NO. 1035047
Court of Appeals No. 858114-I

SUPREME COURT
OF THE STATE OF WASHINGTON

BREMERTON SCHOOL DISTRICT,

Plaintiff/Petitioner,

v.

SCHOOLS INSURANCE ASSOCIATION OF WASHINGTON,

Defendant/Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Schools Insurance Association of Washington ("SIAW"), respectfully submits this Answer to Petitioner Bremerton School District's (the "District") Petition for Review of the Court of Appeals' unpublished decision in *Bremerton School District v. Schools Insurance Assoc. of WA.,* No. 85811-4. The District has attached a copy of this decision ("Opinion") as Appendix A to its Petition for Review.

SIAW is a joint self-insurance program formed pursuant to RCW 48.62.031. As members, public school districts jointly negotiate the standard contract terms in SIAW's Memorandum of Coverage ("MOC") including the terms of Exclusion 5.c, which is at issue in this matter. In the Opinion, the Court of Appeals affirmed the King County Superior Court when it found that Exclusion 5.c clearly and unambiguously excluded coverage for the award of attorneys' fees and costs to the plaintiff in the underlying litigation when he was found to be

the prevailing party on his claims for declaratory and injunctive relief.

Review of the Opinion pursuant to RAP 13.4(b)(1) is unnecessary because the Court of Appeals correctly applied controlling Washington Supreme Court precedent when it determined Exclusion 5.c of the MOC (1) distinguished attorneys' fees from monetary damages; (2) was not ambiguous; and (3) applied to preclude coverage for the federal court's judgment obligating the District to pay attorneys' fees as a result of an adverse judgment for declaratory relief or injunctive relief. Review of the Opinion pursuant to RAP 13.4(b)(4) is unnecessary because the unpublished Opinion does not involve an issue of substantial public interest that should be determined by the Supreme Court. Rather, the Opinion addresses an exclusion unique to a mutually negotiated coverage document by SIAW's members. For these reasons, SIAW respectfully requests that the Court deny review of the Court of Appeals' unpublished Opinion.

II. SIAW'S COUNTERSTATEMENT OF THE CASE

A. In the Underlying Action, the District was Held Liable for Kennedy's Attorneys' Fees and Costs as a Result of the Federal Court's Adverse Judgment for Declaratory and Injunctive Relief.

In August 2016, former Bremerton High School assistant football coach Joseph Kennedy filed suit against the District in the matter of *Joseph A. Kennedy v. Bremerton School District,* U.S.D.C. Western District of Washington Case No. 3:16-CV-05694-RSL ("Underlying Action"), after the District refused to renew his football coaching contract. Clerk's Papers (CP) 3 at ¶ 4.6, 146. The District declined to renew. Kennedy's football coaching contract because he refused to stop his postgame tradition of engaging in religious prayer on the field. The District viewed this as a violation of the Establishment Clause in the First Amendment to the Constitution and the analogous provisions in the Washington State Constitution. CP 3-4 at 4.7.

Kennedy asserted the following Causes of Action in the Underlying Action: (1) Violation of First Amendment Right to

Free Speech; (2) Violation of First Amendment Right to Free Exercise; (3) Disparate Treatment under Title VII of the Civil Rights Act of 1964; (4) Protected Characteristic as Motivating Factor under Title VII of the Civil Rights Act of 1964; (5) Failure to Accommodate under Title VII of the Civil Rights Act of 1964; (6) Retaliation under Title VII of the Civil Rights Act of 1964; and (7) Failure to Re-Hire Under Title VII of the Civil Rights Act of 1964. CP 3-4 at ¶ 4.7, 159-161.

Kennedy sought the following declaratory and injunctive relief on his Causes of Action: (1) Judgment declaring that the District's discrimination against Kennedy on the basis of his religious expression violated his freedom of speech as protected by the First Amendment; (2) Judgment declaring that the District's discrimination against Kennedy on the basis of his religious expression violated his right to free exercise as protected by the First Amendment; (3) Judgment declaring that the District's actions violated Title VII of the Civil Rights Act of 1964; (4) Injunction ordering the District to reinstate

Kennedy as an assistant football coach; (5) Injunction ordering the District to provide Kennedy with a religious accommodation affirming his right to pray at the 50-yard line at the conclusion of the Bremerton High School's football games (6) Awarding. Kennedy's attorneys' fees and costs; (7) Awarding Kennedy pre- and post-judgment interest; and (8) Awarding . Kennedy all other appropriate relief as the court deemed just and proper. *Id.* and CP 4 at ¶ 4.8.

SIAW agreed to provide a defense to the District in the Underlying Action under a reservation of rights and retained defense counsel for the District. CP 195-198. After conducting discovery, the parties brought cross motions for summary judgment. The trial court granted the District's motion and the United States Court of Appeals for the Ninth Circuit affirmed. *Kennedy v. Bremerton Sch. Dist.,* 991 F.3d 1004, 1023 (9th Cir. 2021). The United States Supreme Court granted Kennedy's petition for *certiorari*, and on June 27, 2022, the Supreme Court reversed the Ninth Circuit and held that Kennedy was entitled

to summary judgment on both his free speech and free exercise claims. CP 4 at ¶ 4.12, 4.13.

After remand, on November 10, 2022 the trial court entered judgment against the District and in favor of Kennedy pursuant to an Order entitled: Order Granting Plaintiff Declaratory and Injunctive Relief. CP 5 at ¶ 4.17, CP 187-189. The trial court referred to the June 27, 2022 U.S. Supreme Court Opinion and then entered three declarations, the first two stating that the District violated Kennedy's free exercise and free speech rights under the First Amendment. CP 187-189. The court next entered four injunctions that required the District to reinstate Kennedy as a football coach and to allow him to engage in a personal religious ritual after football games. *Id.* The court then ordered that under 42 U.S.C. § 1988(b), as the prevailing party, Kennedy was entitled to his reasonable attorneys' fees. *Id.*

B. After Settlement of Kennedy's Attorneys' Fees and Costs, the District Filed Suit against SIAW Seeking

Coverage for the Amount of Attorneys' Fees SIAW did not Pay.

Throughout the many years of litigation in the Underlying Action, SIAW paid for the District's defense under a reservation of rights, including reserving under Exclusion 5.c, which excludes coverage as follows:

> The insurance under any Liability Coverage Part in this MOC does NOT apply to:
>
> 5. Damages of the following types:
>
> ***
>
> c. Relief or redress in any form other than monetary damages, or for any fees, costs or expenses which an **Insured** may become obligated to pay as a result of any adverse judgment for declaratory relief or injunctive relief.

In March, 2023, the District, working with SIAW, and negotiated the settlement of Kennedy's attorneys' fees in the amount of $1,775,000, of which SIAW paid $300,000. CP 192 at ¶ 2.3 and 2.4, 216 at ¶ 4.31.

After SIAW agreed to waive the District's internal appeal obligation under the Bylaws of SIAW, the District filed suit in

King County Superior Court against SIAW, claiming SIAW was obligated to indemnify the District for the remaining fees, and moved for Judgment on the Pleadings. CP 222. After briefing by the parties and hearing oral argument, King County Superior Court Judge Adrienne McCoy entered an Order denying the District's Motion for Judgment on the Pleadings, holding that Exclusion 5.c of the MOC applied to preclude coverage. CP 275-282. The District appealed.

C. In Affirming the Denial of the District's Motion for Judgment on the Pleadings, the Court of Appeals Correctly Interpreted and Enforced Exclusion 5.c in SIAW's MOC.

The Court of Appeals affirmed the trial court's denial of the District's Motion for Judgment on the Pleadings:

> The exclusion plainly excludes from coverage "any fees" resulting from an adverse action for declaratory or injunctive relief. Because Kennedy prevailed in an action for declaratory and injunctive relief and was later awarded fees as the prevailing party, the attorney fee and cost award was "a result of" an adverse action for declaratory or injunctive relief.

Opinion at A-7.

The Court of Appeals applied Washington Supreme Court precedent for policy interpretation:

> We construe insurance policies as a whole, giving the language "'a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.'" *Seattle Tunnel Partners*, 200 Wn.2d at 321 (quoting *Queen Anne Park Homeowners Ass'n v. State Farm Fire & Cas. Co*., 183 Wn.2d 485, 489, 352 P.3d 790 (2015)). "Where a term is not defined in the policy, it is assigned its 'plain, ordinary, and popular meaning.'" *Seattle Tunnel Partners*, 200 Wn.2d at 321 (internal quotation marks omitted) (quoting *Queen Anne Park*, 183 Wn.2d at 491).
>
> [I]f the policy language is clear and unambiguous, we must enforce it as written; we may not modify it or create ambiguity where none exists." *Kut Suen Lui v. Essex Ins. Co.,* 185 Wn.2d 703, 712, 375 P.3d 596 (2016) (alteration in original) (quoting *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005)). "Language in an insurance contract is ambiguous if it is susceptible to two different but reasonable interpretations." *Kut Suen Lui*, 185 Wn.2d at 712. If a clause in the policy is ambiguous, we may rely on extrinsic evidence to determine the intent of the parties and resolve the ambiguity. *Quadrant Corp*., 154 Wn.2d at 172. "Any ambiguity remaining after examination of the applicable extrinsic evidence is resolved against the insurer and in favor of the insured. But while exclusions should be strictly construed against the drafter, a strict application should not trump the plain, clear language of an

> exclusion such that a strained or forced construction results." *Quadrant Corp*., 154 Wn.2d at 172 (citation omitted).

Opinion at A-7 and A-8. The Court of Appeals then turned to the applicable language in the MOC, Exclusion 5.c and stated:

> Relevant here is Subsection (c) covers "any fees, costs or expenses" that the District may become obligated to pay as the result of any adverse judgment for declaratory or injunctive relief. "Any" is defined as "one indifferently out of more than two" and "all;" it is "used as a function of a word esp[ecially] in interrogative and conditional expressions to indicate one that is not a particular or definite individual of the given category." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (2002). The attorney fee and cost award at issue in this case is clearly excluded from coverage by this subsection because it is a "fee" and "cost." Giving the exclusion's language a fair and reasonable construction, "any fees [or] costs" plainly includes attorney fees and costs. To interpret "any fees, costs or expenses" not to include attorney fees and costs would result in a strained and forced construction of the exclusion.

Opinion at A-8 and A-9. In other words, the Court of Appeals assigned the "plain, ordinary, and popular" meaning of the language used in Exclusion 5.c, found it to be "clear and unambiguous," and therefore enforced it as written. Thus, the

Court of Appeals did indeed follow this Court's precedent in applying the rules of contract/policy construction, and affirmed the trial court's denial of the District's Motion for Judgment on the Pleadings.

III. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

The District now seeks review of the Court of Appeals' order, under Washington Rules of Appellate Procedure ("RAP") 13.4(b)(1) and (4), which state "[a] petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or . . . (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." First, as the Court of Appeals' reasoning quoted above makes plain, the Opinion, holding that Exclusion 5.c of the MOC clearly and unambiguously applies to the award of attorneys' fees and costs to Kennedy, does not conflict with this Court's well-established precedent. Moreover, the

unpublished Opinion does not involve an issue of substantial public interest that should be determined by the Supreme Court. The unpublished Opinion addresses the unique impact of an exclusion to a coverage document mutually negotiated between members of a risk pool formed by local governmental entities that have chosen to jointly self-insure under RCW 48.62.031. This exclusion does not exist in individual or commercial lines policies issued to the vast majority of policyholders in Washington. For these reasons, the District fails to establish a basis for review by this Court.

a. Standards for Interpreting the Language in SIAW's MOC.

SIAW is not an insurance company and indeed is specifically excluded from the definition of "insurer" under RCW 48.01.050. Nevertheless, SIAW agrees with the District that Washington authorities discussing the rules of interpreting contracts and insurance policies provide guidance in the

interpretation of the language in its MOC.[1] The District's arguments are almost exclusively based on the proposition that Exclusion 5.c, as selectively parsed and supplemented by the District, is ambiguous. But as aptly discussed and correctly applied by the Court of Appeals as quoted above, pursuant to Washington Supreme Court precedent, Washington courts will not rewrite policy language to create an ambiguity where none exists and are instructed to give it a "fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." *Weyerhaeuser Co. v. Commercial Union Ins. Co.,* 142 Wn.2d 654, 666, 15 P.3d 115 (2000).

b. The MOC Excludes Coverage for Attorneys' Fees the District Is Obligated to Pay as a Result of an Adverse Judgment for Declaratory or Injunctive Relief.

Exclusion 5.c. in the SIAW MOC states:

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[1] SIAW is not arguing that the basic rules of contract interpretation are inapplicable; however as a risk pool and not an "insurer," SIAW maintains that it is allowed to use extrinsic evidence regarding intent in interpreting the MOC. Regardless, the District has not adduced any extrinsic evidence of intent supporting its interpretation of Exclusion 5.c.

> The insurance under any Liability Coverage Part in this MOC does NOT apply to:
>
> 5. Damages of the following types:
>
> ***
>
> c. Relief or redress in any form other than monetary damages, or for any fees, costs or expenses which an **Insured** may become obligated to pay as a result of any adverse judgment for declaratory relief or injunctive relief.

However, despite its clear and unambiguous language, the District completely rewrites this exclusion to claim that it only applies to "'fees, costs or expenses' 'incurred' to implement the 'relief' or 'redress' required by an adverse judgment for declaratory or injunctive relief." This is at best a strained and forced construction that ignores the plain language and structure of the exclusion.

Moreover, contrary to the District's interpretation, the exclusion applies to two ***separate*** categories: "relief or redress in any form other than monetary damages, ***or*** for any fees, costs or expenses which an insured may become obligated to pay as a result of any adverse judgment for declaratory or injunctive

relief" (emphasis added). The District ignores the word "or" separating these two clauses to suggest the fees excluded in the latter clause must have been "incurred to implement" the "relief or redress" in the former clause. However, the words "incurred" and "implement" are found nowhere in the exclusion.

Courts are not allowed to rewrite contract/policy language in Washington. The Court of Appeals recognized this principle in rejecting the District's argument in this regard:

> In order for the District's interpretation to make sense, this court would need to modify the exclusion to replace the words "as a result of" with the words "in order to implement." The District's interpretation is not reasonable.

Opinion at A-10.

To see the unambiguous application of Exclusion 5.c in this matter, it is helpful to review the trial court's November 10, 2022 Order Granting Plaintiff Declaratory and Injunctive Relief. CP 187-189. Referencing the U.S. Supreme Court Opinion in that Order, the trial court entered three declarations, the first two stating the District violated Kennedy's free

exercise and free speech rights under the First Amendment. The trial court then entered four injunctions that primarily required the District to reinstate Kennedy as a football coach and allow him to engage in a personal religious ritual after football games. Finally, the trial court ordered that pursuant to 42 U.S.C. § 1988(b), as the prevailing party, Kennedy was entitled to his reasonable attorneys' fees. *Id.* In sum, the trial court entered a summary judgment for both declaratory and injunctive relief in favor of Kennedy, and because he was the prevailing party, awarded him his reasonable attorneys' fees. These are precisely the circumstances subject to Exclusion 5.c. Pursuant to that Order, the District became obligated to pay fees as a result of an adverse judgment for declaratory and injunctive relief.

The District next replaces the unambiguous phrase "as a result of" with the dictionary definitions "caused by" or "a consequence of," and, argues that the award of attorneys' fees was not "caused by" or "a consequence of" the adverse judgment for declaratory relief and injunctive relief, but rather

was a consequence of the trial court's "independent" and "stand alone" determination that Kennedy was entitled to his attorneys' fees as the prevailing party under 42 U.S.C. §1988(b). This contention is not only a strained, unreasonable, and impermissible parsing of Exclusion 5.c, it completely divorces the award of attorneys' fees from the basis for the award. Without the trial court's adverse judgment in the against the District and in favor of Kennedy for declaratory and injunctive relief, the trial court would not have and could not have awarded fees to Kennedy. The same order entering judgment in favor of Kennedy on his claims for declaratory and injunctive relief included the determination that Kennedy was the prevailing party and that he was entitled to his attorneys' fees. CP 189.

The Court of Appeals rejected the District's argument in this regard:

> . . . the District asserts that Kennedy's attorney fee and cost award is not "a result of" a declaratory or injunctive judgment because the Supreme Court

> did not enter a judgment for declaratory or injunctive relief and because the district court determined that Kennedy was entitled to his fees under 42 U.S.C. § 1988 independent of entering a judgment for declaratory or injunctive relief. This argument ignores the nature of appellate review and 42 U.S.C. § 1988. As an appellate court, the Supreme Court does not enter judgments—it directs the trial court to do so, exactly as it did in this case. As a result of the Supreme Court's decision, the district court here entered judgment in Kennedy's favor. The Supreme Court awarded Kennedy his printing and clerk's costs because it determined that Kennedy should prevail on his claims for declaratory and injunctive relief. These necessary procedural steps are interrelated to Kennedy's judgment for declaratory and injunctive relief.

Opinion at A-10 and A-11.

Moreover, if, as the District claims, the award of attorneys' fees - which the trial court characterized as damages - was not a result of an adverse judgment against the District for declaratory relief and injunctive relief, but the result of a court's independent and stand-alone determination, then the attorneys' fee damages claimed by Kennedy do not satisfy the insuring

agreement in the MOC. The applicable insuring agreement states in pertinent part:

> In return for the payment of the premium, we agree with you to pay amounts for which you become legally obligated to pay as damages because of a **Wrongful Act** to which the insurance under this Coverage Part applies for a **Claim** "first made" against an **Insured ….**
>
> ***
>
> No other obligation to pay any additional sums or perform acts or services is covered.

By the District's contention, these attorney fee damages were not because of a Wrongful Act of the District, but because of an independent decision of the trial court. If the District did not become legally obligated to pay damages because of a Wrongful Act, then SIAW is not obligated to pay them.

c. The District Cites no Authority Supporting its Strained and Unreasonable Interpretation of Exclusion 5.c.

The District fails to provide any authority that actually supports its interpretation of Exclusion 5.c, because such an interpretation is simply contrary to Washington law and standards of policy interpretation.

The District relies on the 1988 Ohio Court of Appeals decision in *City of Kirtland v. W. World Ins. Co.*, 43 Ohio App. 3d 167, 540 N.E.2d 282 (1988), however, the exclusion addressed there had distinctly different wording than Exclusion 5.c here, and therefore that case provides no guidance on interpretation of Exclusion 5.c. More specifically, *Kirtland* involved a peculiar procedural process. The City was initially sued in a separate lawsuit for equitable relief. The plaintiff prevailed on this claim. The plaintiff then filed a second lawsuit, seeking its attorneys' fees under 42 U.S.C. § 1988(b), incurred in prosecuting the first lawsuit. The City tendered the defense of this second lawsuit to the defendant insurer, who denied any duty to defend or indemnify. *Kirtland,* 43 Ohio App.3d at 167. After the plaintiff obtained a default judgment against the City and was awarded its attorneys' fees, the plaintiff then filed supplemental proceedings against the defendant insurer seeking coverage for its award of fees. *Id*. The City then paid the plaintiff's fees and filed a third-party

complaint against the defendant insurer seeking its fees in defending the second lawsuit, its fees in prosecuting the third-party complaint against the defendant insurer, and the fees it paid to plaintiff in the second lawsuit. *Id*.

The insurance policy at issue had the following pertinent provisions:

> "* * * that if, during the policy period, any claim or claims are first made against it as a result of any Wrongful Act, the Company will pay on behalf of, in accordance with the terms of this policy, all loss which the Public Entity becomes legally obligated to pay as damages, and * * * the Company shall have the right and duty to defend any suit against the Insured seeking damages on account of such Wrongful Act * * *.
>
> "Loss shall mean any amount which the Insureds are legally obligated to pay, * * * for any claim or claims made against them, for Wrongful Acts and shall include but not be limited to damages, judgments, settlements, and costs * * *.
>
> "The Company shall not be liable to make payment for Loss in connection with any claim made against the Insureds allegedly, based upon or arising out of * * *
>
> "* * *
>
> "4(a) Claims, demands or actions seeking relief, or redress, in any form other than money damages;

> "(b) For fees or expenses relating to claims, demands or actions seeking relief or redress, in any form other than money damages."

Id. at 168-169.

The court ruled in favor of the City, holding that the award of attorneys' fees constituted "money damages" and ordered the insurer to reimburse the City. In so holding, the court emphasized two issues. First, the court repeatedly stated that the insurance policy did not define the term "money damages." *Id*. at 169. Second, the court focused on the insurer's claims examiner's comment in the claims file that "there were no monetary damages sought other than the attorneys' expenses." *Id*. While not quite holding that this statement was an admission by the insurer, the court went on to state that the insured "will not bear the burden of the insurer's own uncertainty as to a term in the policy [the insurer] wrote." *Id*. at 169-170. After holding that the plaintiff's attorneys' fees were "money damages," the court did not need to and did not address the impact of exclusions 4(a) and 4(b) above. *Id*. By holding

that the underlying lawsuit (second lawsuit) was seeking money damages, the court did not have to address the exclusion, because it held that the predicate claim was one for "money damages."

Unlike the Underlying Action in this matter, the lawsuit for which the City of Kirtland sought coverage was solely for attorneys' fees. In contrast here, Kennedy sought declaratory and injunctive relief as well as his statutory attorneys' fees if he prevailed on his claims for equitable relief. The Court of Appeals in this case correctly reasoned:

> Kirtland is distinguishable from the case at hand. Exclusion 5 is much more specific than exclusion 4 in Kirtland and provides several examples of uncovered damages under the MOC. And unlike the present case, the Kirtland policy did not exclude damages resulting specifically from a judgment for equitable relief. See Kirtland, 43 Ohio App. 3d at 169. Moreover, the Kirtland court did not interpret the exclusion language at issue in that case—it relied on a statement from the insurer's claims adjuster to determine that money damages included attorney fee awards

Opinion at A-14.

The Ohio Court of Appeals decision in *Kirtland* does not support the District's position.

d. The District's Remaining Arguments in Support of Ambiguity are Unpersuasive.

The Court should reject all other arguments proffered by the District in its Petition for Review.

First, the Court should reject the District's argument based upon Exclusion 5.d. The District argues SIAW could have used the phrase "attorneys' fees" in Exclusion 5.c and because SIAW used only the words "any fees," Exclusion 5.c cannot be enforced. To the contrary, Exclusion 5.d proves the opposite. Exclusion 5.d applies to:

> d. Any fines and/or attorney's fees awarded through any administrative hearing process including but not limited to the Washington Public Records Act.

In comparing this language to that in Exclusion 5.c, to find "any fee" ambiguous, a court would have to add "except attorneys' fees" to the language of Exclusion 5.c, something that would be

contrary to Washington law. The Court of Appeals opined thusly:

> But this argument fails to consider that "any fees" is broader than "attorney fees" and that "any fees" can reasonably be interpreted to include "attorney fees."

Opinion at A-12.

The District argues that SIAW would pay attorneys' fees awarded against the District if the underlying plaintiff had also claimed and recovered monetary damages suffered as a result of a civil rights violation or employment practice violation, and therefore the MOC is ambiguous and should cover an award of attorneys' fees when the claim is only for declaratory or injunctive relief. However, there is no ambiguity. The SIAW and its members jointly decided to cover the first set of circumstances and not to cover the second set of circumstances where the member may become obligated to pay attorneys' fees as a result of an adverse judgment for declaratory or injunctive

relief. The SIAW MOC language clearly and unambiguously reflects this choice.

Second, the Court should reject the District's argument that Exclusion 5.c is ambiguous because the District could have settled this matter and would have been indemnified for the settlement. This argument a red herring. The District did not settle the Underlying Action and continued to litigate it from the initial trial court to the Ninth Circuit Court of Appeals to the United States Supreme Court. There is no evidence in the record of any attempt to settle or opportunity to settle the Underlying Action before an adverse judgment for declaratory relief and injunctive relief was entered against the District.[2]

Third and finally, the Court should reject the District's argument that SIAW did not mention that Exclusion 5.c applied to an attorney fee award in its initial reservation of rights letter.

[2] Moreover, the MOC requires the member to obtain SIAW's consent to any settlement and SIAW would not have consented to any settlement requiring the District to pay Kennedy's attorneys' fees unless the District agreed to assume this liability.

This argument ignores the fact that the entire exclusion was quoted in the reservation of rights letter (CP 197), and that when the U.S. Supreme Court entered summary judgment in favor of. Kennedy, SIAW promptly advised the District:

> The only relief sought in the Complaint other than declaratory and injunctive relief is an award of attorney's fees and costs under 42 U.S.C. § 1988(b) and 42 U.S.C. § 2000e-5(k). Those statutes allow an award of attorney's fees and costs to prevailing parties. No other relief is specifically requested in the Complaint's Prayer for Relief, and none of the appellate opinions indicate that Mr. Kennedy sought any other relief.
>
> Exclusion 5.c. applies to "fees, costs, or expenses" that the District becomes obligated to pay "as the result of any judgment for declaratory relief or injunctive relief." Although the trial court has not yet entered a judgment, there is no relief that a judgment could encompass other than declaratory and injunctive relief. Thus, it is likely that exclusion 5.c. will exclude coverage for any fees and costs awarded by the trial court under the two statutes.

CP 202-203. The Court of Appeals properly rejected the District's argument:

> While SIAW may not have expressly noted at that early stage that attorney fee and costs awards may not be covered, the District overlooks the nature of

> SIAW's letter: to advise the District on its initial stance based on the facts of the claim available at the time. The letter expressly states that it is not "a waiver of any policy defense that may be found to limit or preclude coverage." Finally, we note that SIAW's initial letter included the entirety of exclusion 5(c)'s language, making clear that "any fees, costs or expenses" that the District may become obligated to pay as the result of Kennedy's action for declaratory and injunctive relief would not be covered under the policy.

Opinion at A-10. SIAW appropriately reserved rights based on Exclusion 5.c, and reiterated those reservations when it became clear the only monetary relief that could be awarded in the Underlying Action would be for attorneys' fees and costs.

None of these arguments from the District persuaded the Court of Appeals, and none should be considered by this Court now.

IV. CONCLUSION

SIAW respectfully requests that the Court deny the District's Petition for Review. In addition, SIAW respectfully requests this Court award SIAW its costs as allowed under RAP 1.1-14.6.

I certify that this document contains 4,892 words, in compliance with RAP 18.17.

DATED this 25th day of October, 2024.

SOHA & LANG, P.S.

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CERTIFICATE OF E-SERVICE

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DATED this 25th day of October, 2024, at Seattle, Washington.

s/Angela Murray
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SOHA & LANG

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