

NO. 35867-1-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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HARTFORD FIRE INSURANCE CO.; VESTA INSURANCE CORP.,  
and VALLEY INSURANCE COMPANY,

Appellants,

vs.

CSV LIMITED PARTNERSHIP,

Respondent.

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**BRIEF OF RESPONDENT/CROSS-APPELLANT  
CSV LIMITED PARTNERSHIP**

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## **I. COUNTER-STATEMENT OF THE CASE**<sup>1</sup>

Respondent/Cross-Appellant CSV Limited Partnership (CSV) is the declarant of the Village at Columbia Shores Condominium complex in Vancouver, Washington. The condominium complex includes two separate types of buildings: thirty-nine (39) townhomes (commonly referred to as “Phase I”) and a high-rise consisting of ninety-six (96) residential units (commonly referred to as “Phase II”). (CP 43; Finding 1, CP 956) The focus of this matter is Phase II. (CP 43)

Construction of Phase II began in late 1994. Ankrom Moisan Associated Architects (the Architect) designed the building. Courtesy Construction was the general contractor for the building, and it engaged a number of subcontractors to do the work. Phase II consisted of two wings, east and west. Work on the east wing was completed before that on the west wing. The City of Vancouver issued a Certificate of Occupancy on March 21, 1996. (Findings 2 and 3, CP 956) All units had been created as a condominium by November 15, 1995. (Exs. 1 and 2)

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<sup>1</sup> Appellant Hartford Fire Insurance Company (Hartford) has not assigned error to any Findings of Fact made by the trial court in this matter. As will be discussed below, the trial court’s Findings of Fact become verities on appeal for that reason. CSV’s counter-statement of the case will refer to those Findings of Fact by reference to the Clerk’s Papers.

## **Building Envelope**

Phase II's cladding consisted of Louisiana Pacific Inner Seal Siding over a weather resistive barrier of seven-pound paper. (Findings 5 and 6, CP 956-57) The installation of the siding and resistive barrier was completed by mid-July 1995. (RP 478; Ex. 3 (Field Report 50))

By late January of 1996, it was noted that water was getting into the interior of the units through the windows. (Ex. 3 (Field Report 72)) The problem continued through 1996 and early 1997. (Finding 7, CP 957) This caused damage to the interiors of the units in Phase II, including swelling of sheetrock and damage to woodwork. CSV repaired problems as they cropped up and believed the repairs were taking care of the problem. Difficulties continued, however, through the rainy season of late 1997 and early 1998. (Finding 7, CP 957; Exs. 17-19 and 23; RP 254-55, 381-87, and 532; Ex. 47)

At that point, CSV arranged to have a portion of the siding removed. During this inspection, the source of the problem was discovered. The weather resistive barrier was missing in some places and had been improperly installed. (Finding 8, CP 957; RP 271-73) The problems with the water resistant barrier could not have been observed without removing the siding. (Finding 8, CP 957)

CSV then asked the contractor and the siding subcontractor to repair the problem. They would agree only to remediate certain limited areas on the south side of the building. (Finding 9, CP 957; Ex. 123; RP 274-76)

CSV then took the bull by the horns and engaged Montgomery Construction to remove the siding, reinstall the weather resistive barrier, repair building members and interiors of units that had been damaged, and replace the siding. During the course of repairs, rot of structural members was observed and repaired. These measures largely fixed the problem. (Finding 9, CP 957; CP 38, 91-92, and 271-73; Ex. 95)

CSV reasonably and necessarily spent a total of \$235,858.93 to investigate, repair, and remediate the building envelope problem. (Finding 10, CP 957; Conclusion 6, CP 962) Remediation was absolutely necessary at that time. If it had not been done, the amount necessary to fix the damage to structural members would have exceeded the total amount CSV paid for repairs and remediation. (RP 72-73, 102, 109-10, and 834-35; Ex. 152)

Before work commenced, Courtesy Construction and the siding contractor were given the opportunity to examine the conditions. They chose Raymond Bartel and Colin Murphy, respectively, to investigate the situation. Both are respected professionals who deal with water intrusion

issues on a regular basis. All inspection, repair, and remediation were well documented and photographed by various individuals, including consultants, architects, and contractors. (Finding 11, CP 957). Hartford had access to all materials associated with the inspection, repair, and remediation, including the physical damage to the building envelope. (Finding 11, CP 957; 816-20; Exs. 23, 102, and 166)

### **Lightweight Concrete**

Lightweight concrete was utilized in the Phase II units to help level floors, meet building code requirements concerning fire safety, and reduce sound transmission between units. It was installed between the first and second floors; the second and third floors; and the third and fourth floors of the building. This was done between May and August of 1995. (Finding 18, CP 958; Ex. 3 (Field Reports 42, 46, 51, and 52)) Specifications called for installation to a thickness of one inch with a three-quarter inch minimum thickness. (Finding 18, CP 958; Ex. 12)

By September of 1995, problems were noted with the lightweight concrete in some high traffic areas such as hallways. (Finding 19, CP 958) This was discussed at one or more of the regular meetings of the Construction Task Force, a group consisting of representatives from CSV, the Architect, and the contractor. (Finding 20, CP 958-59) The group resolved to replace the lightweight concrete in some of the hallways. The

group did not believe it was necessary to replace all the lightweight concrete in areas where condominium units would be located, only the high traffic areas. (*Id.*) Repairs were ultimately completed by November 7, 1995. (*Id.*) The Architect approved the process and did not conclude that there would in fact be any further problems. His report noted the problems had been resolved. (Findings 19 and 20, CP 958-59; CP 569; Ex. 3 (Field Reports 63 and 65-71); Exs. 8 and 9)

Unfortunately, a windstorm buffeted Vancouver in December 1995 causing the buckling of seismic straps in the building. The straps would then protrude through the lightweight concrete, which required repairs. Buckling recurred in February of 1996 in one of the same units where it had been previously observed. The Task Force members and the Architect believed the buckling was a unique event related to the windstorm. (Finding 21, CP 959; Exs. 10, 11, and 120; RP 279-284)

The buckling of seismic straps continued thereafter. This caused the floor to become spongy and in need of repair. When repairs were made, the lightweight concrete was observed to have an improper thickness and composition. There were incidents of buckling observed between March 1, 1996, and March 1, 1997. One of the causes of this problem was the improper thickness of the lightweight concrete (Ex. 25; RP 124-27, 286, 322-23, and 418)

### **The Homeowner's Association Lawsuit**

In the spring of 1999, CSV got wind that the condominium homeowner's association was contemplating making a claim against it. It put its insurers on notice by letter dated June 23, 1999. The letter notified the insurers of the water intrusion problems that CSV had remediated. Hartford received this notice in July of 1999. This was the first notice that Hartford received. (Finding 12, CP 957; Exs. 26 and 27) Hartford responded in December 1999 by denying both its duties to defend and indemnify. (Ex. 29)

The Village at Columbia Shores Homeowners Association ultimately filed suit against CSV in August 1999. (Finding 25, CP 959; Ex. 30) At length, the Association produced a Statement of Claims that sought damages of approximately \$2.6 million. This included more than \$1 million to replace the lightweight concrete, among other items not at issue in this appeal. (Finding 27, CP 960; Exs. 37, 38, and 40)

On April 12, 2001, the Association advised CSV that it felt all of its claims were valid, but that five (5) areas were critical, one of which included the buckling of the floors due to the lightweight concrete issues. (Finding 28, CP 960) The Association asked CSV either to fix these items itself or pay a lump sum of just less than \$645,000.00 to settle the entire case. (*Id.*) CSV believed that its liability might exceed \$645,000.00 if the

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Association's claims went to trial. (Finding 29, CP 960). On that basis, CSV agreed to settle with the Association for a lump sum payment payment of \$645,000.00. The settlement did not include any allowance for attorney's fees or unspecified consequential damages or litigation associated costs incurred by the homeowners. (Finding 30, CP 960) It placed no restriction on the Association's use of the funds. The settlement consummated on June 27, 2001. (Finding 30, CP 960-61; Exs. 35 and 43-55; RP 331, 433, 570-71, and 578)

The Association had no idea why CSV chose to settle. (RP 333 and 436-37) In reaching their settlement, the parties had no meeting of the minds on how much of the settlement would be allocated to specific problems or "line items." (RP 437, 570-71, and 578) CSV believed the problems with the lightweight concrete would well exceed the amount the Association asked it to pay. (RP 572-75) Hartford had offered to contribute only \$7,500.00 to the settlement. (Finding 29, CP 960)

#### **CSV's Claims against Hartford**

CSV filed this action against Hartford on November 7, 2002, alleging that Hartford had a duty to indemnify it for the Association's claims. (CP 1-4) The parties held it in abeyance while CSV pursued an action against Courtesy Construction and certain subcontractors to recover additional losses. (RP 576)

During the course of the litigation with the contractors, an issue arose as to how CSV's claim was affected by the class action settlement in a case entitled *Louisiana-Pacific Inner-Seal Siding Litigation*, United States District Court for the District of Oregon Cause No. CV 95-879-JO. The Special Master heard the matter on motion and concluded that the remediation expenses were within the scope of the class action settlement but that costs of repair to structural members other than the siding and weather resistive barrier were not within the settlement. As a result, CSV was not allowed to pursue claims against the contractor and subcontractor for costs of the building envelope remediation, but was allowed to pursue claims for repairs. (Ex. 163)

CSV's claims against the contractors were ultimately settled on October 13, 2004, for a total of \$400,000.00. (Finding 31, CP 961) This amount specifically included the attorney's fees CSV incurred in connection with that case, as well as an issue related to flooring for which no claim was made against Hartford. (Finding 31, CP 961; Ex. 44) It did not include any reimbursement for the building envelope issues. (*Id.*)

After the settlement with the contractors was consummated, CSV's claims against Hartford proceeded in earnest. The matter was ultimately tried before Hon. Robert A. Lewis. After motions for reconsideration, Judge Lewis issued the Amended Findings of Fact and Conclusions of

Law on October 19, 2006. (CP 935-66) These included findings that Hartford provided liability coverage to CSV between March 1, 1996, and March 1, 1997, as the parties agreed. (Finding 4, CP 956; Ex. 110) They also included findings that CSV had sold seventy-six (76) of the ninety-six (96) units in Phase II by the expiration of the Hartford policy period. (Finding 32, CP 961; CP 1302-90) The parties agreed that the “owned property exclusion” in Hartford’s policy would be applied to reduce its liability proportionally as set forth in *State Farm Fire & Cas. Co. v. English Cove Ass’n, Inc.*, 121 Wn. App. 358, 88 P.3d 986 (2004).

Based on the findings, the trial court concluded that the problems with the weather resistive barrier and lightweight concrete were covered claims because CSV had demonstrated property damage caused by an occurrence from those issues during Hartford’s policy period for which CSV was legally obligated to compensate the homeowners. (Conclusions 2-5 and 13-15, CP 961-962 and 963)

Significantly, the trial court also found that CSV believed the strap buckling was related to the windstorm and would not recur during Hartford’s policy period. From this, it concluded that the “known loss rule” did not apply to eliminate coverage. (Finding 21, CP 951; CL 16, CP 963) The trial court also made no finding that Hartford was prejudiced because CSV failed to notify it of the water intrusion problem before June

1999. To the contrary, the trial court noted that Hartford had not demonstrated any prejudice. (Conclusion 11, CP 962-63)

### **Calculation of the Judgment Entered Against Hartford**

The trial court entered judgment against Hartford in the amount of \$540,949.89. (CP 1254-55) Of that amount, \$355,707.90 was attributed to the building envelope issues, which included amounts for principal and prejudgment interest. Of the balance, \$86,315.03 was attributed to prejudgment interest for the lightweight concrete claim. The trial court did not award any principal amounts for the lightweight concrete claim, finding that those amounts were subject to an offset from the monies CSV received in its action against the contractors.<sup>2</sup> (Conclusion 33(a)-(c), CP 967) The trial court also entered judgment in favor of CSV against Hartford for \$98,926.96 in attorney fees. (CP 1255)

Judgment was entered on January 19, 2007. (CP 1254-56) Hartford timely appealed. (CP 1257-87) CSV timely cross-appealed. (CP 1433-71)

## **II. COUNTER-STATEMENT OF THE ISSUE FOR APPEAL**

Whether the trial court's findings of fact support its conclusions of law regarding Hartford's duty to indemnify CSV for the building envelope and lightweight concrete claims.

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<sup>2</sup> The trial court's application of this offset is the subject of CSV's cross-appeal and will be discussed in more detail below.

### III. RESPONDENT'S ARGUMENT

**A. Hartford's Failure to Assign Error to Any of the Trial Court's Findings of Fact Limits this Court's Inquiry to Whether the Trial Court's Findings Support Its Conclusions of Law.**

An appellate court may only review findings of fact to which error has been assigned. *Dickson v. Kates*, 132 Wn. App. 724, 730, 133 P.3d 498 (2006); *see also* RAP 10.3(g). Any finding of fact necessary to the resolution of an issue on appeal must be set out verbatim either in the text or in an appendix to the brief. RAP 10.4(c). Findings of fact to which no error is assigned are verities on appeal. *In re Marriage of Boisen*, 87 Wn. App. 912, 918, 943 P.2d 682 (1997).

Hartford did not assign error to any of the trial court's Findings of Fact. Instead, Hartford limited its assignments of error to generalized statements that the trial court "erred" in entering judgment on two items of coverage and damage against Hartford and in favor of CSV. *Hartford brief at 1*. Assignments of error using the phraseology that a trial court "erred in holding" or other similar language are insufficient to bring a trial court's findings of fact before this Court. *See Becwar v. Bear*, 41 Wn.2d 37, 38, 246 P.2d 1110 (1952); *Browning v. Browning*, 46 Wn.2d 538, 539-40, 283 P.2d 125 (1955).

Findings of fact to which no error is assigned become the established facts of the case. *Goodman v. Bethel Sch. Dist. No. 403*, 84

Wn.2d 120, 524 P.2d 918 (1974). An assignment of error as to a conclusion of law (even assuming Hartford's assignments could be so construed) "does not bring up for review the facts found upon which the conclusion is based." West Coast Airlines, Inc. v. Miner's Aircraft & Engine Service, Inc., 66 Wn.2d 513, 518, 403 P.2d 833 (1965). "An assignment of error is without merit where it is based upon conclusions supported by findings which are not challenged and which have become established facts in the case." *Id.*

Thus, this Court's inquiry is limited to the question of whether the trial court's findings of fact support its conclusions of law related to the issues raised in Hartford's brief. Becwar, 41 Wn.2d at 38-39; Goodman, 84 Wn.2d at 124. CSV asks this Court to disregard any factual arguments made by Hartford, as well as any arguments which extend beyond the findings entered by the trial court.

**B. The Findings of Fact Entered by the Trial Court Support Its Conclusions that Hartford's Policy Provided Coverage for the Water Intrusion and Lightweight Concrete Damages.**

- 1. The trial court correctly found that Hartford failed to meet its burden of showing actual prejudice resulting from the timing of CSV's notification of the water intrusion damages or by CSV's payment to the homeowners.**

An insurer may deny coverage for an insured's failure to comply with a policy condition only if the noncompliance results in actual

prejudice to the insurer. Key Tronic Corp. v. St. Paul Fire & Marine Ins. Co., 134 Wn. App. 303, 307, 139 P.3d 383 (2006). Actual prejudice “requires affirmative proof that whatever is lost or changed is material and not otherwise available.” *Id.* The burden of showing actual prejudice is on the insurer, and it is a factual determination. Public Utilities Dist. No. 1 of Klickitat Cty. v. International Ins. Co., 124 Wn.2d 789, 804, 881 P.2d 1020 (1994).

Here, the trial court concluded that Hartford failed to establish it was actually prejudiced by any of CSV’s actions with respect to the building envelope issues. (Conclusion 11, CP 963) In Finding 11, the trial court noted:

The inspection, repair, and remediation efforts [regarding the building envelope issues] were documented and photographed by a number of persons interested in the problem, including consultants, architects, and contractors. The physical damage to the building was included in this documentation. All of these materials have been made available to representatives of Hartford . . . during these proceedings.

(CP 957) These findings are verities on appeal and support the trial court’s conclusion that Hartford failed to show actual prejudice.

Hartford makes several arguments that it was allegedly prejudiced by CSV’s delay, all of which are essentially premised on the argument that Hartford lost the ability to distinguish between covered and uncovered

property damage.<sup>3</sup> However, Hartford does not argue that the documents, photographs, and other investigative materials referred to in Finding 11 (CP 957) were insufficient to allow Hartford to make this distinction, even assuming one existed. Hartford contends instead that, as a matter of law, it “need not rely upon an inspection performed by others,” citing Key Tronic Corp. v. St. Paul Fire & Marine Ins. Co., 134 Wn. App. 303, 139 P.3d 383 (2006). *Hartford brief at 20.*<sup>4</sup> There are two problems with this argument.

First, this Court may not consider whether Hartford was prejudiced as a matter of law. This Court’s inquiry is limited to whether the findings support the trial court’s conclusion. Further, actual prejudice is a factual issue, which the trial court resolved upon disputed evidence. Hartford’s failure to assign error to any findings of fact precludes any review of whether those findings are supported by substantial evidence, as they are now the established facts of this case.

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<sup>3</sup> In support of this argument, Hartford first cites to unpublished opinion of Christensen Shipyards, Ltd. v. St. Paul Fire & Marine Ins. Co., 2006 WL 3749943 (W.D. Wash. 2006), for the proposition that an insured who settles with a claimant without the consent of its insurer breaches the conditions of the policy. *Hartford brief at 16*. It is inappropriate to cite to unpublished opinions of other jurisdictions. Mendez v. Palm Harbor Homes, Inc., 111 Wn. App. 446, 473, 45 P.3d 594 (2002). This Court should disregard Hartford’s citation to the Christensen Shipyards case and its analysis based thereupon.

<sup>4</sup> Interestingly, Hartford’s argument regarding prejudice fails to take into account that at no time following the filing of the Association’s lawsuit against CSV did Hartford ever claim that it was prejudiced by CSV’s handling of the building envelope issues, despite having been notified of those issues well in advance of the lawsuit. (Exs. 29 and 33)

Second, it is not an accurate statement of the law. *Key Tronic* does not stand for the proposition that an insurer is prejudiced as a matter of law in every case where it does not independently conduct an investigation. *Cf. Hartford brief at 20*. In that case, Key Tronic, the insured, settled a loss with a claimant before notifying St. Paul, its insurer, ostensibly in order to minimize future expenses. *Key Tronic*, 134 Wn. App. at 305-06. Key Tronic then sought reimbursement from St. Paul, who denied coverage because Key Tronic failed to notify St. Paul of the loss as soon as possible. *Id.* at 306. In particular, St. Paul argued that if it had been timely notified of the loss, it could have asked Key Tronic and/or the claimant to document the damage. *Id.* at 307. Because the loss was not documented, St. Paul was denied the opportunity to investigate and adjust the loss, and was granted summary judgment. *Id.* at 308.

It should not go unnoticed by either Hartford or this Court that St. Paul premised its prejudice argument on the lack of a documented investigation on the part of its *insured*, and not on its inability to conduct a personal investigation. Here, CSV – Hartford’s insured – fully documented its inspection, repair, and remediation efforts. (Finding 11, CP 957) Thus, Hartford was **not** denied the opportunity to investigate. At best, it was only denied the opportunity to select the information upon which it would base its investigation.

Indeed, at no place in its brief does Hartford contend that the documentation referred to in Finding 11 was deficient, incomplete, or in any way inadequate for it to make its decisions regarding coverage. While Hartford may have a right to investigate claims, it does not necessarily follow that it is prejudiced as a matter of law if it is denied its own *personal* investigation. The trial court found that Hartford was not prejudiced because it had adequate investigative materials available. CSV knows of no case – and Hartford does not cite to one – that holds an insurer is prejudiced as a matter of law if it is unable to perform its own personal investigation. Actual prejudice does not exist where whatever is claimed to have been lost – here, an investigation – is otherwise available. Key Tronic, 134 Wn. App. at 307.

In order to succeed on its actual prejudice claim, Hartford had to demonstrate that it suffered a concrete detriment which had an “identifiable prejudicial effect” on Hartford’s ability to present coverage defenses to the water intrusion claim. Unigard Ins. Co. v. Leven, 97 Wn. App. 417, 427, 983 P.2d 1155 (1999), *rev. denied*, 140 Wn.2d 1009 (2000). Actual prejudice requires the identification of an “identifiable prejudicial effect,” not just an identification of an abstract theory of prejudice as Hartford contends.

A similar argument was rejected in PUD No. 1, 124 Wn.2d 789, *supra*. In that case, one of the issues on appeal was whether the insured's settlement in a multi-district litigation case involving failed insurance bonds was enforceable against its insurers where it was reached without their consent. *Id.* at 802. The insurers asked the court to presume prejudice, citing a prior Washington case which "presumed prejudice from the insured's noncompliance with a timely notice clause because the delay deprived the insurer of an opportunity to investigate and evaluate the case prior to and during trial." *Id.* at 804 (citing Felice v. St. Paul Fire & Marine Ins. Co., 42 Wn. App. 352, 360, 711 P.2d 1066 (1985), *rev. denied*, 105 Wn.2d 1014 (1986)). The PUD court, noting that prejudice is presumed only in "extreme cases," rejected the insurer's argument and held that the insurers' duty to pay was not extinguished because the insurer could not show it was actually prejudiced by the insured's settlement without its consent. *Id.* at 803.

Hartford's argument that prejudice should be presumed as a matter of law in every case where the insurer was prevented from conducting an investigation or presenting a coverage defense should likewise be rejected. *Hartford brief at page 20-21*. This is not the law, nor was this the evidence presented in this case. The trial court found that Hartford was not prejudiced because, at every stage, including inspection, repair, and

remediation, those efforts were documented and photographed by numerous individuals, including consultants, architects, and contractors, all of which was made available to Hartford. (Finding 11, CP 957; Conclusion 11, CP 962-63) These findings support the trial court's conclusion that Hartford failed in its burden to prove actual prejudice.

Hartford claims it was also prejudiced based on its speculation that it might have been able to repair the building envelope for less than CSV paid. *Hartford brief at 22*. But the trial court found that CSV's expenditures for investigation, repair, and remediation "were reasonable, given the nature and extent of the problem." (Finding 10, CP 957; *see also* Conclusion 5, CP 962) Hartford has not assigned any error to this finding and it is a verity on appeal.

Finally, Hartford suggests that CSV may not have been legally obligated to incur the water intrusion repair costs because of the LP Siding class action. *Hartford brief at 22*. Again, though, Hartford offers nothing in the way of actual, identifiable prejudice, other than its own speculation. This argument also ignores the trial court's conclusion that CSV was legally obligated to inspect, repair, and pay for remediation of the water intrusion problems and the trial court's finding that the judge's decision in the LP siding class action, made in a different proceeding and context, did not affect that conclusion. (Conclusion 5, RP 962)

Whether an insurer is actually prejudiced by an insured's failure to meet a policy condition is an issue of fact, which, in this case, the trial court resolved in favor of CSV. The trial court's conclusion that Hartford failed to show actual prejudice is supported by the findings. The trial court's judgment in favor of CSV on damages related to the building envelope issues should be affirmed.

**2. The trial court correctly concluded that the lightweight concrete damages were not a "known loss."**

The trial court concluded that the failure of the lightweight concrete was covered under Hartford's policy (Conclusions 13, 14, and 15; CP 963) and that it was not excluded by way of the "known loss" rule." (Conclusion 16, CP 963) In doing so, the trial court listed a number of factual reasons why coverage was not excluded:

Hartford's liability to cover the damages associated with failure of the lightweight concrete is not affected by the 'known loss' rule. The project was not substantially complete at the time Hartford's policy went into effect. There had been a significant effort to correct the lightweight concrete problem before substantial completion, and CSV believed that the problems with the seismic straps were related to an unusual windstorm. Some of the Task Force members believed there was no problem; Daniels [CSV's principal] was not sure whether any additional buckling would occur. The evidence did not establish that CSV knew that loss would recur at the time the Hartford policy was purchased.

(Conclusion 16, CP 963)<sup>5</sup>

Hartford contends the trial court erred in so finding because it failed to apply the proper legal standard. *Hartford brief at 28*. This argument fails for two reasons.

First, Hartford did not assign any error to the factual findings of the trial court supporting its conclusion that the “known loss” rule did not apply. Thus, the factual findings identified above (incorrectly designated in a conclusion of law) are verities on appeal, and support the trial court’s conclusion. Further, even assuming this failure is either ignored or excused, Hartford makes no attempt to argue those specific findings are not supported by substantial evidence. Hartford’s desire that the trial court would have weighed certain evidence differently does not mean the findings were not supported by substantial evidence. *Cf. Hartford brief at 29-33*.

Second, Hartford’s reliance on *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 38 P.3d 322 (2002), is misplaced. The insurer in *Overton* attempted to avoid coverage by claiming that no “‘occurrence’ triggering coverage” existed. *Id.* at 421. In contrast here, Hartford contends that the

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<sup>5</sup> Although included in a conclusion of law, these findings are clearly findings of fact. If a conclusion of law includes “any statement of fact, the statement may be treated as such even though found in what is characterized as a conclusion of law.” *City of Redmond v. Kenzer*, 10 Wn. App. 332, 343, 517 P.2d 625 (1973) (and cases cited therein).

lightweight concrete damages are excluded under Exclusion 2a of its policy. *Hartford brief at 25*. The *Overton* opinion offers no analysis or law regarding this exclusion. Likewise, the *Overton* court does not offer any analysis or law regarding the common law “known loss” defense.<sup>6</sup> The court was concerned with “establishing coverage under the ‘occurrence’ analysis” and did not consider whether the loss at issue in that case was excluded by the known loss defense. *Overton*, 145 Wn.2d at 432. Hartford is simply incorrect when it asserts the *Overton* court announced a rule with respect to the known loss defense. *Hartford brief at 26*.

“The known loss doctrine, as recognized in [*PUD No. 1*, 124 Wn.2d 789, *supra*], prevents an insured from collecting on an insurance policy for losses that he or she subjectively knew would occur at the time the insurance policy was purchased.” *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 137 Wn. App. 352, 362, 153 P.3d 877 (2007). Of course, the knowledge that some loss may occur in the future is the very driving force behind the purchase of insurance. *PUD No. 1*, 124 Wn.2d at 808. Thus, the known loss doctrine applies only if the insured knew there was a substantial probability he would be sued by a third party claimant at the

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<sup>6</sup> This doctrine is a matter of common law and is not found in insurance contracts. *Alcoa v. Aetna Cas. & Surety Co.*, 140 Wn.2d 517, 556, 998 P.2d 856 (2000). The doctrine, though, has the effect of an exclusion and “is sometimes called the unnamed exclusion.” *Id.*

time the policy was issued. *Id.* at 806, 807. Evidence of an insured's general knowledge that a loss may occur in the future is insufficient to preclude coverage under the known loss doctrine. *Id.* at 808. Whether the doctrine applies is a question of fact. *Hillhaven Properties, Ltd. v. Sellen Const. Co., Inc.*, 133 Wn.2d 751, 758, 948 P.2d 796 (1997).

Here, the facts identified in Conclusion 16 (CP 963) are verities on appeal and support the trial court's conclusion that the known loss doctrine does not apply. Hartford's arguments are based solely on the weight of the evidence and its application of that evidence to an incorrect standard of law.<sup>7</sup> As noted above, this Court's inquiry is limited to whether the trial court's findings support its conclusions, not whether evidence exists from which a different conclusion could be reached. *See Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959) ("If we were of the opinion that the trial court should have resolved the factual dispute the other way, the constitution does not authorize this court to substitute its finding for that of the trial court. The judgment must

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<sup>7</sup> Throughout its factual argument, Hartford makes several references to the architect being a agent of CSV and, thus, any statements made by him are party admissions. *Hartford brief at 31-32*. Hartford does not refer this Court to any portion of the record where it made such an argument to the trial court, because there is none. Hartford should not be allowed to raise an evidentiary argument for the first time on appeal, especially in the absence of any evidence to support it.

be affirmed.”). The trial court’s judgment in favor of CSV on the lightweight concrete damages should be affirmed.

**3. The trial court correctly concluded that the lightweight concrete damages constituted “property damage” caused by an “occurrence” under Hartford’s policy.**

Hartford next makes various (and somewhat confusing) arguments that the lightweight concrete damages were not “property damage” caused by an “occurrence” under its policy. *Hartford brief at 34-39*. Hartford appears to principally argue that it has no duty to indemnify for any losses related to the lightweight concrete because any such losses occurred prior to the inception of its policy.

Initially, it should be noted that Hartford relies heavily on the unpublished opinion of *Mid-Continent Casualty Co. v. Williamsburg Condominium Assoc.*, 2006 WL 2927664 (W.D. Wash. 2006). As noted in footnote 2, above, it is inappropriate to cite to unpublished opinions of other jurisdictions. *Mendez, supra*, 111 Wn. App. at 473. CSV asks this Court to disregard Hartford’s citation to the *Mid-Continent* case and any analysis based thereupon.

Further, Hartford’s contention that the occurrence of the lightweight concrete property damage predated the inception of its policy fails. The trial court specifically found that the lightweight concrete installation was completed in November 1995 and that, at that time, CSV

believed any problems with respect to the concrete installation had been resolved, despite reservations by the architect.<sup>8</sup> (Finding 20, CP 958-59) The trial court also found that damage to the flooring occurred in 1996 and 1997 from the buckling of seismic straps. (Finding 22, CP 959) These findings support the trial court's conclusion that the lightweight concrete failed and caused the seismic straps to buckle, which in turn caused property damage occurring in Hartford's March 1, 1996-March 1, 1997 policy period. (Conclusions 13 and 15, CP 963; Finding 4, CP 956).

Hartford also makes a very general argument that the lightweight concrete damages were not a covered occurrence because they are, effectively, damages arising from negligent construction. *Hartford brief at 34*. This argument is without merit. Whether an insurance policy provides coverage for a particular loss is determined by a two-step process: an insured must first establish that the loss falls within the scope of the policy's insured losses. Then, to avoid responsibility for the loss, the insured must show that the loss is excluded by specific language in the policy. *Diamaco, Inc. v. Aetna Cas. & Surety Co.*, 97 Wn. App. 335, 337, 983 P.2d 707 (1999). A court determines coverage by reading the insuring and exclusion clauses of an insurance policy. *Id.* at 340. Thus, the focus

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<sup>8</sup> In this section of its brief, Hartford again refers to the architect as CSV's agent. *Hartford brief at 38 and 39*. CSV again asks this Court to disregard it as incorrect, unsupported by any factual evidence, and not an issue raised to the trial court.

is on the specific language of the policy, not on general incantations about what a particular policy is or is not intended to cover. *Id.* at 338-39. Hartford's argument to the contrary should be rejected.

Hartford next argues that "occurrence" of the lightweight concrete damages occurred on July 25, 1995 (the date on which the lightweight concrete installer submitted its final invoice), before Hartford's policy incepted. *Hartford brief at 37.* Again, Hartford does not reference a single Finding of Fact related to this argument. The trial court found that the flooring was damaged in 1996 and 1997 (Finding 22, CP 959) and that the lightweight concrete failure constituted property damage and that such damage was caused by an occurrence falling within Hartford's policy period. (Conclusions 13 and 14, CP 963) The trial court also made the following findings regarding the problems which arose following installation:

There were disputes between various members of the Task Force about whether there was a problem with the lightweight concrete, the extent of the problem, and what should be done in response. A number of test cores were taken, although some thought extensive sampling could contribute to the problem. Consultants advised the developer [CSV] that the strength of the material could not be meaningfully tested after a pour. **After repairing the high traffic areas, the Task Force decided that the problem had been adequately addressed, despite reservations by the architect.** Completion

on this part of construction occurred in November 1995.

(Finding 20 (CP 958-59)) (emphasis added). The trial court's findings support its conclusion that the lightweight concrete resulted in property damage caused by an occurrence during Hartford's policy period. See *Pederson's Fryer Farms, Inc. v. Transamerica Ins. Co.*, 83 Wn. App. 432, 444, 922 P.2d 126 (1996) ("whether damage occurred during the policy period is a factual determination to be made by the trier of fact."). The fact that Hartford wishes the trial court would have weighed the evidence differently does not mean that the findings do not support the trial court's conclusion on these issues.

**4. The trial court correctly concluded that no exclusions other than the "owned property" exclusion apply in this case.**

The trial court concluded that the only exclusion which applied to CSV's claims was the "owned property" exclusion, which operated to apply a proportional percentage to Hartford's indemnification obligations based on the percentage of condominium units CSV owned during Hartford's policy period. (Conclusion 8, CP 962 (building envelope); Conclusion 17, CP 963 (lightweight concrete)) The trial court also concluded that no other policy exclusion applied to the loss. (Conclusion 9, CP 962) Nonetheless, Hartford argues that coverage for the lightweight

concrete and building envelope damages are not covered under two exclusions that it refers to as “business risk” exclusions. *Hartford brief at 43*.

The trial court made no findings regarding these two exclusions, and concluded as a matter of law that no policy exclusion other than the owned property exclusion applied to CSV’s claims. (Conclusion 9, CP 962) As the insurer, Hartford bore the burden of proof to establish that a particular exclusion precluded coverage for CSV’s claims. *Diamaco, supra*, 97 Wn. App. at 337. “The absence of a finding of fact in favor of the party with the burden of proof about a disputed issue is the equivalent of a finding against that party on that issue.” *Car Wash Enterprises, Inc. v. Kampanos*, 74 Wn. App. 537, 546, 874 P.2d 868 (1994) (citing *In re Marriage of Olivares*, 69 Wn. App. 324, 334, 848 P.2d 1281, *rev. denied*, 122 Wn.2d 1009 (1993)). Thus, for purposes of this appeal, the trial court found that no facts supported the application of either of Hartford’s “business risk” exclusions to the facts of this case. Hartford failed to meet its burden to show that the exclusions applied and may not reargue either the factual or legal issues regarding those exclusions to this Court. *See George v. Helliard*, 62 Wn. App. 378, 384, 814 P.2d 238 (1991).

Furthermore, the absence of findings is supported by the record. Stated another way, there is no evidence in the record to support

Hartford's arguments that the exclusions apply. Indeed, Hartford's argument regarding exclusion (k) borders on frivolous. That exclusion excludes coverage for property damage to "your product." (Ex. 110, HART 97). "Your product" is generally defined as any goods or products manufactured, sold, handled, distributed, or disposed of by CSV, "**other than real property.**" (Ex. 110, HART 106 (emphasis added)). A condominium is defined, by statute, as real property. RCW 64.34.020(9). All units in Phase II had been statutorily created as condominiums by November 15, 1995, well before the inception of Hartford's policy. (Exs. 1-2) None of the cases cited by Hartford are helpful, because none discusses the application of this exclusion to a condominium and none discusses the exclusion's inapplicability to real property.

Hartford's arguments regarding the application of exclusion (j) are equally inadequate. Hartford relies primarily on Advantage Homebuilding, LLC v. Maryland Cas. Co., 470 F.3d 1003 (10th Cir. 2006) in support of its arguments regarding exclusion (j). However, Hartford fails to appreciate that the facts of Advantage Homebuilding are completely distinguishable from those in this case. Advantage Homebuilding involved homeowners' claims for compensatory damages for windows that were damaged by the insured. Id. at 1006, 1009. It did not involve claims for construction defect; *e.g.*, claims for property

damage caused by the incorrect installation of windows by the insured. Thus, the homeowners' claims for damaged windows were excluded under (j)(5) because the damage occurred during the course of the insured's work and were excluded under (j)(6) because the windows were damaged while the insured's work was ongoing. *Id.* at 1010 and 1012. In contrast, there are no facts in this case to suggest, for example, that the siding or concrete themselves were damaged during installation.

As to exclusion (j)(5), Hartford claims that the exclusion "applies to work in progress before substantial completion was reached in March 1996," but does not explain how the building envelope and lightweight concrete losses fall within its interpretation of the exclusion. *Hartford brief at 47.* The exclusion, though, applies specifically to property damage that occurs at the time the operations were being performed. The building envelope and lightweight concrete damages for which CSV sought indemnification all occurred after construction on those items was concluded, not during.

Hartford's citation to *Vandivort Constr. Co. v. Seattle Tennis Club*, 11 Wn. App. 303, 522 P.2d 198, *rev. denied*, 84 Wn.2d 1011 (1974), is unhelpful. In that case, a contractor brought a lawsuit against its liability insurer to recover increased construction costs incurred when a landslide caused by the contractor's own negligence damaged the contractor's

construction site. *Id.* at 303-04. One of the issues on appeal was whether the loss was excluded under policy language excluding coverage for damage to “that particular part of any property, . . . upon which operations are being performed by . . . [the] insured[.]” *Id.* at 308. The court held the exclusion applied because the damages sought resulted from property damage that occurred while the contractor was performing its operations. In contrast, CSV seeks indemnification from Hartford from third party claims of property damage occurring after the “operations” (the building envelope and lightweight concrete construction) were completed.

Exclusion (j)(6) also does not apply. By its plain language, the exclusion applies only to damage to property that must be repaired because CSV’s work was “incorrectly performed **on it.**” (Ex. 110, HART 97 (emphasis added)) Thus, the exclusion applies when work is being performed **on** pre-existing property. See *American Equity Ins. Co. v. Van Ginhoven*, 788 So.2d 388, 391 (Fla. App. 2001). As commentators have recognized, the exclusion applies only when the incorrect work is done “on” property that is then damaged, not when the work is the creation of the property in the first instance:

The exclusion applies to ‘property that must be restored, repaired, or replaced because ‘your work’ was incorrectly performed on it.’

Note the exclusion could have ended at ‘incorrectly performed,’ but it goes on to expressly qualify its meaning with the addition of the term ‘on it.’ As such, the latter term must be given some meaning. It indicates that the property that was damaged must exist prior to the work in question and that the insured’s subsequent work must be ‘on’ that pre-existing property. Examples of this are remodeling work and service work. By contrast, where the damaged property was the creation of the insured, *e.g.*, a poured slab of concrete, it cannot rightly be said that the contractor had performed work ‘on’ it. Rather, the insured’s work ‘was’ it. At the very least, this wording creates an ambiguity that should be construed in favor of coverage.

Turner, *Insurance Coverage of Construction Disputes* § 32.6. Hartford points to no evidence in the record that either the building envelope or lightweight concrete damages occurred while CSV was performing work on pre-existing property.

The trial court correctly concluded that no policy exclusions other than the “owned property” exclusion applied to this loss. Hartford’s arguments regarding the application of the “business risk” exclusions to this case must be rejected.

**5. The trial court correctly concluded that CSV was entitled to attorney fees associated with the lightweight concrete claim.**

Hartford contends that CSV was not entitled to an award of attorney fees and costs against it because there is no coverage for the lightweight concrete claim. *Hartford brief at 49.* Because Hartford’s

arguments regarding coverage for this claim are without merit, the trial court's award of attorney fees must stand.

#### **IV. CSV'S CROSS-APPEAL**

##### **A. Introduction**

When the trial court calculated the damages CSV was entitled to, it included a partial offset of the amounts CSV received from its lawsuit against the contractors and a settlement with the architect. The trial court also allocated only a portion of CSV's settlement with the homeowner's association to the amounts owed by Hartford to CSV; *i.e.*, to covered claims. CSV's cross-appeal presents two alternative issues. One, the trial court's calculation and application of the allocation was error. There is no basis in law for an allocation. Further, the trial court's findings of fact do not support the trial court's conclusion that an allocation should have been made. Two, in the alternative, the trial court's application of an offset to the covered portion of CSV's settlement with the Association was error because there was no equitable basis for it.

CSV asks this Court to either reverse the trial court's application of the allocation to CSV's damages or reverse the trial court's application of an offset, and remand to the trial court for recalculation of its damages consistent with the below analysis.

**B. Assignments of Error for Cross-Appeal**

**1. Assignments of Error**

(a). The trial court erred in making the following findings of fact and conclusions of law contained in Conclusion of Law 24:

. . . . Of the remaining settlement amount of \$548,255, I conclude that \$272,000 should be allocated to claims related to the HVAC system, which is not a covered claim. The remainder cannot be directly attributed to a category other than lightweight concrete remediation, and is a reasonable compromise of that claim. The settlement amount allocated to covered claims is \$276,255.

(b). The trial court erred in making the following findings of fact and conclusions of law contained in Conclusion of Law 33:

CSV should have judgment against Hartford for the following amounts or items of damage:

. . .

c. Prejudgment interest on \$218,241.45 (79% of \$276,255.00, the portion of the HOA settlement attributed to covered claims, at the rate of twelve percent (12%) per annum, from June 27, 2001 through October 13, 2004. No judgment will be entered on the principal damages of \$218,241.45, because the offset reduced these damages to \$0 on October 13, 2004.

(c). The trial court erred in making the following findings of fact and conclusions of law contained in Conclusion of Law 26:

A partial offset of the amount received from the contractors, subcontractors, and architect should be made against the settlement amount paid by CSV to the HOA. The total of \$410,000.00 included \$100,000 for attorney's fees; \$36,831.48 for defective flooring repairs; \$25,562.05 for interest on the defective flooring damages; and \$12,500 received from the HVAC subcontractor. These amounts are not related to the CSV-HOA settlement, and are excluded from the offset. The total offset is \$235,106.47. This offset will be applied to reduce the principal damages for which each defendant is liable from the date of the settlement agreement, October 13, 2004.

(d). The trial court erred in failing to enter judgment against Hartford in favor of CSV for principal damages on the covered claim involving lightweight concrete damages.

## **2. Issues Pertaining to Assignments of Error**

(a). Whether the trial court properly allocated only a portion of the amounts CSV paid in settlement of the Association's claims to the covered claim for lightweight concrete damages in the absence of any evidence CSV or the Association to the settlement intended such an allocation. (Assignments of Error (a), (b), and (d))

(b). In the alternative, whether the trial court correctly granted Hartford an equitable offset from amounts CSV received from its settlement with the contractors against its recovery of the covered portion of its settlement with the Association when there was no evidence that

CSV would receive a double recovery in the absence of the offset.  
(Assignments of error (c) and (d))

**C. Statement of the Case for Cross-Appeal**

CSV incorporates its counter-statement of the case, above.

**D. Argument**

CSV's cross-appeal concerns the trial court's failure to award any principal damages to CSV for the lightweight concrete damages. The trial court concluded that only \$276,255 of the \$645,000 CSV paid to settle the Association's claims against it should be allocated to the lightweight concrete damages. The trial court also concluded that Hartford was entitled to offset \$235,106.47 against that amount based on CSV's settlement with the contractors and architect. When the "owned property" percentage was applied to the \$276,255, the resulting amount was less than Hartford's putative offset and, thus, the trial court did not award any principal amounts for the lightweight concrete damages to CSV. This calculation (based either on the trial court's improper allocation or, in the alternative, the trial court's improper allowance of an offset) and the trial court's failure to award any such principal amounts were in error.

**1. The trial court's allocation of only a portion of CSV's settlement with the Association to covered damages was in error.**

The trial court's findings of fact do not support its conclusion that only a portion of CSV's settlement with the Association should be allocated to lightweight concrete damages. When a recovery is subject to a clear allocation between items of damage, such an allocation must be respected. See *Hi-Way Fuel Co. v. Estate of Allyn*, 128 Wn. App. 351, 361, 115 P.3d 1031 (2005). Conversely, where no such allocation is made, no allocation may be imputed. *Cramer v. Pemco Ins.*, 67 Wn. App. 563, 566, 842 P.2d 479 (1992).

In this case, the trial court made the following findings of fact with respect to CSV's settlement with the Association:

- a. That the Association had originally made a claim against CSV in excess of \$1 million to replace the lightweight concrete. (Finding 27, CP 960)
- b. That CSV paid a lump sum settlement amount of \$645,000 to the Association. (Finding 30, CP 960)
- c. That the settlement agreement did not place any restrictions on the Association's use of the settlement money. (*Id.*)
- d. That CSV's potential liability for remediation of the lightweight concrete was "substantial" and that the estimates of the cost of such remediation varied widely. (Conclusion 22, CP 964)<sup>9</sup>

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<sup>9</sup> Although included in Conclusion 22, this is clearly a finding of fact, as are all the other findings erroneously included in conclusions of law.

e. That the Association was not required to spend the settlement money on any particular item or remedy any specific defect. (Conclusion 23, CP 964)

f. That while CSV's settlement with the Association included damages for covered and uncovered claims, CSV conceded **only** that a portion of that amount related to an uncovered claim involving fire sprinklers in the amount of \$96,745.00, leaving a balance of \$548,255.00. (Conclusion 24, CP 964)

These findings constitute the established facts of the case. Yet despite these findings, the trial court concluded that the balance of \$548,255 should be split between two particular items of damage – one covered (the lightweight concrete) and one uncovered (the HVAC system). (Conclusion 24, CP 964) The trial court's allocation should be reversed because it essentially imputes a particular allocation to CSV's settlement with the Association, which is an error of law. See *Cramer*, *supra*, 67 Wn. App. at 566.

A similar result was reached in *Prudential Prop. and Cas. Ins. Co. v. Lawrence*, 45 Wn. App. 111, 724 P.2d 418 (1986). In that case, an insurer sought to avoid paying the full amount of a settlement reached in a case involving both covered and uncovered claims against its insured. The insurer contended that it need only pay that portion of the settlement allocated to covered claims. However, because the settlement agreement did not so allocate and "specified only that it involved 'all claims' of the

parties,” the trial court did not err in ordering the insurer to pay the entire settlement. *Id.* at 120-21.

Moreover, even assuming an allocation could be made, the trial court’s allocation is not supported by the findings. The trial court’s findings of fact establish that there were no “line items” to the settlement and provide the trial court with no factual basis upon which to make the allocation it did. The evidence presented below supported these findings. (CP 26-30)

Thus, the entire balance of the settlement (\$645,000.00 minus \$96,745.00, which CSV conceded was attributable to an uncovered claim) must, in the absence of any allocation, be attributed to the covered claim for lightweight concrete damages. Indeed, this is supported by the trial court’s finding that the Association’s claim against CSV for such damages exceeded \$1 million. (Finding 27, CP 960). The trial court erred in allocating only a portion of the settlement to the lightweight concrete claim. The amount of CSV’s damages related to the lightweight concrete should have been set at \$548,255.00, with interest running from June 27, 2001, the date on which CSV paid the settlement with the Association, to

October 13, 2004, the date on which CSV entered into the settlement with the contractors.<sup>10</sup>

For purposes of this argument, CSV does not dispute that an offset of \$235,106.47 (representing that portion of CSV's settlement with the contractors and the architects related to covered claims (Conclusion 26, CP 965)) is appropriate. However, the offset must be applied against \$548,255.00 plus interest. From that amount, the "owned property" percentage must then be applied and, finally, prejudgment interest should be calculated on that amount. CSV asks this Court to remand this case to the trial court for recalculation of its damages against Hartford consistent with the above analysis.

**2. In the alternative, the trial court's application of an offset from the amounts CSV received from its lawsuit against the contractors and its settlement with the architect was in error.**

Prior to trial, Hartford obtained an order of partial summary judgment establishing its right to an offset "based on monies recovered by CSV in its action against the general contractor." (CP 294) Hartford premised its entitlement to an offset of the amounts CSV received from the contractors and the architect based on the theory that, without such an offset, CSV would obtain a double recovery. (CP 19) *Eagle Point*

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<sup>10</sup> Hartford has not challenged the trial court's conclusion that interest is properly calculated from June 27, 2001 to October 13, 2004. (Conclusions 26 and 27, CP 965)

Condominium Owners Assoc. v. Coy, 102 Wn. App. 697, 9 P.3d 898 (2000). Following trial, the trial court affirmed Hartford's right to the offset and calculated an amount based on that portion of the settlement related to CSV's settlement with the Association. (Conclusion 26, CP 965) This was in error.

A trial court's decision to grant an offset is reviewed for abuse of discretion. *Id.* at 701. "A court abuses its discretion if its decision is not based on tenable grounds or tenable reasons." *Id.*

In Eagle Point, a condominium association filed suit against the declarant (Coy) and the contractor (Brixx). *Id.* at 700. The association settled with Brixx and obtained a judgment against Coy following a bench trial. *Id.* at 701. Coy asked the trial court to offset the entire amount of the Brixx settlement. *Id.* The trial court allowed an equitable offset in the amount of \$55,000 (\$10,000 less than the settlement amount) and both the association and Coy appealed. *Id.*

On appeal, the court concluded that "the trial court was within its discretion to conclude that an offset was necessary as a matter of equity to ensure that the plaintiffs did not recover damages from both Coy and Brixx for the same defects." *Id.* at 703. This conclusion was based on the fact that the association had originally asserted all of its claims against Coy and Brixx jointly, that the Brixx settlement did not allocate it to any

particular claim of damage, and that the association continued to assert the same claims against Coy after its settlement with Brixx. *Id.* at 702.

The *Eagle Point* case makes clear that an equitable offset is authorized only to avoid a double recovery. *See also Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 15 P.3d 115 (2000) (“But even assuming the existence of a general rule barring double recovery absent policy language to that effect, the insured must first be fully compensated for its loss before any setoff is ever allowed.”); *Puget Sound Energy, Inc. v. ALBA General Ins. Co.*, 149 Wn.2d 135, 142-43, 68 P.3d 1061 (2002) (the insurer “bears the burden of establishing the right to and amount of any offsets necessary to avoid double recovery” by the insured). Here, if the trial court’s allocation was correct, its calculation of the offset was error because there is no double recovery.

A double recovery exists only if there are multiple recoveries for the same damages. *Id.* Here, the trial court found that CSV made a claim against the contractors for damages occasioned by the HVAC system. (Finding 17, CP 958) The trial court also allocated \$272,000 of CSV’s settlement with the Association to the HVAC system (Conclusion 24, CP 964) and then concluded the HVAC claims were not covered (Conclusion 12, CP 963) This amount is clearly in excess of the offset amount (\$235,106.47). Thus, a double recovery would be present only if the

HVAC costs were covered and Hartford was responsible to indemnify CSV for those costs. That is not the case here.

A similar result was reached in Pederson's Fryer Farms, Inc. v. Transamerica Ins. Co., 83 Wn. App. 432, *supra*. That case concerned an insured's attempt to recover expenses for cleaning up contamination from an underground gasoline storage tank. *Id.* at 435. Because one insurer could not demonstrate which portion of the insured's settlement with a different insurer was attributable to cleanup costs, the appellate court concluded the insurer was not entitled to an offset:

The settlement . . . was not mere payment for Pederson's cleanup costs; it was in exchange for a release of liability for all past, present and future environmental claims. Transamerica did not demonstrate what part, if any, of the settlement was attributable to cleanup costs. Thus, no showing of double recovery was made. The trial court acted appropriately by not reducing the award.

*Id.* at 452.

Hartford bears the burden of proving that CSV was fully compensated by its settlement with the contractors and that, in the absence of an offset, CSV would receive a double recovery. Weyerhaeuser Co., *supra*, 142 Wn.2d at 674-75. Because the trial court made no factual findings regarding full compensation or double recovery, it must be

assumed that Hartford failed in this burden. *Car Wash Enterprises, supra*, 74 Wn. App. at 546. Because the lack of such findings is the functional equivalent of a finding against Hartford, the trial court's conclusion that an offset is warranted is error.

Taking into consideration the trial court's allocation of \$276,255.00 to the lightweight concrete claim, CSV should have been awarded 79 percent of that amount as principal lightweight concrete damages, or \$218,241.45, and interest should have been calculated on that amount. If this Court does not remand on the allocation issue, CSV asks this Court to remand this case to the trial court for recalculation of its damages against Hartford consistent with the above analysis.

#### **V. REQUEST FOR ATTORNEY FEES**

Pursuant to RAP 18.1(a) and (b), CSV asks this Court to award it attorney fees for defending this appeal. As a general rule, if applicable law allows the trial court to grant attorney fees, that law is also interpreted as allowing fees to the prevailing party on appeal. *Lindsay v. Pacific Topsoils, Inc.*, 129 Wn. App. 672, 685, 120 P.3d 102 (2005).

An insured is entitled to recover his actual attorney fees when his insurer compels him to pursue legal action in order to obtain the full benefit of the insurance contract. *McGreevey v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 33, 904 P.2d 731 (1995). CSV is entitled to an award of its

attorney fees on appeal and respectfully asks that this Court so order.

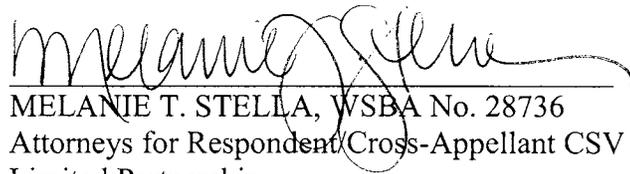
CSV also asks that it be awarded its costs under RAP 14.

Respectfully submitted this 25th day of July, 2007.

BURGESS FITZER, P.S.



TIMOTHY R. GOSSELIN, WSBA No. 13730  
Attorneys for Respondent/Cross-Appellant CSV  
Limited Partnership

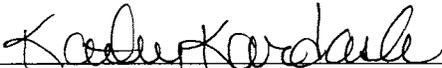


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a true and correct copy of this affidavit and Brief of Respondent/Cross-Appellant CSV Limited Partnership.

  
KATHY KARDASH

Subscribed and sworn to before me this 25th day of July, 2007.



  
Jody Doty  
Notary Public in and for the State of  
Washington, residing at Gig Harbor.  
My Commission Expires: 3/2/09