

No. 36961-3-II

COURT OF APPEALS  
DIVISION TWO  
OF THE STATE OF WASHINGTON

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METROPOLITAN PROPERTY & CASUALTY INSURANCE  
COMPANY,

Respondent

v.

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

Appellants.

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RESPONDENTS' OPENING BRIEF

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## I. STATEMENT OF THE CASE

### A. FACTS

Sherry Johnson and her late husband, Dr. Johnson, owned the 1910 home which is located on Tacoma Avenue in Tacoma, Washington. They owned the home for approximately 50 years. (CP 190) Metropolitan Property & Casualty Insurance Company ("MetLife") provided a homeowners' insurance policy to Mrs. Johnson for the last three and a half years that she owned the property, from 1992 to mid-1996. The MetLife policy was canceled just before Mrs. Johnson sold the house to the Martins in 1996. (CP 617) When the Martins purchased the property, the existence of an in-ground heating oil tank was disclosed by inspection reports, but they were not concerned about it. Ms. Martin testified that it was "not an important issue to us at the time of our purchase." (CP 190) The Martins owned the home for eight years, and they purchased homeowners insurance from USAA Insurance Company. In 2004, the

Martins sold the home to the Barnetts, who made removal of the oil tank a condition of the sale. (CP 190) The Martins made a homeowners claim with USAA, which paid for the cost of removal. Mrs. Johnson was by this time deceased. Some 10 years after the sale, the Martins and USAA sued the Johnson Estate, claiming that both Mrs. Johnson and the Martins would have been liable for the removal costs under the Washington Model Toxic Control Act (MTCA) and that the Martins were entitled to contribution. (CP 19) The Johnson Estate agreed to the entry of a Stipulated Judgment in exchange for a Covenant Not to Execute. Because the MetLife policy contained an absolute pollution exclusion, MetLife denied coverage for this third party liability claim and filed this declaratory judgment action, asking the Court to declare that the Martin/USAA claim is not covered under the MetLife policy. The claimants eventually conceded in motions that pollution claims were excluded in the MetLife policy. However, in July 2007, the claimants raised for the

first time the theory that their claim against Mrs. Johnson was actually for “wrongful entry.” Wrongful entry is one of the specific offenses covered under the part of the MetLife policy entitled “II—Optional Coverage, 25. Personal Injury.” That section of the policy covers a group of specifically described offenses, which include false arrest, defamation, and “wrongful eviction or wrongful entry.” The trial Court ruled on cross summary judgment motions that the Martin/USAA claim was not covered under the MetLife policy. Judge Chushcoff prepared a succinct written opinion, which is attached as Exhibit A. (CP 615)

The undisputed facts in this case, based entirely on the testimony of the claimants’ own experts, are: (1) that the oil tank leaked at some unknown time prior to 1994; it could have been 30 years ago or more; (2) ground water on this property contacted the oil in the soil at some unknown time; (3) that neither the oil nor the ground water ever left the property. (CP 430, 433, 208) The trial Court’s decision was

that even if “wrongful entry” was construed to be synonymous with trespass, as the claimants argued, based on the case of *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 964 P.2d 1173 (1998), in this case, unlike the *Kitsap* case, there was no intrusion or entry “upon the land, interest, or premises of another.” The trial Court recognized the claimants’ argument that at some time the oil and the water in the ground came into contact and recognized that the State of Washington has an interest in ground water. However, the Court concluded that while ground water may be property, it was not an “interest in the possession or use of land or premises of the State.” Thus, the trial Court held that contamination on the Johnson property alone was not a “wrongful entry” and was not covered by the MetLife policy. The trial Court’s opinion recognized, but did not discuss, the other legal arguments presented by MetLife. (CP 617)

## B. THE METLIFE POLICY PROVISIONS

A complete copy of the Metropolitan policy was attached as an Exhibit to the Declaration of R. Scott Fallon. (CP 208) The most pertinent policy provisions read as follows:

### **SECTION II—LOSSES WE COVER COVERAGE F—PERSONAL LIABILITY**

**We** will pay all sums for **bodily injury** and **property damage** to others for which the law holds **you** responsible because of an **occurrence**. This includes prejudgment interest awarded against you.

**We** will defend **you** at our expense with counsel of **our** choice against any suit or claim seeking these damages. **We** may investigate, negotiate or settle any suit or claim.

### **GENERAL DEFINITIONS**

**“OCCURRENCE”** means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, resulting in bodily injury or property damage during the term of the policy.

### **SECTION II—LOSSES WE DO NOT COVER UNDER COVERAGE F—PERSONAL LIABILITY and COVERAGE G—MEDICAL**

**PAYMENTS TO OTHERS, WE DO NOT COVER:**

11. Bodily injury or property damage resulting from the release of toxic chemicals and other pollutants or contaminants. This exclusion does not apply to pollution caused directly by hostile fire.

12. Statutorily imposed liability resulting from the release of toxic chemicals and other pollutants or contaminants. This exclusion does not apply to pollution caused directly by hostile fire.

**UNDER COVERAGE F—PERSONAL LIABILITY, WE DO NOT COVER:**

2. **Property damage** to property owned by **you**.

3. **Property damage** to property occupied or used by **you**, rented to **you**, in **your** care, or for which **you** have physical control. Coverage is provided for **property damage** caused by fire, explosion or smoke.

**SECTION II—CONDITIONS**

7. **Other Insurance Under Coverage F—Personal Liability.** This insurance is excess over other valid and collectible insurance, except insurance written specifically to cover as excess over the limits of liability that apply in this policy.

**SECTION II-OPTIONAL COVERAGES  
COVERAGE 25—PERSONAL INJURY**

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.

**Section II—Losses We Do Not Cover** do not  
apply to **personal injury**.

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**;
2. Injury caused by violation of a penal law or  
ordinance committed by **you** or with **your**  
knowledge or consent;

#### **GENERAL CONDITIONS—SECTIONS I AND II**

**1. Policy Period.** This policy applies only to  
accidental loss in Section I or bodily injury or  
property damage in Section II which occurs  
during the policy period.

**9. Assignment.** **You** may not assign this policy  
to another person without **our** written consent.

## II. ARGUMENT

### A. **The Absolute Pollution Exclusion Should Be Applied**

The real question in this case is whether the Court will make the MetLife homeowners' policy cover this pollution event. It is undisputed that MetLife homeowners did not have to pay premiums for this potentially huge risk, because pollution was excluded. (CP 617) Likewise, there is no dispute that the liability claim against Mrs. Johnson was for pollution under the Washington MCTA provisions for contribution. The amount of the Stipulated Judgment in the underlying case against the Johnson Estate was for the remediation costs, plus attorneys' fees. (CP 5) The claimants cite the case of *Kitsap County v. Allstate Ins. Co.*, *supra*, and argue that regardless of the absolute pollution exclusion, pollution should nevertheless be covered if semantics would allow it to be called a "wrongful eviction or wrongful entry," which are among the specific covered

offenses listed in **COVERAGE 25—PERSONAL INJURY**, for which the **SECTION II** exclusions, including the pollution exclusion, do not apply. The claimants argument would mean that practically any escape of pollutants would be covered as a “wrongful entry” of some sort. The result of this argument would be to completely rewrite this policy under the guise of construing it. The claimants’ argument would not only give coverage for pollution, but for other excluded offenses as well. For example, burglary or arson could logically be labeled a “wrongful entry.” Certainly, homeowners’ insurance was never intended to cover automobile accidents. Nevertheless, driving a car into the side of a building could certainly be called a “wrongful entry.” Taking the claimants’ theory to its logical conclusion would destroy the standard homeowners’ policy and make it unaffordable for the premium-paying public.

The claimants’ theory is based on the *Kitsap* case, *supra*, but at the outset it should be made clear that the

Court in *Kitsap* did not consider or rule on this issue. The Court specifically stated at page 577 that it was given a discrete question from the Federal Court as to the meaning of the term “wrongful entry.” And at page 578, the *Kitsap* Court said that it did not address whether the pollution exclusion would bar coverage, regardless of whether or not it could be called a “wrongful entry.”

Likewise, the trial Court in this case did not address this larger issue. Instead, the trial Court carefully applied only the *Kitsap* Court’s semantic analysis.

## **B. Legal interpretation of F—Personal Liability, Wrongful Eviction**

### **1. MetLife Policy Language in Context**

In discussing the *Kitsap* Court’s analysis, it may be important to first note the difference between the policy language in the *Kitsap* case and the language in the MetLife policy. In *Kitsap*, the insurance personal injury section covered wrongful entry and/or other invasion of the right of private occupancy. The MetLife policy, on the other hand,

provides personal injury coverage for wrongful eviction or wrongful entry. The specific offenses listed in the insurance policy in *Kitsap* actually addressed any type of invasion of private occupancy. However, the MetLife policy was clearly in the context of landlord-tenant offenses. As the *Kitsap* Court pointed out, wrongful entry is not a tort, although in its general sense, it is synonymous with trespass or nuisance, which were the claims asserted in that case. However, the MetLife policy does not use wrongful entry in its general sense. Instead, it is linked directly with wrongful eviction. These are landlord-tenant offenses specifically addressed now in RCW 59.16, UNLAWFUL ENTRY AND DETAINER, in Chapter 59.18, the Landlord-Tenant Act, and in Chapter 59.20, the Mobile Home Landlord-Tenant Act. In this context, the two terms have a more specific legal meaning, where at common law and now by statute, a landlord may not enter the rented premises, except in specific circumstances. In this context, wrongful entry is an

actionable offense and has a specific legal meaning, just like the other specific actionable offenses listed there. The claimants' interpretation would make it a general term that could apply to many wrongs, actionable or not. However, in context, the words together "wrongful eviction or wrongful entry" describe specific landlord-tenant causes of action. In context, their actual meaning as actionable offenses makes their interpretation much easier.

The rules for construction of insurance policies are well known. The Court seeks to determine the intent of the parties, as expressed in the contract, and generally will give the language used its proper and ordinary meaning. The Court should use a common sense approach to insurance policies and not create confusion to fasten liability. *Haustead v. Convention Center*, 23 Wn. App. 349, 595 P.2d 574 (1979). The interpretation of insurance policies is a question of law, and in construing the language of an insurance policy, the Court must construe the entire contract

together, so as to give force and effect to each clause. *Morgan v. Prudential Ins. Co.*, 86 Wn.2d 432, 545 P.2d 1193 (1976). The entire insurance contract is to be construed together for the purpose of giving force and effect to each clause. *Meer v. Fireman's Fund*, 103 Wn.2d 316, 692 P.2d 830 (1985); *Shotwell v. Transamerica*, 91 Wn.2d 161, 588 P.2d 208 (1978). Insurance contracts should be interpreted in light of actual language used and with respect to the policy as a whole, not in terms of isolated segments. *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 38 P.3d 322 (2002). A clause or phrase in an insurance policy cannot be considered in isolation, but should be considered *in context, including the purpose of the provision*. *American Star Ins. Co. v. Grice*, 121 Wn.2d 869, 854 P.2d 622 (1993). An insurance policy should be construed as a whole, with the policy being given a fair, reasonable, and sensible construction, as would be given to the contract of the average person purchasing insurance. *McDonald v. State*

*Farm*, 119 Wn.2d 724, 837 P.2d 1000 (1992). When analyzing the insurance policy and determining whether any ambiguity exists, the Court does not engage in a strained or forced construction that would lead to absurd results, nor does the Court interpret policy language in a way that extends or restricts the policy beyond its fair meaning or renders it nonsensical or ineffective. *Christal v. Farmers Ins. Co.*, 133 Wn. App. 186, 135 P.3d 479 (2006).

If the phrase “wrongful eviction or wrongful entry” is considered not in isolation, but in context, and if the purpose of the provision is considered, then wrongful entry is not a general concept. Rather, it is a specific actionable offense, just like all of the other specific offenses listed in this personal injury coverage. It then has a purpose for being listed with the other offenses. Otherwise, it is nothing more than a category, analogous to actual legal offenses, but with no real reason for being listed with the specific legal offenses, all of which are actionable. The claimants’

interpretation would create the “absurd result” of extending the policy beyond its fair meaning to a place where pollution or burglary or car accidents could fit within its broad concept. The term “wrongful eviction or wrongful entry” is not ambiguous. The question is whether in the context of this policy it should be allowed to expand the insurance coverage beyond anyone’s intent.

2. The Kitsap Analysis Precludes Coverage

As discussed above, the ruling of the trial Court was based on the application of the analysis of the term “wrongful entry” in the *Kitsap* case. The *Kitsap* opinion, at pages 584 and 585, specifically recognize that while the claims of trespass and nuisance in that case could be construed as wrongful entry, not every pollution claim could be. The Court noted that other pollution claims would not be covered. Even using the phrase “wrongful entry” in its most general sense, coverage in the *Kitsap* case still required the invasion of the possession of land of another person. In this case,

the undisputed evidence is that this never occurred. The State may have an interest in protecting ground water, but Mrs. Johnson owned the property and had the legal right to use and withdraw that water for any purpose, so long as it did not unreasonably obstruct or divert waters to the injury of neighboring property owners. *Evans v. City of Seattle*, 182 Wash. 450, 47 Pacific 984 (1935); *Patrick v. Smith*, 75 Wash. 407, 134 Pacific 1076, 48 L.R.A.M.S. 740 (1913). The point is that there was never any entry or other invasion of another person's land.

3. Policy Coverages for Bodily Injury and Property Damage

Liability insurance policies cover bodily injury and property damage. That is a requirement for coverage. As the Court stated in *General Ins. v. International Sales*, 18 Wn. App. 180, 566 P.2d 966 (1977), at page 184:

In order for the policy to have any effect whatsoever, there must necessarily exist some property damage or personal injury. The type of damage contemplated by the policy is not damage to the insured's product, rather the

insurance product must cause property damage to another object.

The MetLife policy specifically states that the property damage must be “to others.” In this case, the underground storage tank leaked heating oil on Mrs. Johnson’s own property. This occurred at some unknown time, prior to July 1994. The experts all testified that the oil leaked out of the tank prior to the time that the Martins took ownership of the property in 1996. They also categorically agreed that the oil never left Mrs. Johnson’s own property. The claimants in this case attempt to get around this problem by arguing that ground water on the Johnson’s property could have been contaminated. There is no direct evidence that this occurred before Mrs. Johnson sold the property. Nevertheless, it is a possibility. However, the claimants’ argument completely ignores the fact that in the underlying claim of *Martin/USAA v. Johnson*, the claim in the Stipulated Judgment was for the costs of removal of the tank and surrounding soil plus attorneys’ fees. There never was and never would be any

claim for damage to the ground water. And any such claim for the small amount of water in the Johnson soil would be inconsequential.

4. The Metlife Policy Requires an Occurrence

The MetLife policy specifically says that “we will pay all sums for bodily injury and property damage to others for which the law holds **you** responsible because of an **occurrence**.” The policy defines occurrence as follows:

**“OCCURRENCE** means an accident, including continuous or repeated exposure to substantially the same generally harmful conditions, resulting in bodily injury and property damage during the term of the policy.”

The claimants claim that the entire requirement of an occurrence during the policy period should be ignored. Claimants would have a single homeowners’ policy provide liability coverage forever. The authority cited for this proposition is the line of cases that have found the accidental damage section of the occurrence requirement to

be in some cases inconsistent with providing personal injury coverage for certain offenses such as defamation, which may actually require some intent to be actionable. These holdings are clearly in accord with Washington law requiring that the policy should be considered as a whole and given a fair, reasonable, and sensible construction, e.g., *McDonald v. State Farm, supra*. However, the claimants' argument would do the exact opposite. The MetLife policy was in effect from February 1, 1992 to July 2, 1996. The ownership of the property transferred to the Martins when the deed was delivered (*Estate of O'Brien v. Robinson*, 109 Wn.2d 913, 749 P.2d 154 (1988)), which happened after the MetLife policy was canceled. (CP 435, 617, 208) Thus, the policy ended while the property was still owned by Mrs. Johnson. The claimants could not establish when the oil's contact with ground water occurred. It may have been 30 years prior to the inception of the MetLife policy, or eight years after it was canceled. In *Welbrock v. Assurance Co. of America*, 90 Wn.

App. 234, 951 P.2d 367 (1998), the Court held that there was no coverage for the insured's liability because there was no "occurrence" during the policy period. The insured had damaged the roots of a tree while his policy was in force, but the tree fell and his liability was created after the policy had expired. The Court held that there was no "occurrence." The Court said at page 242: "These cases establish that an 'occurrence' for insurance coverage purposes is determined by reference to the time the agreed party sustains an injury, not the time the initial negligence or damage occurred." The aggrieved party, the Martins and USAA, could not have had any claim or sustained any damage while Mrs. Johnson still owned the property. Thus, there was no occurrence during the policy period.

Washington law has also held that a party asserting coverage bears the burden of proving that the loss suffered is a covered "occurrence" within the policy period. *Queen City Farms v. Central National Ins.*, 126 Wn.2d 50, 70, 882

P.2d 703 (1984), 891 P.2d 718 (1995). Other jurisdictions have held that claims made for environmental cleanup costs done after the liability policy expired were not covered by the policy. *Dilmar Oil Co. v. Federated Mutual Ins.*, 986 F.Supp 949 (D.S.C. 1997), affirmed, 129 F.3d 116, 28 Evntl. L.Rep 20341 (4<sup>th</sup> Cir. 1997). In *Gilman Sciences v. Fidelity & Casualty Co.*, 214 Mich. App. 560, 543 NW.2d 38 (1995), the Court held that insurance coverage for damage caused by a discharge of chemicals into the ground was triggered when the contamination was first detected in wells and ground water. This was years after the initial discharge. Since the policy had expired by that time, the Court held there was no coverage.

5. The General Conditions Section of the Policy Also States That Property Damage Must Occur During the Policy Period

As stated in the previous section of this Brief, the “occurrence” requirement of the policy requires an accident

during the policy period. The **GENERAL CONDITIONS** section of the policy requires the same thing. The **GENERAL CONDITIONS** applies to the entire policy and all of **Section II**, including **Coverage 25**. The first GENERAL CONDITION states:

1. **Policy Period.** This policy applies only to accidental loss in Section I, or **Bodily Injury** or **Property Damage** in Section II, which occurs during the policy period.

Clearly, the entire policy is structured to apply only to liability for damages that occur during the policy period. The claim against Mrs. Johnson was for the Martin/USAA cost to remove the tank under the MTCA. There was no State of Washington claim for wrongful entry into ground water. However, even if that had been the claim, this requirement of the policy has not been established. There is no evidence indicating whether the oil contacted water in the ground, or whether water went into the ground and contacted the oil. Likewise, there is no evidence determining when this occurred. It could well have been years before or years after

the MetLife policy. The policy was canceled in 1996 while Mrs. Johnson still owned the property. Thus, the claimants have completely failed to show a claim by the State for ground water damage during the MetLife policy time period.

6. Coverage 25 Exclusions – Violations of a Penal Law

**COVERAGE 25—PERSONAL INJURY**, on page 22 of the policy, says in applicable part:

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**;
2. Injury caused by violation of a penal law or ordinance committed by **you** or with **your** knowledge or consent.

The Martins' Complaint and Motion for Reasonableness Hearing stated that their claim was an action for contribution. (CP 19) The only basis for a contribution claim or for attorneys' fees was under the Washington MTCA. RCW 70.105D. The Revised Code of

Washington obviously contains the law of the State and is codified by the Washington legislature. The preface to each volume of the Revised Code of Washington says that it contains “the laws of general and permanent nature in force in Washington.” This statute itself, RCW 70.105D.040(2), says its purpose is “to clean up all hazardous waste sites and to prevent the creation of further hazards due to improper disposal of toxic wastes.” The Act empowers the State “to recover all costs and damages from persons liable therefor.” RCW 70.105D.030(2). The State can order remediation and can obtain treble damages and civil penalties of up to \$25,000 for each day the party refuses to comply. RCW 70.105D.050(1)(a)(b). The statute empowers any person to bring a private action, including a claim for contribution, for remedial costs if they are the equivalent of a State-conducted remedial action. RCW 70.105D.080.

The question of whether the Martin/USAA claim was for violation of a penal law depends, then, on the meaning of

the word "penal." Black's Law Dictionary defines it as follows:

#### PENAL

**Penal**, adjective of, relating to, or being a penalty or punishment, especially for a crime.

The general rule is that penal statutes are to be construed strictly. By the word "penal" in this connection is meant not only such statutes as in terms impose a fine, or corporate punishment, where corporature is a consequence of violating laws, but also acts which impose by way of punishment damages beyond compensation for the benefit of the injured party, or which impose any special burden, or take away or impair any privilege or right. (Citations)

The word "penal" connotes some form of punishment imposed on an individual by the authority of the State. Where the primary purpose of a statute is expressly enforceable by fine, imprisonment, or similar punishment, the statute is always construed as penal. (Citations)

Black's Law Dictionary (8<sup>th</sup> Ed. 2004).

Clearly, the MTCA fits this definition. It creates liabilities for owners of private property that did not previously exist and imposes fines and damages for its violation. It is not merely advisory. It does not simply define rights and duties, such as RCW 46.61, which defines the

Rules of the Road for motor vehicles. But it imposes strict liability with fines and damage that did not exist under the common law. It is a “penal” law because it creates these legal penalties. Thus, its violation should be specifically excluded under the terms of **COVERAGE 25** itself.

### III. CONCLUSION

The claim in this case is one for pollution, which is excluded by the absolute pollution exclusion in the MetLife policy. The law on this is now well settled. *Time Oil v. Cigna*, 743 F.Supp 1400, 31 ERC (1985); *American Star Ins. v. Grice*, 121 Wn.2d 869, 854 P.2d 622 (1993); *City of Spokane v. United National Ins.*, 190 F.Supp.2d 1209 (ED Wash. 2000); *In re Hub Recycling, Inc.*, 106 Br. 372 (DNJ 1989). Thus, when the parties filed their Cross-Motion for Summary Judgment in this declaratory judgment action, the claimant raised for the first time the theory that the Martin/USAA claim was a claim by the State of Washington for “wrongful entry” of oil into ground water in which the State

had an interest. The claimants relied upon the case of *Kitsap County v. Allstate Ins. Co., supra*. The trial Court granted summary judgment to MetLife because the undisputed facts in this case do not meet the definition of “wrongful entry” established in *Kitsap, supra*. The critical element of “the unauthorized intrusion of the premises or land of another” simply was not the claim for which judgment was entered in the *Martin v. Johnson* lawsuit. The claimants argue for liberal construction of policy language, but that was already done in the *Kitsap* case. In *Kitsap*, the Federal Court certified to the Supreme Court the single question of the meaning of “wrongful entry.” The *Kitsap* Court gave the phrase a broad semantic definition. However, the Court’s definition was not so broad as to include any wrongful act or any pollution. It was not so broad as to include claims that were never made. And it was not so broad as to include things that might not even be a legal cause of action.

The *Kitsap* opinion also stated that it did not address the greater issue found in determining whether its broad definition of “wrongful entry” could override the intention of the policy makers, which indicates that insurers would not charge homeowners premiums for the costly risk of pollution.

Also, the personal injury coverage language in *Kitsap* was significantly different from the language in the MetLife policy. In *Kitsap*, the coverage was for “wrongful entry or other invasion of the right of private occupancy.” The MetLife policy covers “wrongful eviction or wrongful entry,” and those specific causes of action are set amongst other specific legal causes of action. The *Kitsap* case confirmed that the personal injury coverage was designed to cover specific legal causes of action, but concluded that trespass and nuisance were legal causes of action that fit the broader definition. However, the policy language in the MetLife policy lists only “wrongful eviction or wrongful entry,” which are specific causes of action in Washington found only in the

law of landlord-tenant. Thus, in the MetLife policy, the context is clear and the rules in Washington for judicial interpretation of insurance policies would not support the isolation and expansion of the term “wrongful entry” to mean any actionable invasion of another’s land or premises.

The trial Court’s ruling should be affirmed if there is any legal basis for it. In this case, there was no claim by the State for property damage to ground water, and no evidence of any measurable damage to ground water. The undisputed evidence was that neither the oil nor the water in the ground ever left this property.

In this case, it was never established that damage to ground water occurred during the three and a half years that the MetLife policy was in effect. The description of coverage in the MetLife policy requires an “occurrence” for all liability coverages, including personal injury. Likewise, the conditions section at the end of the policy also requires it. Claimants argue that these occurrence requirements should

be judicially deleted from the policy, because cases can be found where the occurrence requirement of an accident conflicts with coverage for specific causes of action that may have an element of intent. However, no authority exists for deleting the time of loss conditions.

The Martin Complaint was for MTCA remediation costs. The reasonableness hearing was based on that claim, and the stipulated judgment amount was for that claim. Washington law is clear that the pollution exclusions in this policy would preclude coverage for this. Therefore, it is respectfully submitted that the summary judgment decision of the trial Court should be affirmed.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of May, 2008.

FALLON & MCKINLEY, PLLC

By:   
R. Scott Fallon, WSBA #2574  
Attorneys for Metropolitan  
Property & Casualty Insurance  
Company

**EXHIBIT A**

met | Johnson

**SUPERIOR COURT OF WASHINGTON  
FOR PIERCE COUNTY**

BRYAN CHUSHCOFF, Judge  
Susan Winnie, Judicial Assistant  
Department 4  
(253) 798-7574

**RECEIVED**

534 COUNTY-CITY BUILDING  
930 TACOMA AVENUE SOUTH  
TACOMA, WA 98402

**AUG 29 2007**

August 27, 2007

**FALLON & MCKINLEY**

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Seattle, WA 98119-3927

RE: *Metropolitan Property Casualty Ins. Company v. Estate of Johnson et. al.*  
*Pierce County #06-2-08353-4*

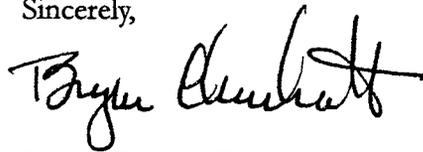
Counsel:

I have determined to grant Metropolitan's motion for summary judgment. I will not recount the facts or analyze all of the legal arguments made to me. It is sufficient for this purpose to note only that the oil leak did not escape the Johnson property. Because of this, the personal injury insurance coverage for "wrongful entry" does not apply to cover Ms. Johnson for this claim.

Our Supreme Court in *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567 (1998) notes that "wrongful entry" is not, as the insurers in that case asserted, "limited to physical invasion of another's property for the purpose of taking or withholding possession of the property and is limited to landlord-tenant situations." *Id.* at 587. Rather, the court noted that wrongful entry was essentially synonymous with the word "trespass" which requires the unauthorized intrusion of the premises or land of another including an unintentional trespass. It would also arguably include an improper interference with the use of land of another. But in any case, the intrusion or entry must be upon the *land interest or premises of another*. Since the oil leak in this case did not escape the Johnson property, it was not a wrongful entry for which coverage is provided by the contract.

Defendants claim that in this case the intrusion is upon the property interest of the State of Washington in the groundwater of the Johnson property. They point out that under the Model Toxic Control Act persons or entities other than the State of Washington are authorized to vindicate the State's interest in the quality of its groundwater. Defendants cite to the case of *Olds-Olympic v. Commercial Union*, 129 Wn.2d 464 (1996). But *Olds-Olympic* is distinguishable because that case was not interpreting the wrongful entry language of the instant contract. Rather, *Olds-Olympic* interpreted the language of a comprehensive general liability policy.<sup>1</sup> Groundwater is property but it is not an interest in the possession or use of land or premises of the State; to contaminate on the Johnson property alone was not a "wrongful entry" insured by the policy.

Sincerely,



Bryan Chushcoff  
Judge

cc: Pierce County Clerk for filing  
under above cause number.

---

<sup>1</sup> *Olds-Olympic* does note that the state's groundwater is property of another for purposes of whether third party insurance is at stake. This can be an important consideration as first party insurance for protection of loss to a policyholder's own property is often excluded from coverage in some types of insurance contracts. Not on point but of interest is footnote 18 of the decision that states, in part:

Olds-Olympic asserts "the owned and alienated property exclusions do not bar coverage when property damage is to a government property interest." [Citation omitted.] We disagree.

While the State undoubtedly has a police power interest in regulating the environment, that interest does not rise to the level of a property interest cognizable under present insurance contracts.

Reconciling these statements, it appears that the Court is pointing out that government regulation of the environment alone is not sufficient to give rise to a property interest of the state. *Olds-Olympic v. Commercial Union*, 129 Wn.2d at 479. Regardless, *Olds-Olympic* does not purport to assert that contamination of the state's groundwater is an unlawful entry or that the state's ownership of groundwater constitutes an interest in the use, possession or occupation of land.

COURT OF APPEALS  
DIVISION TWO  
OF THE STATE OF WASHINGTON

METROPOLITAN PROPERTY &  
CASUALTY INSURANCE  
COMPANY,

Respondent,

vs.

H.E. SHERRY JOHNSON, et.al.,

Appellants.

No. 36961-3-II

CERTIFICATE OF  
SERVICE BY HAND

The undersigned hereby certifies that on Friday, May 23, 2008, he caused true and complete copies of

1. Respondents' Opening Brief, and
2. this Certificate of Service by Hand

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:

Mr. James T. Derrig  
Eklund Rockey Stratton, PS  
521 Second Avenue West

FILED  
COURT OF APPEALS  
DIVISION II  
08 MAY 23 PM 4: 23  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

**ORIGINAL**

Seattle, WA 98119-3927  
Attorneys for Appellant

Dated this 23<sup>rd</sup> day of May, 2008.

FALLON & MCKINLEY, PLLC

A handwritten signature in black ink, appearing to read "R. Scott Fallon". The signature is written in a cursive style with some capital letters.

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206.682.7580  
Attorneys for Respondents