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SUPREME COURT
OF THE STATE OF WASHINGTON

BY RONALD R. CARPENTER

CLERK

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent,

v.

MACPHERSON CONSTRUCTION & DESIGN, LLC

Petitioner.

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STATE OF WASHINGTON

**SUPPLEMENTAL BRIEF OF
PETITIONER MACPHERSON CONSTRUCTION & DESIGN, LLC**

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I. INTRODUCTION

This case involves a dispute over the meaning of a phrase in an insurance contract. This Court has long held that an insurance contract must be interpreted according to its language. The Court of Appeals erred when it subordinated this bedrock rule of law to an overbroad misapplication of an already limited insurance principle (the “business risk” doctrine). No rule of law in this state has ever sanctioned the application of ephemeral insurance doctrines over an analysis of the plain language of the policy provision at issue. The decision of the Court of Appeals should be reversed and this Court should hold that the “work performed” exclusion contained in the UMB 3011 endorsement does not bar coverage for property damage arising out of the work of Petitioner MacPherson Construction & Design, LLC’s (“MacPherson”) subcontractors.

II. ASSIGNMENTS OF ERROR

The Court of Appeals erred in at least four ways.

First, the decision of the Court of Appeals violates the rule that, if the language of an insurance policy is plain and unambiguous, courts should apply that language as it is written. In abandoning this rule in favor of the misapplication of anachronistic principles of liability insurance, the decision of the Court of Appeals invalidates a key liability

protection for which Washington contractors have paid enormous premiums to secure. As it stands, the decision of the Court of Appeals will cause contractors in this state to forfeit, with no corresponding return of premium, an important insurance coverage for their businesses. The resultant windfall to insurers is unjustified.

Second, to the extent the policy language at issue could be considered ambiguous, this Court has held that ambiguities must be construed against the insurance company. It was error for the Court of Appeals to interpret the policy language at issue in Mutual of Enumclaw's favor, where MacPherson offered a reasonable interpretation of the same language. Division One's error is particularly significant where, as here, the insurance industry organization that drafted the very language at issue clarified long ago that MacPherson's current interpretation of the language at issue is not only a "reasonable" interpretation – it is the intended interpretation.

Third, the Court of Appeals erred by relying on Schwindt v. Underwriters at Lloyd's London,¹ when it held that Mutual of Enumclaw's deletion of the "by or on behalf of" language was "superfluous." Schwindt has no precedential value in this appeal, as Schwindt involved a different exclusion and different policy language than is used in

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

MacPherson's policy.² Moreover, the Schwindt court based its decision, in part, on the fact that it had no evidence before it regarding what the insurer intended the policy language at issue to mean. Here, MacPherson offers substantial authority, as well as the admissions of Mutual of Enumclaw itself, establishing that Mutual of Enumclaw intended to cover property damage arising out of its named insured's subcontractors when it changed its policy language. Schwindt should be overruled to the extent it is inconsistent with this Court's rules regarding the interpretation of insurance contracts.

Fourth, the Court of Appeals erred when it held that MacPherson had the burden to prove what Mutual of Enumclaw *subjectively intended* when it used the policy language at issue. This is not the correct burden of proof in Washington. Even if it was, MacPherson presented unrebutted deposition testimony and authority establishing that Mutual of Enumclaw interpreted its UMB 3011 endorsement "in the same fashion" that ISO intended the endorsement to be interpreted.

III. STATEMENT OF THE CASE

MacPherson was a general contractor and built a custom home for Thomas and Anne Marie Hedges. MacPherson utilized subcontractors to

² The Court of Appeals' reliance on the case of Mutual of Enumclaw v. Patrick Archer Construction is similarly misplaced, as that case also dealt with a "products" exclusion, not with a "work performed" exclusion. *See also* note 38, *infra*.

perform the labor on the project.³ Employees of the siding subcontractor inadvertently failed to install the necessary flashing and caulking at the seams of the synthetic stucco system.⁴ Water entered the seams and caused severe damage to the wood framing and sheathing members underneath.⁵ An arbitrator awarded the Hedges \$399,088.32 against MacPherson.⁶ Mutual of Enumclaw refused to pay any of the award.

Mutual of Enumclaw 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 contained several forms and endorsements, including a “UMB 3011” endorsement. The “UMB 3011” endorsement – captioned “Broad Form Property Damage (BFPD) Including Completed Operations”⁸ – replaced the “work performed” exclusion in the main umbrella coverage form with a more limited exclusion – one that deleted the “or on behalf of” language:

³ CP 229 at ¶ 3.

⁴ CP 234 – 238; CP 1361 – 1366.

⁵ CP 415 – 425.

⁶ CP 427.

⁷ CP 429 – 542.

⁸ Referred to in relevant literature by the acronym “BFPD” endorsement.

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 or any portion thereof, or out of materials, parts or equipment furnished in connection therewith.⁹

The UMB 3011 endorsement utilized standard language drafted by the Insurance Services Office (“ISO”).¹⁰ The ISO version of the UMB 3011 endorsement is referred to as “Exclusion (z).” The “BFPD Including Completed Operations” exclusions found in Exclusion (z) and in MoE’s version of Exclusion (z) – the UMB 3011 endorsement – are identical in all material respects.

Division One of the Court of Appeals held that the deletion of the “or on behalf of” language in the UMB 3011 endorsement was “superfluous” and “does not support the conclusion that MoE intended to broaden the coverage provided by the policy.”¹¹ The Court of Appeals concluded that, notwithstanding the deletion of “or on behalf of,” the

⁹ CP 158 (emphasis added).

¹⁰ 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.”).

¹¹ Mutual of Enumclaw v. MacPherson, 2007 Wash. App. LEXIS 2024 at *33 (2007).

Policy continues to exclude “coverage for claims arising from work performed by MacPherson’s subcontractors.”¹²

MacPherson filed a timely Petition for Review in this Court, seeking review of Section II of the decision of the Court of Appeals. This Court accepted review on April 30, 2008.

IV. ARGUMENT

The decision of the Court of Appeals abandons rules governing the interpretation of an insurance contract in favor of antiquated misapplications of the “business risk” and “merger” doctrines. Notwithstanding, a simple reading of the contract language at issue supports MacPherson’s position. Even if there was a question as to what the language at issue means, MacPherson compellingly supports its interpretation by way of explanatory memoranda issued by the very organization that drafted the policy language at the heart of this appeal.

A. **A BRIEF HISTORY OF THE EXCLUSION AT ISSUE**

In 1973, the BFPD endorsement and its Exclusion (z) were standardized by the insurance industry.¹³ “Exclusion (z) modified the work performed exclusion in the main body of the CGL policy so that instead of excluding coverage for work performed ‘by or on behalf of’ the

¹² Id.

¹³ Insurance for Defective Construction, Wielinski at 273 (2nd ed. 2005).

named insured, it excluded only property damage to work performed ‘by’ the named insured, *thus providing coverage to a general contractor for defective workmanship of its subcontractors.*”¹⁴ Mutual of Enumclaw sold its version of Exclusion (z) to MacPherson (i.e. the UMB 3011 endorsement).

B. THE LIMITED REACH OF THE “BUSINESS RISK” DOCTRINE AS APPLIED TO THIS CASE

In support of its position in the Court of Appeals, Mutual of Enumclaw offered a 1971 law review article by Roger Henderson, entitled *Insurance Protection for Products Liability and Completed Operations – What Every Lawyer Should Know.*¹⁵ Mutual of Enumclaw offers the Henderson article to support the broad notion that a CGL policy is not intended to cover property damage arising out of defective work or products.¹⁶ Henderson’s article, however, was authored before Exclusion (z) was drafted. Therefore, it should not be considered when interpreting language equivalent to that used in Exclusion (z):

[T]he purpose of the Henderson article was to discuss the 1966 revisions to the standard form CGL policy, in particular the effect of the 1966 revisions to create a dichotomy between products liability coverage for

¹⁴ Insurance for Defective Construction, Wielinski at 273 (2nd ed. 2005) (emphasis added).

¹⁵ 50 NEBRASKA LAW REVIEW 415 (1971).

¹⁶ Mutual of Enumclaw’s Response Brief of Cross-Respondent at 32-33; *see also* Insurance for Defective Construction, Wielinski at 276 (2nd ed. 2005).

manufacturers and completed operations coverage for contractors and other providers of services.

A fact overlooked by the courts that relied on this article, however, is that the 1966 CGL revisions were made 3 years before [Exclusion (z)] was drafted by the insurance industry. . . .

Unfortunately, in most of the cases that rely on this article as persuasive authority for the intent behind the drafting of the products and work performed exclusions, the courts have seized on the “business risk” analysis at the expense of focusing on the actual language contained in the policy.¹⁷

Thus, the major flaw in the reasoning employed by the Court of Appeals stems from its reliance on the spirit, if not the letter, of the Henderson article to invalidate subsequently-drafted policy language that Henderson himself **did not intend to address**. This strained reasoning employed by the Court of Appeals (the legal equivalent of trying to shove the proverbial square peg into the round hole) was predicted by earlier commentary warning of the dangers of failing to interpret policies by resort to actual policy language:

Obviously, there can be no argument with the basic premise that an insured contractor . . . should not be insured for business risks within its own control. *However, that underlying premise cannot serve as a substitute for careful application of the policy provisions to a defective work claim.* A departure from the application of policy

¹⁷ Insurance for Defective Construction, Wielinski at 276 (2nd ed. 2005) (emphasis added).

provisions to the individual claim leads to anomalous results that benefit neither insureds nor insurers.

In fact, these very policy provisions circumscribe and limit the business risk doctrine by preserving coverage for certain risks that might usually be regarded as typical business risks of an insured contractor. *There is no better example of such a provision than Exclusion (z) of the Broad Form Property Damage (BFPD) endorsement.*¹⁸

When the focus is properly placed upon the precise contract language, it is apparent that the deletion of the “or on behalf of” language was not superfluous and should not be subsumed by an “ephemeral” application of the “business risk” doctrine.¹⁹ This Court must reverse the decision of the Court of Appeals.

C. THE DECISION OF THE COURT OF APPEALS VIOLATES THE RULE THAT, IF THE LANGUAGE IN AN INSURANCE POLICY IS PLAIN AND UNAMBIGUOUS, COURTS SHOULD APPLY THAT LANGUAGE AS IT IS WRITTEN

This Court has long held that “if the policy language is clear and unambiguous, we must enforce it as written.”²⁰ Courts do not create

¹⁸ Insurance for Defective Construction, Wielinski at 273 (2nd ed. 2005).

¹⁹ *See Insurance for Defective Construction*, Wielinski at 273 (2nd ed. 2005) (“Historically, the analysis of the applicability of these exclusions has been colored by a tendency by the courts to apply them not according to the terms and language of the exclusions themselves, but according to the ephemeral ‘business risk’ doctrine.”).

²⁰ 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.²¹ Similarly, courts do not change contract language under the guise of interpreting it.²²

To determine the plain meaning of undefined terms, Washington courts look to standard English language dictionaries.²³ 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*.”²⁴ On the other hand, the dictionary defines “on behalf of” as: “As the agent of; on the part of.”²⁵

Here, Mutual of Enumclaw issued 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.” Utilizing standard English language dictionary definitions, the plain language of the exclusion limits its reach to property damage to work MacPherson *alone* performed

²¹ 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.”).

²² 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.”).

²³ 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.

²⁴ THE AMERICAN HERITAGE® DICTIONARY OF THE ENGLISH LANGUAGE 255 (4th ed. 2000).

²⁵ THE AMERICAN HERITAGE® DICTIONARY OF THE ENGLISH LANGUAGE 162 (4th ed. 2000).

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. 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.

**D. TO THE EXTENT THE POLICY LANGUAGE AT ISSUE
COULD BE CONSIDERED AMBIGUOUS, THIS COURT
HAS HELD THAT SUCH AMBIGUITIES MUST BE
CONSTRUED AGAINST THE INSURANCE COMPANY**

Even if there was any question as to the interpretation of the “work performed” exclusion, this Court has repeatedly held that ambiguous exclusions must be interpreted in favor of coverage.²⁶ MacPherson and Mutual of Enumclaw offered competing interpretations of the UMB 3011 “work performed” exclusion. MacPherson argued that the deletion of the “or on behalf of” language constituted an intentional broadening of coverage and offered case law, industry commentary, and – most persuasively – an ISO memorandum explaining the exclusion at issue. As one commentator explained:

The [Broad Form Property Damage] endorsement including completed operations contains what at first

²⁶ 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.”)

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.*²⁷

Also, as discussed in MacPherson's Petition for Review, the weight of common law authority also favors MacPherson's interpretation.²⁸ Even if the exclusion were to be found ambiguous, MacPherson is entitled to an interpretation in its favor as a matter of law.

²⁷ Insurance for Defective Construction, Wielinski at 209-10 (2nd ed. 2005). (Emphasis added.)

²⁸ 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. 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).

E. THE COURT OF APPEALS WAS WRONG - SCHWINDT HAS NO APPLICATION IN THIS CASE

The Court of Appeals cited its prior holding in Schwindt v. Underwriters at Lloyd's of London,²⁹ when it held that the deletion of the “or on behalf of” language in the “work performed” exclusion was “superfluous.” Division One erroneously reasoned that, because “under Washington law, once an operation is completed, the work of the subcontractors has merged with the work of the general contractor.”³⁰ The Court of Appeals held that this principle obviated coverage for property damage arising out of the work of subcontractors, despite Mutual of Enumclaw’s decision to utilize narrower policy language. This is also despite a premium having been paid by the named insured for the narrower “work performed” exclusion contained in the UMB 3011 endorsement. In so holding, the Court of Appeals grossly misapprehended the import of the holding in Schwindt. The decision in Schwindt is of no precedential value in the context of this case for the following reasons.

First, Schwindt involved a policy form issued by Lloyd’s London which did not utilize language drafted by ISO. MacPherson’s Policy did. This distinction is significant, as even the Schwindt court recognized that it had been presented with “no comparable evidence that the insurers did

²⁹ 82 Wn. App. 293, 914 P.2d 119 (1996).

³⁰ Mutual of Enumclaw v. MacPherson, 2007 Wash. App. LEXIS 2024 at *33 (2007).

not intend to include the work of subcontractors in these provisions.”³¹

Such evidence is before the Court in this case.

Second, and most importantly, the exclusion at issue in Schwindt is the “products” exclusion.³² Schwindt *did not* involve a “work performed” exclusion. Conversely, this appeal *does not* involve a “products” exclusion. A comparison of the respective policy language best illustrates this distinction.

Exclusions at issue in <u>Schwindt</u>	Exclusion at issue in <u>MacPherson</u>
<p>(1) <i>for repairing or replacing any defective product or products</i> manufactured, sold or supplied by the Assured or any defective part or parts thereof nor for the cost of such repair or replacement; or</p> <p>(2) for the loss of use of any such defective product or products or part or parts thereof, or</p> <p>(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 performed³³</p>	<p><i>The exclusions of this policy relating to Property Damage are replaced by the following exclusion...</i></p> <p>B. With respect to the COMPLETED OPERATIONS HAZARD to Property Damage to <i>work performed</i> by the Named Insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith.³⁴</p>

³¹ Schwindt, 81 Wn. App. at 305.

³² Schwindt, 81 Wn. App. at 295.

³³ Schwindt, 81 Wn. App. at 295 (emphasis added).

³⁴ CP 531 (emphasis added).

The policy language at issue in this case and in Schwindt are markedly different. It was therefore error to rely on Schwindt to deny MacPherson coverage. This Court should so rule.

Third, as part of its erroneous analysis of Schwindt, the Court of Appeals erred by commingling the “work performed” exclusion and the “products” exclusion into a hybrid (but contractually absent) “work product” exclusion.³⁵ Just like there is no “products” exclusion contained in the UMB 3011, there is no “work product” exclusion contained in the UMB 3011. This tendency to ignore policy language in favor of broad applications of the “business risk” and “merger” doctrines is an anomaly this Court must remedy. The case at bar and the Schwindt case are apples to oranges. In sum, it is untenable to apply the rule of Schwindt to a case involving a different exclusion and markedly different policy language.

F. THE COURT OF APPEALS’ ERRONEOUS RELIANCE ON SCHWINDT RESULTS IN AN UNWARRANTED RESTRICTION IN MACPHERSON’S COVERAGE

Commentators have sagely predicted the errors made by the Court of Appeals in this case.

³⁵ Schwindt, 81 Wn. App. at 305. The exclusion at issue in Schwindt involved “products manufactured, sold or supplied by the Assured.” Nowhere in the exclusions cited by the Schwindt court does the phrase “work done by the Assured” appear. Despite this, the Schwindt court illogically proceeds to address “policy exclusions [referring] to products installed and work done by ‘the Assured,’ not ‘on behalf of’ the assured.”

Unfortunately . . . the courts have seized on the “business risk” analysis at the expense of focusing on the actual language contained in the policy. This is evident from the [Weedo v. Stone-E-Brick, Inc., 405 A.2d 788 (N.J. 1979)] opinion where, in numerous places, the court collapsed the products and work performed exclusions into what is referred to as the “business risk” exclusion.

Moreover, . . . many other courts similarly collapsed the products and work performed exclusion into a “work product” exclusion in applying them to claims involving work performed by an insured contractor. . . . Forsaking the policy language for the business risk analysis leads to unwarranted restrictions of coverage, since a more thorough analysis of the policy language is necessary to understand how the addition of Exclusion (z) and the deletion of the work performed exclusion broaden the coverage.

A prime example of the anomalous coverage determinations that can result from blind adherence to the business risk analysis at the expense of the actual terms of the policy is set out in a line of cases from Minnesota, starting with Bor-Son Bldg. Corp. v. Employers Commercial Union Ins. Co. of Am., 323 N.W.2d 58 (Minn. 1982). . . .

The [Bor-Son] court ignored the BFPD endorsement and basically adopted the business risk analysis set out in Weedo v. Stone-E-Brick and the Henderson law review article *Of course, this was despite the fact that those authorities were distinguishable since they did not address policies with BFPD endorsements attached.*³⁶

³⁶ Insurance for Defective Construction, Wielinski at 276-77 (2nd ed. 2005). *See also* Wanzek Constr., Inc. v. Employers Ins. of Wausau, 679 N.W.2d 322, 326, 2004 Minn. LEXIS 235 (2004) (The Bor-Son opinion “does not identify which form of the exclusion was in the policy,” nor does it even reference the “work performed” exclusion.”)

The Court of Appeals' "blind adherence to the business risk analysis at the expense of the actual terms of the policy" becomes evident upon review of the following passage:

The Wanzek decision did not, however, invalidate the holdings in Bor-Son and Knutson³⁷ 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. . . . *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 contractor.'*"³⁸

In order to correct the harm suffered by MacPherson, this Court must reverse the Court of Appeals and enter judgment in MacPherson's favor.

³⁷ Knutson Constr. Co. v. St. Paul Fire and Marine Ins. Co., 396 NW.2d, 229, 1986 Minn. 1986).

³⁸ Mutual of Enumclaw v. MacPherson, 2007 Wash. App. LEXIS 2024 at *30-1 (2007) (emphasis added) (*also citing Mutual of Enumclaw v. Patrick Archer Construction, Inc.*, 123 Wn. App. 728, 735-36, 97 P.3d 751 (2004)). As briefed by MacPherson in the Court of Appeals, any reliance on Patrick Archer is as misplaced as reliance upon Schwindt, insofar as Patrick Archer also only involved a "products" exclusion. Patrick Archer, 123 Wn. App. at 733 ("Rather, the applicability and scope of the products exclusion is at issue.")

G. THE COURT OF APPEALS ERRED WHEN IT REQUIRED MACPHERSON TO SHOULDER THE BURDEN TO PROVE WHAT MUTUAL OF ENUMCLAW SUBJECTIVELY INTENDED WHEN IT UTILIZED THE EXCLUSIONARY LANGUAGE AT ISSUE

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.³⁹

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.*”⁴⁰ 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.⁴¹

³⁹ Mutual of Enumclaw v. MacPherson, 2007 Wash. App. LEXIS 2024 at *32-3 (2007).

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

⁴¹ 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. Contrary to the Court of Appeals’ decision, even if it were MacPherson’s burden to prove what Mutual of Enumclaw intended (though it is not), MacPherson offered such evidence:

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.**⁴²

V. CONCLUSION

For the foregoing reasons, and for the reasons stated in the record on review, MacPherson respectfully asks this Court to reverse the decision of the Court of Appeals enter judgment in its favor. MacPherson also renews its request for attorney’s fees and expenses pursuant to RAP 18.1.

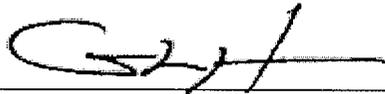
⁴² CP 407 (emphasis added).

VI. APPENDIX

Attached as an exhibit is a copy of ISO "Broad Form Property Coverage Explained" GL 79-12 (January 29, 1979). This document has sometimes been referred to as "the ISO circular" in these proceedings.

RESPECTFULLY SUBMITTED this 30th day of May, 2008.

HARPER | HAYES PLLC

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

Filed as attachment to E-mail

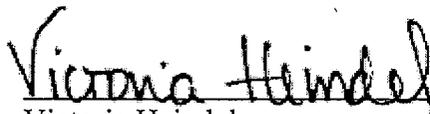
CERTIFICATE OF SERVICE

The undersigned certifies that on *Friday, May 30, 2008*, 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

DATED this 30th day of May, 2008.



Victoria Heindel

Filed by attachment to E-mail

APPENDIX

Circular

January 29, 1979

BROAD FORM PROPERTY DAMAGE COVERAGE EXPLAINED

General Liability GL 79-12
(Rules/Forms)

BACKGROUND

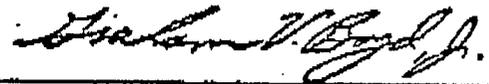
Because Broad Form Property Damage Coverage is difficult to understand, companies and agents have requested that we make available an explanation of this coverage as provided by Advisory Endorsements ADV-3005 and ADV-3006. This coverage is also provided in Standard Endorsement G222 (GL 04 04 07 76), Broad Form Comprehensive General Liability Endorsement.

ISO ACTION

We have established a comparative analysis showing the advisory endorsement language and the explanation of intent.

ATTACHMENT

Explanatory Memorandum for Broad Form Property Damage Coverage



Graham V. Boyd, Jr.
Manager
General Liability Division
(212) 487-4672



EXPLANATORY MEMORANDUM*
BROAD FORM PROPERTY DAMAGE COVERAGE

The Broad Form Property Damage Endorsements ADV.-3005 and ADV.-3006 are intended primarily for contracting risks. However, when either endorsement is used in connection with a Comprehensive General Liability Policy, the result is to broaden and clarify property damage coverage for any risk covered thereunder. Although the effect of these endorsements is to extend property damage coverage, the approach is to modify the application of the property damage exclusion. The following explanation of intent corresponds to the appropriate sections of the endorsements. It should be pointed out that these endorsements are the same, except for the difference between exclusion (x) and (z), and will therefore be discussed together.

ADVISORY ENDORSEMENT LANGUAGE

It is agreed that the insurance for property damage liability applies, subject to the following additional provisions:

- A. The exclusions relating to property damage to (1) property owned, occupied or used by or rented to the insured or in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control and (2) 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, are replaced by the following exclusions (w) and (x).

(w or y) to property damage

- (1) to property owned or occupied by or rented to the insured, or, except with respect to the use of elevators, to property held by the insured for sale or entrusted to the insured for storage or safekeeping;

*This explanation also applies to that portion of Endorsement G222 that pertains to Broad Form Property Damage Coverage.

EXPLANATION OF INTENT

- A. This paragraph is self explanatory and refers to certain exclusions to which this Advisory Endorsement applies.

(w or y)(1) - Property owned by the insured is excluded in accordance with the traditional approach in liability policies but considerable difficulty has been found in defining owned property in connection with contracting risks. It is intended that property manufactured or purchased by the insured and constructed or installed at premises not owned by the insured shall be considered property owned by the insured until the construction or installation is accepted by the owner. Property of others which is constructed or installed on premises owned by the insured becomes property owned by the insured only when the construction or installation thereof is completed and the insured has the right to use such property (z)

The exclusion of property occupied by the insured is not intended to apply to occupancy in the sense of the insured's mere presence therein. The exclusion applies only to property which is formally occupied over a specific period of time for a specific purpose, as in the case where a general contractor is given the exclusive use of an area in a building as headquarters for his construction operations.

The exclusion of property held by the insured for sale is intended to apply only to property which is in his possession for that purpose. The exclusion of property entrusted for storage or safekeeping is intended to apply whether or not the insured retains possession of such property. These exclusions do not apply to the use of elevators.

- (2) except with respect to liability under a written sidetrack agreement or the use of elevators to (w or y)(2) - It must be kept in mind that this paragraph of the exclusion does not apply to property owned or rented to the insured, for such property is already specifically excluded by paragraph (1). The exception with which this paragraph commences follows the present exception to the property damage exclusion and has the effect of giving coverage for damage to property for which the insured is liable under a sidetrack agreement and for damage to property with respect to which the insured has purchased elevator property damage insurance. Thus, while property at the insured's premises is excluded generally under (w and y)(2)(a), if such property is damage because of the use of an elevator, then the damage is covered. Property damage which results solely out of the existence of the property while on the elevator is not covered. The property damage must result from the use of the elevator.

(a) property while on premises owned by or rented to the insured for the purpose of having operations performed on such property by or on behalf of the insured.

(2)(a) - This exclusion is intended to apply to the insured who is engaged in operations at his own premises, such as a television repairman. The exclusion applies from the time property is brought onto the premises until it is taken away therefrom. The language is not intended to exclude coverage for damage to property brought onto the insured's premises in connection with his operations or to be installed for the insured. For example, consider a general contractor who is performing construction operations on premises which he owns. If a subcontractor brings property that the subcontractor owns onto the insured premises for the purpose of installation or construction, and the general contractor damages this property owned by the subcontractor, such damage is intended to be covered. As another example, consider an insured manufacturer who order a piece of machinery. The machinery is brought onto the insured manufacturer's premises to be installed by the seller, and the insured damages the machinery during the installation. Coverage is intended for such damage.

(b) tools or equipment while being used by the insured in performing his operations,

(2)(b) - Tools and equipment not excluded under paragraph (1) are excluded while actually being used by the insured. The word "equipment" is intended to mean any property used to implement the operations of the insured and particularly any mechanical device, whether it is permanently installed at the premises or whether it is brought onto the premises by the insured. Property damage to cranes, hoists, etc., not formally rented to the insured but borrowed temporarily would be excluded under this section. Property damage arising out of the occasional use by the insured of an elevator on the premises to carry materials would not be excluded, but if the insured were performing operations on an elevator shaft and using the elevator as a platform for such operations, then the elevator would be regarded as "equipment" and property damage to such equipment would be excluded.

(c) property in the custody of the insured which is to be installed, erected or used in construction by the insured,

(2)(c) - This exclusion is intended to apply to property furnished to the insured for construction or installation from the time such property is delivered to the insured until the time the insured commences the construction or installation. For example, the owner of premises may turn over to the general contractor an expensive piece of machinery, such as an air-conditioning unit, to be installed in a building which is being erected by the general contractor-insured. Damage to such property is excluded.

(d) that particular part of any property, not on premises owned by or rented to the insured,

(2)(d) - This paragraph is intended to precisely define the extent to which damage to property on which the insured is actually working is to be excluded. Under the present policy language, with respect to general contracting risks, the exclusion relating to property in the care, custody or control of the insured is intended to remove from coverage all property damage caused by an insured in many situations.

Under this care, custody or control exclusion, if the general contractor who is in charge of a project damages a portion of it, the damage is excluded even though that portion may be work being performed by a subcontractor. On the other hand, if a subcontractor damages some portion of the job beyond his own scope of operations, the damage would be covered. The intent under these endorsements is to give the same coverage to both the general and subcontractor for damage arising out of their own operations and to exclude only damage to the particular property on which the insured is working.

The exclusion is intended to apply only to the part of the property on which the operations are being performed. In this context, "property" is intended to mean any unit of property which may become the subject of liability. For example, consider an insured subcontractor who is erecting steel beams furnished to him by the general contractor. Having erected four steel beams, the subcontractor is in the process of erecting a fifth steel beam and this beam falls, resulting in damage to all five beams. "That particular part" of the property would be the fifth beam. As another example, if the insured were an electrical subcontractor and, in the process of installing a switch which was furnished to him, he damaged the switch which resulted in burning out the electrical system, the switch would be "that particular part" of the property.

(1) upon which operations are being performed by or on behalf of the insured at the time of the property damage arising out of such operations, or

(2)(d)(i) - This clause excludes the property on which the insured is actually working at the time of the property damage. It also excludes property damage caused by subcontractors of the insured while they are actually working on the property. Where the damage caused by the insured in the performance of his operations goes beyond damage to the property on which he is working, this section limits the exclusion to the particular part on which he is working.

(ii) out of which any property damage arises, or

(2)(d)(ii) - This section excludes property damage to the particular part of any property which was in use when damage occurred even though work on that part has been completed and also where it cannot be established that the damage was the result of faulty workmanship. For example, if the insured has installed a valve on a pressure vessel, and, while being tested, the valve fails to function because of a defect in the valve which causes the vessel to explode, only the damage to the valve is excluded.

(iii) the restoration, repair or replacement of which has been made or is necessary by reason of faulty workmanship thereon by or on behalf of the insured;

(2)(d)(iii) - This section excludes property damage to that particular part of any property which occurs after work on that part has been completed and where it can be established that the property damage was the result of faulty workmanship by the insured or his subcontractor. This section has particular application to the insured who undertakes to repair property.

(The following applies to exclusion (x) in Advisory Endorsement ADV. 3005-Broad Form Property Damage Endorsement)
(Excluding Completed Operations)

(x) with respect to the completed operations hazard (if the insurance otherwise applies to property damage included within such hazard) and with respect to any classification stated below as "including completed operations", 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.

(x) - This paragraph repeats the policy exclusion but makes it clear that the exclusion applies only to the completed operations hazard, thus avoiding any apparent conflict between this policy exclusion and exclusion (w)(2)(d) of endorsement ADV-3005.

(The following applies to exclusion (z) in Advisory Endorsement ADV.-3006-Broad Form Property Damage Endorsement)
(Including Completed Operations)

(z) with respect to the completed operations hazard and with respect to any classification stated below as "including completed operations", to property damage to work performed by the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith.

(z) - This exclusion in endorsement ADV.-3006, which modifies the corresponding policy exclusion, provides broad form completed operations property damage coverage by excluding 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.
- (4) The insured would have coverage for damage to a subcontractor's work, or if the insured is a subcontractor to a general contractor's work or another subcontractor's work, arising out of the insured's work.

B. The insurance afforded by this endorsement shall be excess insurance over any valid and collectible property insurance (including any deductible portion thereof) available to the insured, such as but not limited to Fire and Extended Coverage, Builder's Risk Coverage or Installation Risk Coverage, and the "Other Insurance" Condition is amended accordingly.

B. This paragraph is included to clarify the intent that endorsement coverage provided under these endorsements is to be excess over first party coverages available to the insured.

The following are specific examples showing the application of coverage provided under these endorsements:

<u>Situation</u>	<u>Result</u>
Painter decorating a home damages furniture while moving it out of the way.	Covered since it is not property to be used in connection with the insured's operations.
Painter damages chandelier while painting the interior of a home, the keys to which had been turned over to him.	Covered since it is not property used in connection with the insured's operations, nor is it property on which operations are being performed.
Contractor borrows a crane to set steel. The steel is not at the job site, and the crane is damaged (while at the site).	Covered since the borrowed crane is not actually being used.
Subcontractor brings equipment on job which is damaged by the insured general contractor who is not performing operations upon such equipment.	Covered since equipment is not property to be installed, erected or used in operations by the insured.
Insured general contractor damages light fixture being installed by subcontractor while moving concrete forms.	Covered since equipment is not property to be installed, erected or used in operations by the insured.
Insured general contractor pouring concrete floor for tenth story of new building. Forms used for construction of the tenth story collapse damaging rough plumbing being installed by a subcontractor.	Covered since equipment is not property to be installed, erected or used in operations by the insured.
Contractor replaces relief valve on a pressure vessel. As he is testing the vessel, it bursts because the relief valve does not function.	Covered with respect to the pressure vessel. Only the valve ("that particular part") is excluded.
Painter is burning paint off a house with a torch and sets fire to the house.	Covered except for "that particular part" to which the torch was applied.
Serviceman working on television in owner's home blows out picture tube while tinkering with another tube, or tips set over damaging other parts.	Covered since picture tube or other parts are not "that particular part" on which operation are being performed.

OFFICE RECEPTIONIST, CLERK

To: Victoria Heindel
Subject: RE: Mutual of Enumclaw Insurance Company v. MacPherson Construction & Design, LLC, Washington State Supreme Court No. 80590-3

Rec. 5-30-08

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Sent: Friday, May 30, 2008 12:17 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Mutual of Enumclaw Insurance Company v. MacPherson Construction & Design, LLC, Washington State Supreme Court No. 80590-3

Regarding:

Mutual of Enumclaw Insurance Company v. MacPherson Construction & Design, LLC
Supreme Court Case No. 80590-3

Good afternoon:

Attached to this email is the Supplemental Brief of Petitioner MacPherson Construction & Design, LLC. This brief is respectfully submitted by the following counsel of record:

Gregory L. Harper, WSBA #27311
Harper | Hayes PLLC
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600 University Street, Suite 2420
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Attorneys for Petitioner
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Thank you for your time.

Victoria Heindel
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