IN THE SUPREME COURT OF THE STATE OF WASHINGTON

AMERICAN BEST FOOD, INC., a Washington corporation d/b/a/ CAFÉ ARIZONA; and MYUNG CHOL SEO and HYUN HEUI SEO-JEONG,	)	No. 80753-1
Respondents,	)	En Banc
v.	)	
ALEA LONDON, LTD., a foreign corporation,	)	
Petitioner.	)	Filed March 18, 2010

CHAMBERS, J. — This court is called upon to decide whether a complaint alleging that postassault negligence caused or exacerbated injuries falls under an insurance policy's assault and battery exclusion. We find it does not. We are also asked whether an insurer breached its duty to defend as a matter of law when, relying upon an equivocal interpretation of case law, it gave itself the benefit of the doubt rather than give that benefit to its insured. We find that it has. We affirm the Court of

Appeals in part and remand for further proceedings consistent with this opinion.

Facts

American Best Food, Inc., operates Café Arizona, a Federal Way nightclub.[1] On January 19, 2003, after they apparently brushed against each other on the dance floor, George Antonio confronted Michael Dorsey inside Café Arizona. Club security escorted Antonio out of the building. When security later let Antonio return, he confronted Dorsey again. This time security escorted both men outside. Once outside the nightclub, Antonio pulled a gun and shot Dorsey nine times. A club security guard returned fire, wounding Antonio. Dorsey apparently staggered to the alcove of the club, where security guards carried him inside. Myung C. Seo instructed club employees to remove Dorsey from the establishment. According to Dorsey's complaint, the employees "dumped him on the sidewalk." Clerk's Papers (CP) at 42.

Later that year, Dorsey sued, alleging that Café Arizona failed to take reasonable precautions to protect him against criminal conduct despite considerable notice of the potential harm given the history of violence at the club and the specific conduct of Antonio. In an amended complaint, Dorsey also explicitly contended that the security guards exacerbated his injuries by dumping him on the sidewalk after he was shot. Café Arizona promptly sought protection from its insurer, Alea London, Ltd., by notifying it of Dorsey's lawsuit and asserting rights to defense and indemnity. Alea refused, citing exclusion in its policy for injuries or damages "arising out of" assault or battery. CP at

[1] While the record is not completely clear, it appears that respondents Myung C. Seo and Hyun Heui Seo-Jeong own and operate American Best Food, Inc. American Best Food, Inc., in turn, operates Café Arizona, a nightclub. We use the name "Café Arizona" for all the respondents.

107-09. Café Arizona's counsel protested, contending that the complaint contained factual allegations of additional injuries caused by the negligence of Café Arizona's employees, injuries to which the assault and battery exclusion may not necessarily apply, including claims of employee postassault negligence. Alea still refused, relying on *McAllister v. Agora Syndicate*, *Inc*., 103 Wn. App. 106, 11 P.3d 859 (2000), for an expansive reading of the exclusion and contending that under "*McAllister,* Washington courts would likely find the allegations of negligence not sufficient" to trigger coverage. CP 110-11. Café Arizona's counsel responded again, arguing that at least some question of coverage existed, thus entitling the insured to a defense. Counsel especially called the insurer's attention to an out-of-state case that clearly supported coverage, citing *Western Heritage Insurance Co. v. Estate of Dean,* 55 F. Supp. 2d 646 (E.D. Texas, 1998) (finding that a tavern owner's failure to render aid to an injured patron was a covered occurrence, not excluded by an assault and battery exclusion). CP at 274. Alea again declined. Further correspondence from Café Arizona to Alea, including provision of an expert witness report, failed to change Alea's position.

Café Arizona sued Alea in May 2005 for breach of contract, bad faith, and violation of the Consumer Protection Act, chapter 19.86 RCW. On cross motions for summary judgment, the King County Superior Court found for Alea and dismissed Café Arizona's claims. Café Arizona appealed. The Court of Appeals partially reversed, holding that Alea breached its duty to defend and that summary dismissal of the bad faith refusal to defend and indemnification claims was inappropriate. *Am. Best Food, Inc. v. Alea London, Ltd.*, 138 Wn. App. 674, 689, 691, 158 P.3d 119 (2007). It

affirmed dismissal of Café Arizona's consumer protection act and insurance regulation claims. We granted review. *Am. Best Food, Inc. v. Alea London, Ltd.,*163 Wn.2d 1039, 187 P.3d 268 (2008).

Analysis

This case comes to this court on review of the Court of Appeals' partial reversal of a summary dismissal of respondents' claims. Summary judgment is reviewed de novo. *Liberty Mut. Ins. Co. v. Tripp*, 144 Wn.2d 1, 10, 25 P.3d 997 (2001). We interpret insurance policy provisions as a matter of law. *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 575, 964 P.2d 1173 (1998).

A. *Duty To Defend*

We have long held that the duty to defend is different from and broader than the duty to indemnify. *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 392, 823 P.2d 499 (1992) (citing 1A Rowland H. Long, The Law of Liability Insurance § 5B.15, at 5B-143 (1986)). The duty to indemnify exists only if the policy *actually covers* the insured's liability. The duty to defend is triggered if the insurance policy *conceivably covers* allegations in the complaint. *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 53, 164 P.3d 454 (2007). "The duty to defend 'arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage.'" *Truck Ins. Exch. v. VanPort Homes, Inc.,* 147 Wn.2d 751, 760, 58 P.3d 276 (2002) (quoting *Unigard Ins. Co. v. Leven,* 97 Wn. App. 417, 425, 983 P.2d 1155 (1999)). An insurer may not put its own interests ahead of its insured's. *Mut. of Enumclaw Ins.*

Co. v. T&G Const., Inc., 165 Wn.2d 255, 269, 199 P.3d 376 (2008) (citing *Butler*, 118 Wn.2d at 389). To that end, it must defend until it is clear that the claim is not covered. The entitlement to a defense may prove to be of greater benefit to the insured than indemnity. *Truck Ins. Exch.,* 147 Wn.2d at 765.

The insurer is entitled to investigate the facts and dispute the insured's interpretation of the law, but if there is any reasonable interpretation of the facts or the law that could result in coverage, the insurer must defend. *Id.* at 760 ("Only if the alleged claim is clearly not covered by the policy is the insurer relieved of its duty to defend." (citing *Kirk v. Mt. Airy Ins. Co.,* 134 Wn.2d 558, 561, 951 P.2d 1124 (1998)). When the facts or the law affecting coverage is disputed, the insurer may defend under a reservation of rights until coverage is settled in a declaratory action. *See id.* at 761 (citing *Grange Ins. Co. v. Brosseau,* 113 Wn.2d 91, 93-94, 776 P.2d 123 (1989)). "Once the duty to defend attaches, insurers may not desert policyholders and allow them to incur substantial legal costs while waiting for an indemnity determination." *Id*. Instead,

> [i]f the insurer is unsure of its obligation to defend in a given instance, it may defend under a reservation of rights while seeking a declaratory judgment that it has no duty to defend. A reservation of rights is a means by which the insurer avoids breaching its duty to defend while seeking to avoid waiver and estoppel. "When that course of action is taken, the insured receives the defense promised and, if coverage is found not to exist, the insurer will not be obligated to pay."

Id. (citation omitted) (quoting *Kirk,* 134 Wn.2d at 563 n.3). With these principles in mind, we turn to the assault and battery exclusion.

B. *Exclusion*

Alea argues that the Court of Appeals erred when it held that Alea had a duty to defend. It contends the assault and battery exclusion clearly bars coverage of the claim as alleged in the complaint, and therefore, it had no duty to defend its insured. The assault and battery exclusion reads:

> This insurance does not apply to any claim arising out of-
>
> A. Assault and/or Battery committed by any person whosoever, regardless of degree of culpability or intent and whether the acts are alleged to have been committed by the insured or any officer, agent, servant or employee of the insured or by any other person; or
> B. Any actual or alleged negligent act or omission in the:
> 1. Employment;
> 2. Investigation;
> 3. Supervision;
> 4. Reporting to the proper authorities or failure to so report; or
> 5. Retention;
>
> of a person for whom any insured is or ever was legally responsible, which results in Assault and/or Battery; or
> C. Any actual or alleged negligent act or omission in the prevention or suppression of any act of Assault and/or Battery.

CP at 62. Alea argues that absent the assault, Dorsey would have no cause of action against Café Arizona and thus, his entire claim, including his claim for any injuries sustained when club security guards allegedly dumped him on the sidewalk on orders of the club owner, is excluded under the policy.

"[E]xclusionary clauses are to be most strictly construed against the insurer."

Phil Schroeder, Inc. v. Royal Globe Ins. Co., 99 Wn.2d 65, 68, 659 P.2d 509 (1983) (citing *W. Am. Ins. Co. v. State Farm Mut. Auto. Ins. Co*., 4 Wn. App. 221, 480 P.2d 537, *overruled on other grounds by* 80 Wn.2d 38, 491 P.2d 641 (1971)), *modified on other grounds*, 101 Wn.2d 830, 683 P.2d 186 (1984). Alea relies on *McAllister* to posit a "but for" theory justifying its denial of a defense of Dorsey's lawsuit. *McAllister* involved a fight between bar patrons resulting in serious injury to McAllister. *McAllister*, 103 Wn. App. at 108. Prior to the fight, club employees removed the other combatant but later allowed him to reenter. *Id*. Under an assignment of rights, McAllister brought a declaratory judgment action against the bar's insurer after it denied coverage of his claim. *Id*. The Court of Appeals affirmed a summary dismissal of McAllister's claims, concluding that the insurer owed neither a duty to defend nor a duty to indemnify. *Id*. Reasoning that "without first establishing the underlying assault, negligence cannot be proved," the court held that McAllister's underlying claim was "'based on'" the assault and battery. *Id*. at 111. Thus, his injuries were excluded from the policy. *Id*.

McAllister, however, is a significantly different case from the one before us. As the Court of Appeals noted, the claims in *McAllister* involved preassault negligence by club employees. *Am. Best Food, Inc.,* 138 Wn. App. at 686 (citing *McAllister,* 103 Wn. App. at 110-11). In contrast, the claims in Dorsey's complaint involve "'discrete intervening act[s] of alleged negligence,'" many of which occurred after the assault. *Id*. at 687 (quoting *United Nat'l Ins. Co. v. Penuche's, Inc.*, 128 F.3d 28, 32 (1st Cir. 1997)).

Many states have found a preassault/postassault distinction in analyzing "assault and battery" exclusions. *See*, *e.g.*, *Penuche's*, 128 F.3d at 30-32 (holding that injuries sustained when a bouncer grabbed a bar patron in a "bear hug" to stop a fight did not arise out of the originating fight); *Bucci v. Essex Ins. Co.*, 393 F.3d 285, 287, 290-91 (1st Cir. 2005) (duty to defend attaches when a bar patron suffered injuries of unknown origin after being knocked unconscious); *Planet Rock, Inc. v. Regis Ins. Co.*, 6 S.W.3d 484, 485, 491 (Tenn. Ct. App. 1999) (complaint alleging failure to render aid to a patron injured in a fight outside of insured's club was sufficient to trigger duty to defend); *West v. City of Ville Platte*, 237 So. 2d 730, 732-33 (La. Ct. App. 1970) (duty to defend arose in a lawsuit alleging negligent postassault care of a prisoner beaten in custody); *W. Heritage Ins. Co. v. Estate of Dean*, 55 F. Supp. 2d 646, 647, 652 (E.D. Tex. 1998) (duty to defend arose on a failure to render aid claim against a bar after a patron died after being beaten in a barroom fight). *But see Taylor v. Duplechain,* 469 So. 2d 472, 474 (La. Ct. App. 1985). In *Penuche's*, *Bucci*, *Planet Rock*, *West*, and *Dean,* a pattern of holding an insurer to a duty to defend in the case of postassault negligence emerges. "Arising out of" in those cases has not been interpreted to inoculate insurers against such a duty because the various negligent acts of insureds—while related to the excluded conduct—were nevertheless independent *enough* to warrant a defense. In these cases, it was irrelevant that the chain of events was caused by an assault; if the insured had acted exactly the same in response to covered occurrence, liability could have been the same.

Alea contends that persuasive out-of-state precedent should not trump binding in-state law. We agree. However, as the Court of Appeals noted, Washington courts have yet to consider the factual scenario before us today. Evaluation of out-of-state cases was appropriate in deciding which rule to apply. The lack of any Washington case directly on point and a recognized distinction between preassault and postassault negligence in other states presented a legal uncertainty with regard to Alea's duty. Because any uncertainty works in favor of providing a defense to an insured, Alea's duty to defend arose when Dorsey brought suit against Café Arizona. *Truck Ins. Exch.*, 147 Wn.2d at 760.

Alea and its amicus State Farm Fire & Casualty Company argue that the Court of Appeals' approach "smacks of proximate cause analysis," Br. of Amicus Curiae State Farm at 9, and is contrary to established Washington law, Suppl. Br. of Pet'r at 4. Alea contends that the phrase "arising out of" encompasses *any* occurrence with a causal connection to the excluded act or omission. We disagree that any causal connection whatsoever between an assault or battery and subsequent negligence would suffice to render the resultant injuries "clearly not covered." Alea directs our attention to three cases. First, in *Toll Bridge Authority v. Aetna Insurance Co.*, 54 Wn. App. 400, 403, 773 P.2d 906 (1989), the Court of Appeals construed a similar term in an insurance policy issued to a ferry operator. When a car exiting a ferry jumped a protective block, it struck and injured four foot passengers. *Id*. at 401. The court held that the insurers owed no duty to indemnify the insured ferry system because one policy excluded coverage for "claims or

accidents arising out of the operations, maintenance or use of any watercraft" and the other excluded coverage for "the operation, maintenance, use, loading, or unloading of any watercraft." *Id*. at 404-05 (citing policies). Reasoning that "[t]he phrase 'arising out of' is unambiguous and has a broader meaning than 'caused by' or 'resulted from,'" the court interpreted the phrase to mean "'originating from', 'having its origin in', 'growing out of', or 'flowing from.'" *Id*. at 404 (quoting *State Farm Mut. Auto. Ins. Co. v. Centennial Ins. Co.*, 14 Wn. App. 541, 543, 543 P.2d 645 (1975) and *Avemco Ins. Co. v. Mock*, 44 Wn. App. 327, 329, 721 P.2d 34 (1986)). The *Toll Bridge* court distinguished three cases[2] where the policy language "logically raised the causation issues decided by the courts." *Id.* at 406. Rather than adopt proximate cause as coverage determinative, the court stated that "'[a]rising out of' and 'proximate cause' describe two different concepts." *Id*. at 407. However, *Toll Bridge* did not consider an allegation that postaccident negligence by the insured caused injuries.

Second, in *Krempl v. Unigard Security Insurance Co.*, 69 Wn. App. 703, 705-06, 850 P.2d 533 (1993),[3] the court declined to apply the "efficient proximate cause" analysis. There, motorists had attached a makeshift gas tank and fuel

[2] *Villella v. Pub. Employees Mut. Ins. Co.*, 106 Wn.2d 806, 725 P.2d 957 (1986); *Graham v. Pub. Employees Mut. Ins. Co.*, 98 Wn.2d 533, 656 P.2d 1077 (1983); *Safeco Ins. Co. of Am. v. Hirschmann*, 52 Wn. App. 469, 760 P.2d 969 (1988), *aff'd*, 112 Wn.2d 621, 773 P.2d 413 (1989).

[3] "[W]here a peril specifically insured against sets other causes into motion which, in an unbroken sequence, produce the result for which recovery is sought, the loss is covered, even though other events within the chain of causation are excluded from coverage." *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 731, 837 P.2d 1000 (1992) (citing *Graham v. Pub. Employees Mut. Ins. Co.,* 98 Wn.2d 533, 538, 656 P.2d 1077 (1983)).

delivery system to a car they recently purchased. *Id*. at 704. When the gas tank caught fire, the plaintiff tried to assist in its removal. *Id*. One motorist tossed the fiery tank on the ground, spraying ignited gasoline onto the plaintiff. *Id*. The Court of Appeals affirmed a summary dismissal in favor of the motorists' insurance company. *Id*. at 709. Because the chain of events leading to the plaintiff's injuries began with an *excluded* activity—the operation of an automobile—the court held that the exclusion applied. *Id*. at 705-07. However, in *Kempl,* unlike here, there were no intervening, allegedly negligent acts by the insured.

Third, in *Detweiler v. J.C. Penney Casualty Insurance Co.*, 110 Wn.2d 99, 101, 751 P.2d 282 (1988), a claimant shot his .357 magnum pistol at the wheel and tire of his truck as it was being driven away by a friend of his, injuring himself in the process. The court held that the driver's liability for the claimant's injuries "arose out of the driver's 'use' of the pickup." *Id*. at 109. The court reasoned that "[i]n order for . . . liability . . . to arise out of the 'use' of an uninsured motor vehicle, it is not necessary that the use be the proximate cause of the . . . injuries . . .; it is only necessary that there be a causal connection between them." *Id*.; *see also Transamerica Ins. Group v. United Pac. Ins. Co.*, 92 Wn.2d 21, 25-28, 593 P.2d 156 (1979) (attaching liability because there was a causal connection between the use of a vehicle and an accident caused when a weapon stored inside went off while being moved), *overruled on other grounds by State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995). Again, however, the court was not considering a case of postaccident negligence by its insured.

Alea's interpretation of Washington law fails to persuade us that its interpretation of the contract is correct. We find persuasive precedent from other states that have found claims that the insured acted negligently after an excluded event are covered. Further, a balanced analysis of the case law should have revealed at least a legal ambiguity as to the application of an "assault and battery" clause with regard to postassault negligence at the time Café Arizona sought the protection of its insurer, and ambiguities in insurance policies are resolved in favor of the insured. *Mut. of Enumclaw Ins. Co. v. Jerome*, 122 Wn.2d 157, 161, 856 P.2d 1095 (1993) (citing *Rones v. Safeco Ins. Co. of Am.*, 119 Wn.2d 650, 835 P.2d 1036 (1992)). Because such ambiguity is to be resolved in favor of the insured, we hold that Alea's policy afforded coverage for postassault negligence to the extent it caused or enhanced Dorsey's injuries.

C. *Breach as a Matter of Law*

We turn now to whether Alea breached its duty to defend as a matter of law, which we find was properly preserved on this record. Alea contends that because it relied upon a reasonable interpretation of the law in refusing to defend, its refusal does not constitute bad faith.[4]

Alea relies upon *Leingang v. Pierce County Medical Bureau, Inc.,* 131 Wn.2d 133, 930 P.2d 288 (1997), which involved the denial of medical benefits and the duty to indemnify, not the duty to defend. We do not find *Leingang* helpful

[4] We also accepted review of Café Arizona's claim that Alea failed to do an adequate investigation. However, it does not appear that any failure to investigate was relevant to Alea's legal interpretation or rejection of its duty to defend. We do not disturb the Court of Appeals holding on this issue.

because the duties to defend and indemnify are quite different. Alea's reliance on *Kirk* is also misplaced. *Kirk* was a certified question from the federal court in which we were asked to assume both a duty to defend and bad faith. *Kirk,* 134 Wn.2d at 560. There, we were considering an "intentional abuse of a fiduciary relationship." *Id.* at 562. The important holding of *Kirk* is our reaffirmation of the presumption of harm that occurs when an insurer wrongfully refuses to defend:

> The rebuttable presumption of harm applies to the question before us because a bad faith breach of the duty to defend wrongfully deprives the insured of a valuable benefit of the insurance contract, and leaves the insured faced with the difficult problem of proving harm. Without the rebuttable presumption of harm, the insurer could defend its position under the following contract theory—even if there were a duty to defend, our bad faith breach did not cause injury to the insured because ultimate liability was found to be outside the scope of coverage. . . . The rebuttable presumption of harm must be applied because an insured should not be required to prove what might have happened had the insurer not breached its duty to defend in bad faith; that obligation rightfully belongs to the insurer who caused the breach. *Butler*, 118 Wn.2d at 390.

Id. at 563. This presumption of harm animates much of our post—*Butler* insurance jurisprudence. As recently as *Woo v. Fireman's Fund Insurance Co.,* 161 Wn.2d 43, 164 P.3d 454 (2007), we rejected the argument now advanced by Alea that an insurer may rely upon its own interpretation of case law to refuse to defend:

> [The insurer] is essentially arguing that an insurer may rely on its own interpretation of case law to determine that its policy does not cover the allegations in the complaint and, as a result, it has no duty to defend the insured. However, 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. Here, [the insurer] did the opposite—it relied on an equivocal interpretation of case law to give *itself* the benefit of the doubt rather than its insured.

Id. at 60. We upheld the jury's conclusion that the denial was in bad faith. *Id.* at 68.

An insurer acts in bad faith if its breach of the duty to defend was unreasonable, frivolous, or unfounded. *See St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.,* 165 Wn.2d 122, 130, 196 P.3d 664 (2008) (quoting *Smith v. Safeco Ins. Co.,* 150 Wn.2d 478, 485, 78 P.3d 1274 (2003)); *Truck Ins. Exch.,* 147 Wn.2d at 777. We specifically disapprove of language to the contrary, *e.g., Holly Mountain Res., Ltd. v. Westport Ins. Corp.* 130 Wn. App. 635, 650, 104 P.3d 725 (2005). This test is in the disjunctive.[5]

Again, if there is any reasonable interpretation of the facts or the law that could result in coverage, the insurer must defend. *Truck Ins. Exch.,* 147 Wn.2d at 760 (citing *Kirk,* 134 Wn.2d at 561). Exclusions are interpreted narrowly. *Phil*

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[5] Contrary to the dissent's suggestion, we do not presume that a breach of the duty to defend is per se bad faith. Dissent at 7. We respectfully disagree with the dissent's analysis of our case law. Statements made in passing, taken in isolation, are not holdings of this court. The dissent relies on a statement made in passing in *Overton v. Consolidated Insurance Co.,* 145 Wn.2d 417, 433, 38 P.3d 322 (2002) that "[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." But *Overton* was not considering an erroneous decision not to defend by an insurance company. *Overton* relied on *Kirk,* 134 Wn.2d at 560, where we were asked to assume bad faith by the federal court, and the statement was there to frame the analysis. It was, thus, dicta. *Kirk* relied on a consumer protection act case, *Transcontinental Insurance Co. v. Washington Public Utilities Districts' Utility System,* 111 Wn.2d 452, 470, 760 P.2d 337 (1988), which predated this court's recognition of bad faith as separate tort in *Butler* by several years. The instant case appears to be the court's first opportunity to consider whether we should import bad faith under the consumer protection act into the *Butler* tort. We find that is inconsistent with the insurer's obligation to resolve every doubt in favor of the insured, not itself, and therefore decline to do so.

Schroeder, 99 Wn.2d at 68. In order to put the incentives in the right place and because it is often impossible for an insured to prove damages for wrongful refusal to defend, we have established a remedy that does not require it. *See, e.g., Truck Ins. Exch.,* 147 Wn.2d at 765; *Kirk,* 134 Wn.2d at 560; *Butler,* 118 Wn.2d at 393-94. It cannot be said that the insurer did not put its own interest ahead of its insured when it denied a defense based on an arguable legal interpretation of its own policy. Alea failed to follow well established Washington State law giving the insured the benefit of any doubt as to the duty to defend and failed to avail itself of legal options such as proceeding under a reservation of rights or seeking declaratory relief. 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.[6]

[6] We agree with the courts below that summary judgment was properly granted to Alea on Café Arizona's consumer protection act claims and claims based on alleged violations of Washington insurance code violations. Café Arizona simply did not come forward with sufficient evidence to raise a factual issue.

Conclusion

In sum, the duty to defend is different from and broader than the duty to indemnify. *Butler*, 118 Wn.2d at 392. The duty to defend is triggered when a complaint against an insured, construed liberally, alleges facts which could, if proved, impose liability upon the insured within the policy coverage. *Truck Ins. Exch.,* 147 Wn.2d at 760. In deciding whether to defend, an insurer may not put its own interest above that of its insured. *T&G Const., Inc*., 165 Wn.2d at 269. An insurer may not refuse to defend based upon an equivocal interpretation of case law to give itself the benefit of the doubt rather than its insured. *Woo*, 161 Wn.2d at 60. An insured may defend under a reservation of rights and may seek declaratory relief to establish that its policy excludes coverage. *Truck Ins. Exch.,* 147 Wn.2d at 760-61. Alea's "assault and battery" exclusion does not apply to allegations that postassault negligence enhanced a claimant's injuries. Alea's refusal to defend Café Arizona based upon an arguable interpretation of its policy was unreasonable and therefore in bad faith. Alea breached its duty to defend as a matter of law. We affirm the Court of Appeals in part and remand to the trial court for further proceedings consistent with this opinion.

AUTHOR:

Justice Tom Chambers

WE CONCUR:

Justice Charles W. Johnson	Justice Mary E. Fairhurst
Justice Richard B. Sanders	Philip J. Thompson, Justice Pro Tem