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No. 63692-8

**COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION I**

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, subscribing to
Policy Nos. A02BF387 and CJ352084,

Plaintiff/Appellant,

vs.

VALIANT INSURANCE COMPANY; and NORTHERN INSURANCE
COMPANY OF NEW YORK,

Defendants/Respondents,

BRIEF OF APPELLANT

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A. INTRODUCTION

This matter involves a coverage dispute between three insurers. Appellant, Certain Underwriters at Lloyd's London subscribing to policy numbers A02BF387 and CJ352084 (referred to herein as "Underwriters") and Respondents, Valiant Insurance Company and Northern Insurance Company of New York (collectively referred to herein as "Valiant and Northern"), issued primary commercial general liability policies to their mutual insured, Stratford Constructors, LLC ("Stratford"), a developer/general contractor, who built a retirement facility commonly known as Chateau Pacific. Stratford Constructors, LLC was sued by the owner of Chateau Pacific for alleged defects and damages related to the design, development and construction of the facility in two consolidated actions.

The primary issue presented is whether an anti-stacking provision in three successive commercial general liability policies issued by Valiant and Northern applies to limit coverage for the underlying construction defect action to one policy limit. The interpretation and application of an anti-stacking provision in successive commercial general liability policies in the context of cases involving damage that occurs during each policy year is an issue of first impression in Washington.

A secondary issue presented is whether an exclusion for continuous or progressively deteriorating injury or damage applies to preclude coverage under a commercial general liability policy issued by Respondent, Northern Insurance Company of New York.

B. ASSIGNMENT OF ERROR & ISSUES PRESENTED

The trial court erred in entering its order of May 22, 2009 granting Defendants, Valiant Insurance Company and Northern Insurance Company of New York's motion for summary judgment filed April 24, 2009. The issues pertaining to this assignment of error are as follows:

1. Whether there was sufficient evidence for the trial court to find that the anti-stacking provision in Valiant and Northern's three successive commercial general liability policies applied to the same occurrence.

2. Whether a material question of fact exists as to when each instance of property damage alleged in the Underlying Action occurred, the source of the property damage, and whether the property damage was discrete or continuous, such that the trial court erred in granting summary judgment in favor of Valiant and Northern.

3. Whether the trial court erred in finding no ambiguity between the anti-stacking provision and the annual limits provision in Valiant and Northern's successive commercial general liability policies.

4. Whether an anti-stacking provision in a commercial general liability policy violates Washington public policy regarding full compensation of insureds.

5. Whether the anti-stacking provision is contrary to Washington law that insurers are jointly and severally liable to pay covered losses up to each applicable policy limit.

6. Whether there was sufficient evidence for the trial court to find that coverage for the Underlying Action was barred under Northern's June 1, 2001 to June 1, 2002 policy based on its Continuous or Progressively Deteriorating Injury or Damage exclusion.

7. Whether the trial court erred in failing to strike the Supplemental Declaration of Jacquelyn A. Beatty and all of the exhibits attached thereto.

C. STATEMENT OF THE CASE

1. Underlying Construction Defect Action

GCG Associates, LP ("GCG") was the owner of a retirement facility commonly known as Chateau Pacific located in Lynnwood, Washington. Clerk's Papers ("CP") 174, 176. GCG hired Stratford Constructors, LLC as the general contractor for construction of Chateau Pacific. CP 174, 176. Construction of the facility was completed in early 2000. CP 118. Beginning shortly after completion of the facility, GCG

noticed some miscellaneous and sporadic leaks. CP 148. During the winter of 2004/2005, there were a significant amount of window leaks. CP 148. In March, 2005, Stratford performed a leak investigation which revealed water intrusion at various locations around the facility caused by various construction defects. CP 154.

GCG filed a construction defect suit against Stratford on December 12, 2005 in an action entitled GCG Associates, LP v. Stratford Constructors, LLC, Snohomish County Superior Court Cause No. 05-2-13409-5. CP 169-171. GCG subsequently filed a second construction defect suit against Stratford on February 8, 2006 in Snohomish County Superior Court under Cause No. 06-2-06389-7. CP 173-177. The two actions were consolidated and are collectively referred to herein as “the Underlying Action”. CP 232.

Underwriters, Valiant, and Northern defended Stratford in the Underlying Action under reservation of rights. CP 3. In or about June, 2007, the Underlying Action against Stratford was settled. CP 118. Underwriters contributed \$1,741,300 towards settlement, Valiant contributed its \$1,000,000 policy limit under its June 1, 1999 to June 1, 2000 policy. CP 3, 118. No settlement money was paid by Northern under either of its two policies based on its assertion of the anti-stacking provision in its policies. CP 3. As a result of Northern’s refusal to pay

any settlement money, the excess insurer above Valiant and Northern's policies, Great American Insurance Company ("Great American"), was forced to drop down and contribute \$494,200 towards the settlement on behalf of Stratford. CP 3, 118.

Underwriters obtained an assignment of rights from the insured, Stratford, and its excess insurer, Great American, and brought suit against Valiant and Northern to recover the settlement amounts overpaid by Underwriters and its assignee, Great American, due to Valiant and Northern's failure to pay their equitable share of the settlement in the Underlying Action. CP 1-5, 235.

2. Respondents' Policies

a. Respondent Valiant Insurance Company

Valiant issued policy number CON 28895374 for the period June 1, 1999 to June 1, 2000 to Humphrey Construction, Inc. CP 39, 44. Stratford Constructors, LLC is also listed as a named insured under the policy. CP 45. The policy provides coverage for commercial general liability, commercial property, and limited pollution liability coverage. CP 44. The total premium charged to the insured for the coverages provided by the policy was \$15,804.00. CP 44.

b. Respondent Northern Insurance Company of New York

Northern issued policy number CON 28895374 for the period June 1, 2000 to June 1, 2001 to Humphrey Construction, Inc. CP 39, 68. Stratford Constructors, LLC is also listed as a named insured under the policy. CP 39, 69. The policy provides coverage for commercial general liability, commercial property, and limited pollution liability coverage. CP 68. The total premium charged to the insured for the coverages provided by the policy was \$15,603.00. CP 68.

Northern subsequently issued policy number CON 28895374 for the period June 1, 2001 to June 1, 2002 to Stratford Constructors, LLC. CP 39, 93. This policy also provides coverage for commercial general liability, commercial property, and limited pollution coverage. CP 93. The total premium charged to the insured for the coverages provided by the policy was \$23,240.00. CP 93.

c. Valiant and Northern's Policy Language

The insuring agreement in each of Valiant and Northern's three policies provides in pertinent part:

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.

...

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”; and

(2) The “bodily injury” or “property damage” occurs during the policy period.

...

CP 48, 73, 98.

Valiant and Northern’s policies define “occurrence” and “property damage” as follows:

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

...

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 shall be deemed to occur at the time of the “occurrence” that caused it.

CP 62-63, 87-88, 112-113.

The Limits of Insurance section (Section III) of the policies describes the amount of coverage the insurer will pay under the

Commercial General Liability Coverage Part for various liability limits and contains an annual limits provision as follows:

The limits of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance. (Emphasis added.)

CP 57-58, 82-83, 107-108.

Section IV – Commercial General Liability Conditions of the Valiant and Northern policies provides as follows:

11. Two Or More Coverage Forms or Policies Issued By Us

If this Coverage Form and any other Coverage Form or policy issued to you by us or any company affiliated with us apply to the same “occurrence,” the maximum Limit of Insurance under all the Coverage Forms or policies shall not exceed the highest applicable Limit of Insurance under any one Coverage Form or policy. This condition does not apply to any Coverage Form or policy issued by us or an affiliated company specifically to apply as excess insurance over this Coverage Form.

CP 60, 85, 110.

Northern's June 1, 2001 to June 1, 2002 policy contains an endorsement titled "Prior Claims or Continuous or Progressively Deteriorating Injury or Damage" which provides as follows:

The insurance provided by this Coverage Part, including insurance provided by any coverage form or endorsement attached to and forming a part of this Coverage Part, does not apply to sums that the insured becomes legally obligated to pay as damages because of a claim that was:

1. first brought against any insured, or
2. first asserted against any insured in a "suit"

prior to the effective date of this policy.

The insurance provided by this coverage Part, including insurance provided by any coverage form or endorsement attached to and forming a part of this Coverage Part, does not apply to:

1. any injury or damage, including continuous or progressively deteriorating injury or damage, that first occurs prior to the effective date of this policy, or
2. any injury or damage, including continuous or progressively deteriorating injury or damage, that first occurs prior to the effective date of this policy, continues through the policy term and ends after the expiration date of this policy, or
3. any injury or damage, including continuous or progressively deteriorating injury or damage, that first occurs after the expiration date of this policy.

We will have no duty to defend any “suit” seeking damages to which this insurance does not apply.

CP 116.

3. Underwriters’ Policies

Underwriters issued commercial general liability policy number A02BF387 for the period June 1, 2002 to June 1, 2003 to Stratford Constructors, LLC. CP 2. The policy was renewed under policy number CJ0352084 for the period June 1, 2003 to June 1, 2004. CP 2.

4. Great American’s Policy

Great American Insurance Company (“Great American”) issued umbrella commercial general liability policy numbers TUU 2-53-49-20-00 for the period June 1, 1999 to June 1, 2000; TUU 2-53-49-20-01 for the period June 1, 2000 to June 1, 2001; and TUU 2-53-49-20-02 for the period June 1, 2001 to June 1, 2002 to Stratford Constructors, LLC. CP 2.

5. Underwriters’ Suit Against Respondents and the Proceedings Below

On June 6, 2008, Underwriters filed suit against Valiant and Northern for equitable contribution and equitable subrogation to recover the settlement amounts overpaid by Underwriters and its assignee, Great American Insurance Company, due to Valiant and Northern’s failure to

pay their equitable share of the settlement in the Underlying Action. CP 1-5.

On or about April 24, 2009, Valiant and Northern filed a motion for summary judgment. In the motion, Valiant and Northern argued that: (1) the anti-stacking provision in their three consecutive policies barred the insured from cumulating policy limits for a single occurrence limiting their liability to contribute to the settlement of the Underlying Action to one policy limit of \$1 million; and (2) an endorsement in Northern's June 1, 2001 to June 1, 2002 policy applied to bar coverage for claims of continuous or progressively deteriorating damage commencing before the policy's inception.

Underwriters opposed the motion for summary judgment contending that Valiant and Northern failed to satisfy their burden to prove that the anti-stacking provision and the continuous or progressively deteriorating damage exclusion in Northern's June 1, 2001 to June 1, 2002 policy applied to preclude coverage under their policies. In addition, Underwriters raised issues of material fact regarding whether the policies issued by Valiant and Northern apply to the same "occurrence" as well as whether all of the alleged property damage occurred before Northern's June 1, 2001 to June 1, 2002 policy period.

Underwriters also pointed out ambiguity in Valiant and Northern's policy language between the anti-stacking provision and the annual limits provision and further argued the anti-stacking provision contravened Washington's public policy regarding full compensation of insureds and the joint and several liability of insurers.

Valiant and Northern's motion was heard on May 22, 2009. The trial court issued its Order the same day and granted the motion. CP 242-244. In the Order, which was filed in the clerk's office on May 26, 2009, the trial court did not provide any specific reasons for granting summary judgment to Valiant and Northern. CP 242-244. Underwriters timely filed a Notice of Appeal. CP 245-246.

D. ARGUMENT

The standard of review of an order of summary judgment is de novo. Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 665, 15 P.3d 115 (2000); State Farm Fire & Cas. Co. v. English Cove Ass'n., Inc., 121 Wn.App. 358, 362, 88 P.3d 986 (2004). In a summary judgment motion, the moving party is held to a strict standard and any doubts as to the existence of a genuine issue of material fact are resolved against the moving party. Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). In determining whether a genuine issue of material fact exists

and whether the moving party is entitled to judgment as a matter of law, the appellate court engages in the same inquiries as the trial court. Mike M. Johnson, Inc. v. Spokane County, 150 Wn.2d 375, 386 n.4, 78 P.3d 161 (2003). The court considers all facts and reasonable inferences from them in the light most favorable to the nonmoving party and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. Id.

The interpretation of an insurance policy is a question of law. Polygon Northwest Co. v. American Nat'l Fire Ins. Co., 143 Wn.App. 753, 766, 189 P.3d 777 (2008). Insurance policies are construed as a whole and are given a fair, reasonable, and sensible construction consistent with the understanding of an average person purchasing insurance. Id.; Capelouto v. Valley Forge Ins. Co., 98 Wn.App. 7, 13, 990 P.2d 414 (1999). Overall, a policy should be given a practical and reasonable interpretation rather than a strained or forced construction that leads to an absurd conclusion, or that renders the policy nonsensical or ineffective. Transcontinental Ins. Co. v. Washington Public Utilities Districts' Utility System, 111 Wn.2d 452, 457, 760 P.2d 337 (1988).

1. **The Trial Court Erred In Granting Summary Judgment As Valiant and Northern Failed to Establish That Their Anti-Stacking Provision Applies to the Same “Occurrence”.**

The trial court erred in applying Valiant and Northern’s anti-stacking provision because Valiant and Northern did not establish that their policies applied to the “same occurrence”. When a separate occurrence takes place in each year of successive CGL policies, the anti-stacking provision cannot apply.

Washington law recognizes that several types of injuries flowing from multiple, distinct events can trigger coverage under one or more policies. Transcontinental Ins. Co. v. Washington Public Utilities Districts’ Utility System, 111 Wn.2d 452, 466-67, 760 P.2d 337 (1988). Valiant and Northern’s argument that the Underlying Action involved indivisible property damage defies logic. Damage to a ceiling from water intrusion through the roof is different from damage to flooring that results from water intrusion through a window. While each event may be one occurrence of water intrusion, it cannot be said that all incidences of water intrusion at the project are the “same occurrence”. There can be separate occurrences of water intrusion in different locations at different times which trigger coverage in different policy years. See IDC Construction, LLC v. Admiral Ins. Co., 339 F.Supp.2d 1342, 1351 (S.D.Fla. 2004) (finding question of fact whether damages from construction defects were

the result of ‘continuous or repeated exposure to substantially the same general harmful conditions’ that first occurred before insurer’s policy period or a separate occurrence that first happened during policy period.)

In City of Idaho Falls v. Home Indem. Co., 126 Idaho 604, 888 P.2d 383 (1995), the insurer argued that because the same types of misrepresentations and omissions were alleged to have occurred during the timeframe of its first policy year and a prior year covered retroactively by a Prior Acts Endorsement, the claims involved the “same or related wrongful acts”. Id. at 608. The Idaho Supreme Court rejected the insurer’s argument stating:

“...simply because the same types or categories of wrongful acts are alleged over an interval spanning both the Prior Acts Endorsement period and the first policy year does not mean that all wrongful acts were in fact the same or related.”

Id. at 608-09.

Similarly, just because the same type of damage, i.e. water intrusion, is alleged to have occurred during the timeframe of Valiant, Northern and Underwriters’ policy periods does not mean that all of the damage is the same or related.

Valiant and Northern contend that the Underlying Construction Defect Action involved one occurrence, i.e. water intrusion, that caused indivisible property damage throughout the building and cite Gruol

Constr. Co. v. Ins. Co. of North Am., 11 Wn.App. 632, 524 P2d. 427 (1974) and American Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co., Inc., 134 Wn.2d 413, 951 P.2d 250 (1998) in support of its argument. However, these cases differ from the present one because they involved a single injury caused by a single act or source. Gruol involved dry rot caused by negligent backfilling and B&L Trucking involved pollution caused by leaching from smelter slag.

Here, different construction defects caused separate and distinct property damage to various parts of the building. Investigations performed by Stratford and GCG's expert in the Underlying Action revealed there were 10 separate, distinct, and unrelated sources of water intrusion at the building, including through windows, siding, and the roof. CP 150, 154-155.

The facts in this case are more akin to those in Chu v. Canadian Indem. Co., 224 Cal.App.3d 86, 97-98, 274 Cal.Rptr. 20 (Cal.Ct.App. 1990) and Gary Day Constr. Co., Inc. v. Clarendon Am. Ins. Co., 459 F.Supp.2d 1039, 1047-48 (D.Nev. 2006) and demonstrate that, in construction defect cases, each defect and instance of property damage needs to be analyzed for purposes of insurance coverage.

In Chu, a condominium developer was sued by a condominium association for construction defects. The developer's insurer denied

coverage for the construction defect action contending that damage from the defective construction first manifested before its policy and subsequent damage was nothing more than a continuation of the same damage that manifested before the insurer's policy became effective. Id. at 93. In granting summary judgment in favor of the insurer, the trial court found that the construction defects were first discovered prior to the insurer's policy and that all subsequent problems were nothing more than a reoccurrence or further manifestation of the same defect – "faulty construction". Id.

The California Court of Appeal rejected the trial court's conclusion that manifestation of one defect demonstrates the project suffers from the generic defect of faulty construction and later manifestations of distinct and unrelated problems are merely re-manifestations of the same defect of faulty construction. Id. at 98. The Court held that each set of distinct defects must be analyzed separately to determine whether the insured had knowledge of those defects at the time he sold the condominium units. Id.

In Gary Day, a framing subcontractor filed suit against its insurers seeking coverage for an underlying construction defect action. One of the insurers, Clarendon, denied coverage for the construction defect action based on the fact that the first instance of damage in the homes occurred before the inception of Clarendon's policy. Id. at 1043-1044. For

coverage to be triggered, Clarendon's policy required both the property damage and the occurrence to first take place during the policy period. Id. at 1045.

The Nevada court determined that the occurrence under the policy was water intrusion into the homes. Id. at 1047. The Court concluded that evidence of water intrusion at some of the homes was insufficient to conclusively establish that there was water intrusion in all of the homes falling within Clarendon's policy period. Id. at 1048. The Court held there were genuine issues of material fact as to the existence of water intrusion in each of the 20 homes, and the date on which the water intrusion occurred and that an evaluation of each home was required. Id. at 1047-1048.

As shown by the Chu and Gary Day cases, there can be different "occurrences" of water intrusion resulting in different property damage in different policy periods. For example, there could be an "occurrence" of water intrusion through a window damaging interior drywall on the east side of the building during Valiant's June 1, 1999 to June 1, 2000 policy period while a different "occurrence" of water intrusion through a roof defect caused damage to the building's framing during Northern's June 1, 2000 to June 1, 2001 policy period.

Given that the documents in the Underlying Action show there were 10 different sources of water intrusion into the building with damage occurring at different locations and different times, it can hardly be said that Valiant and Northern's policies apply to the "same occurrence" for purposes of the anti-stacking provision.

The fact that there were multiple, different sources of water intrusion into the building raises a material question of fact regarding whether there were separate occurrences during the various insurers' policy periods which should have precluded the trial court's grant of summary judgment in favor of Valiant and Northern.

2. The Anti-Stacking Provision Conflicts with the Annual Limits Provision in Valiant and Northern's Policies Resulting in Ambiguity.

The trial court erred in finding no ambiguity between the anti-stacking provision and the annual limits provision in Valiant and Northern's successive policies.

Valiant and Northern issued three consecutive one-year commercial general liability policies which provide for a limit of \$1 million per occurrence per year. Valiant's policy ran from June 1, 1999 to June 1, 2000. CP 44. Northern's first policy ran from June 1, 2000 to June 1, 2001 and its second policy ran from June 1, 2001 to June 1, 2002. CP 68, 93. The declarations page for each policy outlines the policy

period and applicable limits of liability for that policy year. CP 44, 68, 93. Moreover, the word “annual” appears in the top right corner of each declarations page. CP 44, 68, 93. In addition, in Section III – Limits of Insurance, each policy contains a provision stating that the limits of the commercial general liability coverage part “apply separately to each consecutive annual period”. CP 57-58, 82-83, 107-108.

Reading the declarations page for each policy together with the annual limits provision, it is clear that the \$1 million per occurrence limit in Valiant and Northern’s three consecutive insurance policies applies separately to each of the three policy years. However, an anti-stacking provision in the Conditions section of each policy purports to restrict the coverage under each policy from \$1 million per year to a total of \$1 million regardless of the number of policy years.

Anti-stacking provisions have been found to be ambiguous when they conflict with policy provisions providing for annual limits. Columbia Heights Motors, Inc. v. Allstate Ins. Co., 275 N.W.2d 32, 35-36 (Minn. 1979), A.B.S. Clothing, Inc. v. Home Ins. Co., 34 Cal.App.4th 1470, 41 Cal.Rptr.2d 166 (Cal.Ct.App. 1995), Cincinnati Ins. Co. v. Sherman & Hemstreet, Inc., 260 Ga.App. 870, 581 S.E.2d 613 (Ga.Ct.App. 2003); Glaser v Hartford Cas. Ins. Co., 364 F.Supp.2d 529 (D.Md. 2005); and

Karen Kane, Inc. v. Reliance Ins. Co., 202 F.3d 1180 (9th Cir. 2000) (applying California law).

The policy language at issue in this case is similar to the policy language at issue in Columbia Heights. In Columbia Heights, Allstate issued a business package policy providing several types of coverage. The policy period ran from June 1, 1973 to June 1, 1976. During the policy period, the insured sustained losses from an employee's theft. The policy contained a provision in one part of the policy (Condition 10 of General Provisions) providing that "any limit of Allstate's liability stated in the policy as 'aggregate' shall apply separately to each consecutive annual period." Id. at 34. In another part of Allstate's policy (Section 11 of Comprehensive Crime Form), there was a provision stating that "regardless of the number of years this form shall continue in force and the number of premiums ... paid, the limits of Allstate's liability ... shall not be cumulative from year to year or period to period." Id. at 35. The Minnesota Supreme Court held that an ambiguity existed as the one policy provision provided that the aggregate limits applied separately to each policy year while the other policy provision purported to restrict the insurer's total liability limit regardless of the number of years. Id. at 36.

Similar to Valiant and Northern's policies, the policies at issue in A.B.S., Glaser, and Karen Kane also contained an anti-stacking provision

that attempted to limit coverage under consecutive policies if a loss was covered under more than one policy issued by the insurer. See A.B.S., 34 Cal.App.4th at 1479; Glaser, 364 F.Supp.2d at 535-536; and Karen Kane, 202 F.3d at 1182. Akin to this case, the primary issue in A.B.S., Glaser and Karen Kane was whether an employee's theft that occurred over multiple, successive policy years was covered by each policy in effect each year or if recovery under the successive policies was limited to one policy limit.

In A.B.S. and Karen Kane, each Court looked at whether the insurer's policies constituted separate and distinct contracts for each policy period or whether the policies were one continuous contract. The Courts determined that the issue of whether separate policies were issued or one continuous multi-year policy was important because an insurer that issues three separate policies is liable up to its limit of liability for each policy period. A.B.S., 34 Cal.App.4th at 1476 ("Where indemnity is afforded through separate and distinct contracts for specific policy periods the insurer is generally held liable up to its limit of liability for each policy period."); Karen Kane, 202 F.3d at 1186.

Similarly, under Washington law, an insurer that issues separate policies is liable up to its limit of liability for each policy period. Gruol, 11 Wn.App. at 637-638; B&L Trucking, 134 Wn.2d at 424. Thus, the fact

that Valiant and Northern issued separate consecutive one-year policies as opposed to one continuous multi-year policy is significant because, under the language of their policies, the insured Stratford is entitled to recover the applicable limit of liability for each year the liability policies are in effect when property damage caused by an occurrence takes place in each year.

In Glaser, the Court found the fact that the insurer had issued separate consecutive policies significant in interpreting each policy's language. The Court stated that:

Glaser's five successive policies required different premiums to account for varied levels of coverage over different property, all of which indicate that each policy was independent. To interpret the successive policies as narrowly as suggested by the [insurer] would essentially render the coverage of successive policies and the payment of premiums meaningless.

Id. at 538.

In construing each policy's definition of occurrence, non-cumulation provision, and anti-stacking provision in favor of the insured, the Glaser court held that the employee's multiple acts of embezzlement constituted one occurrence in each policy year. Id.

As noted above, the declarations page of each policy issued by Valiant and Northern provides for a \$1 million per occurrence limit for

commercial general liability coverage per policy year. The annual limits provision in the Limits of Insurance section provides that the liability limits apply separately to each consecutive annual period. However, the anti-stacking provision in the Conditions section of the policies attempts to restrict the \$1 million per occurrence per year limit to a total of \$1 million regardless of the number of years. Clearly there is ambiguity between the declarations page, the annual limits provision, and the anti-stacking provision regarding the liability limits the insured is entitled to under the policies. On the one hand, the policies provide that the limits of the three policies apply annually and, on the other hand, the policies attempt to restrict the total limits available under the three policies to only one policy limit.

Given the fact that the policy limits apply separately to each consecutive annual period, the anti-stacking provision's attempt to restrict coverage to one policy year and one limit is conflicting and therefore ambiguous.

Because the coverage provided to Stratford by Valiant and Northern was under three separate, consecutive policies, Stratford was entitled to recover the highest applicable limit of insurance under each policy in effect during the time the property damage took place.

3. **The Trial Court Erred in Relying on Anti-Stacking Provisions in Uninsured/Underinsured Motorist Policies In Granting Summary Judgment in Favor of Valiant and Northern.**

The trial court erred in granting Valiant and Northern's motion for summary judgment regarding their anti-stacking provision based on case law upholding the provision in the context of uninsured/underinsured motorist ("UIM") coverage. The cases cited by Valiant and Northern in support of their motion for summary judgment, National Merit Ins. Co. v. Yost, 101 Wn.App. 236, 3 P.3d 203 (2000), Greengo v. Public Employees Mut. Ins. Co., 135 Wn.2d 799, 959 P.2d 657 (1998), and Parker v. United Services Automobile Associates, 97 Wn.App. 528, 984 P.2d 458 (1999), are distinguishable both factually and legally from this case.

First, Yost, Parker and Greengo involved losses caused by a single discrete event, i.e. an automobile accident, which triggered multiple policies in the same year. Here, the property damage alleged in the Underlying Action was caused by water intrusion through various construction defects occurring at different locations and different times over the course of a number of years triggering coverage under different policies in different years.

Second, Yost, Parker and Greengo involved an anti-stacking provision in UIM policies, not commercial general liability policies. UIM

coverage is wholly distinct from commercial general liability coverage and the public policy underlying UIM coverage is different than the public policy underlying commercial general liability coverage. The public policy underlying UIM coverage is to provide a second floating layer of coverage. Greengo, 135 Wn.2d supra at 809. As the Washington Supreme Court has stated:

..UIM is unique among insurance. Its purpose and focus are very narrow. Rather than full compensation, UIM coverage simply provides additional insurance to cover any judgment that might be entered in favor of the insured against an underinsured motorist.

Sherry v. Financial Indem. Co., 160 Wn.2d 611, 622, 160 P.3d 31 (2007) citing Brown v. Snohomish County Physicians Corp., 120 Wn.2d 747, 757, 845 P.2d 334 (1993).

The coverage provided by comprehensive or commercial general liability policies is much broader than UIM coverage. As the Washington Supreme Court stated in Olds-Olympic, Inc. v. Commercial Union Ins. Co., 129 Wn.2d 464, 471 (1996):

[An] insurance obligation is interpreted in a fashion consistent with the undertaking described in the policy label. Insureds are not purchasing “almost comprehensive” coverage. CGL policies are marketed by insurers as comprehensive in their scope and should be strictly construed when the insurer attempts to

subtract from the comprehensive scope of its undertaking.

Third, Washington's UIM statute, RCW 48.22.030, expressly permits an insurer to prohibit the stacking of policy limits for UIM coverage. See Greengo, 135 Wn.2d at 806; Mutual of Enumclaw Ins. Co. v. Grimstad-Hardy, 71 Wn.App. 226, 857 P.2d 1064 (1993). No statutory or case authority exists in Washington allowing anti-stacking provisions in commercial general liability policies. Rather, Washington courts have expressly allowed the policy limits of successive commercial general liability policies to be stacked in cases involving continuous injury or damage. See Gruol, 11 Wn.App. at 637-38; B&L Trucking, 134 Wn.2d at 429.

4. **An Anti-Stacking Provision in Commercial General Liability Policies Violates Washington's Public Policy of Full Compensation of Insureds.**

Public policy has been invoked to invalidate insurance contract provisions where appropriate. Brown, 120 Wn.2d supra at 753. There is a recognized public policy in Washington regarding full compensation of insureds. Thiringer v. American Motors Ins. Co., 91 Wn.2d 215, 220, 588 P.2d 191 (1978); Mahler v. Szucs, 135 Wn.2d 398, 417-418, 957 P.2d 632 (1998); Bordeaux, Inc. v. American Safety Ins. Co., 145 Wn.App. 687, 696-697, 186 P.3d 1188 (2008); Cammel v. State Farm Mut. Auto. Ins.

Co., 86 Wn.2d 264, 270, 543 P.2d 634 (1975), *overruled by statute*; Federated Am. Ins. Co. v. Raynes, 88 Wn.2d 439, 447, 563 P.2d 815 (1977) *overruled by statute*. The public policy favoring full compensation of insureds does not arise only in situations involving subrogation. Brown, 120 Wn.2d *supra* at 756. The public policy underlying commercial general liability coverage is full compensation of insureds. See B&L Trucking, 134 Wn.2d at 429 (Once coverage is triggered in one or more policy periods, those policies provide full coverage for all damage, without any allocation between insurer and insured.)

Here, the anti-stacking provision in Valiant and Northern's commercial general liability policies violates Washington's public policy of full compensation of insureds as it unnecessarily restricts the number of policies and limits available to an insured for damage that occurs in successive policy years and that triggers coverage under those years. Valiant and Northern charged and collected a separate premium for each of the three consecutive policies they issued from June 1, 1999 through June 1, 2002. By limiting the insured's recovery to the amount of one policy limit, even though the insured paid separate premiums for the same coverage under two successive policies, the insured is left in the position of having paid for coverage it did not receive.

If this Court upholds the anti-stacking provision in Valiant and Northern's policies, it will allow Valiant and Northern to escape their respective contracted-for obligations and render coverage illusory for two of the three policy years. Many courts have rejected the application of anti-stacking provisions in successive insurance policies in situations involving continuing losses as such provisions are inequitable and contrary to the reasonable expectations of the insured. See, Outboard Marine Corp. v. Liberty Mutual Ins. Co., 283 Ill.App.3d 630, 644-45, 219 Ill.Dec. 62, 670 N.E.2d 740 (Ill. App. 1996) (To apply the non-cumulation of liability clause would give the insurer a double credit and deprive the insured of the full value of its premium.); A.B.S., 34 Cal.App.4th supra at 1478 (Courts have generally recognized that limiting recovery to only one year's policy limit when the insured has paid several years' premiums is contrary to the insured's reasonable expectation of coverage.); Ernie Haire Ford, Inc. v. Universal Underwriters Ins. Co., 541 F.Supp.2d 1295, 1303 (M.D. Fla. 2008); Glaser v. Hartford Cas. Ins. Co., 364 F.Supp.2d 529, 538 (D.Md. 2005).

Because the anti-stacking provision in Valiant and Northern's commercial general liability policies violates Washington's public policy of full compensation of insureds, it should be found to be void and unenforceable.

5. **The Anti-Stacking Provision in Valiant and Northern's Commercial General Liability Policies Violates Washington's Policy of Joint and Several Liability for Insurers.**

Washington has adopted the continuous injury trigger of coverage in cases involving continuous and progressively deteriorating damage that occurs over time and during successive policy periods. Gruol, 11 Wn.App. at 637-38. When damage occurs over several policy periods, all insurers on the risk during the time of ongoing damage are jointly and severally liable for the entire loss up to their policy limits. B&L Trucking, 134 Wn.2d at 424. Once coverage is triggered under an insurance policy, that policy provides full coverage for all continuing damage, without any allocation between insurer and insured. Id. at 429.

Here, Valiant and Northern issued three consecutive one-year policies from June 1, 1999 through June 1, 2002 to the insured, Stratford. The Underlying Action against Stratford involved allegations of various construction defects that caused property damage to various parts of the project from the time of completion of construction in 2000 to the time Stratford performed an investigation at the project in 2005. As the claimed property damage occurred over the course of a number of years, including Valiant and Northern's respective policy periods, Valiant and

Northern were jointly and severally liable for the full amount of damage under all three of their policies.

Even though all three of Valiant and Northern's policies were triggered in the Underlying Action, Valiant and Northern contend that the anti-stacking provision in their policies applies to limit their liability under all three policies to only one policy limit of \$1 million. By restricting the available limits under three separate consecutive policies to one policy limit, the anti-stacking provision has the effect of allocating damages that occur during insured periods to the policyholder.

For example, assuming for argument's sake that Stratford had no insurance coverage after Northern's June 1, 2001 to 2002 policy and no umbrella or excess coverage during its June 1, 1999 to June 1, 2002 policy period for the Underlying Action. Also assume that the Underlying Action settled for a total of \$3,000,000. If Valiant and Northern's anti-stacking provision applied to limit its indemnity obligation under all three policies to one policy limit of \$1,000,000, then Stratford would be left responsible for the balance of \$2,000,000. Such a result is contrary to the holdings of both Gruol and B&L Trucking that damages cannot be apportioned between insured and insurer.

Because Valiant and Northern's anti-stacking provision is contrary to Washington law regarding insurers' joint and several obligations, it should be held void and unenforceable.

6. Northern Failed to Establish that Its Continuous or Progressively Deteriorating Damage Exclusion Applied to Preclude Coverage.

Northern's June 1, 2001 to June 1, 2002 policy contains an endorsement titled "Prior Claims or Continuous or Progressively Deteriorating Injury or Damage" which excludes coverage for 1) any injury or damage which first occurs prior to the effective date of the policy, 2) any injury or damage that first occurs prior to the effective date of the policy, continues through the policy period and ends after the policy expires, or 3) any injury or damage that first occurs after the expiration date of the policy.

An insurer bears the burden of proving an exclusion applies to preclude coverage under its policy. Queen City Farms, Inc. v. Central Nat'l Ins. Co., 126 Wn.2d 50, 71, 882 P.2d 703 (1994). Courts liberally construe insurance policies to provide coverage wherever possible and exclusions are strictly construed. Bordeaux, 145 Wn.App. at 694.

In the motion for summary judgment, Northern did not satisfy its burden of establishing that all of the claimed property damage first occurred prior to its June 1, 2001 to June 1, 2002 policy. In fact, Northern

failed to submit any evidence at all regarding the timing of the property damage at issue in the Underlying Action. Instead, Northern's counsel merely made conclusory arguments that the endorsement "bars coverage for the type of 'continuous' property damage involved in the Underlying Action." CP 34. See, Green v. A.P.C., 136 Wn.2d 87, 100, 960 P.2d 912 (1998) (Motion for summary judgment should be supported by competent evidence and arguments of counsel are not evidence.).

Here, the Underlying Action against Stratford involved allegations of various construction defects resulting in separate and distinct property damage at various building locations. Evidence in the Underlying Action revealed that problems with the building started to occur shortly after it was completed in 2000 and occurred sporadically thereafter. CP 148. It was not until 2005 when an investigation was performed by Stratford that the extent of the problems and damage were discovered. CP 154-159.

Both Stratford and the owner's expert determined there was no single source of the water intrusion, but rather at least ten separate and distinct sources that allowed for water intrusion into the building: 1) Window Units; 2) Window Flashing; 3) Weather Resistive Barrier under Stucco; 4) Weather Resistive Barrier under vinyl cladding; 5) Roofing underlayment; 6) Roof to wall details; 7) Deck to wall details; 8) Deck flashing and membranes; 9) Vent penetrations, and 10) Sealants around

penetrations which had caused extensive damage at all elevations and floor lines of the building. CP 150, 154-155.

Valiant and Northern also conceded in their motion for summary judgment that, even though residents in the facility did not begin reporting water leaks until January, 2004, the parties' investigation revealed substantial water intrusion damage that had occurred for a significant time before 2004. CP 118. Their reasoning appears to be that because some damage from water leakage occurred prior to inception of Northern's second policy, and because water damage is deemed continuous, that all water damage at Chateau Pacific falls within its continuous injury endorsement. However, the fact that some property damage may have first occurred prior to Northern's June 1, 2001 to June 1, 2002 policy period does not mean that all of the property damage from all causes first occurred prior to that policy. IDC Construction, LLC v. Admiral Insurance Co., 339 F.Supp.2d 1342 (S.D.Fla. 2004); Chu, 224 Cal.App.3d at 97-98; Gary Day, 459 F.Supp.2d at 1047-48.

In IDC, the Court reviewed a "pre-existing damage" exclusion similar to the exclusion in Northern's June 1, 2001 to June 1, 2002 policy. In IDC, the insurer, Admiral, argued that the underlying complaint alleged property damage that was known and first occurred before its policy incepted and was therefore excluded under its pre-existing damage

exclusion. Id. at 1350. The Court found a question of fact regarding whether the damages alleged in the underlying complaint were the result of ‘continuous or repeated exposure to substantially the same general harmful conditions’ that first occurred before the policy period or a separate occurrence that first happened during Admiral’s policy period. Id. at 1351.

As noted above, in 2005, Stratford, conducted an investigation to determine why the building envelope was leaking, where it was leaking, the extent of the leaking, and damage caused by the leaking. CP 154. In a memorandum dated March 18, 2005, a Stratford representative advised that a multitude of different problems were discovered, including but not limited to, missing flashing, improperly installed flashing, missing caulk, and improperly applied caulk. In addition, stucco leaks from cracks were discovered along with water intrusion around stucco expansion joints. CP 154-159.

The memo included a map of the areas where the various problems were occurring and determined that damage was occurring at different locations and was being caused by different defects. CP 154-159. At elevation A, the memo indicates that three windows on the first floor have been plagued by leakage since the building was completed. CP 155. At elevation B, an investigation was performed at an apartment in which the

tenant had been complaining of water intrusion since she moved in when the building was new. CP 156. While the memo indicates that no definitive source of the water intrusion could be found, moisture readings suggested that water was entering through a cornice and window. CP 156. In addition, a high level of moisture at the top of the wall above and below the roofline indicated faulty installation of roofing/parapet wall. CP 156. Another area, elevation K, exhibited a combination of problems. CP 156. A void in a joint between the balcony railing and stucco had moss growing in it. CP 156. In addition, the deck beam/stucco joint flashing and caulking was found to be frequently missing throughout the building which could result in structural degradation of the decks. CP 156.

As the foregoing evidence indicates, separate and distinct construction defects caused separate and distinct property damage which occurred at different times from the time of the building's completion through the time of Stratford's investigation of the problems in 2005.

Because Northern did not provide any evidence to establish that all of the alleged property damage first occurred prior to the inception of its second policy, the trial court's order granting summary judgment in Northern's favor should be reversed.

7. **The Trial Court Erred in Failing to Strike the Supplemental Declaration of Jacquelyn A. Beatty and the Exhibits Thereto.**

In reply to Underwriters' opposition to the motion for summary judgment, Valiant and Northern's counsel submitted a supplemental declaration attaching additional documents as exhibits for the trial court's consideration. CP 178-211. Underwriters objected to and moved to strike both the supplemental declaration and exhibits thereto based on lack of authentication and hearsay. CP 222-226. While the trial court reviewed Underwriters' objection and motion to strike, the trial court did not rule on the motion and erred in considering the evidence to which Underwriters objected. CP 242-244.

Authentication of evidence is a condition precedent to admissibility. ER 901(a). Proper foundation can be established in any manner permitted by Washington Evidence Rule 901(b) or 902. See ER 901(b) (providing ten examples of authentication); ER 902 (self-authenticating documents need no extrinsic foundation). A writing is not authenticated merely by reference to it in an affidavit. United States v. M. E. Dibble, 429 F.2d 598, 602 (9th Cir. 1970). The writing must be authenticated by "a witness who wrote it, signed it, used it, or saw others do so." Orr v. Bank of America, 285 F.3d 764, 774 fn. 8 (9th Cir. 2002).

Here, authentication has not been established for the following exhibits attached to Ms. Beatty's Supplemental Declaration: 1) an April 5, 2007 letter from Zurich adjuster Jack Hilbert to Bernie Conley, Stratford's owner (Exhibit A) CP 181-186; 2) e-mail string correspondence between Stratford's personal counsel, Greg Harper, Bernie Conley, and Stratford's representative, Victoria Chaussee (Exhibit C) CP 189-200; 3) a December 8, 2006 letter from Plaintiff's coverage counsel, Jerret Sale, to Bernard Conley (Exhibit D) CP 201-207; and 4) a May 3, 2007 letter from Greg Harper to Jack Hilbert (Exhibit E) CP 208-211.

These documents were not written by Ms. Beatty nor does she state that she witnessed anyone writing these documents. Therefore, the foregoing exhibits lack proper authentication and should not have been admissible.

In addition, Ms. Beatty's supplemental declaration and all of the exhibits thereto constitute impermissible hearsay under ER 801 and 802. Her supplemental declaration is also inadmissible to the extent that it summarizes the documents is inadmissible to prove the content of those writings.

E. CONCLUSION

In reviewing the evidence in the light most favorable to Underwriters, Valiant and Northern failed to meet their burden of showing

that there was no genuine issue of fact and they were entitled to judgment as a matter of law. As discussed above, material questions of fact exist with regard to when each instance of property damage occurred, the source of the property damage, and whether the property damage was discrete or continuous. These questions of fact are essential to determining whether the Valiant and Northern policies apply to the “same occurrence” as required by the anti-stacking provision. In addition, these questions of fact negate the application of Northern’s Continuous or Progressively Deteriorating Damage exclusion in its June 1, 2001 to June 1, 2002 policy.

Notwithstanding the existence of material questions of fact, the anti-stacking provision does not apply to bar coverage under Valiant and Northern’s policies as it attempts to restrict coverage under the three successive policies to only one policy limit which is in conflict with the Limits of Insurance section of the three policies which provides the annual limits apply separately to each policy period.

Lastly, the anti-stacking provision in Valiant and Northern’s commercial general liability policies violates Washington’s public policy regarding full compensation of insureds as well as the stated policy of joint and several liability of insurers.

Therefore, Underwriters respectfully requests that this Court reverse the Trial Court's Order Granting Valiant and Northern's Motion for Summary Judgment entered on May 22, 2009 and remand the case for further proceedings.

DATED: September 14th, 2009

Respectfully submitted,

By: Kathleen A. Harrison

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TWG

No. 63692-8

**COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION I**

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, subscribing to
Policy Nos. A02BF387 and CJ352084,

Plaintiff/Appellant,

vs.

VALIANT INSURANCE COMPANY; and NORTHERN INSURANCE
COMPANY OF NEW YORK,

Defendants/Respondents,

CERTIFICATE OF SERVICE

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused to be filed a copy of the documents listed below with the Court of Appeals of the State of Washington in this action:

DOCUMENT DESCRIPTION:

Appellant, Certain Underwriters at Lloyd's London's Original Brief

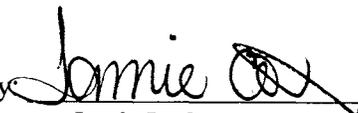
I caused to be served the foregoing document(s) on the parties in this action addressed as follows:

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(BY UPS OVERNIGHT) I am readily familiar with the practice of Robertson ▪ Clark, LLP for collection and processing of correspondence for overnight delivery and know that the document(s) described herein will be deposited in a box or other facility regularly maintained by UPS for overnight delivery.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 14th day of September, 2009.

Executed at San Diego, California.

By 
Jamie L. Cox