No. _____
Court of Appeals No. 858114-I

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**SUPREME COURT**
**OF THE STATE OF WASHINGTON**

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BREMERTON SCHOOL DISTRICT,

*Plaintiff/Petitioner,*

v.

SCHOOLS INSURANCE ASSOCIATION OF WASHINGTON,

*Defendant/Respondent.*

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# PETITION FOR REVIEW

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**GORDON TILDEN**
**THOMAS & CORDELL LLP**
Susannah C. Carr, WSBA #38475
Emily Uppal, WSBA #60639
600 University Street, Suite 2915
Seattle, WA 98101
Tel. 206.467.6477

ATTORNEYS FOR PETITIONER

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### Rules

## I. IDENTITY OF PETITIONER

Petitioner is the Bremerton School District ("District").

## II. CITATION TO COURT OF APPEALS

The District respectfully seeks review and reversal of the Court of Appeals' unpublished opinion in *Bremerton School District v. Schools Insurance Assoc. of WA*, No. 85811-4 ("Opinion" or "Op."). A copy of the Slip Opinion is attached as Appendix A.

## III. ISSUES PRESENTED FOR REVIEW

1. Applying the rule that exceptions to insurance policy exclusions must be liberally construed, did the Court of Appeals err by concluding that attorney fee and cost awards are not "a form of monetary damages"?

2. Applying the rule that exclusions in insurance policies must be narrowly construed, did the Court of Appeals err by concluding that an exclusion for "any fees, costs, or expenses which an Insured may become obligated to pay as a result of any adverse judgment for declaratory relief" applies to

a U.S. Supreme Court judgment for printing costs and clerk fees and to a district court's attorney fee award?

3. Whether the relevant exclusion is at least ambiguous, so that it must be interpreted in favor of the insured to not include a U.S. Supreme Court judgment for printing costs and clerk fees and a district court's attorney fee award?

## IV. STATEMENT OF THE CASE

### A. The District was held liable for Mr. Kennedy's attorneys' fees and costs because he prevailed on his civil rights claims.

In August 2016, Joseph A. Kennedy filed suit against the District in United States District Court for the Western District of Washington ("Kennedy Action"). Clerk's Papers (CP) 3 at ¶ 4.6, 146. Mr. Kennedy asserted claims under 42 U.S.C. § 1983, alleging that his rights under the Free Exercise and Free Speech Clauses of the First Amendment were violated after the District declined to renew his football coaching contract, in part because he refused to comply with the District's requests to cease his postgame tradition of openly engaging in religious

prayer at midfield. CP 3-4 at ¶¶ 4.7-4.8. In addition to declaratory and injunctive relief, Mr. Kennedy sought attorneys' fees and costs, pre- and post-judgment interest, and "all other appropriate relief as the Court deemed just and proper." CP 4 at ¶ 4.8.

Mr. Kennedy experienced a series of defeats at the trial and appellate level, including the Ninth Circuit affirming the summary judgment dismissal of his claims. CP 4 at ¶ 4.10; *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1023 (9th Cir. 2021). However, in June 2022, the Supreme Court reversed. It determined the District had violated Mr. Kennedy's rights under the Free Exercise and Free Speech Clauses of the First Amendment and concluded, "Mr. Kennedy is entitled to summary judgment on his First Amendment claims." *Id.* at ¶ 4.13; *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543-44 (2022). Having determined that the District violated Mr. Kennedy's civil rights, the Supreme Court entered judgment reversing the Ninth Circuit and remanding the case. CP 181.

In the same order, the Supreme Court entered judgment in favor of Mr. Kennedy for $5,161.83 in printing and clerk costs. CP 181, 183. The Ninth Circuit subsequently vacated the grant of summary judgment to the District and remanded the case back to the district court. CP 5 at ¶ 4.15, CP 185.

In November 2022, the district court entered summary judgment against the District and in favor of Mr. Kennedy consistent with the Supreme Court's opinion. CP 187-189. The district court's order awarded Mr. Kennedy three types of relief.

First, it declared that Mr. Kennedy's First Amendment rights were violated, and that the District could permit him to engage in religious prayer midfield after games without violating the Establishment Clause. CP 5 at ¶ 4.17, CP 187-189.

Second, the order required the District to: (1) reinstate Mr. Kennedy to his previous coaching position, subject to completing the necessary hiring forms and certifications; (2)

refrain from interfering with Mr. Kennedy's ability to engage in quiet prayer after football games; (3) construe all District policies and procedures to permit the activity described above; and (4) refrain from retaliating or taking any future adverse employment action against Kennedy for conduct consistent with the terms of the order. *Id.* The District is not seeking insurance coverage for any of the costs, fees, or expenses it has incurred to comply with these terms of the judgment.

Third, the order awarded Mr. Kennedy his attorneys' fees and costs because he had prevailed against the District:

> *In addition*, pursuant to 42 U.S.C. § 1988, and *as the prevailing party*, Kennedy is entitled to reasonable attorneys' fees and costs."

*Id.* (italics added). On March 16, 2023, the District and Mr. Kennedy settled his claim for attorneys' fees under 42 U.S.C. § 1988(b) and the Supreme Court cost award for $1,775,000. CP 6 at ¶ 4.21.

### B. SIAW refused to indemnify the District for Mr. Kennedy's attorneys' fees and costs based solely on Exclusion 5(c).

When Mr. Kennedy filed his action, the District was insured against civil rights claims under a Memorandum of Coverage ("MOC") issued by the Schools Insurance Association of Washington ("SIAW"). *See* CP 11–144. The MOC's Wrongful Acts Liability Coverage Part broadly insures the District for "amounts for which you become legally obligated to pay as damages because of… civil rights and Employment Practices Violations." CP 85 (granting coverage for Wrongful Acts) and CP 60 (defining "Wrongful Act" to include "violation of civil rights" and "Employment Practices Violations") (bold omitted); *see also id.* at CP 52- 53 (defining "Employment Practices Violations" to include a "[v]iolation of an individual's civil rights").

On August 26, 2016, SIAW agreed to defend the District in the Kennedy Action under reservation of rights. SIAW's letter acknowledged that "coverage is afforded under the

MOC," but reserved its rights to later deny coverage based on one exclusion:

> 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.

CP 197. SIAW's reservation of rights letter explained the exclusion meant "injunctive and declaratory relief and reinstatement are not covered." *Id.* The letter did not tell the District that the exclusion applied to attorney fee and cost awards, though such awards are a well-known part of civil rights claims and were the only form of monetary damages sought by Mr. Kennedy. *Id.*

Not until six years later, after the Supreme Court issued its opinion, did SIAW inform the District that the exclusion

applied to Mr. Kennedy's anticipated award for attorneys' fees and costs. CP 200. SIAW's denial relied solely on the second part of the exclusion, asserting that the anticipated fee and cost award fell within the scope of "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." CP 203.

On September 6, 2022, SIAW denied coverage for the Supreme Court award of costs. CP 205. SIAW subsequently reiterated its position that an award of attorneys' fees would not be covered. CP 208. The District settled Mr. Kennedy's claims for the Supreme Court costs and his attorneys' fees and other costs. SIAW contributed only $300,000 towards the $1,775,000 settlement amount. CP 7 at ¶¶ 4.31-4.32.

**C. Procedural history**

On March 28, 2023, the District filed this lawsuit alleging that the MOC covers the entire amount it paid to settle Mr. Kennedy's claims for his costs and attorneys' fees. The

District moved for judgment on the pleadings, asking the trial court to rule as a matter of law that: (a) attorneys' fees and costs are "damages" covered under the MOC's insuring agreement; and (b) SIAW could not meet its burden of proving that Exclusion 5(c) clearly and unambiguously applies to the Supreme Court cost award and district court's attorney fee and cost award. CP 222.

On August 28, 2023, the trial court issued a written decision denying the District's motion. The trial court agreed that the cost and fee awards were "damages" and fell within the scope of the MOC's insuring agreement but nonetheless concluded the settlement with Mr. Kennedy was not covered because Exclusion 5(c) applied. CP 276. Neither party appealed the trial court's conclusion that the attorneys' fees and costs were "damages." The District appealed the trial court's conclusion that Exclusion 5(c) applied. On August 26, 2024, departing from well-established law, the Court of Appeals

affirmed, concluding that Exclusion 5(c) applied to the District's settlement.

## V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Opinion holding that Exclusion 5(c) of the MOC clearly and unambiguously applies to the awards of attorneys' fees and costs to Mr. Kennedy conflicts with this Court's well-established precedent and involves issues of substantial public interest. *See* RAP 13.4(b)(1), (4). The Opinion conflicts with the fundamental tenets of Washington insurance law that policy exclusions must be interpreted narrowly and in favor of the insured, and ambiguities in insurance policies must be interpreted in favor of the insured. The public has a substantial interest in ensuring that the Opinion, which will detrimentally affect policyholders, school districts, and taxpayers throughout the State, is promptly addressed and corrected.

### A. The Opinion conflicts with this Court's precedent that exclusions must be narrowly construed in favor of coverage.

Under Washington law, an insurer bears the burden of proving that an exclusion clearly and unambiguously applies. *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 731, 837 P.2d 1000 (1992). "A clause in a policy is ambiguous when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable." *Greer v. Northwestern Nat'l Ins. Co.*, 109 Wn.2d 191, 198, 743 P.2d 1244 (1987). Accordingly, if the insured provides a reasonable interpretation of the policy, the policy must be construed in favor of coverage. *Cf. Kaplan v. Nw. Mut. Life Ins. Co.*, 115 Wn. App. 791, 808, 65 P.3d 16 (2003) (to benefit from the ambiguity rule, the insured "does not need to show that his list of possible interpretations, or any one of them, is more reasonable than that espoused by [the insurer], but only that there is more than one reasonable interpretation").

The ambiguity rule is even more demanding when an exclusion is at issue because "[e]xclusionary clauses are narrowly construed for the purpose of providing maximum coverage for the insured." *Int'l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 288, 313 P.3d 395 (2013); *Vision One, LLC v. Phila. Indem. Ins. Co.*, 174 Wn.2d 501, 512, 276 P.3d 300 (2012) ("Because '[e]xclusions from insurance coverage are contrary to the fundamental protective purpose of insurance,' we construe exclusions strictly against the insurer."). As such, the "rule strictly construing ambiguities in favor of the insured applies with added force to exclusionary clauses which seek to limit policy coverage." *Am. Star Ins. Co. v. Grice*, 121 Wn.2d 869, 875, 854 P.2d 622 (1993).

The Opinion is contrary to this Court's longstanding precedent because it did not interpret the exclusion narrowly and strictly against SIAW, and because, in the very least, the exclusion is ambiguous and must be interpreted in favor of the District.

### 1. An award of attorneys' fees and costs is a form of "monetary damages."

The first clause of Exclusion 5(c) states that coverage does not apply to "[r]elief or redress in any form ***other than monetary damages***..." Because an insurance policy must be "considered as a whole," the exception for "monetary damages" in the first clause of the exclusion must be considered when determining the meaning of the second clause. *Moeller v. Farmers Ins. Co. of Washington*, 173 Wn.2d 264, 271, 267 P.3d 998 (2011) ("We view an insurance contract in its entirety and cannot interpret a phrase in isolation."). Accordingly, if an award of attorneys' fees and costs is a "form" of "monetary damages" within the first clause, the second clause must refer to some *other* type of "fees, costs or expenses."

The undefined term "monetary damages" includes an award of attorneys' fees and costs. Because "monetary damages" is an inclusionary term—*i.e.*, it refers to what is covered—it must be liberally construed. *See State Farm Mut. Auto. Ins. Co. v. Ruiz*, 134 Wn.2d 713, 718, 952 P.2d 157

(1998), *as amended* (Mar. 16, 1998). As an undefined term, it must also be interpreted according to its "plain, ordinary, and popular meaning" as the average insurance purchaser would, using a standard English dictionary. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990). Liberally construed in accordance with the relevant dictionary definitions, an award of attorneys' fees and costs is a form of "monetary damages." *See Monetary*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/monetary (last visited September 11, 2024) ("of or relating to money"); *Damages*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/damages (last visited September 11, 2024) ("compensation in money imposed by law for loss or injury"); *Money Damages*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/money-damages (last visited September 11, 2024) ("money ordered by a judge to be paid by a person or organization to someone who has been harmed or lost money as a result of their wrong

actions"); *see also City of Kirtland v. W. World Ins. Co.*, 43 Ohio App. 3d 167, 170, 540 N.E.2d 282 (Ohio Ct. App. 1988) ("Since the term 'money damages' was not defined in the policy . . . this court holds that the attorney fees awarded [against] appellee were money damages").

The Court of Appeals did not address whether the District's interpretation was reasonable according to these principles because it considered the potential effect of the exception for "monetary damages" only after it had already concluded that the reference to "any fees" in the second clause included an award of attorneys' fees. Op. at 12-13. By reading the exclusion in reverse, the Court of Appeals reached an interpretation of "monetary damages" that contradicted the relevant dictionary definitions and the rule that inclusionary terms must be liberally construed.

The Court of Appeals further erred in this section of the Opinion by focusing on "any fees, costs or expenses" without considering the subsequent language limiting the excluded fees,

costs, or expenses to those the insured incurs "as a result of any adverse judgment for declaratory relief and injunctive relief." Washington law requires policy terms to be interpreted as a whole, not piecemeal. *Moeller*, 173 Wn.2d at 271.

But even if the Court of Appeals arrived at *one* reasonable interpretation of the exclusion by reading it in reverse, the Opinion does not address why it was *unreasonable* for the District to read the exclusion in order and interpret the first clause before interpreting the second clause. The Court of Appeals' interpretation of "monetary damages" thus also violates the fundamental rule that an insurance policy is ambiguous and must be construed in favor of coverage if the insured presents a reasonable interpretation of its terms.

**2. Narrowly interpreted, the exclusion for "any fees, costs or expenses that…result from any adverse judgment for declaratory and injunctive relief" does not include the cost and fee awards.**

The second clause of Exclusion 5(c) states that coverage does not apply to "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." A fundamental principle of Washington insurance law is that exclusions must be narrowly interpreted in favor of coverage. *Vision One,* 174 Wn.2d at 512.

Because the phrase "as a result of" is not defined in the MOC, the Court should look to standard dictionaries to inform its interpretation. *See Boeing*, 113 Wn.2d at 877. Dictionary definitions show an average person would understand the phrase to mean "caused by" or "as a consequence of." *E.g.*, *Result from something,* CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/result-from (last accessed September 17, 2024) (meaning to "be caused by"… "a particular event or activity"); *Result*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/result (meaning "to proceed or arise as a consequence, effect, or conclusion") (last accessed September 17, 2024).

Interpreted narrowly, "any fees, costs, or expenses" that are "caused by" or "as a consequence of" an adverse judgment for declaratory or injunctive relief are any fees and costs the insured incurs to effectuate the non-monetary relief required by the judgment. Examples of such fees in this case are the costs associated with reinstating Mr. Kennedy to his previous position, costs incurred to update District guidelines and to train District personnel on new policies, costs incurred to provide Mr. Kennedy with the necessary certifications so that he may supervise players, and costs of hiring security guards for football games.

The cost and fee awards, on the other hand, were not "because of" or "caused by" the declaratory and injunctive relief. The District's liability for these amounts was the result of the civil rights violations identified in the Supreme Court's opinion and the district court's subsequent legal conclusion that Mr. Kennedy prevailed in his claims.

### a. The Supreme Court's judgment was for printing fees and clerk costs, not declaratory or injunctive relief.

In its 2022 opinion, the Supreme Court determined that the District had violated Mr. Kennedy's First Amendment rights. *Kennedy v. Bremerton School District*, 597 U.S. 507, 543 (2022). The opinion's scope of relief was limited: the Supreme Court concluded Mr. Kennedy was entitled to summary judgment on his First Amendment claims and ordered "[t]he judgment of the Court of Appeals is *Reversed*." *Id.* at 544 (italics in original). The Supreme Court's opinion did not address whether Mr. Kennedy was entitled to additional relief, and the opinion certainly was not an adverse judgment for declaratory relief or injunctive relief.

Shortly after issuing its opinion, the Supreme Court entered judgment in favor of Mr. Kennedy. This judgment reversed the judgment of the Ninth Circuit and awarded Mr. Kennedy $5,161 in printing fees and clerk costs. CP 181, 183. Like its opinion, the Supreme Court's judgment made no

mention of declaratory or injunctive relief. *Id.* Mr. Kennedy was not awarded declaratory and injunctive relief by the district court until months later. *See* CP 187–89.

The Court of Appeals concluded the Supreme Court's judgment was an adverse judgment for declaratory and injunctive relief that fell within the ambit of Exclusion 5(c):

> This argument [by the District] 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… 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.

Op. at 11 (italics added). The Court of Appeals first incorrectly posited that the Supreme Court cost award was not a judgment. CP 181 and 183 (Supreme Court clerk's office transmitting "the judgment of this Court" to the Ninth Circuit). After concluding the Supreme Court's award of printing costs and clerk's fees was *not* a judgment, the Court of Appeals concluded the award fell within the scope of Exclusion 5(c), although the exclusion

is expressly limited to "adverse *judgments* for declaratory or injunctive relief." The Court of Appeals' contradictory conclusion is wrong for two reasons. First, it misapplies the facts. The Supreme Court's award for printing costs and clerk's fees was a judgment. Second, the Court of Appeals turned the rule that exclusions must be narrowly interpreted in favor of coverage on its head. Narrowly interpreted, the phrase "adverse judgment for declaratory and injunctive relief" cannot be read to include a judgment for printing and clerk's costs that lacks any declaratory or injunctive relief whatsoever.

**b. The district court's attorney fee award was not "as a result of any adverse judgment for declaratory and injunctive relief."**

The district court's subsequent award for Mr. Kennedy's attorneys' fees and other costs under 42 U.S.C. § 1988(b) was not the result of an adverse judgment for declaratory or injunctive relief either. In civil rights cases, a defendant's liability for the plaintiff's attorneys' fees under 42 U.S.C. § 1988(b) results from the court's separate legal conclusion that

the plaintiff is entitled to their fees as the "prevailing party." 42 U.S.C. § 1988(b) ("the court, in its discretion, may allow the prevailing party…a reasonable attorney's fee as part of the costs"). The award is the result of the district court's discretionary determination that the plaintiff materially altered the legal relationship between the parties to a sufficient degree that they are entitled to fees. *Farrar v. Hobby*, 506 U.S. 103, 111-14 (1992). The court's fee award determination is independent from the other relief awarded to the plaintiff, whether that relief is declaratory, injunctive, compensatory damages, or a combination thereof. *See Rhodes v. Stewart*, 488 U.S. 1, 3 (1988) (nothing about entry of declaratory judgment "automatically renders that party prevailing under § 1988", and, despite receiving declaratory judgment in their favor, two civil rights plaintiffs were not prevailing parties for purposes of § 1988). *See also Farrar*, 506 U.S. at 111 (a plaintiff may be the prevailing party under § 1988 based on a consent decree or settlement).

Here, the District became liable for Mr. Kennedy's attorneys' fees and other costs because the Supreme Court concluded the District violated Mr. Kennedy's civil rights, and the district court applied 42 U.S.C. § 1988(b) to determine that Mr. Kennedy had prevailed. *See* CP 189 ("In *addition*, the Court ORDERS that *pursuant to 42 U.S.C. § 1988(b)*, and *as the prevailing party*, Kennedy is entitled to reasonable attorneys' fees and costs") (italics added). That the district court declared Mr. Kennedy was entitled to return to his coaching position and enjoined the District from prohibiting his midfield prayers after games—relief that led to fees, costs, and expenses distinct from the attorney fee award—in the same order it awarded him his attorneys' fees and costs does not mean the attorney fee award "resulted from" the declaratory and injunctive relief. The attorney fee award and the declaratory and injunctive relief are independent forms of relief,

each awarded to Mr. Kennedy as a result of the Supreme Court concluding the District violated his civil rights. [1]

The District's interpretation that it became obligated to pay Mr. Kennedy's attorneys' fees as a result of its civil rights violations and the district court's application of 42 U.S.C. § 1988(b), and not from the declaratory or injunctive relief, is reasonable. Notably, this interpretation comports with SIAW's own interpretation of the exclusion. Its initial reservation of rights letter told the District the exclusion meant "injunctive and declaratory relief" are not covered. CP 197. The Court of Appeals, instead of following the rule that exclusions must be narrowly interpreted, applied the phrase more broadly than necessary and included the attorney fee and cost award. This is clear error.

[1] Ironically, the Court of Appeals observed in its opinion that the Supreme Court awarded Mr. Kennedy his printing costs and clerk's fees "because it determined that Kennedy should prevail on his claims," yet it failed to apply that reasoning to either the Supreme Court cost award or the attorney fee award.

### 3. The District's interpretation follows Washington's other rules of policy interpretation.

The Court of Appeals' failure to apply the longstanding rules that exclusions must be interpreted as a whole and narrowly construed is sufficient reason for this Court to grant review. But the District's interpretation comports with the other rules of insurance policy interpretation as well.

First, it gives effect to every clause in the policy. *Kitsap Cty. v. Allstate Ins. Co.*, 136 Wn.2d 567, 575, 964 P.2d 1173 (1998) ("A policy is considered as a whole so that the court can give effect to every clause in the policy."). As explained above, the exclusion's exception for "monetary damages" is rendered meaningless if the phrase "any fees, costs or expenses... as a result of an adverse judgment for declaratory or injunctive relief" is interpreted include an award of attorneys' fees and costs. *See Assurance Co. of Am. v. Wall & Assocs. LLC of Olympia*, 379 F.3d 557, 560 (9th Cir. 2004) ("a clause or phrase

cannot be considered in isolation, but should be considered in context, including the purpose of the provision.").

Exclusion 5(c) must also be construed with other exclusions throughout the MOC, including subsection 5(d), which use the specific term "attorney fees" when the intent is to exclude coverage for this form of damages. CP 62 (exclusion 5(d), excluding coverage for "*attorneys fees* awarded through any administrative hearing process") (emphasis added); CP 87 (exclusion 13, excluding "*attorney fees* arising out of Washington Public Records Act…") (emphasis added). SIAW thus knew how to draft an exclusion that would clearly apply to attorneys' fees, in the instance of exclusion 5(c), and chose ***not*** to do so. *See Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 688, 871 P.2d 146 (1994) ("courts necessarily consider whether alternative or more precise language, if used, would have put the matter beyond reasonable question.").

The District's interpretation is also consistent with the MOC's intent to insure the District for civil rights and employment claims. *See Transcon. Ins. Co. v. Washington Pub. Utilities Districts' Util. Sys.*, 111 Wn.2d 452, 457, 760 P.2d 337 (1988) ("To determine the parties' intent, the court first will view the contract as a whole, *examining its subject matter and objective*, the circumstances of its making, the subsequent conduct of the parties, and the reasonableness of their respective interpretations.") (italics added). The insuring agreement broadly insures the District for "amounts for which you become legally obligated to pay as damages because of…civil rights and Employment Practices Violations." CP 52-53, 60, 85. Moreover, the "Limit of Insurance" is defined as the "sums for which an Insured is legally liable by reason of a judgment . . . or a settlement . . . and shall include all costs arising out of . . . [civil rights and Employment Practices Violations]." CP 56. An award of attorneys' fees and costs is within the broad scope of both a "judgment" and "all costs

arising out of" civil rights violations and Employment Practices Violations.

It is also well-known that the prevailing plaintiff in a civil rights action is generally entitled to recover their attorneys' fees and costs. It would be contrary to the intent of the MOC to cover civil rights claims were it to cover the plaintiff's other monetary damages but not the damages consisting of the claimant's attorneys' fees. *See Moeller*, 173 Wn.2d at 272 (the insurance policy must be read as a "whole" and not given a "strained or forced construction leading to absurd results.") (internal quotations omitted). The Court of Appeals' Opinion also leads to an absurd result, where the plaintiff's attorney fee award is covered when the plaintiff is awarded even low compensatory damages in combination with declaratory and injunctive relief, but not when the plaintiff's relief consists only of declaratory and injunctive relief. There is no reasonable basis to distinguish between these two scenarios. What does make sense is to interpret "as a result of" narrowly

and limit its application to any fees, costs, or expenses an insured incurs effectuating the declaratory and injunctive relief. These fees, unlike an attorney fee award, are indeterminate and often ongoing.

### B. The exclusion conflicts with this Court's precedent that ambiguities must be interpreted in favor of the insured.

For all the reasons previously stated, the District's interpretation of Exclusion 5(c) is reasonable. As a result, Washington's longstanding rule that the exclusion is at least ambiguous and must be interpreted in favor of coverage applies. *Greer*, 109 Wn.2d at 198 ("A clause in a policy is ambiguous when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable."); *Kaplan*, 115 Wn. App. at 808 (to benefit from the ambiguity rule, the insured "does not need to show that his list of possible interpretations, or any one of them, is more reasonable than that espoused by [the insurer], but only that there is more than one reasonable interpretation"). The Court of Appeals' failure to

apply the ambiguity rule and interpret the exclusion in favor of coverage was also clear error.

### C. The public has a substantial interest in this Court promptly rectifying the error in the Opinion.

The Court should also accept review under RAP 13.4(b)(4). This Opinion should not be left to stand. Because insurance policies use standardized forms, misinterpretation of policy terms has wide ranging consequences. For example, the term "monetary damages" is commonly undefined in liability policies. The Opinion's holding that an award of attorneys' fees and costs are not "monetary damages" will affect coverage for other Washington policyholders in a wide variety of liability policies.

Further, many public and private entities purchase insurance coverage to protect them against allegations of civil rights violations, where liability for attorneys' fees and costs is often the most significant financial risk faced by the insured. Knowing whether their potential liability for attorneys' fees and costs is insured is important information for all policyholders to

have as they defend these claims and assess litigation risk and settlement opportunities. The Court should take the opportunity now to correct the Court of Appeals' error and the ramifications it may have for other policyholders throughout the State.

Addressing the Court of Appeals' error is also of paramount importance to taxpayers throughout Washington. The Court of Appeals' opinion eliminated coverage for one of the most significant—and in this case, substantial—liabilities that a school district may face in response to civil rights claims. Washington taxpayers have a direct and substantial interest in this Court accepting review to address the scope of coverage provided to school districts and other public entities for civil rights actions.

## VI. CONCLUSION

For the foregoing reasons, the District respectfully requests that this Court grant its petition.

I certify that this document contains 4,973 words, in compliance with RAP 18.17.

Respectfully submitted this 25th day of September, 2024.

**GORDON TILDEN THOMAS & CORDELL LLP**
Attorneys for Appellant Bremerton School District

By *s/ Susannah C. Carr*
Susannah C. Carr, WSBA #38475
Emily Uppal, WSBA #60639
600 University Street, Suite 2915
Seattle, Washington 98101
Tel. 206.467.6477
scarr@gordontilden.com
euppal@gordontilden.com

## CERTIFICATE OF E-SERVICE

I certify that I initiated electronic service of the foregoing document via the Court's eFiling Application to counsel of record:

***Counsel for Respondents:***
Paul Rosner, WSBA #37146
J. William Ashbaugh, WSBA #21692
Soha & Lang, P.S.
1325 Fourth Avenue, Suite 940
Seattle, WA 98101
206.624.2800
rosner@sohalang.com
ashbaugh@sohalang.com
murray@sohalang.com

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

*s/ Susannah C. Carr*
Susannah C. Carr, WSBA #38475

# APPENDIX A

FILED
8/26/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | |
|---|---|
| BREMERTON SCHOOL DISTRICT,<br><br>Appellant,<br><br>v.<br><br>SCHOOLS INSURANCE ASSOCIATION OF WASHINGTON,<br><br>Respondent. | No. 85811-4-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION |

SMITH, C.J. — After the Bremerton School District declined to renew Joseph Kennedy's coaching contract due to Kennedy's post-game ritual of praying on the football field with student players, Kennedy sued the District, alleging violations of his First Amendment rights to free speech and free exercise of religion, as well as a myriad of violations under Title VII of the Civil Rights Act of 1964. Kennedy sought only injunctive and declaratory relief, as well as attorney fees.

Following defeat at the federal trial and appellate level, Kennedy's case eventually reached the United States Supreme Court, which reversed and ordered the district court to enter summary judgment in favor of Kennedy. The Supreme Court also awarded Kennedy printing costs incurred on appeal. On remand, the district court granted summary judgment in Kennedy's favor and awarded him attorney fees and costs. The parties later reached a 1.77 million dollar settlement for Kennedy's attorney fees and costs.

The District then sought indemnification from its insurer, the Schools Insurance Association of Washington (SIAW), which denied coverage based on a provision that excluded coverage for "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." The District sued SIAW for coverage in King County Superior Court, claiming breach of contract, and moved for judgment on the pleadings. The trial court denied the District's motion, concluding that the attorney fee and cost award was excluded by SIAW's policy.

On appeal, the District asserts that the trial court erred by concluding that the attorney fees and cost award was excluded under the policy because the District was not liable for the fees and costs "as a result of" an adverse judgment for declaratory and injunctive relief. Because the award constitutes fees and cost that the District became obligated to pay as a result of Kennedy's judgment for declaratory and injunctive relief, we conclude that the award is excluded from coverage under the policy and affirm.

## FACTS

### Background

In August 2016, former Bremerton High School assistant football coach Joseph Kennedy sued the Bremerton School District in federal court after the District declined to renew his coaching contract, in part because Kennedy

refused to stop his postgame tradition of praying on the field.[1] Kennedy claimed that the District's actions violated his First Amendment[2] rights to free speech and free exercise of religion, as well as his rights under Title VII of the Civil Rights Act of 1964,[3] which prohibits discrimination on the basis of religion.

Kennedy sought various forms of declaratory and injunctive relief, including reinstatement as assistant coach of the football team, a religious accommodation to pray at the 50-yard line at the conclusion of games, and a declaration that the District's actions violated Kennedy's rights to freedom of speech and free exercise of religion. Kennedy also requested that he be awarded his attorney fees and costs, pre- and post-judgment interest, and all other appropriate relief as the court deemed just and proper.

After conducting initial discovery, the parties cross-moved for summary judgment. The district court granted the District's motion and dismissed Kennedy's claims, concluding that the District's actions were justified because of the risk of a violation of the First Amendment's establishment clause if the District allowed Kennedy to continue with his religious conduct. The Ninth Circuit affirmed.

In January 2022, the United States Supreme Court granted Kennedy's petition for certiorari. On June 27, 2022, the Supreme Court reversed the decision of the Ninth Circuit and determined that Kennedy was entitled to

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[1] Kennedy v. Bremerton Sch. Dist., No. 3:16-cv-05694-RSL (W.D. Wash.).

[2] U.S. CONST. amend. I.

[3] Pub. L. 88-352, 78 Stat. 241 (1964).

summary judgment on his First Amendment claims. The Supreme Court also entered judgment in favor of Kennedy for the recovery of $5,461.83 in printing and clerk costs incurred in his Supreme Court appeal.

On remand, the district court granted Kennedy's motion for summary judgment as to his free speech and free exercise of religion claims and ordered that Kennedy be reinstated as assistant football coach. The district court also ordered that, as the prevailing party, Kennedy was entitled to reasonable attorney fees and costs.

After the court entered its summary judgment order on Kennedy's First Amendment claims, the parties negotiated a settlement for $1,775,000, the amount of attorney fees and costs owed to Kennedy. As part of the settlement negotiations, the District's insurer, SIAW, agreed to pay $300,000 of the total settlement amount.

Present Matter

In August 2016, after Kennedy filed his lawsuit, the District tendered defense and indemnity[4] to SIAW, which acknowledged receipt of the tender and agreed to defend the District under reservation of rights. SIAW's reservation of rights was based on an exclusion in the Memorandum of Coverage (MOC), which excludes coverage for "[r]elief or redress in any form other than monetary

[4] A tender of defense and indemnity notifies another party, typically an insurer, of (1) the pendency of the suit against the defendant, (2) that if liability is found, the defendant will look to the insurer for indemnity, (3) that the notice constitutes a formal tender of the right to defend the action, and (4) that if the insurer refuses to defend, it will be bound in a subsequent litigation between them to determine if coverage applies. Dixon v. Fiat-Roosevelt Motors, Inc., 8 Wn. App. 689, 692, 509 P.2d 86 (1973).

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 August 2022, SIAW sent a letter to the District stating that Kennedy's award for attorney fees and costs was unlikely to be covered under the MOC because they were fees and costs that resulted from an adverse judgment for declaratory and injunctive relief. In September 2022, SIAW denied coverage for the Supreme Court's award of printing and clerk costs.

On January 17, 2023, counsel for SIAW sent a letter to counsel for the District confirming that SIAW's position remained that any award for attorney fees and costs resulting from the lawsuit were not covered under the MOC. Despite denying coverage for the majority of the settlement between Kennedy and the District, SIAW agreed to contribute $300,000 toward the total amount.

In March 2023, the District sued SIAW in King County Superior Court, alleging that SIAW breached their contractual duties under the MOC by denying coverage for the settlement. A few months later, the District moved for judgment on the pleadings, claiming that the attorney fee and cost award was covered under the MOC because the award constituted "monetary damages" rather than "fees, costs or expenses." The trial court disagreed, concluding that the exclusion language was unambiguous and excluded coverage for attorney fees and costs, and denied the District's motion.

The District appeals.

## ANALYSIS

### Standard of Review

We review a dismissal under CR 12(c) de novo and "identically to a CR 12(b)(6) motion to dismiss for failure to state a claim." P.E. Sys., LLC v. CPI Corp., 176 Wn.2d 198, 203, 289 P.3d 638 (2012). Dismissal is " 'appropriate only when it appears beyond doubt' that the plaintiff cannot prove any set of facts that 'would justify recovery.' " Wash. Trucking Ass'ns v. Emp't Sec. Dep't, 188 Wn.2d 198, 207, 393 P.3d 761 (2017) (quoting San Juan County v. No New Gas Tax, 160 Wn.2d 141, 164, 157 P.3d 831 (2007)). When reviewing a dismissal on a motion for judgment, "[a]ll facts alleged in the complaint are taken as true, and we may consider hypothetical facts supporting the plaintiff's claim." FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 180 Wn.2d 954, 962, 331 P.3d 29 (2014). But if a claim remains legally insufficient even under a plaintiff's proffered hypothetical facts, dismissal is appropriate. FutureSelect, 180 Wn.2d at 963.

Likewise, we interpret language in insurance policies as a matter of law and review de novo a trial court's interpretation of the policy language. Seattle Tunnel Partners v. Great Lakes Reinsurance (UK) PLC, 200 Wn.2d 315, 320, 516 P.3d 796 (2022).

### Interpretation of Memorandum of Coverage

The District asserts that the trial court erred by concluding that exclusion 5(c) in the MOC applied to Kennedy's award of attorney fees and costs because the District was not liable for the fees "as a result of" declaratory or injunctive

relief. In the alternative, the District maintains that the exclusion is ambiguous and must be interpreted in favor of the District. We disagree.[5] 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.

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

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[5] We note that SIAW disagrees that it is an "insurance company" but does not disagree that principles of insurance contract interpretation apply here. Because the parties agree that principles of insurance contract interpretation apply, we do not address whether general contract interpretation principles apply instead.

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).

Here, the MOC provides that

> [t]he insurance under any Liability Coverage Part in this MOC does NOT apply to:
>
> . . .
>
> 5. Damages of the following types:
>
> (a) Any costs, civil fines, penalties or expenses levied or imposed against an Insured arising from any complaint or enforcement action from any federal, state, or local government regulatory agency;
>
> (b) Punitive damages, exemplary damages or the multiplied portion of any damage award (RICO); or
>
> (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 or injunctive relief.
>
> (d) Any fines and/or attorney fees awarded through any administrative hearing process including but not limited to the Washington Public Records Act.
>
> (e) Back wages.

(Emphasis and boldface omitted.)

Relevant here is subsection (c). 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.

Still, the District maintains that subsection (c) does not apply, or does not exclude coverage, for several reasons, none of which are persuasive. The District first contends that the latter half of subsection (c) refers to fees, costs or expenses the policyholder incurs to *implement* o*r* co*mply with* the injunctive or declaratory relief awarded, and not attorney fees awarded as a result of a judgment for declaratory or injunctive relief. This interpretation ignores the plain meaning of the exclusion's language. The exclusion excludes from coverage *any* fees that an insured may become obligated to pay as a result of an adverse judgment and does not specifically address costs of implementation. While the exclusion could be reasonably read as excluding *both* (1) attorney fees resulting from an injunction or declaratory judgment and (2) any other costs resulting from

that judgment (such as the costs and expenses to implement that judgment), it is a strained interpretation to say that only implementation costs are excluded. 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.

In a related argument, the District points to SIAW's initial reservation of rights letter, which noted that "injunctive and declaratory relief and reinstatement are not covered" but did not mention whether the exclusion applied to attorney fee and cost awards, as evidence supporting its interpretation of the exclusion. 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.

Second, 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.

The District's alternative arguments to this point, that an award of attorney fees under 42 U.S.C. § 1988 is not dependent on first obtaining relief and that the entering of a judgment is an "intervening act" that makes a fee award under 42 U.S.C. § 1988 unavailable, are simply not accurate. In order for a party to recoup fees under 42 U.S.C. § 1988, they must first prevail in a civil rights action. A court may then, in its discretion, award the prevailing party their reasonable attorney fees. Again, these are interrelated procedural steps that must be completed before a party may recoup fees under 42 U.S.C. § 1988. Here, Kennedy could only request attorney fees and costs under 42 U.S.C. § 1988 due to the fact that a judgment in a civil rights action for declaratory and injunctive relief was entered in his favor.

Third, the District argues that its interpretation is consistent with the MOC's intent to insure the District for civil rights and employment claims. In support of this assertion, the District points to the MOC's definition of "Limit of Insurance," which provides that the limit of insurance is "[t]he sums for which an

Insured is legally liable by reason of a judgment, . . . or a settlement executed by you and the claimant, and shall include all costs arising out of an Accident, Occurrence or Wrongful Act." (Boldface omitted.) The District then notes that it "makes no sense for the MOC's coverage for attorneys' fees to depend on the nature of relief sought by the plaintiff." This argument ignores that the MOC also contains other exclusions concerning coverage. Additionally, it overlooks that the parties were free to contract as they wanted.

In a related argument, the District notes that another subsection of Exclusion 5, subsection (d), specifically excludes from coverage "[a]ny fines and/or attorneys fees awarded through any administrative hearing process," which indicates that when SIAW intended to exclude attorney fees, it expressly stated as such. 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."

Fourth, The District contends that its interpretation gives effect to all the terms used in the exclusion and urges this court to interpret "monetary damages" to include attorney fees and costs. The District asserts that an ordinary person would interpret an award of attorney fees as "an award of money," and thus, "monetary damages." This argument ignores the plain language of the exclusion and the exclusion's sentence structure. Subsection (c) provides that no coverage exists for "[r]elief or redress in any form other than monetary damages, o*r* for any fees, costs or expenses." (Emphasis added.) A reasonable, ordinary person would deduce from the exclusion's language that "monetary damages" do

not encompass attorney fees because the exclusion also provides that "any fees" are not covered.

The District's assertion that the term "monetary damages" is ambiguous is similarly unavailing when viewed in the context of the MOC. Exclusion 5 begins with a broad heading of "damages." It then references different types of damages that may result: civil fines or penalties, punitive damages, exemplary damages, monetary damages, any fees, costs, or expenses, any fines awarded through administrative proceedings (except for attorney fees), and back wages. Though the MOC does not define the broad category of "damages," by listing the various types of damages separately, exclusion 5 makes clear that within this broad category of damages, monetary damages are separate and distinct from fees, costs, or expenses. An ordinary person reading exclusion 5 would conclude that "any fees, costs or expenses" are separate from "monetary damages."

Fifth, the District claims that City of Kirtland v. W. World Ins. Co., 43 Ohio App. 3d 167, 540 N. E. 2d 282 (Ohio Ct. App. 1988) is analogous to the present case. The insurance policy in Kirtland contained the following exclusion:

> 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.

43 Ohio App. 3d at 169 (alteration in original). The policy defined "damages" as "only those damages which are payable because of personal injury," but did not

provide a definition for "money damages." Kirtland, 43 Ohio App. 3d at 169. The Kirtland court also noted that a senior claims examiner for the insurance company had characterized the attorney fee award as a money damage. 43 Ohio App. 3d at 169. The court reasoned that the insured should not have to "bear the burden of [the insurer's] own uncertainty as to a term in a policy [the insurer] wrote." Kirtland, 43 Ohio App. 3d at 169-70. The court concluded that "[s]ince the term 'money damages' was not defined in the policy . . . the attorney fees awarded appellee were money damages." Kirtland, 43 Ohio App. 3d at 170.

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.

Lastly, the District maintains that, at the very least, the exclusion is ambiguous and must be interpreted in its favor. But despite the District's assertion to the contrary, there is no reasonable interpretation of the exclusion that would require coverage. The only reasonable interpretation of the exclusion excludes coverage for an award of attorney fees and costs resulting from an adverse judgment for declaratory or injunctive relief.

Because the attorney fee and cost award is excluded from coverage by the MOC and because the provision is not ambiguous, we conclude that the trial court did not err by denying the District's motion for judgment on the pleadings.

Attorney Fees on Appeal

The District asserts that it is entitled to its attorney fees and costs if it prevails on appeal.

"An insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to attorney fees, regardless of whether the duty to defend is at issue." Olympic S.S. Co., Inc. v. Centennial Ins. Co., 117 Wn.2d 37, 54, 811 P.2d 673 (1991).

Here, the District does not prevail on its coverage claim on appeal and it is not entitled to its attorney fees.

Affirmed.

Smith, C.J.

WE CONCUR:

Brunson, J

Hazelrigg, A.C.J.

# GORDON TILDEN THOMAS CORDELL LLP

## September 25, 2024 - 10:46 AM

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