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THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

V.

ABCD Marine, LLC, a Washington LLC; ABCD Marine, a Washington partnership,
and Albert Boogaard, an individual domiciled in Washington,
Appellants.

RESPONDENT'S
APPELLEE'S SUPPLEMENTAL BRIEF

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 ORIGINAL

TABLE OF CONTENTS

	PAGE
I. APPELEE'S ARGUMENTS TO ISSUES RAISED ON APPEAL	1
A. There is No coverage Under the Partnership Policy for Personal Injuries as Boogaard is not a "Third Party" Under the IMU Policy	6
1. Mr. Boogaard is a "First party" to the IMU Policy, the Northland Contract and the Lawsuit Against Himself	6
2. The Rationale of <i>Mcdowell V. Austin</i> does not Require IMU to Provide Coverage	9
II. CONCLUSION	11

CASE AUTHORITIES

	PAGE(s)
<i>Aguilar v. Int'l Longshoremen's Union Local No. 10</i> , 966 F.2d 443, 447 (9th Cir. 1992)	11
<i>Boogaard v. Northland et. al.</i> , Cause No. 06-2-35554-7SEA	2,8
<i>Cowan Systems Inc. v Harleysville Mutual Insurance Co</i> , 457 F.d 368 (4thCir. 2006)	4
<i>Crow Tribe of Indians v. Racicot</i> , 87 F.3d 1039, 1045 (9th Cir. 1996)	10
<i>Maffei v. Northern Ins. Co. of New York</i> , 12 F.3d 892, 898-99 (9th Cir. 1993)	10
<i>McDowell v. Austin Company</i> , 105 Wn.2d 48, 710 P.2d 192 (1985)	6,9
<i>Truck Insurance Exchange v. BRE</i> , 119 Wn.App 582, 584 (Div. I 2003)1,2	1,2,4
<i>McHugh v. United Serv. Auto. Ass'n</i> , 164 F.3d 451, 454 (9th Cir. Wash. 1999)	11

OTHER AUTHORITIES

JOSEPH M. MCLAUGHLIN, JACK B. WEINSTEIN & MARGARET A. BERGER, Weinstein's Federal Evidence sec. 702.03. (2007) Revised Uniform Partnership Act#1998 c.103 §201	11
RCW 25.05.050.	5,7
RCW 25.05.125(1)	5,7,8
RCW 25.05.030(2)	5,8
RCW 4.24.115	9,10

I. APPELLEE’S ARGUMENTS TO ISSUES RAISED ON APPEAL

Appellant vastly overstates the complexity and importance of the issues it presents in this case, principally by distracting from the salient facts.

Appellant presents his situation as that of a victim and attempts to mislead the Court into believing that he represents an entire class of potential small business victims of a loophole in the system. But that is simply not the case. Mr. Boogaard’s situation is one of his own making. Mr. Boogaard signed a contract that obligated him to do a simple task: simply call his insurance broker and tell him to add Northland as an “additional insured” on the ABCD CGL policy. Had he honored his contract and done that simple task, Northland would have submitted the claim for coverage by IMU, the claim would have been insured by IMU and this case would not exist. That is the same fact pattern as in *Truck Insurance Exchange v. BRE*, 119 Wn. App 582, 584 (Div. I 2003). The difference, however, is that in *Truck Insurance* the contractor BRE honored its contract; it paid the premium to get West Star named an additional insured on the CGL policy. *Id.* at 584. Mr. Boogaard, however, did not honor his contract, did not pay the premium and did not get Northland named an additional insured on the IMU policy. When

West Star was sued, it properly claimed coverage as an “additional insured” on the BRE liability policy because it was named on that policy. Division 1 properly held, “...BRE and West Star may each read the policy as if it is ‘the insured.’” *Id.* at 589. Here, Northland had no basis to claim it was an insured under the IMU policy, because Mr. Boogaard never added it to his policy. “But for” Mr. Boogaard’s breach of the Northland contract, his claim would have been covered.

Appellant does not ask this Court to apply the rule of *Truck Insurance*, he asks this Court to extend the rule to accommodate circumstances created solely by his own breach of contract.

Mr. Boogaard complains of the tragic and unforeseeable consequences that potentially affect these small operators. The “class” of aggrieved small business owners he represents consists of only those small business owners who choose to dishonor their contracts. Like Mr. Boogaard, any small business operator who chooses to save money by not buying first-party insurance, who choose to save money by not buying Worker’s Compensation covering the owners, and who choose to breach a contract he signs that obligates him to acquire insurance coverage for others, will suffer consequences that may indeed be tragic. But they are not unforeseeable. For example, the *statutory law* requires drivers to buy insurance and when drivers ignore it, they may suffer uninsured or

underinsured consequences of their own making but they are not unforeseeable. Here, the *contract law* required Mr. Boogaard to buy insurance; he ignored it and suffered a foreseeable, uninsured consequence of his own making.

Ignoring these fundamental realities in this case, Appellant raises three discrete issues of appeal. The first issue is based on a demonstrably false premise, namely that workers “are left with no legal remedy if they are required to enter into indemnity agreements” with the landowners, like was done here with Northland. They do have legal remedies, simple ones. They can a) buy Worker’s Compensation insurance for the owners; b) honor the contract they signed by adding the landowner (Northland) as an additional insured; c) both; or d) don’t sign the contract and don’t work for the landowner. If “members of small sub-contractor partnerships” or any other subcategory of owners do (a), (b), (c), or (d), then they and their workers are completely covered and there is no problem. But signing the contract and then choosing not to honor it, like Mr. Boogaard did, is not a viable option. The “problem” is not *with the law*, but with convincing people like Mr. Boogaard to honor their contracts.

The “insured contracts” provision was intended to pick up true, third-party liability claims assumed under a broad range of contractual structures, not to create a whole new class of first-party coverage for sole

proprietor and partnership business owners too cheap to buy Workmen's Compensation for themselves.

Otherwise, the first issue raised on appeal appears to be an appeal of the underlying contract decision of Judge Specter in the underlying case, *Boogaard v. Northland et. al.*, where Mr. Boogaard fought the enforceability of the indemnity provisions of the Northland Access Agreement, and unfortunately lost. Mr. Boogaard chose not to appeal that adverse ruling on the contract in that case and he may not challenge that ruling on appeal in this case, especially for the first time (it was never raised in either the trial court or at Division I). This is not the contract case between Mr. Boogaard and Northland; this is an insurance coverage case between Mr. Boogaard and IMU.

The second issue raised is easily answered in the negative. There is no conflict between the Court of Appeals decision, Washington authority and national authority concerning who is a "third-party" under an "insured contract" provision of an insurance contract. The Division I opinion does not conflict with Washington law and is entirely consistent with the holding in *Truck Insurance v. BRE*. The facts are different so there is a different outcome.

Appellant argument about Mr. Boogaard not being third-party, as opposed to a "first-party," stems from a misunderstanding of basic

partnership law. Partnerships are indeed separate entities from the partners. RCW 25.05.050. However, the mere fact that they are separate entities does not mean that *only the partnership* is a first-party to the contract. General partners are also first-parties to the general partnership contracts they sign, *in addition* to the partnership. RCW 25.05.125(1) provides that general partners are automatically, jointly and severally liable on every partnership contract, in addition to the general partnership. RCW 25.05.125(1). RCW 25.05.030(2) provides that general partners *may be sued directly* on the partnership contracts, *with or without naming the general partnership as a defendant*. Thus a partner is not some kind of third-party beneficiary, or third-party indemnitor on a partnership contract. A general partner is a first-party, joint and several obligor on a general partnership contract. Mr. Boogaard was a general partner; therefore he was first-party to that Northland contract, directly liable to Northland, jointly and severally with ABCD general partnership. This is consistent with the pleading posture in the underlying case, namely that Mr. Boogaard was the sole named plaintiff and first-party counterclaim defendant and there were no CR 14 “third-party” claims.

Furthermore, the Division I opinion was consistent with the other “national authority” because the only “national authority” on the issue is *Cowan Systems Inc. v Harleysville Mutual Insurance Co*, 457 F.3d 368

(4th Cir 2006). Indeed, the dearth of national authority on the issue is testament to the overstatement of the importance of these issues by the Appellant.

The third issue is, like the first, an effort to raise an issue (for the first time) about the enforceability of the Northland Access Agreement against Mr. Boogaard and whether Judge Specter's ruling in that case is consistent with *McDowell v. Austin Company*, 105 Wn.2d 48, 710 P.2d 192 (1985). Again, this may well have been a proper issue on appeal in the *Boogaard v. Northland* case, which Mr. Boogaard chose not to pursue, but it is not properly on appeal in this coverage case. Further, the issue is framed with another false predicate, namely that "contractors/partners... cannot insure themselves against their own injuries through the negligence of the landowner." They can, and Mr. Boogaard could, through any of the options (a) - (c) above. Mr. Boogaard simply chose not to. *Choosing* not to buy insurance or honor a contract, is not synonymous with *being unable* to honor a contract or buy insurance.

A. There is no Coverage Under the Partnership Policy for Personal Injuries as Boogaard is not a "Third-Party" Under the IMU Policy

1. Mr. Boogaard is a "First Party" to the IMU Policy, the Northland Contract and the Lawsuit Against Himself

ABCD partnership purchased a CGL policy from IMU to protect them from liability they may have to third-parties for damages they cause. As a partner in the ABCD general partnership, Mr. Boogaard is a first-party beneficiary to the IMU policy as an “Insured.” (*Dec. Sheet and policy, CP 110 & CP 88-146.*) As a partner, Mr. Boogaard is a first-party insured under the IMU policy *for liability for personal injury claims*. As a partner, he was also a first-party obligor on the contract, along with ABCD general partnership. RCW 25.05.125(1).

The policy also included coverage for liability assumed under an “Insured Contract.” An “insured contract means: that part of a contract ...under which you assume the tort liability of another party to pay for the bodily injury.....to a third-person or organization.” CP 122, 114 & 136.

Mr. Boogaard frames the issue by claiming that Mr. Boogaard, personally, was intended to be a “third-party” under this clause of the contract. In support, he argues that the Superior Court, Division I panel, and the entire Division I on reconsideration “overlooked” RCW 25.05.050 of the Revised Uniform Partnership Act, passed by our legislature in 1998 c.103 §201 that states, “A partnership is an entity distinct from its partners.”¹ However, nothing in the RUPA says that only the general

¹ Appellant also makes numerous factual statements at P. 12 in the briefing about all the ways Mr. Boogaard supposedly observed the strict separation

partnership, and not general partners, are first-parties to general partnership contracts. Indeed, the opposite is true. RUPA makes general partners “first-parties” to general partnership contracts *in addition to the general partnership entity itself*. RCW 25.05.125(1) states, “...all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.” Further, RCW 25.05.130(2) permits automatic direct actions against partners for partnership debts, regardless of whether the partnership entity is even named in the lawsuit or not. That means that when Mr. Boogaard signed the Northland contract, he automatically, personally assumed first-party, joint and several liabilities on that contract.

The Superior Court confirmed this in its holding in *Boogaard v. Northland, et.al.*

“[P]laintiff [Boogaard] is liable to defendants [Northland] for breach of the requirement in the Access Agreement to procure insurance covering defendants in amount equal to any recovery he may have against defendants plus costs and attorney fees.”

See March 10, 2008 Order Granting Northland Motion for Summary Judgment CP 277-279 (Exhibit E to Moran Declaration.)

between himself and his partnership. These claims are disputed and unsupported by citation to evidence in the Record.

This ruling was never appealed and stands as fixed law. Mr. Boogaard was a “first-party” *vis-a-vis* Northland on the contract; he was a first-party judgment debtor personally liable to Northland for breach of that contract; and he was a first-party *vis-a-vis* himself in his personal injury lawsuit where he was essentially suing himself for his own personal injury claim.

There is no way in logic or law that a person can be a “third-party” to his own personal injury claim, especially one made (ultimately) against himself, no matter how convoluted he tries to structure it.

2. The Rationale of *McDowell v. Austin* does not Require IMU to Provide Coverage

Petitioner alleges that the rationale of *McDowell v. Austin*, 105 Wn.2d 48 (1985) somehow requires a coverage determination in this case although there is no legal justification for that. In that case, the Court upheld a contract requiring indemnity so long as it did not violate RCW 4.24.115. In *McDowell*, a general contractor sought indemnification for a portion of a settlement it had paid a subcontractor’s employee who was injured on the job site. The contract between the general and the sub required indemnification, but the Supreme Court found that such agreements are only enforceable if there is concurrent negligence, and will not be enforceable if the injury resulted from the sole negligence of the

general contractor. Under RCW 4.24.115 there cannot be indemnification for the sole negligence of the indemnitee. That case would have had more relation to Mr. Boogaard's claim against NSI which he chose not to appeal since the allegations seem to be clear that NSI was the sole negligent party. However, NSI's judgment against Mr. Boogaard relates to his failure to name NSI as an additional insured under the policy. An act he simply decided not to undertake. It further raises the question as to why Mr. Boogaard decided not to appeal the claims against NSI.

Furthermore, the Court need not consider Appellant's arguments about expert testimony regarding policy language interpretation or emotional policy arguments about uninsured injured workers. They have no application here. Mr. Sedillo's testimony regarding the distinction between a named insured and an automatic insured cannot substitute for the policy language. Expert testimony cannot be used to provide legal meaning or interpret the insurance policies as written. *See Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996) (stating that expert testimony is not proper for issues of law because the role of experts is to interpret and analyze factual evidence and not to testify about the law); *Maffei v. Northern Ins. Co. of New York*, 12 F.3d 892, 898-99 (9th Cir. 1993) (holding that an insurance expert's declaration that a sulphur dioxide cloud constituted a "hostile fire" as described in insured's policies was

improper expert testimony); *Aguilar v. Int'l Longshoremen's Union Local No. 10*, 966 F.2d 443, 447 (9th Cir. 1992) (stating that matters of law are "inappropriate subjects for expert testimony"). Therefore, the Court should view the experts' testimony in this case as only relevant for the facts that they observed and not for their legal conclusions as to what conditions were covered or excluded under the terms of the policy. *McHugh v. United Serv. Auto. Ass'n*, 164 F.3d 451, 454 (9th Cir. Wash. 1999); 4 JOSEPH M. MCLAUGHLIN, JACK B. WEINSTEIN & MARGARET A. BERGER, Weinstein's Federal Evidence sec. 702.03. (2007), (stating that "matters of contract interpretation are generally for the finder of fact to decide, and are not an appropriate subject for expert testimony"). Here, Sedillo's testimony cannot change the clear policy language as it relates to the definition of "insured contracts." Furthermore, his opinion testimony cannot change the facts or rewrite the policy. Consequently, the policy language should require this Court to affirm its previous decision and the trial court in dismissing Mr. Boogaard's claims.

CONCLUSION

This is not a case about a potential class of uninsured workers, but instead is a case where an owner of a business failed to meet his obligations under a contract and now seeks to invoke an emotional rather than a factual and legal decision on the merits of this coverage case. Had

Mr Boogaard simply made the decision to contact his insurance company and name Northland as an additional insured there would be no issue. He failed to do so. He also failed to obtain worker's compensation coverage. He made bad business decisions and now he wants someone else to pay for it. Unfortunately he did not obtain coverage for such bad decisions. Mr Boogaard as a general partner in a partnership is a first party named insured on the CGL policy and he is a first party to the access agreement with Northland. He was not a third party under the IMU policy nor could he be without ignoring the language and purpose of the policy. This is not a broad policy case, this is one person failing to abide by his contract. The Court of Appeals should be affirmed.

Signed this 5th day of October, 2012.

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I hereby certify under penalty of perjury that on October 5th, 2012, I sent to the Supreme Court of the State of Washington, through email, and to parties listed below, through legal messenger and email, a copy of the document to which this certificate is included:

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