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No. 70143-6-I

COURT OF APPEALS
DIVISION 1
OF THE STATE OF WASHINGTON

WESTERN NATIONAL ASSURANCE COMPANY,
a Washington Corporation,
Respondents,

v.

SHELCON CONSTRUCTION GROUP, LLC, a Washington
Limited Liability Company,
Appellants.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

Error is assigned to the trial court's granting of summary judgment in favor of Western National Assurance Company ("WNAC") and denying Shelcon Construction Group, LLC's ("Shelcon") Motion for Summary Judgment. Both parties agreed there existed no material facts in genuine dispute.

II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did WNAC breach its duty to defend Shelcon against the claims asserted by A-2 Venture, LLC. ("A-2").

III. STATEMENT OF THE CASE

A-2 sued Shelcon for property damage to A-2's undeveloped land located in Puyallup ("Subject Property"). (CP 18, pgs. 59-63). The property damage for which A-2 sued Shelcon was A-2's loss of use of the Subject Property for construction of 57 homes to be built upon conventional foundations. (CP 18, pgs. 59-63).

A-2 hired Shelcon to prepare the Subject Property for A-2's construction of 57 homes built upon conventional foundations. (CP 18, pgs. 59-63). A-2's business plan was to then construct and sell the homes to the public. (CP 18, pgs. 59-63).

Prior to Shelcon's work on the Subject Property, A-2 retained the services of a geotechnical engineering firm, The Riley Group, who advised A-2 that the Subject Property was unstable and potentially unable to provide adequate support for construction of homes built upon conventional foundations. (CP 18, pgs. 59-63). The Subject Property was potentially unstable because there were significant deposits of peat underneath the ground surface. (CP 18, pg. 126). The depths of the peat deposits were undetermined. (CP 18, pg. 61). A-2 retained The Riley Group to design a procedure for compacting the Subject Property. (CP 18, pg. 124). The Riley Group recommended that Shelcon place settlement markers on top of the native soil, import and place approximately 4-6 feet of surcharge on top of the native soil, and then measure the rate and amount of settlement of the native soil. (CP 18, pg. 126). When no more settlement was measureable, then the 57 homes could be constructed upon conventional foundations. (CP 18, pgs. 59-63).

Shelcon installed the settlement markers on top of the native soil. (CP 18, pg. 125). Shelcon then imported and placed the 4-6 feet of surcharge on the entire Subject Property, leaving the tips of the steel rods visible above the ground, the vertical movement of which was to be later measured by laser. (CP 18, pg. 126). All settlement markers installed by Shelcon's workers were installed pursuant to the project drawings. (CP 18, pg. 126)

Shelcon imported approximately 11,000 truckloads of surcharge and properly placed the surcharge over the entire Subject Property. (CP 18, pg. 127). However, during the course of importing and placing the surcharge across the Subject Property, the trucks accidentally ran over and destroyed all the settlement markers thus leaving the Subject Property covered with 4-6 feet of surcharge which could no longer be measured in terms of its rate of settlement. (CP 18, pg. 127).

A-2 alleged in its Complaint that it was "impractical" to install the settlement markers once the 4-6 feet of surcharge had been imported and placed. (CP 18, pg. 62). A-2 alleged that the settlement markers had to be placed ***before*** the surcharge. (CP 18, pg. 61). Otherwise, settlement could not be accurately measured according to A-2. (CP 18, pg. 61). Because, the stability of the ground remained unmeasured and thus uncertain, the Subject Property could not be used to construct conventional foundations upon. (CP 18, pgs. 61-62).

A-2 sued Shelcon for damage to the Subject Property, due to loss of use of the Subject Property to support construction of 57 homes built upon conventional foundations. (CP 18, pgs. 59-63). A-2 claimed that Shelcon's destruction of the settlement markers caused ***"a total failure to meet the geotechnical requirements of the job so that the property could be used to construct improvements on"***. (CP 18, pgs. 61-62). A-2 further alleged that

Shelcon's negligent destruction of the settlement markers "...caused the plaintiff to sustain far reaching damages...", ***including*** the loss in value and marketability of the property. (CP 18, pg. 62).

A-2 did ***not*** sue Shelcon for damage to the settlement markers. A-2 did ***not*** claim that the settlement markers were incorrectly or negligently installed by Shelcon. A-2 did ***not*** claim that Shelcon incorrectly or negligently imported and placed the surcharge of dirt. Rather, A-2 sued Shelcon because of Shelcon's allegedly negligent destruction of the settlement markers which A-2 claimed ***resulted*** in A-2's ***loss of the use*** of the Subject Property to construct 57 homes with conventional foundations. (CP 18, pgs. 61-62). It is this ***loss of use*** of the Subject Property that formed the basis of A-2's lawsuit against Shelcon.

WNAC issued Policy No. CP-300007658-02/000 ("CGL Policy") to Shelcon. The CGL Policy expressly included WNAC's standard Commercial General Liability Coverage Form CG 00 01 12 04. (CP 18, pgs. 66-81). Upon being served with A-2's Summons and Complaint, Shelcon timely tendered the defense to WNAC. (CP 18, pgs. 83-85). WNAC denied Shelcon's tender of defense because WNAC elected not to read A-2's claim as being a claim for property damage. (CP 18, pgs. 88). Shelcon then took the deposition of A-2's sole member (Scott Haymond). (CP 18, pgs. 91-111). Haymond testified that Shelcon's negligent

destruction of the settlement markers resulted in the loss of use of A-2's property. (CP 18, pgs. 96-98, 100-102). Shelcon forwarded Haymond's complete deposition to WNAC with a second tender of defense. (CP 18, pgs. 114-116). WNAC still refused to defend. (CP 18, pgs. 118-120). WNAC then chose to focus on that part of A-2's Complaint that claimed that Shelcon's negligent destruction of the settlement markers "reduced the value of the property substantially".

> **"There is no claim that Shelcon's work resulted in physical injury to or loss of use of the property; only that the property became less attractive to potential buyers".** (CP 18, pg. 118).

WNAC chose to ignore A-2's allegations in A-2's Complaint which further claimed that **"the property could not be used to construct improvements on"** (CP 18, pgs. 61-62) and that A-2's damages were **"far reaching"** (CP 18, pg. 62), thus potentially including damages other than loss of value.

WNAC also refused to defend Shelcon because:

> **"Removal of the settlement markers occurred while Shelcon was "performing operations" at the site and Policy CP300007658 excludes damage occurring while the insured is performing operations on the job site":** (CP 18, pg. 118).

WNAC's position was that if Shelcon damaged any property during the course of its operations, regardless of how and no matter whether that

damage lead to subsequent or consequential damage, whatever damage was caused by Shelcon, either initially or consequentially, that damage was excluded from coverage.

> **"Even if the complaint did allege "property damage" as that term is defined in the policy, exclusions in the policy would eliminate coverage. Removal of the settlement markers occurred while Shelcon was "performing operations" at the site and policy CP 300007658 excludes damage occurring while the insured is performing operations on a job site:"** (CP 18, pg. 118).

WNAC also refused to defend Shelcon because WNAC took the position that there was no physical injury to the Subject Property by the placement of 4-6 feet of surcharge on top of the Subject Property that could no longer serve the purpose of the surcharge, which was to measure the rate and amount of settlement of the native soil in order to proceed with the construction of homes built upon conventional foundations. WNAC stated as follows:

> **"The land has not sustained a physical injury."**
> (CP 18, pg. 120).

Additionally, WNAC refused to defend because WNAC elected to interpret plaintiff's Complaint as ***not*** alleging a loss of use, but simply alleging that the property was less marketable. Specifically, WNAC stated:

> **"Although it is less marketable, it can be used and therefore has not sustained a loss of use."** (CP 18, pg. 120).

WNAC further declined to defend Shelcon because WNAC opined that the settlement markers ***could*** be replaced after the surcharge was imported and spread across the Subject Property. WNAC stated as follows:

> **"The property is tangible property that has not been physically injured or is less useful because of the removal of the settlement markers. It could be restored to use by replacement of the settlement markers and therefore satisfies the definition of "impaired property."** (CP 18, pg. 120).

However, earlier on December 19, 2011, WNAC stated its understanding of A-2's claims far differently:

> **"A2 maintains that Shelcon failed to adhere to the Riley Group Geotechnical Report dated October 24, 2005 that was a part of the contract documents. Soils conditions at the site called for the installation of settlement markers to be inspected until 95% compaction was achieved at each level of fill. A2 asserts that Shelcon removed the markers and simply continued to install fill material. Their actions resulted in "a total failure to meet the geotechnical requirements of the job so that the property could be used to construct improvements on. When defendant's said negligent actions had been discovered, the costs and time of remedying the errors was impractical. The said actions by defendant reduced the value of the property substantially."** (CP 18, pg. 87).

Then, three short months later on March 20, 2012, WNAC expressed the following contrary understanding:

> "There is *no* claim that Shelcon's work resulted in physical injury to or loss of use of the property; only that the property became ***less attractive*** to potential buyers," (emphasis supplied). (CP 18, pg. 118).

WNAC's first letter of denial on December 19, 2011 clearly stated as follows:

> "Their *(referring to Shelcon)* actions resulted in a total failure to meet the geotechnical requirements of the job ***so that the property could be used to construct improvements on***". (CP 18, pg. 87).

But later, on March 20, 2012, WNAC wrote:

> "Although it is less marketable, it can be used and therefore has not sustained a loss of use."
>
> "Their *(Shelcon's)* actions resulted in a total failure to meet the geotechnical requirements of the job ***so that the property could be used to construct improvements on.***" (CP 18, pg. 120).

WNAC did nothing to investigate the claims asserted by A-2. WNAC never contacted A-2. WNAC never contacted A-2's attorney. WNAC never requested a single document from A-2, A-2's attorney, or Shelcon's attorney. WNAC never reviewed the geotechnical reports prepared by The Riley Group or any of the other documents expressly identified in A-2's Complaint against Shelcon. All of this contact information was contained within A-2's

Complaint. (CP 18, pgs. 59-63). WNAC declined to attend Mr. Haymond's deposition.

A-2's claims came on for trial in the Pierce County Superior Court Department No. 10, at the conclusion of which Judge Garold E. Johnson entered Findings of Fact and Conclusions of Law and Judgment in favor of Shelcon and against A-2. (CP 18, pgs. 122-134).

WNAC filed a Complaint For Declaratory Relief. (CP 1). Both WNAC and Shelcon filed for motions for summary judgment. (CP 18 and 20). The trial court granted WNAC's motion for summary judgment and denied Shelcon's motion for summary judgment. (CP 34 and 35). This appeal followed. (CP 36).

IV. ARGUMENT

A. THE POLICY COVERAGE

(1) Property Damage

The CJL Policy provides the terms and conditions of WNAC's coverage for property damage that has been accidentally caused. Section I is entitled "Coverages" and states in pertinent part as follows:

> **SECTION 1 – COVERAGES**
> **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
> **1. Insuring Agreement**
> **a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or**

"property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defned the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.

Section V of the CGL policy defines some (but not all) of the words used within the CGL Policy. Property damage is one of the words defined in the CGL Policy. Property damage is defined as follows:

17. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

According to the CGL Policy, "Property damage" means "physical injury" to "tangible property", ***including*** loss of use of that property. The CJL Policy provides no definitions of "physical", "injury", "tangible", "property", "resulting", "loss", "use", "or that property". So those worked should be given their ordinary meanings.

The CGL Policy insures against either or both (1) physical injury to the property, and/or (2) loss of use of the property. "Property damage" is a

covered loss regardless of physical injury to A-2's property because the CGL Policy insured Shelcon against A-2 claims of ***loss of use*** of A-2's property, regardless of physical injury to A-2's property which there most certainly existed due to the placement of 4-6 feet of surcharge spread across the Subject Property.

(2) Occurrence.

Section I(b)(1) provides that 'property damage' must be caused by an "occurrence".

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "Occurrence" that takes place in the "coverage territory."

"Occurrence" is defined by the CGL Policy as follows:

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

Within the policy's definition of "occurrence", the term "accident" was left undefined by WNAC.

The "occurrence" in this case was the accidental destruction of the settlement markers by Shelcon. WNAC itself recognized in writing that the damage to the settlement markers was an "occurrence".

In its letter of March 20, 2012, WNAC clearly acknowledged that destruction of the settlement markers was an "occurrence" within the meaning of the CGL Policy. WNAC wrote as follows:

> "Any loss of use of the property that was not damaged is deemed to have ***occurred*** at the time of the "occurrence" that caused the loss of use. ***Here***, that would be removal of the markers." (Emphasis supplied).

In Shelcon's case, the occurrence alleged by A-2 was Shelcon's negligent destruction of the settlement markers. In Shelcon's case, the property damage covered by the CGL Policy was the resulting loss of use of A-2's Subject Property to support construction of 57 homes with conventional foundations. There was no coverage for damage to the settlement markers themselves, nor did A-2's Complaint seek recovery for damage to the settlement markers, nor did A-2's Complaint seek damages for the cost of replacing the settlement markers, nor did A-2's Complaint seek a credit from Shelcon for not installing the settlement markers. Rather, A-2 alleged in its Complaint as follows:

> "The employees of defendant removed the settlement markers without the knowledge of the plaintiff or plaintiff's engineers and continued to install fill on top of the area. This made it impossible to accurately measure the settling. There was therefore a total failure to meet the geotechnical requirements of the job so that the property could be used to construct improvements on. When defendants said negligent actions had been discovered, the costs and time of remedying the errors was impractical." (CP 18, pg. 61).

In *Diana v. Western National Insurance Company*, 56 Wn.App 741 (1990), the Court defined "accident" as "an unusual, unexpected, and unforeseen happening". In addition, the Court stated "an accident is never present when a deliberate act is performed (e.g., trucks running over settlement markers) unless some additional unexpected, independent and unforeseen happening occurs" that produces the damage (e.g., loss of Subject Property's use for construction of homes).

In Shelcon's case, the "additional, unexpected, independent and unforeseen happening" that occurred and that also produced the property damage to A-2 (i.e., loss of use of property) was not the damage to the settlement markers, but the consequences which ensued from the destruction of the settlement markers throughout the course of importing and placing the surcharge. A-2 alleged that the settlement markers could not be installed after the surcharge had been imported and placed. And, as A-2 alleged, without the settlement markers properly in place, A-2's property was damaged by 4-6 feet of surcharge on the property with no capability of measuring the settlement. Therefore, A-2 lost the use of the Subject Property to construct homes upon conventional foundations. Again, the "accident" or "occurrence" is not the damage to the settlement markers. The "accident" or "occurrence" is the property damage (loss of

use) to A-2's property that was the unexpected result of the destruction of the settlement markers.

(3) Physical Injury to A-2's Property.

Shelcon allegedly negligently destroyed the settlement markers. Damage to the settlement markers alone was not a covered loss. That was a business risk assumed by Shelcon. Shelcon understands that. However, A-2 did not sue Shelcon to recover damages for the damaged or destroyed settlement markers themselves. Rather, A-2 sued Shelcon for damage (resulting loss of use) to the Subject Property ***as a result of*** Shelcon's allegedly negligent destruction of the settlement markers. ***This*** property damage ***is*** a covered loss.

WNAC denied there was property damage because there was no physical injury to the Subject Property caused by placement of the fill dirt on top of the native soil.

"The land has not sustained a physical injury."

But the CGL Policy's definition of "property damage" does not require that there be physical injury to the property. Property damage is also defined by the CGL Policy to include loss of use.

(4) Loss of Use.

WNAC further denies that A-2 sustained loss of use of the Subject Property. WNAC asserted that A-2 still had remaining uses for the

Subject Property other than for the construction of 57 homes with conventional foundations. WNAC denies that A-2 sustained property loss other than diminution in value of its property.

> ***"Although it is less marketable, it can be used and therefore has not sustained a loss of use".***

But it was not for WNAC to second guess A-2's Complaint. A-2's Complaint alleged a loss of use. WNAC was just arguing with its own insured. Instead, WNAC should have been defending its insured.

(5) Repair, Restoration, Replacement.

WNAC acknowledged that the Subject Property was tangible property within the meaning of the CGL Policy's definition of "property damage", but refused to defend the claim because WNAC opined that the settlement markers ***could*** be replaced. WNAC's position is that

> ***"It could be restored to use by replacement of the settlement markers and therefore satisfies the definition of "impaired property".***

But it is the allegations that matter: not WNAC's disagreement with those allegations.

It was WNAC's duty to defend Shelcon against those allegations if:

1. Those allegations "conceivably" could trigger coverage, and/or unless

2. It is "clear" that the allegations in the Complaint could not trigger coverage. *American Best Food, Inc v. Alea London, Ltd,* 168 Wn. 2d. 398 (2010).

WNAC disagreed with A-2's allegations that the Subject Property was damaged because its settlement and compaction could no longer be measured ("impractical"), and therefore did not accept A-2's allegations that A-2 sustained loss of use of the Subject Property for construction of 57 homes built upon conventional foundations. WNAC's disagreement with A-2's allegation does not equate with WNAC's duty to defend Shelcon against those allegations.

B. THE POLICY EXCLUSIONS

WNAC relied upon three (3) exclusions. Each of these three (3) exclusions applies to "property damage". They are commonly referred to as the "business risk" exclusions. The three exclusions are (1) Exclusion j(5), (2) Exclusion j(6), and (3) Exclusion (m):

> **j(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or**

j(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

m. Damage To Impaired Property Or Property Not Physically Injured
"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accident physical injury to "your product" or "your work" after it has been put to its intended use.

The purpose, scope and application of Exclusions j(5) and j(6) are well summarized by **Couch On Insurance, 3D, §129:20 Work in Progress Exclusions**, as follows:

> Exclusion j(5) has generally been applied to preclude coverage for damages to particular real property resulting from or arising out of the ongoing operations of the insured. The purpose of exclusion j.(6) is to preclude coverage for the costs to repair or replace particular work which is discovered to be defective or otherwise incorrectly performed while the insured is still performing its work.
>
> Both of these exclsions are limited in their application by both time and scope. In order for these exclusions to apply, the claims must arise at the time the insured is actually performing the work on the property. Conversely, the exclusions do not apply to claims which arise after the

> insured's operations are complete. These exclusions will further only apply to that "particular part" of the subject property where the operations were being performed by the insured."

1. Exclusion j(5)

Exclusion j(5) excludes from coverage any "property damage to that ***particular part*** of real property" on which Shelcon was performing operations. Property damage to the particular part (i.e., settlement markers) is never covered. Damage to the "particular part" is just a business risk. In this case, the ***particular part*** was the settlement markers. Damage to that "particular part" (i.e., the settlement markers) is not covered by the CGL Policy. That is a business risk assumed by Shelcon. But the the CJL Policy ***does*** cover the consequential property damage cause by the negligent destruction of the settlement markers if the consequential property damage arose out of Shelcon's operations on the particular part (i.e. the settlement markers). WNAC's interpretation of the j(5) exclusion is that the j(5) exclusion excludes any and all property damage caused by Shelcon during the course of its operations on A-2's property. But if that were a reasonable interpretation, there would never be ***any*** insurance for any property damage. The only reason or basis for Shelcon to be working on A-2's property was to perform operations. If anything and everything from Shelcon's

operations were excluded from any coverage, there would be no reason to buy CGL insurance.

Exclusion j(5) ***only*** excludes property damage to that ***particular part*** which Shelcon damaged during the course of its operations, which in this case was the negligent destruction of the settlement markers. If the CGL Policy excluded ALL property damage caused by Shelcon, there would be no reason for the definition of "property damage" to include ***"particular part"*** or ***"resulting loss of use"*** arising out of those operations concerning the particular part (i.e., the settlement markers). The CGL Policy insured Shelcon against A-2's claims of resulting loss of use of the property. It is the loss of use or the damage to the Subject Property that is the "property damage" for which A-2 sought recovery. A-2 did ***not*** seek recovery for damage to the settlement markers. The settlement markers were the ***"particular part"*** of the real property on which Shelcon was performing operations at the time that Shelcon negligently destroyed the settlement markers. The resultant loss of use of A-2's property arose out of ***"those operations"*** ("those operations" being the destruction of the settlement markers). The word or term ***"those operations"*** must necessarily refer only to operations on ***"that particular part"*** of property upon which Shelcon was performing operations: not the whole project. That is the only way to apply

Exclusion j(5) to A-2's claim and WNAC's duty to defend against that claim.

Exclusion j(5) is an awkward read at first glance. That is because Exclusion j(5) would be a little clearer if it had better punctuation. In the CGL Policy itself, Exclusion j(5) is stated as follows:

> "That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations if the "property damage" arises out of those operations."

The above printed j(5) exclusion would read more clearly if commas were placed as follows:

> "That particular part of real property on which you or any contractors or subcontractors, working directly or indirectly on your behalf, are performing operations, if the "property damage" arises out of those operations."

The j(5) exclusion not only applies to Shelcon's work, but it also applies to any work performed by Shelcon's subcontractors. Thus, for all intents and purposes on Shelcon's motion for summary judgment, the j(5) exclusion can be succinctly stated as follows:

> That ***particular part*** of real property on which Shelcon performed operations if the ***"property damage"*** arose out of ***those*** operations.

But the limited and narrow scope of Exclusion j(5) is still apparent.

Exclusion j(5) only excludes coverage for damage to that ***particular part*** of the property on which Shelcon (or its subcontractors) were performing operations (i.e. the settlement markers) if the "property damage" (loss of use of the Subject Property's to support the construction of homes built upon conventional foundations) arises out of ***"those"*** operations the word ***"those"*** referring to Shelcon's work on ***"that particular part of real property"*** (i.e., the settlement markers). This is the only way to apply Exclusion j(5). There is no other way. Every court in the United States that has been presented with this issue has concluded that this is the only way to read Exclusion j(5). See citations on page 24. There is no other way. ***"that particular part"*** does not refer to the entire project or to the entire Subject Property. Rather, the words ***"that particular part"*** refer to the property that was initially damaged by Shelcon (i.e., the settlement markers).

A good way to see what the CGL Policy means by "that particular part" is to look at the j(1), (2), (3), (4), and (6) exclusions. They ***all*** deal with the insured's very own property ***or*** the property or thing that the insured touched and damaged: the first link in the chain of progressive damage. The first link is never covered by insurance. That is the link in the chain called "business risk.".

The carpenter drives a finishing nail through the baseboard beneath the newly installed kitchen cabinets. Unknown to the carpenter, the nail penetrates a plumbing line. The ***"occurrence"*** was the driving of the nail. Yes, the carpenter deliberately drove the nail, not doing so by chance or accident or whim. However the consequences of driving the nail were unexpected and unforeseen by the carpenter, and thus constitute an ***"occurrence"*** within the meaning of the CGL Policy because the CGL Policy defines ***"occurrence"*** as follows:

> 13. "Occurrence" means an accident..."(CP 18, pg. 79).

Given this ***"occurrence"***, here is how the coverage plays out.

Scenario #1. Nail enters pipe. Water gushes out underneath the baseboard. Carpenter sees all of this. Carpenter quickly goes down to the basement and turns off the water to the house. Carpenter rushes back to the kitchen, pulls off the baseboard, cleans up all the water, replaces the pipe, installs a new baseboard, turns the water pressure on, and that is the end of that. All the cost of "that" is borne by the carpenter. That was the first link in the chain. That is the "business risk" link. There is no insurance under the CGL Policy for "that" property damage to the pipe. That is just a "business risk" of damaging your own work. Like breaking up a customer's irrigation system while operating a backhoe as part of building a rockery for the

customer. If you touch and damage, that's on you. What you touched and damaged is your (not the insurer's) "business risk". If the roofing contractor uses nails that are too long and thus penetrate the sheeting underneath the roofing materials so that water pours into the attic, there's no insurance to tear off the roofing materials and tear off the sheeting. That's because the contractor touched all of that work and it is simply a business risk that the contractor assumes when he hires employees. But, the water damage in the attic ***is*** a covered loss. That's because ***"that particular part"*** of the real property being worked upon by the contractor was the exterior of the roof, not the attic. So, ***"that particular part"*** is not covered, but the water damage is covered by the contractor's CGL Policy.

Scenario #2. No observable leaks. But the pipe slowly leaks as the nail works loose over the next few years, but at a rate so slow that no water ever seeps out onto the kitchen floor. Instead, the water just accumulates behind the baseboard and eventually rots out the flooring underneath the cabinets as well as the subfloor. Years later this is discovered because there are bad odors in the kitchen. Now, it's not just a matter of pulling off a baseboard, mopping up some water and replacing a pipe. Now, all the cabinets have to be pulled out and a new floor constructed by the kitchen. That ***is*** a covered CGL loss. That loss is not excluded by the j(5) exclusion. Applying the j(5) exclusion, the ***"particular part"*** was the baseboard, nail,

and pipe. ***"Those operations"*** are the operations performed on the baseboard, the nail, the pipe: i.e., ***"that particular part"*** of the real property (the house) on which the carpenter was performing operations when the "property damage" covered by the CGL Policy (replacement of the rotted flooring, subflooring, etc), occurred. The ***covered*** property damage was the damage to the kitchen floors and subflooring underneath the kitchen cabinets, and the ***insurer*** has to pay for that. As for the replacement of the baseboard and the pipe and the nail, that's for the insured to pay for.

See, *Transportation Insurance Co. v. Piedmont Construction Group, LLC*, 686 S.E. 2d 824 (2009); *Columbia Insurance Company v. Schauf*, 967 S.W.2d 74 (1998); *Acuity v. Burd & Smith Construction, Inc. 721 N.W.2d 33 (2006).*

2. Exclusion j(6)

Exclusion j(6) does not apply in this case because A-2 never claimed that the settlement markers could be restored, repaired, or replaced after they were destroyed by Shelcon. Just the opposite. A-2's Complaint expressly alleged the opposite: "remedying the errors was impractical". So, A-2 never made a claim that would fall within Exclusion j(6). Now, WNAC's opinion is that A-2 is wrong: that the settlement markers could have been restored, replaced or repaired. But that's not what A-2 claimed in

its Complaint or deposition and therefore WNAC's opinion, although acknowledged and respected, is immaterial. See, *Mid-Continent Casualty Co. v. JHP Development, Inc.*, 557 F.3d 207 (2009).

3. Exclusion (m)

The nature, scope and application of Exclusion (m) has been well summarized in **Couch On Insurance 3d §129:21, Impaired Property Exclusion** as follows:

> "The impaired property exclusion contained in he standard commercial general liability policy precludes coverage for property damage to property, other than the insured's work or product, which is not physically damaged and which damage is cause by the insured's faulty work or products when there is no physical injury to the property. In other words, this exclusion prevents an insured from claiming coverage for pure economic losses. However, the exclusion does ***not*** apply where there is physical damage to the other property into which the insured's work or product has been incorporated or if the insured's work cannot be repaired or replaced without causing physical injury to the other property. The exclusion also does ***not*** apply when the loss of use arises out of a sudden and accidental physical injury to the insured's product."

Exclusion (m) does not apply because Exclusion (m) deals with "damage to impaired property". Impaired property is defined by the policy as follows:

8. "Impaired property" means tangible property, other than "your product" or your work", that cannot be used or is less useful because:

a. It incorporates "your product" or "your work" that is known or though to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill the terms of a contract or agreement;

If such property can be restored to use by:

a. The repair, replacement, adjustment or removal of "your product" or "your work"; or

b. Your fulfilling the terms of the contract or agreement

There are four (4) parts to Exclusion (m), and ***all*** have to be present in order for Exclusion (m) to apply. The four parts are as follows:

1. Someone else's (A-2's property) has to be made useless or less useful because a particular part (Exclusion j(5)) of Shelcon's work was "defective, deficient, or inadequate". Now, that part of Exclusion (m) is present in this case. Shelcon's work was deficient because Shelcon's work on the Subject Property did not include settlement markers. Initially it did, but then the settlement markers were accidentally destroyed. So it can be reasonably stated that someone else's property, (i.e., the 11.2 acres constituting the Subject Property) became less useful because of Shelcon's deficient work.

2. Exclusion (m) never applies unless the "defect, deficiency, or inadequacy" in the work can be "repaired, replaced, or adjusted".

3. Exclusion (m) never applies if the property damage was caused by accident.

4. Exclusion (m) never applies to property that has been physically injured.

In this case, the A-2 specifically alleged that the settlement markers could not be replaced. A-2 alleged that it was impractical to do so. That's what A-2 claimed at trial. That was the testimony of A-2's geotechnical engineers at the trial. So, A-2's property was not "impaired property". It was not "impaired property" because Shelcon's destruction of the settlement markers could not be cured by the repair, replacement, or adjustment of the settlement markers according to A-2's allegations. The plaintiff specifically alleged that such could not be done because it was not practical to do so.

Furthermore, Exclusion (m) specifically states that Exclusion (m) does not apply to the loss of use of the Subject Property arising out of an accidental physical injury to Shelcon's work.

m. Damage To Impaired Property Or Property Not Physically Injured "Property damage" to "impaired property" or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accident physical injury to "your product" or "your work" after it has been put to its intended use.

WNAC was provided a true, accurate and complete copy of Scott Haymond's deposition. Scott Haymond was the sole member of A-2 Venture, LLC. Scott Haymond clearly testified that the destruction of the settlement markers was accidental. A-2's Complaint itself alleged the tort of negligence. A-2 did not allege deliberate destruction of the settlement markers. The case proceeded to trial on A-2's theory of tort and breach of contract. (CP 18, pgs. 59-63).

Finally, Exclusion (m) does not apply to property that has been physically injured. Exclusion (m) only applies to property that has become "impaired" but ***not*** physically injured. In this case, there was physical injury. There was placement of 4-6 feet of nonstructural surcharge over the entire site of allegedly unstable soil. Just ask yourself, if you came home from work one summer evening to discover 4-6 feet of dirt covering your entire yard and driveway, would you say "no harm, no foul"? Webster's Dictionary defines injury as "harm or damage". The CGL Policy provides no definition whatsoever of the words "physical" or "injury". WNAC contends that their interpretation of the term "physical injury" excludes the placement of the fill dirt on top of the Subject Property. Maybe that's a

reasonable interpretation. On the other hand, Shelcon interprets "physical injury" in the same way that a homeowner would interpret physical injury upon discovery of 4-6 feet of fill dirt covering their yard and driveway. Shelcon's interpretation of "physical injury" is reasonable too. See, *Essex Insurance Company v. Bloomsouth Flooring Corporation*, 562 F.3d 399 (1st Cir. 2009).

C. THE DUTY TO DEFEND

There exists a well developed body of Washington precedent regarding the nature of an insurer's duty to defend and whether or not the insurer has met or breached that duty. *Woo v. Fireman's Fund Insurance Company*, 161 Wn.2d 43 (2006) provides a good summary of this developed precedent. In *Woo v. Fireman's Fund Insurance Company*, Tina Alberts worked for Woo as a dental surgical assistant. Woo performed a dental procedure on Alberts. While Alberts was under anesthesia, Woo inserted two boar tusk "flippers" in Albert's mouth and took photographs of her. After taking the photographs, Woo completed the planned procedure without further incident. Alberts was given the photographs at a gathering to celebrate her birthday. Dr. Woo and his staff thought this was a funny, practical joke. Alberts did not see it that way. She quit her job and sued Woo. Woo's policy contained general liability coverage. Fireman's Fund

denied coverage. The Court stated that Fireman's Fund Insurance Company "refused to defend under the general liability provision on the grounds that the alleged practical joke was intentional and not considered a business activity. Fireman's Fund at 458. In reaching its ultimate conclusion that Fireman's Fund Insurance Company should have provided a defense to Dr. Woo, the Court summarized the law in Washington with regard to an insurer's duty to defend as follows:

> A. The duty to defend
> [4][5][6][7][8][9][10] ¶ 14 The rule regarding the duty to defend is well settled in Washington and is broader than the duty to indemnify. *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wash.2d 55, 64, 1 P.3d 1167 (2000). The duty to defend "arises at the time an action is first brought, and is based on *the potential for liability.*" *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wash.2d 751, 760, 58 P.3d 276 (2002) (emphasis added). An insurer has a duty to defend " 'when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within ***53** the policy's coverage.' " *Id.* (quoting *Unigard Ins. Co. v. Leven*, 97 Wash.App. 417, 425, 983 P.2d 1155 (1999)). An insurer is not relieved of its duty to defend unless the claim alleged in the complaint is "clearly not covered by the policy." *Id.* (citing *Kirk v. Mt. Airy Ins. Co.*, 134 Wash.2d 558, 561, 951 P.2d 1124 (1998)). Moreover, if a complaint is ambiguous, a court will construe it liberally in favor of "triggering the insurer's duty to defend." *Id.* (citing *R.A. Hanson Co. v. Aetna Ins. Co.*, 26 Wash.App. 290, 295, 612 P.2d 456 (1980)).[FN5] In contrast, the duty to indemnify "hinges on the insured's *actual liability* to the claimant and *actual coverage* under the policy." *Hayden*, 141 Wash.2d at 64, 1 P.3d 1167 (emphasis added). In sum, the duty to defend is triggered if the insurance policy conceivably covers the

allegations in the complaint, whereas the duty to indemnify exists only if the policy *actually covers* the insured's liability.

[11][12][13] ¶ 15 "There are two exceptions to the rule that the duty to defend must be determined only from the complaint, and both the exceptions favor the insured." *Truck Ins.*, 147 Wash.2d at 761, 58 P.3d 276. First, if it is not clear from the face of the complaint that the policy provides coverage, but coverage could exist, the insurer *must* investigate and give the insured the benefit of the doubt that the insurer has a duty to defend. *Id.* Notice pleading rules, which require only a short and plain statement of the claim showing that the pleader is entitled to relief, impose a significant burden on the insurer to determine if there are *any* facts in the ***54** pleadings that could conceivably give rise to a duty to defend. *Hanson*, 26 Wash.App. at 294, 612 P.2d 456. Second, if the allegations in the complaint " ' "conflict with facts known to or readily ascertainable by the insurer," ' " or if " ' "the allegations ... are ambiguous or inadequate," ' " facts outside the complaint may be considered. *Truck Ins.*, 147 Wash.2d at 761, 58 P.3d 276 (quoting *Atl. Mut. Ins. Co. v. Roffe, Inc.*, 73 Wash.App. 858, 862, 872 P.2d 536 (1994) (quoting *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wash.2d 901, 908, 726 P.2d 439 (1986))). The insurer may not rely on facts extrinsic to the complaint to deny the duty to defend-it may do so only to trigger the duty. *Id.*

[14] ¶ 16 The duty to defend is a valuable service paid for by the insured and one of the ****460** principal benefits of the liability insurance policy. *Grifin v. Allstate Ins. Co.*, 108 Wash.App. 133, 138, 29 P.3d 777, 36 P.3d 552 (2001); *Safeco Ins. Co. v. Butler*, 118 Wash.2d 383, 392, 823 P.2d 499 (1992); *Tank v. State Farm Fire & Cas. Co.*, 105 Wash.2d 381, 390, 715 P.2d 1133 (1986); THOMAS V. HARRIS, WASHINGTON INSURANCE LAW § 11.1, at 11-1, 11-2 (2d ed.2006). If the insurer is uncertain of its duty to defend, it may defend under a reservation of rights and seek a declaratory judgment that it has no duty to defend. *Truck Ins.*, 147 Wash.2d at 761, 58 P.3d 276 (citing *Grange Ins. Co. v. Brosseau*, 113 Wash.2d 91, 93-94, 776 P.2d 123

(1989)). Although the insurer must bear the expense of defending the insured, by doing so under a reservation of rights and seeking a declaratory judgment, the insurer avoids breaching its duty to defend and incurring the potentially greater expense of defending itself from a claim of breach. *Id.*

In applying this body of Washington precedent to the facts of the case, the Court stated as follows:

¶ 32 Fireman's obtained a formal written legal opinion from attorney Stephen G. Skinner, who advised that Fireman's did not have a duty to defend under the professional liability provision based on *Blakeslee* and *Hicks.* Skinner's opinion acknowledged, however, that neither *Blakeslee* nor *Hicks* were entirely on point and that a court reviewing them might conclude they relate only to cases involving sexual assault.

[18] ¶ 33 Fireman's reliance on Skinner's equivocal advice regarding the application of ****463** *Blakeslee* or *Hicks* to this case flatly contradicts one of the most basic tenets of the duty to defend. The duty to defend arises based on the insured's *potential* for liability and whether allegations in the complaint *could conceivably* impose liability on the insured. *Truck Ins.*, 147 Wash.2d at 760, 58 P.3d 276. An insurer is relieved of its duty to defend only if the claim alleged in the complaint is "clearly not covered by the policy." *Id.* Moreover, an ambiguous complaint must be construed liberally in favor of triggering the duty to defend. *Id.*

[19] ¶ 34 Fireman's 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, Fireman's did the opposite-it relied on an equivocal

> interpretation of case law to give *itself* the benefit of the doubt rather than its insured.

Subsequent to *Woo v. Fireman's Insurance Company*, the Court again summarized Washington law with regard to the difference between the duty to defend and the duty to indemnify. In *American Best Food, Inc. v. Alea London, Ltd.,* 168 Wn.2d 398 (2010), a suit was brought by an injured nightclub patron alleging that the club failed to take reasonable precautions against criminal conduct of other patrons. The Complaint further alleged that the club's security guards exacerbated the injuries when they dumped the plaintiff on the sidewalk after he had been shot. Alea London, Ltd., was the insurer. Alea London, Ltd., denied a defense to the club. The Court provided the following analysis:

> ****696** A. *Duty To Defend*
> [3][4][5][6][7] ¶ 6 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 Wash.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 Wash.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.' " ***405***Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wash.2d 751, 760, 58 P.3d 276 (2002) (quoting *Unigard Ins. Co. v. Leven*, 97 Wash.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 Wash.2d 255, 269, 199 P.3d 376 (2008) (citing Butler, 118 Wash.2d at 389, 823 P.2d 499). 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 Wash.2d at 765, 58 P.3d 276.

[8][9][10][11][12] ¶ 7 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, 58 P.3d 276 ("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 Wash.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, 58 P.3d 276 (citing *Grange Ins. Co. v. Brosseau*, 113 Wash.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."

[14] ¶ 9 "[E]xclusionary clauses are to be most strictly construed against the insurer." *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wash.2d 65, 68, 659 P.2d 509 (1983) (citing *W. Am. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 4 Wash.App. 221, 480 P.2d 537, overruled on other grounds by

80 Wash.2d 38, 491 P.2d 641 (1971)), *modified on other grounds,* 101 Wash.2d 830, 683 P.2d 186 (1984).

... [17] ¶ 20 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 Wash.2d at 760, 58 P.3d 276 (citing *Kirk,* 134 Wash.2d at 561, 951 P.2d 1124). Exclusions are interpreted narrowly. *Phil Schroeder,* 99 Wash.2d at 68, 659 P.2d 509. 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 Wash.2d at 765, 58 P.3d 276; *Kirk,* 134 Wash.2d at 560, 951 P.2d 1124; *Butler,* 118 Wash.2d at 393–94, 823 P.2d 499. 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.[FN6]

***414** CONCLUSION

[18] ¶ 21 In sum, the duty to defend is different from and broader than the duty to indemnify. *Butler,* 118 Wash.2d at 392, 823 P.2d 499. 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 Wash.2d at 760, 58 P.3d 276. In deciding whether to defend, an insurer may ****701** not put its own interest above that of its insured. *T & G Const., Inc.,* 165 Wash.2d at 269, 199 P.3d 376. 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 Wash.2d at 60, 164 P.3d 454. 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 Wash.2d at 760–61, 58 P.3d 276. 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. Café Arizona has properly moved for RAP 18.1 and *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wash.2d 37, 52–53, 811 P.2d 673 (1991), expenses and attorney fees. Café Arizona is awarded reasonable expenses and fees.

D. DIMINUTION IN VALUE

A-2's Complaint alleged physical injury to the Subject Property caused by Shelcon's placement of 4-6 feet of immeasurable fill dirt on top of the Subject Property. A-2 claimed that the placement of this unmeasured fill precluded use of the Subject Property for construction of 57 homes using conventional foundations. As a result of that particular loss of use, the property became less attractive to buyers. In turn, the decrease in buyer attraction necessarily resulted in diminution in value.

But diminution of value is just a measure of damages. If the settlement markers could have been re-installed after the placement of the 4-6 feet of surcharge, then the measure of damages would have been the cost of replacement. But the replacement damages would have been excluded by the j(6) exclusion. That's because the j(6) exclusion excludes from coverage any amount of money that can be paid to correct the initial

problem or where the initial problem or accident does not cause any consequential damage.

Going back to the example of the carpenter and the water pipe, if it cost $800.00 to clean up the water spill and replace the plumbing line and the baseboard, the $800.00 cleanup cost is excluded by the j(6) exclusion, and the contractor has to pay the $800.00. Similarly in the Shelcon case, if the settlement markers could have been installed after the surcharge was placed, then under the j(6) exclusion, Shelcon would have had to go back on its own nickel (without any insurance reimbursement or indemnification) and reinstall the settlement markers after the fact. But in this case, A-2 alleged in their Complaint that the settlement markers could not be installed after the surcharge was placed. It was too late according to A-2. So A-2 was left with a ***measure*** of damages of diminution of value due to the property damage. Shelcon's Policy states as follows:

> We will pay those sums that the insured becomes legally ***obligated to pay as damages*** because of "bodily injury" or "property damage" to which this insurance applies.

Damages is nowhere defined in the CGL Policy. Nowhere in the CGL Policy does WNAC define damages. The reason that the policy does not cover diminution of value is ***not*** because the CGL Policy expressly excludes an obligation to "pay those sums that the insured becomes obligated to pay as damages", but because the definition of "property

damage" states that "property damage" means physical injury to tangible property ***including*** a resulting ***loss of use*** of that property and is alternatively defined as simply a loss of use of the tangible property that is ***not*** physically injured.

So Shelcon fully understands that Shelcon's very own CGL policy does not insure Shelcon against simply diminishing the value of somebody else's property. Shelcon knows that. Shelcon understands that. But that's not what this case is about. This case is about property damage (physical injury to tangible property and/or loss of use of tangible property that is not physically injured). Those were the claims of A-2. Diminution of value is just a measurement of those property damages sustained by A-2 as a result of property damage (i.e., loss of use) caused by Shelcon.

The distinction between the CGL Policy's definition of "property damage" and the ***measurement*** of damages due to property damages was perfectly identified and discussed in *Missouri Terrazo Co. v. Iowa National Mutual Insurance Co.*, 740 F.2d 647 (8th Cir. 1984). Missouri Terrazo Co. allegedly damaged the floor of a supermarket during the course of installing a terrazzo covering. Once installed, the flooring could not be taken out, removed, or replaced. So the supermarket sued for diminution in value. As in Shelcon's case, the CGL Policy did not cover claims for mere diminution in value. The Court of Appeals for the 8th Circuit certainly recognized that.

So everyone could agree that diminution in value without property damage is not covered. But in the Missouri Terrazo case as well as the Shelcon case, there ***was*** property damage for which damages could be awarded based on diminution in value. At least property damage was alleged. In both the Missouri Terrazo case and the Shelcon case, the claimant was saying that the defective work could not be repaired, replaced, or restored. So the plaintiffs sued for diminution in value. The 8th Circuit Court of Appeals identified and analyzed the difference between a definition of property damage and an insurer's obligation to pay damages. Two different things. Worlds apart.

> "Iowa National contends that the district court erred in its holding that National Supermarket's claim for diminution in value constitutes "property damage," as that term is defined in the policy. The policy provides that Iowa National will pay "all sums which the insured shall become legally obligated to pay as damages because of ... property damage to which this insurance applies, caused by an occurrence."
>
> "Property damage" is defined as "physical damage to or destruction of tangible property which occurs during the policy period." The parties do not disagree that National Supermarket's claim for diminution in value represents the difference between the value of the building before the injury and after the injury. *See* 566 F.Supp. at 553. Iowa National contends that the claim for diminution in value, since it did not include the cost of repair or replacement of the defective floor, is for nonphysical damage, and is therefore not covered by the policy. We cannot agree.
>
> [1] The district court held that the damage suffered by

> National Supermarket met the policy's definition of "property damage" because "[t]he floor, which is tangible property, physically deteriorated by cracking, settling, and flaking during the policy period." 566 F.Supp. at 552. The cases Iowa National relies upon for its proposition that diminution in value cannot constitute "property damage," *St. Paul Fire and Marine Insurance Co. v. Northern Grain Co.*, 365 F.2d 361, 366 (8th Cir.1966) (diminution in value of wheat crop caused by sale of wrong type of seed),[FN4] and *American Motorists Insurance Co. v. Trane Co.*, 544 F.Supp. 669, 687 (W.D.Wis.1982) (diminished value of liquid natural gas plants, in the form of production shortfalls, caused by faulty heat exchangers), are inapposite. Here, the physical damage to tangible property, i.e., the physical deterioration of the floor, is manifest. We agree with Missouri Terrazzo that the diminution in value in this case is "merely a means of measuring the damage sustained as a result of the property damage." We therefore hold that the district court did not err in its conclusion that Missouri Terrazzo's liability to National Supermarket was based on "property damage," as that term is defined in the policy. Thus, it is clear that the policy covered National Supermarket's claim for damages unless an exclusionary clause is applicable." Missouri Terrazo at 650.

In Shelcon's case, there ***was*** property damage. Unless there was property damage claimed by A-2, there would be no obligation on WNAC to pay damages. Property damage was alleged by A-2. A-2 alleged loss of use of their property due to Shelcon's accidental destruction of the settlement markers. So there was a claim of property damage. The CGL Policy states as follows:

> **SECTION 1 – COVERAGES**
> **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
> **1. Insuring Agreement**
> **a. We will pay those sums that the insured**

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

The "property damage" to which this insurance applies was and is A-2's lawsuit for loss of use. The ***measure*** of damages selected by A-2 to claim against Shelcon was diminution in value. That is a ***measure*** of damages. WNAC doesn't like that ***measure*** of damages. But the CGL Policy clearly states as follows:

> "We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or property damage" to which this insurance applies."

WNAC ***could*** have written a policy that inserted "(except for damages for diminution in value)" right behind the word "damages" appearing in Section 1 – Coverages (1): Insuring Agreement (a) so that the section ***could*** have read:

> "We will pay those sums that the insured becomes legally obligated to pay as damages because **(except for damages for diminution in value)** of "bodily injury" or property damage" to which this insurance applies."

But that's not what WNAC did. And that's not the CGL Policy that WNAC sold to Shelcon.

Diminution of value is just a ***measure*** of damages. It is not property damage itself. It is not a definition or an exclusion regarding property damage. There first has to be property damage in order for the insurance company to be responsible to pay any damages. In this case, there ***was*** property damage because there was a resulting loss of use which is defined as property damage by the Policy.

V. REQUEST FOR ATTORNEY'S FEES

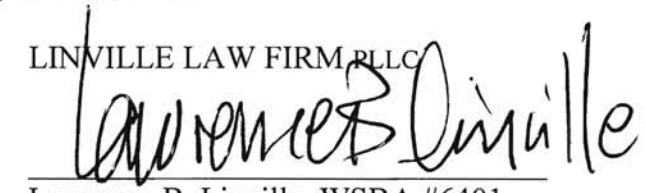
Pursuant to RAP 18.1, Appellant requests that it be awarded its attorneys fees and costs pursuant to *Olympic Steamship v. Centennial Ins. Co.*, 117 Wn.2d 37, 53 (1991); *Estate of Jordan v. Hartford & Indem. Co.*, 120 Wn.2d 490 (1993); *Public Util. Dist. I v. International Ins. Co.*, 124 Wn.2d 789 (1994); *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26 (1995); *Panorama Vill. v. Allstate Ins. Co.*, 144 Wn.2d 130 (2001); RCW 19.86.090 and RCW 48.01.030.

VI. CONCLUSION

The Court of Appeals should reverse the trial court's entry of summary judgment in favor of WNAC, and issue a Mandate to the trial court to enter summary judgment in favor of Shelcon.

DATED this 21st day of June, 2013.

LINVILLE LAW FIRM, PLLC



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