No. 80753-1

OWENS, J. (concurring/dissenting) -- This case involves three types of claims by American Best Food, Inc. (Café Arizona)[1] against its insurer, Alea London, Ltd. (Alea): breach of contract; the tort of bad faith; and violation of the Consumer Protection Act (CPA), chapter 19.86 RCW. The majority holds that, as a matter of law, Alea breached its contractual duty to defend Café Arizona and that Café Arizona failed to present sufficient evidence to survive a summary judgment motion on its CPA claims. With these holdings I readily agree. However, because I find that breach of an insurance contract does not create per se liability for the tort of bad faith, I must respectfully dissent from that part of the majority opinion addressing Café Arizona's

[1] "Café Arizona" refers collectively to all the respondents in this case.

bad faith claim.

This court has long recognized that breach of an insurance contract and the tort of bad faith are separate claims that are analyzed independently. Breach of an insurance contract is neither necessary, *Coventry Associates v. American States Insurance Co.*, 136 Wn.2d 269, 279, 961 P.2d 933 (1998), nor sufficient, *Greer v. Northwestern National Insurance Co.*, 109 Wn.2d 191, 201-02, 205, 743 P.2d 1244 (1987), to establish the tort of bad faith. *See also Transcon. Ins. Co. v. Wash. Pub. Utils. Dists.' Util. Sys.*, 111 Wn.2d 452, 470, 760 P.2d 337 (1988) (holding that "[a] denial of coverage based on a reasonable interpretation of the policy is not bad faith," even if incorrect).

The majority ably sets forth the standard for finding that an insurer has breached its duty to defend an insured. The duty to defend is broader in scope than the duty to indemnify, *Truck Insurance Exchange v. VanPort Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002), and "is triggered if the insurance policy conceivably covers the allegations in the complaint," *Woo v. Fireman's Fund Insurance Co.*, 161 Wn.2d 43, 53, 164 P.3d 454 (2007) (emphasis omitted). Relying on out-of-state precedent, the majority announces a new rule of Washington law—that postassault negligence does not fall under an insurance policy's "arising out of" assault or battery exception. *See* majority at 7-9. I agree that, because it was conceivable in light of out-of-state precedent suggesting that it might have a duty to defend, Alea breached its

duty to defend. This, however, does not resolve the question of whether Alea acted in *bad faith* when it refused to defend Café Arizona. The standard for finding that an insurer has breached its duty of good faith is a different matter entirely.

A claim for breach of good faith "'sounds in tort.'" *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 130, 196 P.3d 664 (2008) (quoting *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499 (1992)). As such, a plaintiff must demonstrate duty, breach, causation, and harm. *Id*. (citing *Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 161 Wn.2d 903, 916, 169 P.3d 1 (2007)). To establish the breach element, the plaintiff must show that the insurer's action was "unreasonable, frivolous, or unfounded." *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 560, 951 P.2d 1124 (1998). This is a "heavy burden." *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 433, 38 P.3d 322 (2002). Put another way, "[i]f the insurer's denial of coverage is based on a *reasonable interpretation* of the insurance policy, *there is no action for bad faith*." *Id*. (emphasis added).

In the present case, Alea had a duty to defend Café Arizona so long as the insurance policy "conceivably cover[ed]" the conduct alleged in the complaint. *Woo*, 161 Wn.2d at 53 (emphasis omitted). Thus, the question squarely presented is whether it was unreasonable, frivolous, or unfounded for Alea to determine that, under Washington law, its policy did not conceivably cover Café Arizona's claim. That an

insurer is incorrect does not necessarily mean that it is unreasonable. Justice Bridge, joined by Chief Justice Alexander and Justices Smith and Madsen, dissenting in *Truck Insurance Exchange*, adopted precisely this position, finding that the insurer had breached its duty to defend but not in bad faith. 147 Wn.2d at 777 (Bridge, J., dissenting). The majority, which I joined, did not disagree that such a result was possible, but simply found that, under the facts of that case, there was sufficient *additional* evidence of bad faith (specifically, an "unconscionable delay in responding to its insured"). *Truck Ins. Exch.*, 147 Wn.2d at 764.

In the present case, Michael Dorsey was shot nine times by George Antonio. Dorsey returned to the club and was carried inside, where he remained until the club owner instructed employees to remove him from the building. Café Arizona's insurance policy contains the following provision:

> This insurance does not apply to any claim arising out of—
>
> A. Assault and/or Battery committed by any person whosoever, regardless of degree of culpability or intent and whether the acts are alleged to have been committed by the insured or any officer, agent, servant or employee of the insured or by any other person.

Clerk's Papers at 62. Relying on this provision, Alea determined that it had no duty to defend Café Arizona in a negligence action brought by Dorsey. Alea is surely correct in concluding that the shooting was an "assault or battery." Alea is also surely correct

in determining that any exacerbation of Dorsey's injuries is causally related to the assault or battery. The remaining issue is whether it was reasonable for Alea to determine that "arising out of" requires only a causal relationship.

In determining that Café Arizona's negligence arose out of assault or battery, Alea relied on well-established Washington case law. In *Toll Bridge Authority v. Aetna Insurance Co.*, 54 Wn. App. 400, 404, 773 P.2d 906 (1989), the Court of Appeals interpreted the phrase "arising out of" in an insurance contract to mean "'originating from', 'having its origin in', 'growing out of', or 'flowing from,'" *id.* (quoting *Avemco Ins. Co. v. Mock*, 44 Wn. App. 327, 329, 721 P.2d 34 (1986)), and expressly noted that it "has a broader meaning than 'caused by' or 'resulted from,'" *id.* (quoting *State Farm Mut. Auto Ins. Co. v. Centennial Ins. Co.*, 14 Wn. App. 541, 543, 543 P.2d 645 (1975)). In *McAllister v. Agora Syndicate, Inc.*, 103 Wn. App. 106, 11 P.3d 859 (2000), the Court of Appeals interpreted an assault and battery exclusion in a case stemming from an assault in a nightclub. There, club staff allowed persons previously removed from the club due to an altercation to reenter the club. *Id*. at 108. The two involved in the previous altercation again confronted one another and patrons "informed [club] security personnel of the ensuing melee, but they failed to take any action." *Id.* Interpreting the language of the policy, the Court of Appeals held that the insurer had no duty to defend because the negligence claim by the injured patron fell

within the "based on assault and/or battery" exception. *Id*. at 109, 111. Numerous other cases have similar holdings. *See*, *e.g.*, *Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wn.2d 99, 109, 751 P.2d 282 (1988) (holding that liability arises out of an event so long as there is a "causal connection" between the event and the liability); *Krempl v. Unigard Sec. Ins. Co.*, 69 Wn. App. 703, 706-07, 850 P.2d 533 (1993) (holding that an "arising out of" exclusion applies to claims flowing from or growing out of the excluded activity).

I agree that the foregoing cases are narrowly distinguishable, as the facts in this case present a matter of first impression. However, these cases interpret similar and sometimes identical language and all point in a single direction—that "arising out of" is a broad term covering most events causally related to the specified activity. The majority cites no case from this jurisdiction pointing in the opposite direction. Though I join the majority in determining, as a matter of first impression, that postassault negligence exacerbating injuries should not be considered "arising out of" assault or battery, I cannot conclude that Alea's contrary determination, though incorrect, was unreasonable, frivolous, or unfounded in light of the existing case law.

The majority fails to properly analyze Café Arizona's claim for the tort of bad faith. It provides no meaningful independent analysis of the question of whether the insurer acted in an "unreasonable, frivolous, or unfounded" manner, *Kirk*, 134 Wn.2d

at 560, in determining that its policy did not conceivably cover the conduct at issue. The majority certainly does not address whether Café Arizona has met its "*heavy burden*," *Overton*, 145 Wn.2d at 433 (emphasis added), of proving that Alea acted in bad faith. Instead, the majority reasons that Alea failed to give "the insured the benefit of any doubt as to the duty to defend . . . . Alea's failure to defend based upon a questionable interpretation of law was unreasonable and Alea acted in bad faith as a matter of law." Majority at 15. This analysis misses the mark, conflating the duty to defend and the duty of good faith.

The majority supports its finding of bad faith with a single argument: that Alea relied on a questionable interpretation of law. *Id*. at 15. Proof that an insurer failed to defend based on a questionable interpretation of law is proof only of breach of its duty to defend, not breach of its duty of good faith. *Truck Ins. Exch.*, 147 Wn.2d at 760 ("Only if the alleged claim is clearly not covered by the policy is the insurer relieved of its *duty to defend*." (emphasis added)). The majority embellishes on this standard, noting that Alea "put its own interest ahead of its insured" and failed to give "the insured the benefit of any doubt." Majority at 15. These statements will always apply where an insurer relies on a questionable interpretation of law in its favor. The statements do not, however, get the majority any closer to its conclusion that Alea acted in bad faith; they simply reinforce that Alea breached its duty to defend. *See*

Woo, 161 Wn.2d at 60 ("the *duty to defend* requires an insurer to give the insured the benefit of the doubt when determining whether the insurance policy covers the allegations in the complaint" (emphasis added)). The only other support for the majority's conclusion that Alea's breach of its duty to defend was "unreasonable, frivolous, or unfounded" is its conclusory statement that "Alea's failure to defend based upon a questionable interpretation of law was unreasonable." Majority at 15. A conclusory statement is no substitute for legal analysis. In finding that Alea breached its duty of good faith, the majority is either relying on its conclusory statement or presuming that a breach of the duty to defend is per se evidence of a breach of the duty of good faith. The former is unfounded while the latter is contrary to our precedent, which has held that breach of the duty to defend is insufficient to show the tort of bad faith. Further, the result is an undesirable outcome, as bad faith determinations should be reserved for more culpable conduct.

I take exception to one additional aspect of the majority opinion. The majority's explanation of the test for finding bad faith by an insurer calls into question multiple holdings of this court. In setting forth the test for finding bad faith, the majority begins with the uncontroversial standard that the insurer's action must be "unreasonable, frivolous, or unfounded." *Id*. at 14. The majority proceeds, however, to "disapprove of language to the contrary," *id*., followed by a citation to *Holly*

Mountain Resources, Ltd. v. Westport Insurance Corp., 130 Wn. App. 635, 650, 104 P.3d 725 (2005). At the cited page, the only discussion of the standard for the tort of bad faith, apart from setting forth the language also used by the majority, is the following: "The insured does not establish bad faith . . . when . . . the insurer denies coverage or fails to provide a defense based upon a reasonable interpretation of the insurance policy." *Id*. Multiple precedents of this court include nearly identical language, s*ee Overton*, 145 Wn.2d at 433; *Kirk*, 134 Wn.2d at 560; *Transcon. Ins. Co.*, 111 Wn.2d at 470, and it has never been thought to be "contrary" to the general standard.

If the majority wishes to overturn a line of this court's cases, it must make "'a clear showing that [the] established rule is incorrect and harmful.'" *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). It has not done so here. Inclusion of this apparent non sequitur by the majority, disapproving of the language in *Holly Mountain Resources*, is of questionable effect, for lower courts should not lightly presume that this court overturns its prior decisions sub silentio.

In sum, I conclude that Alea's determination that, under Washington law, it had no duty to defend Café Arizona was not "unreasonable, frivolous, or unfounded," even though it was incorrect. Because the court today holds that Alea breached its duty to

defend Café Arizona, Café Arizona will be restored to the position it would have been in had Alea not violated its duty. *Kirk*, 134 Wn.2d at 561. This includes attorney fees and damages, up to the policy limits. *Greer*, 109 Wn.2d at 202-03. However, because I conclude that Café Arizona did not meet its "heavy burden" of proving that Alea's refusal to defend was "unreasonable, frivolous, or unfounded," I cannot agree that Café Arizona is entitled to summary judgment on its bad faith tort claim.

AUTHOR:

Justice Susan Owens

WE CONCUR:

Chief Justice Barbara A. Madsen

Justice Gerry L. Alexander

Justice James M. Johnson