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No. 632493-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ALLSTATE INSURANCE COMPANY,

Respondent,

v.

LIBERTY SURPLUS INSURANCE CORPORATION,

Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

When a serious personal injury claim was made against Mr. Sangjin Kim, d/b/a Advanced Ladders (Advanced Ladders), his insurance company, Allstate, stepped up, investigated, negotiated and settled the claim. During its pendency, Advanced Ladders also tendered the claim to Liberty Surplus Insurance Corporation which Advanced Ladders contended insured it under a Broad Form Vendors Endorsement. For reasons which Liberty has since mostly abandoned, Liberty denied coverage and the tender.

Allstate brought suit against Liberty for equitable contribution asserting that Liberty covered Advanced Ladders for claim, that Liberty's policy was primary to Allstate's and that Liberty should have paid the claim. Clow v. Nat'l. Indem.Co., 54 Wn.2d 198, 399 P.2d 82 (1959). Two cross motions for summary judgment were argued to the King County Superior Court and judgment was entered for Allstate. Liberty has appealed to this court, arguing selected issues.

II. ISSUES PRESENTED ON LIBERTY'S ASSIGNMENTS OF ERROR

Was the trial court correct in granting summary judgment to Allstate on the issue of whether Advanced Ladders was an insured under the Liberty policy.

Was the trial court correct in granting summary judgment to Allstate on the issue of whether Advanced Ladders was covered by the Liberty policy for the Colton accident.

III. STATEMENT OF THE CASE

This insurance contribution lawsuit arises out of an accident that occurred on November 30, 2004, in which James Colton was injured while using a “Little Giant” ladder at the business premises of Sangjin Kim, d/b/a Advanced Ladders. CP 85, ¶ 2. “Little Giant” ladders are manufactured by Wing Enterprises, Inc., and were sold by Advanced Ladders. Id. Mr. Colton asserted liability claims against Advanced Ladders for his injuries and also put on notice Wing and Wing’s insurance carrier, Liberty Surplus Insurance Corporation. CP 86, ¶ 4, CP 737-39, Dep. of Connolly, p. 15, l. 7 to p. 24, l. 25.

Allstate insured Advanced Ladders and conducted an investigation of the claim. CP 86, ¶ 4. Mr. Colton asserted and Allstate’s investigation demonstrated that he was injured when the “Little Giant” ladder that was being demonstrated to him and that he was standing on, unexpectedly telescoped downward, causing him to fall. Id. ¶ 4. Allstate’s investigation revealed that Mr. Colton’s injuries were caused at least in part by the apparent negligence of an Advanced Ladders employee, who failed to properly set up the ladder immediately prior to Mr. Colton’s accident. Id.

Liberty's policy for Wing also insured its vendors. Advanced Ladders tendered the Colton liability claim to Liberty taking the position that it was such a vendor. CP 34, ¶ 4; CP 740-47, Dep. of Connolly, p. 26, l. 4 to p. 54, l. 23, and CP 266-67. Liberty denied coverage for Advanced Ladders. CP 34, ¶ 4 and 749-51. Advanced Ladders advised Liberty that it would attempt to settle the Colton claims and might look to Liberty for reimbursement later. Liberty was unmoved. CP 34, ¶ 5.

In December, 2006, following extensive, contentious negotiations and mediation of the claim before Larry Jordan, Mr. Colton's claims against Advanced Ladders were settled by Allstate's payment of one million dollars. CP 34-35, ¶ 6, CP 87 ¶6. Allstate also incurred attorneys' fees, costs and expenses in defending Mr. Colton's claims and negotiating the settlement. CP 87-88, ¶ 7; Exs. 3-4.

Thereafter alleging that Liberty Surplus covered Advanced Ladders for the claim, and that Liberty's coverage was primary, Allstate brought this equitable contribution action against Liberty to recover the settlement amount, its defense costs and interest. CP 1-11.

A. Facts Relating to On File With Company Issue.

The Broad Form Vendors Endorsement in the Liberty/Wing policy at issue in this case is at CP 335-36. The endorsement says that it applies to the vendors and the products shown in the endorsement schedule.

Under Products, it states "All Products." This requirement is obviously met. Under Name of Person or Organization (Vendor) it states "On File With Company." One issue for determination on appeal is whether, given the evidence, Advanced Ladders is a vendor under the endorsement.

"Company" as used in the phrase "On File With Company" refers to Liberty. The policy refers "to the Company providing this insurance" at the beginning of the insuring agreement on Form CG0038 07 98 at page 1 of 13. CP 364.

What is meant by "On File With Company" and what in fact was in the Company files is entirely in the hands of Liberty. Testimony of the underwriter Ms. Laura Corwin, the claims supervisor Mr. Jamie Moray, and the claim representative Ms. Colleen Connelly, and their documents and files provide information to answer these questions.

Ms. Laura Corwin is a Vice President and underwriter with Liberty in Boston. CP 706, Dep. of Corwin, p. 69, l. 24-25. As the underwriter, her role was to review the insurance application provided by Wing through its insurance broker, Marsh. She considered Wing's operations and losses, determined a price and that the risk fit the type of business that Liberty was interested in writing. CP 691, Dep. of Corwin, p. 8, l. 16 to p. 9, l. 3. She determined what terms and conditions and forms were

going to be in the policy and actually issued the policy at issue in this case. CP 691-92, Dep. of Corwin, p. 9, l. 18 to p. 10, l. 2.

In this case, the broker submitted the Wing business to Liberty along with that of about 15 other ladder manufacturing companies under the Safe Step Program. CP 692, Dep. of Corwin, p. 10, l. 15 to p. 12, l. 23.

Corwin received an insurance policy application signed by Wing that broadly identified Wing's vendors. CP 692, 697, Dep. of Corwin, p. 12, ll. 2-12; p. 30, l. 18 to p. 31, l. 16; CP 708-11, Dep. Ex. 2. The application referred to the fact that Wing's products were sold at "over thousands of locations through out the United States". CP 708, Ex. 2, part 4.b).

The application form itself contains a typographical error. It is a series of questions and Wing filled in answers. Questions 4.a). and 4.b). read exactly the same, asking for the location of factories or stores at which products are manufactured. Wing filled out the form answering part 4.a). with the location of its manufacturing plants and answering part 4.b). with the information about its sales locations and vendors that is quoted above. At her deposition Ms. Corwin was asked if she could read the duplicate questions and the different answers and draw the conclusion that in answer to 4.b). Wing was providing information as to where its

products were sold. She said you could read it that way and draw that conclusion. CP 697, Dep. of Corwin, p. 30, l. 18 to p. 31, l. 18.

Ms. Corwin knew that Wing wanted a Broad Form Vendors Endorsement in its policy because Wing's broker asked her for it. CP 692, Dep. of Corwin, p. 13, ll. 12-25. She acknowledged in her deposition that the intent was to include all vendors. She testified:

Q. When you received a request that the policy contain a broad form Vendors Endorsement from the broker, did you understand that what the broker and Wing wanted was to insure their vendors under the broad form Vendors Endorsement?

A. I believe it was assumed.

CP 696, Dep. of Corwin, p. 26, ll. 17-23.

Wing's prior year policy with St. Paul contained a Broad Form Vendors Endorsement covering Wing and "all vendors" for "all products." CP 693-94, Dep. of Corwin, p. 16, l. 22 to p. 19, l. 7.

Further, Ms. Corwin testified that all of Liberty's policies of this type contain a vendors endorsement. The coverage is included within the standard charge. CP 699, Dep. of Corwin, p. 40, l. 20 to p. 41, l. 8. The premium on the one year Wing policy was at least \$750,000. CP 702-03, Dep. of Corwin, p. 53, l. 2 to p. 54, l. 2.

Ms. Corwin issued a quotation letter to the broker offering to write the business and indicated that the terms and conditions of the policy

would include a Broad Form Vendors Endorsement. CP 696, Dep. of Corwin, p. 27, ll. 2-20; CP 712-13, Dep. Ex. 4.

The quote was accepted; Corwin issued a binder for the policy, and then issued a policy, effective February 1, 2004. A rearrangement in the premium structure was later agreed to and the policy was reissued under another number effective April 1, 2004. Both the February 1 and the April 1, 2004 policies contain the same Broad Form Vendors Endorsement. CP 698-99, Dep. of Corwin, p. 37, l. 23 to p. 40, l. 15, CP 702, Dep. of Corwin, p. 52, ll. 11 to 17. A complete copy of the April 1, 2004 policy is in the record at several places including at CP 331-376.

Corwin acknowledged at her deposition that there was nothing that she received in writing or by telephone from either the insured or from its broker that indicated that they wanted to cover less than all of Wing's vendors under the Broad Form Vendors Endorsement. CP 701, Dep. of Corwin, p. 46, ;ll. 2-10.

The vendor schedule in the endorsement says "On File With Company." CP 335. Ms. Corwin testified:

Q. Who determined what information was going to be put in the schedule of the broad form vendor's endorsement?

A. I determined it.

Q. And how did you do so?

A. Based on not having all the information of who the vendors were, we made what we would say a blanket vendor's endorsement.

CP 698, Dep. of Corwin, p. 35, l. 25 to p. 36, l. 9.

What does "On File With Company" mean? Ms. Corwin said: "It means that the insurance company would have that information within their files." CP 701, Dep. of Corwin, p. 46, ll. 20-25.

She acknowledged that this information can take many forms including the application for insurance. CP 701, Dep. of Corwin, p. 47, l. 7 to p. 48, l. 5.

She acknowledged that Exhibit 2 to her deposition CP 708-11, the signed application from Wing that refers to Wing's vendors as selling ladders at thousands of locations was in her files. CP 697, Dep. of Corwin, p. 31, ll. 17-18. This document generally identifies Wing's vendors. It was in Liberty's files and therefore was on file with the company. Id.

Ms. Corwin said that if Liberty feels that it needs more information from their insured, it can follow up with the broker or the insured with regard to information on vendor identity. In this case, there was no follow up with regard to vendor identity. CP 701-02, Dep. of Corwin, p. 49, l. 10 to p. 50, l. 14. There were several subsequent communications between

Liberty and the broker for Wing Enterprises, including correspondence and letters in May and September, 2004. CP 714-19, Dep. of Corwin exhibits 12, 13, 14, 15, and 16. These letters evidence open and active lines of communication between Liberty and Wing's broker. No one at Liberty followed up with Marsh or Wing for more information about Wing's vendors. CP 701, Dep. of Corwin, p. 48, l. 24 to p. 49, l. 9.

Ms. Corwin also testified that one way a vendor could be identified in Liberty's files was to be issued a certificate of insurance. CP 701, Dep. of Corwin, p. 47, l. 18 to p. 48, l. 5. However, with respect to the Wing/Liberty policy, the certificates of insurance, all issued by Marsh, were never sent to Liberty until just before Ms. Corwin's deposition in January, 2009 when she made an inquiry of Marsh. The certificates were not in Liberty's files until then. CP 705-07, Dep. of Corwin, p. 63, l. 10 to p. 70, l. 7.

Testimony was developed in the deposition of Mr. Jamie Moray, Liberty's Senior Claims Manager and Assistant Vice President, about the claims that were handled under the Liberty/Wing policy.

Mr. Moray supervises a unit of claims professionals and part of his job is to make coverage decisions on claims that are made against policies that Liberty issues to its insureds. CP 722, Dep. of Moray, p. 7, ll. 3-11.

One of the documents produced by Liberty in this case is a loss run for the policy, which is a list of claims made and some information about each claim. CP 722-23, Dep. of Moray, p. 9, l. 12 to p. 10, l. 7.

The loss run included a reference to the claim of Mr. Dale Curtis. Mr. Curtis filed suit alleging that he was injured by a Wing ladder. He sued Wing Enterprises and Sunset Ladder Company. Sunset was sued as the vendor of the ladder. CP 723, Dep. of Moray, p. 11, l. 1 to p. 12, l. 11.

Sunset tendered its defense to Wing and also at that time requested a certificate of insurance confirming that it was insured under Wing's policy. CP 723-24, Dep. of Moray, p. 12, l. 12 to p. 14, l. 8; CP 731-32, Ex. 23. The letter makes it clear that Sunset had not earlier received a certificate of insurance confirming that it had vendors coverage. The tender letter was passed on from Wing Enterprises to Risk Retention Services/Ladder Management, a third party claim administrator for Liberty as to Wing's ladder claims. Risk Retention is an entity that has special expertise in defending liability claims involving ladders. CP 724, Dep. of Moray, p. 16, l. 7 to p. 17, l. 12.

At this time the only reference to Sunset in Liberty's files was the general one in the Wing application and the tender letter from Sunset which was written in response to the suit.

On behalf of Liberty, Risk Retention accepted the tender from Sunset because Sunset was an insured under the Broad Form Vendors Endorsement in the Liberty policy. CP 725, Dep. of Moray, p. 18, l. 9 to p. 19, l. 19. Liberty defended Sunset Ladder, the case went to trial resulting in a defense verdict. Liberty would have paid had an adverse judgment been entered against Sunset. CP 725-26, Dep. of Moray, p. 20, ll. 23-25; p. 22, l. 24 to p. 23, l. 14.

Liberty analyzed coverage with respect to Sunset Ladder, and decided to defend and indemnify Sunset because of the vendors endorsement and because the claim arose out of an alleged product defect in the ladder. CP 726, Dep. of Moray, p. 23, ;l. 19 to p. 24, l. 14.

The other claims, except for Advanced Ladders, that were made against Wing and which are referenced on the Liberty/Wing policy loss run were against Wing only and did not involve claims against vendors. CP 726-28, Dep. of Moray, p. 25, l. 25 to p. 30, l. 14, CP 735-37, Dep. of Connolly, p. 8, l. 23 to p. 15, l. 6.

Advanced Ladders tendered the Colton claim to Liberty. Moray was responsible along with Ms. Colleen Connolly, a claim representative he supervised, for analyzing and responding to the tender. Mr. Moray understood that Advanced Ladders distributed Little Giant Ladders manufactured by Wing. CP 729, Dep. of Moray, p. 35, l. 22 to p. 36, l. 11.

He testified that he rejected the claim for three reasons: 1) the claim did not arise out of a defect in Wing's product, 2) there was an exclusion in the Broad Form Vendors Endorsement that he thought applied and 3) based on the other insurance provisions of the Allstate policy and the Liberty policy, Liberty thought that the primary coverage for Advanced Ladders was with Allstate. CP 729, Dep. of Moray, p. 36, l. 17 to p. 37, l. 24.

The third Liberty witness that Allstate obtained evidence from is Ms. Colleen Connolly, Senior Claims Specialist for Liberty. Ms. Connolly handled several of the claims that were made against Liberty's Wing liability insurance policy. None of the claims that she handled (except Advanced Ladders) involved vendors. CP 735-37, Dep. of Connolly, p. 9 to p. 15.

Several tender letters were written to Liberty on behalf of Advanced Ladders. CP 266-67. Ms. Connolly handled the tender. She investigated by reviewing the Allstate policy to determine which insurance was primary and by reviewing the facts and circumstances of the accident as set out in the third party administrator's investigation and report documentation that was developed after Colton notified Wing of the accident. CP 742, Dep. of Connolly, p. 35, ll. 3-15.

Connolly eventually responded with a letter, CP 749-51, in which she asserted that Allstate's other insurance provision put it ahead of Liberty's policies in connection with the Colton claim. CP 743, Dep. of Connolly, p. 41, ll. 2-24; CP 749-51. She also turned down the tender because of exclusion e. in the Broad Form Vendors Endorsement which she contended applied to Advanced Ladders' conduct at the time of the accident. CP 744, Dep. of Connolly, p. 42, l. 7; p. 43, l. 4; CP 749-51, ep. Ex. 35.) These arguments have been abandoned by Liberty. When Ms. Connolly turned down Advanced Ladders' tender for the reasons stated above, she intended to put in all the reasons why Advanced Ladders was not covered by the Liberty policy. CP 744, Dep. of Connolly, p. 45, ll. 8-12. In responding to Advanced Ladder's tender, she did not contend that Advanced Ladders was not within the scope of vendors endorsement schedule. The investigation, tender and response documents were in Liberty's files. CP 266-67, 749-51.

Further, in this suit Liberty has admitted in this case that its policy provides coverage to Advanced Ladders with respect to the Colton claim. In paragraph 6 of its Complaint, Allstate alleged that Liberty insured Advanced Ladders pursuant to the Vendors Endorsement in the Wing policy. CP 4. Liberty answered:

Answering paragraph 6 (Liberty) states that pursuant to the terms and conditions of its policy, defendant (Liberty) provided excess insurance to Advanced Ladders and except as herein expressly admitted denies each and every remaining allegation of paragraph 6.

CP 7.

Further, in Paragraph 16 of its Complaint for Declaratory Relief and for Contribution in this lawsuit, CP 5, Allstate alleged that “Liberty Surplus Insurance had a duty to indemnify Advanced Ladders with respect to the liability claims of James Colton.” In its Answer to Paragraph 16 of the Complaint, LSI stated:

Answering paragraph 16, [Liberty] admits that pursuant to the terms and conditions of defendant’s [Liberty’s] policy, defendant had a duty to indemnify plaintiff when plaintiff’s primary policy of insurance had been exhausted, and except as herein expressly admitted denies each and every remaining allegation of paragraph 16.

CP 8-9. In other words, although Liberty contended that its coverage is excess to that of Allstate, Liberty admitted that its policy insured Advanced Ladders for the Colton claim. Moreover, Liberty did not plead any affirmative defenses in its answer denying coverage under the Liberty policy, other than to repeat its assertion that the Liberty policy is excess to the Allstate policy. CP 9.

B. Facts Relating to Outline of Liberty Policy Provisions On Coverage For Advanced Ladders.

The insuring agreement in the Liberty policy, states that it will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury...included within the “products completed operations hazard”.... CP 364, Section I, ¶1.

The insured is defined as any person qualifying as an insured; definition being found at the top of page 1 of CP 364, the form CG 00 38 07 98. The products completed operations hazard is defined at p. 12, paragraph 12 of the same form and states that it includes all bodily injury “occurring away from premises you own or rent and arising out of ‘your product’ or ‘your work’” CP 375.

“You and “your” are defined terms. Turning back to page 1 of the CG 00 38 07 98 form, the policy says “you” and “your” refer to “the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under the policy.” CP 364.

The Named Insured on this policy is identified in the Declarations page as Wing Enterprises, Inc. CP 332. Accordingly, the “you” and “your” that is referenced in the products completed operations coverage only includes Wing Enterprises. The limitation requiring that the accident happen away from premises you own or rent therefore does not apply to

Advanced Ladders as it is not a Named Insured. On the other hand, the accident did occur away from Wing's premises. The policy therefore covers accidents arising out of Wing's products that occur at Advanced Ladders' premises, exactly the situation that occurred in the Colton accident.

The Additional Insured-Vendors Endorsement, No. 2, form PRDTS 1002 0103, CP 335-36, states that who is an insured is amended to include as an insured any person or organization shown in the schedule "but only with respect to bodily injury...arising out of 'your products' as shown in the Schedule which are distributed or sold in the regular course of the Vendors' business...." The "your products" shown in the schedule include all products of Wing Enterprises. The Little Giant ladder involved in the accident is undeniably one of Wing's products and Allstate shows that the accident arose out of the use of the ladder. The exclusions in the Broad Form Vendors Endorsement, CP 336, are referred to in the argument section of the brief as part of Allstate's coverage argument, but Liberty does not argue that they apply to defeat coverage.

IV. ARGUMENT

A. Standard of Review.

Allstate agrees with Liberty's discussion of the standard of review at Brief of Appellant, p. 10.

B. Advanced Ladders Was An Insured Under the Liberty Policy.

Allstate argues that Advanced Ladders was an insured under the Liberty Broad Form Vendors Endorsement on four separate, independently sufficient, grounds.

First, Advanced Ladders was within the scope of the Wing vendors that were generally described in Wing's insurance application in the files of Liberty. Liberty's underwriter, Laura Corwin, testified that referencing vendors in an insurance application was one way that Liberty could be informed as to the covered vendors.

Second, there was correspondence to and from Liberty that identified Advanced Ladders. Therefore, Advanced Ladders was "on file" with Liberty. This correspondence specifically referred to the Jim Colton case. Also, an insurance adjustor for Liberty attended a meeting at Advanced Ladders in January, 2005, shortly after the accident.

Third, Allstate argues that the language "On File With Company" is ambiguous. The language is unspecific. It doesn't say to what detail or when the files of Liberty have to contain information about Wing's vendors. Since the policy provision is subject to several interpretations with regard to specificity and timing, reference to extrinsic evidence is appropriate. The testimony of Liberty witnesses clearly indicates that all of Wing's vendors were intended to be covered. The evidence also shows

that in the single circumstance other than this one where a claim was made against a vendor of Wing, that vendor was on file with Liberty only to the extent of being generally referenced in the insurance application (see first point above) prior to the suit being filed against it. That vendor, Sunset Ladders, tendered and Liberty accepted and defended it. Additionally, when Liberty denied the tender of Advanced Ladders, it denied the tender based on the fact that claims against Advanced Ladders involved allegations of the negligence of an employee rather than a claim of a product defect, because of an exclusion in the Vendors Endorsement and because Liberty thought its policy was excess to Allstate's. Liberty did not deny the request for coverage by Advanced Ladders based on the fact that Advanced Ladders was not an insured under the Vendors Endorsement.

Fourth and finally, Liberty admitted that Advanced Ladders was an insured in its Answer to Allstate's Complaint.

Although the "On File With Company" issue is fact-based, Allstate believes that the undisputed evidence and the testimony of Liberty's own witnesses, which it cannot challenge, allows it issue to be determined as a matter of law as reasonable minds could reach but one conclusion.

Swineheart v. City of Spokane, 145 Wn.App. 836, 844, 187 P.3d 345 (2008).

1. **Advanced Ladders, Along With All Wing Vendors are Identified on the Wing Insurance Application and This is Sufficient to Make Advanced Ladders On File with the Company.**

There's no dispute that Advanced Ladders was a vendor of Wing Enterprises.

The Vendors' Endorsement schedule in the Liberty policy says it applies to vendors that are "On File With Company." What does "On File With Company" mean? Ms. Corwin, underwriting Vice President for Liberty said: "It means that the insurance company would have that information within their files." CP 701, Dep. of Corwin in p. 46, ll. 20-25.

She acknowledged that this information came in many forms including the application for insurance. (CP 701, Dep. of Corwin, p. 47, l. 7 to p. 48, l. 5.) She acknowledged that the signed application by Wing Enterprises for insurance was in her files. (CP 697, 708-12, Dep. of Corwin, p. 31, lines 17-18, Dep. Ex.2.) This document generally describes Wing's vendors. (CP 708, ¶ 4.b.) The application referred to the fact that Wing's products were sold at "over thousands of locations throughout the United States." Id.

It is a series of questions and Wing filled in the answers. The form itself contains a typographical error. Questions 4.a) and 4.b) read exactly

the same, asking for the location of factories or stores at which products are manufactured. Wing, an experienced entity with regard to filling out insurance applications, filled out the form answering part 4.a). with the location of its manufacturing plants and answering part 4.b). with the information about its sales locations and vendors that is quoted above. Ms. Corwin of Liberty acknowledged that you could read the duplicate questions and the different answers and draw the conclusion that Wing's answer to 4.b). was information as to Wing's vendors and where its products were sold. (CP 697, Dep. of Corwin, p. 30, l. 18 to p. 31, l. 16.)

If Wing had thousands of vendors as it says it did in its insurance application, it would have been difficult for it to provide Liberty Surplus with a list of vendors. It is also unlikely that such a list would be current for very long; it would have to be maintained on a day-to-day basis. Wing's reference in its insurance application to the fact that it has thousands of vendors was sufficient to notify Liberty of all of Wing's vendors which Wing wanted covered. Advanced Ladders was one of those vendors and Advanced Ladders was therefore an insured under the Vendors Endorsement.

If Liberty argues that the application is insufficient to identify Wing's vendors Allstate submits that at best (for Liberty) this argument

illustrates an ambiguity in the policy which should be resolved against Liberty and in favor of coverage.

2. Information About Advanced Ladders was Specifically On File with Liberty.

Even if Liberty's more restrictive interpretation of the term "On File With Company" is adopted by the court, the evidence submitted to the trial court was sufficient to show that references to Advanced Ladders were within Liberty's files. Liberty sent an independent insurance adjustor, Ms. Sharon Setzler, to Advanced Ladders' premises in January, 2005 for a ladder inspection. (CP 728-29, Dep. of Moray, p. 31, l. 20 to p. 34, l. 6, CP 486, ¶ 4.) Liberty had an investigation report about the facts and circumstances of the accident. (CP 742, Dep. of Connolly, p. 35, lines 11-22.)

Further, a letter was sent to Colleen Connolly of Liberty and to Mr. Robert Stuligross of Risk Retention Services/Ladder Management, by counsel for Advanced Ladders with additional information about the Colton claim and requesting that Liberty acknowledge that it covered Advanced Ladders with respect to the claim. CP 266-267 Further still, a letter from Ms. Colleen Connolly of Liberty to counsel for Advanced Ladders was sent which specifically refers to Advanced Ladders by name and denies the Colton claim tender. CP 749-751. If the test for "On File

With Company” is as Ms. Corwin said it was, then Advanced Ladders meets that test through at least these two documents.

Liberty may argue that this correspondence should not be considered because it was dated after the date of the accident. However, there is no temporal requirement in the “On File With Company” language. As is discussed below, in the Sunset Ladder claim, the identity of the vendor, Sunset Ladders, came in to Liberty only after the accident and suit. Sunset Ladders was a total stranger to Liberty’s files prior to Liberty’s receipt of the tender letter which only was received after Sunset was sued (except insofar as Sunset was generally identified in Wing’s insurance application). Liberty accepted Sunset’s tender and defended Sunset in the lawsuit (CP723-726, Dep. of Moray, p. 11, l. 4 to p. 25, l. 24.) It is apparently common for Liberty to receive additional insured information long after the fact. With respect to the Wing policy, the insurance broker, Marsh, wrote a number of certificates of insurance confirming additional insured status. Copies of these certificates were not received by Liberty until January 2009, just before the deposition of Ms. Corwin and only then because she made an inquiry. (CP 705-07, Dep. of Corwin, p. 63, l. to 10 p. 70, l. 7, and CP 789-90, 1059-64.) (Ex. 19).

3. **The Liberty Policy is Ambiguous. Evidence From Liberty Witnesses Clearly Indicates that All Wing Vendors were Meant to be and were Insured Vendors under the Vendors Endorsement.**

The Liberty policy is subject to various interpretations and is therefore ambiguous. It does not say what specifically is required for the description of the vendors. Does each vendor need to be listed with name and address? Could they be listed as “All?” Does the general identification of Wing’s vendors in its insurance application suffice? In this respect, consider that Liberty never requested additional detail from Wing or its insurance broker about Wing’s vendors. (CP 701-02, Dep. of Corwin, p. 49, l. 10, to p. 50, l. 14.) Did Liberty intend to provide illusory vendors coverage by not requesting additional information and then taking the position that what was provided was insufficient? The definition of policy ambiguity is whether the language can have two or more reasonable interpretations. Weyerhaeuser Co. v. Aetna Cas. of Sur. Co., 123 Wn.2d 891, 897, 874 P.2d 142 (1994). If the policy is ambiguous, the construction in favor of coverage is adopted.

Liberty’s policy is also ambiguous because it does not say when the vendor information has to be on file with company. Liberty argues for the most restrictive interpretation, but there is nothing in the policy that says that the information can’t come in at a later date. This is reasonable,

given Wing's thousands of vendors. (CP 708, ¶ 4.6; 697, Dep. of Corwin, p. 30, l. 18 to p. 31, l. 18.)

Since the language is ambiguous, resort to extrinsic evidence is appropriate. Summers v. Great Southern Life Ins. Co., 130 Wn. App. 209, 122 P.3d 195 (2005); Berg v. Hudesman, 115 Wn.2d 657, 670, 801 P.2d 222 (1990).

Liberty Vice President Laura Corwin testified that the broker for Wing asked that the policy contain a Broad Form Vendors Endorsement. (CP 692, Dep. of Corwin, p. 13, lines 12-25). Corwin understood that the broker wanted to cover all of Wing's vendors. (CP 696, Dep. of Corwin, p. 26, lines 17-23; 701, Dep. of Corwin, p. 46, lines 2-10.) There was no indication that Wing or its broker wanted the endorsement to cover less than all of Wing's vendors. (CP 696, 712-13, Dep. of Corwin, p. 27, lines 2-20, Dep. Ex 4).

Liberty complains in several places in its brief (p. 15, 16, 17) that Allstate produced no evidence from Wing or Marsh about their intent or understanding concerning the vendors endorsement. The above discussion demonstrates that the evidence that Allstate developed went one better, with evidence from the underwriter herself. Corwin confirmed in a quote for insurance and in a binder letter that the Wing policy would contain a Broad Form Vendors Endorsement. CP 712. The policy as eventually

issued contained a Broad Form Vendors Endorsement and Corwin referenced the scope of the vendors to be covered as “On File With Company.” (CP 335-36.) She called this blanket coverage in her deposition. CP 698, Dep. of Corwin, p. 35, l. 25 to p. 36, l. 9.

Corwin testified that “On File With Company” means that the insurance company has information about the vendors in their files, such as information in an insurance application. (CP 701, Dep. of Corwin, p. 46, l. 20 to p. 48, l. 5.)

Corwin had in her file a signed insurance application from Wing that described in general terms all of Wing’s vendors, which includes Advanced Ladders. (CP 697, 708-11, Dep. of Corwin, p. 31, lines 17-18, Ex. 2.) Given that the application says that there were thousands of locations where Wing products were sold, it would have been clearly impractical to list them all, keep the list up to date, or to issue a separate certificate of insurance for each one, confirming that they were covered by Wing’s policy as vendors.

Wing’s prior policy with St. Paul simply referenced that it covered “all vendors.” (CP 693-95, Dep. of Corwin, p. 16, l. 22 to p. 19, l. 7).

Corwin testified that if Liberty needed further information for their files with regard to vendor identity, they would ask for it from the broker. Liberty made no request for additional vendor information for the Wing

policy (CP 701-02, Dep. of Corwin, p. 49, l. 10 to p. 50, l. 14) although there was subsequent communication with the broker about other changes and corrections to the policy. (CP 714-19, Dep. of Corwin, Ex. 12-16.) The sum and substance of Corwin's testimony is that all of Wing's vendors were "On File With Company" and that includes Wing's vendor, Advanced Ladders.

This position is buttressed by the testimony of Mr. Jamie Moray, Liberty Claim Manager. He testified that the one other case where there was a claim against a Wing vendor was Curtis v. Wing and Sunset Ladder Co. After the suit was filed, Sunset Ladders, tendered the defense and Liberty picked up the tender and defended the it through trial which resulted in a defense verdict. The status of Sunset Ladders as an insured or not an insured under the policy was no different than that of Advanced Ladders as far as the Vendors Endorsement schedule was concerned. Sunset Ladder, the vendor, asked for a certificate of insurance confirming its coverage under the Vendors Endorsement, only after it had been sued in the Curtis case. The subsequently issued certificate merely described the coverage that was already in place. The certificate of insurance, here issued after a loss and a suit is filed did not create any new coverage for Sunset that Sunset didn't already have. The certificate itself says so.

(CP 1154-55, Ex. 19, Dep. of Corwin.) Pekin Ins. Co. v. Am. Country Ins. Co., 213 Ill. App. 3d 543, 572 N.E.2d 1112, 1114 (1991).

In all the other cases or claims that Liberty handled under the Wing policy (except for the Colton-Advanced Ladders claim) there were no claims against vendors. (CP 726-28, Dep. of Moray, p. 25, l. 25 to p. 30, l. 14, CP 735-37, Dep. of Connolly, p. 8, l. 23 to p. 15, l. 6).

Mr. Moray was involved in turning down Advanced Ladders' tender. The reasons for his decision did not involve a contention that Advanced Ladders was not part of the endorsement vendor schedule. CP 729, Dep. of Moray, p. 36, l. 17 to p. 37, l. 24.

The testimony of Ms. Colleen Connolly, Liberty claim adjuster, makes clear that her reasons for denying the tender of defense from Advanced Ladders with respect to the Colton claim was because she thought that an the Liberty policy did not apply to a case involving vendor negligence, that exclusion in the Broad Form Vendors Endorsement applied to defeat coverage for Advanced Ladders and she thought that Allstate's policy was primary to Liberty and would in any event be first in line with regard to liability coverage. (CP 741-47, Dep. of Connolly, p. 30, l. 2 to p. 55, l. 12; CP 749-51, Ex. 35 to Dep. of Connolly.) Those were the only reasons she denied the tender. She did not deny the tender

because Advanced Ladders was not “On File With Company” as a Wing vendor.

Finally, if Liberty’s analysis of the On File With Company issue were to be accepted, virtually none of the thousands of Wing vendors would be covered. If the reference in the Wing insurance application is to be ignored Liberty’s underwriting file contained only a passing reference to four of the thousands of vendors. (CP 789-1058.) As is mentioned above, Ms. Corwin did not get the certificates of insurance from the broker until January 2009. (CP 705-07, Dep. of Corwin, p. 63, l. 10, to p. 70, l. 7).

4. **Liberty Admitted in its Answer to Allstate’s Complaint that Advanced Ladders was An Insured and Covered under the Vendors Endorsement, Reserving Only an Argument as to Which Policy was Primary.**

In several places in its Complaint, Allstate alleged that Liberty Surplus insured Advanced Ladders. In paragraph 6 Allstate alleged that Liberty insured Advanced Ladders for liability coverage under the Wing policy pursuant to the Vendors Endorsement. CP 4. At paragraph 16, Allstate alleged that Liberty had a duty to indemnify Advanced Ladders with respect to the liability claims of Mr. Colton. CP 5.

In answer to paragraph 6, Liberty stated that “pursuant to the terms and conditions of its policy, defendant (Liberty) provided excess insurance

to Advanced Ladders and except as herein expressly admitted denies each and every remaining allegation in paragraph 6.” CP 7.

In answer to Allstate’s paragraph 16, Liberty said: “Answering paragraph 16, (Liberty) admits that pursuant to the terms and conditions of defendant’s (Liberty’s) policy, defendant had a duty to indemnify plaintiff when plaintiff’s primary policy of insurance had been exhausted, and except as herein expressly admitted, denies each and every remaining allegation in paragraph 16.” CP 8-9.

Liberty argued in the Motions for Summary Judgment that it had not admitted coverage in its pleadings and answer. However, at a minimum these allegations and Liberty’s responses establish that Advanced Ladders was an insured under Liberty’s policy and that to the extent necessary Advanced Ladders was “On File With Company.”

C. Liberty’s Policy Covered Advanced Ladders for the Colton Accident.

Liberty spends little time in its brief discussing the actual language and wording in its policy. How is it that Allstate believes that Advanced Ladders as an insured under the endorsement is covered under the Liberty policy? The reasoning is as follows:

The insuring agreement in the basic Liberty policy states that it will pay those sums that the insured becomes legally obligated to pay as

damages because of bodily injury ... included within the “products completed operations hazard” CP 364. This insuring agreement applies to “the insured.” That term is defined as any person qualifying as an insured, see the definition found at the top of p. 1 of 13 of the policy insuring agreement form CG 00 38 07 98. CP 364. The products completed operations hazard is defined at p. 12, ¶ 12 of the policy form and states that it includes all bodily injury “occurring away from premises that you own or rent and arising out of “your product” or “your work”” CP 375.

“You” and “your” are terms defined in the policy back on page 1 of the policy form mentioned above. It says that they refer to “the Named Insured shown in the Declarations and any other person or organization qualifying as Named Insured under the policy.” CP 364.

The Named Insured on the policy is identified in the Declarations page as Wing Enterprises, Inc. CP 332. Therefore, the “you” and “your” that is referenced in the products completed operations coverage is Wing Enterprises. Advanced Ladders, under the vendors endorsement, is an insured but not a Named Insured. The limitation requiring that the accident happen away from premises “You” own or rent doesn’t apply to Advanced Ladders. The sum and substance of the above is that the policy can cover accidents arising out of Wing’s products when they occur at

Advanced Ladders' premises, exactly the situation that happened in the Colton accident.

Endorsement #2 "additional insured – vendors" on Form PRDTS 1002 1003, CP 335-36, states that persons or entities insured as vendors are insured under the policy "but only with respect to bodily injury ... arising out of "your products" as shown on the schedule, which are distributed or sold in the regular course of a vendor's business ..." The "your products" shown in the schedule include all the products of Wing Enterprises. The Little Giant ladder that Mr. Colton was on at the time of his accident was undeniably one of Wing's products. Allstate contends that for purposes this policy provision and the insuring agreement under the general form, the "arising out of" test has been met as Mr. Colton was standing on a Wing ladder which unexpectedly telescoped downward at the time of the accident. Accordingly, Advanced Ladders is covered for the Colton accident under the Broad Form Vendors Endorsement in the Liberty policy.

Liberty does not now argue that any of the exclusions in the Broad Form Vendors Endorsement apply. However, Allstate points out that several of the exclusions are pertinent in illustrating the intent of the policy with regard to coverage for events that might take place on the vendor's premises and for vendor negligence. The exclusions would be

nonsensical or surplusage if Liberty's interpretation of the policy were adopted.

Liberty makes two major and several minor arguments with regard to the construction and interpretation of this policy as it might apply to Advanced Ladders. The two major arguments are that the accident and injury really didn't arise out of a Wing ladder but rather arose out of Advanced Ladders' negligence and that the policy does not apply where the negligence of the vendor was the cause of the accident rather than a defect in the product manufactured by the named insured.

1. The Claim Arose Out of the Ladder.

A close look at the legal meaning of the "arising out of" language which is found in the Liberty policy in two places shows that Liberty's argument is flawed.

In Australia Unlimited, Inc. v. Hartford Casualty Ins. Co., 147 Wn. App. 758, 198 P.3d 514 (2008) this Court held that:

The phrase "arising out of" is unambiguous and has a broader meaning than "caused by" or "resulted from." It ordinarily means "originating from," "having its origin in," "growing out of," or "flowing from." "Arising out of" does not mean "proximately caused by." (Footnotes and citations omitted).

Australia Unlimited, 147 Wn. App. at 774.

The term is broader than "caused by" and broader than proximate cause. Just as with proximate cause, an incident may arise out of more

than one thing or action. Clearly, one of the things that the accident flowed from or grew out of was the Little Giant ladder, without which the accident would not have happened.

Equilon Enterprises LLC v. Great American Alliance Ins. Co., 132 Wn. App. 430, 132 P.3d 758 (2006) contains an excellent and comprehensive discussion of the use of the term “arising out of” in an insurance policy context. The court noted in that case that the language of the additional insured endorsement was broad. The carrier could have narrowed the language, but it did not. The court said that it could “neither disregard contract language which the parties have employed, nor revise the contract under a theory of construing it.” Equilon, 132 Wn. App. at 436-37, citing Wagner v. Wagner, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980). The Equilon court observed that the term “arising out of” has been interpreted to mean a “natural consequence” level of causation. In Marathon Ashland Pipeline LLC v. Maryland Cas. Co., 243 F.3d 1232, 1239 (10th Cir. 2001) the fact that a loaned employee was on the job at the time he was injured meant that the accident arose out of his employment. The term “arising out of” broadly links a factual situation with an event creating liability, and connotes only a minimal causal connection or incidental relationship.” Equilon, 132 Wn. App. at 438, citing Acceptance

Insurance Co. v. Syufy Enterprises, 59 Cal. App. 4th 321, 81 Cal. Rptr. 2d 557, 561 (1999).

The Equilon case involved a dispute between Shell Oil and Great American the insurer of the operator of a Shell branded service station. . The policy insured Shell as an additional insured, but only with respect to liability arising out of the service station's operations or premises. A teenager was assaulted and beaten on the premises, and along with many other defendants, Shell was sued. It tendered its defense to Great American, but the tender was rejected. Shell settled the case and sued Great American for defense and indemnity obligations. The carrier argued that liability did not arise out of the primary insured's operations as required by the policy. Shell, the additional insured, noted that its agency liability exposure in the case did in fact arise out of the fact that there were Shell Oil signs at the station and the signs were part of the station operator's ongoing operations. The court held that the arising out of test was met. If the presence of a Shell Oil sign at a service station was sufficient to meet a liability arising out of test in a case involving an assault, clearly the ladder that a customer is standing on which telescopes downward and injures the customer likewise meets an injury arising out of test.

Several courts have held, in circumstances similar to this one, that the arising out of test was met in a vendors endorsement insurance

coverage situation where there was no claim of product defect. In KMart Corporation v. Fireman Fund Ins. Co., 88 F. Supp. 2d 767 (E.D. Mich. 2000), KMart sued the insurance carrier for a patio furniture manufacturer which had issued a vendors endorsement covering KMart as a vendor of the furniture. Claims were being made against KMart because KMart employees had misassembled the furniture when it put display models on its floor for sale. KMart employees weren't following the assembly instructions and when customers would sit down in the furniture to try it out, it would collapse. KMart tendered the defense of the claims to Firemans Fund, which disclaimed any obligation to defend or indemnify asserting that the vendors endorsement did not cover KMart's negligent assembly of the furniture. The language in the vendors endorsement at issue appears to be identical to the language in the Liberty Broad Form Vendors Endorsement. The court construed the "arising out of" language in the vendors endorsement. The term is ordinarily understood to mean "originating from, having its origin in, or growing out of or flowing from." The court said it was clear that the claims against KMart arose out of the primary insured's patio furniture and were therefore within the scope of the insuring agreement.

In SportMart v. Daisy Manuf. Co., 268 Ill. App. 3d, 974, 645 NE.2d 360 (1994), SportMart was insured under a vendors endorsement of

a policy purchased by Daisy Manufacturing. Daisy made air-rifles and BBs for use as ammunition in air rifles. SportMart sold some BBs to an underage boy who proceeded to use the ammunition in an unsafe way and put his eye out. SportMart was sued and tendered the claim to Daisy's insurance carrier, under the Broad Form Vendors Endorsement. The carrier, Continental, argued that SportMart wasn't covered. The terms of the insurance policy as described in the court's opinion appears to be the same as the policy form issued out here by Liberty. The court noted that the primary requirement in the insuring agreement was that the injury arise out of the primary insured Daisy's products. Arising out of means connected with, incidental to, originating from, growing out of and flowing from. It is a broad term and is considered satisfied by a causal connection. It does not require proximate causation. The court found that the test was met here as it was clear that the injury grew out of or resulted from Daisy's BBs.

Transport Indemnity Co. v. Sky Craft, Inc., 48 Wash. App. 471, 740 P.2d 319 (1987), cited by Liberty, involved an analysis by the court of Hull and Fixed Base Operator liability policies in a case where a pilot crashed in weather he was not rated to fly in. The court held that the aircraft was not the cause in fact of the accident and for this reason one part of the coverage would not apply. However, as Allstate points out

above, in the additional insured context the term arising out of means a natural consequence level of causation which is clearly met under the facts of our case. Further, the insuring agreement in Sky Craft was worded more narrowly than the Liberty policy language which only requires that the injury arise out of Wings products.

2. The Policy Covers Claims Involving Vendor Negligence.

The second major issue argued by Liberty involves whether or not Advanced Ladders could be covered under the Broad Form Vendors Endorsement where the underlying claims involved allegations of negligence against a vendor and no claim of product defect against a manufacturer.

Liberty argues that the policy was drafted to preclude claims based on vendor negligence. Brief of Appellant at p. 24. This is not correct. Nowhere does the policy specifically exclude any and all vendor negligence. Liberty could have done so when drafting the policy but did not do so. There are a number of vendors endorsement cases that hold that coverage extends, through the endorsement to the vendor for its own negligence. We will discuss a few of them.

The facts of Kmart Corporation v. Fireman's Fund Insurance Company, 88 F. Supp. 2d 767 (E.D. Mich., 2000), are discussed above at pages 34-35.

When Kmart tendered the defense of the claims, FFIC disclaimed any obligation to defend or indemnify asserting that the endorsement did not cover Kmart's negligent assembly of the furniture. (As was mentioned above, the language in the vendors endorsement in Kmart appears to be identical to the Liberty vendors endorsement.) FFIC claimed that the vendor's endorsement covered only product defects and not instances of active negligence on the part of the vendor. The court noted that the carrier could have included an express provision excluding claims arising out of the vendor's negligence but failed to do so. FFIC admitted that there was no specific language in the vendors endorsement that excluded coverage for negligence on the part of the vendor beyond the narrowly drawn specific exclusions. If the insurer wanted to limit coverage for claims involving the vendor's negligence, it had a duty to express those limitations clearly in the policy. It didn't do so.

Fireman's Fund attempted to avail itself of what at best was parole evidence by arguing from the general purpose of the vendor's endorsement and offering an affidavit from an insurance coverage expert with regard to practices in the insurance industry. Liberty attempts to do the same thing by referring to the policy generically as a products completed operations policy in spite of the fact that the language in the policy isn't as limited. The court rejected FFIC's effort. Interpretation of

the insurance contract was an issue of law for the court, not a matter of expert opinion.

A similar case on the negligence issue is SportMart v. Daisy Manufacturing Company, 268 Ill. App. 3d 974, 645 N.E.2d 360 (1994), discussed above as to the “arising out of” issue. The case involved claims of negligence against SportMart and no issues of negligence or product defect against Daisy.

The court noted that there was nothing in the policy limiting coverage to claims alleging product defect, or to exclude all injuries caused by the product and also attributable to the vendor’s negligence. The broad language of the policy would be construed against the insurer to require coverage if there was the requisite causal link between the product and the injury.

In Makrigannis v. Nintendo of America, Inc., 442 Mass. 675, 815 N.E.2d 1066 (2004), Nintendo provided a Gameboy display console to a retailer who assembled the console and placed it on the floor of its store. A young customer of the retailer was injured when the console tipped over and fell on him. The injured boy sued Nintendo and the store and the store tendered the case to Nintendo’s insurance carrier pursuant to a Broad Form Vendors Endorsement. The carrier argued that a vendors endorsement did not indemnify a vendor for independent acts of

negligence because the purpose of the policy was only to protect a vendor in a products liability suit. The court noted that regardless of the store's negligence, the injuries to the underlying plaintiff arose out of Nintendo's product. It noted with approval several cases where courts found coverage under a vendor's endorsement where the claim arose out of the vendor's product even where there was negligence on the part of the vendor, referencing the SportMart case which is discussed above and Pep Boys v. CIGNA Indemnity Insurance Co., 300 N.J. Super 245, 249-55, 692 A.2d 546 (1997). The court noted that the endorsement did not specifically limit coverage to claims of product defect nor did it exclude coverage when injury results from a vendor's negligence. Had the carrier intended to exclude coverage for negligence it could have expressly stated the same in its policy. The language in exclusion 1.f. of the endorsement for demonstration, installation, servicing or repair operations, except such operations performed at the vendor's premises in connection with the sale of the product buttressed the court's opinion. While an exclusion cannot create coverage, the language would not make sense if the policy did not cover the vendor's negligence. The court also rejected the carrier's argument that product manufacturers have no reason to insure vendors for anything other than actual product defects. It noted that product manufacturers have sound reasons to insure vendors for a vendor's own

negligence because such coverage removes any incentive for the vendor to point the finger at the manufacturer when claims arise. To that, Allstate suggests that also the named insured may be concerned that any claim involving its product, even if the claim relates only to the vendors negligence is properly defended. The coverage may bring a special level of expertise to bear on the claim such as was found here with Risk Retention Services/Ladder Management, the third party administrator.

In accord is Twin City Fire Ins. Co. v. Fireman's Fund Ins. Co., 386 F.Supp.2d 1272 (S.D. Fla., 2005) affirmed, 200 Fed. Appx. 953 (11th Cir. 2006) (arising out of is very broad term in vendors endorsement, carrier's argument that coverage not extend to vendors negligence rejected.)

In its argument, Liberty cites the case of Raymond Corporation v. National Union Fire Insurance Company of Pittsburgh, 5 N.Y.3d 157, 833 N.E.2d 232 (2005). This 4 to 3 decision by the New York Court of Appeals found that a vendor's endorsement did not apply to the active negligence of the vendor in a case where the vendor had misadjusted a machine at the premises of one of its customers. The court found that language "arising out of" in the vendor's endorsement was limited to mean injuries arising out of defects in the products and did not include the vendor's negligence. In fact, there was no such limitation in the phrase.

In this sense, Raymond is inconsistent with Washington law. See discussion, at pages 32-34 regarding Washington law on “arising out of.”

In reaching its conclusion, the majority in Raymond utilized an economic analysis based on the assertion that the endorsement was a cheap add-on to a liability policy and therefore couldn't have been expected to provide coverage for the vendor's independent negligence. The evidence in our case does not support the idea that the vendor's endorsement was a cheap add-on to the Liberty policy. Ms. Corwin, the vice president of Liberty and the underwriter, testified that all of Liberty's policies of this type contained a Broad Form Vendors Endorsement. CP 699, Dep. of Corwin, p. 4, l. 20 to p. 41, l. 8. It is not an add-on. Ms. Corwin further testified that the premium for Wing's policy was in the range of \$750,000 for one year of coverage. CP 702.03, Dep. of Corwin, p. 53, l. 2 to p. 54, l. 2. Certainly not cheap. Further, there is no Washington rule of insurance policy construction or interpretation that elevates the amount of the premium charged for a certain coverage over and above the actual language of the policy itself in terms of determining what risks are covered by the insurance.

The dissent in Raymond is vigorous. It noted that construing the “arising out of” language to only mean arising out of defects in your

products as the majority did essentially made 4 of the 6 exclusions in the vendors endorsement pointless.

Allstate makes this argument in response to Liberty's coverage contentions in this case as well. In particular, the exclusion in the endorsement for failure to make any inspections, adjustments, tests or servicing that the vendor has agreed to make or normally undertakes to make in the ordinary course of its business (exclusion 1.e.) and the exclusion for demonstrations, installation, servicing or repair operations except such operations performed by the vendor at its own premises (exclusion 1.f.) would be entirely meaningless if the policy only covered a vendor's liability for defective products and did not include liability for certain types of negligence that the vendor might have committed.

The dissent in Raymond noted that cases from other jurisdictions supported its reading citing Pep Boys and calling these cases indistinguishable from the instant case. (To this list we could also add the Kmart, Nintendo, Twin City, and Ohio Cas. Ins. Co. v. PetSmart Inc., 2003 WL 22995160 (U.S. Dist. Ct., N.D. Ill. 2003) cases.) The dissent also distinguished the case of Hartford Fire Insurance Co. v. St. Paul Surplus Lines Insurance Co., 280 F.3d 744 (7th Cir., 2002), a case that the majority relied upon and which is cited by Liberty. In Hartford the vendor had not only sold the product in question but had also designed the

contents of the product label including the warnings. The warnings were central to the underlying claim against the vendor. However, the vendors endorsement contained an express exclusion for cases in which a claim was based on labeling or relabeling of the product by the vendor. CP 336, exclusion 1.g. The no coverage result was compelled by the clear policy language in Hartford and not by an over-reaching concept that the vendors endorsement does not cover independent negligence on the part of the vendor.

Liberty argues that for there to be coverage for Advanced under the policy, the injury has to arise out of a defect in the Wing ladder. Brief of Appellant, p. 22. However, the word “defect” is not found in the portions of Liberty policy that Allstate relies on, and Liberty’s contention is unsupported by the policy language. All that is required is that the injury arise out of the ladder which is distributed or sold in the regular course of the vendors business. That test is met here.

Liberty argues that any result that allows for coverage in the absence of a defect in the ladder exposes Liberty to virtually endless coverage. Brief of Appellant, p. 23. This is not so. There are limits to the term arising out of, although they are exceeded under the facts of this case. Further, there are numerous exclusions in the policy. CP 335-36, 349-60, 365-67.

Liberty's argument attempts to elevate the title on the policy over the actual wording in the insuring agreements. This is contrary to Washington rules of insurance policy construction which hold that the words in an insurance policy will be interpreted in their plain, ordinary and popular sense. Lynott v. National Union Fire Ins. Co., 123 Wn.2d 678, 689-90, 871 P.2d 146 (1994). Policy language is to be given its ordinary meaning, unless it is apparent from the reading of the whole instrument that a different or special meaning was intended, or was necessary to avoid an absurd result. Lawrence v. Northwest Cas. Co., 50 Wn.2d 282, 285, 311 P.2d 670 (1957). All of the provisions in an insurance contract will be reviewed together so that each will have its intended force and effect. American Star Ins. Co. v. Grice, 121 Wn.2d 869, 877-78, 854 P.2d 622 (1993).

Liberty's argument that this is products completed operations coverage and that a generic label should substitute for a careful reading of the actual language of the policy is met with the contract interpretation principle that specific or exact terms are given greater weight than general language. Mayer v. Pierce County Medical Bureau, Inc., 80 Wn. App. 416, 909 P.2d 1323 (1995). The title of a policy does not substitute for or override the actual language in the policy and its meaning and content. As the court recognized in Pep Boys, "[o]ur role in the present case is to

apply the language of the vendor's endorsement before us to the specific facts in this case." 300 N.J. Super at 254, 692 A.2d at 551. It is inappropriate to analyze the Liberty policy solely based on some generic classification.

Liberty argues that given Allstate's interpretation of the vendors coverage, the coverage for Advanced Ladders is greater than that which Wing obtained. Brief of Appellant, p. 25. This is a function of the way Liberty wrote its policy and sometimes happens when dealing with additional insured coverage. In Truck Ins. Exch. v. BRE Properties, 119 Wn. App. 582, 81 P.3d 929 (2003), an exclusion which would have applied to the named insured did not apply to the additional insured. The additional insured's coverage was broader than that of the named insured.

Liberty argues that the trial court ignored the fact that the fundamental purpose of the Broad Form Vendors Endorsement was to protect the vendor only in case of a product defect. Brief of Appellant, p. 26. However, this is not the entire fundamental purpose of the Broad Form Vendors Endorsement. If it was, the term product defect might be found in that part of the policy and it is not. The concept of a fundamental purpose cannot override the plain language of the policy. Further, there are reasons why the vendor could be covered broadly under the arising out

of language even in cases of the vendors own negligence. See discussion in Makrigannis, 815 N.E.2d at 1071 (2004).

Liberty argues that indemnity agreements that exculpate the indemnitee from liability for its own acts or omissions are not favored and that this principal applies here. Brief of Appellant, p. 27. This is an Alice in Wonderland argument when applied to a case involving liability insurance. A major purpose of liability insurance is to indemnify someone from their own negligence.

Liberty cites the case of Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co., 206 P.3d 1255 (Wn. App. Div. I, 2009) as authority for an argument with regard to the supposed limited scope of additional insured coverage. We can only assume from reading the opinion in that case that the parties must have stipulated or agreed to the extent of the additional insured coverage, because the case didn't discuss the policy language, never resolved any issues with regard to the scope of the additional insured coverage and merely stated in a conclusory short section what the additional insured coverage amounted to. That case is not authority for resolving contested issues relating to the scope of additional insured coverage given that the issue is never discussed or analyzed at all.

Liberty is basically asking the court to take its word for the fact that Liberty didn't intend to insure Advanced Ladders for the Colton claim. This is in lieu of actually analyzing the language in the policy. The language in the policy supports Allstate's arguments for coverage. Allstate has submitted evidence and arguments that separate this case from the authority relied upon by Liberty. The "take my word for it" approach to policy interpretation and analysis is not particularly well recognized under Washington law. Liberty's invitation to embrace it should be rejected.

V. CONCLUSION

Advanced Ladders was an insured under the Liberty policy and it covered the Colton accident. Allstate, which fulfilled its duty and protected Advanced Ladders has shown that the claim really was the responsibility of Liberty. The trial judges were correct in granting Allstate's motions, and denying those of Liberty and in entering judgment for Allstate. This court should affirm the trial courts' judgment.

RESPECTFULLY SUBMITTED this 15th day of July, 2009.

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