

66102-7

66102-7

No. 66102-7-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

International Marine Underwriters, a division of One Beacon America
Insurance Company, a Massachusetts insurance company,

Respondent,

v.

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

Appellants,

v.

Alliance Insurance Corp. a/k/a
Alliance Insurance, Inc.,

Respondent.

Appeal from the Superior Court for King County
The Honorable Susan Craighead

BRIEF OF RESPONDENT ALLIANCE

ROCKEY STRATTON, P.S.
Steven A. Rockey, WSBA 14508
Attorneys for Respondent Alliance

521 Second Avenue West
Seattle, WA 98119-3927
(206)223-1688

2011 SEP 26 AM 10:14
K
SUPERIOR COURT
KING COUNTY

TABLE OF CONTENTS

Table of Contents i

Table Of Authorities iii

A. Response to Appellants’ Assignments of Error and Issues 1

B. Procedural Statement of This Case 3

C. Statement of the Case — Facts 6

D. Authority & Argument..... 13

1. The Statute of Limitations Has Run 15

 a. Appellants’ Claim Accrued Before March 2008..... 17

 b. Appellants’ Raising of Two Subsidiary Issues Is Belated and Not Material to Alliance’s Statute of Limitations Defense 24

2. The Appellants Lacked Prima Facie Proof of an Insurance Agent Negligence Claim..... 26

 a. ABCD Marine Did Not Request that NSI Be Made an Additional Insured at Any Time Prior to the Accident and Accordingly There Was No Duty or Breach of Duty on the Part of Alliance to Make It an Additional Insured 26

 b. NSI Is Not Northland Holdings, Inc. Nor Naknek Barge Lines, LLC..... 31

 c. The Contention that “Reformation” of Additional Insured Status for Naknek Barge Lines, LLC and Northland Holdings, Inc. Would Have Occurred To Make NSI an Additional Insured Has No Legal or Factual Support..... 37

 d. Appellants’ “General Law” Section on “Duties of a Broker” Does Not Support Their Arguments in This Appeal..... 40

3. Appellants Lack Prima Facie Proof of Damages for Their Cross-Claim Against Alliance 43

Conclusion 50

TABLE OF AUTHORITIES

Cases

<i>1519-1525 Lakeview Blvd. Condominium Ass'n v. Apartment Sales Corp.</i> , 144 Wn.2d 570, 29 P.3d 1249 (2001).....	23
<i>AAS-DMP Mgmt. L.P. Liquidating Trust v. Acordia Northwest, Inc.</i> , 115 Wn. App. 833, 63 P.3d 860 (2003).....	21, 41, 43
<i>American States Ins. Co. v. Breesnee</i> , 49 Wn. App. 642, 745 P.2d 518 (1987).....	28, 29
<i>Architectronics Constr. Management, Inc. v. Khorram</i> , 111 Wn. App. 725, 45 P.3d 1142 (2002).....	23
<i>Besel v. Viking Ins. Co. of Wisconsin</i> , 146 Wn.2d 730, 49 P.3d 887 (2002).....	44
<i>Branom v. State of Washington</i> , 94 Wn. App. 964, 974 P.2d 335 (1999)	48
<i>Burns v. McClinton</i> , 135 Wn. App. 285, 143 P.3d 630 (2006).....	16, 23
<i>Clare v. Saberhagan Holdings, Inc.</i> , 129 Wn. App. 599, 123 P.3d 465 (2005).....	16, 17
<i>Crisman v. Crisman</i> , 85 Wn. App. 15, 931 P.2d 163 (1997).....	23
<i>Denaxas v. Sandstone Court of Bellevue, LLC</i> , 148 Wn.2d 654, 63 P.3d 125 (2003).....	39
<i>Douglass v. Stanger</i> , 101 Wn. App. 243, 2 P.3d 998 (2000).....	16
<i>Gates v. Logan</i> , 71 Wn. App. 673, 862 P.2d 134 (1994).....	30
<i>Gausvik v. Abbey</i> , 126 Wn. App. 868, 107 P.3d 98 (2005).....	22
<i>Gazija v. Nicholas Jerns Co.</i> , 12 Wn. App. 538, 530 P.2d 682 (1975)...	22
<i>Gazija v. Nicholas Jerns Co.</i> , 86 Wn.2d 215, 543 P.2d 338 (1975).....	22
<i>Huff v. Roach</i> , 125 Wn. App. 724, 106 P.3d 268 (2005).....	19, 20, 21, 23
<i>Hunter v. Knight Vale & Gregory</i> , 18 Wn. App. 640, 571 P.2d 212 (1977).....	48
<i>Kim v. O'Sullivan</i> , 133 Wn. App. 557, 137 P.3d 61 (2006).....	44
<i>Lybbert v. Grant County</i> , 141 Wn.2d 29, 1 P.3d 1124 (2000).....	25
<i>Minton v. Ralston Purina Co.</i> , 146 Wn.2d 385, 47 P.3d 556 (2002).....	35
<i>Ruth v. Dight</i> , 75 Wn.2d 660, 453 P.2d 631 (1969).....	23
<i>Sabey v. Howard Johnson & Co.</i> , 101 Wn. App. 575, 5 P.3d 730 (2000).....	21, 22
<i>Safeco Ins. Co. v. Dairyland Mut. Ins. Co.</i> , 74 Wn.2d 669, 446 P.2d 568 (1968).....	39
<i>Shows v. Pemberton</i> , 73 Wn. App. 107, 868 P.2d 164 (1994).....	30
<i>Suter v. Virgil R. Lee & Son, Inc.</i> , 51 Wn. App. 524, 754 P.2d 155 (1988).....	29, 30, 41

<i>U.S. Oil & Refining Co. v. Lee & Estes Tank Lines, Inc.</i> , 104 Wn. App. 823, 16 P.3d 1278 (2001).....	40
<i>Water's Edge Homeowners Ass'n v. Water's Edge Associates</i> , 152 Wn. App. 572, 216 P.3d 1110 (2009).....	44, 46
<i>Werlinger v. Warner</i> , 126 Wn. App. 342, 109 P.3d 22 (2005).....	44
Statutes	
RCW 4.16.080	15

Respondent Alliance Insurance Corporation (hereinafter, “Alliance”) submits this brief in response to the Brief of Appellants.

A. Response to Appellants’ Assignments of Error and Issues

Appellants’ “assignments of error” do not satisfy the meaning of the term, as they refer generically to (1) “numerous errors of law . . . as detailed below” pertaining to “interpretation of insurance contracts” and (2) “fail[ure] to consider disputed issues of material fact in its decision as detailed below.” Brief of Appellants (“App. Opening Br.”) at 5. Alliance assumes that, as to the appeal against it, appellants assign error to the entry of the order granting summary judgment against appellants’ cross-claim, CP 1047-49.

Appellants list nine issues (their nos. 14-23) pertaining to Alliance, which are excessive. Alliance submits the following statement of issues, as to it:

(1) **(Statute of Limitations)** Did appellants have a negligence claim upon which they could sue Alliance prior to the denial of liability insurance coverage to appellant Boogaard in March 2008, when the facts underlying appellants’ negligence theory against Alliance all existed and were known to appellants by December 2004 — *viz.*, that Northland Services, Inc. would assert breach of the “Access Agreement” against appellant Boogaard due to its requirement of “additional insured”

coverage being unmet — and when appellants’ negligence theory against Alliance does **not** contend that Alliance should have obtained any different policy language on the definition of “insured contract,” or any other insurance policy terms, relied upon by International Marine Underwriters in denying coverage in March 2008 to Boogaard for NSI’s counterclaim asserted in the underlying lawsuit?

(2) **(Absence of Request by Appellants for Insurance Change)** Do appellants lack a *prima facie* claim for insurance agent negligence when they never informed Alliance that appellant ABCD Marine had signed (through appellant Boogaard as one of its general partners) an “Access Agreement” with Northland Services, Inc. that contained indemnity provisions and insurance requirements, at any time prior to the accident that gave rise to the underlying suit in which Northland Services, Inc. counterclaimed against Boogaard for breach of the Access Agreement?

(3) **(Lack of *Prima Facie* Proof of Damages)** Given the fact that the agreed judgment in the underlying action in favor of Northland Services, Inc. and against appellant Boogaard is expressly deemed satisfied upon the resolution of the claim by Boogaard against International Marine Underwriters, do appellants lack *prima facie* proof of the damages element of their negligence cross-claim against Alliance?

B. Procedural Statement of This Case

In the proceedings in the court below, plaintiff International Marine Underwriters (“IMU”) sued (1) Northland Services, Inc. (“NSI”), a Washington corporation, and (2) the three appellants — Albert Boogaard (“Boogaard”), ABCD Marine, and ABCD Marine, LLC — in April 2008. CP 1-7. IMU’s complaint requested a declaratory judgment that it was not obligated under its general liability insurance policy issued to ABCD Marine¹ to pay an agreed judgment in favor of NSI and against Boogaard, a partner in ABCD Marine, that was entered on NSI’s counterclaim against Boogaard in the underlying tort lawsuit.² CP 6 (¶ 4.2).

¹ The name “ABCD Marine” is used by two parties to this action: the first is a Washington general partnership, per its answer, CP 25 (¶ 1.2); the second, whose full name is ABCD Marine LLC, is a Washington limited liability company that did not come into existence until appellant Boogaard formed it, about three weeks after the October 2004 accident that gives rise to this dispute. CP 723-26 (Certificate of Formation), CP 654-55. The LLC cannot have a claim against Alliance in this action, absent an assignment or novation, neither of which appears to be present. This fact was pointed out below in Alliance’s motion for summary judgment, CP 606, and has not been contested by appellants. The term “ABCD Marine,” as used herein, means the general partnership unless there is an explicit reference to the LLC.

² The underlying tort lawsuit is *Boogaard v. Northland Services, Inc., et al.*, King County Superior Court Cause No. 06-2-35554-7. It arises from an October 2004 accident in which an employee of NSI drove a forklift that struck a vehicle occupied by Boogaard, who was on site to perform ABCD Marine’s welding contractor services for NSI. App. Opening Br. at 12 (¶ 15); CP 881 (at 11).

To prevent confusion, the ambiguity in the record as to the date of the October, 2004 accident should be noted. Some documents from the underlying lawsuit indicate October 19, 2004, *see* CP 1004 (¶ 9), CP 711 & 717, CP 740, while others refer to October 14, 2004, *see* CP 985 (¶ 2). Appellants’ brief refers to October 14, 2004 as the

Appellants counterclaimed against IMU in the instant action, CP 27-29, alleging that IMU was contractually obligated to pay the agreed judgment in favor of NSI and against Boogaard in the amount of \$712,000. CP 29. Their counterclaim further alleged that IMU had committed insurance bad faith. CP 27-29.

NSI moved for a summary judgment dismissing it as a defendant in the instant action, stating that it had no legal interest in the matter for which IMU sought declaratory judgment, and that Boogaard had acquired rights to any amount owed by IMU, by virtue of the prior settlement between him and NSI in the underlying lawsuit. CP 1056-58. IMU and appellants did not oppose that motion, and the court below dismissed NSI from the instant action in August 2008. CP 1064-66.

Appellants and IMU later stipulated, in December 2008, to appellants' amending their answer to bring in respondent Alliance as a new party in this action, a "cross-claim defendant." CP 30-32. Appellants on December 30, 2008 filed their amended answer,

date of the accident. App. Opening Br. at 12. This discrepancy appears inadvertent. Boogaard testified October 19, 2004 was the date. CP 655. Medical provider documents attached to a demand letter in the underlying lawsuit (which appellants' attorneys produced in this action) confirm October 19, 2004 to be the date of the accident (those documents are not in the record on appeal). The five-day difference is not material to any issues in this appeal.

counterclaim and “cross-claims,” CP 33-42,³ alleging that if IMU was not obligated to pay the \$712,020 judgment in favor of NSI, then they were entitled to recover that amount against Alliance under a negligence theory. CP 39-40. The amended pleading reiterated appellants’ counterclaims against IMU, CP 36-38 & 40 (¶¶ 1-2), in the same form as appellants’ initial answer and counterclaim.

By orders entered on April 9, 2010 and April 30, 2010, the Superior Court granted a complete summary judgment in favor of Alliance, dismissing the appellants’ cross-claim against it. CP 1025-26, 1047-49. The second of these orders amended the first by listing completely all pleadings filed below on Alliance’s CR 56 motion. *Id.*

By an earlier order on January 4, 2010, the Superior Court had granted partial summary judgment in favor of IMU on one of appellants’ counterclaims in this action, ruling that IMU was not contractually obligated under its liability insurance policy issued to ABCD Marine to pay the agreed judgment. CP 1054-55. On April 9, 2010, the Superior Court denied IMU’s second CR 56 motion, which had sought dismissal

³ Appellants’ claim against Alliance was not a “cross-claim” in the way that CR 13 uses the word since Alliance was not a party to the proceeding below prior to appellants’ amending their pleading. However, because Alliance has been consistently called a “cross-claim defendant” in this lawsuit and appellants’ amended pleading filed December 30, 2008 labels their claim against Alliance as a “cross-claim,” the word is used herein without further clarification.

of appellants' remaining counterclaim, for insurance bad faith. CP 1023-24. Appellants and IMU later stipulated to dismissal without prejudice of that counterclaim, which was granted. CP 1052-53.

C. Statement of the Case — Facts

On September 29, 2004, ABCD Marine entered into an Access Agreement with NSI through the signature of one of its partners, Boogaard. CP 708-09 (copy of Access Agreement). CP 1068 (¶ 5). NSI was one of the two companies for which ABCD Marine provided welding contractor services. CP 659.⁴ (Naknek Barge Lines, LLC was the other. *See* CP 658.) ABCD Marine and Boogaard did not inform Alliance about the existence of the Access Agreement, or its terms regarding insurance, at any time prior to the accident on October 19, 2004, in which a NSI employee, while operating a forklift, caused personal injury to Boogaard. This fact is conceded in appellants' opening brief at 39-40, and is established by Boogaard's testimony in both this action, CP 675, 682, and the underlying action, CP 702, 703.

⁴ Certain of the Clerk's Papers contain transcripts of Boogaard's deposition testimony in this lawsuit or the underlying lawsuit. In order to not clutter this statement of the case with excessive numerical references, only the pertinent page in the Clerk's Papers is given when such deposition testimony is cited for factual support. However, more precise citations listing the transcript page(s) and line(s) are given in Appendix A hereto, to assist locating testimony (particularly where the transcript is in a "minuscrit" format that has 4 pages of testimony on each page of Clerk's Papers). The numbers for CP citations herein that are italicized herein indicate citations to deposition testimony that have a corresponding entry in Appendix A.

In the Access Agreement, ABCD Marine undertook to hold NSI harmless from any liability resulting from the presence or the operations of ABCD Marine. CP 709 (¶ 8). The agreement also contained a paragraph, entitled “Insurance,” in which ABCD Marine undertook that NSI would become an additional insured person on ABCD Marine’s insurance policy and that ABCD Marine would carry workers’ compensation insurance. CP 709 (¶ 10).

There had not been any written contract between ABCD Marine and NSI prior to the Access Agreement, and no prior requirement that NSI be an additional insured on ABCD Marine’s insurance policy, Boogaard testified. CP 693. ABCD Marine had also not previously purchased workers’ compensation coverage, having exercised its option to exempt himself and Wes Dahl, the owners, from such coverage, Boogaard stated. CP 680-81.

When the accident occurred, three weeks after Boogaard signed the Access Agreement, NSI was not an additional insured, CP 39 (¶ 6.11), and ABCD Marine was not carrying workers’ compensation insurance, CP 704, contrary to the Access Agreement’s requirements. In their opening brief on appeal, appellants concede that because “Alliance was not provided with this document [the Access Agreement], therefore [Alliance] has no independent responsibility under [it].” App. Opening

Br. at 39-40. Their concession was not made prior to this appeal.

By October 29, 2004, Boogaard had engaged attorneys to represent him against NSI — the Law Offices of Martin D. Fox, P.S. — who notified NSI of the representation. CP 711. NSI answered through its attorney on November 1, 2004, pointing out it would assert the Access Agreement in a response to Boogaard's claim, CP 713, to which Mr. Fox replied on November 4, 2004, CP 717. Boogaard received and read copies of these letters. CP 691-92.

Effective December 1, 2004, NSI was made an additional insured on ABCD Marine's general liability insurance policy at the request of ABCD Marine. CP 720, 107. Boogaard received and read the letter from Alliance enclosing the change. CP 687-88, 720, 630 (¶ 3). This was the first time Boogaard had seen any insurance document stating NSI was an additional insured on ABCD Marine's insurance. CP 689-90.

ABCD Marine also made two other insurance changes at about the same time. Boogaard states that he obtained workers' compensation insurance for the company. CP 684-85. In addition, he testified that he formed ABCD Marine, LLC on November 12, 2004, CP 723-24, 654-55, having concluded after the accident that ABCD Marine should operate as a limited liability company, CP 700, 701. At ABCD Marine's request, the LLC was substituted as the named insured on the insurance policy

effective December 2, 2004. CP 687-88, 720-21, 108.

The other company, in addition to NSI, for which ABCD Marine performed services as a welding contractor was Naknek Barge Lines, LLC. CP 658. That company maintained barges, Boogaard testified. CP 658-59, 849-50. Boogaard testified ABCD Marine invoiced Naknek Barge Lines, LLC for welding on the barge vessels, and invoiced NSI for welding on docks. CP 660. Each company paid separately its own respective invoices from ABCD Marine. CP 661.

Naknek Barge Lines, LLC is a Delaware limited liability company. CP 729 (¶ 6) & 732; CP 946, 983. It is owned by Northland Holdings, Inc., CP 728 (¶ 3), which is also a Delaware corporation, CP 732, 909. NSI is a Washington corporation. CP 2 (¶ 1.3) & 34 (¶ 1.3), 732, 943. Its parent is also Northland Holdings, Inc. CP 728 (¶ 3). Northland Holdings, Inc. is a holding company without any employees or operations. CP 729 (¶ 5). Boogaard testified that he had been informed by his partner Wes Dahl “[r]ight from the start” that Northland Holdings, Inc. was the owner of Naknek Barge Lines, LLC. CP 849. Boogaard also knew from Wes Dahl that Northland Holdings, Inc. owned NSI. *Id.*

In a memorandum dated August 27, 2001, more than three years before the accident to Boogaard, Naknek Barge Lines, LLC informed its

contractors that each contractor would have to furnish a certificate of insurance on or before September 1, 2001 naming Naknek Barge Lines, LLC and Northland Holdings, Inc. as additional insureds. *See* CP 734, 669-70. Boogaard's deposition testimony was that he personally delivered that memorandum to Alliance the day he received it, CP 672, although his declaration eight weeks later stated Wes Dahl was the ABCD Marine partner who contacted Alliance about the memorandum, CP 1068 (¶ 4). Regardless, at ABCD Marine's request, CP 671, the certificate of liability insurance was issued by Alliance on September 17, 2001 and states that each of Naknek Barge Lines, LLC and Northland Holdings, Inc. is a certificateholder and that "certificate holder is included as additional insured but only with respects to named insured's operations," CP 736.⁵

When asked about the fact that the certificate did not name or refer to NSI, Boogaard agreed he "did not recall that it did." CP 674. Boogaard does not recall ABCD Marine's ever requesting any changes to its insurance policy between the time it was initially issued⁶ and the

⁵ There is one subsequent certificate, which is dated August 20, 2002 and contains this same wording, and which likewise names Naknek Barge Lines, LLC and Northland Holdings, Inc. as certificate holders. CP 544.

⁶ The first insurance policy to ABCD Marine took effect in April 2000. CP 662, 663, 738. The annual renewal date for the policy was each April 3.

October 2004 date of his injury, except for this one change relating to Naknek Barge Lines, LLC and Northland Holdings, Inc. about a year and a half after the first policy was issued. CP 667-68.

On April 21, 2008, Boogaard signed a settlement agreement with NSI. CP 740-44. The agreement provides that two agreed judgments would be entered. CP 740 (¶ C), 741 (¶ D). In the first one, for \$600,000, NSI is the judgment debtor and Boogaard is the judgment creditor on his personal injury tort claim. CP 746-47. In the second, Boogaard confessed judgment in favor of NSI on NSI's counterclaim in the amount of \$712,022.01. CP 748-49. The counterclaim had alleged that Boogaard was a partner in ABCD Marine and that he therefore was liable for ABCD Marine's hold harmless obligation to NSI under the Access Agreement, and further that he was liable for ABCD Marine's breach of its undertakings to have NSI made an additional insured and to carry workers' compensation insurance. CP 36-37 (¶¶ 5.1-5.3), 740, 991. The counterclaim judgment amount reflected \$112,000 of attorneys' fees NSI had incurred in defending itself, per appellants' answer in the instant action. CP 37 (first of the two ¶¶ 5.3); *see also* CP 740 & 741 (¶¶ 1 & 2.D).

The settlement agreement contains mutual covenants by Boogaard and NSI not to execute on the judgments, CP 741-42 (¶ E). The

settlement agreement also provides that both judgments shall be deemed satisfied, and that satisfactions of judgment will be filed, upon resolution of Boogaard's lawsuit against International Marine Underwriters. CP 742 (¶¶ E(3), E(5)).

Boogaard and NSI signed the agreed judgments which the court entered on September 11, 2008. CP 746-49. The agreed judgments are expressly subject to the terms and conditions of the settlement agreement. CP 746. Boogaard testified that he accordingly has not had to pay anything to NSI on its judgment against him, nor has NSI sought to enforce its judgment. CP 695. Per the terms of the settlement agreement, NSI did pay \$50,000 in cash to Boogaard and his attorneys at the time of closing the settlement. CP 694, 749 (¶¶ L, N).

In the present lawsuit, in ABCD Marine and Boogaard's cross-claim asserted against Alliance, a single item of damages is alleged: the amount of the judgment against Boogaard, \$712,000, in favor of NSI. CP 39-40 (¶ 6.15).

Northland Holdings, Inc. is neither a creditor nor a debtor in either of the judgments involving Boogaard. CP 746-49. It is not a signatory to the settlement agreement or the judgments. CP 740-44. When Boogaard agreed to dismiss with prejudice the underlying tort action upon entering the settlement agreement with NSI, the dismissal was ruled to include all

claims and parties in that action, including Northland Holdings, Inc., by order of May 2, 2008, CP 1020, entered over the objection of Boogaard's attorney, CP 1008-09. It was not clear why Boogaard had originally sued Northland Holdings, Inc. in the underlying action along with NSI. He does not appear to have argued a piercing-of-the-corporate-veil theory in the underlying action, although in the instant appeal he contends the veil should be pierced. It was stated by both NSI and Boogaard that NSI was the employer of Jeff Cronn, the forklift driver who injured Boogaard, *see* CP 988-89 (¶¶ 4, 8), CP 1008, *see also* App. Opening Br. at 12 (¶ 15), although at the outset of the underlying action Boogaard had alleged that Cronn was an employee of both corporations, CP 986 (¶ 8). In the underlying action, Boogaard argued at one point that Northland Holdings, Inc. was "the general operator in control of all the property and both sides of the operation." CP 1008. In the present case, appellants appear to no longer so contend. *See* App. Opening Br. at 59-60.

D. Authority & Argument

Alliance presented three independent grounds for summary judgment in its favor, and also a fourth ground directed at an ancillary negligence claim it appeared appellants might have been asserting.

The summary judgment sought dismissal on the central point that ABCD Marine never requested additional insured status for NSI and

therefore lacks a *prima facie* claim of insurance agent negligence. The two other major grounds were that (a) appellants knew before the end of 2004, more than three years before they sued Alliance, that NSI was not an additional insured on the ABCD Marine policy and would assert breach of the Access Agreement in opposition to Boogaard's claim against NSI; and (b) appellants had no *prima facie* proof of damages for a claim against Alliance because the agreed judgment in favor of NSI and against Boogaard for \$712,000 provided not only that NSI would never enforce it but also that it would be deemed satisfied upon resolution of the litigation between Boogaard and IMU. CP 611-12, CP 614-24.

The fourth prong of Alliance's CR 56 motion, CP 624-26, was limited and directed at a possible claim by appellants against Alliance that was based on Alliance's allegedly having told IMU in November 2004 that no claim was being made at that time on the IMU insurance policy, CP 4 (¶ 6.16)⁷; and further directed at any as yet unidentified claim made by appellants under the catchall phrase "and such other and further acts of negligence as may be disclosed in discovery" that they

⁷ IMU contended that Alliance had such a communication with its claims department in November 2004. CP 4 (¶ 7). Appellants pleaded in response that Alliance was not their agent with respect to any such communication, CP 35 (¶ 3.7); *see also* CP 34 (¶ 1.2), CP 298 (¶¶ 3-4), but appellants included the November 2004 communication among the alleged bases for their negligence cross-claim against Alliance, CP 40 (¶ 6.16).

included in their cross-claim against Alliance. *See* CP 40 (¶ 6.16). It actually appeared, based on oral statements by appellants' attorney, that appellants did not intend to pursue any ancillary claims, CP 625 & 649 (¶ 19), but rather only the main negligence claim based on lack of "additional insured" status. Alliance's motion sought to make this clear, CP 624-26, by employing the CR 56 standards (requiring a claimant to present *prima facie* proof of the challenged elements of the claim — *see* CP 612-13, citing cases). Appellants did not oppose this aspect of Alliance's CR 56 motion in their response, CP 769-93, and in particular did not dispute the absence of any causal link between the alleged statement in November 2004 by Alliance to IMU and any loss or damages to appellants, which Alliance's motion and reply memorandum in the court below pointed out. *See* CP 625, 679.

1. The Statute of Limitations Has Run

The limitations period for a negligence claim is three years. RCW 4.16.080. All of the negligent acts or failures to act that are alleged against Alliance occurred in 2004 or earlier. In particular, the allegedly negligent omission to have NSI made an additional insured on the liability policy issued to ABCD Marine occurred in 2004. The cross-claim against Alliance was not filed until December 30, 2008.

When Alliance brought its CR 56 motion, the possibility existed

ABCD Marine and Boogaard would try to argue the “discovery rule.” However, to do so, they would have “**the burden of proving** that the facts constituting the claim **were not and could not have been discovered by due diligence** within the applicable limitations period.” *Clare v. Saberhagan Holdings, Inc.*, 129 Wn. App. 599, 603, 123 P.3d 465 (2005) (emphasis added); *see also Burns v. McClinton*, 135 Wn. App. 285, 300, 143 P.3d 630 (2006); *Douglass v. Stanger*, 101 Wn. App. 243, 256, 2 P.3d 998 (2000).

In *Clare*, the court elaborated:

The general rule in Washington is that **when a plaintiff is placed on notice by some appreciable harm occasioned by another’s wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the scope of the actual harm. The plaintiff is charged with what a reasonable inquiry would have discovered.** “[O]ne who has notice of facts sufficient to place him upon inquiry is deemed to have notice of all acts which reasonable inquiry would disclose.” Thus, the discovery rule requires the plaintiff to use due diligence in discovering the basis for the cause of action.

Clare, 129 Wn. App. at 603 (emphasis added, citation omitted).

Furthermore, “[t]he key consideration under the discovery rule is the factual, not the legal, basis for the cause of action. . . . As our [state] Supreme Court has held . . .”:

[Plaintiff] would have us adopt a rule that would in effect toll the statute of limitations until a party walks into a lawyer’s office and is specifically advised that he or she

has a legal cause of action; that is not the law. A party must exercise reasonable diligence in pursuing a legal claim. If such diligence is not exercised in a timely manner, the cause of action will be barred by the statute of limitations.

Clare, 129 Wn. App. at 603-04, quoting *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 772-773, 733 P.2d 530 (1987).

In any event, appellants did not meaningfully argue that it was after December 30, 2005, three years before they filed suit against Alliance, that they first acquired knowledge of the alleged negligent acts of Alliance. Instead, appellants argue their claim against Alliance lacked an injury element, and thus appellants had no right to seek redress in court, until March 2008.

a. Appellants' Claim Accrued Before March 2008

Appellants frame the key statute of limitations issue as follows:

Did the statute of limitations begin to run [on appellants' claim] against Alliance before IMU denied coverage in 2008?

App. Opening Br. at 6 (¶ 14).⁸ IMU had written to Boogaard's attorney on March 20, 2008 stating it would not cover the counterclaim against him in the underlying lawsuits. CP 582-83.

⁸ Appellants also present two other subsidiary issues for the statute of limitations ground for summary judgment, *id.* at 7 (¶¶ 15, 16) that are addressed *infra* at 24-25.

This argument ignores the basis for appellants' cross-claim against Alliance. Appellants have not contended that Alliance could have or should have obtained a different insurance policy from IMU (or any other insurer) with a broader definition of "insured contract," or any other improved contractual language related to the policy provisions cited in the March 20, 2008 coverage denial letter. They have not offered evidence or argument that any different definition of "insured contract," or different versions of any other pertinent policy provisions, were available, nor if they were available that ABCD Marine could have been underwritten for them. Rather, appellants' claim against Alliance is that Alliance did not obtain "additional insured" status required by ABCD Marine's customer.

Second, appellants' arguments overlook the fact that the injury to the interests of Boogaard and ABCD Marine was known much earlier than 2008, by December 2004. This defect is true of the appellants' primary argument — that they had no right to sue Alliance until the "denial" letter issued from IMU on March 20, 2008 — and also their secondary argument, that they did not know the Access Agreement was "enforceable" until a March 16, 2008 ruling by the court in the

underlying lawsuit. App. Opening Br. at 47.⁹ In *Huff v. Roach*, 125 Wn. App. 724, 106 P.3d 268 (2005), the court rejected arguments similar to that appellants make here. The plaintiffs in *Huff* sued their former attorney for legal malpractice. The attorney had failed to file their personal injury claims within the required time period after an accident. The plaintiffs, through a new attorney, later filed suit, at which point they were met with a statute of limitations defense. The plaintiffs then voluntarily dismissed their individual claims and settled the claim by their minor child. When plaintiffs then sued their former attorney for legal malpractice, the evidence established that they knew (or were on notice of) the fact that their former attorney had missed the statute of limitations within four months after that limitations period had actually expired. The *Huff* court upheld summary judgment, rejecting the plaintiffs' argument that the damages element of their claim had not accrued until they were met with the defense in court that their personal injury claim was time-barred. The court ruled:

[T]he statute of limitations does not accrue “until

⁹ Appellants did not submit in opposition to Alliance's CR 56 motion any of the briefs in the underlying lawsuit regarding the effect of the Access Agreement, and so whether Boogaard had grounds to challenge its validity or enforceability, and did so challenge it, is not in the record. It seems unlikely that Boogaard had a basis to argue that the insurance undertakings by ABCD Marine in paragraph 10 of the Access Agreement, CP 709, were unenforceable.

the client discovers, or in the exercise of reasonable diligence should have discovered the facts which give rise to his or her cause of action.” The rule does not specifically require knowledge of the existence of a legal cause of action. Instead, the statute of limitations begins to run when “the plaintiff knew or should have known all of the essential elements of the cause of action.”

Here, malpractice refers to legal negligence. “The elements of negligence are duty, breach, causation, and *injury*.” The “injury” element refers to “damage” as opposed to “damages” The Huffs were injured by [the defendant attorney] when he missed the statute of limitations, **effectively invading their legal interests**.

The Huffs’ argument that they did not suffer damages until the statute of limitations defense was raised misses the point that their negligence claim accrued upon damage or injury.

Huff, 125 Wn. App. at 729-30 (italics by court; boldface added; citations omitted).

Similarly, ABCD Marine’s and Boogaard’s legal interests were invaded once NSI stated to Boogaard and his attorney that it was asserting its rights under the Access Agreement as a defense to Boogaard’s personal injury claim. The fact that Boogaard waited over two years after the accident to file suit against NSI, whereupon he was met with a formal counterclaim, does not change that fact. If it were otherwise, Boogaard would have had the power to unilaterally extend the statute of limitations for a lengthy and indeterminate period, depending on how long it took for the counterclaim to be formally alleged and the

litigation to reach a conclusion. The *Huff* court recognized the absurd result if this argument were allowed:

Under the proposed exception, the limitations period could be indefinitely extended simply by filing a time-barred action, however late, and waiting until an adverse judgment is rendered to file a negligence suit. The proposed exception conflicts with Washington cases supporting a strict application of the statute of limitations. We will not generally read an exception into statutes of limitation which has not been embodied in the statute, however reasonable such exception may seem.

Huff, 125 Wn. App. at 732 (citations omitted).

The four principal cases Boogaard cites, do not support his argument against the statute of limitations. The holding in *AAS-DMP Mgmt. L.P. Liquidating Trust v. Acordia Northwest, Inc.*, 115 Wn. App. 833, 63 P.3d 860 (2003) was that the insured person's claim against the broker accrued, and the limitations period started to run, when the insured person missed the deadline (due to alleged inaccurate advice from its broker) for presenting to the insurer a claim for lost profits stemming from a fire. 115 Wn. App. at 843. It did not hold that accrual was delayed until later points in time when the validity of the policy's "two-year service of suit" clause (which was a disputed issue, *id.* at 841) was decided, or when the insurer denied the claim or settled it for a fraction of the loss. In *Sabey v. Howard Johnson & Co.*, 101 Wn. App. 575, 5 P.3d 730 (2000), the limitations issue turned on the fact no evidence or reason

existed for disregarding the corporate form so as to harm or invade the interests of the individual (Mr. Sabey) until a time that was within three years of suit's being filed, not that a ruling that the corporate veil could be pierced was necessary for the claim to accrue, and also the fact that the individual could not have reasonably discovered the misrepresentation that put him at risk until much later. 101 Wn. App. at 593. In *Gausvik v. Abbey*, 126 Wn. App. 868, 872, 107 P.3d 98 (2005), the limitations period for a negligent investigation claim was held to begin when plaintiff was sentenced for a wrongful conviction, not when a later court ruling vacated the conviction, and the statute of limitations accordingly barred the claim.

And in *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 543 P.2d 338 (1975), the vessel sank in 1970. The insured person had filed suit not later than 1972,¹⁰ contending the fact property insurance on the lost fishing equipment had previously been cancelled was due to the defendant agent's misapplication of the insurance premium payments made by the plaintiff. The court rejected the argument that the three-year limitations period had started running when the agent made the mistake in

¹⁰ See the intermediate appellate court decision *Gazija v. Nicholas Jerns Co.*, 12 Wn. App. 538, 538, 530 P.2d 682 (1975) (indicating the order was under appeal entered in September 1972).

applying the premium (in 1966). But the court clearly did not say that any court proceedings from the sinking or the vessel insurer's denial of coverage had to reach conclusion before harm to the vessel owner existed.

Gazija is also distinguished in *Huff*, 125 Wn. App. at 730, the *Huff* decision clearly articulating that when an aggrieved person knows his legal interests are invaded, it is not necessary to have a legal ruling or proceedings to start the limitations period. *Id.* at 731-32. *Gazija* is essentially a “discovery rule” case at an early point in the rule’s formation.

The purpose of statutes of limitation is to protect defendants and the judicial system from stale claims. When claimants sleep on their rights, evidence may be lost and memories may fade. *Burns*, 135 Wn. App. at 293; *see also Huff*, 125 Wn. App. at 731-32 (noting Washington’s policy favoring the statute of limitations shielding defendants from stale claims); *Crisman v. Crisman*, 85 Wn. App. 15, 19, 931 P.2d 163 (1997).¹¹

In light of the purpose of statutes of limitations, and appellants knowing

¹¹ *See also 1519-1525 Lakeview Blvd. Condominium Ass’n v. Apartment Sales Corp.*, 144 Wn.2d 570, 578, 29 P.3d 1249 (2001); *Architectronics Constr. Management, Inc. v. Khorram*, 111 Wn. App. 725, 728-29, 45 P.3d 1142 (2002); *see generally Ruth v. Dight*, 75 Wn.2d 660, 664-65, 453 P.2d 631 (1969) (listing the several policy considerations).

all elements of their negligence claim against Alliance by December 2004, summary judgment was proper on the three-year statute of limitations.

b. Appellants' Raising of Two Subsidiary Issues Is Belated and Not Material to Alliance's Statute of Limitations Defense

Appellants make two irrelevant side arguments on the statute of limitations ground for dismissal. In the first, which corresponds to their issue no. 15, they contend Alliance is “barred” from asserting the statute of limitations began running in 2004 because “Alliance notified IMU that ABCD [Marine] was abandoning its claims and as a result IMU stopped processing the claim.” App. Opening Br. at 7 (¶ 15); *see also id.* at 54-55. Presumably, appellants contend that but for this, IMU would have issued a denial of coverage for NSI’s claim against Boogaard earlier than March 20, 2008. They did not make this argument to the court below. And as noted *supra* at 14-15, they did not respond at all to that part of Alliance’s CR 56 motion asking for *prima facie* proof of causation and other essential elements of any claim based on the purported 2004 communication with IMU. If the argument were preserved, it could be relevant only if appellants’ claim against Alliance arose from any inadequacies in the insurance policy provisions IMU relied upon in

March 2008 to deny liability coverage for NSI's counterclaim.
CP 582-83.

In the second, appellants contend that even though they failed to issue a summons to Alliance until September 2009, the "commencement date" of their claim against Alliance is still December 30, 2008, when they filed their amended pleading bringing Alliance in as a new party. They invoke the doctrine of "waiver" as to Alliance's CR 12(b)(4) defense of insufficient process. This is a non-issue. First, the difference between December 30, 2008 and September 4, 2009 is immaterial, Alliance's argument for a statute of limitations dismissal applies equally well with either date, as does appellants' argument in opposition, if accepted. Second, appellants have made no showing in the record of the acts needed for a waiver to exist under the insufficiency-of-service case they cite, *Lybbert v. Grant County*, 141 Wn.2d 29, 38-39, 1 P.3d 1124 (2000), and they did not present this "waiver" argument to the court below (understandably, since it was immaterial).

2. **The Appellants Lacked *Prima Facie* Proof of an Insurance Agent Negligence Claim**

a. **ABCD Marine Did Not Request that NSI Be Made an Additional Insured at Any Time Prior to the Accident and Accordingly There Was No Duty or Breach of Duty on the Part of Alliance to Make It an Additional Insured**

Prior to the September 29, 2004 Access Agreement, there was no requirement on ABCD Marine that NSI be an additional insured on its liability insurance policy. ABCD Marine and Boogaard do not contend that at any time on or before the September 29, 2004 Access Agreement they ever made a request to Alliance to obtain additional insured status for NSI. And they have now conceded they did not make any such request between September 29, 2004 and the accident three weeks later, nor did they provide a copy of the Access Agreement to Alliance or give any notice to Alliance that they had signed the agreement.

Boogaard's testimony has been that he took no steps to change ABCD Marine's insurance coverages to satisfy the Access Agreement because he was under the impression ABCD Marine already had all the insurance coverages it required in place. CP 675-76; CP 680; CP 703. However, he has not and cannot point to any document or information he ever received, on or before the accident, from Alliance or anyone else, stating that NSI was an additional insured, or that ABCD Marine carried

workers' compensation insurance.

In addition, (1) Boogaard did take at least some time to read the Access Agreement (five minutes, he estimates), CP 679, CP 676-77; (2) Boogaard saw that it was considerably longer than the previous short, one-page memorandum from August 2001 to Naknek Barge Lines, LLC contractors, CP 734, and involved NSI instead of Naknek Barge Lines, LLC as the opposite party, CP 678, 680; (3) Boogaard was aware at the time that the earlier requirement, in the August 27, 2001 memorandum was Naknek Barge Lines, LLC and Northland Holdings, Inc. be made additional insureds, CP 678; and (4) Boogaard knew that ABCD Marine did not have workers' compensation insurance because he and Wes Dahl, who were also owners, had lawfully exempted themselves from such coverage, CP 704.

Furthermore, Boogaard agrees that Alliance had told him orally, and in annual letters accompanying the mailing of the insurance policy, to let Alliance know if ABCD Marine's insurance needs changed, and that he indicated he would do so. CP 664-65; CP 668; *see also* CP 629-30 (¶ 1), 634, 636, 638, 640 & 642.¹² That Boogaard had the ability to do so is illustrated by the fact that ABCD Marine did go to Alliance in 2001

¹² Boogaard states he was the ABCD Marine partner responsible for insurance matters. CP 705.

when Naknek Barge Lines, LLC asked for an insurance change.

An insured has a duty to give his insurance agent “clear, explicit and positive” instructions regarding the type and scope of coverage requested. *American States Ins. Co. v. Breesnee*, 49 Wn. App. 642, 649, 745 P.2d 518 (1987), citing 3 R. Anderson, *Couch on Insurance* § 25:34 at 333 (2d ed. 1984). If the insured’s instructions are “ambiguous or obscure and will bear different interpretations, the agent is justified in acting in good faith upon one of two reasonable constructions.” *Id.*

In *American States*, Breesnee owned a car lot. His son bought a Trans-Am in his own name. 49 Wn. App. at 643. Breesnee notified his insurance agent that he wanted the Trans-Am added to his commercial car lot policy. *Id.* at 644. He did not tell the agent that the car was in his son’s name. *Id.* at 644-45. The son wrecked the car and coverage was denied because the son was not a named insured and the Trans-Am was not a covered vehicle under the terms of the car lot’s commercial policy. *Id.* at 645. Breesnee argued that the insurance agent had a duty to make inquiries of him to determine the extent and type of coverage required. *Id.* at 649. The court rejected this argument and concluded that the insured had a duty to specifically tell the agent that he wanted special coverage for a car that was not registered in the name of the car lot. *Id.* at 649-50. The trial court’s entry of summary judgment was affirmed on the

ground that Breesnee's instructions were not sufficiently clear to give rise to a duty to obtain special coverage for the Trans-Am. *Id.*

The argument that an insurance agent has a duty to procure insurance or otherwise act to change coverage without a direction from the insured person was also rejected by the court in *Suter v. Virgil R. Lee & Son, Inc.*, 51 Wn. App. 524, 529, 754 P.2d 155 (1988). In *Suter*, plaintiffs did not have adequate liability insurance to cover an accident and argued that the agent had a duty to recommend higher liability limits. *Id.* at 526-27. The agent moved for summary judgment to dismiss the plaintiffs' claims on the basis that the agent had no such duty absent the insured person raising the issue. *Id.* at 526. The plaintiffs in *Suter* presented the affidavit of an "insurance expert" who testified that an insurance agent had a duty to inquire into an insured's assets, income, occupation and real estate holdings and to recommend liability coverage adequate to protect the insured's assets. *Id.* The expert opined that the agency had failed to act prudently when it failed to recommend certain limits to plaintiffs. *Id.* at 527. The plaintiffs argued that the question of duty was a factual one and could not be resolved on summary judgment because the finder of fact might believe their expert. *Id.*

The court rejected plaintiffs' argument and held that the existence of a duty is a question of law for the court. *Id.* at 527-28. The court

noted that “[n]o affirmative duty to advise is assumed by the mere creation of an agency relationship.” *Id.* at 528. The court stated that “[t]he general duty of reasonable care which an insurance agent owes his client does not include the obligation to procure a policy affording the client complete liability protection. . . .” *Id.*, quoting *Jones v. Grewe*, 189 Cal. App. 3d 950, 956, 234 Cal. Rptr. 717, 720 (1987). Consequently, the court concluded that it is the insured’s responsibility to inform the agent of the insurance he wants. *See also Shows v. Pemberton*, 73 Wn. App. 107, 868 P.2d 164 (1994) (insurance agent not obligated to advise insured about area where exemption to coverage applied); *Gates v. Logan*, 71 Wn. App. 673, 862 P.2d 134 (1994) (insurance agent had no duty to get higher limits).¹³

ABCD Marine similarly had a responsibility to inform Alliance if it wanted an insurance change to make NSI an additional insured. While Boogaard may try to portray himself as naïve about insurance, it is not material. He certainly knew enough to contact Alliance if he received or signed a document imposing insurance requirements on ABCD Marine. He, or Wes Dahl, had done so before, in 2001. He simply did not do so

¹³ The *Suter*, *Gates* and *Logan* courts also rejected the argument that a “special relationship” existed that could give rise to a duty to advise. *See* discussion *infra* at 41-43.

with the 2004 Access Agreement at any time prior to the accident. Alliance was not in a position to read ABCD Marine's mind. In the absence of ABCD Marine's contacting it to request that it procure additional insured status for NSI, Alliance had no duty to do so.

b. NSI Is Not Northland Holdings, Inc. Nor Naknek Barge Lines, LLC

Appellants presented a fallback argument when faced with the undisputed evidence that the appellants never requested NSI be made an additional insured and the absence of any legal dispute over Washington law holding that ABCD Marine had to request the desired insurance before any duty can arise for an agent or broker to obtain it. Their argument was that additional insured certificates for the two Delaware entities, Naknek Barge Lines, LLC and Northland Holdings, Inc., requires IMU to pay the \$712,000 judgment in favor of NSI and against Boogaard; but that if IMU is held to not be so obligated, then Alliance is *prima facie* liable in negligence for not causing IMU to issue a policy endorsement stating that Naknek Barge Lines, LLC and Northland Holdings, Inc. were each "included as additional insured but only with respects to the named insured's operations," which is the language in the certificates. CP 736, 544. In that vein, appellants assert:

Had the additional insured endorsement [for Northland Holdings, Inc. and Naknek Barge Lines, LLC] been

secured as both IMU was required to do and IMU was duty bound to follow through on for ABCD [Marine], **then there would have been no question of coverage either in the underlying action or this lawsuit.**

App. Opening Br. at 39 (emphasis added).¹⁴

Despite the certitude in this quotation, it ignores the facts (a) Northland Holdings, Inc. and Naknek Barge Lines, LLC are not the judgment creditor or judgment debtor on either of the agreed judgments, CP 746-49; (b) Northland Holdings, Inc. and Naknek Barge Lines, LLC are distinct entities from NSI; and (c) no basis has been offered by appellants to disregard the corporate entities.

As can be seen from the above quotation, appellants argue the certificates issued to Naknek Barge Lines, LLC and Northland Holdings, Inc. as a basis of their claim against IMU. *See* App. Opening Br. at 30-39. (This is appellants' secondary argument against IMU, behind their primary argument that the "insured contract" clause in the IMU liability insurance policy requires IMU to pay the \$712,000 judgment. *Id.* at 19-30.) Appellants have utilized Alliance discovery responses and the deposition of the former Alliance employee who signed the September 17, 2001 certificate in stating Alliance communicated with IMU's

¹⁴ Similarly, appellants say the Access Agreement's requirement that NSI be made an additional insured on ABCD Marine's policy was "superfluous" if Northland Holdings, Inc. was an "additional insured beginning in 2001." *Id.* at 51.

underwriting department to get the wording for the certificate. *Id.* at 9 (¶ 6). IMU has, in its legal briefs responding to appellants, referred to the certificates as being “unauthorized.” *See* CP 426-27, CP 47. Alliance’s position has been that appellants’ argument is academic, however, since Naknek Barge Lines, LLC and Northland Holdings, Inc. owe nothing to Boogaard, are owed nothing by him, and have no bearing on coverage issues between appellants and IMU.

The record (including documents Boogaard has submitted) shows that Northland Holdings, Inc. and Naknek Barge Lines, LLC are Delaware entities and remained so in good standing during all the years in question. No document shows that either ever merged with NSI, a Washington corporation. In the court below, appellants asserted (erroneously) that “[i]n 2000, South NSI Ventures, Naknek, and Northland Services, Inc. merged into one entity.” CP 785. That argument is not made in their appeal.¹⁵

Appellants argue that Boogaard sued both NSI and its parent Northland Holdings, Inc. in the underlying lawsuit, and they should be treated as equivalent. Boogaard never articulated a viable theory for how

¹⁵ The exhibit cited by appellants in the court below, which was Articles of Merger dated May 1, 2000, did not have anything to do with Naknek Barge Lines, LLC. *See* CP 954.

Northland Holdings, Inc. could be liable to him, nor did he present any evidence against it, which was pointedly stated to the court in the underlying lawsuit. CP 999, 1001, 1018. The forklift driver who caused the injury to Boogaard was NSI's employee, a fact Boogaard conceded. He later argued in the underlying lawsuit that Northland Holdings, Inc. was "the general operator in control of all the property and both sides of the operation [and therefore] was ultimately responsible for the overall safety of both operations to the public and to subcontractors on the pier such as Mr. Boogaard." CP 1008.¹⁶ That argument is not made in the present action.

Appellants also contend that Judge Spector ruled Northland Holdings, Inc. was a party to the settlement. App. Opening Br. at 58. Even if this were true, it would be immaterial and not change the facts that Northland Holdings, Inc. is not the judgment debtor of judgment creditor in either of the agreed judgments in the underlying case, nor was Boogaard able to articulate or adduce any evidence against Northland Holdings, Inc. In any event, Judge Spector's May 2, 2008 order provides simply that a dismissal order of all claims in the underlying lawsuit will

¹⁶ By "both sides" and "both operations," Boogaard's attorney was referring to his earlier statement that "Northland Holdings, Inc. uses Northland Services, Inc. to perform ground operations at the pier, and uses Naknek Barge Lines, LLC to operate the barge side of the operation." CP 1008.

be presented. CP 1020. The settlement agreement had stated that the underlying lawsuit was “full[y] and complete[ly] compromise[d].” CP 1000; *see also* CP 742 (§ G).

In the current action, appellants contend primarily that the “corporate veil” should be pierced to reach Northland Holdings, Inc. App. Opening Br. at 58-64. The argument ignores clear Washington law to the contrary and also that Boogaard did not plead or argue any such contention in the underlying case.

“It is a general principle of corporate law deeply ‘ingrained in our economic and legal systems’ that a parent corporation (so-called because of control through ownership of another corporation’s stock) is not liable for the acts of its subsidiaries.” . . . To pierce the corporate veil and find a parent corporation liable, the party seeking relief must show that there is **an overt intention by the corporation to disregard the corporate entity** in order to avoid a duty owed to the party seeking to invoke the doctrine. Generally, a party must show that the corporation manipulated the entities in order to avoid the legal duty.

....

[T]his court has held that “[m]ere common ownership of stock, the same officers, employees, etc., does not justify disregarding the separate corporate identities unless a fraud is being worked upon a third person.”

Minton v. Ralston Purina Co., 146 Wn.2d 385, 398-99, 47 P.3d 556 (2002) (emphasis added; citations omitted). Appellants quote an A.L.R.3d article listing 11 factors to be considered as a whole, App.

Opening Br. at 61-62, but conspicuously do not offer proof, or even meaningful argument, that any of them are present other than the one regarding common officers.¹⁷

Appellants' expert witness declaration by Robert Sedillo contains the speculative statement that IMU, upon defending Northland Holdings, Inc., would have gratuitously also defended NSI. CP 969. He points to no legal obligation under any contract for IMU to have done so. Obviously, NSI was the company exposed to liability to Boogaard, so his supposition that IMU would have expanded any defense to include it is also contrary to common sense. More importantly, he does not even surmise there would be any indemnity of NSI by IMU.¹⁸ The Sedillo declaration generally is conclusory. But even apart from whether it would meet evidentiary standards at trial, the premises for its opinions

¹⁷ Appellants say there is a "bewildering array of corporate filings," App. Opening Br. at 8 (¶ 2), citing CP 908-63, and that "there are a large number of corporate entities and shells with the same officers and directors with similar names and responsibilities, and interrelationships," *id.* at 62, albeit without proof other than some commonality of officers. The pages cited for the "bewildering array" consist of appellants' attorneys' putting in the record a large assortment of corporate documents they searched for and obtained on line or from the Secretary of State's office. The contention is irrelevant. Furthermore, the fact that Northland Holdings, Inc. was a holding company for three entities, *see* CP 732, and did not have employees or conduct operations, CP 729 (¶ 5) is a straightforward fact and not complex.

¹⁸ Conjecture or speculation by an expert should be disregarded. *See, e.g., Melville v. State of Wash.*, 115 Wn.2d 34, 41, 793 P.2d 952 (1990).

evaporates when appellants lack a basis for disregarding the corporate entities.

Appellants also argue that it was confusing which corporation had “operational control over terminal 115.” App. Opening Br. at 63-64. No one asked Alliance to procure insurance for the operations at terminal 115. The request in August 2001 by Naknek Barge Lines, LLC was to obtain additional insured status for it and its parent, Northland Holdings, Inc. Naknek Barge Lines, LLC had its own scope of operations which, according to Boogaard’s knowledge and testimony, was barges. It is conjecture for appellants to argue that what Naknek Barge Lines, LLC really must have wanted in August 2001 was additional insured status for all “operations at Terminal 115” but just did not know how to say it.

c. **The Contention that “Reformation” of Additional Insured Status for Naknek Barge Lines, LLC and Northland Holdings, Inc. Would Have Occurred To Make NSI an Additional Insured Has No Legal or Factual Support**

Appellants argue “the evidence is uncontradicted that in 2001 . . . Northland wanted insurance for ABCD [Marine]’s welding activity on barges **and at the pier.**” App. Opening Br. at 64 (emphasis added). No citation is given, and nothing in the August 27, 2001 memorandum from Naknek Barge Lines, LLC indicates such a broad request. They further

say, in the same portion of their argument, that “[i]f Mr. [Ed] Hiersche was mistaken as to which Northland entity was operating the terminal at the time[,] it is clear that the parties made a mistake about who needed to be named as an insured.” *Id.* at 65. Again, there is no citation or support for any such “mistake.” On this basis, appellants argue that somehow the additional insured coverage for Northland Holdings, Inc. and Naknek Barge Lines, LLC, requested in 2001 by Naknek Barge Lines, would have been judicially reformed, on grounds of mutual mistake, to have NSI granted additional insured status, if only Alliance had caused IMU to issue a policy endorsement in 2001 that stated Northland Holdings, Inc. and Naknek Barge Lines, LLC were additional insureds. *Id.* at 64-66.

This argument has nothing to back up its premises, that the August 27, 2001 memorandum showed intent that additional insured coverage be in place for whoever “was operating the terminal” or “had operational day to day management of Pier 115” or was “the pier management,” to use appellants’ various phrases, *id.* at 65, 66; and that the memorandum mistakenly stated Northland Holdings, Inc. was “the operator.” The memorandum itself lacks any content to support this interpretation. *See* CP 734. And no evidence is offered, beyond the memorandum, for appellants’ argument on this purportedly unexpressed mutual intent.

The memorandum is a one-page document on stationery of Naknek Barge Lines, LLC. It is addressed to “All Naknek Barge Lines” contractors. It begins with the introductory phrase “[d]ue to changes in Naknek Barge Lines’ general liability coverage, it has been necessary to” Nothing in it refers or alludes to a company that is “the operat[or]” of the terminal or “ha[s] operational day-to-day management of Pier 15” or any similar role or function.

Northland Holdings, Inc. was the parent of Naknek Barge Lines, LLC. If appellants believed that there was a reason beyond that relationship that led to Northland Holdings, Inc.’s being mentioned in the third sentence of the memorandum, they presumably would have tried to develop evidence to that effect.

The standards for reformation are strict. “Clear, cogent, and convincing” evidence is required of the purported “mutual mistake.” *See, e.g., Denaxas v. Sandstone Court of Bellevue, LLC*, 148 Wn.2d 654, 699, 63 P.3d 125 (2003); *Safeco Ins. Co. v. Dairyland Mut. Ins. Co.*, 74 Wn.2d 669, 672, 446 P.2d 568 (1968). Appellants’ speculation does not even remotely approach that standard. Boogaard himself made it clear that he lacked knowledge of why Naknek Barge Lines, LLC wanted the changes stated in its memorandum. CP 851. And as for the repeated (without any citation) assertions that Northland Holdings, Inc. “was in charge of the

workplace,” “represented itself” as “the responsible entity” and as “in control of the job site,” and the like, App. Opening Br. at 59 (lines 2-4 & 19-20), 60 (lines 17-19), 62 (lines 19-20), 63 (line 13) & 64 (lines 3-5), that are spread throughout appellants’ argument, nothing evidences any such representations. Certainly, the August 27, 2001 memorandum does not. Boogaard testified that he was told (by Wes Dahl, his partner) that Northland Holdings, Inc. was the owner of Naknek Barge Lines, LLC and also of NSI. CP 849. ABCD Marine never billed Northland Holdings, Inc. for any operations of ABCD Marine. CP 851. The “reformation” argument lacks any basis in law or fact.

d. Appellants’ “General Law” Section on “Duties of a Broker” Does Not Support Their Arguments in This Appeal

Appellants present a general section on “Duties of Insurance Brokers,” App. Opening Br. at 41-46, that does not refute the fact that ABCD Marine had the responsibility to inform Alliance of the Access Agreement and request changes to its insurance policy if it wanted them. They cite to *U.S. Oil & Refining Co. v. Lee & Estes Tank Lines, Inc.*, 104 Wn. App. 823, 16 P.3d 1278 (2001), a case that they say is “on all fours with this case.” App. Opening Br. at 45. No issue of insurance agent or broker liability is addressed or decided in the *U.S. Oil* decision, so this assertion is an exaggeration. The opinion rules on the legal rights

between an oil supply company and a truck-tanker company that serviced it, arising from the indemnity agreement between them and the fact that the truck-tanker company did not obtain additional insured coverage for the oil company, as the indemnity agreement required. While the opinion acknowledges that Lee & Estes had made a third-party complaint against two insurance agents or brokers, it says nothing whether it was a viable or meritorious claim.

Appellants also, in this section of their brief, quote from *AAS-DMP Mgmt., L.P. Liquidating Trust v. Accordia Northwest, Inc.*, 115 Wn. App. 833, 839, 63 P.3d 860 (2003), on the “duty to advise” that can arise if “a special relationship” exists between an insurance broker or agent and the insured person. But the instant case does not involve any “special relationship.” Appellants did not try to prove such a relationship.¹⁹ Nor could they have done so in light of Boogaard’s testimony on ABCD Marine’s infrequent dealings with Alliance. Between the inception of the IMU policy in 2000 and the accident in 2004, ABCD Marine’s contacts with Alliance were annually to take in

¹⁹ A special relationship may arise in two situations: first, if an agent holds himself out as an insurance specialist **and** receives compensation for consultation and advice apart from the premium paid by the insured; or, second, if there is a longstanding relationship and some type of interaction on questions of coverage coupled with detrimental reliance by the insured person on the expertise of the insurance agent. *Suter*, 51 Wn. App. at 528.

the premium payment and providing the August 2001 memorandum from Naknek Barge Lines, LLC to Alliance. CP 666. Boogaard “does not recall any specific questions [he] had for her” or “any specific answer or advice” by Alliance. CP 664. “Nothing stands out” in his memory from any discussions with Alliance at the times of renewal. CP 666-67. The August 2001 memorandum of Naknek Barge Lines, LLC was the only instance in which ABCD Marine requested a change in its coverage. CP 667-68. He does not recall any discussion with Alliance about what the request meant to “name and waive” Naknek Barge Lines, LLC and Northland Holdings, Inc. in the August 27, 2001 memorandum. CP 671. He states Alliance asked to be informed if ABCD Marine required any insurance changes or if there were any changes in its business operations affecting its insurance, and he told Alliance he would do so. CP 664-65.²⁰ Boogaard also testified he regarded Alliance as the agent for the insurer, not as a broker or agent for ABCD Marine, CP 994-95, which is consistent with appellants’ allegations in their cross-claim, CP 38 (¶ 6.2).

²⁰ Appellants’ generic assertion that “ABCD [Marine] relied on Alliance to secure its insurance needs,” citing in wholesale fashion to 128 pages of Boogaard deposition testimony, App. Opening Br. at 39 (citing CP 157-84) does not meaningfully add anything on this issue. And the immediately following assertion that Alliance “acknowledged” such generalized reliance, suggesting it had undertaken some broad-based duty other than to act on specific requests by ABCD Marine, is not supported by the citation appellants make to the eight deposition pages in CP 861 and 866.

Boogaard did not get any of his individual insurance coverages through Alliance. CP 656-57.

In *AAS-DMP Mgmt.*, by contrast, the duration of the broker-insured person relationship was 10 to 15 years. The broker spoke almost daily with the insured person about insurance and insurance risk matters, and the broker had traveled to London to negotiate the insurance policy with an underwriting syndicate. 115 Wn. App. at 836-37, 840. Furthermore, the insured person had specifically asked the broker for advice on the existence of any time deadlines for it to submit a claim for lost profits, stemming from a fire, to the insurer, which was the central subject of the negligence claim against the broker. Here, ABCD Marine did not provide the Access Agreement to Alliance, or tell Alliance it existed, at any time prior to the accident.

3. Appellants Lack Prima Facie Proof of Damages for Their Cross-Claim Against Alliance

NSI has an agreed judgment in its favor against Boogaard in the amount of \$712,022.01. That judgment is alleged by appellants ABCD Marine and Boogaard to be their damages in the cross-claim against Alliance. CP 39-40 (¶¶ 6.13-6.15). Appellants have not paid any amounts to NSI in satisfaction of that judgment, nor will he ever be required to, as there is a covenant by NSI not to execute on the judgment.

Although agreed judgments with covenants not to execute are judgments in name only, they can, in an action for bad faith against an insurance company that fails to provide a defense to its insured person or that defends improperly, be treated as a presumptive measure of damages. *Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 737, 49 P.3d 887 (2002).²¹ However, even in that situation, the clear trend of the case law has been to impose limitations on the use of such judgments. *See Werlinger v. Warner*, 126 Wn. App. 342, 109 P.3d 22 (2005) (\$5 million covenant judgment in fatal motor vehicle case held not to establish damages for subsequent action against insurer because the amount was unreasonable due to the defendant tortfeasor's having been discharged in bankruptcy); *Water's Edge Homeowners Ass'n v. Water's Edge Associates*, 152 Wn. App. 572, 216 P.3d 1110 (2009) (holding confessed judgment amount was unreasonable based on several factors); *Kim v. O'Sullivan*, 133 Wn. App. 557, 137 P.3d 61 (2006) (holding confessed judgment could not establish damages in the defendant's subsequent action against the attorney assigned by his insurer to defend him as such defense attorneys have different duties than insurers).

²¹ Alliance is an insurance agent, and not an insurance company, and did not have a duty to defend Boogaard under an insurance policy and did not receive any tender of his defense. However, Alliance's CR 56 motion did not draw on that distinction for purposes of presenting the defense based on lack of provable damages.

The confessed judgment at issue here has an additional feature that goes beyond a simple covenant not to execute against Boogaard, however. That judgment becomes fully satisfied and of no further effect, not even paper effect, upon resolution of Boogaard's claim against IMU, and a satisfaction of judgment will be filed.

Specifically, the settlement agreement states that NSI "agrees not to execute or enforce its judgment pending resolution of Boogaard's bad faith and coverage claim against ABCD Marine's insurance carrier, International Marine Underwriters/OneBeacon America Insurance Company (the 'insurance claim')." See CP 742 (§ E(2)). It further states:

(3) Resolution of the insurance claim shall be **deemed satisfaction of the judgments** stated in 2(C) and 2(D), regardless of the outcome of that claim and/or litigation.

....

(5) At the resolution of the insurance claim and regardless of the outcome of that claim, the parties **agree to enter mutual satisfactions of judgment** for any judgment entered in King County Superior Court, Cause No. 06-2-35554-7SEA [*Boogaard v. Northland Services*].

CP 742 (§§ E(3), E(5)) (brackets in the original; emphasis added). The alleged damages in the cross-claim therefore no longer even exist upon paper upon the resolution of Boogaard's claim against IMU.

Boogaard, having reached the settlement terms with NSI in

“arm’s length” negotiations that were not collusive or fraudulent (as he clearly avers was the case), cannot now seek to disavow those terms. The *Water’s Edge* case is instructive on this point. There, the plaintiff condominium association and the defendant developer agreed to a confessed judgment that was ruled unreasonable. The plaintiff appealed that ruling and also an earlier ruling that had dismissed its claims for breach of express and implied warranties as time-barred. (The respondent in the appeal was an intervenor, the insurer of the developer.) The *Water’s Edge* court affirmed the unreasonableness of the judgment amount and further ruled that the trial judge was not required to revise the judgment to a lower amount that would have been reasonable, thus rendering the settlement effectively moot. And the *Water’s Edge* court in addition declined to review the dismissal of the warranty claims that plaintiff sought, holding that its settlement agreement with the developer stated it was final and had no contingencies and did not preserve any claims, and noting that developer with which the association had negotiated the agreement was no longer a party to the action. Similarly, NSI is no longer a party to this action and the Settlement Agreement between it and Boogaard is final and has no contingencies or terms

beyond what is in the agreement itself.²²

In response, appellants conspicuously avoid the central point: the judgment for NSI is not damages against Alliance, even if it is accepted at face value, because the judgment's terms provide that it shall be deemed satisfied upon resolution of Boogaard's claim against IMU, regardless of the outcome. Instead, they assert Boogaard himself has "severe" damages and state that Judge Spector, in the underlying lawsuit, ruled reasonable the \$600,000 amount of the agreed judgment in favor of Boogaard and against NSI. App. Opening Br. at 57. They further point out that Boogaard, in covenanting not to enforce that judgment against NSI, reserved the right "to seek any recovery for this judgment . . . against his insurance carrier IMU/One Beacon Insurance Company, his insurance broker, or assigned counsel." *Id.*, quoting CP 742 (§ 2.E(1)).

But Alliance is not alleged to have caused the bodily injury to Boogaard. The issue is whether there is *prima facie* proof of injury that ABCD Marine, or Boogaard in his capacity as a partner in it, sustained. Paragraph E.1 of the settlement agreement, by its own terms, pertains solely to the judgment **in favor of Boogaard** for \$600,000, not the one against him. CP 742. Appellants did not allege the judgment in

²² An "Entire Agreement" clause is included in the terms of settlement between NSI and Boogaard. *See* CP 743 (§ 4).

Boogaard's favor represents damages in their cross-claim against Alliance. Even if they had tried, that judgment would not tie to their theory of liability against Alliance, that it caused Boogaard to face a counterclaim in the underlying suit and suffer judgment on it.

Furthermore, Boogaard's interest as judgment creditor in the \$600,000 agreed judgment is as an individual, not as a partner in ABCD Marine. The latter has no right or interest in that judgment. Alliance's customer relationship was with ABCD Marine, and only indirectly with Boogaard, to the extent of his capacity as a partner. No duty was owed to Boogaard as an individual. *See Branom v. State of Washington*, 94 Wn. App. 964, 973, 974 P.2d 335 (1999) (holding the defendant's duty to plaintiff to obtain informed consent was owed only in plaintiff's capacity as representative of a minor, not to plaintiff individually); *Hunter v. Knight Vale & Gregory*, 18 Wn. App. 640, 644-45, 571 P.2d 212 (1977) (duty of accounting firm did not run to corporation's president in an individual capacity even though he had negotiated the engagement of accounting services for the company and alleged individual damages). ABCD Marine's purpose in getting a liability policy was to insure against business liability, not to provide a pool for Boogaard and his partner Wes Dahl to collect from claimants. If the latter had been its concern, ABCD Marine presumably would have purchased workers' compensation

insurance. That it turned out to be Boogaard who was injured was happenstance. It is doubtful that he individually contemplated that he would be injured by NSI and would want to collect damages against his own firm's general liability insurance policy — certainly, he has offered no proof to suggest that. If he had informed Alliance about the existence of the Access Agreement and discussed the presence in it of a broad hold harmless undertaking by ABCD Marine, which would impair his or Wes Dahl's ability to prevail and obtain judgment in any suit they might have against NSI for personal injury, then perhaps it would be foreseeable Boogaard's individual interest that he now asserts would be at risk. But ABCD Marine and Boogaard never had any communication with Alliance about the Access Agreement until after the accident.

The \$600,000 agreed judgment that Boogaard has as an individual exists only because it is part of the arrangement that contains also a \$712,000 judgment in favor of NSI. The only interest ABCD Marine had was in the latter. ABCD Marine, and Boogaard as a partner in it, were at all times protected against the NSI judgment for \$712,000: it will never be collected against them; it will be satisfied by IMU if appellants can prevail on his argument that the "insured contract" clause of the IMU policy embraces it; and if they cannot so prevail, the \$712,000 judgment will still be satisfied by its own terms and a satisfaction of judgment filed.

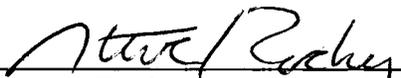
Appellants lack *prima facie* proof of damages for their cross-claim against Alliance.

CONCLUSION

For the reasons stated herein, the summary judgment entered by the court below dismissing the appellants' cross-claims against Alliance should be affirmed.

DATED this 25th day of April, 2011.

ROCKEY STRATTON, P.S.



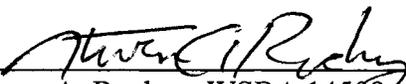
Steven A. Rockey, WSBA 14508
Attorneys for Respondent Alliance

CERTIFICATE OF SERVICE

I certify that service of a copy of the foregoing document to which this certificate is attached is being made on the 25th day of April, 2011 by mailing same via the United States Postal Service to the attorneys of record in this case, first class postage prepaid.

DATED this 25th day of April, 2011.

ROCKEY STRATTON, P.S.



Steven A. Rockey, WSBA 14508
Attorneys for Respondent Alliance

APPENDIX A

TABLE OF CITATIONS TO BOOGAARD DEPOSITIONS

Page in Brief	CP Citation	Deponent ¹	Transcript Page(s)	Lines
6	659	A. Boogaard	31	6-13
6	658	A. Boogaard	30	15-24
6	675, 682	A. Boogaard	82, 92	15-22, 17-20
6	702, 703	A. Boogaard (u/l)	134, 133	8-21, 7-11
7	693	A. Boogaard	111	16-19
7	680-81	A. Boogaard	87-88	18-25 & 1-3
7	704	A. Boogaard (u/l)	138-39	14-25 & 1-2
8	691-92	A. Boogaard	102-103	17-25 & 1-5, 18-23
8	687-88	A. Boogaard	97-98	21-25 & 1-3
8	689-90	A. Boogaard	99-100	25 & 1-3
8	684-85	A. Boogaard	94-95	18-25 & 1-17
8	654-55	A. Boogaard	10-11	12-15, 19-25 & 1-7
8	700, 701	A. Boogaard (u/l)	80, 83-84	13-23, 22-25 & 1-23
9	687-88	A. Boogaard	97-98	21-25 & 1-10
9	658	A. Boogaard	30	15-24
9	658-59	A. Boogaard	30-31	25 & 1-2
9	849-50	A. Boogaard	69-70	21-25 & 1-18
9	660	A. Boogaard	32	5-20
9	661	A. Boogaard	33	11-18
9	849	A. Boogaard	67	6-22
10	669-70	A. Boogaard	65-66	3-25 & 1-8
10	672	A. Boogaard	71	14-20
10	671	A. Boogaard	68	7-10
10	674	A. Boogaard	75	18-20
10	662, 663	A. Boogaard	35, 36	9-12, 5-22
11	667-68	A. Boogaard	51-52	23-25 & 1-8
12	695	A. Boogaard	120	14-24

¹ “A. Boogaard” refers to the deposition of Albert Boogaard in this action (for which transcript pages appear in CP 652-96 and 994-95). “A. Boogaard (u/l)” refers to the deposition of Albert Boogaard in the underlying action (for which transcript pages in “minuscrit” format appear in CP 698-706).

12	694	A. Boogaard	116	1-7
26	675-76	A. Boogaard	82-83	15-25 & 1-5
26	680	A. Boogaard	87	9-24
26	703	A. Boogaard (u/l)	133	7-11
27	679	A. Boogaard	86	23-25
27	676-77	A. Boogaard	83-84	25 & 1-4
27	678	A. Boogaard	85	15-17
27	680	A. Boogaard	87	1-15
27	678	A. Boogaard	85	18-23
27	704	A. Boogaard (u/l)	138-39	14-25 & 1-2
27	664-65	A. Boogaard	46-47	17-25 & 1-7
27	668	A. Boogaard	52	9-22
27	705	A. Boogaard (u/l)	143	18-20
39	851	A. Boogaard	76	15-23
40	849	A. Boogaard	67	6-22
40	851	A. Boogaard	76-77	24-25 & 1-2
42	666	A. Boogaard	50	8-19
42	664	A. Boogaard	46	11-16
42	666-67	A. Boogaard	50-51	20-25 & 1-2 & 11-22
42	667-68	A. Boogaard	51-52	23-25 & 1-8
42	671	A. Boogaard	68	11-19
42	664-65	A. Boogaard	46-47	17-25 & 1-7
42	994-95	A. Boogaard	44-45	3-25 & 1-6
42	656-57	A. Boogaard	28-29	12-25 & 1-10