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OF THE STATE OF WASHINGTON

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DIVISION I
SEATTLE, WA

WEST COAST PIZZA COMPANY, INC.

Appellant,

vs.

NATIONAL CONTINENTAL INSURANCE COMPANY

Respondent.

RESPONDENT'S BRIEF

Jeffery E. Adams, WSBA #9663
Of Attorneys for Respondent
MURRAY, DUNHAM & MURRAY
200 West Thomas, Ste. 350
PO Box 9844
Seattle WA 98109-0844
Phone: (206) 622-2655
Fax: (206) 684-6924

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I. ASSIGNMENTS OF ERROR

1. Did the trial court err in denying National Continental's Summary Judgment Motion on the grounds that National Continental had cancelled the policy prior to the May 29, 2007 accident?

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did National Continental Comply With The Statutory And Policy Requirements When Cancelling Its Policy With West Coast?

III. STATEMENT OF FACTS

West Coast Pizza Company, Inc. (hereinafter "West Coast") is a Washington corporation doing business as Domino's Pizza, and in 2006-2007 operated two stores in Everett.¹ West Coast's three shareholders were Kevin Dobb, Bryan Dobb, and Dean Brandt, and its main office was in Port Roberts, Washington.² Brian Dobbs was the sole shareholder in three other Washington companies, all doing business as Domino's Pizza, named Mad Pizza Company (hereinafter "Mad Pizza"), Tiem Pies, and Mac Pies.³ Mad Pizza operated 12 pizza stores, including one in Lynnwood, Washington.⁴

West Coast, with the assistance of its insurance broker, David Brink of A.J. Gallagher Risk Management Services, Inc. (hereinafter

¹ CP 46-47.

² CP 47, 49.

³ CP 46.

⁴ CP 46.

“Gallagher”) applied for insurance through the Washington Automobile Insurance Plan (hereinafter “WAIP”).⁵ WAIP was created to:

... Provide automobile insurance coverage to eligible risks who seek coverage and are unable to obtain such coverage through the voluntary market (for complete eligibility requirements, *see* Section 2 and 18). Eligible Washington Automobile Insurance Plan risks are shared among companies writing automobile insurance in the State of Washington⁶

WAIP provides for both personal and commercial automobile insurance. The purpose of the Commercial Automobile Insurance Plan (hereinafter “CAIP”) is in part:

To make automobile insurance available subject to the conditions hereinafter stated, and

...

For sharing the premiums, losses, and expenses of such eligible risks among all participating insurers.⁷

One seeking insurance through CAIP must satisfy the eligibility requirements set forth in Section 18.⁸ A successful applicant is assigned

⁵ CP 129-130.

⁶ CP 613.

⁷ CP633.

⁸ CP633-4.

an insurer (referred to in CAIP as a “servicing carrier”). CAIP equitably assigns the applications to the servicing carriers.⁹

A successful applicant can purchase automobile insurance with a minimum coverage of \$25,000/\$50,000 bodily injury limits and \$10,000 property damage limits. The applicant can choose to purchase additional coverage.¹⁰

Gallagher, West Coast’s insurance broker, submitted an application to CAIP in August of 2006. West Coast was the sole applicant and it gave its address as:

Post Office Box 187
Point Roberts, Washington, 98281¹¹

Mad Pizza, Tiem Pies, and Mac Pies were not listed as applicants or additional insureds, or otherwise identified anywhere in the application. West Coast misrepresented on the application that it had 285 employees, 100 of which used vehicles to deliver pizza.¹² West Coast never informed National Continental Insurance Company (hereinafter “National Continental”) that this number included employees of Mad Pizza, Tiem Pies, and Mac Pies.

CAIP accepted this application and assigned National Continental

⁹ CP637.

¹⁰ CP635.

¹¹ CP750.

¹² CP753.

as the servicing carrier. The insurance was effective from September 1, 2006 to September 1, 2007.¹³ West Coast paid an initial premium of \$2,500; however, the premium needed to be adjusted depending upon the total number of pizza stores West Coast had and the total number of its drivers.¹⁴

Dean Daquila, an underwriter with National Continental, reviewed the application, and determined that West Coast may have overpaid the estimated premium by \$500.¹⁵ National Continental mailed a \$500 check to West Coast at its post office box. West Coast received and cashed this check in October of 2006.¹⁶

Pursuant to Section 31A.11 of CAIP, Mr. Daquila was required to verify directly with West Coast the information National Continental needed to rate the policy.¹⁷ National Continental therefore mailed to West Coast a “Premium Audit Questionnaire” (hereinafter “Questionnaire”) dated September 25, 2006.¹⁸ This Questionnaire notified West Coast that

¹³ CP602.

¹⁴ CP601-2.

¹⁵ CP601-2.

¹⁶ CP602.

¹⁷ CP602; 646.

¹⁸ CP602.

National Continental could cancel the policy if West Coast failed to return the completed Questionnaire, stating in relevant part:

Your policy has been classified as a Prepared Food Delivery Service. Please respond to the following inquiries and return this completed questionnaire within ten days to insure proper rating of your policy and to avoid possible policy cancellation.¹⁹

West Coast did not respond to this Questionnaire and on October 25, 2006, National Continental sent another copy of the Questionnaire to West Coast.²⁰ The second Questionnaire contained the same warning that the policy could be cancelled if West Coast failed to respond.²¹ West Coast did not respond to this second Questionnaire.²²

A. **NATIONAL CONTINENTAL CANCELLED THE POLICY BECAUSE WEST COAST DID NOT RESPOND TO THE QUESTIONNAIRE.**

Section 27 of CAIP specifically authorized the servicing carrier (i.e., National Continental) to cancel a policy if the insured failed to respond to two requests for pertinent underwriting information. Section 27 provides:²³

CANCELLATION

...

B. Cancellation by Servicing Carrier.

1. A servicing carrier which has issued a policy or binder under this plan shall have the right to cancel the insurance by giving

¹⁹ CP697-8.

²⁰ CP603; 700-1.

²¹ CP700-1.

²² CP603.

²³ CP641-2.

notice as required in the policy or binder if the insured

...

h. cannot be located by the servicing carrier for the purposes of its underwriting review, **or fails to respond to at least two written requests for pertinent underwriting information which would have a direct bearing on the rating of a policy**, or

...

(Emphasis Added).

National Continental exercised its right under Section 27 and cancelled the policy.²⁴ On December 15, 2006, National Continental mailed to West Coast a Cancellation Notice which stated that the policy was cancelled effective January 16, 2007, and stated the following reason for the cancellation:²⁵

Actual reason(s) for cancellation, non-renewal or declination of insurance:

Violation of contract terms – failure to comply with Premium Audit Questionnaire.

National Continental addressed the Cancellation Notice to West Coast at Post Office Box 187, Point Roberts, Washington, and mailed it using the U.S. Postal Service with the required postage.²⁶ National Continental mailed the Cancellation Notice to West Coast using Record of Mailing, and mailed a copy of the Cancellation Notice to Gallagher by regular mail.²⁷ Neither Cancellation Notice was returned to National

²⁴ CP603-4.

²⁵ CP703-4; 37-41; 50-64.

²⁶ CP37-41; 50-64.

²⁷ CP50-64.

Continental.²⁸

On January 25, 2007, National Continental mailed to West Coast at its post office box in Port Roberts, a Declaration stating that the policy had been cancelled.²⁹ This Declaration also was not returned to National Continental.³⁰ National Continental also mailed to West Coast a “Premium Notice” dated February 12, 2007 wherein it states in relevant part:³¹

Your policy is cancelled effective 01-16-07,
12:01 A.M. A refund of premium will
follow.

At approximately the same time, National Continental mailed to West Coast at its Post Office Box in Point Roberts, a refund check of \$1,250. West Coast received the check because it cashed it on February 22, 2007.³²

B. SOLOMON QUITO, AN EMPLOYEE OF MAD PIZZA, WAS INVOLVED IN AN AUTOMOBILE ACCIDENT ON MAY 29, 2007.

On May 29, 2007, Solomon Quito, an **employee of Mad Pizza**, was involved in an accident with William Tschernega while delivering pizza for Mad Pizza. **Mr. Quito was never an employee of West**

²⁸ CP605.

²⁹ CP604; 706-8.

³⁰ CP605.

³¹ CP604; 712.

³² CP604; 710.

Coast.³³ Mr. Tschernega has sued Mr. Quito and Mad Pizza for injuries arising from this accident. He has not sued West Coast.

C. WEST COAST'S STATEMENT OF FACTS ARE UNSUPPORTED BY ITS CITATIONS TO THE RECORD.

RAP 10.3(a)(5) requires that references to the record must be included for each factual statement. National Continental has checked West Coast's reference to the record for the factual statements in its Statement of Facts. These references do not support West Coast's factual assertions and should be stricken.³⁴

D. THE COURT CAN CONSIDER ONLY THOSE DOCUMENTS WHICH WERE PART OF THE RECORD BEFORE THE COURT AT THE TIME OF NATIONAL CONTINENTAL'S SUMMARY JUDGMENT MOTION.

The trial court heard oral argument on National Continental's Summary Judgment Motion on April 30, 2010 and decided the motion based on the documents submitted at that time by the parties. On August 20, 2010, the trial court heard oral argument on United National's summary judgment motion and ruled based upon the documents submitted by the parties at that time.

On review, this court must decide whether the trial court erred in granting National Continental's summary judgment motion based upon the

³³ CP765-6.

³⁴ *Hirata v. Evergreen State Limited Partnership* #5, 124 Wash. App. 631, 637, 103 P.3d 812 (2004).

record before this trial judge and not the record before the trial court on the subsequent summary judgment motion by United National. Unfortunately, West Coast did not segregate the record between these two motions, and asserts facts from United National's summary judgment motion as though they were present at the time of National Continental's summary judgment motion.

West Coast has submitted an appendix and refers to it in its brief. Appendix A, E, F, G, and H are documents submitted after National Continental's summary judgment dismissal. This court cannot consider these documents in deciding whether National Continental was entitled to summary judgment.

PROCEDURAL HISTORY

West Coast brought this action for declaratory judgment after National Continental declined the tender of defense on behalf of Mr. Quito and Mad Pizza. In September of 2009, National Continental brought a Summary Judgment Motion asking the court to declare that it owed no duty to defend or indemnify Mr. Quito or Mad Pizza on the grounds that: (1) National Continental had cancelled the policy and (2) National

Continental did not insure either Mr. Quito or Mad Pizza.³⁵ This motion was denied.³⁶

National Continental later renewed its Summary Judgment Motion. Judge Susan Craighead denied the motion on the basis that the policy had cancelled.³⁷ However, she granted the motion on the basis that National Continental did not insure Mad Pizza or Mr. Quito.³⁸ West Coast has appealed this latter Order on Summary Judgment.³⁹ National Continental has cross-appealed the denial of its Summary Judgment on the basis that the policy had cancelled before any loss occurred.⁴⁰

IV. ARGUMENT

A. NATIONAL CONTINENTAL CANCELLED ITS POLICY WITH WEST COAST FOUR MONTH BEFORE THE MAY 29, 2007 ACCIDENT.

1. National Continental Had The Right To Cancel The Policy Because West Coast Failed To Comply With Two Requests To Verify Pertinent Policy Information.

³⁵ CP20-36.

³⁶ CP182-184.

³⁷ CP287-89.

³⁸ CP587-589.

³⁹ CP585-6.

⁴⁰ CP594-5.

National Continental was required under §31.A.11 of CAIP⁴¹ to contact the insured and conduct a preliminary premium audit and obtain information to properly rate the policy. National Continental mailed two “Premium Audit Questionnaires” to West Coast requesting this information. The first was mailed on September 25, 2006⁴² and the

⁴¹§31.A.11 of CAIP provides:

11. Underwriting/Rating

The servicing carrier must

- a. properly price all policies in accordance with the approved rating plans contained in the Manual of Rules and Rates and establish procedures for appropriate and timely verification of policy holders and operators’ driving records and/or obtain other information as necessary to assist in the proper classification and rating of an applicant;
- b. provide appropriate engineering and loss control service equivalent to voluntary market practices including follow-up for compliance with all reasonable safety requirements;

...

(2) The servicing carrier will conduct a survey of every applicant assigned in the following classes:

Taxicabs (nonfleet)

All fast food delivery risks

All youthful artisan contractors (25 years or younger)

...

d. perform a preliminary premium audit on every applicant assigned in the following classes:

- All policies with Any Auto coverage symbol

...

Within 60 days from the effective date of coverage, two documented good faith attempts to make contact with the applicant for purposes of scheduling or conducting a preliminary premium audit must be made.

It is expected the audit will be completed or and distributed no later than 120 days following the effective date of coverage. Audits completed or distributed after 120 days due to circumstances beyond the control of the servicing carrier must be documented. (Emphasis added. CP646.

⁴² CP697-98; CP602-3.

second on October 25, 2006,⁴³ but West Coast failed to respond to both requests. West Coast was warned in both letters that the policy may be cancelled if it failed to respond to the Premium Audit Questionnaire. The letters stated:

Your policy has been classified as a prepared food delivery service. Please respond to the following inquiries and return this completed questionnaire within ten days to insure proper rating of your policy and to **avoid a possible policy cancellation.** (Emphasis added).⁴⁴

Section 27 of CAIP authorized National Continental to cancel the policy after West Coast failed to respond to the two requests for the pertinent policy information.⁴⁵

2. *National Continental Complied With Both The Statutory Requirements And Its Policy Provisions When It Mailed The Cancellation Notices To West Coast And The Policy Cancelled On January 30, 2007.*

RCW 48.18.290 sets forth the requirements an insurer must satisfy in order to cancel a policy. An insurer must:

- Deliver or mail written notice of cancellation to the named insured at least 45 days prior to the effective date of the cancellation,⁴⁶ and

⁴³ CP698-99; CP603.

⁴⁴ CP697-701.

⁴⁵ CP641.

⁴⁶ RCW 48.18.290(1)(a)(i).

- Include the actual reason for canceling the policy on the Cancellation Notice.⁴⁷

National Continental's policy has the same requirements.⁴⁸

a. **The Cancellation Notice Stated The Reason Why The Policy Was Cancelled.**

National Continental complied with RCW 48.18.290(1)(a)(ii) as the cancellation notice stated the following reason for cancelling the policy:

Actual reason(s) for cancellation, non-renewal or declination of insurance: violation of contract term – failure to comply with premium audit questionnaire.

b. **The Cancellation Notice Became Effective 45 Days After It Was Mailed.**

National Continental's Cancellation Notice mistakenly gave an effective cancellation date of January 16, 2007, only 31 days notice instead of 45 days as required by statute and the policy. However, this mistake did not render the cancellation ineffective. Instead, the Cancellation Notice did not become effective until the statutory time elapsed on January 30, 2007.⁴⁹

⁴⁷ RCW 48.18.290(1)(2)(ii).

⁴⁸ CP690.

⁴⁹ *Insurance Management, Inc. v. Guptill*, 16 Wash. App. 226, 544 P.2d 359 (1976); *Ralston v. Royal Insurance Co., Ltd. of Liverpool*, 79 Wash. 557, 140 P. 552 (1914).

In *Insurance Management, Inc. v. Guptill*, *supra*, the insured argued that the Cancellation Notice was ineffective because the Cancellation Notice stated a date for cancellation which was less than 10 days required by statute. Division I rejected this argument, explaining on p. 231:

Further, even where a notice specifies a shorter period than that required, it is not ineffective, since in this jurisdiction the notice is treated as if it stated the proper date. *See Rolston v. Royal Insurance Co.*, 79 Wash. 557, 561-62, 140 P. 552 (1914). *See also*, 7D. Blashfield, *Automobile Law and Practice*, Sec. 293.9 at 269 (3d Ed. 1966).

This rule is in accord with the majority of jurisdictions. As stated in *2 Couch on Insurance* (3d Ed.) Sec. 32.52:

In general, the specification in the notice cannot shorten the amount of time provided for in a statute, or by the policy but, if the notice provides for a longer period than that required by the terms of the policy, the longer notice period will prevail. An attempt to shorten the period by the terms of the Notice of Cancellation generally leaves the policy in force, at least until lapse of the full required period, under the general view that a notice which provides less time than that required by statute or policy, if otherwise sufficient as to form and content, is effective after the lapse of the full period so required. Thus, the notice is effective, but is to be read as though it stated the proper date which would be allowed by policy. ...

The fact that the Notice of Cancellation does not allow the proper period of time is immaterial where the loss is sustained subsequently due to the lapse of what would be the required period of time. For example, a cancellation is not ineffective under a 10 day notice clause merely because ten days did not elapse between the receipt of the notice and the date fixed for cancellation, where no loss occurs until long after such date.

In the present case, National Continental's Cancellation Notice was mailed on December 15, 2006 and gave an effective date of January 16, 2007, a period of 31 days. Since the statute requires 45 days notice, the policy did not cancel until January 30, 2007. This occurred well before the May 29, 2007 accident.

c. National Continental Complied With The Mailing Requirements Of RCW 48.18.290(2).

An insurer who mails a Cancellation Notice to its insured must comply with the following requirement set forth in RCW 48.18.920(2):

The mailing of any such notice shall be effected by depositing it in a sealed envelope, directed to the addressee at his or her last address as known to the insurer or as shown by the insurer's records, with proper pre-paid postage affixed, in a letter depository of the United States Post Office. The insurer shall retain in its records any such items so mailed, together with its envelope, which was returned by the post office upon failure to find, or deliver the mailing to, the addressee.

(3) The affidavit of the individual making or supervising such a mailing, shall constitute *prima facie* evidence of such facts of the mailing as are therein affirmed.

National Continental complied with these requirements. As the declarations of National Continental's employees establish,⁵⁰ National Continental deposited in the U.S. Mail, with the proper postage, a sealed envelope containing the cancellation notice addressed to West Coast at its mailing address of PO Box 187, Point Roberts, Washington, 98281. National Continental also mailed a copy of the Cancellation Notice to A.J. Gallagher. Neither Cancellation Notice was returned to National Continental as undelivered.

d. The Cancellation Notice Was Effective Upon Mailing Regardless Of Whether West Coast Received It.

Washington courts have uniformly held that an insurer who complies with the mailing requirements of RCW 48.18.290 has cancelled the policy regardless of whether the insured actually receives the notice.⁵¹

In *Wisniewski v. State Farm, supra*, State Farm mailed a Cancellation Notice to plaintiffs after plaintiffs failed to pay the premium.

⁵⁰ See Declaration of Dean Daquila (CP600-715), Lucy Gura (CP50-64), and Franchot Thomas (CP37-41).

⁵¹ *Wisniewski v. State Farm*, 25 Wash. App. 766, 609 P.2d 456 (1980); *Tremmel v. Safeco*, 42 Wash. App. 684, 713 P.2d 155 (1986); *Isaacson v. DeMartin Agency, Inc.*, 77 Wash. App. 875, 893 P.2d 1123 (1995).

The cancellation was effective March 14, 1978. Plaintiffs' home was damaged in a fire on March 25, 1978 and plaintiffs attempted to pay the overdue premium on March 28, 1978. State Farm refused payment and denied coverage. Plaintiffs sued.

On appeal, plaintiffs' argued that State Farm had to establish that plaintiffs actually received the mailed Cancellation Notice before the policy could be canceled. The court rejected this argument, stating on p. 767:

First, the plaintiffs urged this Court to require proof of receipt of the Notice of Cancellation by the insured in order to effect cancellation of an insurance policy. **However, the long-established rule in this state is that proof of mailing is all that is necessary.** (Emphasis Added).

In *Tremmel v. Safeco, supra*, Safeco mailed its Cancellation Notice to plaintiffs on October 27, 1982 notifying plaintiffs that the policy would cancel on November 10, 1982 unless Safeco received payment before that date. Plaintiffs did not receive the Cancellation Notice until November 8, 1982, and mailed its premium payment on November 15. Plaintiff was involved in an accident on the same day. Plaintiff sued Safeco for coverage and appealed a summary judgment in Safeco's favor.

On appeal, plaintiffs' argued that it had ten days to pay the premium following the day it received the Notice. The court rejected this

argument. It followed the rule that proof of mailing is all that is necessary in order to effect cancellation of an insurance policy.

In the present case, National Continental followed the requirements set forth in RCW 48.18.290(2) when it mailed the Cancellation Notice to West Coast. This is *prima facie* evidence of such mailing.⁵² West Coast presented no evidence to overcome this presumption and created no genuine issue of material fact. The fact that West Coast claims that it did not receive the Cancellation Notice is irrelevant because National Continental only needs to show that it mailed the notice.

3. **National Continental's Policy Cancelled Before The May 29, 2007 Accident.**

Since National Continental's policy cancelled effective January 30, 2007, National Continental had no duty to West Coast, or any other entity, to defend or indemnify it for the claims arising from the May 29, 2007 accident. This court should uphold the Summary Judgment Order based on this ground.

B. **ASSUMING THAT NATIONAL CONTINENTAL'S POLICY WAS IN FORCE ON MAY 29, 2007, IT DID NOT INSURE EITHER MAD PIZZA OR MR. QUITO.**

National Continental's policy provides the following liability coverage:

⁵² RCW 48.18.920(3).

We will pay all sums an **'insured'** legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a **covered 'auto'**. (Emphasis added).

National Continental's obligation to pay is only to an **insured**. Further, its obligation to pay requires that the damages result from the ownership, maintenance, or use of a **covered "auto."**

I. Neither Mr. Quito nor Mad Pizza Qualify as an Insured.

National Continental's policy defines an "insured" as follows:

1. Who Is An Insured.

The following are 'insureds'.

- a. You for any covered 'auto'.
- b. Anyone else while using with your permission a covered 'auto' you own, hire or borrow except:

... ⁵³

The word "you" refers only to West Coast, the name insured.⁵⁴ Consequently, neither Mad Pizza nor Mr. Quito qualify as an insured under §§a.

⁵³ CP667.

⁵⁴ This policy provides:

Throughout this policy the words 'you' and 'your' refer to the named insured shown in the Declarations. The words 'we', 'us' and 'our' refer to the company providing this insurance. CP666

Under §§b. above, an “insured” is one who is using a covered “auto” owned, hired or borrowed by West Coast with West Coast’s permission. In the present case, West Coast did not own, hire or borrow Mr. Quito’s vehicle, and therefore he does not fall within this definition of an “insured.”

2. *Mr. Quito’s Vehicle Is Not A “Covered Auto” Under National Continental’s Policy.*

The policy defines covered autos as follows:

SECTION I – COVERED AUTOS.

Item Two of the Declarations shows the covered ‘autos’ that are covered ‘autos’ for each of your coverages. The following numerical symbols describe the ‘autos’ that may be covered ‘autos’. The symbols entered next to a coverage on the Declarations designate the only ‘autos’ that are covered ‘autos’.

The Declarations page has the numerical symbol “9” for covered autos. Symbol “9” is for “Nonowned ‘Autos’ Only” which the policy defines as:

Only those ‘autos’ you do not own, lease, hire, rent or borrow **that are used in connection with your business.** This includes ‘autos’ owned by your ‘employees’, partners (if you are a partnership), members (if you are a limited liability company), or members of their households **but only while**

used in your business or your personal affairs. (Emphasis added)⁵⁵.

This definition requires that the automobiles must be used in “connection with your business” and includes “autos” owned by the business’s “employees.” Thus, in order for Mr. Quito’s automobile to be a covered auto, he must be an employee of West Coast Pizza and the automobile had to be used in connection with West Coast’s business.

In the present case, Mr. Quito’s auto was not used in West Coast’s business. Mr. Quito never worked for West Coast, and was not its employee. Instead, he worked for Mad Pizza, a separate corporation, in a store in Lynnwood operated by Mad Pizza. Mr. Quito was Mad Pizza’s employee at the time of the accident. Since Mr. Quito was not West Coast’s employee, and was not using his vehicle in West Coast’s business, his vehicle does not qualify as a covered “auto,” and the insurance does not apply.

3. **West Coast Has Misrepresented What Is A “Covered Vehicle.”**

On p. 16 of West Coast’s Brief, it quotes partially from National Continental’s Policy and asserts that “covered autos” include:

- (1) The owner or anyone else from whom you hire or borrow a covered ‘auto’. This exception does not apply if the covered

⁵⁵ CP666.

'auto' is a 'trailer' connected to a covered 'auto' you own.

(2) Your 'employee' if the covered 'auto' is owned by that 'employee' or a member of his or her household. (Emphasis added).

West Coast misleads the court because these two quoted sections are exceptions as to who is an insured and does not identify what a "covered auto" includes. The policy provision actually states:

1. Who Is An Insured.

The following are 'insureds':

a. You for any covered 'auto'.

b. Anyone else while using with your permission a covered 'auto' you own, hire or borrow **except:**

(1) The owner or anyone else from whom you hire or borrow a covered 'auto'. This exception does not apply if the covered 'auto' is a 'trailer' connected to a covered 'auto' you own.

(2) Your 'employee' if the covered 'auto' if owned by that 'employee' or a member of his or her household.⁵⁶

C. NATIONAL CONTINENTAL NEVER INTENDED TO INSURE ANY ENTITY EXCEPT WEST COAST.

1. The Court Cannot Consider West Coast's Unexpressed Intent in Interpreting the Contract.

⁵⁶ CP667.

The primary goal in a contract dispute is to ascertain the intent of the parties at the time they executed the contract.⁵⁷ The court's concern is the intent of the parties at the time of contracting.⁵⁸

Extrinsic evidence is admissible to aid in the interpretation of the words used in the contract.⁵⁹ However, extrinsic evidence cannot be used to show a party's intention independent of the contract.⁶⁰ As explained in *Lynotte v. National Union Fire Insurance Company*:⁶¹

The underlying principle is well established ...

[w]e have long adhered to the objective manifestation theory of contracts. This theory means that we impute to a person an intention corresponding to the reasonable meaning of his words and acts. Petitioner's unexpressed impressions are meaningless when attempting to ascertain the mutual intentions [of the parties].

This principle is quite simple. Unilateral or subjective purposes and intentions about the meaning of what is written do not constitute evidence of the party's intentions. (Citations omitted).

The undisputed evidence in this case is that National Continental intended to insure only West Coast, and no other entity. West Coast, with

⁵⁷ *Berg v. Hudesman*, 115 Wash.2d 657, 663-4, 801 P.2d 222 (1990).

⁵⁸ *Queen City Farms v. Central National Insurance Company*, 126 Wash.2d 50, 78-9, 882 P.2d 703 (1994).

⁵⁹ *Berg v. Hudesman*, *supra*.

⁶⁰ *J.W. Seavey Hopp Corp. v. Pollock*, 20 Wash.2d 337, 147 P.2d 310 (1944).

⁶¹ 123 Wash.2d 678, 684, 871 P.2d 146 (1994).

the assistance of its insurance broker, submitted the application which listed only West Coast as the applicant.⁶² West Coast left blank the section which asked it to name "... of any party requiring a certificate of insurance or additional insured endorsement."⁶³

West Coast misrepresented to National Continental that it had 285 employees and 100 drivers. This misrepresentation cannot be used to infer that National Continental intended to insure three other undisclosed entities in addition to West Coast.

If West Coast intended to have National Continental insure Mad Pizza, Tiem Pies, and Mac Pies in addition to West Coast, it was an unexpressed intent. This court cannot consider the unexpressed intentions in interpreting the contract.

D. WEST COAST IS NOT ENTITLED TO REFORMATION.

1. The Court Cannot Consider this Issue because Appellant Did Not Plead Reformation in its Complaint.

In *Carew, Shaw and Bernaskoni v. General Casualty Company of America*,⁶⁴ the court set forth the following law governing reformation:

The rules of law governing reformation of written agreement are applicable to the reformation of an insurance policy. An insurance contract is no different from any other contract when the rules of law

⁶² CP750.

⁶³ CP754.

⁶⁴ 189 Wash. 329, 336-7, 65 P.2d 689 (1937).

governing the reformation of written agreements are to be applied to it. It is a rule, so well settled as to need no citation of sustaining authority, that a written instrument, which constitutes the contract between two parties, will be performed only when fraud or mistake is shown by clear, cogent, and convincing evidence. If, as in the case at bar, the evidence is in sharp conflict or any doubt exists as to the intention of the parties, reformation will not be granted.

To support reformation, there must be evidence of fraud or mutual mistake.⁶⁵

Civil Rule CR 9(b)⁶⁶ requires that allegations of fraud or mistake must be pled and the circumstances stated with particularity. This requirement that the circumstances be stated with particularity must be pled in the complaint and not in subsequent briefing.⁶⁷

In the case at bar, West Coast did not plead fraud or mutual mistake, or seek reformation in its complaint. West Coast first raised the issue of reformation only after National Continental filed its summary

⁶⁵ *Rocky Mountain Fire & Casualty Company v. Rose*, 62 Wash.2d 896, 902, 385 P.2d 405 (1963).

⁶⁶ **RULE 9. PLEADING SPECIAL MATTERS**

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.

⁶⁷ *Haverman v. WPPSS*, 109 Wash.2d 107, 165, 744 P.2d 1032 (1988).

judgment, and even then West Coast did not move to amend its complaint.

This issue is not properly before the court and cannot be considered.

2. **Even if Considered, West Coast is not Entitled to Reformation.**

The court will not impose a contract upon the parties that they did not agree to:

It is a longstanding rule that courts cannot, and ought not, make a contract for the parties for which they did not make for themselves or impose upon one party an obligation which was not assumed.⁶⁸

A court can exercise its equitable powers to reform a contract only where the two parties have the same intention as to its terms, but the subsequent writing varies in some material way with that intent.⁶⁹ This rule is well stated in *Tumwater State Bank v. Commonwealth Land Title Insurance Company*⁷⁰:

Where parties to a transaction have an identical intention as to the terms to be embodied in a proposed agreement and the writing executed by them is materially at variance with the intention, a court of equity will reform the writings so that it will truly express the intention of the parties. *Thorsteinson v. Waters*, 65 Wn.2d 739, 744-45, 399 P.2d 510 (1965).

The party seeking reformation has the

⁶⁸ *Seattle First National Bank v. Earl*, 17 Wash. App. 830, 835, 565 P.2d 1215 (1977).

⁶⁹ *Denny's Restaurants, Inc. v. Security Union Title Insurance Company*, 71 Wash. App. 194, 859 P.2d 619 (1993); *Keierleber v. Botting*, 77 Wn.2d 711, 466 P.2d 141 (1970).

⁷⁰ 51 Wash. App 166, 752 P.2d 930 (1988)

burden of proving the mutual mistake and must show clearly that the parties to the transaction have an identical intention as to the terms to be embodied in the deed or instrument and that the deed or instrument is materially at variance with that identical intention.

Keierleber v. Botting, 77 Wn.2d 711, 715-16, 466 P.2d 141 (1970).

In *Leonard v. Washington Employers, Inc.*,⁷¹ the court set forth the following rule:

One seeking reformation of an instrument must prove, by clear, cogent and convincing evidence, (1) both parties to the instrument had an identical intention as to the terms to be embodied [sic] in a proposed written document, (2) that the writing which was executed is materially at variance with that identical intention, and (3) innocent third parties will not be unfairly affected by reformation of the writing to express that identical intention.

Reformation will not be granted if there is any doubt as to the intent of the parties.⁷²

3. ***West Coast and National Continental Did Not Have the Identical Intention.***

National Continental intended to insure West Coast. This was the only entity listed by West Coast as the named insured in the application for

⁷¹ 77 Wash.2d 271, 279, 461 P.2d 538 (1970).

⁷² *Akers v. Sinclair*, 37 Wash.2d 693, 703, 226 P.2d 225 (1951).

insurance West Coast filled out with the assistance of its broker. National Continental clearly did not intend to insure other companies such as Mad Pizza, Tiem Pies, and Mac Pies.

4. There was no Mutual Mistake.

Reformation is only allowed if there is a **mutual** mistake. As explained in *Wilson v. Westinghouse Electric Corp.*:⁷³

This court has repeatedly reiterated the rule that there must be a mutual mistake of the parties to the transaction in order to justify the granting of reformation. The mistake on the part of one party alone is not relievable.

In the present case, no mutual mistake existed on who the insured would be under the policy. National Continental never intended to insure anyone other than West Coast.

5. The Cases Cited By West Coast Do Not Support Its Position.

West Coast initially cites *Metropolitan Mortgage and Security, Inc. v. Reliance Insurance Company*⁷⁴ in support of its contention that the contract should be reformed. However, this case does not involve the issue of whether a contract should be reformed. Instead, the court is interpreting a contract to determine whether the parties intended that the insurance policy be void by the transfer of a vendor's interest in the property without the insurer's approval.

Appellant also cites *Carew, Shaw and Bernasconi v. General*

⁷³ 85 Wash.2d 78, 84, 530 P.2d 298 (1975).

⁷⁴ 64 Wash.2d 98, 390 P.2d 694 (1964).

Casualty Company, supra. The issue in this case is whether the plaintiff had established reformation by clear, cogent, and convincing evidence. The court ultimately held that plaintiff did not meet this burden and denied reformation.

Plaintiff finally cites *Providence Washington Insurance Company v. Stanley*⁷⁵ a case not involving reformation of a contract. Instead, the issue before the court was whether Mrs. Stanley had an insurable interest in the property at the time of the loss.

6. **At Most, West Coast Made A Unilateral Mistake Of Fact Which Does Not Allow For Reformation.**

A unilateral mistake of fact occurs when only one party to a contract makes a mistake as to the basic assumption on which he made the contract. Restatement (Second) of Tort § 153. A contract may be **voided** for a unilateral mistake only if the other party to the contract knows or is charged with knowledge of the mistake. As stated in *Gill v. Waggoner*⁷⁶:

One party to a contract is not liable if the contract is based on that party's unilateral mistake and the other party to the contract knows of or is charged with knowledge of the mistake. A mistake is a belief not in accord with the facts. (Citations omitted).

In other words, a party to a contract can void that contract if it makes a unilateral mistake and the other party to the contract knows of the mistake, or is charged with knowledge of the mistake. Otherwise, the mistaken party is bound by the terms of the contract.

In the present case, West Coast made a unilateral mistake in identifying only itself as the named insured, and not including Mad Pizza,

⁷⁵ 403 F.2d 844 (5th Cir. 1969).

⁷⁶ 65 Wash. App 272, 276, 828 P.2d 55 (1992)

Tiem Pies and Mac Pies as named insureds. National Continental did not know of this mistake, and had no reason to know of it. National Continental relied upon the application submitted by West Coast wherein it listed only West Coast as the named insured. Consequently, National Continental cannot be charged with knowledge that West Coast intended to have other entities included as the named insured. West Coast is bound by the mistake.

7. **A Unilateral Mistake Only Allows The Court To Void The Contract, Not Reform It.**

If one is entitled to relief from a unilateral mistake because the other party knew or is charged with knowledge of that mistake, then the remedy is to void the contract, not reform it. Restatement (Second) of Tort § 153.⁷⁷ Reformation is allowed only in the circumstances set forth in section D above.

Even if West Coast were entitled to relief for a unilateral mistake, it would be entitled only to void the contract *ab initio*, and receive its premium back. There would be no contract, and National Continental would owe no duty to defend or indemnify Mad Pizza or Mr. Tschernega in the underlying lawsuit.

8. **West Coast's Remedy Is Against Gallagher Not National Continental.**

West Coast's insurance broker was Gallagher, who fully assisted West Coast in filling out the WAIP insurance application. It was

⁷⁷ Restatement (Second) of Tort § 153 provides in relevant part:

153. When the mistake of one party makes a contract **voidable**. Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performance that is adverse to him, the contract is **voidable** by him if he does not bear the risk of the mistake under rule stated in 154 and ...

Gallagher's responsibility to provide accurate information to National Continental, including those entities to be named insureds. If this application was not completed correctly, then National Continental's remedy is against Gallagher, not National Continental.

E. THE TRIAL COURT DID NOT ERR IN RULING THAT NATIONAL CONTINENTAL DID NOT OWE A DUTY TO DEFEND AFTER DETERMINING THAT THE POLICY DID NOT INSURE MAD PIZZA OR MR. QUITO.

West Coast finally argues that West Coast breached its duty to defend Mad Pizza and Mr. Quito. The duty to defend arises only if the insured may be legally liable for damages as a result of the covered event.⁷⁸

In the present case, the insured is West Coast. West Coast was not named as a Defendant in the underlying lawsuit by Mr. Tschernega, and it had no possibility of being legally liable for damages. Accordingly, National Continental breached no duty to defend.

IV. CONCLUSION

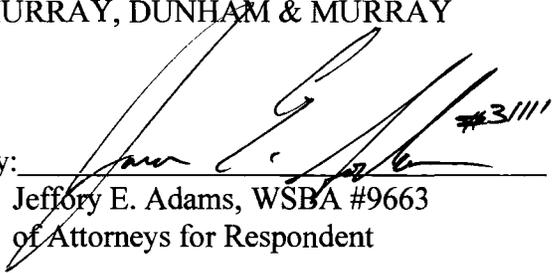
For the reasons set forth above, this court should uphold the summary judgment in favor of National Continental on two grounds. First, National Continental's policy with West Coast cancelled before the underlying accident occurred. Moreover, National Continental insured

⁷⁸ *State Farm v. Emerson*, 102 Wash.2d 477, 486, 687 P.2d 1139 (1984).

only West Coast, and not Mad Pizza or Mr. Quito. The summary judgment should be affirmed.

RESPECTFULLY SUBMITTED this 17th day of February, 2011.

MURRAY, DUNHAM & MURRAY

By: 

Jeffery E. Adams, WSBA #9663
of Attorneys for Respondent