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COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

METROPOLITAN PROPERTY &
CASUALTY INSURANCE COMPANY,

Respondent,

v.

Personal Representative of the Estate of H.E. SHERRY
JOHNSON; and WILLIAM and KARYL MARTIN,

Appellants.

APPELLANTS' OPENING BRIEF

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INTRODUCTION

This appeal presents two questions. First, does Metropolitan's coverage for "wrongful entry" apply to the escape of pollutants from an underground oil tank? Second, if there is coverage, is Metropolitan bound to pay the settlement this Court found to be reasonable in *Martin v. Johnson*, 141 Wn. App. 611, 170 P.3d 1198 (2007)?

ASSIGNMENTS OF ERROR

1. The trial court erred in granting Metropolitan's motion for summary judgment.
2. The trial court erred in denying Martin and Johnson's motion for partial¹ summary judgment on coverage and application of the settlement.

STATEMENT OF THE CASE

A. Procedural Background

This controversy arises out of a suit the Martins brought against the Estate of H.E. Sherry Johnson for leakage from an abandoned underground heating oil storage tank. (CP 120, 130) Laurence Johnson is the Estate's personal administrator. (*Id.*) The suit was settled. (CP 136)

¹ The motion was for "partial" summary judgment because at the time the motion was brought, the Martins and Johnsons had bad faith claims against Metropolitan. These claims subsequently were dismissed without prejudice.

A reasonableness hearing was held and the settlement was approved as reasonable over Metropolitan's objection. (CP 179) Pursuant to the settlement, judgment was entered against the Estate and in favor of the Martins. (CP 183) Metropolitan appealed and the judgment was affirmed. *Martin v. Johnson*, 141 Wn. App. 611, 170 P.3d 1198 (2007).

While the liability suit was pending, Metropolitan brought this action seeking a declaration of "no coverage," and naming both the Martins and the Estate as defendants. (CP 1) The Estate counterclaimed for breach of contract and also asserted extracontractual claims for bad faith and violation of the Consumer Protection Act. (CP 5) Metropolitan moved for summary judgment on coverage. (CP 189) The Martins and the Estate moved for partial summary judgment, contending there was coverage and that Metropolitan was bound to pay the reasonable settlement. (CP 19) The trial court granted Metropolitan's motion and denied the Martins and the Estate's motion. (CP 619) Later, the counterclaims were dismissed without prejudice. (CP 622) This appeal followed.

B. Facts

1. The Leak and the Ongoing Pollution

H.E. Sherry Johnson was the second owner of the home at 501 North Tacoma Avenue. (CP 186, line 20) She purchased it in the 1950's. (*Id.*) At the time it had oil heat, but in the 1970's she converted to electric heat. (CP 186, line 22) The 1500 gallon heating oil tank in the front yard was not removed or properly decommissioned. (CP 305, line 18; CP 187, line 4) Rather, it was left underground with oil in it. (CP 187, line 4)

At some point prior to 1994, the underside of the tank finally rusted through and released its contents into the ground. (CP 318, line 24 to CP 319, line 10)² This date is known because in June 2004 the most recent contaminants were age-dated as being at least 10 years old. (CP 36-37; CP 316, lines 5-6) The release began a long-term process of soil and groundwater contamination; the following testimony from the parties' joint³ expert was uncontroverted:

² Occasionally, the witnesses refer to a "UST," which is an abbreviation for "underground storage tank."

³ "Joint" because Met and the Estate both filed declarations from the same expert. There was no competing expert testimony in this case.

The groundwater level was measured by others to be at 13 feet.^[4] Due to gravity, fluids move down through the ground. It logically follows that the contaminants in the groundwater on the date the sample was taken first entered the soil 10 or more years prior to the date of the sample, as the contaminants at the 13 foot level would be as old or older than the contaminants at the 9.5 foot level, which were age dated in Exhibit A. Leaching of these older contaminants from the soil into the groundwater would have been a continuous process that continued up to the date of soil remediation.

(CP 37, lines 13-20)

The tank would have been continuously leaking into groundwater from at least June 1994 until the leak was discovered in June 2004.

(CP 66, lines 11-13) The amount of heating oil released into the soil and groundwater was extensive—soil contamination levels were 6 times the level allowed by the Department of Ecology while groundwater contamination was *one thousand five hundred* times the allowed level:

Q. Okay. All right. Did the laboratory analysis tell you anything else about the soil or the water?

A. So the soil came back at 12,000 parts per million, which is six times the state cleanup level. The ground water sample came back with diesel and heavy range hydrocarbons at a concentration of 750,000 parts per billion, with a B.

Q. Okay. 750,000 pp billion?

⁴ The 13-foot figure is established by CP 312, line 21 to CP 313, line 4, and by the middle of the last paragraph at CP 68.

A. Uh-huh. State cleanup level for ground water is 500 ppb.

Q. 500,000?

A. 500.

(CP 315, lines 10-20; *see* CP 66, line 5)

Although the contamination spread vertically downward through State property,⁵ it did not extend horizontally past Ms. Johnson's property line.

The Martins purchased the property from Ms. Johnson in 1997, i.e., when the contamination had already begun. (CP 186, line 18) The problem was discovered in 2004. (CP 187, lines 7-19)

Because the property was polluted it was in violation of state law and had to be decontaminated. (CP 66, line 6) A successful remediation was performed pursuant to the Department of Ecology's Voluntary Cleanup Program. (CP 236) Pursuant to the program, it was monitored by an independent site assessor, who reported to the Department of Ecology. (CP 326, lines 2-7; CP 332, lines 17-20). The Martins paid the cleanup contractor for this work. (CP 187, line 23)

⁵ By statute, discussed more fully *infra*, groundwater is state property. RCW 90.44.040.

Because the contamination dated back to her ownership of the property, Ms. Johnson was put on notice of the problem. She passed away for unrelated reasons and the Martins brought their action against her Estate. Ms. Johnson's attempts to seek liability insurance coverage from Met are discussed in the next section.

2. The Attempt to Seek Insurance Coverage

From February 1, 1992 through June 19, 1996, Ms. Johnson was continuously insured under homeowners policies issued by Metropolitan Property & Casualty Co. (CP 125, ¶ 2) The policies were identical in form. (CP 126, ¶ 2) With each policy, Ms. Johnson paid an additional premium and received a special, optional coverage which Met called "Coverage 25—Personal Injury." (CP 79) The coverage states:

The insurance provided in Coverage F – Personal Liability is extended to include protection for **personal injury**.

"Personal injury" is defined as injury arising out of one or more of the following:

1. false arrest, false imprisonment, wrongful detention or malicious prosecution;
2. wrongful eviction or wrongful entry;
3. libel, slander, defamation of character or invasion of privacy.

The Section II – Losses We Do Not Cover do not apply to personal injury

(CP 110; underlining added; bolding in original)

“Section II – Losses We Do Not Cover” is the section of the policy containing the liability coverage exclusions. (CP 105-6) The exclusions in that section thus do not apply to the optional Personal Injury coverage. However, the Personal Injury coverage goes on to list its own set of exclusions, one of which has been depended upon by Met:

Under **personal injury** we do not cover:

1. liability assumed by **you** under any contract or agreement except any indemnity obligation assumed by **you** under a written agreement directly relating to the ownership, maintenance or use of the **insured premises**;

(CP 110; bolding in original)

Prior to the Martins’ suit, Met received a claim for contribution toward the Martins’ remediation expenses. In a December 2, 2004 letter to Ms. Johnson, Met cited to a pollution exclusion⁶ and said:

This claim for contribution alleges that property damage (ground water contamination by home heating oil) occurred (for at least the last ten years) at the property covered by your policies, and owned by you during the time in question, specifically at 501 N Tacoma Ave,

⁶ Because the pollution exclusion is found in “Section II—Losses We Don’t Cover,” and because that section expressly does not apply to the Personal Injury coverage, the pollution exclusion is irrelevant to this litigation.

Tacoma WA from February 1, 1992 to approximately June 19, 1996. While the terms contaminant and pollutant are not defined in the policy, home heating oil is generally held to be a contaminant and pollutant. As such, there is no coverage under your policies for this claim.

(CP 118)

Met never mentioned the Personal Injury coverage. After the Martins sued, Ms. Johnson's Estate tendered defense to Met. In a January 6, 2006 letter to the Estate's counsel, Met again denied any duty to pay for the Martins' remediation costs:

The complaint alleges that property damage (ground water contamination by home heating oil) occurred (for at least the last ten years) at the property covered by the Johnson's [sic] policies, and owned by the Johnsons during the time in question, specifically at 501 N Tacoma Ave, Tacoma WA from February 1, 1992 to approximately June 19, 1996. While the terms contaminant and pollutant are not defined in the policy, home heating oil is generally held to be a contaminant and pollutant, and is regulated under the Model Toxic Control Act. As such, there is no coverage for indemnity under the Johnson's [sic] policies for any judgment entered for cleanup of contamination, for any statutorily imposed liability under the Model Toxic Control Act, or for any bodily injury or emotional distress due to potential exposure to toxic substances.

(CP 128, underlining added)

Although Met disclaimed any duty to ever pay for the damages the Martins actually were seeking, Met provided a defense attorney. The basis was that the Complaint included a boilerplate prayer for "such

further relief as the Court deems just and proper,” which theoretically might involve covered damages. Met said:

Other damages proven and awarded in any judgment, such as those the court deems just and proper, may be covered under the Johnson’s [sic] policies. As such, we will provide a defense of this lawsuit under claim number FR002967, which is being handled by adjuster Gardner Cronk.

(CP 128)

The Martins did not actually seek any such other damages and there was no legal possibility that such damages could be awarded. The Martins had filed a probate claim limited to the Martins’ pollution remediation expenses, and a claim against the Estate for any other damages would have been barred by the probate nonclaim statute.

(CP 131 line 20; CP 187 line 23)

The Estate thus was confronted with the somewhat unusual situation of its insurer denying, without reservation, coverage for any damages that might conceivably be awarded, but providing, under a “reservation of rights,” a defense based on the possibility of damages that would never be awarded.

Although Met provided this “defense,” it also filed this declaratory action. Service of the declaratory action on the Estate

represented the third time Met had denied coverage for any damages the Estate actually might be liable for.

Faced with Met's thrice-stated denial of a duty to indemnify the Estate for any pollution-related claims, the Estate protected itself by entering into a reasonable settlement with the Martins. (CP 136) Pursuant to the settlement, judgment was entered against the Estate and in favor of the Martins. (CP 183)

ARGUMENT

A. **As a Matter of Law, the Estate Is Entitled to a Liberal, Nontechnical Construction in Favor of Coverage**

Because this is an appeal from a summary judgment, the following standard applies:

When reviewing an order for summary judgment, an appellate court engages in the same inquiry as the trial court. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wash.2d 337, 341, 883 P.2d 1383 (1994). Summary judgment is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Clements v. Travelers Indem. Co.*, 121 Wash.2d 243, 249, 850 P.2d 1298 (1993). All facts and reasonable inferences are considered in the light most favorable to the nonmoving party. *Taggart v. State*, 118 Wash.2d 195, 199, 822 P.2d 243 (1992). Questions of law are reviewed de novo. *Mountain Park Homeowners Ass'n*, 125 Wash.2d at 341, 883 P.2d 1383.

North Pacific Ins. Co. v. Christensen, 143 Wn.2d 43, 47, 17 P.3d 596 (2001).

Where, as here, the contract is an unnegotiated adhesion contract, the insured is entitled as a matter of law to a liberal construction in favor of coverage.

If the portion of the policy being considered is an *inclusionary clause* in the insurance policy, the ambiguity should be liberally construed to provide coverage whenever possible. However, the basic principle that applies to exclusionary clauses in insurance contracts is that any ambiguity should be “most strictly construed against the insurer.”

Ross v. State Farm Mut. Auto. Ins. Co., 132 Wn.2d 507, 515-16, 940 P.2d 252 (1997) (italics in original; footnotes omitted); *see also State Farm Mut. Auto. Ins. Co. v. Ruiz*, 134 Wn.2d 713, 718, 952 P.2d 157 (1998).

Here, the Personal Injury coverage for “wrongful entry” is an inclusionary clause granting coverage, rather than exclusionary clause limiting it. Therefore, it should be liberally construed in favor of the Estate.

B. A Prohibited Release of Contaminants into Soil, and into the Property of a Third Party (the State), Is a “Wrongful Entry”

1. Semantic Analysis

a. A Reasonable Layperson Would Read the Coverage as Applying

The first level of analysis is a semantic one: What does the pertinent language say? The policy does not define the phrase “wrongful

entry,” so the following rule applies:

The interpretation of insurance policy language is a question of law. *State Farm Gen. Ins. Co. v. Emerson*, 102 Wash.2d 477, 480, 687 P.2d 1139 (1984). Undefined terms in an insurance policy “must be given a fair, reasonable, and sensible construction as would be given by an average insurance purchaser.” *Mid-Century Ins. Co. v. Henault*, 128 Wash.2d 207, 213, 905 P.2d 379 (1995).

The terms of the policy must be understood in their plain, ordinary, and popular sense.” *Farmers Ins. Co. v. Miller*, 87 Wash.2d 70, 73, 549 P.2d 9 (1976). “To determine the ordinary meaning of an undefined term, our courts look to standard English language dictionaries.” *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wash.2d 869, 877, 784 P.2d 507 (1990).

Christensen, 143 Wn.2d at 48.

According to Webster’s, “wrongful” means:

wrongful \ . . \ adj [ME, fr. 1wrong + -ful] 1 : full of wrong : injurious, unjust, unfair <a ~ act> 2 : not rightful esp. in law : having no legal sanction : unlawful, illegitimate <the ~ heir to a throne> <~ occupation of an estate>

(Appendix 1 to this brief)

Because it was illegal, there is no doubt the pollution was “wrongful.” Leaking underground petroleum storage tanks are regarded as a serious threat to human health and the environment. WAC 173-360-100. The contamination levels at issue here were as much as 1500 times

the regulatory maximum. (CP 315, lines 12-20) The prohibited entry of these contaminants into the soil and groundwater thus was “wrongful.”

The term “entry” includes the following meanings:

1 : the act of entering : ENTRANCE, INGRESS

(Appendix 2 to this brief)

Here, the petroleum left a confined, specific area—the underground storage tank—and *entered* into an outside area—soil and groundwater—into which entry is forbidden by law. Thus, the leakage into soil and groundwater was a wrongful entry according to the phrase’s “plain, ordinary, and popular meaning.” *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 576, 964 P.2d 1173 (1998).

Support is found in *Travelers Indem. Co. v. Summit Corp. of America*, 715 N.E.2d 926 (Ind. App. 1999). In the course of finding that an insurance policy’s Personal Injury provisions covered a claim for pollution and groundwater contamination, the court said:

The policies use the phrases “wrongful eviction,” “wrongful entry,” and “invasion of the right of private occupancy” to define acts causing “personal injury.” The word “wrongful” is defined by WEBSTER’S NEW WORLD DICTIONARY as “full of wrong; unjust or injurious ... without legal right; unlawful.” *Id.* at 1543. “Entry” is defined as “the act of entering.” *Id.* at 454. “Invasion” is defined as “... an intrusion or infringement ... the onset or appearance of something harmful or troublesome ...” *Id.* at 710. As we find that the terms used

in the policies can have a variety of meanings, we conclude that these phrases are ambiguous.

715 N.E.2d at 937 (ellipses in original).

In the present case a reasonable person, not knowing of or looking for technical legal meanings, would conclude that the exit of prohibited contaminants, from where they are supposed to be, also was an entry into where they are not supposed to be. He or she also would conclude that since the entry was unlawful, it was wrongful. Therefore, a semantic analysis indicates there is coverage.

2. **The Kitsap County Case Already Resolves the Question in the Estate's Favor**

In *Kitsap County*, 136 Wn.2d at 567, Kitsap County was faced with a predicament similar to the Estate's. It was a defendant in lawsuits in which "plaintiffs sought damages for environmental problems which they alleged were caused by Kitsap County and other defendants." 136 Wn.2d at 572. This included alleged problems with hazardous wastes disposed of in the County's landfills. *Id.* The plaintiffs alleged the contaminants migrated onto their property. *Id.*

The County was insured by various liability policies, some of which included personal injury coverage for "wrongful entry." The County eventually settled the suits and sued the insurers in federal court,

seeking coverage for the settlement amounts. When the County moved for summary judgment, the federal district court certified the following question, and received the following response:

The United States District Court for the Western District of Washington has certified the following question to us: “Whether the claims against Kitsap County constitute ‘personal injury’ under each of the subject liability insurance policies.” Doc. 603 at App. A. For reasons that we set forth hereafter, we answer yes to the question insofar as it relates to policies that provide coverage for a personal injury arising from a “wrongful entry” and/or “other invasion of the right of private occupancy” and answer no as it relates to policies that provide coverage only for a personal injury arising from a “wrongful eviction.”

136 Wn.2d at 571 (underlining added); *see Scottish Guarantee Ins. Co., Ltd. v. Dwyer*, 19 F.3d 307 (7th Cir. 1994) (similar holding).

The present Court is bound by the *Kitsap County* holding and likewise should treat the present environmental claim as constituting a wrongful entry for purposes of Met’s Personal Injury coverage.

3. **“Wrongful Entry” Is Not Limited to Trespass Actions, or to Trespasses Crossing Horizontal Property Boundaries**
 - a. **Kitsap County Is Not Limited to Trespass Claims**

In *Kitsap County* the county was sued by landowners adjacent to the county’s landfill. The landowners alleged that contaminants from the

landfill had migrated to their property. Seizing on this fact, Met has argued that a “wrongful entry” only takes place when there is a common law trespass, and that no trespass can occur until the contaminants migrate horizontally over a property boundary. The trial court accepted this argument.

The argument fails for several reasons. First, it is a textbook example of a deductive fallacy: A is B, therefore B must be A; a river is a body of water, therefore a body of water must be a river; a trespass is a wrongful entry, therefore a wrongful entry must be a trespass.

While *Kitsap County* happened to involve a trespass claim, nothing in that case suggests that only trespass claims can be wrongful entries. The Court simply followed the usual rules of insurance contract construction and decided that, liberally construing the policy in favor of coverage, a trespass could be a “wrongful entry.” It didn’t say that only trespasses could be wrongful entries.

The policy never uses the word “trespass.” Using interpretation to insert such a technical legal term into the policy would violate the rule that technical meanings are not read into the policy unless it is shown through extrinsic evidence that both parties intended such a result:

However, before an insurance company can avail itself of a legal technical meaning of a word or words, it must be clear that both parties to the contract intended that the

language have a legal technical meaning. *Thompson v. Ezzell*, 61 Wash.2d 685, 688, 379 P.2d 983 (1963). Otherwise the words will be given their plain, ordinary meaning. *Farmers Ins. Co. v. Miller*, 87 Wash.2d 70, 73, 549 P.2d 9 (1976).

Boeing Co. v. Aetna Cas. and Sur. Co., 113 Wn.2d 869, 882, 784 P.2d 507 (1990); *see also Kitsap County*, 136 Wn.2d at 576 (“If words have both a legal, technical meaning and a plain, ordinary meaning, the ordinary meaning will prevail”).

b. **The “Right of Private Occupancy” Restriction Is Missing**

There is another reason why a “trespass” limit cannot be read into the Met policy. In *Kitsap County* the Personal Injury coverage was for “wrongful entry or eviction, or other invasion of the right of private occupancy.” 136 Wn.2d at 574. The reference to “*other* right of private occupancy” indicated that only wrongful entries which violated a right of private occupancy were a Personal Injury. This limitation is not present in Met’s policy. Thus, Met’s policy language does not support limiting the coverage to injuries flowing from violations of private occupancy rights, i.e., trespasses.

c. **Because of Groundwater Contamination, the Present Case Involved Encroachment onto the Property of Others**

Even if one indulges in the assumption that a wrongful entry

requires a physical invasion of another's property, such an invasion took place here: Groundwater contamination was a physical invasion of State property. The following testimony was not controverted:

[T]he contaminants in the groundwater on the date the sample was taken first entered the soil 10 or more years prior to the date of the sample, as the contaminants at the 13 foot level would be as old or older than the contaminants at the 9.5 foot level, which were age dated in Exhibit A. Leaching of these older contaminants from the soil into the groundwater would have been a continuous process that continued up to the date of soil remediation.

(CP 37, lines 13-20; underlining added)

By statute, groundwater is State property. RCW 90.44.040.

Thus, the present claim involves an invasion of the property rights of another:

As a general matter, groundwater in Washington is publicly owned. *Department of Ecology v. United States Bureau of Reclamation*, 118 Wash.2d 761, 766, 827 P.2d 275 (1992); *Olds-Olympic, Inc. v. Commercial Union Ins. Co.*, 129 Wash.2d 464, 476, 918 P.2d 923 (1996); RCW 90.44.040; see RCW 90.03.010. RCW 90.44.040 provides that “[s]ubject to existing rights, all natural ground waters of the state ... are hereby declared to be public ground waters and to belong to the public and to be subject to appropriation for beneficial use under the terms of this chapter and not otherwise.”

Hillis v. State, 131 Wn.2d 373, 383, 932 P.2d 139 (1997) (ellipsis in original).

Since the present claim in fact involves the illegal invasion of the

property rights of another, any “trespass” requirement imposed by the *Kitsap County* opinion was met here.

d. A Trespass Suit by the State Was Not Necessary

In the court below, Met made much of the fact that the State of Washington was not a party to the liability suit. Supposedly, this showed that the Estate’s liability was not grounded on a trespass onto State property. The argument sowed nothing but procedural confusion and was based on a misunderstanding of how liability arises under the pollution laws. Basically, both the Estate and the Martins were strictly liable to the State for the groundwater contamination, but because the Martins engaged in the State’s voluntary cleanup program, a legal action by the State was not necessary. The Martins, however, had a statutory contribution right against the Estate. Thus, while the State never was required to bring suit, the liability at issue here ultimately arise out of statutory liability both the Martins and the Estate had to the State for contamination that included contamination of State property.

The MTCA makes certain classes of individuals strictly liable to the State for pollution events. The classes include “[t]he owner or operator of the facility,” and “[a]ny person who owned or operated the facility at the time of disposal or release of the hazardous substances[.]” RCW 70.105D.040(1)(a), (b). As owners during a time when the site was

contaminated, both the Martins and the Estate were liable under subsection (a). As owners during a time of ongoing releases into soil and groundwater, both would also be liable under subsection (b). The State had the right to hold both the Estate and the Martins strictly liable, jointly and severally:

(2) Each person who is liable under this section is strictly liable, jointly and severally, for all remedial action costs and for all natural resource damages resulting from the releases or threatened releases of hazardous substances.

RCW 70.105D.040(2); *see Weyerhaeuser Co. v. Aetna Cas. and Sur. Co.*, 123 Wn.2d 891, 898, 874 P.2d 142 (1994); *see also* RCW 70.105D.080 (granting contribution right between those liable to the State).

While the State thus has the power to sue environmental violators, as a practical matter such suits seldom have to be brought. To control their costs, violators have the option of engaging in a voluntary cleanup, which is exactly what the Martins did. (CP 236; CP 332, lines 17-22) These independent cleanups avoid contentious, expensive, and circuitous procedures in which the State must first incur cleanup expenses and then seek reimbursement through a legal action. *See Weyerhaeuser*, 123 Wn.2d at 907 (“independent remedial actions form an integral part of the Model Toxics Control Act program in Washington”).

The present situation could have begun as a trespass action by the State, alleging contamination of State property (groundwater). The only reason it did not was because the Martins recognized their legal obligations and voluntarily fixed the problem. Such a procedural fortuity does not provide Met with a defense, as the Estate remained liable for the contamination, albeit through the contribution action brought by the Martins rather than through a direct suit by the State.

Controlling precedent dictates this result. In *Weyerhaeuser*, 123 Wn.2d 891, Weyerhaeuser commenced voluntary cleanups at numerous waste disposal sites. Since Weyerhaeuser was complying with government regulations, there was no need for the State to institute, or even threaten, legal proceedings. The insurers denied liability coverage on the ground that no formal legal action had been taken by the State. Finding coverage, the Court said:

One ultimate issue is here presented.

ISSUE

Can there be insurance coverage under a Comprehensive General Liability (CGL) policy for property damage when the policyholder has incurred environmental cleanup costs pursuant to statute, but where the involved government environmental agency has not made an overt threat of formal legal action?

DECISION

CONCLUSION. We conclude that Comprehensive General Liability (CGL) insurance policies, which provide coverage for all sums which the insured shall be obligated to pay by reason of the liability imposed by law for damages on account of property damage, may provide coverage when an insured engages in the cleanup of pollution damages in cooperation with an environmental agency. Such policies can reasonably be read to provide coverage for actions taken to clean up pollution damages required under environmental statutes which impose strict liability for such cleanup.

123 Wn.2d at 896-97.

Like Weyerhaeuser, the Martins were not required to wait for the inevitable suit by the State. Instead, they undertook a voluntary cleanup and brought a contribution action, as the statute allows. RCW 70.105D.080. While the State might not have brought a formal claim against the Martins and/or the Estate, it certainly had the ultimate legal right to either force a cleanup at the expense of those responsible, or to clean up on its own and sue to recover.

Thus, for purposes of applying any “trespass” requirement in *Kitsap County*, it doesn’t make any difference that the State never brought a trespass suit for the groundwater contamination. According to *Weyerhaeuser*, it is sufficient that the State could have done so. The fact

that a responsible private party voluntarily decontaminated the site does not excuse a liability insurer from its coverage obligations.

e. **Metropolitan Deleted the “Owned Property” Exclusion and Now Is Trying to Revive It**

There is another reason why Met’s “trespass” arguments fail: By arguing that wrongful entries confined to the insured’s own property are not covered, Met is trying to revive an exclusion it explicitly deleted from the Personal Injury coverage.

The Personal Injury coverage states:

The Section II – Losses We Do Not Cover do not apply to personal injury

(CP 110; underlining added)

“Section II – Losses We Do Not Cover” is the section containing most of the exclusions. Included in that section was an exclusion for:

property damage to property owned by you.

(CP 106)

By deleting this exclusion with respect to the Wrongful Entry coverage, Met showed an intent to cover wrongful entries that involve property owned by the insured. When an insurer has limiting language available and declines to use it, a court will not read the same limitation into broader language the insurer actually used. *See Lynott v. National*

Union Fire Ins. Co. of Pittsburgh, Pa., 123 Wn.2d 678, 694, 871 P.2d 146 (1994).

In *Lynott*, the insurer argued that an endorsement excluded liability arising out of a stock purchase transaction. Rejecting the argument, the Washington Court noted that the insurer had available, but did not use, language which would have specifically excluded coverage:

We repeat: “Exclusions of coverage will not be extended beyond their ‘clear and unequivocal’ meaning”. (Footnote omitted. Italics ours.) *American Star Ins. Co. v. Grice*, 121 Wash.2d 869, 875, 854 P.2d 622 (1993).

Application of that rule is particularly justified here where (1) National Union did not define the term “acquisition” even though it was aware of the pending negotiations, and (2) National Union had a standard form clause which would have excluded specifically the subject transaction by merely inserting a description of the potential investors or the transaction in general. It is the burden of the insurer to draft an exclusion in clear and unequivocal terms. Instead, National Union chose to use an undefined term.

123 Wn.2d at 694 (comment in original; underlining added).

Here, Met’s policy contained a specific exclusion which would have accomplished exactly the result Met now seeks—eliminating coverage for wrongful entries occurring on the insured’s property. It would be a strange result indeed for a court to conclude that a liberal construction in favor of the insured requires reading a deleted exclusion back into the policy.

4. The “Occurrence” Coverage Is Irrelevant

Without the optional Personal Injury coverage, the Met policy is a standard homeowners liability policy. These standard policies provide coverage for an “occurrence,” which is defined as an accident which results, during the policy period, in bodily injury or property damage. *See generally State Farm Fire & Cas. Co. v. Ham & Rye, L.L.C.*, 142 Wn. App. 6, 174 P.3d 1175 (2007). The terms “bodily injury” and “property damage” also are specially defined, in a manner limiting the coverage available. *See generally E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 726 P.2d 439 (1986); *Scottsdale Ins. Co. v. International Protective Agency, Inc.*, 105 Wn. App. 244, 19 P.3d 1058 (2001).

For the sake of brevity, this standard liability coverage will be referred to as the “occurrence coverage.”

In the case below, Metropolitan argued the Personal Injury coverage was subject to the limitations found in the occurrence coverage. More specifically, Met argued that a personal injury had to be an “occurrence” and thus had to involve an accident and also had to involve “property damage” during the policy period. (CP 459)

Met’s argument is not tenable, as it creates irreconcilable conflicts in the policy coverages. The occurrence coverage only covers accidents,

while the Personal Injury coverage applies to nonaccidental, intentional torts such as malicious prosecution. For this reason, courts have rejected the contention that the Personal Injury coverage is subject to the limitations in the occurrence coverage.

We reject the defendant's argument that the policy covers only unintentional torts because of the ambiguity created when the policy is read as a whole. The policy covers "occurrences," defined as events which "unexpectedly or unintentionally result[] in personal injury." Then the policy defines "personal injury" to include a number of torts which are inherently intentional. These torts include: false arrest, false imprisonment, detention, malicious prosecution, humiliation, libel, slander, defamation of character, invasion of privacy, assault and battery, as well as discrimination. We agree with the Seventh Circuit that "the definition of personal injury which includes intentional torts and the definition of 'occurrence' which excludes intentional torts" are inconsistent and create an ambiguity. *Hurst-Rosche Eng'rs, Inc. v. Commercial Union Ins.*, 51 F.3d 1336, 1345 (7th Cir.1995). Other courts reviewing insurance policies similar to the one before us have also concluded that the provisions of the policies are internally inconsistent because they appear to provide coverage for "unintentional" "intentional" torts.

North Bank v. Cincinnati Ins. Companies, 125 F.3d 983, 986-87 (6th Cir. 1997) (brackets in original).

Reading the policy in its entirety, it is evident that the occurrence requirement is more akin to damages arising from negligence and cannot be applied to claims for personal injuries because to do so would yield the absurd result of a policy that covers unexpected and unintended intentional torts. As the motion justice noted, false arrest, false imprisonment, malicious prosecution, and assault and battery, all of which are listed in the policy as potential

personal injuries, “can never arise out of an ‘occurrence,’ as defined in the insurance contract, because they all either require the element of intent or require an element of expectation as to the resulting injury.”

Town of Cumberland v. Rhode Island Interlocal Risk Management Trust, Inc., 860 A.2d 1210, 1216 (R.I. 2004) (footnote omitted); *see also* *Lineberry v. State Farm Fire & Cas. Co.*, 885 F. Supp. 1095, 1099 (M.D. Tenn. 1995); *Liberty Life Ins. Co. v. Commercial Union Ins. Co.*, 857 F.2d 945, 950 (4th Cir. 1988).

The above authorities focus on the conflict between the coverage for intentional torts, granted by the Personal Injury coverage, and the occurrence coverage, which is restricted to accidents. There is another, perhaps more fundamental, conflict.

The occurrence coverage only applies to “property damage” and “bodily injury.” These are specially defined terms. “Property damage” only involves tangible property; damage to intangible property, such as a view from a home or a right to a business license, is not covered. *See Scottsdale*, 105 Wn. App. 244; *Guelich v. American Protection Ins. Co.*, 54 Wn. App. 117, 772 P.2d 536 (1989). “Bodily injury” requires physical harm; mental injury is not covered. *See E-Z Loader*, 106 Wn.2d 901.

If these concepts are applied to the Personal Injury coverage, much of it disappears. The Personal Injury coverage includes injuries such as libel, slander, defamation of character, and invasion of privacy. Such suits concern injury to reputation and privacy interests, which would not be tangible property as required for “property damage” under the occurrence coverage. The damages awarded in such suits also include damages for emotional distress, which does not qualify as “bodily injury.” *Compare Brink v. Griffith*, 65 Wn.2d 253, 258, 396 P.2d 793 (1964) (discussing damages in privacy and publicity torts), *with Scottsdale, supra* (discussing tangible property requirement for occurrence coverage). This conflict only magnifies the ambiguities noted by the previously cited cases.

The commentators agree that the occurrence and Personal Injury coverages are separate:

Under these standard personal injury and advertising insurance forms, the “occurrence” definition does not apply. Thus, when dealing with these coverages, the fact that the conduct and/or damages are not “accidental” does not preclude coverage in the absence of a specific limitation.

20 *Holmes’ Appleman On Insurance 2d* § 131.1, p.330.

The above observation is echoed in *Kitsap County*. The insurers argued that because the County also contended the occurrence coverage

applied, allowing coverage under the Personal Injury provisions would “improperly result in the County receiving coverage under two different parts of the policy for the same allegations.” 136 Wn.2d at 581. Rejecting this argument, the Washington Court noted that the Personal Injury coverage could be read as a separate coverage and if it applied, then there was coverage notwithstanding the occurrence coverage:

There is, in short, no rule of law that we are aware of that prevents an insurance company from providing overlapping coverage in any policy that it issues. By the same token, we know of no authority for the proposition that an insured must elect which coverage it chooses if it has been furnished with overlapping coverage in a policy. Any insurer that is a party to this suit provided the coverage that can be ascertained from a plain reading of its entire policy or policies. If the claims against Kitsap County constitute “personal injury” as that term is defined in any policy, then coverage is available under that policy, notwithstanding the fact that additional coverage may be provided to the insured by other provisions in the policy.

136 Wn.2d at 581-82 (underlining added).

In sum, if one tries to make the Personal Injury coverage subject to the limitations in the occurrence coverage, one quickly is faced with irreconcilable conflicts. These conflicts creates an ambiguity which is cured by treating the Personal Injury coverage as separate from, rather than subject to, the occurrence coverage and its limitations.

5. The Settlement Is Not Excluded as a “Liability Assumed by Contract”

The underlying suit was settled, not tried. A judgment was entered based on the settlement, so there is no doubt the Estate is legally liable to the Martins. (CP 183) Met argued below that the settlement is excluded as “liability assumed by you under any contract or agreement,” an exclusion specifically listed in the Personal Injury coverage. (CP 110)

Numerous cases have considered such assumed liability exclusions, and the holdings are unanimous: These exclusions apply when the underlying claim is based on the insured’s assumption of a third party’s liability, such as through an indemnity clause, not when the insured settles a claim that was based on a liability otherwise imposed by law:

This exclusion operates to deny coverage when the insured assumes responsibility for the conduct of a third party. As [the insured] is not being sued as the contractual indemnitor of a third party's conduct, but rather for its own conduct, the exclusion is inapplicable.

Federated Mut. Ins. Co. v. Grapevine Excavation Inc., 197 F.3d 720, 726 (5th Cir. 1999) (footnote omitted).

In *USF Ins. Co. v. Mr. Dollar, Inc.*, 175 F. Supp. 2d 748 (E.D. Pa. 2001), the insured was sued for causing a fire. The insurer denied coverage, so the insured stipulated to judgment for \$366,877.90 and

assigned its rights to the plaintiff. Rejecting an argument that the assumed liability clause applied to the settlement, the court said:

Mr. Dollar's liability did not stem from the Stipulation and Entry of Judgment but from the fire. *Daily Exp., Inc. v. N. Neck Transfer Corp.*, 490 F.Supp. 1304, 1308 (M.D.Pa., 1980) (stating that “ where the express contract actually adds nothing to the insured's liability, the contractual liability exclusion clause is not applicable, but where the insured's liability would not exist except for the express contract, the contractual liability clause relieves the insurer of liability.”). This is also not a case where Mr. Dollar assumed the liability of a third party and is attempting to force USF to cover that liability under the CGL Policy. In *Insurance Co. of North America v. McCarthy Bros. Co.*, 123 F.Supp.2d 373 (S.D.Tex.2000), the Defendant argued that the exact same exclusion language did not exclude coverage based upon an obligation accepted by the insured related to its own negligent conduct. *Id.* at 377. The court agreed with this interpretation and stated that “the exclusion at issue merely ‘operates to deny coverage when the insured assumes responsibility for the conduct of a third party.’” *Id.* at 377-78 (quoting *Federated Mut. Ins. Co. v. Grapevine Excavation Inc.*, 197 F.3d 720 (5th Cir.1999)). For the forgoing reasons, USF's argument fails, and the Contractual Liability Exclusion is inapplicable in this case.

175 F. Supp. 2d at 753.

In *Lennar Corp. v. Great American Ins. Co.*, 200 S.W.3d 651 (Tex. App. 2006), a contractor settled various claims for defective construction. The insurer unsuccessfully tried to avoid liability for the settlement by invoking the assumed liability exclusion:

With certain exceptions, Exclusion B(2) excludes coverage for “‘property damage’ for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement.” Markel contends Lennar's voluntary agreements to repair the EIFS homes constitute contracts under which Lennar assumed liability. However, this exclusion is inapplicable here.

Exclusion B(2) precludes coverage when the insured contractually assumes liability for the conduct of a *third party* such as through an indemnity or hold harmless agreement. *See Federated Mut. Ins. Co. v. Grapevine Excavation, Inc.*, 197 F.3d 720, 726 (5th Cir.1999); *McCarthy Bros.*, 123 F.Supp.2d at 377-78; *see also Am. Girl*, 673 N.W.2d at 80-81; *Olympic, Inc. v. Providence Wash. Ins. Co.*, 648 P.2d 1008, 1010-11 (Ak.1982). Lennar's settlement of the EIFS claims was not contractual assumption of a third party's liability, but rather resulted from Lennar's own conduct. *See McCarthy Bros.*, 123 F.Supp.2d at 377-78 (holding that “assumption of liability” exclusion did not preclude coverage for insured builder's agreement through settlement to repair damage caused by its faulty construction because insured accepted liability for its own conduct-not liability of a third party). Accordingly, the trial court erred if it granted summary judgment for Markel based on Exclusion B(2).

200 S.W.3d at 692-93.

A thorough discussion of the exclusion is found in *Gibbs M.*

Smith, Inc. v. U.S. Fidelity & Guar. Co., 949 P.2d 337 (Utah 1997).

In *Olympic, Inc. v. Providence Washington Insurance Co.*, 648 P.2d 1008, 1011 (Alaska 1982), the court observed, “‘Liability assumed by the insured under any contract’ refers to liability incurred when one promises to indemnify or hold harmless another, and does not refer to liability that results from breach of contract.” The court explained further:

Liability ordinarily occurs only after breach of contract. However, in the case of indemnification or hold harmless agreements, assumption of another's liability constitutes performance of the contract. Because "liability assumed by contract" refers to a particular type of contract—a hold harmless or indemnification agreement—and not to the liability that results from breach of contract, the contractual liability exclusion applies only to hold harmless agreements.

Id. (citing 1 Rowland H. Long, *Law of Liability Insurance* § 1.12 (1981)); *see also* 43 Am.Jur.2d *Insurance* § 712 (1982). The pertinent law abundantly confirms that a liability insurance contract exclusion clause excludes only contracts in which the insured assumes the tort liability of another. *See Commercial Union Ins. v. Basic Am. Med.*, 703 F.Supp. 629, 633 (E.D.Mich.1989) (“[C]ontractual exclusion clauses' deny the coverage generally assumed by a liability policy in cases in which the insured in a contract with a third party agrees to save harmless or indemnify [a] third party.”); *Smithway Motor Xpress v. Liberty Mut. Ins.*, 484 N.W.2d 192, 196 (Iowa 1992) (“We believe there is a distinction between incurring liability through breach of an employment contract and incurring liability through entering a contract to assume liability of another.”); *Aetna Casualty & Sur. Co. v. Cotter*, 26 Mass.App.Ct. 56, 522 N.E.2d 1013, 1014 (1988) (“The ‘liability assumed’ exclusion clause has been taken to refer to ‘liability incurred’ when one promises to indemnify or hold harmless another.”).

949 P.2d at 341-42 (footnote omitted).

The reasoning in the above cases applies here: The Estate was not sued because it assumed, through an indemnity clause, the liability of a third party, but because MTCA made the Estate strictly liable for the

contamination and granted the Martins a contribution right. The assumed liability exclusion does not apply to the Estate's settlement of such a liability.

C. **Met Is Bound by the Reasonable Settlement in the Underlying Action**

The preceding sections establish that Met breached its contract by denying a duty to indemnify the Estate for its pollution-related liability when, in fact, the "wrongful entry" coverage applies. The remaining question is whether Met is bound by the reasonable settlement entered between the Martins and the Estate and previously affirmed by the present Court.

Met is.

This result is dictated by *Public Utility District No. 1 of Klickitat County v. International Ins. Co.*, 124 Wn.2d 789, 881 P.2d 1020 (1994). In that case the insurers denied coverage for several class action suits arising out of the WPPSS bond default. The insured settled the suits, and the settlements were declared reasonable by the federal court overseeing the class actions. 124 Wn.2d at 794-95. The insureds then filed an action to recover the reasonable settlement amounts. The insurers argued that to prevail, the insureds could not rely on the reasonable settlements, but had to show they actually would have been liable to the class plaintiffs.

Disagreeing, the Washington Court ruled that the insurers were bound by the settlement:

We agree and hold that the plaintiffs, in this action to collect insurance proceeds under the settlement agreement, need only prove the underlying claims were covered by the policies-an issue we addressed in the *Transcontinental* case and have further explored earlier in this opinion. To require claims to be actually proved in an action to enforce a settlement and collect insurance proceeds would defeat the purpose of settlement agreements. The MDL 551 settlement was reached in part to avoid lengthy and difficult litigation of these very issues.

124 Wn.2d at 809-10 (underlining added).

The present case is not distinguishable. The settlement is reasonable. *Martin v. Johnson*, 141 Wn. App. 611, 170 P.3d 1198 (2007). The Martins are not required to prove the validity of their underlying contribution claim. The entire purpose of the reasonable *settlement* was to avoid the need for such litigation and now “plaintiffs . . . need only prove the underlying claims were covered[.]” *Public Utility District No. 1*, 124 Wn.2d at 809. Because the underlying claims are covered as a “wrongful entry,” Met is bound to pay the settlement.

D. As the Prevailing Party, Appellants Are Entitled to Attorney Fees

In compliance with RAP 18.1(b), the Martins and the Estate request their attorney fees. This is an action concerning insurance

coverage. Met sued its insured, the Estate, and the insured's assignee (the Martins) asking for a declaration of no coverage. Under Washington's *Olympic Steamship* rule, an insured that prevails on a question of coverage is entitled to attorney fees. *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 53, 811 P.2d 673 (1991); *Nationwide Mut. Ins. Co. v. Hayles, Inc.*, 136 Wn. App. 531, 544-45, 150 P.3d 589 (2007). A prevailing assignee of the insured, such as the Martins, also is entitled to attorney fees. *See Estate of Jordan by Jordan v. Hartford Acc. and Indem. Co.*, 120 Wn.2d 490, 508, 844 P.2d 403 (1993).

CONCLUSION

For the above reasons, the Court of Appeals should (1) reverse the summary judgment entered in Met's favor, (2) reverse the denial of the appellants' motion for summary judgment, (3) direct entry of summary judgment in appellants' favor, and (4) award appellants their attorney fees.

DATED this 27 day of March, 2008.

EKLUND ROCKEY STRATTON, P.S.


James T. Derrig, WSBA 13471
Attorneys for Appellants

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en-tre-sol \ 'ent(r)säl, 'en-trə-s-, 'än-trə-s-, 'u-trə-s-, -söl\ n -s [F, fr. entre- + sole story, floor, alter. of OF suete, fr. (assumed) VL sola, fr. L spolea sandal, sole, still — more at SOLE]: MEZZANINE

en-tro-pi-on \ 'en-tröpē, 'än-, 'ēn\ n -s [NL, fr. Gk entropē act of turning toward, turning in + -ion (dim. suffix)]: inversion or turning inward against the eyeball of the border of the eyelids

en-tro-py \ 'en-tröpē, -pi\ n -es [ISV 2en- + -tropy] 1 in thermodynamics: a quantity that is the measure of the amount of energy in a system not available for doing work, numerical changes in the quantity being determinable from the ratio dQ/T where dQ is a small increment of heat added or removed and T is the absolute temperature (the ~ of dry air is proportional to its potential temperature — A.H.Thiessen) 2 in statistical mechanics: a factor or quantity that is a function of the physical state of a mechanical system and is equal to the logarithm of the probability for the occurrence of the particular molecular arrangement in that state 3 in communication theory: a measure of the efficiency of a system (as a code or a language) in transmitting information, being equal to the logarithm of the number of different messages that can be sent by selection from the same set of symbols and thus indicating the degree of initial uncertainty that can be resolved by any one message 4: the ultimate state reached in the degradation of the matter and energy of the universe: state of inert uniformity of component elements: absence of form, pattern, hierarchy, or differentiation (cultural diversity and heterogeneity counteracts the tendency to cultural ~ — David Bidney) (~ is the general trend of the universe toward death and disorder — J.R.Newman)

en-truck \ 'en-trək, en-\ vb [ten- + truck (n.)] vi, of troops : to get into a truck ~ vt: to put (troops) into trucks

en-trust or in-trust \ 'en-trəst, en-\ vt [ten- or 2in- + trust (n.)] 1: to confer a trust upon: deliver something to (another) in trust (~ed him with responsibility for completing the work) (~ed him with my money) 2: to commit or surrender to another with a certain confidence regarding his care, use, or disposal of (~ed money to him) SYN see COMMIT

en-trust-ment \ -s(t)mənt\ n -s 1: the act of entrusting or the condition of being entrusted 2: something with which one is entrusted: TRUST (encouraged and imparted Christian spiritual ~s — Time)

en-try \ 'en-trī, -ri\ n -ES [ME entre, fr. OF entree, fr. fem. of entré, past part. of entrer to enter — more at ENTER] 1: the act of entering: ENTRANCE, INGRESS (~ into the conflict disposed of the immediate issue of foreign policy — Oscar Handlin) (helps smooth his ~ into group life — N.Y. Times) (the Roman conquest of Britain began by an ~ in the south-east — L.D.Stamp) 2: the right or privilege of entering: ADMISSION, ENTREE (managed to gain ~ to an exclusive club) (I wandered into Symphony Hall and after some difficulty (for the house was sold out, as usual) obtained ~ — Virgil Thomson) 3 a: the place or point at which entrance is made (at the ~ to the bridge stand two imposing pillars): as (1): VESTIBULE, PASSAGE, HALLWAY (they had played hide-and-seek dodging ... in and out of the entries of apartment houses — Jean Stafford) (2): DOOR, GATE (the procession entered the church by the south ~) (3): the mouth of a river (the French controlled both the St. Lawrence and the Mississippi entries to the great interior plain — B.K.Sandwell) b: a section of a building (as a college dormitory) that is divided into several sections each with its own entrance (it was the only bathtub in her ~ — George Santayana) 4 dial Brit: a short lane or alley 5 a: the act of making or entering a record (~ of a sale) b: something that is entered: as (1): a record or notation (as in a journal, diary, or account book) of a particular day's occurrences or of some transaction or proceeding (~ made no ~ in his logbook for that day) (the entries for that year reveal the growing scale of the firm's operations) (one ~ records a vote of censure against the speaker of the house) (2): a descriptive record in a catalog or listing of a book, periodical, or other item in a library's collection (3): HEADWORD; also: a headword with its appended definitional and informational matter — see VOCABULARY ENTRY (4): one of various similar objects composing a total or series: ITEM, OFFERING (the entries in this anthology are of uneven worth) (fortunately, this ~ has little in common with the other stories — James Stern) (the latest ~ of the theater season is a very slight comedy) 6 a: the exhibition or depositing (as by a ship's officer at the customhouse) of the papers required by law to procure license to land or import goods b: the giving an account esp. of a ship's cargo to the officer of the customs and obtaining his permission to land or import it — see ENTER vt 8 c: BILL OF ENTRY 7 a: a person or thing entered in a contest (as a race) b: the aggregate of persons or things so entered (a large ~ is attracted, with the best men and dogs from England — Roy Saunders) 8: a main passageway for haulage and ventilation in a mine 9 a: the actual taking possession of lands or tenements by entering or setting foot on them b: a putting upon record in proper form and order c: the act in addition to breaking essential to constitute burglary consisting of the introduction of the least part of the person or of any instrument for the purpose of committing a felony 10 a: ENTRANCE 6 b: the entrance of a voice in a fugue esp. after a rest c: ENTRÉE 3 11: ENTRANCE 8a 12 a: the act or means of winning a trick so as to lead to the next trick in bridge b or entry card: the card with which such a trick is or can be won — compare REENTRY

en-try-man \ -mən\ n, pl entrymen 1: one who enters upon public land with intent to secure an allotment under homestead, mining, or other laws 2: a coal miner engaged in driving a haulageway, airway, or passageway

entry table n: a conveyor that feeds material or objects (as bottles to be capped or labeled) into a processing machine

entryway \ 'en-ri\ n: a passage for entrance: ENTRY

entry word n: HEADWORD

ents pl of -ENT

—E.A.Weeks) (the census ... enumerated 241,450 persons of Hungarian birth — L.M.Sears) (the bank enumerated 57 overseas offices in addition to 71 New York branches — Investor's Reader); specif: to make a census of the population of (the population in 1820 when Mississippi was first enumerated as a state — U. S. Census) 2: to relate one after another: LIST, SPECIFY (it is not necessary to ~ all the bitter and factious disputes which marked this unhappy quarter century — B.K.Sandwell) (enumerated the advantages of his new position) (enumerated the necessary qualities of a good general — Eric Linklater) (the enumerated and implied powers of Congress) (the circumstances may be roughly enumerated as follows — G.G.Coulton) SYN see COUNT

enu-mer-a-tion \ 'ē-mer-āshən, (,)ē-\ n -s [MF or L; MF, fr. L enumeration-, enumeratio, fr. enumeratus + -ion-, -io -ion] 1 a: the act of listing one after the other: DETAILING (the rebel leader's effective ~ of popular grievances): the act of mentioning as an item in a total or series (not so entwined with the government as to warrant ~ as a separate element of the constitutional system — F.A.Ogg & Harold Zink) b: an itemized list or detailed or seriatim account: CATALOG (the modern way to learn English ... is to absorb a phrase-by-phrase ~ of all that might be conceivably said in ordinary talk — J.M.Barzun) (a careful ~ of the circumstances that led to the tragedy) (the author provides complete ~s ... of the opinions of Cartesian scholars on disputed questions of interpretation — W.F.Doney) 2 a: the act of counting: NUMBERING (as the faculty of speech developed ... the art of ~ or counting would begin — J.A.N.Friend) b: a count of something (as a population): CENSUS (the decennial ~ is only one of the many censuses it conducts — Current Blog.) 3 logic: examination of the instances falling under a universal (total ~ in perfect induction)

enu-mer-a-tive \ 'ē-n(y)ūmā-rād-iv, ē-, -m(ə)rəv, |t|, |ēv also |əv\ adj: enumerating or concerned with enumeration

enumerative induction n: inductive verification of a universal proposition by enumeration and examination of all the instances to which it applies — called also perfect induction

enu-mer-a-tor \ 'ē-n(y)ūmā-rād-ə(r), -ātə-\ n -s: one that enumerates; esp: a census taker

enun-cia-ble \ 'ē-nən(t)sēəbəl, -nənç(ə)əb-ə-\ adj [enunciate + -able]: capable of being enunciated

enun-cia-tive \ -nən(t)sē,āt sometimes -nənçē-, usu -əd- + V\ vb -ED/-ING/-S [L enunciativus, enuntiativus, past part. of enunciare, enuntiare to report, declare, express, fr. e- + nunciare, nuntiare to announce, relate, inform, fr. nuncius, nuntius messenger, message] vt 1 a: to make a definite or systematic statement of: FORMULATE (Descartes was the first to ~ the modern principle of inertia — S.F.Mason) (emphasized ... and enunciated a materialistic theory of the universe — Encyc. Americana) b: ANNOUNCE, PROCLAIM, DECLARE (he enunciated the aims of the paper — Current Blog.) (enunciated the principles to be followed by his administration) 2: UTTER, ARTICULATE, PRONOUNCE (enunciating their words with peculiar and offensive clarity — Geoffrey Household) ~ vi: to utter articulate sounds (should children be taught to ~ correctly — Bertrand Russell)

enun-cia-tion \ (,)ē-mer-āshən, ē-, -m(ə)rəv, |t|, |ēv also |əv\ n -s [L enunciation-, enunciativus, enuntiativus, fr. enunciativus, enuntiativus + -ion-, -io -ion] 1 a: the act of formulating or stating (as a law or principle) in a definite systematic way (the ~ of the exclusion principle resolved the apparent contradiction within the ... theory — G.H.Wannier) b: the act of producing or declaring publicly (we have a national penchant for ~ of broad, idealistic goals — A.B.Lans) 2: manner of uttering, articulating, or pronouncing esp. as regards ease of perceptibility (a region of literacy and slurred ~ — James Thurber) (detected in his ~ some slight influence of the brandy — Glenway Wescott) 3: something that is enunciated: STATEMENT, ANNOUNCEMENT, EXPRESSION (a tentative ~ to a theme which was to become important — G.J.Becker) (contained an ~ ... of all the traditional freedoms — J.P.Humphrey)

enun-cia-tive \ 'ē-mer-ā-d-iv, |t|, |ēv also |əv sometimes -nənç(ə)v\ adj [L enunciativus, enuntiativus, fr. enunciativus, enuntiativus + -ivus -ive] 1: serving to enunciate: DECLARATIVE 2: relating to enunciation — enun-cia-tive-ly \ |v|ēv, -tī\ adv

enun-cia-tor \ -nən(t)sē,ād-ə(r), -ītə- sometimes -nənçē-\ n -s [LL enunciator, enuntiator, fr. L enunciativus, enuntiativus + -or]: one that enunciates

enure var of INURE

en-u-re-sis \ 'en-yə-rēs-sis\ n -ES [NL, fr. Gk enourein to urinate in, to wet the bed (fr. en-2en- + ourein to urinate, fr. ouron urine) + NL -esis — more at URINE] an involuntary discharge of urine: incontinence of urine — called also bed-wetting — en-u-ret-ic \ 'ē-ri-tik, -et|, |ēk\ adj or n

env abor 1 envelope 2 envoy

envassal vie [ten- + vassal (n.)] obs: to reduce to vassalage

enveigle chiefly Brit var of INVEIGLE

en-veil also in-veil \ 'en, en + \ vt [ten- or 2in- + veil, n.]: to cover with or as if with a veil

en-vel-op also en-vel-ope \ 'en-veləp, en-\ vt enveloped; enveloped; enveloping; envelops also envelopes [ME envelopen, fr. MF enveloper, envoleper, enveloper, fr. OF, fr. en-1en- + voluper, voleper, veloper to wrap up] 1 a: to enclose completely with a garment or other covering: wrap up (a shroud ~ed her form — Mary W. Shelley) (drew off his coat and ~ed him in a white robe — Laura Krey) (other folks ~ the meat in the leaves — E.J.Banfield) b: to enclose or surround with a nonsolid material or medium (as air or darkness): obscure or conceal by covering or shrouding (distant hills ~ed in a blue haze) (large black clouds ~ed the moon) (flames ~ed the building) (a snug ... warmth ~ed him — O.E.Röivaag) c: to surround or enfold with something immaterial (as a mood or atmosphere): POSSESS, DOMINATE (the Presbyterian culture that ~ed me when I was a boy — St. Clair McKelway) (the drowsy silence that ~ed the yacht — Scott Fitzgerald) (she had been ~ed in profound

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 36961-3-II

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

METROPOLITAN PROPERTY
& CASUALTY INSURANCE
COMPANY,

Respondent,

v.

H.E. SHERRY JOHNSON, et al.,

Appellants.

NO. 36961-3-II

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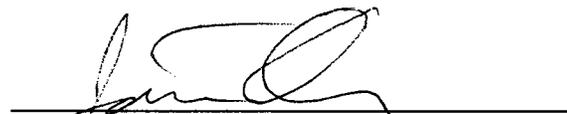
to be served by having the same delivered by hand to the offices of the counsel of record in this case listed below and left with a clerk therein, or with a person apparently in charge thereof:

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