

No.: 66102-7-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

IMU a division of One Beacon America Insurance Company, a
Massachusetts Insurance Company

Respondent

v.

ABCD LLC, a Washington LLC; ABCD, a Washington partnership and
Albert Boogaard, an individual domiciled in Washington,

Appellants,

v.

ALLIANCE INSURANCE CORP a/k/a ALLIANCE INSURANCE,
INC.,

Respondent.

Appeal from Superior Court for King County
The Honorable Susan Craighead

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
I. INTRODUCTION AND SUMMARY OF THE ARGUMENT	1
II. STATEMENT OF ISSUES	5
III. STATEMENT OF THE CASE	6
A. Factual Background	6
IV. LEGAL ARGUMENT	15
A. Neither the Policy or Any of BooGaard’s legal Theories Give Rise to Coverage Under the Policy	16
1. Contract Interpretation and Policy Language	17
2. The IMU Policy Is Not a First Party Liability Policy And the Four corners of the Contract Cannot Be Ignored Merely Because The Insured Now Wishes to Be Considered A Third Party	22
3. The Case Law Cited By Boogaard Does Not Change The Clear Policy Language His Expert Testimony About What The Law Should Be Does Not Substitute For What the Policy Says.	25
B. Alliance’s Accord Certificates Did Not Modify The IMU Insurance Policy to Make Northland An Additional Insured Prior to the Forklift Accident	28
1. No Evidence Was Submitted To Support A Claim That IMU Gave Express or Apparent Authority To Alliance To Issue Policy Endorsements	31
C. IMU never Cancelled Boogaard’s Policy; IMU Never Issued An Endorsement Naming An Additional Insured Until It was Asked to Do so After the Injury	34

D. Bad Faith Allegations Do Not Change The Insurance Contract To Cover A Claim Which Is Not Covered By The Contract	35
E. CONCLUSION	39

TABLE OF AUTHORITIES

Washington Cases

<i>AAS/DMP v. Accordia Northwest</i> , 115 Wn. App. 833, 839 (2003).	30
<i>Carew, Shaw and Bernasconi, Inc. v. General Casualty, Co.</i> 189 Wash. 329, 336-337 (1937)	29
<i>Codd v. New York Underwriters Ins. Co.</i> , 19 Wn.2d 671, 680 (Wash. 1943).	31
<i>DLS v. Maybin</i> , 130 Wn.App 94, 98 (Div. I 2005)	30,31
<i>EZ Loader Boat Trailers Inc. v. Travelers Indem. Co.</i> , 106 Wn.2d 901, 907, 726 P.2d 439 (1986)	18,22
<i>Grange Ins. Co. v. Brosseau</i> , 113 Wn. 2d 91, 100 (1989)	18
<i>Hayden v. Mut. Of Enumclaw Ins. Co.</i> , 141 Wn. 2d 55, (2000)	36
<i>H.D. Fowler v. Warrant</i> , 17 Wn. App. 178 (1977).	29
<i>Holland America Ins. Co v. Nat'l Indem. Co.</i> , 75 Wn. 2d 909, 911-12	37
<i>Kirk v. Mt. Airy Ins. Co.</i> , 134 Wn. 2d 558 (1998).	37
<i>McGreevy v. Oregon Mutual Insurance Company</i> , 141 Wn. App. 858 (1994).	35
<i>Mutual of Enumclaw Insurance Company v. Paulson Construction</i> , 161 Wn.2d 903)	38
<i>Perry v. Continental Insurance Co.</i> , 178 Wash 24 (1934)	29
<i>R.A. Hanson Co. v. Aetna Ins. Co.</i> , 26 Wn. App. 290 (1980).	37
<i>Safeco Ins. V. Butler</i> , 118 Wn. 2d 383 (1992)	36
<i>Stouffer & Knight v. Continental Cas. Co.</i> , 96 Wn.App. 741, 747	17

982 P.2d 105 (1999)	
<i>Tank v. State Farm</i> , 105 Wn.2d 381, 393, 715 P.2d 1133 (1986)	21
<i>Truck Ins. Exchange v. BRE Properties, Inc.</i> , 119 Wn.App. 582, 589, 81 P.3d 929 (2003)	26
<i>Truck Insurance v. Vanport Homes</i> , 147 Wn.2d 751 (2002)	36
<i>Unigard Ins. Co. v. Leven</i> , 97 Wn. App. 417 (1999)	37
<i>Weyerhaeuser Co. v. Commercial Union Ins. Co.</i> , 142 Wn.2d 654, 665-666 (Wash. 2000).	18

Other Authorities

<i>Aguilar v. Int'l Longshoremen's Union Local No. 10</i> , 966 F.2d 443, 447 (9 th Cir. 1992).	27
<i>Crow Tribe of Indians v. Racicot</i> , 87 F.3d 1039 (9 th Cir. 1996)	27,33
<i>Garnet Construction v. Arcardia Ins. Co.</i> , 61 Mass App. Ct. 705 (2004)	26
<i>Golden Eagle Ins. Co. v. Insurance Company of the West</i> , 99 Cal. App 4 th (837 (2002)	37
<i>John Deer Insurance v. DeSmet Insurance</i> , 650 NW.2d 601	26
<i>Maffei v. Northern Ins. Co. of New York</i> , 12 F.3d 892, 898-99 (9 th Cir. 1993)	27
<i>McHugh v. United SErv. Auto Ass'n</i> , 164 F.3d 451, 454 (9 th Cir. Wa 1999)	28
<i>United States v. Brodie</i> , 868 F.2d 492, 496 (9 th Cir. 1988)	33
4 Joseph M. McLaughlin, Jack B. Weinstein & Margaret A. Berger, <i>Weinstein's Federal Evidence</i> § 702.03 (2007)	28
Thomas Harris, <i>Washington Insurance Law</i> § 14.2	38

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TABLE OF CONTENTS

TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
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TABLE OF AUTHORITIES

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<i>Kirk v. Mt. Airy Ins. Co.</i> , 134 Wn. 2d 558 (1998).	37
<i>McGreevy v. Oregon Mutual Insurance Company</i> , 141 Wn. App. 858 (1994).	35
<i>Mutual of Enumclaw Insurance Company v. Paulson Construction</i> , 161 Wn.2d 903)	38
<i>Perry v. Continental Insurance Co.</i> , 178 Wash 24 (1934)	29
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I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

Albert Boogaard purchased a third party liability policy from IMU. This covered him for personal injuries he caused to others by his negligence. A Northland employee negligently injured Mr. Boogaard on the job. This is not covered by the third party IMU policy. Therefore, the issue is whether to enforce an insurance contract, as it is written and according to its plain language. The answer is a clear "yes", a third party liability policy and does not cover the first party personal injuries of the insured. First party insurance covers first party injuries, third party liability insurance covers third party liabilities, and they are different. That is exactly what the Superior Court did upon Summary Judgment and on the record before it.

Instead, however, the plaintiff asks this Court to turn a third party liability policy into a first party policy, relying not on the law and text of the policy itself, but upon a) the opinion of an "expert" witness about what he thinks the law ought to be and b) based upon alleged "facts" which were not even in the record before the lower court. The correct and undisputed facts are that a) Mr. Boogaard signed a contract with Northland which required him to

go to his insurance broker and add Northland as an "additional insured" on his policy (CP 203, 274-275); b) he didn't get around to it until a couple months later when; c) a Northland employee negligently injured him on the job, d) then after he was injured, he asked his broker to ask IMU to add Northland as an additional insured on the IMU policy. CP 75 & 103-108. That's the undisputed order of events before both the lower court and this court.

Had Mr. Boogaard timely added Northland as an additional insured, the entire legal relationship changes between all the parties and this is an entirely different case. But that did not happen, so the legal relationships and the legal rules are simple: A third party liability policy does not cover a first party injury. Consequently, Mr. Boogaard tries to turn his IMU policy, a third party liability policy, into a first party medical insurance coverage, by any means he can come up with. Put simply, Mr. Boogaard asks this court to rewrite an insurance policy just because he delayed and ultimately failed to take his Access Agreement to his insurance broker so his broker could get him the insurance he promised to acquire in that agreement. This court should deny this.

IMU further requests that this Court not be confused by the fact that Boogaard is appealing two separate summary judgment

motions granted to two entities, IMU and Alliance. Alliance is Boogaard's broker, and therefore his agent. Alliance is not IMU's Agent. Thus, the Boogaard-Alliance interface (whatever went on behind the scenes between these two) is irrelevant to the IMU-Alliance interface. IMU dealt with Alliance and only Alliance, which acted on behalf of Mr. Boogaard and only on behalf of Mr. Boogaard. Alliance never had any authority to act on behalf of IMU as its agent or any manner whatsoever, so if Mr. Boogaard had an issue with his broker then that was between them, as a matter of law. However, Boogaard's brief repeatedly seeks to blur this important distinction in order to confuse the issues and the Court.

This is evident in appellant's opening brief, wherein Appellant fails to distinguish between evidence submitted in the summary judgment hearings brought by IMU with those brought by Alliance. In particular, Appellant attempts to add deposition testimony regarding the naming of an additional insured to the IMU policy from Ms. Hausinger, regarding authority she alleges to have had. This testimony occurred after the IMU Summary Judgment motion and thus was decidedly not part of the record on that motion and neither did Mr. Boogaard argue a CR 56(f) motion that it was needed for that motion. The Summary Judgment Order is clear on

these points, which are themselves not challenged on appeal. The documents submitted to the trial court on the coverage summary judgment motion were as follows: IMU's motion for partial summary judgment (CP 63-73), the Moran declaration in support (CP 147-279), the Cox declaration in support, (CP 88-146) the O'Laughlin declaration in support (CP 74-87), Boogaard's opposition (CP 300-323), Balint's declaration (CP 324-409), Alliance's Response (287-296), Hammelrath's declaration (CP 297-299), IMU's reply (CP 424-428) and the first declaration of Robert Sedillo (CP 410-423). There is no Hausinger deposition, thus it cannot be considered on the record on appeal.

Furthermore, the parties to this case stipulated to the dismissal without prejudice of alleged bad faith claims against IMU. This stipulation and the issues therein are not on appeal before this court, thus they are not addressed in detail by IMU. Despite this stipulation, Boogaard's brief makes allegations of bad faith and seeks coverage based upon it, at the end of its briefing relating to coverage. Consequently, Appellant will need to cite to other parts of the record below on the bad faith issues, as it seems Boogaard is trying to use these allegations, which were minimally discussed in the motion for summary judgment below in order to create a

claim that he was prejudiced by a reservation of rights and therefore should receive coverage because he lost the counterclaims brought against him by Northland. The law is clear that the duty to defend is broad and under Washington law it would have been an act of bad faith to institute a declaratory action against Boogaard while he was litigating with Northland.

II STATEMENT OF ISSUES

1. Whether the trial court correctly found that Boogaard does not have coverage under the IMU policy when there is no language in the policy that would provide coverage for his injuries.
2. Whether the court may rewrite a third-party liability policy into a first party insurance contract.
3. Whether the agent of an insured may bind an insurer when they have no authority to do so, when there is no evidence that the insurer granted authority to the agent of the insured and the insured and his agent failed to seek proper coverage for their claims.
4. Whether Boogaard is a third-party to his first party insurance contract, which he signed as a Senior Partner and named insured?
5. Whether the "insured contract" coverage in the IMU policy provides coverage for Boogaard, when the language of the clause states that it provides coverage to injuries to third-parties?

III. STATEMENT OF THE CASE

A. Factual Background

Albert Boogaard was at all times material the senior partner of ABCD Marine, a Washington partnership. ABCD Marine provided welders to marine operators such as Northland Services, Inc. ("Northland"). Through his partnership, Boogaard provided welding services to Northland at its marine terminal located on the Duwamish River in Seattle, beginning in 2000. The vast majority of the work done by ABCD Marine was on barges and other vessels owned or operated by Northland at Terminal 115.

Prior to 2004, ABCD Marine was an independent contractor for Northland and Naknek Barge lines. In 2000, Mr. Boogaard hired an insurance broker, third party defendant Alliance Insurance ("Alliance"), to obtain the insurance he needed. Alliance submitted a policy application to IMU and IMU issued a policy for "Comprehensive Marine Liability and Ship Repairers Legal Liability" on April 11, 2000. IMU confirmed Alliance's representation that ABCD did not require "any additional insured's on the policy." CP 92. Ms. Clarke further advised IMU on May 3, 2000 that Northland had no written contract with ABCD at the time, as ABCD were hourly workers. CP 94. There were no additional insured's under

the policy. IMU confirmed this fact before issuing the policy. In a letter to Alliance dated April 11, 2000, IMU specifically confirmed the following: ***“You have also confirmed the assured will not be using any subcontractors or require any additional insured’s on the policy.”*** CP 92. IMU renewed the policy over the following years, 2001, 2002, 2003 and 2004 without any reported or requested changes of any significance to this matter. CP 96 & 98. ***An endorsement to add an additional insured was never requested of IMU and IMU never provided an endorsement.***

After Northland merged with another company, Naknek, it apparently changed its policies and began requiring its contractors to execute Access Agreements. The Agreements imposed new insurance and other obligations on contractors like ABCD. The agreement included additional insurance and indemnification requirements, namely it required Mr. Boogaard to have Northland named as an “additional insured” on his liability policy. Mr. Boogaard signed the Access Agreement on September 29, 2004. The Access Agreement required the following:

8. Personal Injuries: User [Boogaard] shall be responsible for all bodily and personal injuries to all persons arising out of or resulting from its operations and/or use of the Property, including bodily and personal injuries to its own employees, except if

caused by the sole intentional negligence of NSI. User shall indemnify and hold harmless (including costs and legal fees) NSI of and from all losses, damages, claims and suits for bodily and personal injury, whether direct or indirect, arising out of or relating to its operations or use of the Property, except such bodily and personal injuries caused directly from the sole intentional negligence of NSI. This indemnification agreement includes all claims and suites against NSI by any employee (present or former) of User and User expressly waives all immunity and/or limitation of liability under any worker's compensation, disability benefits or other employee or employment-related act of jurisdiction...

10. Insurance. User shall obtain and maintain, at its own expense, public liability insurance for personal injuries and property damage covering User's operations under this agreement including a contractual liability endorsement which specifically insures User's liabilities pursuant hereto. Such insurance must have minimum limits per occurrences of \$1,000,000 and shall be evidenced by an Insurance certificate specifically naming NSI as additional insured and must waive subrogation against NSI (and its officers, directors, employees, agents, and subsidiary or affiliated companies), with the waiver to include any claim relative to policy deductible, and must be primary to any other insurance which may be maintained by NSI. Further, the insurance shall be endorsed such that it may not be canceled or changed materially except on thirty (30) days notice to NSI. User shall also procure and maintain, at its own expense, state and federal, as applicable, standard worker's compensation liability insurance covering all its employees, subcontractors and agents, but neither User nor its workers' compensation insurer shall have nay right of action against NSI for subrogation or reimbursement of any payments made pursuant to that policy (including payments within any policy deductible.)

CP 203-204 (Exhibit A to Boogaard dep. Attached to Moran Decl. 247-279)) & CP 274-275 (Exhibit D to Moran Dec.)

Mr. Boogaard apparently asked no questions regarding the terms of the access agreement. He apparently did not seek legal counsel or seek any expert help from his insurance broker or others to help understand his obligations under this agreement. Id. The access agreement was not provided to IMU. CP 75. Nevertheless, Boogaard signed the access agreement. CP 203

Just over 2 weeks later on October 19, 2004, Mr. Boogaard was struck by a Northland forklift at the Northland yard, causing Mr. Boogaard serious bodily injuries.

On November 10, 2004, Alliance Insurance advised IMU of the incident with a General Liability Notice of Occurrence/Claim form. IMU's Senior Claims Manager, Dave O'Laughlin, promptly called Alliance to investigate. CP 75. Mr. O'Laughlin determined that IMU's insured, Mr. Boogaard, had suffered personal injuries as a result of Northland's negligent conduct. However, the IMU policy was a liability policy covering Mr. Boogaard's *liability to others for*

his negligence. There is no exception, however, which provides coverage under the IMU policy for torts of others which cause damage to “third parties” that Mr. Boogaard contractually agrees to cover in what are called “insured contracts.” CP 75. However, the “insured contract” is a term of art in the policy and a contract that purports to cover Mr. Boogaard’s liability for Mr. Boogaard’s own personal injuries does not qualify. CP 136.

Mr. Boogaard’s broker Alliance understood this and that there was no coverage on the IMU policy as evidenced by an email exchange between Mr. O’Laughlin of IMU and the brokers at Alliance. CP 78. Thus, Alliance confirmed that the notice was informational only and that Mr. Boogaard was not making a claim under the IMU policy. CP 78-79. On December 1, 2004, after Boogaard’s injury, Alliance advised IMU that ABCD was formally changing from a general partnership to an LLC and they asked IMU to add Northland as an additional insured on the IMU policy. CP 103-104. IMU made the changes, prospectively. CP 105-108.

In November 2006, Mr. Boogaard sued Northland for his personal injuries. Northland counterclaimed for breach of

contract, namely the Access Agreement. In March of 2007, Boogaard tendered the defense to IMU. CP 75. IMU agreed to appoint a defense to the counterclaims under a reservation of rights. CP 75-76 & 81. IMU appointed Louis Shields to defend against the counterclaim. CP 75-76. Both parties filed cross motions for summary judgment. During this same time period the Washington Supreme Court was hearing the case. *Mutual of Enumclaw Insurance Company v. Paulson Construction*, 1616 Wn.2d 903) which was determining whether an insurer acts in bad faith if it pursues a declaratory judgment that it has no duty to defend if that action might prejudice the insured's tort defense.

On March 11, 2008, Judge Spector granted Northland's motion for Summary Judgment on the Access Agreement, finding that Boogaard breached it as a matter of law by failing to provide Northland with insurance and indemnification. CP 277-279. Following that order, IMU denied coverage on March 20, 2008. CP 84. IMU did agree to continue providing a defense for an appeal, and even agreed to pay for new counsel of Boogaard's choosing. CP 86. Then on or about April 16, 2008, Mr. Boogaard and

Northland settled the case between them, stipulating to damages of \$712,022.01 and demanding that IMU pay the entire amount under its insurance policy. IMU brought a declaratory action to determine coverage under that policy.

IMU then filed a summary judgment motion as no genuine issues of material fact could preclude summary judgment on the issue of coverage. CP 63-73. Mr. Boogaard had hired its broker, Alliance, to purchase a third party liability insurance policy from IMU. They didn't seek, nor did they ask for a first party insurance policy that would have covered Mr. Boogaard for his own injuries. They intended to acquire a policy that protected them from liability for other people's damages that Mr. Boogaard might cause. They contacted IMU and IMU sold them exactly what they wanted, a third party liability policy. That is what Mr. Boogaard intended to buy and its what IMU intended to sell.

When Mr. Boogaard was injured on the Northland site and did not have first party insurance he needed the ability to sue the party who injured him. Unfortunately, the new insurance and indemnity obligations in the Access Agreement left him with an obvious problem of his own

making. Mr. Boogaard was left with an injury and nobody to pay for it. But he went ahead anyway, rolling the dice on his lawsuit against Northland on the validity of the Access Agreement. He unfortunately lost that effort.

He then brought a claim against IMU. However, he purchased, and IMU intended to sell, a third party liability insurance policy and that policy does not provide coverage for Mr. Boogaard's first party tort claim. That is the objective intent of the insurance policy when it was purchased and that is what the court held it was.

Knowing that the insurance policy did not provide any coverage for a first party injury, Boogaard brought forth several other theories in hopes of rewriting the policy. Boogaard attempted to portray himself as a third party to the insurance contract even though the policy clearly states that he is a named insured under it. CP 300-323. Boogard sought to avoid the policy language by presenting the opinion testimony of an alleged insurance expert as to the legal meanings of insured contracts and third parties, but he did not supply any facts, which could allow the trial court to simply ignore the policy language. CP 410-423. Second,

Boogaard sought to establish that IMU somehow acquiesced to adding his tortfeasor to the policy as an additional insured, even though IMU never received such a request until well after his injury. Namely, Boogaard claimed that IMU agreed to add Northland and Naknek as additional assureds prior to his injury, through the acts of Boogaard's broker - Alliance. There was absolutely zero evidence submitted to support the theory. IMU never was requested to provide such coverage, the insurance policy specifically precludes granting Boogaard's broker such authority and no acts of IMU have been identified which would provide any apparent authority for such coverage to be bound under the circumstances. There is no evidence in the record below, which would substantiate Boogaard's allegations that IMU granted apparent authority to anyone to make additional endorsements to the policy. The trial court properly found that there was no coverage for Boogaard's injuries under the IMU policy under either theory. See Supplemental Designation of Clerk's papers

This case, while unfortunate for Mr. Boogaard is of his own making. There exists no legal or equitable argument,

which could allow any Court to simply rewrite a third-party liability policy into a first party policy.

III. LEGAL ANALYSIS

The decision of the trial court must be affirmed for the following reasons:

1. The clear policy language does not provide coverage for Boogaard/ ABCD's personal injury and damage claims;

2. The "Insured Contracts" clause in the policy only provides coverage for damage caused to third parties and Boogaard is not a third party under the unambiguous language in the policy.

3. Boogaard never requested that Northland/Naknek be named an additional insured under his policy until after he suffered his injury.

4. IMU never issued an endorsement naming Northland as an additional insured under the policy.

5. There is no evidence in the record that demonstrates that IMU authorized an additional insured endorsement in the policy until it was requested to do so prospectively after the injury to Boogaard.

6. If Alliance issued a certificate of insurance claiming Northland is an additional insured, (1) the language of the

certificate itself does not bind IMU or provide coverage; (2) the policy precludes Alliance from claiming that it is an agent of IMU; (3) Alliance never received authority from IMU to make the endorsement; and (5) no acts of IMU have been presented which would allow Boogaard to reasonably believe that his own insurance broker was somehow acting as IMU's agent.

7. The opinions of a retained expert as to the legal interpretation of an insurance contract cannot substitute for the actual language of the policy, or create facts where there are none.

A. Neither the Policy or Any of Boogaard's Legal Theories Give Rise to Coverage Under the Policy

The purpose of the policy Boogaard purchased from IMU was to provide coverage for any injuries Boogaard and his companies cause to third parties. The purpose of the policy was not to provide coverage for injuries Boogaard and his company sustained. A third party liability coverage policy does not provide benefits for a first parties personal injury claim. To get around this fact, Boogaard sought to create three legal theories in hopes of creating coverage where there is not. First, Boogaard attempts to use the "Insured Contracts" provision of the policy. His second theory is to impute acts of his own agent (alliance) to IMU in order

to claim that Northland/Naknek became an additional insured under his policy prior to his injury rather than after. The third and final claim is that a bad faith reservation of rights precludes IMU from denying coverage under the policy. The policy language itself, clear law, and the failure of evidence defeat each of these claims. The policy language excludes the situation here from providing coverage for an "insured contract" as set forth by Boogard. Furthermore, the acts of Alliance cannot be imputed to IMU as a matter of law, as there is no evidence that IMU granted any authority to Alliance to act on its behalf.

1. Contract Interpretation And the Policy Language

In Washington, insurance policies are construed as contracts. An insurance policy is construed as a whole, with the policy being given a "fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." *Stouffer & Knight v. Continental Co.*, 96 Wn.App. 741, 747 (1999). If the language is clear and unambiguous, the court must enforce it as written and may not modify it or create ambiguity where none exists. If the clause is ambiguous, however, extrinsic evidence of the intent of the parties may be relied upon to resolve the ambiguity. Any ambiguities remaining after examining

applicable extrinsic evidence are resolved against the drafter-insurer and in favor of the insured. A clause is ambiguous when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 665-666 (Wash. 2000). Further, the policy “should not be given a strained or forced construction which would lead to an extension or restriction of the policy beyond what is fairly within its terms.” *E-Z Loader Boat Trailers Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 907, 726 P.2d 439 (1986) (quoting *Morgan v. Prudential Ins. Co. of Am.*, 86 Wn.2d 432, 434, 545 P.2d 1193 (1976)). If the plain language of the policy does not provide coverage, courts will not rewrite the policy to do so. *Grange Ins. Co v. Brosseau*, 113 Wn. 2d 91, 100 (1989).

The IMU policy is a third party liability policy. It provides coverage to the insured for *liability*, and extends that liability coverage to liability acquired by an “insured contract.” CP 136. However, an “insured contract” only extends coverage by contract where the bodily injury is suffered by a “third person or organization” and Mr. Boogaard does not qualify as a third person or organization under the clear language of the policy. CP 136.

He is a first party insured and a first party to the Access Agreement as demonstrated by the policy itself.

SECTION I- COVERAGES
COVERAGE A. BODILY INJURY AND
POROPERTY DAMAGE LIABILITY.
Insuring Agreement.

1. We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of "bodily injury" or "property damage" to which this insurance applies....

...

SECTION II- EXCLUSIONS
A. EXCLUSONS APPLICABLE TO
SECTION 1, COVERAGES A AND B
ONLY:

Notwithstanding anything to the contrary contained in this policy, it is hereby understood and agreed that this policy is subject to the following exclusions and that this policy shall not apply to:

.....

2. "Bodily injury" or property damages" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- a. Assumed in a contact or agreement that is an "insured contract," provided that the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement;.....

.....

9. "Insured contract" means:

.....

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) **under which you assume the tort liability of another to pay for “bodily injury” or “property damage” to a third person or organization.**

CP 112, 114 & 136. Here, Mr. Boogaard is not a “third person.” He is a first party to both the Access Agreement and the IMU insurance policy by virtue of his representation in the access agreement and the definitions as set forth under the policy.

USER
Albert Boogaard/Wes Dahl
By: Albert Boogaard
Its: Senior Partner
umed: Yes No

CP 203-204; see also 273-275, Exhibit D to Moran Declaration.)

As a partner in the ABCD general partnership, Mr. Boogaard is a first party beneficiary to the IMU policy as an “Insured.”

Named Insured	ABCD Marine	Producer	Alliance Insurance, Inc.
Street	346 NW 89th Street	Street	P.O. Box 77086
City	Seattle	City	Seattle
State	WA	State	WA
Zip	98117	Zip	98177
Policy Period:	From: April 3, 2004	To: April 3, 2005	
	At 12:01 A.M. Standard Time at your Mailing Address shows above.		

Named Insured Is A: Corporation Partnership Individual Joint Venture Organization (Other than Corp, Partnership or Joint Venture)

Business Description: Welding and deck repair on barges and fishing vessels.

See CP 110, Dec Page to IMU policy, (Exhibit F to Cox declaration CP 88-146.)

SECTION IV- WHO IS AN INSURED.

1. If you are designated in the Declarations as:

...

- b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insured's, but only with respect to the conduct of your business.

Moreover, it's fairly fundamental that if he were a "third person" then he couldn't have a first party insurance claim or a bad faith claim, as those are exclusive to "first parties." See *Tank v. State Farm*, 105 Wn.2d 381, 393 715 P.2d 1133 (1986). Since Boogaard is not a "third person" then the Access Agreement is not an "insured contract," thus the Exclusion A(2) applies.

Mr. Boogaard tries to get around this by trying to convince the Court to rewrite the policy language. He wishes that the

paragraph 9(f) clause included the words “any person” instead of “third person,” then it would have read as follows:

f. That part of any other contract or agreement pertaining to your business...under which you assume the tort liability of another [Northland] to pay for “bodily injury”...to any person or organization.

But the policy doesn't say “any person,” it says “*third person*.” It is black letter law that a Court may not rewrite a contract because one party does not like the terms agreed to. The contract is to be interpreted as it is written, not how Mr. Boogaard wishes it were written. See *E-Z Loader Boat Trailers Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 907 (1986).

2. The IMU Policy Is Not a First Party Liability Policy and The Four Corners of the Contract Cannot Be Ignored Merely Because the Insured now Wishes to Be Considered a Third Party

The objectively intended purpose of any third party liability policy is to cover third party liabilities, not to cover first party liabilities by pretending the guy who purchased the insurance in the first place is somehow a “third party.” However, that's exactly the fiction Mr. Boogaard appears to urge the court to embrace here.

The policy is very clear that it intends to be a liability policy. Examination of the 4 corners lead to the inescapable conclusion

that it objectively intends to cover liabilities of its insured's but not first party injury claims by ABCD or its owners, employees, directors, etc. in Section II A 4 (a-e). These are:

Notwithstanding anything to the contrary contained in this policy, it is hereby understood and agreed that this policy is subject to the following exclusions and that this policy shall not apply to:

4. a. Any liability of whatsoever nature of the insured, whether you may be liable as an employer or in any other capacity whatsoever, to any of your "employees", including but not limited to any liability under any Workers' Compensation Law, Unemployment Compensation Law, Disability

MARINE UNDERWRITERS/CONFREACOM INSURANCE

Benefit Law, United States Longshoremen's & Harbor Workers' Compensation Act, Jones Act, Death on the High Seas Act, General Maritime Law, Federal Employers' Liability Act, or any similar laws or liabilities, and/or whether by reason of the relationship of master and servant or employer and employee or not.

- b. Any liability of whatsoever nature of the insured to the spouse, child, parent, brother, sister, relative, dependent or estate of any of your "employees" arising out of the "bodily injury" and/or "personal injury" to said "employees", whether you may be liable as an employer or in any other capacity whatsoever.
- c. Any liability of whatsoever nature of the insured to any other party arising out of "bodily injury" and/or "personal injury" to any of your "employees", including but not limited to any such liability for (i) indemnity or contribution whether in tort, contract or otherwise and (ii) any liability of such other parties assumed under contract or agreement.

- d. Any liability of any of your “employees” with respect to “bodily injury” and/or “personal injury” to another of your “employees” sustained in the course of such employment.**
- c. Any liability of whatsoever nature which any of your directors, officers, partners, principals, “employees” or stockholders may have to any of your “employees”.**

CP 114-115.

These exclusions help manifest the clear intent of the policy to be a third party liability policy as opposed to a first party policy covering employee injury claims. Therefore, when it comes to interpreting the definition of "third party" in the insured contract clause, the interpretation needs to be consistent with the intent of the insurance contract itself. All that means is that the court needs to treat Mr. Boogaard as the first party he is, a first party to the Access Agreement and a First Party to the policy. That's the obvious intent of the policy, indeed the intent of any third party liability policy: it covers third party liabilities but not liabilities to oneself.

In a last ditch attempt to get around the policy language, ABCD/Boogaard also attempt to argue that Mr. Boogaard is not a first party because ABCD is the first party and he is a third employee of some sort. However, the 4 corners of the contract

lead to the inescapable conclusion that it objectively intends to cover liabilities of its insured's but not first party injury claims by ABCD or its owners, employees, directors, etc. in Section II A 4 (a-e).¹ CP 114-115. Mr. Boogaard's argument doesn't make much logical sense because it seems to require Mr. Boogaard to be wearing 2 hats, one hat as a first party signatory to the Access Agreement but a third party hat as an ABCD employee. But if that were the case, then the Exclusions at 4(a), (c) and (d) above would apply anyway. CP 114-115. These exclusions manifest the clear intent of the policy to be a third party liability policy as opposed to a first party policy covering employee injury claims.

3. The Case Law Cited By Boogaard Does Not Change the Clear Policy Language and His Expert Testimony About What the Law Should Be Does Not Substitute For what the Policy Says.

The cases cited by ABCD/Boogaard not address this issue of whether Mr. Boogaard is a "third party" or "first party." They all deal with coverage issues where a party has added another as an additional insured, which Mr. Boogaard *did not do*. Boogaard simply ignores this very important distinction in order to try and

¹ To counter this, ABCD/Boogaard offer the briefing by Mr. Sedillo on what he thinks the law is. Mr. Sedillo's legal briefing is just that, dressed up in the guise of "industry usage" to attempt admissibility.

make the case applicable to this fact pattern. For example, *Truck Insurance v. BRE*, 119 Wn. App 582, discusses the applicability of an insured contract where the contractor, WestStar actually went out and got the insurance policy naming BRE as an additional insured under the WestStar policy. The case dealt with in large part the distinction between different insureds under a policy. In that instance, BRE was a first party beneficiary to the Truck Insurance liability policy, so Truck had an obligation to treat BRE as a first party insured. *Truck*, 119 Wn. App. at 589. Consequently, when an independent contractor suffered an injury, the insurer could not deny coverage because the tortfeasor had become a first party insured as an additional insured under the policy and therefore the injured party was a third party to the insured tortfeasor. In the case at bar, the tortfeasor was not an additional insured under the policy. Consequently, Northland was not a first party insured under the IMU contract and therefore Boogaard could not be considered a third party.

John Deere Insurance v. De Smet Insurance, 650 NW.2d 601, (Iowa 2002) *Golden Eagle Insurance Company v. Insurance Company of the West*, 99 Cal. App 4th 837 (2002) and *Garnet Construction v. Arcardia Insurance Co.*, 61 Mass. App. Ct. 705

(2004). stand for the very same proposition. None are relevant to this case because Mr. Boogaard didn't buy the additional insured coverage for Northland.

Furthermore, Sedillo's testimony regarding the distinction between a named insured and an automatic insured is nonsensical and cannot substitute for the policy language. Expert testimony cannot be used to provide legal meaning or interpret the insurance policies as written. See *Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996) (stating that expert testimony is not proper for issues of law because the role of experts is to interpret and analyze factual evidence and not to testify about the law); *Maffei v. Northern Ins. Co. of New York*, 12 F.3d 892, 898-99 (9th Cir. 1993) (holding that an insurance expert's declaration that sulphur dioxide cloud constituted a "hostile fire" as described in insured's policies was improper expert testimony); *Aguilar v. Int'l Longshoremen's Union Local No. 10*, 966 F.2d 443, 447 (9th Cir. 1992) (stating that matters of law are "inappropriate subjects for expert testimony"). Therefore, the Court should view the experts' testimony in this case as only relevant for the facts that they observed and not for their legal conclusions as to what conditions were covered or excluded under the terms of the policy.

McHugh v. United Serv. Auto. Ass'n, 164 F.3d 451, 454 (9th Cir. Wash. 1999); 4 JOSEPH M. MCLAUGHLIN, JACK B. WEINSTEIN & MARGARET A. BERGER, *Weinstein's Federal Evidence* sec. 702.03. (2007) (Stating that "matters of contract interpretation are generally for the finder of fact to decide, and are not an appropriate subject for expert testimony"). Here, Sedillo cannot provide any facts that would demonstrate that IMU ever issued an endorsement or was ever requested to issue an endorsement until after the subject casualty occurred. Furthermore, his testimony cannot change the clear policy language as it relates to the definition of "insured contracts" or the requirements necessary to procure endorsements. Furthermore, his opinion testimony cannot change the policy language, which precludes Boogaard's agent from acting as the agent for IMU or taking any actions on behalf of IMU. His testimony cannot change the facts or rewrite the policy. Consequently, the policy language should require this Court to affirm the trial court in dismissing Boogaard's claims.

- B. **Alliance's Accord Certificates did not modify the IMU insurance policy to make Northland an Additional Insured prior to the forklift accident.**

The insurance contract is to be enforced according to its terms, "no different than any other contract." *Carew, Shaw and Bernasconi, Inc. v General Casualty Co*, 189 Wash. 329, 336-337 (1937). It is Washington law that a party to a contract "will not be heard to declare that he did not read it, or was ignorant of its contents." *H.D. Fowler v. Warren*, 17 Wn.App. 178, 180 (1977), quoting *Perry v. Continental Insurance Co.*, 178 Wash 24 (1934).

"...It is the general rule...that a party to a contract...will not be permitted to urge that he did not read it and that he was ignorant of its contents and supposed them to conform to what he had agreed with or represented to the adverse party or his agent."

Perry, 178 Wash at 28.

One cannot "bring into existence a contract not made by the parties and create a liability contrary to the express provisions of the contract the parties did make." *Carew*, 189 Wash at 335. IMU never provided any certificate of insurance to Northland, nor did IMU authorize naming Northland as an additional insured. They did not do so because they were never asked to. In fact, IMU specifically confirmed that there would be no additional insureds named to the policy at the outset of binding coverage. If Alliance did something on their own, then Boogaard's issues are with

Alliance, not IMU, as IMU never made any representations to Boogaard about endorsements for further coverage.

Under Washington law, the insurance broker is the agent of the insured, not the insurer. *AAS/DMP v. Accordia Northwest*, 115 Wn. App. 833, 839 (2003).

Since the IMU policy didn't include coverage for Northland, however, ABDC tries to bootstrap a modification by declaring that its own broker, Alliance was IMU's *actual or apparent* agent and thus the false certificates ABCD's broker issued are imputed to IMU and modify the IMU policy. This is where Boogaard/ABDC's claims fail for a lack of evidence. In order to establish *actual authority*, a party must show the existence of an actual agreement granting the agent authority to act. *DLS v. Maybin*, 130 Wn. App 94, 98 (Div. I 2005). This is consistent with the IMU-Alliance contract, which provided that Alliance *was not* IMU's actual agent or representative.

The Broker is not an employee, authorized representative or agent of the company, but is an independent contractor for all purposes and in all situations. The Broker shall not in any manner represent that it is an employee, authorized representative or agent of the Company;

CP 366-367 (Exhibit 5A, to Balint Declaration). *Apparent authority* can be inferred only from *acts of the principal*, which

cause the third party to “actually, or subjectively, believe that the agent has authority to act for the principal.” *Maybin* at 101. Indeed, the rule that, in the determination of the question whether an agent acts within the apparent scope of his authority, the acts of the principal alone and not the acts of the agent are to be considered, needs no citation of sustaining authority. *Codd v. New York Underwriters Ins. Co.*, 19 Wn.2d 671, 680 (Wash. 1943) The subjective belief must also be objectively reasonable in order to support justifiable reliance by the third party upon the representations made by the principal. *Maybin, at 101*. There is absolutely no evidence in the record that IMU took any acts, which would allow Boogaard to claim that he believed that IMU gave apparently authority for his broker to issue endorsements to his policy. Alliance understood that it was Boogaard’s agent and not IMU’s. There are no documents or testimony supporting a claim that IMU agreed to have an additional insured named to the policy until after the accident and in fact the documents in the case demonstrate that no additional insured had been requested.

- 1. No Evidence Was Submitted to Support a Claim That IMU Gave Express Or Apparent Authority to Alliance to Issue Policy Endorsements**

Alliance is Boogaard's agent not IMUs. The policy states this very clearly. Furthermore, all the acts of Alliance were taken on behalf of Boogaard and not IMUE. Here, ABCD never identified any acts of IMU, the putative principal, towards Mr. Boogaard from which one could infer that Alliance was IMU's agent as opposed to Mr. Boogaard's agent. Additionally, the certificates themselves clearly state that they do not "Amend, Extend or Alter" coverage of the policy itself, so any reliance to the contrary would not be objectively reasonable.²

Furthermore, objectively reasonable belief should be demonstrated through the acts of IMU, not the 'expert' opinion of Mr. Sedillo (an insurance broker) about what the law should be. As the case law cited above demonstrates, Mr. Sedillo 's testimony should be limited to the facts, and not what he believes the legal conclusions of the policy should be. Mr. Sedillo could point to no acts of IMU, which would justify any belief that Alliance was the agent of IMU as opposed to his agent. Mr. Sedillo's declaration on "industry usage" does not create facts, and does not state the law. In his declaration he proclaims to know what Boogaard, IMU and Alliance all "believed" regarding "certificates of Insurance" provided

² CP 333-335 Excerpt of Exhibit 3 to Balint Declaration.

by Alliance to Boogaard. Subjective belief cannot provide coverage under apparent authority when it is not based upon any act by IMU to grant apparent authority. Boogaard is simply making the allegations up in hopes that an expert opinion on what he believes is industry standard, can attribute acts to IMU when IMU itself took no such acts. Mr. Sedillo explains his mandate at paragraph 3, when he says he was asked to opine on the legal meaning of the "insured contracts" clause in the contract. However, this is the precise legal issue for the court to determine. Expert testimony is not proper for determining issues of law in contracts. *Crow Tribe v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996). "Experts interpret and analyze factual evidence, they do not interpret the law." *Id*, citing *US v. Brodie*, 868 F.2d 492, 496 (9th Cir. 1988).

IMU at all times acted in conformity with the policy and never took any the affirmative acts Mr. Sedillo claims other insurance companies do. The trial court properly understood that merely opining upon what he believes insurance companies do cannot substitute for actual admissible facts to support an apparent authority claim. The apparent authority argument failed below and it should fail here as Boogaard/ABDC failed to present any

admissible evidence to show that IMU gave Alliance any authority to add Naknek as an additional assured under the policy prior to the forklift accident.

C. IMU never cancelled Boogaard's Policy; IMU never issued an Endorsement naming an additional Insured until it was asked to do so after the Injury

Boogaard in one of his many failed approaches to obtain coverage also claims that IMU must provide coverage for Naknek/Northland as an additional insured because IMU failed to inform Boogaard it was cancelling the additional insured endorsement. This argument has no basis in fact. IMU never added Northland/Naknek as an additional insured because it was never asked to do so. As stated in the Cox declaration, which contained the correspondence between IMU and Alliance in the initial purchase of the policy, no additional insured were to be named. As set forth in the statement of facts, in a letter to Alliance dated April 11, 2000, IMU specifically confirmed the following: ***"You have also confirmed the assured will not be using any subcontractors or require any additional insured's on the policy."*** CP 92. So there is simply no basis for Boogaard to argue that IMU supplied an endorsement and then suddenly cancelled it. No such endorsement ever existed to cancel at any point.

Boogaard's citation of *McGreevy v. Oregon Mutual Insurance Company*, 141 Wn. App. 858 (1994), consequently, is irrelevant. That case dealt with whether an insurer can change a policy without notice to the insured. That situation never occurred here, because IMU never changed the policy. Boogaard is simply making the allegation up. If he believes that he had requested Northland be named as an additional insured, his claims are proper against Alliance, his broker and agent, as opposed to IMU.

D. Bad Faith Allegations Do Not Change The Insurance Contract To Cover A Claim That Is Not Covered By The Contract.

When Northland counter-claimed against Boogaard for attorneys fees and costs for his failure to obtain proper coverages under the access agreement, IMU agreed to defend the claim under a reservation of rights. For Boogaard to claim in this instance that his rights were prejudiced by IMU agreeing to provide a defense is beyond the pale. As Boogard and his counsel know, the initial claim investigation determination proved difficult. On one hand, IMU was fairly certain that the Access Agreement was not an "insured contract" within the scope of coverage under the policy. However, in the short amount of time, IMU was unable to identify any case authority "on point" with this specific clause, thus IMU had

to consider that a court could, possibly, rule another way. Additionally, there was the issue with whether Northland was indeed an "Additional Insured." Again, IMU's file was fairly clear and IMU was fairly certain that Northland was not an Additional Insured, but it appeared that Alliance had issued unauthorized Accord Certificates predating the accident that, at the time, were inexplicably and incorrectly listing Northland companies as Additional Insured's on the IMU policy.

Thus, IMU concluded that there was *probably* no coverage under the policy, either through the "insured contract" avenue or the "additional insured" avenue, but it was not unimaginable that facts might subsequently arise in the *Boogaard v. Northland* litigation that could change this preliminary decision. Therefore, consistent with the rules in the *Truck Insurance v. VanPort Homes*, 147 Wn.2d 751, 761, 58 P.3d 276 (2002) line of cases IMU determined that it was obliged to defense under a reservation of rights.

Indeed, An insurer's duty to defend is broader than its duty to indemnify. *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wash.2d 55, 64, 1 P.3d 1167 (2000). The duty is one of the main benefits of the insurance contract. *Safeco Ins. Co. v. Butler*, 118 Wash.2d 383, 392, 823 P.2d 499 (1992). The duty to defend arises at the time an

action is first brought, and is based on the potential for liability. See *Holland Am. Ins. Co. v. Nat'l Indem. Co.*, 75 Wash.2d 909, 911-12, 454 P.2d 383 (1969). The duty to defend "arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage." *Unigard Ins. Co. v. Leven*, 97 Wash.App. 417, 425, 983 P.2d 1155 (1999). Only if the alleged claim is clearly not covered by the policy is the insurer relieved of its duty to defend. *Kirk v. Mt. Airy Ins. Co.*, 134 Wash.2d 558, 561, 951 P.2d 1124 (1998) (citing *State Farm Gen. Ins. Co. v. Emerson*, 102 Wash.2d 477, 687 P.2d 1139 (1984)). If the complaint is ambiguous, it will be liberally construed in favor of triggering the insurer's duty to defend. *R.A. Hanson Co. v. Aetna Ins. Co.*, 26 Wash.App. 290, 295, 612 P.2d 456 (1980)."

Additionally, IMU had to consider the option of seeking a declaratory judgment at the time, but determined that it would have been inappropriate to do so while the underlying litigation was pending, had to be concerned that such a proceeding could, possibly, prejudice Mr. Boogaard's case in chief against Northland. IMU weighed the benefits to Mr. Boogaard of resolving this issue in a declaratory action, verses the potential harm such a case could

cause to Mr. Boogaard's interests in his underlying case against Northland, and decided it was inappropriate to proceed with a declaratory action at that time. Furthermore, IMU recognized that there was a case pending before the Washington Supreme Court at that time on exactly the same issue. It was argued in June 2007 and several months later the Court announced its decision in *Mutual of Enumclaw Insurance Company v. Paulson Construction*, 161 Wn.2d 903 (Oct.11, 2007) confirming this rule: "While defending under a reservation of rights, an insurer acts in bad faith if it pursues a declaratory judgment that it has no duty to defend and that "action might prejudice its insured's tort defense." THOMAS V. HARRIS, WASHINGTON INSURANCE LAW § 14.2, at 14-4 (2d ed.2006). Indeed, it was believed possible at the time, by both IMU and Mr. Fox, that Mr. Boogaard would prevail against the Northland counterclaims, at which point the coverage dispute between he and IMU would become moot.³

Therefore, on March 4, 2007 IMU issued a letter reserving rights under the policy and offering to provide a defense *and* waive

³ It appears that Mr. Fox misinformed Mr. Boogaard about IMU's position, leading Mr. Boogaard to believe IMU denied coverage outright. *Boogaard dep. at 130:4-11.*

the deductible. IMU appointed Louis Shields to defend, under the direction of Mr. Boogaard's primary attorney Mr. Fox.

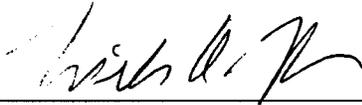
Over the next year of litigation, Mr. Shields worked aggressively with and under the direction of Mr. Fox to try to defeat the Northland Counterclaims. *See Shields Declaration.* Mr. Shields billed IMU \$36,939.50 in fees for his work representing Mr. Boogaard. *Id.* Mr. Boogaard thought Mr. Shields did a good job, and he certainly had no complaints about the quality of his work. His only complaint was that he lost, ultimately. So for Boogaard to claim some form of prejudice is a severe stretch and demonstrates the lengths he will now go to create coverage where none simply exists.

E. CONCLUSION

This is a tragic case, but one of Appellant's own making. There is no language in the IMU policy that provides coverage in this case, and IMU was never requested to, nor did it add any additional insureds to the Appellants' policy until after the unfortunate forklift accident. Any complaints Boogaard has relating to the coverage of his insurance should rightly lay with Boogaard and his agent – Alliance. The decision of the trial court should be affirmed and the case dismissed.

DATED this 25st day of April 2010.

MORAN WINDES & WONG, PLLC

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on April 25, 2011, service of a true and complete copy of the foregoing Respondent's Brief was made on the attorneys of record herein by a) sending the same to said attorneys electronically by email and by messenger.

DATED this 25th of April, 2011.

MORAN WONG & KELLER

/s/ William Keller 

William Keller, WSBA # 29361

Moran Wong & Keller

Attorney for