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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS NO. 353940-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

Cause No. 353940

WESTERN NATIONAL ASSURANCE COMPANY,

Respondent.

v.

JOHN AND LINDA ROBEL, individually

And as husband and wife; and ROBEL'S

ORCHARD, a Washington Corporation

and/or sole proprietorship owned by John

and Linda Robel; and VICKI LYNN POSA, a single person,

Appellant,

AMENDED RESPONDENT'S BRIEF

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I. INTRODUCTION

This is an appeal by Appellant Vicki Posa from a summary judgment order granting declaratory judgment in favor of Respondent Western National Assurance Company (“Western National”) in an insurance coverage dispute over an alleged fall occurring while Ms. Posa was picking cherries to purchase while a customer at Robel’s Orchard. Ms. Posa filed a lawsuit in Spokane County Case No.13-2-02853-5, naming John and Linda Robel, and Robel’s Orchard as defendants on July 18, 2013. Western National enlisted attorney Andrew Bohrnsen to defend its insureds, and he appeared on October 23, 2013 in Spokane County Superior Court. In a separate action, Western National filed a declaratory judgment action to obtain a ruling on its coverage obligations, and moved for summary judgment in Case No. 13-2-04393-5. The trial court granted Western National’s motion, concluding that its homeowners policy did not indemnify its insureds business, Robel’s Orchard. The valid and unambiguous policy language excluded coverage for business activities conducted at the insured’s home, and the bodily injury suffered by Ms. Posa arose out of the Robels’ operation of a business, Robel’s Orchard, at their home.

On May 15, 2017, the time set for oral argument on Respondent’s Motion for Summary Judgment for Declaratory Relief, Appellant Vicki Posa filed an Amended Complaint in Case No. 13-2-02853-5. Ms. Posa

failed to file the Amended Complaint in Case No. 13-2-04393-3, or formally serve Western National. Appellant subsequently filed a motion to amend the clerk's papers to reference its Amended Complaint in this appeal; Commissioners Wasson granted Appellant's request on February 6, 2018 and directed the parties to file amended briefs.

The underlying record from the May 15, 2017 summary judgment argument reflects that the Court found that no genuine issue of material fact established that Western National's policy imposed a duty to indemnify John and Linda Robel's business activity as Robel's Orchard. Further, no genuine issue of material fact was raised in opposition to the evidence presented by Western National which established that (1) John and Linda Robel engaged in the regular, continuous and profit-motivated operation of Robel's Orchard as a business, and (2) that Ms. Posa's use of the ladder and bucket was related to the "pay-to-pick" business. Respondent prepared an order reflecting the trial court's Order, which was signed by counsel for Ms. Posa, and entered on May 17, 2017. This appeal followed.

II. COUNTERSTATEMENT OF THE ISSUES.

1. The trial court correctly concluded that Defendants Robel were operating a business, Robel's Orchard, on a regular and continuous basis, for profit.
2. The trial court correctly concluded that the plain, ordinary, clear and unambiguous language of Western National's homeowners policy excluded coverage for Ms. Posa's fall because she was on the

insured's premises as a customer of Robel's Orchard.

3. The trial court correctly concluded that Appellant's use of the bucket and ladder at Robel's Orchard, a "pay-to-pick" orchard, was an activity viewed as "Business in Nature."
4. No evidence was presented to establish a genuine issue of material fact that Western National owed a duty or breached a duty to indemnify Robel's Orchard.
5. Appellant is judicially estopped from advantageously filing an amended Complaint which contradicts its prior position.

III. RESPONDENT'S COUNTER STATEMENT OF THE CASE

1. Relevant Facts

John and Linda Robel owned, operated, and licensed their business Robel's Orchard and they registered the address of the company at their home located at 19405 N. Sands Road Colbert, WA 99005. CP 30, and 31. Beginning in 2001, Robel's Orchard cultivated, harvested and sold produce for profit at the 19405 N. Sands Road on a regular and continuous basis. CP 30. Western National insured John and Linda's home under one homeowners policy number 000067160, which excluded coverage for bodily injury or property damage resulting from the performance of a business activity, trade, profession, or occupation, including but not limited to farming at the insured premises. CP 29 and 31. Contrary to Appellant's assertions, the residential premises were never insured as a "farm" because such a business activity was explicitly prohibited by the clear and unambiguous terms of the policy. CP 31, 32, 36.

Ms. Posa's alleged injury occurred on July 20, 2012. CP 1 and 31. Ms. Posa's initial Complaint, filed on July 18, 2013, named Robel's Orchard as a party in the "business of selling fruit for public picking" at N. 19405 Sands Road. CP 1. Appellant admitted that she visited Robel's Orchard to "pay to pick cherries", and alleged that Defendants Robel and Robel's Orchard were negligent "in operating and managing said business". CP 1. Western National satisfied its duty to defend its insureds; WNAC enlisted attorney Andrew Bohrsen, who filed a Notice of Appearance to defend John and Linda Robel.

During Mr. Bohrsen's deposition of Appellant, Ms. Posa testified that she visited the insured's premises after contacting Robel's Orchard to determine its hours of operation, and confirmed that Robel's Orchard sold "pay-to-pick" cherries at a price per pound. CP 32 (pg. 8, Ln. 6-8) and CP 35 (pg. 80, ln. 19-25 and pg. 72, ln. 4 – pg. 73 ln. 17). Similarly, Ms. Posa testified that she decided to go to Robel's Orchard because the Green Bluff Grower Grocer listed Robel's Orchard as a "pay-to-pick" cherry orchard, and found Robel's Orchard after following the signs identifying its location. CP 31 (Exh. C, pg. 72-73). Ms. Posa testified that there were three other customers at Robel's Orchard when she arrived, and that an employee near the barns named John advised her that they were open for business. CP 31 and 32. After she was fitted with a harnessed bucket by the employee, she picked cherries using a ladder until the weight of her

bucket full of cherries allegedly caused her to fall. CP 31 (Exh. C, pg. 80, 85 and Exh. D).

After being notified of the claim, and defending its insureds, Western National instigated the underlying declaratory action due to actual, present, existing and obvious disputes regarding whether Western National's homeowners policy provided liability coverage, indemnity defense or indemnity to John and Linda Robel under Western National's homeowners policy number 02HO 000067160. Plaintiff's supplemental briefing alleges that Ms. Posa "learned of additional facts through Western National's Motion for Summary Judgment that gave rise to insurance coverage", but she completely fails to reference, or introduce the "new" evidence in the supplemental briefing.

2. Western National's Valid and Unambiguous Contract Prohibited its Insureds From Conducting Business on the Insured Premises.

The Western National homeowners policy excluded coverage for bodily injury to "a person who is on the 'insured premises' because a 'business' is conducted or professional services are rendered on the insured premises." CP 32 (pgs. 7-8). Specifically, Western National's homeowners policy did not cover " 'bodily injury' or 'property damage' resulting from the rendering of or the failure to render a 'professional service' " and similarly excluded coverage for " 'bodily injury' or 'property damage' resulting from activities related to the 'business' of an

‘insured’, except as Provided by Incidental Business Coverage.” CP 32 (pgs. 7-8). Incidental Business Coverage only covered bodily injury or property damage which resulted from the rental of part of the insured premises which are otherwise occupied as a residence, to include the rental of other parts of the insured premises for use as another residence, school, studio, office, or private garage. CP 32. The homeowners policy defined “Business” as “a trade, a profession, or an occupation including farming, all whether full or part time...” CP 32 (pgs. 7-8). The definition of “Business” does not include ‘part-time or seasonal activities that are performed by minors’, or ‘activities that are related to ‘business’, but are usually not viewed as ‘business’ in nature. CP 32 (pg. 7-8).

Plaintiff misstates the facts in her supplemental briefing; no “farm property” was covered by “premises liability insurance through Western National.” Western National’s homeowner’s policy clearly and unambiguously excluded business coverage for “farming” and therefore did not provide coverage for any “farm property”. CP 1, 29, 32.

3. The Robels’ Admissions to Carrie Miller were Properly Introduced in Support of Western National’s Motion.

Western National introduced a transcribed copy of Carrie Miller’s interview with Defendants Robel, which was permissibly recorded during Ms. Miller’s investigation on behalf of Western National. Both John and Linda Robel provided their verbal consent, and knowingly and willingly

participated in the recorded discussion. CP 30 (Exh. 1). Defendant Robels' admissions as a party opponent were properly introduced under Washington's Rules of Evidence, Rules 401 and 801(d)(2)(i) through the sworn declaration of Ms. Miller. CP 30; *See also* ER 801(d)(2)(i) and ER 805. During the interview, the Robels admitted that beginning in 2001, they cultivated, harvested and sold produce at the 19405 N. Sands Road, the residential premises covered by Western National's homeowners policy, and that they continued this business activity on a regular and continued basis, selling cherries for profit. CP 30 (Exh. B).

4. Western National Properly Introduced Portions of Ms. Posa's Deposition Testimony in Support of its Motion.

Ms. Posa was deposed by Mr. Bohrsen on behalf of Western National's insureds in Spokane County Superior Court Case No. 13-2-02853-5, and she acknowledged under penalty of perjury that: (1) John and Linda Robel operated Robel's Orchard at their home, (2) Robel's Orchard was in the business of growing and selling cherries for profit, (3) Ms. Posa visited Robel's Orchard to pick cherries, (4) Robel's Orchard provided Ms. Posa a bucket and access to ladders to pick cherries, and (5) she suffered her alleged fall while using a ladder and bucket to pick cherries at Robel's Orchard. CP 31 (Exhs. A, C and D). Western National properly introduced the prior, sworn statements of Defendant Posa pursuant to ER 801(d)(1)(i) via the sworn declaration of Eric R.

Byrd. CP 31. And, Ms. Posa's responsive pleadings filed in opposition to Western National's motion failed to establish any issue of fact concerning the regularity, continuity or pecuniary motivation for the Robel's cultivation and sale of cherries, or a genuine issue of material fact to support an assertion that the Robel's Orchard's provision of a bucket and ladder to Ms. Posa was unrelated to the business of Robel's Orchard.

5. Appellant is Judicially Estopped from Advantageously Changing the Facts Relied Upon by the Court and the parties during the summary Judgment Proceedings.

On May 15, 2017, Appellant filed its Amended Complaint in Spokane County Superior Court Case No. 13-2-02853-5, but never filed or properly served Western National in the present action. Appellant's Amended Complaint presents an advantageously alternative version of events where Western National's insureds, John and Linda Robel were *not* operating Robel's Orchard at their home when Ms. Posa visited to pick cherries. Plaintiff filed this retrofitted, inconsistent position to manufacture an issue of fact in opposition to Respondent's summary judgment motion, which should be disregarded. Western National had already satisfied its duty to defend, and clear questions still remain regarding Western National's duty to indemnify its insureds, even if Appellant has removed reference to Robel's Orchard in its Amended Complaint.

For purposes of the present motion, Appellant's new, advantageous and inconsistent position should be rejected under the doctrine of judicial

estoppel because: (1) it is inconsistent with its prior Complaint and contradicts Ms. Posa's deposition testimony, and admissions by party-opponents John and Linda Robel; (2) it implies that the allegations in the prior Complaint lacked merit, and were misleading; and, (3) it attempts to gain an unfair advantage in the present litigation by changing the underlying facts upon appeal. Here, the Court had already considered and relied upon the Complaint, and Appellant's original position, which was referenced consistently in the pleadings by the parties. This Court should reject Appellant's new position.

IV. STANDARD OF REVIEW

1. **Western National's Policy is a Valid Contract, and the Applicable Exclusionary Language is Unambiguous.**

Insurance policies are construed as contracts, meaning they are interpreted as a matter of law. *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 423-24, 932 P.2d 1244 (1997). In construing an insurance policy's language, the policy should be interpreted in the way that would be understood by a fair, reasonable, sensible, and average person purchasing insurance. *Vadheim v. Cont'l Ins. Co.*, 107 Wn.2d 836, 840-41, 734 P.2d 17 (1987); *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 907, 726 P.2d 439 (1986) (citing *Morgan v. Prudential Ins. Co. of Am.*, 86 Wn.2d 432, 545 P.2d 1193 (1976)). Undefined terms are given their ordinary and common meaning, not their technical, legal

meaning. *Allstate Ins. Co.*, 131 Wn. 2d at 424 (citing *Kish v. Ins. Co. of N. Am.*, 125 Wn.2d 164, 170, 883 P.2d 308 (1994)); *Kitsap Cty. v. Allstate Ins. Co.*, 136 Wn.2d 567, 576, 964 P.2d 1173 (1998) (quoting *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990)).

In interpreting exclusions, we have held exclusions from coverage of insurance are contrary to the fundamental protective purpose of insurance and will not be extended beyond their clear and unequivocal meaning. *McDonald Indus., Inc. v. Rollins Leasing Corp.*, 95 Wn.2d 909, 915, 631 P.2d 947 (1981). Exclusionary clauses should be narrowly construed for the purpose of providing maximum coverage for the insured. *McDonald Industries, Inc.*, 95 Wn. 2d at 914–15 (quoting 12 *George J. Couch, Cyclopedia of Insurance Law* § 45:125 (2d ed.1964)). And, ambiguous exclusion clauses should be construed against the drafter. *Nationwide Mut. Ins. Co. v. Kelleher*, 22 Wn. App. 712, 715, 591 P.2d 859 (1979). If the language is clear and unambiguous, it must be enforced as written; courts may not create an ambiguity. *Kitsap County*, 136 Wn.2d 567 at 576; *Washington Pub. Util. Districts' Utilities Sys. v. Pub. Util. Dist. No. 1 of Clallam Cty.*, 112 Wn.2d 1, 10, 771 P.2d 701 (1989).

Here, Plaintiff's attempt to create ambiguities within the clear terms of the policy must fail; Plaintiff has offered no new argument or authority to supports its claims that the language of the policy is unclear or unequivocal, and instead is asking this Court to second-guess the trial

court's decision without basis.

2. The Record on Appeal does not Support a Claim That Western National Breached a Duty to its Insureds to Cover Robel's Orchard Under a Commercial General Liability Policy.

Western National satisfied its duty to defend by enlisting attorney Andrew Bohrsen to represent its insureds. *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 46, 164 P.3d 454 (2007). A duty to indemnify manifests when the language of the policy provides for actual coverage of the claims. *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 425, 983 P.2d 1155 (1999), *as amended* (Apr. 24, 2000)); *Woo*, 161 Wn. 2d at 53–54. Western National's duty to indemnify, which is less broad than a duty to defend, is based upon the language of the policy; an action for breach of such a duty only ripens upon a judgment, or finding of an obligation to provide indemnification coverage. *W. Nat. Assur. Co. v. Shelcon Const. Grp. LLC*, 182 Wn. App. 256, 332 P.3d 986 (2014), *Woo*, 161 Wn. 2d 43.

Western National was justified to instigate the present declaratory action because actual, present, existing and obvious disputes existed regarding whether Western National's homeowner policy provided liability coverage, indemnity defense or indemnity for the claims asserted by Vicki Posa. Appellant's supplemental brief ignores evidence introduced at the trial level, including the clear and unambiguous policy language, Ms. Posa's sworn deposition testimony, and party-opponent John and Linda Robel's admissions against self-interest, which

established that no genuine issue of material fact support Ms. Posa's claims for indemnity coverage. No amount of revisionist history can change the events of July 20, 2012, or stretch the clear and unambiguous exclusions located in Western National Assurance Company's homeowner policy number 02HO 000067160, which precludes business liability coverage.

3. Respondent Did Not Owe John and Linda Robel a Duty to Issue a Policy to Cover Robel's Orchard.

Appellant claims without legal authority or supportive facts that Western National owed or breached a duty to issue a policy to John and Linda Robel to cover Robel's Orchard. "The existence of a duty is a question of law for the court, to be considered in light of public policy considerations." *Suter v. Virgil R. Lee & Son, Inc.*, 51 Wn. App. 524, 528, 754 P.2d 155 (1988) (citing *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 933, 653 P.2d 280 (1982)). In the insurance context, an agent does not have a general duty to procure a policy that affords the client complete liability protection. *Gates v. Logan*, 71 Wn. App. 673, 677-78, 862 P.2d 134 (1993). Insurers are not obligated to cover all possible losses, nor are they required to even provide coverage sufficient to fully compensate an insured. *Certain Underwriters at Lloyd's London v. Valiant Ins. Co.*, 155 Wn. App. 469, 478, 229 P.3d 930 (2010). Such a duty can only arise upon a showing that the insurer's agent (1) held himself out as an insurance

specialist and was compensated for the consulting advice relied upon, or (2) there is a long-standing relationship, documented proof of a question about coverage, and detrimental reliance upon the advice concerning coverage. *Gates*, 71 Wn. App. at 677.

Appellant had every opportunity to introduce evidence in support of its claims, and the underlying record does not support allegations that Western National had notice of its insured's operation of a business on the insured premises, or that Western National caused the Robels to detrimentally rely upon assurances concerning coverage. Similarly, Defendants Robel never alleged that Western National knew of the business operations, or alleged that a duty that was owed to them was breached by Western National. CP 30. Appellant had several years to conduct investigation, discovery and depositions, and chose to proceed without subpoenaing records, deposing parties or witnesses, or requesting a continuance to conduct additional discovery before the May 15, 2017 summary judgment hearing. Consequently, the underlying trial court's record is silent on these issues. Appellant remains unable to substantiate its assertions on appeal; Plaintiff's reliance on inferences, assumptions and inaccurate interpretations of the law should be rejected.

Similarly, the record does not support Appellant's assertion that the court impermissibly shifted the burden to Ms. Posa. Ms. Posa was never required "to show that there is no genuine issue as to a material fact

regarding the business in nature of the Robels.” The defendant, on summary judgment has the burden of showing the absence of evidence to support plaintiff’s case. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Once the moving party shows an absence of genuine issue of material fact, the burden shifts to the nonmoving party. *Young*, 112 Wn. 2d at 225. While Courts construe the evidence and reasonable inferences in the light most favorable to the non-moving party, if the nonmoving party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,” summary judgment is appropriate. *Young*, 112 Wn. 2d at 225 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Ms. Posa failed to raise a single genuine issue of material fact in opposition to Respondents Motion to show that Western National’s policy terms imposed a duty to indemnify John and Linda Robel’s business activity as Robel’s Orchard at their residential premises. Similarly, Ms. Posa failed to establish how John and Linda Robel’s regular, continuous and profit-motivated operation of Robel’s Orchard was not a business, or how Ms. Posa’s use of the ladder and bucket was unrelated to those business practices.

4. Appellant Failed to Establish the Existence of an Ambiguity in the Policy’s Exclusionary Language.

The common “business pursuit” insurance exclusion is unambiguous. *Transamerica Ins. Co. v. Preston*, 30 Wn. App. 101, 104, 632 P.2d 900 (1981). The seminal analysis of the business pursuits exception can be found in the Washington State Supreme Court’s decision in *Stuart v. American States Ins. Co.*, where the Court reviewed four appellate cases discussing business pursuit exclusions, two of which were from Division III of the Washington Court of Appeals. *Stuart v. Am. States Ins. Co.*, 134 Wn.2d 814, 819, 953 P.2d 462 (1998) (citing *Stoughton v. Mut. of Enumclaw*, 61 Wn. App. 365, 810 P.2d 80 (1991); *Rocky Mountain Cas. Co. v. St. Martin*, 60 Wn. App. 5, 802 P.2d 144 (1990); *Transamerica Ins. Co.*, 30 Wn. App. 101; and *U. S. F. & G. Ins. Co. v. Brannan*, 22 Wn. App. 341, 589 P.2d 817 (1979)).

The Supreme Court held that for the business pursuits exception to apply, the activity must be conducted on a regular and continuing basis, and be profit motivated. *Stuart*, 134 Wn. 2d at 822. Importantly, when adopting the *Stoughton* court’s analysis, the Supreme Court emphasized that there was no requirement that the activity be motivated “solely by pecuniary gain” or undertaken as a “major source of livelihood” to satisfy the profit motive test. *Stoughton*, 61 Wn. App. at 370–71. Ms. Posa admitted that Robel’s Orchard was in the business of farming and selling cherries for profit. CP 34 (pg. 8, Ln. 6-8) and CP 35 (Exh. 1, pg. 80, ln. 19-25 and pg. 72, ln. 4 – pg. 73 ln. 17). Appellant’s deposition testimony

established that before visiting Robel's Orchard as a customer, she learned of its business operations via advertisement and called Robel's Orchard to confirm its hours of operation, and confirmed that Robel's Orchard sold pay-to-pick cherries at a price per pound. CP 34 (Exh. A) and CP 35 (Exhs. A, B, C, D and E). The next day, she followed signage to find Robel's Orchard, and upon her arrival at the business she saw other customers picking cherries. CP 35 (Exhs. A, B, C, D, and E) and CP 1. Here, Western National established that the Defendant's operation of Robel's Orchard was regular and continuous, and that it was motivated by profit. *Stuart*, 134 Wn. 2d at 822; CP 31 (Exhs. A and C); CP 30 (Exh. 1); CP 34; CP 35 (Exhs. A, C, D, and E).

5. Appellant's Use of the Ladder at Robel's Orchard, a "Pay-To-Pick" Orchard, was an Activity Viewed as "Business in Nature."

The facts establish that upon Appellant's arrival at Robel's Orchard an employee inquired whether she picked cherries with her right or left hand, and she was fit with a harnessed bucket and directed to the cherries and ladders. CP 35 (Exhs. A, B, C, D, and E); CP 1. Ms. Posa, proceeded to use a ladder, which she emphasized was not an ordinary household ladder but was instead designed to facilitate picking cherries from the trees; Ms. Posa testified that but-for the ladder she would have been unable to pick cherries because of her diminutive stature, and the height of the cherries in the trees. CP 35 (Exh. A); CP 31 (Exh. C and

D).

Ms. Posa's allegations that her use of the ladder and bucket were non-business in nature must fail. Ms. Posa was not a social guest of the Robels, and she has similarly failed to demonstrate how the provision of the ladder and bucket to pick cherries was ordinarily incident to the conduct of the John and Linda Robel's household. *Rocky Mountain Cas. Co.*, 60 Wn. App. 5. Appellant cannot establish that her use of the ladder and bucket did not contribute to, or further Robel's Orchard, or that the provision of an uniquely designed ladder and a harnessed bucket were acts normally performed for guests at the Robel's household, or that such an act was not referable to the conduct of the business. See *Transamerica Ins. Co.*, 30 Wn. App. 101, *Torgerson v. N. Pac. Ins. Co.*, 109 Wn. App. 131, 139, 34 P.3d 830 (2001).

Division III conducted an analysis of business pursuits which are excluded from liability coverage due to the customary business nature of the activity in *Torgerson*, 109 Wn. App. at 139. The *Torgerson* court held that liability coverage was excluded for a mobile home park tenant's injury on the stairway connected to the landlord/ insured's residence because it arose out of the business pursuits of the insured. *Torgerson*, 109 Wn. App. at 134–135. The lower court found that although the stairway was used by the insured for personal use, it was also the access route for the mobile home park tenant's laundry/ recreational facilities.

and therefore its use was in connection with the insured's business relationship with the injured party. *Torgerson*, 109 Wn. App. 131. The Court of Appeals affirmed the decision, holding that for coverage to survive the business pursuits exclusion, the activity must be one which is not associated with or related to the insured's business; coverage is excluded when the activity is a part of the insured's employment, includes an instrumentality ordinarily related to the business, and the employee is motivated by a business purpose. *Torgerson*, 109 Wn. App. at 139, (citing *Transamerica Ins. Co.*, 30 Wn. App. at 105).

Again, Robel's Orchard was in the business of selling pay-to-pick cherries, and providing buckets and ladders to its customers to pick and gather cherries. The underlying record shows that Ms. Posa confirmed that Robel's Orchard sold pay-to-pick cherries, and that an employee of Robel's Orchard fitted Ms. Posa with a harnessed bucket based upon her picking hand, pointed her in the direction of the cherries she wanted to pick, and made available a ladder for her use to pick cherries. CP 31 and 35. Ms. Posa was not a social guest, and the bucket and ladder she used to pick cherries were provided to her by an employee of Robel's Orchard. The facts show that the provision of a bucket and ladder by Robel's Orchard was an activity associated with and related to the business; Robel's distribution of instrumentalities like buckets and ladders were ordinarily related to the business because it made possible the customer's

picking and purchase of cherries. Appellant failed to establish a genuine issue of material fact to support her assertion concerning the non-business use of the ladder and bucket at summary judgment.

6. The Doctrine of Judicial Estoppel Prohibits Consideration of Appellant's Amended Complaint.

Judicial estoppel is an equitable doctrine that precludes a party from asserting a position to its advantage which contradicts an earlier position held by the same party, and which was relied upon by the Court. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). “[J]udicial estoppel may be applied only in the event that a litigant's prior inconsistent position benefited the litigant or was accepted by the court.” *Taylor v. Bell*, 185 Wn. App. 270, 282, 340 P.3d 951 (2014). The Court evaluates three factors when applying the doctrine of judicial estoppel: (1) whether the party's later position is clearly inconsistent with its earlier position, (2) whether accepting the new position would create the perception that a court was misled, and (3) whether a party would gain an unfair advantage from the change. See, *State v. Wilkins*, 200 Wn. App. 794, 403 P.3d 890, 896 (2017) (citing *Miller v. Campbell*, 164 Wn.2d 529, 539, 192 P.3d 352 (2008)).

Appellant's Amended Complaint seeks to advantageously remove reference to allegations concerning the business activities of Defendants Robel at Robel's Orchard in an attempt to reverse course, create new issues

of fact and relitigate its case to find coverage under the Western National homeowner's policy. The new version of facts implies that the prior allegations in the original complaint were misleading. Here, the trial court relied upon the Complaint filed by Vicki Posa in Case No. 13-2-02853-5, as Exhibit A to the Declaration of Eric R. Byrd in Support of Plaintiff's Motion for Summary Judgment. CP 31. Therefore, the doctrine of judicial estoppel prevents Appellant's efforts to introduce new pleadings which advantageously contradict allegations asserted in prior pleadings. *Taylor v. Bell*, 185 Wn. App. 270, 282-83, 340 P.3d 951 (2014). Respondent respectfully requests the Court deny Appellant's new version of the facts pursuant to the doctrine of judicial estoppel.

VI. CONCLUSION

Appellant has failed to support the present appeal with additional argument or authority sufficient to overturn the underlying court's dismissal. Respondent respectfully requests that this Court affirm the underlying trial court's Order.

RESPECTFULLY SUBMITTED this 7 day of March, 2018.

BENNETT BIGELOW & LEEDOM, P.S.

By: _____


Eric R. Byrd, WSBA #39668
Attorney for Respondents

CERTIFICATE OF SERVICE

Pursuant to RCW § 9A.72.085, the undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the 7 day of March, 2018, the foregoing was delivered to the following persons in the manner indicated:

Monica Flood Brennan
James, Vernon & Weeks, P.A.
1626 Lincoln Way
Coeur d'Alene, ID 83814

VIA REGULAR MAIL []
VIA CERTIFIED MAIL []
VIA FACSIMILE / *Email* [X]
HAND DELIVERED []
VIA FEDERAL EXPRESS [X]

This 7 day of March, 2018 in
Spokane, WA

