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No. 57866-9

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

MUTUAL OF ENUMCLAW INSURANCE COMPANY,
and
COMMERCIAL UNDERWRITERS INSURANCE COMPANY,
Appellants,
v.
USF INSURANCE COMPANY,
Respondent.

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REPLY BRIEF OF APPELLANTS

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A. USF'S COUNTER STATEMENT OF THE CASE CONTAINS MISLEADING STATEMENTS

USF claims on page 5 of its Response Brief that after Mr. Beal's December conversation with Jim Skeen that "Beal then notified his client, Dally, that the Windsong Arbor Homeowners Association . . . was preparing to file a lawsuit against Dally Homes . . . for property damage resulting from construction defects in the condominium development." This statement suggests Beal notified Dally immediately of specific information that a lawsuit was being prepared against Dally. The evidence rebuts these two claims. The testimony of both Mr. Beal and Mr. Dally establishes their first conversation about the Windsong claim occurred on January 20, 2000. (CP 331-332 – Dep. p. 32, l. 23 – p. 34. l. 7; CP 353, Dep. p. 18, ll. 5-24; 359-362- Dep. p. 45, l. 17 – p. 55 l. 25 Testimony from *Daytimer* phone log for January 18-21, 2000) Any earlier call from Mr. Beal would have been a voice mail asking Dally to return his call. (CP 332 – Dep. p. 36, ll. 15-21)

There is no evidence showing what Mr. Beal learned from Mr. Skeen. The evidence only shows Mr. Beal's conclusions. (CP 345-346) As a result, there is no evidence to show what Mr. Beal was able to tell Mr. Dally on January 20, 2000.

USF argues on pages 5 and 6 of its brief that about the time the Windsong Board hired its expert in December of 1999, real estate agent Loren Kenkman learned that some of the Windsong Arbor Homeowners were planning a construction defect lawsuit against Dally and immediately informed Don Dally that a lawsuit was coming. This claim suggests that Mr. Kenkman both knew that a lawsuit was being planned and gave Dally that information in December. The evidence rebuts this. Although Mr. Kenkman guessed he learned of the January 20 meeting one and one-half to two weeks in advance of it and thought he told Mr. Dally the same day he learned of it or the following day, Mr. Dally testifying from his *Daytimer* log established January 18 as the date of Mr. Kenkman's call, after the USF policy bound at 12:01 a.m. that morning. (CP 370-371, 352, 359-360, 46) In addition, Windsong Board member James Skeen testified the Homeowners were unaware of damage to their condominium, the basis for their action, until their expert told them in the January 20 meeting. (CP 91-92) If the Homeowners learned of damage on the 20th, Kenkman must have learned of it then as well. Any talk of damage or a suit on the 18th must have been nothing more than rumor.

USF claims on pages 7 and 8 of its Brief that Mr. Beal “knew” of the Homeowners’ intended construction defect suit against Dally Homes and “told Don Dally about the claim and intended suit before the inception of the USFIC policy.” It is not possible to make this conclusion from the evidence. We know from Mr. Beal’s testimony he can no longer remember what he was told but that he feared a lawsuit against Dally Homes. (CP 345) He also testified that the Board’s intention at the time of his conversation with Mr. Skeen was only to investigate. (See *Id.* and see also CP 91-92) Furthermore, testimony of both Mr. Beal and Mr. Dally establish that their first conversation about the potential Windsong claim was after the policy became effective at 12:01 a.m., January 18, 2000. (CP 46, 331-332 – Dep. p. 32, l. 23 – p. 34. l. 7; CP 353; 359-362, Dep. p. 45, l. 17 – p. 55, l. 25, Testimony from *Daytimer* phone log for January 18-21, 2000) To substantiate these claims USF quotes from Mr. Beal’s testimony of his conversation with Barbara Hammermeister, an insurance representative, which occurred on or about January 26, 2000, more than a month after his conversation with Mr. Skeen in which he first learned of the Windsong investigation. (Respondent’s Brief, page 8, note 1, citing CP 417) This information is placed directly next to

a quote from Mr. Beal's deposition that relates to his status in December, 1999 when he spoke to Mr. Skeen in which he refers to himself "as Dally's representative back in December." (*Id.* citing CP 429) Mr. Beal's testimony shows that he was ambivalent at best about the status of his relationship with Dally in December. In referring to his December conversation with Mr. Skeen, Mr. Beal stated: "I was the person Don had designated to receive information. I was the person Don had designated to make decisions about tenders of defense and, you know, what was right and what wasn't. You know, I was the person he – maybe 'designation' is too strong a word. He had an expectation that I would keep my ear to the ground to gain information about whether he was going to be sued and what circumstances and that type of thing." (CP 345) (Emphasis added) Although Mr. Beal may have been Dally Homes' representative when he spoke to Barbara Hammermeister, his status in December when he spoke to Mr. Skeen was a bit more ethereal. (See, Appellants' Brief, pages 30-36)

On page 8 of its Brief USF suggests that MOE and CUIC deliberately withheld notice from USF by placing together the statement that Dally Homes deliberately withheld tender and the

statement “nor did any of Dally Homes other insurers inform USFIC of the Windsong Arbor claims.” MOE and CUIC notified USF shortly after they discovered the policy. USF’s policy was not discovered until after the Windsong claim was settled and actions against the subcontractors and previously known insurers were completed. (CP 36, 401) This evidence also rebuts USF claim on page 29 that “MOE and CUIC waited four years before asking USFIC to contribute to the cost of Dally Homes’ defense and settlement.”

**B. IN WASHINGTON INSURANCE POLICIES ARE TRIGGERED
EVEN BEFORE TENDER BY THE OCCURRENCE
OF DAMAGE OR A LAWSUIT**

USF argues that the common obligation from which the right of equitable contribution arises does not exist among insurers unless they have all received a tender from the insured triggering their policies. (Respondent’s Brief 13-15) This argument fails because in Washington a tender is not required to trigger a policy. A policy is triggered in the first instance by the occurrence of damage during the policy period. *Gruol Construction, v. Insurance Co. of N. America*, 11 Wn. App. 632, 636, 524 P.2d 427 (1974) and *American Nat’l Fire Ins. Co., v. B&L Trucking & Construction Co.*,

134 Wn. 2d 413, 425, 951 P.2d 250 (1998). The duty to defend the insured under the policy is said to be triggered by the claimant filing a complaint alleging covered claims against the insured. *Eg, Griffin v. Allstate*, 108 Wn. App. 133, 138, 29 P.3d 777 (2001). (See Appellants' Brief 6-8) The insurers' duty to defend and indemnify continues even in the face of delayed notice or tender, unless the insured's breach of the policy actually prejudices the insurer. Compare, *Uniguard Ins. Co. v. Leven*, 97 Wn. App. 417, 983 P.2d 1155 (1999) (insurer prejudiced by loss of potential defense during delay) with *Griffin v. Allstate*, 108 Wn. App. 133, 29 P.3d 777 (2001) (insurer required to pay for pre-tender litigation after failing to show prejudice). (See, Appellants' Brief 8-19)

USF cites *Travelers Casualty & Surety Co. v. Employers Ins. of Wausau* for the proposition that there is no right of contribution if the would-be contributor's policy has not been triggered by tender, excludes coverage, or if there is a failure of an occurrence within the meaning of the policy. 130 Cal. App. 4th 99, 108, 29 Cal. Rptr. 3d 609, 614-615 (2005) cited at page 14 of the Respondent's Brief. In that case contribution was denied because an endorsement excluded any potential coverage under the policy. 130 Cal. App. 4th at 111. The only tender problem occurred when the insured, after

Wausau correctly determined its policy excluded coverage and concluded its investigation, failed to notify Wausau that a fourth amended complaint provided new factual allegations which might have altered Wausau's conclusion. This determination was based on the idea that once the insurer had properly determined there was no coverage it had no continuing duty to investigate unless it was provided new information. 130 Cal. App 4th at 110. This conclusion appears to conflict with Washington's requirement that the insurer show actual prejudice.

USF correctly states that the party requesting contribution has the burden to demonstrate the contributor's policy covers the loss. (Respondent's Brief 14-15) However, USF has never argued its policy would not cover Dally's loss. It has only argued the failure to tender relieves it of an obligation to contribute, as it continues to argue on appeal.

C. THE INSURED'S OBLIGATIONS UNDER A POLICY, AND OTHER INSURERS RIGHTS OF CONTRIBUTION, SURVIVE AN INSURED'S UNILATERAL DECISION NOT TO TENDER

USF argues Dally waived its rights under the policy and that waiver ended the policy with respect to the Windsong claim regardless of whether USF was prejudiced. (Respondent's Brief

20-26) USF argues on page 21 that an insurer's selection of risks to cover entitles an insured to choose whether to enforce the policy. The two ideas are unrelated. An insurance company can choose the risks it prefers to cover. However, once the parties accept the policy as their contract they are bound by it. Even if the insured initially decides not to tender but then tenders late, the insurer is obligated under the policy despite the delay unless it is prejudiced. See the previous section. Similarly, an insured's decision not to tender a claim does not relieve the insured of its duties under the policy. For example, its decision to withhold tender does not immunize it from the other insurance clause. The insured's decision to withhold tender does not cause the policy to disappear.

USF's policy for Dally contained an "other insurance" clause permitting USF to contribute only its share of a policy obligation for which "other valid and collectable insurance is available." (CP 61) Although an insurer may be required to pay its insured the full amount of a loss even when other insurance is available, the other insurance clause permits the insurer to obtain contributions from other insurers to avoid payment of more than its share. *B&L Trucking*, 134 Wn. 2d at 429 (obligated to pay the entire loss up to policy limits); *Kirkland v. Ohio Casualty Ins. Co.*, 18 Wn. App. 538,

569 P.2d 1218 (1977) (contribution required by “other insurance” clause). In the *Kirkland* case Ohio Casualty was required to pay its share under the other insurance clause despite its argument that an insurance policy is a personal contract. *Id* at 544. USF argues at the top of page 22 there is “no provision within the policy document for enforcement of its terms by a third party.” However, the other insurance clause is just such a provision. It prevents the insured from requiring the insurer to ultimately pay more than its own share when other insurance is available. See, *Kirkland*, 18 Wn. App. at 544-546.

USF argues Dally didn’t just fail to tender, but chose not to report the Windsong claim to USF. Respondent’s Brief 22 –26. This is a waiver argument. Even under the Illinois rule that USF cites for its “selective tender” argument there must be an intentional waiver by the insured. *The Cincinnati Companies v. West American Ins. Co.*, 183 Ill.2d 317, 701 NE 2d 499 (1998). The Illinois court stated “the insurer, having received consideration for inclusion of the insured on its policy, should not be allowed to evade its responsibilities under the policy as a result of the insured’s ignorance, particularly where the insurer has actual notice of the claim against its insured.” *Id* at 329. And again a little further

down the page “we hold that where the insured has not knowingly decided against an insurer’s involvement, the insurer’s duty to defend is triggered by actual notice of the underlying suit, regardless of the level of the insured’s sophistication.” *Ibid.* The court required contribution from an insurer to whom the insured had failed to tender because the insured was unaware it was listed as an insured on the policy. The insurer was required to contribute because it was unable to demonstrate a waiver of its coverage. Similarly, USF is unable to demonstrate Dally knew it was entitled to coverage and despite knowing decided to waive that coverage, as it is required to do to meet its burden of proof. See, *Jones v. Besk*, 134 Wn.2d 232, 241-242, 950 P.2d 1 (1998) and Appellants’ Brief, pages 19-20.

USF is unable to bring this proof because Mr. Dally himself had no knowledge of a potential claim from Windsong until after the policy became effective on January 18, 2000, and we are unable to determine what Mr. Beal knew before that date because he can’t recall. (CP 331-332, 353, 359-362, 345) Not only has Mr. Beal forgotten what he was told by Windsong Board member James Skeen, according to Skeen the Homeowners Board had no intention of bringing a claim until after its meeting with its expert two

days after the policy bound. (CP 91-92, 345) If the Windsong Board didn't know it would bring a claim, Mr. Beal couldn't have known.

Mr. Beal's concern that his occasional client Dally Homes might be sued is not the equivalent of knowledge of a claim for an intentional waiver of coverage rights. A lawyer's concern for a client's welfare has a much lower threshold than knowledge of an actual claim or suit. A careful lawyer should be concerned at the mere suggestion of a claim.

D. EQUITABLE CONTRIBUTION APPLIES TO USF

USF argues on pages 27-32 of its Brief that equitable contribution is inapplicable to it. It begins by claiming Dally Homes waived its rights under USF's policy by making an "informed decision" not to tender its claim to USF. USF has the burden of demonstrating Dally intentionally relinquished a known right resulting in waiver. The evidence in this case does not permit that proof. This has been dealt with above, see 9-10.

Next, USF argues its policy would become a third party beneficiary contract if it is required to contribute in a case "in which the insured has directed USFIC not to participate." Respondents Brief at 27. (Emphasis added) First, there is no evidence that Dally

“directed USFIC not to participate.” The evidence shows Dally withheld tender, but there is nothing to indicate that Dally communicated with USF and directed it not to participate.

As pointed out above, USF’s other insurance clause permits it to participate in contribution with other available insurers in the payment of a loss. Although USF might have been required to pay the entire loss, the clause permits it to recoup all but its own fair share from the other carriers. This clause may not have been intended to benefit other insurers, but certainly imposes a limitation on USF’s insured to complain if USF engages in contribution with the other insurance companies. In addition, the clause constitutes a promise by USF to contribute its fair share along with the other companies. It can be enforced by the other companies. *Kirkland v. Ohio Casualty Ins. Co.*, 18 Wn. App. 538, 569 P.2d 1218 (1977). See above at 8-9.

USF argues on page 29 of its Brief that it is inequitable to require USF to contribute because of the late notice to it, citing a Missouri case. Under the Washington rule it is inequitable to require an insured to contribute only if it has been prejudiced by late notice. See, *Uniguard Ins. Co. v. Leven*, 97 Wn. App. 417, 983 P.2d 1155 (1999) and *Griffin v. Allstate*, 108 Wn. App. 133, 29 P.3d

777 (2001). This is a better rule because it requires the insurance company to abide by its promise unless it would be unfair to do so.

USF continues its inequity argument citing *Truck Ins. Exchange v. Uniguard Ins. Co.*, 79 Cal. App. 4th 966, 94 Cal. Rptr. 2d 516 (2000). Respondent's Brief 30-31. That case is distinguishable because Truck knew from the first of several cases that Uniguard was, or could have been, an insurer for their mutual insured, and despite that knowledge withheld notice until the conclusion of the cases. In a series of five cases over about four years both Truck and Uniguard defended the same insured in the first, fourth, and fifth cases involving roughly the same time period. *Id.* at 970-972. Despite this knowledge Truck waited until after it settled the other cases to demand contribution. *Id.* at 972. Truck's contribution action failed in part because "Truck decided to investigate and settle the *Cimmaron* cases without Uniguard's involvement." *Id.* at 979. Under that circumstance it was inequitable to require contribution. *Id.* at 981.

Knowingly withholding notice to an insurer until after resolution of the case is a significant factor in Washington cases as well. Compare *Pulse v. Northwest Farm Bureau Ins. Co.*, 18 Wn. App. 59, 60, 566 P.2d 577 (1977) with *Felice v. St. Paul Fire &*

Marine Ins. Co., 42 Wn. App. 352, 360, 711 P.2d 1066 (1985) and *Northwest Prosthetic & Orthotic Clinic, Inc. v. Centennial Ins. Co.*, 100 Wn. App. 546, 548-549, 554, 997 P.2d 972 (2000). Under Washington cases intentionally delaying notice to an insurer is much more likely to produce prejudice to the insurer than notice delayed by ignorance of the coverage. This may result from the suspicion that the notice is intentionally delayed to cause the insurer a disadvantage. This element is not present in this case.

E. THE RELEVENCE OF LATE NOTICE

USF argues on pages 32-34 of its Brief that the ideas in late notice cases are not relevant to the issues in this case. It claims that its selective non-tender argument is based on “ordinary contract law” while late notice or known loss is peculiar to insurance law. MOE and CUIC are seeking contribution which does not arise from contract law but rather equity. It is based on a desire to require the sharing of a common obligation to avoid unjust enrichment of parties who have escaped paying their share. *Fireman’s Fund Ins. Co. v. Maryland Casualty Co.*, 65 Cal. App. 4th 1279, 1293, 77 Cal. Rptr. 2d 296 (1998).

The late notice cases have another impact on our case. In Washington, delayed notice or tender will not defeat an insurer’s

obligation to defend or indemnify unless the insurer is actually prejudiced by the delay. *Uniguard Ins. Co. v. Leven*, 97 Wn. App. 417, 983 P.2d 1155 (1999) and *Griffin v. Allstate*, 108 Wn. App. 133, 29 P.3d 777 (2001). If the insurer's duty to its insureds survives a delay so will its obligation to contribute. USF has made no effort to show it was prejudiced, relying solely on its prejudice as a matter of law theory.

**F. MOE'S AND CUIC'S SUMMARY JUDGMENT MOTION ON
THE KNOWN LOSS DEFENSE SHOULD HAVE BEEN
GRANTED**

1. Denial of a summary judgment is appealable once the case is concluded by judgment or order.

USF raises an issue it raised by motion earlier in the appeal.

It argues the Trial Court's denial of MOE's and CUIC's Partial Summary Judgment Motion is not an appealable order even though the court later concluded the action by an Order of Dismissal. USF's earlier motion was denied by the Court Administrator on May 3, 2006. For a full treatment of this issue see the Appellants' Answer to USF's Motion filed on May 3, 2006.

2. The facts show dally did not know of the loss until after USF's policy bound

USF argues in the last 11 pages of its Brief that Dally Homes knew of the Windsong loss before USF's policy went into effect relieving USF of any responsibility for that claim. It characterizes MOE's and CUIC's argument that Dally was unaware of that claim as a dispute of fact on page 36 of its Brief. The facts are set by the testimony of the various witnesses. That testimony is not in dispute. A careful reading of that evidence demonstrates that Dally Homes was unaware of the Windsong claim when the USF policy bound, rebutting USF's argument. USF argues that Rick Beal and Loren Kenkman learned of the claim and told Don Dally before the policy bound. The testimony shows these claims to be incorrect.

USF claims Dally Homes knew of the claim before the policy bound because Property Manager Cheryl Dittamore "told [Mr. Beal] the homeowners were preparing a suit because of property damage. . . ." Respondent's Brief at 40. This is incorrect. Mr. Beal testified ". . . I don't remember much if anything about the conversation with Cheryl, other than she had a project that was coming up on the four-year statute of limitations, that she had wanted her client to consult with some lawyer, and she had given

my name.” She was alerting him that he might receive a call from Mr. Skeen. (CP 327 – Dep. p. 17, ll. 12 – p.18, l. 1) There is no evidence that Ms. Dittamore told Mr. Beal that the homeowners were preparing a construction defect suit.

USF argues on page 40 of its Brief that Rick Beal “as attorney for Dally Homes” learned of property damage at Windsong Arbor in December, 1999 and then told Don Dally before the USF policy bound that a lawsuit had been proposed by the Homeowners Association. This argument contains three inaccuracies. First, Mr. Beal was not actively representing Dally Homes in December, 1999. Second, he had not been told of property damage at Windsong Arbor. Third, he did not tell Dally Homes before the policy bound.

Although Mr. Dally hired Mr. Beal off and on to represent him on insurance issues, his most recent insurance representation of Dally had ended one or more years before. (CP 331 – Dep. p. 30, ll. 8-16) He had not been in touch with Mr. Dally for some time and had forgotten his phone number. (CP 332 – Dep. p. 36, ll. 3-25) In addition to occasional insurance representation Mr. Beal was expected to keep his ear to the ground for rumors about Dally’s projects. (CP 345 – Dep. p. 88, l. 20 – p. 89, l. 6) This function

was not legal services and did not constitute Mr. Beal's representation of Dally Homes as a lawyer. See, *Restatement 3rd The Law Governing Lawyers* § 14(1) and comment c. Mr. Beal was neither a lawyer nor an agent for Dally Homes when he spoke to Mr. Skeen. See, Appellants' Brief, p. 30-32 (not an agent).

Neither did Mr. Beal learn of property damage at Windsong Arbor. He testified his conversation with Mr. Skeen was quite short, that he obtained very little information, and could not remember what Mr. Skeen said. (CP 328 – Dep. p. 18, l. 2 - p. 19, l. 8; CP 345-346 – Dep. p. 88, l. 20 - p. 90, l. 9). Even the Homeowners Association didn't know there was damage. They had hired their expert only to be sure that if damage existed they could act before the statute of limitations expired. (CP 92-93; CP 345 – Dep. p. 89, ll. 7-16) Mr. Beal has never adequately explained his conclusion that a claim was imminent. Although rumors of a claim or a suit may be of significant interest to a client, they do not constitute knowledge for the purpose of a known loss under insurance law. See, *Hillhaven Property Ltd., v. Sellen Construction Co.*, 133 Wn.2d 751, 767-768, 948 P.2d 796 (1997); Appellant's Brief 25-26.

Mr. Beal did not talk to Don Dally before the policy went into effect on January 18, 2000. He first talked to Mr. Dally about

Windsong on January 20, 2000. (CP 331-332; CP 353, 359-362, Mr. Dally's testimony from his *Daytimer* telephone log for January 18 – 21, see especially Dep. p. 52, l. 17 – p. 53 l. 8)

Also on page 40 of its Brief, USF claims real estate agent Loren Kenkman told Mr. Dally the Windsong homeowners were prepared to bring an action a week and one-half to two weeks before the January 20 meeting. This is not correct. Mr. Dally's first conversation with Mr. Kenkman about the January 20 meeting occurred on January 18, just hours after the USF policy bound. Mr. Kenkman was deposed on October 20, 2005, nearly six years after the events. When asked if the Windsong Board meeting was held on January 20 answered: "that's probably – it could be about that time frame, yes," demonstrating a natural imprecision about dates of such remote events. (CP 370 – Dep. p. 13, ll. 13-17) When asked how long before the meeting he learned of it he guessed: "it was probably a week and a half or two weeks prior," demonstrating the same imprecision of memory. (CP 370 – Dep. p. 13, ll. 18-21) When asked when he told Don Dally he said: "it was pretty much immediately. It might even have been the same day or the next day." (CP 371, Dep. p. 14, ll. 11-15) He testified he wasn't aware of any actual construction defects. (CP 375) No one at Windsong

knew there was even a claim of actual defects until the January 20 meeting. (CP 91-92) Even if Mr. Kenkman reported that a lawsuit was imminent, it was not factual information constituting knowledge, it was merely a rumor. As a result, Dally Homes did not have sufficient information to constitute a known loss from either Mr. Beal or Mr. Kenkman.

USF makes similar claims on page 42 of its Brief stating: "attorney Beal was on notice and informed his client, in December, 1999, that the HOA had gathered evidence of code or construction defects and was prepared to file suit." At the bottom of the page it states: "here, of course, the unequivocal testimony is that Don Dally knew, prior to January 18, 2000, that Dally Homes was going to be sued; and that it was going to be sued for alleged construction defects or property damage at Windsong Arbor Condominiums...." and that Dally was told this by both Mr. Kenkman and Mr. Beal. These statements are incorrect for the reasons just given above.

USF argues that Mr. Beal's claimed knowledge of the loss should be imputed to Dally Homes beginning on page 43 of its Brief. It claims that Mr. Beal had represented Dally Homes for a significant period of time including another condominium construction defect case "not long before." Mr. Beal actually

testified that he couldn't remember whether the earlier suit "was several years earlier or a year earlier or when it was." (CP 331 – Dep. p. 30, ll. 8-11) He had no current matter pending with Dally Homes and had forgotten Mr. Dally's phone number. (CP 332 – Dep. p. 36, ll. 3-12) He thought, but was uncertain, that another lawyer in his firm had represented Dally "years and years and years earlier." (CP 331 – Dep. p. 30, ll. 11-16)

USF claims on page 43: "Mr. Beal was 'officially' . . . Dally Homes' lawyer." Mr. Beal's testimony "I think officially we were Dally Homes' lawyer" was apparently intended to identify the corporation rather than Don Dally as the firm's client and not intended to claim that his firm was then actively providing some legal service to Dally. CP 331 – Dep. p. 32, ll. 19-22)

Citing several cases and a section of the *Restatement of the Law Governing Lawyers*, USF argues the "knowledge" Mr. Beal obtained from Mr. Skeen and Ms. Dittamore should be imputed to Dally Homes. The *Restatement* section it cites is from a portion of the *Restatement* dealing primarily with a lawyer's obligations when representing a client in litigation. See, *Restatement 3rd The Law Governing Lawyers*, Chapter 2, Topic 4, Introductory Note and § 25 and § 28. The rule relates to information a lawyer obtains "during

and relating to the representation of a client.” *Id.* at § 28 (1). In that section representation of a client refers to the appearance before a tribunal on behalf of the client. *Restatement 3rd The Law Governing Lawyers*, Chapter 2, Topic 4, Introductory Note and § 25. As Mr. Beal made clear he was not representing Mr. Dally before any tribunal nor did he even have any legal services for Dally pending at the time of his conversations with Skeen and Dittamore. The only pending task he had with Dally homes was what he called “ear to the ground” or passing on rumors that could implicate Mr. Dally or his company. This does not constitute representation of Dally Homes because it is not a form of legal services. *Restatement 3rd The Law Governing Lawyers*, § 14 (1) and Comment c. Since Mr. Beal was not representing Dally at the time he received the calls from Mr. Skeen and Ms. Dittamore imputation is inappropriate. See, Appellants’ Brief 30-36.

The *Restatement* provision cited by USF provides an exception to the rule imputing a lawyer’s knowledge to his client. Even in a situation where the lawyer represents a client in litigation it is not proper to impute the lawyer’s knowledge to the client in situations in which the “client’s rights or liabilities require proof of the client’s personal knowledge or intentions. . . .” *Restatement 3rd*

The Law Governing Lawyers, Chapter 28 (1). In this instance Mr. Dally's corporation had to have subjective knowledge of the loss for USF to have the known loss defense. See, *Overton, v. Consolidated Ins. Co.*, 145 Wn.2d 417, 425, 38 P.3d 322 (2002) and *Hillhaven Property Ltd., v. Sellen Construction Co.*, 133 Wn.2d 751, 767-768, 948 P.2d 796 (1997). See also Appellant's Brief, pages 25-26.

USF cites several cases involving the imputation of a lawyer's knowledge to the client. *Community Dental Servs. v. Tani*, 282 F.3d 1164 (9th Cir. 2002); *Veal v. Geraci*, 23 F.3d 722 (2nd Cir. 1994); *Haller v. Wallace*, 89 Wn.2d 538, 573 P.2d 1302 (1978); and *Deering v. Holcomb*, 26 Wash. 588, 67 Pac. 240 (1901). All of these cases impute a lawyer's knowledge which the lawyer possessed while representing the client in litigation, not during a hiatus in representation like we have in this case.

USF cites two cases for the proposition that the existence of an agency relationship is generally a question of fact for a jury. *O'Brien v. Hafer*, 122 Wn. App. 279, 93 P.3d 930 (2004), reviewed denied 153 Wn.2d 1022, 108 P.3d 1229 (2005) and *Prosser Communication Co. v. Guarantee Nat'l Ins. Co.*, 41 Wn. App. 425, 700 P.2d 1188 (1985). That is a correct statement of the general

rule unless the facts are undisputed. *Uni-Com Northwest Ltd. v. Argus Publishing Co.*, 47 Wn. App. 787, 796, 737 P.2d 304 (1987). Here the testimony is in and is undisputed. It refutes USF's claims at every turn.

Dated this 14th day of September, 2006.

HACKET, BEECHER & HART

A handwritten signature in black ink, appearing to read 'DRC', written over a horizontal line.

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