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Supreme Court No. 80420-6

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CLEIN THE SUPREME COURT OF THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent

v.

T & G CONSTRUCTION, INC., and VILLAS AT HARBOUR POINTE
OWNERS ASSOCIATION,

Petitioners.

PETITIONERS' SUPPLEMENTAL BRIEFING

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I. INTRODUCTION

Petitioners T & G Construction, Inc. (“T & G”) and Villas at Harbour Pointe Owners Association (“Association”) submit this supplemental briefing to:

- (1) emphasize, now that the linked appeal has been terminated, that judgment entered against T & G in the construction defect action is unassailable and constitutes T & G’s “legal obligation to pay;”
- (2) provide practical considerations and further public policy rationale supporting application of *Besel*¹ to declaratory judgment actions;
- (3) demonstrate why this Court should affirm the trial court’s summary judgment rulings on coverage under a *de novo* standard of review; and
- (4) confirm that an insured should not be required to obtain its insurer’s consent prior to entering into a settlement agreement when the insurer is defending under a reservation of rights.

II. SUMMARY OF SUPPLEMENTAL ARGUMENT

With this Court’s denial of MOE’s Petition for Review in the linked appeal, the parties, have a final and unassailable judgment entered

¹ *Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 49 P.3d 887 (2002).

against T & G in the construction defect action. This unassailable judgment constitutes T & G's "legal obligation to pay" the Association.

Enhanced public policy and practical considerations support the rule that the amount of a stipulated judgment which was determined to be reasonable by a trial court, should be the presumptive measure of damages in an ensuing declaratory judgment action, regardless of bad faith, as long as coverage is proven.

Review of the instant record reveals the court of appeals was wrong when it assumed the trial court relied upon the reasonableness determination in the construction defect action to decide coverage issues in this insurance lawsuit. Regardless, when reviewed *de novo*, this Court should find that coverage exists, none of the policy exclusions apply, and pre-settlement consent by MOE was not required. Consequently, this Court should reverse the court of appeals' ruling and affirm the judgment entered against MOE.

III. ARGUMENT

A. **Mutual of Enumclaw's Arguments Regarding "Legal Obligation to Pay" Are Moot Now that the Judgment in the Underlying Action is Unassailable.**

Throughout this appeal, MOE was able to cling to its argument that as long as the judgment entered against T & G in the construction defect action was on appeal with the possibility of being overturned, the

judgment did not constitute a “legal obligation to pay” the Association. MOE’s arguments in support of this contention that can be summarized into two primary assertions: (1) that the judgment was voidable; and (2) that MOE could challenge the enforceability of the judgment. This Court correctly disagreed with MOE’s contentions when it denied the insurer’s Petition for Review in the linked appeal. Other courts and scholars have reached the same conclusion as this Court:

The consequences of an assignment-covenant not to execute are potentially severe for the carrier. After the insured’s liability is established, the carrier can no longer argue that the insured was not at fault, because doing so would represent an impermissible collateral attack on a judgment.²

Also, the “law of the case” doctrine bars MOE from collateral challenge to the judgment entered against T & G.³

² Chris Wood, Assignment of Rights and Covenants not to Execute in Insurance Litigation (75 Tex. L. Rev. 1373, 1382) (footnote omitted); *see also* Restatement (Second) of Judgments § 58(1)(a) (1982) (stating that a judgment has the effect of estopping an indemnitor who has a duty and an opportunity to defend the indemnitee “from disputing the existence and extent of the indemnitee’s liability to the injured person”).

³ The law of the case doctrine refers to the principle that questions determined on appeal, or which might have been determined had they been presented, will not again be considered on a subsequent appeal in the same case. *Zorich v. Billingsley*, 55 Wn.2d 865, 867, 350 P.2d 1010 (1960). As explained by Professors Orland and Tegland, “when a court once announces a principle of law to be applied to the case under consideration, it will generally apply that principle to the same issue in later proceedings in the same case, and if it is an inferior court, it will be required to follow the determination made by its reviewing court.” 14 LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE, TRIAL PRACTICE: § 380, at 773 (5th ed. 1996).

Having been affirmed by the court of appeals and terminated from review by this Court, the judgment entered by the trial court in the construction defect action is now unassailable and constitutes T & G's "legal obligation to pay" the Association. Accordingly, the Association, as assignee of T & G's claims, has met its initial burden that the loss falls within the MOE's policy's initial grant of coverage.⁴

B. Determination of Damages Resulting From a Reasonableness Hearing Should Constitute the Presumptive Measure of Damages in an Ensuing Declaratory Judgment Action.

The Association requests this Court adopt the law in other states by holding that the amount of a stipulated judgment determined to be reasonable constitutes the presumptive measure of damages in a subsequent declaratory judgment action, assuming coverage is proven and the amount does not exceed policy limits.⁵ Under *Besel, supra*, this is the rule of law for insurance bad faith actions in Washington. But there is no practical or legal reason to prevent the application of this rule to insurance declaratory judgment actions. The Association has briefed this issue in its Petition for Review and in briefing submitted to the court of appeals. The

⁴ The determination of coverage is a two-step process. The insured must first establish that the loss falls within scope of the policy's covered losses. *Diamaco, Inc. v. Aetna Cas. & Sur. Co.*, 97 Wn. App. 335, 337, 983 P.2d 707 (1999). To avoid responsibility for the loss, the burden is then on the insurer to establish that the loss is excluded by specific language in the policy. *Id.* at 165.

⁵ This is the law in the majority of states. See Petition for Review, at pp. 15-16.

following supplemental briefing describes the practical benefits of applying *Besel* to all subsequent insurance actions.⁶

1. In the Context of Determining the Amount of Presumptive Damages, There is no Appreciable Distinction Between Declaratory Judgment Actions and Bad Faith Actions.

At the time of settlement of most underlying liability actions when an insurer is defending under a reservation of rights, neither the claimant, insured nor insurer know for certain if the assignment will lead to simply a declaratory judgment dispute, or if bad faith will be litigated. Therefore, under the current law in Washington, unless an insurer is convinced it will not face bad faith liability, it will intervene in the underlying liability action and participate in the reasonableness hearing. Thus, insurers today routinely intervene in reasonableness hearings. Since this is the practical effect of a limited interpretation of *Besel*, it makes economical and logical sense to apply the holding of *Besel* to all insurance coverage disputes, not just bad faith actions.

⁶ The Association initially characterized application of *Besel* to declaratory judgment actions as an “expansion” of the opinion. However, a more accurate description would be to interpret the holding in *Besel* to apply to ensuing insurance actions, regardless of whether bad faith is established. As described *infra*, the rationale for this rule applies equally to declaratory judgment lawsuits, as well as bad faith actions. Thus, the question before the Court in this petition is whether it would have decided *Besel* differently if the facts in *Besel* did not include bad faith.

MOE argues that if this Court were to apply *Besel* to declaratory judgment actions, such action would unfairly punish an insurer that did not act in bad faith, and would “vitate the legal protection that a reservation of rights is supposed to confer.” *MOE’s Answer to Petition for Review*, at p. 6. MOE’s contentions are without merit. There are significant protections available to insurers through the reasonableness hearing process.⁷ Moreover, an insurer still maintains the right to dispute coverage in a subsequent declaratory judgment action.

2. *Interpreting Besel to Apply to Declaratory Judgment Actions Would Promote Judicial Economy, Encourage Consistent Results and Uphold Fair and Efficient Use of Litigants’ Resources, as is Done in UIM Cases.*

Application of *Besel* to insurance declaratory judgment actions would prevent needless re-litigation and inconsistent results. The law in Washington holds that when an insurer has notice of an action and an opportunity to participate, it is bound by the judgment against its insured on liability questions and bound by any material fact essential to the liability judgment that is also decisive of coverage.⁸ This holding is based

⁷ See *Besel*, 146 Wn.2d at 739.

⁸ *Finney v. Farmers Ins. Co.*, 21 Wn. App. 601, 586 P.2d 519 (1978), *aff’d*, 92 Wn.2d 748, 600 P.2d 1272 (1979); see also Respondent’s Brief, at pp. 16-17, submitted to the Court of Appeals, with citations to *Lenzi v. Redland Insurance Co.*, 140 Wn.2d 267, 996 P.2d 603 (2000); *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 961 P.2d 350 (1998); and *Waite v. Aetna*, 77 Wn.2d 950, 467 P.2d 847 (1970).

upon the doctrines of *res judicata* and collateral estoppel, and referred to as “the Finney-Fisher rule.”⁹

Here, the court of appeals summarily rejected application of the Finney-Fisher rule because the authority cited by the Association was based upon uninsured/underinsured motorist (“UIM”) case law.¹⁰ But the same considerations and rationale that support the Finney-Fisher rule in UIM cases apply to reasonableness hearings: (i) considerations of fairness and the avoidance of redundant litigation; (ii) the prevention of anomalous results; and (iii) preventing insurers from picking and choosing their judgments. *Accord Lenzi*, 140 Wn.2d at 279-80. An insurer who intervenes in a reasonableness hearing protects its interests; otherwise, what purpose would there be to allow an insurer to intervene? As described below, and as adopted in many states, there are enhanced public policy grounds and practical considerations which support applying *Besel*

⁹ *Lenzi*, 140 Wn.2d at 273. The rule was adopted from *Finney, supra* and *Fisher, supra*.

¹⁰ The Court of Appeals cited *Wear v. Farmers Ins. Co. of Wash.*, 49 Wn. App. 655, 745, P.2d 526 (1987), for the proposition that “here, unlike the UIM context, when an insurer defends under a reservation of rights, the insurer is not bound by the prior findings, conclusions, or the judgment in the declaratory judgment action.” *Court of Appeals’ Ruling (“Ruling”)*, at p. 10. But in *Wear*, the court noted an exception to the rule that applied only if the insurer’s interest in defending were not “in harmony with the insured’s intent.” *Id.* at 659-60. The *Wear* court further stated: “When the insurer has the same interest as the insured in disputing liability and damage issues, it is fair to treat the insurer as a party for collateral estoppel purposes.” *Id.* at 660. Here, MOE’s interest in minimizing T&G’s liability and resultant property damage at Villas were in lock-step with its insured’s identical interest. Thus, the rationale supporting the Finney-Fisher rule applies to reasonableness hearing cases along with UIM cases, as long as the insurer and insured share similar interests.

to all insurance actions, regardless of bad faith, as long as coverage is shown.¹¹

3. *If This Court Were to Rule that Besel Did Not Apply to Declaratory Judgment Actions, Litigants Would be Subjected to Needless Delays, Unnecessary Re-Litigation and Inconsistent Results.*

If this Court were to refuse to apply *Besel* to ensuing declaratory judgment actions, then insurers would be given a chance to re-litigate damage issues in the declaratory judgment action using the exact evidence used during the reasonableness hearing in the underlying liability action.

Review of the facts of *Villas* underscore this point. The parties would rely upon the same photos, expert reports, expert deposition testimony and expert live testimony regarding water intrusion, dry rot, decay, deterioration and elevated moisture that was submitted during the reasonableness hearing. Resubmitting this same evidence to a different judge would invite the risk of inconsistent results. The duplication also would drain judicial resources and constitute needless re-litigation. Instead, the determination of damages, for both the insured and insurer, should be made by the underlying court, and not the court in the subsequent declaratory judgment or bad faith action.¹²

¹¹ See FN 5.

¹² This Court already has ruled that the proper forum for conducting a reasonableness hearing is in the underlying liability action and not the subsequent insurance action. *Besel*, 146 Wn.2d at 738; see also THOMAS V. HARRIS, WASHINGTON Insurance Law § 10.2, at 10-8 (2d ed. 2006) (“Allowing tort plaintiffs to prove reasonableness in the

Moreover, as this Court ruled in *Besel*, “If a reasonable and good faith settlement amount of a covenant judgment does not measure an insured’s harm, our requirement that such settlements be reasonable is meaningless.” *Id.* at 739.¹³ Under this scenario, all damages would be determined in the subsequent insurance action. But delaying determination of reasonableness until the ensuing insurance action would lead to an absurd result, contravene the rationale expressed by this Court in *Besel*, and prevent litigants from being able to enter into settlement agreements because the amount of damages would be undetermined in the underlying liability action.¹⁴

underlying personal-injury action, and requiring insurers thereafter to prove a settlement was the product of fraud or collusion, encourages ‘settlement so necessary to the orderly disposition of cases.’) (citing *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 765, 58 P.3d 276 (2002).

¹³ In its ruling, the Court of Appeals cited *Mutual of Enumclaw v. Paulson Constr. Co.*, 132 Wn. App. 803, 817-18, 134 P.3d 240, *rev’d*, 161 Wn.2d 903, 169 P.3d 1 (2007), for the notion there is no need to conduct a reasonableness hearing when an insurer’s actions do not amount to bad faith. *Ruling*, at p. 11. The court’s interpretation is incorrect because it was based on an improper interpretation of *Paulson*. In *Paulson*, the court found it did not need to decide whether the stipulated judgment award and subsequent judgment were reasonable because the appellate court found no bad faith against MOE, not because a determination of reasonableness was not required when coverage was shown, as was the case here. The Court of Appeals’ reliance upon *Paulson* is even less persuasive since this Court reversed the opinion, found MOE in bad faith, and reconfirmed *Besel*’s holding that “the amount of a covenant judgment is the presumptive measure of an insured’s harm caused by an insurer’s tortious bad faith if the covenant judgment is reasonable.” *Paulson*, 161 Wn.2d at 924-25.

¹⁴ In settlements that incorporate stipulated judgments, covenants not to execute and assignments of claims, the agreements are conditioned upon or contemplate the trial court validating the reasonableness of the settlement amount via a reasonableness hearing.

Also, delaying the reasonableness hearing to the ensuing insurance action would require the court in the insurance lawsuit to hear evidence and rule upon each of the nine *Glover* factors to determine the reasonableness of a settlement involving the underlying liability case. Enigmatically, much of the evidence and liability issues from the underlying liability lawsuit would not be relevant to the insurance action. Also, damages or injuries in the underlying liability action might have to be remediated prior to litigating the ensuing insurance lawsuit, as was the case in this appeal. If so, such delay would hamper damages discovery or make it altogether unviable.

Under the court of appeals' ruling, litigants in Washington would face needless re-litigation and a demonstrable lack of certainty and finality. This result would discourage settlements or make them virtually impossible to achieve if they included a stipulated judgment, covenant not to execute and assignment of claims. A more fair, just and efficient solution would be to apply *Besel* to all ensuing insurance actions.

4. How Application of Besel Would Play Out

If *Besel* were applied to declaratory judgment actions, the scenario would play out as follows: A defendant's insurance company is defending under a reservation of rights. Claimant and defendant negotiate a proposed settlement. The insurance company is provided an opportunity

to either fund the settlement, withdraw its reservation of rights and take control of the defense, or do nothing and allow the parties to settle. If the insurer chooses the latter option, then claimant and defendant enter into a settlement which includes a stipulated judgment, covenant not to execute and assignment of claims. Under *Besel*, a reasonableness hearing is conducted.¹⁵ The insurer intervenes to protect its interests. Since the insurer is defending under a reservation of rights, it has been receiving case information since the onset of litigation. See *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 379, 89 P.3d 265 (2004).

In *Howard*, the court held:

Royal was not a complete “stranger to the case.” Royal provided counsel for its insured Cascade, and Cascade had the opportunity to participate in discovery. Royal had access to all of Howard's medical records and copies of the correspondence between the settling parties. At the reasonableness hearing, Royal was allowed to cross-examine Howard's treating physician and was able to present substantial evidence.

While stepping through the nine *Glover* factors,¹⁶ the insurance company has the opportunity to present evidence regarding damages that

¹⁵ The reasonableness hearing serves two purposes: (1) to validate the settlement so the parties can confirm settlement, enter judgment and terminate the case; and (2) to set the presumptive measure of damages for the ensuing insurance action.

¹⁶ In *Glover v. Tacoma General Hospital*, 98 Wn.2d 708, 658 P.2d 1230 (1983) overruled on other grounds by *Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988), this Court articulated nine factors a trial court should consider when determining if a settlement is reasonable.

may or may not be covered under the policy.¹⁷ Thus, evidence on the basic coverage issue of property damage is already relevant and before the trial court.

At the conclusion of the hearing, the parties ask the court to enter findings of fact and conclusions of law regarding the reasonableness of the settlement under the nine *Glover* factors. Concurrently, the parties and intervenor insurance carrier ask the court to enter findings and conclusions regarding what part of the settlement amount is a covered loss under the policy.¹⁸ If during the subsequent insurance action coverage is proven but the insurer did not act in bad faith, then that figure would constitute the presumptive measure of damages in the insurance lawsuit. If bad faith is proven subsequently, then the total amount of the settlement determined to be reasonable would constitute the presumptive measure of damages.

¹⁷ With respect to cases involving property damage or bodily injury, this portion of the evidence and testimony would be relevant under the *Glover* factors relating to “the releasing person’s damages,” “defendant’s ability to pay,” and “the extent of the releasing person’s investigation and preparation of the case,” *i.e.*, *Glover* factors one, six and eight.

¹⁸ This limited request does not impinge on the trial court’s providence in the ensuing insurance action, as the parties are only asking the court in the liability action to allocate what portion of the damages considered under the *Glover* factors constitute a covered loss. All remaining coverage issues, and all policy exclusion issues, remain for determination in the ensuing insurance action.

5. *Application of Besel to This Case Would Uphold the Doctrines of Fairness and Judicial Economy.*

Here, MOE fully litigated in the reasonableness hearing damages that resulted from T & G's liability. The insurer obtained a continuance of the reasonableness hearing, conducted discovery of T & G's expert witnesses, used the witnesses as their own during the hearing and contested the property damage that arose from T & G's defective work. A preponderance of the testimony presented during the reasonableness hearing involved expert witnesses who focused almost exclusively on the results of comprehensive intrusive investigations identifying the type, scope and cost of covered "property damage" at Villas.¹⁹ RP 75-77, 80-85, 117-76, 195-260, 200-46, 260-61, 269-91, 297-382. The parties submitted substantial evidence as to the precise type of damage at Villas arising from T & G's defectively installed siding, including water intrusion, dry rot, decay, deterioration and elevated moisture to the underlying sheathing, framing and gypsum wallboard. CP 55-60, 195-260, 467-597, 643-45, Reasonableness Hearing Exhibits 2, 3, 6 and 7. Findings of Fact and Conclusions of Law were filed wherein the court concluded that T & G's liability to the Association amounted to \$3 million.

¹⁹ Property damage under MOE's policy means "physical injury to tangible property." CP 1265.

It is well settled in Washington that “[o]nce a finder of fact concludes that the defendant’s conduct is the cause of an injury, the burden of segregating damages is upon the defendant.” *Tolson v. Allstate Ins. Co.*, 108 Wn. App. 495, 498, 32 P.3d 289 (2001) (citing *Cox v. Spangler*, 141 Wn.2d 431, 442-47, 5 P.3d 1265 (2000) and *Bennett v. Messick*, 76 Wn.2d 474, 478-79, 457 P.2d 609 (1969)); *see also Prudential Prop. and Cas. Ins. Co. v. Lawrence*, 45 Wn. App. 111, 120-22, 724 P.2d 418 (1986) (court found that because the insurer “made no attempt to segregate the settlement” and “made no effort to apportion the settlement or segregate attorney’s fees, even though it had the opportunity to do so,” the insurer was obligated to pay the entire settlement amount and all defense costs). Here, because MOE litigated the scope, breadth and cost of property damage that resulted from T & G’s defectively installed siding, it should not have an opportunity to re-litigate the exact issues in this insurance action.

For each of the foregoing reasons, the determination of damages resulting from a reasonableness hearing in an underlying liability action should constitute the presumptive measure of damages in an ensuing insurance action, as long as coverage is proven and the amount does not exceed policy limits. Accordingly, this Court should reverse the court of appeals and affirm the judgment entered against MOE.

C. None of the Policy Exclusions Apply to Bar Coverage.

1. The Court of Appeals Erroneously Assumed the Trial Court in the Insurance Action Relied Upon the Findings of Fact and Conclusions of Law from the Construction Defect Lawsuit When it Decided Coverage Issues.

As stated in the Petition for Review, the court of appeals reversed the trial court's orders on summary judgment because it found that the "trial court *appears* to have erroneously relied on the reasonableness determination to decide whether policy exclusions applied." *Ruling*, at p. 11 (emphasis added). A review of the record demonstrates the court of appeals' assumption was wrong.

Regarding the Association's summary judgment motion involving Exclusions "m. Damage to Impaired Property or Property Not Physically Injured" and "n. Recall of Products, Work or Impaired Property," review of the pleadings and court order reveal the trial court did not rely upon the Findings of Fact and Conclusions of Law from the construction defect lawsuit.²⁰ CP 5-25. With respect to the Association's summary judgment motions regarding grant of coverage and Exclusion "l. Damage to Your Work," review of the pleadings and court orders similarly reveals the trial court did not rely upon the reasonableness hearing findings and

²⁰ The trial court did, however, rely upon the findings and conclusions regarding damages, CP 763-65; however, this reliance would be appropriate if *Besel* applies to declaratory judgment actions. See discussion in Section B, *supra*.

conclusions from the construction defect lawsuit. CP 835-41, 1173-89, 1289-1340, 1347-49.

Even if the trial court in the declaratory judgment action had relied upon the findings and conclusions entered in the construction defect lawsuit, this Court can, and should, conduct a *de novo* review of the trial court's summary judgment rulings. *Valley/50th Ave., LLC v. Stewart*, 159 Wn.2d 736, 153 P.3d 186 (2007). Because there are no genuine issues of material fact, and since evidence in the instant record supports the trial court's rulings regarding coverage and policy exclusions, this Court should affirm each of the summary judgment rulings.²¹

2. *Property Damage at Villas is not Damage to "Your Work"*²²

The cost to remove and replace the siding at Villas is covered as consequential damage resulting directly from property damage to the underlying building components. *See Yakima Cement Products. Co.*, 93 Wn.2d 210, 218, 608 P.2d 254 (1980); *Dewitt Constr. Inc. v. Charter Oak Fire Ins. Co.*, 307 F.3d 1127, 1136 (9th Cir. 2002); *Marley Orchard Corp.*

²¹ If this Court conducts a *de novo* review of the summary judgment rulings on the various exclusions, the Association respectfully refers this Court to Respondent's Brief submitted to the court of appeals and the Petition for Review submitted to this Court.

²² The Association offers the following supplemental briefing solely with respect to Exclusion "I. Damage to Your Work."

v. Travelers Indem. Co., 50 Wn. App. 801, 807, 750 P.2d 1294 (1988). MOE contends that the cost of a “strip-and-reclad” is excluded from the policy because the siding is the work of T & G.

MOE’s argument lacks merit. The insurer improperly contends that the cost to remove and replace the siding is excluded from coverage because property damage *to siding* occurs in the re-siding process. Thus, the argument goes, such damage would not be covered since the siding is the work of T & G. But MOE is confusing physical injury to tangible property with the nature of the damages that flow therefrom. *Accord General Ins. Co. of America v. Gauger*, 23 Wn. App. 928, 931, 538 P.2d 563 (1975) (consequential damages not excluded under the defendant’s insurance policy). The property damage that arose from T & G’s work was to the underlying framing, sheathing and gypsum, not to the siding itself.²³ The “occurrence” at issue was not damage to siding, it was damage to underlying building components; the work of subcontractors other than T & G. Whether or not siding is damaged during the “strip-and-reclad” process is not relevant, as the cost of removing and replacing the siding is not based on property damage to the siding itself, but rather, as consequential damages incurred to access and repair the property

²³ As stated unequivocally on page 39 of Respondent Association’s Brief submitted to the Court of Appeals, “There is no evidence of property damage to the work of T & G.”

damage to the underlying building components. It is not possible to repair the underlying property damage without removing and replacing the siding and weather resistive barrier.

Property damage in this case is to the underlying sheathing, framing and gypsum wallboard within the condominium's exterior and interior walls. It is undisputed this tangible property was installed by contractors other than T & G, and therefore, does not fall under Exclusion "1. Damage to Your Work." Accordingly, this Court should reverse the court of appeals and affirm the trial court's summary judgment rulings and entry of judgment against MOE.

D. Consent Should Not Be Required When an Insurer is Defending Under a Reservation of Rights.

In addition to Respondent's Brief, at pp. 41-46, submitted to the court of appeals, the Association respectfully directs this Court to the following passage from WASHINGTON INSURANCE LAW:

An insurer's ability to assert a cooperation-clause defense will be quite limited when the legitimate interests of an insurer and its insured are different. An example of such a situation is when an insurer provides a defense subject to a reservation of rights. In such a setting, it is the insured "who must decide whether to settle a lawsuit." When it disputes coverage, an insurer cannot attempt to utilize its cooperation clause for the purpose of compelling its insured to forego a settlement which is in the insured's best interest. In fact, an insurer cannot contend that its insured has breached his duty to cooperate even if the insured

accepts a covenant not to execute, assigns a bad faith claim against the insurer, and participates in a consent judgment for an amount equal to or in excess of the policy limit. As the court implicitly recognized in *Chaussee v. Maryland Cas. Co.*, an insured has the right, when his insurer is defending subject to a reservation of rights, to enter into such a cooperative arrangement with a third-party claimant.²⁴

The circumstances here exactly mirror those described in WASHINGTON INSURANCE LAW. Accordingly, the law in Washington does not allow MOE to hide behind policy language after it abandoned T & G and T & G settled to avoid personal liability.²⁵ Therefore, this Court should rule as a matter of law that if the operative policy language at issue is construed to act as a precedent to coverage, which the Association vehemently challenges, the provision is unenforceable as against public policy.

IV. CONCLUSION

For the aforementioned reasons, along with the grounds stated within Respondent's Brief submitted to the court of appeals and the Petition for Review, this Court should affirm judgment entered against MOE in the amount of \$3,516,046.89, plus interest and attorneys' fees.²⁶

²⁴ Thomas V. Harris, WASHINGTON INSURANCE LAW § 13.2 at 13-12 (citations omitted).

²⁵ See *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 389-90, 715 P.2d 1133 (1986).

²⁶ As stated in Section G of Respondent's Brief submitted to the Court of Appeals, the Association seeks attorneys' fees in this appeal as allowed under RAP 18.1 and *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52-53, 811 P.2d 673 (1991) ("award

Respectfully submitted this 2nd day of May, 2008.



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of fees is required in any legal action where the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract, regardless of whether the insurer's duty to defend is at issue"); *see also Estate of Jordan v. Hartford Acc. & Indem. Co.*, 120 Wn.2d 490, 508, 844 P.2d 403 (1993); *Prof'l Marine Co v. Those Certain Underwriters at Lloyd's*, 118 Wn. App. 694, 711-12, 77 P.3d 658 (2003); *Panorama Village Condo. Owners Ass'n Bd. of Directors. v. Allstate Ins. Co.*, 144 Wn.2d 130, 143-44, 26 P.3d 910 (2001); *but see PUD No. 1 v. Internat'l Ins. Co.*, 124 Wn.2d 789, 815, 881 P.2d 1020 (1994).