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Supreme Court No. 80420-6
Court of Appeal No. 57679-8-I

BY RONALD D. CARPENTER
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CLERK

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent,

v.

T & G CONSTRUCTION, INC., and VILLAS AT HARBOUR
POINTE OWNERS ASSOCIATION,

Petitioner.

RESPONDENT'S ANSWER TO PETITIONER'S
PETITION FOR REVIEW

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TABLE OF CONTENTS

A.	Identity of Respondent _____	1
B.	Respondent's Statement of the Case _____	1
C.	Argument Why Review Should Be Denied _____	5
	1. The Decision of the Court of Appeals is Entirely Consistent With the Public Interest and Law Established by this Court _____	6
	2. The Decision of the Court of Appeals does Not Conflict With Any Decision of the Supreme Court _____	22
	3. The Decision of the Court of Appeals does Not Conflict With Any Other Decision of the Court of Appeals. _____	22
D.	Conclusion _____	23
	APPENDIX _____	24

TABLE OF AUTHORITIES

CASE LAW - WASHINGTON

<i>Ballard Square Condominium Owners Assoc. v. Dynasty Construction Co.</i> , 126 Wn. App. 285, 108 P.3d 818 (2005) _____	7
<i>Ballard Square Condominium Owners Assoc. v. Dynasty Construction Co.</i> , 158 Wn.2d 603, 146 P.3d 914 (2006) _____	8, 13
<i>Besel v. Viking Ins. Co. of Wisconsin</i> , 146 Wn.2d 730, 49 P.3d 887 (2002) _____	18, 22
<i>Bour v. Johnson</i> , 80 Wn. App. 643, 649 (1996) _____	11
<i>Bresolin v. Morris</i> , 86 Wn.2d 241, 245 (1975) _____	12
<i>Finney v. Farmers Ins. Co.</i> , 21 Wn. App. 601, 586 P.2d 519 (1978) aff'd, 02 Wn.2d 778, 600 P.2d 1272 (1979) _____	15
<i>Fisher v. Allstate Ins. Co.</i> , 136 Wn.2d 240, 961 P.2d 603 (2003) _____	15
<i>Freise v. Walker</i> , 27 Wn. App. 549, 553 (1980) _____	13
<i>Grady v. Dashiell</i> , 24 Wn.2d 272, 290 (1945) _____	11
<i>Lenzi v. Redland Ins. Co.</i> , 140 Wn.2d 267, 280, 996 P.2d 603 (2000) _____	14
<i>Mulcahy v. Farmers Ins. Co. of Washington</i> , 152 Wn.2d 92, 95 P.3d 313 (2004) _____	22
<i>Mutual of Enumclaw Ins. Co. v. T&G Construction, Inc., And Villas At Harbour Pointe Owners Association</i> , 137 Wn. App. 751, 154 P.3d 950 (2007) _____	3
<i>Nationwide Mutual Ins. Co. v. Hayles, Inc.</i> , 136 Wn. App. 531, P.3d 589 (2007) _____	22, 23

<i>N. Sea Prods. V. Clipper Seafoods Co.</i> , 92 Wn.2d 236 (1979)	11
<i>Tank v. State Farm Fire & Casualty Co.</i> , 105 Wn.2d 381, 390, 715 P.2d 1133 (1986)	6, 7
<i>Yakima Cement Products Co. v. Great American Ins. Co.</i> , 14 Wn. App. At 559, 560, 561, 544 P.2d 763 (1975)	19, 20

CASE LAW – OTHER JURISDICTIONS

<i>Miller v. Shugart</i> , 316 N.W.2d 729 (Minn. 1982).	21
<i>Patrons Oxford Ins. Co. v. Preston</i> , 905 A.2d 819 (Maine 2006).	21
<i>United Services Automobile Assoc. v. Morris</i> , 741 P.2d 246 (Ariz. 1987)	21

STATUTES

RCW 23B.14.340	8, 13
RCW 64.34	2

A. IDENTITY OF RESPONDENT

Mutual of Enumclaw Insurance Company is the Respondent filing this Answer in Opposition to the Petition for Review.

B. RESPONDENT'S STATEMENT OF THE CASE

This is an insurance coverage case growing out of a Construction Suit currently under review in *Mutual of Enumclaw Insurance Company, v. T&G Construction, Inc., and Villas At Harbour Pointe Owners Association*, Court of Appeals Case No. 57679-8-1 (Petition for Review Pending). The factual and procedural history related in the Petition for Review in that companion case is quite detailed and adopted for application in the present appeal. That petition is attached as an Appendix for ease of reference.

Briefly, Possession View, LLC ("Possession View") was the developer of the Villas at Harbour Pointe ("The Villas"), a condominium complex consisting of 23 buildings, with a total of 96 units. Possession View hired Construction Associates, Inc. ("CA") as the general contractor on the project. CA, in turn, hired many subcontractors to perform certain aspects of the construction work. One of these subcontractors, T&G, Inc. ("T&G"), was hired to install siding. Mutual of Enumclaw Insurance

Company ("Mutual of Enumclaw") insured T&G under a general liability policy at all times relevant.

The Villas at Harbour Pointe Owners Association ("the Association") sued the developer under the Condominium Act (RCW 64.34) and 28 contractors or subcontractors were added as defendants. Mutual of Enumclaw defended T&G under a reservation of rights. The suit was ultimately settled by the developer and other contractors for an aggregate payment of \$5.733 million. (CP 405) T&G had long been out of business and was a dissolved corporation before the Association claims were presented. (CP 795) It was excluded from the global settlement because its insurer, Mutual of Enumclaw, refused the large settlement demand against its dissolved and immune former insured.

Much of the factual controversy regarding T&G in the Construction Suit involved the extent and method of repair of siding deficiencies. The evidence showed that spot repairs to replace and seal areas around envelope openings in all 23 buildings could be accomplished for as little as \$300,000, while the cost to totally remove and re-clad with new siding could cost in the \$2 to \$4.5 million range. (CP 626) In its reasonableness findings, the Court in the Construction Suit found that "Full siding removal is the only way of discovering all the defects and the only remedy that would allow the homeowners to sell their property in the

future for full value by advising future owners that the problem had been fully remedied.” (CP 627)

The spot repair method dealt with the actual “property damage” caused by T&G’s work which was localized around window openings. (CP 1106) The strip and re-clad was designed to allow “inspection” for discovering defects which could lead to damage at some time in the future. This difference is important in comparing breach of contract damages against covered “property damage.”

Mutual of Enumclaw commenced this Coverage Suit to determine the extent, if any, of its indemnity obligation for the claims against T&G. (CP 1) Shortly after this suit was filed, T&G’s former president stipulated to a \$3.3 million settlement (CP 427) without the consent of Mutual of Enumclaw. (CP 791) This agreement resulted in a \$3.3 million stipulated judgment (CP 757) collectable only against Mutual of Enumclaw. We know that the Association overstepped its bounds - the trial court in the Construction Suit found that the dollar amount the Association attempted to palm off on Mutual of Enumclaw by way of T&G was \$300,000 *above and beyond* the admittedly nebulous bounds of reasonableness. (CP 1085) Mutual of Enumclaw appealed the reasonableness determination in the linked case of *Mutual of Enumclaw Insurance Company, v. T&G Construction, Inc., and Villas At Harbour Pointe Owners Association*, 137

Wn. App. 751, 154 P.3d 950 (2007). The Court of Appeals in that case affirmed the reasonableness determination and judgment against T&G, and Mutual of Enumclaw has filed a Petition for Review in that matter.

Procedural History of the Coverage Suit

The Coverage Suit was resolved through a series of Summary Judgment Motions.

The Order on the first Motion for Partial Summary Judgment adopted a \$3 million “reasonableness finding” in the Construction Suit as the measure of damages in the Coverage Suit. It also held that policy exclusions for “impaired property” and for “withdrawal from use” did not apply to the Association’s claims. (CP 763)

Mutual of Enumclaw’s Motion for Summary Judgment on the issue of its responsibility for a claim for which its dissolved insured was not actually liable was denied. (CP 1289)

In a second Motion for Partial Summary Judgment, the trial court ruled that the policy exclusion for damage to the “work” of T&G did not apply to the Association’s claims. (CP 1173)

Finally, the court essentially incorporated its prior Partial Summary Judgment Orders into an Order on Summary Judgment awarding \$3 million, plus interest and attorneys’ fees. (CP 1347)

Review of the Construction Suit and the Coverage Suit together demonstrates how the misuse of a statutory reasonableness hearing procedure improperly impacted and obscured the coverage analysis. This contrivance resulted in a multimillion-dollar judgment against Mutual of Enumclaw even though its insured was immune from liability — and even though the stipulated judgment included damages specifically excluded from coverage.

The Court of Appeals Decision

The Court of Appeals reversed the entry of judgment against Mutual of Enumclaw. In doing so, it held that Mutual of Enumclaw was entitled to assert T&G's corporate dissolution as a bar to its "legal obligation to pay," and thus as a bar to coverage under the policy. The court also ruled that Mutual of Enumclaw was not bound by the factual determinations made as part of the reasonableness determination by the court in the Construction suit. Because the Court of Appeals decision is sound and consistent with Washington precedent, the Supreme Court should deny the Association's Petition for Review.

C. ARGUMENT WHY REVIEW SHOULD BE DENIED

The Association asks this Court to accept review for two reasons: First, that the Petition involves an issue of substantial public interest that should be reviewed by the Supreme Court; and second, that the decision of

the Court of Appeals is in conflict with decisions from the Court of Appeals and this Court. The Court should reject both of these arguments because the decision of the Court of Appeals is in concert with both public interest and decisions of this Court, and the alleged "conflict" with other decisions of the Court of Appeals and this Court is no conflict at all.

1. *The Decision of the Court of Appeals is Entirely Consistent with the Public Interest and Law Established by this Court.*

The Association argues that it is in the public interest to treat an insurer that acted in **good faith**, reserving its rights with respect to coverage, identically to one that acted in **bad faith**. If the Court adopted the Association's position, an insurer that denied a claim in bad faith under these circumstances would, at the end of the day, be in the same position as one that complied with the highest standards of good faith and fair dealing. Accepting the Association's position would also vitiate the legal protection that a reservation of rights is supposed to confer, despite this Court's observation that providing a defense under a reservation is a "valuable service to the insured." *Tank v. State Farm Fire & Casualty Co.*, 105 Wn.2d 381, 390, 715 P.2d 1133 (1986).

In the case at bar, there is no dispute Mutual of Enumclaw completely and effectively reserved its rights to rely on policy coverage limitations. There is no dispute that Mutual of Enumclaw provided T&G

with an effective, independent defense in compliance with the spirit and the letter of this Court's ruling in *Tank*. The only disputes are whether Mutual of Enumclaw should be "bound" by a void, defective judgment rendered against its insured T&G, and whether the *probabilities* recited by another court as part of a reasonableness determination should be broadly used to "equitably" estop Mutual of Enumclaw from asserting any coverage defenses. The Association's proposed resolution of these disputes does not further the public interest; it violates it. The Court of Appeals resolved these issues correctly, and the decision of that Court should not be disturbed.

a. *Mutual of Enumclaw Has the Right to Challenge T&G's Legal Obligation to Pay in this Case.*

Mutual of Enumclaw has argued that there was no coverage in favor of the Association because the claim did not come within the grant of coverage in T&G's Mutual of Enumclaw policy. In order to come within the policy's grant of coverage, T&G must be "legally obligated to pay" the Association. Before the trial court and on appeal, Mutual of Enumclaw argued that T&G was not legally obligated to pay because it was a dissolved corporation, immune from liability and not subject to suit under the case of *Ballard Square Condominium Owners Assoc. v. Dynasty Constr. Co.*, 126 Wn. App. 285, 108 P.3d 818 (2005).

This argument was persuasive under the Court of Appeals resolution of *Ballard Square*, but it became conclusive as the Washington legislature enacted a new dissolution statute, RCW 23B.14.340, and this Court affirmed that the change was retroactive in *Ballard Square Condominium Owners Assoc. v. Dynasty Constr. Co.*, 158 Wn.2d 603, 146 P.3d 914 (2006). This issue is discussed in detail in Mutual of Enumclaw's Petition for Review in the Construction case, attached as an appendix to this Answer.

In the face of the court's retroactive loss of jurisdiction over T&G, the Association simply repeats, as a mantra, that Mutual of Enumclaw "lacks standing to step into the shoes of its insured to an affirmative defense its insured failed to prevail upon in a separate lawsuit." *Pet. for Rev. at p. 10, fn. 9, Respondent's Appeal Brief at 23.* Mutual of Enumclaw is *not* attempting to step into T&G's shoes; but Mutual of Enumclaw is entitled to a judicial determination of whether T&G was "legally obligated to pay," as those terms are used in the insurance policy. The only reason by virtue of which T&G could be "legally obligated to pay" is the judgment in the Construction Defect action.

What the Court of Appeals held, in accordance with what is undisputedly the law of Washington, was that Mutual of Enumclaw was entitled to mount a challenge to the exercise of jurisdiction of the trial

court in the Construction case. The Association claims this is a collateral attack; that is one way of looking at it. What the Association fails to recognize is that Mutual of Enumclaw is not just arguing that the stipulated judgment represents an incorrect application of the law. Mutual of Enumclaw is arguing that the court in the Construction case did not have the power to render the judgment, and the court in the Coverage case could not have enforced it against T&G.

The Petition for Review characterizes this as an “impermissible” collateral attack. The Associate is wrong. There are two complementary aspects of Mutual of Enumclaw’s position, which are equally valid, lead to the same result, and neither of which is an impermissible collateral attack. The first is a challenge to the *enforceability* of the judgment against T&G on the grounds that a judgment against a dissolved corporation cannot be enforced, and there can thus be no “legal obligation to pay.” An equally valid, though theoretically distinct side of the argument is that it is a *permissible* collateral attack on a void judgment from another court. Either way, this challenge to T&G’s “legal obligation to pay” is not based on a simple disagreement with another court’s decision; it is based on that court’s lack of power to create the “legal obligation to pay.” In this very narrow context, the public policy parade of horrors conjured by the Association that would result from allowing insurers to challenge whether

a stipulated judgment creates a legal obligation to pay is really not a parade at all. In fact, it is hard to imagine how public policy would *ever* favor binding *any* party to the result of a judgment rendered by a court without the necessary statutory jurisdiction.

i. A Judgment that Cannot be Enforced Creates No Legal Obligation to Pay.

In the past, certain insurance companies have argued that where an insured is protected by a covenant not to execute, the insured has no “legal obligation to pay,” and thus there could be no coverage. *Pet. for Review, p. 9, fn. 8.* Mutual of Enumclaw has *never* argued that the covenant not to execute prevents T&G from having “legal obligation to pay” under the policy. The presence of a judgment, stipulated or otherwise, will very often be conclusive on the issue of whether an insured has a legal obligation to pay. But not always. Imagine that Acme, Inc. is insured by Insurance Company. Plaintiff names Acme, Inc. as a defendant in breach of contract case. Process Server accidentally serves process on Widget Corp., whose offices are next door to Acme’s. Acme fails to appear (because it is entirely unaware of the lawsuit), and plaintiff takes a default judgment. When Plaintiff tries to enforce that judgment against Acme, is Acme “legally obligated to pay?” Despite a facially valid judgment, of course not.

A judgment cannot be enforced against an entity not amenable to suit. In the context of garnishment, for example, in *Bour v. Johnson*, 80 Wn. App. 643, 649 (1996), the court held:

Despite a superior court's statutory authority to issue a writ of garnishment, the superior court is denied subject matter jurisdiction to issue a writ of garnishment when the garnishee under no circumstances would be liable.

See also N. Sea Prods. v. Clipper Seafoods Co., 92 Wn.2d 236 (1979). The statutory mechanisms available to execute a judgment against T&G, regardless of the covenant not to execute, could not even theoretically have been used to collect a judgment against T&G because it no longer existed. For this reason, in spite of the “judgment” against it, Mutual of Enumclaw was entitled to challenge T&G’s legal obligation to pay.

ii. *Mutual of Enumclaw has the Right to Collaterally Attack a Void Judgment.*

There is such a thing as a “permissible” collateral attack. Indeed, Mutual of Enumclaw’s challenge in this case is a perfect example of one. The propriety of collateral attack in certain circumstances is well established in Washington caselaw. One early example is the case of *Grady v. Dashiell*, 24 Wn.2d 272, 290 (1945). In *Grady*, the plaintiff was a recovered insane person, who, during the course of his insanity, was

represented in his legal affairs by three successive guardians. Upon recovery, the plaintiff sued the second guardian, and that guardian's bond, for failing to account for trust expenditures. From a judgment on the bond, the surety appealed. The plaintiff had argued that the guardian had failed to meet the statutory prerequisites for obtaining the order in the guardianship proceedings discharging the bond, and the bond thus remained in force. The surety's principle response was that the order of discharge was *res judicata* with respect to the plaintiff, who should not be allowed to collaterally attack it. This Court ruled that a collateral attack was proper, because the order of discharge was statutorily void.

The guardian, Dashiell, had no power or authority to compromise or settle a claim against Dow, or his estate, until and unless he filed a petition setting up the requirements enjoined by Rem. Rev. Stat., § 1576, and until such a petition was filed and presented the probate court was without jurisdiction to enter an order authorizing such compromise or settlement. That order was therefore void, and, being so, was subject to collateral attack. *Id.*

The appropriateness of a collateral attack on a void judgment has been repeatedly recognized in Washington jurisprudence. *See inter alia Bresolin v. Morris*, 86 Wn.2d 241, 245 (1975) ("Respondent may only attack that order in a collateral proceeding if it is absolutely void, not merely erroneous. A judgment is void only where the court lacks jurisdiction of the parties or the subject matter or lacks the inherent power

to enter the particular order involved.) *Freise v. Walker*, 27 Wn. App. 549, 553 (1980) (“In order to declare a judgment void, an appellate court must find that the trial court lacked jurisdiction over the subject matter or the parties, or lacked the inherent power to make the order.”)

In the case at bar, the legislative revision stripped the court of any authority it may have had to exercise jurisdiction over T&G. As this Court noted in *Ballard Square Condominium Owners Assoc. v. Dynasty Constr. Co.*, 158 Wn.2d 603, the right to sue a corporation exists by the grace of the legislature, and can be stripped away at the legislature’s discretion. Once the legislature enacted the new provisions relating to dissolved corporations, it retroactively removed judicial authority to hear claims against corporations dissolved more than two years prior to suit. The trial court in the Construction Suit was thus without subject matter jurisdiction with respect to T&G, and the judgment it issued is void. In the case at bar, the Court of Appeals did not resolve the issue of the application of new RCW 23B.14.340 to the lawsuit against T&G; it simply ruled that Mutual of Enumclaw was entitled to a determination on remand consistent with that law and the *Ballard Square* case. That ruling was correct and should not be disturbed.

b. Mutual of Enumclaw Has the Right to Litigate the Application of Policy Exclusions.

The Association also argues that the decision of the Court of Appeals violates the public interest because it allows Mutual of Enumclaw

to assert policy defenses in the Coverage case. Specifically, the Association takes issue with the ruling that “the trial court appears to have erroneously relied on the reasonableness determination to decide whether policy exclusions applied.” *Pet. for Rev. at 18*. In the absence of a memorandum opinion, however, it is impossible to know exactly what the trial court relied upon in ruling on the various summary judgment motions in this case. But the Court of Appeals was right to call particular attention to the rule of law that findings in the reasonableness determination are not binding on Mutual of Enumclaw with respect to coverage issues. This conclusion is the inescapable result of the direct application of the rules governing collateral estoppel and *res judicata*. As this Court held in *Lenzi v. Redland Ins. Co.*, 140 Wn.2d 267, 280, 996 P.2d 603 (2000), collateral estoppel only applies when (1) the issue decided in the prior adjudication is identical, (2) the prior adjudication ended in a final judgment on the merits, (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication, and (4) application of the doctrine will not work an injustice. *Res judicata* applies to matters that were actually litigated or might have been litigated in a prior action. *Id.* As was noted by the Court of Appeals, a reasonableness determination is not a “mini-trial” on the merits. The only “issue decided” is whether the terms of the settlement comport with the *Chaussee* factors. The trial court

was explicit that the findings supporting that determination were probabilities, that it weighed against other probabilities, consciously without resolving the dispute.

The Association claims that where an insurer has notice and an opportunity to intervene, it is bound by findings, conclusions, and judgment of the arbitral proceeding, citing *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 961 P.2d 603 (2003), and *Finney v. Farmers Ins. Co.*, 21 Wn. App. 601, 586 P.2d 519 (1978) *aff'd*, 92 Wn.2d 748, 600 P.2d 1272 (1979). These “uninsured / under insured motorist” cases are distinguishable from the case at bar because of the nature of the insurer’s ability to “intervene.” In that context, the insurer can intervene and actually litigate the merits of the dispute. When a liability insurer intervenes for purposes of a reasonableness hearing, the only thing it can even theoretically accomplish is to show that the amount for which the insured settled was outside the bounds of reasonableness. The rough assessment of probabilities that determines the outcome of a reasonableness determination should not bind anyone in a subsequent coverage lawsuit.

Furthermore, and perhaps more importantly, the findings of fact made in the reasonableness determination in this case do not purport to resolve any coverage issues. The Association begs the question when it

states, “A large percentage of testimony presented during the reasonableness hearing involved expert witnesses who focused almost exclusively on the results of comprehensive intrusive investigations identifying **the type, scope, and cost of covered “property damage”** at Villas.” *Pet. for Rev. at 17 (emphasis added)*. There is no dispute that experts testified regarding the Association’s complaints at the reasonableness hearing. But there was no testimony, nor should there have been, as to what qualified as “covered property damage” under the Mutual of Enumclaw policy. The Mutual of Enumclaw policy was not even before that court. That court did not consider the application of the policy’s grant of coverage, nor any of the three exclusions relied upon by Mutual of Enumclaw. For example, there was no determination if property damage to the siding caused by tearing it off during remediation was excluded as damage to T&G’s “Work.”¹ There was no determination of whether the settlement amount comprised any damage to “Impaired Property,” as defined and excluded by the policy. And there was no determination of whether performing properly siding was removed because of the fear that it might become defective in the future - such a repair is excluded by the “Withdrawal from Use” exclusion. To the extent

¹ For a more detailed description of these exclusions, see *Brief of Appellant* at 38-46.

that the trial court relied upon the reasonableness findings to conclusively establish that these exclusions did not apply, it was improperly hindering Mutual of Enumclaw's right to litigate the applicability of policy terms. The Court of Appeals was correct to rule that the trial court should reconsider its summary judgments based on the evidence and law before it in the coverage case, not giving conclusive effect to the reasonableness determination as the "measure of covered property damage."

c. *Besel Estoppel is Inappropriate where the Insurer Acts in Good Faith.*

Ultimately, the issue of whether Mutual of Enumclaw is bound by the determination that \$3 million would have been a reasonable settlement is moot because the court that made that determination had no subject matter jurisdiction over T&G. Additionally, the Court of Appeals made no specific ruling regarding whether the *actual determination* of reasonableness was binding on Mutual of Enumclaw. That is to say, the Court did not rule one way or the other as to whether Mutual of Enumclaw was entitled to prove, in the Coverage case, that the settlement was *unreasonable*. What the Court of Appeals *did* rule was that the factual conclusions supporting the reasonableness determination, explicitly couched by the trial court as probabilities, were not facts established and conclusive against Mutual of Enumclaw.

In arguing that this Court should extend the *Besel* rule of estoppel to insurers that act in good faith, the Association conflates two distinct kinds of “harm.” In *Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 49 P.3d 887 (2002), the Court ruled that the amount of the covenant judgment was the presumptive measure of harm suffered *by the insured* as a result of the insurer’s tort of bad faith, as long as it passed a reasonableness test. The question, in that context, is what harm has befallen the insured as a result of the insurer’s tortious conduct? In stark contrast to that scenario, however, where the insurer acts in good faith, there is no tort, and thus no compensable harm flowing from a tort; the only issue is what is covered by the contract of insurance².

Nevertheless, the Association asks this Court to extend *Besel* by ruling that the amount of the covenant judgment in a contract action should be the measure of damages in a subsequent coverage action. Mutual of Enumclaw has consistently argued that there is a basic, conceptual distinction between what T&G may have owed CA (and thus what it was reasonable for T&G to settle for), and what is covered by the insurance policy. There is only coverage for “sums which the insured becomes legally obligated to pay as damages *because of property damage*.”

² Notably, this is a contract of insurance that was undisputedly breached by the insured when it settled without notice to, or consent of, Mutual of Enumclaw.

...” That is to say, if T&G incurred liability to CA because of anything other than property damage, that liability would not be covered under the grant of coverage. As a prime example, CA alleged that T&G breached its subcontract by failing to install a weatherproof barrier under the board and batten siding, even though then-current code did not require such a barrier. The strip and re clad, demanded by CA, would upgrade the siding from T&G’s actual work product, and T&G was charged with that cost. That extra liability for the cost of the upgrade was not “damages because of property damage.” It was “damages because of breach of contract.” The reasonableness hearing addresses only whether the settlement between T&G and CA was reasonable; it did not address whether some or all of the undifferentiated amount came within policy coverage.

A similar issue was before the court in *Yakima Cement Products Co. v. Great American Ins. Co.*, 14 Wn. App. at 559, 560, 544 P.2d 763 (1975). A federal court in the underlying case had entered judgment that the insured Yakima Cement was liable in the amount of \$69,474.17, but issued stipulated findings of fact that \$26,000 of that liability was the result of property damage. The court in the subsequent coverage action held that these findings were not binding on the insurer, and as such, ruled that there was an unresolved factual issue regarding what, if any, of the damages were “because of property damage.”

Similarly, here, there has yet to be a determination of which part of the \$3 million “judgment” against T&G represents “damages because of property damage.” The Association below argued that Mutual of Enumclaw was trying to “undo” the Construction Suit court’s reasonableness finding that a strip and reclud was necessary, and its cost was the appropriate measure of damages against T&G. (CP 979)

Mutual of Enumclaw wants to be absolutely clear on this point; it is not challenging whether T&G could have been liable to CA for the cost of a strip and reclud, even one that was an upgrade over what was actually installed. T&G’s liability to CA, however, is an entirely different question than what is covered under T&G’s insurance policy. *See Yakima Cement, supra* at 561. (“[T]he causes of action for tort liability and for indemnity liability are separate and distinct.”) Thus the cost of repairing actual property damage would be an obligation “because of property damage,” but the cost of ripping out and replacing siding that had not failed, but that was simply outside of contract specs, would not be.

The Association claims that allowing Mutual of Enumclaw to challenge whether the entire amount of the settlement came within the “because of property damage” grant of coverage is a frontal assault on the spirit, if not the letter, of *Besel*. An exceedingly important difference between the case at bar and *Besel*, however, is that the insurer in *Besel*

acted in bad faith. As a remedy for that bad faith, the Court held that policy defenses were no longer applicable. By properly reserving its rights and otherwise acting in good faith, Mutual of Enumclaw preserved its right to indemnify only liability within the grant of coverage, and not excluded by exclusions. The Association's blanket request that the Court "expand its holding in *Besel*" to rule that "the presumptive measure of an insured's damages *in a declaratory judgment action* is the settlement amount³" is a bull in the china shop of insurance rights; it ignores the fact that a settlement may resolve multiple claims, some of which come within, and some of which are outside of, the grant of coverage. As a matter of public interest, the right and obligation of an insurer to pay only covered claims must not be sacrificed to the expediency of "binding" it to any reasonable settlement amount whenever the insurer reserves rights⁴. The Court of Appeals resolved this issue correctly. Notably, it did not rule one way or the other as to whether the entire \$3 million stipulated judgment

³ *Pet. for Rev. at 15, emphasis in original.*

⁴ The Association cites several cases from other jurisdictions to suggest that an insurer is automatically "bound" by any reasonable stipulated judgment, even absent bad faith. *Patrons Oxford Ins. Co. v. Preston*, 905 A.2d 819 (Maine 2006); *United Services Automobile Assoc. v. Morris*, 741 P.2d 246 (Ariz. 1987); *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982). In none of those cases was there any dispute that one hundred percent of the claim came within the policies' grant of coverage. Additionally, no finding relating to reasonableness was bootstrapped to bind an insurer with respect to facts applicable to policy exclusions. They are thus highly distinguishable from the case at bar.

came within the grant of coverage, but it did rule that Mutual of Enumclaw was entitled to an actual adjudication of that issue on remand. That resolution is entirely consonant with the public interest.

2. *The Decision of the Court of Appeals does Not Conflict with Any Decision of the Supreme Court.*

The Association does not present a direct conflict between the opinion of the Court of Appeals in this case and any decision of the Supreme Court. It argues that the rules articulated in the UIM case of *Mulcahy v. Farmers Ins. Co. of Washington*, 152 Wn.2d 92, 95 P.3d 313 (2004) and the bad faith case of *Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730 should be extended to cover the facts of this case. This argument is based on the Association's view of "good policy," not a direct conflict with the rulings in those cases.

3. *The Decision of the Court of Appeals does Not Conflict with Any Other Decision of the Court of Appeals.*

The Association alleges that Division One's ruling directly contradicts the holding of Division Three in the case of *Nationwide Mutual Ins. Co. v. Hayles, Inc.*, 136 Wn. App. 531, 150 P.3d 589 (2007). The Association claims that *Hayles* "relied on a factual finding in the reasonableness hearing regarding the insured's intentional act of turning on the irrigation." *Pet. for Rev. at 19*. *Hayles* holds no such thing. In that case, the court simply noted that the issue of intentionality had not been

established in the reasonableness determination, but that the insurer had no proof that the insured had intentionally damaged the onion crop. It certainly did not "bind" the insurer to a factual finding in the reasonableness determination for purposes of the coverage litigation.

D. CONCLUSION

For the foregoing reasons, Mutual of Enumclaw respectfully requests that the Court deny the Petition for Review.

RESPECTFULLY SUBMITTED THIS 13th day of August, 2007.

HACKETT, BEECHER & HART

/s/*

Brent W. Beecher, WSBA #31095
Attorneys for Mutual of Enumclaw
* Original Signature on file.

APPENDIX

FILE COPY

Supreme Court No. _____

Court of Appeals No. 56144-8-1

IN THE SUPREME OF
THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Appellant,

v.

VILLAS AT HARBOUR POINTE OWNERS ASSOCIATION,

Respondent.

APPELLANT'S PETITION FOR REVIEW

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TABLE OF CONTENTS

	Page
A. Identity of the Petitioner _____	1
B. Court of Appeals Decision _____	1
C. Issue Presented for Review _____	1
D. Statement of the Case – Factual Background _____	2
E. Statement of the Case – Relevant Procedural History _____	2
F. Argument Why Review Should be Accepted _____	6
G. Conclusion _____	12

APPENDICES

- Appendix A: Published in Part – Court of Appeals,
Division One, Cause No. 56144-8-1, Linked
With No. 57679-8-1, dated April 2, 2007
- Appendix B: Annotated Revised Code of Washington
Title 23B. Washington Business Corporation
Act, Chapter 23B.14. Dissolution
- Appendix C: Order Denying Motion to Publish – Court of
Appeals, Division One, Cause No. 56144-8-1,
Linked With No. 57679-8-1, dated July 3, 2007

TABLE OF AUTHORITIES
CASE LAW - WASHINGTON

Adoption of Buehl, 87 Wn.2d 649, 655,
 555 P.2d 1334 (1976) _____ 10

*Ballard Square Condominium Owners Assoc. v.
 Dynasty Construction Co.*, 126 Wn. App. 285,
 108 P.3d 818 (2005) _____ 5, 9

*Ballard Square Condominium Owners Assoc. v.
 Dynasty Construction Co.*, 158 Wn.2d 603, 607,
 146 P.3d 914 (2006) _____ 5, 7, 8

Lushington v. Seattle Auto and Driving, 60 Wash. 546,
 548-549, 111 P.785 (1910) _____ 7, 8, 11

*Skagit Surveyors & Eng'rs, LLC v.
 Friends of Skagit County*, 135 Wn.2d 542, 556,
 958 P.2d 962 (1998) _____ 11, 12

Wampler v. Wampler,
 25 Wn.2d 258, 267, 170 P.2d 316 (1946) _____ 11

CASE LAW - OTHER JURISDICTIONS

Accord. Johnson v. Airplane Servs. Corp., 404 F.Supp.
 726 (D.Md.1975) _____ 7

Dinkytown Day Care Center, Inc., 486 N.W. 2d 587
 (S.D. 1992) _____ 7

Farmers Union Coop. Ass'n. v. Mid-States Constr. Co.,
 322 N.W. 2d 373 (Neb. 1982) _____ 7

State Ex.Rel Eale Oil Co. v. Tillman, 712 S.W. 2d 20
 (Mo.App. 1986) _____ 7

COURT RULES

Ct. of Appeals RAP 2.5(a) _____ 10

Ct. of Appeals RAP 13.14(b)(1) _____ 5

STATUTES

RCW 4.22.060 _____ 3, 4, 5

RCW 23B.14.060 _____ 8

RCW 23B.14.340 _____ 6, 8

RCW 64.34 _____ 1

A. IDENTITY OF THE PETITIONER

The Petitioner is Mutual of Enumclaw Insurance Company ("Mutual of Enumclaw").

B. COURT OF APPEALS DECISION

Mutual of Enumclaw seeks review of a Court of Appeals decision, wherein Division One of that Court affirmed a trial court's RCW 4.22.060 determination of reasonableness of a settlement; both the trial court and the Court of Appeals purported to exercise jurisdiction over a third party, T&G Construction, Inc. The decision was published in part at *Mutual of Enumclaw Ins. Co. v. Villas at Harbor Pointe Owners Association*, No. 56114-8-I (linked with No. 57679-8-I), on April 2, 2007. No Motion for Reconsideration was filed. On July 3, 2007, the Court of Appeals denied a Motion to Publish filed by Villas at Harbour Pointe Owners Association.

C. ISSUE PRESENTED FOR REVIEW

Whether the trial court and the Court of Appeals had subject matter jurisdiction over a corporation that was sued more than two years post-dissolution.

D. STATEMENT OF THE CASE - FACTUAL BACKGROUND

Possession View, LLC ("Possession View") was the developer of the Villas at Harbour Pointe ("The Villas"), a condominium complex consisting of 23 buildings, with a total of 96 units. Possession View hired Construction Associates, Inc. ("CA") as the general contractor on the project. CA, in turn, hired many subcontractors to perform certain aspects of the construction work. One of these subcontractors, T&G, Inc. ("T&G"), was hired to install siding. (CP 273) Work on the project was substantially complete by January 2000. (CP 274) Mutual of Enumclaw Insurance Company ("Mutual of Enumclaw") insured T&G under a general liability policy at all times relevant to this lawsuit. Mutual of Enumclaw has defended T & G in this action under a reservation of rights. (CP No. 800)

E. STATEMENT OF THE CASE - RELEVANT PROCEDURAL HISTORY

The Villas at Harbour Pointe Owners Association ("the Association") filed a lawsuit against the developer, Possession View, in September, 2002. The owners alleged violations of the Condominium Act (RCW 64.34) resulting in damages due to design, construction and marketing practices. (CP 437) Possession View brought a third-party

complaint against CA, primarily based on allegations that CA, as the general contractor, had breached the terms of the construction contract by building inferior condominiums. (CP 310) CA, in turn, brought a fourth party complaint against several subcontractors, including T&G. (CP 288)

In June, 2004, T&G filed a Motion for Summary Judgment. (CP 271) The relief requested was dismissal with prejudice of all of CA's claims on the ground (*inter alia*) that T&G had been administratively dissolved in October, 2000, (CP 315) but CA did not sue T&G until February, 2004 (CP 437).

On September 8, 2004, all of the parties to the lawsuit attended a mediation. The mediation resolved much of the case; all parties except T&G settled for an aggregate payment of \$5.733 million to the Association, and an assignment to the Association of CA's claims against T&G. (CP 448) Negotiations between the Association and T&G continued through the original mediator. (RP 395) The Association was demanding \$1.9 Million, and Mutual of Enumclaw was offering, on behalf of T&G \$750,000. (RP 397) By an agreement dated October 15, 2004, without Mutual of Enumclaw's participation or knowledge, T&G settled with the Association. (RP 22) Under the terms of the settlement, T&G agreed to stipulate to a judgment in the amount of \$3.3 million and

assigned all claims against Mutual of Enumclaw in exchange for the Association executing a covenant not to execute on the judgment. (CP 448) The Association thus stepped into T&G's shoes. (RP 23)

Shortly after the settlement with T&G, the Association requested that the trial court perform a reasonableness hearing pursuant to RCW 4.22.060. (RP 9) The purpose of this hearing was to bind Mutual of Enumclaw, not a party to the lawsuit, to the settlement amount and affect coverage defenses. (CP 492) Further, a lump sum settlement would blur the distinction between the claims for which Mutual of Enumclaw had acknowledged coverage, and those which it had reserved its right to challenge. In short, the Association was attempting to establish "damages" against Mutual of Enumclaw (to be litigated in an entirely separate coverage lawsuit) (RP 13) by holding a reasonableness hearing in this case at bar. The settlement was in no way contingent upon the trial court's determination that it was reasonable. (CP 477)

When Mutual of Enumclaw learned of the settlement and proposed hearing, it moved to intervene and for a continuance to prepare for the hearing. The Association stipulated to the intervention, and the court granted a continuance. (RP 8) Mutual of Enumclaw objected to the trial court conducting a reasonableness hearing at all, arguing that the statute

mandating a reasonableness hearing, RCW 4.22.060 does not apply to this case. (CP 96) Mutual of Enumclaw also argued that the settlement for \$3.3 million was unreasonable. (RP 23)

The trial court reserved the issue of its authority to hold a reasonableness hearing, (RP 17) and actually conducted the hearing, beginning on December 15, 2004. (RP 25) On March 10, 2005, the court published a memorandum decision which concluded that it was proper to hold a reasonableness hearing under RCW 4.22.060, and that the settlement was reasonable at \$3.3 million. (CP 82) The trial court then entered a judgment against T&G, pursuant to the stipulation of T&G and the Association, for the full \$3.3 million amount. (CP 757)

Mutual of Enumclaw moved the trial court to withdraw its memorandum decision based upon errors of fact and law, and cited the case of *Ballard Square Condominium Owners Assoc. v. Dynasty Construction Co.*, 126 Wn. App. 285, 108 P.3d 818 (2005) *subsequently affirmed on other grounds* at 158 Wn.2d 603, 146 P.3d 914 (2006), which was not available at the time of the reasonableness hearing. (CP 39) Although the trial court eventually decided that \$3.3 million was *unreasonable*, and determined that \$3 million was reasonable, Mutual of

Enumclaw strongly contended that no judgment at all was reasonable, in light of T&G's corporate dissolution, and consequent immunity from suit.

Mutual of Enumclaw appealed the determination of the trial court that \$3 million was a reasonable settlement value of the claims against T&G, as well as the trial court's authority to hold an RCW 4.22.060 reasonableness hearing at all. While Mutual of Enumclaw does not agree with the Court of Appeals' resolution of these issues, this Petition for Review is based on a different, very narrow issue: The Court of Appeals affirmed a judgment against T&G that was void for lack of subject matter jurisdiction, as a result of recent retroactive statutory amendments. This Court should accept review and vacate the stipulated judgment because the trial court lacked subject matter jurisdiction to enter it.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court should accept review of this case because the Opinion of the Court of Appeals conflicts directly with decisions from this Court, as well as statutes enacted after oral argument before the Court of Appeals. RAP 13.4(b)(1).

1. *Under Clear Precedent of this Court, the Trial Court and the Court of Appeals Lacked Jurisdiction to Adjudicate Any Claim Against T&G.*

There has been lively debate in recent years about how Washington should handle claims brought against defunct corporations. One issue on which there has been no debate, however, is that a corporation is a creature of statute, which can act, sue and be sued only by the strict terms of the statutes which give them life. *See eg. Ballard Square Condominium Owners Assoc. v. Dynasty Construction Co.*, 158 Wn.2d 603, 146 P.3d 914 (2006)¹. That is to say, if there is no "survival" statute that allows for corporations to be sued post-dissolution, then corporations blink out of existence the moment they dissolve. *Id.* Without the survival statute, they are not entities over which a court could statutorily have subject matter jurisdiction. *Id.* When a judgment is entered against a dissolved corporation, outside the confines of a survival statute, that judgment is void, and must be vacated. *Lushington v. Seattle Auto and Driving Club*, 60 Wash. 546, 548-549, 111 P. 785 (1910).

The case presently before the Court is easily analyzed and resolved under the current statute (RCW 23B.14.340) and this Court's ruling in the case of *Ballard Square Condominium Owners Assoc. v. Dynasty*

¹ *Accord. Johnson v. Helicopter & Airplane Servs. Corp.*, 404 F.Supp. 726 (D.Md. 1975); *Farmers Union Coop. Ass'n v. Mid-States Constr. Co.*, 322 N.W.2d 373 (Neb. 1982); *State Ex. Rel. Eale Oil Co. v. Tillman*, 712 S.W.2d 20 (Mo.App. 1986); *M.S. v. Dinkytown Day Care Center, Inc.*, 486 N.W. 2d 587 (S.D. 1992).

Construction Co., 158 Wn.2d 603, 146 P.3d 914 (2006). RCW

23B.14.340 states:

The dissolution of a corporation . . . by administrative dissolution by the secretary of state . . . shall not take away or impair any remedy available against such corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution or arising thereafter, unless action or other proceeding thereon is not commenced within two years after the effective date of any dissolution that was effective prior to June 7, 2006. . .

In the case at bar, T&G was administratively dissolved in October, 2000. T&G thus remained amenable to suit until October, 2002. CA did not sue until February, 2004. CP 437. Because the statutory authority by which T&G continued to exist after dissolution came to an end over a year before CA sued, T&G simply did not exist, and could not have been any kind of proper defendant. Two years after dissolution, the right that the legislature conferred on courts to exercise jurisdiction over corporations expires.

The only possible counterargument to this application of the statute would be that it was enacted in June, 2006, and perhaps does not apply retroactively. This Court soundly rejected that argument in *Ballard Square Condominium Owners Assoc. v. Dynasty Construction Co.*, 158

Wn.2d 603, holding that it applied to a corporation that dissolved in 1995. *Id.* at 607. As a matter of law, T&G did not exist when it was sued by CA in 2004, and the trial court did not have jurisdiction to render a judgment against it.

The only reason that this simple argument is being presented for the first time at the Supreme Court is unfortunate timing. The Court of Appeals decision in *Ballard Square Condominium Owners Assoc. v. Dynasty Construction Co.*, 126 Wn. App. 285, 108 P.3d 818 (2005) came out days after the trial court in this case entered the stipulated judgment against T&G. Under the erroneous decision of the Court of Appeals in *Ballard Square*, interpreting the old statute, there was a crucial difference between claims against a defunct corporation that arose pre-dissolution, and claims that arose post-dissolution; the former could be brought for two years following dissolution, and the latter abated immediately². *Id.* Because the appellate version of *Ballard Square* was the law during the briefing and oral argument of the case at bar before Division One, the arguments centered on whether the claims were pre- or post-dissolution,

² The Association also argued that the two year bar did not apply to creditors known to the dissolved corporation at the time of dissolution, unless the corporation gave notice of its dissolution under RCW 23B.14.340. They contended that CA's claim was "known" to T&G prior to dissolution (RCW 23B.14.060), but no notice of the dissolution was given, and thus T&G could not invoke the two year limit of RCW 23B.14.340.

and whether CA was a "known claimant." Those issues became moot when this Court later issued its Opinion in *Ballard Square*, retroactively applying the new statute. Doubt on this issue has been banished; the legislature defined an absolute two-year period in which to sue a dissolved corporation, and this Court has applied that rule retroactively. CA did not sue T&G within that window, and T&G thus no longer existed to be sued.

2. *T&G's Dissolution Led to a Lack of Subject Matter Jurisdiction that Could Not Be Waived.*

Because T&G no longer existed at the time it was sued, it was (retroactively) never a proper defendant, and the trial court failed to obtain subject matter jurisdiction over it. "Jurisdiction over the subject matter of an action is an elementary prerequisite to the exercise of judicial power. It is the authority of the court to hear and determine the class of actions to which the case belongs." *In re Adoption of Buehl*, 87 Wn.2d 649, 655, 555 P.2d 1334 (1976). While a superior court has jurisdiction to hear the sorts of *claims* raised in this lawsuit, the expiration of the legislature's limited grant of jurisdiction *over the corporate form* renders the court powerless to adjudicate any kind of dispute against a corporation dissolved more than two years prior to suit. The result of T&G's dissolution was that the trial court lost statutory authority to enter any judgment against it. As this

Court held in *Lushington v. Seattle Auto and Driving Club*, 60 Wash. 546, 548-549, 111 P. 785 (1910).

The complete dissolution of a corporation destroys its capacity to be sued at law because a judgment can no more be rendered against a dead corporation than against a dead man. . . It follows that a judgment rendered against a corporation after it has been dissolved is voidable, in the sense that it will be reversed on error, or that the execution of it will be perpetually enjoined. . . . A defendant to proceed against is ***essential*** except where the proceedings are strictly in rem. The defendant against whom respondent proceeded does not legally exist. . . the action must therefore fail.

So too in this case. CA had no defendant to proceed against, and the trial court lacked power to enter the stipulated judgment, as a matter of statutory law. The fact that the judgment was entered by stipulation changes nothing. "It is a universal rule of law that parties cannot, by consent, give a court, as such, jurisdiction of subject matter of which it would otherwise not have jurisdiction." *Wampler v. Wampler*, 25 Wn.2d 258, 267, 170 P.2d 316 (1946). This lack of subject matter jurisdiction left the court without power to pass on the merits of the case. *Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998).

3. *Mutual of Enumclaw has Standing to Assert Lack of Jurisdiction, and May Do So at Any Time.*

It is likely that the Association will argue that Mutual of Enumclaw lacks standing to assert this failure of subject matter jurisdiction, or that Mutual of Enumclaw waived this argument by not having brought it previously. Both of these contentions are easily dispelled, relying on *Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998). In that case, this Court held, "Any party to an appeal, including one who was properly served, may raise the issue of lack of subject matter jurisdiction at any time." *See also RAP 2.5(a)*.

G. CONCLUSION

For the foregoing reasons, Mutual of Enumclaw respectfully requests that the Court grant this Petition for Review and vacate the judgment against T&G.

RESPECTFULLY SUBMITTED THIS 2nd day of August, 2007.



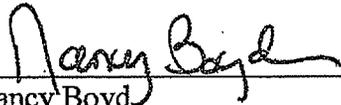
Brent W. Beecher, WSBA #31095
Attorneys for Appellant

FILED AS ATTACHMENT
TO E-MAIL

CERTIFICATE OF SERVICE

The undersigned declares under the penalty of perjury that on Monday, August 13, 2007, she caused a copy of the Respondent Mutual of Enumclaw's Answer to Petitioner's Petition for Review to be served on the following:

Daniel Zimmeroff
Barker - Martin
719 2nd Avenue, Suite 1200
Seattle, WA 98104



Nancy Boyd

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To: OFFICE RECEPTIONIST, CLERK

Cc: Dan Zimberoff; dinawong@barkermartin.com

Subject:

Dear Clerk,

Enclosed for filing is Mutual of Enumclaw's Answer to Petition for Review with Proof of Service in the case of:

Mutual of Enumclaw Ins. Co. v. T&G Construction, Inc. et al., Supreme Court No. 80420-6

Thank you.

Filed by Brent Beecher

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