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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it entered judgment on January 19, 2007 against Hartford Fire Insurance Company (“Hartford”) in favor of CSV Limited Partnership (“CSV”) for coverage of defective building products and installation and water intrusion damages in the amount of \$355,707.90.
2. The trial court erred when it entered judgment on January 19, 2007 against Hartford in favor of CSV for coverage and pre-judgment interest on a lightweight concrete flooring repair settlement made by CSV with a Homeowners Association (“HOA”) in the amount of \$86,315.03.
3. The trial court erred when it entered judgment on January 19, 2007 against Hartford in favor of CSV for attorney’s fees and costs in the amount of \$98,926.96.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether CSV failed to comply with policy conditions by waiting six years to give notice to Hartford that defective building product repairs were completed and paid for thereby prejudicing Hartford by denying an opportunity to investigate the claim?
2. Whether CSV had repeated and clear notice by its project architect and others of a defective lightweight concrete flooring product and its installation prior to the inception of the Hartford policy period?
3. Whether lightweight concrete that was damaged prior to inception of the Hartford policy is a covered “occurrence”?
4. Whether the Hartford policy’s clear and unambiguous business risk exclusions bar coverage for CSV’s defective lightweight concrete, LP Siding and building paper products?
5. Whether CSV’s award of attorney’s fees and costs must be reversed should the Court find there is no coverage for damages associated with the defective lightweight concrete?

III. SUMMARY OF ARGUMENT

The trial court erred when it entered judgment against Hartford in favor of CSV for coverage of water intrusion damages in the amount of \$355,707.90 inclusive of pre-judgment interest. It is uncontested that CSV completely repaired the entire building envelope and discarded all repair materials before giving notice to Hartford as required by the policy. It is also uncontested that CSV paid \$235,858.93 to repair the building envelope without Hartford's consent as required by the policy. As a result, Hartford was prejudiced because it lost any ability to investigate and assess covered versus uncovered "property damage" associated with defectively installed building envelope products, lost any ability to negotiate with the responsible contractors/architect for repair of the building envelope and lost the ability to eliminate CSV's liability to the HOA under a nationwide LP Siding class action release. Under Washington law, CSV's prejudicial breach of the policy conditions relieved Hartford of its potential coverage obligations. The trial court's refusal to apply dispositive law to the compelling evidence of prejudice is reversible error.

The trial court erred when it entered judgment against Hartford in favor of CSV for pre-judgment interest on a lightweight concrete flooring repair settlement between CSV and the HOA in the amount of \$86,315.03.

CSV actually knew that the lightweight concrete flooring was defective by 1995 well prior to the inception of the March 1, 1996 Hartford policy. Under the clear terms of an express policy exclusion and the common law “known loss” doctrine, there is no coverage for repairs to the lightweight concrete where CSV had notice of the damage prior to the inception of Hartford’s policy. The trial court’s refusal to apply Washington law to the compelling evidence of CSV’s notice of damage prior to the inception of Hartford’s policy is reversible error. In addition, the trial court further erred by finding coverage for lightweight concrete repairs because damaged lightweight concrete is not a covered “occurrence,” let alone one that happened in the Hartford policy period. Uncontested evidence established that complete damage to the lightweight concrete flooring system occurred eight months prior to inception of Hartford’s policy.

The trial court also erred when it failed to apply the Hartford policy exclusions k for damages to “your product” and j(1), (5) and (6). A liability policy is not a performance bond, product liability insurance or malpractice insurance. The trial court’s award of damages to CSV for building envelope repairs and lightweight concrete settlement were errors.

Finally, the trial court erred when it entered judgment against Hartford in favor of CSV for attorney’s fees and costs in the amount of \$98,926.96. CSV’s award of attorney’s fees and costs must be reversed

because, there are no covered damages.

IV. STATEMENT OF CASE

A. Introduction.

Respondent CSV seeks liability coverage from its Appellant insurer Hartford and Valley Insurance for damages CSV paid for defective construction of the Columbia Shores condominium project (“The Project”). CSV purchased a commercial general liability (“CGL”) policy from Hartford for the period March 1, 1996 – March 1, 1997. Ex 110. CSV also purchased a CGL policy from Valley Insurance for the period March 1, 1995 – March 1, 1996. Ex 151. CSV retained Courtesy Construction as its general contractor and Ankrom Moison as its architect and construction managing agent. RP 524, 596-97. The Project began in 1994, physical construction was completed in February 1996, and the Certificate of Occupancy was issued on March 21, 1996. Ex 13, RP 524, 526, 596-97.

Prior to construction completion and continuing through 1999, water intruded behind the Louisiana Pacific Siding (“LP Siding”) and penetrated weather-resistant building paper because the siding and paper were defective products and because of CSV’s installation defects. RP 49-53, 61-62, 92-96, 267-74, 298-301. In 1998, CSV, without notice to Hartford, paid for removal and reinstallation of the LP Siding and replaced

the inadequate weather-resistive building paper. RP 607-09. The remediation included a complete removal of the building paper; installation of flashings; and reinstallation of the original LP Siding. RP 117, Ex 47. The cost incurred by CSV was \$235,858.93. Ex 47.

The Project suffered from other substandard conditions. In 1999, the HOA filed a Condominium Act complaint against CSV. Ex 30. CSV filed third-party claims against Courtesy Construction, the general contractor, as well as the trade subcontractors. In June 2001, CSV settled with the HOA for \$645,000. Ex 43. On October 13, 2004, CSV recouped \$400,000 from its contractors and \$10,000 from its architect. Ex 44; RP 881-82. CSV filed its complaint against Hartford and Vesta Insurance Corporation on November 7, 2002. CP 1. On October 29, 2004, CSV filed an amended complaint adding Valley Insurance as a defendant. CP 13.

B. Summary of Damages Awarded By The Trial Court.

At trial, CSV alleged two categories of liability damages for which it sought coverage from the insurers. The first category was remediation costs CSV incurred with respect to the defective LP siding and building paper. CP 957, Conclusion 10. The trial court concluded there was coverage for this claim but that the GGL owned property exclusion, exclusion (1), reduced the amount by 21%. CP 962, Conclusion 8. CSV

was awarded \$186,328.55. CP 966, Conclusion 33. The trial court also awarded pre-judgment interest of \$169,379.35 on this claim from June 23, 1999 through entry of judgment. CP 966, Conclusion 33, CP 1255.

The second category of damages sought was money paid to the HOA to settle its claims against CSV. In June 2001, CSV reached a global settlement with the HOA for \$645,000. Ex 43. At trial, CSV sought to recover \$548,255.00¹ from Hartford and Valley. CP 961, Conclusion 33. CSV's President, Greg Daniels, identified three claims he believed exposed CSV to liability:

1. HVAC system's failure to heat or cool properly;
2. Defective lightweight concrete flooring system product and installation; and
3. Failure of gypsum wallboard at the RC Channels to provide sound dampening between walls and floors.

RP 565-69.

The trial court correctly concluded that there was no "property damage" for the failure of the HVAC system to properly heat or cool. CP 958, Conclusion 12. Moreover, there was no "occurrence" during the Hartford policy period because the HVAC system was completed in 1995. CP 963, Conclusion 12. The trial court allocated \$272,000 of \$548,255 to

¹ The \$96,745 difference between the \$645,000 paid to the HOA and the \$548,255 sought by CSV in this matter is solely attributed to a claim for uninsulated sprinkler pipes. The claim for uninsulated sprinkler pipes was brought only against Vesta Insurance Corporation. Vesta settled this claim and was dismissed.

the uncovered HVAC claim. CP 964, Conclusion 24. The court also concluded that there was no coverage for poorly installed gypsum soundproofing wallboard. CP 964, Conclusion 20. The gypsum wallboard was also installed prior to the Hartford policy. CP 964, Conclusion 18-20.

The trial court concluded that the defective lightweight concrete product was the sole covered “property damage” and of the \$548,255 sought by CSV, allocated \$276,255 to the claim. CP 963-64, Conclusions 13-16; CP 964, Conclusion 24. The trial court applied the owned property exclusion and reduced the lightweight concrete award by 21% to \$218,241.45. CP 963, Conclusion 17 and CP 966, Conclusion 33.

CSV recovered a total of \$410,000 from its contractors and architect on or about October 13, 2004. Ex 44, RP 881-82. Of that amount, the trial court concluded that \$235,106.47 offset the \$218,241.45 amount it awarded for lightweight concrete. CP 965, Conclusion 26, CP 966, Conclusion 33. Because the amount of the covered offset exceeded the amount of covered damages, no award was entered on the flooring claim. CP 966, Conclusion 33. However, the trial court awarded pre-judgment interest of \$86,315.03 on the \$218,241.45 from June 27, 2001, the date of settlement, through October 13, 2004, the date of offset recovery. CP 966, Conclusion 33. The total judgment against Hartford

was \$540,949.89:

1.	LP siding, building paper repairs	
a.	Principal	\$186,328.55
b.	Pre-judgment interest	\$169,379.35
2.	Lightweight concrete flooring	
a.	Principal (after offset)	\$ 0.00
b.	Pre-judgment interest	\$ 86,315.03
	<hr/>	
	Total	\$540,949.89

CP 1255.

C. CSV Waited Six Years To Notify Hartford Of The Water Intrusion Repairs And Never Sought Consent To Repair.

From 1996 through early 1999, CSV incurred repair costs for building envelope defects (LP Siding, flashing and building paper) and resulting water intrusion to some condominium interior units. Ex 47. CSV learned of extensive leaks at windows, vents and other penetrations in the fall of 1995. RP 610-62, 477-78, 851. CSV performed some repairs, but could not stop the leaking, especially on the south facing weather side of the building. RP 297-301. CSV waited two years to perform forensic invasive testing in January 1998. Ex 47. CSV determined that the building paper under the LP Siding was of inadequate thickness and the window waterproofing wraps were defectively installed. RP 49-53, 93-96, 117, 272-74, Ex 122, 166. No notice was given to Hartford of the defects, the testing or the results.

In August 1998, CSV paid to have the LP Siding removed, the building paper removed, upgraded and replaced, new window flashing installed, and the LP Siding reinstalled for a total cost of \$235,858.93. RP 117, Ex 47. \$165,158.14 went solely to removing and replacing the defective LP Siding product. No notice was given to Hartford.

At trial, CSV conceded the categories of costs incurred related to building envelope defective product repairs:

a.	Investigation	\$ 15,895.17
b.	Repair costs for interior condominium unit damage	\$39,028.82
c.	Removal/replacement/reinstallation of LP Siding system, building paper and flashing	\$165,158.19
d.	Oversight of remediation work	\$15,776.95
	TOTAL	\$235,858.93

RP 768-771 and Ex 47. No prior notice was given to Hartford that the work had been performed or costs incurred. RP 607. The repairs to the building envelope took seven months. Ex 47. Hartford had no opportunity to inspect before repairs were made or to review conditions, or segregate covered versus uncovered damages or otherwise participate. RP 607-609.

The very first notice from anyone acting on CSV's behalf having anything to do with any HOA claims at The Project was July 2, 1999, well after CSV completed all remediation work on the building envelope, paid the costs and disposed of the products. Ex 92. The following is a summary

of all correspondence Hartford received from CSV or its agents:

- **07/02/1999** Letter from CSV's insurance agent forwarding a letter from Ben Shafton, counsel for CSV. Nowhere in the letter is there any mention or tender of the \$235,858.93 already paid by CSV related to the 1998 building envelope remediation.
- **08/23/2000** Letter from Mike Mitchell, counsel for CSV first retained by Vesta, and then jointly retained by Vesta and Hartford. Nowhere in the letter is there any tender of or notice of the costs incurred related to the 1998 building envelope remediation or \$235,858.93 in repair costs.
- **11/30/2000** Letter from Mike Mitchell. Nowhere in the letter is there any tender or mention of the costs incurred related to the 1998 building envelope remediation.
- **01/23/2001** Letter from Mike Mitchell discussing the homeowners' current claims against CSV. Nowhere in the letter is there any tender or claim for the costs incurred related to the 1998 building envelope remediation.
- **03/26/2001** Letter from Mike Mitchell. Nowhere in the letter is there any tender of the costs incurred related to the 1998 building envelope remediation.
- **05/03/2001** Correspondence from Mike Mitchell forwarding a copy of a letter from Mr. Shafton. Nowhere in either of the letters is there any tender or claim for the costs incurred related to the 1998 building envelope remediation.
- **05/04/2001** Letter from Mr. Shafton. Nowhere in the letter is there any tender or claim for the building envelope remediation.
- **06/22/2001** Letter from Mike Mitchell. Nowhere in the letter is there any tender or claim for the costs incurred related to the 1998 building envelope remediation.
- **08/16/2001** Letter from CSV counsel Ben Shafton. The letter only mentions costs to repair interior condominium unit water damage. Nowhere in the letter is there any tender of the substantial costs incurred by CSV for the 1998 building envelope remediation.
- **9/20/2004** Letter from CSV counsel Shafton. This is the first correspondence and notice that CSV seeks reimbursement for repair costs incurred by CSV for the

1998 remediation of the building envelope.

Ex 92.

CSV waited more than six years to notify Hartford that it was seeking indemnity for repair of the building envelope. Ex 128. CSV never sought Hartford's prior consent to pay \$235,858.93, as required by the policy. Ex 110, HART 101-02. Hartford lost any opportunity to participate or to evaluate coverage.

D. CSV Knew Prior To Inception Of The Hartford Policy That The Lightweight Concrete Flooring Was Defective.

The trial evidence revealed that the problems with the lightweight concrete were three-fold: 1) inadequate thickness; 2) the composition of the lightweight concrete caused it to flake, crumble, powder and disintegrate; and 3) consequent failure to meet fire and sound Uniform Building Codes. Ex 8, 10, 12, 85, 133, 135-39, 145. The inadequate thickness and durability of the lightweight concrete affected the upper three condominium floors of the entire project. RP 737, 740 and Ex 8, 10, 12, 85, 133, 135-39, 145.

The defective lightweight concrete flooring on all floors was completely installed by July 1995, well before the Hartford policy inception of March 1, 1996. Ex 82. The problems with the defective lightweight concrete flooring were repeatedly reported by the project

architect David Partridge and others to CSV beginning in September 1995 and continuing to February 1996. RP 286-87, 540, CP 554-56, 1130 and Exs. 133-145.

The architect repeatedly warned CSV in his weekly 1995 field reports that the flooring was defective and failed to meet codes. CSV nonetheless consciously elected to, literally and figuratively, cover up the defective flooring rather than fix the problem. The architect's comments indisputably reveal that CSV had pre-policy inception knowledge of extensive defects in the lightweight concrete flooring.

- **September 19, 1995** “The gypsum “Firm Fill” [lightweight concrete] product used on the floors continues to perform below typical standards.” Ex 133, p.2.
- **October 2, 1995** “The Firm-Fill system problem is still an issue. It is crumbling in many areas and “sanding” **almost everywhere.**” Ex 135, p. 2 emphasis added.
- **October 6, 1995** “It [Firm-Fill] is disintegrating into a sandy –lime topping up to a ¼” thick in many high traffic areas. I would assume this was due to an improper mix during application. A second issue is the thickness.... The average thickness is important for three reasons. The first is acoustic, the second is the manufacturer’s warranty and the third is fire protection.... The 3/8” to 5/8” I discovered simply will not be acceptable for code compliance.” Ex 85, p. 1.
- **October 10, 1995** “The Firm-Fill system problem is still an issue.... **I noticed carpet was being installed over the lime/sandy surface at the east building third floor units.** I believe this is premature and is **a great risk at this time.** **The potential buyer liability problems could be staggering....** The carpet, vinyl, and bath floor tile that are already installed is at risk of a poor underlayment and a

failed assembly in the future.” Ex 136, p. 3. *Emphasis added.*

- **October 17, 1995** “The Firm-Fill system problem is still an issue.... The pressure is really on since carpeting is nearly ready or is already installed in most of the west building.” Ex 137, p. 2.
- **October 24, 1995** “Courtesy Construction has required their sub to pay for tearing out and replacing the Firm-Fill only at the west building corridors. The units will remain, in their opinion.” Ex 138, p. 2.

In addition to pre-policy inception notice, the trial evidence established that the defective lightweight concrete did not damage any property other than itself, thereby precluding coverage. RP 774, 348-50².

V. LEGAL ARGUMENT

A. Standards of Review.

The standard for review of the trial court’s findings of fact is substantial evidence. “We review a trial court's findings of fact after a bench trial for substantial evidence.” *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986). *See also Keever & Assocs., Inc. v. Randall*, 129 Wn. App. 733, 737, 119 P.3d 926 (2005), *review denied*, 157 Wn.2d 1009, 139 P.3d 349 (2006); *Carbon v. Spokane Closing and Escrow, Inc.*, 135

² “Q. And again, [the lightweight concrete] didn’t, in any way, harm physically any other part of the condominium, other than itself perhaps?”

A. That’s right. It is not a hazard in and of itself.” RP 350, trial testimony of HOA President William Macht.

The trial court found that seismic straps affixed to the flooring under the concrete may have loosened because of the defective concrete. There was no admissible expert testimony on a more probable than not basis to support this finding. In any event, the concrete was indisputably defective before straps may have failed. No straps failed before July 1995 when the flooring was completely installed and immediately determined to be defective.

Wn. App. 870, 876, 147 P.3d 605, 608 (2006). “There is substantial evidence if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *Bering*, 106 Wn.2d at 220 (*citations omitted*). The standard of review for the trial court’s conclusions of law is *de novo*. “The interpretation of an insurance policy is a question of law. See *PUD No. 1 v. International Ins. Co.*, 124 Wn.2d 789, 797, 881 P.2d 1020 (1994). Conclusions of law and judgments are reviewed *de novo*. See *Snohomish County v. Hawkins*, 121 Wn. App. 505, 510, 89 P.3d 713 (2004).

B. CSV’s Late Notice Of Building Envelope Repairs And Costs Incurred Caused Actual Prejudice To The Hartford.

It is uncontested that CSV did not comply with express conditions in Hartford’s policy, including timely notice of claims and prior approval of the 1998 voluntary payments to repair the building exterior products. The policy requires CSV to give immediate notice of a loss or potential loss to Hartford and prohibits CSV from making any payments or incurring any financial obligations without Hartford’s consent. The policy provides in pertinent part:

**SECTION IV – COMMERCIAL GENERAL LIABILITY
CONDITIONS**

...

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit.

a. You must see to it that we are notified **as soon as practicable** of an “occurrence” or an offense which may result in a claim. To the extent possible, notice should include:

- (1) How, when and where the “occurrence” or offense took place;
- (2) The names and addresses of any injured persons and witnesses; and
- (3) The nature and location of any injury or damage arising out of the “occurrence” or offense.

b. If a claim is made or “suit” is brought against any insured, you must:

- (1) Immediately record the specifics of the claim or “suit” and the date received; and
- (2) Notify us as soon as practicable

You must see to it that we receive written notice of the claim or “suit” **as soon as practicable**

c. You and any other involved insured must:

...

- (3) Cooperate with us in the investigation, settlement or defense of the claim or “suit”; and
- (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. **No insureds will, except at their own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.**

Ex 110, HART 000101-02, *emphasis added*. CSV prejudicially breached its obligations 1) by delaying notice to Hartford until after CSV had paid

to completely remediate the entire building envelope and discarded all materials, and 2) by paying \$235,858.93 without Hartford's consent. *See Christensen Shipyards, Ltd. v. St. Paul Fire & Marine Ins. Co.*, 2006 WL 3749943 (W.D. Wash. 2006) (holding that insured who settled with a claimant without consent of its insurer defending under a reservation of rights breaches the conditions of the policy).

The trial court agreed that it was CSV's obligation to provide notice to Hartford "as soon as practicable" of a potential claim. The trial evidence established that CSV was aware of a water intrusion problem as early as 1995 and certainly not later than the conclusive invasive testing done in January 1998. However, it was not until September 20, 2004, some six years later, that CSV for the first time gave notice it was seeking indemnity from Hartford for \$226,567.00 (which is less than the \$235,858.93 amount claimed at trial) arising from the 1998 water intrusion repair claim.³ Ex 128. In order to effectively put an insurance company

³ CSV also failed to disclose the water intrusion problems, fire and sound code violations to either the building department who issued the Certificate of Occupancy or to purchasers of the condominium units as it was required to do by law. RP 590-93. CSV provided each purchaser with the public offering statement and a purchase and sale agreement. Exs. 45 and 160. Despite knowing about serious defective conditions at the project, that violated applicable codes, CSV did not disclose those conditions in either the public offering statement or the purchase and sale agreement. On the contrary, CSV made affirmative representations in both Exhibit 45 and 160 that the project was soundly constructed and met all applicable building code requirements. CSV's conduct caused the HOA to bring a cause of action against CSV for fraud. Ex 30. This underscores that CSV had actual notice of defects before policy inception.

on notice of a claim, a timely and specific tender of defense/indemnity of the claim to the insurer is required. “The insured must affirmatively inform the insurer that its participation is desired.” *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 427, 983 P.2d 1155, 1160 (1999).

An insured’s breach of the policy conditions relieves an insurer of any coverage obligation where said breach causes actual prejudice to the insurer. *See Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 961 P.2d 358 (1998); *Northwest Prosthetic & Orthotic Clinic, Inc. v. Centennial Ins. Co.*, 100 Wn. App. 546, 997 P.2d 972 (2000); *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 983 P.2d 1155 (1999). “To establish actual prejudice, the insurer must demonstrate some concrete detriment resulting from the delay which harms the insurer’s preparation or presentation of defenses to coverage or liability.” *Northwest Prosthetic & Orthotic Clinic, Inc. v. Centennial Ins. Co.*, 100 Wn. App. at 550. In *Leven*, an insured delayed nearly seven years before notifying its CGL insurer of property damage. The court held that the delay as a matter of law prejudiced the insurer solely because of its inability to perform a timely investigation to protect its interests, including coverage defenses. *Id.* In order to show “actual prejudice,” Hartford need not establish that “timely notice to the insurer would have produced a different outcome.” *Id.* at 553, 975. Rather, Hartford need only show that it lost the

opportunity to investigate, evaluate or present defenses to liability or coverage because of the late notice from CSV. *See id.* at 552-53, 975-76 citing *Sears, Roebuck & Co. v. Hartford Accident & Indemnity Co.*, 50 Wash. 443, 313 P.2d 347 (1957); *Pederson's Fryer Farms, Inc. v. Transamerica Ins. Co.*, 83 Wn. App. 432, 922 P.2d 126 (1996); *Felice v. St. Paul Fire and Marine Ins. Co.*, 42 Wn. App. 352, 711 P.2d 1066 (1985); *Key Tronic Corp v. St. Paul Fire & Marine Ins. Co.*, 134 Wn. App. 303, 139 P.3d 383 (2006). The evidence is compelling that Hartford lost such opportunity. Hartford lost any ability to timely assess covered versus uncovered "property damage" associated with the defectively installed building envelope, and lost the ability to negotiate with the responsible contractors/ architect for repair of the building envelope, and lost the ability to dispute CSV's liability to the HOA in light of the LP Siding class action settlement, discussed below, which released CSV from all siding and paper liability.

An insurer suffers actual prejudice when delayed notice of claim harms the insurer's preparation or presentation of defenses to coverage. *See Key Tronic Corp v. St. Paul Fire & Marine Ins. Co.*, 134 Wn. App. 303, 307, 139 P.3d 383, 385 (2006). The building envelope was forever changed by the remediation work performed by CSV in 1998. Because of the late notice and repairs, Hartford was deprived of the opportunity to

investigate for covered “property damages” and thus was entitled to judgment as a matter of law. *Northwest Prosthetic*, 100 Wn. App. at 550. CSV’s original products and original installation could not be viewed by Hartford. Defective conditions alone do not give rise to a covered claim pursuant to the policy exclusions discussed below. The building envelope – LP Siding, weather resistive barrier and penetration flashings – were CSV’s chosen products. CSV may only recover costs associated with “property damage” to something other than its defectively installed building products. Hartford was denied the opportunity to make this distinction. Of the \$235,585.93 CSV spent in remediating the building envelope, \$165,158.19 went to repair/replace CSV’s defective products which are not covered damages pursuant to policy exclusions, discussed below. RP 768-71; Ex 47.

Leaks were concentrated around the living room windows and penetrations on the south-facing side of the building. RP 117-18, 274-75. Exs. 112, 123. Sider Jerry Clark, CSV’s agent Everett Foster, and others agreed in 1998 following invasive testing, that the only necessary repairs were those areas that had exhibited failure by the presence of leaks – the south side of the building. Ex 112, 123, RP 471-475. Despite the localized nature of the water leaks, CSV inexplicably decided to remediate the entire building. All remediation materials were discarded after the repairs six

years before Hartford was put on notice of the costs incurred. RP 607-09.

This was further prejudice.

The trial court erred when it concluded that it was sufficient for Hartford, in 2004, to rely on 1998 inspections performed by CSV to assess covered versus uncovered claims. CP 957, Finding 11. The court erred because Hartford as a matter of law need not rely upon an inspection performed by others. Hartford has the right to independently conduct an investigation. *See Key Tronic*, 134 Wn. App. at 308-09, 139 P.3d at 386. In *Key Tronic*, the insured contracted with a third-party to assemble and package a product for shipment. *Id.* The insured used inappropriate packaging materials. *Id.* The insured removed and replaced the damaged materials at its own expense. *Id.* Thereafter, it put its insurer on first notice of the claim. *Id.* Essentially identical to Hartford's policy, the policy in *Key Tronic* required the insured to put its insurer on notice "as soon as possible." Further, both the Hartford policy and the *Key Tronic* policy provided that the insured agreed to assume all financial obligations for any money paid without the insurer's consent. *Id.*, Ex 110 Hart 000102. The *Key Tronic* Court held that an insurer is prejudiced if "whatever is lost or changed is material and not otherwise available." *Id.* The sole prejudice inquiry is whether the insured's failure to notify prevents the insurer from conducting a meaningful investigation or presenting a viable defense to

coverage. *Id.* Hartford here was completely prevented from making any meaningful examination or investigation.

The *Key Tronic* insurer argued, and the Court agreed, that the insurer was prejudiced by the insured's late notice because it was deprived of the opportunity to examine all the allegedly damaged items before they were discarded. *Id.* Because the insured waited until it had replaced the damaged pallets, the insurer lost the opportunity to investigate and rely on policy exclusions. *Id.* Similarly, there was nothing left to view or inspect when notice was finally given to Hartford by CSV.

The insured in *Key Tronic* (and CSV at trial) argued that its settlement with the third-party was reasonable and any notice to the insurer was unnecessary. The *Key Tronic* Court flatly rejected this argument. “**[The insurer] had a right to independently investigate and decide the validity of the claim. [The insurer] is not required to defer to [the insured's] settlement decisions.**” *Id. emphasis added.* Because the insurer's ability to evaluate or present defenses to coverage was prejudiced by the inability to inspect, the Court found that there was no coverage. The trial court here erred in not applying the correct legal standard. The trial court's conclusion that Hartford should have relied on six-year-old investigations performed by CSV was legal error. The Court in *Key Tronic* flatly rejected the trial court's conclusion. The *Key Tronic*

Court held an insurer had the right to “independently investigate and decide the validity of the claim.” *Id.*

Hartford also suffered actual prejudice in that it was denied the opportunity to negotiate with the siding subcontractor, architect and general contractor concerning payment for the product repairs. Based upon the documentary evidence and testimony of Jerry Clark, the original siding subcontractor, the cost of remediation could have been shared by the siding subcontractor, the general contractor, the architect and CSV. Ex 121-23, RP 474-75. The envelope could have been repaired for \$50,000-\$60,000. RP 475. CSV rejected this offer and inexplicably decided to incur all costs. RP 537. Had Hartford been put on notice of the claim or had CSV sought consent of Hartford prior to incurring those costs, Hartford would have had the opportunity to evaluate the water intrusion claim and the necessity of CSV alone incurring costs for the repairs.

Finally, because of CSV’s late notice, Hartford lost the opportunity to dispute CSV’s liability to the HOA for any claims related to the LP Siding. On April 26, 1996, a nationwide class action settlement was reached wherein Louisiana Pacific agreed to resolve all claims related to LP Siding in exchange for a release of LP and insulation of contractors and siding applicators from homeowner claims. Ex 108, 163. This was two years *before* CSV voluntarily paid to investigate and remediate the water

intrusion issues. CSV received notice of the class action for The Project in 1996. *See* Ex 108. In addition, at the April 3, 1998 meeting with the developer team, CSV agent Everett Foster was instructed to investigate the LP Siding settlement before CSV paid to remediate the building envelope. Ex 121. Without explanation, CSV did not pursue the protections of the LP Siding release prior to paying for remediation of the siding and building envelope. Had Hartford been given notice of the claim, Hartford would have had the opportunity to insulate CSV from HOA claims under the LP Siding agreement. Ex 108, 163.

After CSV paid \$235,858.93 to repair the siding, and when CSV demanded recovery from the sider, the sider, not CSV, sought judicial resolution of the scope of the LP Siding class action release. The question was decided by the Honorable Richard L. Unis, Special Master for the LP Siding Litigation for the United States District Court for Oregon. Ex 163. Justice Unis determined that the HOA was a claimant bound by the broad LP release. Ex 163. As such, the homeowners had no legal claims against CSV related to LP Siding including claims for “removal and replacement of the flashing, and the removal and replacements of the weather resistive barrier.” Ex 163, page 23. In addition to releasing Louisiana Pacific, CSV and its contractors were also released. Ex 163.

Per Judge Unis’ Order, CSV had no legal obligation to remove and

replace the siding or weather resistive barrier and flashings at the project in 1998 because this HOA claim was released as part of the master LP Siding release. Ex 163. CSV was a volunteer in 1998 when it made the expenditures. Absent legal liability, there is no coverage under a CGL policy. The Hartford policy provides “We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage.” Ex 110, HART 95. By failing to give notice to Hartford, Hartford was denied the benefit of the LP Siding release. The court erred in finding the repair costs were a covered claim.

In *MacLean Townhomes, LLC v. American States Ins. Co.*, 156 P.3d 278 (2007), the Court held that insurer suffered actual prejudice from the insured’s late notice where the insured limited full judicial review of its defenses regarding an HOA’s claim. Prior to putting its insurer on notice of the defective construction claims, the insured entered into an agreement with the HOA to submit to arbitration although the HOA retained the right to reject the decision. *Id.* at 280-81. The insurer was precluded from availing itself of the judicial process on the insured’s behalf that would have been available had the insured not agreed to waive those rights. *Id.* It did not matter that the result might not have been different. *Id.* Rather, the loss of judicial review in and of itself constituted actual prejudice. *Id.* Hartford similarly was denied the opportunity to avail itself of the LP class

action judicial process, including the LP Siding release, because CSV, without notice to or consent of Hartford, paid for LP remediation work. Because of the prejudice, it was error for the trial court to award any damages including pre-judgment interest for the water intrusion claim.

C. CSV Was On Notice Of The Defectively Installed Lightweight Concrete Prior To Inception Of The Hartford Policy.

Under the “fortuity” doctrine, one cannot secure insurance coverage for a loss that has already occurred. In Washington it is more commonly known as the “known loss” doctrine. Here, CSV sought coverage from Hartford for defective lightweight concrete flooring that it knew was defective at time of completion in 1995, prior to Hartford’s policy inception in 1996. Where property damage is expected or intended, *i.e.*, known by the insured prior to the inception of an insurance policy, there is no coverage. *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 432-33, 38 P.3d 322, 329 (2002).

Exclusion 2a of the policy and the common law “known loss” doctrine make clear there is no coverage for property damage CSV knew existed prior to Hartford’s policy inception on March 1, 1996:

2. Exclusions.

This insurance does not apply to:

a. Expected or Intended Injury

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured.....

Ex 110, HART 000095.

Overton involved a landowner's knowledge of pollutants on his property, the subsequent purchase of a CGL policy and a "known loss" defense by the insurer when remediation was ordered. *Id.* The insured argued that for the exclusion to apply he had to have notice of a loss – i.e. a third-party claim. The Court flatly rejected this argument.

The inquiry is not whether the insured had notice that a loss – third-party claim – would ensue. The sole inquiry is whether the insured had notice of the "property damage" that later gave rise to the claim of loss. *Id.* The insured in *Overton* had notice that there were pollutants on the land prior to inception of the policy. The insured did not yet have notice of a legal claim for cleanup liability. The Court held that the owner's knowledge that the property was likely damaged was sufficient to constitute a "known loss" under a CGL policy. *Id.* at 427-428. The *Overton* Court reiterated the long standing rule that for the known loss doctrine to apply "the insured merely must be put on notice" of the condition. *Id.* at 426. Here, CSV had actual not just potential knowledge that the entire lightweight concrete system was failed flooring before it purchased the Hartford policy.

The sole factual inquiry with respect to Hartford's Exclusion 2.a and the common law "known loss" defenses is whether CSV had "notice"

that the lightweight concrete was “likely damaged” prior to March 1, 1996. As set forth in detail on Exhibit 165 below, CSV had uncontested notice prior to March 1, 1996 that the lightweight concrete was “likely damaged.”

LIGHTWEIGHT CONCRETE KNOWLEDGE

EXHIBIT	DATE	DESCRIPTION
133	09/19/95	Architect’s report, first written notice to CSV of problems with concrete
135	10/02/95	Architect’s report, thickness is an issue. 1” was specified. Found places with 1/2’ or less. Usually 3/4 is specified but 1” was specified for this project for sound dampening issues
85	10/06/95	Architect’s letter to CSV that there are problems with the thickness and strength of the lightweight, including crumbling and flaking.
136	10/10/95	Architect’s report, carpet is being installed over crumbling concrete in the east wing third floor units
137	10/17/95	Architect’s report, pressure to resolve concrete issue because carpet is already installed in most of the west wing
138	10/24/95	Architect’s report, CSV chose to only fix west wing corridors
139	10/31/95	Architect’s report, CSV believes concrete issue is resolved
145	12/13/95	Architect’s report, Architect has completed his investigation and will prepare a summary letter
12	3/19/96	Architect’s summary letter of fall 95 investigation. Concrete is inferior in both thickness and mix
10	12/6/95	Letter from Everett Foster to CSV advising that concrete is likely

		defective
8	10/31/95	Courtesy agrees to add CSV as an AI on its policy for future liability concerning the concrete

Despite extensive knowledge that the installed lightweight concrete was “likely damaged,” CSV knowingly sold substandard condominiums that plagued the HOA from the time of first occupancy.⁴

The trial court incorrectly concluded that the known loss doctrine did not apply to claims against Hartford arising from the defectively installed lightweight concrete because there was some self-serving testimony that CSV believed repairs to only a portion of the affected floors were sufficient. CP 963, Conclusion 16. The trial court’s conclusion is error. It failed to apply the relevant legal tests and standards. CSV knew the entire flooring was defective in 1995 before Hartford’s policy of March 1, 1996 inception.

First, the correct inquiry is not whether CSV thought partial repairs were sufficient. Rather, the correct inquiry is whether CSV had notice that the lightweight concrete was “likely damaged” prior to inception of the

⁴ The trial record shows that CSV made numerous cost-cutting decisions during construction that it knew would lead to an inferior building that would be riddled with construction defects. Such cost cutting decisions included the decision to only repair a small portion of what is an entirely defective lightweight concrete floor. CP 1121, 1128. CSV also chose to use an inferior and cheaper weather resistive building paper rather than a better product specified by The Project architect. See Exhibits 80, 81 and 114. CSV chose to build an inferior project because by August 1994, well before the majority of construction had even begun, CSV was \$350,000 over budget. See Exhibit 91.

Hartford policy on March 1, 1996. *See Overton*, 145 Wn.2d at 426 (For the known loss doctrine to apply, “the insured merely must be put on notice” of the condition). That CSV knew it had to make repairs – whatever the scope – is conclusive evidence of its knowledge that the lightweight concrete was “likely damaged.” The trial court failed to appreciate the fact that some repairs were actually attempted – dispositive proof that CSV had actual notice of the defective flooring. By the end of 1995, CSV was on notice that the entire lightweight concrete flooring was damaged. Yet, CSV chose to repair a mere portion of the defective lightweight concrete system leaving the remaining defective lightweight concrete system for the HOA to discover after occupancy, which it did, and which was why it sued CSV.

Architect Partridge’s detailed field inspection reports in late 1995 documented in patently clear detail that the lightweight concrete flooring was of inadequate thickness and strength, cracked and disintegrated, and failed the fire and sound building codes. Ex 133-145. The following are excerpts of written materials CSV received from architect Partridge:

. . .The Firm-Fill system is still an issue. It is crumbling in many areas and “sanding” almost everywhere. I also noticed in most of the crumbing areas the total thickness is only ½” or less. This concerns me since 1” was noted on the drawing sections. Usually ¾” is used, but 1” was specified for acoustical reasons since only one layer of gypsum board and no R/C/ channel was used on the ceiling

Ex 135, Report from Architect dated 10/2/95.

. . .The Firm-Fill system [lightweight concrete flooring] is disintegrating into a sandy/lime topping up to a ¼” thick in many high traffic areas. I would assume this is due to an improper mix prior to application. A second issue is the thickness of the Firm-Fill itself. We specified 1” on the floor assembly section drawings. In numerous areas, where it is failing by fracture, I found it to be only 3/8” to 5/8” thick.

...

The average thickness is important for three reasons. The first is acoustic. The second is the manufacturer’s warranty and the third is fire protection. The thickness for acoustic reasons in this project is simple. We elected to use 1” of gypsum concrete instead of two layers of gypsum board on the ceiling below the floor. This assembly, allows conformance to the (STC) and (IIC) sound transmission code requirements for condominiums in Vancouver. The 3/8” to 5/8” I discovered simply will not be acceptable for code compliance. . . The fire protection is assembly rated. In order to achieve the required (1) hr. rating, ¾” to 1” of gypsum underlayment is required.

Ex 85 Letter from Architect to CSV dated 10/6/95

. . . The Firm-Fill system problem is still an issue . . . I noticed carpet was being installed over the sandy/lime surface at the east building third floor units. I believe this is premature and is a great risk at this time. **The potential buyer liability problems could be staggering.**⁵ . . . The carpet, vinyl, and bath floor tile that are already installed is [sic] at risk of a poor underlayment and a failed assembly in the future. . .

Ex 136 Report from Architect dated 10/10/95 *emphasis added*.

Architect Partridge told CSV at multiple task force meetings and in its written reports in 1995 that the defective lightweight concrete system was project wide – including the units. CP 556.

⁵ Partridge was an excellent observer and proved to be prescient about CSV’s liability.

Q. So is it fair to say that the owners CSV had notice that in your opinion the thickness of the lightweight concrete did not meet specifications by at least December 13, 1995?

A. Yes

...

Q. Is it fair to say that the owners' representatives were fully aware of the problems with the Gyp-Crete that you had reported to them?

A. Yes.

CP 557, 1124.

The architect was CSV's managing construction agent and thus this was a party admission at trial. CSV was also put on notice of the defective lightweight concrete flooring system by its own project manager, Everett Foster, in his reports to CSV:

. . . As you are aware using the ¾" to 1" cementious underlayment promotes two important conditions. (1) to give the floor assembly the required 1 hour fire assembly without the expense of double layers of gyp board on the ceiling below and (2) achieve a sound transmission rating of 50-55 STC.

In the absence of the required thickness, both conditions are questionable. . . The decision to redo the high traffic areas lends itself to a question by the "team" that possibly a problem did exist. . .

The fact that neither the Contractor, Architect, nor applicator will give MII [CSV] a written certification of compliance nor a hold harmless statement in the event of future problems, leads me to suspect that the degree of certainty is low, that the floor does not meet all specifications. **Should litigation, from either a sound complaint or fire happen, it is my opinion that the company will be in a weak position of defense.**

Ex 10, Report from Everett Foster to CSV dated 12/6/95 (*emphasis added*). These communications (more admissions by a party

representative) obviously precede March 1, 1996 when Hartford went on the risk. CSV, through President Greg Daniels, admitted that it received the architect's field inspection reports. RP 529. Daniels further admitted that he was made aware of the lightweight concrete flooring defects by the developer team in 1995, before all the finish flooring (carpet) had been installed over the defective lightweight concrete. RP 540; CP 1130. He went ahead with the finish flooring rather than pay to redo it. *Id.*

The trial court erred. Instead of applying the Supreme Court's *Overton* standard (mere notice of the defective condition prior to inception of the policy bars coverage), the trial court committed reversible error by creating its own standard for coverage – partial repairs of a defective system negates knowledge of the eventual larger loss. CP 958-59, Finding 20, CP 963, Conclusion 16. The trial court's standard is without legal basis. Further, it is not supported by substantial factual evidence. The evidence is to the contrary on the issue of notice of likely damage.

The repairs performed by CSV in the fall of 1995 to the defective lightweight concrete were only performed to the corridors in the west wing of The Project. CP 1129, Ex 138. The CSV settlement with HOA ultimately was for complete flooring replacement. Ex 37. No repairs were made by CSV to any of the interior units nor were repairs made to any of corridors in the east wing of The Project. CP 1129, Ex 138.

Architect Partridge specifically gave CSV notice in 1995 that the *entire* lightweight concrete system, project-wide, including interiors of units, was damaged. CP 556. Architect Partridge made specific observations of the disintegrated lightweight concrete in the east wing third floor units where carpet was being installed over the defective flooring. Ex 136.

Because finish flooring was being installed and some unit owners were moving into the units, CSV made a conscious decision not to repair the defective lightweight concrete system project wide. CP1121, 1128-29. CSV decided to roll the dice and hope that the HOA did not make a claim for damages in the future. If a claim was made, general contractor Ruggiero colluded with CSV to have Ruggiero's insurance cover it.

CSV's Daniels testified:

- A. Then from that, my guys' concerns, people that were working for me was, "What about the rest of it? Why not the units?" What came out of that conversation from Ruggiero was, "If there's a problem, not to worry about it, because I've go [sic] insurance to cover that, if there is a problem, but let's get on with constructing the rest of the building.

CP 1128.

Under **Exclusion 2 a.** and the "known loss" doctrine, the trial court committed reversible error when it awarded CSV \$86,315.03 for pre-judgment interest damages on the lightweight concrete flooring settlement.

CP 1255.

D. CSV Cannot Meet Its Burden To Prove “Property Damage” Caused By An “Occurrence” During Hartford’s Policy Period.

In order for CSV to prevail on its flooring claim, it must first establish that its claim falls within the policy coverage grant. CSV must prove “property damage” caused by an “occurrence” during the policy period of March 1, 1996 through March 1, 1997. Ex 110, HART 95. This standard form language is unambiguous and has been applied to claims for “property damage” in numerous Washington decisions. *See, e.g., Queen City Farms, Inc. v. Central Nat’ Ins. Co. of Omaha*, 126 Wn.2d 50, 71-72, 882 P.2d 703, 715-16 (1994).

CSV failed in its evidentiary burden. CSV seeks indemnity for its failure to construct a building in accordance with its contractual and statutory code obligations. However, breach of contract or warranty for defective construction is not a covered “occurrence”. *See Mid-Continent Casualty Co. v. Williamsburg Condo. Assn.*, 2006 WL 2927664 (W.D. Wash. 2006). In *Mid-Continent*, the Court was asked to determine whether there was coverage under a CGL policy for claims arising from defective construction. The Court determined that damage arising from defective construction was not a covered “occurrence.” *Id.* at *5. Because Washington does not recognize a claim for negligent construction, the only claims available were for breach of contract and breach of statutory

warranties. *See Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wash.2d 406, 417, 745 P.2d 1284, 1290 (1987). However, breach of contract or warranty is not covered “occurrences.” *Id.* at *7. The *Mid-Continent* Court refused to treat a CGL policy as a form of performance bond. As such, there was no covered “occurrence” under the policy for the HOA’s claims for breach of contract and breach of warranties, arising from the insured’s performance under the contract. *Id.* at *7. “CGL policy holders . . . have purchased a general liability police [sic], not a performance bond, product liability insurance, or malpractice insurance. *Id.* at *6. Because CSV seeks indemnity arising from its failure to properly construct The Project, there is no covered “occurrence.”

CSV further fails in its burden because all of the flooring damage happened before Hartford’s policy period. The defectively installed lightweight concrete system was completely installed by July 1995. Ex 82. CSV did not present evidence that “property damage” arising from an “occurrence” associated with the flooring actually continued into the March 1, 1996 - March 1, 1997 Hartford policy period. CSV failed to do so because the floors were unequivocally flawed upon installation by the end of July 1995.

The first section of the CGL policy defines what damages fall within the coverage of the policy, subject to the conditions and exclusions

that follow in subsequent sections:

SECTION I – COVERAGES

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

- a. We 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. . . . But:
- b. This insurance applies to “bodily injury” and “property damage” only if:

. . .

- (2) **The “bodily injury” or “property damage” occurs during the policy period.**

Ex 110 HART 000095 (*emphasis added*). The policy defines certain terms as follows:

SECTION V – DEFINITIONS

- 12. “Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

Ex 110, HART 000105.

- 15. “Property damage” means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

Ex 110, HART 106.

It is CSV's burden to prove that defectively installed lightweight concrete system constitutes "property damage" (as defined) arising from an "occurrence" (as defined) during Hartford's policy period. Even assuming that the defective lightweight concrete was defined "property damage," such damage was not an "accident" and had already occurred (and was known to CSV) before Hartford's policy inception. Washington case law holds that the "time of an occurrence" for insurance coverage purposes is when damages or injuries take place. *Castle & Cooke, Inc. v. Great American Ins. Co.*, 42 Wn. App. 508, 517 (1986); *Villella v. Pemco*, 106 Wn.2d 806, 811 (1986); *Gruol Construction Co. v. Ins. Co. of North America*, 11 Wn. App. 632, 636 (1974).

Even assuming the defective and improperly installed lightweight concrete system constituted an "occurrence," the discrete time of the occurrence was final installation in July 1995. Putting aside the separate question of whether defective lightweight concrete constitutes covered "property damage," (after the effect of exclusions) the time of the "occurrence," if any, was completion of installation by July 25, 1995. Hartford came on the risk on March 1, 1996. Ex 82, 110.

From September 1995 through December 1995, CSV, its managers, its project architect and general contractor were openly and repeatedly discussing the defective lightweight concrete. The focus of the

inquiry with respect to time of an “occurrence,” is on “the event causing physical injury to or destruction of property.” *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 432 (2002). The lightweight concrete installer submitted its final invoice after completing installation of all lightweight concrete on July 25, 1995. Ex 82. It was immediately determined to be defective and CSV was initially notified by its agents in September 1995. Ex 133.

The “occurrence” requirement is a necessity for a claim to fall within the coverage grant of a CGL policy. *See* Hartford Policy at Exhibit 110, bates page 000092; *See also Queen City Farms, Inc. v. Central & National Insurance Company*, 124 Wn.2d 526, 553 (1994). CSV has the burden of showing that its claims fall within the coverage provisions of the Hartford insurance contract, including “property damage” during the policy period. *Id.* at 556. The time of the occurrence for insurance coverage purposes is determined by when damages or injuries take place. *Transcontinental Ins. Co. v. Washington Pub. Utilities Dist.*, 111 Wn.2d 452, 465 (1988). With the exception of progressive loss scenarios which are not applicable to the lightweight concrete defects, an occurrence in any other context is a single and discrete event that results at a fixed time. By the time that Hartford’s policy incepted on March 1, 1996, defective lightweight concrete flooring was a fact and CSV had explicit knowledge

of the defective installation.

The trial court, however, erroneously found an “occurrence” during the Hartford policy. CP 963, Conclusion 13. The trial court’s conclusion ignored the overwhelming evidence that the lightweight concrete was already in a failed state, project wide, as acknowledged by CSV’s agents prior to inception of the Hartford policy. CP 1130, Ex 10. The time of an occurrence is a single discrete event measured at the point in time when damage actually occurs. *Castle & Cooke, Inc. v. Great American Ins. Co.*, 42 Wn. App. 508, 517 (1986); *Villella v. Pemco*, 106 Wn.2d 806, 811 (1986); *Gruol Construction Co. v. Ins. Co. of North America*, 11 Wn. App. 632, 636 (1974). As the entire system was already damaged by September 1995 and repeatedly confirmed through December 1995, it needed to be replaced in its entirety. As a matter of law, there could be no additional “occurrence” during the Hartford policy period of March 1, 1996 through March 1, 1997.

E. Hartford’s Policy Specifically Excludes Coverage For The Types Of Damages Alleged By CSV.

There is no coverage for defective lightweight concrete or the defective building envelope siding or paper products because those damages are excluded “property damage”. Hartford’s policy contains the following exclusions and definitions:

SECTION I – 2. EXCLUSIONS

j. Damage to Property

“Property damage” to:

1. Property you own, rent or occupy;
5. That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the “property damage” arises out of those operations; or
6. That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.

k. Damage to Your Product

“Property damage” to “your product” arising out of it or any part of it.

SECTION V – DEFINITIONS

15. “Property damage” means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

17. “Your product” means:

- a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
 - (1) You;
 - (2) Others trading under your name; or
 - (3) A person or organization whose business or assets

you have acquired; and

...

“Your product” includes:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your product”; and
- b. The providing of or failure to provide warnings or instructions.

19. “Your work” means:

- a. Work or operations performed by you or on your behalf; and
- b. Materials, parts or equipment furnished in connection with such work or operations.

“Your work” includes:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your work”; and

Ex 110, bates page HART 000097-98, 000104-106.

When an insurer issues a CGL policy, courts have ruled that it is not issuing a performance bond, product liability insurance or malpractice insurance. *Westman Industries Co. v. Hartford Ins. Group*, 51 Wn. App. 72 (1988). A CGL policy does not provide coverage when a developer like CSV fails to fulfill its contract or warranties. *Harrison Plumbing v. New Hampshire Ins. Group*, 37 Wn. App. 621 (1984). CSV was liable to the HOA under the Condominium Act statutory warranties, but such liability is not insurable.

In *Harrison Plumbing*, an insured was sued for failure to complete an irrigation system within the terms of its contract. The court held that these claims alleged breaches of contract and intentional acts with foreseeable results. *Id.* at 624. The court ruled that the CGL policy was not intended to indemnify for defective or incomplete workmanship. *Id.* Restoration, repair and replacement of the insured contractor's work was not covered. *Id.* Damage to property of the insured constitutes an uninsured "business risk" borne by the contractor. *Id.*

Other cases have similarly held that where an insured becomes liable to replace or repair its product, the cost of such replacement or repair is not recoverable under a CGL policy. *Simpson Timber Company, Inc. v. Aetna Casualty & Surety Co.*, 19 Wn. App. 535 (1978). The court in *Simpson Timber Company* used the following example:

For example, if a contractor builds a house and as a result of an improper mixture of the stucco, water is absorbed into the walls and the stucco cracks and falls off and a child is injured by the falling stucco, the injury to the child would be covered, but the replacement cost of the stucco would be excluded. Also, if the water absorbed into the wall and reached the interior walls and injured a valuable painting hanging there, the damage to the painting would be recoverable under the policy while the damage to the walls would not.

Id. The Court's example is the case at bar.

Costs solely for the removal and replacement of defective products incorporated in a structure are not covered. *General Service Ins. Co. v.*

R.E.W., Inc., 53 Wn. App. 730 (1989). In the *R.E.W.* case, a contractor constructed cold storage controlled atmosphere rooms for fruit growers. The contractor used a product known as “Isoboard” as a panel liner, but it warped causing a failure in environmental temperature control. The insureds were not covered under the product exclusions for the tear out and removal of their damaged product and any costs associated with replacing the board or repairing the buildings. *Id.*

CSV claims almost identical damages for defective flooring. However the “business risk” exclusions preclude coverage. In addition, the cost incurred by CSV to remove and reinstall defective materials is excluded. Washington precedent construing the business risk exclusions bars insurance coverage to CSV for the lightweight concrete flooring settlement and the monies spent by CSV on the defective siding and building paper. CGL policies are not performance bonds for shoddy developer work or shortcuts or less costly product substitutions.

1. **Defective Lightweight Concrete And Defective Siding And Building Paper Are Not Covered “Property Damage” Pursuant To Exclusion k.**

Exclusion k precludes coverage for “Property damage” to “your product” arising out of it or any part of it. EX 110, HART 000087-98. The lightweight concrete, the LP Siding and building paper were CSV’s products. The “your product” and “your work” business risk exclusions

do not require that an insured like CSV be a seller of products. See *Schwindt v. Underwriters at Lloyd's of London*, 81 Wn. App. 293, 300, 914 P.2d 119, 123 (1996). The courts have construed the policy language to exclude coverage for repair or replacement of "any defective product or products manufactured, sold or supplied by an insured." *Id.* All components of the building are products. *Baugh Constar. Co. v. Mission Ins. Co.*, 836 F.2d 1164 (9th Cir. 1998). To avoid this exclusion, CSV must show physical injury to tangible property other than its own property or product. It cannot do so.

Defective systems or products are not covered because of their mere presence in or on an otherwise sound structure. *Yakima Cement Product Company v Great American Insurance Company*, 93 Wn.2d 210, 218 (1980) (no coverage to replace insured's defective concrete panels). The rule is that there is no coverage for the simple cost of replacing the insured's defective product. *Id.*

In *General Ins. Co. of America v. Int'l Sales Corp.*, 18 Wn. App. 180, 566 P.2d 966 (1977) where an insured applied a defective coating to pipe, the coating failed, causing loss of use of the pipe and consequential damages. See *General Ins.*, 18 Wn. App. at 180. There was no separate physical damage to the pipe or adjacent structures. On these facts, the court held that;

The type of damage contemplated by the policy is not damage to the insured's product; rather, the insured's product must cause property damage to another object.

Id. at 184. The same court cited to a leading California case in explaining the essential differences between covered and uncovered CGL "property damage" claims:

If the insured becomes liable to replace or repair any "goods or products" or "premises alienated" or "work completed" after the same has caused an accident because of a defective condition, the cost of such replacement or repair is not recoverable under the policy. However if the accident also caused damage to some *other* property or caused personal injury, the insured's liability for such damage or injury becomes a liability of the insurer under the policy and is not excluded.

Id. at 188 citing *Liberty Bldg. Co. v. Royal Indemnity Co.*, 177 Cal. App. 2d 583, 587, 346 P.2d 444, 446-47 (1960).

There was no damage to the wood beneath the lightweight concrete flooring or to other property – only the lightweight concrete itself was damaged. The LP Siding and building paper were also inadequate products. CSV paid solely to repair and replace these defective products. The "your product" exclusion cited in Hartford's policy excludes coverage for property damage to CSV's "products," here the lightweight concrete flooring, the LP Siding and building paper.

The HOA representative William Macht, called as plaintiff's witness, and Hartford's expert Mark Lawless both agreed that there was

no damage to property adjacent to the defective flooring. RP 774 and 349-50. Only the defective LP Siding and building paper products were repaired or replaced. Similarly, the CSV/HOA flooring settlement amount, considered a covered claim by the court, was solely to replace a defective product.

2. Exclusion J “Damage To Property” Precludes Coverage.

Coverage is also precluded under Exclusion j(1) where the insured owns the property at the time the “property damage” occurs. Exclusion j(5) and j(6) also preclude coverage where “property damage” occurs during ongoing construction operations and /or has to be replaced because the work was improperly performed. Ongoing operations ceased in February 2006 prior to inception of the Hartford policy on March 1, 1996. Even if this were not the case, the damages would still be excluded pursuant to exclusion j(5) and j(6).

j. Damage to Property

“Property damage” to:

1. Property you own, rent or occupy;
5. That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the “property damage” arises out of those operations; or
6. That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.

The lightweight concrete system was defective when it was installed. Likewise, the defective LP Siding and building paper were defective when they were installed. On July 31, 1995, CSV owned the entire building, including the entire defective lightweight concrete flooring system and defective LP Siding and building paper. Exclusion j(1) excludes coverage for damages to replace the lightweight concrete flooring system and LP Siding and building paper because those systems were defective in 1995 when CSV owned all of the property.

Exclusion j(5) applies to work in progress before substantial completion was reached in March 1996. It excludes coverage for losses to the property upon which a contractor works during the construction period. *Vandivort Construction v. Seattle Tennis Club*, 11 Wn. App. 303 (1974). In *Vandivort*, the court held that where a general contractor is performing operations on property under construction and the property damage arose out of those operations, then coverage for damage to the property is precluded under this exclusion. *Id.* See also *Advantage Homebuilding, LLC v. Maryland Casualty Co.*, 470 F.3d 1003 (10th Cir. 2006) (holding that “property damage” that occurred during construction operations was excluded pursuant to exclusion j(5). The focus is on when the “property damage” occurred, not when a claim for damage was made.)

Similarly, Exclusion j(6) bars coverage for “property damage” to that particular part of any property that must be “restored or repaired” because CSV’s work was incorrectly performed on it. Exclusion j(6) excludes “property damage” that directly or consequentially occurs from the faulty workmanship of the insured and its contractors/subcontractors while the work is ongoing. *See Advantage Homebuilding*, 470 F.3d at 1012. In *Advantage Homebuilding*, the Court found that damage to home windows that occurred while the house was constructed was not covered pursuant to exclusions j(5) and j(6). Because the damage occurred while the work was being performed, there was no coverage. The Court specifically rejected the argument by the insured that the exclusions do not apply because the homeowners did not make a claim for damages until after completion of construction activities. The relevant inquiry is when the “property damage” occurred not when a claim is made. *Id.* Because CSV’s defective work occurred during “ongoing operations” and had to be repaired, damages are excluded.

F. CSV Is Not Entitled To An Award For Attorney’s Fees And Costs.

The trial court awarded CSV attorneys fees and costs because Hartford and Valley contested coverage. CP 965, Conclusion 31. However, the Court limited the award of fees and costs against Hartford

because CSV breached the conditions of the Hartford policy requiring timely notice of the water intrusion claim and consent before paying any costs.

CSV's failure to notify Hartford of the water intrusion [building envelope] problems before 1999, or to consult with the insurer before paying for the costs associated with inspection, repair and remediation, violated the conditions of the policy. . . **CSV will not be permitted to recover any costs or attorney's fees which are associated with establishing coverage for the water intrusion damages against Hartford.**

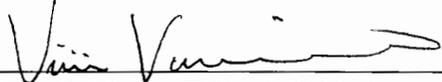
CP 962-63, Conclusion 11 (*emphasis added*). Thus the only fees and costs the court awarded against Hartford are those associated with the lightweight concrete claim.

The trial court's award of attorney's fees and costs to CSV against Hartford was contingent upon successfully proving coverage for the lightweight concrete claim. If this Court finds, as it should, that there is no coverage for the defective lightweight concrete, then the Court must necessarily find that CSV is not entitled to recover any attorney's fees or costs from Hartford.

VI. CONCLUSION

For all the foregoing reasons, Hartford respectfully requests the Court reverse the judgments and dismiss all of CSV's claim against Hartford with prejudice.

RESPECTFULLY SUBMITTED this 25th day of May, 2007.

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The undersigned hereby certifies under the penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen (18) years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On May 25, 2007, I caused to be served the a copy of the Appellant Hartford Fire Insurance Company's Opening Brief on the following individuals in the manner indicated:

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Dianne Eastman