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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

NO. 66102-7-1
THE SUPREME COURT
OF THE STATE OF WASHINGTON

INTERNATIONAL MARINE UNDERWRITERS, a division of One
Beacon America Insurance Company, a Massachusetts Insurance
Company,

Respondents,

v.

ABCD MARINE, LLC a Washington LLC; ABCD MARINE, a
Washington partnership and ALBERT BOOGAARD, an individual
domiciled in Washington,

Appellants,

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE SUSAN CRAIGHEAD

APPELLANTS' PETITION FOR REVIEW

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COURT OF APPEALS
STATE OF WASHINGTON
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I. IDENTITY OF PETITIONER

The petitioner is Albert Boogaard, Appellant.

II. UNDERLYING DECISION

Come now the appellants pursuant to RAP 13.4 (b) and petition the court for reversal of the trial court's summary judgment dismissing the petitioners claims against defendant IMU, the Court of Appeals unanimous decision affirming the trial court dated December 5, 2011, and the majority decision of the Court of Appeals on March 7, 2012 denying Appellant's Motion for Reconsideration after requesting briefing.

III. ISSUES PRESENTED FOR REVIEW

The negligence of Northland Services, Inc. (hereinafter NSI) is an insured risk under the "insured contract" provisions of the Commercial General Liability (CGL) policy purchased by ABCD Marine, a general partnership (hereinafter ABCD) from International Marine Underwriters (hereinafter IMU). Does the status of the policy holder entity as a general partnership exclude the injured worker if he is also a partner?

Is there a question of substantial public interest implicated in this claim because partners, who are small independent contractors personally doing work on the premises, are left with no legal remedy if they are

required to enter into ubiquitous indemnity agreements with land owners and are injured by negligence of an agent or employee of the land owner?

Is there a conflict between the decision of the Court of Appeals and Washington case authority and national authority holding that an injured worker is a “third party” under “insured contract” provisions of CGL policies?

Does the rationale of *McDowell vs. Austin*, 105 Wn.2d. 48, 710 P. 2d. 192 (1985), which allows for the indemnification of land owners for their negligence by their contractors through the purchase of insurance policies with indemnification “insured contract” provisions, apply to contactor/partners, who cannot insure themselves against their own injuries through the negligence of the landowner because of the indemnification?

IV. STATEMENT OF THE CASE

The Court of Appeals found that Mr. Boogaard, by virtue of being general partner of ABCD, was a “first party” to the indemnity contract with NSI. Further, as a general partner, Boogaard was also deemed to be a “first party” to IMU’s policy “insured contract” provisions which provided indemnity coverage to NSI caused by the negligence of NSI employees to others. As a first party/partner to both the indemnity agreement and insurance contract, Boogaard was excluded for indemnity

coverage which would have been otherwise available to NSI for claims of third parties. (Decision pps. 9-10)

V. ARGUMENT

A. FACTS AND SUMMARY

On October 4, 2004 at approximately 7:30 a.m. after the early morning meeting, Boogaard parked ABCD's 20' panel van next to the lunch room/rest area preparing to go to the bathroom before starting work. As he turned off the van preparing to exit the van, he was speared by a 20 ton fork lift driven by long time NSI employee, Jeff Kronn. Boogaard suffered severe injuries and incurred over \$80,000 in uninsured medical expenses. He was off work for approximately a year, and he suffered permanent injuries. In this case IMU was obligated to indemnify NSI's employee negligence to any third party to NSI through an "access agreement" signed by Boogaard a general partner on behalf of ABCD, the named IMU insured on the IMU CGL policy. The Trial court and Court of Appeals held that Boogaard was responsible for personally indemnifying NSI against **own injuries** and he could not recover under the IMU ABCD CGL policy. Boogaard, an innocent victim, was left with \$600,000 of court approved but uncompensated damages

The present case presents both a conflict between prior case law, locally and nationally, and statutory law (RCW 4.25.115), RAP

13.4(b)(1), and has substantial public interest, RAP 13.4(b)(4), because of its dire implications to all small independent contractor/ partnerships whose partners personally do work or supervise work for land owners or general contractors who require “indemnity agreements” as a condition precedent for their proposed job called “access agreements.” Modern insurance practice provides automatic coverage for these contractors without notice to the carrier in their CGL policies for this common contractual requirement known in the industry as an “insured contract.” However, as in this case, where the partner/ contractor does the work himself and suffers an injury due to the negligence of an agent or employee of landowner/general contractor he has no legal remedy because he was deemed to be a “first party” to the indemnity agreement by the decision of the Court of Appeals.

The decision of the Trial Court and the Court of Appeals leave small independent partner contractors, such as Albert Boogaard (hereinafter Boogaard), without any remedy for any and all injuries they suffer due to the negligence of others on their work sites. This is a catastrophic result. The “Access Agreement” (Attached as Appendix A) which forms the basis of the lower courts’ rulings was not the result of the arms length bargaining between two large companies with the input of their attorneys and advisors. Instead, the “Access Agreement” is a two page pre-printed

form foisted on Boogaard to sign before NSI allowed Boogaard to enter their property and go to work welding one morning. The obvious intent of the agreement is to require that NSI's subcontractors provide indemnity insurance in their CGL policy to NSI for any and all injuries caused by NSI employees occurring on NSI property related to the sub-contractor's work. The insurance was intended to indemnify NSI against claims by anyone injured, including anyone working by or through the subcontractor. The indemnification provides as follows in part as follows:

This indemnification agreement includes all claims and suits against NSI by any employee (present or former) of User, and User waives all immunity and/or limitation on liability under any workman's compensation, disability benefit or other employee or employment-related act of any jurisdiction. (Exhibit A- paragraph 8)

In the present case, Boogaard, who was in ABCD's panel van prior to starting work on the premises of NSI on his way to do a welding job, would have been protected by statute, RCW 4.25.115, from providing indemnification to NSI for his own injuries as a condition for the work on their premises. However, after the decision *McDowell vs. Austin*, 105 Wn. 2d. 48, 710 P2d. 192 (1985), which allowed contractual insurance indemnification, this type of insurance indemnification requirement became ubiquitous in the construction /transportation industry in standard contract language.

To meet the needs of their customers, post *McDowell, supra*, insurance companies began inserting “insured contract” language in their CGL policies to provide standard and automatic indemnity for their insured sub-contractor customers. The Court of Appeals has previously found that this type of “insured contract” provided indemnification for claims of injured workers of the subcontractor against the general contractor/land owner for negligence. *Truck Ins. Exchange v. BRE Properties, Inc.*, Wash. App. 582, 595-596, 81 P.3d 929, 935 (2003).

The underlying decision of the Court of Appeals leaves the members of small sub-contractor partnerships, who do work themselves or supervise work of others, who are injured due to the negligence of agents or employees of landowners or general contractors, without a remedy in common law, statute, or insurance contract.

The rationale behind the decision, *McDowell, supra*, is thwarted in this case due to the decision from the Court of Appeals because a partner-contractor cannot buy insurance to cover his own general damages if he is injured on the premises of a customer that he has promised to indemnify, and thus he cannot cover that risk in his contract price.

B. “INSURED CONTRACT”

NSI, due to its status as a indemnitee of an “insured contract,” was entitled to be covered under ABCD’s IMU policy for liability for the

injuries to Boogaard arising out of ABCD's operations. NSI obtained a judgment for \$712,000 for their indemnity under the "Access Agreement" and assigned that judgment to Boogaard. Included in the NSI judgment was Boogaard's judgment for his injuries of \$600,000, and NSI's costs and attorneys fees of \$112,000. IMU was made a party to the lawsuit at the reasonableness hearing which approved the settlement. IMU did not appeal the finding of reasonableness or the summary judgments of Judge Spector. Just because IMU repeatedly shouts its "first party" mantra that Boogaard is making a first party claim does not make it true. The indemnified/insured was NSI and all its affiliates.

The named insured under the IMU contract was ABCD, a general partnership, and Boogaard was an "automatic insured" (Sedillo Declaration, Appendix B). By granting Northland's motion for summary judgment, Judge Spector found that the intent of Northland under the "Access Agreement" was to obtain indemnity from ABCD for injuries to anyone, including Boogaard, caused by the negligence of NSI's own employees arising out of work performed at the ABCD work site. No longer does IMU deny that the "Access Agreement" was an "insured contract" under the policy and instead it only argues that Boogaard was not a "third party" to the "insured contract."

“Insured contracts” are standard in the construction industry intending to provide automatic indemnity coverage for property owners on the contractor’s job site. There is no limitation in the “Access Agreement”/ “insured contract” limiting the indemnification of NSI from liability to any one group of injured parties. In fact, the “Access Agreement” is all inclusive and provides specifically for indemnification for NSI against any claim by anyone injured on the ABCD worksite, including ABCD employees. (Appendix A)

Boogaard is a third party to NSI and by law NSI would be liable to Boogaard for the negligence of NSI’s employees, and by contract ABCD was required to provide indemnity to NSI for that liability. The insured contract language of the Access Agreement covering injured employees is standard. To exclude injured employees ignores the very meaning of “insured contracts.”

There is no requirement in the IMU contract to notify IMU that their insured has signed such an indemnity agreement. Coverage is automatic. The relevant pages of the IMU contract are attached as Appendix C. The policy provides coverage as follows in Section IX Definitions 9 f.

“f: That part of any contract or agreement pertaining to your business (including an indemnification of a municipality) under which **you** assume the tort liability of

another to pay for a “bodily injury” or “property damage” **to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.**” (emphasis added).

If one looks at the indemnification provision in the IMU general liability contract itself the answer is clear. The term **You** has a specific meaning as the entity shown on the declaration. The term “*you*” is specifically defined in the IMU contract on Page 1 Second Paragraph as the named insured, ABCD. (Appendix C.)

“Named insured” (You) is distinguished from “insured.” The word “insured” means any person or organization qualifying as such under WHO IS AN INSURED (SECTION IV).

SECTION IV, WHO IS AN INSURED provides as follows:

1. If **you** are designated in the declarations as:...
 - b. A partnership or joint venture, you are insured. Your members your partners, and their spouses are also insured, but only with respect to the conduct of your business.

By definition in the policy itself the use of the term “**you**” is limited to the entity listed on the declarations page and everyone else is an “automatic insured” as described by Sedillo. There are differences between the two, i.e., between a named insured and others to whom coverage is provided. For instance, the named insured has stringent

reporting requirements. The employees, executive officers, and directors of the named insured are also insured. Certain exclusions apply only to the named insured (property). The named insured must reimburse deductibles. The named insured has to pay the premium. The named insured receives refunds. The named insured may cancel the policy, and the named insured receives all notices. (Appendix B).

As a practical matter the “insured contract” provision of this general liability policy is for the very purpose of not forcing the injured to have to go through the paperwork of adding every customer to its insurance policy as an “additional insured” when the customer requires such coverage under the construction contract for the work to be done. (Sedillo Dec., App. B).

Owners such as NSI want to be insured for injuries to the employees of the contractor/ABCD, who are the ones to be most likely to be injured on the site, and against whom ABCD would have immunity against their claims or comparative negligence by virtue of the L&I laws, see, eg. *Edgar v. City of Tacoma*, 129 Wn.2d 621, 634, 919 P.2d 1236 (1996). Ostensibly the argument for this is that the contractor generally has the most control over the work site and should bear the risk of accidents occurring there. (Sedillo Dec., Appendix B (CP 414)).

As a practical matter owners of shipyards, terminals, mines, garbage dumps, ski hills routinely provide visitors with agreements containing releases/waivers/indemnities every time a visitor desires entry to the premises through the controlled access to the owner's property. It would be impossible to do business if each one of those entities requesting entry had to call their insurance carriers each day to add each of their potential customers and/or suppliers for that day, in writing on their general liability policy, for each stop they make during the day.

C. GENERAL PARTNERSHIP IS A LEGAL ENTITY

The Court of Appeals, in its opinion, erroneously conflated the identity of ABCD, a general partnership, with the identity of Boogaard, a general partner and the managing partner of ABCD.

There is an entire statute, i.e., RCW 25.05.005 et seq. (The Uniform Partnership Act) that was overlooked by both the trial court and the Court of Appeals. First and foremost, The Uniform Partnership Act clearly and unequivocally states (at RCW 25.05.050): "Partnership as entity. (1) A partnership is an entity distinct from its partners."

In this case, the trial court and the Court of Appeals were presented with an undisputed history of the relationship of all of the parties to the case. There was no dispute but that ABCD was a general partnership

founded in the year 2000 by Boogaard and Cecil (Wes) Dahl for the exclusive purpose of doing welding business on Pier 115 in Seattle (CP 843 and CP 163-164). From the time they began through the date of the injury in this case when a NSI employee speared Boogaard with a forklift, ABCD scrupulously maintained all aspects of itself as a separate legal entity. All billings for welding services were in the name of ABCD. All payments made by NSI were paid to ABCD. Partnership tax returns were properly done by ABCD. ABCD was properly registered with the State of Washington. ABCD's status as a proper legal entity was never challenged in the trial court or in any of the briefing submitted to this Court of Appeals.

In 2001 when the pier operators demanded a liability insurance policy, ABCD purchased such a policy from IMU. The named insured was ABCD, and it is labeled on the facing page as a partnership (Appendix C). Nowhere in the policy does the name Boogaard appear. The premiums were all paid by ABCD consistently from 2001 through the date of the injury.

The document misconstrued by the Court of Appeals in its opinion is the Access Agreement (CP 395-396, Appendix A). In the top left hand corner of the Access Agreement, the "User" is identified under the caption "Identification of User." The first line in this identification box asks for

the name of the company. ABCD is so identified. Boogaard is labeled in that box as the “contact person.” In the box at the upper right hand corner, NSI asked for the identity of the company personnel who were to be allowed access to the pier; Boogaard and Wes Dahl were listed. It is clear that the ‘User’ is a company and that Boogaard is properly listed as one of two persons affiliated with the company who would be permitted access to the NSI jobsite.

It is only at the bottom of the front page, in regard to the signature lines that concerned the Court of Appeals. However, the signature is “by” Albert Boogaard who was specifically labeled as “Its: Senior Partner.” It makes no difference to a proper analysis if the partnership name is ABCD or “Albert Boogaard/Wes Dahl” because it is signed by Boogaard as a partner. How else could Mr. Dahl be bound by this document unless there was a partnership for which Boogaard was authorized to sign?

The short summary is that no one disputes the fact that from the year 2000 until the day before the Access Agreement was signed on September 29, 2004 ABCD was a general partnership and therefore a separate entity from its partners (as defined by law). Yet the Court of Appeals seemed to think that suddenly, on September 29, 2004, ABCD changed its form of doing business and that Albert Boogaard signed the Access Agreement as an individual.

The Court is urged to consider the following proposition. Had ABCD been a corporation, would its owner signing for the corporation be identical to it? If ABCD had been a limited liability company, would the court have still found an identity of interests? If ABCD had been an LLC, would the court still find Boogaard to be identified with it? Just because ABCD at all times material to this case was a legal general partnership does not and should not in law obscure this legal distinction between the company and its two partners.

The reverse page of the Access Agreement is even more explicit. It allocates liabilities of NSI (and all of its affiliated companies) and contractually shifts the burden of any NSI torts to whom? To the ‘**User.**’ (Appendix A, paragraph 8).

RCW 25.05.050 mandates that a partnership entity is distinct from its partners. Furthermore, in this case it is clear that the ABCD partnership, and *not* Albert Boogaard individually, was the owner of the IMU policy. RCW 25.05.060 provides that property acquired by the partnership is partnership property and not property owned by partners. The IMU insurance policy is partnership property and by statute Boogaard was not a co-owner of the policy. RCW 25.05.200.

The signature line of the Access Agreement is signed by Boogaard “as senior partner.” RCW 25.05.100(1), provides that a partner is the agent of the partnership for doing its business and binds the partnership

In this case everyone—absolutely *everyone*—treated ABCD as a separate legal entity from its individual partners. NSI certainly did. Alliance Insurance, ABCD’s broker, did. Boogaard and Mr. Dahl certainly did and were scrupulous in maintaining that separate business entity. IMU also did, by issuing its insurance contract to ABCD as a general partnership. The law also treats partners as separate and distinct from their business entity, the general partnership. In this case, only the courts have treated Boogaard as a first party and not as a distinct person separate from the business entity.

D. UNDERLYING JUDGMENT AGAINST BOOGAARD

The respondents argued in their response to petitioner’s motion for reconsideration that the judgment in the lower court in the Northland case was against Boogaard, and somehow this fact negates Boogaard’s status as a separate entity. It is true that a partner is jointly and severally liable for the obligations of a partnership. RCW 25.05.125. However, under the same statute Mr. Dahl, the other general partner, could have been sued by Northland for indemnification for the injuries to Boogaard. Would the

result in this case have been different in the underlying case if Mr. Dahl was sued by Northland for indemnity, because he was not injured by NSI and he did not personally sign the “Access Agreement?” Did the IMU insurance contract protect Mr. Dahl from the claims by NSI against him personally or upon his partnership liability for claims against ABCD?

Additionally, the Court of Appeals ignored the fact that ABCD itself is liable to Boogaard for relief from the judgment against him for the partnership liability to NSI for indemnification. RCW 25.05.170, *Gildon v. Simon Property Group Inc.*, 158 Wn. 2d. 483, 499, 145 P 2d 1196 (2006).

Had NSI sued the ABCD partnership directly instead of Boogaard for breach of contract it would not have been able to collect assets of Mr. Boogaard until it exhausted the assets of ABCD. Further, the same statute holds that a judgment against the partnership entity is not a judgment against the partner. RCW 25.05.130

E. “INSURED CONTRACTS” WORKER IS THIRD PARTY

The legal treatment of “insured contracts” by the Court of Appeals flies in the face of Washington precedent to provide compensation to the innocent victims of someone else’s negligence.

These CGL policies are common everywhere as are access agreements constituting insured contracts.

This Court below made a grave mistake, exposing, literally, thousands of owner/worker/supervisors of various businesses subject to these insured contracts to suffering their own losses when the owner of the property, who hires their company injures such a worker.

In order for independent companies to work on such properties, independent companies must sign similar, if not identical, access agreements. These indemnity contracts are so ubiquitous within the industry that insurance contracts such as the one issued by IMU to ABCD automatically provide customer indemnification without the need for any notification after the effective date of the insurance policy. In the insurance industry an employee of a subcontractor is never considered to be excluded as a first party claimant when injured by the negligence of the general contractor or any employee of the general contractor under these “insured contracts.” (Appendix B, paragraphs 18, 19, 20)

The language of the IMU contract is such that tort liabilities assumed by the named insured are excluded from coverage unless they are an ‘insured contract.’ Insured contracts are covered if the injury caused by the indemnitee (NSI) are to a ‘third person.’ The core of the language of the IMU policy (Appendix C) is:

“...notwithstanding anything to the contrary contained in this policy, it is hereby understood and agreed that this policy is subject to the following exclusions and that this policy shall not apply to:

...

2. ‘Bodily injury’ or ‘property damages’ for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. **This exclusion does not apply to liability for damages:**

a. **Assumed in a contract or agreement that is an ‘insured contract,’** provided the ‘bodily injury’ or ‘property damage’ occurs subsequent to the execution of the contract or agreement...” (CP 114) (emphasis added)

Insured contract is defined in relevant part as follows:

“9. ‘Insured contract’ means:

f. That part of any other contract or agreement pertaining to your business ... under which you assume the tort liability of another party to pay for ‘bodily injury’ or ‘property damage’ to a third person or organization...” [Emphasis added.] (CP 136)
under

As a matter of public policy, this published decision of the Court of Appeals leaves a whole and common class of workers unprotected from the torts of others—persons who are principals of and workers for general partnerships, as well as all independent contractors performing their own labor or supervising their employees on a customer’s work site.

The Court of Appeals acknowledged by its approval of the *Truck Insurance v. Bre*, 119 Wn App. 582 (2003), and *Cowan Systems Inc v. Harleyville Mutual Insurance*, 457 F 3d. 368 (4th Cir 2006) cases that

injured workers of subcontractors are third parties within the context of insurance 'insured contract' coverages. The result should be no different if the subcontractor named insured is a general partnership and the injured worker is a partner, yet that is the bizarre effect of the holding of the Court of Appeals. Is there any difference in risk to the insurance company to provide the landowner indemnity for the broken arm of a partner welder rather than an employee welder?

What the Court of Appeals did in its opinion was to say that a general partnership worker is, by law, carved out from this protection. Further, the effect of the opinion was to negate the law of partnerships. This cannot be the case, especially when the issue comes to the Court of Appeals by summary judgment and not after trial.

VI. CONCLUSION

Due to the decision of the Court of Appeals there will be tragic unintended consequences. Every time a partner of a general partnership sub-contractor (plumber, carpenter, electrician, mechanic, or welder) gets called out to do a job, and as a condition to enter the owner's premises to do his work, he is given a preprinted form to sign on the spot confirming that he has insurance that will cover the owner for all injuries on his job site, he will unknowingly be at risk for his own injuries caused by the negligence of the owner's employees. The risk to the carrier to indemnify the owner is no different for injuries to the contractor's

employee as it is for the contractor himself. Further, the small independent contractor will be subject to risk even if he is injured on the jobsite while checking the progress of his workers on a job. Both the contractor and his employee are third parties to the owner, but one has a remedy for his injuries and one does not. Accidents happen to everyone, contractor and employee. This is an absurd result for an everyday occurrence that ultimately the public will be paying the bill for.

Dated this 3rd day of April, 2012 at Seattle, Washington.

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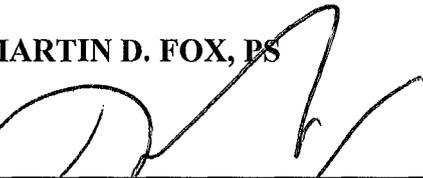
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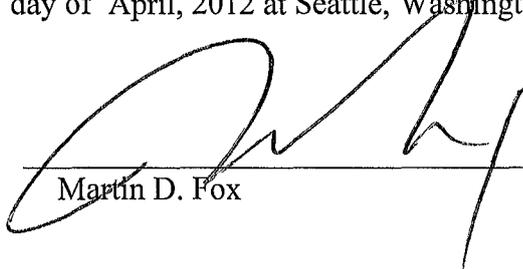
Boogaard, an individual

**DECLARATION OF SERVICE
OF APPELLANTS' PETITION FOR REVIEW**

I certify that on the 4th day of April, 2012 I caused a true and correct copy of the APPELLANTS' PETITION FOR REVIEW to be served on the following in the manner indicated below:

Counsel for plaintiffs/respondents	
Dennis M. Moran	() US Mail
Moran & Keller	(X) Hand Delivery
5608 – 17 th Ave. Northwest	() ABC Legal Messenger
Seattle, WA 98107	() Email
dmoran@morankellerlaw.com	

DATED this 4th day of April, 2012 at Seattle, Washington.



Martin D. Fox

APPENDIX A



Northland Services
MARINE TRANSPORTATION

ALLIANCE
P.O. BOX 24527
SEATTLE, WA 98124
PHONE: (206) 763-3000
FAX: (206) 767-5579

ACCESS AGREEMENT

IDENTIFICATION OF USER	
<u>ABC Marine</u> Name of Company	
<u>346 N.W. 89th St.</u> Street Address	
<u>Seattle, Wa. 98117</u> City, State and Zip Code	
<u>Albert Boogaard</u> Contact Person	
<u>206-732-5229</u> Phone Number	

PERSONS ALLOWED ACCESS	
<u>Albert Boogaard</u>	
<u>Wes Dahl</u>	

Vessel, Facility and/or Premises :
 Times and Dates of allowed access :
 Access charge and/or other charges :

All Vessels, All Premises and all Job sites
From today's date forward, Monday through Friday 8:30 AM through 8:00 PM. Access at other times by advance permission only.
None

PURPOSE OF ACCESS, PERMITTED USE AND/OR SPECIAL CONDITIONS	
Work relating to the completion of tasks as defined by Northland Services Marina Maintenance Manager, Maintenance Supervisor or Port Engineer.	

User agrees with Northland Services, Inc. (NSI) that access to and use of the vessel(s), facility(ies) and/or premises identified above (the "Property") shall be for the limited purposes identified above and shall be subject to the terms and conditions set forth in this agreement. User has read the reverse side of this agreement, and understands that it limits the liability of NSI and places certain liabilities and responsibilities upon User, including responsibilities to insure and be responsible for all persons accessing the Property.

DATED this 29 day of Sept., 2004

NORTHLAND SERVICES, INC.

 By: _____
 Its: _____
 Badge Number: 64/69

USER
Albert Boogaard/Wes Dahl
 By: Albert Boogaard
 Its: Senior Partner

Returned: Yes No

1. **Non-Exclusive Access:** The access granted herein is non-exclusive, is for the limited purposes set forth on the Vessel, Facility and/or Premises (the Property) described above. User understands and acknowledges that marine and heavy equipment utilization and cargo operations, and the inherent dangers associated therewith, may be occurring concurrently with User's access.

2. **Inspection:** Prior to beginning operations each day, User shall conduct a thorough inspection of the Property and areas adjacent thereto for the purpose of safety to personnel and equipment and for suitability for its proposed work and activities (hereinafter operations). If User believes there are problems as to safety or suitability (including for its personnel and equipment or for others), it must notify NSI prior to beginning operations. If such conditions cannot be changed by mutual agreement such as to secure safety and suitability of operations, then User shall promptly withdraw its tools, materials, equipment and personnel and this agreement shall be deemed voluntarily terminated. Similarly, if problems with safety or suitability develop during the working day while operations are being conducted, User shall immediately cease operations, notify NSI and attempt to work out the problems. If the problems cannot be worked out, User shall withdraw its tools, materials, personnel and equipment and this agreement shall be deemed voluntarily terminated. If User begins its operations whether with or without such daily inspection, or continues to conduct operations, including while aware of safety or suitability problems, it shall be irrevocably presumed that the Property was accepted as both safe and suitable for User's operations. NSI makes no warranties whatsoever with respect to the Property and/or with respect to User's operations or intended use thereof.

3. **Time/Clean-up:** User is allowed access only to the Property identified and only for the limited scope identified on the face of this document, with User's access to be limited to normal working hours unless otherwise identified on the face hereof. All User's tools, materials, equipment and personnel must be removed daily from the Property and all areas utilized by User must be cleaned of debris. Any dunnage, cargo handling gear and other materials relating to User's operations, or generated as a consequence of these operations, must be removed daily.

4. **Rules:** User shall be responsible for ensuring that its employees, agents and subcontractors obey all rules and regulations promulgated by NSI or others with respect to the Property, whether posted or advised verbally. Rules and regulations handed out shall be deemed posted. User is required to observe any load limit requirement imposed by NSI or any authority having jurisdiction with respect to the Property or any equipment thereon.

5. **Interference:** In addition to obeying rules and regulations, User agrees that its personnel and equipment will not interfere with operations being conducted by others. User also agrees that its personnel and equipment will not be utilized such as to create a safety hazard for others.

6. **Security:** NSI will not provide security for tools, materials, personnel, equipment or items of User on the Property. User shall be solely responsible for security with respect to its personnel and property, and is cautioned to watch carefully all materials, tools, personal items and equipment and to remove the same daily. User assumes all risk of loss of, and agrees to hold NSI harmless from, all loss, injury and/or damage (including, without limitation, theft, vandalism and malicious mischief) to its equipment, materials, tools and property, including those of its employees.

7. **Property Damage:** User shall be responsible for all property damage to the Property or equipment of NSI and all others caused by User, its tools, materials, equipment or personnel, while operating on the Property, including all consequential damages resulting therefrom. User agrees that in the event any such property damage occurs, it shall immediately repair or restore the damaged property to its pre-existing condition with no reduction for depreciation. If User fails to do so, NSI may proceed to do so, in which event User shall pay or reimburse NSI for its actual costs plus an additional fifteen percent (15%) markup for handling and overhead and interest at one percent (1%) per month to accrue on all charges until fully paid. NSI shall be responsible only for property damage caused by its sole intentional negligence, and User shall be responsible only for direct physical damage and not for any consequential or intangible damages of any kind or nature whatsoever. User shall indemnify and hold harmless (including costs and legal fees) NSI of and from all losses, damages, claims and suits of property damage, whether direct or indirect, arising out of or relating to User's utilization or access hereunder, except such damage resulting solely and directly from NSI's sole intentional negligence.

8. **Personal Injuries:** User shall be responsible for all bodily and personal injuries to all persons arising out of or resulting from its operations and/or use of the Property, including bodily and personal injuries to its own employees, except if caused by the sole intentional negligence of NSI. User shall indemnify and hold harmless (including costs and legal fees) NSI of and from all losses, damages, claims and suits for bodily and personal injury, whether direct or indirect, arising out of or relating to its operations or use of the Property, except such bodily and personal injuries caused directly from the sole intentional negligence of NSI. This indemnification agreement includes all claims and suits against NSI by any employee (present or former) of User, and User expressly waives all immunity and/or limitation on liability under any workers' compensation, disability benefit or other employee or employment-related act of any jurisdiction.

9. **Notification:** User shall notify NSI of every instance of bodily or personal injury and property damage relating in any fashion to its operations conducted on the Property. User shall also promptly provide NSI with written accident reports of all bodily or personal injuries and property damages, and will cooperate fully with NSI in any investigation, including allowing inspection of property and access to personnel.

10. **Insurance:** User shall obtain and maintain, at its own expense, public liability insurance for personal injuries and property damage covering User's operations under this agreement including a contractual liability endorsement which specifically insures User's liabilities pursuant hereto. Such insurance must have minimum limits per occurrence of \$1,000,000 and shall be evidenced by a insurance certificate provided to NSI prior to commencement of operations. The insurance must specifically name NSI as additional insured and must waive subrogation against NSI (and its officers, directors, employees, agents, and subsidiary or affiliated companies), with the waiver to include any claim relative to policy deductible, and must also be primary to any other insurance which may be maintained by NSI. Further, the insurance shall be endorsed such that it may not be canceled or changed materially except on thirty (30) days notice to NSI. User shall also procure and maintain, at its own expense, state and federal, as applicable, standard workers' compensation liability insurance covering all its employees, subcontractors and agents, but neither User nor its workers' compensation insurer shall have any right of action against NSI for subrogation or reimbursement of any payments made pursuant to that policy (including payments within any policy deductible).

11. **Extension of Benefits:** All exceptions, exemptions, defenses, immunities, limitations of liability, privileges and conditions provided by this agreement or any applicable statute, regulation or law for the benefit of NSI shall be automatically extended to and for the benefit and to all business entities parent of, subsidiary to, affiliated with or under the management of NSI, including their respective members, directors, officers, employees and agents.

12. **Law/Jurisdiction:** This agreement shall be construed and interpreted pursuant to the laws of the State of Washington. The parties agree that with respect to any litigation arising out of this agreement or performance under it, the federal and/or state courts located in Seattle, Washington shall have exclusive personal and subject matter jurisdiction. The prevailing party in any suit or proceeding shall be entitled to recover its legal fees and costs.

13. **Entire Agreement:** This constitutes the complete agreement between the parties with respect to matters addressed herein, and supersedes any prior written or oral agreements. This agreement may only be modified by a writing signed by both parties.

APPENDIX B

FILED

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THE HONORABLE SUSAN CRAIGHEAD

Hearing: IMU's MRS. Sedillo for

Decs Up 2009 @ du 00 AM

With Oral Argument

CASE NUMBER: 08-2-13632-9 SEA

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IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF KING

INTERNATIONAL MARINE UNDERWRITERS,
a division of One Beacon America Insurance
Company, a Massachusetts insurance company,

Plaintiff,

v.

ABCD MARINE, LLC, a Washington LLC; ABCD
MARINE, a Washington partnership and ALBERT
BOOGAARD, an individual domiciled in Washington,

Defendants,

v.

ALLIANCE INSURANCE CORP. a/k/a
ALLIANCE INSURANCE, INC.,

Cross-Claim Defendant.

NO. 08-2-13632-9 SEA

DECLARATION OF ROBERT A.
SEDILLO

Attached is the sworn declaration of Robert A. Sedillo dated November 27, 2009 in
opposition to International Marine Underwriters' motion for partial summary judgment.

DECLARATION OF ROBERT A. SEDILLO - 1

MARTIN D. FOX, P.S.
2033 SIXTH AVENUE, SUITE 800
SEATTLE, WA 98121
PHONE: (206)728-0588

COPY RECEIVED

10/10/03

DECLARATION OF ROBERT A. SEDILLO

DAVID J. BALINT, PLLC
ATTORNEY AT LAW

I, Robert A. Sedillo, under penalty of perjury, hereby declare as follows:

1. I am over the age of 18 and have personal knowledge of the facts stated in this declaration. If called as a witness, I could and would competently testify thereto.

2. I am the owner and principal consultant of an independent risk management consulting firm called Sedillo Risk Services, located in Redmond, Washington. I have over 35 years experience in risk management consulting, insurance brokerage, and underwriting. I have earned the following designations: Associate in Risk Management (ARM); Chartered Property Casualty Underwriter (CPCU); Associate in Underwriting (AU); and Certified Insurance Counselor (CIC). I hold a Bachelor of Arts from the University of Arizona and am a faculty member of the American Management Association and past faculty member of Bellevue Community College, teaching risk management and insurance courses. I have testified multiple times in the Superior Courts in the State of Washington and in other jurisdictions as an expert regarding insurance related issues. A copy of my curriculum vitae is attached hereto as Exhibit "A." Documents provided to me by the attorneys for the Defendants which I have reviewed in making this Declaration are attached as Exhibit "B."

3. I have been asked by the attorneys for ABCD Marine, a Washington partnership, to consult as an expert regarding underwriting issues and specifically the meaning of the "insured contracts" clause at issue. My testimony set forth in this declaration is based on my experience in risk management consulting, insurance brokerage, and underwriting, which include underwriting and drafting of insurance clauses, as well as my research

concerning the customs and practices of the property/casualty insurance industry. With over 35 years of industry experience and teaching, I have an excellent understanding of what insurance companies mean when they write such clauses and how they apply such clauses to the claims process.

4. On September 29, 2004, ABCD Marine entered into an Access Agreement with Northland Services, Inc. which included a hold harmless and indemnity clause in favor of Northland Services, Inc. as well as insurance requirements (including adding Northland Services, Inc. as an additional insured on ABCD's liability insurance policies) in order for ABCD Marine to perform work on Northland's premises. The Access Agreement was signed by Mr. Albert Boogaard on behalf of ABCD Marine.

5. Hold harmless and indemnity clauses are included in contracts, such as the Access Agreement between Northland and ABCD, to transfer the liability risk of one of the contracting parties (the indemnitee – Northland Services, Inc.) to the other party (the indemnitor – ABCD Marine). Typically, the financial consequences of potential legal liability to a third party are the risk being transferred. It is the customs and practices of the insurance industry that the contract does not absolve the liable party from its legal obligation to an injured third party; it merely makes the indemnitor responsible for meeting the financial obligation on the liable party's behalf. If the indemnitor does not have the financial resources to meet the legal obligation, it remains the obligation of the liable party.

6. To reduce the possibility that an indemnitor will not have the financial resources and thus will be unable to respond to its contractual obligation, it is common to require liability insurance to reinforce the legal liabilities transferred in hold harmless agreements. One of the drawbacks to relying solely on the contractual liability coverage feature of these liability policies

is that this coverage relies on the enforceability of the indemnity provision. Many states have enacted anti-indemnity statutes that limit the enforceability of some types of hold harmless provisions. This was not an issue for this particular Access Agreement between Northland and ABCD Marine, after the Summary Judgment.

7. Enforceability issues are the reasons it is common to require that the indemnitee be included as an additional insured on the indemnitor's liability insurance. Doing so means that the indemnitee has some protection to fall back on in the event there is a problem with the enforceability of the hold harmless agreement. This, in effect, is what is known as the "belt and suspenders" concept. Thus, if contractual liability insurance applies, there is no need to rely on additional insured status. Conversely, if contractual liability coverage does not apply for some reason, additional insured status can be relied on for the protection of the indemnitee.

8. Securing Direct Rights in the Policy – When another party is entitled to indemnification that may be covered by the named insured's contractual liability insurance, some insurers refuse to step in and indemnify the other party. Instead, they prefer to wait until the underlying action is settled and then reimburse the indemnitee or challenge the validity of the indemnification clause. In the meantime, someone else, such as the indemnitee, must fund the defense costs and pay any settlements or judgments. Therefore, one of the most important reasons for seeking additional insured status in addition to contractual indemnification is to secure direct rights in the indemnitor's insurance policy. This will allow the indemnitee to pursue its right to coverage directly with the indemnitor's insurer rather than rely solely on the rights outlined in the indemnification clause of the underlying business contract.

9. It is very common and ordinary in the stream of commerce for

organizations to demand and/or receive demands concerning insurance requirements, such as additional insured status, hold harmless & indemnity, waivers of subrogation, and certificates of insurance. In theory, the party that has the most control over the risk should be responsible for suffering the financial loss should it fail to prevent losses from occurring. Of course, the relative bargaining positions of the contracting parties also play a key role in determining the extent of any such transfers.

10. A brief word needs to be made regarding certificates of insurance and how they're handled. Faced with increasing administrative burdens involving certificates of insurance, it's very commonplace today for insurers to direct their agents not to forward copies of "standard" insurance certificates. The insurers indicate the agents are responsible for issuing and maintaining "standard" certificates. What is considered a "standard" certificate may vary from carrier to carrier, and therefore needs to be defined. However, as a rule, certificates do not amend, extend, or alter the insurance policies they document. Therefore, if a certificate of insurance reflects an individual or organization as an additional insured, the policy must reflect this coverage either in the coverage form itself or by an endorsement. If it became necessary to add an additional insured to the policy and issue a certificate reflecting that addition, normally, the agent would bind the coverage, instruct the underwriter to issue the necessary endorsement and then, a certificate would be issued. On or about September 17, 2001, the agent, Alliance, requested and received from IMU, specific additional insured wording to be used on the certificate of insurance. Alliance followed IMU's instructions by using the following wording on the certificate of insurance: *"Certificate holder is included as additional insured but only with respects to named insured's operations."* The certificate holders were Naknek Barge Lines, LLC and Northland Holdings, Inc. It would be reasonable to expect, from that

exchange between Alliance and IMU, knowing that Alliance would be issuing a certificate of insurance reflecting Northland Holdings was an additional insured, that IMU would have gone ahead and issued the additional insured endorsement to the policy, naming Northland Holdings, Inc., but IMU never did. Had IMU done this, it is more likely than not the IMU policy for the 4/3/2004 – 4/3/2005 policy period would have contained an endorsement naming Northland Holdings, Inc. as an additional insured (Northland Holdings, Inc. evidently owned Northland Services, a new entity that took over the operation of the piers). The reason why this would be the likely outcome is that unless and/or until the insured (ABCD Marine) requests the additional insured endorsement deleted, the endorsement would continue to be attached to the current policy and carried forward for all future policies.

11. On October 19, 2004 Boogaard was severely injured by a forklift that was negligently operated by an employee of Northland Services. Boogaard filed a claim against Northland Services, Inc., Northland Holdings, Inc. and the forklift driver. Northland Services, Inc. responded that under the Access Agreement ABCD was to indemnify and hold Northland Services, Inc. harmless, as well as add Northland Services, Inc. as an additional insured under ABCD's liability insurance policy.

12. The insurance policy in effect for ABCD Marine at the time Boogaard was injured was a "Comprehensive Marine Liability and Ship Repairers Legal Liability policy, issued by International Marine Underwriters (IMU), a division of One Beacon America Insurance Company, a Massachusetts insurance company, for the policy period April 3, 2004 to April 3, 2005. This policy did not have Northland Services, Inc. named as an additional insured (refer to previous discussion under paragraph 10), but the policy did provide contractual liability coverage for "insured contracts."

13. The term "insured contract" is a defined term in the Comprehensive Marine policy issued by IMU. Under Section IX – Definitions, 9. "Insured Contract" means: (f.) That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement (emphasis added).

14. To fully understand this definition of "insured contract" one must also examine the meaning of several terms used within that definition. Page 1, second paragraph of the IMU policy states the words "you" and "your" refer specifically to the Named Insured shown on the declarations page. Note that the Named Insured on the declarations page is ABCD Marine. Therefore, throughout the policy, any time the terms "you" or "your" are used, these terms are synonymous and interchangeable with the Named Insured, ABCD Marine.

15. The third paragraph of Page 1 goes on to state the word "Insured" means any person or organization qualifying as such under WHO IS AN INSURED (SECTION IV). This paragraph (the 3rd paragraph on Page 1) introduces the concept that in addition to the Named Insured, there may be other individuals or entities that qualify as insureds (but not as Named Insureds) because they are automatically included as insureds under SECTION IV - WHO IS AN INSURED. Some of the main differences between Named Insured and Insured status are:

- The named insured (NI) has more stringent occurrence reporting requirements;
- The NI's employees, executive officers, and directors are insureds;
- Certain exclusions apply only to the NI (e.g. property damage);

- The NI must reimburse the amount of any deductible paid by the insurer;
- The *First* NI is required to pay the premium;
- The *First* NI receives any premium return;
- The *First* NI may cancel the policy;
- The *First* NI receives cancellation notice.

16. There are a total of 3 types of insureds under any liability policy including the IMU Comprehensive Marine Liability policy, and so far, we've discussed two of the three – named insured and automatic insured. The third and final type of insured is the additional insured. Additional insureds are those insureds that generally are not automatically included as insureds under the liability policy of another but for whom the named insured desires or is required to provide a certain degree of protection under its (the named insured's) liability policy. An endorsement usually is used to effect additional insured status for these parties. This additional insured endorsement may specifically name the additional insured or it may provide blanket additional insured status to entities with whom the named insured agrees in a contract to provide additional insured status. Of course, it is also possible for a provision providing such blanket additional insured status to be incorporated directly into a nonstandard or manuscript liability insurance form, eliminating the need for an endorsement.

17. Going back to the definition of an "insured contract" found in the IMU policy issued to ABCD Marine, and substituting the names of the parties in the appropriate places, the definition would read as follows: (f.) That part of any other contract or agreement pertaining to your (ABCD Marine's/named insured/indemnitor) business under which you (ABCD Marine /named insured/indemnitor) assume the tort liability of another party (Northland Holdings, Inc./indemnatee) to pay for "bodily injury" or "property damage" to a

third person or organization (Mr. Albert Boogaard). Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

18. Plaintiff, IMU, incorrectly argues that Mr. Boogaard is not a "third person," therefore the Access Agreement is not an "insured contract," thus Mr. Boogaard's claim is not covered by the IMU policy. The plain, simple truth is that Mr. Boogaard is a "third person," making the Access Agreement an "insured contract," thus triggering the contractual liability coverage under the IMU policy.

19. In the March, 2007 edition of Malecki on Insurance (written by Donald S. Malecki, CPCU and Pet Ligeros, JD) there was a piece, entitled "Contractual Liability – Tort Liability Assumed – Who is A Third Party?" The question is who can a third party be? The answer is, the one who has sustained injury or damage at the hands of the indemnitee, and that means it can be almost anyone, even an employee of the indemnitor. Both Mr. Malecki and Mr. Ligeros are recognized authorities regarding property and casualty coverage issues.

20. Plaintiff, IMU mistakenly believes that because Mr. Boogaard signed the Access Agreement, he is a first party insured and a first party to the Access Agreement, and therefore, cannot be a third person (see IMU's Motion for Partial Summary Judgment). However, it appears Plaintiff may have overlooked Section IV – Who Is An Insured in the IMU policy, which reads as follows:

1. If you are designated in the Declarations as:
 - b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business (emphasis added).

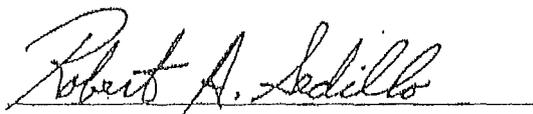
We've already covered the meaning of you and your in the policy, which refer to the named insured, ABCD Marine. Therefore if ABCD Marine is the named

insured and ABCD Marine is designated as a partnership in the Declarations, ABCD (the entity) is an insured; the next sentence states your partners are also insureds. The word also means in addition. Therefore, the partners, Mr. Boogaard and Mr. Dahl (and their spouses) are insureds in addition to and separate from, ABCD Marine, the partnership entity (see SECTION VIII – CONDITIONS PRECEDENT TO COVERAGE, 14, Separation of Insureds, of the IMU Comprehensive Marine Liability policy).

21. In conclusion, even though Mr. Boogaard signed the Access Agreement on behalf of ABCD Marine, the indemnitor was ABCD Marine, the partnership entity that was assuming the tort liability of the indemnitee, Northland Services. Mr. Boogaard was the third party (to Northland Services) who sustained injury at the hands of the indemnitee. Therefore, it is my opinion the Access Agreement was an "insured contract" and contractual coverage was triggered under the IMU Comprehensive Marine Liability policy.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Executed this 27th day of November, 2009 at Redmond, Washington.

A handwritten signature in cursive script that reads "Robert A. Sedillo". The signature is written in black ink and is positioned above a horizontal line.

Robert A. Sedillo

APPENDIX C



C5JH 80128

Previous Policy Number

PRODUCER NUMBER

46-68305

The Company issuing this policy is indicated below:
OneBeacon America Insurance Company

POLICY NUMBER

C5JH 80128

Named Insured ABCD Marine

Producer Alliance Insurance, Inc.

Street 346 NW 89th Street

Street P.O. Box 77086

City Seattle

City Seattle

State WA

State WA

Zip 98117

Zip 98177

Policy Period: From: April 3, 2004 To: April 3, 2005

At 12:01 A.M. Standard Time at your Mailing Address shown above.

Named Insured Is A: Corporation Partnership Individual Joint Venture Organization (Other than Corp, Partnership or Joint Venture)

Business Description: Welding and deck repair on barges and fishing vessels.

Location of all premises you own, rent or occupy:

Northland Services Yard at E. Marginal Way, Seattle, WA

Limits of Insurance:	General Aggregate Limit (Other Than Products-Completed Operations)	\$1,000,000
	Products-Completed Operations Aggregate Limit	\$ 300,000
	Personal and Advertising Injury Limits	\$ 300,000
	Each Occurrence Limit	\$ 300,000
	Fire Damage Limit (Any One Fire)	\$ 50,000
	Medical Expense Limit (Any One Person)	\$ 5,000

Deductible: \$10,000

Premium, Fees & Rate(s):	Exposure Rating Basis:	Gross Receipts
	Estimate Exposure For Period:	\$90,000
	Adjusted at a Rate of:	2.80 %
	Estimated Annual Premium:	\$2,500
	Terrorism Premium:	Not Covered
	Advance or Deposit Premium:	\$2,500
	Minimum Annual Premium:	\$2,500
	Premium Shown is Payable:	Annual

SUBJECT TO CONDITIONS OF FORMS AND ENDORSEMENTS ATTACHED HERETO:

Comprehensive Marine Liability Policy	Ship Repairer's Legal Liability Endorsement
Traveling Workmen Endorsement	Electronic Date Recognition Endorsement

THIS POLICY IS MADE AND ACCEPTED SUBJECT TO THE FOREGOING PROVISIONS AND STIPULATIONS AND THOSE HEREINAFTER STATED, WHICH ARE HEREBY MADE A PART OF THIS POLICY TOGETHER WITH SUCH PROVISIONS, STIPULATIONS AND AGREEMENTS AS MAY BE ADDED HERETO, AS PROVIDED IN THIS POLICY.

IN WITNESS WHEREOF, this Company has caused this policy to be executed below, but this Policy shall not be valid unless countersigned by a duly authorized representative of the Company.

Dennis R. Smith
Secretary

Ray Barrette
Managing Director & CEO

Countersigned by
this date

May 7, 2004

Authorized Representative

COMPREHENSIVE MARINE LIABILITY POLICY

Various provisions in this policy restrict or exclude coverage. Read the entire policy carefully to determine your rights and duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we," "us," and "our" refer to the company or companies providing this insurance.

The word "Insured" means any person or organization qualifying as such under WHO IS AN INSURED (SECTION IV).

Other words and phrases that appear in quotation marks have special meaning. Refer to DEFINITIONS (SECTION IX).

The Section, Form or Clause titles or headings are for your reference only and have no bearing on the interpretation of the Sections, Forms or Clauses. Be certain to read all Sections, Forms and Clauses carefully to determine their meaning.

SECTION I - COVERAGES

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

Insuring Agreement.

1. We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may at our discretion investigate any "occurrence" and settle any claim or "suit" that may result. But:

- a. The amount we will pay for damages is limited as described in LIMITS OF INSURANCE (SECTION V); and
- b. Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgements or settlements under Coverage A or B or medical expenses under Coverage C and/or Supplementary Payments under Section III.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS - COVERAGES A AND B (SECTION III).

2. This insurance applies to "bodily injury" and "property damage" only if:
- a. The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and
 - b. The "bodily injury" or "property damage" occurs during the policy period.

- b. The expenses are incurred and reported to us within one year of the date of the accident; and
 - c. The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.
2. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:
- a. First aid administered at the time of an accident;
 - b. Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and
 - c. Necessary ambulance, hospital, professional nursing and funeral services.

SECTION II - EXCLUSIONS

A. EXCLUSIONS APPLICABLE TO SECTION 1, COVERAGES A AND B ONLY:

Notwithstanding anything to the contrary contained in this policy, it is hereby understood and agreed that this policy is subject to the following exclusions and that this policy shall not apply to:

1. "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.
2. "Bodily injury" or "property damages" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
 - a. Assumed in a contract or agreement that is an "insured contract," provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement; or
 - b. That the insured would have in the absence of the contract or agreement.
3. "Bodily injury" or "property damage" for which any insured may be held liable by reason of:
 - a. Causing or contributing to the intoxication of any person;
 - b. The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
 - c. Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business, whether or not for profit, of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.
4. a. Any liability of whatsoever nature of the insured, whether you may be liable as an employer or in any other capacity whatsoever, to any of your "employees", including but not limited to any liability under any Workers' Compensation Law, Unemployment Compensation Law, Disability

Be t Law, United States Longshoremen's & Harbor Workers' Compensation Act, Jones Act, Death on the High Seas Act, General Maritime Law, Federal Employers' Liability Act, or any similar laws or liabilities, and/or whether by reason of the relationship of master and servant or employer and employee or not.

- b. Any liability of whatsoever nature of the insured to the spouse, child, parent, brother, sister, relative, dependent or estate of any of your "employees" arising out of the "bodily injury" and/or "personal injury" to said "employees", whether you may be liable as an employer or in any other capacity whatsoever.
 - c. Any liability of whatsoever nature of the insured to any other party arising out of "bodily injury" and/or "personal injury" to any of your "employees", including but not limited to any such liability for (i) indemnity or contribution whether in tort, contract or otherwise and (ii) any liability of such other parties assumed under contract or agreement.
 - d. Any liability of any of your "employees" with respect to "bodily injury" and/or "personal injury" to another of your "employees" sustained in the course of such employment.
 - e. Any liability of whatsoever nature which any of your directors, officers, partners, principals, "employees" or stockholders may have to any of your "employees".
5. Liability arising out of any act or omission by you, or any other person or entity for whose acts or omissions you are legally liable, in respect of your "Employee Benefits" including but not limited to:
- a. giving counsel to "employees" with respect to "Employee Benefits";
 - b. interpreting the "Employee Benefits";
 - c. handling and keeping of records in connection with "Employee Benefits";
 - d. effecting enrollment, termination or cancellation of "employees" under the "Employee Benefits";
 - e. any dishonest, fraudulent, criminal, or malicious act or omission;
 - f. failure of performance of contract by an insurer;
 - g. lack of compliance with the terms of any contract, declaration of trust, or instrument providing "Employee Benefits";
 - h. lack of compliance with any law concerning "Employee Benefits";
 - i. failure to procure or maintain satisfactory and adequate insurances on "Employee Benefits" assets or property;
 - j. failure of stock or other securities or of any investments of whatever kind to perform as represented;
 - k. advice given to an "employee" to participate or not to participate in Stock Subscription or similar plans; and
 - l. any liability arising out of the Employee Retirement Income Security Act and any other similar federal, state or other statutes, rules or regulations.

As used in this exclusion, the term "Employee Benefits" includes, without limitation, Group Life Insurance, Group Health Insurance, Profit-Sharing Plans, Pension Plans, Employee Stock Subscription Plans, Workers' Compensation, Unemployment Insurance, Social Security and Disability Benefits Insurance.

6. Any liability for any cost or expense incurred or incidental to the raising, removal or destruction of any wreckage or debris or obstruction, however caused, whether or not it is your property, and whether or not such raising, removal or destruction is required by law, statute, contract or otherwise. This

any judgment therein which accrues after entry of the judgment and before we tender or deposit in court that part of the judgment which does not exceed the limit of our liability therein;

2. Premiums on appeal bonds required in any such claim or "suit", premiums on bonds to release attachments in any such claim or "suit" for an amount not in excess of the applicable limit of liability of this policy, and the cost of bail bonds required of the Insured because of accident or traffic law violation arising out of the use of any vehicle to which this policy applies, not to exceed two hundred fifty (\$250) dollars per bail bond, but the Company shall have no obligation to apply for or furnish any such bonds;
3. Expenses incurred by the insured for first aid to others at the time of an accident, for "bodily injury" to which this policy applies;
4. All reasonable expenses incurred by the insured at our request in assisting us in the investigation or defense of the claim or "suit", including actual loss of earnings up to two hundred fifty (\$250) dollars a day because of time off from work.

SECTION IV - WHO IS AN INSURED

1. If you are designated in the Declarations as:
 - a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
 - b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
 - c. An organization other than a partnership or joint venture, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
 - d. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
2. Each of the following is also an insured:
 - a. Your "employees", other than your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, no "employee" is an insured for:
 - (1) "Bodily injury" or "personal injury" to you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), or to a co-"employee" while that co-"employee" is either in the course of his or her employment or performing duties related to the conduct of your business;

- c. All s of the world if:
- (1) The injury or damage arises out of:
 - (a) Goods or products made or sold by you in the territory described in a. above; or
 - (b) The activities of a person whose home is in the territory described in a. above, but is away for a short time on your business; and
 - (2) The insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in a. above or in a settlement we agree to.
6. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker."
7. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any similar governing document.
8. "Impaired property" means tangible property, other than "your product" or "your work," that cannot be used or is less useful because:
- a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
 - b. You have failed to fulfill the terms of a contract or agreement;
- If such property can be restored to use by:
- a. The repair, replacement, adjustment or removal of "your product" or "your work;" or
 - b. Your fulfilling the terms of the contract or agreement.
9. "Insured contract" means:
- a. A lease of premises;
 - b. A sidetrack agreement;
 - c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
 - d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
 - e. An elevator maintenance agreement;
 - f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

APPENDIX D

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 DEC -5 AM 10: 34

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

INTERNATIONAL MARINE)
UNDERWRITERS, a division of One Beacon)
America Insurance Company, a)
Massachusetts Insurance Company,)

Respondent,)

and)

ALLIANCE INSURANCE CORP. a/k/a)
ALLIANCE INSURANCE, INC.,)

Third Party Defendant.)

v.)

ABCD MARINE, LLC, a Washington LLC;)
ABCD MARINE, a Washington partnership)
and ALBERT BOOGAARD, an individual)
domiciled in Washington,)

Appellants,)

No. 66102-7-I

DIVISION ONE

PUBLISHED OPINION

FILED: December 5, 2011

SPEARMAN, J. — In this insurance coverage case, we must decide whether Albert Boogaard, an injured named insured who contractually assumed the liability of the tortfeasor Northland Services, Inc. (“NSI”), is covered by his own comprehensive marine liability policy. Specifically, the question we must address is whether the policy’s exclusion of coverage for liability assumed in a contract precludes coverage for Boogaard or whether there is coverage under the policy’s exception for an “Insured

Contract.” We conclude that because Boogaard is not a “third person” under the “Insured Contract” clause, the exclusion applies, and the trial court properly granted summary judgment. Affirmed.

FACTS

Two companies, Northland Services, Inc. (“NSI”) and Naknek Barge Lines, LLC (“Naknek”) retained ABCD Marine (through ABCD senior partner, Albert Boogaard) as an independent contractor to provide welding services. Boogaard provided welding services to NSI and Naknek at a marine terminal located on the Duwamish River beginning in 2000. According to the parties, NSI and Naknek are related to a third corporate entity, Northland Holdings, Inc., although the record is not clear as to the exact relationship between the companies.

ABCD hired Alliance Insurance (“Alliance”) as an insurance broker. Alliance submitted a policy application on behalf of ABCD to International Marine Underwriters (IMU) insurance, and IMU issued a Comprehensive Marine Liability and Ship Repairers Legal Liability policy in April 2000. Alliance told IMU that ABCD did not have any written contracts with other parties and did not require any additional insureds on the policy.

In August 2001, Naknek sent ABCD a letter indicating that all of Naknek’s contractors must provide commercial general liability insurance coverage of \$1 million, and that the certificate of insurance “must name and waive Naknek Barge Lines LLC and Northland Holdings Incorporated.” According to Boogaard, he told Alliance about this letter. IMU, however, contends it never received a request to add any additional insured to the policy and as such, it simply renewed the policy without any significant

changes over the following years: 2001, 2002, 2003, and 2004. The 2003-04 policy included no additional insured endorsements for any entity.¹

On September 29, 2004, ABCD (via its senior partner Boogaard) and NSI entered into a written "Access Agreement" (Agreement). The Agreement required ABCD to (1) defend and indemnify NSI for injuries to all persons arising out of ABCD's operations and/or use of NSI's property, and (2) obtain liability insurance that included an additional insured endorsement naming NSI as an additional insured on the policy:

8. Personal Injuries. User [Boogaard/ABCD] shall be responsible for all bodily and personal injuries to all persons arising out of or resulting from its operations and/or use of the Property, including bodily and personal injuries to its own employees, except if caused by the sole intentional negligence of NSI. User shall indemnify and hold harmless (including costs and legal fees) NSI of and from all losses, damages, claims and suits for bodily and personal injury, whether direct or indirect, arising out of or relating to its operations or use of the Property, except such bodily and personal injuries caused directly from the sole intentional negligence of NSI. This indemnification agreement includes all claims and suits against NSI by any employee (present or former) of User and User expressly waives all immunity and/or limitation of liability under any workers' compensation, disability benefits or other employee or employment-related act of jurisdiction.

...

10. Insurance. User shall obtain and maintain, at its own expense, public liability insurance for personal injuries and property damage covering User's operations under this agreement, including a contractual liability endorsement which specifically insures User's liabilities pursuant hereto. Such insurance must have minimum limits per occurrences of \$1,000,000 and shall be evidenced by an Insurance certificate provided to NSI prior to commencement of operations. The insurance must specifically name NSI as additional insured and must waive subrogation against NSI (and its officers, directors, employees, agents, and subsidiary or affiliated companies), with the waiver to include any claim relative to policy deductible, and must be primary to any other insurance which may be maintained by NSI. . . .

¹ We note that the 2003-04 policy, which was the policy in effect when Boogaard was injured, is the only policy ever submitted to the trial court and is thus the only policy in the record.

It is undisputed that neither Alliance or IMU were ever informed of, or provided a copy of, the Agreement.

Boogaard was seriously injured by a forklift driven by a NSI employee on October 19, 2004. Alliance advised IMU of the accident in November 2004. When Alliance representative Tammy Hausinger spoke with the IMU claim manager Dave O'Laughlin about the accident, she agreed that there was no coverage for Boogaard's injuries under the IMU policy. In December 2004, for the first time, Ms. Hausinger asked IMU to add "Northland Services" as an additional insured to the policy. IMU made this change prospectively. The policy in effect at the time of Boogaard's injury included the following provisions:

SECTION I – COVERAGES

COVERAGE A. BODILY INJURY AND PROPOERTY DAMAGE LIABILITY

Insuring Agreement.

1. We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of "bodily injury" or "property damage" to which this insurance applies . . .

SECTION II – EXCLUSIONS

A. EXCLUSIONS APPLICABLE TO SECTION 1, COVERAGES A AND B ONLY:

Notwithstanding anything to the contrary contained in this policy, it is hereby understood and agreed that this policy is subject to the following exclusions and that this policy shall not apply to:

2. "Bodily injury" or "property damages" for which the insured is obligated to pay damages by reason of the assumption of

liability in a contract or agreement. This exclusion does not apply to liability for damages:

- a. Assumed in a contract or agreement that is an "insured contract," provided that the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement; . . .

SECTION IV – WHO IS AN INSURED

- 1. If you are designated in the Declarations as:

- b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.

SECTION IX – DEFINITIONS

- 9. "Insured Contract" means:

- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another to pay for "bodily injury" or "property damage" to a third person or organization. . . .

The Declarations listed "ABCD Marine" as the named insured.

Boogaard sued NSI and Northland Holdings for his personal injuries. NSI and Northland counterclaimed for indemnity and for breach of the Agreement, which it alleged required Boogaard to include NSI as an additional insured. Boogaard later tendered defense of the counterclaims to IMU. IMU accepted the tender under a reservation of rights. NSI moved for summary judgment, and the trial court granted the motion, finding Boogaard had as a matter of law breached the Agreement and was required to indemnify NSI. IMU then denied coverage, but agreed to continue to pay for

Boogaard's defense for an appeal. Boogaard, however, did not appeal the summary judgment ruling. Instead, Boogaard and NSI settled the case, stipulating to damages of \$712,022.01.

The trial court held a reasonableness hearing (after joining IMU as a party to the hearing). The court approved the settlement agreement as reasonable, awarding Boogaard a judgment of \$600,000 against NSI (for his personal injury claim), and awarding NSI a judgment of \$712,022.01 against Boogaard (indemnification for Boogaard's personal injury claim plus attorney fees and costs). IMU claims in its brief that ABCD and Boogaard demanded IMU pay that entire \$712,022.01.

IMU brought a declaratory action¹ against ABCD and Boogaard to determine coverage. ABCD and Boogaard filed an amended answer, making counterclaims against IMU for breach of insurance contract and for bad faith. They later amended the answer to include a "cross-claim" against Alliance for negligence.² The trial court granted Alliance's motion for summary judgment, dismissing the claims against it. The trial court also granted IMU's motion for summary judgment on coverage, ruling that ABCD and Boogaard were not entitled to coverage. The court thus dismissed their breach of insurance contract counterclaim. The trial court did not dismiss the bad faith counterclaim, but the parties stipulated to dismissal without prejudice, and that claim is not at issue here.

ABCD and Boogaard appealed both the order dismissing IMU and the order dismissing Alliance. Before oral argument, however, ABCD, Boogaard and Alliance

² Although denominated a "cross claim" below, ABCD's claim against Alliance is actually a third-party action.

settled and jointly moved to dismiss that portion of the appeal. We granted the motion. As such, the only remaining issues on appeal relate to the trial court's dismissal of the claims against IMU.

DISCUSSION

ABCD and Boogaard argue that the trial court erroneously concluded there was no coverage under the IMU policy. For the reasons described herein, we disagree with ABCD and Boogaard, and affirm the trial court.

ABCD and Boogaard contracted with NSI specifically to indemnify NSI for any and all injuries caused by NSI. On that issue, the Agreement is clear that ABCD and Boogaard were "responsible for all bodily and personal injuries to all persons arising out of or resulting from [their] operations and/or use of the Property, including bodily and personal injuries to [their] own employees[.]" Likewise, they were to "indemnify and hold harmless (including costs and legal fees) NSI of and from all losses, damages, claims and suits for bodily and personal injury" and the indemnification agreement "includes all claims and suits against NSI by any employee (present or former) of [ABCD/Boogaard.]"

Exclusion 2 of the IMU policy generally excludes from coverage such contractual assumptions of liability. ABCD and Boogaard contend the Agreement, however, is an "Insured Contract" under the IMU policy, which would bring ABCD's contractual assumption of NSI's liability outside of exclusion 2. An "insured contract" under the IMU policy means:

That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another to pay for "bodily injury" or "property damage" to a third person or organization. . . .

ABCD and Boogaard claim that because they contracted in the Agreement to indemnify NSI for any and all claims against NSI, they have an Insured Contract, and exclusion 2 does not operate to bar coverage.

IMU does not disagree that the Agreement is an Insured Contract. It contends only that Boogaard is not covered by the exception because he is not a "third person" as that term is used in the Insured Contract clause. Neither party cites to relevant caselaw in support of their respective positions as to the meaning of the term "third person" in this context.³ However, in Cowan Systems, Inc. v. Harleysville Mut. Ins. Co., 457 F.3d 368 (4th Cir. 2006) the court considered the term "third person" in an Insured Contract clause identical in relevant part to the one at issue here. In that case, Cowan Systems contracted with Linens N Things to provide transportation services. In the contract, Cowan agreed to indemnify Linens N Things against "all claims, actions, losses, damages, expenses, judgments, and costs . . . resulting from or arising out of damage or injury to persons . . . caused in whole or in part by [Cowan's] performance or nonperformance[.]" Cowan, 457 F.3d at 371. Harleysville Mutual Insurance insured Cowan. Id.

³ None of the three cases cited by ABCD and Boogaard are helpful here. Golden Eagle Ins. Co. v. Insurance Co. of the West, 99 Cal. App. 4th 837 (2002), was primarily about whether legal fees and expenses could be included as "damages" under the policy; see Id. at 847, and nowhere in the case did the court address the meaning of the phrase "third person" as used in the Insured Contract clause. We note, however, that unlike the situation here, the injured party was not an insured, an employee of an insured, and was not connected to the contracting parties. Similarly, in John Deere Ins. Co. v. De Smet Ins. Co. of South Dakota, 650 N.W.2d 601 (Iowa 2002) the court did not address whether the injured party was a "third person" but there also the injured party was not the insured, an employee of an insured, or in any way connected to either of the contracting parties. See generally, John Deere, 650 N.W.2d at 602-03. Likewise, in Truck Ins. Exch. v. BRE Properties, Inc., 119 Wn. App. 582, 81 P.3d 929 (2003), the court did not address the meaning of the term "third person" but there the injured plaintiff was the insured's employee, not the insured himself.

A Cowan employee (George Shaffer) slipped and fell on ice when delivering a trailer to Linens N Things. He sued Linens N Things, who in turn filed a third-party complaint against Cowan, alleging Cowan had agreed to indemnify. Id. at 371. Cowan tendered to Harleysville, but Harleysville denied coverage, refusing to defend or indemnify. Cowan defended itself and obtained summary judgment in its favor. Cowan then filed a declaratory judgment action against Harleysville. One of the issues was whether the contract between Cowan and Linens N Things was an Insured Contract that would bring Cowan's agreement to indemnify outside of the general exclusion of contractual assumptions of liability.

Harleysville did not dispute that the indemnification agreement was an Insured Contract, but it claimed that Shaffer was not a "third person" with respect to Cowan because he was an employee of Cowan. The Fourth Circuit rejected this argument, holding the question of whether one is a "third person" should be answered from the frame of reference of the liable party:

Thus, Cowan, as the insured, assumed the tort liability of "another party," i.e. Linens N Things. In this case, Linens N Things' liability was based on a breach of its duty to Shaffer, who was a "third person." Shaffer was not its employee and so was a "third person" with respect to it. Moreover, Shaffer was not a party to the Trucking Transportation Agreement [between Cowan and Linens N Things] and therefore was also a "third person" with respect to the contractual indemnification in that agreement.

Id. at 373. Here, although Boogaard was not an employee of NSI, he nevertheless had a first party relationship with it because both Boogaard and NSI were parties to the Agreement. Moreover, as a general partner of the named insured on the policy at issue here, Boogaard was also a first party as to IMU. Thus, unlike the injured party in Cowan, Boogaard is not a "third person" to the Agreement or to the insurance policy.

Therefore, the Insured Contract exception does not apply to him and Exclusion 2 of the IMU policy precludes coverage for Boogaard and ABCD's contractual assumption of NSI's liability. The trial court did not err in granting summary judgment.

ABCD and Boogaard also argue the trial court should be reversed because NSI was an additional insured on the policy and had a right to be directly covered under the policy. We reject this argument. First, in their briefing, ABCD and Boogaard repeatedly conflate NSI with Northland Holdings and Naknek, implying that the employee who caused Boogaard injuries (Jeff Cronn) was employed by Northland Holdings and/or Naknek. But NSI is the only party as judgment debtor on the judgment entered in favor of Boogaard. Moreover, Cronn was not employed by Northland Holdings or Naknek. He was an employee of NSI, and there was no dispute about this below.⁴

From the faulty premise that Cronn was employed by Northland Holdings and/or Naknek, ABCD and Boogaard then argue Northland Holdings and/or Naknek were additional insured based two certificates issued by Alliance for the 2001-02 and 2002-03 policies. As IMU points out, however, "the purpose of issuing a certificate of insurance is to inform the recipient thereof that insurance has been obtained; the certificate itself, however, is not the equivalent of an insurance policy." Postlewait Const., Inc. v. Great American Ins. Companies, 106 Wn.2d 96, 100-01; 720 P.2d 805 (1986). Indeed, each certificate indicates that it "is issued as a matter of information only and confers no

⁴ ABCD and Boogaard also appear to claim that because they settled their claims with NSI and Northland Holdings, and because Judge Spector found the settlement was reasonable, IMU should somehow be precluded from arguing only NSI, and not Northland Holdings, was responsible as Cronn's employer for Boogaard's injuries. But because they fail to support this argument with citation to any authority, we decline to consider it. RAP 10.3(a)(6); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below.” Additionally, it is undisputed that Alliance was ABCD and Boogaard’s agent, not IMU’s agent. ABCD and Boogaard’s claim that Alliance was granted “permission” from IMU to add additional insured endorsements is not supported by the citations to the record.

Moreover, ABCD and Boogaard never submitted in opposition to IMU’s summary judgment motion any policies actually showing NSI, Northland Holdings, or Naknek were additional insureds.⁵ The only evidence in the record on this issue was the 2004 IMU policy showing the policy contained no additional insured endorsements, the testimony of the IMU claim handler that IMU was never asked to add additional insureds, and the letter from Alliance to IMU indicating ABCD and Boogaard would not be adding additional insureds. We reject ABCD and Boogaard’s arguments on this issue.

Boogaard and ABCD also argue the trial court erred by failing to reform the insurance policy to add NSI as an additional insured. We disagree. “To support a reformation of contract, there must be a showing of either fraud or mutual mistake.” Rocky Mt. Fire & Cas. Co. v. Rose, 62 Wn.2d 896, 902, 385 P.2d 45 (1963). As is described above, ABCD and Boogaard made no showing of fraud or mutual mistake.

⁵ ABCD and Boogaard claim, “[W]e do have one of the policies, the facing page of which shows that insurance was issued for all of the corporations, including Northland Holdings, Inc. and Northland Services Inc., Naknek, Northland Terminal Service, Inc. and others.” The policy to which they refer, however, has nothing to do with IMU’s policy issued to ABCD, but is instead a wholly different policy issued to the Northland Entities as named insureds by XL Specialty, a totally different insurance company.

There is no evidence in the record showing IMU intended to cover NSI as an additional insured.

Finally, even though the parties stipulated to the dismissal of the bad faith and breach of insurance contract claims without prejudice, and even though ABCD did not appeal that order, ABCD appears to argue in various portions of its brief on appeal that IMU committed bad faith. The bad faith claims are not at issue here, however, and as such, we decline to address those arguments.

Affirmed.

WE CONCUR:

Speer, J.

Dryden, C.J.

Reivelle, J.

APPENDIX E

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

INTERNATIONAL MARINE)
UNDERWRITERS, a division of One Beacon)
America Insurance Company, a)
Massachusetts Insurance Company,)
Respondent,)
v.)
ABCD MARINE, LLC, a Washington LLC;)
ABCD MARINE, a Washington partnership)
and ALBERT BOOGAARD, an individual)
domiciled in Washington,)
Appellants,)

No. 66102-7-1

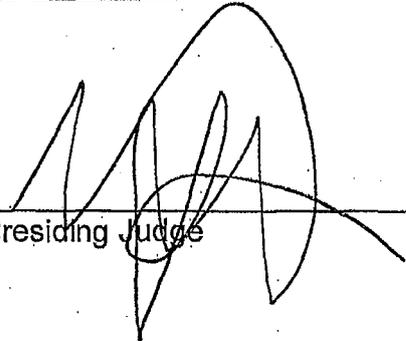
ORDER DENYING MOTION
FOR RECONSIDERATION

Appellant, ABDC Marine, filed a motion for reconsideration of the published opinion filed on December 5, 2011 in the above matter; an answer to the motion was filed by respondent, International Marine Underwriters.

A majority of the panel of this court has determined that the motion should be denied; Now therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

Dated this 7th day of March, 2012.


Presiding Judge

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 MAR -7 PM 1:42