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Supreme Court No. 87231-7

Court of Appeals No. 66102-7-I

THE SUPREME COURT
OF THE STATE OF WASHINGTON

CLERK

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,

APPELLANTS' REPLY BRIEF TO RESPONDENTS' ANSWER TO
APPELLANTS' PETITION FOR REVIEW

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I. STATEMENT OF FACTS

In their zeal to reply respondents have incorrectly recited several facts in their response, and they attempt to mislead the court by using incorrect and inexact language and by raising issues that are not part of this appeal to the Supreme Court. For example, on page one of their brief they note that the Access Agreement was signed by ABCD Marine (hereafter, ABCD) on September 4, 2004 (CP 708-709) and that, as managing partner, Mr. Boogaard failed to promptly provide notice to International Marine Underwriter (hereafter, IMU). The implication (without citation to the record) is that Mr. Boogaard failed to secure additional insured status for Northland Services, Inc. (hereafter, NSI). However, for purposes of the Supreme Court Appeal, appellant is not relying on coverage for the NSI negligence “additional insured” status but rather on the basis of coverage provided by automatic coverage provided by the policy itself for the clauses of the contract relating to “insured contracts.” With the “insured contracts” provisions of the contract there was coverage to NSI for torts committed by an NSI employee arising out of work done by ABCD on their premises. Furthermore, International Marine Underwriters (hereafter, IMU) can point to no exclusion whatsoever where the injured person is the named insured employee or partner. This would be contrary to the language of the policy itself and the

way it is interpreted in the industry. It is implemented in all states having these Commercial General Liability (hereafter, CGL) policies.

A similar effort to mislead and/or confuse, throughout its brief, respondent IMU conflates and uses interchangeably the identity of ABCD, the general partnership, with Mr. Boogaard, its managing partner.

The context of the Settlement with NSI is also mis-stated at page 6-7. Mr. Boogaard did receive \$50,000 from NSI in settlement, but he had over \$90,000 in uninsured medical expenses, over a year of lost wages, and permanent disabling injuries from the accident including an organic brain injury. Further, Boogaard settled with NSI because in addition to his unpaid medial bills he was exposed to a \$112,000 attorneys fee claim by NSI (CP 405-409). Additionally, at the time of settlement IMU informed Boogaard that they were denying his claim (CP 83-84 and CP 402-403), that IMU would not pursue the claim of “insured contract” on appeal which also was not asserted by their attorneys in the underlying case, and that he was further informed by IMU that if the appeal were unsuccessful Boogaard would be exposed to further attorneys fees of NSI all of which would have combined to bankrupt him (CP 582-583). Lastly, IMU was present at the mediation in which the settlement occurred and walked out of the proceedings leaving Mr. Boogaard on his own up the river without a paddle.

IMU was made a party to the underlying lawsuit and judgment arising out of a fairness hearing pursuant to RCW 4.22.060 in the case brought by Boogaard against NSI (CP 405). The trial court found that Boogaard's judgment for liability against NSI in the amount of \$600,000 was reasonable, and NSI's judgment against Boogaard on its counter claim of \$712,000 were reasonable (CP 405-409). IMU did not appeal the ruling of the trial court at the fairness hearing and the judgments are presumed to be reasonable under the statute (CP 405-409 and CP 893-897).

NSI was also made a party to this Declaratory Judgment Action and dismissed by stipulation between the parties because NSI has assigned their judgment arising out of the "Access Agreement" to Mr. Boogaard as part of the settlement, and NSI had no further interest in the claim and no desire to incur further attorneys fees (CP 1-7).

Under the "insured contract" provisions of the ABCD general liability policy IMU is liable to Mr. Boogaard for indemnification of NSI's liability to him in the amount of \$600,000, and IMU is also liable to NSI for NSI's attorneys fee claim in the amount of \$112,022.21 for a total of \$712,022.21 (CP 136).

II. LEGAL ANALYSIS

A. Purpose of the “Insured Contract” Provision was to Protect NSI from any Third Party Claim, Including Boogaard’s.

NSI, the tortfeasor, was the insured under the IMU insurance contract because the injury occurred in the context of ABCD’S work for NSI.

The purpose of the “Insured Contract” provisions in the ABCD Commercial General Liability Policy (hereafter, CGL) was to instantly and automatically indemnify and provide liability insurance for NSI as a customer of ABCD who required indemnity as a condition of a contract to do work without obtaining NSI’s new endorsements on existing insurance. In other words, the “insured” was NSI for any of its negligence arising out of any work being performed by ABCD. Mr. Boogaard is a third party to NSI, the indemnified party, under this portion of the “insured contract” provision (CP 330 and CP 736).

Their coverage afforded to NSI is so automatic that no notice of the named insured entering into such a contract is required. (emphasis added). The entire “notice issue” raised by IMU in its brief is completely bogus.

The “named insured” is ABCD. Neither Mr. Boogaard nor was Dahl (the other partner) was named anywhere in the IMU policy. Mr.

Boogaard as a partner is “an insured” under the contract just as any employee of ABCD would be “an insured.” “You” is defined in the policy as the named insured, and not types of partners who may be covered. Employees of named insureds have already been found by the Courts to be third parties to customers such as NSI under identical general liability policy contract provisions *Cowan Systems Inc. vs. Harleyville Mutual Insurance*, 457 F.3d 368 (4th Cir 2006). So has our own Courts: *Truck Ins. Exchange v. BRE Properties, Inc.*, Wash. App. 582, 595-596, 81 P.3d 929, 935 (2003). This directly contradicts though respondents’ mountain-like ropifier that employees cannot be third parties under the CGL policy. p. 13. To summarize: an employee or partner of the named insurer ABCD, was not expressly excluded from the “insured contract” coverage provided to NSI by the policy.

The results in *Cowan* and *BRE* are uniform throughout the country. IMU has cited no contrary authority.

B. NSI Counterclaimed Against Boogaard because Partnership Law Allowed Them to Do So.

The UPA (Uniform Partnership Act) law allowed NSI to counterclaim directly against Boogaard for ABCD’s indemnification because the UPA makes him “jointly and severally liable for all

obligations of the partnership.”RCW 25.05.125. Similarly under the UPA, had they chosen to do so NSI could have cross claimed against Wes Dahl for ABCD’s obligation to indemnify NSI for the injury to Boogaard, or they could have cross claimed against ABCD itself *Seafirst Center Ltd. Partnership v. Kargianis, Austin & Erickson*, 73 Wash. App. 471, 866 P.2d 60 (1994), decision aff’d, 127 Wn. 2d 355, 898 P.2d 299 (1995).

However, joint and several liability does not convert Mr. Boogaard’s identity into the ABCD Partnership itself nor does it convert him into the “named insured” under the IMU CGL policy. Where a partner is called upon to pay the debts of the partnership he is entitled to be indemnified by the Partnership and his copartners and said indemnification has nothing to do with the liability one has for one’s own actions. Indemnification is related solely to the business relationship between the partnership and its partners created under the UPA. *Gildon v. Simon Property Group, Inc.* 158 Wn.2d 483, 498-503, 145 P.3d 1196, 1204 - 1207 (2006).

The bottom line here not addressed by respondents is that the partnership statute is unequivocal in declaring that a Partnership is an “entity distinct from its partners.” RCW 25.05.050. It is undisputed that Boogaard signed the NSI “Access Agreement” as the managing partner of ABCD pursuant to RCW 25.05.100. A Partnership, an LLC, or a Corporation can only act through its agents and IMU to suggest otherwise

as respondents do is nonsensical.

IMU had the same obligation to indemnify NSI for injuries to Mr. Boogaard as they would have had to any employee of ABCD. IMU's risk and obligation is the same in both instances because Mr. Boogaard and/or any employee of ABCD is each a third party to NSI which is the basis for the "insured contract" indemnity provision. *Cowan*, supra.

C. Industry Standards Must Be Considered to Provide Uniformity

In the present case the terms "insured contract" and "third party" in the context of insured contracts are terms used and understood within the insurance industry and approved by regulators for use in Construction and Maritime CGL policies. Plaintiff's insurance industry expert, Robert Sedillo, submitted declarations explaining the industry usage of technical terms. Mr. Sedillo's qualifications were not challenged. The substance of his testimony was not questioned. A motion to strike his testimony was denied by the trial court. Mr. Sedillo points out that the language of CGL policies is uniform in nature and promulgated by the insurance industry. (Declaration of Robert A. Sedillo). It is not a mere happenstance that the "insured contract" language in the general liability policy in the *Cowan*, supra. and *Bre*, supra is almost identical to the language in the IMU policy in the present case.

This court has recognized that there is an ambiguity created in a non negotiated standard form CGL insurance contract where the industry drafted clause selected by the insurer has a meaning different than the common understanding of the language itself, and in such cases the language is construed against the drafter. Further where the clause involves limitations or exceptions on coverage the principal is applied with added force. *Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omah*, 126 Wn.2d 50, 82-83, 882 P.2d 703, 721 (1994) citing with approval. *Morton Intern., Inc. v. General Acc. Ins. Co. of America* 134 N.J. 1, 30-31, 629 A.2d 831, 848 (N.J.,1993).

Mr. Sedillo provides expert testimony as to the industry wide meaning of the non negotiated standard “insured contract” clause in the IMU CGL policy which has been approved for use by State regulators across the country. When construing standard insurance industry clauses courts have held the clauses should be interpreted as understood by the industry and state regulatory authorities, who have had an opportunity to disapprove the clause in arms length negotiations, and not necessarily as written or as commonly understood. To do otherwise would contravene public policy to require regulatory approval of standard industry wide policy provisions to assure fairness in rates and policy content. Interpretations of such clauses are provided by explanatory statements

made by the industry. *Morton Intern., Inc. v. General Acc. Ins. Co. of America*, 134 N.J. 1, 30-31, 629 A.2d 831, 848 (N.J.,1993).

The ABCD partnership, is by statute is an independent entity distinct from its partners. RCW 25.05.050 This separate identity makes Boogaard a third party to NSI, a fact which was ignored by the trial court and two of the judges of the Court of Appeals, is recognized by the industry in the creation of the “insured contract” clause.

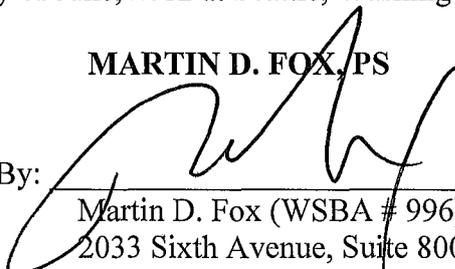
III. CONCLUSION

The court should apply the UPA and find that the ABCD partnership is an independent entity distinct from its partners and extend the ruling of *Bre. supra*, and *Cowan, supra*. to provide relief to Mr. Boogard . IMU is bound by the industry wide usage “insured contract” standard contract clause language in their non negotiated CGL policy. The published holding of Court of Appeals is contrary to uniform holdings interpreting the “insured contract” provision of CGL policies. Employer (or partners) of named insured business entities are “third parties” when they are

injured by the negligence of the entity hiring their company.

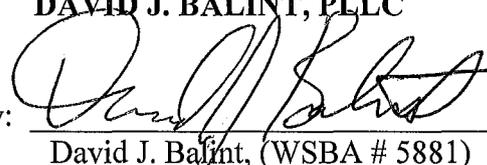
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DECLARATION OF SERVICE
APPELLANTS' REPLY BRIEF TO RESPONDENTS' ANSWER
TO APPELLANTS' PETITION FOR REVIEW

BY RONALD R. CARPENTER
CLERK

I certify that on the 11th day of June, 2012 I caused the original of Appellants' Reply Brief to Respondents' Answer to Appellants' Petition for Review to be filed with the Supreme Court of the State of Washington, and caused a true and correct copy of Appellants' Reply Brief to Respondents' Answer to Appellants' Petition for Review to be served on the following in the manner indicated below:

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