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SUPREME COURT  
OF THE STATE OF WASHINGTON

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MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent,

vs.

MACPHERSON CONSTRUCTION & DESIGN, LLC,

Petitioner.

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RESPONDENT'S SUPPLEMENTAL BRIEF

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**I. Supplemental Statement of Issues**

1. *Is the Exclusion in the Umbrella Endorsement Ambiguous?*
2. *Should the Court Consider the Language of an Exclusion, Eliminated by an Endorsement, to Determine Whether an Exclusion in the Endorsement is Ambiguous?*
3. *Should the Court Assume Mutual of Enumclaw's Alleged "Intent" to Provide Coverage for Subcontractor Liability, Where No Evidence of that "Intent" Exists?*
4. *Is the Merger Doctrine a Sound Principle of Washington Construction Law?*
5. *If the Court does Overrule Schwindt and Reverse the Court of Appeals, Should this Decision be Applied Purely Prospectively?*

**II. The Language of the Endorsement's Work Exclusion is Unambiguous.**

1. *The Endorsement's Work Exclusion is Unambiguous on Its Face.*

MacPherson's Umbrella policy was endorsed with form UMB 3011, which replaced several pages of "property damage" exclusions with a short list, all of which were contained on a single page. CP 532. One of the "replacement" exclusions in the endorsement states that the policy 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 any materials, parts or equipment furnished in connection therewith.

CP 532 (emphasis in original).

In the case at bar, MacPherson contracted to build a house for the Hedges. As a general contractor often does, MacPherson hired subcontractors to perform some of the work which MacPherson alone was contractually obligated to accomplish. After completion of the house, the Hedges discovered that there was significant water intrusion and rot beneath the siding. The Hedges sued (in arbitration) only one party for their damages: MacPherson - the general contractor that was obligated to them for the quality of the entire house upon its completion.

Mutual of Enumclaw has consistently argued that where a general contractor builds a house, the entire house is the "work performed by" that general contractor. As a matter of the insured's liability, based on the laws applicable to general contractors (about which more below), the fact that the insured elected to perform some of the work called for in the contract through the use of subcontractors is irrelevant.

The legal underpinning of Mutual of Enumclaw's position is based in part on the case of *Schwindt v. Underwriters at Lloyds of London*, 81 Wn. App. 293, 914 P.2d 119 (1996), *rev. den.* 130 Wn.2d 1003, 925 P.2d 989 (1996), and the cases cited therein. In *Schwindt*, the Court of Appeals ruled:

[T]he named insured is the general contractor and work performed by the insured must necessarily be such work as the named insured is required to perform under the

construction contract. . . The contractor can employ subcontractors or use employees to do the work, but in the end, when the work is complete, all the work called for by the contract on the part of the contractor must be deemed to be work performed by the contractor.

*Id. at 30, cf Blaylock & Brown Constr., Inc. v. AIU Ins. Co., 796 S.W.2d 146, 153 (Tenn. App. 1990).*

Because MacPherson was responsible for *all* of the work which it agreed to perform, the entire house is MacPherson's work. MacPherson has presented *no* authority that the Work exclusion in the Umbrella Endorsement, standing alone, is ambiguous with regard to coverage for property damage caused by subcontractors. A plain reading of that exclusion precludes the coverage MacPherson seeks.

2. *The Endorsement's Work Exclusion is Unambiguous Because of Schwindt.*

If there were any question regarding the meaning of the Umbrella Endorsement's Work exclusion, standing alone, all doubt was removed when the Court of Appeals published its decision in the *Schwindt* case in April 1996, and this Court denied the Petition for Review, passing on the opportunity to correct any perceived error in that opinion. In August, 1997, more than one year later (and thus more than one policy renewal later), MacPherson entered into a contract, agreeing to build the Hedge's house per the Hedge's plans. CP 279.

Therefore, at the time that MacPherson purchased, and subsequently renewed, the policy of insurance upon which it now relies, the *Schwindt* case defined the legal landscape pertaining to the interpretation of “work” exclusions in liability policies; those exclusions unambiguously prevent coverage for a general contractor’s liability for work performed by subcontractors. Because *Schwindt* was in the public domain at all times relevant to MacPherson’s policy, both the insurer and the insured should be deemed to have incorporated that law into their contract. As this Court very recently held, “It is presumed that any contract is made in contemplation of existing law.” *Silverstreak, Inc. v. Dep’t of Labor & Indus.*, 159 Wn.2d 868, 890, 154 P.3d 891 (2007) *see also Margola Assocs. v. Seattle*, 121 Wn.2d 625, 653, 854 P.2d 23 (1993). (“[C]ontracting parties are generally deemed to have relied on existing state law pertaining to interpretation and enforcement.”) MacPherson should not be entitled to claim that a policy provision is ambiguous where, at the time the insurance contract was made, there was unequivocal caselaw directly on point holding the opposite.

Mutual of Enumclaw is acutely aware, in making this argument, that the law of Washington requires insurance policies to be interpreted as would the average, lay insured:

In this state, legal technical meanings have never trumped the common perception of the common man. The proper inquiry is not whether a learned judge or scholar can, with study, comprehend the meaning of an insurance contract but instead whether the insurance policy contract would be meaningful to the layman. The language of insurance policies is to be interpreted in accordance with the way it would be understood by the average man, rather than in a technical sense.

*Boeing Co. v. Aetna Casualty & Sur. Co.*, 113 Wn.2d 869, 881, 784 P.2d 507 (1990) (citations omitted).

*Boeing* is distinguishable from Mutual of Enumclaw's argument in this case. It is one thing to interpret a policy as would an average, lay insured, but it is entirely another to suggest that the average lay insured is immune from legal precedent. Mutual of Enumclaw is not proposing that words in MacPherson's policy be given their "legal," rather than "common" definitions, as was the insured in *Boeing*; Mutual of Enumclaw is instead arguing that the presence of a case that says "this language means that the insured is entitled to no coverage for the poor work of subcontractors" (*Schwindt*) should be as binding on the insured as it would have been on the insurer. Any other rule would abrogate entirely the precedential effect of a judicial determination, even from this Court, that policy language was unambiguous, and destroy the legal stability so

necessary to the proper allocation of risks and premiums in the sphere of insurance.

**III. It is Improper to Even Consider An Exclusion that was Replaced by an Endorsement if the Endorsement is Unambiguous.**

Because the *actual* exclusion upon which Mutual of Enumclaw relies - the Work exclusion in the Umbrella Endorsement - is unambiguous, it is improper to use portions of the policy deleted by that endorsement to ascertain the “intent” of the insurer. MacPherson puts substantial weight on the fact that the Work exclusion in the Umbrella endorsement is phrased differently than the Work exclusion in the basic Umbrella policy. The basic policy provides that there is no coverage for liability for 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; CP 75.

The Endorsement replaces *pages* of Umbrella exclusions “relating to property damage” with one page of new ones, including:

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 any materials, parts or equipment furnished in connection therewith.

Because the work exclusion in the base Umbrella policy is clearly replaced by the endorsement, it is not, nor ever was, a part of

MacPherson's policy. The *only* possible relevance of an exclusion that is *not* part of the policy is to show the "intent" of the parties.

As this Court recently held in *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 186, 110 P.3d 733 (2005), "Washington law clearly requires this court to look first to the plain language of an insurance policy exclusion. If the exclusionary language is unambiguous, then the court cannot create an ambiguity where none exists. If the language is plain there is no need to consider extrinsic evidence of the parties' intent." Here, the language in the Endorsement's Work exclusion is plain, and there is no legal basis to search out "intent" by reference to exclusions that are not part of the policy.

Even if MacPherson were correct that the contents of the deleted exclusions ought to be used to interpret the actual exclusion, MacPherson is incorrect that this comparison creates ambiguity. It is critical to analyze *liability coverage* in relation to *liability asserted* in a Complaint. Consider two possible allegations in a Complaint:

1. MacPherson is liable for the defective construction work performed **by** MacPherson while building the Hedges' house.
2. MacPherson is liable for the defective construction work performed **by or on behalf of** MacPherson while building the Hedges' house.

The difference between these two allegations is absolutely

immaterial, because as the general contractor, MacPherson was responsible for the entire project as a “reality of commercial construction.” The superfluity noted by the Court of Appeals reflects the fact that this difference in language bears no relationship to any difference in liability. The first version of the allegation charges MacPherson with liability for its subcontractor’s work just as clearly as the second. Similarly, the Endorsement’s Work exclusion excludes subcontractor liability as clearly as the Umbrella’s. There is no ambiguity. Once the operation is completed, the work of the subcontractors has merged with the work of the general contractor<sup>1</sup>.

MacPherson attempts to avoid the application of *Schwindt* by relying on the case of *Fireguard Sprinkler Systems, Inc. v. Scottsdale Ins. Co.*, 864 F.2d 648 (9th Cir.1988)<sup>2</sup> and its progeny, asserting that the Court ought to consider various indicia of Mutual of Enumclaw’s private “intent” with respect to the language of the Endorsement. The *Fireguard* rule is exactly at odds with the *Schwindt* rule, though both decisions enjoy

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<sup>1</sup> “Whether the work was ‘done by’ or ‘on behalf of’ the general contractor is irrelevant to the analysis. *The completed product* is to be viewed as a whole, not as a ‘grouping’ of component parts.” *Schwindt*, 81 Wn. App. at 306 (emphasis added).

<sup>2</sup> *Fireguard* applied the state law of Oregon.

considerable support in other jurisdictions<sup>3</sup>. *Fireguard* was expressly rejected by the *Schwindt* court.

*Schwindt* remains the law of this State. Because the exclusionary language denied coverage for property damage arising out of the insured's work, and *all* of the work was the insured's work upon completion, there was no coverage for damage to that work.

**IV. There is No Evidence of Mutual of Enumclaw's Alleged "Intent" to Cover Liability Arising from Subcontractor's Work.**

MacPherson continues to insist that Mutual of Enumclaw "intended" to provide coverage for MacPherson's liability for poor work performed by subcontractors. Aside from the fact that such "evidence" is irrelevant in the face of clear policy language (*Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165), none of MacPherson's proffered evidence is relevant to what either of the actual parties to this insurance contract intended. Mutual of Enumclaw is confident when this Court closely inspects MacPherson's "sources" regarding Mutual of Enumclaw's alleged intent, it will discover that they do not represent Mutual of Enumclaw's intent at all.

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<sup>3</sup> The contours of this split of authority have been exhaustively briefed by both parties, on appeal, and in the Petition for Review.

MacPherson's primary "intent" source is a *post-hoc* ISO circular describing the effect of removing the words "or on behalf of" from an endorsement. However, the endorsement at issue is *not* the endorsement discussed in that circular, nor in any of the caselaw relied upon by MacPherson (though it is similar), and there is no evidence that Mutual of Enumclaw had any particular intention with respect to the Endorsement actually used.

Further, MacPherson presents no evidence that Mutual of Enumclaw was any more aware of that circular, or ISO's "intent," than was MacPherson. The only Mutual of Enumclaw testimony upon which MacPherson relies is that of claims representative Debbi Sellers. MacPherson tells the Court that Ms. Sellers testified at deposition that Enumclaw "follows ISO intent with respect to the scope of the UMB 3011 endorsement." (Pet. for Rev., p. 13). Ms. Sellers did no such thing. She was asked if she had knowledge of whether Mutual of Enumclaw underwriters intended something other than what ISO intended. CP 407. She confirmed that she had *no knowledge* of whether the underwriters intended "the endorsement to be interpreted in the same fashion." *Id.* She was then asked if she had come across any literature which indicated that Mutual of Enumclaw had a different intent than the ISO. She responded that she had not come across any such literature, but that she had not

spoken with any underwriter about it. *Id.* Here is how MacPherson analyses Ms. Sellers' testimony:

1. I do not know if Mutual of Enumclaw intended something other than the ISO.
2. I did not find any literature indicating that Mutual of Enumclaw intended something other than the ISO.

THEREFORE:

3. Mutual of Enumclaw "intended what ISO intended."

Even if intent evidence were relevant, neither the ISO circular nor this exchange with Ms. Sellers establishes Mutual of Enumclaw's intent, and the Endorsement's Work exclusion should be accorded its plain meaning.

**V. The "Merger" Doctrine is Not a Guide to Interpreting Insurance Policies - it is the Washington Law that Defines a General Contractor's Liability.**

The "Merger" doctrine is the core principle upon which the logic of the *Schwindt* case, and the Court of Appeals decision in this case, are based. As the Court of Appeals noted in this case:

[W]e 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. . . .

[U]nder Washington law, once an operation is completed, the work of the subcontractors has merged with the work of the general contractor, 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.

*Id.* at LEXIS \*28

The merger principle, however, does not exist for purposes of interpreting insurance policies; it exists because it is the law that applies to general contractors when they face liability for their poor work. It was, of course, the very basis for MacPherson’s liability to the Hedges for the failure of the siding on their house. The Hedges sued *MacPherson*, not the siding subcontractor that MacPherson hired, because it was *MacPherson* that was contractually responsible for all of the work. Unsurprisingly, it was MacPherson that was liable to the Hedges as a result of the arbitration award. MacPherson was not entitled to evade liability by pointing to its siding subcontractor, because it was MacPherson that agreed to perform that work. The fact that MacPherson elected to use a subcontractor is irrelevant vis-à-vis MacPherson’s liability. These are the “realities of commercial construction” noted by the *Schwindt* decision, and the source of this rule has nothing to do with the

interpretation of insurance policies. Rather, the merger doctrine is an acknowledgement that a general contractor's reason for being, as a matter of reality and law, is to assume total responsibility for construction<sup>4</sup>. And it is against the insured's *liability* that coverage under the policy is measured. Because it is irrelevant, for purposes of MacPherson's liability whether the poor work was performed "by MacPherson or on its behalf" the Court of Appeals correctly found that the exclusion prevented coverage for this claim.

**VI. If this Court Overrules *Schwindt* and Reverses the Court of Appeals, that Policy Interpretation Should Apply Purely Prospectively.**

*Schwindt* is a well-reasoned case whose logic should be adopted by this Court and following in the case at bar. For the past twelve years, *Schwindt* has been the controlling law of the State of Washington. It defined the legal environment in which Mutual of Enumclaw sold its policies, and in which MacPherson and its agent purchased policies. *Schwindt* defined the risks that MacPherson and Mutual of Enumclaw shifted through the insurance indemnification agreement. As the court noted in *Staiger v. Burkhart*, 299 Ore. 49, 54, 698 P.2d 487 (1985), "The insurer was charged with knowledge of the relevant law when it set its

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<sup>4</sup> "The point of hiring a general contractor for a construction job is for the general to manage the job and hire the subcontractors. The owner does not deal directly with the subcontractors, and often is unaware of the identity of the subcontractors." *D.J. Painting Inc. v. Baraw Enters.*, 172 Vt. 239, 245, 776 A.2d 413 (2001).

premium and sold the policy to the [insured].” If MacPherson were given the benefit of the law of other jurisdictions, that had been expressly rejected by Washington before its premium was set, MacPherson would receive a windfall.

Even if this Court disagrees with the result of *Schwindt*, there can be no argument that it was operative at all times relevant to this case. If the Court overrules *Schwindt* and reverses the Court of Appeals in the case at bar, the new law announced by the Court should be applied purely prospectively, as a matter of basic fairness. There are three theoretical ways in which an appellate decision can become the law. It can apply retroactively, selectively prospectively, or purely prospectively. *Robinson v. Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992) cert. den. 506 U.S. 1028, 113 S. Ct. 676, 121 L. Ed. 2d 598 (1992). Retroactive application is where the rule announced by the Court is applied to the parties before the Court, and to future cases, including pending proceedings that have not yet reached the court of last resort. “The practice of retroactive application is ‘overwhelmingly the norm.’” *Id.* at 74. “Modified” or “Selective” application is where the new rule announced by the Court applies to the parties in the case announcing that rule, but applies to other parties only prospectively. *Id.* There are strong policy reasons against selective prospective application, as it applies differently to different parties, on

identical facts. As the Court noted in *Robinson*, Washington does not employ selective prospective application of caselaw, at least in civil matters.

Finally, there is pure prospective application. This standard “requires the new rule be applied neither to the parties in the law-making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision.” *Id.* at 74. The three factors that Washington courts consider in determining whether a decision will apply prospectively are the following<sup>5</sup>:

(1) determine whether the decision establishes a new principle of law either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect and whether retrospective operation will further or retard its operation; and (3) weigh the inequity imposed by retroactive application.

*Id.* at 72<sup>6</sup>.

In the case at bar, if the Court reverses the Court of Appeals, each of these factors weighs heavily in favor of pure prospective application of

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<sup>5</sup> The Court in *Robinson* ruled that its decision applied retroactively, but noted that the option of prospective application of judicial decisions remains viable.

<sup>6</sup> *Robinson* notes that the case from which these factors were drawn, *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971), has been criticized and its application limited. However, *Robinson* also notes that subsequent United States Supreme Court decisions have left open the possibility of purely prospective application of decisions.

any new rule announced by the Court. First, *Schwindt* is clear precedent which defined the law of Washington at the time the MacPherson's policy was sold and its premium calculated. Second, by taking a side in the national split of authority regarding the effect of the Endorsement, *Schwindt* has played a role in reducing uncertainty regarding indemnification obligations, and thus reducing the risk to both the insurer and the policy holder. As MacPherson frequently mentions, coverage for the liability for the poor work of subcontractors was available on the market, had MacPherson elected to pay the premium to obtain it. Third and finally, the retroactive application of a rule abandoning *Schwindt* and adopting the opposing line of authority would be inequitable in these circumstances, because the risks shifted by the policy were calculated and assessed in the *Schwindt* context. If the Court reverses the Court of Appeals and applies a rule that neither party had any reason to foresee, that rule should apply prospectively only, and not directly to the parties to the case at bar.

## **VII. Conclusion**

Mutual of Enumclaw respectfully requests that the Court affirm the Court of Appeals decision in this case. However, in the event that the Court is inclined to establish a novel rule of Washington law, Mutual of Enumclaw respectfully requests that it be applied purely prospectively to

insurance contracts entered into subsequent to the date on which this Court's opinion is published.

DATED THIS 29th Day of May, 2008.

HACKETT, BEECHER & HART

/s/ Original Signature on File  
Brent W. Beecher, WSBA #31095  
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CERTIFICATE OF SERVICE

The undersigned declares under the penalty of perjury that on Thursday, May 29, 2008, she caused a copy of *Respondent's Supplemental Brief* to be served on the following counsel:

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Dear Clerk,

Attached for filing is Respondent's Supplemental Brief for the following matter.

Supreme Ct. No. 80590-3

Mutual of Enumclaw, Respondent v. MacPherson Construction & Design, LLC, Petitioner

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