

65299-1

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No. 652991-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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ATLANTIC CASUALTY INSURANCE COMPANY.,

Plaintiff/Appellant,

vs.

SALMON BAY PLUMBING, REMODELING & HEATING, INC.,

Defendant/Respondent

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**RESPONSE BRIEF OF SALMON BAY PLUMBING,  
REMODELING & HEATING, INC.**

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## I. QUESTIONS PRESENTED

**A. Whether the trial court's ruling in favor of Respondent Salmon Bay Plumbing Remodeling & Heating, Inc. ("Salmon Bay") in absence of a formal answer to Appellant Atlantic Casualty Insurance Company's ("Atlantic Casualty") Complaint for Declaratory Relief was In Error or Whether Such Error was Harmless.**

**B. Whether Sufficient Evidence of Bad Faith was Before the Court to Justify a Finding that Coverage Under the Policy was Available by Estoppel.**

**C. Whether the trial court could consider the issue of whether or not coverage was triggered under Atlantic Casualty's insurance policy.**

**D. Whether a basis existed for the trial court to find that, as a matter of law, Atlantic Casualty was estopped from denying coverage under the policy.**

**E. Whether the trial court properly construed an ambiguity in the Atlantic Casualty insurance policy against Atlantic Casualty.**

**F. Whether the trial court improperly took judicial notice of the definition of new construction.**

**G. Whether the trial court improperly awarded attorney's fees to Salmon Bay.**

## II. STATEMENT OF THE CASE AND FACTS

Northwood Parkway is a Washington limited liability company, which at all times material hereto, owned, and was the general contractor engaged in the conversion of a tenant-occupied apartment complex located in Edmonds, Snohomish County, Washington. The scope of the conversion involved the replacement of interior walls, the application of an exterior sealing envelope, the replacement of windows, the replacement of interior finishes and the replacement of plumbing fixtures. The conversion did not involve any structural alteration to any of the buildings

in the complex, expansion of any building envelope or square footage, or the replacement of any of the buildings' structural features. CP 415-416.

On September 18, 2006, Northwood Parkway and Salmon Bay entered into a contract (the "Agreement") whereby Salmon Bay would, among other things, provide all supervision, labor, materials, tool, equipment, services and other items to complete all plumbing rough in and trim work on real property located at 23015 Edmonds Way, Edmonds, WA 98020, and known as the Sequoyah Condominiums (the "Property"). The total contract price for the work to be performed by Salmon Bay was \$701,561.34 with approved changes. The Agreement was executed on behalf of Salmon Bay by John Quandt. CP 416.

Northwood Parkway fully performed all of its obligations under the Agreement. Salmon Bay failed to perform according to the project specifications which were incorporated into the contract documents per the Agreement. CP 416.

Specifically, Salmon Bay failed to properly install hot water heaters, shower and tub units, bathroom sinks, toilets, garbage disposals, main shut-off valves, shower and tub rough-in valves, sink and tub/shower drains, and water supply lines per the specifications in its contract, the manufacturer's specifications for installation and in a good and workmanlike manner. As a result, Northwood Parkway suffered catastrophic property damage, incurred costs of replacement and repair, consequential damages and delay damages. The extent of Northwood

Parkway's damages continues to increase as Salmon Bay's failures are discovered but as of August 25, 2009 totaled not less than \$230,208.14. CP 416.

On September 11, 2008, Northwood Parkway filed suit against Salmon Bay for Breach of Contract, claiming damages, estimated to exceed \$370,000.00 (the "Underlying Suit"). Damages claimed in the Underlying Suit were incurred wholly or partially during the policy period. CP 408.

On March 23, 2009, Atlantic Casualty commenced its action in the trial court by filing Plaintiff's Complaint for Declaratory Relief Pursuant to Uniform Declaratory Judgments Act, RCW 7.24., seeking a "judicial declaration: (a) That the 'condominiums, townhomes, townhouses, apartments, tract houses' exclusion contained in Policy No. L071002466-0 excludes coverage for any work performed by Salmon Bay at the Sequoyah Condominiums." No other basis for an exclusion of coverage, or basis by which Atlantic disclaims indemnity was articulated in Atlantic Casualty's Complaint for Declaratory Judgment. CP 405-414.

The exclusion cited by Atlantic Casualty (the "Exclusion") reads as follows:

**"EXCLUSION – CONDOMINIUMS, TOWNHOMES,  
TOWNHOUSES, APARTMENTS, TRACT HOUSES**

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE PART**

PRODUCTS COMPLETED OPERATIONS LIABILITY  
COVERAGE PART

This insurance does not apply to 'bodily injury' or 'property damage' included in the 'products-completed operations hazard' and arising out of 'your work' on the new construction of any condominiums, townhomes, townhouses or apartments. This exclusion also applies to tract houses or production homes, defined any project or premises on which more than 5 houses or dwelling units have been built or are in any stage of development, planning or construction.

This exclusion does not apply to repair work on any such units described above.

We shall have no duty to defend any insured against any loss, claim, 'suit' or other proceeding alleging damages arising out of or related to 'bodily injury' or 'property damage' to which this endorsement applies."

CP 405-414.

Defendants Northwood Parkway and Salmon Bay each appeared, but only Northwood Parkway answered. CP398-400. In its answer, Northwood Parkway sought denial of Plaintiff's requests for relief, but raised no counterclaim per se. CP 393-395. No other action was taken by the Atlantic Casualty or either Defendant until August 28, 2009 when Northwood Parkway filed its Motion for Summary Judgment, supported by Declarations of counsel and one of its principals and project manager seeking, specifically, "a judgment declaring that Plaintiff, Atlantic Casualty Insurance Company ("Atlantic Casualty") **is obligated to indemnify Defendant Salmon Bay Plumbing, Remodeling & Heating, Inc. ("Salmon Bay")** for judgment awarded in Defendant Northwood Parkway's favor and against Defendant Salmon Bay in Northwood Parkway, LLC v. Salmon Bay Plumbing, Remodeling & Heating, Inc.,

King County Cause No. 08-2-31396-4 SEA (“the Underlying Suit”), for losses sustained during the effective period of Atlantic Casualty’s policy of insurance issued to Salmon Bay.” CP 415-513 (emphasis added). The hearing on Northwood Parkway’s Motion was noted for October 20, 2009. To accommodate the Atlantic Casualty, Northwood Parkway re-noted the hearing on its motion to November 25, 2009. CP 389-390. On November 16, 2009, Atlantic Casualty filed its opposition pleadings, including a cross-motion for summary judgment, and Declarations of counsel, an insurance adjustor and a construction expert. CP 287-372. Northwood Parkway filed Defendant Northwood Parkway, LLC’s Reply to Plaintiff’s Opposition to Motion for Summary Judgment and Cross Motion on November 20, 2009. Counsel for Northwood Parkway and Plaintiff appeared before the Court on the parties’ competing motions as scheduled on November 25, 2009 at 9:30am. At the hearing’s commencement, Atlantic Casualty made an oral motion to dismiss Northwood Parkway as a matter of right, citing CR 41(a). CP 192-193. The parties, through counsel, requested the opportunity to brief the issue of Atlantic Casualty’s right to dismiss Northwood Parkway pursuant to CR 41(a), and the Court entered an order embodying that agreement. CP 192-193. Subsequent to the entry of the Court’s Order, Defendant Salmon Bay filed a pleading joining in Northwood Parkway’s motion and opposition to Plaintiff’s cross-motion.

Northwood Parkway was thereafter dismissed by order of the Court and Atlantic Casualty re-noted its cross motion for summary judgment to be heard on January 21, 2010. CP 155-156 and 157-159. Salmon Bay appeared at the re-noted hearing on Atlantic Casualty's cross-motion and opposed Atlantic Casualty's request for judgment in its favor. CP 152-153. On February 4, 2010, the Court issued a memorandum ruling granting "Defendant's motion for summary judgment." CP 147-151. The trial court found that ordinarily it would look to the local jurisdiction's building code for the definition of new construction, but that one could not be located for the City of Edmonds. The Court noted that regardless of the difference approaches to defining "new construction" taken by the court and the parties the policy contained no definition, so "this court does not have resolve the lack of definition between "new construction" and "repair". The omission is construed against the insurer. CP 148. On February 10, 2010, Salmon Bay noted its Order on Summary Judgment for Presentation. The proposed Order on Summary Judgment mirrored the language in the introduction of Northwood Parkway's Motion for Summary Judgment as reproduced above. CP 33-36.

Atlantic Casualty filed its Motion for Reconsideration of Court's Ruling on Cross Motion for Summary Judgment on February 12, 2010. Atlantic Casualty's motion was made on the basis that it was the only party with a motion which was properly noted. CP 137-143. Atlantic Casualty apparently sought a determination that its cross-motion was

denied and an order neither granting nor denying the Motion for Summary Judgment brought by Northwood Parkway and joined in more than a month before the hearing on Atlantic Casualty's cross-motion by Salmon Bay. The trial court denied Atlantic Casualty's Motion for Reconsideration on March 1, 2010. CP 93-97.

On March 19, 2010, Atlantic Casualty filed its Opposition to Proposed Order of Summary Judgment. CP 84-90. Salmon Bay filed its Reply to Plaintiff's Opposition to Proposed Order of Summary Judgment on March 23, 2010. CP 52-55. At the hearing for presentation of Salmon Bay's proposed Order of Summary Judgment, Atlantic Casualty filed its Sur-Reply to Defendant Salmon Bay Plumbing, Remodeling and Heating, Inc.'s Reply to Plaintiff's Opposition to Proposed Order of Summary Judgment and for the first time put its reservation of rights letter before the Court for consideration. CP 28-30. Salmon Bay's proposed Order of Summary Judgment was entered by the trial court following the March 24, 2010 hearing. CP 33-36. On April 23, 2010 Atlantic Casualty sought review of the trial court's Order on Summary Judgment and for Declaratory Judgment entered March 24, 2010. CP 1-6.

### III. ARGUMENT

**A. The trial court's ruling in favor of Salmon Bay in absence of a formal Answer to Atlantic Casualty's Complaint for Declaratory Relief was not in error or such error was harmless.**

For the first time, Atlantic Casualty argues that Salmon Bay's failure to file a formal answer to its Complaint for Declaratory Relief was fatal to its opposition to Atlantic Casualty's Motion for Summary

Judgment. This argument was never brought before the trial court as against Salmon Bay and should not now be considered by the Court of Appeals. As Atlantic Casualty notes, the Court of Appeals has reversed a trial court's finding for summary judgment against a party who failed to reply when the motion for summary was based solely on the non-moving party's failure to reply. Nothing in the *Beers* holding cited by Atlantic Casualty would support the proposition that, having joined in its co-defendant's motion, but having failed to file a formal answer to the Complaint, that it was no longer entitled to participate in the trial court proceedings. See *Beers v. Ross*, 137 Wash.App. 566, 154 P.3d 277 (2007).

In any event, the trial court's determination that it could find for Salmon Bay in absence of a formal answer did not ultimately effect the outcome of its determination.

Per RCW 7.24.020, any interested person can file a Declaratory Judgment action. Obviously as Atlantic Casualty originally brought this action against Northwood Parkway, and as Northwood Parkway has an interest in the outcome of this action, Northwood is an "interested party." Atlantic Casualty successfully moved to dismiss Northwood. However, since it never had the opportunity to fully litigate the merits of its dispute nothing now prevents Northwood Parkway from filing the same Declaratory Action (seeking determination of whether Atlantic Casualty is obligated to provide coverage). Then, per CR 20 (Permissive Joinder), the

two exact same Declaratory Judgment actions (one filed by AC and one filed by the now dismissed Northwood) would be have to be joined as one action. Then Northwood Parkway's and Atlantic Casualty's motions for summary judgment would then have to be heard, and the trial court would be considering the very same issues that Atlantic Casualty complains it should not have considered by virtue of its dismissal of Northwood Parkway, and Salmon Bay's failure to file a formal answer to the Complaint. A finding approving of Atlantic Casualty's procedural trickery simply prolongs the resolution of the merits of the action, and thus any error by the trial court in allowing Salmon Bay to join Northwood Parkway's summary judgment motion is simply harmless and should not be considered by the Court of Appeals.

**B. Sufficient Evidence of Bad Faith was Before the Court to Justify a Finding that Coverage Under the Policy was Available by Estoppel.**

As Atlantic Casualty properly notes, when evidence exists of an insurer's bad faith, the trial court can apply coverage by estoppel regardless of an insurer's reservation of rights. *Hayden v. Mutual of Enumclaw*, 141 Wash.2d 55, 1 P.3d 1167 (2000). In this matter, the insurer filed its Complaint for Declaratory Judgment against its insured and its insured's adversary in the Underlying Action. Atlantic Casualty referenced a single of the policy's exclusions as the basis by which it believed it was not obligated to indemnify its insured. Northwood

Parkway and Atlantic Casualty each moved for summary judgment as to whether Atlantic Casualty was obligated to provide coverage and fully briefed the single exclusion specifically raised in Atlantic Casualty's Complaint. Atlantic Casualty laid in the weeds until it had determined that its own insured was not going to respond, and moved to dismiss the one party who had responded Northwood Parkway, leaving its request for a finding against its insured conveniently unopposed. Atlantic Casualty now wants to blame its insured for failing to counterclaim against its insurer as to whether exclusions not raised in its insurer's lawsuit against it would shield its insurer from its coverage obligation. The position that Atlantic Casualty finds itself is one made of its own tactical litigation decisions that it took against its own insured. Atlantic Casualty cannot, with a straight face, assert that it acted in good faith and is absolved of any responsibility under a coverage by estoppel theory.

**C. The Trial Court Did not Issue a Ruling on An Issue that None of the Parties Argued.**

Northwood Parkway's Motion for Summary Judgment specifically requested that the trial court make a finding that Atlantic Casualty was obligated to indemnify Salmon Bay for losses found to have been caused by Salmon Bay in the Underlying Action. As Atlantic Casualty determined that its Complaint for Damages not specifically reference any exclusion other than the Exclusion for the new construction of condominiums, neither party undertook to research and argue the fourteen

(14) other exclusions referenced in the policy. It was Atlantic Casualty who determined not to respond to Northwood Parkway's specific request for an affirmative determination of coverage in either its cross-motion or its opposition to Northwood Parkway's Motion for Summary Judgment.

The facts and case law relevant to any other exclusions that Atlantic Casualty believed applied or now believe apply were best known to it and should have been raised when it cross-moved for summary judgment. Atlantic Casualty's request for remand to relitigate, perhaps *in seriatim*, fourteen (14) policy exclusions for which it never asked for a specific determination should not be granted and in fact included only in an impermissible sur-reply no authority for the consideration of which by the trial court exists or was argued.

Moreover, Atlantic Casualty's request for summary judgment only came in the form of a cross-motion for summary judgment in response to Northwood Parkway's motion. Regardless of whether Northwood Parkway was still a party to the case, the trial court could not possibly consider Atlantic Casualty's request for summary judgment except in reference to Northwood Parkway's Motion for Summary Judgment. How Northwood Parkway had framed the issue in its Motion and whether Northwood was still participating, or its Motion being argued by Salmon Bay should not be determinative of the outcome, particularly where the trial court, as Atlantic Casualty notes, could find for any party in whose

favor a finding of summary judgment was clear. See e.g., *Leland v. Frogge*, 71 Wash.2d 197, 427 P.2d 724 (1967).

**D. The Trial Court Properly Determined that the Exclusion for New Construction Was Ambiguous and Therefore Should be Construed Against the Insurer.**

Under Washington law, “[i]nterpretation of insurance policies is a question of law in which the policy is construed as a whole and each clause is given force and effect.” *Overton v. Consol. Ins. Co.*, 145 Wash.2d 417, 424, 38 P.3d 322 (2002). Policy language must be given a “fair, reasonable, and sensible construction, as would be given to the contract by the average person purchasing insurance.” *Sears v. Grange Ins. Ass’n.*, 111 Wn.2d 636, 638, 762 P.2d 1141 (1988). However, “[l]anguage in an insurance policy that is susceptible to two different but reasonable interpretations is ambiguous and must be liberally construed in favor of the insured” *American Best Food, Inc. v. Alea London, Ltd.* 138 Wash.App. 674, 158 P.3d 119 (2007) citing *Teague Motor Co. v. Federated Serv. Ins. Co.*, 73 Wash.App. 479, 482, 869 P.2d 1130 (1994).

Furthermore, Courts have singled out Exclusions “[b]ecause coverage exclusions are contrary to the fundamental protective purpose of insurance.” *Diamaco, Inc. v. Aetna Cas. & Sur. Co.* 97 Wash.App. 335, 983 P.2d 707 (1999); *Getz v. Progressive Specialty Ins. Co.*, 106 Wash.App. 184, 22 P.3d 835 (2001). They must be “strictly construed” against the insured. The overriding policy concerns here are to provide

“maximum coverage for the insured.” *George v. Farmers Ins. Co. of Washington*, 23 P.3d 552 (2001).

Thus, when reviewing the Exclusion in question, this Court should follow the trial court and hold Atlantic Casualty to the high burden it undertook in making its case for a declaratory action. At the outset, Atlantic Casualty advances a disfavored position—disclaiming coverage. Specifically, Atlantic Casualty must convince this Court that the Exclusion’s wording is not susceptible to two different, and reasonable, readings. If Salmon Bay’s reading of the Exclusion is reasonable, then this Court must liberally construe the policy in favor of providing coverage.

Because exclusionary clauses are contrary to the fundamental protective purpose of insurance, they must be strictly construed against the insurer and must not extend them beyond their clear and unequivocal meaning. *Stuart v. Am. States Ins. Co.*, 134 Wash.2d 814, 818-19, 953 P.2d 462 (1998). For example, an “Intentional or Criminal Act” exclusion that is oftentimes written into an insurance policy as an exclusion to coverage does not give an insurer a blanket exception to all acts technically classified as “criminal.” *Allstate Insurance Company v. Raynor*, 143 Wn.2d 469, 477, 21 P.3d 707, 712 (2001) (citing *Van Riper v. Const. Govt. League*, 1 Wash.2d at 635, 642, 96 P.2d 588 (1939)).

In *Van Riper*, William Van Riper was killed in an automobile accident on the night of October 17, 1937. 1 Wash.2d at 638, 96 P.2d at

590. Apparently, Van Riper was driving along a graveled country road on a dark and foggy night. *Id.* Van Riper approached an intersection, failed to heed a stop sign and skidded into the intersection at an excessive rate of speed. *Id.* He lost control of his vehicle and collided with another car. *Id.* Van Riper died later that night from the injuries he sustained in the collision. *Id.*

Van Riper's insurance company denied death benefits. *Id.* at 637-38 P.2d at 637-38 589. It claimed that the exclusion in the certificate that bared benefits for "acts committed in criminal violation of Law" excused it from providing coverage. *Id.* Van Riper's insurer argued that by speeding and running a stop sign, Van Riper committed criminal acts thereby excusing it from providing coverage. *Id.*

The Washington Supreme Court disagreed. *Id.* at 642, 96 P.2d at 591. It announced that terms in an insurance policy are to be construed in a "plain, ordinary, usual, and popular sense" as those words would be understood by a layperson. *Id.* at 640-42, 96 P.2d at 590-91. The court then held: "We believe that the word 'criminal,' as used in the certificate, was meant to signify an act done with malicious intent, from evil nature, or with a wrongful disposition to harm or injure other persons or property" rather than an act that was technically (or statutorily) classified as "criminal." *Id.* at 591, 96 P.2d at 642. The court subsequently required the carrier to provide coverage.

Just as in *Van Riper* (where the court found that a “Criminal Acts” exclusion was to be construed in a plain, ordinary, usual, and popular sense as that term would be understood by a layperson) a “New Construction” exclusionary term should be viewed under the same standard.

Additionally, although the courts in Washington appear not to have specifically resolved the definition of “new construction” as it relates to commercial liability policies such as the one before the Court, the 7th Circuit Court of Appeals has held that the term “construction” does not include “repairs, maintenance, reconstruction, renovation, and the like to an already existing structure.” *Myers v. Merrimack Mut. Fire Ins. Co.* 788 F.2d 468, 472 (1986). In reaching this conclusion, *Myers* cites many state cases, several of which stand for the premise that one does not “construct” an already existing structure. See *Travelers Indemnity Co. v. Wilkes County*, 102 Ga.App. 362, 116 S.E.2d 314, 317 (1960) (“Construction” within a windstorm policy excluding buildings under construction, imports the building or erection of something which theretofore did not exist, or the creation of something new rather than the repair or improvement of something already existing.”) *Muirhead v. Pilot Properties, Inc.*, 258 So.2d 232, 233 (1972) (“This Court has addressed itself to the term ‘construction’ and indicated that the word means, in its ordinary sense, to build or to erect something which therefore did not exist”); *Commonwealth v. McHugh*, 406 Pa. 566, 178 A.2d 556, 558 (1962) (“In

the common understanding and language of the people, when we speak of the erection or construction of a house or a building, we mean the erection of a new house or building, and not the repairs of an old one.”) *People v. NY Central RR Co.*, 397 Ill. 247, 250, 23 N.E.2d 302 (1947) (“Under the accepted terminology it cannot be said that ‘construct’ is synonymous with ‘repair,’ ‘improve,’ or ‘maintain.’ Webster’s New International Dictionary gives the following definition of ‘construct:’ ‘To put together the constituent parts of (something) in their proper place and order; to build; form; make; as, to construct an edifice.’ The accepted common meaning of the word in its everyday usage is to build); *People v. Olsen*, 32 N.Y.S.2d 63, 65, 66 (1941) (“the words ‘used in the course of the construction of any building or structure’, should be construed as applying to something that did not theretofore exist rather than to the repair or improvement of something already in existence.”) See also 28 CFR 36.401 (“New Construction” ...is... “a facility designed and constructed for first occupancy.”)

Furthermore, Atlantic Casualty’s position goes beyond misconstruing the word “construction” to encompass renovation. It also ignores that Atlantic Casualty itself clarified that it was only excluding “new” construction from coverage. Ignoring this word, “new,” contravenes the basic canon of contract interpretation: every word and phrase must be presumed to have been employed with a purpose. *Ball v. Stokely Foods*, 37 Wash.2d 79, 221 P.2d 832 (1950). Here, this Court

should not ignore the word “new” which modifies “construction.” It clarifies for Northwood, and an average reader, that this exclusion applied to new structures.

Atlantic Casualty attempts to distract from the plain language of the trial court’s holding and suggest that it failed to consider the Declaration of Mark Lawless, relying instead on the City of Cheney municipal code. Initially, there is no evidence that the trial court failed to consider the Lawless Declaration. In fact the trial court’s Order on Summary Judgment and Order of Summary Judgment specifically mentions its consideration of the declarations in support of Atlantic Casualty’s cross-motion. The trial court’s failure to apply Mr. Lawless’s definition of “new construction” does not suggest that it failed to consider the facts laid out in his declaration, only that the trial court did not take his conclusion as to the definition of “new construction” as the law.

Secondly, contrary to Atlantic Casualty’s argument that the trial court relied on the City of Cheney’s municipal code’s definition of new construction, the trial court makes it clear that it did not find that definition to be the law, nor the revenue code definition argued for by Atlantic Casualty, nor the extra-jurisdictional authority provided by Northwood Parkway and argued for by Salmon Bay. The trial court in fact never reached the definition of “new construction” and found only that strictly construing the Exclusion, “this court does not have to resolve the lack of

definition between the terms ‘new construction’ and ‘repair.’ The omission is construed against the insurer.” CP 148.

**E. The trial court properly awarded attorney’s fees to Salmon Bay.**

“[A]n award of fees is required in any required in any legal action where the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract.” *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wash.2d 37, 811 P.2d 673 (2001). In this matter, Salmon Bay is entitled to an award of its attorney’s fees for having to assume the burden placed on it by its insurer to obtain coverage under its policy.

The trial court in granting summary judgment against Atlantic Casualty made an award of attorney’s fees to Salmon Bay that should not be disturbed on appeal. Atlantic Casualty’s reference to an award to Northwood Parkway of fees is believed to be a typographical error, as no such award was made and the body of Atlantic Casualty’s argument correctly references an award to Salmon Bay. There is no genuine dispute as to whether Salmon Bay was the prevailing party on Atlantic Casualty’s cross-motion for summary judgment in the form of the trial court’s order, and should the Court of Appeals affirm the trial court’s finding and uphold the form of its order, Salmon Bay’s award of attorney’s fees should be affirmed and it should be further entitled to its costs and attorney’s fees incurred on appeal. RAP 7.2(i). Even if the Court of Appeals finds that

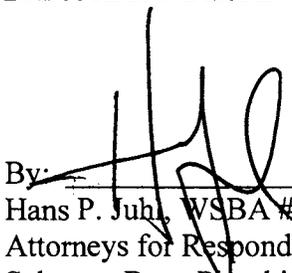
the trial court erred in affirmatively obligating Atlantic Casualty to indemnify Salmon Bay and finds only that Atlantic Casualty's cross-motion for summary judgment was properly denied, Salmon Bay should be found to be the prevailing party.

## V. CONCLUSION

At its essence, this appeal is about only two issues. First, does the "new construction" Exclusion relieve Atlantic Casualty's coverage obligation to its insured. Second, and if not, should Atlantic Casualty be allowed to litigate one exclusion through to the Court of Appeals against its own insured, and then, if it loses, return to the trial court and argue another, or fourteen (14) other, exclusions against its insured. The trial court properly found that Atlantic Casualty should be held to a higher standard with respect to its insured and affirmatively obligated Atlantic Casualty to indemnify Salmon Bay as a matter of law. That judgment should be affirmed.

DATED this 13 day of September, 2010.

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