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SUPREME COURT
OF THE STATE OF WASHINGTON

RECEIVED
COURT OF APPEALS
DIVISION ONE
AUG 15 2007

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent,

v.

MACPHERSON CONSTRUCTION & DESIGN, LLC

Petitioner.

PETITION FOR REVIEW BY THE SUPREME COURT

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A. IDENTITY OF PETITIONER

Petitioner MacPherson Construction & Design, LLC (“MacPherson”) asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

MacPherson seeks review of Section II of the Court of Appeals’ unpublished decision in *Mutual of Enumclaw Ins. Co. v. MacPherson Construction & Design, LLC*, No. 57820-1-I, filed on July 16, 2007. A copy of the Court of Appeals’ decision is attached as Appendix A. No motion for reconsideration was filed.

C. ISSUES PRESENTED FOR REVIEW

The Court of Appeals decision in this case eliminates insurance coverage for the completed work of Washington contractors that utilize subcontractors to perform labor – a fundamental insurance coverage for which these policyholders pay “enormous” additional premiums. This key liability protection shields contractors from construction defect lawsuits, and is therefore vital not only to these builder/policyholders, but also to the millions of Washington homeowners residing in the homes these builders sell.

The insurance language at issue in this case excludes damage to work performed “by the named insured” (*i.e.*, the insured general contractor) – as opposed to “by *or on behalf of*” the named insured (*i.e.*, the insured’s subcontractors). Petitioner argued that this language did not exclude damage arising out of work the policyholder’s subcontractors performed. The Court of Appeals rejected that argument, holding that the phrase “by the named insured” encompasses work performed *on behalf of* the named insured. In so holding, the Court of Appeals reasoned that the insurer’s deletion of “or on behalf of” was superfluous, and that the policyholder had failed to prove what the insurance company subjectively intended its policy to cover. After other courts similarly misconstrued this identical policy language, the industry organization that drafted the policy language at issue in this case was “embarrassed by the gross miscalculation of its language” and issued a clarifying memorandum – twenty-eight years ago. Despite having this memorandum, and other authority before it, the Court erred in interpreting the policy language at issue.

The Court of Appeals’ decision directly contradicts this Court’s prior decisions in at least three fundamental ways.

First, this Court has held that if language in an insurance policy is plain and unambiguous, courts should apply that language as it is written. In holding that the phrase “by the named insured” means the same thing as “by or on behalf of the named insured,” the Court of Appeals violated this seminal rule of Washington insurance law.

Second, to the extent that the policy language here could be considered ambiguous, this Court has held that such ambiguities must be construed against the insurance company. This rule is particularly significant here because courts, commentators, and even the insurance industry itself have all acknowledged that Petitioner’s reading of “by the named insured” in this case is a reasonable interpretation of that policy language.

Third, this Court has held that in construing an insurance policy (or any other contract), the parties’ unexpressed and subjective intent is irrelevant. By requiring MacPherson to prove what its insurance company subjectively intended an exclusion to mean, the Court of Appeals violated that rule.

Thus, the Court of Appeals decision not only negatively affects a significant class of Washington insurance consumers and their customers, it conflicts with multiple fundamental decisions of this Court. As a result,

this Court should grant this Petition under RAP 13.4(b)(1) and (4), and reverse Section II of the Court of Appeals' decision.

D. STATEMENT OF THE CASE

MacPherson was a general contractor and built a custom home for Thomas and Anne Marie Hedges. MacPherson utilized subcontractors to perform the labor on the project.¹ Employees of the siding subcontractor inadvertently failed to install the necessary flashing and caulking at the seams of the synthetic stucco system.² Water entered the seams and caused severe damage to the wood framing and sheathing members underneath.³

The Hedges filed a lawsuit in King County Superior Court against MacPherson to recover repair costs and consequential damages arising from the construction of their home.⁴ The court stayed the Hedges' lawsuit pending arbitration.

MacPherson tendered the Hedges' lawsuit to its liability insurer, Mutual of Enumclaw ("MoE"). MoE then filed the instant lawsuit,

¹ CP 229 at ¶ 3.

² CP 234 – 238; CP 1361 – 1366.

³ CP 415 – 425.

⁴ King County Cause No. 03-2-31187-1 SEA.

seeking a declaration that it had no duty to indemnify MacPherson against the Hedges' lawsuit.⁵

On November 15, 2004, arbitrator Henry Jameson awarded the Hedges \$399,088.32 against MacPherson.⁶ The arbitration award was subsequently reduced to a judgment. MoE refused to pay any of the judgment. MacPherson consequently paid the judgment in full without the benefit of insurance coverage.

MoE insured MacPherson under a Comprehensive General Liability insurance policy ("the Policy"). The Policy included primary coverage, as well as supplemental umbrella coverage.⁷ Only the supplemental umbrella coverage is at issue in this appeal.

The Policy's supplemental umbrella coverage is comprised of several forms and endorsements, including a main umbrella coverage form⁸ and a "UMB 3011" endorsement. The main umbrella coverage form contains an exclusion for "property damage to work performed by or on behalf of the named insured" – the so-called "work performed" exclusion.⁹

⁵ CP 1 – 5.

⁶ CP 427.

⁷ CP 429 – 542.

⁸ Designated as form "UP-2 (5-74)."

⁹ CP 147.

The “UMB 3011” endorsement – captioned “Broad Form Property Damage Including Completed Operations”¹⁰ – replaced this “work performed” exclusion in the main umbrella coverage form with a more limited exclusion – one that deleted the “or on behalf of” language:

The exclusions of this policy relating to Property Damage are replaced by the following exclusion . . .

B. With respect to the COMPLETED OPERATIONS HAZARD to Property Damage to work performed *by the Named Insured* arising out of the work of any portion thereof, or out of materials, parts or equipment furnished in connection therewith.¹¹

This endorsement utilized standard language drafted by the Insurance Services Office (“ISO”).¹²

In January 2005, MacPherson and MoE filed cross-motions for summary judgment. The trial court denied MacPherson’s motion and granted MoE’s cross-motion, holding that the UMB 3011 endorsement barred coverage for the Hedges’ lawsuit as a matter of law.

MacPherson timely appealed. On July 16, 2007, Division One of the Court of Appeals affirmed in an unpublished decision. The Court of Appeals held that the deletion of the “or on behalf of” language in the

¹⁰ Sometimes referred to in relevant literature by the acronym “BFPD” endorsement.

¹¹ CP 158 (emphasis added).

¹² Aetna Cas. & Sur. Co. v. Dow Chem. Co., 28 F. Supp. 2d 440, 444 (D. Mich. 1998) (“‘ISO’ stands for the Insurance Services Office, the industry trade group that drafts form policies used in the American liability insurance market.”).

UMB 3011 endorsement was “superfluous” and “does not support the conclusion that MoE intended to broaden the coverage afforded by the policy.”¹³ The Court of Appeals concluded that notwithstanding the deletion of “or on behalf of,” the Policy continues to exclude “coverage for claims arising from work performed by [the insured contractor’s] subcontractors.”¹⁴

E. ARGUMENT

1. Summary of Argument

This Court has long recognized that the extent to which an insurance policy covers the risks of its policyholder must be governed by the specific terms of the contract. The decision of the Court of Appeals in this case conflicts with the Supreme Court’s decisions governing the interpretation of insurance policies and applicable burdens of proof relevant to that inquiry. Absent clarification of the proper rules of insurance policy interpretation, the slippery slope of misinterpretation will only become steeper.

First, the Court of Appeals’ decision ignores bedrock rules governing the interpretation of insurance policies, especially when that language is plain and unambiguous. Second, even if the subject language

¹³ Mutual of Enumclaw v. MacPherson, Court of Appeals decision at 24.

¹⁴ Id.

were subject to two or more reasonable interpretations, ambiguous exclusions must be narrowly construed in favor of coverage. The Court of Appeals interpreted the exclusion broadly and in favor of no coverage. Finally, by requiring MacPherson to establish MoE's subjective intent as a pre-condition to coverage, the Court of Appeals incorrectly imposed the burden on the policyholder to prove an exclusion does not apply – rather than correctly imposing the burden of proving an exclusion applies on the insurance company. For the following reasons, review of the Court of Appeals' decision is warranted.

2. The Court of Appeals' Decision Violates the "Plain Language" Rule of Insurance Policy Interpretation

The seminal rule in Washington regarding interpretation of an insurance policy – or any other contract – is that courts apply plain language the way that it is written: "[I]f the policy language is clear and unambiguous, we must enforce it as written."¹⁵ Courts do not create

¹⁵ Quadrant Corp. v. Am. States Ins. Co., 154 Wn.2d 165, 171, 110 P.3d 733 (2005); *see also* Hamilton Trucking Serv. v. Auto. Ins. Co., 39 Wn.2d 688, 692, 237 P.2d 781 (1951) ("The language used is plain and unambiguous. There is nothing to interpret or construe.").

ambiguity where none exists.¹⁶ Similarly, courts do not change contract language under the guise of interpreting it.¹⁷

To determine the plain meaning of undefined terms, Washington courts look to standard English language dictionaries.¹⁸ Resort to the dictionary evidences the plain distinction between the word “by” and the phrase “on behalf of”. “By” means: “1. Without company; alone: *went by herself*. 2. Without help: *wrote the book by myself*.”¹⁹ On the other hand, the dictionary defines “on behalf of” as: “As the agent of; on the part of.”²⁰

Here, MacPherson purchased the UMB 3011 endorsement to “*replace*” the “work performed” exclusion in the main umbrella coverage form. That UMB 3011 endorsement excluded only “property damage to work performed *by the Named Insured*.” The plain language of the exclusion limits its reach to property damage to work MacPherson *alone*

¹⁶ See, e.g., Quadrant, 154 Wn.2d 165, 171, 110 P.3d 733 (“[W]e may not modify [policy language] or create ambiguity where none exists.”).

¹⁷ See, e.g., S. L. Rowland Constr. Co. v. Beall Pipe & Tank Corp., 14 Wn. App. 297, 306, 540 P.2d 912 (1975) (“This court cannot rewrite a contract or create a new one under the guise of judicial interpretation.”).

¹⁸ Boeing v. Aetna, 113 Wn.2d 869, 877, 784 P.2d 507 (2001). Neither “by” nor “on behalf of” are defined in MoE’s policy.

¹⁹ THE AMERICAN HERITAGE® DICTIONARY OF THE ENGLISH LANGUAGE 255 (4th ed. 2000).

²⁰ THE AMERICAN HERITAGE® DICTIONARY OF THE ENGLISH LANGUAGE 162 (4th ed. 2000).

performed *without the help of its subcontractors*. In holding that the deletion of the “or on behalf of” language was “superfluous,” the Court of Appeals ignored the plain language rule – it read the UMB 3011 exclusion as if the original language of the exclusion had not been replaced and changed.

The Court of Appeals erred when it held the exclusion applies to property damage to work performed by MacPherson’s agents (i.e. its subcontractors). In sum, the Court of Appeals decision fails to give effect to a part of the policy MacPherson (and other similarly-situated contractors) paid a premium for and are thus entitled to the benefit of. It is proper for this Court to accept review of the Court of Appeals’ decision.

3. The Court of Appeals Erred When It Rejected MacPherson’s Interpretation of the UMB 3011 “Work Performed” Exclusion in Favor of MoE’s Interpretation

Even if there was any question as to the scope of the “work performed” exclusion, this Court has repeatedly held that ambiguous exclusions must be interpreted in favor of coverage.²¹ MacPherson and MoE offered competing and reasonable interpretations of the UMB 3011 “work performed” exclusion. MacPherson argued that the deletion of the

²¹ Queen City Farms v. Cent. Nat’l Ins. Co., 126 Wn.2d 50, 68, 882 P.2d 703 (1994) (“Unresolved ambiguities are resolved against the drafter-insurer and in favor of the insured. Under this rule, a subjective standard applies, as the insured has offered this reasonable construction of the policy language.”)

“or on behalf of” language constituted an intentional broadening of coverage and offered case law, industry commentary, an ISO memorandum dealing with the exclusion at issue and testimony from MoE’s own corporate designate in support of its position. One authority explained the intended coverage of the narrowed exclusion:

The [Broad Form Property Damage] endorsement including completed operations contains what at first may appear to be a minor change in wording. *Nevertheless, that change is quite significant. The change accomplished by the endorsement is the deletion of the phrase “or on behalf of” that greatly expands the completed operations coverage of the 1966 or 1973 CGL policy. . . . Eliminating the words “or on behalf of” from the work performed exclusion . . . has the effect of providing coverage for damage to the work of the insured’s subcontractors or for damage to the work of others arising from the work of the insured’s subcontractors.*²²

The weight of common law authority also favors MacPherson’s interpretation.²³

²² Insurance for Defective Construction, Wielinski at 209-10 (2nd ed. 2005). (Emphasis added.)

²³ See McKellar Development of Nevada, Inc. v. Northern Ins. Co. of New York, 108 Nev. 729, 837 P.2d 858 (1992); Corner Const. Co. v. United States Fidelity and Guar. Co. 638 N.W.2d 887 (S.D. 2002); American Family Mut. Ins. Co. v. American Girl, Inc., 268 Wis. 2d 16, 673 N.W.2d 65 (2004); J.S.U.B., Inc. v. U.S. Fire Ins. Co., 906 So. 2d 303 (Fla. Dist. Ct. App. 2d Dist, 2005), review granted, 925 So.2d 1032 (Fla. 2006); Harbor Ins. Co. v. Tishman Const. Co., 218 Ill. App. 3d 936, 161 Ill. Dec. 551, 578 N.E.2d 1197 (1st Dist. 1991); C.O. Falter, Inc. v. Crum & Forster Ins. Cos., 79 Misc. 2d 981, 361 N.Y.S.2d 968 (1974); Limbach Co. LLC v. Zurich American Ins. Co., 396 F.3d 358 (4th Cir. 2005); Fireguard Sprinkler Systems, Inc. v. Scottsdale Ins. Co., 864 F.2d 648 (9th Cir. 1988); Gulf Fleet Marine Operations, Inc. v. Wartsila Power, Inc., 797 F.2d 257 (5th Cir. 1986); W.E. O’Neil Const. Co. v.

Rather than adhere to the applicable rule requiring courts to construe ambiguous exclusionary language narrowly and *in favor of coverage*, the Court of Appeals adopted the policy interpretation advanced by MoE and stated in a prior (but factually inapposite) holding in Schwindt v. Underwriters at Lloyd's of London, which dealt with a non-ISO policy form containing markedly different policy language.²⁴ The Court of Appeals held that the exclusion applied to bar coverage.

In so holding, the Court of Appeals glossed over the fact that the policy language at issue in Schwindt was substantially different than the language at issue in this case and that Schwindt, in turn, relied on an outdated line of Minnesota cases.

a. The exclusions at issue in Schwindt are markedly distinct from the exclusions at issue in MacPherson

The exclusions at issue in Schwindt were:

(1) for repairing or replacing any defective product or products manufactured, sold or supplied by the Assured or any defective part or parts thereof nor for the cost of such repair or replacement; or

National Union Fire Ins. Co., 721 F. Supp. 984 (N.D. Ill. 1989); Fejes v. Alaska Ins. Co. Inc., 984 P.2d 519 (Ala. 1999); Alaska Pacific Assur. Co. v. Collins, 794 P.2d 936 (Ala. 1990); Insurance Co. of North America v. National American Ins. Co., 37 Cal. App. 4th 195, 43 Cal. Rptr. 2d 518 (4th Dist. 1995); Maryland Casualty v. Reeder, 221 Cal. App. 3d 961, 270 Cal. Rptr. 719 (4th Dist. 1990), opinion modified, (July 25, 1990).

²⁴ 81 Wn. App. 293, 914 P.2d 119 (1996).

(2) for the loss of use of any such defective product or products or part or parts thereof, or

(3) for damage to that particular part of any property upon which the Assured is or has been working caused by the faulty manner in which the work has been performed²⁵

The exclusions in Schwindt lacked the key feature at issue in MacPherson, i.e. the language Lloyd's London used in Schwindt lacked the ISO "by or on behalf of" language that is central to the exclusionary language at issue here. Also, in arriving at its decision, the Schwindt court recognized that there was "no comparable evidence that the insurers did not intend to include the work of subcontractors in these provisions."²⁶

That is not the case here. Unlike the policy language at issue in Schwindt, the UMB 3011 endorsement utilized *verbatim* ISO language. Unlike Schwindt, the Court of Appeals in this case was presented with substantial evidence that ISO-subscribing insurers like MoE intended to provide coverage for property damage arising from the work of the named insured's subcontractors. MoE's CR 30(b)(6) designate testified that MoE *follows ISO's intent with respect to the scope of the UMB 3011 endorsement*.

²⁵ Schwindt, 81 Wn. App. at 295.

²⁶ Id. at 305.

Q. You don't have any knowledge as you sit here today whether the MOE underwriters involved in underwriting the MacPherson policies intended anything different from sections 2, 3 and 4 on page 10 of the ISO circular, correct?

A. As it relates to the UMB3011?

Q. Yes.

A. That's correct, with regards to how that -- that *that endorsement would be interpreted in the same fashion.*

Q. You never came across any literature anywhere, either in the underwriting file or in general underwriting materials at Mutual of Enumclaw, stating that the company intended something different with its UMB3011 completed operations language, than is set forth in paragraphs (2), (3) and (4) of the ISO circular, correct?

A. *Yeah. I did not --*

Q. And so as the designated representative of Mutual of Enumclaw, if there is any written underwriting material, either in MOE's MacPherson underwriting file, or any other place in the company that expresses a contrary intent from the ISO intent set forth in paragraphs (2), (3) and (4), you are unaware of it, correct?

A. *That's correct.*²⁷

It was therefore gross oversight for the Court of Appeals to designate the deletion of the "or on behalf of" language as "superfluous." To the contrary, "[t]his seemingly subtle change was not an unintended,

²⁷ CP 407.

clerical oversight. *It was a major, deliberate and intentional broadening of coverage (by weakening the exclusion) by insurers in exchange for a significant additional premium.*²⁸ The plain intent of the modified “work performed” exclusion is to cover property damage arising “out of work performed ‘on behalf of’ the named insured.”²⁹

The Court of Appeals’ decision results in an “inadvertent[] . . . windfall” to insurers like MoE:

[T]he courts have been uneven in upholding the drafters’ intended meaning. Some courts correctly applied the drafters’ intent (and the policyholders’ reasonable expectation of coverage). *But, many other courts miss this intended and expected expansion in coverage. In so doing, the latter voided the completed operations coverage in their respective jurisdictions, which insureds had paid enormous additional premiums to secure. This inadvertently resulted in a windfall to insurers that may have reached hundreds of millions of dollars. Even the insurance industry organization that drafted the policy was embarrassed by the gross miscalculation of its language and, in response, issued its Circular No. GL 79-12 dated January 29, 1979, to confirm its original intent and admitting that this 1976 exclusion was “difficult to understand.”*³⁰

Though the plain language of the modified “work performed” exclusion (as supported by the authority cited above) results in coverage

²⁸ Insurance Coverage for Construction Disputes, Scott C. Turner at § 33.3 (2nd ed. 2007). (Emphasis added).

²⁹ Id.

³⁰ Id. (Emphasis added).

for property damage arising from subcontractor work, at a minimum the Court of Appeals should have recognized the language as ambiguous. An insurance policy provision is ambiguous when it is fairly susceptible to two different interpretations, both of which are reasonable. If exclusionary language is ambiguous, it is proper to construe the effect of such language against the drafter. Thus, if an insurance policy's exclusionary language is ambiguous, *the legal effect of such ambiguity is to find the exclusionary language ineffective.*³¹ It was clear and prejudicial error for the Court of Appeals to hold the deletion of the "or on behalf of" language was superfluous.

b. The Court of Appeals relied on a line of cases which has been "dispensed" with

Not only does the Schwindt case deal with non-ISO language, the Court of Appeals erred in adopting the Schwindt court's reliance on a now-outdated line of cases. The Court of Appeals cited two Minnesota Supreme Court cases in holding that the "work performed" exclusion in MacPherson's policy excludes coverage for claims arising from work performed by MacPherson, as well as by MacPherson's subcontractors.³²

In so holding, the Court of Appeals relied on a generalized statement of

³¹ Kaplan v. Northwestern Mut. Life Ins. Co., 115 Wn. App. 791, 802, 65 P.3d 16 (2003) (citations omitted) (emphasis added).

³² Knutson Constr. Co. v. St. Paul Fire & Marine Ins. Co., 396 N.W.2d 229 (Minn. 1986); Bor-Son Bldg. Corp. v. Employers Commercial Union Ins. Co. of Am., 323 N.W.2d 58 (Minn. 1982).

the “business risk” doctrine which states that “the quality of the work performed, both by [the general contractor] as well as by its subcontractors, [is] the responsibility of the [general contractor] and no one else.”³³ The Court of Appeals’ holding incorrectly subordinated careful analysis of contract language as the key factor in interpreting policies of insurance to general application of common law rules. Such an approach not only violates this Court’s bedrock rules governing contract interpretation, but also ignores the facts that Schwindt dealt with very different policy language and the cases Schwindt relies upon have been dispensed with by more recent decisions interpreting ISO language.

The correct, and modern, rule governing the interpretation of *ISO policy language like that at issue in this appeal* is stated in Westfield Insurance Company v. Weis Builders, Inc.³⁴ In that case, a general contractor sought indemnity coverage from several of its insurers for water intrusion and other property damage to a townhome development. In holding that the insurers owed the general contractor indemnity coverage, the Westfield court reiterated that the Minnesota Supreme Court had “dispensed with” the Bor-Son and Knutson decisions:

Westfield acknowledges that under exclusion (1), it must provide coverage for property damage to Weis's

³³ Mutual of Enumclaw v. MacPherson, Court of Appeals decision at 21.

³⁴ 2004 U.S. Dist. LEXIS 13658 (2004) (applying Minnesota law).

work, provided that the damaged work was performed by subcontractors on Weis's behalf. However, it asserts that the "business risk doctrine" applies to preclude coverage for the repair and replacement costs of defective work itself. See Bor-Son Bldg. Corp. v. Employers Commercial Union Ins. Co. of Am., 323 N.W.2d 58, 61-63 (Minn. 1982) (endorsing the business risk doctrine); Knutson Constr. Co. v. St. Paul Fire & Marine Ins. Co., 396 N.W.2d 229, 231-33 (Minn. 1986) (reaffirming Bor-Son). The business risk doctrine is a judicially-recognized doctrine related to manageable risks. . . .

As if on cue, three days after the Court heard oral argument on these motions, the Minnesota Supreme Court issued an opinion *dispensing with the Bor-Son and Knutson interpretation of the "your work" exclusion. See Wanzek Constr., Inc. v. Employers Ins. of Wausau*, 679 N.W.2d 322 (Minn. 2004). In that case, the Minnesota Supreme Court held that *the extent to which a policy covers business risks must be governed by the specific terms of the contract, as opposed to the business risk doctrine. Id.* at 327. Therefore, the Court finds that exclusion does not apply to exclude coverage for those claimed damages that involve damaged work or work out of which the damage arises if that work was performed by a subcontractor on Weis's behalf.³⁵

The Court of Appeals was obligated to interpret the "work performed" exclusion in the UMB 3011 endorsement consistent with its terms. Even if the language was ambiguous, MacPherson submitted a wealth of on-point authority establishing that the deletion of the "or on behalf of" language in ISO forms was anything but superfluous. To

³⁵ Id. at *15-*17.

correct the substantial injustice occasioned by the Court of Appeals' decision, review is warranted.

4. The Court of Appeals Erred When it Required MacPherson to Prove That MoE Intended to Cover Property Damage Arising From the Work of its Subcontractors

The Court of Appeals held that:

MacPherson has not presented any evidence indicating that, by including language like that used in the ISO draft form, MoE intended to adopt the intent discussed in the ISO circular. MacPherson merely relies on the testimony of MoE's representative that she had no knowledge of the existence of MoE documents that express an intent contrary to the ISO circular.³⁶

First, no decision in the state of Washington has ever required the policyholder to prove the insurer's subjective intent in issuing its policy. To the contrary, this Court has held that "[i]f there be any ambiguity in a contract, the interpretation which the parties have placed upon it is entitled to *great, if not controlling, weight in determining its meaning.*"³⁷ Moreover, Washington courts hold that, because insurance policies are interpreted as an average layman would understand them; it is only the objective manifestation of the parties that matters.³⁸

³⁶ Mutual of Enumclaw v. MacPherson, Court of Appeals decision at 23.

³⁷ Toulouse v. New York Life Ins. Co., 40 Wn.2d 538, 541, 245 P.2d 205 (1952).

³⁸ Quadrant Corp., 118 Wn. App. at 529. ("Interpretation of an insurance policy is a question of law, and summary judgment is appropriate if the contract has only one reasonable meaning when viewed in light of the parties' objective manifestations.").

Here, MoE admitted in deposition that the UMB 3011 “work performed” exclusion would be interpreted in the “same fashion” as ISO’s interpretation – an interpretation unquestionably supportive of MacPherson’s position. Moreover, the only objective manifestation in the record (i.e. the deletion of the “or on behalf of” language constituted an *intentional* broadening of coverage and was not superfluous) was supportive of MacPherson’s position.

F. CONCLUSION

For all of these reasons, the Court of Appeals decision conflicts with this Court’s long established rules of insurance policy interpretation. Further, this case presents “an issue of substantial public interest that should be determined by the Supreme Court,” and MacPherson respectfully requests that the Court grant this Petition and reverse the Court of Appeals’ July 16, 2007 decision.

DATED this 15TH day of August, 2007.

HARPER | HAYES PLLC

By: _____



Gregory L. Harper, WSBA No. 27311
Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies that on *Wednesday, August 15, 2007*, I caused a true and correct copy of this document to be delivered in the manner indicated to the following parties:

BY MESSENGER

Steven A. Branom
Brent W. Beecher
Hackett, Beecher & Hart
1601 Fifth Avenue, Suite 2200
Seattle, Washington 98101
Counsel for Plaintiff Mutual of Enumclaw

RECEIVED
COURT OF APPEALS
DIVISION ONE
AUG 15 2007

DATED this 15th day of August, 2007.

Victoria Heindel
Victoria Heindel

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY,)	
)	
Appellant,)	No. 57820-1-I
)	
v.)	DIVISION ONE
)	
MACPHERSON CONSTRUCTION & DESIGN, INC.; MACPHERSON CONSTRUCTION & DESIGN, LLC,)	
)	UNPUBLISHED OPINION
Respondent,)	
)	
and THOMAS and ANNE MARIE HEDGES,)	
)	
Defendants.)	FILED: July 16, 2007

DWYER, J. — General contractor MacPherson Construction & Design, LLC, was insured by Mutual of Enumclaw Insurance Company (MoE). MoE filed this action against MacPherson seeking a judgment declaring that MacPherson's insurance policy did not cover a claim asserted against MacPherson by a third party for damages arising out of the faulty workmanship of a subcontractor. The trial court granted partial summary judgment in favor of MoE, ruling that an exclusion in the policy precluded coverage under the policy's general terms. The trial court then granted summary judgment in favor of MacPherson, ruling that a liberalization clause contained in the policy applied because MoE had

sought the insurance commissioner's approval of new policy language that would apply to MoE's situation, and that the claim was covered. Both parties appeal.

We affirm the trial court's ruling that an exclusion in the policy applies to preclude coverage for the claim under the policy's general terms. We also hold, however, that neither party has demonstrated that it is entitled to summary judgment regarding the application of the liberalization clause. Accordingly, we reverse the trial court's summary judgment ruling on that issue, and remand this matter to the trial court for proceedings consistent with this opinion.

FACTS

MacPherson is a developer and general contractor in the business of constructing homes. At all times relevant to this lawsuit, MacPherson was insured by MoE under both a commercial general liability (CGL) policy and a supplemental umbrella policy.¹ It is the coverage afforded MacPherson under the umbrella policy that is the subject of this appeal.

In 1999, MacPherson was the general contractor on the construction of a house for Thomas and Anne Marie Hedges. In 2001, the Hedges discovered significant water damage to the structure of the house caused by siding that had been incorrectly installed by one of the subcontractors. The Hedges brought an action in arbitration against MacPherson and the matter proceeded to hearing.

¹ An umbrella policy provides coverage for amounts exceeding CGL policy limits, and protects against gaps in the underlying policy. Prudential Property & Cas. Ins. Co. v. Lawrence, 45 Wn. App. 111, 117, 119, 724 P.2d 418 (1986).

The arbitrator awarded the Hedges \$399,088.32, an amount representing both damages to the house itself and damages for the loss of a favorable purchase offer on the house that had been made before the water damage was discovered. MoE filed this action against MacPherson in 2004, seeking a judgment declaring that “the Hedges’ claims against McPherson, Inc. and MacPherson, LLC are not covered by the Mutual of Enumclaw liability policies” issued to MacPherson.

In January 2005, the trial court granted partial summary judgment in favor of MoE, ruling that, as a result of policy exclusions, MacPherson was not entitled to coverage under the general terms of either the CGL policy or the umbrella policy. The trial court also ruled, however, that there remained an unresolved question of fact as to whether MacPherson was entitled to coverage as a result of a liberalization clause contained in the umbrella policy.²

In July 2005, both parties filed additional motions for summary judgment regarding the issue of coverage pursuant to the liberalization clause. The trial court granted summary judgment in favor of MacPherson, ruling that the policy had been “liberalized” so that it provided coverage for the award amount.

² As herein discussed, the liberalization clause allows the policy-holder to benefit from terms not included in its policy, which would allow for broader coverage than that allowed pursuant to the terms included in its policy, under particular circumstances. Generally speaking, a policy is “liberalized” pursuant to such a clause when the insurer has submitted to the Office of the Insurance Commissioner (OIC) forms or “other provisions” which purport to extend or broaden the policy-holder’s insurance to provide such coverage, without additional charge to the policy-holder, and when the OIC approves such provisions “to be effective” while the holder’s policy is in force.

Insurers wishing to offer a new or extended coverage plan are required to file documents with the OIC, which reviews the proposed plan to ensure that it complies with the requirements of chapter 48.19 RCW, the chapter regulating the Washington insurance industry. RCW 48.19.040.

The trial court then entered judgment in favor of MacPherson, awarding MacPherson \$399,088.32, the total amount of the arbitration award.

MacPherson also moved for an award of attorney fees and costs in the amount of \$165,900.75. The trial court awarded MacPherson \$43,447.88 in such fees and costs.

Both parties appeal. MoE contends that the trial court erred by ruling that MacPherson was entitled to coverage pursuant to the umbrella policy's liberalization clause, thereby granting MacPherson's motion for summary judgment and denying MoE's motion for summary judgment on the same issue. MacPherson contends that the trial court erred by ruling that an exclusion in the umbrella policy applied to preclude coverage under the policy's general terms.

We hold that there exist disputed issues of material fact concerning whether the liberalization clause applies to provide coverage to MacPherson for the arbitration award amount. Accordingly, we reverse the trial court's summary judgment ruling in favor of MacPherson on this issue. We also hold that MoE has failed to demonstrate that it is entitled to summary judgment regarding the application of the liberalization clause. Accordingly, we affirm the trial court's denial of summary judgment on this issue. Finally, we affirm the trial court's summary judgment ruling that a policy exclusion precludes coverage for the arbitration award pursuant to the umbrella policy's general terms.

DISCUSSION

This court reviews de novo an order on summary judgment, and engages in the same inquiry as the trial court, Marincovich v. Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990), based solely on the precise record before the trial court. Green v. Normandy Park Riviera Section, Cmty. Club, 137 Wn. App. 665, 678, 151 P.3d 1038 (2007). Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law. CR 56(c); Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217, 220, 802 P.2d 1360 (1991). If, after viewing all of the evidence, reasonable persons could reach only one conclusion, summary judgment is appropriate. Doherty v. Municipality of Metro. Seattle, 83 Wn. App. 464, 468, 921 P.2d 1098 (1996).

Where different inferences can be reasonably drawn from evidentiary facts, however, summary judgment is not warranted. Johnson v. Schafer, 47 Wn. App. 405, 407, 735 P.2d 419 (1987), reversed on other grounds, 110 Wn.2d 546, 756 P.2d 134 (1988). Thus, a motion for summary judgment must be denied if the record shows any reasonable hypothesis which entitles the nonmoving party to relief. Mostrom v. Pettibon, 25 Wn. App. 158, 162, 607 P.2d 864 (1980). The trial court is not permitted to weigh the evidence or resolve any material factual issues in ruling on a motion for summary judgment. Fleming v. Smith, 64 Wn.2d 181, 185, 390 P.2d 990 (1964). "The function of . . . summary judgment is to avoid a useless trial. A trial is not useless but absolutely

necessary where there exists a genuine issue as to any material fact.” Preston v. Duncan, 55 Wn.2d 678, 681, 349 P.2d 605 (1960).

The party moving for summary judgment always has the burden of proving, by uncontroverted facts, that no genuine issue as to any material fact exists, whether or not that party would have the burden of proof on the issue at a trial on the merits. State ex rel. Bond v. State, 62 Wn.2d 487, 490, 383 P.2d 288 (1963). Once the moving party satisfies its initial burden, the burden then shifts to the nonmoving party to show that a triable issue exists. Doherty, 83 Wn. App. at 468. All material evidence and all reasonable inferences therefrom must be construed most favorably to the nonmoving party. Ashcraft v. Wallingford, 17 Wn. App. 853, 854, 565 P.2d 1224 (1977).

I. Liberalization Clause

MoE appeals the award of summary judgment to MacPherson, contending that the trial court erred by ruling that MacPherson’s policy was “liberalized” pursuant to the liberalization clause and, thus, provided coverage for the arbitration award amount. MoE asserts that, as a matter of law, the requirements of the liberalization clause were not satisfied. On the other hand, MacPherson asserts that, as a matter of law, the requirements of the liberalization clause were satisfied.

We disagree with the assertions made by both parties, and hold that neither party has demonstrated that it is entitled to judgment as a matter of law on this issue. Initially, we hold that an issue of material fact exists regarding the

application of the liberalization clause, which precludes an award of summary judgment to MacPherson. We further hold that MoE has failed to demonstrate that, as a matter of law, any one requirement of the liberalization clause was not satisfied, which precludes an award of summary judgment to MoE.³

The liberalization clause⁴ states:

Liberalization Clause. In the event any filing is submitted to the insurance supervisory authorities on behalf of the Company, and:

(a) the filing is approved or accepted by the insurance authorities to be effective while this policy is in force or within 45 days prior to its inception; and

(b) the filing includes insurance forms or other provisions that would extend or broaden this insurance by endorsement or substitution of form, without additional premium;

the benefit of such extended or broadened insurance shall inure to the benefit of the insured as though the endorsement or substitution of form had been made.

(Emphasis added.)

It is undisputed that MoE submitted a filing to the Office of the Insurance Commissioner, an insurance supervisory authority within the meaning of the liberalization clause.⁵ The parties dispute, however, whether that filing fulfilled

³ As herein discussed, in order for MacPherson to demonstrate that it is entitled to summary judgment regarding this issue, MacPherson must show that, as a matter of law, each requirement of the liberalization clause was satisfied. On the other hand, in order for MoE to demonstrate that it is entitled to summary judgment regarding this issue, MoE need show only that, as a matter of law, any one requirement of the liberalization clause was not satisfied.

⁴ There are no Washington cases interpreting a liberalization clause in an insurance policy, such as the one at issue here. Such clauses have been applied and upheld by a handful of courts in other jurisdictions. See, e.g., Gerrish Corp. v. Aetna Cas. & Sur. Co., 949 F. Supp. 236 (D. Vt. 1996); Gov't Employees Ins. Co. v. Wilson, 69 Misc. 2d 1020, 332 N.Y.S.2d 338 (1972). The validity of the liberalization clause itself is not at issue in this case.

⁵ The filing by MoE to the OIC proposed to transition the insurance it offered to customers such as MacPherson from a "pre-simplified" to a "simplified" plan. As herein discussed, the pre-simplified plan contains an exclusion for damage caused by the completed work of the insured. Under Washington case law, such an exclusion encompasses damage caused by work completed by a subcontractor: Schwindt v. Underwriters at Lloyd's of London,

the additional requirements of the liberalization clause.

A. "Additional Premium"

Initially, the parties contest whether the filing would have extended or broadened MacPherson's insurance coverage without any additional premium, as required by section (b) of the policy's liberalization clause. The evidence presented to the trial court regarding this issue is as follows.

MacPherson presented to the trial court several written communications from MoE to the OIC, which contain statements regarding the anticipated effect of the proposed plan on premium rates. The following statements, taken from various submissions to the OIC, are representative:

- [A]s an [Insurance Services Office] member, to be consistent with the principles of the ISO transition, MoE's transition should not result in an increase to policyholders.
... The factors that we proposed will permit MoE to move from our old ISO [General Liability] program based upon rates to the simplified ISO GL program based upon loss costs and simultaneously provide a modest decrease in our Washington GL premium level.
- Impact on policyholders will be a modest decrease [in premiums].
- Note that under all scenarios, Capped Minimum Transition, Capped Maximum Transition and Capped Mean Transition, modest decreases are indicated. These modest decreases demonstrate that MoE will not receive a premium level change

81 Wn. App. 293, 305-07, 914 P.2d 119 (1996). On the other hand, while the simplified plan also contains an exclusion for property damage arising out of the insured's work, that exclusion specifically excepts the work of subcontractors: "This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." The arbitration award here at issue arose out of a claim asserted by a third party for damages caused by the faulty work of a subcontractor. Accordingly, if MacPherson were entitled to benefit from the provisions of the simplified plan, MacPherson's insurance may be broadened to cover some or all of the arbitration award amount.

when we transition to the simplified ISO GL program.

....
No scenario results in a rate increase. All scenarios present an anticipated rate decrease.

(Emphasis added.) MacPherson argues that the listed statements indicate that the premium level of each policy holder, including that of MacPherson, would decrease under the proposed plan.

In response, MoE contends that the listed statements refer to the anticipated effect of the proposed plan on the overall premium rate, rather than its anticipated effect on each individual premium rate. In support of this contention, MoE points to other statements in the correspondence relied on by MacPherson, which specifically appear to refer to such an overall rate change.

The following statement is representative:

The results of our analysis indicated that . . . the overall premium change related to our transition to the simplified ISO GL program would range from -8.82% at the Capped Minimum Transition to -7.36% at the Maximum Transition with -7.95% at the Capped Mean Transition.

(Emphasis added.) Accordingly, MoE contends that some individual premium rates may actually increase under the proposed plan.

MoE next contends that MacPherson's would be one such premium which would increase under the proposed plan. In so contending, MoE relies on a declaration from one of its employees, unaccompanied by supporting documentation, asserting that MacPherson's individual premium would increase significantly should the proposed plan go into effect.

Each party asks us to resolve this dispute by accepting its interpretation

of the evidence over that of the other party. In other words, each party invites us to weigh the evidence by discounting the probative effect of some such evidence and accepting the probative effect of other such evidence. However, that is not the proper role of this court on summary judgment, nor is it the proper role of the trial court. Fleming, 64 Wn.2d at 185.

Rather, in determining whether a moving party is entitled to summary judgment, we must view the evidence presented in the light most favorable to the nonmoving party. Ashcraft, 17 Wn. App. at 854.⁶ After so viewing the evidence in this case, we conclude that neither party is entitled to summary judgment on this issue.

MacPherson asserts that the proffered evidence compels the conclusion that its premium would decrease under the proposed plan. However, viewing such evidence in the light most favorable to MoE, the statements herein discussed may reasonably be interpreted to refer to a change in overall premium rates under the proposed plan and, therefore, imply nothing about MacPherson's individual premium rate. Furthermore, the declaration by MoE's employee may

⁶ Both parties assert that no reasonable person would agree with the other party's interpretation of the evidence. It is true that summary judgment is appropriate if reasonable persons could reach only one conclusion from all of the evidence. Doherty, 83 Wn. App. at 468. This "reasonable persons" standard, however, does not allow us to weigh the evidence presented, discounting the evidence of the non-moving party. Rather, we must view all of the evidence presented in the light most favorable to the non-moving party. Aschraft, 17 Wn. App. at 854. Accordingly, summary judgment is warranted pursuant to the reasonable person standard only if, viewing the evidence in such a light, no reasonable person would reach a conclusion other than that asserted by the moving party.

Furthermore, while each party asserts that the other's proffered evidence is irrelevant to the determination at issue, neither party moved the trial court to strike any such evidence. Accordingly, all the evidence herein discussed was before the trial court and is, therefore, in the record to be considered by us. Green, 137 Wn. App. at 678.

reasonably be interpreted to indicate that MacPherson's premium would actually increase under the plan. Thus, an inference other than that asserted by MacPherson may reasonably be drawn from the evidence presented.

On the other hand, MoE asserts that the proffered evidence compels the conclusion that MacPherson's premium would increase under the proposed plan. However, viewing the evidence in the light most favorable to MacPherson, the statements herein discussed may reasonably be interpreted to indicate that the premiums of all of the policy-holders would not increase under the proposed plan. Such an interpretation indicates that MacPherson's would be one such premium, despite the statement to the contrary by MoE's employee. Thus, an inference other than that asserted by MoE may also reasonably be drawn from the evidence presented.

Where different inferences can reasonably be drawn from evidentiary facts, summary judgment is not warranted. Johnson, 47 Wn. App. at 407. Whether MacPherson's premium would increase under the proposed plan is a genuine issue of material fact. Where such an issue exists, a trial is necessary. Preston, 55 Wn.2d at 681.

In order to sustain its burden on summary judgment, MacPherson had to demonstrate, as a matter of law, that each requirement of the liberalization clause was satisfied. As there is a genuine issue of material fact regarding whether its premium would increase under the proposed plan, MacPherson has failed to satisfy that burden. Thus, the trial court erred by awarding summary

judgment to MacPherson on this issue.

In order to sustain its burden on summary judgment, however, MoE need only show that, as a matter of law, any one of the requirements of the liberalization clause were not satisfied. MoE contends both that the filing was not “approved or accepted by the insurance authorities to be effective” while MacPherson’s policy was in force, as is required by section (a) of the liberalization clause, and that the filing did not contain provisions that would “extend or broaden” MacPherson’s coverage by “endorsement or substitution of form,” as is required by section (b) of the liberalization clause. Accordingly, we turn to a discussion of these issues.

B. “To Be Effective”

MoE first asserts that the filing was not approved or accepted by the OIC “to be effective” while MacPherson’s policy was in force. We disagree.

It is undisputed that the filing submitted by MoE to the OIC was approved during the time period MacPherson’s policy was in force.⁷ MoE asserts, however, that the requirement of section (a) was not satisfied because insureds such as MacPherson would not transition to the plan automatically but, rather, would transition only when their policies were “renewed or rewritten.” Thus, MoE

⁷ MacPherson’s policy was in force from October 18, 2000, until October 18, 2002. The filing submitted by MoE to the OIC was stamped “approved effective 8-1-01,” within the time period MacPherson’s policy was in force. The day before August 1, 2001, MoE sent a letter to the OIC stating that “the effective date will need to be changed from the current filed effective date of 8/01/2001 to 9/15/2001 for new business and from 11/01/2001 to 12/15/2001 for renewals.” That letter was stamped “approved effective 9/15/01” by the insurance commissioner. Both September 15, 2001 and December 15, 2001 are also within the time period MacPherson’s policy was in force.

argues that, because MacPherson never renewed its policy after the date the OIC approved the simplified plan, the simplified plan never actually became effective while MacPherson's policy was in force.

In essence, MoE argues that subsection (a) of the liberalization clause ("the filing is approved or accepted by the insurance authorities to be effective while this policy is in force") requires that the policy provisions contained in the filing at issue must become effective while MacPherson's policy is in force. MacPherson, on the other hand, argues that subsection (a) requires only that the approval or acceptance of the filing must occur while its policy is in force.

Insurance policy language is interpreted as it would be understood by an average person and in a manner that gives effect to each provision. McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 733, 837 P.2d 1000 (1992). If policy language is clear and unambiguous, we will enforce it as written. Quadrant Corp. v. Am. States Ins. Co., 154 Wn.2d 165, 172, 110 P.3d 733 (2005). However, if policy language is ambiguous, "it is proper to construe the effect of such language against the drafter." Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 123 Wn.2d 678, 690, 871 P.2d 146 (1994) (quoting McDonald v. State Farm, 119 Wn.2d at 733). Thus, ambiguity is "resolved against the insurer and in favor of the insured." Quadrant Corp., 154 Wn.2d at 172. An insurance policy is ambiguous "when it is fairly susceptible to two different interpretations, both of which are reasonable." Lynott, 123 Wn.2d at 690 (quoting McDonald v. State Farm, 119 Wn.2d at 733).

Here, the relevant language may reasonably be read as either party asserts. MacPherson's interpretation, that the language requires only that approval or acceptance occur while its policy is in force, would be more clearly supported if subsection (a) simply stated, "the filing is approved or accepted by the insurance authorities while the policy is in force." The inclusion of the "to be effective" language tends to support MoE's interpretation that the effective date must occur while the policy is in force. On the other hand, MoE's interpretation would be more clearly supported if subsection (a) stated, "the filing is approved or accepted by the insurance authorities and becomes effective while this policy is in force." Thus, the exclusion of the "and becomes" language tends to support MacPherson's interpretation that only an approval of effectiveness must occur while the policy is in force.

Thus, the policy provision is fairly susceptible to two different interpretations and is, therefore, ambiguous. See Lynott, 123 Wn.2d at 690 (quoting McDonald v. State Farm, 119 Wn.2d at 733). The language should be construed in favor of the insured, MacPherson. See Quadrant Corp., 154 Wn.2d at 172. So construed, the language at issue requires only that approval of effectiveness occur during the time period the policy was in force. That requirement was here satisfied.

Accordingly, MoE has failed to demonstrate, as a matter of law, that this requirement of the liberalization clause was not satisfied.

C. "Endorsement or Substitution of Form"

Moe next contends that the filing did not allow for “endorsement or substitution of form” pursuant to MacPherson’s policy, because the forms referred to in the filing at issue were not new, but had been available to other insureds through an alternate plan known as the “Emerald Series” before the filing. Again, we disagree.

MoE contends that the liberalization clause does not apply when the forms substituted by a particular filing were available prior to the inception of the policy period, citing State Securities Co. v. Federated Mutual Implement & Hardware Insurance Co., 204 F. Supp. 207, 223 (D. Neb. 1960). The court in that case interpreted a liberalization clause similar to the one at issue here:

It was not the purpose, and is not the consequence, of the Liberalization Clause above quoted to introduce into fire insurance policies clauses, provisions or endorsements which, no less than now or at the time of loss, were available to the parties when the policies were issued, but were simply not used as between the contracting parties.

State Sec. Co., 204 F. Supp. at 223 (emphasis added).

Although MacPherson neglects to respond to this argument in its briefing, MoE concedes in its briefing⁸ that the Emerald Series plan “was available primarily to artisans and subcontractors, and generally was not offered to general contractors such as MacPherson.”

Accordingly, while the forms happened to be in use with other policyholders before the filing, they were not available to MacPherson, a factor that

⁸ Brief of Respondent at 41.

distinguishes the circumstances here from those at issue in State Securities Co. Thus, despite MoE's contention to the contrary, the filing made those forms available to MacPherson by allowing such forms to be substituted for those already contained in MacPherson's policy. Thus, the filing contains provisions that would alter MacPherson's insurance policy by "endorsement or substitution of form."

MoE has failed to demonstrate, as a matter of law, that this requirement was not satisfied.

D. "Extend or Broaden"

Finally, MoE contends that the simplified plan would not "extend or broaden" coverage, asserting that the plan would extend coverage in some respects but restrict it in others. We hold, however, that there is a genuine issue of material fact regarding this issue.

Initially, there is evidence in the record that the filing in question contains a form that would provide more liberal coverage in the area relevant to this case, i.e., damage caused by the work of subcontractors. MoE contends, however, that the "extend or broaden" language must be read to require an overall extension or broadening of coverage. In support of its assertion, MoE relies on Donoho & Sons, Inc. v. Aetna Insurance Co., 598 S.W.2d 11 (Tex. App. 1980), wherein the court was unable to determine if a filing would extend coverage for purposes of a liberalization clause based on the record before it, and notes that the filing would extend coverage in some instances and restrict it in others.

However, even if the “extend or broaden” language may be read as MoE contends, such a reading does not entitle MoE to summary judgment. MoE has not directed this court to any evidence in the record that compels the conclusion that the filing, considered as a whole, would provide MacPherson with less broad coverage overall. Rather, the evidence highlighted by MoE merely suggests that the filing contained provisions that would restrict coverage in some respects.

Considering such provisions, as well as the provision that would appear to broaden MacPherson’s coverage by excepting the work of subcontractors from the exclusion applicable to the claim here at issue, the overall effect of the filing is a genuine issue of material fact. Thus, Moe has failed to demonstrate that this or any provision of the liberalization clause was not satisfied as a matter of law.

Both parties have failed to demonstrate that they are entitled to summary judgment regarding the application of the liberalization clause. Thus, the trial court correctly denied MoE’s motion for summary judgment but erred by awarding summary judgment to MacPherson. Accordingly, we reverse and remand this matter to the trial court for further proceedings.⁹

⁹ We note that, should the trial court conclude on remand that the MacPherson’s policy is “liberalized” pursuant to the liberalization clause, such a conclusion does not necessarily support an award to MacPherson of the entire arbitration award amount. The trial court must also determine whether any separate exclusions in the “liberalized” plan apply to preclude coverage for all or any of the arbitration award amount.

MoE asserts that, even if MacPherson’s policy is “liberalized” pursuant to the liberalization clause, a portion of the arbitration award is subject to a separate exclusion for products “recalled from the market.” The merits of this contention must be resolved by the trial

II. Policy Exclusions

On cross-appeal, MacPherson contends that the trial court erred by ruling on summary judgment that MacPherson was not entitled to coverage for the Hedges' arbitration award under the umbrella policy's general terms. Specifically, MacPherson asserts that the trial court erred by determining that a policy provision excluding coverage for claims arising from work performed "by the named insured" also excluded coverage for claims arising from work performed by a subcontractor. We disagree.

The interpretation of an insurance policy is a question of law reviewed de novo. Alaska Nat'l Ins. Co. v. Bryan, 125 Wn. App. 24, 30, 104 P.3d 1 (2004). "Insurance policy language is interpreted as it would be understood by an average person and in a manner that gives effect to each provision." Schwindt v. Underwriters at Lloyd's of London, 81 Wn. App. 293, 298, 914 P.2d 119 (1996).

The umbrella policy MacPherson initially purchased from MoE clearly excluded coverage for property damage caused by the work done by or "on behalf of" the named insured. That policy states: "This policy does not apply: . . . to property damage to . . . work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts, or equipment furnished in connection therewith." (Emphasis added.) Thus, the

court in the event that, on remand, MacPherson prevails on its assertion that the policy was "liberalized."

policy exclusion specifically excluded coverage for claims arising from work performed on behalf of the named insured, such as work performed by a subcontractor.

MacPherson also purchased, however, a supplemental endorsement that expressly replaced the property damage exclusion contained in the original umbrella policy. The supplemental endorsement provides that policy coverage does not apply:

With respect to the COMPLETED OPERATIONS HAZARD to Property Damage to work performed by the Named Insured arising out of the work or any portion thereof, or out of the materials, parts, or equipment furnished in connection therewith.

(Emphasis added.) In contrast to the original exclusion, the exclusion contained in the supplemental endorsement form omits the phrase “on behalf of.”

MacPherson contends that the only reasonable interpretation of the endorsement form’s replacement exclusion, in light of that omission, is that only claims for damage arising out of work performed by the named insured itself are excluded from coverage, not claims for damage arising out of work performed by subcontractors.

In support of this contention, MacPherson points to cases in several other jurisdictions holding, under endorsements similar to the endorsement at issue here, that where an exclusion omits the phrase “on behalf of,” the exclusion does not encompass work performed by subcontractors. See, e.g., Fireguard Sprinkler Sys., Inc. v. Scottsdale Ins. Co., 864 F.2d 648 (9th Cir. 1988); Feies v.

Alaska Ins. Co., 984 P.2d 519 (Alaska 1999); McKellar Dev. of Nevada, Inc. v. N. Ins. Co. of New York, 108 Nev. 729, 837 P.2d 858 (1992).

However, an argument substantially similar to the one advanced by MacPherson was rejected by this court in Schwindt, 81 Wn. App. at 305-07. The plaintiff in that case argued that a policy exclusion precluding coverage for work done by “the Assured,” rather than “on behalf of the Assured,” must be interpreted to preclude only work actually performed by that policy-holder rather than by subcontractors on the policy-holder’s behalf.

In discounting that argument in Schwindt, we expressly addressed and rejected the rule adopted by those cases now cited by MacPherson. The Schwindt decision held that “work of subcontractors is necessarily included in exclusions pertaining to faulty work or defective products of the contractor.” Schwindt, 81 Wn. App. at 306. In so holding, we reasoned that the policy-holder was the party in control of, and responsible for, the quality of work performed by a subcontractor. As stated therein, the general contractor

undertook construction . . . and was obligated by the contract to perform that work in a satisfactory manner. The fact that it subcontracted out some of the work on the project did not relieve it of its contractual obligation to produce a product free of defects and faulty workmanship.

Schwindt, 81 Wn. App. at 307.

In support of our holding in Schwindt, we favorably cited two Minnesota Supreme Court cases. See Knutson Constr. Co. v. St. Paul Fire & Marine Ins. Co., 396 N.W.2d 229 (Minn. 1986); Bor-Son Bldg. Corp. v. Employers

Commercial Union Ins. Co. of Am., 323 N.W.2d 58 (Minn. 1982). The court in those cases held that similar policy exclusions precluded coverage for the work of subcontractors, despite the absence of the “on behalf of” language. The holdings in those cases similarly reasoned that the risk of supplying faulty goods or services is a business expense most appropriately borne by the general contractor who has control over the quality of goods and services supplied. Knutson, 323 N.W.2d at 235; Bor-Son, 323 N.W.2d at 64.

No Washington cases since Schwindt have invalidated either the rule established therein or the rationale supporting it. To the contrary, we recently applied the Schwindt rule in another case, Mutual of Enumclaw Insurance Co. v. Patrick Archer Construction, Inc., 123 Wn. App. 728, 735-76, 97 P.3d 751 (2004) (“There can be no question that the quality of the work performed, both by [the general contractor] as well as by its subcontractors, was the responsibility of [the general contractor] and no one else.”).

MacPherson contends, nonetheless, that the Schwindt rule is no longer valid, asserting that in Wanzek Construction, Inc. v. Employers Insurance of Wausau, 679 N.W.2d 322, 326 (Minn. 2004), the Minnesota Supreme Court recently “dispensed” with the rule established by the court in Bor-Son and Knutson. That contention is unavailing.

The court in Wanzek held that the exclusion there at issue did not preclude coverage for the work of subcontractors. However, unlike the policy exclusions at issue in Schwindt, Bor-Son, and Knutson, that policy exclusion

explicitly excepted damages caused by the faulty workmanship of subcontractors. Wanzek, 679 N.W.2d at 326.¹⁰ The plaintiff in that case contended, nonetheless, that damage caused by a subcontractor's work should be excluded from coverage pursuant to the rule expressed by the court in Bor-Son and Knutson. Unsurprisingly, the court in Wanzek disagreed, holding simply that the express terms of the exclusion controlled. Wanzek, 679 N.W.2d at 326.

The Wanzek decision did not, however, invalidate the holdings in Bor-Son and Knutson, cases in which the exclusions at issue contained neither an express exception for work performed by a subcontractor nor any other direct evidence of intent to except the work of subcontractors from the exclusions at issue. In Schwindt as well, we noted that there was no "evidence that the insurers did not intend to include the work of subcontractors" in the exclusion at issue. Schwindt, 81 Wn. App. at 305. Accordingly, the reasoning of the court in Wanzek does not cast doubt on our holding in Schwindt, a well-reasoned holding to which we adhere.

Accordingly, in the absence of evidence that such an exclusion was intended to operate to the contrary, "work of subcontractors is necessarily included in exclusions pertaining to faulty work or defective products of the

¹⁰ The exclusion at issue in Wanzek stated: "This insurance does not apply to . . . "Property damage" to "your work" arising out of it or any part of it and including in the "products-completed operations hazard." This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." Wanzek, 679 N.W.2d at 326 (emphasis added).

contractor.” Schwindt, 81 Wn. App. at 306. Accord Patrick Archer Constr., Inc., 123 Wn. App. 728.

MacPherson next attempts to distinguish this case from the situation at issue in Schwindt, arguing that MoE intended, by omitting the phrase “on behalf of” in the endorsement exclusion, to broaden coverage to encompass damage arising out of the work of subcontractors. We disagree.

In support of this contention, MacPherson refers to a draft insurance policy form disseminated by the Insurance Services Office (ISO), which contained language that was later adapted by MoE to create the endorsement here at issue. The ISO published a “circular” in which it stated that the intended effect of the draft form’s omission of the “by or on behalf of” language was to provide coverage for damages caused by the work of subcontractors.¹¹

However, MacPherson has not presented any evidence indicating that, by including language like that used in the ISO draft form, MoE intended to adopt the intent discussed in the ISO circular. MacPherson merely relies on the testimony of MoE’s representative that she had no knowledge of the existence of MoE documents that express an intent contrary to the ISO circular. Such

¹¹ The circular provides:

This exclusion . . . [excludes] only damages caused by the named insured to his own work. Thus,

- (1) The insured would have no coverage for damage to his work arising out of his work.
- (2) The insured would have coverage for damage to his work arising out of a subcontractor’s work.
- (3) The insured would have coverage for damage to a subcontractor’s work arising out of the subcontractor’s work.

(Emphasis added.)

evidence is not sufficient to raise a genuine issue of material fact regarding this issue.

Furthermore, under Washington law, once an operation is completed, the work of the subcontractors has merged with the work of the general contractor, Schwindt, 81 Wn. App. at 305, rendering the “by or on behalf of” language superfluous. Thus, the removal of the superfluous “on behalf of” language in the supplemental endorsement does not support the conclusion that MoE intended to broaden the coverage provided by the policy.

Accordingly, MacPherson has not provided sufficient reason to herein depart from the rule clearly expressed and applied by this court in Schwindt. Thus, the exclusion here at issue, which excludes coverage for claims arising from work performed by MacPherson, also excludes coverage for claims arising from work performed by subcontractors.

We affirm the trial court’s summary judgment ruling on this issue.

III. Attorney Fees

Our reversal of the judgment in favor of MacPherson also requires vacation of the attorney fee award in MacPherson’s favor.

Attorney fees are not recoverable by the prevailing party as costs of litigation unless the recovery of fees is permitted by contract, statute, or some recognized ground in equity. McGreevy v. Oregon Mut. Ins. Co., 128 Wn.2d 26, 35, 904 P.2d 731 (1995), overruled on other grounds by Panorama Vill. Condo. Owners Ass’n Bd. of Dirs. v. Allstate Ins. Co., 144 Wn.2d 130, 26 P.3d 910 (2001). In Olympic Steamship Co. v. Centennial Insurance Co., 117 Wn.2d 37,

52, 811 P.2d 673 (1991), our Supreme Court held that such a ground in equity exists when an "insurer refuses to defend or pay the justified action or claim of the insured."

MacPherson has not yet proved that it is entitled to coverage pursuant to the policy at issue. Accordingly, we vacate the award of attorney fees in favor of MacPherson. Should MacPherson prevail on remand, it may re-apply to the trial court for an award of fees.

MacPherson's request for an award of attorney fees on appeal pursuant to RAP 18.1 is denied.

Affirmed in part, reversed in part, and remanded.

Deery, J.

WE CONCUR:

Schindler, ACT

Cox, J.