

NO. 68129-0

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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JBC ENTERTAINMENT HOLDINGS, INC., D/B/A JBC ENTERTAINMENT,  
INC., JBC OF SEATTLE, WA, INC., GEMINI INVESTORS AND ALPHA  
CAPITAL PARTNERS LTD.,  
Appellants

v.

CAPITOL SPECIALTY INSURANCE CORPORATION,  
Respondent

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**APPELLANT'S REPLY BRIEF**

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## **REPLY BRIEF OF APPELLANTS**

Appellants JBC Entertainment Holdings, Inc. D/B/A JBC Entertainment, Inc.; JBC of Seattle, WA, Inc.; Gemini Investors; and Alpha Capital Partners Ltd. (collectively “JBC”), by and through its attorneys of record Mark W. Conforti and Ema Viridi-Sehra of Dynan, Conforti P.S., hereby submit their reply brief in response to the brief submitted by respondent Capitol Specialty Insurance Corporation (“Capitol”) and in further support of their appeal.

### **I. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

The essence of JBC’s appeal results from the trial court’s December 2, 2011, Order Granting Capitol’s Motion for Summary Judgment Regarding Firearms Exclusion. JBC appeals that ruling and argues that the trial court erred when it granted Capitol’s Motion for Summary Judgment Regarding Firearms Exclusion despite the fact that the Firearms Exclusion in Capitol Policy No. PR00213034 is unclear and genuinely ambiguous providing for multiple interpretations of the policy language. The interpretation of a Firearms Exclusion is one of first impression in Washington. While the trial court granted Capitol’s Motion for Summary Judgment Regarding Firearms Exclusion holding that the Capitol’s insurance policy precludes coverage for the claims, injuries and damages asserted by Mika in his Complaint, it *did not* state that the

Firearms Exclusion is unambiguous as asserted by Capitol in its assignment of error and response.<sup>1</sup>

## **II. RESPONSE TO CAPITOL'S COUNTERSTATEMENT OF THE CASE**

### **A. The Policy**

Capitol argues that JBC failed to assert that it was not on notice of the Firearms Exclusion at issue prior to the underlying shooting involving Mika.<sup>2</sup> It further argues that JBC failed to seek any clarification from Capitol regarding the Firearms Exclusion prior to the underlying shooting.<sup>3</sup> The basis of the present appeal relates to JBC's reasonable interpretation and understanding, as a purchaser of an insurance coverage and nightclub operator, that coverage was afforded to JBC in a situation where an alleged injury takes place as a result of a shooting *not* caused by JBC, its employees, officers, agents, and/or affiliates. In other words, JBC essentially had no purpose or reason to seek clarification from Capitol with regards to the language of the Firearms Exclusion, as it reasonably presumed that coverage applied in an event such as the one involving

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<sup>1</sup> CP 475; *see also Brief of Respondent*, p. 3; See also Stipulation, Agreement and Order certifying finality of the court's order granting Plaintiff's Motion for Summary Judgment regarding Firearms Exclusion filed by the Superior Court on February 10, 2012.

<sup>2</sup> *See Brief of Respondent*, p. 6.

<sup>3</sup> *Id.*

Mika. JBC was not required to, nor was it necessary for it to seek out clarification from Capitol as to the exclusion language.

Capitol fails to cite to any statutory authority or case law supporting their argument that JBC, as the insured, was required to or should have sought clarification from Capitol regarding the language outlined in the Firearms Exclusion. It is Capitol's obligation to ensure that the Exclusions they write and include in the policy are unambiguous and in compliance with Washington law to accomplish the purpose they seek.

Capitol further does not provide any statutory authority or case law disputing Washington's longstanding history favoring the insured in which there is a constant and prevalent emphasis regarding the importance of an insurer's duty towards an insured. Capitol also concedes that there are no Washington cases interpreting a Firearms Exclusion. Accordingly, there is no Washington law that would have put JBC on notice that its interpretation of the Firearms Exclusion was unreasonable and therefore they should raise questions about it.

### **III. AUTHORITY**

#### **A. An Insurance Policy's Interpretation is Construed Strictly in Favor of an Insured; Not the Insurer**

It is long-standing Washington law, that in construing the language of an insurance policy, a Court must adopt the construction most favorable

to the insured.<sup>4</sup> Where a provision of the insurance contract is susceptible to two different constructions, the construction most favorable to insured will be adopted.<sup>5</sup> Insurance contracts are liberally construed in favor of the object to be accomplished and *strictly* construed against the insurer.<sup>6</sup> Any ambiguities in an insurance policy remaining after consideration of extrinsic evidence are resolved in favor of the insured. An insurance contract should not be given a strained interpretation that would render it ineffective.<sup>7</sup>

Exclusions from insurance coverage are contrary to the fundamental protective purpose of insurance and the Washington State Supreme Court will not extend them beyond their clear and unequivocal meaning.<sup>8</sup> Exclusionary clauses in insurance contracts, like the policy, are construed strictly against the insurer. Any undefined terms in an insurance

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<sup>4</sup> *Jack v. Standard Marine Ins. Co., Ltd., of Liverpool, England*, 33 Wash.2d 265, 205 P.2d 351 (1949).

<sup>5</sup> *Id.* at 271.

<sup>6</sup> *Id.* (emphasis added).

<sup>7</sup> *Smith v. Continental Cas. Co.*, 128 Wash.2d 73, 904 P.2d 749 (1995).

<sup>8</sup> *Nationwide Mut. Ins. Co. v. Hayles, Inc.*, 136 Wash.App. 531, 539, 150 P.3d 589 (Div. III) (2007).

policy are given their ordinary and common meaning, not their legal technical meaning.<sup>9</sup>

An insurance contract as a whole must be read as the average person would read it; it should be given a practical and reasonable, rather than literal interpretation, and not a strained or forced construction leading to absurd results.<sup>10</sup> An interpretation of an insurance policy that contradicts the general purpose of the policy in hardship or absurdity is presumed to be unintended by the parties.<sup>11</sup> The meaning of even an exclusionary clause must be determined in view of the policy as a whole.<sup>12</sup>

JBC's position with regards to the Firearms Exclusion is that it is unspecific, overly broad and reasonably subject to more than one interpretation. JBC does not agree with Capitol's contention that the language in the Firearms Exclusion is clear and that as a result, there is no coverage for the Mika lawsuit.<sup>13</sup> The language of the Firearms Exclusion does not specify whether the exclusion applies only to firearms used or

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<sup>9</sup> *Spratt v. Crusader Ins. Co.*, 109 Wash.App. 944, 948, 37 P.3d 1269 Wash.App. Div. 3, 2002.

<sup>10</sup> *Moeller v. Farmers Ins. Co. of Washington*, 173 Wash.2d 264, 267 P.3d 998 (2011).

<sup>11</sup> *Western Nat. Assur. Co. v. Hecker*, 43 Wash.App. 816, 719 P.2d 354 (1986).

<sup>12</sup> *Id.*

<sup>13</sup> *See Brief of Respondent*, p. 16.

owned by an employee, agent and/or officer of JBC; to any firearm used by anyone at anytime; or even if the use of the firearm must take place on property covered by the insurance agreement. It is not unreasonable for JBC, as an operator of a nightclub, to presume that coverage is applicable to JBC even where a firearm is utilized so long as the firearm is not utilized or owned by an agent, employee, officer or other individual serving JBC's business operations. The language of the firearms exclusion is clearly unspecific as to when the exclusion applies and *must* be interpreted against the drafter and the insurer, Capitol, in accordance with longstanding Washington law. In order to avoid coverage, Capitol must show that the loss outlined in Mika's Complaint was specifically excluded by the exclusionary language of the Firearms Exclusion; it simply cannot, as there is no exclusionary language specific to the claims alleged by Mika – the use of a firearm by a patron of JBC who is unrelated in anyway to JBC.

JBC's reasonable expectation, based upon the purpose and intent of the policy as a whole, was to protect itself from perils not of its own doing. Exclusions to withdraw coverage for events or actions of JBC itself (like the intentional acts of an officer or agent for example) are expected. Exclusions to preclude coverage for acts of others or accidents

are not reasonably expected by insureds unless clearly stated. This exclusion is not clear and unambiguous.

**B. Capitol's Duty to Defend versus its Duty to Indemnify**

Capitol asserts that JBC "muddles the duty to defend versus the duty to indemnify" and outlines for this Court the differences between the two insurer duties, while also alleging that it has complied with its duty to defend by fully defending JBC until Capitol demonstrated, via the lower court's summary judgment Order, that the Firearms Exclusion applied.<sup>14</sup>

The duty to defend and the duty to indemnify arise at different times in a tort proceeding. The duty to defend arises when the facts indicate that liability would eventually fall upon the indemnitor. The duty to indemnify, in contrast, arises when the Plaintiff in an underlying action prevails on facts that fall within coverage.<sup>15</sup> Since we do not know the facts that the trier of fact will ultimately find applicable when it renders its verdict, whether the duty to indemnify will arise may still be in doubt unless this court finds that under any set of facts presented there is no coverage.

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<sup>14</sup> *Id.* at p. 15.

<sup>15</sup> *George Sollitt Corp. v. Howard Chapman Plumbing & Heating, Inc.*, 67 Wash.App. 468, 836 P.2d 851 (Div. II) (1992).

This argument by Capitol strays away from the focus of the present appeal, which is the lower court's granting of Capitol's Motion for Summary Judgment Regarding Firearms Exclusion where the policy language at issue is unclear, vague, and ambiguous, and where such language should have been construed in favor of the insured, JBC, in accordance with longstanding Washington law. There is no issue in this appeal regarding whether Capitol complied with its duty to defend prior to the trial court granting the summary judgment motion. JBC's sole point is that it is possible for the appellate court to find a duty to defend in a case even where there may be no duty to indemnify.

**C. *Purdie's* Applicability to the Present Case**

As at the lower level, Capitol continues to rely on cases that interpret assault and battery exclusions in insurance policies, as opposed to those that specifically interpreted a firearms exclusion. Capitol further attempts to de-emphasize the holding in *Purdie*, arguing that "several California State and Federal Courts have rejected or criticized the independent or "concurrent cause" theory employed in *Purdie*."<sup>16</sup> It is noteworthy to mention that *Purdie* has not been overruled and continues to

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<sup>16</sup> See *Brief of Respondent*, p. 18.

be good law.<sup>17</sup> In fact, Capitol identified only two reported cases that have declined to follow or disagreed with *Purdie - Century Transit* and *Gonzalez*.<sup>18</sup> Both *Century Transit* and *Gonzalez* are distinguishable to the facts in the present case.

Capitol concedes that *Century Transit* did not involve a Firearms Exclusion, but rather interpreted an assault and/or battery exclusion. In *Century Transit*, a cab driver assaulted two men who attempted to film a political demonstration by a gay rights activists. The two assaulted men sued the cab driver's employer for assault, battery and negligent hiring, supervision and retention of the cab driver (in addition to other related causes of action that the Court did not review). *Century's* insurer denied coverage invoking the assault and battery exclusion within *Century's* policy. The Exclusion at issue read, "*No coverage shall apply under this policy for any claim, demand or suit based on assault and battery and assault shall not be deemed an accident, whether or not committed by or at the direction of the insured.*" (Emphasis added).<sup>19</sup> The *Century Transit*

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<sup>17</sup> *Underwriters Ins. Co. v. Purdie*, 145 Cal.App.3d 57, 193 Cal.Reptr.248 (1983).

<sup>18</sup> *Id.* at p. 18-21; see also *Century Transit Systems Inc., v. American Empire Surplus Lines Ins., Co.*, 42 Cal.App.4<sup>th</sup> 121, 49 Cal.Rptr.2d 567 (Cal.App.2d Dist. 1996); see also *Maryland Cas. Co. v. Gonzalez*, \_\_F.Supp.2d\_\_, 2012 WL 92928 (E.D.Cal.).

<sup>19</sup> See *Century* at 124.

Court held that the trial court properly granted summary judgment in favor of the insurer.<sup>20</sup>

In fact, in interpreting *Purdie*, the *Century Transit* Court stated, “unless the employee fired the gun, the injury would not have occurred. Therefore, liability for negligent hiring was wholly dependent upon an injury caused by an excluded event and was not a true “independent” cause of Plaintiff’s injury.”<sup>21</sup>

*Century Transit* is distinguishable from the present case because one of the key disputes as to the interpretation of the Capitol Policy is that no representative of JBC utilized the firearm as related to the claims made by Mika. When viewed in light of the comparison between the Capitol Firearms Exclusion which is unspecific and ambiguous, and the *Century* exclusion which specifically states it applies regardless of who commits the excluded act, the distinguishing factor becomes clear.

Mika’s alleged injuries were solely and proximately caused by acts taken by a person who was not related in anyway to JBC or its affiliates, while in *Century Transit*, the actual employee of the insured was the individual who took part in the beating, assault and battery of the

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<sup>20</sup> *Id.* At 124.

<sup>21</sup> *Id.* at 129.

claimants in the underlying suit. Given JBC's reasonable expectations that the application of exclusions would be based upon JBC's actions, and Capitol's failure to write an exclusion similar to *Century's* that specified that it applied regardless of who owned or operated the firearm, the principles used in Washington to interpret policy language mandate that Capitol's failure must be construed against them and in favor of JBC.

Similarly, with regards to the *Gonzalez* case, the facts in *Gonzalez* are also distinguishable to the facts in the present case. In *Gonzalez*, the insurer issued a commercial general liability policy to the insureds in relation to their business of selling vacuum cleaners.<sup>22</sup> The policy had an auto exclusion, which specified that it did not apply to: "*bodily injury or property damage arising out of the ownership, maintenance, use, or entrustment to others of any aircraft, auto, or watercraft owned or operated by or rented or loaned to any insured.*"<sup>23</sup> The insureds and policy purchasers nevertheless directly hired Gabriel Pascaul to assist with their sales business. Mr. Pascaul was driving under the influence and driving on a suspended license when his van was involved in a collision with another automobile resulting in alleged injuries to the other driver.

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<sup>22</sup> See *Gonzalez* at 1.

<sup>23</sup> *Id.*

The insurer sought a declaratory judgment specifying that it had no duty to defend or indemnify the insurers or driver in a negligence action brought by passengers.<sup>24</sup>

The present appeal does not involve a general commercial liability policy that excludes bodily injury or property damage arising out of the use of a vehicle loaned to others. The policy language in *Gonzalez* was clear, unambiguous and the exclusion at issue there could and should have been easily understood by the insureds that were in the business of selling vacuums door to door.

The present case deals with a Firearms Exclusion presenting the following question - whether the Firearms Exclusion can be read clearly, without doubt or ambiguity, by a purchaser such as a nightclub operator, to apply *even where* no JBC employee, owner, officer or affiliate made use of or owned the firearm which caused Mika's injuries. Again, had Capitol chosen to write an exclusion with the specificity of the *Gonzalez* exclusion, there would be no ambiguity regarding whether the owner or operator of the firearm needed to be an employee or agent of JBC in order for the exclusion to apply. Capitol chose not to write such an exclusion, and therefore the language must be construed against them.

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<sup>24</sup> *Id.*

**D. Capitol's focus on Washington case law that does not follow the "concurrent cause" theory is distinguishable from the question of whether the policy language within the Firearms Exclusion can be reasonably interpreted to include coverage to JBC in light of the Mika Complaint**

Capitol argues that Washington does not follow the "concurrent cause" theory that is cited in *Purdie*, yet at the same time agrees that the issue of interpreting an ambiguous firearms exclusion is one of first impression in Washington. In other words, JBC contends the "concurrent cause" theory argument is independent of the issue of whether the Firearms Exclusion language could have reasonably been interpreted by JBC, as the insured, to provide coverage with regards to Mika's claims.<sup>25</sup>

Capitol relies on *McAllister*<sup>26</sup> and *Alea*<sup>27</sup> to support the contention that coverage should not be afforded to JBC in relation to the Mika Complaint.<sup>28</sup> Again, however, the issue at dispute in *McAllister* was the interpretation of an assault/battery exclusion and the fact that the nightclub staff allowed certain patrons to re-enter a club after an altercation. Similarly, in *Alea*, two patrons were involved in an altercation, which

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<sup>25</sup> See *Brief of Respondent*, p. 21.

<sup>26</sup> *McAllister v. Agora Syndicate, Inc.*, 103 Wash.App. 106, 11 P.3d 859 (2000).

<sup>27</sup> *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn. 2d 398, 229 P.3d 693 (2010).

<sup>28</sup> *Id.* p. 22 – 23.

resulted in one of the patrons being shot, when nightclub security escorted patrons outside of their nightclub and presumably allowed the same patrons to re-enter the club after an altercation.<sup>29</sup> In *Alea*, the assault and battery exclusion was in dispute and the question presented was whether coverage should have been afforded to the nightclub given the nightclub employees' actions.<sup>30</sup>

First, the dispute in this case involves a Firearms Exclusion, not an assault and battery exclusion. Second, in both *Alea* and *McAllister*, some type of affirmative action was taken by the employees and/or agents of the nightclub (i.e. allowing patrons to re-enter after altercations had taken place); no such action was taken by JBC, its employee and/or associates in this matter. Rather, Mika's injuries were sustained as a result of an entirely separate act by a "stranger" to JBC.

The court must also take note of the specific exclusions at issue in *McAllister* and *Alea* and contrast them with the Capitol Firearms Exclusion.

The *McAllister* Assault and Battery Exclusion is very similar to the *Century Transit* Exclusion. It reads:

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<sup>29</sup> See *Brief of Respondent*, p. 23, see also *Alea* at 398, 402 – 403.

<sup>30</sup> See *Alea* at 398, 403, 410-411.

*“It is agreed that no coverage shall apply under this policy for any claim, demand or suit based upon assault and/or battery, and assault and/or battery shall not be deemed an occurrence, whether or not committed by or at the direction of the insured.”<sup>31</sup>*

Two things are unambiguous from this exclusion: 1.) The person committing the assault is irrelevant as it does not need to be someone at the direction of the insured; and 2.) an assault and/or battery is not an occurrence and therefore is not a covered act.

The *Alea* Assault and Battery Exclusion reads as follows:

*This insurance does not apply to any claim arising out of –*

*A. Assault and/or Battery committed by any person whosoever, regardless of degree of culpability or intent and whether the acts are alleged to have been committed by the insured or any officer, agent, servant or employee of the insured or by any other person; or*

*B. Any actual or alleged negligent act or omission in the:*

- 1. Employment;*
- 2. Investigation;*
- 3. Supervision;*
- 4. Reporting to the proper authorities or failure to so report; or*
- 5. Retention;*

*of a person for whom any insured is or ever was legally responsible, which results in Assault and/or Battery; or*

*C. Any actual or alleged negligent act or omission in the prevention or suppression of any act of Assault and/or Battery.<sup>32</sup>*

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<sup>31</sup> See *McAllister* at 109.

<sup>32</sup> See *Alea* at 406.

Several things are unambiguous from this exclusion: 1.) The person committing the assault is irrelevant as it does not need to be someone at the direction of the insured; 2.) Actions other than the actual assault are specified and excluded, such as supervision and employment; and 3.) Acts and Omissions in the prevention or suppression of the assault and/or battery are excluded. Clearly, this exclusion provided an unambiguous basis for the court to conclude that pre-assault negligence by club employees was excluded because the exclusion at issue specifically stated that it was.

Capitol continues to argue that its Firearms Exclusion broadly disclaims coverage for *any* bodily injury or property damage resulting from any firearm. Nevertheless, while the Firearms Exclusion language in the Capitol policy provided to JBC may have been broad, it is also unspecific, vague and reasonably susceptible to at least two interpretations, unlike the exclusions at issue in *Century Transit*, *McAllister*, and *Alea* which clearly and unambiguously excluded the acts and omissions at issue. Had Capitol desired to have the protections afforded by the exclusions at issue in *Century Transit*, *Alea*, and *McAllister*, it could have written an exclusion that was as specific and clear as those exclusions. It did not. Therefore, to interpret its ambiguous

exclusion in the same way as the specifically worded *Alea*, *McAllister* and *Century Transit* exclusions defeats the very purpose the insured was seeking in purchasing such a policy - to protect itself from an unfortunate instance and scenario such as the *Mika* incident without any notice or reasonable expectation that such an incident would be excluded from the coverage it purchased.

As outlined above, questions as to coverage should be construed in favor of the insured and against the insurer.<sup>33</sup> JBC has demonstrated that the Capitol Firearms Exclusion is ambiguous when compared to the *Century Transit*, *McAllister*, and *Alea* assault and battery exclusions. As a result, this court should take this opportunity to interpret a Firearms Exclusion for the first time in Washington to reaffirm the longstanding principle in Washington that if an insurer desires to write an exclusion in its policy in an effort to deny coverage, the exclusion must be unambiguous and put the insured on notice of the conduct that would deny coverage.

**E. The Declaration of Kent Lawson in support of Plaintiff's Motion for Summary Judgment Regarding Firearms Exclusion was not based on personal knowledge outside the scope of CR 56(e)**

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<sup>33</sup> *City of Bremerton v. Harbor Ins. Co.*, 92 Wash.App. 17, 963 P.2d 194 (Div II.) (1998).

There was no evidence before the trial court that Mr. Lawson had ever served as an insurance agent for JBC. He was not involved in any negotiations related to the issuance of the Capitol policy to JBC. He did not state that he had any personal knowledge regarding the policy application process relating to the subject policy eventually obtained by JBC from Capitol. Mr. Lawson's Declaration testimony supporting Capitol's Motion for Summary Judgment, lacked the appropriate foundation required by CR 56(e), which specifically provides, "supporting and opposing affidavits shall be made on personal knowledge...and shall show affirmatively that the affiant is competent to testify to in the matters stated therein."<sup>34</sup>

Although Mr. Lawson served as the Vice President of Claims for Capitol, he did not demonstrate any familiarity with the process of negotiation and the issuance of the policy to JBC by Capitol. All he could state is what was or was not in the file. Accordingly, the trial court erred when it failed to strike the specific portions of Mr. Lawson's declaration that lacked the foundation required by CR 56(e), specifically as related to Mr. Lawson's lack of personal knowledge as to the policy issuance process and negotiations between JBC and Capitol.

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<sup>34</sup> CR 56(e).

#### IV. CONCLUSION

The policy language in Capitol Policy No. PR00213034, specifically the Firearms Exclusion, is ambiguous when viewed in light of the assault and battery exclusions previously interpreted by the Appellate Courts and relied upon by Capitol. The Firearms Exclusion does not state that it applies where an individual or entity, not associated in anyway with JBC, utilizes a firearm that is not owned by JBC. JBC, as an insured, a nightclub operator and a purchaser of the policy, reasonably expected that the Firearms Exclusion would not apply to a situation like the *Mika* incident where no JBC employee, agent and/officer made use of a firearm and the firearm was not owned by JBC, as this would not be consistent with the overall intent and scheme of the policy as a whole. They expected that the policy they purchased would provide coverage for this type of situation.

As an issue of first impression in Washington, the interpretation of the Firearms Exclusion at issue in this appeal must be read in favor of JBC as the insured if it is ambiguous. JBC has demonstrated that the Firearms Exclusion is ambiguous. Accordingly, the trial court erred in granting summary judgment in favor of Capitol. JBC respectfully requests that the lower court's decision should be reversed upon appeal and that Capitol be ordered to reinstate its defense of the JBC Defendants in the *Mika* lawsuit.

**RESPECTFULLY SUBMITTED** this 23<sup>rd</sup> day of May, 2012.

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