corp.*, 176 Wn.2d 872, 880, ¶¶12-13, 297 P.3d 688 (2013).

2. **Probuilders' absolute pollution exclusion is ambiguous because Ms. Xia's injury was caused by its insured's negligent failure to vent a residential water heater, not a pollutant that was used as intended.**

The absolute pollution exclusion as applied to this case involving negligent installation of a home hot water heater is susceptible to more than one interpretation, and is therefore ambiguous. First, the definition of a "pollutant" to include virtually any natural or artificial substance that may cause "irritation or contamination" does not obviously include an odorless substance that is not the intended byproduct of a properly functioning water heater. Second, a reasonable person could read the exclusion for "pollution" to preclude coverage of injuries caused in the first instance by the dispersal of a hazardous substance rather than by the negligent installation of a non-polluting household appliance that set in motion a chain of events that eventually produced carbon monoxide at a toxic level.

The Insurers' repeated characterization of the absolute pollution exclusion in Probuilders' policy as "broad" is a gross but telling understatement. The absolute pollution exclusion purports to exclude any injury caused by a "pollutant," defined under the policy

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 . . .”. (CP 335)

Probuilders’ policy creates ambiguity precisely because it is so broadly drafted. The Insurers’ “plain language” interpretation would entirely negate coverage for any act of negligence that directly or remotely involved *any* substance that causes any injury. “[T]here is virtually no substance or chemical in existence that would not irritate or damage some person or property.” *Motorists Mut. Ins. Co. v. RSJ, Inc.*, 926 S.W.2d 679, 682 (Ky. 1996) (pollution exclusion does not exclude carbon monoxide poisoning from leak in vent stack in insured’s boiler), quoting *Sullins v. Allstate Ins. Co.*, 340 Md. 503, 667 A.2d 617, 621 (1995) (absolute pollution exclusion ambiguous as applied to household exposure to lead-based paint).³

³ The Insurers argue that because *Quadrant* rejected the argument that its interpretation of the absolute pollution exclusion rendered coverage illusory in that case, it is not illusory here. The *Quadrant* Court reasoned that other injuries, “[f]or example, slip and fall injuries would clearly fall outside of the pollution exclusion.” *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 186 ¶41, 110 P.3d 733, 744 (2005). That would not be the case under the Insurers’ expansive interpretation of the term “pollutant,” which purports to include any substance, whether naturally occurring or not, including water or organic matter left on a walking surface. (CP 335)

The Insurers' expansive interpretation of the exclusion ignores other more specific exclusions in the policy for particular substances – exclusions that would be superfluous under their interpretation of the “broadly drafted” pollution exclusion. The Probuilders policy contains specific exclusions for “asbestos products, asbestos fibers or asbestos dust” (CP 376), the “hazardous properties of nuclear material” (CP 377), “electromagnetic radiation,” “mold, fungus, bacteria, virus, allergen or organic pathogen,” (CP 378), “existence or exposure to lead,” “use or exposure to any product known as formaldehyde” (CP 379), and “adsorption or absorption by concrete products of sulfates.” (CP 380) “Broadly” interpreting the pollution exclusion to include injury attributable to each of these substances renders these specific exclusions superfluous and so fails to give effect to the policy as a whole.

A more reasoned interpretation would limit the term “pollutant” to the ordinary meaning of the policy’s definition of a “solid, liquid, gaseous or thermal” substance that is an “irritant or contaminant” when used as intended. This was the interpretation given to the exclusion in *Quadrant*, as well as in *Cook v. Evanson*, 83 Wn. App. 149, 151, 154, 920 P.2d 1223 (1996), *rev. denied*, 131 Wn.2d 1016 (1997), both of which involved exposure to a toxic chemical

product. "Because the tenant in this case was injured by fumes emanating from water proofing material that was being used as intended, the air in her apartment was 'polluted.' Thus, the pollution exclusion applied and the court affirmed the summary judgment dismissal of the insureds' suit." *Quadrant*, 154 Wn.2d at 179, ¶28 (discussing *Cook*). See also *City of Bremerton v. Harbor Ins. Co.*, 92 Wn. App. 17, 19-20, 963 P.2d 194 (1998) (noxious fumes produced by sewage treatment plant).

The difference here is that the odorless carbon monoxide that poisoned Ms. Xia was not the intended contaminating byproduct of a water heater. Because the builder failed to vent the device, "the air required for efficient combustion was compromised by the oxygen deficient exhaust being vented into the utility room." (CP 194) Rather than working as intended, the oxygen-depleted air caused the water heater to produce increasing concentrations of carbon monoxide, injuring Ms. Xia over a period of many months. Carbon monoxide, which is odorless, harmless in small quantities, and not the usual byproduct of a properly vented water heater, is neither a

“fume”⁴ nor an “irritant or contaminant” as those terms are commonly understood by the ordinary purchaser of insurance.

A reasonable contractor purchasing builder’s liability insurance would view the exclusion’s reference to “gaseous” “irritants or contaminants” to mean those substances that when used as intended can contaminate the environment, rather than a means to negate coverage for bodily injury arising from negligent or defective work. The Court should interpret the exclusion reasonably, in light of the policy as a whole and as an ordinary purchaser of insurance would, in order to fulfill and not defeat the promise of coverage for acts of ordinary negligence. Whether Ms. Xia’s injury was “caused by . . . dispersal of pollutants” within the meaning of the policy is similarly debatable. This exclusion applies “where the pollutant was being used as it was intended,” *Quadrant*, 154 Wn.2d at 179, ¶28, and “does not apply merely because a potential pollutant was involved in the causal chain.” *Kent Farms*, 140 Wn.2d at 402.

The Insurers argue that by adding the phrase “regardless of the cause of the pollution” to the exclusion’s language, Probuilders could broadly exclude coverage for negligent acts whether injury was caused

⁴ “Fume” is ordinarily defined as a “smoke, vapor or gas, especially when irritating or offensive.” www.merriam-webster.com/dictionary/fume.

in the first instance by the presence of a “pollutant.” However, they ignore that the definition of “pollution” under the policy requires that a “pollutant” must “form[] the basis of liability.” (CP 335) Here, the “basis of liability” was Issaquah Highlands’ negligent failure to vent the hot water heater in Ms. Xia’s new home.

While this Court has “left open the possibility that an insurer may draft policy language to deny coverage when an *excluded* peril initiates an unbroken causal chain,” *Vision One*, 174 Wn.2d at 520, ¶43 (emphasis added), an insurer may not define a “cause” so broadly as to exclude coverage where liability arises in the first instance from a *covered* peril such as Issaquah Highlands’ negligent work. The efficient proximate cause rule “cannot be circumvented by an exclusionary clause; an exclusionary clause drafted to circumvent the rule will not defeat recovery.” *Key Tronic Corp., Inc. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wn.2d 618, 625-26, 881 P.2d 201 (1994), citing *Safeco Ins. Co. v. Hirschmann*, 112 Wn.2d 621, 629, 773 P.2d 413 (1989). The Insurers’ reliance on “plain language” fails to give effect to the liability policy purchaser’s reasonable expectation of coverage for negligent acts.

B. Probuilders breached its duty of good faith by denying a defense in the face of “legal uncertainty” whether an absolute pollution exclusion precluded coverage for carbon monoxide poisoning caused by its insured’s negligent installation of a hot water heater.

Regardless whether the claim was excluded from indemnity, Probuilders breached its duty of good faith by denying a defense without reserving its rights to later deny coverage. It breached its duty whether or not this court ultimately holds that Ms. Xia’s injury was an excluded cause under the absolute pollution exclusion because Probuilders owed its insured Issaquah Highlands a defense in the face of legal uncertainty concerning the permissible scope of an absolute pollution exclusion and its application to a residential hot water heater that was not acting as it was intended to act.

The Insurers ignore settled precedent in arguing that Probuilders could satisfy its duty of good faith by categorically denying coverage and a defense after looking only at Ms. Xia’s allegation that she suffered carbon monoxide poisoning and the “broad” “plain language” of its policy, without researching Washington law and discovering the legal ambiguity governing the permissible scope of a pollution exclusion under *Kent Farms* and *Quadrant*. The Insurers’ contention that “[n]o Washington authority supports a rule under

which an insurer has an affirmative duty to research the local law” (Insurers Br. 19) is particularly misplaced.

This Court has held that an insurer must review relevant case law that bears on the application of policy language to the plaintiff’s allegations, and that where the relevant case law interpreting policy language is “equivocal,” the insurer must defend under a reservation of rights. *Woo v. Fireman’s Fund Ins. Co.*, 161 Wn.2d 43, 60, ¶37, 164 P.3d 454 (2007). “[I]f there is any reasonable interpretation of the facts *or the law* that could result in coverage, the insurer must defend.” *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 405, ¶7, 229 P.3d 693 (2010) (emphasis added; citation omitted).

The Insurers fabricate a distinction between the legal uncertainty identified as a basis for the duty to defend in *Alea* and “*genuine* uncertainty,” arguing that “creative arguments” for coverage are insufficient to give rise to a duty to defend. (Insurers’ Br. 12) (emphasis in original) That distinction is not only nonsensical but is unsupported by the established requirement that an insurer must give its insured every benefit of the doubt before categorically denying a defense, and that an insurer denies a defense at the peril of liability for bad faith and coverage by estoppel. *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 802-04, ¶¶16-19, 329 P.3d 59, 65 (2014).

The Insurers' assertion that Probuilders could summarily deny its insured a defense here because, without performing any legal research, it discerned no "genuine uncertainty" about the scope of its exclusion ignores the legal ambiguity in determining where Ms. Xia's claim falls on the continuum between *Kent Farms* and *Quadrant*. "Legal uncertainty" regarding Washington courts' interpretation of an absolute pollution exclusion is not a product of creative lawyering that barely "manages to pass CR 11 muster." (Insurers' Br. 11) It is instead the necessary consequence of *Quadrant's* holding that injury is excluded where a polluting product acts as intended, while distinguishing (and not overruling) *Kent Farms'* holding that the exclusion does not apply merely because a pollutant appears somewhere within the causal chain.

The Insurers' argument ignores the principal holding of *Quadrant*: that the absolute pollution exclusion was unambiguous in that case only because the injury was caused by the polluting product. The deck sealant contained warnings regarding its toxicity and "was being used as intended." *Quadrant*, 154 Wn.2d at 179, ¶38; see also *Cook*, 83 Wn. App. at 154 (injury caused by exposure to "a chemical product requiring protective gear and proper ventilation"). And the Insurers' argument fails to even acknowledge that the *Quadrant*

Court expressly recognized that the ambiguity of the pollution exclusion could not be resolved without considering the specific facts of a specific case: “While we note that the policy language is unambiguous *in the context of this case*, that is not to say that the language would not be ambiguous in the context of another case involving very different factual circumstances.” *Quadrant*, 154 Wn.2d at 183 n.10 (emphasis in original); at 181, ¶32 (“An absolute pollution exclusion clause can be ambiguous with regard to the facts of one case but not another.”).

While it distinguished *Kent Farms*, the *Quadrant* Court did not overrule its core holding that the presence of “a pollutant . . . in the causal chain” will not “trigger[] application of the exclusion clause.” *Kent Farms*, 140 Wn.2d at 399. *Quadrant* did not definitively and unambiguously hold that an absolute pollution exclusion could negate coverage of liability for simple negligence that results in a consumer appliance not functioning as intended, so long as that negligence results in exposure to a substance that could be considered a “pollutant.” This Court in *Quadrant* did not resolve the *genuine* “legal uncertainty,” *Alea*, 168 Wn.2d at 408, ¶12, that necessarily accompanies application of a pollution exclusion to injury caused by a toxic by-product of a device that, like the gas shutoff valve in *Kent*

Farms, is not functioning as intended because of an insured's negligence.

The trial court recognized that "legal uncertainty." (11/2/13 RP 130: "*Quadrant* is not on all fours. *Kent* is not on all fours either") Scholarly commentary similarly notes that the scope of an absolute pollution exclusion remains uncertain in Washington. Alan Windt, in his widely cited treatise on insurance, cites both *Quadrant* and *Kent Farms* for the proposition that Washington limits pollution exclusions to "broadly dispersed environmental pollution. " Windt, 3 *Insurance Claims and Disputes* § 11:11 & n.25 (6th ed.). Other scholars have noted that "[d]espite the court's efforts, the *Quadrant* decision is difficult to reconcile with *Kent Farms*," Note, *Quadrant Corp. v. American States Insurance Co.*, 110 P.3d 733 (Wash. 2005), 27 No. 8 Ins. Litig. Rep. 443 (2005), and that this Court's decisions in *Kent Farms* and *Quadrant* attempting to define "the apt limits of the pollution exclusion" has "produce[d] opinions that appear inconsistent." Jeffrey W. Stempel, *Rediscovering the Sawyer Solution: Bundling Risk for Protection and Profit*, 11 Rutgers J.L. & Pub. Pol'y 170, 212 n. 95 (2013). Accord, *Recent Developments In The Law Regarding The "Absolute" And "Total" Pollution Exclusions, The "Sudden And Accidental" Pollution Exclusion And Treatment Of The "Occurrence" Definition*, SNO50 ALL-ABA 1, 80

(2008) (characterizing Washington's treatment of absolute pollution exclusions as "mixed").

The Insurers' claim that Probuilders need not consider, or even research, the effect of Washington case law in summarily denying Probuilders a defense is a remarkable expansion of the so-called "eight corners" rule. "[I]f coverage is not clear from the face of the complaint but coverage could exist, the insurer must investigate and give the insured the benefit of the doubt on the duty to defend." *Expedia*, 180 Wn.2d at 803, ¶18.

This Court has thus soundly rejected the Insurers' contention that it would be "unfair" to hold that Probuilders breached its duty to defend because it could not "anticipate whether and how" the Court would interpret *Quadrant* and *Kent Farms*.⁵ (Insurers Br. 16) The unresolved questions were precisely why Probuilders was obligated to defend under a reservation of rights. The insurer's good faith duty to defend must be assessed when the claim is tendered, and not, as the Court of Appeals did, with the benefit of hindsight after adjudicating whether the insurer has the ultimate obligation to

⁵ This argument rings particularly hollow in this case, where Probuilders summarily denied its insured a defense and coverage without researching Washington law at all. (CP 255-76) Probuilders could not "anticipate" this Court's interpretation of its precedent because it did not even make itself aware of the relevant case law.

indemnify. *Alea*, 168 Wn.2d at 404, ¶16; *National Surety*, 176 Wn.2d at 885, ¶26. Regardless whether this Court determines that ProBuilders has a duty to indemnify its insured for Ms. Xia's damages, ProBuilders summary denial of a defense based on the language of a pollution exclusion that has been interpreted differently in cases Probuilders did not even bother to research conclusively establishes its lack of good faith.

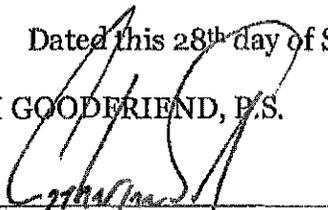
III. CONCLUSION

WSAJ Foundation correctly summarizes the rules of insurance contract interpretation governing the Court's task here. The Insurers provide no reasoned basis for interpretation of Probuilders' pollution exclusion to justify its failure to defend or to deny indemnity for Ms. Xia's claims. This Court should hold that Probuilders breached its duty to defend as a matter of law.

Dated this 28th day of September, 2016.

SMITH GOODFRIEND, P.S.

KILPATRICK/LAW GROUP, PC

By: 

By: 

Howard M. Goodfriend

Dick Kilpatrick

WSBA No. 14355

WSBA No. 7058

Catherine W. Smith

WSBA No. 9542

Attorneys for Petitioner

DECLARATION OF SERVICE

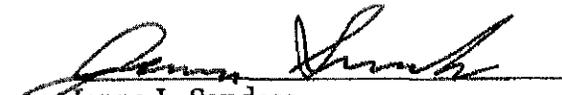
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 28, 2016, I arranged for service of the foregoing Petitioner's Answer to Amicus Briefs, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 28th day of September,
2016.


Jenna L. Sanders

SMITH GOODFRIEND, PS

September 28, 2016 - 3:10 PM

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