

Supreme Court No. 80420-6

SUPREME COURT  
OF THE STATE OF WASHINGTON

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MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent,

v.

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

Appellants.

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SUPPLEMENTAL BRIEF OF RESPONDENT,  
MUTUAL OF ENUMCLAW  
AND  
MOTION TO DISMISS

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**I. Supplemental Statement of Issues**

1. Is remand necessary to determine whether T&G's breach of the No Action clause in its policy prejudiced Mutual of Enumclaw?
2. What is the effect of recent legislation, RCW 23B.14.340, and its retroactive application, on T&G's corporate status?
3. Motion to Dismiss - Should this Case be dismissed now?
4. Is an "extension" of *Besel* necessary or appropriate to apply to insurers that act in good faith?

**II. The Association's Failure to Petition for Review on the Issue of T&G's Violation of Policy Conditions Requires the Court to Affirm the Court of Appeal's Vacation of the Judgment Against Mutual of Enumclaw, and Remand this Case.**

At the trial court and the Court of Appeals, Mutual of Enumclaw ("Enumclaw") argued that by settling without Enumclaw's consent, and without even giving Enumclaw notice of its intent to settle, the insured had breached the "No Action" clause of the policy, which is a condition precedent to coverage<sup>1</sup>. *Mutual of Enumclaw Ins. Co. v. T&G Constr., Inc.*, Court of Appeals No. 57679-8-I (*discussed on final page*). The Association never contended that T&G Construction, Inc. (T&G) complied with this obligation. *Id.* The Court of Appeals ruled that this breach could jeopardize any coverage available to T&G, *if* Enumclaw

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<sup>1</sup> The Court of Appeals did not use the term "No Action" clause, instead referring to it as "the policy condition requiring an insured to obtain consent prior to entering into a settlement."

could prove that it was prejudiced by the breach. *Id.* The Court of Appeals remanded for a determination on the issue of prejudice.

In its Petition for Review, the Association did not request that the Court review this aspect of the Court of Appeals' ruling. In order for an issue to be properly before the Court, it must be identified with specificity in the Petition for Review. RAP 13.7(b) limits the issues to be reviewed by this Court to those "raised in . . . the petition for review and the answer." As the Court held in *State v. Collins*, 121 Wn.2d 168, 178-179, 847 P.2d 919 (1993):

The proper method for raising an issue in a petition for review is described in RAP 13.4(c)(5), which provides that the petition for review must contain '[a] concise statement of the issues presented for review.' This court has required that the petition for review state the issues with specificity.

To the same effect, see *Douglas v. Freeman*, 117 Wn.2d 242, 257-258 (1991) (*declining to consider an issue raised for the first time in a supplemental brief filed after review has been accepted.*)

Therefore, regardless of how the Court rules on the issues that *are* properly before it, the decision of the Court of Appeals, in so far as it vacated the judgment and remanded to the trial court for a factual determination of the prejudice issue, must be affirmed by this Court.

**III. The Judgment Rendered in the Construction Suit is Subject to Collateral Attack for Voidness.**

**1. T&G's Dissolution and the applicable law.**

T&G Construction, Inc. (T&G) was the siding subcontractor at a condo project known as the Villas at Harbour Pointe. Construction was finished there in late November or early December 1999. CP 1203. T&G was then administratively dissolved on October 23, 2000, but not sued for its work at the Villas project until April 8, 2003 (the "Construction" suit). CP 795, 869. At that time, the law in Washington regarding the effect of corporate dissolution was unclear. (*See Ballard Sq. Condo. Owners Ass'n v. Dynasty Constr. Co.*, 126 Wn. App. 285, 108 P.3d 818 (2005)). Enumclaw provided T&G with defense counsel, and on June 5, 2004, that attorney filed a Motion for Summary Judgment on the basis of T&G's dissolution. CP 845 – 856. The trial court did not dismiss T&G, ruling that there were material issues of fact regarding whether Construction Associates was a "known creditor" at the time of dissolution (a distinction that probably mattered only under the pre-2006 RCW 23B.14.340). CP 452. T&G then "settled" with the Association (to whom the claims against T&G had been assigned), and executed a covenant judgment and assignment of rights with respect to Enumclaw. CP 431 – 436. The stipulated judgment amount was \$3.3 million. CP 431. Enumclaw

participated in the ensuing reasonableness hearing, and argued that T&G's dissolution should have resulted in a dramatic discount of the Association's claims. The trial court agreed, and ruled that the \$3.3 million settlement was outside the (generous) bounds of reasonableness under the *Chaussee* factors<sup>2</sup>, reducing the reasonable value of the settlement to \$3 million. CP 637. By that time, the Association had already entered a stipulated judgment against T&G in the amount of \$3.3 million. That judgment was never amended to reflect the fact that it was unreasonable. Enumclaw timely appealed that decision.

Enumclaw raised the T&G's corporate dissolution again in this case – the Coverage suit. CP 809-817. The Association argued, and the trial court erroneously agreed, that Enumclaw was bound by the court's "resolution" of the dissolution argument in the Construction suit. CP 5 – 25; CP 1021 - 1023. From a judgment in the amount of \$3 million plus attorney fees and interest, Enumclaw timely appealed. CP 1467; CP 1448 – 1449.

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<sup>2</sup> The *Chaussee* factors, also known as the *Glover* factors, are a list elements the trial court is supposed to consider in determining whether a settlement is reasonable. *Chaussee v. Maryland Casualty Co.*, 60 Wn. App. 504, 803 P.2d 1339 (1991). The *Glover/Chaussee* factors include: [T]he releasing person's damages; the merits of the releasing person's liability theory; the merits of the released person's defense theory; the released person's relative faults; the risks and expenses of continued litigation; the released person's ability to pay; any evidence of bad faith, collusion, or fraud; the extent of the releasing person's investigation and preparation of the case; and the interests of the parties not being released.

After all briefing had been completed and oral argument heard at the Court of Appeals, this Court issued its opinion in the *Ballard Square* case, applying the newly minted corporate survival statute retroactively. *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 619, 146 P.3d 914 (2006). Thus no court has yet ruled on how the new RCW 23B.14.340 applied to T&G's corporate existence.

In reversing the judgment against Enumclaw, the Court of Appeals remanded this case, entitling Enumclaw to prove that T&G's corporate dissolution barred its liability to the Association. While there is sufficient factual support in the record for this Court to rule that T&G's dissolution extinguished the Association's claims, Enumclaw was (and is) content to return to the trial court on that issue, per the Court of Appeals' ruling. Thus Enumclaw did not Petition for Cross-Review, and this Court need not resolve the question of whether factual predicates for corporate existence were met as a matter of law. However, squarely before the Court is whether the judgment against T&G is the *kind* of judgment that can be collaterally attacked on the grounds of corporate dissolution by a third party whose interests will be prejudiced in a subsequent proceeding.

## 2. The Effect of T&G's Corporate Dissolution on these Proceedings.

The most basic element of the policy's grant of coverage is that it only applies to "sums that the insured becomes legally obligated to pay. . ." CP 820. Thus, a primary question in this coverage lawsuit is whether Enumclaw's insured, T&G Construction, is "legally obligated to pay" the Association anything. Before this Court is the question of whether a "judgment" against an entity that did not exist, as an absolute matter of law, at any time during the proceedings against it, can be applied with preclusive effect against a third party. As the Court of Appeals correctly held, Enumclaw has a right to challenge whether the court in the Construction suit had authority to render a judgment against a dissolved corporation; this challenge undoubtedly represents a collateral attack against a void judgment. There is a paucity of authority on the proper way to even frame the question of how legislation that effectively "disappears" one of the parties to a lawsuit, retroactive to before the lawsuit was filed, undermines a judgment rendered before that legislation was enacted<sup>3</sup>. One approach would be to consider whether the new statute deprived the court of subject matter jurisdiction, thus rendering the judgment void. Another would be to evaluate whether the court retroactively lost jurisdiction over

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<sup>3</sup> Mutual of Enumclaw's research has revealed no case other than this Court's decision in *Ballard Square* where a statute that retroactively dissolved a corporation was enacted after a lawsuit had already been filed against that corporation.

the “person” of the dissolved corporation, also resulting in a void judgment. Both of these approaches will be discussed below.

a. *A Collateral Attack is Proper Where a Judgment is Void for Failure of Personal Jurisdiction, or Failure of Subject Matter Jurisdiction.*

The Association has repeatedly characterized Enumclaw’s arguments regarding T&G’s dissolution as an “impermissible collateral attack” on the judgment in the construction case. Outside of using the “impermissible” descriptor, however, the Association has offered no explanation of why a collateral attack is in appropriate in this case. Collateral attacks are most certainly permissible under a narrow range of procedural circumstances; this case presents one of them.

It has long been the law of Washington that where a judgment is absolutely void, a party affected by that judgment is free to attack it in a collateral proceeding. In 1917, this Court held, “A void judgment may be attacked collaterally as well as directly. It is entitled to no consideration whatever in any court as evidence of right.” *Picardo v. Peck*, 95 Wash. 474, 474-475, 164 P. 65 *cf Kizer v. Caufield*, 17 Wash. 417, 49 Pac. 1064 (1897). This rule thrives in the modern era, as well:

It matters not what the general powers and jurisdiction of a court may be. If it act without authority in a particular case, its orders and judgments are mere nullities, protecting no one acting under them and constituting no hindrance to the prosecution of any right. A judgment which is absolutely void

is entitled to no authority or respect and may be impeached in collateral proceedings by any one with whose rights or interests it conflicts. If the judgment is rendered by a court without jurisdiction, either of the persons or of the subject matter, such judgment may be subjected to collateral attack.

*Hesthagen v. Harby*, 78 Wn.2d 934, 945, 481 P.2d 438 (1971) (citations omitted)

It follows that Enumclaw is entitled to collaterally attack the judgment of the court in the Construction suit, so long as the attack is based on a failure of jurisdiction, "either of the persons or of the subject matter." In this case, there is a failure of both.

*b. The Dissolution Deprived the Court of Subject Matter Jurisdiction.*

If the Court in the Construction case lacked subject matter jurisdiction with respect to the claims against T&G, the judgment over that defendant is void and subject to collateral attack. *Id.* As this court held in *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994) (citation omitted):

A tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate. The focus must be on the words "type of controversy." If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction.

A corporation exists only by the "grace of the legislature," and does not exist at all but for that grace. *Ballard Square Condo. Owners*

*Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d at 619. As the Court noted in *Ballard Square*, the “type of controversy” in a lawsuit against a corporation is purely statutory, invoking the legislative “grace” that holds a corporation in legal existence. When the legislature withdraws its grace, there is nothing left in the courtroom to have a “case” against. A lawsuit against a completely dissolved corporation presents a “type of controversy” which the court has no authority to adjudicate.

The issue of subject matter jurisdiction over a dissolved corporation can also be seen (independently) in a Constitutional light. For a court to exercise judicial power, there must be a justiciable case or controversy. *Villas at Harbour Point Owners Assoc. v. Mutual of Enumclaw*, 137 Wn. App. 751, 760, 154 P.3d 950, *cf* U.S. Const. art. III, §2; *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001). Where a plaintiff sues the ghost of John Smith (really his *ghost*, not his estate), there would not be a “justiciable case or controversy” before the court; there would be a mockery of the mechanisms of the judicial system. While there is more room for honest disagreement about the factual basis of corporate dissolution than there is about whether a natural person is defunct, once that status has been established, the effect on the court’s constitutional mandate is identical. Where there is only one party before the court, there is no case or controversy.

3. ***The Dissolution Prevented the Court from Obtaining In Personam Jurisdiction Over T&G.***

Another equally valid vantage from which to view the effect of T&G's dissolution is that the court in the Construction case never obtained jurisdiction over the "person" of T&G. Failure of *in personam* jurisdiction provides a separate ground for finding a collateral judgment to be void and of no effect. *Hesthagen v. Harby*, 78 Wn.2d 934, 481 P.2d 438 (1971). If it was theoretically impossible to hail T&G before the court, then it was also impossible to obtain personal jurisdiction over it. A lack of personal jurisdiction voided a judgment in the case of *Picardo v. Peck*, 95 Wash. 474, 474-475, 164 P. 65 (1917). In *Picardo*, a man named Seipman commenced an action, on March 10, 1909, for unlawful detainer and rent under a power of attorney from an individual named Elsholtz. That suit resulted in a deficiency judgment, which was assigned to the appellant. The appellant had levied execution on the property, a certificate of sale had issued to the appellant. The respondent, who claimed title to the same property as the successful bidder at a separate foreclosure sale, attacked the appellant's claim to title on the basis that the court in the action for unlawful detainer and rent did not have jurisdiction to enter the judgment which ultimately resulted in the appellant's sheriff's deed. *Id.* The jurisdictional defect, argued the respondent, was based on the fact that

Elsholtz, the purported plaintiff in that cause, had died in 1907 – over a year before Seipman had filed suit in his name under Elsholtz’s power of attorney. *Id.* This Court affirmed judgment for respondent, recognizing that the judgment on which appellant’s claim was based was void:

If Elsholtz was dead, the judgment under which appellant claims was void for want of jurisdiction of the parties. In order to give that jurisdiction which in all cases is essential to the validity of a judgment there must be jurisdiction of the plaintiff as well as of the defendant. Lack of jurisdiction in the one case is as fatal to the jurisdiction of the court as lack of jurisdiction in the other. It matters not that such judgment is attacked collaterally. A void judgment may be attacked collaterally as well as directly. It is entitled to no consideration whatever in any court as evidence of right.

*Id.*

So, too, in this case. In *Picardo*, it was a natural person - plaintiff that ceased to exist before suit was filed. In this case, it was a corporation – defendant. But the effect is identical; in the actual absence of either the plaintiff or the defendant, any judgment rendered by the court is void and subject to collateral attack.

The *Ballard Square* decision ruled that once the two year survival statute expired, a plaintiff’s suit against the former corporation is “barred.” The Court ruled that legislation was the only thing holding the corporation in existence, such that it could sue and be sued, and that the legislature could divest a plaintiff of all of its rights against the former corporation even while a lawsuit was pending. Courts in other jurisdictions have

addressed the propriety of a collateral attack on proceedings against a defunct corporation. For example, the case of *Theta Props. v. Ronci Realty Co.*, 814 A.2d 907, 913-916 (R.I. 2003) (*citations omitted*) held:

[I]f a party fails to sue within the statutory period for doing so, there is no longer an entity that can sue or be sued, and any right of action against the corporation terminates. . . . Consequently, any judgment entered against a dissolved corporation that was not sued within the two-year period for doing so is void.

Under these circumstances, we hold, § 7-1.1-98, with its two-year period of repose, barred this lawsuit and deprived the Superior Court of jurisdiction to entertain this action, much less to enter a judgment against a deceased corporation.

To identical effect, a bankruptcy court explained the effect of corporate dissolution on the jurisdiction of the court in *In re Peer Manor Bldg. Corp.*, 134 F.2d 839, 841 (7th Cir. 1943) (*citation omitted*):

It could neither sue nor be sued. The service of process upon it was an impossibility . . . The purported appearance and answer of the former corporation by the attorneys were a nullity. The corporation had been dead for seven years, and was incapable of appointing attorneys or exercising any other corporate function. Since the court had no proper party before it and could not subpoena the defunct corporation, it was without jurisdiction to proceed.

See also *Martin v. Texas Woman's Hosp.*, 930 S.W.2d 717, 721 (Tex. App. Houston 1st Dist. 1996) (“[I]f a party fails to sue within the time limits of the survival statute, there is no longer an entity which can be sued.”)

These decisions, entirely consistent with Washington statutory law and *Ballard Square*, confirm that two years after T&G's dissolution, T&G ceased to exist, and no court could have obtained *in personam* jurisdiction over it. Because a "judgment" against a completely dissolved corporation is exactly the kind of judgment that can be attacked collaterally, the Court of Appeals was correct in ruling that Enumclaw had a right to present that argument on remand.

**4. *Neither Enumclaw nor T&G Waived the Right to Assert that T&G's Corporate Dissolution Resulted in a Void Judgment.***

As noted above, the *Peer Manor Bldg. Corp.* answers the objection that T&G waived the defense of corporate dissolution by appearing and defending. Although there were attorneys present, purporting to represent T&G, their presence and their actions were a "nullity." *Id.* No waiver occurred. The Association also argues waiver based on the fact that T&G pursued a 5<sup>th</sup> party claim, and passed through some settlement dollars to the general contractor (keeping nothing for itself). All of these events, however, took place before the new corporate survival legislation, and before this Court applied that legislation retroactively. If a retroactive corporate dissolution deprives a court of subject matter jurisdiction, the

parties cannot waive that defect<sup>4</sup>. If a retroactive corporate dissolution affects only personal jurisdiction, there still must be a “person” available to waive it; additionally and separately, a waiver must be an intentional relinquishment of a known right<sup>5</sup>. Because it was theoretically impossible that T&G’s former president knew his former company had a “right” that was based on future legislative activity, no waiver could have occurred.

**5. Dissolution was Not a “Defense” that Belonged to T&G.**

The Association classifies T&G’s dissolution as a “defense” available to T&G in the Construction suit, and argues that Enumclaw should be equitably estopped from “re-litigating” it in this coverage suit. There are two definitive answers to the Association’s contention. First, a void judgment *can* be collaterally attached. Second, a non-entity need not “assert” any defense at all related to corporate dissolution. Any appearance or action by attorneys purporting to be representing that former entity is a “nullity.” *In re Peer Manor Bldg. Corp.*, 134 F.2d 839

The Association, by framing the issue as it does, raises the question of whether an insurer can assert the defenses that might have been available to the insured in the underlying litigation to limit coverage

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<sup>4</sup> See *In re Marriage of Furrow*, 115 Wn. App. 661, 667, 63 P.3d 821 (2003) (“Parties cannot confer subject matter jurisdiction on the court by agreement between themselves; a court either has subject matter jurisdiction or it does not; if it does not, any judgment entered is void, and is, in legal effect, no judgment at all.”)

<sup>5</sup> *Jones v. Best*, 134 Wn.2d 232, 950 P.2d 1 (1998).

after a judgment against the insured has been entered. Where the insured faces huge liability, but has strong defenses (e.g. Comparative Negligence), it might be reasonable for the insured to settle that case for a large sum (and enter into a covenant judgment), which includes a discount for the strength of defense. The insurer ordinarily *cannot*, in a subsequent coverage action, argue that the insured's "legal obligation to pay" is less than the amount of that judgment. That is because the presence of a judgment, generally, is the best way to know if a person is legally obligated to pay. The points of law and fact in an underlying case merge into the final judgment, whether it is by stipulation or adjudication, whether they be correct or incorrect. Enumclaw wants to be absolutely clear with the Court that it is not, nor has it ever, argued that an insurer should have the right to re-present, in the coverage action, normal liability defenses that belonged to its insured in the underlying action.

The case at bar, however, is very different; while a valid judgment is usually conclusive on whether a party has a "legal obligation to pay," a void judgment is not. Where a judgment has been entered against a dissolved corporation, the judgment itself is defective, and cannot establish such an obligation. Enumclaw is asking for nothing more than the right to present, to the trial court, its argument that T&G's corporate dissolution prevents T&G from having a legal obligation to pay, in spite of

the stipulated judgment against it. The Court should affirm the Court of Appeals decision on that point.

**IV. Motion to Dismiss this Case for Lack of Jurisdiction.**

As outlined above, the court in the Construction case did not have jurisdiction to render a judgment against T&G. Because of the retroactive effect of RCW 23B.14.340, the same structural deficiency that was present in the Construction case is present in this Coverage case as well. This lawsuit was filed by Enumclaw against T&G on September 15, 2004. It was later determined (retroactively) by the legislature that T&G no longer existed at that point. Thus there was no defendant properly before the Court. The other party to this lawsuit, the Association, is claiming only rights that were “assigned” to it by an entity which did not exist at the time of the assignment. Thus, regardless of the insurance coverage dispute that would otherwise be before the Court, this Court lacks jurisdiction to continue. *Picardo v. Peck*, 95 Wash. 474, 474-475.

**V. There is No Justification for an Extension of *Besel*.**

The Association also requests the Court extend *Besel*<sup>6</sup> and rule that a covenant judgment settlement is the presumptive measure of “damages” in a declaratory judgment case, even where, as here, the insurer acted in good faith. The Association’s argument is based on a profound

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<sup>6</sup> *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 49 P.3d 887 (2002).

misunderstanding of the nature of *Besel* estoppel. Bad faith is a *tort* remedy, divorced from the terms of the contract of insurance from which the good faith duty flows. Where an insurer breaches those good faith obligations relating to the defense of its insured, and the insured protects itself from personal liability by entering into a reasonable settlement (plus assignment), the value of that reasonable settlement *is* the presumptive measure of damages against the insurer for its bad faith conduct. In stark contrast, where there is a coverage action, absent evidence of bad faith, the issue before the court is whether the judgment against the insured is not covered, is covered in part, or covered entirely by the terms of the policy.

Outside of the rare scenario where the judgment against the insured is void or otherwise unenforceable, a valid judgment is conclusive on the “coverage” issue of whether the insured is “legally obligated to pay” that amount. This proposition is not an “extension of *Besel*,” it is nothing more than insurance policy interpretation at its very most basic level.

The Association’s invocation of *Besel* reveals that it wants the judgment and reasonableness findings against T&G to do more than establish T&G’s “legal obligation to pay.” It wants to leverage those findings and the judgment and use them as a cudgel to fight off any limitations on T&G’s coverage, and achieve the result of a bad faith judgment without actually having to prove bad faith.

In fact, Enumclaw has the right to insist on a legal declaration regarding which parts of the judgment (if any) come within the policy's grant of coverage, and which parts of the judgment (if any) are outside the policy because of exclusions. *Alaska Nat'l Ins. Co. v. Bryan*, 125 Wn. App. 24, 104 P.3d 1 (2005). Furthermore, where the insurer acted in good faith, it is the *insured* that has the burden of allocation:

Absent a successful bad faith claim and the resulting coverage by estoppel, the insured still has the burden of proving how much of the [settlement] should be allocated to covered claims. *Mutual of Enumclaw Ins. Co. v. Paulson Constr. Inc.* 161 Wn.2d 903, 919, 169 P.3d 1 (2007)

Presuming, for the sake of argument, that the Court were to determine that the judgment against T&G is valid, that does not mean that the entire amount comes within the scope of the policy's grant of coverage. *Id.* The policy provides coverage for "sums the insured becomes legally obligated to pay *because of property damage*."<sup>7</sup> It is easy to image a case with multiple causes of action, where some involve damage to property, and some do not. This is just such a case. For example, the general contractor 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. No evidence has been presented that this alleged deficiency resulted in any

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<sup>7</sup> The policy defines "property damage" as "physical injury to tangible property."

property damage at all. The strip and re-clad, demanded by the Association, 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 addressed only whether the settlement between T&G and the Association was reasonable; it did not address whether some or all of the undifferentiated amount came within policy coverage<sup>8</sup>. The Court of Appeals was correct to remand this case for a factual determination of what portion of the stipulated judgment represents liability "because of property damage." Pursuant to *Paulson*, the burden of the allocation falls to the Association.

The same is true of policy exclusions. No "extension of *Besel*" should be applied to prevent an insurer acting in good faith from asserting exclusions. Enumclaw has advocated that at least three exclusions operate to preclude coverage for certain portions of the settlement amount in this case: the Work exclusion, the Impaired Property exclusion and the

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<sup>8</sup> The Association continues to argue that the reasonableness findings established that T&G's liability was entirely for "covered property damage" and that Mutual of Enumclaw had plenty of opportunity to contest that liability at the reasonableness hearing. The issue of whether the stipulated judgment was based entirely on "covered property damage" was not before the court in the Construction suit. Even if it had been, however, the Court of Appeals was correct to note that there was no final determination on the merits – only a weighing of probabilities – and those findings therefore do not have the effect of either *res judicata* or collateral estoppel in the Coverage suit. *Mutual of Enumclaw Ins. Co. v. T&G Constr., Inc.*, Court of Appeals No. 57679-8-I.

Withdrawal from Use exclusion. Both Enumclaw and the Association presented their arguments for and against the applicability of these exclusions to the Court of Appeals. The Court of Appeals, however, did not directly resolve those contentions; rather it remanded for a factual determination of how the exclusions applied, free from the influence of the reasonableness findings. In its Petition for Review, the Association asserts that Enumclaw should be bound by reasonableness findings, but it did not assign error to the Court of Appeals' failure to parse out the meaning of the exclusions as applied to the facts of this case<sup>9</sup>. In any event, there is nothing to which Enumclaw could be "bound" with respect to the application of policy exclusions because the court in the Construction case did not make findings or conclusions (even at the level of probability) regarding how the various claims asserted by the Association should fit within or outside of policy exclusions.

## **VI. Conclusion.**

For the above reasons, Enumclaw respectfully requests that the Court dismiss this case with prejudice for failure of jurisdiction. In the alternative, Enumclaw respectfully requests that the judgment of the Court of Appeals be affirmed in all respects.

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<sup>9</sup> Thus the interpretation of those exclusions is not before the Court, per RAP 13.7(b) and *State v. Collins*, 121 Wn.2d 168, 178-179.

DATED THIS 2nd day of May, 2008.

HACKETT, BEECHER & HART

/s/\*

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## CERTIFICATE OF SERVICE

The undersigned declares under the penalty of perjury that on Friday, May 2, 2008, she caused a copy of the Supplemental Brief of Respondent, Mutual of Enumclaw, to be served on the following counsel:

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