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NO. 57866-9-I

DIVISION ONE OF THE COURT OF APPEALS AT SEATTLE  
STATE OF WASHINGTON

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MUTUAL OF ENUMCLAW INSURANCE COMPANY  
And  
COMMERCIAL UNDERWRITERS INSURANCE COMPANY,

Plaintiffs/Appellants,

v.

USF INSURANCE COMPANY,

Defendant/Respondent.

APPEAL FROM THE  
SUPERIOR COURT FOR KING COUNTY WASHINGTON  
HONORABLE NICOLE MACINNES

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BRIEF OF RESPONDENT

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## QUESTIONS PRESENTED

Respondent is one of several insurers who provided liability coverage for a general contractor who had built a condominium project. The general contractor's experienced and seasoned insurance coverage and construction defect attorney was informed of a potential claim by the homeowner's association against the general contractor in late 1999. The homeowner's association filed a lawsuit against the general contractor in early 2000. The general contractor's attorney advised it and its insurance broker not to tender the claim to Respondent. The general contractor did tender the claim to its several other insurers, including the Appellants. The questions presented are:

1. Whether an insurer who has paid damages on behalf of its insured can seek contribution from another insurer to whom the insured knowingly elected not to tender the claim?

2. Whether an insured's attorney's knowledge of a potential claim prior to the inception of a policy creates a genuine issue of material fact with respect to when coverage is barred by the "known loss" or "fortuity" doctrine?

## **PARTIES TO THE PROCEEDING**

Respondent is USF Insurance Company, an insurer doing business in the State of Washington at the time relevant to this case. Respondent was the defendant below.

Appellants are Mutual of Enumclaw Insurance Company and Commercial Underwriters Insurance Company, the plaintiffs below.

## COUNTER STATEMENT OF THE CASE

Mutual of Enumclaw ("MOE") and Commercial Underwriters Insurance Company ("CUIC"), the Plaintiffs below and Appellants herein, brought claims for contribution and subrogation from USF Insurance Company ("USFIC") towards the amount of its alleged share of defense and indemnity costs paid by MOE and CUIC in settlement of the claims in *Windsong Arbor Homeowners Association v. Dally Homes, Inc., et al.*, King County Superior Court No. 00-2-19309-2.

USFIC bound coverage on Commercial General Liability ("CGL") Policy No. MS 02474 ("Policy") for Dally Homes, on January 18, 2000. **CP 44 - 87**. USFIC first learned of the Windsong Arbor claims and suit four years later, in February, 2004, when counsel for MOE and CUIC sent a letter to USFIC demanding contribution. **CP 397-402**.

Windsong Arbor is a condominium development located near Kent, Washington. The development was built in the mid-1990s, and final certificates of occupancy were issued for the condominiums from 1996 through 1998. Dally Homes, Inc. ("Dally Homes") was the developer and an affiliated entity, Windsong

Arbor Limited Partnership, was the declarant for Windsong Arbor. Both Dally Homes and Windsong Arbor, LLP, are controlled by Don Dally. **CP 350**

The Windsong Arbor Homeowner's Board of Directors became concerned that the Condominium Act statute of limitations might run leaving them without a remedy for construction defects. **CP 91-92.** In December 1999, the Board selected its President, James Skeen, to interview attorneys regarding a potential lawsuit against Dally Homes. **CP 90-92.**

Sometime in November or December of 1999, Dally Homes' attorney, Richard Beal received a call from Cheryl Dittamore of Suhrco Property Management, a property manager with whom Beal and Dally had worked on previous occasions and were then working with. Dittamore advised that she had a project that was coming up on the four-year statute of limitations, and she was alerting Beal that he might get a call from a Mr. Skeen.

Skeen did, in fact, call Beal in late 1999, to inquire whether Beal would be interested in representing the Board against Dally Homes. Skeen informed Beal of the potential lawsuit, and Beal

then asked who the developer of the project had been. Skeen told Beal that the developer was Dally Homes. **CP 328-415.**

Beal advised Skeen that he could not pursue the matter any further, as Dally Homes was a client of his. Beal obtained permission from Skeen to inform Don Dally and Dally Homes of the impending lawsuit. **CP 328 – 412.** Beal also suggested that Skeen contact Bo Barker, an attorney who handles construction defect cases on a regular basis. **CP 328; CP 91-93.** Beal then notified his client, Dally, that the Windsong Arbor Homeowners Association (“HOA”) was preparing to file a lawsuit against Dally Homes and Windsong Arbor, LLP, for property damage resulting from construction defects in the condominium development. **CP 65-66; CP 328-329; CP 413-15.**

Also in December 1999, the Board hired Mark Jobe, a construction expert, to inspect the condominium project and determine what construction defects existed. **CP 91, 93.** About this same time, real estate sales representative Loren Kenkman learned that some of the Windsong Arbor homeowners were planning a construction defect suit against Dally Homes. One or more of the homeowners at Windsong Arbor told Kenkman that

there was to be an HOA meeting to discuss the basis of that suit and damages that had been found to date. Kenkman immediately informed Don Dally that there was a lawsuit coming, and discussed the potential claims and the lawsuit with Mr. Dally prior to the upcoming HOA meeting. Kenkman attended the HOA meeting and gave Don Dally a report of what had been discussed there. **CP 351-52; CP 360-61; CP 369-72; CP 32-33.** Mr. Jobe presented his conclusions and report to the Board at its January 20, 2000 meeting. **CP 91.**

At about the same time, in November and December of 1999, Dally Homes was working with its insurance broker, Parker Smith & Feek ("PS&F"), to obtain new liability coverage. Its existing coverage with CUIC was set to expire on January 18, 2000. One of the companies the broker looked to for replacement coverage was USFIC. The USFIC policy was issued to replace the CUIC coverage, bound and effective on January 18, 2000. **CP 416; CP 423-424.**

Subsequently, on January 24 or 25, 2000, the broker's claims manager, Barbara Hammermeister, spoke with Beal about the Windsong Arbor claims. On January 25, 2000, she faxed him a

list of all of Dally Homes' "completed operations coverages." Beal specifically instructed Hammermeister to not report this claim to USFIC. Accordingly, Hammermeister provided notice to all other insurers who wrote coverage for Dally Home. The PS&F file for Dally Homes includes the January 25, 2000 fax to Mr. Beal containing the notation, "1/26 per Rick do not Rept." **CP 167** In 2000, Windsong brought its lawsuit against Dally Homes. Consistent with Beal's instructions on behalf of his client, Dally Homes, the broker tendered Dally's defense to MOE and CUIC, among others, but did not tender the claim to USFIC. **CP 416; CP 423-24; CP 437; CP 504; CP 541-42; CP 549-54; CP 559-62; CP 564-65.**

Beal, a sophisticated attorney experienced in the areas of insurance coverage and construction defect litigation, instructed his client and its insurance broker not to tender the Windsong claim to USFIC. Beal testified that he "would have regarded it as a fraud" to so tender, because as attorney for Dally Homes, Beal knew of the HOA's intended construction defect suit against Dally Homes and told Don Dally about the claim and intended suit before the

inception of the USFIC policy. **CP 416.**<sup>1</sup>

Dally Homes deliberately chose not to tender the HOA's claim to USFIC. Nor did any of Dally Homes' other insurers inform USFIC of the Windsong Arbor claims. **CP 397-402.**

On or about January 30, 2002, Dally Homes, the Windsong Arbor Limited Partnership, MOE and CUIC, entered into an Agreement concerning the funding of the settlement in the Windsong Arbor Homeowners' Association suit. Dally and the Partnership assigned to MOE and CUIC its rights to recovery in four policies of insurance under which it claimed coverage for the HOA settlement was available. USFIC was not listed, although the Agreement did include an assignment of rights to recover defense costs from "all liable insurers." **CP 443-54.** The Agreement also purported to assign and to release certain claims between and

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<sup>1</sup> *Mr. Beal testified:*

And there is zero question in my mind but that, as a representative of Dally Homes, I knew about this claim before January 18 and I was not about to tender what I knew was a known loss and I knew from my experience as a lawyer what would have been, I would say, a grossly improper tender. **CP 416.**

I mean, at the time this was a no-brainer. I knew about the claim. I was a representative of Dally Homes. I wasn't about to tender something – a claim that already knew before the policy started. **CP 417.**

And so I not only knew, as Dally's representative back in December, that there was a substantial probability, [of a claim]... in my view it was a certainty. **CP 429.**

among Dally Homes, Windsong Arbor Limited Partnership, MOE, CUIC and certain other insurers, but not USFIC. As of the end of January 2002, well after settlement of the Windsong Arbor Homeowners' Association suit, USFIC was not identified by its insured or by MOE and CUIC as a Dally insurer.

MOE and CUIC gave no notice to USFIC of a contribution or subrogation claim until after they had settled the HOA suit against Dally Homes and after they had recovered a settlement in an earlier contribution suit<sup>2</sup> against the other insurers of Dally Homes, and its sub-contractors. **CP 397-99; CP 401-02; CP 506.** USFIC had no opportunity to participate in the defense, investigation settlement or allocation of settlement proceeds that occurred in the wake of the HOA and the insurer contribution lawsuit.

After the contribution and subrogation actions were completed, MOE and CUIC realized that Dally Homes also had maintained an insurance policy with USFIC, which might potentially

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<sup>2</sup>*Mutual of Enumclaw Insurance Company and Commercial Underwriters Insurance Company, On the Assignment of Windsong Arbor Limited Partnership and Dally Homes v. American States Insurance Company, Safeco Insurance Company of America, Meir Insurance Agency, Inc., American National Fire Insurance Company, Assurance Company of America, Valiant Insurance Company and Western National Assurance Company, King County Superior Court No. 01-2-27606-9 KNT.*

cover the Windsong construction defect case. In 2004, MOE and CUIC filed this lawsuit against USFIC for subrogation and for contribution. **CP 1 - 5.**

MOE and CUIC filed a motion for partial summary judgment against USFIC, seeking to defeat USFIC's policy defense of a "known loss." That motion was denied by the trial court, as was plaintiffs' subsequent motion for reconsideration. **CP 281-283; CP 598-599.**

On January 31, 2006, the trial court below granted USFIC's motion for summary judgment under the doctrine of selective non-tender, and dismissed all of MOE and CUIC's claims with prejudice. **CP 377-378; CP 576-79; CP 586-88.**

## STANDARD OF REVIEW

An order granting summary judgment is subject to *de novo* review and will be affirmed “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c); *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124, 1127 (2000). The court considers the facts and the inferences from the facts in a light most favorable to the nonmoving party. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333, 336 (1998). A reviewing court may sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof. *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480, 481 (1984).

MOE and CUIC also seek review of an earlier order, in which the trial court denied their motion for summary judgment to dismiss USFIC's defense of “known loss.” The trial court specifically found that there were genuine questions of material fact as to this defense. **CP 281-283; 598-599**. There is no routine standard of review for such an order, because a trial court's denial

of summary judgment is neither appealable under RAP 2.2, nor is it a proper subject for discretionary review under RAP 2.3, *DGHI, Enters. v. Pac. Cities, Inc.*, 137 Wn.2d 933, 949, 977 P.2d 1231 (1999); *Roth v. Bell*, 24 Wn. App. 92, 104, 600 P.2d 602, 609 (1979).<sup>3</sup> In the unusual case where one of the exceptions of RAP 2.3(b) applies, the standard of review is *de novo*, viewing all facts in the light most favorable to the non-moving party (USFIC). *Sea-Pac Co., Inc., v. United Food and Commercial Workers Local Union 44*, 103 Wn.2d 800, 801-02, 699 P.2d 217, 218 (1985).

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<sup>3</sup> USFIC acknowledges that the Court's commissioner made a notation ruling allowing this portion of the appeal to proceed, but that ruling did not address any of the criteria in RAP 2.2 or 2.3.

## ARGUMENT

### A. Summary of Argument

When USFIC moved for summary judgment below, MOE and CUIC offered no evidence in response to the motion. The material facts surrounding USFIC's insured's decision not to give notice to USFIC of the Windsong Arbor Homeowner Association's claims were not disputed. For purposes of Summary Judgment below, (and its affirmation here) it is inconsequential when USFIC's insured, Dally Homes, learned of the HOA's claims. Likewise, it is also irrelevant why PS&F was instructed by Dally Homes and Rick Beal not to provide notice of the HOA's claims and suit to USFIC.

USFIC had no notice of the HOA's claims and suit until February of 2004, when counsel for MOE and CUIC demanded reimbursement from USFIC for settlement amounts paid out by Appellants. Dally Homes, USFIC's insured, has never requested coverage under the USFIC policy.

### B. When an Insured Does Not Tender a Claim to Its Insurer, Contribution is Not Available as a Matter of Law

Equitable contribution is an insurer's right to recover from a co-obligor that shares the same liability. *Fireman's Fund Insurance*

*Co. v. Maryland Casualty Co.*, 65 Cal. App. 4th 1279, 1293, 77 Cal.Rptr.2d 296, 303 (1998). "Where two or more insurers independently provide primary insurance on the same risk *for which they are both liable*, for any loss to the same insured, the insurance carrier who pays the loss or defends a lawsuit against the insured is entitled to equitable contribution from the other insurer . . . ." *Id.* at 1289, 77 Cal. Rptr. 2d 296, 301 (*emphasis added*).

However, there is no joint obligation and no right of contribution when there is no coverage under one policy because of no tendered claim to the insurer, a policy exclusion precluding coverage, or lack of an occurrence. See, *Travelers Casualty & Surety Co. v. Employers Ins. of Wausau*, 130 Cal. App. 4th 99, 108 29 Cal.Rptr.3d 609, 614-615 (2005): ("courts should not impose an obligation on an insurer that contravenes a provision in its insurance policy") (*citation omitted*). In an insurance contribution action, "the inquiry is whether the nonparticipating coinsurer 'had a legal obligation ... to provide [a] defense [or] indemnity coverage for the ... claim or action prior to [the date of settlement],' and the burden is on the party claiming coverage to show that a coverage obligation arose or existed under the coinsurer's policy." *Safeco*

*Ins. Co. of America v. Superior Court*, 140 Cal. App. 4th 874, 879, 44 Cal. Rptr.3d 841, 844-45 (2006) (*citations omitted*). Although MOE and CUIC argue that there was coverage under the USFIC policy for property damage merely because that damage had occurred, such an argument ignores the undisputed fact that Dally Homes chose not to ask for either defense or indemnity from USFIC.

A liability insurer's initial duty to its insured is to defend, and that duty is broader than its duty to indemnify. *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 64, 1 P.3d 1167, 1171 (2000). The duty to defend "does not hinge on the insured's potential liability to the claimant, but on whether the complaint alleges any facts rendering the insurer liable to the insured under the policy language." *Aetna Cas. & Sur. Co. v. M & S Indus.*, 64 Wn. App. 916, 927-28, 827 P.2d 321, 328 (1992). USFIC never saw a complaint and the insured, Dally Homes, chose not to tender the HOA suit to USFIC. Dally Homes' decision not to give notice to USFIC of the HOA claim and suit means that USFIC's policy was not triggered. Dally Homes chose not to invoke coverage.

## 1. Insurer Must Receive Notice and Tender of Suit for Contractual Duties to be Enforced

As an initial matter, an insurer's duty to defend is not triggered until it gets notice of a suit from the insured. See, e.g., *Cellex Biosciences, Inc. v. St. Paul Fire & Marine Ins. Co.*, 537 NW 2d 621, 623 (Minn. Ct. App. 1995). "What is required is knowledge that the suit is potentially within the policy's coverage coupled with knowledge that the insurer's assistance is desired. An insurance company is not required to intermeddle officiously where its services have not been requested." *Casualty Indem. Exch. Ins. Co. v. Liberty Nat'l Fire Ins. Co.*, 902 F. Supp. 1235, 1239 (D. Mont. 1995), citing *Hartford Acci. & Indem. Co. v. Gulf Ins. Co.*, 776 F.2d 1380, 1383 (7th Cir. 1985). Thus, although an occurrence during the policy period, such as property damage, may "trigger coverage"<sup>4</sup>, an insurer cannot fairly or logically be expected to discharge its duty to defend before it has been notified of the claim. Although the duty to defend arises as soon as the insured is sued, the insurer does not breach the duty unless it has notice of the

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<sup>4</sup> See, *American Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 134 Wn.2d 413, 951 P.2d 250, (1998). Unlike the situation here, the claim was tendered to all available insurers.

claim and fails, without legal justification, to provide a defense. See, *Sherwood Brands v. Hartford Accident & Indem. Co.*, 347 Md. 32, 46-50, 698 A.2d 1078, 1085-87 (1997).

In Washington an insured must give notice that it wants the insurer to respond to a claim. As this Court has held:

Several courts have concluded that a tender of defense is sufficient if the insured puts the insurer on notice of the claim, while others have determined that an insurer's duty to defend does not arise unless the insured specifically asks the insurer to undertake the defense of the action. See *Hartford Accident & Indem Co. v. Gulf Ins. Co.*, 776 F.2d 1380, 1383 (7th Cir. 1985). In *Time Oil Company v. Cigna Property & Casualty Insurance*, 743 F. Supp. 1400, 1420-1421 (W.D. Wash. 1990), the United States District Court for the Western District of Washington adopted the latter theory. *We agree with the federal court that an insurer cannot be expected to anticipate when or if an insured will make a claim for coverage; the insured must affirmatively inform the insurer that its participation is desired.*

*Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 426-427, 983 P.2d 1155 (1999) (*emphasis added*).

Mere knowledge that an insured is sued does not constitute tender of a claim:

[W]here 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...in order to have actual notice sufficient to locate

and defend a suit, the insurer must know both that a cause of action has been filed and that the complaint falls within or potentially within the scope of the coverage of one of its policies.

*Cincinnati Cos. v. West Am. Ins. Co.*, 183 Ill.2d 317, 701 N.E. 2d 499, 502-505 (1998).

The undisputed evidence below was that USFIC had no actual notice of the HOA's claims prior to February 2004. The undisputed evidence below was that USFIC had no constructive notice of the HOA's claims, prior to February 2004. This is not a case of an insurer refusing to defend after constructive notice or late notice from its insured. On the undisputed facts, this case is one where a knowledgeable insured elected not to enforce its contractual insurance policy rights by choosing not to provide notice of its claim to its insurer, USFIC.

There are several reasons an insured might choose not to tender a particular claim to a particular insurer. One obvious one is to protect its relationship with its current insurer (which USFIC was for Dally Homes at that time), avoiding cancellation or a premium increase. This is extremely common with automobile liability policies. If a driver causes a fender-bender with damages only marginally higher than his deductible, he may

often choose to pay the damages out-of-pocket rather than tender the small claim to his insurer. In addition to its counsel's concern over tendering a "known loss" to USFIC, Dally Homes may have been seeking to protect the policy limits of a particular policy so that they were available to pay other claims. This might have been a factor here; at the time the Windsong Arbor claim was made, Dally Homes already had several other projects under construction. Two of the projects did, in fact, result in construction defect claims which Dally Homes tendered to USFIC. See, *Corte Madera Homeowners Association v. USF Insurance Company*, No. 55687-8-I, and *Steeplechase Hill LLC v. USF Insurance Company*, No. 55687-8-I. Alternatively, the insured may have already tendered a claim under a particular policy, and had a bad experience with either the adjuster or the defense firm appointed to represent the insured; it may simply want to avoid dealing with those people again. The doctrine of selective non-tender is designed to protect the insured's right to choose which insurance company will respond to a claim, regardless of the insured's reason for the choice. Allowing contribution defeats that right, particularly if it was exercised in order to preserve one policy's limits. The insured must have the

right to seek or not to seek an insurer's participation in a claim as the insured chooses when more than one carrier's policy covers the loss. "Moreover, an insured's ability to forgo that assistance should be protected." *Cincinnati Cos. v. W. Am. Ins. Co.*, 183 Ill. 2d 317, 324 - 327, 701 NE 2d 499, 503 - 504 (Ill. 1998), (*citation omitted*).

**2. Insurance is a Private Contract and An Insured is Free to Choose Whether To Enforce its Contract With Its Insurer**

The insured's right to enforce or not to enforce a particular policy essentially implicates the insured and the insurer's freedom to contract. "Insurance is a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies." RCW 48.01.040. The relation between an insurer and an insured is purely a contractual one. *Richards v. Metropolitan Life Ins. Co.*, 184 Wash. 595, 55 P.2d 1067 (1935). It is axiomatic that competent persons may make such a contract for insurance as they may see fit, provided that it does not contravene any provision of statutory law and is not opposed to public policy. *Trinity Universal Ins. Co. v. Willrich*, 13 Wn.2d 263, 272, 124 P.2d 950 (1942), *citations omitted*. "[I]nsurance contracts have traditionally been held to be private

contracts between parties. *Sears, Roebuck & Co. v. Hartford Acc. & Indem. Co.*, 50 Wn.2d 443, 449, 313 P.2d 347, 350 (1957). As a private contractor, the insurer is ordinarily permitted to limit its liability unless inconsistent with public policy or some statutory provision." *Mutual of Enumclaw Ins. Co. v. Wiscomb*, 97 Wn.2d 203, 210, 643 P.2d 441, 445 (1982) (*citation omitted*).

It follows that an insured is likewise free to choose whether or not to enforce his contract with the insurer.

The right of an insurer to contribution from a coinsurer exists when both insurers are liable for the loss; a situation which can only arise when the obligations of both insurers under their respective policies are 'triggered'. Otherwise, *if the doctrine of equitable contribution were applied to a coinsurer for a claim never tendered by the insured to that coinsurer, 'the insurance policy becomes, in effect, a third-party beneficiary contract entered into by the insured for the direct benefit of other carriers.'* Such a rule would be 'inequitable' in that it would 'require an insurer to reimburse another carrier for a claim it has no obligation to pay to its insured and in circumvention of the insurer's wishes with whom it has the contract.'

*Casualty Indem. Exch. Ins. Co. v. Liberty Nat'l Fire Ins. Co.*, 902 F. Supp. 1235, 1239 (D. Mont. 1995) (*citations omitted*) (*emphasis added*).

USFIC and Dally Homes entered into an insurance contract, and there is no provision within the policy document for enforcement of its terms by a third party. The court cannot "create a contract for the parties which they did not make themselves, nor can the court impose obligations which never before existed." *Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 73, 549 P.2d 9, 11 (1976). MOE and CUIC should not now be allowed to require USFIC to respond when its insured elected not to exercise its rights under the contract of insurance.

When USFIC's insured, Dally Homes, chose not to "report" the Windsong Arbor claim to USFIC, it chose not to exercise its right to either a defense to the HOA suit or indemnification from damages. **CP 504; CP 559 – 562.** A liability insurer's duty to indemnify is a separate obligation from the duty to defend. The duty to indemnify hinges on the insured's actual liability to the claimant and actual coverage under the policy. *Allstate Ins. Co. v. Bowen*, 121 Wn. App. 879, 884, 91 P.3d 897, 900 (2004), (citations omitted). Other jurisdictions are in agreement with Washington law, holding that an insured must provide notice of a claim to its insurer before a defense obligation under a policy is triggered. The

indemnity obligation requires “actual coverage” and there cannot be coverage absent tender; i.e the insured “must affirmatively inform the insurer that its participation is desired.” *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 427, 983 P.2d 1155 (1999).

Since a liability policy is only triggered by tender of actual notice of the underlying claim or suit, an intentional waiver of tender means the policy is never called upon to defend or to indemnify and “coverage” is not provided. See, *Casualty Indem. Exch. Ins. Co. v. Liberty Nat'l Fire Ins. Co.*, 902 F. Supp. 1235 (D. Mont. 1995). *Casualty Indemnity* involved contribution claims between two insurers who had issued liability policies to a motel where a guest was injured. After the guest filed suit, the insured tendered the claim to Casualty Indemnity but not to its other insurer, Liberty National. This failure to tender was inadvertent.

After Casualty Indemnity paid the claim, it filed a contribution action against Liberty Mutual. The United States District Court granted summary judgment dismissing Casualty Indemnity's contribution claim, holding: “[W]here the insured has failed to tender the defense of an action to its insurer, the latter is excused from its duty to perform under its policy or to contribute to a

settlement procured by a co-insurer.” Casualty Indem. Exch. Ins. Co., 902 F. Supp. at 1239. This holding is in line with *Cincinnati Cos. v. West Am. Ins. Co.*, 183 Ill. 2d 317, 701 NE 2d 499 (1998), where the insurer actually had notice of the suit because one defendant had tendered to the insurer, but their insured co-defendant had not. After finding out about the potential coverage, a co-insurer brought suit for equitable contribution. In reaching its decision denying contribution, the *Cincinnati Cos.* court specifically noted that when an insured “knowingly” does not tender to all insurers:

[T]he duty to defend falls solely on the selected insurer. That insurer may not in turn seek equitable contribution from the other insurers who were not designated by the insured. This rule is intended to protect the insured's right to knowingly forgo an insurer's involvement.

*Id.*, 183 Ill. 2d 317, 324, 701 N.E.2d 499, 503 (1998) (*citation omitted*); see also, *Legion Ins. Co. v. Empire Fire & Marine Ins. Co.*, 354 Ill. App. 3d 699, 704, 822 N.E.2d 1, 5 (2004), and cases cited therein.

Similarly, in *Federated Mutual Ins. Co. v. Pennsylvania Nat'l Mut. Ins. Co.*, 480 F. Supp. 599, 600 (D. Tenn. 1979), the court

dismissed a contribution action against a carrier whose insured did not ask it to participate in the defense of a claim: “An insurer who, pursuant to its policy obligations, undertakes the defense of its insured, has no right to contribution . . . from a second insurer, absent a request from the common insured that it join in the defense.”

In a case very much like the one before this Court, an insured “made clear that it did not want Royal [Insurance] to become involved in [a liability claim] and that the defense was being tendered solely to Indiana [Insurance]. Therefore, Indiana was foreclosed from seeking equitable contribution from Royal.” *John Burns Constr. Co. v. Indiana Ins. Co.*, 189 Ill. 2d 570, 578, 727 N.E.2d 211, 217 (2000).

The *John Burns* court looked specifically to its ruling in *Bituminous Casualty Corp. v. Royal Insurance Co. of America*, 301 Ill. App. 3d 720, 726, 704 N.E.2d 74, 79 (1998), for the proposition that:

[It] is only when an insurer's policy is triggered that the insurer becomes liable for the defense and indemnity costs of a claim and it becomes necessary to allocate the loss among co-insurers. The loss will be allocated according to the terms of the 'other

insurance' clauses, if any, in the policies that have been triggered.

When a policy was not triggered because of the insured's decision not to tender, the policy's obligation to defend and indemnify "was excused by the targeted tender..." In *Bituminous Casualty Corp, supra*, the primary insurer was brought into the case after its insured informed it of a personal injury lawsuit filed against the insured, and the insured informed its secondary insurer that it was looking solely to the primary insurer for defense against the lawsuit and for compensation in the event of an adverse verdict. Although the insured could also have sought protection and compensation from the secondary insurer, it declined to do so. The primary insurer eventually settled the case, and thereafter sought partial contribution from the secondary insurer. In dismissing the primary carrier's subrogation claim on summary judgment, the court first held that "only the insured or someone acting at the specific request of the insured can properly tender and trigger a defense... coverage cannot be triggered by a tender from a rival insurer." *Id.* at 301 Ill. App. 3d 726, 726, 704 N.E.2d 74, 79 (*citations omitted*).

### **3. Equitable Contribution Does Not Apply**

If the insured, Dally Homes, had merely overlooked the USFIC policy when putting its insurers on notice of the HOA's claims; or if USFIC had refused the tender of its insured's defense after receiving notice of the insured's claims, the equitable principles underlying contribution and subrogation suggest that USFIC might be estopped to deny its duty to defend Dally Homes, or to indemnify Appellants. But the USFIC policy was never triggered, because Dally Homes and its counsel, Rick Beal, waived Dally Homes' rights under the USFIC policy. Dally Homes made an informed decision not to make a claim to USFIC and chose not to seek coverage under the USFIC policy.

To paraphrase an Illinois decision: If the doctrine of equitable contribution is applied to the facts of this case to allow MOE and CUIC to recover from USFIC for a claim never tendered by the insured and in which the insured has directed USFIC not to participate, the insurance policy becomes, in effect, a third-party beneficiary contract entered into by the insured for the direct benefit of other carriers. This result is not what Dally Homes intended in purchasing coverage from USFIC. Dally Homes has

taken the position that the loss should not be attributed to the USFIC policy. Moreover, there is nothing in the USFIC policy that shows it was made for the direct benefit of other insurance carriers.<sup>5</sup>

When several insurance policies are available to the insured, that insured has the paramount right to choose or knowingly forego an insurer's participation in a claim. The insured may choose to forego an insurer's assistance for various reasons, including the insured's fear that premiums would increase or that the policy would be canceled in the future. Moreover, an insured's ability to forego that assistance should be protected... When an insured has knowingly chosen to forego an insurer's assistance by instructing the insurer not to involve itself in the litigation, the insurer is relieved of its obligation to the insured with regard to that claim. The targeted insurer, then, has the sole responsibility to defend and indemnify the insured. That insurer may not seek equitable contribution from the other insurers that were not designated by the insured.

*Legion Ins. Co. v. Empire Fire & Marine Ins. Co.*, 354 Ill.App. 3d 699, 703-04, 822 N.E.2d 1, 4-5 (2004) (*citations omitted*); see also, *Employers Ins. v. James McHugh Constr. Co.*, 144 F.3d 1097, 1107 (7th Cir. 1998).

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<sup>5</sup> See, *Institute of London Underwriters v. Hartford Fire Ins. Co.*, 234 Ill. App. 3d 70, 79, 599 N.E.2d 1311, 1316-17 (1992), *overruled on other grounds by Cincinnati Cos. v. West Am. Ins. Co.*, 183 Ill. 2d 317, 323, 701 N.E.2d 499, 502 (1998).

The concepts of subrogation and contribution both find their origin in general principles of equity. See, *Couch on Insurance* §§ 61:20, 62:151 (2d ed. 1983). A venerable maxim holds that "he who seeks equity must do equity." *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket*, 96 Wn.2d 939, 949, 640 P.2d 1051, 1057 (1982). In this regard, the courts have stated that the right to contribution is not absolute; it depends on an analysis of several factors, including "a test of reasonableness. In determining this issue the trier of the fact may consider the proportion of the total coverage afforded by the settling carrier, *the presence or absence of notice to other carriers*, and the discussions among the carriers, in addition to the evaluation of liability and damage issues." *State Farm Mutual Auto. Ins. Co. v. MFA Mutual Ins. Co.*, 671 S.W.2d 276, 279 (Mo. 1984) (en banc) (*emphasis added*).

MOE and CUIC waited four years before asking USFIC to contribute to the cost of Dally Homes' defense and settlement. MOE and CUIC gave no notice to USFIC of a contribution or subrogation claim until after the HOA had settled its suit against Dally Homes and after MOE and CUIC had recovered a settlement

in their earlier contribution suit against the other insurers of Dally Homes and its sub-contractors. This is an undisputed fact. **CP 397-99; CP 401-02; CP 506.** MOE and CUIC admitted below that USFIC had no opportunity to participate in the defense, investigation, settlement or allocation of settlement proceeds that occurred in either the HOA lawsuit (King County Superior Court No. 00-2-19309-2), or the insurer contribution lawsuit (King County Superior Court No. 01-2-27606-9).

Consideration of notice in a contribution action, as well as a subrogation case, comports with the ever present specter of fairness subsumed in equity. It is unfair to ask co-insurers to contribute to a completed settlement when these carriers have been given absolutely no prior opportunity to participate in or simply monitor the lawsuit or the settlement proceedings, regardless of the participation of counsel for or agents of the settling insurer.

*United Nat'l Ins. Co. v. Admiral Ins. Co.*, 1992 U.S. Dist. LEXIS 12336 (D. Pa. 1992).

In a case with facts similar to those here, where an insurer was asked to contribute to defense and indemnification costs long after litigation had ended, the insurer refused to contribute on the ground that it had not been asked to participate in the litigation, by tender of defense or otherwise. The court found that it was

inequitable to deny control of the defense and then charge the protesting insurer with expenses about which it knew nothing, particularly when the insurer had not been notified of the potential for contribution.

Unigard's insured tendered the defense of the ... cases to Truck, not Unigard. Absent tender, it is difficult to understand what, if anything, Unigard was supposed to do. Although the defense was tendered to, and accepted by, Truck, Unigard did not receive notice of its potential liability for contribution until after the ... cases were resolved. Under these circumstances, the imposition of contribution on Unigard--a stranger to the litigation--would subject it to a significant financial burden even though it did not enjoy any of the concomitant benefits, e.g., the right to participate in and control the defense. Truck decided to investigate and settle the ... cases without Unigard's involvement. Having done so, Truck should not be permitted to drag Unigard into the picture after the fact.

*Truck Ins. Exchange v. Unigard Ins. Co.*, 79 Cal. App. 4th 966, 979, 94 Cal. Rptr.2d 516, 525 (2000) (*citation omitted*).

USFIC's insured knowingly chose to forego USFIC's assistance, instructing its broker not to tender the Windsong Arbor litigation to USFIC. USFIC was thus relieved of its obligation to Dally Homes with regard to that claim. The remaining insurers, including MOE and CUIC, had the sole responsibility to defend and

indemnify the insured. MOE and CUIC may not seek equitable contribution from USFIC or any other insurers that were not designated by the insured, and equity counsels that MOE and CUIC may not demand contribution to a completed settlement of which USFIC was never informed and in which it had no opportunity or obligation to participate.

**4. Late Notice Is Not Relevant to Either Issue In This Appeal.**

The parties agree that USFIC was not provided with timely notice of the Windsong Arbor claims, and only learned of the claims four years after they were first tendered to MOE and CUIC, among others. However, that is immaterial to the issues before this Court. In fact, the circumstances of notice are only worth mentioning in this case because they pertain in some ways to MOE's and CUIC's secondary issue regarding known loss, discussed *infra*.

The trial court's decision dismissing MOE's and CUIC's claim was based on the doctrine of selective non-tender. Unlike "late notice", selective non-tender is based on common law contract principles, rather than on any theories of insurance law. It

revolves simply around the fact that MOE and CUIC were strangers to the contract between Dally Homes and USFIC, and do not have any rights to enforce it. See, *Alcan United, Inc. v. West Bend Mut. Ins. Co.*, 303 Ill. App. 3d 72, 84, 707 N.E.2d 687, 695 (1999). This doctrine applies equally well in non-insurance situations, such as those arising on a construction site, involving indemnity agreements in various subcontractors' subcontracts.

The late notice doctrine, on the other hand, involves specific policy language and issues peculiar to insurance law. The USFIC policy itself contains a condition requiring timely notice of claims. **CP 472** Washington law holds that such a condition in an insurance policy is only enforceable if the insurer was prejudiced by the lateness of the notice. *Oregon Auto Ins. Co. v. Salzberg*, 85 Wn.2d 372, 377, 535 P.2d 816 (1975). Numerous appellate decisions discuss what constitutes prejudice. See, e.g., *Canron Inc. v. Federal Ins. Co.*, 82 Wn. App. 480, 486-87, 918 P.2d 937, 941 (1996). *NW Prosthetic v. Centennial Ins.*, 100 Wn. App. 546, 554, 997 P.2d 972, 976 (2000). These "late notice" issues are entirely irrelevant here.

Likewise, the known loss doctrine is peculiar to insurance law. It is based on the fundamental principle of "fortuity," and, in the context of liability policies such as those here, on the words "accident" or "occurrence" used in liability policies' Insuring Agreements. See, *Aluminum Co. of Amer., Inc., v. Aetna Cas. and Sur. Co.*, 140 Wn.2d 517, 555-56 and n. 15, 998 P.2d 856, 878-79 (2000). Although this doctrine requires analysis of when Dally Homes became aware of the claim, notice to USFIC is not pertinent.

Thus, unlike "late notice" and "known loss," selective non-tender is based on ordinary contract law. However, even if doctrines of insurance law were invoked here, they would tend to favor USFIC's position that MOE and CUIC have no standing to make a claim against USFIC. This Court has found that the public policies inherent in insurance law are designed to protect the policyholder, not third parties. See, e.g., *Smith v. Safeco Ins. Co.*, 112 Wn. App. 645, 650; 50 P.3d 277, 280-81 (2002), *reversed on other grounds*, 150 Wn.2d 478, 78 P.3d 1274 (2003) (insurer's duties of good faith and fair dealing run only to its insured, not third parties).

C. The Trial Court Properly Denied MOE's and CUIC's Motion to Summarily Dismiss USFIC's "Known Loss" Policy Defense.

On September 22, 2005, MOE moved in the trial court for partial summary judgment, alleging that there were no issues of material fact and that USFIC could not establish a "known loss" or "non-fortuity" defense to coverage under the policy as a matter of law. The trial court denied the motion, finding issues of material fact remained. **CP 281-283** The court denied a subsequent motion for reconsideration brought by MOE. **CP 377-378**<sup>6</sup>

Summary judgment is available only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Neff v. Allstate Ins. Co.*, 70 Wn. App. 796, 799, 855 P.2d 1223, 1224 (1993), *review denied*, 123 Wn.2d 1004, 868 P.2d 872 (1994). Denial of a summary judgment motion signifies only that the moving party did not satisfy its burden and constitutes neither an appealable order nor an estoppel bar. See,

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<sup>6</sup>A denial of a motion for reconsideration is reviewed for an abuse of discretion. *Wagner Dev., Inc. v. Fidelity & Deposit Co.*, 95 Wn. App. 896, 906, 977 P.2d 639, *review denied*, 139 Wn.2d 1005, 989 P.2d 1139 (1999). MOE and CUIC have appealed the trial court's denial of their two Motions for Reconsideration. **CP 598-599; CP 377-378**. However, MOE and CUIC have not presented authority and argument in support of their appeal of the denial of those two motions. The motions for reconsideration should not be reviewed. *McAndrews Group, Ltd. v.*

e.g., *Zimny v. Lovric*, 59 Wash. App. 737, 739, 801 P.2d 259, 260 (1990), *rev. denied*, 116 Wash. 2d 1013, 807 P.2d 884 (1991).

USFIC moved to dismiss MOE and CUIC's appeal of the denial of their motion to summarily dismiss USFIC's defense of "known loss." By notation ruling of May 3, 2006, this Court allowed the appeal to go forward. If the Court properly upholds the summary dismissal of all of MOE and CUIC's claims, their appeal of the denial of summary judgment does not need to be reached in order to completely dispose of this appeal.

In the proceedings below, MOE and CUIC disputed the facts surrounding the insured's notice of property damage at Windsong Arbor Condominiums and the HOA suit, particularly as to attorney Richard Beal's communications with Don Dally, head of Dally Homes. MOE and CUIC dispute that USFIC can show its insured's knowledge of a loss or claim prior to the time the USFIC policy was bound. This is the "known loss" doctrine, also referred to as the "loss-in-progress" doctrine. Washington courts recognized the known loss doctrine in third party insurance cases *in Public Util. Dist. No. 1 v. Int'l Ins. Co.*, 124 Wn.2d 789, 805, 881 P.2d 1020, 

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*Ehmke*, 121 Wn. App. 759, 765, 90 P.3d 1123 (2004).

1030 (1994): The Court observed, "generally, courts applying the known risk principle (also referred to as the known loss principle) must determine whether a particular occurrence was expected by the insured before the insurance coverage was obtained. This is a question of fact." *Id.*

The USFIC CGL policy excludes coverage for "Bodily Injury' or 'Property Damage' expected or intended from the standpoint of the insured." **CP 466** In Washington, as in a preponderance of jurisdictions, the "known loss" exclusion is upheld and will preclude coverage. See, *Time Oil Co. v. Cigna Property & Casualty Insurance Co.*, 743 F. Supp. 1400, 1414-15 (W.D. Wash. 1990). The *Time Oil* court, applying Washington law, held the risk of liability was no longer unknown when the insured received notice indicating a "substantial probability" the loss would occur.

In *Time Oil*, the insured had pre-policy knowledge of both groundwater contamination and its legal liability through status as a potentially responsible party under CERCLA. The *Time Oil* court reasoned "where there is evidence beforehand indicating a substantial probability that loss will occur, if the loss does occur, it is not an occurrence." *Time Oil Co.*, supra, 743 F. Supp. at 1414,

(*citations omitted*). The Washington Supreme Court later discussed the *Time Oil* decision:

*Time Oil* holds, for purposes of determining whether the property damage is expected by the insured, the insured merely must be put on notice. See *City of Okanogan v. Cities Ins. Ass'n*, 72 Wn. App. 697, 703, 865 P.2d 576, 580 (1994). "If an event causing loss is not contingent or unknown prior to the effective date of the policy, there is no coverage." *Id.* at 701. The dispositive issue is not how the insured was notified of property damage, but whether the insured had such notice prior to purchasing the policy. BARRY R. OSTRAGER & THOMAS R. NEWMAN, *HANDBOOK ON INSURANCE COVERAGE DISPUTES* § 8.02[c] (10th ed. 1999) (citing numerous cases, including *Time Oil*); see also *Town of Tieton v. Gen. Ins. Co. of Am.*, 61 Wn.2d 716, 724, 380 P.2d 127, 131-132 (1963).

*Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 426, 38 P.3d 322, 326 (2002).

MOE and CUIIC argue that there is no evidence that USFIC's insured had sufficient knowledge of a loss prior to policy inception. Not only is there abundant evidence of the insured's specific knowledge that it was going to be sued because property damage or defects had been found, the knowledge required is not as stringent as Appellants' assert (nor is it even relevant here for determination of this appeal).

For example, in *Hillhaven Props. Ltd. v. Sellen Constr. Co.*, 133 Wn.2d 751, 765, 948 P.2d 796, 802-803 (1997), the court held that a letter describing “numerous resident complaints of water seepage and drippage accompanied by obvious related physical damage...”, was not sufficient to show notice of a potentially insured loss. But *Hillhaven*, *supra*, did not involve knowledge of a property defect or damage claim that had matured into an imminent suit when the insured was put on notice, as is the case with Dally Homes. *Hillhaven* might best be read as confirming Washington law: “Washington has adopted the ‘known risk’ doctrine in third party cases. The doctrine is ‘premised on the principle that an insured cannot collect on an insurance claim for a loss that the insured subjectively knew would occur at the time the insurance was purchased.’” *Id.*

In *Overton v. Consol. Ins. Co.*, *supra*, the court held that when an insured’s knowledge of property damage “predated its purchase of the policies”, the property damage was not unexpected, “regardless of when [the insured] became liable...” *Overton*, *supra* at 145 Wn.2d 431. Here Dally Homes knew prior to the policy purchase of January 18, 2000, that there was sufficient

evidence of property damage that the HOA was going to sue. Attorney Beal testified that after his conversation with property manager Cheryl Dittamore, who told him the homeowners were preparing a suit because of property damage, he spoke with HOA president Jim Skeen. **CP 327 – 329.**

Mr. Richard Beal, as attorney for Dally Homes, was put on notice in December of 1999 that there was property damage at Windsong Arbor; Mr. Beal then notified Don Dally, principal of Dally Homes, and informed him prior to the time the USFIC policy was bound that there was sufficient evidence of property damage that litigation was contemplated and proposed by the HOA. **CP 327-328**

Mr. Dally was also told by Loren Kenkman that the HOA was prepared to bring suit, this notice coming “ a week and a half or two weeks prior” to the January 20, 2000 HOA meeting; i.e., 8 – 10 days prior to the January 18, 2000 date the USFIC policy was bound. **CP 370-371** This is sufficient knowledge on the part of the insured to preclude coverage. *Time Oil Co., supra* 743 F. Supp. 1414.

Dally Homes “had notice of the defective condition” of Windsong Arbor before the purchase and inception of the USFIC

policy. *Overton, supra*, 145 Wn.2d at 431. More particularly, and as discussed below, the USFIC policy at issue here contained a very specific "*Pre-Existing Damages and/or Defects Exclusion*" that is narrower in scope than the general "known loss" exclusion cited below by MOE and CUIC.

The USFIC policy issued to Dally Homes contains a specific "known loss" exclusion:

**PRE-EXISTING DAMAGES AND/OR DEFECTS EXCLUSION** This insurance shall not apply to "bodily injury," "property damage," "personal injury," or "advertising injury" arising out of, based on, or involving the continuation into the period of coverage of this policy, *any pre-existing damages and/or defects* known to any insured before the effective date of this policy shown in the declarations of this policy. This exclusion shall apply *whether or not the cause of the damages and/or defects were known* before the effective date of this policy. This exclusion shall apply *whether or not the insured's legal obligation to pay damages in respect of such pre-existing damages and/or defects were established* before the effective date of this policy. This exclusion shall be applicable to all known pre-existing damages and/or defects including, but not limited to those listed in the schedule of this endorsement. (*emphasis added*). **CP 490 - 491.**

As discussed in detail above, Dally Homes clearly had knowledge, "before the effective date" of the USFIC policy, (January 18, 2000) that there were sufficient defects, or adequate

property damage at Windsong Arbor condominiums, to support a lawsuit. 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. Under Washington law, notice of a suit prior to policy inception precludes coverage.

Generally, courts applying the known risk principle (also referred to as the known loss principle) must determine whether a particular occurrence was expected by the insured before the insurance coverage was obtained. This is a question of fact...The known risk defense is premised on the principle that an insured cannot collect on an insurance claim for a loss that the insured subjectively knew would occur at the time the insurance was purchased.

*Public Util. Dist. No. 1 v. Int'l Ins. Co.*, 124 Wn.2d 789, 805-806, 881 P.2d 1020, 1030 (1994). In *PUD No. 1* the Court approved a jury instruction which stated the “‘known risk’ principle only applies if you find that the insureds knew that there was a substantial probability that they would be sued . . . .” *Id.* at 806, (*emphasis added*).

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, a very "particular occurrence". Dally was told this by Loren Kenkman. More importantly, he was told this by his attorney, Beal.

In December of 1999, Mr. Beal had represented Dally Homes for a significant period of time and had represented Dally Homes in a condominium defect suit at Oxford Park not long before the Windsong Arbor claims arose. **CP 329; CP 330 - 332; CP 364 - 365** In December of 1999, Mr. Beal was "officially...Dally Homes' lawyer." **CP 331**; Notice to attorney Beal, in December 1999 put Dally Homes, on notice of the HOA claims and impending suit in December, 1999.

(1) Information imparted to a lawyer during and relating to the representation of a client is attributed to the client for the purpose of determining the client's rights and liabilities in matters in which the lawyer represents the client, unless those rights or liabilities require proof of the client's personal knowledge or intentions or the lawyer's legal duties preclude disclosure of the information to the client.

*Restatement (Third) of the Law Governing Lawyers*, § 28 (1).

"Clients are 'considered to have notice of all facts known to their lawyer-agent.'" *Community Dental Servs. v. Tani*, 282 F.3d 1164,

1168 (9th Cir. 2002) (*citation omitted*). See too, *Veal v. Geraci*, 23 F.3d 722, 725 (2d Cir.1994): Relationship between attorney and client is one of agent and principal. The issue of the existence of an agency/principal relationship and scope of an agent's authority is generally a question of fact for a jury. *O'Brien v. Hafer*, 122 Wn.App. 279, 284, 93 P.3d 930, 932 (2004) *review denied*, 153 Wn.2d 1022, 108 P.3d 1229 (2005). *Prosser Comm'n Co. v. Guaranty Nat'l Ins. Co.*, 41 Wn. App. 425, 433, 700 P.2d 1188, 1192 (1985).

Agency principles aside, Washington recognizes that the knowledge of an attorney is knowledge of his or her client. *Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302, 1307 (1978): "The attorney's knowledge is deemed to be the client's knowledge, when the attorney acts on his behalf. As between attorney and client, there is a duty to keep the client informed of material developments in the matters being handled for the client."

It is a general rule that notice to the attorney is notice to his client; that this rule applies to all notice arising in the progress of a case, *or as to other matters in which the relation of attorney and client exists at the time of the notice*, and it applies, not only to knowledge acquired by the attorney in the particular transaction, but to knowledge acquired by him in a

prior transaction in which he acquired material information...

*Deering v. Holcomb*, 26 Wash. 588, 597, 67 P. 240, 243 (1901)  
(citations omitted) (*emphasis added*).

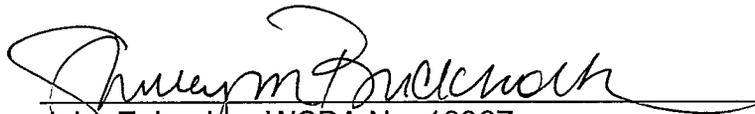
In the face of substantial evidence that Dally Homes, knew of “pre-existing damages and/or defects... before the effective date of the policy”, (even though Dally Homes, may not have then known “the cause of the damages and/or defects”), the USFIC policy provides no coverage for property damage to Windsong Arbor. **CP 490**. The trial court properly denied MOE and CUIIC's motion to summarily dismiss USFIC's "known loss" policy defense. USFIC presented significant evidence of Dally Homes' knowledge of a loss prior to the time the USFIC policy was bound.

### **CONCLUSION**

The trial court correctly applied the doctrine of selective non-tender and associated contractual and equitable principals, to find that USFIC has no obligation to contribute to MOE's and CUIIC's settlement on behalf of Dally Homes. Furthermore, MOE and CUIIC are not entitled to review of the trial court's finding that there were genuine issues of material fact regarding USFIC's known loss

defense. USFIC respectfully requests this appeal be denied, and the trial court's dismissal of MOE and CUIIC's case be affirmed.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of August, 2006.



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