

65299-1

65299-1

No. 65299-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ATLANTIC CASUALTY INSURANCE COMPANY,
Plaintiff/Appellant

v.

SALMON BAY PLUMBING, REMODELING & HEATING, INC.
Defendant/Respondent

APPELLANT'S REPLY BRIEF

GORDON THOMAS HONEYWELL LLP
Joanne Thomas Blackburn
Michelle A. Menely
Attorneys for Appellant

Suite 2100
600 University Street
Seattle WA 98101
(206) 676-7500
WSBA No. 21541
WSBA No. 28353

2010 OCT 13 01:31:11

WJ
COURT OF APPEALS
DIVISION I
CLERK OF COURT

TABLE OF CONTENTS

A.	Introduction	1
B.	Counterstatement of Facts	2
(1)	Procedural Facts.	2
(2)	Counterstatement of Substantive Facts.....	7
C.	Argument.....	9
1.	The Trial Court Erred in Determining a Matter that was Not At-Issue and there is No Admissible Evidence Demonstrating that the Error was Harmless.....	9
a.	Salmon Bay's Failure to File an Answer is an Admission	9
b.	The court erred in addressing an issue outside those framed by the pleadings.....	11
2.	There is No Evidence of Bad Faith and, Therefore, Coverage by Estoppel Should Not Have Been Imposed...	14
3.	The Issue of Whether the 14 Other Potential Exclusions Applied Was Never Raised.....	17
4.	There Were Disputed Facts as to Whether an Ambiguity Existed in the "New Construction" Exclusion and Thus the Trial Court Erred in Summarily Determining that Issue.....	20
5.	Attorneys Fees Should Not Be Awarded.....	24
D.	Conclusion.....	24

TABLE OF AUTHORITIES

Cases

<i>American Best Foods, Inc. v. Alea of London, Ltd.</i> , 168 Wn.2d 398, 229 P.3d 693 (2010).....	16
<i>Beal for Martinez v. City of Seattle</i> , 134 Wn.2d 769, 954 P.2d 237 (1998).....	15
<i>Camp Finance LLC v. Brazington</i> , 133 Wn. App. 156, 162, 135 P.2d 946 (2006)	13
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 809, 828 P.2d 549 (1992).....	19
<i>Fusato v. Washington Interscholastic Activities Assn</i> , 93 Wn. App. 762, 970 P.2d 774 (1999).....	21
<i>Grimwood v. Univ. of Puget Sound</i> , 110 Wn.2d 355, 753 P.2d 517 (1988).....	23
<i>Hayden v. Mutual of Enumclaw</i> , 141 Wn.2d 55, 1 P.3d 1167 (2000).....	15, 17
<i>Holland v. City of Tacoma</i> , 90 Wn. App. 533, 954 P.2d 290 (1998).....	19
<i>In re Welfare of BRSH</i> , 141 Wn.App. 39, 169 P.3d 40 (2007).....	17
<i>Jansen v. Nu-West, Inc.</i> , 102 Wn.2d 432, 6 P.2d 98 (2000).....	9
<i>Kaplan v. Northwestern Mut. Life Ins. Co.</i> , 115 Wn. App. 791, 65 P.3d 16 (2003).....	19
<i>Kirby v. City of Tacoma</i> , 124 Wn. App. 454, 98 P.3d 827 (2004).....	12, 13
<i>Olympic S.S. Co., Inc. v. Centennial Ins. Co.</i> , 117 Wn.2d 37, 811 P.2d 673 (2001).....	24
<i>Shinn Irr. Equip, Inc. v. Marchand</i> , 1 Wn. App. 428, 430-31, 462 P.2d 571 (1969)	12
<i>Smith v. Safeco ins. Co.</i> , 150 Wn.2d 478, 78 P.3d 1274 (2003).....	15

State Farm Mut. Auto. Ins. Co. v. Ruiz,
134 Wn.2d 713, 952 P.2d 157 (1998).....22

Strong v. Terrell,
147 Wn. App. 376, 195 P.3d 977 (2008).....11

Weyerhaeuser Co. v. Commercial Union Ins. Co.,
142 Wn.2d 654, 15 P.3d 115 (2000).....23

A. Introduction

As was addressed in more detail in the opening brief of appellant, this appeal involves a myriad of issues, including the trial court's determination that indemnity obligations were triggered under the commercial general liability policy Atlantic Casualty Insurance Company ("Atlantic Casualty") issued to its insured, Salmon Bay Plumbing, Remodeling & Heating, Inc. ("Salmon Bay").

The trial court's ultimate determination was based upon multiple rounds of briefing, including a motion for reconsideration, which was not only briefed but argued, and further argument and briefing at the time of presentation of the final order. All of the issues raised on appeal flow from the trial court's erroneous ruling that began with the granting of a motion not before the court. The trial court continued to commit errors of law in ruling on the motion for reconsideration and, ultimately, on the final order.

Salmon Bay, through Northwood Parkway's counsel, opposes the appeal but fails to provide a sufficient factual record or, in many cases, even citation to authority, to support its assertions. For these reasons stated herein, and for the reasons stated in Atlantic Casualty's opening brief, this Court should reverse the trial court's numerous errors in its

rulings on the motions, as ultimately reflected in its final order and remand this matter for further proceedings.

B. Counterstatement of Facts

(1) Procedural Facts.

This case is a declaratory judgment action in which Appellant Atlantic Casualty sought a determination of its rights and obligations pertaining to **one** particular exclusion contained in a commercial general liability insurance policy issued to Respondent Salmon Bay. (CP409-414). The case underlying this declaratory judgment action is one for construction defects in which Northwood Parkway LLC sued Salmon Bay for alleged construction deficiencies which allegedly occurred during the creation of the condominiums known as Sequoyah Condominiums. (CP 410). Salmon Bay tendered the claim to Atlantic Casualty for defense and indemnity. Atlantic Casualty accepted the tender of defense but specifically reserved its rights to have a court ultimately determine its obligations under the applicable policy. (CP 12-27). In doing so, Atlantic Casualty provided its insured with a reservation of rights letter which delineated and explained that there were over 14 potential exclusions to coverage. (*Id.*) Salmon Bay has never contended it did not receive the reservation of rights letter or that it did not understand the 14 potential exclusions. Atlantic Casualty instituted this declaratory judgment action

seeking a determination that one of the 14 potential exclusions – the exclusion for new construction – barred coverage. (CP 409-414).

Salmon Bay, itself, appeared in the declaratory judgment action through its attorney, Dan DeLue (CP 396-398), but otherwise took no action – including failing to even file an Answer to the Complaint for Declaratory Relief.¹ Despite Salmon Bay's apparent realization that Atlantic Casualty's coverage position was correct, Northwood Parkway, filed an Answer to the underlying Complaint but, notably, did not seek affirmative relief of any kind. That is, Northwood Parkway did not counterclaim for a determination that coverage was implicated under Atlantic Casualty's policy. (CP393-395). Thus, no one in this lawsuit ever filed a pleading that the issue of whether Atlantic Casualty was required to indemnify its insured for the claims being made against it by Northwood Parkway. Instead, all that was brought into the question in the pleadings that were filed was whether one exclusion applied. Indeed, when Northwood Parkway – but not Salmon Bay – later filed a Motion for Summary Judgment it limited the issue to whether the one exclusion applied. (CP 501-509). In fact, Northwood Parkway framed the issue at bar as

¹ Salmon Bay filed an untimely joinder in Northwood Parkway's Motion for Summary Judgment. However, "Salmon Bay's" joinder occurred **after** Atlantic Casualty moved to

WHETHER THE EXCLUSION RELIEVES
ATLANTIC OF ITS DUTY TO INDEMNIFY
SALMON BAY FOR LOSSES FOUND TO HAVE
BEEN INCURRED DURING THE POLICY
PERIOD WHEN SALMON BAY'S WORK WAS
NOT BEING PERFORMED IN FURTHERANCE
OF 'NEW CONSTRUCTION'

CP 504 (emphasis added). Atlantic Casualty cross-moved on the same, single issue. (CP 373-386).

Northwood Parkway's motion was never heard due to Atlantic Casualty's determination to non-suit Northwood Parkway and to proceed only against its named insured, Salmon Bay. Consequently, on the morning scheduled for hearing of the Motions for Summary Judgment, Atlantic Casualty orally moved to non-suit the claims against Northwood Parkway. (CP 193). The trial court took Atlantic Casualty's oral motion under advisement and required the parties to submit briefing on whether the non-suit was proper. The trial court also specifically held that

If Northwood Parkway is dismissed, the court can rule on Atlantic Casualty's motion for summary judgment without oral argument as it is unopposed.

If Northwood Parkway remains a defendant because the Court does not dismiss them, the parties agree to re-note before a judge.

(CP 192).

non-suit Northwood Parkway -- and **after** the trial court took the motion for nonsuit under advisement. (CP 158, ¶3).

On December 14, 2009, Judge Anita Farris of the Snohomish County Superior Court granted Atlantic Casualty's Motion for Voluntary Non-Suit as to Northwood Parkway. In doing so, the court specifically noted:

2. . . . It is hereby ordered, that if Atlantic Casualty Inc. wishes to have its Motion for Summary Judgment heard it shall re-note the matter for hearing on the Civil Motions Calendar.

3. As Salmon Bay Plumbing joined in the Summary Judgment motion after the hearing before this Court, this Court makes no determination on the disputed issue as to whether Salmon Bay Plumbing can join in Northwood Parkway LLC's Summary Judgment motion and now oppose Atlantic Casualty Insurance Company's Summary Judgment. That matter must be determined on the Civil Motions Calendar at or before the time of any re-noted Summary Judgment motion, so that all parties can be heard on that issue.

CP 158.

On December 23, 2009, Atlantic Casualty re-noted its Motion for Summary Judgment. (CP 155). On the morning of the hearing, January 21, 2010, Northwood's counsel, Hans Juhl, provided the trial court and counsel with a "Notice of Limited Appearance" in which Mr. Juhl appeared on behalf of his client's adversary, Salmon Bay. In doing so, Mr. Juhl specifically asserted that his representation of Salmon Bay's was

for the "**limited purpose of defending** Plaintiff, ATLANTIC CASUALTY INSURANCE COMPANY's motion for summary judgment filed herein." (CP 152 (emphasis added)). However, despite now being represented by Northwood Parkway's counsel and despite the trial court's specific direction, Salmon Bay **never** sought a determination as to whether its untimely joinder in Northwood Parkway's motion could be considered and, more importantly, Salmon Bay never noted either its own Motion for Summary Judgment or ever re-noted Northwood Parkway's Motion for Summary Judgment. Thus, the only motion at issue on January 21, 2010, was Atlantic Casualty's Motion for Summary Judgment.²

Despite the undisputed record, the trial court decided to rule on the cross-motion for the parties. The trial court erred in doing so as cross-motions were not at-issue. Moreover, even assuming *arguendo* that "cross-motions" were at-issue, the trial court nevertheless erred in resolving an issue that had not been properly submitted, briefed or argued. That is, the trial court erred in not limiting its ruling to whether the **one** exclusion at issue applied; instead, the court summarily determined an issue never raised in a pleading – that Atlantic Casualty's policy had been triggered. In doing so, the trial court effectively imposed coverage by

² Indeed, the Minute Order related to the oral argument on the Motion for Summary Judgment, Judge Lucas specifically noted that the court was taking "PLAINTIFF'S

estoppel. However, the court did so without even an allegation that the prerequisite for imposing coverage by estoppel – the insurer's bad faith – had occurred. In the absence of bad faith, coverage by estoppel simply cannot be imposed. Thus, the trial court erred.

(2) Counterstatement of Substantive Facts.

In its reply brief, Northwood Parkway/Salmon Bay asserts, for the first time, that the work related to the conversion of apartments to condominiums "did not involve any structural alternation...."³ Salmon Bay cites to the declaration Dirk Bouwer (the principal of Northwood Parkway, LLC) to support this position. Mr. Bouwer's declaration does not contain any such assertion. Furthermore, the facts belie such assertion. First, in his declaration Mr. Bouwer candidly admits that structural alterations occurred stating that at **least** minor structural changes occurred. Indeed, Mr. Bouwer admitted:

4. . . . The conversion involved only minor structural alternations to the residential units in the complex, actual square footage and the replacement of the buildings' structural features.

CP 416 at ¶4.

[Atlantic Casualty's] MOTION FOR SUMMARY JUDGMENT" under advisement. (CP 154.)

³ Salmon Bay Opposition, pg 1.

Moreover, the "Scope of Work" section of the contract between Northwood Parkway and Salmon Bay demonstrates that "structural" changes were contemplated and occurring during the conversion of the apartments to condominiums. First, as addressed in detail in Atlantic Casualty's Motion for Summary Judgment, the contract required extensive work by Salmon Bay including the "rough-in" of various plumbing fixtures. (CP 373-386 at 374). As explained by Atlantic Casualty's retained construction expert, Mark Lawless, "rough-in" means "work performed by a contractor to cut into something to make new work fit into a space, e.g., cut into other material to install washing machines, showers, sinks and the like." (CP 290-292 at 291).

Second, the contract called for "design" work to be performed by "licensed, design professionals" with the "Designer's signature and seal [to] appear on all drawings, calculations, specifications, certifications, Shop Drawing and other submittals prepared by the Designer." (CP 420). It is common sense that drawings, e.g., plans, indicate that "structural" changes are occurring.

Finally, the trial court did not find Atlantic Casualty in bad faith in any of its rulings, not in the denial of Atlantic Casualty's Motion for Summary Judgment, the granting of Northwood Parkway's Motion for Summary Judgment, the denial of Atlantic Casualty's Motion for

Reconsideration or in the final order which was based upon all these prior rulings and the briefing of same. The trial court could not have done so because the issue of whether Atlantic Casualty engaged in bad faith conduct was never pled, argued or briefed.

C. Argument

1. The Trial Court Erred In Determining a Matter that was Not At-Issue and there is No Admissible Evidence Demonstrating that the Error was Harmless.

a. Salmon Bay's Failure to File an Answer is An Admission.

Salmon Bay never filed an Answer to Atlantic Casualty's Complaint for Declaratory Relief. As was pointed out to the trial court during briefing submitted with Atlantic Casualty's Motion for Reconsideration⁴ and at the time of presentation of the final order⁵ the failure to file an answer entitles Atlantic Casualty to the relief it requested. *See, Jansen v. Nu-West, Inc.*, 102 Wn.2d 432, 438, 6 P.2d 98 (2000) ("failure to deny an averment in a [complaint] constitutes an admission").

In apparent recognition that the failure to file an answer should have been dispositive of the issues before the trial court, Salmon Bay asserts that the issue of the lack of answer is being raised for the first time on appeal. The contrary is true. Atlantic Casualty specifically argued

⁴ (CP 98-99).

below that Salmon Bay's failure to file an answer constitutes an admission.⁶ Salmon Bay was the only defendant in the action at the time the Motion for Summary Judgment was heard. Salmon Bay never filed an Answer and, thus, the averments in the Complaint should have been deemed admitted. The trial erred in failing to find that Salmon Bay's failure to file an answer constituted an admission.

Salmon Bay's alternative argument – that it would have been permitted to file a declaratory judgment which could have been joined with Atlantic Casualty's action is similarly unpersuasive. In making this argument Salmon Bay simply asserts that because it **could** have filed a declaratory judgment action in its own right and such action **could** have been joined with Atlantic Casualty's action that the failure to file an answer is harmless. However, Salmon Bay's speculation on what **could** have happened is not factual evidence supporting the trial court's ruling; instead, it is pure speculation. No one knows what a trial court would have ruled on any of the hypothetical questions posed by Salmon Bay for the first time in this appeal. It is, or at least should be, beyond dispute that a summary judgment determination adverse to a party cannot be based on speculation but instead, it must be based on factual evidence before the

⁵ See CP 89.

court. *See, e.g., Strong v. Terrell*, 147 Wn. App. 376, 384, 195 P.3d 977 (2008). Here, Salmon Bay submits nothing but its speculation that had it taken some action that the outcome would be the same. Salmon Bay's speculation is not a fact upon the trial court's determination should be upheld. This is especially true in this case where the trial court, in effectively ruling on a Northwood Parkway's Motion for Summary Judgment should have taken the facts and reasonable inferences therefrom in the light most favorable to Atlantic Casualty, as Atlantic Casualty was the non-moving party.

b. The court erred in addressing an issue outside those framed by the pleadings.

The only party who filed an Answer to the Complaint for Declaratory Relief was Northwood Parkway – a party who has since been dismissed from this case. However, assuming *arguendo* that Northwood Parkway's answer could be deemed to be that of Salmon Bay, the Answer is nevertheless insufficient to raise the issue of whether coverage was triggered under Atlantic Casualty's policy.

In answering Atlantic Casualty's Complaint, Northwood Parkway simply denied the averments made and, more importantly, did not seek affirmative relief. That is, Northwood Parkway did not file a counterclaim

⁶ See CP98-99 (Reply on Motion for Reconsideration); see, also, CP84-89 at 89 (Atlantic Casualty's Opposition to Proposed Order of Summary Judgment).

seeking a declaration that coverage was triggered under the applicable policy. (CP 394-395).

There is no question but that a defendant can seek affirmative relief in responding to a Complaint. However, to do so, the defendant must comply with the rules of pleading. That is, the defendant must make denials which are "definite enough to inform the adverse party of the issues" which must be met and an "opposing party's prima face case . . . is not put at issue by a general denial." *Shinn Irr. Equip, Inc. v. Marchand*, 1 Wn. App. 428, 430-31, 462 P.2d 571 (1969). Additionally, a defendant who seeks affirmative relief must specifically plead the relief being sought. In fact, a defendant does not raise a "claim" by attempting to invoke the issue during summary judgment proceedings. *See, Kirby v. City of Tacoma*, 124 Wn. App. 454, 472, 98 P.3d 827 (2004) ("a party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along"). *Kirby* involved claims of alleged employment discrimination and, purportedly included a claim for violation of the First Amendment, with the First Amendment argument not being raised until plaintiff submitted his opposition to the City's motion for summary judgment. *Id.* at 469. In affirming the dismissal of the purported First Amendment claim, the Appellate Court specifically noted that Kirby

"never pleaded below that the City discriminated against him and violated his First Amendment rights for acting as a union activist." *Id.* at 469. In explaining why such claims were, thus, properly dismissed the Appellate Court first noted the rules of pleading, stating that a complaint [or other applicable pleading] must

'apprise the defendant of the nature of the plaintiffs' claims and the legal grounds upon which the claim rests.' (Citations omitted). 'A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests.' (Citations omitted).

Id. at 469-70. In rejecting that documents outside the complaint could form the basis of the plaintiff's claim, the Court specifically held "[t]he City should not be required to guess against which claims they will have to defend." *Id.* at 470. *See, also, Camp Finance LLC v. Brazington*, 133 Wn. App. 156, 162, 135 P.2d 946 (2006) (a party cannot raise new legal theories in response to a motion for summary judgment without first amending the applicable pleading).

Here, the only pleadings filed in this case related to **one** exclusion to coverage and, thus, that was the only issue that was to be decided. Neither Northwood Parkway nor Salmon Bay ever changed the issue by pleading that Atlantic Casualty's policy was definitively triggered. Just as the City in *Kirby* was not required to guess at the plaintiff's theories of

recovery, Atlantic Casualty was not required to guess at what theory Salmon Bay would, could or might assert as to why coverage in fact applied. In this circumstance, the trial court erred in determining in its final order that coverage was triggered.

The trial court clearly did not understand the limited motion and claims raised by Atlantic Casualty in its Declaratory Relief Action or that its summary judgment motion involved only one (1) out of fourteen (14) potential exclusions raised its reservation of rights letter to Salmon Bay. As the Court noted in its Order Denying Atlantic Casualty's Motion for Reconsideration

And from this court's point of view, given that there are no disputed material facts, it does not matter whether there are cross-motions or one motion from plaintiff, the relief the court must determine is the same.

(CP 95). Yet, the relief sought was not the same. The court decided that there was coverage under the Atlantic Casualty policy despite such issue never having being pled, briefed, or raised in oral argument. Atlantic Casualty never raised this issue, only the question of whether one exclusion applies. Such a ruling is clearly erroneous.

2. There is No Evidence of Bad Faith and, Therefore, Coverage by Estoppel Should Not Have Been Imposed.

Both parties agree that coverage by estoppel can be imposed upon an insurer **provided** there has been a **finding** that the insurer acted in bad

faith. *See, e.g., Hayden v. Mutual of Enumclaw*, 141 Wn.2d 55, 1 P.3d 1167 (2000). In an attempt to demonstrate the requisite "bad faith," Salmon Bay makes a cursory argument in which it has unilaterally determined, without citation to authority of any kind, that Atlantic Casualty's actions in this case constitute the "bad faith." Bad faith does not exist simply because Salmon Bay determines it to be so.

First, Salmon Bay's provides no authority for its proposition and, for this reason alone, the proposition should not be considered. *See, Beal for Martinez v. City of Seattle*, 134 Wn.2d 769, 777, 954 P.2d 237 (1998) (when no authority for a proposition is presented, the issue is not properly before the appellate court). Second, assuming *arguendo* that Salmon Bay's position is properly presented, it is erroneous. To summarily find that an insurer acted in bad faith requires a review of all pertinent facts and the determination that from those facts "reasonable minds could reach but one conclusion." *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 484, 78 P.3d 1274 (2003).

Here, the issue of whether Atlantic Casualty engaged in "bad faith" was never before the court and, consequently, no "facts" of bad faith were ever presented. There was never an opportunity for the determination that from those facts "reasonable minds could reach but one conclusion."

Moreover, the trial court never held that Atlantic Casualty engaged in bad faith, or even used the term “bad faith” in any of its rulings.

By failing to cite to any authority for its proposition (that bad faith can be determined without the issue being raised, argued or briefed), Salmon Bay tacitly admits that the trial court erred in imposing coverage by estoppel. Indeed, if authority existed demonstrating that bad faith could be determined from the subjective views of the adverse party, Salmon Bay would, presumably, have provided such authority. Salmon Bay's admission, in and of itself, demonstrates that this Court should, at a minimum, reverse the trial court's determination of coverage by estoppel.

Moreover, it cannot be said, at least not as a matter of law, that Atlantic Casualty engaged in bad faith. First, Atlantic Casualty advised its insured, from the outset,⁷ that there multiple reasons for denying coverage under the applicable policy. (CP12-27). Second, in bringing its declaratory judgment action Atlantic Casualty simply took the course of action the Washington Supreme Court has advised insurers to do when their obligations under a policy are potentially unclear: accept the tender of defense and bring a declaratory judgment action. *American Best Foods, Inc. v. Alea of London, Ltd.*, 168 Wn.2d 398, 413, 229 P.3d 693 (2010).

⁷ Salmon Bay mistakenly asserts that Atlantic Casualty did not raise the issue of the Reservation of Rights letter until the time of submission of a sur-reply. The contrary is

Salmon Bay apparently does not dispute the propriety of bringing the declaratory judgment action. Instead, Salmon Bay asserts that Atlantic Casualty should have included each and every possible exclusion to coverage in its declaratory judgment or face coverage by estoppel. Again, Salmon Bay provides no authority for this proposition and none can be found as case law is clear that absent a demonstration of bad faith or prejudice to the insured, an insurer does not waive policy defenses even if the defenses are not included in the original denial letter. *Hayden v. Mut. of Enumclaw*, 141 Wn.2d 55, 1 P.3d 1167 (2000).

Moreover, even if it could be said that bringing a declaratory judgment action on one of a myriad of possible exclusions was bad faith such issue needs to be briefed, argued and decided. The issue of bad faith was **never** addressed below. Generally, a party may not raise an issue for the first time on appeal. *See, e.g., In re Welfare of BRSH*, 141 Wn.App. 39, 45, 169 P.3d 40 (2007). This rule should be applied here as a finding of bad faith, and coverage by estoppel, should not be summarily imposed absent an opportunity to present adequate facts, argument and briefing on that issue.

3. The Issue of Whether the 14 Other Potential Exclusions Applied Was Never Raised.

true. The Reservation of Rights letter was contained as an exhibit to Atlantic Casualty's original motion. (CP357-372).

Salmon Bay asserts that the issue of whether Atlantic Bay's indemnification obligations was triggered was sufficiently raised below. However, again, Salmon Bay does so without any citation to authority and without even attempting to distinguish the authority provided by Atlantic Casualty in its opening brief. Furthermore, Salmon Bay admits that "**neither party** undertook to research and argue the fourteen (14) other exclusions referenced in the policy."⁸ To now assert that it adequately "raised the issue" below is disingenuous at best.

The only issue that was before the trial court was whether **one** specific exclusion applied. Indeed, even Northwood Parkway/Salmon Bay framed the issue as involving only the "new construction" exclusion stating:

WHETHER THE EXCLUSION RELIEVES
ATLANTIC OF ITS DUTY TO INDEMNIFY
SALMON BAY FOR LOSSES FOUND TO HAVE
BEEN INCURRED DURING THE POLICY
PERIOD WHEN SALMON BAY'S WORK WAS
NOT BEING PERFORMED IN FURTHERANCE
OF '**NEW CONSTRUCTION**'

CP 504 (emphasis added). Other than utilizing conclusory statements to the effect that Atlantic Casualty's indemnification obligation was triggered, Salmon Bay **never** argued, or provided authority, supporting that position. As discussed in more detail in Atlantic Casualty's opening

⁸ Salmon Bay reply brief, pg. 10-11.

brief the failure to sufficiently address or argue this supposed issue is fatal to Salmon Bay's claim as the determination of what issues are to be decided is to determined from two sources: the "statement of issues" and the arguments presented. *See, e.g., Kaplan v. Northwestern Mut. Life Ins. Co.*, 115 Wn. App. 791, 65 P.3d 16 (2003). Moreover, "passing treatment of an issue or lack of reasonable argument is insufficient to merit judicial consideration" of that issue. *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998). *See, also, Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (despite identifying issue, issue waived on appeal when plaintiff failed to present any argument relating to that issue during appeal). The reason for requiring identification and argument on a specific issue is simple: a party must adequately inform the opposing party, and the court, of the issue to be decided. *Kaplan*, 115 Wn. App. at 803-03.

Here, Salmon Bay never argued, at all, that it was actually seeking a determination that the 14 other potential exclusions to coverage did not apply. In this circumstance, it cannot be said that Salmon Bay "adequately informed" Atlantic Casualty of its position. For this reason, the trial court's determination that the 14 other exclusions did not apply must be reversed.

4. There Were Disputed Facts as to Whether an Ambiguity Existed in the "New Construction" Exclusion and Thus The Trial Court Erred in Summarily Determining that Issue.

The only portion of Salmon Bay's reply brief containing any real argument or citation to authority relates to whether the trial court properly determined the "new construction" exclusion was ambiguous. However, the authority contained in Salmon Bay's opposition brief is simply repeat of the authority submitted to the trial court relating to what meaning should be ascribed to the phrase "new construction." That is, Salmon Bay simply reargues the case law it relied upon below. However, what Salmon Bay does not do is provide any authority or a reasoned response to the issues actually raised in Atlantic Casualty's opening brief. That is, Salmon Bay fails to address why the trial court erred in determining that an ambiguity exists. Instead, again, Salmon Bay simply provides argument – without any citation to authority – to support its position. As discussed above, the failure to present authority supporting a position necessarily means that the position should be rejected.

Atlantic Casualty agrees that an ambiguity, once found to exist, must be construed against the insurer. However, the point here is that the trial court improperly determined that an ambiguity existed.

First, the parties had competing factual arguments as to meaning of the phrase "new construction" and both parties provided authority from other jurisdictions to support their respective positions. The trial court rejected both parties authority. Instead, the trial court determined the issue by reviewing the City of Cheney's building and taking "judicial notice" of the City of Edmonds/Snohomish County building code. (CP148 and CP 97). However, as was discussed at length in Atlantic Casualty's opening brief, the City of Edmonds/Snohomish County building code does not contain any such definition. A court may take judicial notice only of those fact that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201; *see, also, Fusato v. Washington Interscholastic Activities Assn*, 93 Wn. App. 762, 771, 970 P.2d 774 (1999). Here, it cannot be said that this rule has been met when the section of the building code of which the trial court took "judicial notice" apparently does not exist.

Moreover, Salmon Bay's argument that the court did not take "judicial notice" of this non-existent fact is, simply, wrong. The trial court did not make its determination as whether the exclusion was ambiguous based on **anything** the parties submitted. In fact, the trial court specifically stated that while the parties provided authority from other jurisdiction, that it "did not find [such authorities] helpful or relevant."

(CP149). Instead, after delineating the case law pertaining to how an ambiguity is to be determined and, if found, that the ambiguity must be construed against the insurer, the court determined that the "common understanding" of the definition of "new construction" was as contained in the "sample" code from the City of Cheney. (CP 151). The trial court utilized the City of Cheney's building code as a starting point for its determination that Atlantic Casualty's exclusion was ambiguous. However, the issue was not whether an ambiguity existed because the City of Cheney provided one possible definition of "new construction." Instead, the issue was whether an ambiguity existed in the policy in the first place.

Based on its taking judicial notice of a fact that did not exist, the trial court made the determination that an ambiguity existed because the exclusion did not "specifically define or describe the kind of work at issue." (CP 151). This is not the standard for determining whether an ambiguity exists. Instead, the determination of whether an ambiguity exists is if "on its face, the policy language is fairly susceptible to two different, but **reasonable**, interpretations." *State Farm Mut. Auto. Ins. Co. v. Ruiz*, 134 Wn.2d 713, 721-22, 952 P.2d 157 (1998). However, simply finding that an ambiguity does not end the inquiry. Instead, if a clause is ambiguous the next step is to examine "extrinsic evidence of the intent of

the parties." *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 666, 15 P.3d 115 (2000). If, after examining that extrinsic evidence, an ambiguity remains, it is then to be construed against the insurer and in favor of the insured. *Id.*

Here, Salmon Bay did not put in any "extrinsic evidence" demonstrating the intent of the parties or demonstrating that its intent was different than Atlantic Casualty's. Instead, Salmon Bay simply submitted the declaration of Dirk Bouwer and his unilateral determination that the conversion process was not considered "new construction."

First, Dirk Bouwer is not a party to the underlying insurance contract and thus his intent or belief is wholly irrelevant. Second, Dirk Bouwer simply "opined" without any factual support whatsoever, that he and other contractors would not consider the conversion of the apartment complex to be "new construction." However, Mr. Bouwer's opinion is not supported by references to any facts whatsoever; instead, it is simply his self-serving conclusory opinion. Consequently it should not have been considered. *See, e.g., Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

However, in contrast to the lack of admissible evidence submitted by Salmon Bay, Atlantic Casualty provided a factual basis upon the court could find that an ambiguity did not exist – the declaration of retained

expert, Mark Lawless, a gentlemen that is also a contractor in the area. In his declaration Mr. Lawless explained the basis upon which the determination as to whether the phrase "new construction" should be defined: (1) by looking at the extent of the work and the meaning of "rough-in" and "trim" as utilized in the contract; and (2) by the fact that permits for the work was required. (CP 291). Moreover, the trial court ignored the fact that even Dirk Bouwer admitted that there was at least some **structural** work was necessary to convert the then-existing apartments into condominiums. (CP 416).

5. Attorneys Fees Should Not Be Awarded.

As even Salmon Bay admits, it is entitled to recover attorneys' fees only if prevails on its claim against Atlantic Casualty. *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (2001). Here, for the reasons discussed above and in Atlantic Casualty's opening brief, Salmon Bay should not prevail in this action. Consequently, fees below, and on appeal, are not available.

D. Conclusion

In rendering the original letter ruling, the trial court judge did not find coverage under the Atlantic Casualty policy. Instead, in his written ruling – a ruling which the trial court advised defendant to prepare "a final order consistent with [the] decision" limits the decision to the question

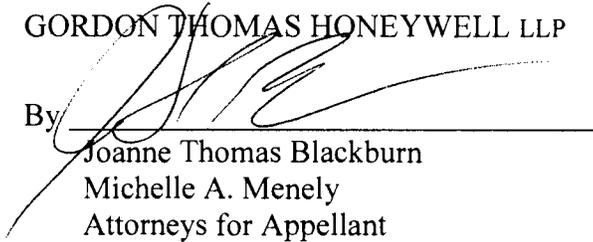
then at-bar – whether the "new construction" exclusion applied. In fact, the trial court specifically stated:

As such, this court does not have to resolve the lack of definition between the terms "new construction" and "repair." The omission is construed against the insurer.

(CP 151). Unfortunately, the final order went far beyond the confines of the trial court's initial letter ruling. Thus, Atlantic Casualty respectfully requests this Court to reverse: (1) the trial court's granting of a motion for summary judgment that was not before it; (2) the granting of a motion to Salmon Bay who never denied any of the allegations in the complaint; (3) the finding of coverage by estoppel in the absence of bad faith; (4) the finding of coverage when such an issue was never even pled in this lawsuit and not raised in the Northwood Parkway's Motion for Summary Judgment; (5) the taking of judicial notice of something that does exist; and, finally (6) the finding of an ambiguity in the Atlantic Casualty insurance policy language of "new construction."

RESPECTFULLY SUBMITTED this 13th day of October, 2010.

GORDON THOMAS HONEYWELL LLP

By 

Joanne Thomas Blackburn
Michelle A. Menely
Attorneys for Appellant
WSBA No. 21541
WSBA No. 28353