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

MUTUAL OF ENUMCLAW  
INSURANCE COMPANY,

No. 57679-8-1

Appellant,

v.

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

Respondents.

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APPELLANT'S AMENDED REPLY BRIEF

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FILED  
COURT OF APPEALS  
DIVISION I  
2006 JUN -2 PM 4:54

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## I. SUMMARY OF THE ARGUMENT

T&G Construction, Inc. had no liability to CA or the Association because T&G was a dissolved corporation. The Association argues that Mutual of Enumclaw is obligated to indemnify T&G in the amount of \$3 million *regardless* of whether that dissolution was an absolute legal bar to liability. To achieve this result, the Association relies on the fact that T&G was willing to enter into a no-cost, no-obligation settlement in which T&G's former president consented to allow a "judgment" to be taken against the defunct corporation. Contrary to the Association's claim, such an action does not obligate Mutual of Enumclaw to pay \$3 million where the insured, in fact, owed nothing.

This Reply Brief addresses the following issues:

1. The Association's erroneous contention Mutual of Enumclaw is bound by the "judgment" against T&G;
2. That the claim against T&G did not fall within the policy's grant of coverage;
3. That policy exclusions apply to certain aspects of the claim;
4. That T&G's failure to even request consent to settle violated a condition to coverage; and
5. That the Association is not entitled to *Olympic Steamship* attorney fees, regardless of the outcome of the coverage issues.

**II. MUTUAL OF ENUMCLAW IS NOT BOUND BY THE “JUDGMENT” IN THE CONSTRUCTION LAWSUIT.**

The Association’s effort to transform a dubious no-stakes settlement with T&G into a *res judicata* judgment against T&G’s insurer is nothing short of an attempt at judicial alchemy. For all of the Association’s talk of *res judicata*, re-litigation and being forced to “endure” multiple actions, the Court might be left with the impression that important issues in this case, such as the effect of T&G’s dissolution, had actually been decided by a court at some point. Contrary to the Association’s assertions, that simply is not the case. These issues have *never* been decided, and the Association’s attempt to sweep them under the rug - to obtain a judgment without ever having proven the allegations against T&G - should be rejected.

The Association’s argument is the agreed judgment entered in the Construction Suit definitively establishes T&G’s “legal obligation to pay,” and estops Mutual of Enumclaw from arguing otherwise. This argument is built on two types of cases, neither of which are applicable to the case at bar. The first type of case holds that insurers can be bound by factual findings necessary to a judgment against their insured, if they had adequate notice of the lawsuit and the opportunity to intervene. The second type of case holds that, in a reservation of rights scenario, where an

insurer acts in bad faith, and the insured settles and assigns its rights against the carrier, the value of the settlement sets the damages flowing from bad faith, so long as the settlement is reasonable. A brief discussion of some of these cases quickly reveals that they are inapplicable to the case at bar.

First, the Association argues that an insurer can be bound by factual determinations necessary to a judgment in the underlying case, if it was given adequate notice and a chance to intervene. The Association cites the case of *East v. Fields*, 42 Wn.2d 924, 259 P.2d 639 (1953). In *East*, a party was injured in a car accident. The car that caused the crash was being driven by a friend of the car's owner. The injured party sued the car's owner, and the car's driver. The claim was tendered to the car owner's insurer, which denied it on the basis of an exclusion that there was no coverage for drivers other than the insured, if the insured was not present in the car. *Id.* The lawsuit against the driver and the owner proceeded, and resulted in a verdict and judgment against *both* the owner and the passenger. The court entered a specific finding of fact that the owner "*was a passenger in his own automobile,*" and ruled that the owner was liable on agency principles. *Id.* at 927 (*italics in original*).

In the subsequent garnishment proceedings, the insurer presented evidence, which the court believed, that the owner had not been in the car. The court thus dismissed the action against the insurer, from which ruling the injured party appealed. The injured party argued that the insurer was barred by the doctrine of *res judicata* from re-litigating the question of the owner's presence in the car. The Supreme Court agreed, holding that the insurer was bound to the finding of fact regarding the owner's presence in the car, because it was a necessary predicate to the judgment:

A judgment is conclusive by way of estoppel only as to facts without the existence and proof or admission of which it could not have been rendered. . . . it is conclusive evidence of whatever it was necessary for the jury to have found in order to warrant the verdict in the former action, and no further.

*Id. at 926.*

The Association attempts to shoehorn the facts of this case into the mold of *East*, but the cases are very different. Most notably, the trial court in the Construction Suit never entered a judgment on the merits, so by definition it did not make any findings of fact "without which [the judgment] could not have been rendered." *Id.* The only "findings of fact" entered by the trial court were admittedly nothing more than probabilities that the court considered in its determination of whether the *settlement* (not the judgment) was *reasonable*.

On this point, the Association suffers from a serious conceptual error. It accuses Mutual of Enumclaw of contending “that the Judgment was based on alleged errors the court in the Construction Suit made on summary judgment and at the reasonableness hearing regarding issues of dissolution and damages.” *Respondent’s Brief at 12.* Mutual of Enumclaw makes no such contention; the judgment was not based on *any* determination by the court in the Construction Suit. The judgment was based on the *settlement*, and T&G’s consent that judgment be entered in the amount of \$3.3 million. Mutual of Enumclaw certainly does argue that the trial court in the Construction Suit erred in several important respects in its Findings of Fact and Conclusions of Law re: Reasonableness Hearing. However, none of those findings of fact or conclusions of law were “facts without the existence and proof or admission of which [the judgment] could not have been rendered.” *East v. Fields*, 42 Wn.2d at 926. This point crystallizes on consideration of the fact that the court ruled that \$3.3 million was \$300,000.00 *more* than a reasonable settlement, but the judgment itself remains at the \$3.3 million mark. If the judgment were necessarily predicated on the court’s Findings of Fact and Conclusions of Law re: Reasonableness Hearing, such a result would be logically impossible, as the judgment and the findings are explicitly contradictory. Even assuming the judgment was inseparable from the court’s Findings of

Fact and Conclusions of Law re: Reasonableness Hearing, the court actually recited that *questions of fact remained* that would prove or disprove T&G's dissolution defense. Because the judgment, agreed to by T&G and the Association, was not dependent on any actual resolution of the dissolution issue, and in fact there was no resolution of the dissolution issue, Mutual of Enumclaw is absolutely entitled to assert that T&G's dissolution precludes coverage.

The Association cites several other cases along these lines, including *Lenzi v. Redland Ins.*, 140 Wn.2d 267, 996 P.2d 603 (2000), *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 961 P.2d 350 (1998), 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). The Association asserts that these cases all stand for the proposition that an insurer is bound by a judgment obtained against the insured if the insurer had the opportunity to participate in the underlying case. *Respondent's Brief at 16*. All of these cases involve car accidents and UIM coverage issues. In *Lenzi*, *Fisher*, and *Finney*, the insured was injured in a car accident, and brought an action against the uninsured motorist that caused the wreck. In each of these cases, the injured party's insurer was given notice of the UIM claim, had an opportunity to intervene in the action against the uninsured tortfeasor, but did not do so. These cases held that a:

UIM carrier can protect its rights by intervening in an arbitration between its insured and a tortfeasor. Thus, so long as the carrier has notice and an opportunity to intervene in the underlying action against the tortfeasor, it will be bound by the findings, conclusions, and judgment of the arbitral proceeding.

*Lenzi v. Redland Ins.*, 140 Wn.2d at 274.

The result in these UIM cases is premised on the fact that the insurer has the right and ability to intervene on behalf of the uninsured motorist, but failed to do so and the case proceeded to a judgment on the merits. Based on these cases, the Association argues that because Mutual of Enumclaw actually *did* intervene in the Construction Suit, it is estopped from asserting that T&G's dissolution prevented it from being liable to the Association.

There are two problems of paramount importance with the application of these UIM cases to the facts in the case at bar. First, on coverage questions, the insurer is only bound to "any material finding of fact essential to the judgment of liability," just as in *East. Finney v. Farmers Ins. Co.*, 21 Wn. App. at 617. Second, these UIM cases presuppose an entirely different kind of "intervention" from the intervention that took place in the Construction Suit. In the UIM context, the insurer can actually intervene on behalf of the tortfeasor and *actually litigate* the claims made by its insured. The "intervention" in the Construction Suit was limited to addressing the reasonableness of the

settlement, and the need for a reasonableness hearing at all. At no point can a liability insurer intervene in an underlying case and start making coverage arguments. *See, inter alia*, ER 411. Because Mutual of Enumclaw did not have the right to intervene in the underlying case prior to the reasonableness hearing, these UIM cases are inapplicable; Mutual of Enumclaw is free to argue in this lawsuit that T&G was not liable to the Association by reason of dissolution.

The second series of cases cited by the Association are even less applicable to this case. These cases address the remedy for insurers' bad faith claims handling. They hold that

When an insurer refuses, in bad faith, to defend a claim brought against its insured, the insured may protect its interests by settling with the plaintiff and then seek recovery from the insurer in a bad faith action. The presumptive measure of the insured's damages in a bad faith action is the settlement amount, so long as the amount is reasonable and not the product of fraud or collusion.

*Howard v. Royal Spec. Underwriting, Inc.* 121 Wn. App. 372, 89 P.3d 265 (2004).

The Association cites the following other two cases of this type: *Besel v. Viking Ins. Co. of Wis.*, 146 Wn.2d 730, 49 P.3d 887 (2002), and *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 803 P.2d 1339 (1991). The Association claims that these cases "hold that a consent or stipulated judgment with a covenant not to execute constitutes both an insured's and

an insurer's *legal obligation to pay*, as long as the consent judgment is not a result of unreasonableness, collusion or fraud." *Respondent's Brief at 13*. Bad faith is the pink elephant in the corner of the Association's argument. The Association can pretend not to notice that a settlement-plus-reasonableness hearing can establish damages only in a *bad faith* action, but that does not change the fact that not one case holds that the insurer is bound by anything that happens at a reasonableness hearing if there was no bad faith<sup>1</sup>.

There has never been any hint of a ruling that Mutual of Enumclaw even *might* be guilty of bad faith in this case. Nevertheless, the Association argues that all of the bad faith remedies should apply. It boldly <sup>2</sup>asserts that Mutual of Enumclaw is bound, estopped, and otherwise prevented from "re-litigating" anything that the court in the Construction Suit addressed in its Findings of Fact and Conclusions of Law re: Reasonableness Hearing, and that the settlement figure is the measure of damages against Mutual of Enumclaw. But such a settlement

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<sup>1</sup> The Association later states, "The Supreme Court's rationale for ruling that damages in an insurance *bad faith or declaratory judgment action* should be litigated in the underlying case rather than in the coverage action is based on sound reasoning." *Respondent's Brief at 18 (emphasis added)*. "Bad faith" is a cause of action, while "declaratory judgment" is a procedural mechanism for bringing a claim - there is no case anywhere that equates these two concepts, and it is hard to believe that the Association would really be confused about this point.

can be the measure of damages only for bad faith. The Association even goes so far as to assert effective estoppel to rely on coverage arguments by proposing that Mutual of Enumclaw must pay even uncovered claims unless the trial court had specifically apportioned liability between covered and uncovered claims in its reasonableness findings. *Respondent's Brief at 40-41.*

What the Association really wants is the Court to award it the remedy for bad faith without actually having to prove bad faith. If the Court were to accept the Association's position, an insurer that defends its insured in good faith would be in exactly the same position as an insurer that intentionally handles a claim in bad faith. That is not the policy of this State. In fact, the reasonableness of the settlement becomes a moot question in a declaratory judgment action where the insurer did *not* act in bad faith. *Mutual of Enumclaw v. Dan Paulson Construction, Inc.*, 2006 Wash. App. LEXIS 918, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (May 8, 2006<sup>2</sup>).

Unlike the bad faith cases, the case of *Yakima Cement Products, Co. v. Great American Ins. Co.*, 14 Wn. App. 557, 544 P.2d 763 (1957) is directly on point. The Court in that case correctly noted that the insurer

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<sup>2</sup> "Accordingly, we reserve the trial court's order of summary judgment imposing coverage by estoppel and vacate the judgment against MOE. . . . Consequently, we do not need to decide whether the stipulated arbitration award and subsequent judgment were reasonable."

was not bound by the parties' stipulated "findings of fact" that the consent judgment was based on "property damage" because that finding was not a prerequisite to the settlement. Similarly, in this case, the Construction Suit was over once the parties settled, and no findings of fact (whether made by the court or stipulated by the parties) was essential to the agreed "judgment" in that case. Because Mutual of Enumclaw did not act in bad faith, and there was no judgment on the merits, the insurer is entitled to argue that the claim did not come within the policy's grant of coverage because T&G was not legally obligated to pay the Association.

### **III. THE CLAIM AGAINST T&G DID NOT FALL WITHIN THE POLICY'S GRANT OF COVERAGE**

#### **A. T&G was not "legally obligated to pay" because it was a dissolved corporation.**

In the Appellant's Brief, Mutual of Enumclaw 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. Mutual of Enumclaw has argued that T&G was *not* legally obligated to pay because it was a dissolved corporation, immune from liability under the case of *Ballard Square Condominium Owners Assoc. v. Dynasty Constr. Co.*, 126 Wn. App. 285, 108 P.3d 818 (2005). The Association makes no new argument

that T&G could be liable to the Association, despite its dissolution. The Association simply repeats, “Enumclaw does not have standing to step into the shoes of its insured and attempt to overturn a summary judgment ruling entered in the Construction Suit, an entirely different action than this declaratory judgment case.” *Respondent’s 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. Further, there was never a judgment, summary or otherwise, that T&G was legally obligated to pay, despite its dissolution. The court in the Construction suit denied T&G’s motion for summary judgment on that issue, citing a factual dispute, and reiterated the continued dispute of fact in its ruling on reasonableness. Just because the Association and T&G agreed to allow a judgment to be taken against T&G, that does not preclude Mutual of Enumclaw’s right to a judicial determination of the effect of T&G’s dissolution in the Coverage Suit. *Yakima Cement Products, Co. v. Great American Ins. Co.*, 14 Wn. App. 557.

**B. T&G Was Not “Legally Obligated To Pay” Because The Confessed Judgment Against It Is Defective And Void.**

Washington statutory law is explicit about the steps that must be followed in order to effectuate a valid confession judgment. The Association does not dispute that the judgment entered in the Construction Suit did not comply with RCW 4.60, nor that strict compliance is required by our courts. The only argument the Association makes is that the judgment in the Construction Suit was a “consent judgment,” not a “confession of judgment,” and thus the strictures of RCW 4.60 do not apply. To support this argument, the Association cites three cases from other jurisdictions that differentiate between consent judgments and confession judgments, for purposes of analyzing the right of appeal. The Association’s proposed rule is that “a judgment by confession is entered pursuant to the voluntary act or agreement of *one* party. . . . a consent judgment is a judgment entered with the consent of *both* the party against whom the judgment is entered *and* the party in whose favor the judgment is entered.” *Respondent’s Brief at 24-25.*

The Association misconstrues Washington law. For example, RCW 4.60.010 requires “the assent of the plaintiff” in addition to the confession of the defendant. In Washington, “[a] confession of judgment *requires* the consent of both parties to the judgment.” *Pederson v. Potter,*

103 Wn. App. 62, 11 P.3d 833 (2000) (emphasis added). Renaming the type of judgment is not enough to avoid the requirements of RCW 4.60. If a party could escape the formalities of a confession of judgment simply by re-branding the document a “consent judgment” then the statute would be meaningless. Both T&G and the Association were required to meet the requirements of RCW 4.60. Because they did not, the judgment against T&G, and T&G’s legal obligation to pay, is void. *Puget Sound Nat’l Bank v. Levy*, 10 Wash. 499, 39 P. 142 (1895).

**C. Any Part of the Judgment Against T&G that is Not “Damages Because of Property Damage” is Not Within the Grant of Coverage.**

1. *The Cost of a Strip and Reclad is Not Damages Because Of Property Damage.*

Even assuming, for the sake of argument, that the “judgment” against T&G is a valid “legal obligation to pay,” not all of that judgment is “because of property damage.” In its Findings of Fact and Conclusions of Law re: Reasonableness Hearing, the court in the Construction Suit specifically recited that an entire strip and reclad was the only way to preserve the Association’s property value, not that it was the cost of repairing the manifest property damage to the condominiums. The latter could come within policy coverage; the former does not.

The Association agrees, as it must, that the policy only covers property damage. *Respondent's Brief at 26.* Instead of making any attempt to parse out what part of the judgment was "because of property damage," the Association returns to the familiar refrain that the issue has been "litigated and decided numerous times," which again is false. The trial court in the Construction Suit held that the cost of a strip and re-clad was a reasonable estimate of the Association's *contractual* damages against T&G; but contractual damages represent all damages flowing from the breach, not the damage flowing from property damage. The cost of actually repairing the manifest property damage is the measure of the damages "because of property damage." That cost is represented by the cost of surgical repairs of the actual damage, and the evidence showed that such spot repairs to replace and seal areas around envelope openings in all 23 buildings could be accomplished for as little as \$300,000. CP 626. The Association casts this assertion as an attempt to re-litigate the reasonableness determination. It is no such thing. The court in the Construction Suit was not charged with the responsibility of determining which damages against T&G were "because of property damage," and it did not do so. Mutual of Enumclaw is entitled to a determination of which of those lump-sum damages comes within the scope of its policy, and this coverage lawsuit is the appropriate place for that determination to be

made. See eg. *Mutual of Enumclaw v. Dan Paulson Construction, Inc.*, 2006 Wash. App. LEXIS 918, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (May 8, 2006).

In support of the proposition that not all of the judgment represents damages “because of property damage,” Mutual of Enumclaw cited *Fidelity & Deposit Co. of Maryland v. Hartford Cas. Ins. Co.* 215 F. Supp. 2d 1171 (D. Kansas, 2002). In *Fidelity*, the insured’s assignee argued that it was entitled to coverage for the entire cost of demolishing and rebuilding buildings because the complete tear down was the most economical way to meet the insured’s contractual obligation to the property owner. The court disagreed, and ruled that the cost of repairing the cracked walls was the real measure of the damages “because of property damage.” The court agreed that the proper measure of actual damages against the insured might be the entire cost of demolition and rebuild, but the need for demolition was largely determined by the fact that the absence of rebar in the walls would cause *future* property damage in the form of *future* cracks in the walls. The cost of repairing those defects, which had not yet caused property damage, was not covered by the policy. *Id.*

The Association argues that *Fidelity* is not on point because a complete removal of the siding was necessary to repair the property

damage to the material beneath. *Respondent's Brief at 28*. This assertion reveals the Association's error. A complete removal of the siding may have been the most economical way to bring the siding into contractual compliance and restore the property values, but it was *not* necessary to repair the actual property damage. The surgical repairs proposed by T&G's expert witness represent a comprehensive repair of the *existing* property damage *without* a strip and reclad. CP 626. The trial court erred when it determined that the entire value of the judgment represented damages "because of property damage."

2. *Attorney Fees Awarded Pursuant To A Fee-Shifting Provisions Are Not "Damages" Under The Grant Of Coverage. The Component Of The Judgment Based On These Fees Is Not Covered.*

The Association does not dispute that an award of attorney fees does not constitute "damages," and by silence acquiesces that such an award is not covered by the policy. The Association's only response to Mutual of Enumclaw's arguments on this issue is that no part of the judgment is based on T&G's purported obligation to pay the Association's legal fees. When there is a lump sum award, however, there is a presumption that some part of that lump sum is properly allocated to *each* of the plaintiff's claims. *Leleux v. The Home Indem. Co.*, 457 So.2d 300, 301 (La. App, 1984). The Association claims that it is Mutual of

Enumclaw's obligation to prove which part of the lump sum is based on uncovered attorney fees. The Association goes so far as to suggest that because Mutual of Enumclaw did not request that the judge in the Construction Suit apportion damages in its reasonableness findings, Mutual of Enumclaw is barred from attempting to make such an allocation now. Aside from the fact this would result in a unwarranted, defacto estoppel to assert that *any* part of the "judgment" is not covered, an apportionment of a lump sum settlement is well beyond a court's *Chaussee* jurisdiction. The Association overlooks the fact that it is the *insured's* burden to prove what is covered by the policy's granting language. *Diamaco, Inc. v. Aetna Casualty and Surety Co.*, 97 Wn. App. 335, 337, 983 P.2d 707 (1999). Unsurprisingly, the obligation to apportion a lump sum award between claims covered by the grant and those that are not also falls to the insured. "Where a judgment includes elements for which the insurer is liable and elements outside the range of coverage, the apportionment of damages to the respective causes of action is a burden imposed upon the party seeking to recover from the insurer." 21-416 *Appleman on Insurance* § 12281. The trial court erred in granting the Association summary judgment to the contrary.

**IV. SOME ELEMENTS OF THE CLAIM AGAINST T&G ARE  
EXCLUDED BY THE POLICY.**

**A. The Impaired Property Exclusion Limits Coverage of T&G's Claim.**

The Association argues that the Impaired Property exclusion is inapplicable because the condominiums would not be restored to use by the replacement of T&G's work alone. The Association states that "unless the replacement of the policy holder's work *alone* restores the impaired property *completely*, the exclusion does not apply." *Respondent's Brief at 31*. In fact, the exclusion says nothing about *alone* or *completely*, and neither do the cases the Association cites, *Federated Mut. Ins. Co. v. Grapevine Excavation, Inc.*, 197 F.3d 720 (5th Cir. 1999), and *Dewitt Constr., Inc. v. Charter Oak Fire Ins. Co.* 307 F.3d 1127 (9th Cir. 2002). In this case, there are elements of the judgment to which the impaired property exclusion applies, and elements to which it does not. The exclusion does not apply to the cost of applying new siding directly over the water damaged gypsum, sheathing and framing. The Association, however, maintains that it is entitled to coverage for the entire cost of the strip and re-clad. The condominiums are impaired property with respect to the cost of replacing any siding that covers the undamaged gypsum, sheathing and framing (ie, the work of other subcontractors.) The

exclusion applies to that component of the lump sum that represents the replacement of siding over undamaged interior. The trial court erred when it ruled that this exclusion applied to no part of the Association's claim.

**B. The Withdrawal from Use Exclusion Limits Coverage of T&G's Claim.**

The Association urges that the Withdrawal from Use exclusion is inapplicable to its claim for two reasons: First, it argues that the siding was not withdrawn from use; second, it asserts that the exclusion applies only to "sisterships," not the "ship" that actually failed. The first argument merits little reply; stripping the siding off a building cannot be anything but withdrawing that siding from use. With respect to the second argument, the Association cites *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 881 P.2d 673 (1991). In *Olympic Steamship*, the Court did review the history of the Withdrawal from Use exclusion, and comment that it applies only to sisterships, not the ship that actually failed. However, this is dicta, as that was not an issue in that case. The exclusion itself says nothing about applying only to sister products, and the unexpressed intent of the drafter can never override the express terms of a contract in Washington. *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990).

Even assuming that the Association is correct about the exclusion's application to sisterships only, the rationale behind that rule is that

while the insurance covers damages for bodily injuries and property damage caused by the product that was defective or failed, it was never intended that the insurer would be saddled with the cost of preventing such defects or failures any more than it was intended that the insurer would pay the cost of avoiding the defect in the first place or preventing the first failure if the product had been discovered to be in a defective or dangerous condition before the occurrence. . . . The insurer, thus, is not liable for the cost of preventative or curative action. . . .”

*Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d at 43.

The Association claims that the condominium structure was only one “ship,” and there were no sisterships to which the exclusion could apply. However, the strip and re clad repair, on which the judgment is allegedly based, is exactly the sort of “preventative action” described in *Olympic Steamship*. The Association discovered some actual damage in the form of leaks around windows (the ship that failed), and then opened a large scale investigation *based on the fear that other areas of the siding suffered from similar deficiencies*. Even if the Court accepted the Association's description of the Withdrawal from Use exclusion's intention, that intention is clearly not limited to actual ships. At the very least this exclusion prevents coverage for the cost of all exploratory stripping of siding, and the cost of recladding undamaged areas as a “preventative action.” *Id.* The scope of the excluded elements of the

judgment was not litigated below because the trial court erroneously ruled that this exclusion was utterly inapplicable to the Association's claim. Mutual of Enumclaw is entitled to a determination of the scope of the application of this exclusion.

**C. The Your Work Exclusion Limits Coverage of T&G's Claim.**

The last applicable exclusion is the "Your Work" exclusion. That exclusion provides that the policy does not apply to property damage to the insured's work, arising out of that work. The Association admits that the siding is T&G's work, per the exclusion, but argues principally that there is no property damage to T&G's work, so the exclusion is inapplicable<sup>3</sup>. The Association pretends to believe that ripping the siding off and entirely replacing does not damage it. The Association knows better; "[T]he cost to take T&G's siding off to repair the areas that are property damaged (the framing, plywood and gypsum sheathing) is covered *because the siding becomes damaged in the process.*" *Respondent's Brief at 34* (emphasis added).

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<sup>3</sup> The Association makes an unsupported half-argument that the Your Work exclusion only applies to damage to T&G's work that *was caused by T&G*. *Respondent's Brief at 36-37*. The Association's mistake was in paraphrasing the exclusion. The actual exclusion applies to the property damage to the insured's work, arising out of that work. The damage must arise out of the work, not be "caused by T&G."

The Association accuses Mutual of Enumclaw of citing no authority that the damage to the work of the insured is excluded by the policy. *Id.* at 38. Mutual of Enumclaw refers the Association and the Court to page 44 of the Appellant's Brief, particularly to the paragraph that begins, "Cases are legion. . ." The Association also asserts that Mutual of Enumclaw "ignored [the] controlling authority" of *Dewitt Constr., Inc. v. Charter Oak Fire Ins. Co.* 307 F.3d 1127. *Dewitt* is not controlling on this issue for two reasons. First, it is a federal case and *not* controlling authority to this Court. Second, and much more importantly, it is not on point. In *Dewitt*, the court held that damage to the work of *other* subcontractors was not excluded, and was consequential to covered property damage. But the court specifically stated, "[O]nce the definition of property damage is satisfied, any and all damages flowing therefrom *and not expressly excluded from the policy* are covered." *Id.* at 1136 (*citation omitted, emphasis added*). In this case, the Association argues that the cost of a strip and re clad is consequential to the damage to the material beneath. Destroying property as part of a remediation, however, does count as property damage under the policy. "*Baugh* controls our conclusion that there was property damage to the extent subcontractors' work had to be removed and destroyed." *Id.* at 1134. Even if the property damage to the siding is "consequential," that does not change the fact that

it is “expressly excluded from the policy,” per *Dewitt*. The Your Work exclusion prevents coverage for the cost of replacing the siding, and the trial court erred when it granted summary judgment to the contrary.

**V. T&G VIOLATED A CONDITION TO COVERAGE.**

There is no dispute that T&G did not even attempt to obtain Mutual of Enumclaw’s consent before it settled the Construction Suit. There is no dispute that the insured was required to at least solicit consent. The Association makes three arguments that the Court should overlook this admitted breach of the insurance policy. First, the Association argues that the policy is ambiguous as to whether the insured must obtain the insurer’s consent to settle a case on its own. There is no ambiguity that a prohibition on making a payment, assuming any obligation, or incurring any expense, would include a prohibition on the insured assuming a \$3.3 million obligation under a voluntary judgment.

Second, the Association argues that the consent to settle clause is not a condition to coverage, because the Mutual of Enumclaw policy does not contain an Action Against the Company provision, as did the policy at issue in *PUD I v. International Ins. Co.*, 124 Wn.2d 789, 881 P.2d 1020 (1994). This argument is something of a mystery, and is likely simply an error on the part of the Association. In fact the Mutual of Enumclaw

policy contains a clause that is almost word for word identical<sup>4</sup>. CP 645, paragraph 3:

**3. Legal Action Against Us.**

No person or organization has a right under this Coverage Part:

- a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or
- b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

Finally, the Association argues that Mutual of Enumclaw is not entitled to enforce the condition unless it can prove that it was prejudiced by T&G's settlement. In the event that this Court rules that there is no coverage because T&G's dissolution precluded it from being "legally obligated to pay" the Association, then the Association is correct – there was no prejudice. If the Court rules that MOE is bound by the "determination" that T&G was legally obligated to pay despite its dissolution, then the prejudice in this case is unusually clear. By settling with the Association, T&G terminated its ability to avoid liability entirely by pursuing its dissolution argument, through an appeal if necessary. Mutual of Enumclaw had a policy right to defend T&G in the Construction Lawsuit, but

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<sup>4</sup> The Mutual of Enumclaw policy does not denominate compliance as a "condition precedent" to suing the insurer, but it specifies that the insured may not sue the insurer unless the insured has complied with the policy conditions, which has the identical legal effect; namely, that of a pre-condition to suit.

T&G short-circuited that right by admitting liability and settling the claim. That is prejudice to the insurer, and grounds for enforcing the consent condition<sup>5</sup>.

**VI. THE ASSOCIATION IS NOT ENTITLED TO *OLYMPIC STEAMSHIP FEES* IN THIS CASE.**

There are two reasons that the Association is not entitled to *Olympic Steamship* fees in this case. The first is that Mutual of Enumclaw is right about policy exclusions. The second is the case of *PUD 1 v. International Ins. Co.*, 124 Wn.2d 789, which holds unequivocally that an insured that settles without consent, in violation of the insurance policy, is not entitled to *Olympic Steamship* fees in a coverage action. The Association calls it an “aberration”, and speculates about the consequences of “adopting” it. *Respondent’s Brief* at 48. *PUD 1* is a case from our Supreme Court, and it is the law of this State, until that Court says otherwise.

**VII. CONCLUSION.**

For the above reasons, Mutual of Enumclaw respectfully requests that the Court grant it the relief requested in the Appellant’s Brief.

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<sup>5</sup> The Association asserts that the settlement process was completely transparent - that Mutual of Enumclaw was provided “notice of each step.” It is worthwhile to note that the Association provides no cite to the record. Although it is difficult to prove a negative, Mutual of Enumclaw respectfully suggests that this assertion is false.

RESPECTFULLY SUBMITTED this 2nd day of June, 2006.

HACKETT, BEECHER & HART

A handwritten signature in black ink, appearing to be "Brent W. Beecher", written over a horizontal line.

Brent W. Beecher, WSBA #31095  
Attorneys for Mutual of Enumclaw

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW  
INSURANCE COMPANY,

No. 57679-8-1

Appellant.

v.

CERTIFICATE OF  
SERVICE

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

Respondents.

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I, Linda Voss, declare that on the date noted below I caused to be delivered via ABC Legal Messengers, Inc., a copy of Appellants' Amended Reply Brief and Certificate of Service to: ~~RECEIVED~~ COURT OF APPEALS DIVISION ONE

Daniel Zimberoff/Dina Wong  
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Seattle, WA 98104

JUN - 2 2006

I Certify Under Penalty Of Perjury Under The Laws Of The State Of Washington That The Foregoing Is True And Correct.

Signed in Seattle, WA this 2nd day of June, 2006.

*Linda Voss*

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