No. 90617-3

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON STATE COURT OF APPEALS
DIV. I
NO. 70143-6-I

WESTERN NATIONAL ASSURANCE COMPANY,
a Washington Corporation,
Respondents,

v.

SHELCON CONSTRUCTION GROUP, LLC, a Washington
Limited Liability Company,
Petitioner/Appellants.

PETITIONER'S REPLY

Lawrence B. Linville, WSBA # 6401
Linville Law Firm, PLLC
Attorney for Petitioner/Appellant
800 5th Avenue, Suite 3850
Seattle, WA 98104
(206) 515-0640

ORIGINAL

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ... iii

I. WNAC ANSWER ... 1

II. CONCLUSION ... 8

TABLE OF AUTHORITIES

CASES

Woo v. Fireman's Fund Insurance Company, 161 Wn.2d 43 (2006)........7

STATUTES

RCW 18.27.050..8

OTHER SOURCES

Couch On Insurance, 3D, §129:20, Work in Progress Exclusions............7

I. WNAC ANSWER

Western National Assurance Company ("WNAC") submitted a lengthy answer to Shelcon Construction Group, LLC's ("Shelcon") petition for review ("Answer"). WNAC's Answer simply argues that the Court of Appeals ***could*** have rejected Shelcon's claim for any number of reasons. However, the Court of Appeals' published decision ("Decision") rejected Shelcon's claim for one reason alone. The singular reason stated by the Court of Appeals was the following:

> "Because the alleged consequential damages arose out of Shelcon's operations on the site, we hold the unambiguous language of exclusion j(5) bars coverage, and affirm."
>
> (Decision ¶ 8-9)

The Decision was an incorrect interpretation of the CGL policy purchased by Shelcon. But more importantly for purposes of the Supreme Court's accepting or rejecting Shelcon's petition for review, the Decision has a far reaching negative application to registered contractors, insurers, the public, and the State of Washington. This case represents the metaphorical stone dropped into the center of the still pond. WNAC does not address the significant public interest of Shelcon's Petition for Review other than stating as follows:

> "This matter involves the application of an insurance policy to faulty construction work that has limited interest to and effect on public policy considerations"
>
> (Answer ¶ 1).

Instead, WNAC simply reargues its position that WNAC's CGL policy provides ***other*** bases for rejecting Shelcon's claim. But, the Court of Appeals decided Shelcon's claim on only one basis. Shelcon identified this basis in its petition for review, this singular basis as follows:

> "The issue presented for review is whether the J(5) exclusion of the standard Commercial General Liability insurance ("CGL") collectively applies to both the initial damage or injury to the particular part of property upon which the insured was performing operations ***and*** the consequential damage resulting from the insured's damage to the "particular part"".
>
> (Petition for Review ¶ 1)

WNAC similarly identifies the singular basis for rejecting Shelcon's claim as follows:

> "The exclusion applies to prevent coverage for the alleged harm to real property arising from or arising out of the ongoing operations of Shelcon"

Again, the Decision below was singular.

> "Because the alleged consequential damages arose out of Shelcon's operations on the site, we hold the unambiguous language of exclusion j(5) bars coverage, and affirm."
>
> (Decision ¶ 8-9)

The Decision was incorrect because the Court of Appeals interprets Shelcon's CGL policy and reads "particular part" out of the J(5) exclusion. This was addressed in Shelcon's petition for review.

Neither the Court of Appeals nor WNAC give any meaning or effect whatsoever to the "particular part" language of the J(5) Exclusion. The Court of Appeals' Decision and WNAC's interpretation of their own policy simply rewrite the J(5) exclusion from

> J. Damage to Property
> "Property damage to:...
>
> (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

to

> J. Damage to Property
> "Property damage to:...
>
> (5) ~~That particular part of~~ real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

Moreover, the Court of Appeal's Decision is based upon an interpretation of Shelcon's CGL policy that favors the insurer, WNAC. However, this is a duty to defend case. This is not a declaratory judgment action brought my WNAC to determine coverage. This was and remains a duty to defend case. Neither WNAC nor the Court of Appeals may apply an interpretation to the CGL policy that favors the insurer's interests over those of the insured's. The rule regarding the duty to defend is broader than the duty to indemnify. If a complaint is ambiguous (which A-2 Ventures, LLC's complaint was not), the court must construe the

complaint liberally in favor of triggering the insurer's duty to defend. The Complaint of A-2 Ventures, LLC alleged as follows:

> "The employees of defendant removed the settlement markers without the knowledge of the plaintiff or plaintiffs' engineers and continued to install fill on top of the area. This made it impossible to accurately measure the settling. There was ***therefore*** a total failure to meet the geotechnical requirements of the job ***so that the property could be used to construct improvements on. When defendant's said negligent actions had been discovered, the cost and time of remedying the errors was impractical. The said actions of defendant reduced the value of the property substantially***."
>
> (emphasis supplied)

Clearly, A-2 Ventures, LLC alleged that the removal of settlement markers (the "particular part") with consequential loss of use ("so that the property could be used to construct improvements on") of A-2 Venture, LLC's 11.2 acres.

Shelcon's CGL policy defined property damage as follows:

> **a.** physical injury to tangible property, including all ***resulting loss of use*** of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; ***or***
>
> **b.** ***loss of use*** of tangible property that is ***not*** physically injured. All such loss of use shall be deemed to occur at the time of the occurrence that caused it.
>
> (emphasis supplied)

It is hard to tell, but it may be that the Court of Appeals has confused A-2 Venture, LLC's loss of use of their property as a result of Shelcon's removal/damage to the settlement marker (particular part). On pg. 8 of the Decision, the Court of Appeals states as follows:

> "Here as in Vandivort and Schwindt, A-2 alleged defective performance by Shelcon in removing the settlement markers resulted in consequential damages to the entire site. Specifically the reduction in value of the property from $8,550,000 to $6,412,500."

But, reduction in value is simply the monetary measure of the property damage (i.e. loss of use of A-2 Venture, LLC's 11.2 acres for the purpose of constructing homes built upon conventional foundations). A-2 Venture, LLC measured its loss of use by asserting a measure of damages. The measure of damage is not the property damage itself. The property damage is the loss of use. The damages claimed were a monetary measure of the loss of use. The monetary damages are ***not*** the consequential damages arising out of a removal or destruction of settlement markers. It was the ***loss of use*** that was the consequential damages. Both WNAC and the Court of Appeals has interpreted the Complaint of A-2 Venture, LLC and the CGL policy in such a way that favors the insurer. This, they cannot do.

The Court of Appeals' Decision in this case will result in no coverage whatsoever for property damage caused by contractors in the State of Washington if that property damage arises out of "operations at

the site". The Court has to ask, where else would the property damage occur if it did not occur at the site and arise out of the contractor's operations?

The Court of Appeal's Decision clearly impacts a significant public interest shared by registered contractors, the public, the insurance industry, potential claimants, and the State of Washington then enacted RCW 18.27.050 for the apparent purpose of providing insurance for property damage sustained by members of the public who contract with registered contractors.

Moreover, the Court of Appeal's Decision consistently refers to Shelcon "removing" the settlement markers. But, after WNAC refused to defend, Shelcon took Haymond's deposition in which Haymond stated that the trucking companies hired by Shelcon ***destroyed*** the settlement markers by running over them. A copy of this deposition was provided to WNAC who again refused to defend Shelcon. So, WNAC was provided not only A-2 Venture, LLC's Complaint, but also the deposition of the owner of A-2 Venture, LLC. The owner, Scott M. Haymond testified at the deposition that it was the trucking companies that destroyed the settlement markers. The settlement markers were the "particular part" that was damaged. A-2 Venture, LLC did not sue for compensation for damage to the settlement markers, the "particular part". Rather, A-2 Venture, LLC sued Shelcon for the secondary damage; namely the loss of

use of A-2 Venture, LLC's 11.2 acres for the purpose of constructing homes built upon conventional foundations.

The duty to defend is triggered if the insurance policy "conceivably" covers the allegations in the complaint whereas the duty to indemnify exists only if the policy actually covers the insured's liability. *Woo v. Fireman's Fund Insurance Co.*, 161 Wn.2d. 43 (2006).

In this case, if Shelcon is correct (and Shelcon is correct in this case) that the words "particular part" have legal significance and cannot be read out of Shelcon's CGL policy based upon an interpretation applied by WNAC and affirmed by the Court of Appeals, then WNAC had the duty to defend Shelcon (which they refused to do).

If the Decision below is supported by settled precedent, then Shelcon's petition for review should be denied. Further, if the decision below is inconsistent with settled precedent but presents no issues in involving a significant public interest, then Shelcon's petition for review should also be denied. But, in this case, the Decision of the Court of Appeals does not give effect to the insurer's duty to defend ***and*** it is contrary to precedent in the State of Washington, every other jurisdiction that has considered the J(5) exclusion, and contrary to the well noted authority, COUCH ON INSURANCE, 3D, §129:20, Work in Progress Exclusions.

The significant public interest involved in this case is the interest of:

(1) all CGL insurers going business in the State of Washington,

(2) all registered contractors doing business in the State of Washington,

(3) all members of the public who are potential claimants for property damage for which contractors are insured under their CGL policies as mandated by RCW 18.27.050, and

(4) the State of Washington itself, that must have intended RCW 18.27.050 that registered contractors provide proof of insurance as a condition of registration covering their operations at the site.

II. CONCLUSION

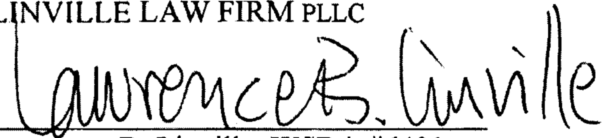
This is a case where both WNAC, the trial court, and the Court of Appeals have chosen a reading and interpretation of Shelcon's CGL policy that favors the insured rather than focusing on the allegations of the Complaint and the deposition of Scott M. Haymond that were each provided by Shelcon to WNAC before WNAC refused (for the second time) to honor its duty to defend. The interpretation should have gone the other way: to the insured.

Equally important, this is a case of significant public interest.

Shelcon respectfully request the Court to accept review of this case.

DATED this 3rd day of September, 2014.

LINVILLE LAW FIRM PLLC



Lawrence B. Linville, WSBA #6401
David E. Linville, WSBA #31017
Attorneys for Petitioner
Shelcon Construction Group, LLC

CERTIFICATE OF SERVICE

Kristen Wayman declares as follows:

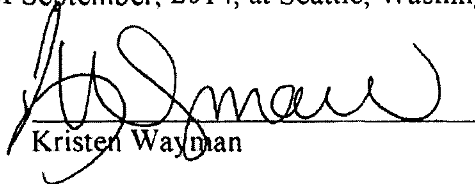
1. I am now and at all times herein mentioned a citizen of the United States, a resident of the State of Washington, over the age of 18 years, not a party to or interested in the above-referenced action, and competent to be a witness therein.

2. On the 3rd day of September, 2014, I served a copy of *Shelcon Construction Group, LLC's Reply* via personal delivery on counsel as follows:

Counsel for Respondent:
Forsberg & Umlauf, P.S.
Attorneys at Law
901 Fifth Ave, Suite 1400
Seattle, WA 98164

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated this 3rd day of September, 2014, at Seattle, Washington.



Kristen Wayman

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From: Kristen Wayman [mailto:KristenW@linvillelawfirm.com]
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To: OFFICE RECEPTIONIST, CLERK
Cc: Kristen Wayman; Larry Linville
Subject: WNAC v. Shelcon, No 90617-3, COA No. 70143-6-I

Good morning –

Please see the attached Reply with regard to the above referenced cause and file in your customary manner.

Please let counsel for petitioner, Larry Linville (copied here) or myself know if anything further is needed from petitioner at this time.

Respectfully,

Kristen Wayman
Paralegal To Lawrence B. Linville
Linville Law Firm PLLC
800 5th Avenue, Suite 3850
Seattle, WA 98104
Tel: (206) 515-0640
Fax: (206) 515-0646