

No. 65299-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ATLANTIC CASUALTY INSURANCE COMPANY,
Plaintiff/Appellant

v.

SALMON BAY PLUMBING, REMODELING & HEATING, INC.
Defendant/Respondent

APPELLANT'S OPENING BRIEF

GORDON THOMAS HONEYWELL LLP
Joanne Thomas Blackburn,
Michelle A. Menely
Attorneys for Appellant

Suite 2100
600 University Street
Seattle WA 98101
(206) 676-7500
WSBA No. 21541
WSBA No. 28353

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A. ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it allowed Salmon Bay to oppose Atlantic Casualty's Motion for Summary Judgment despite Salmon Bay never filing an Answer to the Complaint.

2. Whether the trial court erred in ruling on Salmon Bay's Motion for Summary Judgment when it was never re-noted for hearing.

3. Whether the trial court erred in ruling that coverage was triggered under the entire insurance policy when that issue was never properly raised.

4. Whether the trial court erred when it determined, as a matter of law, that coverage by estoppel should be imposed against an insurer without even an allegation of bad faith on the part of the insurer and when the issue of coverage by estoppel was not an argument presented by the parties and, therefore, not briefed or argued.

5. Whether the trial court erred when it determined, as a matter of law that an ambiguity existed in an insurance policy when the trial court failed to consider extrinsic evidence as to the meaning of the relevant term.

6. Whether the trial court erred by taking judicial notice of a fact that does not exist.

7. Due to the erroneous ruling by the trial court, whether *Olympic Steamship* fees should not have been awarded.

B. STATEMENT OF RELEVANT FACTS

1. Introduction/Procedural Background.

On or about October 3, 2008, Atlantic Casualty Insurance Company ("Atlantic Casualty") received a tender of defense of a lawsuit filed by Northwood Parkway, LLC ("Northwood") against Salmon Bay Plumbing, Remodeling and Heating, Inc. ("Salmon Bay").¹ After investigating the claim, Atlantic Casualty issued a reservation of rights letter to Salmon Bay listing all the potential exclusions and other policy language that could be a basis for Atlantic Casualty to deny the tender.² Atlantic Casualty identified that it retained defense counsel for Salmon Bay and provided the contact information for the defense counsel.³ Subsequent to providing defense counsel for Salmon Bay, Atlantic Casualty filed a Declaratory Relief Action against both Salmon Bay and Northwood on or about March 20, 2009.⁴ Atlantic Casualty based its Declaratory Relief Action on only one of the exclusions included in Atlantic Casualty's Insurance Policy Number L071002466-0, (the

¹ CP 355.

² CP 357-372.

³ CP 371.

"Policy"), the exclusion entitled "Condominiums, Townhomes, Townhouses, Apartments, Tract Houses" related to "new construction" (the "New Construction Exclusion").⁵ Soon thereafter, on or about April 2, 2009, Northwood filed a Notice of Appearance,⁶ as did Salmon Bay.⁷ Northwood filed an Answer to the Complaint on or about April 15, 2009, failing to identify any Affirmative Defenses and under its Prayer for Relief, **specifically not seeking** declaration of coverage under the Policy.⁸ As of the date of the filing of this brief, Salmon Bay has yet to file an Answer to the Declaratory Relief Action. Soon thereafter, Northwood filed a Motion for Summary Judgment seeking a declaration as to whether the claims it was pursuing against Salmon Bay were excluded under the New Construction Exclusion of the Policy.

In bringing the motion, Northwood⁹ correctly framed the issue at-bar was whether an exclusion for work performed on condominiums or multi-family dwelling applied as that was the sole grounds raised by Atlantic Casualty in the Declaratory Relief Action. In responding to the

⁴ CP 405-414.

⁵ CP 409-414, at 411.

⁶ CP 399-400.

⁷ CP 396-398.

⁸ CP 393-395.

⁹ Notably, Atlantic Casualty's insured, Salmon Bay, did not file a motion or even join in Northwood's motion.

motion, Atlantic Casualty cross-moved.¹⁰ In doing so, Atlantic Casualty stated:

The [policy at issue] provided for coverage occurring during the policy period subject to certain exclusions, **including**¹¹ the following . . . :¹²

By the time of the date originally set for hearing oral arguments on the cross-motions, Salmon Bay had not joined Northwood's motion and, notably, had not opposed Atlantic Casualty's motion. In fact, Salmon Bay had not filed an Answer to the lawsuit. Thus, Atlantic Casualty determined that the best course of action would be to have an unopposed motion and, on the morning originally set for hearing, orally moved for non-suit for its claims against Northwood Parkway.¹³ On or around 9:30 a.m. on November 25, 2009, the trial court ordered briefing as to the propriety of the non-suit and, in doing so, noted that if Northwood were dismissed that the court **could rule** on Atlantic Casualty's "Motion for Summary Judgment without oral argument **as it is unopposed.**"¹⁴ The

¹⁰ CP 373-386.

¹¹ By using the term "including," Atlantic Casualty indicated that more than one exclusion could apply.

¹² CP 376.

¹³ CP 192 and CP 193.

¹⁴ CP 192 (emphasis added) and CP 193.

court further noted that if Northwood was not dismissed that the **parties** would then need to re-note the cross-motion(s).¹⁵

In the afternoon of November 25, 2009, after the trial court entered its decision, Salmon Bay filed a Joinder in Northwood's Motion for Summary Judgment and Opposition to Plaintiff's cross motion.¹⁶ On December 14, 2009, the trial court dismissed Northwood as a party defendant and, in doing so, issued a written order pertaining to the non-suit, stating that Northwood was no longer a party to the action. The court further stated that if Atlantic Casualty sought to have a decision on **its** motion, that Atlantic Casualty should "re-note the matter for hearing. . . ."¹⁷ Finally, the court noted that by the time of original hearing on Atlantic Casualty's motion, that Atlantic Casualty's insured, Salmon Bay, had not joined Northwood's motion and had not submitted an opposition to Atlantic Casualty's motion. *Id.* Thus, the court questioned whether it would permit Salmon Bay to do so and specifically stated that that issue "must be determined on the Civil Motions Calendar at or before the time

¹⁵ Specifically, the court stated "If Northwood Parkway remains a defendant because the Court does not dismiss them, the **parties** agree to re-note before a judge." CP 192 (emphasis added).

¹⁶ CP 190-191.

¹⁷ CP 160; 157-159.

of any re-noted Summary Judgment, so that all parties can be heard on that issue."¹⁸

On December 23, 2009, Atlantic Casualty re-noted its motion for January 21, 2010.¹⁹ Salmon Bay never submitted a motion seeking permission to file a joinder and/or to file a late opposition to Atlantic Casualty's motion, nor did it file an Answer to the Complaint. Instead, Northwood's counsel, Hans Juhl, simply appeared at the January 21, 2010, hearing with a "notice of limited appearance" on behalf of Salmon Bay.²⁰ However, notably, Mr. Juhl, who was at that point appearing as Salmon Bay's "limited" counsel, did not file or re-note a motion for summary judgment on Salmon Bay's behalf. Instead, Northwood appeared "for the limited purpose of defending Plaintiff ATLANTIC CASUALTY INSURANCE COMPANY'S motion for summary judgment filed herein".²¹ Thus, the **only** issue before the court at the time of hearing on Atlantic Casualty's Motion for Summary Judgment was whether Atlantic Casualty's Motion for Summary Judgment seeking a declaration of no coverage based upon the New Construction Exclusion in the Policy should

¹⁸ CP 157-159.

¹⁹ CP 155-156.

²⁰ CP 152-153.

²¹ CP 152.

be granted. The trial court took the matter under advisement.²² On February 4, 2010, the trial court issued its ruling.²³ In doing so, the court unilaterally determined that the definition of "new construction" as contained in the City of Cheney Municipal Code provided the "common understanding" of the term "new construction."²⁴ Because the court determined the issue of "new construction" on its own unilateral determination of the meaning of "new construction," and because neither party had addressed this issue, Atlantic Casualty brought a motion for reconsideration on or about February 12, 2010.²⁵ The trial court denied the motion for reconsideration on March 1, 2010.²⁶

Thereafter, Northwood/Salmon Bay sent a draft proposed Order.²⁷ In doing so, Northwood contended, for the first time, that the trial court decreed coverage was implicated.²⁸ Because the breadth of the order was too broad, Atlantic Casualty opposed and, in doing so, pointed out that the language of the proposed order – that coverage was implicated under the

²² CP 154.

²³ CP 147-151.

²⁴ CP 147-151 at 148.

²⁵ CP 137-143.

²⁶ CP 93-97.

²⁷ CP 33-36. The proposed order was not filed with the court. However, the signed order was identical to the proposed order.

²⁸ CP 33-36.

Policy – was not the issue briefed or argued in the motion.²⁹ The trial court nonetheless entered the order as proposed by Northwood/Salmon Bay.³⁰

The trial court erred in determining issues that were not before it – it not only denied Atlantic Casualty's motion but, instead, ruled that coverage was implicated under the Policy.³¹

2. Substantive Background.

On September 18, 2006, Salmon Bay entered into a contract with Northwood in which Salmon Bay agreed to "complete all plumbing rough in and trim work on real property located at 23015 Edmonds Way, Edmonds, Washington."³²

The project upon which Salmon Bay agreed to perform work is an apartment complex that Northwood was in the process of converting to a multi-unit condominium complex that became known as the Sequoyah Condominiums.³³ The work performed and/or to be performed by Salmon Bay was extensive in nature and included:

1. Rough in 149 washing machines including supply box
2. Rough in 24 shower units

²⁹ CP 84-90.

³⁰ CP 33-36 and CP 37

³¹ CP 33-36.

³² CP 212-215 at 213.

³³ CP 217-226.

3. Rough in 66 bath tubs and valves
4. Rough in 132 water closets
5. Rough in 66 second bathroom sinks
6. Rough in 149 ice maker line
7. Change 107 kitchen sink vents
8. Trim; 215 vanity sinks, tub/showers/ water closets,
9. Trim: 149 tubs, kitchen sinks/disposer, dishwashers, water heaters
10. Call for all inspections [by G.C.].³⁴

The "firm fixed price" cost for Salmon Bay's work on the subject project was \$441,325.00.³⁵

According to Northwood, Salmon Bay's work on the Sequoyah Condominiums was deficient in a number of respects and the deficiencies allegedly caused "catastrophic" property damages to the various buildings comprising the Sequoyah Condominiums.³⁶ Consequently, on September 11, 2008, Northwood commenced an action entitled *Northwood Parkway LLC v. Salmon Bay Plumbing Remodeling & Heating, Inc., et. al.*, under

³⁴ CP___ (Sub No. 12, Declaration of Dirk Bouwer in Support of Defendant Northwood Parkway, LLC's Motion for Summary Judgment, pgs. 22-25). (Atlantic Casualty filed a Supplemental Designation of Clerk's Papers on August 6, 2010, so as to designate Northwood's Motion and supporting documents. The supplemental materials have not yet been transmitted to this Court and CPs are not currently available. Thus, references to the supplemental materials are by document title and, when available, page number.)

³⁵ *Id.*, pg. 23.

³⁶ CP 212-215.

King County Superior Court Cause No. 08-2-31396-4 SEA (the "Underlying Lawsuit").³⁷

Salmon Bay tendered the defense and indemnity of Northwood's claims against it under the provision of the Policy.³⁸ In response, Atlantic Casualty began providing a defense while reserving its right to deny a defense or indemnity for some or all of the claims. During its initial investigation of the claims and tender³⁹ Atlantic Casualty learned that the property located at 23105 Edmonds Way, Edmonds, Washington, was an apartment being completely gutted so it could be converted into a condominium complex and, thus, that the claims being asserted were excluded under the terms of the Policy.⁴⁰

Upon investigating the Underlying Lawsuit, and tender, Atlantic Casualty learned the claims against Salmon Bay arose out of the new construction of a condominium project. Based upon this information, Atlantic Casualty filed the present action seeking a declaration that there is no coverage based upon the New Construction Exclusion under the Policy for the claims made by Northwood for property damage allegedly sustained at the Sequoyah Condominiums.

³⁷ *Id.*

³⁸ CP 355.

³⁹ CP 357-372.

⁴⁰ *Id.*

3. The Policy and the New Construction Exclusion.

Atlantic Casualty issued the Policy to Salmon Bay with effective dates of July 1, 2007 through July 1, 2008. The Policy was terminated on December 19, 2007. The Policy provided for coverage occurring during the policy period subject to certain exclusions, including the following:

EXCLUSION – CONDOMINIUMS, TOWNHOMES, TOWNHOUSES, APARTMENTS, TRACT HOUSES

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY
COVERAGE PART**

**PRODUCTS COMPLETED OPERATIONS
LIABILITY COVERAGE PART**

This insurance does not apply to "bodily injury" or "property damage" included in the "products-completed operations hazard" and arising out of "your work" on the new construction of any condominiums, townhomes, townhouses or apartments. This exclusion also applies to tract houses or production homes, defined as any project or premises on which more than 5 houses or dwelling units have been built or are in any stage of development, planning or construction.

This exclusion does not apply to repair work on any such units described above.

We shall have no duty to defend any insured against any loss, claim, "suit" or other proceeding alleging damages arising out of or related to "bodily injury"

or "property damage" to which this endorsement applies.

CG 21 34.⁴¹

C. ARGUMENT

In rendering its opinion in this matter, the trial court determined, as a matter of law, that the Policy covered the claims being pursued by Northwood against its insured, Salmon Bay, in the Underlying Lawsuit. However, the only issue before the court was whether one exclusion applied.⁴² In summarily determining that coverage was implicated, the trial court did not limit itself to the one issue that was before it in Atlantic's re-noted Motion for Summary Judgment, the declaratory relief action itself or the Notice of Limited Appearance filed by Northwood. Instead, the trial court determined, as a matter of law, that the entire Policy **covered** the loss and, therefore, effectively imposed coverage by estoppel. The trial court erred.

1. Standard of Review.

An appellate court reviewing an order on summary judgment conducts a *de novo* review and, in doing so, performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860,

⁴¹ CP 304-353.

⁴² As discussed below, Atlantic Casualty disagrees with the trial court's ruling that the New Construction Exclusion did not apply.

93 P.3d 108 (2004). Thus, the appellate court considers all facts in the light most favorable to the non-moving party and will affirm summary judgment only if the pleadings, affidavits, depositions, and admissions on file demonstrate that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).; CR 56(c). Moreover, in addressing a motion for summary judgment a trial court must not base its ruling on speculation, innuendo or conjecture. Instead, the trial court must base its ruling on facts. "A fact is an event, an occurrence, or something that exists in reality." *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

Here, as discussed below, the trial court failed to meet this standard. In fact, there were no facts (or even argument for that matter) before the court indicating that Atlantic Casualty should be estopped from asserting policy defenses with respect to the claim for coverage that had been tendered by its insured. Instead, the trial court simply determined, without the benefit of any facts, case law, or argument, that coverage by estoppel should be imposed against Atlantic Casualty.⁴³ In this situation,

⁴³ Also without Salmon Bay being present for the motion as Northwood's appearance was limited to representing Salmon Bay in its Opposition to Atlantic Casualty's motion for summary judgment only. CP 154; CP 152-153.

Atlantic Casualty was the non-moving party in the trial court's decision to find coverage. Based upon the arguments below, the trial court erred and its decision should be reversed.

2. The Trial Court Erred in Ruling in Favor of Salmon Bay, as it Never Filed an Answer.

Neither Salmon Bay, nor Northwood for that matter, had any standing to move for and/or to oppose a motion for summary judgment as Salmon Bay, to date, has failed to provide an Answer to Atlantic Casualty's complaint for declaratory relief. Northwood likewise did not have standing as it was dismissed from the lawsuit prior to Atlantic Casualty re-noting its motion and appeared for the limited purpose of representing Salmon Bay in opposing Atlantic Casualty's summary judgment motion. The failure to file an answer to a complaint prior to the time of a hearing on a motion for summary judgment constitutes an admission of the allegations of the complaint. *See, Jansen v. Nu-west, Inc.*, 102 Wn. App. 432, at 438, 6 P.3d 98 (2000) (holding that defendant's failure to reply to a counterclaim constituted an admission at the time of summary judgment). This issue was also addressed in *Beers v. Ross*, 137 Wn. App. 566, 154 P.3d 277 (2007). In *Beers* the defendant moved for summary judgment on a counterclaim, a counterclaim which plaintiff had not answered. The trial court granted the motion on the ground that

plaintiff's failure to respond to the counterclaim constituted an admission. *Id.* at 573. The appellate court reversed. However, in doing so, the appellate court explained that defendant's motion for summary judgment was based "*solely* on the [plaintiff's] failure to reply." *Id.* at 572. The appellate court continued by noting that prior to the time set for hearing on defendant's motion, plaintiffs had requested leave to file a late reply to the counterclaim and that the trial court denied that request, without explanation, and thus, that the trial court abused its discretion. *Id.* at 573. For that reason, the trial court determined that summary judgment on the counterclaim was improperly granted because plaintiffs attempted to file an answer to the counterclaim. *Id.* at 574.

Here, to date, Salmon Bay has not answered Atlantic Casualty's complaint for declaratory relief. In the absence of an answer, Salmon Bay is entitled to judgment as a matter of law. Atlantic Casualty raised the issue of the lack of Salmon Bay's answer to the declaratory complaint in its Motion for Reconsideration of Court's Ruling on Cross-Motion for Summary Judgment.⁴⁴ The trial court never addressed the assertion and denied Atlantic Casualty's motion for reconsideration. Per the above authorities, Salmon Bay's failure to file a responsive pleading constitutes

⁴⁴ CP 98-99.

an admission of the averments of the complaint. In this circumstance, the trial court erred in denying Atlantic Casualty's summary judgment motion.

3. The Trial Court Erred in Determining That Coverage Under the Policy Was Available.

i. Coverage by Estoppel is Available to an Insurer Who Acts in Bad Faith and Atlantic Casualty Did Not Act in Bad Faith in this Case.

Washington case law is clear that coverage by estoppel may be available upon a finding that an insurer has committed bad faith. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 196 P.3d 664 (2008). However, coverage by estoppel cannot be invoked in the absence of bad faith and the determination whether an insurer acted in bad faith is a question of fact. *Id.* at 129.

Here, there is absolutely no allegation that Atlantic Casualty committed bad faith in the handling of Salmon Bay's tender of defense or indemnity. Indeed, in responding to its insured's tender, Atlantic Casualty followed the guidance provided by the Washington Supreme Court. That is, Atlantic Casualty accepted the tender of defense under a reservation of rights and then brought an action seeking a declaration that one of its policy defenses barred coverage. This is exactly the course of action that the Washington Supreme Court has advised insurers to do when their obligations are unclear: accept the tender of defense and bring a declaratory judgment action. *See, e.g., American Best Food, Inc. v. Alea*

London, Ltd., 168 Wn.2d 398, 413, 229 P.3d 693 (2010) (insurer who is unclear of its rights or obligations should accept tender of defense and file a declaratory judgment action); *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 54, 164 P.3d 454 (2007) ("if the insurer is uncertain of its duty to defend, it may defend under a reservation of rights and seek a declaratory judgment that it has no duty to defend.").

Moreover, the fact that Atlantic Casualty brought a declaratory judgment on only one exclusion to coverage cannot be deemed to be bad faith, and certainly not as a matter of law and without addressing facts, case law and argument on that issue. As discussed above, the determination of whether an insurer acted in bad faith is a question of fact. Moreover, case law in Washington is clear that an insurer does not waive policy defenses even if the insurer fails to include all possible defenses in the original reservation of rights letter provided the insurer is not acting in bad faith and/or the insured has not been prejudiced. *See, e.g., Hayden v. Mutual of Enumclaw*, 141 Wn.2d 55, 1 P.3d 1167 (2000) (absent insurer bad faith or insured's demonstration of prejudice, insurer did not waive policy defenses by not including same in initial denial letter).

Here, Atlantic Casualty provided a comprehensive and extensive reservation of rights letter and accepted the tender of defense.⁴⁵ The fact that Atlantic Casualty chose to pursue only one of the possible exclusions in the Policy as the basis to bring the declaratory judgment action cannot be deemed, as a matter of law, an act of bad faith or an act that would prejudice Salmon Bay – especially when Salmon Bay was advised, from the outset, that Atlantic Casualty was reserving its right to deny coverage under a myriad of policy defenses. Moreover, nothing prevented Salmon Bay from filing a counterclaim or defenses related to the rest of the Policy, but Salmon Bay chose to do nothing, not even file an Answer.⁴⁶ Thus, Atlantic Casualty's conduct was correct and permissible under the law and the trial court's determination that coverage by estoppel applied was in error.

4. The Trial Court Should Not Have Issued a Ruling on an Issue that None of the Parties Briefed or Argued.

The sole issue that was before the trial court on Atlantic Casualty's motion for summary judgment, in fact in the declaratory relief action, was whether one of several exclusions to coverage applied. Unfortunately, in rendering its decision, the trial court did not limit its ruling to the single

⁴⁵ CP 357-72.

⁴⁶ Northwood also failed to file any affirmative defenses or a counterclaim putting any other exclusions or policy language at issue in this lawsuit.

issue presented. Instead, the trial court determined, as matter of law, that the Policy covered the claim. The trial court erred.

**i Neither Salmon Bay, or Atlantic Casualty
 Provided Facts, Language of the
 Applicable Policy, or Case Law to
 Support the Trial Court's Ruling.**

The standard on summary judgment is well-known: To prevail on a motion for summary judgment a party must present evidence demonstrating that there is no genuine issue of material fact so that the moving party is entitled to judgment as a matter of law. CR56(c); *Dickgieser v. State*, 153 Wn.2d 530, 535, 105 P.3d 26 (2005). In making that determination the court must consider all **facts** submitted and all reasonable inferences from those **facts** in the light most favorable to the non-moving party. *Vasquez v. Hawthorne*, 45 Wn.2d 103, 106, 33 P.3d 735 (2001) (emphasis added). Here, in granting summary judgment against Atlantic Casualty, the trial court did not employ this basic rule. Indeed, Northwood did not provide any **facts** supporting its assertion that coverage was triggered.⁴⁷ Instead, the court determined that because there

⁴⁷ For example, the Policy provides that Atlantic Casualty will

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

However, the insurance will only "apply" to "bodily injury" or "property damage" caused by an "occurrence" that that occurs **during the policy period**. (CP 315).

Here, Northwood Parkway presented absolutely no **facts** indicating that the claimed loss (a) occurred during the policy period, (b) was caused by "bodily injury" or "property damage" and/or (c) which was caused by an occurrence.

had been full briefing and argument on one issue – and only one issue – whether one exclusion to an insurance policy containing multiple exclusions applied – that coverage was triggered under the entirety of the Policy. However, no one argued that coverage was "fully" available. No case law or policy language was provided to support such a ruling by the parties or the court. Instead, the only briefing and facts that were presented related to whether one specific exclusion applied.

The court erred in granting summary judgment on an issue that was never adequately raised. This exact issue was addressed in *White v. Kent*, 61 Wn. App. 163, 810 P.2d 4 (1991). The Court of Appeals in that case determined that the grant of summary judgment was improper by the trial court. The *White* case involved medical malpractice claims against several doctors and a Medical Center. Defendants moved for summary judgment of dismissal due to plaintiff's lack of any admissible expert testimony on the standard of care applicable to the defendants. In its opposition papers, plaintiff provided excerpts from the depositions of its experts on the standard of care applicable to defendant doctors. In their reply brief defendants raised, for the first time, that plaintiff failed to show that defendants caused plaintiff any damage. Despite plaintiff's objection

Northwood Parkway bore the burden of submitting evidence triggering the insuring clause of the Policy. It did not do so and, consequently, the trial court's affirmative determination that coverage had been triggered under the Policy was in error.

to the new issue, the hearing proceeded and addressed all of the defendants arguments. The court ruled for defendants on all issues. The Court of Appeal reversed and remanded stating:

It is the responsibility of the moving party to raise in its summary judgment motion all of the issues which it believes it is entitled to summary judgment. Allowing the moving party to raise new issues in its rebuttal materials is improper because the non-moving party has no opportunity to respond. . . In sum, it is incumbent upon the moving party to determine what issues are susceptible to resolution by summary judgment, and to clearly state in its opening papers those issues upon which summary judgment is sought.

Id. at 168-69.

The trial court should have utilized the same approach in entering the order on the summary judgment. The order entered by the court is a miscarriage of justice. In *White*, the superior court could only grant summary judgment on the issue of the standard of care, as that was the issue presented. Here, the only issue presented was whether the New Construction Exclusion applied.

The fact that a trial court erred in summarily ruling on issues that were not addressed, briefed or argued is also demonstrated by reviewing case law addressing whether an appellate court can affirm a summary judgment on an alternative ground.

It is beyond dispute that an appellate court can affirm a trial decision on an "alternative ground" versus the issue presented to the trial court. RAP 2.5; *Newman v. Veterinary Bd. of Governors*, 156 Wn. App. 132, 142, 231 P.3d 840 (2010). However, the appellate can affirm on the "alternative ground," if – and only if –

the parties had a full and fair opportunity to develop facts relevant to the decision. Where this opportunity has not been available, the proper resolution of the appeal is not affirmance but remand.

Masunaga v. Gapasin, 52 Wn. App. 61, 757 P.2d 550 (1988). *See, also, Bernal v. American Honda Motor Co., Inc.*, 87 Wn.2d 406, 414, 553 P.2d 107 (1976) (quoting *Heirs of Fruge v. Blood Servs.*, 506 F.2d 841, 844 fn. 2 (5th Cir.1975)).

The issue in *Masunaga* was whether parents who were allegedly financially dependent upon their adult son could pursue a wrongful death action. The defendants moved for summary judgment **solely** on the issue of whether the parents' action was statutorily barred "because the decedent was an adult and had a daughter." *Id.* at 68. The issue of the parents' dependency on their adult-son was not raised below. *Id.* As a result, and as was even conceded by defendant's counsel, the defendants did not argue the parents' allegedly dependency in the motion or summary judgment. *Id.*

In reversing the summary judgment in defendant's favor, the appellate court specifically noted:

The record which was before the trial court when it decided the summary judgment motion indicates that the parties did not have a full and fair opportunity to develop the facts related to the dependency issue such that this factual issues should be decided as a matter of law by an appellate court. (Citation omitted.)

Id. at 69.

Here, only one issue was before the trial court – whether the New Construction Exclusion to coverage applied. The trial court determined that it did not. Regardless of whether the trial court was correct, the trial court should not have issued a ruling on an issue for which the parties did not have a "full and fair opportunity" to brief or argue. The trial court's summary determination that coverage was available under the entirety of the Policy was not at issue and, thus, was not briefed by either party. If an appellate court cannot affirm on a ground that is not fully briefed, the trial court should be likewise precluded from addressing an issue that has not been adequately presented. The trial court's determination that the Policy provided blanket coverage for Salmon Bay's allegedly defective workmanship must be reversed.

**ii The Trial Erred Because Northwood Was
Not a Party in the Action and Salmon Bay
Never Re-Noted Northwood's Motion for
Summary Judgment.**

Moreover, assuming *arguendo* that Northwood did present the issue (and properly briefed and argued that issue) of whether the entirety of the Policy was triggered, the trial court's decision would still be in error. First, by the time of the hearing, and ruling, on Atlantic Casualty's motion for summary judgment, Northwood was **no longer a party to the action** as it had been dismissed through a voluntary non-suit and, thus, its motion could not have been "at-play" at the time of the hearing.⁴⁸ Second, while Salmon Bay belatedly "joined" in Northwood's prior motion for summary judgment, it did not so timely and, more importantly, it **never re-noted any motion for hearing** as was specifically required by the trial court.⁴⁹ Thus, even if Northwood's motion was one seeking a declaration that the Policy fully covered the underlying loss that motion was not before the court and, thus, should not have been ruled upon.

Moreover, Northwood admitted in its Limited Appearance that it only appeared on behalf of Salmon Bay "for the limited purpose of

⁴⁸ Indeed, if a non-party could bring motions in an action, there would be no requirement for an "interested" third-party to seek leave to intervene. Indeed, the "express purpose of intervention is to enable the intervener to participate in the principal action." *Hutteball v. Montgomery*, 187 Wash. 407, 411, 60 P.2d 80 (1936).

⁴⁹ CP 157-159.

defending Plaintiff ATLANTIC CASUALTY INSURANCE COMPANY'S motion for summary judgment filed herein."⁵⁰ Nothing more, so no one presented or argued in the alternative for summary judgment against Atlantic Casualty.

It is conceded that a trial court determining a declaratory judgment action can rule in favor of the non-moving party if it becomes clear that he or she is entitled to an affirmative ruling. *See, e.g., Leland v. Frogge*, 71 Wn.2d 197, 427 P.2d 724 (1967). However, because the parties must have a full and fair opportunity to brief and argue issues on summary judgment, implicit in the holding is that the issue upon which summary judgment is granted **must have been raised**. Here, no one raised the issue upon which the trial court granted summary judgment. Atlantic Casualty never filed any brief to oppose Salmon Bay's motion because it was not re-noted and, therefore, was not before the court. Had the motion been re-noted, Atlantic Casualty would have submitted new briefing to oppose it on several grounds. Thus, the trial court erred in ruling that coverage was triggered under the Policy.

⁵⁰ CP 152-153.

iii Northwood Never Identified that it was Seeking a Determination that Coverage was Triggered Under the Policy.

Finally, the fact that Northwood filed a motion for summary judgment containing conclusory statements – but absolutely no facts, citations to relevant sections of the Policy, argument, or case law – indicating that it was seeking the affirmative determination that coverage was triggered does not control. Again, Northwood's motion was not "submitted to the court" for resolution. *See, Paulson v. Wahl*, 10 Wn. App. 53, 57, 516 P.2d 514, (1973) ("the mere filing of a defense motion for summary judgment . . . does not constitute the submission of the motion to the court for decision, where no hearing has begun and the court has not otherwise exercised its discretion in the matter").

Moreover, Northwood failed to even identify this as an issue it was raising for determination in its summary judgment motion. Instead, Northwood's own pleading identified the one – and only one -- issue it raised for adjudication:

Whether the exclusion relieves Atlantic of its duty to indemnify Salmon Bay for losses found to have been incurred during the policy period when Salmon Bay's work was not being performed in furtherance of 'new construction.'⁵¹

⁵¹ CP ___, Sub No. 10, Defendant Northwood Parkway LLC's Motion for Summary Judgment, pg. 4.

How a party framed the issue is relevant to the determination of whether an issue was properly presented for determination. *See, e.g., Kaplan v. Northwestern Mutual Life Ins. Co.*, 115 Wn. App. 791, 65 P.3d 16 (2003). The issue in *Kaplan* was whether a certain clause in a life insurance policy was ambiguous. One of the issues on appeal was whether the issue had been adequately raised below. Indeed, in addressing this issue, the appellate court noted that the insurer did not "*seriously*" argue that the clause was "*not* ambiguous" but was instead arguing that the insured had "failed to preserve this issue for review, in that he raises this *precise* issue for the first time on appeal." *Id.* at 801.

The appellate court rejected the insurer's contention on two grounds. First, the appellate court noted that the plaintiff identified the specific issue in the "'Statement of Issues' section of his motion for summary judgment." *Id.* at 801. Second, the court noted that the insured addressed the issue in the "'Authority and Argument' portion of the motion." *Id.* at 802. Thus, the appellate court concluded that the issue had been raised stating:

A fair reading of these excerpts from the motion can only lead to the conclusion that Kaplan adequately informed the trial court that he was asking it to rule as a matter of law the 'licensed physician' clauses contained in the six policies are ambiguous. . . . We reject Northwestern Mutual's

contention that the precise issue raised on appeal was not before the trial court.

Id. at 802-03.

Here, the precise issue upon which Northwood Parkway obtained summary judgment was not adequately raised. Indeed, Northwood limited itself by its statement of the issue wherein it asked the court to determine one thing: whether the New Construction Exclusion applied or did not apply. Moreover, even if Northwood Parkway's issue statement is not controlling, as found by the *Kaplan* court, there is no authority or argument in Northwood's motion in which Northwood "adequately informed" the trial court (or Atlantic Casualty for that matter) that it was seeking a determination that the entirety of the Policy was triggered. As indicated in *Kaplan* is issue is adequately raised in a motion if the motion contains authority and argument. Moreover, a party's complete failure to include an argument associated with an issue must result in rejection of judicial consideration of that issue as "passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998).

Here, Northwood Parkway limited the issue to be decided to whether one exclusion applied. The fact that Northwood's motion contains conclusory statements, statements which are not supported by any facts, authority, citation to the Policy itself or the issues raised in the

reservation of rights letter was insufficient to support a ruling on that issue. The trial court's determination that coverage was triggered is without any support and therefore erroneous.

Moreover, at all times pertinent to this claim and action, Atlantic Casualty fully reserved its right to deny coverage not only on the basis of the New Construction Exclusion but also for other reasons. Indeed, on November 19, 2008, Atlantic Casualty provided its insured with a reservation of rights letter in which Atlantic Casualty delineated six (6) separate exclusions to coverage which were contained within the main policy, and further delineated nine (9) additional exclusions and/or limitations to coverage which were contained in endorsements to the Policy (including the exclusion for "new construction" on multi-family dwellings). Thus, in finding that the Policy fully covered the Underlying Lawsuit the trial court voided fourteen (14) exclusions to coverage. The trial court's actions were improper as the applicability of these exclusions was never addressed by the court or the parties.

To determine that coverage was actually available under the Policy would have required the insured to show that the insuring clause was triggered under the Policy. *See, e.g., National Clothing Co. Inc. v. Hartford Cas. Ins. Co.*, 135 Wn. App. 578, 584, 145 P.3d 394 (2006). Then, and only then, would the burden shift to Atlantic Casualty to show

that one of the other exclusions applied. The insured did not meet its burden of demonstrating that the insuring clause was triggered under the Policy. Instead, there were absolutely no facts, citation to the applicable provisions of the Policy, briefing or argument even tangentially addressing the first prong of the coverage analysis. Despite the trial court citing *National Clothing*, in its Order denying Atlantic Casualty's Motion for Reconsideration⁵² the trial court failed to apply the very "two-step" policy analysis it cites in both the order denying reconsideration and its original order denying Atlantic Casualty's Motion for Summary Judgment.⁵³ Instead of providing any analysis, facts, or citations to the Policy language itself in order to find that Salmon Bay met the first prong of the two-step process, that the allegedly defective work by Salmon Bay constitutes a loss within the scope of the Policy's insured losses, the trial court simply jumped to the second prong of the test and found that the New Construction Exclusion did not apply. No where in any pleadings or trial court decisions does anyone examine the Policy language itself to establish that: (1) Salmon Bay's defective work is a loss within the scope of the Policy's insured losses; or (2) that the other fourteen (14) noted exclusions did not apply to Salmon Bay's allegedly faulty work at the site.

⁵² CP 93-97.

⁵³ CP 93-97 and CP 147-151.

Atlantic Casualty never addressed these other fourteen (14) exclusions or the Policy language itself because Northwood never demonstrated that coverage was implicated. When the trial court decided to make this determination on its own, it too failed to apply the two-step process to the entire Policy it decided to find as applicable to the claims made against Salmon Bay. No where does anyone provide, or ever reference how the first step in the two-step process applies to the claims made by Northwood against Salmon Bay. In this circumstance, to hold that the Policy is fully triggered was erroneous.

iv. The Trial Court Erred By Applying the Wrong Summary Judgment Standard.

Furthermore, assuming *arguendo* that Northwood's motion for summary judgment could have been deemed: (1) to be properly before the trial court; and (2) to contain the requisite notice, allegations and argument, the trial court erred because it applied the wrong summary judgment standard. That is, in determining that Northwood's motion should have been granted, the trial court determined that there were no facts demonstrating that coverage may not be available. However, Atlantic Casualty included its reservation of rights letter as an exhibit to its moving papers.⁵⁴ Consequently, there were facts before the trial court

⁵⁴ CP 357-372.

demonstrating that coverage may not be implicated under the other 14-cited exclusions to the Policy. In granting a summary judgment a court **must** construe all facts in the light most favorable to the non-moving party. The court did not so as demonstrated by the fact that: (1) the issue of whether coverage under the entire Policy was implicated was not raised or argued by any party; and (2) there was factual documentation submitted by the party opposing such a ruling (e.g., the reservation of rights letter). Thus, this Court has yet another basis upon which to reverse the trial court's determination of coverage.

In summary, Atlantic Casualty agrees that the trial court had the power to grant a non-moving party summary judgment on the issue before the court.⁵⁵ That is, the court had the power to determine, as a matter of law, the exclusion for work on multi-family dwellings, e.g., condominiums, was not triggered. However, the trial court went well beyond its authority when it determined issues that were not raised, briefed or argued. Moreover, the trial court had evidence before it (the Policy and reservation of rights letter), that taken in the light most favorable to Atlantic Casualty, the non-moving party, creates an issue of fact that precluded the trial court from entering judgment against Atlantic

⁵⁵ Atlantic Casualty does not agree that Salmon Bay was properly before the Court due to the lack of any Answer being filed, and Northwood was only before the Court in the

Casualty finding the Policy is triggered and **no** exclusions to coverage apply. In this circumstance the trial court should not have made the coverage decision as a "matter of law."

4. The Trial Court Erred in Determining that the Exclusion for New Construction Was Ambiguous and Therefore Should be Construed Against the Insurer.

i. The Trial Court Failed To Construe Facts in the Light Most Favorable to the Non-Moving Party, Atlantic Casualty.

In determining that the New Construction Exclusion was not triggered, the trial court determined that the phrase "new construction" was ambiguous; and, therefore, the exclusion needed to be construed against Atlantic Casualty. In doing so, the trial court erred.

While it is true that ambiguities in an insurance policy will be construed against the drafter (the insurer), that rule must be balanced against the standard that in ruling on a motion for summary judgment: that the court must view all facts, and all reasonable inferences therefrom, in the light most favorable to the non-moving party. In the circumstances of this case, the trial court should have been applied this standard in Atlantic Casualty's favor. That is, because the issue of whether the phrase "new construction" was ambiguous was raised in Northwood's motion, the

limited capacity for Salmon Bay to oppose Atlantic Casualty's summary judgment motion.

party opposing the motion was Atlantic Casualty. Thus, while the ambiguity, if one is found to exist, must be construed against Atlantic Casualty, the court's determination of whether the ambiguity exists in the first instance must be made by construing all facts and reasonable inferences therefrom, in Atlantic Casualty's favor. The court did not do so.

First, Northwood did not present any admissible **facts** tending to demonstrate that the construction of the Sequoyah Condominiums was not "new" construction. Indeed, the entirety of "factual" evidence was the declaration of the principal of Northwood, Dirk Bouwer, where he opined that the work necessary to convert the previous apartment complex into condominiums was "limited" and that only "minor structural alterations" were contemplated.⁵⁶ Mr. Bouwer thus determined that such work was "in no way 'new construction' as myself, and any other contractor would understand that term to be used."⁵⁷

Mr. Bouwer's self-serving declaration, in and of itself, should not be sufficient to support a motion for summary judgment. Instead, to support a summary judgment, a party must present **facts**. Presenting opinions and conclusions is insufficient. *See, e.g., Grimwood*, 110 Wn.2d

⁵⁶ CP ____, Bouwer Decl., ¶4 Sub No. 12, pg 2.

⁵⁷ CP ____, Bouwer Decl., ¶7 Sub No. 12, pg 7.

at 359-61 (a party's self-serving opinion and conclusion are insufficient evidence to defeat (or support) summary judgment).

Second, Mr. Bouwer's conclusion – that no "other contractor" would consider the performed to be "new construction" was directly contradicted by the testimony of Atlantic Casualty's expert, Mark Lawless. A short summary of that evidence illustrates there were factual conflicts between the facts presented to the trial court, factual conflicts which should have prevented summary judgment. Atlantic Casualty submitted the following admissible, factual evidence: (a) new building permits were issued for the construction of the Sequoyah Condominiums, permits which pertained to Salmon Bay's work; (b) the document by which the Sequoyah Condominiums were created, the Covenants, Conditions and Restrictions, was prepared and/or filed **after** Salmon Bay performed work in constructing the Sequoyah Condominiums; and (c) testimony of construction expert, Mark Lawless, in which Mr. Lawless explained why the work performed by Salmon Bay met the standard industry definition of "new construction."⁵⁸

In decreeing that the work at the Sequoyah Condominiums was not "new construction" the trial court completely ignored and never addressed Atlantic Casualty's factual evidence; and thus, it cannot be said that the

trial court considered the factual evidence in the light most favorable to the non-moving party, Atlantic Casualty. While a jury would be free to disregard or discredit Mr. Lawless' testimony, the trial court, on summary judgment, cannot do so. Thus, the trial court erred in determining, as a matter of law that the construction of the Sequoyah Condominiums was not "new construction." The record and admissible evidence creates a question of fact that precluded such a decision.

ii. A Question of Fact Existed as to Whether the Exclusion Was Ambiguous.

The trial court erred in determining, as a matter of law, that the exclusion for "new construction" was ambiguous and, therefore, that the clause should be construed in the insured's favor, that is, only if "ground-up" construction was occurring.

Washington case law is clear that an ambiguity in a policy exists if, on its face, the policy language is fairly susceptible to two different, but reasonable, interpretations. *State Farm Mut. Auto. Ins. Co. v. Ruiz*, 134 Wn.2d 713, 721-22, 952 P.2d 157 (1998); *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997). However, if the language is clear and unambiguous, the court must enforce the clause as written and cannot modify the contract or create ambiguity where none exists. *American*

⁵⁸ CP 290-292.

Nat'l Fire Ins. Co. v. B & L Trucking and Constr. Co., Inc., 134 Wn.2d 413, 428, 951 P.2d 250 (1998). If the clause is ambiguous,

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.

Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 666, 15 P.3d 115 (2000).

Here, in determining that the phrase "new construction" was ambiguous the trial court did not rely upon extrinsic evidence at all; instead, it simply determined that the phrase was ambiguous and, thus, construed it against Atlantic Casualty. However, there was evidence indicating that the phrase was not "ambiguous." The declaration of Mark Lawless, a well-known construction expert,⁵⁹ demonstrated, contrary to Mr. Boucher's self-serving statement, that those in the construction industry construe the term "new construction" to mean exactly the work that was done by Salmon Bay in this case. In this situation it cannot be said that the trial court correctly construed the facts in favor of the non-moving party.

⁵⁹ See, e.g., *Water's Edge Homeowners Ass'n v. Water's Edge Associates*, 152 Wn. App. 572, 216 P.3d 1110, 1118 (2009) (where the court noted Mark Lawless was a construction defect expert).

In fact, in ruling on Atlantic Casualty's motion for reconsideration, Judge Lucas specifically identified the basis of his decision regarding the motion for summary judgment. In doing so, the trial court noted that the issue presented by the parties was whether Salmon Bay's work at the subject condominiums was "new construction" or a "repair." The trial court specifically stated:

Plaintiff [Atlantic Casualty] argued that the project was excluded because it was 'new construction' whereas Defendant argued that since it was an existing apartment building, which was converted to condominiums, that it was not 'new construction' but rather was in the nature of a **'repair'**.⁶⁰

Despite specifically noting that the parties had framed and argued the issue on the difference between "new construction," and "repair," the trial court questioned whether the proper distinction should have been "'new construction' versus 'remodeled construction.'"⁶¹ As discussed *infra*, in doing so, the trial court erred as the issue of "new construction" versus "remodeled" construction was not an issue that the parties had an opportunity to address. Just as an appellate court cannot decide a case on an issue that was not previously addressed by the parties, the trial court determination of summary judgment motions should be limited to the issues raised and argued by the parties.

⁶⁰ CP 94 (emphasis added).

Moreover, the apparent "alternative" reasons for the trial court's decision were erroneous. That is, the trial court took issue with Atlantic Casualty's submissions and arguments. Indeed, the trial court specifically stated that Atlantic Casualty "tried to persuade this court that a definition of 'new construction' did not exist in Washington, which assertion was completely inaccurate."⁶² Unfortunately, the trial court failed to acknowledge the fact that both parties argued that for purposes of determining whether the definition was met that the term "new construction" had not been resolved under Washington case law⁶³ and, as a result **both** parties relied upon case law from other jurisdictions.⁶⁴

Second, contrary to the trial court's assertion, Atlantic Casualty provided a definition of "new construction," as contained in Washington law, and argued that such definition should apply. Indeed, Atlantic Casualty quoted a portion of Revenue Code, WAC 458-19.005(2)(p), in which "new construction" was defined as meaning:

⁶¹ CP 147-151 @ 148

⁶² CP 96.

⁶³ Indeed, Northwood/Salmon Bay specifically stated "[t]he courts in Washington appear not to have specifically resolved the definition of 'new construction' as it relates to commercial liability policies such as the one before the Court." CP____. Sub No. 10, Defendant Northwood Parkway, LLC's Motion for Summary Judgment ("Northwood's Opening Motion"), pg. 6, ll. 3-4.

⁶⁴ CP____ (Northwood Opening Motion pgs. 6-7).

the construction or **alteration** of any property for which a building permit was issued, or should have been issued.⁶⁵

While the trial court determined that the Department of Revenue's definition of "new construction" should not apply, and instead relied upon the City of Cheney municipal code, it is wholly inaccurate to assert that "Plaintiff tried to persuade this court" that a definition did not exist.

iii. The Trial Court's Ultimate Determination Was Based on Taking "Judicial Notice" of a Fact that Was Not Presented to the Court and Which is Not Readily Ascertainable.

Finally, the trial court determined the meaning of "new construction" by referring to unpublished case, *Myers v. City of Cheney*, 1999 WL 95744 (Wn. App. Div. 3 1999) and the fact that the city of Cheney's municipal code defined "new construction." In denying Atlantic Casualty's motion for reconsideration, the trial court stated that it was simply taking judicial notice of the Edmonds Municipal Code and the Snohomish County Code. However, as the court noted, neither party provided the court with a definition of "new construction" in reference to the Snohomish County building code or the Edmonds Municipal Code. That is because a search of these two codes does not reveal the existence

⁶⁵ CP 382.

of the definition of "new construction." A court cannot take judicial notice of a fact that does not exist. Instead, a court may:

take judicial facts of facts that are "not subject to reasonable dispute" in the sense that they are "generally known" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b). Judicial notice may be taken of those "facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty." *CLEAN v. State*, 130 Wash.2d 782, 809, 928 P.2d 1054 (1996) (citing *State ex rel. Humiston v. Meyers*, 61 Wash.2d 772, 779, 380 P.2d 735 (1963)).

Fusato v. Washington Interscholastic Activities Ass'n, 93 Wn. App. 762, 772, 970 P.2d 774 (1999).

The standard of review for determining whether a trial court properly took "judicial notice" of a matter is a question of law which is reviewed *de novo*. *Fusato v. Washington Interscholastic Activities Ass'n*, 93 Wn. App. 762, 771, 970 P.2d 774 (1999).

A court may properly take judicial notice of facts that are

'not subject to reasonable dispute' in the sense that they are 'generally known' or 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Id. quoting ER 201(b).

Here, the trial court asserted that it was taking "judicial notice" of the Edmonds Municipal Code and the Snohomish County Code.⁶⁶ However, the trial court did not explain what portion of these codes it was "noticing." From the language of the trial court's letter ruling on the summary judgment motion, it appears that the court determined that the definition of "new construction" as contained in City of Cheney's municipal code is the same or similar to a definition that is contained in Edmonds Municipal and/or Snohomish County Code. However, the trial court does not provide a citation to such a definition and, to date; Atlantic Casualty has been unable to locate any such definition. The trial court erred when it took "judicial notice" of a fact that, apparently, does not exist and, thus, it was error for the trial court to take such notice.

The fact that lack of proof of the existence of a fact upon which a court takes judicial notice is error was specifically addressed in *State v. Anderson*, 80 Wn. App. 384, 909 P.2d 945 (1996). The issue in *Anderson* arose in the context of whether a defendant charged with vehicular homicide as a result of driving while intoxicated was apprised of the right to have an independent blood test. In arguing that it "substantially complied" with the requirement of so notifying the defendant because it "told [defendant's] father that he could take the vial of blood to 'Gibb's

⁶⁶ CP 97.

Lab' and have an analysis performed." *Id.* at 389. The appellate court held that defendant had not been adequately advised. In doing, the court stated

While the trial court took 'judicial notice' of the fact that 'Gibb's Lab' was an independent laboratory, **no proof of the existence of 'Gibb's Lab' was ever offered.** This was not a proper subject for judicial notice under ER 201(b):

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

As pointed out in Anderson's reply brief, there is no listing for 'Gibb's Lab' in any of the area's phone books. Nor does the record disclose that [defendant's] father knew what the trooper meant when he specified 'Gibb's Lab.'

Id. at 390 (emphasis added).

Here, to have determined the definition of "new construction" based on judicial notice of fact that does not exist was improper. The trial court failed to cite to this alleged code in its decision. The trial court's determination must be reversed.

5. The Trial Court Erred in Awarding Fees to the Northwood Parkway.

The trial court awarded fees to Salmon Bay under the authority of *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52, 811 P.2d

673 (1991). *Olympic Steamship* allows a court to award attorneys fees "incurred by an insured in compelling an insurer to assume the burden of legal action to obtain the full benefit of his her contract." *City of Seattle v. McCready*, 131 Wn.2d at fn. 6. Here, as discussed *infra*, the trial court erred in determining that coverage was triggered under the Atlantic Casualty Policy. Consequently, the trial court also erred in awarding *Olympic Steamship* fees and such an award should be reversed.

D. CONCLUSION

For the above stated reasons, Atlantic Casualty respectfully requests this Court reverse the trial court's errors and hold: (1) Salmon Bay did not have standing to oppose Atlantic's Summary Judgment Motion; (2) Northwood's Summary Judgment was not properly before the court; (3) Atlantic Casualty's Policy is not fully triggered in the Underlying Lawsuit; (4) as a matter of law, coverage by estoppel will not be imposed against an insurer without even an allegation of bad faith on the part of the insurer and when the issue of coverage by estoppel was not an argument presented by the parties and, therefore, not briefed or argued; (5) the trial court erred in failing to consider extrinsic evidence as to the meaning of the relevant term and, thus, its ultimate determination was

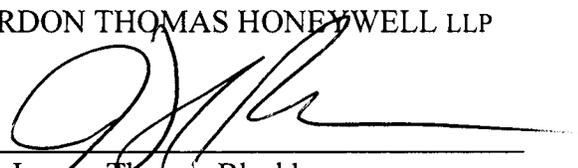
the part of the insurer and when the issue of coverage by estoppel was not an argument presented by the parties and, therefore, not briefed or argued; (5) the trial court erred in failing to consider extrinsic evidence as to the meaning of the relevant term and, thus, its ultimate determination was erroneous; and (6) taking judicial notice of a fact that does not exist is inappropriate.⁶⁷

Dated this 9th day of August, 2010.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By



Joanne Thomas Blackburn
Michelle A. Menely
Attorneys for Appellant
WSBA No. 21541
WSBA No. 28353

⁶⁷ By reversing the trial court it follows that the award of attorney's fees to Salmon Bay should also be reversed.

No. 65299-1-I

COURT OF APPEALS, DIVISION
OF THE STATE OF WASHINGTON

ATLANTIC CASUALTY INSURANCE COMPANY,
Plaintiff/Appellant

v.

SALMON BAY PLUMBING, REMODELING & HEATING, INC.

Defendant/Respondent

CERTIFICATE OF SERVICE

GORDON THOMAS HONEYWELL LLP
Fara L. Fusaro
Legal Assistant to Michelle Menely

Suite 2100
600 University Street
Seattle WA 98101
(206) 676-7500

ORIGINAL

The undersigned declares as follows:

I am over the age of 18 years, not a party to this action, and am competent to be a witness herein. On the 9th day of August, 2010, I caused to be delivered a true and correct copy of the following: (1) Appellant's Opening Brief; and (2) Certificate of Service on the following counsel of record:

Daniel D. DeLue Gerring & DeLue LLP 600 Stewart Street, Suite 1115 Seattle, WA 98101-1242 <input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Email	Hans P. Juhl Barokas Martin & Tomlinson 1422 Bellevue Avenue Seattle, WA 98122 <input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Email
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 9th day of August, 2010.



Para Fusaro

2010 AUG - 9 PM 4: 18
COURT CLERK
JULIA M. HARRIS