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NO. 659464-1

King County Superior Court Cause No. 08-2-27814-0 SEA

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

WEST COAST PIZZA COMPANY, INC.,

Plaintiff/Appellant,

v.

NATIONAL CONTINENTAL INSURANCE COMPANY, and
UNITED NATIONAL INSURANCE COMPANY,

Defendants/Respondents.

BRIEF OF DEFENDANT/RESPONDENT, UNITED NATIONAL
INSURANCE COMPANY.

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INTRODUCTION AND RELIEF REQUESTED

The careless and unsupported conflation of two independent corporate entities in the Brief of Appellant filed by Plaintiff/Appellant West Coast Pizza Company, Inc's ("West Coast") encapsulates and explains the adverse coverage ruling that West Coast is appealing.

Respondent/Defendant United National Insurance Company ("United National") requests that this Court uphold the summary judgment ruling (CP 583-584) and the declaratory judgment entered by Judge Craighead in King County Superior Court, Cause No. 08-2-27814, holding that a United National excess liability policy issued to West Coast: (1) is not triggered by a lawsuit that was filed against third party defendants who are neither named nor defined in the policy as an insured; and (2) does not give rise to a duty to indemnify West Coast for liability that might arise out of that lawsuit in which West Coast has no interest in participating and has not been implicated by any of the asserted claims.

West Coast filed this declaratory judgment action pursuant to Washington's Uniform Declaratory Judgment Act, RCW 7.24 *et seq.* to resolve a dispute with its liability insurers over coverage it requested from its primary liability insurer, Respondent/Defendant National Continental Insurance Company ("National Continental") and its excess

liability insurer United National for a lawsuit filed by Mr. and Mrs. William Tschernega (“Tschernegas”) in Snohomish County, Cause No. 08-2-05028-7 (“Tschernega Suit”) against defendants Mad Pizza Company, Inc. (“Mad Pizza”) and its employee, Solomon Quito (“Quito”). Both insurers denied West Coast’s tender because, as relevant to the ruling West Coast is appealing, neither Mad Pizza nor Quito were named or defined as an insured in either policy, and no claims were asserted or allegations made against West Coast that would or could trigger a duty to defend or indemnify.¹

Judge Craighead granted summary judgment for National Continental on June 11, 2010, and for United National on August 20, 2010, based on the identical coverage defense. The trial court ruled, as a matter of law, that the policies were not triggered by the claims in the Tschernega Suit that were asserted against Mad Pizza and its employee. The trial court additionally denied West Coast’s two cross motions for summary judgment holding that West Coast had no claim for coverage and provided no basis for its requested alternative relief—impermissibly

¹ United National alternatively asserted that its policy did not cover the claims contingent on National Continental assertion that the primary policy was cancelled prior to the occurrence and consequent bodily injury alleged in the Tschernega Suit. The trial court denied National Continental’s Motion for Summary Judgment and held that the primary policy was not cancelled. Consequently, United National did not raise this defense in its summary judgment motion. But, United National does not waive this coverage defense and maintains its right to assert policy cancellation as a coverage defense if this Court finds in favor of West Coast on this appeal and in favor of National Continental on its cross-appeal.

raised for the first time in its motion for summary judgment—asserting that the policies should be reformed to add Mad Pizza as an insured.

Judge Craighead’s rulings were premised on factual findings that were supported by the uncontroverted evidence in the record: (1) the National Continental and United National policies listed West Coast as a named insured, but not Mad Pizza, in accordance with West Coast’s insurance applications; and (2) although West Coast produced evidence of a subsequent request made to its broker Gallagher Insurance Company of America, Inc. (“Gallagher”) seeking to have Mad Pizza and other entities added to both policies as named insureds, uncontroverted testimony by a Gallagher employee shows that Gallagher did not communicate the request to the insurers.²

In light of the trial court’s factual rulings, West Coast’s argument for coverage suffers from a fatal flaw—*West Coast and Mad Pizza are independent corporate entities under Washington law*. In order to find coverage under West Coast’s liability policies for claims asserted against and liability incurred by Mad Pizza, the two would at least implicitly have to be conflated and treated as the same corporate entity. Indeed West Coast *explicitly* conflates the two corporations in its arguments to this Court, at least for the limited purposes of obtaining liability

² As discussed, *infra*, Gallagher was briefly joined in this Action by West Coast before being dismissed without prejudice.

coverage. See Brief of Appellant at 1-2. West Coast misleadingly asserts that it is seeking on this appeal “to obtain the insurance coverage that it paid for to cover *its* 21 Domino’s Pizza stores...” while two paragraphs later conceding that Quito “was *technically* employed by another corporate entity” Mad Pizza, and that in fact “West Coast owns only two of the 21 stores....” *Id.* (italics added, underlining in original). The indefensibility of West Coast’s position is highlighted by its limited disregard of the corporate form only here where it seeks to circumvent an impediment created by its independent corporate identity, yet it is simultaneously shielded by the veil that its corporate form provides so that the Tschernegas may not impute to West Coast any liability that ultimately may be adjudged against Mad Pizza, and United National could not have pursued Mad Pizza for the premiums on West Coats’s policy.

But rhetorical conflation of its identity with Mad Pizza does not satisfy West Coast’s burden to show that it is a real party in interest entitled to the relief it is requesting. West Coast presents no evidence of a justiciable controversy with its liability insurers over their duty to defend and/or indemnify for the Tschernega Suit. Absent evidentiary support allow disregard of its corporate form, the favorable coverage ruling West Coast is seeking will, at most, inure to Mad Pizza and be of

no benefit.

To be clear, even if West Coast did have an evidentiary basis to dispute the trial court's factual determinations and summary judgment ruling, this Court would, nevertheless, have no basis to grant the relief West coast is seeking and rule that United National has a duty to indemnify under its excess policy. The United National excess policy does not have a defense obligation and West Coast is seeking indemnification from United National. But there is currently no liability here to indemnify even if it were warranted—which it is not—because the claims asserted in the Tschernega Suit remain unresolved. Duty to indemnify cannot be resolved in the abstract without evaluating whether liability and damages are covered by the insuring agreement and exclusions set forth in the policy. Here there has been no ruling by the trial court on United National's duty to indemnify and it is not before this Court on appeal, the trial court made no factual findings about coverage for existing liability, and there is no basis for this Court to do so on the record presented.

Based on the evidence, the trial court could not have ruled in West Coast's favor. It could not have found coverage under West Coast's liability policies for the Tschernega Suit and there is no basis to reform the policies. The declaratory judgment followed from the trial

court's factual findings. The Tschernega Suit did not trigger the policies or give rise to any duties by the insurers.

STATEMENT OF FACTS

A. West Coast and Mad Pizza

West Coast and Mad Pizza are independent Washington corporations with all attendant rights and obligations conferred by state law. (CP 462-463) Mad Pizza is wholly owned by Bryan Dobb. (CP 462-463) Bryan Dobb has an ownership interest in West Coast along with his brother Kevin Dobb and Dean Brandt. (CP 462-463)³ Both West Coast and Mad Pizza operate multiple pizza delivery stores that are Dominoes franchises and each is "doing business as Dominos." (CP 462-463) Mad Pizza was employing Quito on May 29, 2007, where his job included delivery of Pizzas from a Mad Pizza store located in Lynwood, Washington. (CP 464)

B. The United National Policy

United National issued an excess liability policy, number

³ Although not relevant to the Action, Bryan Dobb, and others, also own three other separate Washington pizza delivery entities that are franchises of Domino's and together own twenty one stores: Tiam Pies, Inc.; Mac Pizza, LLC; and Kappa Pizza, LLC. (CP 462-463) West Coast asserts that all of these entities should be covered under the National Continental and United National policies under the identity of the named insured West Coast Pizza Inc., DBA Domino's Pizza. For the reasons argued herein, these entities should not be considered insureds under the liability policies.

XTP79005, with a policy period from September 1, 2006, to September 1, 2007. (CP 373) West Coast Pizza Company, Inc. d.b.a. Domino's Pizza is the only named insured listed in the United National policy in accordance with the application for the policy submitted by West Coast through its broker Gallagher. The United National policy was formally cancelled by West Coast effective June 15, 2007, in exchange for a return of \$9,253.00 in premium.⁴ (CP 374)

The insuring agreement of the United National policy obligates the insurer:

To indemnify the Insured for the amount of loss which is in excess of the applicable limits of liability of the underlying insurance [pursuant to the National Continental policy] inserted in Column II of item B in the Schedule; provided that this policy shall apply only to those coverages for which a limit of liability is inserted in Column I; provided further that the limit of the Company's liability under this policy shall not exceed the applicable amount inserted in Column I.

(CP 381) Under the terms of the insuring agreement and pursuant to the included schedules, the United National policy was excess to a primary liability policy issued by National Continental and it followed form to the primary policy. (CP 381) The limits of the United National policy

⁴ If this Court rules in favor of National Continental on its cross-appeal, or if on remand the trial court determines that the National Continental policy was effectively cancelled at an earlier date, then pursuant to its terms, the United National policy was simultaneously cancelled on that earlier date.

were, in relevant part, \$1,000,000 above the limits of the National Continental policy. (CP 380) As an excess policy, the United National includes no duty to defend.

The insuring agreement of United National policy provides that it “follows form” to the underlying National Continental policy:

The provisions of the immediate underlying policy are incorporated as part of this policy except for any obligation to investigate and defend and pay for costs and expenses incident to the same, the amount of the limits of liability, and “other insurance” provision and any other provisions therein which are inconsistent with the provisions of this policy.

(CP 381)

“Loss” is defined in the United National policy as, “the sums paid as damages in settlement of a claim or in satisfaction of a judgment for which the Insured is legally liable after making deductions for all recoveries, salvages and other insurances (whether recoverable or not) other than the underlying insurance and excess insurance purchased specifically to be in excess of this policy.” *Id.* The United National policy lists as the Named Insured “West Coast Pizza Company, Inc.; DBA Domino’s Pizza.” (CP 374) The United National policy lists Dominos Pizza, Inc. as an additional insured. (CP 386) No other entity is listed as an insured in the United National policy.

C. The National Continental Policy

National Continental issued a liability policy, number CP7063115-6, to West Coast with a policy period from September 1, 2006, to September 1, 2007.⁵ The National Continental policy lists as a named insured only West Coast Pizza, Inc. DBA Domino's Pizza. (CP 422)

The Insuring Agreement in the National Continental policy provides:

We will pay all sums an "insured" legally must pay as damages because of "bodily injury or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance, or use of a covered "auto."

(CP 424)

The National Continental policy defines covered autos as:

Item Two of the Declarations shows the covered "autos" that are covered "autos" for each of your coverages. The following numerical symbols describe the "autos" that may be covered "autos." The symbols entered next to a

⁵ The Trial Court denied National Continental's prior motion for summary judgment asserting cancellation of the policy prior to the automobile collision giving rise to the Tschernega Suit. (CP 182-184) United National asserted a similar defense that was contingent to National Continental's policy cancellation. (CP 16-17) Because United National's contingent defense was mooted by the trial court's ruling, United National has not moved or argued its efficacy or raised the issue on appeal, but did not waive the coverage defense. National Continental has cross-appealed the trial court's ruling and United National requests that if this Court overrules the trial court on both National Continental's cross-appeal and West Coast's appeal of United National's summary judgment, then United National requests a remand to the trial court for a determination about the applicability of United National's contingent coverage defense.

coverage on the Declarations designate the only “autos” that are covered “autos.”

(CP 423)

The Declarations page of the National Continental policy has the symbol “9” for covered autos. (CP 412) The symbol “9” is for “nonowned ‘autos’ only,” which the National Continental policy defines as:

Only those “autos” you do not own, lease, hire, rent, or borrow that are used in connection with your business. This includes “autos” owned by your “employees,” partners (if you are a partnership), members (if you are a limited liability company), or members of their households but only while used in your business or your personal affairs.

(CP 423)

D. Neither West Coast, Nor Its Agent, Requested that Mad Pizza Be Covered as a Named Insured

West Coast obtained the National Continental and United National policies through its broker Gallagher. Brief of Appellant at 6-9. West Coast’s applications for insurance were sent on its behalf to the insurers by Gallagher. Brief of Appellant at 6, 8. The uncontroverted evidence shows, and West Coast admits throughout its Brief that it applied for both the National Continental and United National Policies in West Coast’s name and it did not request that either policy include Mad Pizza or any other entity as an insured. *See id.* at 6-9. West Coast concedes that the policies named only West Coast, and that Gallagher contemporaneously issued its “certificate of insurance” listing only West

Coast as an insured.⁶

David Brinks was deposed as a CR 30(b)(6) witness for Gallagher. At his deposition, David Brinks relied on a “screen shot,” or copy of a computer screen, purporting to show an electronic form that Gallagher completed listing West Coast and other entities as named insureds on the National Continental and United National policies. (CP 280-281) David Brinks and Kevin Dobb testified that Gallagher was requested by West Coast to obtain revised policies from National Continental and United National covering Mad Pizza and other entities as named insureds. (CP 280-281) Christine Lopez, a Gallagher employee, testified that she completed the form copied in the screen shot at the request of David Brinks. (CP 205-207) Lopez testified that she would have been the employee with responsibility for the form or any request for revision to the West Coast policies to the insurer. (CP 205-207) However, Lopez testified that she was not instructed to and did not send the form to the insurers or seek to have the policies revised to add other named insureds. (CP 205-207) The trial court made a factual determination based on undisputed and uncontroverted showing that the form, nor any other request for policy revision, was ever sent or communicated to National Continental or United National. (CP 287-

⁶ Gallagher was West Coast’s broker and was not an agent of the insurers. Gallagher did not issue a “certificate of insurance” from the insurers, it created a certificate and sent it to West Coast on its own behalf. Nevertheless, this certificate should have, at the least, put West Coast and Gallagher on notice that, no other entities were listed on the policies as insureds despite West Coast’s current assertion that it believed at the time that four other independent corporate entities were covered under the policies.

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Gallagher was briefly joined in this Action when West Coast filed an Amended Complaint on January 21, 2010. (CP 255-258) Shortly thereafter Gallagher was dismissed without prejudice.

E. The Tschernega Suit

On May 29, 2007, Quito was allegedly involved in an automobile accident while he was in the process of delivering a pizza for the Lynwood location of his employer, Mad Pizza. (CP 5, 366-370) A lawsuit was filed by Mr. and Mrs William Tschernega in Snohomish County, Cause No. 08-2-05028-7, asserting claims for injuries that allegedly resulted from the Quito automobile accident. (CP 5, 360-370) The Tschernega Suit is still pending and no claims have been resolved or liability determined.

An Amended Complaint was filed by the Tschernegas on September 19, 2008, asserting claims against Quito, his wife, and Mad Pizza. (CP 366-370) The Amended Complaint alleges in Paragraph 4.2 that, "At all times material hereto Solomon [Quito] was an employee and/or agent of Mad Pizza." (CP 367) Paragraph 4.3 of the Amended Complaint alleges, "Defendant Mad Pizza is vicariously liable for all acts and omissions performed by Defendant Quito while in the course

and scope of his employment under a theory of respondeat superior.”
(CP 367)

West Coast tendered to National Continental and United National. Both National Continental and United National denied coverage. In relevant part, and at issue on this appeal, United National denied having a duty to provide coverage to Mad Pizza or to Quito because Mad Pizza was not named or defined as an insured in either policy. (CP 17-18) National Continental alternatively denied coverage based on its asserted cancellation of the West Coast policy prior to the date of the automobile collision giving rise to the claims asserted in the Tschernega Suit. (CP 10) United National raised a policy cancellation defense pursuant to the terms of the excess policy which stated that the United National policy was automatically cancelled without notice if and when the primary policy was cancelled. (CP 16-17)

F. The Declaratory Judgment Action

West Coast filed this Declaratory Judgment Action pursuant to the Uniform Declaratory Judgment Act, RCW 7.24 *et seq.*, seeking a ruling on National Continental and United National’s coverage obligations for claims asserted in the Tschernega. (CP 3-6)

The trial court made three summary judgment rulings ultimately

holding that neither the National Continental policy nor the United National policy were triggered by the claims asserted in the Tschernega Suit and there could be no possible liability arising from it that either insurer would have a duty to indemnify. The rulings incorporate and were premised on factual findings that the trial court made based on the undisputed facts in evidence.

It is undisputed that the named insureds on the National Continental policy and United National policy corresponded to the application submitted by West Coast. Brief of Appellant at 6-9. The trial court further determined that no request to add Mad Pizza or any other entity to the policy was communicated to the insures. (CP 287-289)

The premium charged by United National was calculated based upon information supplied by West Coast in the application for insurance including West Coast's representation of the stores it claimed to own, the number of drivers it claimed to employ, and its annual revenue. (CP 460) The United National policy incorporates a list supplied by West Coast of twenty one store addresses corresponding to the stores that West Coast purportedly owned. (CP 378-379) Coverage was limited to West Coast's liability that might arise out of its ownership or operation

of those stores.

West Coast never clarified or corrected any representations that it made to United National, nor has it ever sought to change the terms of the policy or to challenge the calculation of the premiums.

National Continental's first summary judgment motion asserting the policy cancellation was denied by Judge Mack who held that the National Continental policy was not effectively canceled prior to the automobile collision. (CP 182-184) United National's contingent policy cancellation affirmative defense was mooted by Judge Mack's ruling and never heard or ruled on by the trial court. National Continental and West Coast cross moved for summary judgment and Judge Craighead ruled as a matter of law that no coverage was owed for the Tschernega Suit because Mad Pizza was not a named insured. (CP 346-348) United National and West Coast subsequently cross moved for summary judgment on the same coverage defense asserted by United National

LEGAL ARGUMENT AND AUTHORITY

The plain language of the United National policy supports the trial court's conclusion that United National has no duty to indemnify for liability arising out of the Tschernega Suit. West Coast points to no evidentiary or legal basis for this Court to overrule the trial court or grant

West Coast the relief it is seeking.

First, nothing in the record controverts or raises an issue of material fact about the findings of fact that Judge Craighead made. Second, there is no ambiguity about who is an insured in the United National policy which provides liability coverage for claims asserted against West Coast but not for claims asserted against Mad Pizza or its employee Quito.⁷ Third, following from the National Continental policy, the United National Policy provides no coverage based on the automobile Quito was driving at the time of the collision. Fourth, West Coast has not satisfied its burden to show there is a justiciable controversy supporting a declaratory judgment in its favor. Fifth, there is no evidence to support West Coast's improper request for reformation of the United National policy because it was not omitted from the policy on a basis that could support such a remedy.

In reviewing a summary judgment order, the appellate court evaluates the matter de novo. *Kruse v. Hemp*, 121 Wash.2d 715, 853 P.2d 1372 (1993). Summary Judgment is proper if there are no genuine issues of material fact. CR 56(c). A court should consider all of the facts submitted and reasonable inferences in the light most favorable to

⁷ Although not relevant here, Domino's Pizza as the franchiser of West Coast and Mad Pizza, is listed on the United National policy as an additional insured.

the nonmoving party which may include affidavits setting forth facts as would be admissible in evidence. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wash.2d 355, 753 P.2d 517 (1988). An affidavit does not raise a genuine issue of fact unless it sets forth facts evidentiary in nature, i.e., information as to what took place, as distinguished from supposition or opinion. *Id.* at 359. Ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to raise a question of fact. *Id.* at 359-60.

When considering the language of an insurance policy, courts give the policy a fair, reasonable, and sensible construction. *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 682, 801 P.2d 207 (1990). If the policy language is clear and unambiguous, the court must enforce the policy as written. *Ellis Court Apartments Ltd. Partnership v. State Farm Fire & Cas. Co.*, 117 Wn.App. 807, 814, 72 P.3d 1086 (2003), quoting *Weyerhaeuser Co., v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 665-66, 15 P.3d 115 (2000). Courts give undefined terms in an insurance contract their plain, ordinary, and popular meaning as set forth in the standard English language dictionaries. *Overton*, 145 Wn.2d at 428.

**A. Uncontroverted Evidence Shows the Insured's Identity
Conforms To West Coast's Request**

Based on the uncontroverted evidence, the trial court found, and

West Coast concedes, that West Coast did not request that Mad Pizza be an insured on its insurance applications which it submitted through Gallagher. *See* Brief of Appellant at 6 (“Gallagher submitted an insurance application on behalf of West Coast...”), 8 (“Gallagher submitted an insurance application on behalf of West Coast...”), 9 (“The West Coast application to IPC/United was completed in the name of ‘West Coast Pizza Company, Inc. DBA Domino’s Pizza’”). Gallagher concedes that the policies listed only West Coast. *See id.* at 10 (“Gallagher issued its Certificate of Insurance to West Coast Pizza Company, Inc. DBA Domino’s Pizza.” ... “United issued its policy ... to “West Coast Pizza Company Inc., DBA Domino’s Pizza...””).

In opposition to National Continental’s first Motion for Summary Judgment which the trial court denied, West Coast asserted that it requested Gallagher obtain revised policies from National Continental and United National adding Mad Pizza and three other entities to the policies. (CP 67) David Brinks, testifying as a CR 30(b)(6) deposition witness for Gallagher, admitted to receiving West Coast’s request. (CP 267-268) National Continental disputed David Brinks’ testimony that the request had been sent to the insurers and the trial court discounted David Brinks’ testimony because he admitted that he had no direct knowledge about whether the request had been sent because the task had

been delegated within Gallagher. (CP 268) Ultimately, National Continental submitted a declaration from Christine Lopez, the Gallagher employee who David Brinks testified would have been responsible for sending the request to the insurers, and she stated that the request had never been sent to the insurers because David Brinks never instructed her to do so. (CP 205-207) Based on the uncontroverted evidence, the trial court found that West Coast intended to add Mad Pizza to the policies and sent that request to Gallagher and it was never forwarded to the insurers. (CP 289)

B. United National's Policy Does Not Cover Mad Pizza Because It Is Not an "Insured."

The United National policy provides coverage only to an "insured" named or defined in the policy. United National has no duty to indemnify for liability arising out of the Tschernega Suit because no claims have been asserted and no liability will accrue against an "insured." The United National policy lists as the Named Insured "West Coast Pizza Company, Inc.; DBA Dominos Pizza." Mad Pizza is a separate corporate entity and not an insured. Further, no duty to indemnify West Coast is triggered by the Tschernega Suit because West Coast cannot conceivably incur liability. West Coast failed to carry its burden to produce evidence showing that a claim and the resulting

liability and damages are covered under the policy. *See Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 431, 38 P.2d 322 (2002).

West Coast's assertion that Mad Pizza, a defendant in the Tschernega Suit, is a named insured ignores the plain language of the policy. In contrast to the clarity with which West Coast is identified as a named insured by the United National policy, Mad Pizza is nowhere referenced by name or identifiably described as an entity anywhere in the policy. Further, to the extent that Quito could have a claim for or be owed coverage, it is only alleged to contingently arise from a duty to cover Mad Pizza. No evidence or allegations have connected Quito to West Coast or suggested that he was employed by West Coast at the time of the automobile collision. Since Mad Pizza is not an insured, any contingent arguments about Quito's classification are moot.

Instead of looking to the plain language of the policy to determine the identity of covered insureds, West Coast points to invented ambiguities to argue that the policy should therefore cover as a single entity both West Coast and Mad Pizza. West Coast points to the list of locations it provided to United National purportedly listing the addresses of West Coast's stores. West Coast also points to the "dba Domino's" a common appurtenance used by both West Coast and Mad Pizza to

indicate their trade name. Neither creates an ambiguity or leads to coverage.

West Coast misses the point of a liability policy by looking to a list of locations referenced in the policy. The insuring agreement of the United National policy obligates the insurer “[t]o indemnify *the Insured* for the amount of loss which is in excess of the applicable limits of liability.” (CP 381) (emphasis added). “Loss” is further defined in the United National policy with reference to *the Insured*. *Id.* (emphasis added). The policy lists as the Named Insured “West Coast Pizza Company, Inc.; DBA Dominos Pizza.” (CP 373)

The list of policy locations incorporated into the United National policy is a limit to the coverage under the policy, it is not an agreement to insure the listed locations. The duty to indemnify for liability runs to an entity, not to a location. The list is not part of the policy’s definition of an “Insured” and has no bearing on United National’s duty to indemnify a “Loss.” The duty is defined solely in reference to West Coast. The list limits United National’s indemnification obligation to West Coast’s liability arising out of its operation or ownership of those

particular stores.⁸

The list of locations does not create an ambiguity as West Coast asserts because: (1) the identity of the insured is clearly defined; and (2) West Coast's inclusion of stores in the location list that were apparently not owned by West Coast is not a drafting ambiguity in the policy language of the sort that must be interpreted against the insurer. If the policy language is clear and unambiguous, the court must enforce the policy as written. See, *Ellis Court Apartments Ltd. Partnership v. State Farm Fire & Cas. Co.*, 117 Wn.App. 807, 814, 72 P.3d 1086 (2003), quoting *Weyerhaeuser Co., v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 665-66, 15 P.3d 115 (2000). Although ambiguities created by the policy language that the insurer chooses to incorporate into the policy are interpreted against the insurer, there is no support for extending this rule of construction to interpret ambiguities that were created by the *insured*.

The cases cited by West Coast are inapposite. None interpreted a comprehensive general liability policy pursuant to Washington law. See *Metropolitan Mortgage and Securities Co., Inc. v. Reliable Ins. Co.* 64 Wn.2d 98, 390 P.2d 694 (1964) ("vendor" under a first party fire policy), *Providence Wash. Ins. Co. v. Stanley*, 403 F.2d 844 (5th Cir. 1969)

⁸ United National had no reason to question, or duty to verify the accuracy of West Coast's representation.

(applying Alabama law to first party fire policy where outcome hinged on fact that the insured under that policy was not defined with reference to its “corporate existence.”). *Stanley*, for example, was a first party property case under Alabama law hinging on the on the insured’s ownership of the property. 403 F.2d at 848. In this case, West Coast is not entitled to third party liability coverage because it not only did not own or have an insurable interest in Mad Pizza or the store location at issue, Mad Pizza’s potential liability to the Tschernegas will never be imputed to West Coast.

West Coast’s alternative argument that appending “dba Domino’s” to a named insured extends the policy’s coverage fails on its face. Because West Coast and Mad Pizza use a common trade name, like literally thousands of Domino’s franchisees, does not identify Mad Pizza as an insured. As a fundamental principle, a liability policy covers a particular entity or individual for liability for specific risks that occur or that result in particular types of damages during a limited time period. West Coast could not have intended, and a sophisticated insurance broker like Gallagher could not have presumed, that the United National policy covered an amorphous and undefined entity “dba Domino’s” which unlike a corporation, partnership, or LLC defined in the policy, has no legal status. West Coast is simply seeking here, with no legal or

evidentiary support, to obtain contractual benefits for Mad Pizza based on the West Coast's policy. *See, infra*, Section D.

Gallagher is a sophisticated insurance broker and could not conceivably have understood that policies naming West Coast could cover another independent corporate entity, Mad Pizza. Indeed the evidence shows that both Gallagher and West Coast knew that Mad Pizza should be named in the policy. West Coast previously argued against National Continental's assertion that its policy was cancelled prior to the accident by asserting that it had requested that Mad Pizza be named on the policy and even produced a printed copy of a computer screen showing a filled out form requesting the addition of other entities, including Mad Pizza, to the policies. (CP 73)

Although West Coast now argues, to the contrary, that it expected and intended the policies to cover Mad Pizza under the rubric of named insured "West Coast Pizza, Inc., DBA Domino's Pizza," the new declarations by Kevin Dobb and David Brink in its cross motion are insufficient to defeat summary judgment. A party may not create a disputed issue of fact merely by offering testimony that contradicts their prior testimony without any basis or changed circumstances supporting the different version of facts. *Unigard Ins. Co. v. Leven*, 97 Wn.App. 47, 430-31, 983 P.2d 1155 (1999). The trial court correctly disregarded the

declarations they contradicted deposition testimony that the two previously gave and upon which West Coast relied.

Even if the automobile collision out of which the Tschernega Suit arose results in liability, if an *insured* cannot be held liable for the loss then United National has no duty to indemnify for that loss. The insuring agreement of the United National policy obligates United National to indemnify the Insured for a “Loss” and defines “Loss” to include “the sums paid as damages in settlement of a claim or in satisfaction of a judgment for which the *Insured* is legally liable” (CP 381) (emphasis added). Here, there can be no covered “Loss” because as relevant here, only Mad Pizza or Quito could potentially be legally liable for a settlement or a judgment of the claims asserted in the Tschernega Suit. West Coast cannot be held legally liable for an action filed against a separate and distinct legal entity, Mad Pizza. Therefore, United National as a matter of law, has no duty to indemnify West Coast.

C. The United National Policy Follows Form to the Primary Policy Which Does Not Cover Any Liability Arising Out of a Delivery to Benefit Mad Pizza

United National provides no coverage based on the auto Quito was driving at the time of the accident because it was not a “covered auto.” The United National policy follows form to the National

Continental policy which provides coverage for autos not owned by West Coast, driven by an employee of West Coast in the course of employment.

The automobile that the Tschernega Suit alleges was being driven is not a covered auto because the driver was not an employee of the insured, West Coast, and the automobile was not being used in connection with West Coast's business. Because the driver was an employee of Mad Pizza and not the insured, under the plain and unambiguous language of the policy, the car he was driving could not be a covered auto.

D. Without Producing Evidence to Support Conflating West Coast and Mad Pizza, There Is No Case Or Controversy and No Basis for Declaratory Judgment West Coast Seeks or Reforming the Policies

West Coast has not met its burden to produce evidence to support the declaratory judgment it seeks. West Coast provides no factual or legal support allowing it ignore the corporate form and to conflate West Coast and Mad Pizza. The Uniform Declaratory Judgment Act provides in relevant part, that “[a] person interested under a ...written contract or other writing constituting a contract or whose rights, status, or other legal relations are affected by a ...contract ...may have determined any question of construction or validity arising under the instrument ... [or]

contract ... and obtain a declaration of rights, status or other legal relations thereunder.” RCW 7.24.020.⁹ Washington courts interpret the Act to limit a party’s right to obtain a declaratory judgment, except in matters of broad public concern, to a dispute concerning “a justiciable controversy.” *To-Ro Trade Shows v. Collins*, 144 Wash.2d 403, 410-11, 27 P.3d 1149 (2001). A justiciable controversy is defined by Washington law as:

(1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract, or academic, and (4) a judicial determination of which will be final and conclusive. Inherent in these four requirements are the traditional limiting doctrines of standing, mootness, and ripeness, as well as the federal case-or-controversy requirement. In sum, the four justiciability factors must “coalesce” to ensure that the court will be rendering a final judgment on an actual dispute between opposing parties with a genuine stake in the resolution.

Id. at 411.

Here there is no justiciable controversy under the second and third prongs of the definition because West Coast has no interest in obtaining insurance coverage. West Coast has no real and direct

⁹ The Uniform Declaratory Judgment Act defines “person” to include a corporation. RCW 7.24.130.

connection to the Tschernega Suit except that Bryan Dobb happens to own Mad Pizza and have an ownership interest in West Coast. West Coast is not a party to the Tschernega Suit and faces no potential liability. See *Diversified Indus. Develop. Corp. v. Ripley*, 82 Wash.2d 811, 815, 514 P.2d 137 (1973) (finding no justiciable controversy in dispute about financial responsibility of parties to pay potential future damages for unasserted liability).

In *Diversified Industries*, unlike here, the parties and the Court acknowledged that the injured party had grounds for filing a complaint and seeking damages for the injury in anticipation of which the plaintiff requested that the Court determine the relative responsibility of the parties. *Id.* at 812-813. Nevertheless, the Washington Supreme Court held that here was no justiciable controversy between the parties until an actual claim for damages was asserted. *Id.* at 139-40. The Court explained that a projected claim must be more than an unpredictable contingency in order to obtain declaratory relief. *Id.* at 140. Here, there is no basis for West Coast's potential liability—outside of West Coast's argument in this action for, in effect, piercing the corporate veil and conflating the two corporations.

West Coast's citation to *Safeco Insurance Company v. Dairyland*

Mutual Insurance Company, 74 Wash.2d 669, 446 P.2d 568 (1968) (hereinafter *Dairyland*), is inapposite. Brief of Appellant at 13. In *Dairyland* the Court allowed a declaratory judgment action to determine whether an individual was an additional insured under the policy because unlike here, the party seeking the declaratory judgment had a direct and substantial interest in the outcome. *Id.* at 670-71. In *Dairyland* the Court explained that if Safeco prevailed and obtained a ruling that the individual was an additional insured on the Dairyland policy, then Dairyland was required to defend him in a pending lawsuit against him; whereas if Safeco did not prevail, then Safeco would be required to defend the individual. *Id.* at 671. Here, by contrast, West Coast has no direct or substantial interest in the outcome of this declaratory judgment action—it is not seeking and does not need a defense and indemnification for the Tschernega Suit and would not be the beneficiary of either even if it obtains the declaratory judgment that it is seeking.

In addition, the dispute over United National's duty to indemnify cannot currently be decided by this Court and on this record. The United National excess policy follows form to the National Continental policy and generally incorporates the provisions of the underlying National Continental policy except for explicitly excluded obligations including but not limited to, any obligation to investigate and defend. (CP 381)

United National's obligations under the excess policy, if any, are limited to a duty to indemnify for covered liability and damages, and that obligation is further limited to indemnification for damages exceeding the amount of the limits provided by the primary National Continental policy.

The Tschernega Suit is still pending and no liability has been determined or apportioned. The Washington Supreme Court noted that no justiciable controversy exists "where the event at issue has not yet occurred" and cautioned that in the absence of a justiciable controversy a court should not issue a declaratory judgment or it risks "step[ping] into the prohibited area of advisory opinions." *To-Ro Trade Shows*, 144 Wash.2d at 416, 27 P.3d 1149. Any duty that United National may have to indemnify must wait for a liability determination to allow an evaluation of whether and to what extent resulting damages are covered or it risks being an advisory opinion. *See Christal v. Farmers Ins. Co of Washington*, 133 Wn.App. 186, 195, 135 P.3d 479 (2006) (citation omitted) (A primary policy provides coverage immediately upon the occurrence of an accident, while an excess policy provides coverage only after exhausting the primary coverage.).

E. No Legal Support for Reformation of Insurance Policy To Allow Insurer To Correct Its Own False Representations

West Coast, for the first time in its Motion for Summary Judgment, sought as an alternate remedy reformation of the policies to add Mad Pizza as a named insured. As an initial matter, the trial court noted that the basis for the requested relief was an alleged mistake that was never pleaded by West Coast. Civil Rule 9(b) requires that a mistake be pleaded with specificity. On this basis alone, the trial court correctly denied West Coast's request to reform the policies.

Now West Coast argues, for the first time on appeal, that the trial court should have reformed the policies to add all *delivery drivers* (Brief of Appellant at 19-20). West Coast cannot raise an argument for the first time on appeal and claim it was error for the trial court to have denied an argument that was never raised. RAP 2.5. In any event, the trial court could *not* have reformed the policies to add drivers to the policies as West Coast now seems to suggest. Drivers were *defined* in the policies as insureds and were not specifically named. Which hundred drivers does West Coast propose adding to the policy, and is Quito included? Coverage for automobiles is contingent on coverage for the employer of the driver. (CP 387) Since Mad Pizza was Quito's employer, there is no contingent coverage for Quito absent coverage for Mad Pizza—which is

not an insured.

In any event, the trial court correctly denied West Coast's request to reform the policies and add Mad Pizza. A contract may be reformed only to correct a scrivener's error, when there is a *mutual* intent of the parties incorrectly expressed by the written agreement. *See, Reynolds v. Farmers Ins. Co. of Wash.*, 90 Wn.App. 880, 884-45, 960 P.2d 432 (1998). There was no scrivener's error here and the supporting declarations do not, and cannot, evidence a *mutual* mistake. The list of store locations incorporated in the United National policy does not show that United National mistakenly forgot to name Mad Pizza. United National had every reason to believe, as West Coast represented and argues here (*See* Brief of Appellant at 1) that West Coast was listing the stores that it owned.

Moreover, the evidence that West Coast relies upon does not even show that West Coast was mistaken about the policy terms. Extrinsic evidence of a contracting party's intent cannot be considered to interpret or change the unambiguous definition of an insured. *See Spratt v. Crusader Ins. Co.*, 109 Wn.App. 944, 37 P.3d 1269 (2002) (Extrinsic evidence is admissible only to aid in the interpretation of the words employed, not to show intention independent of the instrument.) *Berg v.*

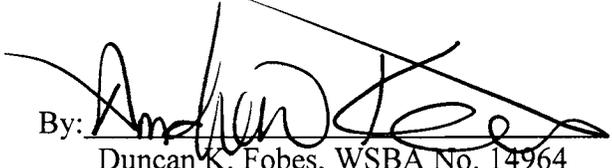
Hudesman, 115 Wash.2d 657, 661, 801 P.2d 222 (1990), cited by West Coast (Brief of Appellant at 15) does not stand for the proposition that evidence may be relied upon to alter the unambiguous terms of a contract. See *Chew v. Lord*, 143 Wash.App. 807, 817 n. 3, 181 P.3d 25 (2008) (explaining Washington Supreme Court clarified holding in *Berg* to allow extrinsic evidence “only to determine the meaning of specific words and terms used, not to show an intention independent of the instrument or to vary contradict, or modify the written word.”) quoting *Oliver v. Flow Int’l Corp.*, 137 Wash.App. 655, 660, 155 P.3d 140 (2006) citing *Hearst Commc’ns, Inc., v. Seattle Times Co.*, 154 Wash.2d 493, 500, 115 P.3d 262 (2005).

In any event, West Coast does not show it made a mistake either. The new Brink and Dobb declarations offered by West Coast do not show it understood the policies as written covered Mad Pizza. They were contradicted by the prior deposition testimony of David Brink and Kevin Dobb and the trial court was correct to disregard them. An issue of fact cannot be created by an affidavit which contradicts previously given clear testimony. See *Ramos v. Arnold*, 141 Wash.App. 11, 19, 169 P.3d 482 (2007). Brink and Dobb previously testified that they attempted to name Mad Pizza on the policies, and Gallagher sent to West Coast a “certificate of liability insurance” it created naming Mad Pizza.

(CP 95) They understood that the policies as written did *not* cover Mad Pizza. Further, the uncontroverted testimony of Christine Lopez, a Gallagher employee, was that Gallagher never requested that Mad Pizza be added to the policies.¹⁰ This does not establish a mistake by West Coast, nor does it create a coverage obligation. *See AAS-DMP Mgmt. v. Acordia Northwest*, 115 Wash.2d 833, 838, 63 P.3d 860 (2003) (holding reformation not available when mistake is made by broker).

CONCLUSION

Summary judgment was appropriately granted to United National because there were no disputed material facts about the contents of the policies nor any aspect of the underlying claim that could potentially result in liability that could trigger coverage under them. Accordingly, the judgment of the trial court in favor of United National should be affirmed.

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¹⁰ Notably, West Coast joined and then dismissed Gallagher as a party to this lawsuit. (CP 255-258)