No. 90617-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON STATE COURT OF APPEALS
DIV. I
NO. 70143-6-I

WESTERN NATIONAL ASSURANCE COMPANY,
a Washington Corporation,
Respondents,

v.

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

PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

Petitioner is Shelcon Construction Group, LLC ("Shelcon").

II. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals decision for which discretionary review is sought pursuant to RAP 13.4 is the Court of Appeals Division I's Opinion filed May 5, 2014 (**Appendix 1**) with regard to Court of Appeals Cause No.: 70143-6-I. Petitioner's Motion for Reconsideration was denied on July 10, 2014 (**Appendix 2**).

III. ISSUE PRESENTED FOR REVIEW

The issue presented for review is whether the J(5) exclusion of the standard Commercial General Liability insurance ("CGL") policy collectively applies to ***both*** the initial damage or injury to the particular part of property upon which the insured was performing operations ***and*** the consequential damage resulting from the insured's damage to the "particular part". Shelcon claims that the J(5) exclusion of its CGL policy only excludes damage or injury to the "particular part" of property on which Shelcon was performing operations, but does ***not*** exclude consequential damage resulting from damage or injury to the "particular part" of property on which the insured was performing operations at the time the "particular part" was damaged. Western National Assurance

Company ("Western") claims that ***both*** the initial and the consequential damages are excluded under the J(5) exclusion of the insured's CGL policy.

IV. STATEMENT OF THE CASE

Shelcon purchased a CGL policy from Western. Shelcon was a site work contractor. Shelcon was hired by A-2 Venture, LLC ("A-2") to clear, grade, and install underground utilities on 11.2 acres of certain property owned by A-2. A-2 intended to develop the property for the construction of 57 homes for resale to the public. During the course of Shelcon's work, Shelcon "allegedly" (according to A-2's Complaint and the deposition of its owner, Scott M. Haymond ("Haymond")) damaged A-2's property. A-2 sued Shelcon. A-2 tendered its defense to Western. Western declined to defend. The case tried before Judge Garold E. Johnson (Pierce County Superior Court Cause No.: 11-2-06443-9). A-2's claims were dismissed at the conclusion of the trial. Shelcon insured defense fees and costs in the amount of $99,483.00.

The property damage claimed by A-2 was loss of use of its property for the purpose of constructing residences using conventional foundations. According to A-2's Complaint and Haymond's deposition, this loss of use resulted from Shelcon's negligent destruction of settlement markers that were embedded on the property for the purposes of measuring settlement of imported soil placed across and over the 11.2

acres. A-2's Complaint alleged that Shelcon's destruction of the settlement markers resulted in A-2 not being able to adequately measure the settlement or compaction of the soil that was imported and placed on its property, and therefore A-2 could not construct residences using conventional foundations. Western's CGL policy covered both physical injury and loss of use of property caused by the insured. Western relied upon Exclusion J(5) and denied any duty to defend. The Court of Appeals affirmed. The J(5) Exclusion states as follows:

> J. Damage to Property
>
> "Property damage to:...
>
> (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

Shelcon contends that the J(5) exclusion applies only to the "particular part" of property (i.e. the settlement markers) that was damaged by Shelcon: not to the secondary or consequential damage caused to ***other*** property as a consequence of the initial damage to the settlement markers (i.e. the "particular part"). The Court of Appeals disagreed stating:

> "Relying on the language in exclusion j.(5) that state the policy does not apply to property damage to the "particular part of real property on which you... are performing operations, if the 'property damage' arises out of those operations," Shelcon argues the exclusion applies only to the settlement markers. Shelcon contends the exclusion does not apply to "consequential property damage" caused by removal of the markers. We considered and rejected the

same argument in Vandivort Construction Co. v. Seattle Tennis Club, 11 Wn.App. 303, 522 P.2d 198 (1974), and Schwindt v. Underwriters at Lloyd's of London, 81 Wn.App. 293, 914 P.2d 119 (1996)."

Thus, the issue presented is whether Shelcon's CGL policy (which is an industry form that has been standardized since 1986) does or does not cover secondary or consequential damage resulting from primary or initial damage to the "particular part" that was damaged by the insured while performing operations on A-2's property.

V. ARGUMENT

This case presents an issue of substantial public interest that should be determined by the Supreme Court (RAP 13.4(b)(4)).

1. There are currently 53,052 active registered contractors in the State of Washington. In order to be properly registered, these 53,052 contractors are each required by RCW 18.27.050 to furnish insurance coverage for property damage in an amount not less than $50,000. This insurance is issued by a variety of insurers doing business in the State of Washington who issue a policy called a Commercial General Liability ("CGL") policy, exactly like the policy which Western issued to Shelcon. The CGL policy is standardized. All insurers issue the exact same CGL policy. The CGL policy is uniform throughout the United States. The CGL policy has been standardized since 1986. Therefore, the Court of

Appeals' decision in this case has an application reaching far beyond the case *sub judice* involving Shelcon.

2. The Court of Appeals' decision gives no meaning or effect whatsoever to the "particular part" words of the J(5) exclusion. The Court of Appeals' decision simply re-writes the J(5) exclusion

from

> J. Damage to Property
> "Property damage to:...
>
> (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

to

> J. Damage to Property
> "Property damage to:...
>
> (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

3. The Court of Appeals' decision is a published decision (published upon motion of Western – **Appendix 3**) and now has precedential value in the construction and insurance industry. Under the Court of Appeals' decision, ***any*** property damage (not just limited to damage to a "particular part") caused by the contractor insured under the standard CGL policy is excluded if the property damage occurred while the insured performed operations at the site. Because ***all*** property damage

occurs at the site while the contractor is performing its operations, under the Court of Appeals' decision there can ***never*** be property damage covered by the contractor's CGL policy. That is because the Court of Appeals' decision combines primary damage to the particular part with ***all*** consequential damage to any other property.

4. The Court of Appeals' decision is contrary to every case that has ever applied the J(5) exclusion. See for example, *Transportation Insurance Co. v. Piedmont Construction Group, LLC*, 301 Ga.App. 17, 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).

Moreover, the Court of Appeals' decision is contrary to Couch On Insurance, 3D, §129:20 Work in Progress Exclusions which reads as follows:

> "Within the business risk exclusion, two exclusions preclude coverage for work in progress. Exclusion j.(5) in the standard commercial general liability policy provides that there is no coverage for the property damage to "[t]hat 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." Exclusion j.(6) in the standard commercial general liability policy provides that the policies do not cover property damage to "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." 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 exclusions 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."**

(emphasis supplied)

5. Under the duty to defend, Western cannot rely on an interpretation of either the policy or law that favors the insurer over those of the insured's interest. *Woo v. Fireman's Fund Insurance Company*, 161 Wn.2d 43 (2006), *American Best Food, Inc v. Alea London, Ltd*, 168 Wn.2d 398 (2010).

6. RCW 18.27.050 (**Appendix 4**) ***must*** have intended to provide some insurance to the public that would actually cover damage to a person's property if that person's property was damaged by a contractor. Pursuant to the Court of Appeals' decision, there is no such coverage under the standard CGL policy which is precisely the policy that the insurance industry has prepared in response to this State's requirements. RCW 18.27.050.

7. The business of insurance is one affected by the public interest. RCW 48.01.030.

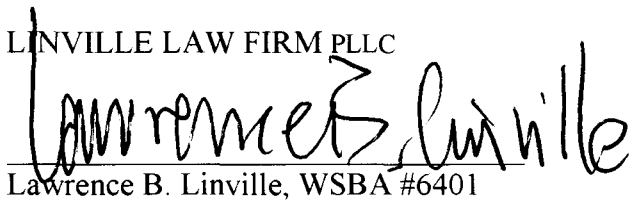
VI. CONCLUSION

Although it may initially seem that Shelcon's Petition for Discretionary Review presents only an isolated dispute between an insurer and its insured or perhaps just a dispute between two litigants over a contract term, this case truly presents an issue of broad and significant interest to both the public and the contractors who perform work in this State.

Shelcon requests the Supreme Court reverse the Court of Appeals decision dated May 5, 2014 and remand the case to King County Superior Court to grant Shelcon's Motion for Summary Judgment.

DATED this 8th day of August, 2014.

LINVILLE LAW FIRM PLLC



Lawrence B. Linville, WSBA #6401
David E. Linville, WSBA #31017
Attorneys for Petitioner
Shelcon Construction Group, LLC

CERTIFICATE OF SERVICE

Kristen Wayman declares as follows:

1. I am now and at all times herein mentioned a citizen of the United States, a resident of the State of Washington, over the age of 18 years, not a party to or interested in the above-referenced action, and competent to be a witness therein.

2. On the 8th day of August, 2014, I served a copy of *Shelcon Construction Group, LLC's Petition for Discretionary Review* via personal delivery on counsel as follows:

Counsel for Respondent:
Forsberg & Umlauf, P.S.
Attorneys at Law
901 Fifth Ave, Suite 1400
Seattle, WA 98164

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated this 8th day of August, 2014, at Seattle, Washington.

Kristen Wayman

APPENDIX 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WESTERN NATIONAL ASSURANCE COMPANY, a Washington corporation, Respondent, v. SHELCON CONSTRUCTION GROUP, LLC, a Washington Limited Liability Company, Appellant.	No. 70143-6-I DIVISION ONE UNPUBLISHED OPINION FILED: May 5, 2014

SCHINDLER, J. — Western National Assurance Company insured general contractor Shelcon Construction Group LLC under a "Commercial General Liability" (CGL) policy. A-2 Venture LLC filed a breach of contract lawsuit against Shelcon. A-2 alleged defective performance by Shelcon resulted in the reduction in value of a property from $8,550,000 to $6,412,500. Shelcon tendered defense of the lawsuit to Western. Because the CGL policy unambiguously excludes coverage, we affirm.

FACTS

A-2 Venture LLC was formed for the purpose of purchasing and developing a subdivision plat known as "Beaver Meadows." A-2 retained DBM Consulting Engineers Incorporated to prepare plans for development of the site for 57 single family residences. A-2 gave the DBM drawings to Shelcon Construction Group LLC to

prepare and submit a bid. On January 10, 2006, Shelcon submitted a bid on the project. The bid excluded "engineering, staking, layout, over-excavation, . . . and structural fill." Shelcon's bid also did not include placement of markers for measurement of settlement on the site.

In February 2011, A-2 filed a "Complaint for Breach of Contract and Damages" against Shelcon. A-2 alleged that the specifications for the work Shelcon agreed to perform were "set forth in detail" in a "Geotechnical Engineering Report" (Report) prepared by The Riley Group Incorporated. The complaint alleged the Report "emphasized that the challenge for the site was underlying peat [deposits]," and recommended placement of dirt to compact the soil and use of settlement markers to "verify" soil compaction. The report recommends inserting the settlement markers during site preparation and keeping the markers in place "until the full amount of settlement had occurred during and after fill and compaction." A-2 alleged that Shelcon placed the markers according to the specifications but then removed the markers and placed fill on top of the area, making "it impossible to accurately measure the settling."

A-2 claimed the failure of Shelcon "to properly prepare the site" resulted in rescission of the purchase and sale agreement and reduction in the value of the property from $8,550,000 to $6,412,500. The complaint alleged, in pertinent part:

> The failure of [Shelcon] to properly prepare the site and soil on [A-2]'s property caused [A-2] to sustain far reaching damages including, but not limited to the following:
>
> . . . .
>
> On August 15, 2007 Sound Built Homes rescinded its agreement to purchase the land because of the failure of the soil preparation to meet the requirements of the geotechnical soil report. The soil preparation had been negligently and improperly done by defendant as aforesaid.

> [A-2] then reduced the price of the land to $6,412,500.00 by purchase and sale agreement to Harbour Homes dated October 19, 2007 based upon buyers [sic] knowledge of the soil preparation errors of [Shelcon] and an estimate of the costs of rectifying them. Harbour Homes thereafter rescinded the lower priced agreement in February, 2008.
>
> One loss to [A-2] was the immediate reduction in value of the property from $8,550,000.00 to $6,412,500, i.e. $2,137,500.00 and further losses because of resulting loan defaults and market changes because the property could not be developed or sold.

Western National Assurance Company insured Shelcon under a "Commercial General Liability" (CGL) policy.[1] Shelcon tendered defense of the A-2 lawsuit to Western.

Western informed Shelcon that because the allegations in the complaint alleged "economic loss" and not "property damage" as defined by the CGL policy, it did not have a duty to defend. Western also stated that "even if the allegations did allege 'property damage,' the 'property damage' exclusions j. and m." excluded coverage.

Shelcon tendered defense of the lawsuit to Western a second time in February 2012, attaching a copy of the complaint, the contract between A-2 and Shelcon, and the deposition of the managing member of A-2, Scott Haymond. Haymond testified that Shelcon installed the settlement markers but then "pulled them out, raised the fill, and never installed them a second time." Haymond said that according to Shelcon, the markers were "in the way of the trucks when they're bringing the dirt in because they would hit them or something." Haymond testified that without the markers, "there was no way for the soils people to monitor how much settling had occurred. . . . And that killed my sale. My profit was like 4 million in cash."

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[1] Policy CP-300007658-00 issued by Western to Shelcon was effective from January 20, 2006 to January 20, 2007. Shelcon renewed its policy in 2007 and again in 2008.

In response, Western reiterated the allegations did not constitute "property damage" because A-2 did not allege physical injury to the land or loss of use of tangible property, and the exclusions for damage occurring during Shelcon's work operations barred coverage.[2]

Following trial on the lawsuit against Shelcon, the court concluded Shelcon did not breach the contract with A-2. The court ruled A-2 owed Shelcon $511,884.22 plus interest of $255,942.11, and that Shelcon was entitled to an award of attorney fees and costs of approximately $100,000.00. The court entered extensive findings of fact and conclusions of law, and judgment against A-2.

On September 27, Western filed a declaratory judgment action alleging that under the terms of the CGL policy, it did not have a duty to defend Shelcon in the breach of contract lawsuit filed by A-2. Shelcon filed a counterclaim alleging Western had a duty to defend, and sought entry of a judgment for the attorney fees and costs incurred in defending the lawsuit filed by A-2 and treble damages under RCW 19.86.090.

The court granted Western's motion for summary judgment and denied Shelcon's cross motion for summary judgment. Shelcon appeals.

ANALYSIS

Shelcon contends the court erred in granting Western's motion for summary judgment. Shelcon asserts Western had a duty to defend. Western contends there is

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[2] The letter states, in pertinent part:

Because the allegations in the complaint fail to allege "property damage" and, even if the allegations do allege property damage, the damages are excluded by exclusions j(5), j(6) and m, Western National cannot defend or indemnify Shelcon from the allegations in this lawsuit.

no duty to defend under the terms of the CGL policy. In the alternative, Western assets that even if there is a duty to defend, property exclusions j.(5) and m. apply and bar coverage.[3]

We review summary judgment de novo. Woo v. Fireman's Fund Ins. Co., 161 Wn.2d 43, 52, 164 P.3d 454 (2007). Summary judgment is proper if no genuine issue of material fact remains and the moving party is entitled to summary judgment as a matter of law. CR 56(c). Interpretation of an insurance contract is a question of law that we also review de novo. Woo, 161 Wn.2d at 52.

Insurance policies are liberally construed to provide coverage wherever possible. Bordeaux, Inc. v. Am. Safety Ins. Co., 145 Wn. App. 687, 694, 186 P.3d 1188 (2008). We determine coverage under the plain meaning of the policy and interpret the agreement to give effect to each provision. Smith v. Cont'l Cas. Co., 128 Wn.2d 73, 78-79, 904 P.2d 749 (1995); Capelouto v. Valley Forge Ins. Co., 98 Wn. App. 7, 13-14, 990 P.2d 414 (1999). The court is also bound by the definitions in the policy. Overton v. Consol. Ins. Co., 145 Wn.2d 417, 427, 38 P.3d 322 (2002).

"It is well settled that the duty to defend under a CGL policy is separate from, and broader than, the duty to indemnify." Hayden v. Mut. of Enumclaw Ins. Co., 141 Wn.2d

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[3] Exclusion m. states, in pertinent part:

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 accidental physical injury to "your product" or "your work" after it has been put to its intended use.

55, 64, 1 P.3d 1167 (2000). The duty to indemnify rests on the terms of the policy. Hayden, 141 Wn.2d at 64. On the other hand, the duty to defend is triggered if the insurance policy "conceivably covers the allegations in the complaint." Woo, 161 Wn.2d at 53. If the allegations in a complaint conceivably trigger coverage and the duty to defend, the court must then determine "whether an exclusion clearly and unambiguously applies to bar coverage." Hayden, 141 Wn.2d at 64.

The CGL policy provides, in pertinent part:

SECTION I - 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.[4] 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. . . .

. . . .

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";

(2) The "bodily injury" or "property damage" occurs during the policy period; . . .

. . . .

2. Exclusions

This insurance does not apply to:

. . . .

j. Damage To Property

"Property damage" to:

. . . .

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on

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[4] Section V of the CGL policy defines "property damage" to mean:

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.

> your behalf are performing operations, if the "property damage" arises out of those operations.

Assuming the allegations in the lawsuit A-2 filed against Shelcon triggered the duty to defend, we conclude the defective work and operations exclusion j.(5) precludes coverage.

The exclusion for the insured's faulty work is one of the primary business risk exclusions in a CGL policy. The rationale for such an exclusion is that faulty workmanship is not a fortuitous event but a business risk to be borne by the insured. Mut. of Enumclaw Ins. Co. v. Patrick Archer Const., Inc., 123 Wn. App. 728, 733, 97 P.3d 751 (2004) (citing 9 LEE R. RUSS, COUCH ON INSURANCE § 129:11, at 129-31 (3d ed. 1997)).

Relying on the language in exclusion j.(5) that states the policy does not apply to property damage to the "particular part of real property on which you . . . are performing operations, if the 'property damage' arises out of those operations," Shelcon argues the exclusion applies only to the settlement markers. Shelcon contends the exclusion does not apply to "consequential property damage" caused by removal of the markers. We considered and rejected the same argument in Vandivort Construction Co. v. Seattle Tennis Club, 11 Wn. App. 303, 522 P.2d 198 (1974), and Schwindt v. Underwriters at Lloyd's of London, 81 Wn. App. 293, 914 P.2d 119 (1996).

In Vandivort, the insured contractor's work caused an earth slide that damaged the site and resulted in increased construction costs to complete the project. Vandivort, 11 Wn. App. at 303. The contractor claimed the exclusion should be limited to the

"particular part" of the property on which it was working when the slide occurred. Vandivort, 11 Wn. App. at 308. We rejected the contractor's argument and held the unambiguous language of the exclusion barred coverage because the insured "was performing operations on the property and the injury here for which damages are claimed arose out of those operations." Vandivort, 11 Wn. App. at 308.

> Vandivort argues that because the slide occurred at Seattle Tennis Club's north property line and damage is claimed beyond that point, the exclusion which it argues applies only to the particular part of any property upon which work is being performed is not applicable. We reject the argument. The plain meaning of the language covers the situation here. Vandivort was performing operations on the property and the injury here for which damages are claimed arose out of those operations.

Vandivort, 11 Wn. App. at 308.

Likewise, in Schwindt, property owners argued that the operation exclusion applied only to "the particular item of defective work" and did not extend to consequential damages from the faulty work. Schwindt, 81 Wn. App. at 302. We rejected that argument on the grounds that "the exclusion is not limited to the component out of which the damage arose." Schwindt, 81 Wn. App. at 304.

Here, as in Vandivort and Schwindt, A-2 alleged defective performance by Shelcon in removing the settlement markers resulted in consequential damages to the entire site. Specifically, the reduction in value of the property from $8,550,000 to $6,412,500. Because the alleged consequential damages arose out of Shelcon's

operations on the site, we hold the unambiguous language of exclusion j.(5) bars coverage, and affirm.[5]

WE CONCUR:

[5] The out-of-state cases Shelcon cites to argue the exclusion only applies to the settlement markers are contrary to the decisions in Vandivort and Schwindt. The cases are also factually distinguishable. See Transp. Ins. Co. v. Piedmont Const. Group, LLC., 686 S.E.2d 824 (Ga. Ct. App. 2009) (holding "that particular part of real property" was limited to the room and plumbing of a building the insured was contracted to perform work on and the exclusion did not bar coverage for damage to those parts of the building the insured had not contracted to work); Columbia Mut. Ins. Co. v. Schauf, 967 S.W.2d 74 (Mo. 1998) (holding "that particular part of real property" was limited to the kitchen cabinets because that was the real property that was the subject of the insured's operations at the time of the damage and the exclusion did not bar coverage for damage to the remainder of the house); ACUITY v. Burd & Smith Const., Inc., 2006 ND 187, 721 N.W.2d 33 (holding "that particular part of real property" was limited to the roof the insured was hired to replace and the exclusion did not bar coverage for damage to the interior of the apartment building).

APPENDIX 2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WESTERN NATIONAL ASSURANCE COMPANY, a Washington corporation, Respondent, v. SHELCON CONSTRUCTION GROUP, LLC, a Washington Limited Liability Company, Appellant.	No. 70143-6-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Shelcon Construction Group LLC, having filed a motion for reconsideration herein and the respondent having filed an answer to the motion, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 10th day of July, 2014.

FOR THE COURT:

Judge

APPENDIX 3

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WESTERN NATIONAL ASSURANCE COMPANY, a Washington corporation, Respondent, v. SHELCON CONSTRUCTION GROUP, LLC, a Washington Limited Liability Company, Appellant.	No. 70143-6-I DIVISION ONE ORDER GRANTING MOTION TO PUBLISH

Respondent Western National Assurance Company filed a motion to publish the opinion filed on May 5, 2014 in the above case. A majority of the panel has determined that the motion should be granted;

Now, therefore, it is hereby

ORDERED that respondent's motion to publish the opinion is granted.

DATED this 10th day of July, 2014.

FOR THE COURT:

Judge