

68129-0

68129-0

NO. 68129-0

---

COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

---

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

---

**BRIEF OF APPELLANTS**

---

Mark W. Conforti, WSBA #28137  
[mconforti@gcdjlaw.com](mailto:mconforti@gcdjlaw.com)

Ema Viridi-Sehra, WSBA #41579  
[evirdi-sehra@gcdjlaw.com](mailto:evirdi-sehra@gcdjlaw.com)

**DYNAN CONFORTI, P.S.**

Suite 400, Building D  
2102 North Pearl Street  
Tacoma, WA 98406-1600  
(253) 752-1600

Attorneys for Appellants JBC of Seattle, WA,  
Inc.; JBC Entertainment Holdings, Inc.; JBC  
Entertainment, Inc., Gemini Investors, and  
Alpha Capital Partners, LTD.

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 MAR 23 PM 4:50

ORIGINAL

**TABLE OF CONTENTS**

	<b>Page(s):</b>
I. <b>INTRODUCTION</b> .....	1
II. <b>ASSIGNMENT OF ERROR</b> .....	3
A.     Assignment of Error.....	3
B.     Issues Pertaining to Assignment of Error.....	4
III. <b>STATEMENT OF THE CASE</b> .....	6
A.     Introduction.....	6
B.     Factual History.....	8
C.     Procedural History.....	12
IV. <b>ARGUMENT</b> .....	13
A.     Standard of Review.....	13
B.     The trial court committed error when it granted Capitol’s Motion for Summary Judgment Regarding Firearms Exclusion When an Ambiguity Exists as to the Applicability of the Firearms Exclusion of Policy No. PR00213034 to the Facts Alleged and Claims Asserted in the Mika Complaint.....	15
1.   The Firearms Exclusion Does Not Preclude Coverage for the Mika Lawsuit.....	18
a.   Mika’s Complaint is Framed Primarily in Terms of Negligence and does not Depend Solely upon use of the Excluded Risk.....	20

b.	The Firearms Exclusion Applies Only to the Use of a Firearm by the Insured.....	22
C.	The Holdings in <i>Purdie</i> and <i>Braxton</i> Provide a Legal Framework as to the Application of the Firearms Exclusion Which Must be Interpreted in Favor of Affording Coverage to JBC .....	27
D.	Other Exclusions Cited by Capitol are Not Applicable to this Case.....	33
E.	The trial court erred in considering the Declaration of Kent Lawson in Support of Capitol’s Motion for Summary Judgment Where Mr. Lawson’s declaration did not meet the standards set forth in CR 56(e).....	34
V.	<b>CONCLUSION</b> .....	37

## TABLE OF AUTHORITIES

STATE CASES	Page(s):
<u><i>American Best Food Inc. v. Alea London, Ltd.</i></u> , 168 Wash.2d 398, 229 P.3d 693 (2010).....	26, 27, 28
<u><i>American Star Ins. Co. v. Grice</i></u> , 121 Wash.2d 869, 854 P.2d 622 (1993), opinion supplemented, 123 Wash.2d 131, 865 P.2d 507 (1994).....	16
<u><i>Atlas Assur. Co. v. McCombs Corp.</i></u> , 146 Cal.App.3d 135, 194 Cal.Rptr. 66 (1983).....	29
<u><i>Bennett v. Ragon</i></u> , 907 So.2d 116, 2004-0706 (L.a.App. 1 Cir. 3/24/05)(2005).....	30, 31
<u><i>Blomster v. Nordstrom Inc.</i></u> , 103 Wash.App. 252, 11 P.3d 883 (2000).....	15
<u><i>Braxton v. United States Fire Insurance Company</i></u> , 651 S.W.2d 616, (Mo.App. E.D. 1983).....	23, 24, 25, 29
<u><i>Grimwood v. University of Puget Sound, Inc.</i></u> , 110 Wash.2d, 355, 753 P.2d 517 (1988).....	15
<u><i>Hartford Fire Ins. Co. v. Superior Court</i></u> , 142 Cal.App.3d 406, 191 Cal.Rptr. 37 (1983).....	29
<u><i>Hayden v. Mut. Of Enumclaw Ins. Co.</i></u> , 141 Wash.2d 55, 1 P.3d 1167 (2000).....	18
<u><i>Kirk v. Mt. Airy Ins. Co.</i></u> , 134 Wash.2d 558, 951 P.2d 1124 (1998).....	19
<u><i>Ledbetter v. Concord Gen. Corp.</i></u> , 665 So.2d 1166, 95-0809 (La. 1/6/96) (1996).....	30, 31
<u><i>McAllister v. Agora Syndicate, Inc.</i></u> , 103 Wash.App. 106, 11 P.3d 859 (2000).....	26, 27

<u>McDonald v. State Farm Fire &amp; Casualty Co.</u> , 119 Wash.2d 724, 837 P.2d 1000 (1992).....	19
<u>Overton v. Consol. Ins. Co.</u> , 145 Wash.2d 417, 38 P.3d 322 (2002).....	22
<u>Phil Schroeder, Inc. v. Royal Globe Ins. Co.</u> , 99 Wash.2d 65, 659 P.2d 509 (1983).....	34
<u>Port of Seattle v. Lexington Ins. Co.</u> , 111 Wash.App. 901, 48 P.3d 334 (2002).....	14
<u>Queen City Farms, Inc. v. Central National Ins. Co. of Omaha</u> , 126 Wash.2d 50, 882 P.2d 703 (1994).....	22, 26
<u>R.A. Hanson Co. v. Aetna Ins. Co.</u> , 26 Wash.App. 290, 612 P.2d 456 (1980).....	19
<u>Safeco Ins. Co. v. Gilstrap</u> , 141 Cal.App.3d 524, 190 Cal.Rptr. 425 (1983).....	29
<u>Santos v. Sinclair</u> , 76 Wash.App. 320, 884 P.2d 941 (1994).....	16
<u>Smith v. Safeco Ins. Co.</u> , 150 Wn.2d 478, 78 P.3d 1274 (2003).....	13
<u>Toll Bridge Auth. v. Aetna Ins. Co.</u> , 54 Wash.App. 400, 773 P.2d 906 (1989).....	29
<u>Truck Ins. Exch. v. VanPort Homes, Inc.</u> , 147 Wash.2d 751, 58 P.3d 276 (2002).....	18, 19
<u>Underwriters Insurance Company v. Purdie</u> , 145 Cal.App.3d 57, 193 Cal.Rptr. 248 (1983).....	20, 21, 22, 28
<u>Unigard Ins. Co. v. Leven</u> , 97 Wash.App. 417, 983 P.2d 1155 (1999).....	18
<u>United States Underwriters Ins. Co. v. Val-Blue Corp.</u> , 85 N.Y.2d 821, 647 N.E. 2d 1342, 623 N.Y.S.2d 834 (1995).....	29

<u><i>Weatherbee v. Gustafson</i></u> , 64 Wash.App. 128, 822 P.2d 1257 (1992).....	14
<u><i>White v. Kent Medical Center, Inc., P.S.</i></u> , 61 Wash.App. 163, 18 P.2d 4 (1991).....	14
<u><i>Williams v. Andrus</i></u> , 74 So.3d 818, 2011-239 (La.App. 3 Cir. 10/5/11) (2011).....	29, 30, 32
<u><i>Woo v. Fireman's Fund Ins. Co.</i></u> , 161 Wash.2d 43, 164 P.3d 454 (2007).....	18
<u><i>Young v. Key Pharmaceuticals, Inc.</i></u> , 112 Wash.2d 216, 770 P.2d 182 (1989).....	14

**FEDERAL CASES**

<u><i>Continental Cas. Co. v. City of Richmond</i></u> , 763 F.2d 1076 (1985).....	29
---	----

**RULES**

CR 56(c).....	14
CR 56(e).....	15, 35

## I. INTRODUCTION

Appellants JBC Entertainment Holdings, Inc., doing business as JBC Entertainment, Inc., a Washington Corporation; JBC of Seattle, WA Inc., a Washington business subsidiary of JBC Entertainment Holdings, Inc.; Gemini Investors, an entity and owner of JBC Entertainment Holdings, Inc.; and Alpha Capital Partners, Ltd., an entity and owner of JBC Entertainment Holdings, Inc. (collectively, “JBC”), respectfully ask this Court to reverse the trial court’s “Order Granting Capitol Specialty Insurance Corporation’s Motion for Summary Judgment Regarding Firearms Exclusion” dated December 2, 2011.

JBC, an owner and operator of Seattle’s Jillian’s nightclub, purchased a Commercial General Liability Insurance Policy (“CGL”) from Capitol Specialty Insurance Corporation (“Capitol”), covering the periods between June 26, 2009 through June 26, 2010. On or about March 21, 2010, a shooting occurred at the Jillian’s nightclub, which allegedly resulted in the injury of Jackson Jacob Mika (“Mika”). The firearm was owned by and fired by a patron of Jillian’s, not an employee, agent or officer of JBC. Mika filed a Complaint against JBC, Michael Knudsen and Jane Doe Knudsen (“Knudsen”), and Marquis Holmes and Jane Doe Holmes d/b/a Boss Life Entertainment (“Holmes”) in *Jackson Jacob Mika v. JBC Entertainment Holdings, Inc., et al*, King County Superior Court

No.11-2-02108-4 SEA. Mika asserted claims against JBC for negligence for allowing an unsafe condition, negligence for failure to provide adequate security, negligent hiring, negligent supervision and negligent training.

On or about November 2, 2011, Capitol filed a Motion for Summary Judgment Regarding Firearms Exclusion, arguing that the firearms exclusion in Policy No. PR00213034 purchased by JBC from Capitol precluded insurance coverage for the lawsuit brought by Mika. JBC argued in opposition that no party disputed that the interpretation of the subject firearms exclusion was an issue of first impression in Washington. It further argued that coverage applied based on Washington's broad reliance on an insurer's duty to defend, the State's continuous pattern of erring in favor of the insured, because the language specified in the firearms exclusion was ambiguous, and because the exclusion when interpreted in favor of JBC was broad enough to allow coverage for Mika's claims against JBC. Mika also filed an opposition to Capitol's motion. Knudsen filed a joinder to JBC's response in opposition to Capitol's Motion for Summary Judgment.

Capitol failed to meet its legal or factual burden for summary judgment for the following reasons: There is a genuine issue of dispute regarding the interpretation of the policy purchased by JBC, the language

of the firearms exclusion is ambiguous, and there is a legal question regarding the application of the firearms exclusions to the facts asserted in Mika's lawsuit given that there is no Washington authority interpreting a firearms exclusion. Capitol failed to produce any case law interpreting a firearms exclusion to support their position that the firearms exclusion precluded coverage for JBC in relation to the claims brought by Mika. All cases interpreting firearms exclusions (that were reported final opinions at the time of the motion hearing) found that coverage is afforded. Despite these issues regarding the interpretation of Policy No. PR00213034 and its firearms exclusion, the trial court granted summary judgment in favor of Capitol.

This is a case of first impression in Washington; nevertheless, there is no dispute that long standing Washington case law favors the insured, constantly emphasizing the importance of an insurer's duty to defend and the broad interpretation of insurance policies in an effort to err in favor of an insured. The trial court's ruling is in error and unsupported by the admissible evidence presented by the parties.

## **II. ASSIGNMENT OF ERROR**

### **A. Assignment of Error**

The trial court erred by granting Capitol's Motion for Summary Judgment Regarding Firearms Exclusion despite an ambiguity in the

language of the exclusion that should be construed against Capitol in favor of providing coverage to JBC. Both parties interpret the firearms exclusion to read a particular way that is in conflict with the other's interpretation, therefore a genuine ambiguity as to the applicability of the exclusion exists and should have been resolved in favor of JBC as the insured and non-drafter of the language.

In addition, the trial court erred in granting Capitol's Motion for Summary Judgment Regarding Firearms Exclusion because this matter is one of first impression in Washington (the application and interpretation of a firearms exclusion). In its initial motion, Capitol failed to cite to any cases whatsoever interpreting the firearms exclusion as it applies to this matter.<sup>1</sup> While Capitol cited to a Louisiana case in its reply brief, at the time of the hearing it was not final opinion, was not proper authority and was also distinguishable from the facts at issue in this appeal.<sup>2</sup>

**B. Issues Pertaining to Assignment of Error**

1. Did the trial court abuse its discretion by granting summary judgment to Capitol regarding the firearms exclusion in Policy No.

---

<sup>1</sup> CP 148-165

<sup>2</sup> CP 460-461

PR00213034 when an ambiguity exists as to the applicability of this exclusion to the facts of which Mika complains in his complaint?

2. Did the trial court abuse its discretion by granting summary judgment to Capitol regarding the firearms exclusion in Policy No. PR00213034 where the parties agree that the issue is one of first impression in Washington, where Washington case law encourages the duty to defend on behalf of the insurer and errs in favor of providing coverage to an insured, and where Capitol failed to cite to any out of state cases interpreting a firearms exclusion to exclude coverage for the types of claims being asserted by Mika that were final authority and reported opinions at the time of the trial court's ruling?

3. Did the trial court abuse its discretion by considering The Declaration of Kent Lawson in Support of Capitol's Motion for Summary Judgment where Mr. Lawson's declaration lacked foundation and failed to support the facts outlined in Capitol's motion, as required by CR 56(e)?

///

//

/

### **III. STATEMENT OF THE CASE**

#### **A. Introduction**

Appellant JBC seeks reversal of the trial court's order granting Capitol's Motion for Summary Judgment Regarding Firearms Exclusion, entered on December 2, 2011.<sup>3</sup>

As outlined below, the only exclusion at issue in this matter is the firearms exclusion contained in Policy No. PR00213034.<sup>4</sup> Capitol takes the position that the firearms exclusion in the policy (which JBC argues is ambiguous and vague in terms of both the ownership of and the person who uses the firearm) precludes coverage for JBC in relation to the claims brought by Mika against them; in other words, Capitol argues that the preclusion applies to "all shooting claims" regardless of who fires the weapon, who owns the weapon, or the theory of the underlying claim, even though this is not specified in the firearms exclusion contained within the policy language itself. Capitol conceded below that there are no Washington cases interpreting the applicability of firearms exclusions in

---

<sup>3</sup> CP 475-478

<sup>4</sup> CP 351

this matter. Capitol relied primarily on assault/battery exclusion cases to support its position.<sup>5</sup>

JBC, in its response, outlined for the lower court the various cases in Washington that support an insurer's duty to defend and the burden that the insurer has to meet to avoid coverage.<sup>6</sup> JBC further argued that the firearms exclusion does not unequivocally exclude acts arising out of the use of a firearm by "any person" under "any circumstances" and that an average purchaser of insurance could reasonably conclude that the firearms exclusion applies only if the insured itself uses a firearm in connection with its business.<sup>7</sup> JBC further took the position that the Mika Complaint was framed in terms of other acts of negligence and *did not* depend solely upon the use of an excluded risk.<sup>8</sup> JBC provided out of state authority interpreting firearms exclusions, which supported JBC's position.<sup>9</sup> Clearly, a genuine issue of dispute exists in terms of the interpretation of the policy and the application of the exclusion at issue to the theories being alleged in the Mika Complaint under Washington law.

---

<sup>5</sup> CP 149; CP 156-157

<sup>6</sup> CP 302-310

<sup>7</sup> CP 307

<sup>8</sup> CP 304-305

<sup>9</sup> CP 304-310

Accordingly, the trial court erred by granting Capitol's Motion for Summary Judgment.

**B. Factual History**

JBC was listed as a Defendant in the related case of *Jackson Jacob Mika v. JBC Entertainment Holdings, Inc., et al.*, King County Cause No. 11-2-02108-4 SEA, filed on January 5, 2011, along with Gemini Investors and Alpha Capital Partners, Ltd. (owners/shareholders of JBC), Michael B. Knudsen and Jane Doe Knudsen (JBC employee), and Marquis Holmes and Jane Doe Holmes d/b/a Boss Life Entertainment (non-employee event promotor).<sup>10</sup> In his Complaint, Mika alleged that on or about March 21, 2010, he was a patron at Jillian's nightclub, when several arguments and fights began to take place on the upstairs level of the nightclub.<sup>11</sup> Mika alleged that while security employees ran to stop the fights, a "shot rang."<sup>12</sup> Mika further alleged that he was shot by a patron of JBC's nightclub because JBC "negligently and carelessly created and/or allowed to exist an unsafe and unsecured premises which, JBC knew, or in the exercise of ordinary and reasonable care should have known, to be an

---

<sup>10</sup> CP 319

<sup>11</sup> CP 322

<sup>12</sup> CP 322

unsafe and dangerous condition.”<sup>13</sup> Mika’s Complaint alleged claims of: (1) negligent hiring; (2) negligent supervision; (3) inadequate security; and (4) improper instruction and training against JBC.<sup>14</sup> Mika alleged that he sustained injuries and damages as a result of the shooting.<sup>15</sup> Mika specifically alleged as follows:

16. Plaintiff Jackson Mika was standing with friends when he heard the shot(s) fired. He began to run with the other patrons away from the direction of gunfire and towards the exit. The Plaintiff later realized when he was outside the night club that something felt “funny” and that he had been injured and was hurt. But he didn’t know that he had been shot.

17. The Plaintiff drove himself to Harborview Medical Center for emergency care. He had a gunshot entry wound in his right buttock and exit wound on his groin. The spent bullet was found on a short stairway inside Jillian’s.<sup>16</sup>

Capitol issued CGL Policy No. PR00213034 to JBC, covering the period from June 26, 2009, to June 26, 2010. The insuring agreement of the policy provided, in pertinent part:

#### **SECTION I – COVERAGES**

#### **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**

---

<sup>13</sup> CP 323

<sup>14</sup> CP 324

<sup>15</sup> CP 322; CP 325

<sup>16</sup> CP 322

**1. Insuring Agreement**

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result.

...

b. This insurance applies to “bodily injury” and “property’ damage” only if:

(1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”;

(2) The “bodily injury” or “property damage” occurs during the policy period; and

(3) Prior to the policy period, no insured listed under Paragraph 1. of Section II - Who is An Insured and no “employee” authorized by you to give or receive notice of an “occurrence” or claim, knew that the “bodily injury” or “property damage” had occurred, in whole or in part....<sup>17</sup>

Capitol provided a defense to JBC in the Mika action under a reservation of rights.<sup>18</sup> Capitol then filed a Complaint for Declaratory

---

<sup>17</sup> CP 387

<sup>18</sup> CP 153

Relief seeking to deny coverage to JBC for Mika's lawsuit by relying on the firearm exclusion endorsement to the CGL policy, among other provisions, which provided as follows:

**FIREARMS EXCLUSION**

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE PART**

In consideration of the premium charged, it is hereby understood and agreed that:

- (i) Clause 2, Exclusions, of Section I - COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY is amended to include the following at the end thereof:

**Firearms**

"Bodily injury" or "property damage" that arises out of, relates to, is based upon or attributable to the use of a firearm(s).

- (ii) Clause 2(a) of Section I - COVERAGES, COVERAGE B PERSONAL INJURY AND ADVERTISING INJURY LIABILITY, is amended to include the following at the end thereof:

**Firearms**

"Personal and advertising injury" arising out of the use of a firearm(s).

ALL OTHER TERMS, CONDITIONS AND EXCLUSIONS REMAIN

UNCHANGED.<sup>19</sup>

**C. Procedural History**

Mika brought his Complaint for negligence on or about January 5, 2011 against JBC and other parties.<sup>20</sup> Capitol subsequently brought a Complaint for Declaratory Relief on or about April 15, 2011.<sup>21</sup>

On or about November 2, 2011, Capitol filed a Motion for Summary Judgment Regarding Firearms Exclusion.<sup>22</sup> In its motion, Capitol argued that the firearms exclusion applied to Mika's lawsuit and precluded coverage to JBC for all claims asserted by Mika. In support of its motion, Capitol also filed the Declaration of Kent Lawson.<sup>23</sup>

JBC filed a response to Capitol's motion on or about November 21, 2011.<sup>24</sup> Knudsen and Mika filed a joinder and a response in opposition to Capitol's motion respectively.<sup>25</sup> JBC further moved to strike portions of the Declaration of Kent Lawson in support of Capitol's Motion for

---

<sup>19</sup> CP 1; CP 33

<sup>20</sup> CP 319

<sup>21</sup> CP 1

<sup>22</sup> CP 148-165

<sup>23</sup> CP 166-291

<sup>24</sup> CP 298

<sup>25</sup> CP 454; CP 464

Summary Judgment Regarding Firearms Exclusion, arguing that it lacked proper foundation in accordance to the standard specified in CR 56(e).<sup>26</sup>

On or about December 2, 2011, the trial court entered an Order granting Capitol's Motion for Summary Judgment Regarding Firearms Exclusion.<sup>27</sup> The trial court also denied JBC's Motion to Strike Portions of the Declaration of Kent Lawson.<sup>28</sup>

The only issue discussed herein, and upon which the trial court based its ruling, is the firearms exclusion of Policy No. PR00213034. The parties agree that no Washington cases have discussed the firearms exclusion and therefore the issue is one of first impression before this Court.

#### IV. ARGUMENT

##### A. Standard of Review

Whether the trial court should have granted Capitol's Motion for Summary Judgment Regarding Firearms Exclusion is a question of law and reviewed *de novo*. Review of a summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court.<sup>29</sup> CR 56(c)

---

<sup>26</sup> CP 435-439

<sup>27</sup> CP 475

<sup>28</sup> CP 473

<sup>29</sup> *Smith v. Safeco Ins. Co.*, 150 Wash.2d 478, 483, 78 P.3d 1274 (2003).

only allows summary judgment where “there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”<sup>30</sup> On a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact.<sup>31</sup> Summary judgment must be denied if the record shows a reasonable hypothesis which entitles the non-moving party to relief.<sup>32</sup> A motion for summary judgment should be granted only if there is no genuine issue of material fact or if reasonable minds could reach only one conclusion on that issue based upon the evidence construed in light most favorable to the non-moving party.<sup>33</sup> Summary judgment is only appropriate where a contract has only one reasonable meaning when viewed in light of the parties’ objective manifestations.<sup>34</sup>

Similarly, CR 56(e) provides in pertinent part that “supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters

---

<sup>30</sup> *CR 56(c)*.

<sup>31</sup> *Young v. Key Pharmaceuticals, Inc.*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989) (citations omitted).

<sup>32</sup> *White v. Kent Medical Center, Inc., P.S.*, 61 Wash.App. 163, 175, 180 P.2d 4 (1991).

<sup>33</sup> *Weatherbee v. Gustafson*, 64 Wash.App. 128, 131, 822 P.2d 1257 (1992).

<sup>34</sup> *Port of Seattle v. Lexington Ins. Co.*, 111 Wash.App. 901, 48 P.3d 334 (2002).

therein.”<sup>35</sup> CR 56(e) is explicit in its requirements which serve the ultimate purpose of summary judgment. Affidavits (1) must be made on personal knowledge, (2) shall set forth such facts as would be admissible in evidence, and (3) shall show affirmatively that the affiant is competent to testify to the matters therein.<sup>36</sup>

**B. The trial court committed error when it granted Capitol’s Motion for Summary Judgment Regarding Firearms Exclusion When an Ambiguity Exists as to the Applicability of the Firearms Exclusion of Policy No. PR00213034 to the Facts Alleged and Claims Asserted in the Mika Complaint**

The trial court erred by granting Capitol’s Motion for Summary Judgment Regarding Firearms Exclusion as the policy language of Policy No. PR00213034, specifically the firearms exclusion relied upon by Capitol, is ambiguous. The terms are not specific, overly broad and subject to more than one interpretation. The language does not specify whether the exclusion applies only to firearms used or owned by an employee, agent and/or officer of JBC, to any firearm used by anyone, or even if the use of the firearm must take place on property covered by the insurance agreement.

---

<sup>35</sup> CR 56(e).

<sup>36</sup> CR 56(e); the emphasis is on facts that the declarant could testify to from personal knowledge and that would be admissible evidence. Ultimate facts or conclusions of fact are insufficient. *Grimwood v. University of Puget Sound, Inc.*, 110 Wash.2d 355, 359, 753 P.2d 517 (1988); see also *Blomster v. Nordstrom Inc.*, 103 Wash.App. 252, 259-60, 11 P.3d 883 (2000).

If the language of an insurance policy is clear and unambiguous, the court may not modify the contract or create an ambiguity.<sup>37</sup> However, an ambiguity exists if the language is fairly susceptible to two different reasonable interpretations.<sup>38</sup> If an ambiguity exists, the court may attempt to determine the parties' intent by examining extrinsic evidence.<sup>39</sup> If a policy remains ambiguous even after resort to extrinsic evidence, then this court will construe the ambiguities in insurance contracts against the insurer.<sup>40</sup> The rule strictly construing ambiguities in favor of the insured applies *with added force to exclusionary clauses which seem to limit coverage*.<sup>41</sup> Further, language should be interpreted in accordance with the way it would be understood by an average person, rather than in a technical sense.<sup>42</sup>

At the lower level, Capitol argued that JBC was bound by “the clear language of the firearms exclusion that the policy did not apply to:

---

<sup>37</sup> *Santos v. Sinclair*, 76 Wash.App. 320, 324, 884 P.2d 941 (1994), citing *American Star Ins. Co. v. Grice*, 121 Wash.2d 869, 874-75, 854 P.2d 622 (1993), opinion supplemented, 123 Wash.2d 131, 865 P.2d 507 (1994).

<sup>38</sup> See *Santos* at 320, 324.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* (emphasis added).

<sup>42</sup> *Id.*, citing *American Star Ins. Co.*, at 874, 854 P.2d 622.

“Bodily injury” or “property damage” that arises out of, relates to, is based upon or attributable to the use of a firearm(s).”<sup>43</sup>

Capitol further attempted to present the lower court with various cases in which the *assault and/or battery exclusion(s)* were held to rule out the application of coverage.<sup>44</sup> Nevertheless, Capitol agreed that no Washington case has interpreted the application of a broad firearms exclusion to exclude coverage to an insured under the facts that exist in this case.<sup>45</sup>

JBC on the other hand takes the position that the firearms exclusion does not preclude coverage, relying on longstanding Washington cases that have repeatedly focused on the importance of an insurer’s duty to defend, and further relying on the fact that the firearms exclusion at issue is not specific as to whether or not coverage applies in situations such as the present one where the insured and/or its employees did not own or fire the firearm at issue. Clearly, a consumer, particularly a nightclub, reasonably obtains coverage to protect itself from the very unfortunate scenario and incident outlined within Mika’s complaint. The

---

<sup>43</sup> CP 150-151

<sup>44</sup> CP 150-160

<sup>45</sup> CP 157

lower court failed to acknowledge the ambiguity in the language of the firearms exclusion and construe the policy exclusion language in favor of the insured, as required by Washington law, therefore, summary judgment was not appropriate.

**1. The Firearm Exclusion Does Not Preclude Coverage for the Mika Lawsuit**

In *Woo v. Fireman's Fund Ins. Co.*, 161 Wash.2d 43, 164 P.3d 454 (2007), the Washington State Supreme Court reiterated that an insurer's duty to defend is extremely broad: The rule regarding the duty to defend is well settled in Washington and is broader than the duty to indemnify.<sup>46</sup> The duty to defend "arises at the time an action is first brought, and is based on *the potential for liability*."<sup>47</sup> An insurer has a duty to defend "when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage."<sup>48</sup> An insurer is not relieved of its duty to defend unless the claim alleged in the complaint is "clearly not covered by

---

<sup>46</sup> *Woo v. Fireman's Fund Ins. Co.*, 161 Wash.2d 43, 164 P.3d 454 (2007), citing *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wash.2d 55, 64, 1 P.3d 1167 (2000).

<sup>47</sup> *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wash.2d 751, 760, 58 P.3d 276 (2002) (emphasis added).

<sup>48</sup> *Id.* at 790 (quoting *Unigard Ins. Co. v. Leven*, 97 Wash.App. 417, 425, 983 P.2d 1155 (1999)).

the policy.”<sup>49</sup> Moreover, if a complaint is ambiguous, a court will construe it liberally in favor of “triggering the insurer’s duty to defend.”<sup>50</sup> “Determining whether coverage exists is a 2-step process. Accordingly, the insured must show the loss falls within the scope of the policy’s insured losses. To avoid coverage, the insurer must then show the loss is excluded by specific policy language.”<sup>51</sup>

Mika’s complaint alleges that he was shot by a patron of JBC’s Jillian’s nightclub because JBC “negligently and carelessly” created or allowed a dangerous condition to exist on JBC’s premises, which resulted in Mika’s injuries.<sup>52</sup> The complaint alleges claims for: a) negligent hiring; b) negligent supervision; c) inadequate security; and d) improper instruction and training.<sup>53</sup> Clearly, Mika’s allegations of bodily injury due to negligence fall within the general scope of the policy’s insured losses.

At the lower level, Capitol presented argument in an effort to avoid coverage by relying on the firearms exclusion; however, the firearms

---

<sup>49</sup> *Id.* (citing *Kirk v. Mt. Airy Ins. Co.*, 134 Wash.2d 558, 561, 951 P.2d 1124 (1998)).

<sup>50</sup> *Id.* (citing *R.A. Hanson Co. v. Aetna Ins. Co.*, 26 Wash.App. 290, 295, 612 P.2d 456 (1980)).

<sup>51</sup> *McDonald v. State Farm Fire & Casualty Co.*, 119 Wash.2d 724, 731, 837 P.2d 1000 (1992).

<sup>52</sup> CP 323

exclusion does not preclude coverage for the Mika lawsuit because: 1) Mika's complaint is framed primarily in terms of negligence and does not depend solely upon use of the excluded risk; and 2) the firearms exclusion is ambiguous as to whether it applies only to the ownership and use of firearms by the insured or is also intended to apply to the use of firearms by anyone. The interpretation of the firearms exclusion is unclear and ambiguous, failing to specify the exclusion of a specific risk. JBC, as a nightclub and consumer of Capitol's policy, interprets the policy providing coverage so long as JBC and/or its employees, agents or officers refrain from the utilization of firearms and the firearm at issue is not owned by a JBC officer, agent or employee. Accordingly, the trial court erroneously granted summary judgment in favor of Capitol in denying coverage.

**a. Mika's Complaint is Framed Primarily in Terms of Negligence and does not Depend Solely upon use of the Excluded Risk**

In *Underwriters Insurance Company v. Purdie*, 145 Cal.App.3d 57, 193 Cal.Rptr. 248 (1983), an insurer brought an action for declaratory relief with respect to whether a firearm exclusion in a multiperil liability policy precluded coverage for damages arising out of the shooting of Plaintiff on the insured's liquor store premises by a liquor store

---

(continued . . .)  
<sup>53</sup> CP 324

employee.<sup>54</sup> The policy contained an endorsement which excluded coverage for bodily injury “caused by, or occurring from any use maintenance or possession of a firearm.” The trial court concluded that the firearm exclusion endorsement precluded coverage, and entered judgment declaring that the insurer had no duty to defend or indemnify the insured or its employee against third-party claims.<sup>55</sup>

On appeal, the California Court of Appeal found that the policy afforded coverage, notwithstanding the firearm exclusion, given the fact that Plaintiff alleged his damages were caused, in part, by the insured’s negligent hiring and retention of a person with a known propensity for violence, whose act of negligence was not indivisibly related to the use of a firearm and, hence, did not depend solely upon the use of an excluded risk, but related in part to an insured risk. In so holding the appellate court stated:

Underwriters contend, nonetheless, that coverage is foreclosed here because the present accident arose out of the use of a firearm. The answer is, of course, the use of the firearm in the instant case, like the use of the automobile in *Partridge*, was a mere contributing cause. ***That multiple causes may have effectuated the loss does not negate any single cause; that multiple acts concurred in the infliction***

---

<sup>54</sup> *Underwriters Insurance Company v. Purdie*, 145 Cal.App.3d 57, 193 Cal.Rptr. 248 (1983).

<sup>55</sup> *Id.*

*of injury does not nullify any single contributory act.*<sup>56</sup>

Similarly, in the present case, Mika's complaint alleges that the use of a firearm by a nightclub patron was merely a contributing cause of Mika's injuries, along with the alleged separate and distinct negligence of JBC relating to hiring, supervision, security, instruction and training.

**b. The Firearms Exclusion Applies Only to the Use of a Firearm by the Insured**

An insurance policy is interpreted as a whole with each term given a fair, reasonable and sensible construction as would be given to the contract by the average person purchasing insurance.<sup>57</sup> "The language in standard form policies is interpreted in accord with the understanding of the average purchaser even if the insured is a large corporation with company counsel."<sup>58</sup> Importantly, the Washington State Supreme Court recognizes that the average purchaser of a comprehensive general liability policy "would expect broad coverage for liability arising from business operations."<sup>59</sup>

---

<sup>56</sup> *Id.* at 70 (emphasis added) (internal quotation marks omitted).

<sup>57</sup> *Overton v. Consol. Ins. Co.*, 145 Wash.2d 417, 424, 38 P.3d 322 (2002).

<sup>58</sup> *Queen City Farms, Inc. v. Central National Ins. Co. of Omaha*, 126 Wash.2d 50, 66, 882 P.2d 703 (1994).

<sup>59</sup> *Id.* at 78.

In the present case, when the firearms exclusion is read in the context of a CGL policy, which is intended to protect the insured against liability arising from his *own actions*, an average purchaser of insurance could fairly conclude that the firearms exclusion applies only if the insured itself uses a firearm in connection with its business. In *Braxton v. United States Fire Insurance Company*, 651 S.W.2d 616, 619 (Mo.App. E.D. 1983), the court ruled that a firearms exclusion similar to the firearms exclusion in the present case did not preclude coverage.<sup>60</sup> In *Braxton*, the Plaintiff was shot by an intoxicated gas station attendant following an altercation over the making of change.<sup>61</sup> The Plaintiff brought suit against the owner of the gas station on a theory of negligent supervision. The owner's insurance policy contained the following exclusion, among others: "[t]his insurance does not apply .... to bodily injury and property damage arising out of the ownership or use of any firearm."<sup>62</sup> The trial court entered judgment in favor of the Plaintiff, and the insurer appealed.

The record on appeal showed that the gun belonged to the attendant, that the attendant was intoxicated, and that the jury found

---

<sup>60</sup> *Braxton v. United States Fire Insurance Company*, 651 S.W.2d 616, 619 (Mo.App. E.D.1983).

<sup>61</sup> *Id.* at 617.

<sup>62</sup> *Id.*

against the gas station owner on the theory that he permitted the attendant to continue to work even though he knew or should have known it was likely the attendant would injure a customer.<sup>63</sup> The Missouri Court of Appeals held that: (1) the policy exclusion for bodily injury and property damage arising out of ownership or use of a firearm did not exclude coverage; and (2) where an insured's own negligence was a separate, concurrent and nonexcluded cause of liability, the policy provided coverage for the Plaintiff's injuries.<sup>64</sup>

In so holding, the court of appeals found that a reasonable person reading the exclusion could fairly conclude that the exclusion applied only if the insured himself owned or used a firearm in connection with his business, or if someone else used the firearm on his behalf.

The exclusion at issue in this case does not unequivocally exclude acts arising out of the ownership or use of a firearm by *any* person under *any* circumstances. A reasonable person reading the exclusion in context could fairly conclude that the exclusion applied only if the insured himself owned or used a firearm in connection with his business, or if someone else used the firearm "for" him or "on his behalf." Here the insured did not own or use the firearm, nor was it used "for" him or "in his behalf." We find that the exclusion did not apply under these circumstances and it is clear that the trial court acted properly within the constraints as heretofore set out by

---

<sup>63</sup> *Id.* at 617.

<sup>64</sup> *Id.* at 620.

applying a construction which favored the insured.<sup>65</sup>

Similarly, in the present case, the subject firearm exclusion does not unequivocally exclude acts arising out of the use of a firearm by *any* person under *any* circumstances. When the firearms exclusion is read in the context of the CGL policy as a whole, an average purchaser of insurance could reasonably conclude that the firearms exclusion applies only if the insured itself uses a firearm in connection with its business. As Mika's complaint does not allege that JBC, or anyone on its behalf, used a firearm, the firearm exclusion would not apply under the circumstances of this case. The court erroneously granted Capitol's motion where a clear issue of dispute exists as to the interpretation and application of the firearms exclusion as read on its face.

Importantly in their original motion, Capitol did not rely upon any cases whatsoever interpreting firearms exclusions; instead it cited to cases interpreting assault and battery exclusions. The assault and battery exclusions cited by Capitol are materially different from the subject firearms exclusion in that the assault and battery exclusions expressly

---

<sup>65</sup> *Id.* at 619.

exclude coverage for assault and battery, whether or not the assault and battery are committed by the insured.<sup>66</sup>

In contrast, the subject firearm exclusion does not expressly exclude acts arising out of the use of a firearm by *any* person under *any* circumstances as specified above. “[E]xclusions should be construed strictly against the insurer.”<sup>67</sup> Had Capitol intended to exclude coverage for claims arising out of the use of firearms by persons other than the insured, it could have easily done so by adding clarifying language similar to assault and battery exclusions. Capitol’s failure to do so creates an ambiguity regarding the applicability of the firearms exclusion when the firearm is owned or used by someone other than an employee, officer or agent of JBC. This ambiguity should be construed in favor of JBC given Washington’s long standing law. “Language in an insurance policy that is susceptible of two different but reasonable interpretations is ambiguous

---

<sup>66</sup> See *McAllister v. Agora Syndicate, Inc.*, 103 Wash.App. 106, 109, 11 P.3d 859, 860 (2000) (“It is agreed that no coverage shall apply under this policy for any claim . . . based on assault and/or battery . . . **whether or not committed by or at the direction of the insured.**”) (emphasis added); *American Best Food Inc. v. Alea London, Ltd.*, 168 Wash.2d 398, 406, 229 P.3d 693, 696 (2010) (“This insurance does not apply to any claim arising out of . . . Assault and/or Battery **committed by any person whatsoever . . . regardless of . . . whether the acts are alleged to have been committed by the insured . . . or by any other person.**”) (emphasis added).

<sup>67</sup> See *Queen City Farms, Inc.*, 126 Wash.2d 50, 74, 882 P.2d 703 (1994).

and must be liberally construed in favor of the insured.”<sup>68</sup> Accordingly, the firearms exclusion in the present case must be construed in favor of affording coverage to JBC. The trial court failed to do so and therefore erred in granting Capitol’s motion.

**C. The Holdings in *Purdie* and *Braxton* Provide a Legal Framework as to the Application of the Firearms Exclusion Which Must be Interpreted in Favor of Affording Coverage to JBC**

The parties agree that interpretation of the subject firearms exclusion is an issue of first impression in Washington. In *American Best Food, Inc.*, the Washington State Supreme Court stated that it is proper to consider out-of-state cases when interpreting an exclusionary clause where there are no Washington cases on point:

Washington courts have yet to consider the factual scenario before us today. Evaluation of out-of-state cases was appropriate in deciding which rule to apply. The lack of any Washington case directly on point and a recognized distinction between preassault and postassault negligence in other states presented a legal uncertainty with regard to Alea’s duty. Because any uncertainty works in favor of providing a defense to an insured, Alea’s duty to defend arose when Dorsey brought suit against Café Arizona.<sup>69</sup>

---

<sup>68</sup> See *McAllister*, 103 Wash.App. at 109, 11 P.3d at 860.

<sup>69</sup> See *American Best Food, Inc.* at 168 Wash.2d at 408, 229 P.3d at 697-698.

In addition, the Supreme Court stated that where case law reveals a legal ambiguity as to the application of an exclusion, the ambiguity must be resolved in favor of the insured:

Further, a balanced analysis of the case law should have revealed at least a legal ambiguity as to the application of an “assault and battery” clause with regard to postassault negligence at the time Café Arizona sought the protection of its insurer, and ambiguities in insurance policies are resolved in favor of the insured. Because such ambiguity is to be resolved in favor of the insured, we hold that Alea’s policy afforded coverage for postassault negligence to the extent it caused or enhanced Dorsey’s injuries.<sup>70</sup>

JBC relies on the holdings in *Purdie* and *Braxton* in support of the proposition that the firearms exclusion does not preclude coverage in this case. As discussed above, the court in *Purdie* held that a liability policy afforded coverage for a shooting on the insured’s premises notwithstanding a policy exclusion for bodily injury “caused by, or occurring from any use maintenance or possession of a firearm” because the complaint alleged negligent hiring and retention of the employee who committed the shooting.<sup>71</sup> Similarly, in *Braxton*, the court held that a liability policy afforded coverage for a gas station owner whose intoxicated employee shot a customer following an altercation in spite of

---

<sup>70</sup> *Id.*, 168 Wash.2d at 411, 229 P.3d at 699.

<sup>71</sup> See *Underwriters Ins. Co. v. Purdie*, 145 Cal.App.3d at 61, 193 Cal.Rptr. at 250.

an endorsement which stated, “[t]his insurance does not apply . . . to bodily injury and property damage arising out of the ownership or use of any firearm” because the exclusion did not unequivocally exclude acts arising out of the ownership or use of a firearm by persons other than the insured.<sup>72</sup> To date, neither *Purdie* nor *Braxton* has been overturned and they remain good law. Although Capitol asserts that the holding of *Purdie* was “forcefully criticized” by several California courts, Capitol has failed to cite any authority overturning *Purdie*.

Furthermore, in its initial motion, Capitol had not cited a single case which discussed or interpreted a firearms exclusion.<sup>73</sup> In its reply, Capitol relied on a Louisiana case, *Williams v. Andrus*, 74 So.3d 818, 2011-239 (La.App. 3 Cir. 10/5/11) (2011) in which the Plaintiff, wife of a deceased who was allegedly shot and killed at Defendant’s bar, contended that certain exclusions contained in the policy held by the bar were ambiguous. With regards to the firearms exclusion, Plaintiff argued that

---

<sup>72</sup> See *Braxton*, 651 S.W.2d at 619.

<sup>73</sup> See e.g., *Atlas Assur. Co. v. McCombs Corp.*, 146 Cal.App.3d 135, 194 Cal.Rptr. 66 (1983) (employee theft exclusion); *Hartford Fire Ins. Co. v. Superior Court*, 142 Cal.App.3d 406, 191 Cal.Rptr. 37 (1983) (aircraft exclusion); *Safeco Ins. Co. v. Gilstrap*, 141 Cal.App.3d 524, 190 Cal. Rptr. 425 (1983) (motor vehicle exclusion); *Continental Cas. Co. v. City of Richmond*, 763 F.2d 1076 (1985) (bodily injury, death, assault and battery exclusion); *United States Underwriters Ins. Co. v. Val-Blue Corp.*, 85 N.Y.2d 821, 647 N.E. 2d 1342, 623 N.Y.S.2d 834 (1995) (assault and battery exclusion); *Toll Bridge Auth. v. Aetna Ins. Co.*, 54 Wash.App. 400, 773 P.2d 906 (1989) (watercraft exclusion); *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 229 P.3d 693 (2010) (assault and battery exclusion).

“it did not exclude coverage for wrongful death resulting from the commission of the felony.”<sup>74</sup>

Capitol’s reliance on *Williams* fails in two ways. First, the *Williams* court also relied only on cases interpreting assault/battery exclusions in considering whether the firearms exclusion excluded coverage, “for wrongful death resulting from a felony.”<sup>75</sup> Furthermore, in “applying the principles of *Ledbetter*...and *Bennett*” the *Williams* court concluded that the terms of the policy at issue in *Williams* were clear and unambiguous.<sup>76</sup>

In *Ledbetter*, the Louisiana Supreme Court was faced with the issue of whether a rape and kidnapping perpetrated against a hotel patron was included within the ambit of a similarly-worded “assault and battery” exclusion.<sup>77</sup> In *Ledbetter*, the court concluded that a “rape” assault and battery exclusion was unambiguous and precluded coverage *for rape*, but the kidnapping did not “necessarily involve the use of force and/or violence upon the person of another,” therefore the policy at issue and its related exclusion were ambiguous as applied to the facts of the case.<sup>78</sup>

---

<sup>74</sup> *Williams v. Andrus*, 74 So.3d 818, 821, 2011-239 (La.App. 3 Cir. 10/5/11) (2011).

<sup>75</sup> *Id.* at 822-823; see also *Ledbetter v. Concord Gen. Corp.*, 665 So.2d 1166, 95-0809 (La. 1/6/96) (1996); see also *Bennett v. Ragon*, 907 So.2d 116, 2004-0706 (La.App. 1 Cir. 3/24/05) (2005).

<sup>76</sup> See *Williams* at 823.

<sup>77</sup> See *Ledbetter* at 1170

<sup>78</sup> *Id.* (emphasis added).

Because the one exclusion was specifically a “rape” exclusion and a rape had occurred, the court found that such was unambiguous.<sup>79</sup> Nevertheless, the kidnapping exclusion *was* in fact ambiguous and unclear because the use of force and/or violence was not made specific.<sup>80</sup> Similarly, in *Bennett*, Plaintiff brought suit as a result of the shooting and the eventual death of a bar patron by the *bar’s owner* during an apparent robbery attempt by the patron.<sup>81</sup> The First Circuit noted that the assault and battery exclusion precluded coverage under the bar’s commercial general liability policy, due to the wrongful death arising from *the bar’s owner’s* assault and battery of the decedent.<sup>82</sup>

Not only are the facts of the case before this Court distinguishable from *Williams*, but they are also distinguishable from the rape issue in *Ledbetter* and the assault by the bar owner in the *Bennett* case. The *Ledbetter* court reasoned that the policy was in fact ambiguous as to kidnapping for example, like the policy in our matter is ambiguous as to *who* uses or owns the firearm. *Ledbetter* noted that kidnapping does not clearly include force and/or violence, which is similar to the exclusion at issue here with regards to Capitol’s firearms exclusion as it does not specify *whose* ownership or usage of a firearm excludes coverage. The

---

<sup>79</sup> *Id.* at 1170.

<sup>80</sup> *Id.* (emphasis added).

<sup>81</sup> See *Bennett* at 116; 121 (emphasis added).

<sup>82</sup> *Id.* (emphasis added).

firearms exclusion at issue in this matter is not as clear cut as the “rape” exclusion in *Ledbetter*, which clearly and without a doubt, by way of utilizing the word “rape,” excluded matters related to rape. *Bennett* is also entirely distinguishable as the actual owner of the bar himself participated in the wrongful conduct. There is no dispute what so ever as to the lack of any involvement of JBC and/or its employees, agents or officers regarding the ownership and use of a firearm on the night Mika complains of in his Complaint.

Second, the question before the court in *Williams* is clearly distinguishable from the issue in this matter. There, the question before the court was whether the firearms exclusion precluded coverage in relation to a wrongful death felony situation.<sup>83</sup> Here, the issue presented is whether a reasonable insured (JBC as a nightclub) and purchaser of insurance, can expect that the firearms exclusion is inapplicable where there was no use of firearms by the insured itself and where the claims brought against the insured relate to a shooting with no specificity as to *who* utilized the firearms at issue.

The lack of any Washington authority directly on point, together with the holdings in *Purdie* and *Braxton* (on point in interpreting the firearms exclusion to provide coverage), present a legal uncertainty with respect to Capitol’s duty toward JBC. In the face of this uncertainty, such a duty must be resolved in favor of affording coverage.

---

<sup>83</sup> See *Williams* at 819.

The trial court erroneously granted summary judgment in favor of Capitol where a clear dispute as to the interpretation and application of the firearms exclusion exists, particularly where Capitol failed to cite to any Washington case law interpreting firearms exclusions to support its position, or in fact cite to any case law that supports the notion that a firearms exclusion applies to deny coverage in a situation like the one complained of by Mika. The trial court failed to “err” in favor of JBC as the insured by granting summary judgment to Capitol where JBC presented various arguments as to its interpretation and reliance on the policy it purchased from Capitol, and the firearms exclusion, as a reasonable purchaser of such a policy.

**D. Other Exclusions Cited by Capitol are Not Applicable to this Case**

At the lower level, Capitol contended that the following policy exclusions may also preclude coverage for Mika’s lawsuit:

**EXCLUSION – EMPLOYMENT –RELATED PRACTICES**

This insurance does not apply to:

“Bodily Injury,” “property damage,” “personal and advertising injury,” or medical expense arising out of any:

- A. Refusal to employ;
- B. Termination of employment;
- C. Coercion, demotion, evaluation, failure to promote, reassignment, discipline, defamation, harassment, humiliation, discrimination, or other employment-related practices, policies, acts or omissions;  
or

D. Consequential “bodily injury,” “property damage” and “personal and advertising injury” as a result of A. through C. above.<sup>84</sup>

However, Mika’s complaint does not allege any of the above claims. Furthermore, in its motion, Capitol specified that its position as to summary judgment was based solely on the firearms exclusion.<sup>85</sup> Contrary to Capitol’s position, Mika’s complaint alleges: a) negligent hiring; b) negligent supervision; c) inadequate security; and d) improper instruction and training, none of which are mentioned in the above exclusions. As exclusionary clauses are strictly construed against an insurer, the above exclusions cannot be construed to preclude coverage for the Mika lawsuit.<sup>86</sup> The only dispute that exists between the parties is the application and interpretation of the firearms exclusion.

**E. The trial court erred in considering The Declaration of Kent Lawson in Support of Capitol’s Motion for Summary Judgment Where Mr. Lawson’s declaration did not meet the standards set forth in CR 56(e)**

On November 4, 2011, the Plaintiff filed the Declaration of Kent

---

<sup>84</sup> CP 164-165

<sup>85</sup> CP 151

<sup>86</sup> See *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wash.2d 65, 68, 659 P.2d 509 (1983).

Lawson in Support of Motion for Summary Judgment.<sup>87</sup> Paragraphs 15, 16 and 17 of said declaration are set forth below:

15. *To my knowledge*, at no time prior to obtaining the Capitol Policy did the JBC Insureds object to or seek clarification from Capitol regarding the Firearms Exclusion.

16. *To my knowledge*, at no time prior or subsequent to obtaining the Capitol Policy did the JBC Insureds affirmatively seek or request from Capitol coverage options for bodily injury or property damage relating to the use of a firearm.

17. *To my knowledge*, at no time prior or subsequent to obtaining the Capitol Policy did the JBC Insureds indicate any belief that they interpreted the Firearms Exclusion to only apply to the use of a firearm by an insured. (JBC first asserted this alleged belief as part of its motion to vacate the order and judgment of default.) And, of course, Capitol does not interpret the Firearms Exclusion in that manner, nor does it believe that it is a reasonable interpretation of this unambiguous exclusion.<sup>88</sup>

As outlined previously, CR 56(e) provides in pertinent part that “[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.”<sup>89</sup> In his declaration, Mr. Lawson stated that he is the “Vice President of Claims” for Capitol and is “familiar with the

---

<sup>87</sup> CP 166

<sup>88</sup> CP 172

<sup>89</sup> CR 56(e).

commercial general liability policy” issued by Capitol.<sup>90</sup> Mr. Lawson however did not state that he was the insurance agent for JBC when the policy was issued; he did not state that he had any personal knowledge of any negotiations relating to the issuance of the subject policy; and he did not state that he had any personal knowledge of the application process relating to the subject policy.<sup>91</sup>

JBC moved to exclude these paragraphs from consideration by the lower court as Capitol had not established the appropriate and proper foundation required under CR 56(e). The trial court erroneously denied JBC’s request and considered Mr. Lawson’s declaration in support of Capitol’s Motion for Summary Judgment Regarding Firearms Exclusion, despite the fact that he had not established that he was JBC’s insurance agent, nor was he involved in any negotiations with regards to the policy purchased by JBC. Clearly, Mr. Lawson’s declaration lacked the foundation to support Capitol’s Motion for Summary Judgment and JBC’s Motion to Strike those portions of his Declaration should have been granted.

---

<sup>90</sup> CP 166-167

<sup>91</sup> CP 166-173

## V. CONCLUSION

The trial court's decision to grant summary judgment to Capitol was clearly erroneous. Capitol's argument that the policy language as outlined in the firearms exclusion was unambiguous on its face is simply not the case. JBC's reading of the firearms exclusion, as a nightclub owner and "ordinary person" reading the policy in a non-technical sense, interprets the firearms exclusion to be inapplicable where JBC, its employees, agents and/or officers took no part in the use of the firearm at issue. More importantly however, a genuine and obvious dispute as to the application and interpretation of the policy exists; therefore granting summary judgment in favor of Capitol at the lower level was in error.

This is an issue of first impression in Washington. It is the parties' understanding that no Washington court has been faced with the issue of the application of a firearms exclusion in an insurance policy interpreted in light of Mika's claims. Capitol, as the moving party bearing the burden to establish and meet the summary judgment standard, failed to produce any Washington case law supporting the fact that the firearms exclusion, in light of Mika's claims, precludes coverage to an insured. To the contrary, Washington's longstanding case law supports a duty to defend by the insurer, on behalf of the insured, and further promotes the idea of erring in favor of the insured. Additionally, the out of state authority

interpreting firearms exclusions in light of similar claims as those asserted by Mika, found that the firearms exclusion did not support the denial of coverage. Nevertheless, the lower court granted summary judgment in favor of Capitol which JBC contends was erroneous.

As outlined above, Capitol simply relies on cases in which the courts have reviewed the application of assault/battery exclusions within particular policies. Capitol cited to a Louisiana case that was not final nor proper authority at the time of the motion hearing. The only issue at dispute in this matter is the application and interpretation of the firearms exclusion as applied to Mika's claims against JBC. JBC takes the position that this Court should consider and follow the holdings outlined in *Purdie* and *Braxton* to find that the firearms exclusion in Capitol's policy does not apply and therefore Capitol must provide coverage to JBC for Mika's claims.

///

//

/

Ultimately, Capitol has failed to meet its burden for summary judgment on any of its preferred legal theories. The trial court erroneously granted summary judgment in its favor at the lower level, particularly given that this is an issue of first impression in Washington. For the reasons outlined above, JBC respectfully requests that this Court reverse the trial court's granting of summary judgment in favor of Capitol.

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

**DYNAN CONFORTI, P.S.**

By: 

Mark W. Conforti, WSBA #28137

Ema Virdi-Sehra, WSBA #41579

Attorneys for Appellants JBC of Seattle,  
WA, Inc.; JBC Entertainment Holdings,  
Inc.; JBC Entertainment, Inc., Gemini  
Investors, and Alpha Capital Partners, LTD.

**DYNAN CONFORTI, P.S.**

Suite 400, Building D  
2102 North Pearl Street  
Tacoma, WA 98406-1600  
(253) 752-1600

**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the date given below I caused to be served, by way of U.S. Mail and Electronic Service, the foregoing **Brief of Appellants JBC of Seattle, WA, Inc.; JBC Entertainment Holdings, Inc.; JBC Entertainment, Inc., Gemini Investors, and Alpha Capital Partners, LTD.** upon the following persons:

Frank J. Steinmark  
Matthew J. McCafferty  
McCafferty & Steinmark, PLLC  
520 Pike Street, Suite 2210  
Seattle, WA 98101  
Via Email: [fsteinmark@TMS-law.com](mailto:fsteinmark@TMS-law.com); [mmccafferty@TMS-law.com](mailto:mmccafferty@TMS-law.com);  
and U.S.P.S.

Michael Knudsen  
25 Lexington Road  
West Hartford, CT 06119  
(805) 907-5459  
Via U.S.P.S.

Howard L. Phillips  
Phillips Law, LLC  
3815 S. Othello St., #100-353  
Seattle, WA 98118  
Via Email: [ldefend@aol.com](mailto:ldefend@aol.com);  
and U.S.P.S.

Michael K. Taylor  
Murray, Dunham & Murray  
P.O. Box 9844 (98109)  
200 W. Thomas, Suite 350  
Seattle, WA 98119  
Via Email:  
[michaelt@murraydunham.com](mailto:michaelt@murraydunham.com);  
and U.S.P.S.

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 MAR 23 PM 4: 51

DATED this 23<sup>rd</sup> day of March, 2012.

  
Francine Artero, Legal Assistant